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Annual Survey of Virginia Law: Tort Law

Sharon Maitland Moon

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TORT LAW

*Sharon Maitland Moon**

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This article addresses tort legislation considered during the 1990 Session of the Virginia General Assembly. This article also reviews significant cases involving torts and products liability decided from January 1, 1989, through May 31, 1990, by the Supreme Court of Virginia, The United States Supreme Court, and the federal courts sitting in Virginia.

I. LEGISLATION

A. *Exemptions and Immunities from Liability*

The General Assembly passed several measures limiting the tort liability of certain entities. In most cases, the legislation protects "good samaritans" who give in tangible and intangible ways to persons or organizations in need. Other exemptions and immunities were created to protect special classes of persons or entities.

Food service establishments and restaurants who donate food to any food bank determined to be a charity exempt from taxation under 26 U.S.C. § 501(c)(3) "shall be exempt from civil liability arising from any injury or death resulting from the nature, age, condition, or packaging of the donated food."¹ The provision does not exempt the donor from liability for intentional acts or gross negligence resulting in injury or death.² In addition, the section provides that "[n]othing contained herein shall limit liability on the part of any donee nonprofit charitable or religious organization which accepts items of food under this section."³ Presumably, issues relating to charitable immunity would arise if an action were brought against a donee who accepted food under this code section.⁴

Dispatchers who provide uncompensated services to licensed

1. VA. CODE ANN. § 3.1-418.1 (Cum. Supp. 1990); see also *id.* § 35.1-14.2 (Cum. Supp. 1990) (donations of food to charitable organizations).

2. *Id.* § 3.1-418.1.

3. *Id.*

4. See ReDavid Rack, *The Doctrine of Charitable Immunity: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 541 (1990) [hereinafter *Charitable Immunity*].

public or nonprofit emergency service agencies, and licensed physicians serving without compensation as medical directors for emergency medical services, shall not be liable for civil damages "resulting from the rendering of emergency medical services in good faith by the personnel of such licensed agency."⁵ These persons are not exempt from liability arising from their own acts or omissions resulting from their gross negligence or misconduct.⁶

Sport shooting ranges are now protected from actions for nuisance relating to noise resulting from the operation of the range.⁷ This exemption from liability applies only "if the range is in compliance with all ordinances relating to noise in effect at the time construction or operation of the range was approved [by the locality]."⁸

Landowners who enter into agreements with the Commonwealth, its agencies, or other local or regional authorities, regarding the use of the landowners' property for public purposes, shall be held harmless from all liability arising out of that public use.⁹ Significantly, the governmental entity who enters such an agreement is responsible for providing and paying the cost of all reasonable legal services required by a landowner who may have a claim asserted against him arising out of the public use of the land.¹⁰ This protection to the landowner cannot be waived by lease or otherwise.¹¹ Moreover, any person who brings an action against the Commonwealth or its agencies, pursuant to this provision, is subject to the Virginia Tort Claims Act requirements.¹² Counties, cities, towns, and local or regional authorities are also immune from liability for acts of simple negligence arising out of the public use of the property.¹³

5. VA. CODE ANN. § 8.01-225(B) (Cum. Supp. 1990). The revisions to this code section follow a two-year study by the Joint Subcommittee Studying Emergency Medical Services. See *Digest of Acts of the General Assembly of Virginia at the 1990 Session*, published by the Virginia Code Commission and the Division of Legislative Services.

6. VA. CODE ANN. § 8.01-225(B).

7. *Id.* § 15.1-29.20 (Cum. Supp. 1990).

8. *Id.*

9. *Id.* § 29.1-509 (Cum. Supp. 1990). The public purposes in this provision include hunting, boating, bicycle riding, sightseeing and "any other recreational use[s]." *Id.* § 29.1-509(B), -509(C). However, this section does not limit the liability created when the landowner receives compensation for the use of the land. *Id.* § 29.1-509(D).

10. *Id.* § 29.1-509(E).

11. *Id.*

12. *Id.*; see generally *id.* §§ 8.01-195.1 to -195.9 (Repl. Vol. 1984 & Cum. Supp. 1990) (Virginia Tort Claims Act).

13. *Id.* § 29.1-509(E) (Cum. Supp. 1990). A county, city, or town is, of course, liable for

Any person who reports or discloses information relating to testing for human immunodeficiency virus (HIV), in compliance with the Code of Virginia, shall be immune from civil liability for such reporting or disclosure.¹⁴ A person who, through gross negligence or malicious intent, makes an unauthorized disclosure of such information, is subject to civil liability and criminal penalty.¹⁵ However, these provisions do not impose any duty upon the testing person or entity to report or disclose information regarding HIV tests.¹⁶ Significantly, there does not appear to be any duty to report test results to the subject of the test.¹⁷

Tow truck operators who respond to police requests to tow vehicles are immune from civil liability only for the act of responding to the call from police.¹⁸ The immunity provision does not protect tow truck operators from "liability for negligence in the towing, recovery, or storage carried out by the towing and recovery operator."¹⁹

The 1990 Session of the General Assembly may be noted for the legislation that it did not pass in the torts area. For example, the General Assembly did not pass a proposed bill which would have extended immunity to "volunteers, sponsors, and certain tax exempt organizations involved in sports activities."²⁰ Immunity would have applied to uncompensated volunteers conducting non-profit sports activities in the absence of "willful or malicious mis-

the gross or wanton negligence of any of its officers or agents in the maintenance or operation of recreational facilities. *Id.* § 15.1-291. In a 1990 amendment, the General Assembly specifically included "skateboard facility" in the list of recreational facilities subject to the immunity provision. *See id.* The supreme court recently decided that a bus, used by a county recreation department to transport senior citizens on a shopping trip, was not a "recreational facility" within the meaning of § 15.1-291. *DePriest v. Pearson*, 239 Va. 134, 135, 387 S.E.2d 480, 481 (1990).

14. VA. CODE ANN. § 32.1-38 (Repl. Vol. 1985 & Cum. Supp. 1990); *see also id.* § 32.1-36.1 (providing confidentiality of test for HIV, civil penalty for unlawful disclosure and personal action for damages). Persons exempt from liability under this section are authorized to disclose HIV testing information only to those persons or entities set out in this Code section. Amendments to these Code provisions resulted from the recommendations of the Joint Subcommittee Studying AIDS. *See Digest of Acts of the General Assembly of Virginia at the 1990 Session*, published by the Virginia Code Commission and Division of Legislative Services.

15. VA. CODE ANN. § 32.1-38 (Cum. Supp. 1990).

16. *Id.* The 1990 amendment to this section clarified that no duty to notify is imposed upon blood collection agencies or tissue banks.

17. *See id.* § 32.1-36.1(D).

18. *Id.* § 46.2-1231.1 (Cum. Supp. 1990).

19. *Id.*

20. H.B. 356, Va. Gen. Assembly, 1990 Sess. (1990).

conduct, . . . a knowing violation of criminal law, or . . . [gross negligence]."²¹

The General Assembly also failed to pass a proposed amendment extending immunity to employers who agree to release employees from work to serve on volunteer rescue squads.²² The amendment would have protected employers from liability for the acts or omissions resulting from the rescue work of employees who provide emergency care during their regular work hours.²³

B. *Defenses and Bars to Recovery*

The General Assembly refused to relax barriers to plaintiff's ability to recover from defendants by failing to pass several bills in the tort area. The General Assembly defeated a bill to change the law of contributory negligence.²⁴ Contributory negligence is a complete bar to relief under Virginia law.²⁵ The proposed bill would have introduced comparative fault into Virginia tort law.²⁶

The General Assembly also failed to pass a bill repealing the notice of claim requirement applicable to claims against a city or town.²⁷ The notice provision has generated significant litigation in recent years.²⁸ However, it remains as a trap for the unwary party

21. *Id.*

22. H.B. 785, Va. Gen. Assembly, 1990 Sess. (1990) (proposed amendment to VA. CODE ANN. § 8.01-225 (Cum. Supp. 1990)).

23. *Id.*

24. H.B. 1047, Va. Gen. Assembly, 1990 Sess. (1990).

25. *See* Smith v. Virginia Elec. & Power Co., 204 Va. 128, 129 S.E.2d 655 (1963); *cf.* Hoban v. Grumman Corp., 717 F. Supp. 1129, 1136 (E.D. Va. 1989).

26. The bill provided as follows:

§ 8.01-44.3. Contributory negligence not bar to recovery.-In all actions brought hereafter for personal injury, wrongful death, or property damage, the fact that the person injured or killed, or the owner of the damaged property or person having control over the property, may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such persons. However, such person shall recover only if such person's negligence is not greater than the combined negligence of all other parties.

H.B. 1047, Va. General Assembly, 1990 Sess. (1990). The bill had 26 patrons from the House and Senate combined.

27. H.B. 544, Va. Gen. Assembly, 1990 Sess. (1990). The bill sought repeal of VA. CODE ANN. § 8.01-222 (Repl. Vol. 1984). The proposed bill referred to counties, as well as cities and towns. *Id.* However, the notice of claim provision under § 8.01-222 applies only to cities and towns. *Id.* The notice provision would have been repealed as to any cause of action accruing on or after July 1, 1990. H.B. 544.

28. *See, e.g.,* Miles v. City of Richmond, 236 Va. 341, 373 S.E.2d 715 (1988); Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (1984). The Supreme Court of Virginia interprets the Code section to be "mandatory, not jurisdictional," and its terms are to be "con-

injured on city or town property.

C. *Releases and Covenants Not To Sue*

A release or covenant not to sue does not discharge other tortfeasors unless the terms of the document so provide.²⁹ The release or covenant also releases the tort-feasor from all liability for contribution to any other tort-feasor.³⁰ The General Assembly attempted, but failed, to amend this section of the Code to provide that "the discharged tort-feasor may still be liable as a contractual indemnitor or as a noncontractual indemnitor to an indemnitee whose sole liability flows constructively, vicariously, or derivatively from the negligence of the discharged tort-feasor."³¹

D. *Presumptions*

A proposal to create a rebuttable presumption of negligence in automobile cases failed during the 1990 Session of the General Assembly.³² The bill would have applied to actions for personal injury, wrongful death, or property damage.³³ The presumption would have arisen

upon proof by any party to the suit that the motor vehicle operated by the party alleged to have been negligent was driven to the left of the highway in violation of § 46.2-802 or subdivision 5 or 6 of § 46.2-804 or that such vehicle left the traveled portion of the highway on either side, resulting in the injury, death, or damage.³⁴

strued liberally." *Miles*, 236 Va. at 344, 373 S.E.2d at 717 (citing *Marler*, 228 Va. at 112, 319 S.E.2d at 749).

29. VA. CODE ANN. § 8.01-35.1(A)(1) (Cum. Supp. 1990). *But see* *Courtney v. Fogelson*, 16 Va. Cir. 399 (Richmond 1989) (tort-feasor who is sued for aggravating the original injury entitled to credit for payments made by released tort-feasor to plaintiff).

30. VA. CODE ANN. § 8.01-35.1(A)(2) (Cum. Supp. 1990).

31. H.B. 155, Va. Gen. Assembly, 1990 Sess (1990).

32. H.B. 278, Va. Gen. Assembly, 1990 Sess. (1990).

33. *Id.*

34. *Id.* VA. CODE ANN. § 46.2-802 (Repl. Vol. 1989) provides that a driver shall drive on the right side of the highway except when overtaking and passing another vehicle. VA. CODE ANN. § 46.2-804(6) provides that no vehicle shall cross a double solid line except in certain circumstances.

E. Damages

The General Assembly did not pass a bill to revise the cap on punitive damages awards in civil actions. The present cap on punitive damages is \$350,000.³⁵ The proposed bill would have limited recovery to "the greater of \$350,000 or five percent of the defendant's net worth."³⁶ The addition of the net worth provision would have impacted greatly on business entities. The proposed bill defined "net worth" for corporations and partnerships as "net stockholders' equity, total shareholders' equity, aggregate partners' equity, total partners' equity" or as otherwise defined pursuant to generally accepted accounting principles.³⁷

In actions by property owners against parents for damage caused by minors living with their parents, recovery is limited to \$750.³⁸ A bill to raise the limit to \$5,000 failed in the 1990 Session of the General Assembly.³⁹

II. CASE LAW

A. Intentional Torts

1. Generally

In *Infant C. v. Boy Scouts of America, Inc.*,⁴⁰ the Supreme Court of Virginia had an opportunity to clarify Virginia law on the distinction between negligence, gross negligence, and willful and wanton conduct evidencing a reckless disregard of the safety of others.⁴¹ The plaintiff alleged that his Boy Scout master sexually molested him. The trial court held that the evidence showed intentional misconduct by the scoutmaster, while the Motion For Judgment alleged that he was reckless and consciously disregarded the boy's welfare.⁴² Therefore, the trial court dismissed the scoutmaster from the case.⁴³

The supreme court said that negligence is equated with inadver-

35. VA. CODE ANN. § 8.01-38.1 (Cum. Supp. 1990).

36. H.B. 1049, Va. Gen. Assembly, 1990 Sess. (1990).

37. *Id.*

38. VA. CODE ANN. § 8.01-44 (Cum. Supp. 1990).

39. H.B. 258, Va. Gen. Assembly, 1990 Sess. (1990).

40. 239 Va. 572, 391 S.E.2d 322 (1990).

41. *Id.* at 579-84, 391 S.E.2d at 326-29.

42. *Id.* at 575, 391 S.E.2d at 323.

43. *See id.*

tent neglect of a duty.⁴⁴ In contrast, willful and wanton conduct, or reckless misconduct, is equated with purpose or design, actual or constructive.⁴⁵ An actor guilty of willful or wanton conduct intends his act, but not the resulting harm.⁴⁶ However, the actor is conscious that his act is likely to, or probably will, cause harm.⁴⁷ Finally, intentional conduct requires proof that the actor intended to cause harm.⁴⁸

Relying on the Restatement (Second) of Torts, the Supreme Court of Virginia stated:

While an act to be reckless must be intended by the actor, the actor does not intend to cause harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless. However, a strong probability is a different thing from the substantial certainty without which he cannot be said to intend the harm in which his act results.⁴⁹

The evidence in *Infant C.* did not show any intent to cause harm to the boy. Instead, the defendant's motivation was deliberate self-gratification with a total disregard of the consequences to his victim. Therefore, the plaintiffs' pleading was sufficient, and the case was remanded for proceedings against the scoutmaster.⁵⁰

The plaintiff in *Woodbury v. Courtney*⁵¹ alleged a battery by a physician who performed a partial mastectomy allegedly without the plaintiff's consent. The physician claimed he had permission to perform a "biopsy."⁵² The trial court struck the battery claim because plaintiff presented no expert testimony on the battery issue. The supreme court reversed, stating that expert evidence was not required to show that the physician exceeded the scope of plain-

44. *Id.* at 582, 391 S.E.2d at 327-28 (citing *Boward v. Leftwich*, 197 Va. 227, 231, 89 S.E.2d 32, 35 (1955)).

45. *Id.*

46. *Id.* at 582, 391 S.E.2d at 328.

47. *Id.* at 582-83, 391 S.E.2d at 328.

48. *Id.* at 582, 391 S.E.2d at 328.

49. *Id.* at 582-83, 391 S.E.2d at 328 (quoting RESTATEMENT (SECOND) OF TORTS § 500 comment f (1965)).

50. *Id.* at 583-84, 391 S.E.2d at 328-29.

51. 239 Va. 651, 391 S.E.2d 293 (1990).

52. *Id.* at 653, 391 S.E.2d at 293.

tiff's permission.⁵³

2. Intentional Infliction of Emotional Distress

The Supreme Court of Virginia has severely limited recovery for intentional infliction of emotional distress. In *Ely v. Whitlock*,⁵⁴ the plaintiffs failed to allege that the defendant filed an ethical complaint "for the specific purpose of inflicting emotional distress upon them, or that she intended her specific conduct and knew or should have known that emotional distress would likely result."⁵⁵

In *Ruth v. Fletcher*,⁵⁶ the defendant mother convinced the plaintiff that he was the father of the defendant's unborn child. The couple never married. The plaintiff, however, attended childbirth classes and helped to name the child. After the child's birth, the plaintiff developed a warm and loving relationship with his young son, and the plaintiff's parents set up trust funds for the boy.⁵⁷ Years later, the defendant and her new husband initiated adoption proceedings where they proved that the plaintiff was not the boy's natural father.⁵⁸ The trial court then permanently denied the plaintiff all custody and visitation rights.⁵⁹ The supreme court held that the plaintiff failed to prove that the defendant acted intentionally or recklessly to hurt the plaintiff. Thus, the plaintiff failed to prove the necessary element to recover for emotional distress.⁶⁰

Consistent with these Virginia cases, the federal district court in *Simmons v. Norfolk & Western Railway*,⁶¹ held that plaintiff's intentional infliction of emotional distress claims failed to "meet the requirements under Virginia law for recovery."⁶² The plaintiff claimed he was harassed at work, screamed at and cursed in public, and continually ordered from job to job.⁶³ The court found that such conduct did not rise to the level of outrageousness required

53. *Id.* at 654, 391 S.E.2d 295; see *infra* notes 103-07 and accompanying text.

54. 238 Va. 670, 385 S.E.2d 893 (1989).

55. *Id.* at 677, 385 S.E.2d at 897.

56. 237 Va. 366, 377 S.E.2d 412 (1989).

57. 237 Va. at 369, 377 S.E.2d at 414.

58. 237 Va. at 371-72, 377 S.E.2d at 415.

59. *Id.* at 372, 377 S.E.2d at 415.

60. *Id.* at 373, 377 S.E.2d at 416; see generally Shepherd, *Legal Issues Involving Children: Annual Survey of Virginia Law*, 23 U. RICH. L. REV. 724 (1989).

61. 734 F. Supp. 230 (E.D. Va. 1990).

62. *Id.* at 231.

63. *Id.* at 232.

for recovery.⁶⁴

B. *Negligence*

1. Generally

The Supreme Court of Virginia reaffirmed the long-standing principle that negligence cannot be presumed from the mere occurrence of damage in *Town of Vinton v. Bryant*.⁶⁵ In *Bryant*, plaintiffs alleged negligence against the town for allowing sewage to back up into their home. Though the town's practice was to clean the sewers each summer, the backup was caused by a blockage in the sewer during the winter. The plaintiffs argued that sewers are more likely to clog in winter, that the town knew that clogs were more likely to occur in winter, and therefore, a jury should conclude that the backup would not have occurred if the town had cleaned the sewers in winter.⁶⁶ The court found the evidence insufficient. "[A]ll the Bryants proved was that a blockage occurred in the Town's sewer line and that they suffered damage as a result. Lacking is proof of the essential element of negligence as the cause of the blockage."⁶⁷

In a case of first impression in Virginia, the supreme court held in *Kalafut v. Gruver*⁶⁸ that an action for a child's wrongful death may be brought against a tort-feasor whose negligence occurred when the decedent was in the mother's womb. In *Kalafut*, a pregnant woman was involved in an automobile accident caused by the defendant. A month later, the mother prematurely delivered her child, who lived for only two hours after birth.⁶⁹ The court rejected the defendant's contention that the child's estate could not recover because the child was not a "person," and thus, had no right of action at the time the accident occurred.⁷⁰ The court also distinguished two cases involving stillborn children,⁷¹ and, relying on the

64. *Id.*; see also *Owens v. Ashland Oil, Inc.*, 708 F. Supp. 757, 760 (W.D. Va. 1989) (defendants' conduct "does not even approach behavior which exceeds all bounds of decency and is intolerable in a civilized community"); cf. *Fairchilde v. Erickson*, 18 Va. Cir. 142 (Fairfax County 1989) (no independent tort action for "outrageous conduct").

65. 238 Va. 229, 384 S.E.2d 76 (1989).

66. *Id.* at 230, 384 S.E.2d at 76.

67. *Id.* at 231, 384 S.E.2d at 77.

68. 239 Va. 278, 278, 389 S.E.2d 681 (1990).

69. *Id.* at 280, 389 S.E.2d at 682.

70. *Id.* at 282, 389 S.E.2d at 683.

71. *Id.* at 282, 389 S.E.2d at 682-84 (citing *Modaber v. Kelley*, 232 Va. 60, 348 S.E.2d 233

Restatement (Second) of Torts, stated: "A tort-feasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, if the child is born alive."⁷²

The supreme court emphasized again in *Lawson v. Doe*,⁷³ that "[i]t is incumbent on [a] plaintiff who alleges negligence to show why and how the accident happened, and if that is left to conjecture, guess or random judgment, he cannot recover."⁷⁴ In *Lawson*, the trial court set aside a jury verdict for the plaintiff.⁷⁵ The plaintiff's decedent was struck by an object as he walked along a road.⁷⁶ The plaintiff's theory was that an unknown motorist drove by the decedent and hit decedent with a board which unlawfully protruded from the vehicle.⁷⁷

The circumstantial evidence included testimony of witnesses who heard a crash and a truck being thrown in gear, a witness who saw a truck traveling at high speed, the placement of a board in the middle of the road, and the fact that the decedent had marks across his abdomen similar to the size of the board.⁷⁸ However, the supreme court said that the plaintiff lacked evidence such as the direction in which decedent was walking, where the board came from, or, if it came from a vehicle, how far it extended beyond the vehicle side, or whether it was dislodged by some non-negligent

(1986); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969) (no cause of action for wrongful death of stillborn child)).

72. *Kalafut*, 239 Va. at 283-84, 389 S.E.2d at 683-84. The court expressly saved for another day the discussion of the cause of action/right of action dichotomy with respect to the statute of limitations. *Id.* at 286 n*, 389 S.E.2d at 685 n*. This case will undoubtedly have ramifications in all types of cases, including medical malpractice, automobile collision, and toxic tort types of claims. The court, however, inserted a caveat with regard to causation:

We do not limit the application of this rule to unborn children who are viable [capable of existence independent of the mother] at the time of the tortious act. . . . Given the present state of medical technology, however, the proof of causation obviously becomes increasingly more difficult as the focus moves to the beginning of pregnancy.

Id. at 284, 389 S.E.2d at 684.

73. 239 Va. 477, 391 S.E.2d 333 (1990).

74. *Id.* at 482, 391 S.E.2d at 335 (quoting *Weddle v. Draper*, 204 Va. 319, 322, 130 S.E.2d 462, 465 (1963)).

75. *Id.* at 477, 391 S.E.2d at 333.

76. *Id.* at 479-80, 391 S.E.2d at 334-35.

77. *Id.* at 480, 391 S.E.2d at 334; see VA. CODE ANN. § 46.2-1111 (Repl. Vol. 1984) ("No vehicle shall carry any load extending more than six inches beyond the line of the fender or body").

78. *Lawson*, 239 Va. at 479-80, 391 S.E.2d at 334.

force.⁷⁹ Without such evidence, plaintiff's recovery was entirely speculative.⁸⁰

*Marshall v. Winston*⁸¹ addressed the issue whether the sheriff and a jailer for the City of Richmond owed a duty to protect a member of the general public from harm by a mistakenly released convict.⁸² The supreme court held that no duty existed, after searching for a special relationship between the defendants and the criminal, or between the defendants and the murder victim, which would give rise to such a duty. The court found no allegations in the Motion For Judgment that the defendants "knew or should have known that Mundy would likely cause bodily harm to others if he were not controlled."⁸³ Moreover, the court found no allegation in the Motion For Judgment that decedent was an identifiable person to whom defendants owed a duty.⁸⁴ Therefore, the sheriff and the jailer had no civil liability to the plaintiff for the convict's brutal murder of the plaintiff's husband.⁸⁵

A driver is under no duty to signal safe passage to a pedestrian. However, the Supreme Court of Virginia recognized, in *Cofield v. Nuckles*,⁸⁶ that a driver who acts gratuitously in signaling a pedestrian across a highway may be guilty of negligence.⁸⁷

79. *Id.* at 481, 391 S.E.2d at 335.

80. *Id.* at 482, 391 S.E.2d at 336.

81. 239 Va. 315, 389 S.E.2d 902 (1990).

82. *Id.* at 316-17, 389 S.E.2d at 903. The convict, Marvin Mundy, was mistakenly released from jail on two occasions. *Id.* at 317, 389 S.E.2d at 903. The murder occurred while Mundy was illegally out of confinement the second time. *Id.* Mundy was convicted of capital murder. *Mundy v. Commonwealth*, ___ Va. App. ___, 390 S.E.2d 525 (1990).

83. *Marshall*, 239 Va. at 319, 389 S.E.2d at 904.

84. *Id.* at 320, 389 S.E.2d at 905. Presumably then, the plaintiff under the circumstances of this case could have survived demurrer and maintained an action had the pleadings contained the appropriate allegations. Interestingly, the trial court and the appellate court recognized the "troubling" facts that Mundy carried a clip containing 50 rounds of ammunition, that he wore a bullet-proof vest when he was arrested, that he threatened the arresting officer and carried a concealed weapon. *Id.* at 318-19, 389 S.E.2d at 904. This evidence was nevertheless insufficient to show that defendants knew or should have known that Mundy would go on a murder spree. *Id.*

85. *Id.* Compare the recent United States Supreme Court decision in *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989). In *DeShaney*, the Court ruled that the state's knowledge of a child abuse victim's jeopardy did not establish a special relationship giving rise to a constitutional duty to protect him because the injury did not occur while the child was in state custody. *DeShaney*, 109 S. Ct. at 1004-06.

86. 239 Va. 186, 387 S.E.2d 493 (1990).

87. *Id.* at 192, 387 S.E.2d at 496. The evidence in *Cofield* was insufficient to find the driver negligent because he checked his mirror and did not have reason to see the approaching van that hit the plaintiff. *Id.* at 192-93, 387 S.E.2d 496-97; see *infra* notes 246-53 and accompanying text.

A federal district court rejected a negligent hiring claim made by a baseball fan against a minor league baseball team.⁸⁸ In *Simmons*, the disgruntled fan heckled two players throughout the game. Afterwards, the fan and the two players confronted each other in the parking lot, and a fight ensued, resulting in injuries to the fan.⁸⁹ The court ruled that the fan did not meet the negligent hiring test recognized under Virginia law.⁹⁰ Since the employer had no knowledge of past actions which would have suggested that the players were "unfit," the employer was not liable for the players' actions.⁹¹

2. Negligent Infliction of Emotional Distress

In *Myseros v. Sissler*,⁹² "sweating, dizziness, nausea, difficulty in sleeping and breathing, constriction of the coronary vessels, . . . chest pain, hypertension, unstable angina, . . . marked ischemia, loss of appetite and weight, change in heart function, and problems with the heart muscle" constituted insufficient evidence of physical injury to recover for negligent infliction of emotional distress.⁹³ These were merely symptoms of an emotional disturbance for which there could be no recovery absent resulting physical injury. Therefore, the Supreme Court of Virginia set aside the plaintiff's jury verdict and entered judgment in favor of the defendant.⁹⁴

88. *Simmons v. Baltimore Orioles, Inc.*, 712 F. Supp. 79 (W.D. Va. 1989).

89. *Id.* at 80.

90. *Id.* at 81. The tort of negligent hiring was set forth recently in *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206, 372 S.E.2d 391 (1988). "The test is whether the employer has negligently placed an unfit person in an employment situation involving an unreasonable risk of harm to others." *Simmons*, 712 F. Supp. at 81 (quoting *Victory Tabernacle*, 236 Va. at 211, 372 S.E.2d at 394).

91. *Id.* The court also rejected the fan's argument that the Orioles were liable to him for failing, as owner of the premises, to keep the parking lot safe. *Id.* at 82. Relying on *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987), the court said "the climate-of-fear rule . . . was clearly not intended to protect a person who has instigated the problem." *Simmons*, 712 F. Supp. at 82. There was therefore no imminent probability of harm against which the Orioles should have protected. *Id.*; see also *Spencer v. General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990) (sexual harassment case in which court said Virginia law does not recognize tort of negligent supervision even where agency relationship facilitated consummation of tort).

92. 239 Va. 8, 387 S.E.2d 463 (1990).

93. *Id.* at 11-12, 387 S.E.2d at 465-66.

94. *Id.* at 12, 387 S.E.2d at 466; see *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973) (cited in *Myseros*, 239 Va. at 9, 387 S.E.2d at 464).

3. Gross Negligence

The Supreme Court of Virginia reversed a \$350,000 verdict against a police officer in *Meagher v. Johnson*.⁹⁵ The court ruled that the plaintiff failed to show gross negligence as a matter of law. The police officer was acting in the discharge of his official duties when his cruiser struck the plaintiff, who was fleeing arrest.⁹⁶ The officer was in hot pursuit, had engaged his lights and siren, was traveling within the acceptable speed limits for emergencies, and applied his brakes immediately when the plaintiff darted in front of the cruiser.⁹⁷ These circumstances did not exhibit "indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another]."⁹⁸

C. Professional Malpractice

A lawyer who drafted wills for the plaintiffs' grandparents faced a \$3,475,000 legal malpractice claim in *Copenhaver v. Rogers*.⁹⁹ While the plaintiffs held the remainder interest in their mother's share of the estate, the defendant lawyer neglected to include in the wills legally sufficient trust terms and other tax savings provisions which would have benefitted the plaintiffs.¹⁰⁰ The Supreme Court of Virginia reaffirmed the well-settled rule in Virginia that in a tort claim solely for economic losses "no cause of action exists . . . absent privity of contract."¹⁰¹ The plaintiffs' tort "claims were properly rejected on demurrer."¹⁰²

95. 239 Va. 380, 389 S.E.2d 310 (1990).

96. *Id.* at 383-84, 389 S.E.2d at 311.

97. *Id.*

98. *Id.* at 383, 389 S.E.2d at 311 (quoting *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971)); see also *Jefferson v. Howard*, 16 Va. Cir. 195 (Richmond 1989) (policeman who struck a civilian car while responding to call for assistance operated within scope of employment for purposes of governmental immunity).

99. 238 Va. 361, 384 S.E.2d 593 (1989).

100. *Id.* at 364, 384 S.E.2d at 594.

101. *Id.* at 366, 384 S.E.2d at 595 (citing *Sensenbrenner v. Rust, Orling & Neale*, 236 Va. 419, 425, 374 S.E.2d 55, 58 (1988)). Note that the supreme court has rejected any tort action solely to recover economic losses, without mention of privity. "Such economic losses are not recoverable in tort; they are purely the result of disappointed economic expectations. The law of contracts provides the sole redress for such claims." *Rotunda Condominium Unit Owners Ass'n v. Rotunda Assocs.*, 238 Va. 85, 90, 380 S.E.2d 876, 879 (1989). For a discussion regarding abolition of the privity requirement in tort, see *Wilkes v. F. L. Smithe Mach. Co.*, 704 F. Supp. 680 (W.D. Va. 1989).

102. *Copenhaver*, 238 Va. at 366, 384 S.E.2d at 595. For a discussion of the court's rulings on the contract claims in this case, see Note, *Whose Beneficiaries are They Anyway? Copenhaver v. Rogers and the Attorney's Contract to Prepare a Will in Virginia*, 24 U.

Evidence of professional malpractice was insufficient to create a jury issue in *Seaward International, Inc. v. Price Waterhouse*.¹⁰³ In that case, the plaintiffs incurred tax liability because their domestic international sales corporation ("DISC") failed to meet the qualified export assets ("QEA") test which would have conferred substantial tax benefits upon the plaintiffs.¹⁰⁴ The plaintiffs' accountants had predicted that the DISC would have sufficient QEA to avoid tax problems.¹⁰⁵ The plaintiffs claimed their accounting firm was negligent in failing to investigate the plaintiffs' records to reveal incorrect calculations provided by the plaintiff to the accountants.¹⁰⁶ No expert testified to the existence of any papers which would have revealed such errors. The jury was thus left to speculate on the existence of any documents which, if reviewed by the accountants, would have made a difference.¹⁰⁷

The federal court in *Timms v. Roseblum*,¹⁰⁸ reiterated that, absent an allegation of outrageous conduct, Virginia law does not allow recovery for mental anguish in legal malpractice cases. Moreover, damages for mental anguish are only recoverable in tort actions.¹⁰⁹ In *Timms*, the plaintiff had no physical injury and alleged no extreme, outrageous, or reckless conduct.¹¹⁰

D. Abuse of Process and Malicious Prosecution

The courts have had several opportunities recently to consider abuse of process and malicious prosecution claims.¹¹¹ In *Triangle*

RICH L. REV. 415 (1990); see also *Haddad v. Mays*, 18 Va. Cir. 171 (Fairfax County 1989) (legal malpractice claim must show that outcome of the litigation would have been different if the attorney had not been negligent).

103. 239 Va. 585, 391 S.E.2d 283 (1990).

104. *Id.* at 589, 391 S.E.2d at 286.

105. *Id.* at 588, 391 S.E.2d at 285.

106. *Id.* at 589, 391 S.E.2d at 287.

107. *Id.* at 592, 391 S.E.2d 287-88. The court made clear that expert testimony was required in cases of this kind. "Unless a malpractice case turns upon matters within the common knowledge of laymen, . . . expert testimony is required to establish the appropriate professional standard, to establish a deviation from that standard, and to establish that such a deviation was the proximate cause of the claimed damages." *Id.* at 592, 391 S.E.2d at 287 (citations omitted).

108. 713 F. Supp. 948 (E.D. Va. 1989); see *Ball v. Rosenblum*, 18 Va. Cir. 48 (Fairfax County 1988) (related state court proceeding which was nonsuited).

109. *Timms*, 713 F. Supp. at 954.

110. *Id.* at 955. "The simple truth is that mental anguish attends all litigation." *Id.*

111. See *Ely v. Whitlock*, 238 Va. 670, 385 S.E.2d 893 (1989) (second abuse of process element met because the defendant attorney's conduct was not proper in the regular prosecution of an ethics complaint); *Triangle Auto Auction v. Cash*, 238 Va. 183, 380 S.E.2d 649

Auto Auction, Inc. v. Cash,¹¹² defendant Triangle sued out a criminal process against plaintiff Cash for grand larceny by bad check. Cash paid the outstanding debt, and filed a civil action against Triangle for "malicious abuse of process."¹¹³ The Supreme Court of Virginia set forth the essential elements of abuse of process as follows: "(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings."¹¹⁴

The supreme court "assume[d] without deciding that . . . Triangle had an ulterior purpose" for swearing out the warrants.¹¹⁵ Prior to the issuance of process, Triangle threatened to send Cash to jail and withheld information from the Commonwealth's Attorney.¹¹⁶ However, the court found that Cash failed to demonstrate that Triangle took any action *subsequent to the issuance of process* which "abused or perverted the criminal prosecution."¹¹⁷ The court reemphasized that abuse of process must occur after process is issued in order for a claim to be actionable.¹¹⁸

The issue in *Ely v. Whitlock*¹¹⁹ centered around the second element of an abuse of process claim. In *Ely*, three lawyers became embroiled in a bitter dispute arising out of their representation of opposing parties in a divorce action.¹²⁰ Ely filed a motion for a rule to show cause why the two Whitlocks' licenses to practice law should not be revoked or suspended. The Whitlocks subsequently filed suit against Ely for malicious prosecution and abuse of pro-

(1989) (no abuse of process shown because defendant's conduct was not an abuse of a criminal prosecution after issuing the process); *JGS Constr., Inc. v. Mechanicsville Concrete, Inc.*, 18 Va. Cir. 313 (Chesterfield County 1989) (filing mechanics lien is not malicious); *Coughlan v. Jim McKay Chevrolet, Inc.*, 18 Va. Cir. 265 (Fairfax County 1989) (lack of probable cause for warrant is sufficient to state malicious prosecution claim); *Wannall v. Hetrick*, 17 Va. Cir. 278 (Fairfax County 1989) (probable cause shown where plaintiff convicted; no improper act occurred after process issued); *Montecalvo v. Johnson*, 15 Va. Cir. 414 (Richmond 1989) (no probable cause for arrest warrant) (appeal pending as of July 1, 1990, Docket No. 900544).

112. 238 Va. 183, 380 S.E.2d 649 (1989).

113. *Id.* at 184, 380 S.E.2d at 650.

114. *Id.*

115. *Id.* at 186, 380 S.E.2d at 651. There was sufficient evidence that Triangle did so only to collect the debt owed to it. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. 238 Va. 670, 385 S.E.2d 893 (1989).

120. *Id.* at 672-73, 385 S.E.2d at 894-95.

cess.¹²¹ After Ely filed a disciplinary proceeding against the Whitlocks, she took depositions to support her claim.¹²² Therefore, the second element of an abuse of process claim was met because Ely's conduct was not proper in the regular prosecution of an ethics complaint.¹²³

The supreme court also held that the Whitlocks failed to show the required special injury to maintain a malicious prosecution action. Anxiety, mental anguish, stress, and threat to livelihood were the "natural consequence of any disciplinary proceeding."¹²⁴

E. *Fraud*

In *Murray v. Hadid*,¹²⁵ the Supreme Court of Virginia set forth the general proof requirement for recovery in an action for fraud. "[A] plaintiff must prove damages which are caused by his detrimental reliance on a defendant's material misrepresentations."¹²⁶ The plaintiffs failed to show causation of damages since their proof showed only that they were in the same position as they had been prior to the fraud.¹²⁷

Moreover, the supreme court held that plaintiffs were "required to show sufficient facts and circumstances to permit a jury to make a reasonable estimate of . . . damages suffered as a result of the fraud."¹²⁸ Plaintiffs were builders, but they had never built a townhouse development and had no experience with such projects. "[T]he townhouse development would have constituted a new enterprise dependent upon too many contingencies to safeguard an estimate of damages."¹²⁹ Therefore, plaintiffs' evidence was specu-

121. *Id.* at 672, 385 S.E.2d at 894-95. The Whitlocks also sued for intentional infliction of emotional distress. *Id.* at 672, 385 S.E.2d at 895. For a discussion of those claims, see *supra* notes 54-55 and accompanying text.

122. *Ely*, 238 Va. at 675-76, 385 S.E.2d at 897.

123. *Id.* at 676, 385 S.E.2d at 897.

124. *Id.* at 675, 385 S.E.2d at 896.

125. 238 Va. 722, 385 S.E.2d 898 (1989). In *Murray*, the plaintiffs wanted to obtain land for a townhouse project. They negotiated with the defendant with the understanding that the defendant would purchase the land and allow the plaintiffs to build the project. The defendant purchased the land with the help of the plaintiffs' negotiations, but subsequently hired other builders to construct a condominium project. *Id.*

126. *Id.* at 730, 385 S.E.2d at 903.

127. *Id.* at 731, 385 S.E.2d at 904. "The usual remedy in an action for fraud is to restore the defrauded party to the position he held prior to the fraud." *Id.*

128. *Id.*

129. *Id.* at 732, 385 S.E.2d at 905.

lative and they could not recover.¹³⁰

In *Elliott v. Shore Stop, Inc.*,¹³¹ the supreme court recognized an action in tort for fraud and deceit where a promise was made with intent not to perform it. Ordinarily, a fraud claim involves misrepresentation of a present or preexisting fact.¹³² The court ruled that the defendant's promise, which he never intended to honor, was a misrepresentation of a present fact.¹³³

The plaintiffs in *Starks v. Albemarle County*¹³⁴ alleged that the defendant withheld information to defraud the plaintiffs and to induce them to buy a home, which was in a flood prone area. The court held that the one-year statute of limitations for fraud barred the action.¹³⁵ In addition, the court held that the *caveat emptor* doctrine barred the plaintiffs' claims.¹³⁶ The court noted that the plaintiffs could have been more diligent in their investigation and inspection of the property before their purchase.¹³⁷

F. *Tortious Interference with Contract*

In *Elliott v. Shore Stop, Inc.*,¹³⁸ the Supreme Court of Virginia found the plaintiff's allegations sufficient to sustain a claim of tortious interference with contractual relations. The plaintiff alleged that she had an employment contract with her employer.¹³⁹ She

130. *Id.* Justice Stephenson, joined by Chief Justice Carrico and Justice Thomas, dissented. The dissent focused on the evidence of profits plaintiffs would have gained from purchasing the property, even if they had chosen not to build the townhouses. Defendant purchased the land for \$984,000. It later sold for \$6.7 million. *Id.* at 734, 385 S.E.2d at 906 (Stephenson, J., dissenting); see generally *Campbell v. Bettius*, 18 Va. Cir. 95 (Fairfax County 1989) (plaintiff required to allege fraud with particularity).

131. 238 Va. 237, 384 S.E.2d 752 (1989).

132. *Id.* at 245, 384 S.E.2d at 756 (citing *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 351, 297 S.E.2d 647, 651 (1982)).

133. *Id.* at 245, 384 S.E.2d at 756. For a more in-depth discussion of employee relations, see Billingsley & Boyette, *Employment Law: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 567 (1990). *But cf.* *Owens v. Ashland Oil, Inc.*, 708 F. Supp. 757, 758 (W.D. Va. 1989) (essential element of fraud is a misrepresentation, and a promise is not a representation).

134. 716 F. Supp. 934 (W.D. Va. 1989).

135. *Id.* at 936 (citing VA. CODE ANN. § 8.01-248); *House v. Kirby*, 233 Va. 197, 355 S.E.2d 303 (1987).

136. *Starks*, 716 F.Supp. at 937. *Caveat emptor* applies in the absence of any action to divert a party from making inquiries or from inspecting the premises. *Id.* (citing *Kuczman-ski v. Gill*, 225 Va. 367, 302 S.E.2d 48 (1983)); see *Armentrout v. French*, 220 Va. 458, 258 S.E.2d 519 (1979); see also *Boris v. Hill*, 237 Va. 160, 375 S.E.2d 716 (1989) (defendant entitled to *caveat emptor* instruction).

137. *Starks*, 716 F. Supp. at 939.

138. 238 Va. 237, 384 S.E.2d 752 (1989).

139. *Id.* at 246, 384 S.E.2d at 757.

alleged further that the employer's agent and an independent third party conspired to rig a polygraph so that the plaintiff would fail, thus giving the employer just cause to fire her.¹⁴⁰ Relying on *Worrie v. Boze*,¹⁴¹ the court said "an action in tort exists against those who conspire to induce a breach of contract and that . . . rule will be applied to hold one liable, along with an independent third party, for conspiring to breach his own contract."¹⁴²

The supreme court reversed a jury verdict in favor of a plaintiff who claimed that a real estate broker intentionally interfered with a real estate sales contract.¹⁴³ In *Century-21*, the supreme court said that the evidence failed to show that the real estate broker engaged in intentional interference which induced or caused the purchasers to breach their contract with the plaintiff.¹⁴⁴ The broker did not "[pursue] a scheme designed wrongfully" to interfere with the purchasers' contract with the plaintiff seller.¹⁴⁵ If anything, the purchasers urged the defendant broker to continue showing them other properties even though they had signed a sales contract to purchase the plaintiff's home.¹⁴⁶

G. Defamation

In *Freedlander v. Edens Broadcasting, Inc.*,¹⁴⁷ the United States District Court for the Eastern District of Virginia found that a defendant's broadcast of a song poking fun at well-known local figures was not actionable. The court found, as a matter of law,

140. *Id.*

141. 198 Va. 533, 95 S.E.2d 192 (1956).

142. *Elliott*, 238 Va. at 246, 384 S.E.2d at 757 (citing *Worrie*, 198 Va. at 540-41, 95 S.E.2d at 198-99).

143. *Century-21 v. Elder*, 239 Va. 637, 391 S.E.2d 296 (1990).

144. *Id.* at 642, 391 S.E.2d at 299. Tortious interference with contract requires evidence of the existence of a valid contractual relationship, knowledge of the relationship on the part of the interferer, intentional interference inducing or causing the breach or termination of the agreement, and resultant damage to the party whose relationship is disrupted. *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985). The *Chaves* test was cited recently in *National Org. For Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1983). There, the plaintiffs sought to block the defendants from "trespassing on, sitting in, blocking, impeding or obstructing ingress or egress from" abortion clinics. *Id.* at 1486. The plaintiffs alleged tortious interference with business relationships. *Id.* at 1495. The court rejected the claim because the evidence failed to show that the defendants knew about any contract between the clinics and the women seeking abortions. *Id.* at 1495-96.

145. *Century-21*, 239 Va. at 642, 391 S.E.2d at 299 (quoting *Chaves v. Johnson*, 230 Va. 112, 222, 335 S.E.2d 97, 103 (1985)).

146. *Id.*

147. 734 F. Supp. 221 (E.D. Va. 1990).

that the song was not defamatory.¹⁴⁸ Alternatively, the court held that the plaintiffs were public figures and that defendants had no actual malice in broadcasting the song.¹⁴⁹

In determining that the song was not defamatory per se, the court stated that the song contained no words implying a criminal offense punishable by imprisonment or involving moral turpitude.¹⁵⁰ Moreover, the court determined that the song depicted the truth.¹⁵¹ The court also ruled that the content of the song and the context of its delivery made clear that it was intended to "amuse, rather than injure," and that a reasonable person could not help but find it humorous.¹⁵²

Finally, the court held that "[since plaintiff Freedlander] thrust himself into the vortex of a public issue, he created the public controversy."¹⁵³ Therefore, he was required to show that "the allegedly defamatory statements were made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁵⁴

The plaintiff in *Harte-Hanks Communications v. Connaughton*¹⁵⁵ successfully proved actual malice in a libel action against a newspaper. The plaintiff was a candidate for judicial office, and was therefore deemed to be a public figure.¹⁵⁶ The newspaper published a damaging story in spite of the plaintiff's efforts to provide the reporter with proof of the story's falsity.¹⁵⁷ In addi-

148. *Id.* at 228.

149. *Id.* at 224.

150. *Id.* at 225-26. The plaintiffs were involved in a well-publicized bankruptcy involving the failure of a second-mortgage company. The song made references to "live-in lover," "money jockey," "the debts, they're a-rising," and "the Feds are closing in on you." *Id.* at 223. The court held that these words were not actionable per se because violations of the fornication and cohabitation statutes do not result in imprisonment. See VA. CODE ANN. §§ 18.2-344, -345 (Repl. Vol. 1975). Moreover, the conduct mentioned does not involve moral turpitude as defined by Virginia law. *Freedlander*, 734 F. Supp. at 226; see also *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 147, 334 S.E.2d 846, 850 (1985). The court also found no defamation *per quod*, which arises by innuendo from words combined with extrinsic facts. *Freedlander*, 734 F. Supp. at 226-28.

151. *Id.* at 227.

152. *Id.* at 228.

153. *Id.* at 230.

154. *Id.*

155. 109 S. Ct. 2678 (1989).

156. *Id.* at 2681; see *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); cf. *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989) (bank was not public figure required to prove actual malice in defamation case).

157. *Connaughton*, 109 S. Ct. at 2692-94.

tion, the reporter never interviewed a key witness and ignored contradictory evidence provided by five other people.¹⁵⁸ Although the failure to investigate alone is not proof of actual malice, the evidence here showed an intent to publish regardless of what the facts showed.¹⁵⁹

H. *Products Liability*

The trial court erred in holding that the plaintiffs' claims against a manufacturer and supplier were time-barred in *Eagles Court Condominium Unit Owners Association v. Heatilator*.¹⁶⁰ The plaintiffs' claims involved a defective steel fireplace system. The fireplace system caused a fire in a condominium unit which spread to several other units and the common areas of the complex.¹⁶¹ The Supreme Court of Virginia first construed the applicable statute of repose as barring any claims of negligent design and claims against the installer of the fireplace system, regardless of whether the system was characterized as "equipment or machinery."¹⁶²

Whether the claims also were barred against the manufacturer and supplier depended on the characterization of the fireplace system as equipment or machinery.¹⁶³ The court ruled that the plaintiffs' claims were not time-barred by the general five-year limita-

158. *Id.* at 2697-98.

159. *Id.* at 2698.

160. 239 Va. 325, 389 S.E.2d 304 (1990).

161. *Id.* at 327, 389 S.E.2d at 305.

162. The statute of repose provides as follows:

No action to recover for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction, or construction of such improvement to real property more than five years after the performance of furnishing of such services and construction.

The limitation prescribed in this section shall not apply to the manufacturer or supplier of any equipment or machinery or other articles installed in a structure upon real property, nor to any person in actual possession and in control of the improvement as owner, tenant or otherwise at the time the defective or unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought; rather each such action shall be brought within the time next after such injury occurs as provided in §§ 8.01-243 and 8.01-246.

VA. CODE ANN. § 8.01-250 (Repl. Vol. 1984).

163. *Eagles Court*, 239 Va. at 330, 389 S.E.2d at 306. The same determination was necessary in *Wilkes v. F. L. Smithe Mach. Co.*, 704 F. Supp. 680 (W.D. Va. 1989). In that case, the court, construing Virginia law, analogized the problem of characterizing machinery and equipment to cases defining "fixtures" attached to real property. *Id.* at 682.

tion period.¹⁶⁴ Rather, the more specific statute of repose applied, which states that an "action shall be brought within the time next after such injury occurs."¹⁶⁵ The limitation period, therefore, ran from the date of the fire if the fireplace system was "equipment or machinery."¹⁶⁶ Thus, the supreme court remanded to the trial court to make that "dispositive factual determination."¹⁶⁷

*Hoban v. Grumman Corp.*¹⁶⁸ involved a design defect claim against the manufacturer of a military aircraft. The plaintiff's evidence failed to show a defect, failed to resolve whether the defect in the aircraft caused it to crash, and failed to state facts rising above mere conjecture, speculation, or guess.¹⁶⁹ Furthermore, the evidence showed that the pilot contributed to the accident by violating course rules and standard operating procedures. Therefore, he was guilty of contributory negligence barring his estate from recovery.¹⁷⁰ The pilot also assumed the risk because he knew that potential malfunctions could occur, especially in the dangerous "low transition" maneuvers he undertook.¹⁷¹

In *Luddeke v. Amana Refrigeration, Inc.*,¹⁷² the court considered an intentional infliction of emotional distress claim by homeowners against the manufacturer of their home heating, air conditioning, and hot water system. After years of trying to fix the system, the seller and manufacturer abandoned repair attempts, and the homeowners filed suit against them.¹⁷³ The homeowners' emotional distress was inflicted, if at all, more than two years before they filed suit, when they first learned that the system's defects could not be repaired.¹⁷⁴ Thus, their claim on this count was barred.

164. *Eagles Court*, 239 Va. at 330, 389 S.E.2d at 307 (citing former VA. CODE ANN. § 8-24; recodified as *id.* § 8.01-243(B) (Cum. Supp. 1990)).

165. *Id.* at 330, 389 S.E.2d at 306 (quoting VA. CODE ANN. § 8.01-250 (Repl. Vol. 1984)).

166. *Id.* at 330, 389 S.E.2d at 306-07.

167. *Id.* at 330-31, 389 S.E.2d at 307; see also *Moore v. Dallas Corp.*, 17 Va. Cir. 97 (Fairfax County 1984) (garage door is equipment and machinery for purpose of § 8.01-250); *Martin v. Guardite, Inc.*, 16 Va. Cir. 273 (Richmond 1989) (former § 8-24.2 applied to manufacturers of machinery incorporated into buildings), *writ denied*, No. 891402, Feb. 23, 1990 (Va. Sup. Ct.).

168. 717 F. Supp. 1129 (E.D. Va. 1989).

169. *Id.* at 1135.

170. *Id.* at 1137.

171. *Id.* at 1137-38.

172. 239 Va. 203, 387 S.E.2d 502 (1990).

173. *Id.* at 204-05, 387 S.E.2d at 503.

174. *Id.* at 207, 387 S.E.2d at 504.

The plaintiffs' continued use of a defective product did not bar their recovery in *White Consolidated Industry v. Swiney*.¹⁷⁵ The plaintiffs noticed that their new stove operated only at high temperatures and that the stove's clock malfunctioned.¹⁷⁶ The plaintiffs finally complained to the seller six months after they purchased the stove, but no further action was taken.¹⁷⁷ While the plaintiffs were away, the stove ignited and burned their house to the ground.¹⁷⁸ The court found that foreseeable misuse of a product is not a defense to a consumer's claim for breach of implied warranty where the defect merely restricts the utility of the product.¹⁷⁹

In *Green v. Bock Laundry Machine Co.*,¹⁸⁰ the plaintiff brought a products liability claim against the manufacturer of a commercial dryer. The defendant manufacturer impeached the plaintiff with evidence of the plaintiff's criminal conviction.¹⁸¹ The United States Supreme Court, pointing to the inartful drafting of Rule 609(a)(1) of the Federal Rules of Evidence, stated:

[W]e hold that Federal Rule of Evidence 609(a)(1) requires a judge to permit impeachment of a civil witness with evidence of prior felony convictions regardless of ensuing unfair prejudice to the witness or to the party offering the testimony. Thus no error occurred when the jury in this product liability suit learned through impeaching cross-examination that plaintiff Green was a convicted felon.¹⁸²

I. *Strict Liability*

The federal courts continue to correctly note that Virginia has never recognized a claim for strict liability in tort.¹⁸³ However, the District Court for the Western District of Virginia stated the general rule and then extended an exception to that rule in *Breeding*

175. 237 Va. 23, 376 S.E.2d 283 (1989).

176. *Id.* at 25, 376 S.E.2d at 284.

177. *Id.*

178. *Id.* at 26, 376 S.E.2d at 284.

179. *Id.* at 29, 376 S.E.2d at 286. The court refused to discuss whether the doctrine of assumption of the risk is a defense to a breach of implied warranty claim under Virginia law. *Id.*

180. 109 S. Ct. 1981 (1989).

181. *Id.* at 1983.

182. *Id.* at 1993-94.

183. *Wilkes v. F. L. Smithe Mach. Co.*, 704 F. Supp. 680 (W.D. Va. 1989).

*v. Koch Carbon, Inc.*¹⁸⁴ The exception involves injury to land. Virginia law imposes strict liability where a person removes subjacent support for the surface and causes it to subside.¹⁸⁵ The issue in *Breeding* was whether strict liability applied to a claim that subsidence caused harm to structural improvements on the land.¹⁸⁶

Analyzing English and American precedent, the court concluded Virginia would adopt the position of the Restatement, the English Courts, and the American Courts which have specifically addressed the issue, that if one withdraws subjacent support for the land of another and subsidence results, if the subsidence would have occurred even in the absence of any artificial additions to the land, then he is strictly liable not only for the harm to the land caused by the subsidence, but also for any harm to the artificial additions on the land that results from the subsidence.¹⁸⁷

J. *Elements of Proof Generally*

1. Proximate Cause

In *Koutsounadis v. England*,¹⁸⁸ the plaintiff, who was injured when he struck the defendant's stationary car, sought to introduce evidence that the defendant had fallen asleep at the wheel, caused an accident, and left his darkened, disabled automobile blocking a portion of the highway. The trial court excluded the plaintiff's evidence because "the issue for the jury [was] to determine what happened *after* the incident as to whether or not the defendant was negligent in removing his automobile from the highway."¹⁸⁹ The supreme court characterized the problem as one of proximate cause, stating that it is within the jury's province to look at a "succession of facts and events and decide whether those facts and events are naturally and probably connected with each other in a continuous sequence."¹⁹⁰ The court concluded that evidence of the defendant's negligent acts was admissible to show the natural and unbroken chain of events leading to plaintiff's injuries.¹⁹¹

184. 726 F. Supp. 645 (W.D. Va. 1989).

185. *Id.* at 646.

186. *Id.*

187. *Id.* at 648.

188. 238 Va. 128, 380 S.E.2d 644 (1989).

189. *Id.* at 130, 380 S.E.2d at 646 (emphasis added)(quoting the trial court record).

190. *Id.* at 132, 380 S.E.2d at 647.

191. *Id.*

The trial court erred in striking plaintiff's evidence of concurring negligence in *West v. Critzer*.¹⁹² In *West*, the plaintiff's decedent was riding in a pick-up truck that apparently pulled out in front of a tractor trailer rig.¹⁹³ The plaintiff alleged that the concurring negligence of the defendant was the proximate cause of the decedent's death.¹⁹⁴ The driver of the tractor trailer did not brake, swerve, or take any other evasive action because he had the right of way, and he "'assumed' the [pick-up] would stop."¹⁹⁵ The tractor trailer was traveling at the posted fifty-five-mile-per-hour speed limit, and a flashing yellow light faced him.¹⁹⁶ Under these circumstances, the jury could have concluded that the tractor trailer driver failed to maintain a proper lookout,¹⁹⁷ failed to maintain a reasonable speed under the circumstances,¹⁹⁸ and failed to keep his vehicle under control.¹⁹⁹

2. Presumptions

The Supreme Court of Virginia expressed its strong disapproval of the so-called "missing witness" instruction in *Banks v. Harris*.²⁰⁰ The instruction gives rise to an inference that the absent witness' testimony would be adverse to the party failing to call him. The supreme court reversed and remanded for a new trial because the plaintiff, an infant, had no memory of the accident in which he was injured.²⁰¹ Thus, he was not an available witness who had knowledge of necessary and material facts. Although the court rejected the instruction based on the facts at hand, Justice Russell wrote a strong concurrence objecting to the instruction's use in any case:

In my view, the 'missing witness' instruction has outlived its usefulness. A case-by-case approach whereby the applicability of the instruction depends upon the facts of each case is certain to prove as

192. 238 Va. 356, 383 S.E.2d 726 (1989).

193. *Id.* at 358, 383 S.E.2d at 727-28.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 359, 383 S.E.2d at 728. "A proper lookout requires the operator to heed what he sees by taking reasonably prudent action to avoid what the lookout discloses." *Id.*

198. *Id.* "The posted speed does not determine whether a particular speed is reasonable under the circumstances." *Id.*

199. *Id.* at 360, 383 S.E.2d at 728. "Control concerns the ability to move the vehicle out of the path of danger by swerving, braking, or some other maneuver." *Id.*

200. 238 Va. 81, 380 S.E.2d 634 (1989).

201. *Id.* at 83, 380 S.E.2d at 635.

fruitful a source of errors, appeals, and reversals in the future as it has in the past.²⁰²

K. *Theories of Imputed Liability*

The Supreme Court of Virginia reached opposite results in two cases concerning liability for the negligence of independent contractors.²⁰³ In *Love v. Schmidt*, the landlord could not delegate to an independent contractor his common law duty to maintain his premises in a reasonably safe condition.²⁰⁴ The landlord was deemed to have knowledge of a toilet seat's unsafe condition.²⁰⁵ He therefore had a duty to see that the unsafe condition was remedied.²⁰⁶

However, in *MacCoy v. Colony House Builders, Inc.*, the general contractor was not liable for the negligent installation of electrical service which resulted in a fire.²⁰⁷ The court said the general contractor had no power to control the electrician's work.²⁰⁸ Therefore, the electrician was an independent contractor, and his negligence could not be imputed under the doctrine of *respondeat superior*.²⁰⁹

A trial court in Virginia rejected an effort to impose dram shop liability on a proprietor of a bar in *Lucas v. C & B Associates*.²¹⁰

202. *Id.* at 84, 380 S.E.2d at 636 (Russell, J., concurring).

203. *Love v. Schmidt*, 239 Va. 357, 389 S.E.2d 707 (1990); *MacCoy v. Colony House Builders*, 239 Va. 64, 387 S.E.2d 760 (1990).

204. 239 Va. 357, 389 S.E.2d 707 (1990).

205. *Id.* at 361, 389 S.E.2d at 710. Notice of the broken toilet seat was given to the independent contractor managing the defendant's property. The court imputed notice to the defendant "on agency principles and the doctrine of *respondeat superior*." *Id.* Other recent cases involving premises liability include *Runyon v. Geldner*, 237 Va. 460, 377 S.E.2d 456 (1989) (steep incline of driveway was open and obvious danger); *FAD Ltd. Partnership v. Feagley*, 237 Va. 413, 377 S.E.2d 437 (1989) (landlord has reasonable time after storm to remove ice from area).

206. *Love*, 239 Va. at 361, 389 S.E.2d at 710.

207. 239 Va. 64, 387 S.E.2d 760 (1990).

208. *Id.* at 68-69, 387 S.E.2d at 762. Unlike the independent contractor in *Love*, the independent contractor's negligence in this case caused the injury in question. *Id.* at 67, 387 S.E.2d at 761.

209. The supreme court noted an exception to the rule that one who employs an independent contractor is not liable for the injuries to third parties as a result of the independent contractor's negligence. The "wrongful per se" exception allows a third party to recover under the *respondeat superior* doctrine "only where the work to be performed is unlawful." *MacCoy*, 239 Va. at 70, 387 S.E.2d at 763 (emphasis added). In *MacCoy*, the work to be performed was lawful in itself, although the electrician violated the building code in the course of performing the lawful work. Thus, the wrongful per se exception did not apply. *Id.*

210. 18 Va. Cir. 446 (Roanoke 1990).

The clear rule in Virginia is that a dram shop owner cannot be liable for failing to stop an intoxicated person who leaves the premises and later causes injury to a third person.²¹¹ The plaintiff in *Lucas* attempted to escape the general rule on the grounds that an employee knew the patron was intoxicated, was given the patron's keys to prevent him from driving, but nevertheless allowed the patron to drive away.²¹² The trial court said the employee "simply had no right or duty to withhold [the patron's] keys."²¹³

L. Damages

1. Compensatory Damages

The United States Court of Appeals for the Fourth Circuit certified to the Supreme Court of Virginia several novel issues of Virginia law in *Bulala v. Boyd*.²¹⁴ The supreme court refused to recognize a separate compensable injury of "loss of enjoyment of life."²¹⁵ Moreover, the court refused to permit recovery for loss of earning capacity in the case of an infant with no work history.²¹⁶

Regarding "loss of enjoyment of life," the court said "the term is duplicative of other elements" recognized in Virginia.²¹⁷ Relying on a New York case, the court noted further that suffering encompasses mental anguish, thus no "salutary purpose would be served by having the jury make separate awards for pain and suffering and loss of enjoyment of life."²¹⁸

The court also held that recovery for lost future earnings must be based on more than statistical averages.²¹⁹ The female infant in

211. See *Williamson v. The Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986).

212. *Lucas*, 18 Va. Cir. at 448.

213. *Id.* The court noted that, had the employee held the keys, he would have been liable to the patron under a conversion theory. *Id.*; cf. *Starr v. Ebbesen*, 18 Va. Cir. 267 (Fairfax County 1989) (holding parents liable for negligent entrustment of air rifle to a minor child, analogizing to automobile entrustment cases).

214. 239 Va. 218, 389 S.E.2d 670 (1990).

For purposes of this article, only those topics of general application to professional malpractice cases will be discussed. See generally Friend, *Evidence: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 613 (1990); Kaine, *Professional Responsibility: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 715 (1990); Mellette, *Medical Malpractice and Health Care Law: Annual Survey of Virginia Law*, 24 U. RICH. L. REV. 655 (1990); *Charitable Immunity*, supra note 4.

215. *Bulala*, 239 Va. at 232, 389, S.E.2d at 677.

216. *Id.* at 234, 389 S.E.2d at 678.

217. *Id.* at 232, 389 S.E.2d at 677.

218. *Id.* (quoting *McDougald v. Garber*, 73 N.Y.2d 246, 257, 536 N.E.2d 372, 377 (1989)).

219. *Id.* at 233, 389 S.E.2d at 678.

Bulala was born with serious birth defects as a result of the defendant's malpractice. The infant died at age three.²²⁰ The plaintiffs' expert economist testified about median income of women in metropolitan areas of Virginia, work life statistics and factors such as mortality, age, race, and sex.²²¹ The court held that this evidence was insufficient to support a recovery for lost future earnings because the evidence was not grounded upon facts "*specific to the individual whose loss is being calculated.*"²²² Recognizing the difficulty with such a rule where a person has no work history, the court nevertheless stated, "Undoubtedly, such an evidentiary standard may confront a plaintiff having no work history and no prospect of future earning ability with an impossible burden but we think that result preferable to the unwarranted burden-shifting that occurs when future earnings are projected solely on the basis of statistics."²²³

However, in *Clark v. Chapman*,²²⁴ the court upheld the admissibility of expert testimony on lost wages although the plaintiff did not have a substantial work history. "[I]n light of the items on which [the expert] stated his calculations were based, . . . there was sufficient evidence to support the expert testimony."²²⁵

The plaintiff in *Mastin v. Theirjung*,²²⁶ appealed a jury verdict in her favor as "inadequate as a matter of law." The written jury verdict stated "[i]n favor of the plaintiff sum of damages \$0.00."²²⁷ The supreme court concluded that the plaintiff failed to introduce sufficient evidence requiring the jury to award damages.²²⁸

The evidence in *Mastin* showed that the plaintiff had an unusually severe reaction to a minor automobile accident. The evidence of her injuries was inconsistent.²²⁹ The trial court admitted evidence of the plaintiff's alcoholism and its likely effect on her reac-

220. *Id.* at 220, 389 S.E.2d at 672.

221. *Id.* at 232, 389 S.E.2d at 677.

222. *Id.* at 233, 389 S.E.2d at 677 (emphasis added).

223. *Id.*

224. 238 Va. 655, 385 S.E.2d 885 (1989).

225. *Id.* at 665, 385 S.E.2d 891. Justice Russell, joined by Chief Justice Carrico, dissented. "The economist was permitted to extrapolate that minimal work history into a lifetime wage loss using an elaborate construction of smoke and mirrors." *Id.* at 668-69, 385 S.E.2d at 893 (Russell, J. dissenting).

226. 238 Va. 434, 384 S.E.2d 86 (1989).

227. *Id.* at 436, 384 S.E.2d at 87.

228. *Id.* at 437, 384 S.E.2d at 88.

229. *Id.* at 437-38, 384 S.E.2d at 88.

tion to the accident.²³⁰ The supreme court ruled that the defendant

might have been responsible for [plaintiff's] unusual reaction to a minor trauma *if* the jury had concluded that the collision caused that reaction. . . . [But] the jury could also have concluded that it was equally likely that [plaintiff's] difficulties either arose from some other cause unrelated to the trauma of the collision or were feigned.²³¹

2. Punitive Damages

The trial court's decision to set aside the jury's verdict awarding compensatory damages was affirmed in *Murray v. Hadid*.²³² Since punitive damages must be predicated upon an award of compensatory damages, the court necessarily denied the punitive damages award.²³³

M. Defenses and Bars to Recovery

1. Contributory Negligence

The plaintiff in *Love v. Schmidt*,²³⁴ was injured when she fell off a toilet seat she knew was loose. The trial court set aside the verdict on the ground that, as a matter of law, the plaintiff's contributory negligence caused her injury.²³⁵ The Supreme Court of Virginia reversed, finding that reasonable minds could differ as to the

230. *Id.* at 440-41, 384 S.E.2d at 89.

231. *Id.* at 438-39, 384 S.E.2d at 88-89. The trial court instructed the jury as follows:

And if you believe from the evidence that a particular injury complained of by the plaintiff may have resulted from either of two causes, for one of which the defendant might have been responsible, and for the other of which he was not, and if the jury are unable to determine which of the two causes occasioned the injury complained of, then the plaintiff cannot recover therefor.

Id. at 439, 384 S.E.2d at 89.

232. 238 Va. 722, 385 S.E.2d 898 (1989).

233. *Id.*; see *Timms v. Rosenblum*, 713 F. Supp. 948, 955 n.20 (E.D. Va. 1989) (punitive damages in legal malpractice denied for lack of evidence of "willful, wanton, reckless, or outrageous conduct"); see also *Welch v. Jarman*, 18 Va. Cir. 179 (Fairfax County 1989) (allegation of legal intoxication, without more, is insufficient for punitive damages claim against defendant driver, relying on *Booth v. Robertson*, 236 Va. 269, 374 S.E.2d 1 (1988)); *Tebbs v. Kilgus*, 17 Va. Cir. 214 (Northumberland County 1989) (punitive damages not recoverable after death of tort-feasor since such damages are not to compensate, but to punish).

234. 239 Va. 357, 389 S.E.2d 707 (1990), *rev'g* 15 Va. Cir. 246 (Richmond 1989).

235. *Id.* at 359, 389 S.E.2d at 708.

plaintiff's negligence since the toilet seat appeared to her to be properly positioned on the toilet.²³⁶

The supreme court affirmed a trial court's decision to set aside a \$1.5 million verdict in *Kelly v. Virginia Electric & Power Co.*²³⁷ The trial court found that the plaintiff was guilty of contributory negligence.²³⁸ The plaintiff, a painter, attempted to move a fully extended aluminum ladder along the side of a building where he was painting gutters.²³⁹ The ladder contacted an uninsulated high-voltage power line, resulting in severe injuries to the plaintiff.²⁴⁰ Although the plaintiff thought the wires above his ladder were overhead telephone lines, the supreme court found that several factors supported the trial court's ruling. The plaintiff was of average intelligence, was wary of power lines in his work, knew that fiberglass ladders were available for use around power lines, and knew that he should lower a ladder before moving it.²⁴¹ In addition, the plaintiff recklessly failed to exercise due care to determine whether the lines were in fact dangerous.²⁴²

The supreme court rejected the use of a contributory negligence instruction in *Clark v. Chapman*.²⁴³ There, the plaintiff, a business invitee, was injured when a grocery store employee pushed a large food rack into the plaintiff's hand.²⁴⁴ The plaintiff saw the rack emerging from the storeroom twenty-seven feet away. However, this movement did not create an open and obvious danger against which the plaintiff had a duty to guard.²⁴⁵

The plaintiff in *Cofield v. Nuckles*,²⁴⁶ was injured when he attempted to walk across a busy street. The crosswalk was blocked by stopped traffic and the plaintiff proceeded to work his way across the street.²⁴⁷ He found an opening in front of a van. The van's driver, Hurdle, motioned the plaintiff across the final lane.²⁴⁸

236. *Id.* at 360, 389 S.E.2d at 709.

237. 238 Va. 32, 381 S.E.2d at 219 (1989).

238. *Id.* at 34, 381 S.E.2d at 222.

239. *Id.* at 37, 381 S.E.2d 221.

240. *Id.* at 34, 381 S.E.2d 220.

241. *Id.* at 38-40, 381 S.E.2d at 222-23.

242. *Id.* at 41, 381 S.E.2d at 223-24.

243. 238 Va. 655, 385 S.E.2d 885 (1989).

244. *Id.* at 657-58, 385 S.E.2d at 886-87.

245. *Id.* at 667-68, 385 S.E.2d at 887.

246. 239 Va. 186, 387 S.E.2d 493 (1990).

247. *Id.* at 188, 387 S.E.2d at 494.

248. *Id.*

When the plaintiff stepped beyond Hurdle's van, he was struck by Cofield's vehicle.²⁴⁹

The supreme court held that the plaintiff was not contributorily negligent as a matter of law.²⁵⁰ The traffic prevented him from crossing at the intersection, he was motioned across by Hurdle, and he slowed his gait and looked for approaching traffic.²⁵¹ Moreover, the plaintiff stepped from a position where he could be seen by approaching traffic.²⁵² It was for the jury to decide whether the plaintiff was guilty of contributory negligence.²⁵³

2. Sudden Emergency and Unavoidable Accident

In *Chodorov v. Eley*,²⁵⁴ the Supreme Court of Virginia considered the trial court's instructions to the jury regarding "sudden emergency" and "unavoidable accident." In *Chodorov*, the defendant was blinded by the sun when his vehicle emerged from a tunnel, causing him to collide with vehicles that had stopped ahead of him.²⁵⁵ Under these circumstances, the trial court erred in giving the "sudden emergency" instruction because there was no "sudden, unexpected, and unforeseen occurrence or happening that call[ed] for immediate action."²⁵⁶ Applying the rationale in another recent case, the supreme court said "[n]o reasonable inferences could be drawn . . . to suggest an 'emergency' within the meaning of the sudden emergency doctrine. [The defendant] was following one of a number of cars in a line of traffic and should have foreseen that the car in front of him might stop suddenly."²⁵⁷

249. *Id.*

250. *Id.* VA. CODE ANN. § 46.1-923 (Repl. Vol. 1989) provides as follows: "When crossing highways or streets, pedestrians shall not carelessly or maliciously interfere with the orderly passage of vehicles. They shall cross, wherever possible, only at intersections or marked crosswalks." VA. CODE ANN. § 46.2-924 provides, "No pedestrian shall enter an intersection in disregard of approaching traffic." VA. CODE ANN. 46.2-926 provides "No pedestrian shall step into a highway open to moving vehicular traffic at any point between intersections where their presence would be obscured from the vision of drivers of approaching vehicles by a vehicle or other obstruction. . . ."

251. *Cofield*, 239 Va. at 189, 387 S.E.2d at 495.

252. *Id.* at 190, 387 S.E.2d at 495.

253. *Id.* at 191, 387 S.E.2d at 495 ("evidence presented a proper jury question").

254. 239 Va. 528, 391 S.E.2d 68 (1990).

255. *Id.* at 530, 391 S.E.2d at 69.

256. *Id.* at 530, 391 S.E.2d at 70.

257. *Id.* at 531, 391 S.E.2d at 70 (quoting *Garnot v. Johnson*, 239 Va. 81, 86, 387 S.E.2d 473, 476 (1990)). The court emphasized in *Garnot*, that immediate and sudden stopping of the vehicles in front of a driver is not enough to warrant an instruction on sudden emergency. Such stopping is a foreseeable, expected occurrence. *Id.* at 530-31, 391 S.E.2d at 70.

Regarding the "unavoidable accident" instruction, the supreme court said that it is rarely permissible to give such an instruction in automobile cases.²⁵⁸ "Unavoidable accident" means "an accident which ordinary care and diligence could not have prevented."²⁵⁹ The evidence in the case showed that the driver of the vehicle immediately in front of the defendant's vehicle had no trouble seeing the stopped traffic approximately 100 feet ahead of him. The court concluded that this evidence negated any possibility that the accident was one which ordinary care and diligence could not have prevented.²⁶⁰

3. Illegal Actions

The plaintiffs' illegal acts barred their recovery in *Murray v. Hadid*.²⁶¹ There, the plaintiffs acted as unlicensed real estate brokers in negotiating the sale of property in violation of licensing laws.²⁶² They were thus barred from recovery for the value of their services.²⁶³

The plaintiff in *Zysk v. Zysk*,²⁶⁴ was barred from recovery for personal injuries which resulted in her participation in the crime of fornication. The plaintiff contracted Herpes Simplex Type-II virus when she engaged in consensual sexual relations with her future husband.²⁶⁵ She sued her husband for damages arising out of his intentional and negligent conduct.²⁶⁶ The supreme court said that "courts will not assist the participant in an illegal act who seeks to profit from the act's commission."²⁶⁷

258. *Id.* at 531, 391 S.E.2d at 70.

259. *Id.* (quoting *Smith v. Tatum*, 199 Va. 85, 91, 97 S.E.2d 820, 824 (1957)).

260. *Id.* at 532, 391 S.E.2d at 70. The *Chodorov* trial court correctly refused an instruction which stated: "The defendant . . . has testified that he received a traffic summons for following too closely and that he paid a forfeiture of said summons. You may consider this an admission of negligence on his part." *Id.* The supreme court did not say that such an instruction is improper as a matter of law. Rather, the evidence did not support such an instruction because the defendant testified that he paid the fine to avoid the inconvenience and expense of contesting the charge. *Id.* at 532, 391 S.E.2d at 70-71.

261. 238 Va. 722, 385 S.E.2d 898 (1989).

262. *Id.* at 729, 385 S.E.2d at 903.

263. *Id.*; cf. *Erwin v. T.E.M., Inc.*, 17 Va. Cir. 376 (Va. Beach 1989) (person who ignites illegal fireworks is negligent per se and is barred from recovery for injuries caused by fireworks).

264. 239 Va. 32, 387 S.E.2d 466 (1990).

265. *Id.* at 33, 387 S.E.2d at 466.

266. *Id.* at 34, 387 S.E.2d at 467.

267. *Id.* VA. CODE ANN. § 18.2-344 (Repl. Vol. 1988) provides that "[a]ny person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty

4. Sovereign Immunity

The sovereign immunity doctrine applied to a salaried employee of a state hospital who worked as a fellow in a research and training program in *Garguilo v. Ohar*.²⁶⁸ The Supreme Court of Virginia rejected the plaintiff's invitation to abolish sovereign immunity.²⁶⁹ Considering the "multitude of purposes" served by the doctrine,²⁷⁰ the court instead applied the traditional four-part test to find immunity.²⁷¹

The court concluded that the nature of the function performed by the defendant was to assist as an employee and student in basic medical research programs.²⁷² The Commonwealth had an acute interest in training and maintaining such a pool of specialists.²⁷³ Moreover, the defendant, as a fellow, was vested with discretion and judgment with respect to her patients who volunteered for her program.²⁷⁴ Finally, the defendant was under the direct supervision of superiors employed by the Commonwealth. Therefore, sovereign immunity barred the plaintiff's claim.²⁷⁵

5. Charitable Immunity²⁷⁶

Ordinarily, charitable institutions are immune from liability from claims asserted by beneficiaries of the charity. This immunity, however, did not apply in *Thrasher v. Winand*.²⁷⁷ In *Thrasher*, the plaintiff participated in a festival by staffing a booth

of fornication, punishable as a Class 4 misdemeanor."

268. 239 Va. 209, 387 S.E.2d 787 (1990).

269. *Id.* at 212, 387 S.E.2d at 789.

270. *Id.* (quoting *Messina v. Burden*, 228 Va. 301, 308, 321 S.E.2d 657, 660 (1984)).

271. *Id.* (citing *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980)). The four parts of the test are 1) the employee's function, 2) the extent of the state's interest and involvement, 3) whether the function involves judgment and discretion, and 4) the degree of control the state exercises over this function of the employee. *James*, 221 Va. at 53, 282 S.E.2d at 869.

272. *Garguilo*, 239 Va. at 213, 387 S.E.2d at 790.

273. *Id.*

274. *Id.* at 213-14, 387 S.E.2d at 790.

275. *Id.* at 214, 387 S.E.2d at 790-91. Justice Stephenson, joined by Justice Compton, dissented on the ground that the defendant was a licensed physician who developed a clear physician-patient relationship with the plaintiff. "The majority . . . places too much emphasis on the relationship that existed between Dr. Ohar and the hospital and too little emphasis on the relationship that existed between Dr. Ohar and her patient." *Id.* at 217, 387 S.E.2d at 792 (Stephenson, J., dissenting).

276. See *Charitable Immunity*, *supra* note 4.

277. 239 Va. 338, 389 S.E.2d 699 (1990).

sponsored by his social club.²⁷⁸ A share of the club's receipts went to the charity organizer of the festival.²⁷⁹ In no way did the social club, or vicariously the plaintiff, benefit from the works of the charity organizer. Thus, the defendant's charitable immunity plea was improperly sustained.²⁸⁰

278. *Id.* at 340, 389 S.E.2d at 700.

279. *Id.* at 339, 389 S.E.2d at 700.

280. *Id.* at 342, 389 S.E.2d at 701. Plaintiff was injured in a motorcycle accident presumably caused by the placement of barricades around the festival site. *Id.* at 340, 389 S.E.2d at 700; see also *Infant C. v. Boy Scouts of America, Inc.* 239 Va. 572, 391 S.E.2d 322 (1990). In *Infant C.*, the court noted the well-established exception to the charitable immunity doctrine. "[A] charitable organization is liable to the beneficiaries of the charity for the negligence of its employees if [the charity] fails to exercise ordinary care in the selection and retention of those employees." *Id.* at 578, 391 S.E.2d at 325. The decision in *Infant C.*, however, did not turn on this exception. See *supra* notes 40-50 and accompanying text.