VIRGINIA'S MEDICAL MALPRACTICE AND TORT CLAIMS ACTS: TWO SETS OF PREREQUISITES FOR FILING A TORT CLAIM AGAINST THE COMMONWEALTH'S HEALTH CARE PROVIDERS

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INTRODUCTION

One morning, a new client, Henry Pietch, comes into your office, wanting your representation in a suit for damages. During surgery, his mother, Marjorie Pietch, suffered complications resulting in a lack of oxygen to her brain. These complications caused brain damage, and Mrs. Pietch is currently comatose. Dr. Drew, the individual performing the surgery, was a research fellow at Virginia State Medical School, a hospital and medical school run by the Commonwealth. The surgery in which Mrs. Pietch was harmed was conducted as part of a study in which she had been participating as a patient. From the facts as related to you by your client, it appears clear that the complications that brought about Mrs. Pietch's current condition were caused by negligence on the part of Dr. Drew. You believe that a case may be successfully brought against the doctor on grounds of malpractice.

Medical malpractice actions brought against the health care providers of the Commonwealth of Virginia are governed by two distinct statutory schemes: the Medical Malpractice Act,¹ and the Virginia Tort Claims Act.² Each statute has its own set of conditions and requirements that must be satisfied before a suit may be recognized. Your failure to comply with these requirements could prevent your client from even bringing the claim.

This article will look at each of the statutory schemes in turn: the history behind their inception in the Commonwealth, and the operation of each statute. In addition, the article will describe the combined operation of the two statutes and set forth the procedural requirements that must be met in order to comply with both schemes.

VIRGINIA'S MEDICAL MALPRACTICE ACT

The History of the Medical Malpractice Act

By a joint resolution passed in February, 1975, Virginia's General Assembly directed the Commission to Study the Costs and Administration of Health Care Services "to make a study and report

¹ Va. Code Ann. §§ 8.01-581.1 to -581.20 (1984 & Supp. 1990).

² Va. Code Ann. §§ 8.01-195.1 to -195.9 (1984 & Supp. 1990).

on the medical malpractice insurance premiums for physicians, with recommendations on how the increase in cost [of such premiums] might be slowed or stopped."³ The motivation behind this resolution was a concern that malpractice insurance premiums in Virginia were being dictated not by the number of claims filed in the Commonwealth, but by a national average. These premiums were believed to be disproportionately high because the quantity of claims brought in Virginia was lower than the national figure.⁴

The resulting report, presented to the General Assembly in November, 1975, indicated that, nationally, medical malpractice insurance rates had spiralled by more than 1,000 percent between 1960 and the time of the study.⁵ This increase was caused by the frequency of malpractice claims and the high amount of damages being sought.⁶

The General Assembly perceived a threat in these rising costs: if insurance were to become more expensive and therefore less accessible for practitioners in the Commonwealth, fewer doctors would be able to serve Virginia residents.⁷ In order to remedy the situation, the General Assembly passed the Virginia Medical Malpractice Act in 1976.⁸

Overview of the Medical Malpractice Act

The Medical Malpractice Act⁹ contains a number of protective provisions favoring health care providers. The main objective of the Act is to lower the costs of medical malpractice insurance and thereby encourage doctors to practice in Virginia. The major sections of the Medical Malpractice Act provide for a notice of malpractice claim,¹⁰ statute of limitations tolling,¹¹ a medical claim review panel,¹² and a cap on recovery.¹³

³ H.R.J. Res. 174, 1975 Va. Gen. Assembly 1478 (1975).

⁴ Id.

⁵ Etheridge v. Medical Center Hospitals., 237 Va. 87, 93, 376 S.E.2d 525, 527 (1989).

⁶ Id.

¹ Id.

⁸ 1976 Va. Acts ch. 611.

⁹ Va. Code Ann. §§ 8.01-581.1 to -581.20 (1984 & Supp. 1990).

¹⁰ See id. § 8.01-581.2(A) (Supp. 1990).

¹¹ See Va. Code Ann. § 8.01-581.9 (Supp. 1990).

¹² See id.

¹³ See Va. Code Ann. § 8.01-581.15 (1984).

Before a claimant can file his suit, he must send the health care provider a notice of claim to alert him of the pending action.¹⁴ Once the claimant sends the notice of claim, a number of tolling provisions on the statute of limitations take effect. After the notice is filed, either party may request a medical malpractice review panel to submit an opinion on the claim.¹⁵ The purposes of the medical review panel are primarily to facilitate settlement and prevent vexatious claims.¹⁶ The Medical Malpractice Act also institutes a cap of one-million dollars on the recovery of all malpractice claims.¹⁷

Definitions Under the Virginia Medical Malpractice Act

The Virginia Code (the Code) defines which health care providers can receive the protection of the Medical Malpractice Act.¹⁸ A health care provider is a "person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services "¹⁹ The Code then lists examples of medical professionals who, if licensed to practice in Virginia, would be eligible for the protection of the Medical Malpractice Act (the Act).²⁰

Richman v. National Health Laboratories, Inc.²¹ helps clarify the definition of a health care provider. In Richman, the plaintiff was examined by a doctor for cervical cancer on July 10, 1981, because she was planning to conceive a child. The doctor prepared a specimen slide, which was tested at the National Health Laboratories (National Health) on or about July 14, 1981. After the laboratory reported that the test results were normal, the plaintiff, in December, 1981, became pregnant. Six months into her pregnancy, the plaintiff discovered that she had cervical cancer, and this was reported to the laboratory. National Health reviewed the original specimen and found that it had shown cervical cancer.

¹⁴ Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

¹⁵ Id

¹⁶ DiAntonio v. Northhampton-Accomack Memorial Hosp., 628 F.2d 287, 290 (4th Cir. 1980).

¹⁷ Va. Code Ann. § 8.01-581.15 (1984).

¹⁸ Stone & Hilton, Medical Malpractice: The Year in Review, 23 U. Rich. L. Rev. 731, 731 (1989).

¹⁹ VA. CODE ANN. § 8.01-581.1 (Supp. 1990). Eligible licensed medical professionals include corporations and persons licensed to provide professional services and health care, professional corporations when all of its members are licensed, and qualifying nursing homes. *Id*.

²⁰ See id.

²¹ 235 Va. 353, 367 S.E.2d 508 (1988).

Pursuant to the Code,²² the plaintiff, on July 11, 1983, filed a notice of claim, and, on November 10, 1983, she filed a motion for judgment.²³

Affirming the decision of the circuit court, the Virginia Supreme Court found that the Richman's suit was barred by the statute of limitations. The Supreme Court dismissed the suit because National Health was not a health care provider as defined by the Medical Malpractice Act, and, therefore, none of the tolling provisions found in the Act could be applied. The laboratory was not a health care provider because it was licensed by the federal government, not the state of Virginia, as is required by the Virginia Code. Furthermore, clinical laboratories are not specifically included in the Code's list of persons and facilities protected. Finally, because the doctor had no right or power to control the laboratory, the Supreme Court concluded that the laboratory was not an agent or employee of the doctor and could not be brought under the statute through such an interpretation.

Under the Code, health care is defined as "any act, or treatment performed or furnished, or which should have been performed or furnished, by any heath care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement." Malpractice is "any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."

²² Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

²³ Richman, 235 Va. at 355-56, 367 S.E.2d at 510.

²⁴ Id. at 359, 367 S.E.2d at 512 (citing Va. Code Ann. § 8.01-243(A) (1984)) ("Unless otherwise provided by statute... every action for personal injuries, whatever the theory of recovery... shall be brought within two years next after the cause of action shall have accrued").

²⁵ See VA. Code Ann. § 8.01-581.9 (Supp. 1990). See infra notes 63-76 (discussing tolling provisions).

²⁶ Richman, 235 Va. at 359, 367 S.E.2d at 512.

²⁷ Id. at 357, 367 S.E.2d at 510-11 (citing VA. Code Ann. § 8.01-581.1 (1977 & Supp. 1987)) ("Health care provider" means (i) a person, corporation, facility or institution licensed by this Commonwealth") Id. (emphasis in original).

²⁸ Id. at 357, 367 S.E.2d at 511 (citing Va. Code Ann. § 8.01-581.1 (1977 & Supp. 1987)).

²⁹ Id. at 358, 367 S.E.2d at 511.

VA. CODE ANN. § 8.01-581.1 (Supp. 1990).

³¹ *Id*.

1. Scope of the Notice

Before an action for malpractice may be brought against a health care provider, the claimant must notify the health care provider by registered or certified mail.³² "A notice of claim is required only if (1) the cause of action is for medical malpractice, and (2) the potential defendant is a health care provider."³³ Once again, a health care provider must be licensed in Virginia to provide health care services.³⁴ The notice of claim is vitally important because it activates a ninety-day period in which the plaintiff cannot file suit³⁵ and tolling provisions for the statute of limitations.³⁶

The notification must be written and include "the time of the alleged malpractice and a reasonable description of the act or acts of malpractice." In *Grubbs v. Rawls*, the defendant health care providers argued that the plaintiff's notice of claim did not notify them of claims of post-operative malpractice. In deciding against the defendants, the Virginia Supreme Court found that the notice of claim is "not meant to be a particularized statement of claims." The purpose of the notice is to call the health care provider's attention to the "general time, place, and character of events complained of."

In *Grubbs*, the notice of claims referred to the doctors' "negligent treatment and surgery of the ... patient while under [their] care."⁴¹ In deciding that the notices to the doctors were "barely sufficient" to inform them of post-operative claims, the court interpreted "negligent treatment while under your care" to include post-operative treatment.⁴² It also considered the fact that both letters mentioned a worsening condition after the surgery, which, according to the court, referred to post-operative events.⁴³

³² *Id.* § 8.01-581.2(A) (Supp. 1990).

³³ Stone & Hilton, supra note 18 at 734 (citing Va. Code Ann. § 8.01-581.2 (1984 & Supp. 1989)).

³⁴ Id. at 735 (citing Va. Code Ann. § 8.01-581.1 (1984 & Supp. 1989)).

³⁵ Id. at 737 (citing Va. Code Ann. § 8.01-581.2 (1984 & Supp. 1989)).

³⁶ Id. (citing VA. Code Ann. § 8.01-581.9 (1984 & Supp. 1989)). See infra notes 63-76 and accompanying text (discussing tolling provisions).

³⁷ Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

^{38 235} Va. 607, 369 S.E.2d 683 (1988).

³⁹ *Id.* at 614, 369 S.E.2d at 687.

⁴⁰ Id.

⁴¹ *Id*.

⁴² Id.

⁴³ Id. at 614, 369 S.E.2d at 688.

In Hudson v. Surgical Specialists, Inc., the circuit court restricted the plaintiff's evidence to the specific facts asserted in her notice of claim to the health care providers and subsequently decided in favor of the health care providers. The Supreme Court of Virginia, reversing this part of the circuit court's ruling, stated that the notice of claim under the Medical Malpractice Act "is not required to contain a summary of the plaintiff's evidence" or explain the theories of his case. The purpose of such notice is merely to call the "defendant's attention to the identity of the patient, the time of the alleged malpractice, and a description of the alleged acts [so that the defendant can] identify the case to which the plaintiff is referring.

The Supreme Court concluded by stating that a defendant is unjustified in relying on the plaintiff's notice of claim in deciding whether to request assessment of the claim by a medical review panel.⁴⁷ As long as the notice is sufficient to identify the case, the defendant is expected to rely on his files and medical records pertaining to the plaintiff in deciding whether to request a panel.⁴⁸ If the notice is not sufficient to identify the case, however, the defendant may request notice that meets the above requirements.⁴⁹

2. Improper Service of Notice

As discussed, before an action for malpractice can be brought against a health care provider, the claimant must notify the health care provider of the impending claim.⁵⁰ Once the notice of claim is sent by certified or registered mail,⁵¹ either party has sixty days to decide whether to ask for a review by a "medical malpractice review panel," which will examine the facts surrounding the alleged malpractice and

^{4 239} Va. 101, 387 S.E.2d 750 (1990).

⁴⁵ Id. at 106, 387 S.E.2d at 753.

⁴⁶ Id.

⁴⁷ Id. at 106-07, 387 S.E.2d at 753.

⁴⁸ Id.

⁴⁹ Id. at 107, 387 S.E.2d at 753.

⁵⁰ Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

⁵¹ *Id. But see* Hewitt v. Virginia Health Services Corp., 239 Va. 643, 391 S.E.2d 59 (1990). In Hewitt, although the Plaintiff failed to send a notice of claim by registered or certified mail, the defendant filed responsive pleadings and participated in discovery for over a year before raising the "improper service" defense. The Virginia Supreme Court, in refusing to allow a dismissal of the action, found that the method of service for a notice of claim is a procedural requirement which is waived if an objection is not timely raised. *Id.* at 645, 391 S.E.2d at 60.

render an opinion on the claim's validity.⁵² The claimant must wait ninety days, after giving notice to the health care provider, before he can file an action on the alleged malpractice.⁵³ If a medical malpractice review panel is requested, no action can be brought during the period of the panel's review.⁵⁴

In Glisson v. Loxley,⁵⁵ the plaintiff filed two claims, a breach of contract and a malpractice claim, against the defendant doctor. The circuit court dismissed both claims because the plaintiff never sent a notice of claim to the doctor, pursuant to the Virginia Code.⁵⁶ The Virginia Supreme Court reversed in part, finding that the circuit court erred in dismissing the breach of contract claim but was correct in dismissing the malpractice claim. The Supreme Court found that the Medical Malpractice Act focuses on tort and not breach of contract, and that the act never intended to encompass contract actions.⁵⁷ While the malpractice claim failed because the notice requirements were not met, the contract claim was allowed because it fell outside the scope of the Medical Malpractice Act.

3. Claims Against Multiple Health Care Providers

When the plaintiff has claims arising from the same incident against multiple health care providers, the plaintiff's notice of claim must name each health care provider and be filed with each health care provider. The claimant and each health care provider named in the notice of claim may request a medical malpractice review panel, and if one health care provider does request a panel, he must send a copy of the request to the claimant and the other health care providers. When such a request is made by any party, one panel will be designated and "all [the] health care providers against whom a claim is asserted shall be subject to the jurisdiction of such panel."

⁵² Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

⁵³ Id. See also Edwards v. City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989) (Circuit court's dismissal of a malpractice suit was affirmed by the Virginia Supreme Court because plaintiff filed suit three days after giving notice of claim to the health care provider). But see Morrison v. Bestler, 239 Va. 166, 173, 387 S.E.2d 753, 757-58 (1990) (Medical Malpractice Act's prohibition against filing suit prior to ninety days after giving the notice of claim is a mandatory procedural requirement, but failure to comply with this requirement does not divest the court of subject matter jurisdiction).

⁵⁴ Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

^{55 235} Va. 62, 366 S.E.2d 68 (1988).

⁵⁶ Id. at 64, 366 S.E.2d at 69 (citing Va. Code Ann. § 8.01-581.2(A) (1984)).

⁵⁷ Id. at 67, 366 S.E.2d at 71.

⁵⁸ VA. CODE ANN. § 8.01-581.2(D) (Supp. 1990).

⁵⁹ Id.

⁶⁰ Id.

The Statute of Limitations

Except for cases of foreign objects negligently left in the patient's body, fraud, and misrepresentation, an action for personal injuries, including medical malpractice, must be brought within "two years after the cause of action accrues." The cause of action, except in cases of foreign objects negligently left in the patient's body, fraud, and misrepresentation, accrues and the statute of limitations begins to run on the date the injury is sustained. 62

The Medical Malpractice Act, however, provides for tolling the statute of limitations in malpractice suits against health care providers covered by the Act.⁶³ When the claimant gives the health care provider a notice of claim, the applicable statute of limitations will be tolled for a "period of 120 days from the date such notice is given, or for 60 days following the date of issuance of any opinion by the medical review panel, whichever is later." This provision is intended to avoid unfairness to the plaintiff who must wait ninety days after giving notice of claim to file suit."

Within sixty days of the notice of the filing of the claim, either party may file a written request for review by a medical malpractice review panel.⁶⁶ If the requesting party decides to rescind the request for a medical review panel,⁶⁷ or when the Chief Justice of the Supreme Court gives notice of his

⁶¹ Id. § 8.01-243(A), (C) (Supp. 1990).

⁶² Id. § 8.01-230 (1984). See also Scarpa v. Melzig, 237 Va. 509, 379 S.E.2d 307 (1989). In Scarpa, the plaintiff was admitted to the hospital for a "complete sterilization" and became pregnant three and a half years later. The Virginia Supreme Court found that the action was barred by the statute of limitations, stating that a "cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained . . . and not when the resulting damage is discovered . . . " Id. at 512, 379 S.E.2d at 309 (quoting Va. Code Ann. 8.01-230 (1984)). But see Grubbs v. Rawls, 235 Va. 607, 369 S.E.2d 683 (1988). In Grubbs, the plaintiff filed suit slightly more than two years after an operation in which the alleged malpractice occurred. The Virginia Supreme Court, however, found that the statute of limitations had not run because there had been "continuing diagnosis and treatment for the same or related illnesses or injuries after the alleged acts of malpractice." Grubbs, 235 Va. at 612, 369 S.E.2d at 686 (citing Farley v. Goode, 219 Va. 969, 980, 252 S.E.2d 594, 601 (1979)).

⁶³ Va. Code Ann. § 8.01-581.9 (Supp. 1990).

ы Id.

⁶⁵ Stone & Hilton, supra note 18, at 732.

⁶⁶ VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

⁶⁷ Id. § 8.01-581.2(B) (Supp. 1990) (Notice to rescind the request for a medical review panel must be given to counsel for the opposing party at the same time it is given to the Chief Justice of the Virginia Supreme Court).

determination granting or denying the request for a medical review panel, the statute of limitations will be tolled for sixty days following the giving of such notice. 59

Dye v. Staley⁷⁰ is an excellent example of how the statute of limitations is tolled. In Dye, the plaintiff's medical malpractice claim arose on July 8, 1978. On March 21, 1980, the plaintiff gave notice of her claim to the health care provider. Neither party requested a medical malpractice review panel.⁷¹ The statute of limitations would have run on July 8, 1980, but since the defendant was a health care provider under the Medical Malpractice Act,⁷² and the plaintiff filed a notice of claim, the statute of limitations was tolled for 120 days.⁷³ The 120-day toll period following the notice of claim ended on July 19, 1980, and the plaintiff filed her motion for judgment with the court on July 23, 1980. Her suit was not barred because the Virginia Supreme Court found that 109 days remained on the two-year limitation period after tolling the claim for 120 days. The plaintiff was still entitled to those 109 days remaining because the statute of limitations had been tolled.⁷⁴ Once the 120-day toll period following the notice of claim terminated on July 19, 1980, the statute of limitations resumed running.⁷⁵ Therefore, the plaintiff had filed her action with 105 days remaining on the limitation period.⁷⁶

The Medical Malpractice Review Panel

1. Composition of the Panel

⁶⁸ Id. § 8.01-581.2(C) (Supp. 1990) (Notice of the determination of the Chief Justice on a request for review shall be given to counsel for both parties).

⁶⁹ Id. § 8.01-581.2(A) (Supp. 1990).

⁷⁰ 226 Va. 15, 307 S.E.2d 237 (1983).

⁷¹ Id. at 17, 307 S.E.2d at 238.

⁷² See Va. Code Ann. § 8.01-581.1 (Supp. 1990).

⁷³ Dye, 226 Va. at 18, 307 S.E.2d at 239 (citing Va. Code Ann. § 8.01-581.9).

⁷⁴ Id. at 18, 307 S.E.2d at 239.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Va. Code Ann, § 8.01-581.3 (Supp. 1990).

the family, partners, or business interest of either party. An "impartial health care provider" is a health care provider who has neither dealt professionally with the claimant or his family, nor anticipates professional dealings with the claimant or his family. Further, the health care provider cannot be an employee or partner of the defending health care provider. Finally, the panel will have a sitting or retired judge of a circuit court acting as the chairman. The chairman can only vote if it is necessary to break a tie. **E

2. Discovery Under the Medical Malpractice Review Hearing

Within ten days of being appointed, the chairman of the medical review panel will inform the parties of the date when discovery is to be completed. The parties will not be precluded from performing additional discovery if an action is later filed.⁸³ Any discovery may be used in a subsequent civil proceeding based upon the same claim.⁸⁴ Unless there is good cause, the date set for the completion of discovery will not exceed ninety days from the date the chairman was appointed.⁸⁵ During discovery, the chairman will notify the parties of the hearing date, which will be no sooner than ten days after the completion of discovery.⁸⁶ The hearing will be held after sufficient notice is given to the parties so as to ensure their presence at the time and place of the hearing.⁸⁷

3. Conduct of the Proceedings

A hearing before the panel will be allowed upon the request of either party. Once the medical review panel is appointed, the respective parties must promptly submit their evidence, in written form,

⁷⁸ *Id.* § 8.01-581.1 (Supp. 1990).

⁷⁹ Id.

⁸⁰ Id.

⁸¹ *Id.* § 8.01-581.3 (Supp. 1990).

⁸² Id.

⁸⁵ Id. § 8.01-581.3:1 (Supp. 1990).

⁸⁴ Id. § 8.01-581.4 (Supp. 1990).

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id. § 8.01-581.5 (1984).

ss Id. § 8.01-581.4 (Supp. 1990).

to each member of the panel.⁸⁹ During the hearing, witnesses will give testimony, if any, under oath.⁸⁰ The parties need not observe the rules of evidence;⁹¹ they can be heard and cross-examined,⁹² and subpoenas for attendance can be issued.⁹³ Unless the parties agree otherwise, all the members of the medical review panel will conduct the hearing, and "a majority of the members present may determine any question and may render an opinion.¹⁹⁴

4. Opinion of the Medical Malpractice Review Panel

The panel's opinion must be rendered within six months of the panel's appointment, unless the parties otherwise agree. Upon a showing of extraordinary circumstances, the chairman can extend this six month period, only once and not for a period exceeding ninety days. If the panel opinion is not rendered within this adjusted time period, the claimant is free to pursue his claim and any subsequent panel opinion will be inadmissible as evidence, unless the claimant's own delay is the reason for the panel's failure to render an opinion.

⁸⁹ Id.

⁹⁰ *Id.* § 8.01-581.6(1) (Supp. 1990).

⁹¹ *Id.* § 8.01-581.6(2) (Supp. 1990).

⁹² Id.

⁹³ *Id.* § 8.01-581.6(3) (Supp. 1990).

⁹⁴ *Id.* § 8.01-581.6(5) (Supp. 1990).

⁹⁵ Id. § 8.01-581.7:1 (1984).

[%] Id.

⁹⁷ Id.

After receiving all the evidence, the panel has thirty days to render its opinion.⁹⁸ The panel's opinion will be in writing and signed by all concurring panelists; a panelist may also note his dissent.⁹⁹ The opinion must be mailed to all involved parties within five days of the date of its rendering.¹⁰⁰

Though it will not be considered conclusive, the opinion of the medical review panel is admissible as evidence in any subsequent action brought by the plaintiff.¹⁰¹ Furthermore, either party, at his own expense, can call as a witness any panel member, except the chairman.¹⁰² In *Klarfeld v. Salsbury*,¹⁰⁰ the plaintiff deposed one of the panel members, after the panel had already delivered its opinion, in order to ask about the panel's deliberations. The plaintiff had no intention of using the panel member as an expert witness.¹⁰⁴ The Virginia Supreme Court reversed the circuit court's finding that panel members could not be required to testify during discovery about the panel's deliberations. The Supreme Court ruled that a panel's findings are merely opinions and are not conclusive. Therefore, the panels' opinions should be "subject to scrutiny" in order to test their credibility and probative value.¹⁰⁵ Any question designed to test the probative value or credibility of the panel's opinion is valid.¹⁰⁶

Within thirty days, after receiving all the evidence, the panel shall have the duty . . . to render one or more of the following opinions:

Id. § 8.01-581(A)(1)-(4) (Supp. 1990).

⁹⁸ *Id.* § 8.01-581.7(A) (Supp. 1990).

^{1.} The evidence does not support a conclusion that the health care provider failed to comply with the appropriate standard of care;

^{2.} The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is a proximate cause in the alleged damages;

^{3.} The evidence supports a conclusion that the health care provider failed to comply with the appropriate standard of care and that such failure is not a proximate cause in the alleged damages; or

^{4.} The evidence indicates that there is a material issue of fact, not requiring an expert opinion, bearing on liability for consideration by a court or jury.

⁹⁹ Id. § 8.01-581.7(C) (Supp. 1990).

¹⁰⁰ Id.

¹⁰¹ Id. § 8.01-581.8 (1984). But see Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986). The Medical Malpractice Review Panel's opinion can be used as non-conclusive evidence, but it cannot be used as expert testimony and take the place of an expert witness. Raines, 231 Va. at 115, 341 S.E.2d at 197.

¹⁰² Va. Code Ann. § 8.01-581.8 (1984).

^{103 233} Va. 277, 355 S.E.2d 319 (1987).

¹⁰⁴ Id. at 279, 355 S.E.2d at 320.

¹⁰⁵ Id. at 285, 355 S.E.2d at 323.

¹⁰⁶ Id. at 286, 355 S.E.2d at 324.

Statutory Cap on Recovery

One of the most important sections in the Medical Malpractice Act is the statutory cap on the available recovery for a malpractice claim. "In any verdict returned against a health care provider in an action for malpractice . . . the total amount recoverable for any injury to, or death of, a patient shall not exceed one-million dollars." In Etheridge v. Medical Center Hosps., 108 the one-million dollar cap on recovery was deemed fully constitutional. 109 The Etheridge decision also settled another matter pertaining to caps. The Virginia Supreme Court found that the cap applies to all defendants in the aggregate, meaning the maximum liability of each defendant could be less than one million dollars. 110

Standard of Care

In Virginia, the standard of care to which a health care provider will be held, in any proceeding before a medical review panel or any action against a health care provider, will be the "degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth "111 The standard of care in a locality, which differs from the state standard of care, may be used in certain circumstances. 112

The law presumes that the Commonwealth's practicing physicians, as well as those licensed to practice in other states who are educationally qualified to practice here, are cognizant of "the statewide

[T]he standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities gives rise to a standard of care which is more appropriate than a statewide standard.

¹⁰⁷ VA. CODE ANN. § 8.01-581.15 (1984).

¹⁰⁸ 237 Va. 87, 376 S.E.2d 525 (1989).

¹⁰⁹ Id. at 96, 376 S.E.2d at 529. The Virginia Supreme Court found that Section 8.01-581.15 of the Virginia Code merely sets the "outer limits" of a remedy. Therefore, the jury is not deprived of its function because a remedy is a matter of law and the jury's function is to resolve disputed facts. Id.

Comment, Interpretation of Virginia's Medical Malpractice Act: Boyd v. Bulala, 12 Geo. Mason L. Rev. 361, 362 (1990) (citing Etheridge v. Medical Center Hosps., 237 Va. 87, 376 S.E.2d 525 (1989)). For a discussion on allowing each plaintiff to recover up to the one-million dollar cap, see id., at 381.

¹¹¹ Va. Code Ann. § 8.01-581.20(A) (Supp. 1990).

¹¹² Id.

standard of care in the specialty or field of medicine in which [they are] qualified and certified."¹¹³ A witness qualified as an expert on the standard of care in any given field of medicine must have actively practiced this particular specialty within a year of the date of the act or omission complained of.¹¹⁴ The jury or the court, if trying the action without a jury, will decide any issue as to standard of care to be applied in a medical malpractice action.¹¹⁵

THE VIRGINIA TORT CLAIMS ACT

Introduction

The Virginia Tort Claims Act (the Act),¹¹⁶ modeled upon the Federal Tort Claims Act,¹¹⁷ was passed by the General Assembly in 1981. This portion of the article seeks to set forth the provisions of the Act, as well as to determine the effect that this statute has had upon the bringing of tort claims against the Commonwealth.

Sovereign Immunity: Precursor to the Tort Claims Act

The doctrine of sovereign immunity has evolved through the common law of Virginia.¹¹⁸ It is also reflected in the Eleventh Amendment of the United States Constitution.¹¹⁹ The doctrine protects the sovereign, or in the case of the United States, the government, from lawsuits brought against it by citizens.¹²⁰ Founded on the principle that "there can be no legal right as against the authority that makes

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id. § 8.01-581,20(B) (Supp. 1990).

¹¹⁶ Id. §§ 8.01-195.1 to -195.9 (1984 & Supp. 1990).

¹¹⁷ 28 U.S.C. §§ 1346(b), 2671-2680 (1988); Comment, The Abrogation of Sovereign Immunity in Virginia: The Virginia Tort Claims Act, 7 Geo. Mason L. Rev. 291, 291 (1984).

Senate and House Committees for Courts of Justice, Report on Governmental. Immunity to the Governor and the Gen. Assembly of Virginia of 1975, H. Doc. No. 31, at 3 (1975). "The doctrine of governmental immunity is firmly embedded in the common law of the Commonwealth." *Id*.

The 11th Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any Foreign State." U. S. Const. amend XI. See Marrapese v. Rhode Island, 500 F. Supp. 1207, 1209 n.2 (1980). "Although by its terms not strictly applicable to suits against the state by its own citizens, the Amendment has been construed to include such actions." Id. (citations omitted).

¹²⁰ Black's Law Dictionary 1396 (6th Ed. 1990).

the law on which the right depends,"¹²¹ the doctrine is currently defended by its effectiveness in conserving public monetary resources; allowing the government to run smoothly without the interruption that constant legal proceedings would entail; protecting public employees' decisions from judicial scrutiny, thus encouraging them to act freely; motivating individuals to serve as public officials and employees; and shielding government decision-making from "the threat or use of vexatious litigation" by citizens attempting to interfere with this decision-making process.¹²²

In Virginia, state immunity from torts suits is part of the common law.¹²⁵ A suit against the Commonwealth may only be brought with the Commonwealth's permission, expressly set forth by statute.¹²⁴ Furthermore, a claimant against the government must adhere closely to those procedures delineated in the statute in order to defeat the state's defense of sovereign immunity.¹²⁵ Courts do not imply a waiver of this protection.¹²⁶

Sovereign immunity is extended beyond the scope of protecting only the highest officials of government to reach lower level employees, depending on whether the complained-of action or omission occurred while that employee was performing a ministerial or discretionary duty.¹²⁷ Garguilo v. Ohar¹²⁸

Taylor, A Re-Examination of Sovereign Tort Immunity in Virginia, 15 U. Rich. L. Rev. 247, 253 (1981).

¹²¹ Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1906).

Messina v. Burden, 228 Va. 301, 308, 321 S.E.2d 657, 660 (1984). Another commentator gives a more cynical explanation for the reasoning behind the doctrine:

⁽¹⁾ the absurdity of a wrong committed by an entire people; (2) a preference that one individual should suffer a loss rather than inconvenience all the people; (3) the idea that whatever the state does must be lawful; (4) the derivative theory that an agent of the state is always outside the scope of his authority when he commits any wrongful act (since the King could do no wrong, he could not, of course, validly authorize one of his ministers to do wrong); (5) a reluctance to divert public funds to compensate for private injuries; and (6) the inconvenience and embarrassment which would descend upon the state government should it be subjected to such litigation.

¹²³ See supra note 118. See also Banks v. Liverman, 129 F. Supp. 743, aff d., 226 F.2d 524 (1955); Eriksen v. Anderson, 195 Va. 655, 79 S.E.2d 597 (1954); Hicks v. Anderson, 182 Va. 195, 28 S.E.2d 629 (1944); Wilson v. State Hwy. Comm'r, 174 Va. 82, 4 S.E.2d 746 (1939).

¹²⁴ Taylor v. Williams, 78 Va. 422 (1884).

¹²⁵ Fugate v. Martin, 208 Va. 529, 532, 159 S.E.2d 669, 672 (1968); Hicks v. Anderson, 182 Va. 195, 199, 28 S.E.2d 629, 630 (1944).

¹²⁶ Kellam v. School Bd. of Norfolk, 202 Va. 252, 255-56, 117 S.E.2d 96, 97 (1966); Wilson v. State Hwy. Comm'r, 174 Va. at 90, 4 S.E.2d at 750 (1939).

¹²⁷ Virginia's Law of Sovereign Immunity: An Overview, 12 U. Rich. L. Rev. 429, 431 (1978) [hereinafter Overview].

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

employed four factors in determining whether sovereign immunity could protect an employee from liability for negligent acts. The activity performed by the state employee, and the "state's interest and involvement in that function," comprise the first two parts of the test. The "judgment and discretion" exercised by the employee are also considered, as is the "degree of control and direction exercised by the state over the employee. These guidelines help the court determine whether the negligent employee is, in effect, an agent of the government entitled to the government's shield from liability. If sovereign immunity applies, the employee's action or omission must constitute more than mere negligence before it is to be considered outside of the employee's authority and therefore actionable.

Sovereign immunity has been the subject of nationwide abrogation, ¹³³ either through legislative enactments or judicial action. ¹³⁴ Reasons for this trend are numerous, but they center around the idea that "negligence is negligence, ¹¹³⁵ and that the government should pay the costs of its torts, just as it would "pay for goods, services and other costs of carrying out the public business. ¹¹³⁶ Reflecting this movement, in 1974, Virginia's General Assembly began a study of the current validity of the doctrine by commissioning the Committees for Courts of Justice to study and report on the doctrine. ¹³⁷ Though the resulting report recommended that the doctrine be legislatively abolished in a number of cases, ¹³⁸ the General Assembly did not pass the Tort Claims Act until 1981.

¹²⁹ Id. at 212, 387 S.E.2d at 789 (citing James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980)).

¹³⁰ Id.

¹³¹ *Id.* at 215, 387 S.E.2d at 791.

Overview, supra note 127, at 433.

¹³³ Taylor, *supra* note 122, at 261-64.

¹³⁴ Id.

¹³⁵ James v. Jane, 221 Va. 43, 55, 267 S.E.2d 108, 115 (1980) (Cochran, J., concurring).

¹³⁶ Taylor, *supra* note 122, at 255.

¹³⁷ Id. at 264.

¹³⁸ The Subcommittee Report in the Virginia House of Representatives (H. Doc. No. 31, 1975 Va. Sess. (1975)), *supra* note 117, recommended abrogation of the sovereign immunity doctrine in: (1) cases involving the Commonwealth's contract responsibilities; (2) cases in which damages arose from a state employees' negligent operation of a motor vehicle; (3) situations where hazardous or substandard conditions of public buildings or publicly-accessible areas adjoining those buildings were the cause of injuries; (4) any case where a state employee is allegedly negligent in providing water, gas, electricity, food, lodging or recreation; collecting sewerage, garbage, or waste; or maintaining thoroughfares, curbs, or gutters. *Comment, supra* note 117, at 296 (1984).

The Current Tort Claims Act

Virginia's Tort Claims Act is contained in Title 8.01, Sections 195.1 through 195.9. Section 195.1 provides the short title of the act, the Virginia Tort Claims Act, 139 and Section 195.2 sets forth the definitions of "state agency" and "state employee," as used in the Act. 140

Section 8.01-195.3¹⁴¹ is the substantive portion of the Act, and it provides Commonwealth liability for:

claims for money... on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury, or death.¹⁴²

This section is subject to some significant limitations, the most important of which is a monetary limit on judgment amounts. The statute limits recoveries to \$25,000 if the cause of action accrued before July 1, 1988, and to \$75,000 if it accrued thereafter. Further, the Act retains "the individual immunity of judges, the Attorney General, Commonwealth's attorneys, and other public officers, their agents and employees from tort claims for damages . . . ," and specifically lists claims where recovery is barred. Finally, the section expressly points out that the Act is not meant to "diminish the sovereign immunity of any county, city or town in the Commonwealth."

Section 8.01-195.4 is concerned with jurisdictional matters in suits brought under the Act. It provides that jurisdiction will lie exclusively in the general district courts for claims less than \$1,000, and will be exclusively in the circuit courts for claims greater than \$7,000.146 If the amount of the claim is

¹³⁹ Va. Code Ann. § 8.01-195.1 (1984).

A "state agency" may be a "department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth " VA. Code Ann. § 8.01-195.2 (Supp. 1990). "State employees" are broadly defined, to include any "officer, employee or agent of any state agency, or any person acting on behalf of a state agency in an official capacity, temporarily or permanently in the service of the Commonwealth, whether with or without compensation." *Id.*

¹⁴¹ Va. Code Ann. § 8.01-195.3 (Supp. 1990).

¹⁴² Id.

¹⁴³ *Id*.

¹⁴⁴ Id. Specific limitations on claimants' recovery protect the General Assembly in its legislative duties, the court system in its judicial duties, administrative agencies in both judicial and legislative roles, and prohibit any claims originating from the tax collection, and those that accrued prior to July 1, 1982 (for the Commonwealth), or July 1, 1986 (for transportation districts). Id.

¹⁴⁵ Id.

¹⁴⁶ Id. § 8.01-195.4 (Supp. 1990).

between \$1,000 and \$7,000, the district and circuit courts have concurrent jurisdiction.¹⁴⁷ The money figures determining jurisdiction do not include amounts for attorneys' fees or interest charges.¹⁴⁸ Venue for causes of action under this Act is in "[t]he county of city where the claimant resides; . . . [t]he county or city where the act or omission complained of occurred . . .; or [i]f the claimant resides outside the Commonwealth and the act or omission complained of occurred outside the Commonwealth, the City of Richmond.¹¹⁴⁹

Section 8.01-195.5 gives the Attorney General authority to settle claims against the Commonwealth brought under the Act.¹⁵⁰ If the claim is against one of the entities of the Commonwealth (i.e., a "department, institution, division, commission, board or bureau"¹⁵¹), and the amount of the suit exceeds \$50,000, the Attorney General may only settle the claim with the approval of both the Governor and the head of the state entity involved.¹⁵² If the amount involved in the controversy is less than \$50,000, the Governor's approval of the settlement is not required, and the agency head, along with the assistant Attorney General assigned to that agency, may settle the claim.¹⁵³

Sections 8.01-195.6 and 8.01-195.7 provide threshold requirements for bringing a cause of action under the Tort Claims Act. Under 8.01-195.6, a potential claimant, or his agent, representative, or attorney must file with the Attorney General a written statement of the claim within one year after the action or omission complained of occurred.¹⁵⁴ This statement must include the time and location where the injury took place and the state entities that the claimant believes are liable.¹⁵⁵ If the claimant is disabled at the time that the claim becomes actionable, the one-year time limit for filing the statement is subject to Section 8.01-229,¹⁵⁶ which allows for tolling of statutes of limitations in the event of disabilities.¹⁵⁷ Finally, in a medical malpractice claim against the Commonwealth, Chapter 21.1 of the

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Id. § 8.01-261(18) (Supp. 1990).

¹⁵⁰ Id. § 8.01-195.5 (Supp. 1990).

¹⁵¹ Id. § 2.1-127 (Supp. 1990).

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Id. § 8.01-195.6 (Supp. 1990).

¹⁵⁵ Id.

¹⁵⁶ Id.

¹⁵⁷ Id. § 8.01-229 (Supp. 1990).

Virginia Code, dealing with Medical Malpractice Claims, applies. The limits on a medical malpractice claim are those set forth in Section 8.01-195.3¹⁵⁸ (\$25,000 if the cause of action occurred before July 1, 1988, or \$75,000 if the cause of action occurred after that date).¹⁵⁹

Along with the requirement for timely notice of a potential cause of action, Section 8.01-195.7 imposes a statute of limitations applicable to the filing of the actual claim. According to this section, the action authorized by Section 8.01-195.3 may be initiated under two conditions: (1) if the Attorney General denies the claim in response to the written notice required in Section 8.01-195.6, or (2) after six months of the claimant's filing of the notice of the claim, unless it had been compromised or settled (as provided in Section 8.01-195.5) within that time. The most important portion of this section is the requirement that an action brought under the Tort Claims Act must be initiated within eighteen months after the initial filing of the 8.01-195.6 notice. In the content of the section is the section in the section brought under the Tort Claims Act must be initiated within eighteen months

Similar to Section 8.01-195.6, regarding the tolling of a claim filed by an individual under a disability, the time limitations in Section 8.01-195.7, dealing with the statute of limitations, may be tolled pursuant to Section 8.01-229.¹⁶³ Medical malpractice claims are subject to Section 8.01-195.7 and to the provisions of Section 8.01-581.9 of the Medical Malpractice statute.¹⁶⁴

Section 8.01-195.8 poses another prerequisite to filing a tort suit against the Commonwealth. Before the Commonwealth may be held liable for any claim under the Act, the claimant must execute "a release of all claims against the Commonwealth, its political subdivisions, agencies, instrumentalities and against any officer or employee of the Commonwealth in connection with, or arising out of, the occurrence complained of." ¹⁶⁵

¹⁵⁸ Id. § 8.01-195.6 (Supp. 1990).

¹⁵⁹ *Id.* § 8.01-195.3 (Supp. 1990).

¹⁶⁰ Id. § 8.01-195.7 (Supp. 1990).

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ See id. § 8.01-195.7 (Supp. 1990).

¹⁶⁴ Id.

¹⁶⁵ Va. Code Ann. § 8.01-195.8 (Supp. 1990).

The statutory scheme's adequacy has been tested and found to provide a constitutionally satisfactory level of due process protection for those with claims against the Commonwealth. Once the statute's procedural requirements are met, the language of Section 8.01-195.3 makes Commonwealth "liability the rule . . . and [sovereign] immunity the exception. If the prerequisites are not met, however, the claim is again subject to the Commonwealth's defense of sovereign immunity. The survival of sovereign immunity has been judicially affirmed by the Virginia Supreme Court. Thus, it is apparent that the Tort Claims Act did little to deprive many Commonwealth entities of the traditional immunity afforded them.

FILING A PROCEDURALLY-CORRECT CLAIM UNDER THE MEDICAL MALPRACTICE AND TORT CLAIMS ACTS

Returning to this article's original hypothetical, what requirements must an attorney meet in order to successfully file a medical malpractice claim against a state-operated hospital/medical school?

The Medical Malpractice Act imposes significantly more procedural complexities than the Tort Claims Act. In a medical malpractice claim against the Commonwealth, the statutory requirements of both the Tort Claims Act and the Medical Malpractice Act must be met.¹⁷⁰

The first requirement under each statute is notice to the party alleged to have caused the complained-of harm.¹⁷¹ Under the Medical Malpractice Act, this notice must be sent by certified or

¹⁶⁶ See Irshad v. Spann, 543 F. Supp. 922, 928 n.3 (E.D. Va. 1982). "Virginia law clearly provides a meaningful post-deprivation remedy for tort claims of \$25,000 or less accruing after July 1, 1982," for the purposes of providing due process to a prisoner complaining of missing or stolen personal items. *Id.*

¹⁶⁷ Comment, *supra* note 117, at 291. "The state can be liable unless it can fit itself into one of the exceptions listed in [Section 8.01-195.3 of] the Act." *Id.* at 297.

Gouldthorpe v. Commonwealth, 6 Va. Cir. Ct. 295 (1986); United Virginia Bank v. Commonwealth, 6 Va. Cir. Ct. 262 (1985). See Bryson, Civil Procedure and Practice: Annual Survey of Virginia Law, 21 U. Rich. L. Rev. 667, 673 (1987).

¹⁶⁹ See Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984). "[T]he doctrine of sovereign immunity is 'alive and well' in Virginia. Though this Court has, over the years, discussed the doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it." *Id.* The court also notes that by enacting the Virginia Tort Claims Act, the General Assembly could have easily invalidated the applicability of the sovereign immunity doctrine, but in fact took the opposite course, by expressly preserving instances where sovereign immunity would be retained, and maintaining the applicability of the doctrine in the cases of cities, towns and counties. *Id.* at 307, 321 S.E. 2d at 660. See VA. Code Ann. § 8.01-195.3 (Supp. 1990).

¹⁷⁰ See Va. Code Ann. §§ 8.01-195.6, -195.7 (Supp. 1990).

¹⁷¹ See id. §§ 8.01-195.6, -581.2 (Supp. 1990).

registered mail to the health care provider.¹⁷² As there is no timing requirement of notice under the Medical Malpractice Act, the general statute of limitations for personal injuries claims applies, and the notice of claim must be dispatched within two years of the injury.¹⁷³ Under the Tort Claims Act, however, a claim is "forever barred unless the claimant . . . has filed a written statement . . . within one year after such cause of action shall have accrued "¹⁷⁴ This statement is filed with the Attorney General of the Commonwealth, and the limitations period is subject to the tolling provisions of § 8.01-229 "if the claimant was under a disability at the time the cause of action accrued "¹⁷⁵ Thus, although notice to health care providers may be given up to two years after the injury, the Attorney General must be informed no later than one year after the claimant's damage.

Each statute requires a waiting period for the potential plaintiff after he has given notice of the impending claim. Under the Tort Claims Act, a claimant must wait six months after giving notice before acting, unless the Attorney General denies the claim before that time or has compromised or settled the claim.¹⁷⁶ Under the Medical Malpractice Act, giving the initial notice sets in motion a number of procedural steps, each of which may delay the ability of either party to push towards trial, or further toll the statute of limitations.

Once a claimant files the notice required under § 8.01-581.2, either party may, within sixty days, petition the Chief Justice of the Supreme Court of Virginia for a review of the case by a medical malpractice review panel.¹⁷⁷ Neither party may file suit while the panel is reviewing the claim.¹⁷⁸ If no panel is requested, the parties must wait ninety days to bring a cause of action.¹⁷⁹ Even if no panel is requested, however, the claimant must still wait six months to file his claim because of the six-month

¹⁷² Va. Code Ann. § 8.01-581.2(A) (Supp. 1990).

¹⁷³ See id. § 8.01-243 (Supp. 1990). The provision of notice must be given ninety days prior to filing suit under the Medical Malpractice Act, VA. Code Ann. § 8.01-581.2 (Supp. 1990), but sending notice operates to toll the statute of limitations by 120 days, id. § 8.01-581.9 (Supp. 1990), so the suit may be brought on a date later than ninety days before the two year limit. *Id.* § 8.01-581.9 (Supp. 1990).

¹⁷⁴ *Id.* § 8.01-195.6 (Supp. 1990).

¹⁷⁵ Id.

¹⁷⁶ Id. § 8.01-195.7 (Supp. 1990).

¹⁷⁷ *Id.* § 8.01-581.2 (Supp. 1990).

¹⁷⁸ Id.

¹⁷⁹ Id.

waiting provision of the Tort Claims Act (unless the Attorney General denies, compromises, or settles the claim before that time).¹⁸⁰

Limitations periods are vital to claims under both of these statutory schemes. Under the Tort Claims Act, a cause of action must be brought within eighteen months of the claimant filing notice of the claim. Although filing notice under the Tort Claims Act does not expressly toll the two-year statute of limitations for all tort actions brought in the Commonwealth, the tolling provisions available under the Medical Malpractice Act also apply to the Tort Claims Act. 182

As mentioned previously, giving notice under the Medical Malpractice Act tolls the statute of limitations for 120 days.¹⁸³ Alternatively, this notice will extend the statute of limitations for sixty days beyond the date that notice is given of the panel's decision, if this would provide a longer tolling period than the usual 120 days.¹⁸⁴

If a request is made for a medical malpractice review panel and that request is denied by the Chief Justice or rescinded by the party making the request, the statute of limitations is tolled for sixty days. This does not operate to shorten the 120-day tolling of the limitations period provided for giving original notice of the claim, but appears to extend it, if necessary.

CONCLUSION

In the case of Mrs. Pietch, the limitations period begins to run on the date of her negligently-performed surgery.¹⁸⁶ The limitations period is two years, and the time remaining for filing notice of the claim depends on the amount of time that lapsed between the injury and Mr. Pietch's seeking an attorney. Similarly, a notice must be filed with the Attorney General of the Commonwealth within one year of the date of injury.¹⁸⁷

¹⁸⁰ Id. § 8.01-195.7 (Supp. 1990).

¹⁸¹ Id.

See infra note 188.

¹⁸³ VA. CODE ANN. § 8.01-581.9 (Supp. 1990).

¹⁸⁴ Id.

¹⁸⁵ Id.

¹⁸⁶ See supra note 62 and accompanying text.

¹⁸⁷ VA. CODE ANN. § 8.01-195.6 (Supp. 1990).

Once the initial notice is filed (assuming this is done on time), tolling provisions in the Medical Malpractice Act become relevant and apply with equal force to the claim under the Malpractice Act and the Tort Claims Act. ¹⁸⁸ This initial notice of the claim under Section 8.01-581.2 tolls the two-year statute of limitations for at least 120 days, with more time in the event of a request for a medical malpractice review panel, the grant or denial of that panel by the Chief Justice, the rescission of the request for the panel, or the final decision of the panel. ¹⁸⁹ As long as initial notice to the Attorney General of the Commonwealth may be given within a year of the accrual of the cause of action, Mrs. Pietch's claim will be procedurally sound.

¹⁸⁸ Id. § 8.01-195.7 (Supp. 1990). "The limitations periods prescribed by this section and § 8.01-195.6 shall be subject to the tolling provision of § 8.01-229. . . . Additionally, claims involving medical malpractice . . . shall be subject to the provisions of § 8.01-581.9." Id.

¹⁸⁹ Id. § 8.01-581.9 (Supp. 1990).