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*From the Nation's Oldest Law School*

# THE COLONIAL LAWYER:

*A Journal of Virginia Law and Public Policy*

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VOLUME 20

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NUMBER 1

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A STUDENT PUBLICATION OF  
THE MARSHALL-WYTHE SCHOOL OF LAW  
COLLEGE OF WILLIAM AND MARY

## EDITOR'S BRIEF

In this issue of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy*, five authors present insightful commentary on a number of controversial and difficult areas of Virginia law.

In our first article, Robin Quash addresses the sensitive topic of spousal abuse. Specifically, Ms. Quash is concerned about the admissibility of expert testimony on the battered woman syndrome as part of the defense of a spouse accused of killing her husband. The issue has not yet been addressed by the Virginia courts. The author discusses the medical explanation for the battered woman syndrome. Next, she relates other state court decisions and statutory provisions that have addressed the admissibility of expert testimony on the battered woman syndrome. Ms. Quash then reviews current Virginia law regarding self-defense and expert testimony in general, and finally, makes a recommendation to Virginia courts that expert testimony on the battered woman syndrome be admissible in homicide cases against victims of spousal abuse.

Next, Tom Cody confronts the issue of regulating sources of electromagnetic fields (EMF) in the face of uncertain scientific evidence that these fields cause adverse health effects in humans. Neither Virginia nor the other 49 states have proposed any such regulation, but Mr. Cody believes that such regulation is imminent. First, the author reviews existing scientific data on the health effects of EMF. He then points out the legal and economic impact EMF has already had on electric power line right-of-way condemnations, attempts to regulate power line strength and siting, and tort liability for health disorders "caused" by EMF. Finally, Mr. Cody examines existing models of hazard regulation, and after applying them to EMF, decides that a comprehensive approach to EMF regulation is needed. In conclusion, Mr. Cody suggests an appropriate model for EMF regulation.

In the Practitioner's Guide section of *The Colonial Lawyer*, the authors present articles directed toward the practicing attorney to provide him/her detailed information on select topics. Jonathan Belcher tackles the thorn-in-the-side of many law students and practitioners, the rule against perpetuities. Mr. Belcher begins with a general statement of the rule and mentions three methods used by courts to reform the common-law rule to prevent violations of the rule. Then, he discusses Virginia's primary choice of reform of the common-law rule, the wait-and-see doctrine, found in Section 55-13.3 of the Virginia Code. Mr. Belcher also briefly mentions Virginia courts' limited use of the cy pres doctrine to reform the common-law rule against perpetuities. In conclusion, Mr. Belcher presents a methodology for solving perpetuities problems in Virginia.

Also in the Practitioner's Guide, the *Colonial Lawyer's* Research Editors, Anne Bowling and Jim Reynolds, discuss the procedural prerequisites for filing a medical malpractice claim against a Virginia state employee. The history and operative provisions of the two relevant statutes, the Medical Malpractice Act and the Virginia Tort Claims Act, are presented first. Then, the authors bring the requirements of both statutes together and illustrate the combined requirements that must be met in order to file a procedurally-correct malpractice claim against a Commonwealth health care provider.

I wish to express my gratitude to my editors and staff for a job well done this semester. The Editors and the Staff of *The Colonial Lawyer: A Journal of Virginia Law and Public Policy* hope that you, the practitioner and the scholar, find the articles of Volume 20, Number 1, insightful and stimulating. Your suggestions, comments, and criticisms are welcomed.

Lisa J. Entress  
Editrix-in-Chief

## SPECIAL ANNOUNCEMENT

In our twentieth year, *The Colonial Lawyer* has seized an exciting opportunity. In 1991, the United States will be celebrating the 200th anniversary of the *Bill of Rights*. As the ancestor of public policy debate in this country, debate on *Bill of Rights* issues complements state public policy debate. In order to expand the substantive law covered by *The Colonial Lawyer*, we have decided to create a section of the journal that addresses *Bill of Rights* law. We will maintain our coverage of Virginia public policy issues, and devote remaining publishing space for articles on nationally-focused public policy issues.

In order to achieve these objectives, *The Colonial Lawyer* will receive a partial grant from the Institute of Bill of Rights Law at the College of William and Mary. In addition, the journal will change its title to *The William and Mary Bill of Rights and Public Policy Law Journal*.

Because of the change in our name, we will start in the Fall of 1991 with Volume 1, Issue 1. Our current subscribers will be billed for Volume 20, Issue 1 of *The Colonial Lawyer*. Then, our subscribers will be given the opportunity to renew their *Colonial Lawyer* subscriptions with the journal entitled as *The William and Mary Bill of Rights and Public Policy Law Journal*. New subscribers are welcome. New subscriptions to *The William and Mary Bill of Rights and Public Policy Law Journal* may be obtained through Wm. S. Hein & Co., similar subscription services, or the journal itself. Back issues of *The Colonial Lawyer* may be obtained from Wm. S. Hein & Co.

The journal will also begin to publish legal articles written by professionals and academicians in addition to the articles written by Marshall-Wythe School of Law students. Interested authors of articles addressing Bill of Rights law, Virginia public policy, or nationally-focused public policy should contact *The William and Mary Bill of Rights and Public Policy Law Journal*, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, Virginia 23185.

## ABOUT THE AUTHORS

Robin L. Quash, *Battered Women Who Kill Their Abusers: The Admissibility of Expert Testimony on the Battered Woman Syndrome to Support a Claim of Self-Defense*, is a third-year student at Marshall-Wythe. Ms. Quash received her B.A. in Psychology from the University of Virginia in 1987. She developed her interest for the topic of spousal abuse after completing a training session for the Battered Women's Task Force at the College of William and Mary.

Thomas P. Cody, *Assessing the Health Risks of Electromagnetic Fields: The Problem of Scientific Uncertainty in Electric Power Line Regulation*, is a third-year student at Marshall-Wythe. Mr. Cody received his B.A. from Bucknell University in 1980 and his M.P.C.D. from the University of Colorado in 1984. Prior to attending law school, Mr. Cody worked as a city planner in Colorado where he developed a working knowledge of electric power line regulation and its respective problems. Following his graduation from Marshall-Wythe, Mr. Cody will practice law at Robinson & Cole in Hartford, Connecticut.

Jonathan Belcher, *The Practitioner's Guide — Virginia's Reform of the Common-Law Rule Against Perpetuities*, is a first-year student at Marshall-Wythe. Mr. Belcher received his B.B.A. in Real Estate, summa cum laude, from Morehead State University in 1990. He is the recipient of the Research and Educational Trust Fund Scholarship from the American Institute of Real Estate Appraisers and the Harwook Memorial Scholarship from the Real Estate Educators' Association.

Anne D. Bowling, *The Practitioner's Guide — Virginia's Medical Malpractice and Tort Claims Acts: Two Sets of Prerequisites for Filing a Tort Claim Against the Commonwealth's Health Care Providers*, is a third-year student at Marshall-Wythe and a Research Editor of *The Colonial Lawyer*. Ms. Bowling received her B.A. in English and Economics from the College of William and Mary in 1988.

James W. Reynolds, *The Practitioner's Guide — Virginia's Medical Malpractice and Tort Claims Acts: Two Sets of Prerequisites for Filing a Tort Claim Against the Commonwealth's Health Care Providers*, is a third-year student at Marshall-Wythe and a Research Editor of *The Colonial Lawyer*. Mr. Reynolds received his B.A. in English from the University of Richmond in 1988.

**BATTERED WOMEN WHO KILL THEIR ABUSERS:  
THE ADMISSIBILITY OF EXPERT TESTIMONY ON THE  
BATTERED WOMAN SYNDROME TO SUPPORT A CLAIM OF SELF-DEFENSE**

Robin L. Quash

INTRODUCTION

In recent years, public awareness of the battered woman syndrome (BWS) has reached the forefront of American social consciousness. In the late 1970s, researchers, including Dr. Lenore Walker, developed the concept to explain common characteristics of women who have sustained physical violence on a recurring basis.<sup>1</sup>

The statistics are staggering and the stories are terrifying with regard to the numbers of battered women and the various forms of their abuse.<sup>2</sup> Courts have begun to recognize and address this form of domestic violence that in the past has been largely ignored.

A central issue confronting the courts is the admissibility of expert testimony on BWS in homicide cases when the female defendant claims that she was acting in self-defense. This article will discuss background information on BWS, case law concerning the admissibility of expert testimony in homicide cases to support a plea of self-defense, and a recommendation for Virginia courts, which to date have not addressed this issue.

THE BATTERED WOMAN SYNDROME

The battered woman syndrome presents a conceptual problem for society. It is difficult to comprehend why a seemingly mature female adult would choose to remain in an abusive relationship, fail to inform another of the abuse, or fail to contact police when she is attacked. The following evidence will reveal the complexity of the answers to such questions.

Historically, the English common law purported to protect wives by limiting the size of the rod by which a husband could chastise his wife to a "rod not thicker than his thumb."<sup>3</sup> Eventually the United States adopted this law; however, in the late 1800s, several states began repealing this right of the

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<sup>1</sup> See L. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

<sup>2</sup> Statistics are cited in D. MARTIN, *BATTERED WIVES* 11-14 (1976).

<sup>3</sup> Davidson, *Wife Beating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2, 4 (M. Roy ed. 1977).

husband to beat his spouse.<sup>4</sup>

Today, the United States is making a concerted public effort to help battered women. This effort did not begin to flourish until the mid-1970s,<sup>5</sup> when the establishment of a Task Force for Battered Women, various coalitions, and shelters across the United States marked the beginning of the movement.<sup>6</sup> Since then, various researchers, including Dr. Walker, have gathered and developed information which has assisted the legal system when confronted with issues pertaining to the battered wife, the abuser, and the battering relationship. For example, a "battered woman" is defined as:

a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice.<sup>7</sup>

As a prerequisite to discussing BWS, it is important to recognize myths surrounding the battered woman and the battering relationship. Research has revealed that any woman can be a battered woman, and the batterer and his victim cannot be easily categorized. Wife abuse is found in all age, socioeconomic, religious, racial, and ethnic groups, and cuts across all educational levels.<sup>8</sup> Hence, battered women include doctors, lawyers, executives, nurses, secretaries, full-time homemakers, and the jobless, among others.<sup>9</sup> Who are society's battered women? If you are a woman, there is a 50 percent chance it could be you.<sup>10</sup>

Dr. Walker states that "the battering of women has been shrouded in myths."<sup>11</sup> Common myths include:

[t]he battered woman syndrome affects only a small percentage of the population; battered women are masochistic; battered women are crazy; middle-class women do not get battered as frequently or as violently as do poorer women; minority group women are battered more frequently than Anglo-Americans; religious beliefs will prevent battering; battered women are uneducated and have few job skills; batterers are violent in all their relationships; batterers are unsuccessful and lack resources to cope with the world; drinking causes batterers behavior; batterers are psychopathic personalities; police can protect the battered woman; the batterer is not a loving partner; a wife batterer also beats his children; once a battered woman always a battered woman; once a batterer

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<sup>4</sup> See *State v. Oliver*, 70 N.C. 60 (1874); *Commonwealth v. McAfee*, 108 Mass. 458 (1871).

<sup>5</sup> See D. MARTIN, *supra* note 2, at 7.

<sup>6</sup> *Id.*

<sup>7</sup> L. WALKER, *supra* note 1, at XV.

<sup>8</sup> D. MARTIN, *supra* note 2, at 15-16.

<sup>9</sup> L. WALKER, *supra* note 1, at 19.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 18.

always a batterer; battered women can always leave home.<sup>12</sup>

There are some recognized characteristics that are generally exhibited by battered women and their abusers. Both the battered woman and her abuser tend to have low self-esteem and traditional or conservative views regarding the male-female relationship.<sup>13</sup> Furthermore, batterers tend to exhibit pathologically jealous behavior and tend to claim that the battered woman's provocation caused him to abuse her.<sup>14</sup> But the question remains:

Why do these women seemingly accept the slapping, punches, kicking and stomping to the face, head and body, choking to the point of loss of consciousness, broken limbs, burns from irons, cigarettes, and scalding liquids; injuries from thrown objects; forced violent sexual acts, stabbing and mutilation with a variety of objects, including knives and hatchets, and gunshot wounds?<sup>15</sup>

The battered woman syndrome is a psychological phenomenon that provides an explanation for an abused woman's action or seemingly inaction in certain situations. It is a term used to describe common psychological characteristics experienced by women who are physically and psychologically abused by their male companions. This phenomenon describes a cyclical pattern of abuse, and is explained by theories referred to as "Learned Helplessness" and "Cycle Theory of Violence."<sup>16</sup>

#### *Learned Helplessness and the Cycle of Theory of Violence*

Learned Helplessness is a psychological theory that explains why battered women remain in their abusive relationships. When humans continuously experience situations in which they have no control over the outcome, the experience hinders them from responding in situations where they could have some control.<sup>17</sup> The battered women are unable to realistically assess their danger, they may become passive and withdrawn, and they fail to take advantage of opportunities to escape.<sup>18</sup> Learned helplessness results from the cyclical pattern of physical and psychological abuse termed Walker's Cycle Theory of Violence.<sup>19</sup>

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<sup>12</sup> *Id.* at 19-30.

<sup>13</sup> *Id.* at 36.

<sup>14</sup> *Id.* at 37-38.

<sup>15</sup> *Id.* at 79.

<sup>16</sup> *See infra* notes 17-33 and accompanying text.

<sup>17</sup> L. WALKER, *supra* note 1, at 42-54. Walker discusses learned helplessness in animal studies involving the phenomenon. *Id.*

<sup>18</sup> A. BROWNE, *WHEN BATTERED WOMEN KILL* 122-27 (1987).

<sup>19</sup> L. WALKER, *supra* note 1, at 42-54.

Walker's Cycle Theory of Violence is especially important to understand in order to consider the admissibility of BWS testimony in self-defense cases. This cycle theory is a well-known explanation of how battered women become victimized and how they develop the learned helplessness traps them in the battering relationship.<sup>20</sup>

The battered woman and her abuser continuously go through a cycle consisting of three distinct phases: the tension-building phase, the acute battering phase, and the contrite loving phase.<sup>21</sup> The tension-building phase is characterized by minor battering incidents.<sup>22</sup> The woman attempts to calm and nurture the batterer to prevent the anger from escalating.<sup>23</sup> Sometimes she is temporarily successful in controlling his behavior, but eventually the tension continues to build and the acute battering incident inevitably occurs.<sup>24</sup> After the tension is no longer bearable and the man seriously beats the woman, he becomes profusely apologetic and may present the woman with expensive gifts along with seemingly sincere promises to never abuse her again.<sup>25</sup> This is the contrite loving phase. The woman is left confused following such extreme behavior, and desperately wants to believe that she will no longer suffer abuse.<sup>26</sup> Thus, she is often manipulated and charmed into staying in this abusive relationship in hopes that the man will change or get help, as he often promises.<sup>27</sup>

The continuous cycle of violence and contrition results in the battered woman developing the learned helplessness condition.<sup>28</sup> The batterer, by threatening homicide or suicide or escalating the degree of violence, may force the battered woman to remain in the abusive relationship. In some cases, women that have succeeded in leaving the batterer have been later followed, harassed, and beaten by the batterer, supporting the belief of many battered women that escape is impossible.<sup>29</sup>

As a result, the battered woman lives in constant fear, coupled with perceptions of her inability

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<sup>20</sup> *Id.* at 55.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 59.

<sup>25</sup> *Id.* at 65.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 65-70.

<sup>28</sup> *Id.* at 55-70.

<sup>29</sup> Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 Vt. L. Rev. 1, 9-10 (1982).

to successfully escape. Eventually, she may feel forced to kill her abuser to avoid being killed herself, perceiving this as an act of self-defense. In some cases, it is clear that the killing was justified self-defense -- for example, if the woman kills her companion in an immediate response to his overt act of aggression which created in her a reasonable fear of imminent death or serious bodily harm.<sup>30</sup> Most situations in which the woman kills her abuser, however, may appear far removed from the traditionally accepted self-defense. The woman may kill in response to verbal threats alone,<sup>31</sup> or she may have killed her companion while he was drunk, sleeping, resting, or in other situations where the abuser would not ordinarily seem to pose a threat to the woman.<sup>32</sup>

#### EXPERT TESTIMONY

In past years, battered women who killed or seriously injured their husbands or male companions frequently pled mental impairment or insanity as a defense to a criminal charge. As a result, these women were often involuntarily committed to a mental institution.<sup>33</sup> Today, many battered women plead self-defense when criminally charged for the killing of their abuser.<sup>34</sup> This has resulted in legal difficulties with regard to the admissibility of expert testimony to explain BWS as support for the self-defense claim.

Because a battered woman's perception of her situation is so shaped by her battering experience-- and because it is so hard for jurors to understand how a woman could be brutally beaten by a man, fear him profoundly, and yet stay with him and love him and believe he loves her --many defense attorneys feel it is absolutely crucial to get information about the battered woman syndrome before the jury in these cases. The only way to counter the prosecutor's arguments that the woman must be lying (either about the violence or about her fear) is to explain to the jury that the woman's behavior,

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<sup>30</sup> See *Commonwealth v. Watson*, 494 Pa. 467, 472-74, 431 A.2d 949, 952 (1981) (a long history of abuse and the victim's attempt to kill his wife supported her claim of self-defense for shooting him).

<sup>31</sup> See *People v. Torres*, 128 Misc. 2d 129, 131-35, 488 N.Y.S.2d 358, 360-63 (1985) (husband's threats to kill defendant created reasonable fear of imminent death or serious bodily harm).

<sup>32</sup> See *State v. Allery*, 101 Wash. 2d 591, 593, 682 P.2d 312, 313-14 (1984) (defendant found husband in her home in violation of a restraining order, and shot him because of his prior threats to kill her).

<sup>33</sup> *Schneider & Jordan, Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, in *WOMEN'S SELF-DEFENSE CASES* 1, 5 (E. Bochnak ed. 1981).

<sup>34</sup> See *State v. Koss*, 49 Ohio St. 3d 213, 551 N.E.2d 970 (1990); *State v. Williams*, 787 S.W.2d 308 (Mo. Ct. App. 1990); *Chapman v. State*, 259 Ga. 706, 386 S.E.2d 129 (1989); *Kansas v. Stewart*, 243 Kan. 639, 763 P.2d 572 (1988); *Commonwealth v. Grove*, 526 A.2d 369 (Pa. Super. 1987); *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *State v. Allery*, 101 Wash. 2d 591, 682 P.2d 312 (1984); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Anaya*, 438 A.2d 892 (Me. 1981); *Hawthorne v. State*, 408 So. 2d 801 (Fla. Ct. App. 1982); *People v. Minnis*, 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

which seems to defy common sense, was entirely characteristic of women in her situation. The way that this can be done in a criminal trial is by means of an expert witness.<sup>35</sup>

Recently, various states have addressed the issue of the admissibility of expert testimony on BWS in support of a self-defense claim by a woman who killed her abuser. A prerequisite to the admissibility of any evidence is that it be relevant to a material fact.<sup>36</sup> Relevance requires that the probative value of the evidence must outweigh its prejudicial impact.<sup>37</sup> In addition, courts generally require that expert testimony meet either the three criteria set forth in *Dyas v. United States*,<sup>38</sup> or the criteria set forth in the Federal Rules of Evidence (or the state equivalent).<sup>39</sup>

The *Dyas* court stated a three-fold test for the admissibility of expert testimony:

- (1) the subject matter must be so distinctively related to some science, profession, business or occupation *as to be beyond the ken of the average laymen*;
- (2) the witness must have sufficient skill, knowledge, or experience in the field to make it appear that his opinion or inference *will probably aid the trier in the search for truth*; and
- (3) [t]he state of the pertinent art or scientific knowledge . . . [must] permit a reasonable opinion to be asserted even by an expert.<sup>40</sup>

In contrast to the traditional criteria stated in *Dyas*, Rule 702 of the Federal Rules of Evidence does not require that the expert testimony be beyond the understanding of the jury. It states that:

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.<sup>41</sup>

## TREND FAVORING ADMISSIBILITY OF EXPERT TESTIMONY

### *Significant State Court Decisions*

Among the states that have considered this issue, a clear trend has developed favoring the

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<sup>35</sup> C. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* 158 (1989).

<sup>36</sup> *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979).

<sup>37</sup> *United States v. Green*, 548 F.2d 1261 (6th Cir. 1977).

<sup>38</sup> *Dyas v. United States*, 376 A.2d 827 (D.C. 1976), *cert. denied*, 434 U.S. 973, 98 S. Ct. 529 (1977). *See infra* note 40 and accompanying text (setting forth the *Dyas* three-part test for the admissibility of expert testimony).

<sup>39</sup> *See* FED. R. EVID. 401.

<sup>40</sup> *Dyas*, 376 A.2d at 832 (citation omitted) (emphasis in original).

<sup>41</sup> FED. R. EVID. 702; *see also* FED. R. EVID. 703, 705.

admissibility of expert testimony on BWS.<sup>42</sup>

1. District of Columbia

*Ibn-Tamas v. United States-District of Columbia*<sup>43</sup> is a landmark decision with respect to the admissibility of expert testimony on BWS in self-defense cases. In *Ibn-Tamas*, the defendant testified that she had been repeatedly beaten by her husband on the morning of the killing.<sup>44</sup> The defendant also testified that she had been subjected to repeated episodes of marital violence in the past.<sup>45</sup> Since the decedent did not have a weapon at the time the defendant shot him, the prosecution argued to the jury that the defendant, being merely tired of her husband's abuse, shot him in cold blood.<sup>46</sup>

Defense counsel sought to admit testimony by Dr. Lenore Walker to: (1) inform the jury that there is an identifiable class of persons who can be characterized as suffering from BWS; (2) explain why the mentality and behavior of battered women are at variance with the ordinary lay perception of how someone would likely react to a spouse who abuses them; and (3) provide a basis from which the jury could understand how Mrs. Ibn-Tamas perceived herself to be in imminent danger when she shot her husband.<sup>47</sup>

The trial court refused to permit the expert testimony on the grounds that: (1) it invaded the "province of the jury;" (2) it exceeded the evidence the jury was entitled to consider and draw conclusions from; and (3) it was conclusive to the character of the deceased, which was irrelevant to the defendant's claim of self-defense.<sup>48</sup>

The District of Columbia Court of Appeals did not find the expert testimony admissible as a matter of law.<sup>49</sup> However, it found that the proffered expert testimony could have served at least two basic functions. First, the expert testimony would have bolstered the credibility of the wife's testimony in the face of cross-examination intended to discredit the defendant's testimony regarding her marital

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<sup>42</sup> See Brewer, *Missouri's New Law on "Battered Spouse Syndrome": A Moral Victory, A Partial Solution*, 33 ST. LOUIS U.L.J. 227, 228 (1988).

<sup>43</sup> 407 A.2d 626 (D.C. 1979).

<sup>44</sup> *Id.* at 630.

<sup>45</sup> *Id.* at 629.

<sup>46</sup> *Id.* at 631.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 635.

relationship.<sup>50</sup> Second, the expert testimony "would have supported [the wife's] testimony that on the day of the shooting her husband's actions had provoked a state of fear which led her to believe that she was in imminent danger . . . ."<sup>51</sup>

The Court of Appeals held that Dr. Walker's testimony about BWS addressed a subject which was beyond the ken of the average lay person.<sup>52</sup> Thus, the first prong of the *Dyas* three-part test was satisfied. The court remanded the case to the trial court with instructions to address the two remaining *Dyas* criteria.<sup>53</sup>

On remand, the trial court again refused to allow the expert testimony, stating that the "defendant failed to establish a general acceptance by the expert's colleagues of the methodology used in the expert's study of battered women."<sup>54</sup> This decision of the trial court was later affirmed on appeal.<sup>55</sup>

The court in *Ibn-Tamas* expressed a willingness to admit expert testimony on BWS on a conditional basis when the battered woman pleads self-defense.<sup>56</sup> *Ibn-Tamas* indicated that expert testimony on BWS is admissible if it is relevant to a material fact and if the *Dyas* test is satisfied. Several other states have subsequently addressed this issue, a majority of which have permitted experts to testify about the syndrome.<sup>57</sup>

## 2. New Jersey

Admissibility of expert testimony about BWS to support a self-defense claim in a homicide action was initially considered in the New Jersey courts in *State v. Kelly*.<sup>58</sup> In *Kelly*, the defendant was

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<sup>50</sup> *Id.* at 634.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 635.

<sup>53</sup> *Id.* at 640. The court also concluded that the probative value of the expert testimony would outweigh the prejudicial harm. *Id.* at 639. *See supra* note 40 and accompanying text (setting forth the *Dyas* three-part test for the admissibility of expert testimony).

<sup>54</sup> *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983).

<sup>55</sup> *Id.*

<sup>56</sup> *Ibn-Tamas v. United States*, 407 A.2d 626, 640 (D.C. 1979).

<sup>57</sup> *See Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982); *Borders v. State*, 433 So. 2d 1325 (Fla. Dist. Ct. App. 1983); *Terry v. State*, 467 So. 2d 761 (Fla. Dist. Ct. App. 1985). The three Florida appellate courts allowed expert testimony where the *Dyas* criteria were satisfied, and/or: 1) the expert was qualified and 2) the state of the art was sufficiently developed to support expert testimony on the battered woman syndrome. *See also infra* text accompanying notes 58-118.

<sup>58</sup> 97 N.J. 178, 478 A.2d 364 (1984).

on trial for the fatal stabbing of her husband with a pair of scissors.<sup>59</sup>

At trial, Mrs. Kelly testified that on the afternoon of the killing, her husband attacked her while they were walking from a friend's house.<sup>60</sup> After two men separated the couple, Mrs. Kelly noticed her husband running towards her with his hands raised. Fearing that he intended to kill her, Mrs. Kelly stabbed him with a pair of scissors from her pocketbook.<sup>61</sup> Mrs. Kelly also testified that their seven-year marriage was characterized by periodic and frequent beatings.<sup>62</sup>

At her trial, the defendant asserted that she acted in self-defense and proffered expert testimony on BWS.<sup>63</sup> The trial court ruled, however, that the expert testimony was inadmissible on the issue of self-defense.<sup>64</sup> Mrs. Kelly was subsequently convicted of reckless manslaughter. The defendant's conviction was upheld on appeal.<sup>65</sup>

The Supreme Court of New Jersey granted certiorari and approved the admissibility of expert testimony on BWS to support a plea of self-defense.<sup>66</sup> The court found that the expert testimony was relevant to Mrs. Kelly's state of mind at the time of the stabbing and that the testimony was admissible to demonstrate that she honestly believed that she was in imminent danger.<sup>67</sup>

After the determination of relevancy, the court considered whether the expert's testimony satisfied the New Jersey Rule of Evidence 56(2).<sup>68</sup> Rule 56(2) states that testimony may be given by an expert "as to matters requiring scientific, technical or other specialized knowledge if such testimony will assist the trier of fact to understand the evidence or determine a fact in issue."<sup>69</sup> Three requirements must be satisfied if expert testimony is to be admitted. First, the testimony on BWS must be beyond the understanding of the average juror.<sup>70</sup> Second, the state of the art concerning BWS must be sufficiently

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \_\_\_, 478 A.2d at 369.

<sup>61</sup> *Id.* at \_\_\_, 478 A.2d at 369.

<sup>62</sup> *Id.* at \_\_\_, 478 A.2d at 369.

<sup>63</sup> *Id.* at \_\_\_, 478 A.2d at 368.

<sup>64</sup> *Id.* at \_\_\_, 478 A.2d at 368.

<sup>65</sup> *Id.* at \_\_\_, 478 A.2d at 368.

<sup>66</sup> *Id.* at \_\_\_, 478 A.2d at 378.

<sup>67</sup> *Id.* at \_\_\_, 478 A.2d at 375.

<sup>68</sup> *Id.* at \_\_\_, 478 A.2d at 379.

<sup>69</sup> N.J. R. EVID. 56(2).

<sup>70</sup> *Kelly*, 97 N.J. at \_\_\_, 478 A.2d at 379 (citing N.J. R. EVID. 56(2) comment 5).

reliable.<sup>71</sup> Third, the witness must have sufficient expertise to offer the testimony.<sup>72</sup>

The court in *Kelly*, like the court in *Ibn-Tamas*, found BWS to be beyond the ken of the average juror.<sup>73</sup> Regarding the second requirement, the court listed three methods by which scientific evidence could be shown generally acceptable and thereby reliable:

- (1) by expert testimony as to general acceptance by others in the profession of the premise on which the expert based the analysis;
- (2) by authoritative legal and scientific writings that accept the premise of the proposed testimony; and
- (3) by judicial opinions indicating general acceptance of the expert's premise.<sup>74</sup>

The court accepted the testimony by the expert that the battered woman's syndrome is acknowledged and accepted among psychiatric and psychological practitioners and professors, and concluded that BWS had sufficient scientific basis to produce uniform and reasonably reliable results.<sup>75</sup> With respect to the third requirement, the court found that the expert possessed sufficient expertise on BWS and was familiar with battered women with experiences similar to that of the defendant.<sup>76</sup>

Although the expert testimony satisfied the aforementioned requirements, the New Jersey Supreme Court did not render final judgment regarding the admissibility of the proffered testimony.<sup>77</sup> Instead, it reversed the trial court's decision disallowing the expert testimony and remanded for a new trial consistent

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \_\_\_, 478 A.2d at 379. *See also* *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985). Defendant testified about her years of psychological and physical abuse by her common-law husband. On the night of the killing, defendant had been beaten and threatened at gun point. Subsequently, her husband went into the living room and sat down. Defendant followed him and shot him three times. *Id.* at 131-32, 488 N.Y.S.2d at 360-61. The *Torres* court found that expert testimony would help the jury understand that the defendant could reasonably fear serious harm from her husband and still remain with him. *Id.* at 133, 488 N.Y.S.2d at 362.

<sup>74</sup> *Kelly*, 97 N.J. at \_\_\_, 478 A.2d at 380.

<sup>75</sup> The *Kelly* court also noted:

The expert also brought to the court's attention the findings of several researchers who have published reports confirming the presence of the battered woman syndrome. She further noted that since 1977 the battered woman syndrome has been discussed at several symposiums, sponsored by such organizations as the Association for the Advancement of Behavior Therapy and the American Sociological Association. Briefs submitted to this court indicate that there are at least five books and almost seventy scientific articles and papers about the battered woman syndrome.

*Id.*

<sup>76</sup> *Id.* at \_\_\_, 478 A.2d at 380.

<sup>77</sup> *Id.* at \_\_\_, 478 A.2d at 380.

with its ruling on BWS testimony.<sup>78</sup>

### 3. Georgia

Whereas *Ibn-Tamas* and *Kelly* admitted expert testimony on a conditional basis, other states have permitted such testimony on BWS unconditionally. In *Smith v. State*,<sup>79</sup> the defendant testified that she was attacked after refusing the advances of her live-in boyfriend.<sup>80</sup> During a violent attack, the defendant gained control of a gun, and, when her attempts to summon help or flee proved futile, shot her boyfriend.<sup>81</sup> The defendant testified that her boyfriend had beaten her in the past, and that he threatened her to prevent her from leaving him.<sup>82</sup> The defendant also testified that she was frightened that he was going to hurt her more than he had before, and that she feared for her life.<sup>83</sup>

The defense sought to admit expert testimony on BWS.<sup>84</sup> The trial court held the testimony inadmissible on the basis that jurors had sufficient knowledge to conclude whether the defendant acted in fear.<sup>85</sup> The appellate court affirmed the lower court's decision stating that the expert testimony invaded the province of the jury because it expressed an opinion on the ultimate facts to be decided by the jury.<sup>86</sup>

The Georgia Supreme Court followed the more modern and liberal Federal Rules of Evidence, Rule 702 and Rule 704,<sup>87</sup> to determine the state's standard for admissibility, rather than the three-part

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<sup>78</sup> *Id.* at \_\_\_\_, 478 A.2d at 368. The court reasoned that a new trial would provide the trial court with a fair and adequate opportunity to reconsider all pertinent matters, including the admissibility of expert testimony on the battered woman's syndrome. *Id.* at \_\_\_\_, 478 A.2d at 382.

<sup>79</sup> 247 Ga. 612, 277 S.E.2d 678 (1981).

<sup>80</sup> *Id.*, 277 S.E.2d at 679.

<sup>81</sup> *Id.* at 612-13, 277 S.E.2d at 678.

<sup>82</sup> *Id.* at 613, 277 S.E.2d at 678.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 613, 277 S.E.2d at 679.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 614-15, 277 S.E. 2d at 680.

<sup>87</sup> FED. R. EVID. 704 provides:

(a) Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

*See supra* text accompanying note 41 (setting forth the provisions of Federal Rule of Evidence 702).

*Dyas* test.<sup>88</sup> The court ruled that expert testimony on BWS was admissible, even with regard to the ultimate issue, if the conclusion of the expert was one upon which the jurors could not ordinarily arrive.<sup>89</sup> The court found that testimony by experts concerning the reasons women suffering from BWS do not leave their abusers, fail to inform anyone of the violence, and fear increased attacks, constitute conclusions that jurors would not ordinarily draw for themselves.<sup>90</sup>

#### 4. Washington

In *State v. Allery*,<sup>91</sup> the defendant had suffered periodic abuse from her husband during the course of their five-year marriage.<sup>92</sup> Defendant testified that she was beaten, pistol-whipped, assaulted with knives, and hospitalized after an assault on her head with a tire iron.<sup>93</sup> As the abuse increased, the defendant filed for divorce and obtained restraining orders against her husband.<sup>94</sup>

The week following the initiation of divorce proceedings, the defendant came home to find her husband, who had been ordered by the court to stay away from the house, in the house.<sup>95</sup> Her husband was lying on the couch and told her, "I guess I'm just going to have to kill you."<sup>96</sup>

The defendant attempted to escape through a bedroom window, but it would not open.<sup>97</sup> She thought she heard her husband getting a knife in the kitchen.<sup>98</sup> The defendant loaded a gun while in her bedroom and moved to the kitchen area; there she shot and killed her husband.<sup>99</sup>

The defendant was charged with second-degree murder. She offered expert testimony on BWS to: (1) explain the general mentality and behavior of battered women; (2) to provide a basis from which the jurors could perceive why defendant believed she was in imminent danger when she shot her husband;

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<sup>88</sup> *Smith*, 247 Ga. 612, 619, 277 S.E.2d 678, 683.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> 101 Wash. 2d 591, 682 P.2d 312 (1984).

<sup>92</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>93</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>94</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>95</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>96</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>97</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>98</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>99</sup> *Id.* at \_\_\_, 682 P.2d at 314.

and (3) to explain why women remain in battering relationships.<sup>100</sup>

The trial court ruled that the testimony was inadmissible.<sup>101</sup> The Supreme Court of Washington determined that the state's standard for the admissibility of expert testimony was governed by Evidence Rule 702.<sup>102</sup> The rule requires that the witness be qualified to testify as an expert, that the expert's opinion be based on an explanatory theory that has general acceptance in the scientific community, and that the expert testimony assist the trier of fact; it must aid in the comprehension of a phenomenon not within the competence of the average lay person.<sup>103</sup>

Noting the admittance of such testimony in other jurisdictions, the court in *Allery* found that BWS "may have substantial bearing on a woman's perceptions and behavior at the time of the killing and that it is central to her claim of self-defense."<sup>104</sup> Therefore, the court ruled that the testimony was admissible.

## 5. Ohio

The trend towards admissibility is also evidenced in Ohio. In *State v. Thomas*,<sup>105</sup> the defendant shot and killed her common-law husband during an argument.<sup>106</sup> The defendant asserted that she acted in self-defense.<sup>107</sup> Evidence showed that the defendant had been abused by her husband for three years preceding the incident at issue,<sup>108</sup> though the defendant's husband was not attacking her at the time of the shooting.<sup>109</sup>

In refusing to admit expert testimony on BWS, the court found that: (1) the testimony is

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<sup>100</sup> *Id.* at \_\_\_, 682 P.2d at 315.

<sup>101</sup> *Id.* at \_\_\_, 682 P.2d at 315.

<sup>102</sup> WASH. R. EVID. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

<sup>103</sup> *Allery*, 101 Wash. 2d at \_\_\_, 682 P. 2d at 315.

<sup>104</sup> *Id.* at \_\_\_, 682 P.2d at 313.

<sup>105</sup> *State v. Thomas*, 66 Ohio St. 2d 518, 423 N.E.2d 137 (1981).

<sup>106</sup> *Id.* at 518, 423 N.E.2d at 138.

<sup>107</sup> *Id.* at 519, 423 N.E.2d at 139.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

irrelevant and immaterial to the issue of self-defense; (2) BWS is within the understanding of the jury; (3) the state of the art of BWS is not sufficiently developed to warrant expert testimony; and (4) the probative value of the testimony is outweighed by its prejudicial impact.<sup>110</sup>

In *State v. Koss*,<sup>111</sup> the Supreme Court of Ohio overruled *Thomas* to the extent that *Thomas* held that expert testimony regarding battered woman's syndrome was inadmissible to support a claim of self-defense.<sup>112</sup> Both the defendant and several witnesses testified that the defendant had been subjected to beatings by her husband on several prior occasions.<sup>113</sup> The court noted that Ohio adjudges the validity of a defendant's self-defense argument by employing a subjective standard.<sup>114</sup> Thus, it is crucial in a claim of self-defense to determine the accused's state of mind.<sup>115</sup>

In determining whether the defendant had reasonable grounds for an honest belief that she was in imminent danger, you *must* put yourself in the position of the defendant, with her characteristics, knowledge or lack of knowledge, and under the same circumstances and conditions that surrounded the defendant at the time. You must consider the conduct of Michael Koss and determine if such acts and words caused the defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm.<sup>116</sup>

The court, in reference to lower Ohio court decisions, noted that expert testimony is admissible in Ohio if it will assist the jurors in search of the truth, but it is inadmissible when such knowledge is within the understanding of the jury.<sup>117</sup> In contrast to the *Thomas* court, the *Koss* court determined that the battered woman's syndrome was beyond the ken of the jury and was a necessary aid to the jury in dispelling an ordinary lay person's misconceptions about battered women.

The court in *Koss* admitted the expert testimony on BWS, stating that where the defendant offers evidence establishing herself as a "battered woman", the expert is qualified to testify about BWS, and such expert testimony will assist the trier of fact in determining whether the defendant acted in self-defense, the testimony will be admissible to support a claim of self-defense.<sup>118</sup>

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<sup>110</sup> *Id.* at 521-22, 423 N.E.2d at 140.

<sup>111</sup> 49 Ohio St. 3d 213, 551 N.E.2d 973 (1990).

<sup>112</sup> *Id.* at \_\_\_, 551 N.E.2d at 975.

<sup>113</sup> *Id.* at \_\_\_, 551 N.E.2d at 975.

<sup>114</sup> *Id.* at \_\_\_, 551 N.E.2d at 973.

<sup>115</sup> *Id.* at \_\_\_, 551 N.E.2d at 973.

<sup>116</sup> *Id.* at \_\_\_, 551 N.E.2d at 973 (emphasis added).

<sup>117</sup> *Id.* at \_\_\_, 551 N.E.2d at 973.

<sup>118</sup> *Id.* at \_\_\_, 551 N.E.2d at 974.

## 6. Louisiana

A minority of states have held that expert testimony on BWS is inadmissible in homicide cases. The Supreme Court of Louisiana, in *State v. Edwards*,<sup>119</sup> held that expert testimony on BWS could only be applied to a defense based on an impaired mental state.<sup>120</sup> In *Edwards*, the defendant killed her husband the day after a violent confrontation. The defendant sought to offer expert testimony regarding her capacity to formulate a specific intent to kill in a non-self-defense situation.<sup>121</sup> After examining the defendant, the expert believed that Mrs. Edward's mental state could be explained by BWS.<sup>122</sup> The trial court, however, determined the expert's testimony to be inadmissible on the grounds that it was irrelevant, that psychiatric testimony invaded the province of the jurors, and that the defendant failed to provide notice of her intent to proffer expert testimony.<sup>123</sup>

The Louisiana Supreme Court upheld the trial court decision, and stated that because an expert witness must state the facts upon which his opinion is based, the testimony of an expert in psychiatry concerning the defendant's lack of specific intent would necessarily include testimony of a mental defect or condition.<sup>124</sup> The court based its decision on the Louisiana Code of Criminal Procedure, Article 651.<sup>125</sup> This statute precludes the admissibility of testimony regarding the mental state of a defendant who fails to plead not guilty by reason of insanity.<sup>126</sup>

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<sup>119</sup> 420 So. 2d 663 (La. 1982).

<sup>120</sup> *Id.* at 678.

<sup>121</sup> *Id.* at 668.

<sup>122</sup> *Id.* at 677.

<sup>123</sup> *Id.* at 678.

<sup>124</sup> *Id.*

<sup>125</sup> Article 651 of the Louisiana Code of Criminal Procedure provides: "When a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible." LA. CODE CRIM. PROC. ANN. art. 651 (West 1967).

<sup>126</sup> Louisiana has based its refusal to permit such expert testimony on other grounds as well. In *State v. Burton*, 464 So. 2d 421 (La. Ct. App. 1985), the defendant shot her husband during a verbal altercation. The court, relying in part upon Louisiana Revised Statutes Annotated section 15:482, held that in the absence of an overt act by the husband at the time of the incident, defendant would not be permitted to introduce evidence of the victim's dangerous character. Defendant argued that this restriction prevented her from demonstrating how she reasonably perceived that she was in imminent danger when she shot her husband. *Id.* at 426, 428.

Research indicates that Wyoming has similarly refused to admit expert testimony on the battered wife syndrome in self-defense cases. In *Buhrle v. State*, 627 P.2d 1374 (Wyo. 1981), the husband had filed for divorce and another battering incident occurred; then the husband moved to a motel where defendant shot and killed him during an argument while she was visiting him. The Supreme Court of Wyoming disallowed testimony on the battered woman's syndrome, stating that the defense failed to satisfy the three-criteria test established in *Dyas*; it unconditionally excluded testimony because the court found that the state-of-the-art requirement was not satisfied. *Id.* at 1375.

### *Statutory Provisions*

In addition to the case law developments, the state of Missouri recently enacted Section 563.033, which provides in pertinent part: "evidence that the actor was suffering from the battered spouse syndrome shall be admissible upon the issue of whether the actor lawfully acted in self-defense or defense of another."<sup>127</sup> The legislature passed this gender-neutral statute to resolve inconsistencies in state court decisions regarding the admissibility of such evidence.<sup>128</sup>

The statute requires written notice in advance of trial if the defendant intends to offer evidence on BWS.<sup>129</sup> In conjunction with Section 632.005, the court, upon motion of the state, will appoint private psychologists or psychiatrists with special training.<sup>130</sup> The appointed doctor will examine the accused or direct the defendant to the appropriate health care professional for an examination.<sup>131</sup> During the course of the examination, statements made by the accused shall not be admitted in evidence against the accused on the issue of whether he/she committed the act charged against him/her.<sup>132</sup>

The Missouri statute applies where the defendant raises the issue in a homicide case to support a claim of self-defense.<sup>133</sup> In effect, it removes the decision of whether to admit expert testimony on BWS from the discretion of the trial judge. The statute requires that the victim be defined as a battered woman and that self-defense be an issue in the case. To apply the statute, the defendant must make a prima facie showing of self-defense.<sup>134</sup>

In *State v. Williams*,<sup>135</sup> a Missouri Court of Appeals case decided after enactment of the statute, the defendant was charged with killing the victim with her automobile.<sup>136</sup> The case was tried on the theory of transferred intent, because the defendant intentionally attempted to run over her boyfriend, but

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<sup>127</sup> Mo. REV. STAT. § 563.033(2) (Supp. 1991).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 563.033(2),(3) (Supp. 1991).

<sup>133</sup> *Id.* § 563.033(1) (Supp. 1991); *but see* *State v. Clay*, 779 S.W.2d 673 (Mo. Ct. App. 1989) (evidence is inadmissible where no claim of self-defense is raised).

<sup>134</sup> Mo. REV. STAT. § 563.033 (Supp. 1991); *State v. Goforth*, 721 S.W. 2d 756, 758, 761 (Mo. Ct. App. 1986); *see* *Brewer*, *supra* note 42, at 239-41.

<sup>135</sup> 787 S.W.2d 308 (Mo. Ct. App. 1990).

<sup>136</sup> *Id.* at 309.

instead mistakenly ran over her friend, who had intervened to protect the defendant from her abuser.<sup>137</sup>

The defendant filed a timely notice, pursuant to Section 563.033, to introduce expert testimony on BWS.<sup>138</sup> Defendant testified that she sustained many beatings from her boyfriend that had required medical attention.<sup>139</sup> The court accepted the testimony that the defendant suffered from BWS, but refused to allow the testimony at trial because the defendant and her batterer were never married.<sup>140</sup> The appellate court reversed the trial court, finding no legitimate reason for the exclusion of the expert testimony.<sup>141</sup> The appellate court held that a battered woman's need to use self-defense is not dependent upon her marital status,<sup>142</sup> reasoning that to deny equal treatment to similarly situated persons would raise equal protection problems.<sup>143</sup>

### THE VIRGINIA APPROACH TO EXPERT TESTIMONY

The majority of jurisdictions that have addressed the issue of the admissibility of expert BWS testimony have permitted such evidence in support of a self-defense claim to homicide. To date, Virginia has not considered this issue. An examination of Virginia's standards for self-defense and for the admissibility of expert testimony will provide a basis for recommending how Virginia courts should rule when confronted with this issue.

#### *Self-Defense*

Virginia maintains a historical distinction with respect to the use of deadly force in self-defense cases.<sup>144</sup> It classifies self-defense in homicide cases as either justifiable or excusable homicide.<sup>145</sup> Thus, a defendant's actions which are classified as either justifiable or excusable will be acquitted of a murder

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<sup>137</sup> *Id.* at 310.

<sup>138</sup> *Williams*, 787 S.W.2d at 310; Mo. REV. STAT. § 563.031 (1986).

<sup>139</sup> *Williams*, 787 S.W.2d at 309.

<sup>140</sup> *Id.* at 310.

<sup>141</sup> *Id.* at 312.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Sims v. Commonwealth*, 134 Va. 736, 760, 115 S.E. 382 (1922).

<sup>145</sup> *Id.*

charge.<sup>146</sup>

"Justifiable homicide . . . occurs where a person without any fault on his part in provoking or bringing on the difficulty kills another while under the reasonable apprehension of death or great bodily harm."<sup>147</sup> What constitutes a "reasonable belief of imminent harm" depends upon the particular facts and circumstances of each case. Whether defendant's belief later proves to be erroneous is inconsequential. What is essential is that defendant has reasonable grounds for believing that he is in imminent danger.<sup>148</sup>

In contrast, excusable homicide occurs where the accused, though partially at fault, kills the aggressor from a reasonable fear that he was in danger of being killed or sustaining great bodily injury after retreating as far as is safely possible under the circumstances and, in a good faith purpose to abandon the fight, makes known his desire for peace by word or act.<sup>149</sup> Excusable homicide is not limited to mutual combat; it is a broader concept embracing less aggressive behavior.<sup>150</sup> Thus, if a defendant is even slightly at fault, the killing cannot be characterized as justifiable homicide.<sup>151</sup>

Self-defense is an affirmative defense, and the defendant assumes the burden of introducing evidence of justification or excuse that raises a reasonable doubt in the minds of jurors.<sup>152</sup> Fear alone that a person intends to inflict serious bodily injury, however well-grounded, but unaccompanied by any overt act indicating such intention, will not warrant killing such person.<sup>153</sup> A person reasonably apprehending an attack, however, has a right to arm himself for his necessary act of self-defense.<sup>154</sup>

#### *Expert Testimony*

Before the court will consider expert testimony on BWS, the concept's relevance to the self-

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<sup>146</sup> *Perricillia v. Commonwealth*, 229 Va. 85, 93-94, 326 S.E.2d 679, 685 (1985).

<sup>147</sup> *Yarborough v. Commonwealth*, 217 Va. 971, 975, 234 S.E.2d 286, 290 (1985) (citation omitted).

<sup>148</sup> *Stoneman v. Commonwealth*, 66 Va. (25 Gratt) 887 (1874).

<sup>149</sup> *Bailey v. Commonwealth*, 200 Va. 92, 96, 104 S.E.2d 28, 31 (1958).

<sup>150</sup> *Jackson v. Commonwealth*, 98 Va. 845, 850, 36 S.E. 487, 489 (1900).

<sup>151</sup> *Perricillia v. Commonwealth*, 229 Va. 85, 94, 326 S.E.2d 679, 685 (1985).

<sup>152</sup> *McGhee v. Commonwealth*, 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978).

<sup>153</sup> *Yarborough v. Commonwealth*, 217 Va. 971, 975, 234 S.E.2d 286, 290 (1985) (citation omitted).

<sup>154</sup> *Stapleton v. Commonwealth*, 123 Va. 825, 830, 96 S.E. 801, 802 (1918).

defense claim must be established.<sup>155</sup> Most courts that have considered this issue have found the testimony relevant upon the defendant making a prima facie showing of self-defense. Other courts have excluded expert testimony where a defendant has failed to establish a claim of self-defense, or the defendant has failed to establish her identity as a battered woman.<sup>156</sup>

In Virginia it is well-settled that:

[E]xpert opinion and testimony are admissible where the jury, or the court trying a case without a jury, is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood, and which cannot be determined intelligently merely from the deductions made and inferences drawn on the basis of ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life.<sup>157</sup>

In other words, expert testimony is *admissible* where the ordinary knowledge of the jury is insufficient to make a determination on the facts. The parallel to this rule in Virginia is also well-settled: "expert testimony is *inadmissible* on matters of common knowledge or those to which the jury are as competent to form an intelligent and accurate opinion as is the witness."<sup>158</sup> Furthermore, in matters that are not of common knowledge, the opinion of experts must be accepted.<sup>159</sup>

The issue of whether a witness is qualified to testify as an expert is within the discretion of the trial judge.<sup>160</sup> The judgment of the trial court will not be reversed on appeal unless it is clearly apparent that the witness is not qualified to testify on the particular subject matter.<sup>161</sup>

There are no formal education requirements that must be satisfied in order to qualify as an expert witness.<sup>162</sup> Virginia merely requires the expert to have sufficient knowledge of the subject he is testifying about to aid the trier of fact.<sup>163</sup> The requisite knowledge may be derived from home study or practical experience.<sup>164</sup> The fact that a witness believes himself to be qualified to testify as an expert, however,

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<sup>155</sup> Hauptfuehrer, *Battered Women and Self-Defense: Admissibility of Expert Testimony on the Battered Woman Syndrome in Virginia*, 10 GEO. MASON U.L. REV. 171, 180 (1987).

<sup>156</sup> See *Ibn-Tamas v. United States*, 407 A.2d 626, 639 (1979).

<sup>157</sup> *Compton v. Commonwealth*, 219 Va 716, 726, 250 S.E.2d 749, 755-56 (1979) (quoting 31 AM. JUR. 2d *Expert and Opinion Evidence* § 16 (1967)).

<sup>158</sup> *Grasty v. Tanner*, 206 Va. 723, 726, 146 S.E.2d 252, 254 (1966) (emphasis added).

<sup>159</sup> *Neal v. Spencer*, 181 Va. 668, 26 S.E.2d 70 (1943).

<sup>160</sup> *Jordan v. Commonwealth*, 207 Va. 591, 598, 151 S.E.2d 390, 395 (1966).

<sup>161</sup> *Id.*

<sup>162</sup> *Noll v. Rahal*, 219 Va. 795, 801, 250 S.E.2d 741, 744-45 (1979).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

does not necessarily qualify him as such.<sup>165</sup>

The Virginia Code has a section pertaining to expert testimony. The provision is expressly limited to civil actions, however.<sup>166</sup> Unlike the Federal Rules of Evidence 703 and 705, which are applicable in both civil and criminal actions,<sup>167</sup> the Virginia state courts continue to require expert witnesses in criminal actions to base their opinions on facts disclosed in their testimony and on facts assumed in a hypothetical question, but generally, not on facts not in evidence.<sup>168</sup>

Virginia state courts continue to exclude expert testimony as to matters of "ultimate issue."<sup>169</sup> The Supreme Court of Virginia rejected the Commonwealth's argument to change the traditional Virginia rule to that of the "unmistakable trend of authority"; the court reaffirmed the function of the jury as the sole source of resolving ultimate issues of fact.<sup>170</sup> The jury also determines the weight to be given to an expert's testimony, after the trial judge makes the initial determination of whether a witness is qualified

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<sup>165</sup> Grubb v. Hocker, 229 Va. 172, 326 S.E.2d 698 (1985).

<sup>166</sup> VA. CODE § 8.01-401.1 provides:

**Opinion testimony by experts.** - In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

<sup>167</sup> FED. R. EVID. 703 states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

FED. R. EVID. 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

<sup>168</sup> SIMPSON & FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 217, at 541 (3d. Ed. 1988); see Evans v. Harrison, 5 Va. App. 8, 360 S.E.2d 212 (1987).

<sup>169</sup> Bond v. Commonwealth, 226 Va. 534, 538, 311 S.E.2d 769, 771-72 (1984).

<sup>170</sup> *Id.* at 538, 311 S.E. 2d at 772. More recently, the court affirmed this issue in Commonwealth v. Lotz Realty Co., Inc., 237 Va. 1, 10, 376 S.E.2d 54, 59 (1989).

to testify as an expert.<sup>171</sup>

This traditional rule barring expert testimony on ultimate issues has been increasingly disregarded in recent years in Virginia, despite the affirmance of this principle by the Supreme Court of Virginia.<sup>172</sup>

#### BATTERED WOMAN SYNDROME APPLIED TO VIRGINIA LAW

To prove self-defense in Virginia, it must be established that the person asserting the defense reasonably believed that he was in imminent danger of death or great bodily harm.<sup>173</sup> The test of reasonableness is based on the circumstances of the case as they reasonably appeared to the defendant.<sup>174</sup> Thus, Virginia has adopted a subjective test in determining whether a particular defendant properly acted in self-defense; it is irrelevant whether the danger is later proven not to exist.<sup>175</sup> Expert testimony in Virginia is admissible where the finder of fact is confronted with issues which require scientific or specialized knowledge or experience in order to be properly understood.<sup>176</sup>

Virginia courts should permit expert testimony on BWS to support a claim of self-defense in homicide cases for five reasons. First, because Virginia employs a subjective standard for determining the reasonableness of a defendant's actions, expert testimony on this syndrome would help determine the reasonableness of the defendant's perception that she was in imminent danger. Such testimony would help the fact finders put themselves in the position of the defendant, with her characteristics, knowledge, or lack of knowledge, and under the same circumstances and conditions that surrounded the defendant at the time of the killing.<sup>177</sup>

Second, expert testimony would enable the fact finders to consider the conduct of the decedent and determine if such acts and words caused the defendant to reasonably believe that she was about to be killed or receive great bodily harm.<sup>178</sup> The Virginia Supreme Court, in *Barnes v. Commonwealth*,<sup>179</sup>

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<sup>171</sup> *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 680 (1982).

<sup>172</sup> SIMPSON & FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* § 219, at 549-50 (3d ed. 1988); *Patterson v. Commonwealth*, 3 Va. App. 1, 10, 348, S.E.2d 285, 290 (1986).

<sup>173</sup> *Stoneman v. Commonwealth*, 66 Va. (25 Gratt) 887 (1874). *See also supra* pp. 17-18 and accompanying notes (discussing self-defense law in Virginia).

<sup>174</sup> *Fortune v. Commonwealth*, 133 Va. 669, 671, 112 S.E. 861, 868 (1922).

<sup>175</sup> *Stoneman*, 66 Va. (25 Gratt) 887 (1874).

<sup>176</sup> *Compton v. Commonwealth*, 219 Va. 716, 726, 250 S.E.2d 749, 755-56 (1979). *See also supra* pp. 18-21 and accompanying notes (discussing expert testimony law in Virginia).

<sup>177</sup> *State v. Koss*, 49 Ohio St. 3d 213, \_\_\_, 551 N.E.2d 973, 973 (1990).

<sup>178</sup> *Id.*

held that evidence of prior conduct of a homicide victim is admissible if it is sufficiently connected in time and circumstances with the homicide as to be likely to characterize the decedent's conduct toward the defendant.<sup>180</sup>

Third, because Virginia allows expert testimony in areas of scientific or specialized knowledge beyond the understanding of the jurors, it should follow that Virginia should admit expert testimony on BWS. BWS has gained substantial scientific acceptance and expert evidence on this syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert testimony would counter any common sense conclusions by the jury that if the beatings were really that severe the woman would have left her husband much earlier. Popular misconceptions about battered women would be addressed, including the beliefs that the women are masochistic and enjoy the beatings, and that they intentionally provoke their husbands into fits of violence.<sup>181</sup>

Fourth, even though Virginia cases have held that no expert may testify to an ultimate fact in issue, this would not preclude courts from admitting expert testimony on BWS. The ultimate issue for the jury to consider would be whether the defendant actually perceived she was in imminent danger and needed to kill in self-defense; the expert does not need to testify to the fact that she thinks the defendant properly acted in self-defense. The expert could merely present an opinion on her knowledge of BWS theory as it applies to the defendant for the jury's consideration in adjudging the reasonableness of the defendant's actions. Further, the expert should be allowed to offer the opinion that such women have certain psychological reactions that result from recurrent psychological and physical abuse which will affect their perceptions of whether they are in imminent danger. Thus, the jury will be enlightened to scientific or specialized knowledge beyond the understanding of the ordinary lay person; this will enable the trier of fact to more intelligently and accurately determine the reasonableness of the defendant's conduct according to her particular situation. Hence, the jury will not be given conclusions as to the defendant's guilt or innocence, but will be given information which they are free to weigh or reject in deciding the ultimate issue in fact.

Fifth, on a moral basis, the Virginia law should deal fairly with battered women who kill their abusers in self-defense. BWS testimony may be crucial to a woman's claim of self-defense. Even though a battered woman may act in self-defense, without expert testimony regarding BWS, she may be

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<sup>179</sup> Barnes v. Commonwealth, 214 Va. 24, 197 S.E.2d 189 (1973).

<sup>180</sup> *Id.*

<sup>181</sup> *Koss*, 49 Ohio St. 3d. at \_\_\_, 551 N.E.2d at 973.

unable to satisfy the traditional elements of a self-defense claim.

## CONCLUSION

The trend favors the admissibility of expert testimony on BWS in support of a plea of self-defense in homicide cases against victims of spousal abuse. In determining this issue, courts are applying either the *Dyas* three-part test, the Federal Rules of Evidence, or state rules of evidence. In addition, Missouri has passed a statute requiring the admissibility of expert testimony on BWS in self-defense cases.

The move toward the admissibility of evidence on BWS is due to society's increasing awareness of the problems surrounding battered women. The admissibility of expert testimony on this subject is being addressed by various jurisdictions in the area of self-defense. Women who kill their abusers are seeking to apply the doctrine of self-defense instead of the insanity doctrine or the doctrine of diminished capacity.

The doctrine of self-defense should continue to be applied in a narrow manner. Accordingly, BWS testimony should be offered only where it is relevant to a claim of self-defense. BWS testimony is offered to enable the fact finder to accurately determine the reasonableness of a defendant's belief that she was in imminent danger when she killed her abuser. Therefore, the trend favoring the admissibility of expert testimony on BWS in self-defense cases serves a valuable purpose. Virginia courts (and the legislature) should permit testimony in this area, which is beyond the understanding of the average laymen.

**ASSESSING THE HEALTH RISKS OF ELECTROMAGNETIC FIELDS:  
THE PROBLEM OF SCIENTIFIC UNCERTAINTY IN  
ELECTRIC POWER LINE REGULATION**

Thomas P. Cody

INTRODUCTION

A growing body of scientific evidence suggests a correlation between human proximity to electromagnetic fields (EMF) and the incidence of adverse health effects. Although one may infer from this evidence that extended exposure to EMF causes or contributes to health disorders such as cancer, leukemia, spontaneous abortion, and fetal abnormalities, no research has established a direct causal relationship. Proving a connection between EMF and adverse health effects has been difficult because of the pervasive nature of EMF and the many other potential causes of disease.

Scientists have demonstrated that EMF occurs in many ways in natural and manmade environments. Despite the lack of evidence of a direct effect on health, one of the most feared sources of EMF is the electric power line. This perception of risk from power line EMF has been reflected in property condemnation awards and in state and local government power line siting and strength regulations. In addition, tort litigation of EMF health hazards may be imminent.

Given that scientific research at least raises an inference that electric power lines may be a cause of health disorders, complex regulatory issues emerge. Should government regulate electric power line EMF despite the lack of conclusive scientific evidence? Should regulation of EMF be preempted until scientific evidence proves a direct causal relationship between EMF and health disorders? Finally, are existing tort remedies sufficient to make plaintiffs whole from any health disorders caused by EMF?

This article first discusses the nature of electromagnetic fields and the existing evidence that EMF poses a hazard to human health. The article then focuses on the legal and economic significance of EMF, including its effect on electric power line right-of-way condemnations, attempts to regulate power line strength and siting, and tort liability for health disorders "caused" by EMF. The article next addresses the question of EMF regulation by examining three existing models of hazard regulation and applying them to EMF. The article concludes by considering the problem of regulation in the face of scientific uncertainty and proposes an appropriate model of EMF regulation.

## SCIENTIFIC OVERVIEW OF ELECTROMAGNETIC FIELDS

### *The Nature of Electromagnetic Fields*

An electric current produces both electric and magnetic fields.<sup>1</sup> Electric and magnetic forces interact to create electromagnetic fields.<sup>2</sup> These oscillating fields exist around power lines, electric wiring in buildings, and electric appliances.<sup>3</sup> Thus, EMF exists not only in the vicinity of obvious sources of electric current such as large transmission lines, but also near electric blankets, waterbeds with electric heating units, kitchen appliances, and video display terminals.<sup>4</sup>

Electromagnetic fields are generally not considered "radiation" because "they do not involve significant propagation of energy away from the lines through space."<sup>5</sup> Traditionally, electromagnetic fields have also been considered too weak to affect biological processes because they do not heat tissue and do not break molecular bonds.<sup>6</sup> In contrast, gamma and x-rays and microwaves affect biological systems because they transfer heat to tissues.<sup>7</sup>

Recent experiments have demonstrated that 60 Hertz fields can interact with cell surfaces.<sup>8</sup> Although the studies are not conclusive, they suggest that cell surfaces amplify weak electromagnetic fields which affect the operation of a cell.<sup>9</sup> The specific effects of these interactions are difficult to isolate, although scientists have detected some changes in "the rate at which calcium ions bond to neural tissue, the rate at which various hormones and enzymes are produced, and shifts in circadian rhythms."<sup>10</sup>

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<sup>1</sup> MCGRAW HILL CONCISE ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 671 (2d ed. 1989).

<sup>2</sup> *Id.*

<sup>3</sup> Morgan, Florig, Nair & Hester, *Controlling Exposure to Transmission Line Electromagnetic Fields: A Regulatory Approach That Is Compatible With the Available Science*, PUB. UTIL. FORT. 49 (Mar. 17, 1988) [hereinafter Morgan, et al.].

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* Sixty Hertz is the frequency at which power systems operate in the United States and Canada. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

The consequences of these phenomena have not been determined.<sup>11</sup> Thus, a direct causal link between EMF and adverse health effects has not been established.

### *The Correlation of Electromagnetic Fields and Health Disorders*

#### 1. Studies on EMF and the Incidence of Cancer

Epidemiological studies have demonstrated a correlation between EMF exposure and the incidence of cancer.<sup>12</sup> One of the first such studies, the Wertheimer and Leeper study, was conducted in 1976 and 1977 in Denver, Colorado, and indicated that "the homes of children who developed cancer were found unduly often near electric lines carrying high currents."<sup>13</sup> Furthermore, the incidence of cancer was highest in homes found closest to transformers where voltage was stepped down and transformed into current, although the risk of cancer for children in these areas was rarely more than doubled.<sup>14</sup> The Wertheimer and Leeper study has been criticized,<sup>15</sup> but subsequent studies have confirmed a correlation between childhood cancer and proximity to electric power lines.<sup>16</sup> Prior to 1990, one of the most comprehensive summaries of the evidence linking EMF to cancer was Paul Brodeur's book, *Currents of Death: Power Lines, Computer Terminals, and the Attempt to Cover Up Their Threat to Your Health*,

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<sup>11</sup> *Id.*

<sup>12</sup> Epidemiology is "the study of the mass aspects of disease." MCGRAW HILL CONCISE ENCYCLOPEDIA OF SCIENCE & TECHNOLOGY 726-27 (2d ed. 1989). Although the word epidemic was used initially to describe the spread of infectious diseases, the subject matter of epidemiology has evolved to include group phenomena of both infectious and noninfectious diseases, such as cancer, heart disease, and mental illness, as well as accidents. *Id.*

<sup>13</sup> Wertheimer & Leeper, *Electrical Wiring Configurations and Childhood Cancer*, 109 AM. J. EPIDEMIOLOGY 273, 273 (1979).

<sup>14</sup> *Id.* The study postulated that strong magnetic fields were found in these areas due to an imbalance in electric current. Whereas magnetic fields can be canceled in ordinary wiring due to the balancing effect of a return current, cancellation does not always occur in the vicinity of buildings. Some of the return current does not flow through the wires, but instead returns through the ground or the plumbing system to which the electrical system may be grounded. *Id.* at 274. The study suggested that alternating magnetic fields affected the body's ability to fight cancer by altering the operation of the immune system. *Id.* at 283.

<sup>15</sup> See, e.g., Morgan, et al., *supra* note 3, at 49. "These results are very controversial. Each of the 'positive' studies can be criticized on a variety of grounds." *Id.*

<sup>16</sup> See, e.g., Note, *The Power Line Controversy: Legal Responses to Potential Electromagnetic Field Health Hazards*, 15 COLUM. J. ENVTL. L. 359, 374-78 (1990). One important study was funded by the New York State Power Authority and several utilities as part of a five million dollar research project ordered by the New York Public Service Commission in 1978. The study found an incidence of childhood cancer twice as high for children with increased exposure to magnetic fields. The final report incorporating Savitz's findings estimated that 10% to 15% of all childhood cancers could be attributed to magnetic fields. *Id.* See *infra* note 27.

published in 1989.<sup>17</sup> Excerpts from the book appeared in three installments in *The New Yorker* during the spring of 1989 and raised public awareness of the issue.

## 2. The EPA Draft Report on EMF and the Incidence of Cancer

On December 13, 1990, the Environmental Protection Agency released a draft report evaluating published information on the potential carcinogenicity of electromagnetic fields.<sup>18</sup> The draft report was quoted as stating that "[t]he strongest evidence that there is a causal relationship between certain forms of cancer, namely leukemia, cancer of the nervous system, and to a lesser extent, lymphoma, and exposure to magnetic fields comes from the childhood cancer study."<sup>19</sup> The draft report suggested that available epidemiological studies support an association between electromagnetic fields and certain types of cancer, although such a link has not been proven conclusively.<sup>20</sup> The draft report concluded that further research is needed before any regulatory or other action should be taken.<sup>21</sup>

## 3. EMF and Video Display Terminals

The National Institute for Occupational Safety and Health recently announced the results of a study examining the possible effect of EMF from video display terminals (VDTs) on the rate of spontaneous abortion in women.<sup>22</sup> The study concluded that the overall rate of spontaneous abortion for all reported pregnancies in the study group of female telephone operators using VDTs was almost exactly the same as the rate of spontaneous abortion among a control group of women who were not exposed

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<sup>17</sup> See P. BRODEUR, *CURRENTS OF DEATH: POWER LINES, COMPUTER TERMINALS, AND THE ATTEMPT TO COVER UP THEIR THREAT TO YOUR HEALTH* (1989). In roughly chronological fashion, the book compiled the results of the epidemiological research linking adverse health effects to EMF exposure. The author found that research from many different sources has confirmed and expanded the original epidemiological findings of Wertheimer and Leeper linking EMF to the incidence of cancer. *Id.*

<sup>18</sup> *EPA Research Office Draft Report Links Certain Cancers to Electromagnetic Fields*, 21 *Env't Rep.* (BNA) 1585 (Dec. 21, 1990).

<sup>19</sup> *Id.* (quoting OFFICE OF RESEARCH AND DEV., ENVTL. PROTECTION AGENCY, *EVALUATION OF THE POTENTIAL CARCINOGENICITY OF ELECTROMAGNETIC FIELDS* (Draft Report Dec. 13, 1990)).

<sup>20</sup> *Id.* ("the information provided in the report [is] insufficient to determine whether a cause-and-effect relationship exists").

<sup>21</sup> *Id.* The report was reviewed by members of an Environmental Protection Agency scientific advisory panel. The panel saw no immediate prospect for regulating EMF, but concluded that further study is necessary. 21 *Env't Rep.* (BNA) 1802 (Feb. 8, 1991).

<sup>22</sup> *Niosh Study Finds No Link Between VDT Use and Spontaneous Abortions*, Daily Lab. Rep. (BNA) No. 50, at A-1 (Mar. 14, 1991). The researchers stated that the strengths of this study included the similarity of the VDT-user group and the comparison group; the use of record-based data on the extent of VDT use during each pregnancy; and the direct measurement of the electromagnetic fields. *Id.*

to the VDTs.<sup>23</sup> The rate of spontaneous abortion for pregnancies during which the mother was exposed to VDTs during the first trimester was just slightly higher than the rate of women who were not exposed to the VDTs during the same time period.<sup>24</sup> Critics have stated that the study does not demonstrate the safety of VDTs because the researchers failed to take into account the possible effects of extremely low frequency (ELF) fields on spontaneous abortion.<sup>25</sup>

#### *Summary of the Scientific Evidence*

Scientists have yet to prove that EMF has any direct effect on biological systems, or that exposure to EMF can be linked conclusively to the incidence of cancer or any other adverse health effect.<sup>26</sup> Although no single study confirms an adverse health effects hypothesis, the number of studies independently noting the correlation of adverse health effects and EMF exposure is alarming. Since epidemiological findings have often preceded actual laboratory confirmation of carcinogenic effects,<sup>27</sup> the lack of a direct causal link between EMF and cancer should not be used at this time to draw preliminary conclusions.

The absence of scientific evidence directly linking EMF and adverse health effects creates a difficult public policy issue. On the one hand, existing scientific evidence suggests that EMF poses a threat to public health, safety and welfare. Several different regulatory responses are possible.<sup>28</sup> On the other hand, the scientific evidence does not prove the threat to a convincing degree. Thus, some

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<sup>23</sup> *Id.* The overall crude rates of spontaneous abortion for all reported pregnancies in the study group were 14.8% for VDT-exposed pregnancies, compared with 15.9% for VDT-unexposed pregnancies. Among the 2,340 women interviewed, 882 pregnancies met the study criteria. Extended VDT use did not affect the findings. *Id.*

<sup>24</sup> *Id.* According to the study, the rate of spontaneous abortion, for pregnancies during which the mother had between one and 25 hours of VDT use in the first trimester, was slightly, but not significantly, higher than for women who did not use VDTs -- 17.2 % compared with 15.6 %. *Id.* However, the rate of spontaneous abortion for women with more than 25 hours of VDT use per week (15.4 %) was similar to that of women who did not use VDTs at all (15.6 %). *Id.*

<sup>25</sup> Streitfeld, *Debating the Perils of VDTs*, Wash. Post, Mar. 18, 1991, at D5. ELF levels were similar for all study participants. *Id.*

<sup>26</sup> See Sagan, *EMF Health Effects Research: Problems and Current Status*, PUB. UTIL. FORT. 30 (July 19, 1990).

<sup>27</sup> See Savitz, *Case-Control Study of Childhood Cancer and Exposure to 60-HZ Magnetic Fields*, 128 AM. J. EPIDEMIOLOGY 21, 37 (1988) (laboratory confirmation of the carcinogenic effects of tobacco smoke, benzene, and arsenic followed epidemiological evidence).

<sup>28</sup> See, e.g., *infra* notes 41-48 and accompanying text.

commentators have argued that time and money should not be spent regulating potential environmental risks until the risks are established conclusively.<sup>29</sup>

The regulatory issue is more complex, however, than a simple decision to act now or wait for better information. Even if EMF directly causes or contributes to adverse health, conclusive proof may be difficult or impossible to produce and the results may take decades to develop. A satisfactory response to the issue must incorporate the inherent uncertainty of the scientific evidence. Therefore, the costs and benefits of EMF regulation must be studied carefully. The first step in the process is to examine the legal significance of EMF and the legal and economic implications of EMF regulation.

### THE LEGAL SIGNIFICANCE OF EMF AND POWER LINES

Electric power lines are the most visible conductors of electricity in the built environment. As a result, electric power lines have attracted considerable attention in the EMF debate.<sup>30</sup> This section of the article examines the legal significance of EMF, as reflected in property condemnations for electric power line construction, power line siting and strength regulations, and tort liability for EMF exposure.<sup>31</sup>

#### *Property Condemnation for Electric Power Line Construction*

Recent litigation of partial takings<sup>32</sup> for power line easements<sup>33</sup> has included claims that remaining

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<sup>29</sup> See e.g., *Dealing with Presumed Health Risks from High-Voltage Transmission Lines*, PUB. UTIL. FORT. 51 (Aug. 3, 1989) [hereinafter *Health Risks*] (one policy option is "'doing nothing until the science becomes better'" (quoting Office of Technology Assessment background paper prepared for the House Interior Subcommittee on Water and Power Resources)).

<sup>30</sup> See, e.g., P. BRODEUR, *supra* note 17; *Power Line Okd Despite Worries Over Health Risks*, L.A. Times, Feb. 15, 1991, at B3, col. 1; *PS Colorado Alters Route of Line After Complaints from Homeowners*, ELEC. UTIL. WK. 17 (Aug. 21 1989).

<sup>31</sup> Although this article focuses on power line EMF, other potential EMF hazards are being investigated, including building electrical wiring, appliances, and lighting fixtures. See *Health Risks*, *supra* note 29, at 51.

<sup>32</sup> The Fifth Amendment to the United States Constitution allows such takings of property for a public use, provided that "just compensation" is paid. U.S. CONST. amend. V ("nor shall private property be taken for public use without just compensation"). Most state constitutions have similar "just compensation" provisions. See e.g., VA. CONST. art. I, § 11 ("the General Assembly shall not pass . . . any law whereby private property shall be taken or damaged for public uses, without just compensation . . .").

<sup>33</sup> "An easement is an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists." RESTATEMENT OF PROPERTY § 450 (1944).

property interests will be devalued by fear of adverse health effects from the power line.<sup>34</sup> Courts have generally followed one of three different approaches to admission of such "fear of EMF" evidence:

- (1) evidence of fear is admitted without any inquiry into reasonableness ("majority rule");
- (2) evidence of fear is admitted if the fear is shown to be reasonable ("intermediate rule"); and
- (3) evidence of fear is rejected regardless of any effect on market value ("minority rule").<sup>35</sup>

Twelve states and the United States Court of Appeals for the Sixth Circuit follow the majority rule, or the least stringent standard, for admitting evidence; three follow the minority rule, or the strictest standard; ten follow the intermediate rule and standard of reasonableness; and the rest either have varied in approach or have not addressed the issue.<sup>36</sup> No reported cases in Virginia have addressed the question of "fear of EMF" evidence.

The condemnation cases cited herein represent a fraction of the cases that have considered the "evidence of power line fear" issue.<sup>37</sup> In many cases, evidence is not limited to the decline in value due to the proven risk of adverse health effects, but may also include fear of power line EMF.<sup>38</sup>

The implications of this trend are enormous for utilities and ratepayers. In a recent New York case, the New York Power Authority spent approximately \$1.5 million on fees and expenses for seven scientific and medical experts to testify at trial.<sup>39</sup> Litigation expenses and the fear of costly judgments have prompted some utilities to settle with property owners for unprecedented amounts of money.<sup>40</sup> This trend will undoubtedly increase the cost of electricity to the ratepaying public.

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<sup>34</sup> See, e.g., *Selective Resources v. Superior Court*, 145 Ariz. 151, 700 P.2d 849 (1984) (trial court improperly denied admission of scientific evidence relating to adverse biological effects of exposure to electromagnetic fields); *Willsey v. Kansas City Power & Light Co.*, 6 Kan. App. 2d 599, 631 P.2d 268 (1981) (property owner cannot recover for "[r]emote, speculative and conjectural damages. . . . Logic and fairness, however, dictate that any loss of market value proven with a reasonable degree of probability should be compensable, regardless of its source"); *Houston Lighting & Power Co. v. Klein Indep. School Dist.*, 739 S.W.2d 508 (Tex. Ct. App. 1987) (trial court heard extensive scientific evidence of EMF and health effects in condemnation case for 345 kilovolt transmission line easement across public school property). *But see Zappavigna v. New York*, Claim No. 74085 (landowner denied damages for alleged diminished property values due to "cancerphobia" from New York Power Authority 345 kilovolt transmission line, by failing to prove "by a preponderance of credible real estate evidence" that "a potential purchaser has reasonable grounds for apprehension that power lines cause health problems").

<sup>35</sup> Dushoff & Henslee, *Valuation of Power Line Easements*, 1989 INST. ON PLAN. ZONING & EMINENT DOMAIN 10-1, 10-3.

<sup>36</sup> Freeman, *The Courts and Electromagnetic Fields*, PUB. UTIL. FORT. 20 (July 19, 1990).

<sup>37</sup> See Dushoff & Henslee, *supra* note 35, at 10-29 to 10-32.

<sup>38</sup> See, e.g. *San Diego Gas & Elec. Co. v. Daley*, 205 Cal. App. 3d 1334, 253 Cal. Rptr. 144 (Ct. App. 1988); see also Note, *supra* note 16, at 363-73.

<sup>39</sup> Freeman, *supra* note 36, at 21.

<sup>40</sup> *Id.*

## *The Regulation of Power Line Strength and Siting*

Seven states have adopted electric or magnetic field strength standards to limit the intensity of the electromagnetic field created along new electric power lines.<sup>41</sup> Other state commissions have not heard enough evidence to justify new regulations.<sup>42</sup> Some state public utilities commissions are embracing a policy of "prudent avoidance" in reviewing power line applications.<sup>43</sup> The Colorado Public Utilities Commission has defined "prudent avoidance" as "'the striking of a reasonable balance between avoiding potential harm and its attendant costs and risks.'"<sup>44</sup>

Some local governments have attempted to use zoning ordinances and environmental regulations to regulate the planning and construction of electric transmission lines.<sup>45</sup> In three recent cases, a court and two public service commissions rejected attempts by local governments to exert such control.<sup>46</sup> In

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<sup>41</sup> *Cano, New Transmission Lines Face Heightened Concern Over EMF Hazards*, INSIDE F.E.R.C., Aug. 21, 1989, at 1 (Florida, Minnesota, Montana, New Jersey, New York, North Dakota, and Oregon). Virginia has not adopted such regulations.

<sup>42</sup> *Freeman*, *supra* note 36, at 22.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* A similar concept, "partial avoidance", has been defined as "remov[ing] people from certain transmission line exposure conditions . . . without changing the number of people who experience other transmission line exposure conditions." Morgan, et al., *supra* note 3, at 52.

<sup>45</sup> *See, e.g., Siegel, 2 Suburbs Consider High-Voltage Limits*, Chicago Tribune, Jan. 16, 1991, at C1 (officials in Wilmette and Lincolnwood, Illinois, are considering limits on electromagnetic field strengths within their jurisdictions).

<sup>46</sup> In *Potomac Elec. Power Co. v. Montgomery County*, 80 Md. App. 107, 560 A.2d 50 (1989), the Maryland Court of Special Appeals found that Montgomery County had improperly and illegally imposed conditions upon the construction of a 69,000 volt transmission line, where the utility had already received a Certificate of Public Convenience and Necessity from the Public Service Commission. The court held that local governments are implicitly preempted from regulating construction of transmission lines by the broad legislative grant of power to the Public Service Commission to regulate construction of overhead transmission lines. *Id.* at \_\_\_, 560 A.2d at 54.

In *Wisconsin Pub. Serv. Corp. v. Town of Sevastopol*, 105 Pub. Util. Rep. 4th (PUR) 45 (1989), the Wisconsin Public Service Commission voided a municipal ordinance which required new transmission lines in the town to be sited, configured and shielded to "reduce to the extent possible" the electromagnetic field effects on humans and livestock, and which required the undergrounding of all new electric transmission lines over twenty kilovolts. The ordinance imposed fines of from \$1,000 to \$10,000 per day for violations. *Id.* at 46.

The commission found that the ordinance was "not reasonably related to the values it seeks to protect, as a matter of physics," because the ordinance attempted to mitigate adverse health effects by regulating voltage levels. Magnetic fields are a function of electric current, however, and not voltage. Furthermore, underground construction does not mitigate magnetic fields, and may place people at greater risk since an underground line is closer to ground level than a line strung from poles. Finally, the undergrounding requirement would increase the cost of a typical small transmission line by a factor of ten to twenty, an expense which the town had no intention of bearing. *Id.*

In *Newport Elec. Corp. v. Jamestown Zoning Bd. of Review*, No. 1910 (R.I.P.U.C. Mar. 10, 1989), the Rhode Island Public Utilities Commission overturned a local zoning board decision which had prohibited Newport Electric Corporation from expanding a substation because of concerns over health hazards associated with EMF. The commission reviewed extensive testimony on the health hazard issue, but concluded that EMF studies were too tenuous to warrant rejection of the utility's proposal. The public's need for electric power outweighed the possible, but undocumented, dangers from EMF created by the project. *Id.*

Virginia, EMF is currently being discussed in the City of Alexandria while the city renegotiates its franchise agreement with Virginia Power Company.<sup>47</sup> Many people in Alexandria are calling for underground power lines in the Old Town area for either aesthetic reasons or the fear of health hazards.<sup>48</sup>

*Tort Liability for Adverse Health Effects from EMF*

Although the question of tort liability for health effects from EMF exposure has yet to reach a jury in any state or federal court, tort liability for adverse health effects from EMF is becoming a concern for electric utilities and other businesses and industries involved with EMF.<sup>49</sup> An important case settled recently on the eve of trial has attracted considerable attention.

In *Strom v. Boeing Co.*,<sup>50</sup> Boeing agreed to settle a case filed by an employee who had been exposed to electromagnetic pulse (EMP) radiation.<sup>51</sup> The employee, Robert Strom, alleged that he was assigned to test a "pulser" as part of a program to develop an electromagnetic gun for the Strategic Defense Initiative.<sup>52</sup> Strom alleged that he was falsely informed by Boeing that the radiation was safe, thereby developing terminal chronic myelogenous leukemia due to his exposure to EMP.<sup>53</sup>

Some scientists and attorneys have stated that due to the fundamental differences in the quality of the energy involved, data from EMP studies cannot be applied to EMF research.<sup>54</sup> Despite the scientific distinctions between EMP and EMF, however, they both involve electromagnetic fields generally.

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<sup>47</sup> Streitfeld, *Old Town Going Under Amid Electromagnetic Debate*, Wash. Post, Mar. 11, 1991, at B5.

<sup>48</sup> *Id.* Some evidence suggests that undergrounding does nothing to dissipate electromagnetic fields, but may actually worsen any adverse health effects since the fields are closer to people than if the lines are strung from poles. *Id.*; *Sevastopol*, 105 Pub. Util. Rep. 4th (PUR) at 46.

<sup>49</sup> *See Note, supra* note 16, at 363-65.

<sup>50</sup> No. 88-2-10752-1 (Wash. Super. Ct., *settlement approved*, Aug. 15, 1990).

<sup>51</sup> *Boeing Settles Radiation Exposure Suit by Promising \$500,000 Payment, Worker Exams*, Daily Lab. Rep. No. 162 (BNA) A-8 (Aug. 21, 1990). Under the terms of the settlement, Boeing will pay Strom and his family over \$500,000 in cash and an annuity. In addition, Boeing will pay over \$200,000 for 10 years of annual medical examinations for 700 other Boeing employees, who had been certified in 1989 as a class of Boeing employees who have been, or will be, exposed to EMP. The agreement settles all of Strom's claims against Boeing, including his workers' compensation claim, but it preserves the right to pursue workers' compensation claims for all other members of the class. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Electromagnetic Field Lawsuits Could Multiply after Boeing Case*, ELEC. UTIL. WK. 15 (Sept. 10, 1990).

This nexus may be sufficient to encourage similar litigation of the EMF question.<sup>55</sup>

For electric utilities, the settlement of EMP claims is an ominous development. The ubiquitous nature of electricity and the EMF created by electric current suggests nearly an unlimited amount of tort litigation. From a practical perspective, the question of electric utility tort liability for EMF exposure is similar to the problem of admission of "fear evidence" in measuring just compensation in property condemnation cases. In both instances, the courtroom is transformed into a scientific tribunal. Courts, and more importantly juries, will be asked to evaluate complex and conflicting data on scientific questions. Decisions of great legal and economic significance will be made partly on jurors' perceptions of risk, and not on proven causation.

On the other hand, electric utilities may not become the next great source of tort liability. The pervasive nature of EMF will make any one source of EMF difficult to isolate as a cause of a particular health effect. Even if a carcinogenic relationship is established in the laboratory, causation will remain difficult to prove in the environment. The high number of "confounders", or other possible causes of disease, will plague tort plaintiffs in their efforts to recover for health disorders from EMF.

## EMF REGULATION

### *Indirect Regulation due to EMF Risk Perception*

With the exception of the few field strength limit regulations described in this paper,<sup>56</sup> EMF is not regulated in any direct or comprehensive way. Nevertheless, electric utilities are effected by perceptions of EMF and power lines.<sup>57</sup> Commentators have observed that changes in risk perception are not necessarily grounded in science.

Public perception of the risk associated with living near transmission lines seems to play a more dominant role than the scientific studies on which perception is supposed to be based, at least in part. It is not so much that the studies' conclusions have changed dramatically in the last decade; it is that many more people are studying electromagnetic

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<sup>55</sup> The executive director of the Trial Lawyers for Public Justice, who represented Strom and the Boeing workers, stated that the lawsuit has "highlighted and developed scientific and medical information showing that electromagnetic fields . . . can cause significant biological effects. This case is only the beginning of our efforts to protect the public from these dangers." *Settlement Reached in Boeing Exposure Suit: \$500,000 Payment, Health Exams Promised*, 5 Toxics L. Rep. (BNA) 404 (Aug. 22, 1990). Another of Strom's attorneys stated that "[t]here are numerous cases that we are looking at involving power lines, electrical substations near schools, video display terminal exposure, even electric blankets, where these kind of electromagnetic fields create a public health hazard. Either the electric power industry removes this hazard, or there will be litigation." *Id.*

<sup>56</sup> See *supra* notes 41-42 and accompanying text.

<sup>57</sup> See *supra* notes 32-40 and accompanying text.

fields now -- and newspapers, magazines, and television have paid a lot of attention.<sup>58</sup>

The perception of increased EMF risk, as manifested in evidence at property condemnation hearings and local attempts to control electric utility activities, indirectly regulates the conduct of electric utilities.

Indirect regulation of EMF and power lines yields ad hoc, inconsistent results.<sup>59</sup> As the Wisconsin Public Service Commission found in *Sevastopol*, the proliferation of local power line siting regulations "would intolerably interfere with the orderly statewide planning, certification, and construction of necessary public utility projects, because it would create artificial areas of high construction cost unrelated to the provision of adequate electric service, statewide environmental protection, or efficiency of the electric grid."<sup>60</sup> The legislature delegated such statewide concerns to the Commission.<sup>61</sup> Although land use control is primarily a local function and local governments have legitimate concerns for powerline right-of-way widths, building setbacks, tower heights, and voltage or current levels, regulation at the local level will create an unacceptable patchwork of regulations within service areas.<sup>62</sup>

As a regulatory strategy, the indirect or ad hoc regulation of powerline EMF is undesirable because it is both underinclusive and overinclusive in effect. It is underinclusive because it promotes no comprehensive way to evaluate the health effects of EMF.<sup>63</sup> Tort litigation and property condemnations are inadequate ways to shape EMF policy because science and law meet in limited factual contexts.<sup>64</sup> If the judicial branch of government is relied upon as the primary means to protect society from EMF, potential adverse health effects may go unchecked.<sup>65</sup>

The process is overinclusive because courts, in some jurisdictions, will consider evidence of the mere fear of adverse health effects to avoid awarding damages for partial takings for utility easements. If the fear is objectively unreasonable, utilities will be forced to spread costs benefitting a very small

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<sup>58</sup> Freeman, *supra* note 36, at 22.

<sup>59</sup> Depending on the court and the evidentiary standard used, evidence of EMF fear may or may not be admissible to determine property values after a taking. Where evidence of fear is admissible, awards will be inconsistent due to the lack of evidentiary standards.

<sup>60</sup> Wisconsin Pub. Serv. Corp. v. Town of Sevastopol, 105 Pub. Util. Rep. 4th (PUR) 45, 46 (1989).

<sup>61</sup> *Id.*

<sup>62</sup> See Radford, *Zoning Ordinances Seek Local Control Over Electric Transmission Lines*, PUB. UTIL. FORT. 4 (Oct. 12, 1989).

<sup>63</sup> See F. CROSS, ENVIRONMENTALLY INDUCED CANCER AND THE LAW: RISKS, REGULATION, AND VICTIM COMPENSATION 159-60 (1989).

<sup>64</sup> *Id.* at 196.

<sup>65</sup> *Id.* at 199.

number of people over an entire system. Even if the fear of EMF is objectively reasonable, ratepayers would absorb the cost of compensating individuals for diminished property values due to the perception, and not the proof, of risk from EMF.

Due to the unsatisfactory nature of indirect regulation, regulatory alternatives should be considered. The science of EMF and its interaction with the human body does not lend itself to any single type of health or environmental hazard regulation. Therefore, this article presents overviews of three models of hazard regulation and applies them to the specific case of EMF. The advantages of each are discussed and a hybrid model of EMF regulation is presented.

### *Three Models of Hazard Regulation*

Three existing models of hazard regulation are relevant to the regulation of power line EMF: new chemical screening, standard-setting, and spatial control of hazards through floodplain regulations.

#### 1. New Chemical Screening to Regulate Hazards

##### The Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) was passed by Congress and signed by President Ford in 1976.<sup>66</sup> TSCA was enacted to fill perceived gaps in the environmental regulatory scheme, and it created a system for evaluating the health and environmental effects of all new chemical substances introduced in the United States.<sup>67</sup> The Act also authorized the Environmental Protection Agency (EPA) to list and study the health and environmental effects of existing chemicals.<sup>68</sup>

The premanufacture notification (PMN) program is the heart of the "screening" component of TSCA.<sup>69</sup> A manufacturer must notify the EPA of any new chemical that it intends to produce.<sup>70</sup> The

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<sup>66</sup> M. WOROBEC & G. ORDWAY, TOXIC SUBSTANCES CONTROLS GUIDE: FEDERAL REGULATION OF CHEMICALS IN THE ENVIRONMENT 13 (1989); Pub. L. No. 94-469 (codified as amended at 15 U.S.C. §§ 2601-2671 (1988)).

<sup>67</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 13-17.

<sup>68</sup> *Id.* at 17. For example, before TSCA was passed, the contamination of lake and river sediment by polychlorinated biphenyls (PCBs) could not be regulated effectively under the existing laws. Although adverse health effects from PCB exposure had been documented, PCBs could only be regulated through limited control of workplaces, drinking water, and air emissions. Exposure from contaminated food and fish and through direct contact remained uncontrolled. TSCA filled this gap with a specific ban on PCBs and a dual program of screening new chemicals and gathering information on existing chemicals. *Id.* at 15.

<sup>69</sup> See Premanufacture Notification, 40 C.F.R. § 720 (1990).

<sup>70</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 18-19; 40 C.F.R. § 720.22 (1990). The notice must include the product name, chemical identity, production levels, proposed use, method of disposal, levels of workplace exposure, by-products, test data on health and environmental effects available from the manufacturer, and a description of ascertainable test data. M. WOROBEC & G. ORDWAY, *supra* note

EPA then publishes a notice in the *Federal Register*,<sup>71</sup> announcing receipt of the PMN and setting a ninety day review period.<sup>72</sup> The agency reviews available data during the ninety day period and, if no concerns are raised, production may begin.<sup>73</sup>

Other than specific bans on PCBs and chloroflourocarbons, TSCA regulates hazardous situations rather than specific substances.<sup>74</sup> The EPA is given authority to determine whether "there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance . . . presents or will present an unreasonable risk of injury to health or environment . . . ."<sup>75</sup> Thus, highly toxic substances used in a tightly controlled system may be acceptable, while less toxic substances that jeopardize health or the environment only after decades of use may be regulated.<sup>76</sup> The EPA must weigh these risks against the economic and societal benefits of a substance's use and consider whether alternatives to regulation are available.<sup>77</sup> Finally, the costs and problems posed by regulation itself must be considered.<sup>78</sup>

The crucial issue in screening regulations such as the PMN program of TSCA is determining "how high to set the standard of proof that an [industry must] meet to show that their products are not too risky."<sup>79</sup> If the standard is set too high, some worthwhile, or at least benign, products will never be produced.<sup>80</sup> If the standard is set too low, some "hazardous products will be approved."<sup>81</sup>

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66, at 66; 40 C.F.R. § 720.45, .50.

<sup>71</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 20; 40 C.F.R. § 720.70 (1990).

<sup>72</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 20; 40 C.F.R. § 720.75 (1990).

<sup>73</sup> 40 C.F.R. § 720.75(d) (1990). If questions arise concerning a substance, the EPA may extend the review period for another ninety days, or suspend the deadline until more data is collected. *Id.* at § 720.75. Beyond the review period, the agency may prevent the manufacture of a new chemical that poses a health or environmental risk by issuing an order or seeking a court injunction limiting or prohibiting manufacture until more information is obtained, or by banning manufacture of the substance through rulemaking on the grounds that it poses an unreasonable risk. A court injunction may be obtained to bar manufacture pending the outcome of the rulemaking. M. WOROBEC & G. ORDWAY, *supra* note 66, at 21-22.

<sup>74</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 16.

<sup>75</sup> 15 U.S.C. § 2604(f) (1988); M. WOROBEC & G. ORDWAY, *supra* note 66, at 16.

<sup>76</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 16-17.

<sup>77</sup> *Id.* at 17.

<sup>78</sup> *Id.*

<sup>79</sup> J. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA* 7 (1988).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

## The Federal Food, Drug, and Cosmetic Act

The Federal Food, Drug, and Cosmetic Act (FFDCA)<sup>82</sup> requires, *inter alia*, that food ingredients and additives to food, drugs, and cosmetics be proven safe before use and that manufacturers prove the safety and effectiveness of new drugs.<sup>83</sup> The Act also "establishes procedure[s] for setting safety limits for pesticide residue on raw agricultural commodities" and "ban[s] the intentional addition to food of substances known to cause cancer in animals."<sup>84</sup> FFDCA is a screening type of chemical control law, similar to the premanufacture notice provisions of TSCA, in that the safety of food additives, coloring agents, and new drugs must be approved before marketing.<sup>85</sup> The Food and Drug Administration administers and enforces the Act.<sup>86</sup>

## Applying a New Chemical Screening Model to EMF Regulation

EMF is different from the typical chemical substance regulated by new chemical screening programs. First, EMF is not a manufactured product; it is a physical phenomenon. Some manmade products and devices create EMF, but EMF itself is not a manufactured product. Second, EMF is already found throughout the environment. Thus, EMF does not lend itself to new chemical screening models of regulation such as TSCA or the FFDCA.

Despite these differences, several aspects of new chemical screening are relevant to EMF regulation. First, screening new sources of EMF would serve a registration or cataloging function, similar to the purposes of toxics registration under TSCA. Second, EMF screening would serve an important notice function. Just as the public is served by the disclosure of food additives, the public would also be served by notice of the existence of EMF and how to avoid it or minimize its potential effects.

## 2. Setting Standards to Regulate Hazards

### The Standard-Setting Component of TSCA

Under TSCA, the EPA may set standards for chemical substances already in use.<sup>87</sup> Industry testing may be required in either of two circumstances:

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<sup>82</sup> 21 U.S.C. §§ 301-393 (1988).

<sup>83</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 68.

<sup>84</sup> *Id.* at 68.

<sup>85</sup> *Id.* at 69-70.

<sup>86</sup> *Id.* at 66.

<sup>87</sup> M. WOROBEC & G. ORDWAY, *supra* note 66, at 23; 15 U.S.C. § 2603(a) (1988).

- a) If a chemical may pose an unreasonable risk to health or the environment and there are insufficient test data on the substance to evaluate its effects, [or]
- (b) If a chemical produced in large volumes could enter the environment in substantial quantities or be in contact with humans in significant amounts and there are insufficient test data on the substance to evaluate its effects.<sup>88</sup>

Before testing is required, however, the agency must propose a rule and show that existing data is inadequate to evaluate risk, and that more testing is needed.<sup>89</sup> Once testing is required, the EPA must specify the scope, standards, and time periods for the testing of the specific chemical.<sup>90</sup> The testing may include evaluation of chemical persistence in the environment and ecological effects.<sup>91</sup>

#### The Standard-Setting Component of the Occupational Safety and Health Act

The Occupational Safety and Health Act (OSH Act)<sup>92</sup> creates a system of standard setting, recordkeeping, and reporting to promote "safe and healthful working conditions."<sup>93</sup> Among other things, the OSH Act authorizes the Occupational Safety and Health Administration (OSHA) to monitor workplace use of chemicals through exposure guidelines and standards designed to minimize adverse health effects from worker exposure to harmful substances.<sup>94</sup>

OSHA is responsible for promulgating four main types of health and safety standards, including general industry standards, and standards for the construction, maritime, and agriculture sectors.<sup>95</sup> Specific limits and conditions for use and exposure to chemicals in the workplace are found within the toxic and hazardous substance category of the general industry standards.<sup>96</sup> Standards are established through notice and comment rulemaking.

Before a standard regulating the use and exposure to a toxic substance may be issued, OSHA must show that the standard is "reasonably necessary and appropriate to remedy a significant risk of material health impairment."<sup>97</sup> To support a standard that tends toward "error on the side of

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<sup>88</sup> *Id.*

<sup>89</sup> M. WOROBEK & G. ORDWAY, *supra* note 66, at 24; 15 U.S.C. § 2603(a) (1988).

<sup>90</sup> M. WOROBEK & G. ORDWAY, *supra* note 66, at 24; 15 U.S.C. § 2603(b).

<sup>91</sup> M. WOROBEK & G. ORDWAY, *supra* note 66, at 24.

<sup>92</sup> 29 U.S.C. §§ 651-678 (1988).

<sup>93</sup> 29 U.S.C. § 651(b); M. WOROBEK & G. ORDWAY, *supra* note 66, at 81-82.

<sup>94</sup> M. WOROBEK & G. ORDWAY, *supra* note 66, at 79.

<sup>95</sup> *Id.* at 83.

<sup>96</sup> *See* 29 C.F.R. § 1910, Subpart Z (1990).

<sup>97</sup> *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.* 448 U.S. 607, 639 (1980).

overprotection," the agency must be able to cite a "body of reputable scientific thought."<sup>98</sup> Any standard must also be "feasible", meaning "capable of being done, executed, or effected."<sup>99</sup>

Standard-setting regulation places the burden of proving hazard risk on the proponent of regulation.<sup>100</sup> In most cases, the proponent will be a government agency.<sup>101</sup> In contrast, new chemical screening programs place the burden of proof on the producer of the new chemical, which must establish that the new product does not pose significant or unreasonable risks.<sup>102</sup> In both models of regulation, however, the burden of proof rests with the party arguing to change the status quo.

#### Applying a Standard-Setting Model to EMF

On its face, a standard-setting model of regulation appears to be appropriate for EMF regulation. Since power line EMF is capable of measurement, field intensity standards for new power lines could be established. Just as the regulations promulgated under TSCA and the OSH Act set standards for production and use of existing chemicals, a rulemaking process could establish field intensity standards for existing power line EMF.

At least two problems emerge under a standard-setting model of power line EMF regulation. First, standards would be difficult and expensive to enforce. Since EMF cannot be seen and fields must be measured individually, compliance with a field intensity standard would require considerable time and labor. Furthermore, modification of existing power lines to achieve compliance with a new field intensity standard would be difficult. Electricity is unlike a product that may taken out of commerce and replaced with an equivalent.

Second, any EMF standard would be arbitrary in effect. A standard with a relatively high tolerance for power line EMF exposure would have virtually no effect on the use of existing power lines.<sup>103</sup> A standard with a low tolerance for EMF exposure would instantly affect many existing power lines;<sup>104</sup> electrical service might have to be curtailed drastically to reduce EMF and achieve compliance.

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<sup>98</sup> *Id.* at 656.

<sup>99</sup> *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508-09 (1981) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 831 (1976)).

<sup>100</sup> J. MENDELOFF, *supra* note 79, at 6-7.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 6.

<sup>103</sup> *Id.* at 7 (discussing the problem of strictness of individual standards).

<sup>104</sup> *Id.*

Assuming that service reductions are an unacceptable solution to EMF exposure, setting standards for existing power line EMF exposure is a limited solution. A more flexible model is needed to respond to the question of existing power line EMF.

### 3. Spatial Regulation of Hazards

#### Floodplain Regulation

Floodplains are the "low and generally flat land areas adjoining a body of water that often floods or has the potential of flooding."<sup>105</sup> Floodplain regulations are spatial land use controls that minimize damage to people and property and aim to restrict land development in floodplains.<sup>106</sup> Development in floodplain areas not only poses a hazard in and of itself, but may also increase flood hazards downstream by reducing the ability of the floodplain to absorb flood waters.<sup>107</sup> The legal justification for restrictive floodplain regulations therefore lies in the connection between land development and flood hazards.<sup>108</sup>

Determining what level of flooding will be regulated is an economic, social, and political assessment of acceptable risk. Development in floodplains is often regulated to the 100 year frequency line.<sup>109</sup> Since the specific timing and magnitude of floods cannot always be predicted with certainty, the regulations reflect "prudent avoidance": development is restricted in areas with a certain level of flood risk. The regulations are somewhat overinclusive, however, in that property development is restricted in areas that flood very rarely. At the same time, the regulations are somewhat underinclusive in that society is not protected from certain substantial, but infrequent risks.<sup>110</sup>

In response to the overinclusive/underinclusive nature of floodplain regulations and the problem of existing development in floodplain areas, insurance schemes have been adopted to complement the

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<sup>105</sup> M. SCHULTZ & V. KASEN, *ENCYCLOPEDIA OF COMMUNITY PLANNING AND ENVIRONMENTAL MANAGEMENT* 154 (1984).

<sup>106</sup> D. MANDELKER, *LAND USE LAW* 457 (2d ed. 1988). The regulations often distinguish the floodway from the flood fringe. The floodway is the part of a channel that carries deep and swift-moving water, and which must remain unobstructed by development. The flood fringe holds shallow and slow-moving water. Development in the flood fringe may be allowed if certain building requirements are met. *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See L. MALONE, *ENVIRONMENTAL REGULATION OF LAND USE* § 7.02[1] (1990). Notwithstanding federal floodplain laws that require state compliance, see 42 U.S.C. § 4001-4128 (1988), the decision to regulate to the 100 line is ultimately a determination that the risk from floods more frequent than the 100 year event is not acceptable, while the risk from floods less frequent than the 100 year event is acceptable.

<sup>110</sup> This is exacerbated by the problem of existing development in floodplain areas, where people and property are at high risks from frequent flooding.

regulations. The National Flood Insurance Program<sup>111</sup> provides insurance for property owners in flood-prone areas if their communities have met federal requirements for controlling development and minimizing flood damages.<sup>112</sup> The program reflects the legislative finding that private flood insurance is not readily available, and that individual hardships from flooding can be great, despite the existence of regulations.<sup>113</sup>

#### Applying a Floodplain Model to Power Line EMF

Floodplains are similar to power line EMF in that both have a spatial component. Just as certain land areas are subject to flooding, EMF occurs in certain places and not in others. Like floodplains, power line EMF lends itself to spatial controls on the proximity of nearby land development.

A policy of prudent avoidance of power line EMF would operate in a similar fashion to floodplain controls. Land development would be restricted within areas of a certain magnitude of adverse health effects risk. The regulatory challenge would lie in finding the analogy to the 100 year flood: determining what is an acceptable risk and thus how close other land uses may encroach on areas of power line EMF. In the words of one group of authors, it is "the articulation of a clear definition of what constitutes a 'significant risk worth regulating.'"<sup>114</sup>

Regulating EMF through prudent avoidance would only be a partial solution, however. As with floodplains, the problem of compensating for damages incurred despite the regulations must be addressed. To accomplish the twin goals of regulation and compensation, a comprehensive approach is necessary.

#### *A Comprehensive Approach to EMF Regulation*

As this article demonstrates, EMF is not regulated in a comprehensive way at any level of government.<sup>115</sup> The federal government has not adopted legislation or regulated EMF, several states have adopted electromagnetic field strength limitation regulations,<sup>116</sup> and a few local governments have

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<sup>111</sup> 42 U.S.C. §§ 4001-4128 (1988).

<sup>112</sup> *Id.* § 4001(e); L. MALONE, *supra* note 109, § 7.02[1].

<sup>113</sup> L. MALONE, *supra* note 109, § 7.01.

<sup>114</sup> Cross, Byrd & Lave, *Discernible Risk - A Proposed Standard for Significant Risk in Carcinogen Regulation*, 43 ADMIN. L. REV. 61, 61 (1991).

<sup>115</sup> See *supra* notes 56-65 and accompanying text.

<sup>116</sup> See *supra* notes 41-42 and accompanying text.

attempted to block or restrict power line development due to fear of EMF.<sup>117</sup> In addition, courts have taken varied approaches to the admissibility of "fear evidence" in property condemnation cases.<sup>118</sup> Virginia is thus in a position similar to most other states with respect to the regulation of EMF; it writes on a clean slate.

A comprehensive approach to the question of EMF regulation would begin at the national level with commitment to EMF research<sup>119</sup> and legislation authorizing state regulation of EMF. Since better information is crucial to resolution of the EMF health effects question, further research is essential.<sup>120</sup> In addition to conducting its own research, a federal agency such as the Environmental Protection Agency could also serve as a clearinghouse for all privately funded research on the subject,<sup>121</sup> as well as state-sponsored research.<sup>122</sup>

### 1. New Sources of EMF

At the state level, power line EMF regulation could begin with a screening program for all

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<sup>117</sup> See *supra* notes 45-48 and accompanying text.

<sup>118</sup> See *supra* notes 33-40 and accompanying text.

<sup>119</sup> The United States House of Representatives requested that \$750,000 of the EPA's fiscal 1991 budget be devoted to EMF research. *Congressman George Brown Succeeds in Funding Electromagnetic Field Research*, *Business Wire*, Oct. 31, 1990. A bill in the U.S. House of Representatives in May 1990 proposed:

to develop and implement a comprehensive study of the potential human health effects of electric and magnetic fields, to evaluate whether improved engineering designs of electricity delivery systems to residences and workplaces will reduce potential health risks posed by electric and magnetic fields, and to establish a comprehensive public information dissemination program on issues related to electric and magnetic fields.

H.R. 4801, 101st Cong., 2d Sess. (1990).

<sup>120</sup> Better information is important not only for resolution of scientific questions, but also for public education. Public Service and Electric and Gas Company of New Jersey recently ran an "informational advertising" campaign to further their customers' understanding of EMF, current research, and the utility's position on the issue. *"Advertorial" Education Campaign Deals with EMF*, *PUB. UTIL. FORT.* 10-11 (Aug. 2, 1990).

<sup>121</sup> The Electric Power Research Institute has spent \$25 million on EMF research. *Electric Light & Power*, Oct. 1990, at 36. A substantial amount of privately funded research is underway. See, e.g., Blakeslee, *Electric Currents and Leukemia Show Puzzling Links in New Study*, *N.Y. Times*, Feb. 8, 1991, at A16, col. 5 (concerning the preliminary results of an Electric Power Research Institute study); Wilson, *Utilities to Study Electric Fields*, *Newsday*, Jan. 29, 1991, at 63 (concerning \$20 million to \$30 million EMF research project proposed by New York Power Authority and other large public utilities).

<sup>122</sup> In Virginia, for example, a House Joint Resolution was introduced in 1990 to "[e]stablish a joint subcommittee to study the effects of exposure to electromagnetic fields." H.R.J. Res. 37, 1990 Va. Gen. Assembly (1990).

proposed electric power lines.<sup>123</sup> Land development would be precluded within a certain distance of any proposed power line based upon a strategy of prudent avoidance and the best available scientific evidence of health effects for that particular type of power line. The burden would be on the utility proponent to show that no unreasonable health risks are posed by development up to the proposed line of encroachment. To promote conformity and efficiency, local governments would be preempted from adopting any laws or regulations not in conformance with state laws or regulations.

## 2. Existing Sources of EMF

The regulation of existing sources of power line EMF is a more difficult problem. Regulations adopting a prudent avoidance strategy with development setbacks from power lines would be extremely expensive to implement where land development is already located within the prohibited zone of EMF. In these situations, either the power line or the development would have to move. Residential relocation costs would be high, and disruption of electric service would be both expensive and undesirable. Thus, prudent avoidance is not a workable solution to the problem of existing sources of power line EMF that may pose a health risk.

One solution to the problem of potential adverse health effects from existing sources of EMF can be found in a new rule of tort liability for future health effects. One commentator has proposed that tort liability rules should be changed to allow recovery for the future risk of cancer.<sup>124</sup> If a plaintiff can establish a defendant's liability for creating a future risk of cancer, the plaintiff would be entitled to damages in the amount of "the present value (cost) of the future risk, discounted by its probability."<sup>125</sup>

The actual cost to utility defendants would be far less than the sum of all the possible adverse health effects. By focusing on the future harm and its probability of occurrence, the defendant could compensate the plaintiff merely for the cost to insure against the health effect.<sup>126</sup> If the market for insurance functions properly, the cost of the insurance would reflect the approximate probability of the

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<sup>123</sup> A screening form of regulation such as the premanufacture notification program of TSCA would be appropriate. *See supra* notes 69-78 and accompanying text.

<sup>124</sup> F. CROSS, ENVIRONMENTALLY INDUCED CANCER, *supra* note 63, at 208-13. "[A] plaintiff could sue as soon as he or she became aware of a material risk of cancer resulting from the liable actions of another. The case would turn on whether the defendant's actions improperly caused a risk of future cancer rather than whether those actions caused an actual cancer." *Id.* at 209.

<sup>125</sup> *Id.* at 209. Medical surveillance costs, emotional damages, and punitive damages would also be available. *Id.*

<sup>126</sup> *Id.* at 209-10.

health effect, discounted for the period of latency.<sup>127</sup> Thus, the defendant utility would pay to insure against the risk of health effects from power line EMF, instead of paying to relocate those same people to avoid the potential consequences of the EMF.

A new tort liability rule is an important solution because it addresses the problem of scientific uncertainty and begins to answer the central problem posed by this article. Recovery for future health risks forces defendants to confront the existing scientific evidence and to internalize the discounted costs of compensating for future harms from EMF. This proposal does not require utility defendants to take the drastic measure of relocating people who are possibly at risk today, or curtailing the transmission of electricity. Rather, it proposes that utility defendants insure those people who can establish a legitimate risk of future harm, while scientists continue to investigate the relationship between EMF and the human body.

The model is flexible because it accommodates an evolving state of risk evidence. If science disproves a causal relationship between EMF and adverse health effects, insurance costs will decrease or evaporate in a well-functioning market. If science substantiates the current epidemiological evidence, insurance costs will increase and may ultimately force a more dramatic solution, such as relocation of people at risk or curtailment of electricity generation. Most importantly, this approach accommodates the present uncertainty of the scientific evidence and protects people at risk, without adopting drastic measures that may ultimately be unnecessary. Thus, the model avoids the harm of underregulation and avoids the waste of overregulation.

## CONCLUSION

Epidemiological evidence of adverse health effects from exposure to electromagnetic fields presents a difficult regulatory issue. Although a correlation has been demonstrated between proximity to EMF and adverse health effects, no research has established a direct causal relationship. The issue is similar to that confronted by agencies regulating hazards under TSCA and the FFDCA, in that the government must assess the hazards posed by uncertain risks. As applied to power line EMF, however, the existing regulatory models of new chemical screening and standard setting are inadequate to protect the public without overregulating or underregulating.

This article presents a framework for power line EMF regulation that reconciles the unique physical characteristics of EMF, the epidemiological evidence that EMF has an adverse effect on human

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<sup>127</sup> *Id.* at 209-11.

health, and the potentially high costs of regulating power line EMF. The approach that is presented suggests first that coordinated research at the national level is necessary to ensure the best possible information. The article also proposes that new power lines undergo a health effects review similar to the risk assessment of new chemical screening. Proponents of power line construction would have the burden of establishing that any proposed power line right-of-way is adequate to protect adjoining land uses from significant risk of adverse health effects from power line EMF.

Spatial regulations and "prudent avoidance" are not appropriate for existing power lines, however. The focus should instead be on compensation for potential harms due to EMF exposure. Tort plaintiffs would have the burden of establishing that exposure to a particular defendant's source of EMF posed a significant risk to their health. The defendant would be liable for the present value or cost to insure against the health consequences of the EMF. In this way, people at risk would be protected, and defendants would be spared the costs of overregulation due to inadequate information or fear. This approach accommodates the unique regulatory challenge of confronting a potential environmental hazard in the face of scientific uncertainty.

# VIRGINIA'S REFORM OF THE COMMON-LAW RULE AGAINST PERPETUITIES

Jonathan Belcher

## INTRODUCTION

A perpetuity is a future interest, created by way of an executory interest or remainder in real or personal property, that will not vest, "or will not necessarily vest," in either interest or possession within the time period set "by law for the creation of future interests."<sup>1</sup> Thus, the rule against perpetuities is a kind of statute of limitations that dictates the maximum length of time for the vesting of a contingent future interest.<sup>2</sup>

Probably no other aspect of property law causes as much difficulty for law students as the infamous rule against perpetuities. But this difficulty is not restricted to law students, and can be a potentially devastating and troublesome rule for the attorney in practice.<sup>3</sup> Indeed, it is often asserted that lawyers frequently ignore the rule against perpetuities and do not feel a need to concern themselves with it when drafting estate documents such as wills, deeds and trusts. This lack of concern has been largely attributed to the misunderstanding and confusion manifested towards the rule while in law school.<sup>4</sup> In reality, the Rule can and does pose a problem for the draftsman, even when statutory reforms have been enacted to lessen the harsh effects of the common-law rule, and a firm grasp of the rule is important.<sup>5</sup>

### *General Statement of the Rule*

The classical statement of the rule against perpetuities under the common law was set forth by

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<sup>1</sup> *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 403, 119 S.E. 89, 91 (1923).

<sup>2</sup> The rule against perpetuities originated from medieval English common law and was based on the judicial policy of discouraging restraints on alienation on land and personal property. The main elements of the classical common-law rule were laid down in *Duke of Norfolk's Case*, where Lord Nottingham sustained a contingent future interest because it was certain to vest or fail to vest within the perpetuities period. 3 Ch. Cas. 1 (1682).

<sup>3</sup> Professor Leach warns, as early as 1938, of the "traps" that the rule can lay for the draftsman. "Many perfectly reasonable dispositions are stricken down because on some outside chance not foreseen by the testator or his lawyer it is mathematically possible that the vesting might occur too remotely." Leach, *Perpetuities in a Nuisance*, 51 HARV. L. REV. 638, 643 (1938).

<sup>4</sup> Becker, *Estate Planning and the Reality of Perpetuities Problems Today: Reliance Upon Statutory Reform and Saving Clauses is Not Enough*, 64 WASH. U. L. Q. 287, 288-92 (1986).

<sup>5</sup> See generally *id.* at 365-78 (discussing various reasons why the attorney should not rely exclusively on reform legislation to validate the contingent future interest); Chaffin, *Reforming the Rule Against Perpetuities*, 24 GA. STATE BAR J. 62 (1987).

John Chipman Gray: "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest."<sup>6</sup> The Virginia rule against perpetuities is similar to Gray's statement of the classical rule, yet the time limit in which the interest must vest differs. The statement of the rule most often utilized by Virginia courts is:

The rule against perpetuities in Virginia voids a contingent remainder or executory interest, created *inter vivos* or by will, which may, by some possibility, however unlikely that possibility may be, vest beyond a life or lives in being at the effective date of the instrument creating the interest, plus 21 years and 10 months.<sup>7</sup>

Thus, the common-law rule against perpetuities in Virginia is concerned with the possible remoteness in vesting of contingent remainders and executory interests.

### *Reforming the Common-Law Rule*

In recent years, a large number of states have opted to reform the common-law rule against perpetuities in various manners. There are three basic methods of modifying the common-law rule: the "patching up" approach, *cy pres*, and the "wait-and-see" approach.<sup>8</sup>

Under the "patching up" approach, various statutory or judicial reforms are made to correct specific problems in the administration of the common-law rule.<sup>9</sup> Examples of these types of specific "patch" reforms are: age limitations upon which one is considered capable of having children (to remedy the "fertile octogenarian" problem under the common law), changes in the rule regarding the "all or nothing" nature of gifts to classes, and rules established to limit the time for completion of the administration of an estate (such as setting a reasonable time for the probate of a will to eliminate the "slothful executor" problem under the common-law rule).<sup>10</sup>

Under the doctrine of *cy pres*, "the limitations [in documents] which would violate the rule are redrafted or reformed [by the court] to conform to the intent of the settlor as nearly as possible without violating the rule."<sup>11</sup> One example of the use of judicial *cy pres* is the reduction of an age contingency

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<sup>6</sup> J. GRAY, *THE RULE AGAINST PERPETUITIES* 174 (3d ed. 1915).

<sup>7</sup> *Hagemann v. National Bank & Trust Co.*, 218 Va. 333, 337, 237 S.E.2d 388, 391 (1977). See also *Rose v. Rose*, 191 Va. 171, 179-80, 60 S.E.2d 45, 48 (1950); *Burruss v. Baldwin*, 199 Va. 883, 887, 103 S.E.2d 249, 252 (1958); *White v. National Bank and Trust Co.*, 212 Va. 568, 571, 186 S.E.2d 21, 23 (1972); *Austin v. Dobbins*, 219 Va. 930, 937, 252 S.E.2d 588, 592 (1979).

<sup>8</sup> E. HALBACK & E. SCOLES, *PROBLEMS AND MATERIALS ON FUTURE INTERESTS* 320 (1977).

<sup>9</sup> Maudsley, *Perpetuities: Reforming the Common-Law Rule--How to Wait and See*, 60 *CORNELL L. REV.* 355, 358 (1975).

<sup>10</sup> *Id.* at 358-59.

<sup>11</sup> R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 160 (1981).

in a devise from 25 to 21 so that the interest will not be violated by the common-law rule.<sup>12</sup> Some scholars argue that cy pres is the best method of reforming the common-law rule against perpetuities in that the doctrine effectively provides for the validation of otherwise invalid interests while preserving the probable intent of the testator.<sup>13</sup>

A substantial number of jurisdictions have adopted the "wait-and-see" approach. This approach was summarized in *United Virginia Bank/Citizens & Marine v. Union Oil Co of California*.<sup>14</sup>

Under [the wait-and-see] doctrine, the rule against perpetuities is determined to have been violated or not by taking into consideration events which occur after the period fixed by the rule has commenced. If, upon a later look, the event upon which an interest was made contingent is found to have occurred and the interest has vested or has become certain to vest within the period fixed by the rule, the rule is held not to have been violated.<sup>15</sup>

In states that have adopted "full" wait-and-see, all contingent future interests are tested for validity by what actually happens during the perpetuities period, not by what might happen.<sup>16</sup> A few states have adopted "limited" wait-and-see, which subjects only certain contingent future interests (such as future interests following life estates or trusts) to the wait-and-see test of actual events.<sup>17</sup>

A number of jurisdictions have adopted two or more of the three methods of reform, e.g., incorporating wait-and-see and then cy pres if the interest does not vest within the statutory time period.<sup>18</sup> Virginia's own choice of reform came in 1982 when the legislature adopted Virginia Code Section 55-13.3, a full-scale wait-and-see approach with limited cy pres for donative transfers.<sup>19</sup> Virginia's reform

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<sup>12</sup> *Carter v. Berry*, 243 Miss. 321, \_\_\_, 140 So.2d 843, 855-56 (1962); L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* 275-76 (2d ed. 1966).

<sup>13</sup> According to Maudsley, cy pres is a favorable means by which courts may rectify mistakes made by the testator's attorney. Maudsley, *supra* note 9, at 360. Approximately fifteen states have adopted some form of cy pres. See *infra* note 104.

<sup>14</sup> *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 197 S.E.2d 174 (1973).

<sup>15</sup> *Id.* at 53, 197 S.E.2d at 177-78.

<sup>16</sup> Chaffin, *supra* note 5, at 63.

<sup>17</sup> Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1882-83 n.49 (1986). This article provides an excellent review of the status of perpetuities law nationwide. Dukeminier also provides insightful examples and a list of jurisdictions that have adopted wait-and-see as of 1986.

<sup>18</sup> *Id.* at 1899. Wait-and-see, followed by cy pres, is the choice of reform adopted by the Restatement. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4 comment a, 1.5 (1983). Maudsley suggests that the optimum "choice of method of reform is the application first of a wait-and-see provision with the cy pres power in reserve, to be applied at the end of the perpetuity period." Maudsley, *supra* note 9 at 361. In a reply to Maudsley's article, Samuel M. Fetters suggested that the entire concept of wait-and-see, and perhaps other reforms, should be abolished in favor of a straight rendition of the common-law rule. Fetters, *Perpetuities: The Wait-and-See Disaster--A Brief Reply to Professor Maudsley, with a Few Asides to Professor Leach, Simes, Wade, Dr. Morris, Et al.*, 60 CORNELL L. REV. 380, 414-15 (1975).

<sup>19</sup> VA. CODE ANN. § 55-13.3 (1986).

modifies the harsh effects of the rule against perpetuities by determining the validity of contingent future interests in light of events that actually happen.<sup>20</sup>

#### THE COMMON-LAW RULE IN VIRGINIA

Mastery of the common-law rule against perpetuities is necessary to understand the effects of the wait-and-see perpetuity reforms in Virginia. Even though wait-and-see may temporarily "save" an interest, every contingent future interest should be drafted to avoid a perpetuities violation. Given the potential for real problems to occur, "compliance with the common-law rule offers a far better solution than mere reliance upon actual vesting, if 'wait-and-see' is available, or upon saving clauses generally."<sup>21</sup>

Prior to the adoption of the wait-and-see reforms in 1982, Virginia applied the rule against perpetuities in a manner similar to most other jurisdictions.<sup>22</sup> The Virginia common-law rule against perpetuities, however, differs from Gray's general statement of the rule in one rather unique aspect.<sup>23</sup> Gray's general statement of the rule sets a period of lives in being plus 21 years, a period that has been almost universally adopted.<sup>24</sup> In contrast, Virginia courts add ten months to the vesting period and, "the limitations . . . must all vest in interest, if at all, during the life or lives in being, and ten months and 21 years thereafter."<sup>25</sup>

Several arguments have been suggested to explain Virginia's addition of ten months to the standard 21 years after some life or lives in being. First, the ten months may have been added to allow for a period of gestation.<sup>26</sup> However, the 21 years plus ten months language is also used in cases where

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<sup>20</sup> Berryhill, *Property*, 21 U. RICH. L. REV. 821, 832 n.65 (1987).

<sup>21</sup> Becker, *supra* note 4, at 294-95.

<sup>22</sup> Note, *The Rule Against Perpetuities in Virginia*, 41 VA. L. REV. 842, 842 (1955). This note, which was written in 1955, prior to Virginia's enactment of wait-and-see reforms, is one of the few that specifically addresses the development of the common-law rule against perpetuities in Virginia.

<sup>23</sup> See *supra* notes 6-7 and accompanying text.

<sup>24</sup> Leach, *supra* note 3, at 639.

<sup>25</sup> Loyd v. Loyd, 102 Va. 519, 527, 46 S.E. 687, 689 (1904).

<sup>26</sup> The common-law rule against perpetuities included an actual period of gestation, so that any children who were conceived, but not yet born at the time of the creation of the future interest, could be used as measuring lives. "[A] person who is conceived and unborn is deemed to be in existence for all purposes of the rule." T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 187 (2d ed. 1984). The period of gestation allowed under the common-law rule was traditionally nine months. Note, *supra* note 22, at 847.

it is impossible for a period of gestation to exist.<sup>27</sup> Second, the 1950 version of Virginia Code Section 55-13 stated that "death without heirs, issue, etc., means death without any heirs, issue, etc., living or born within ten months of the death of the person taking the interest."<sup>28</sup> This provision merely set the maximum period of gestation at a fixed ten months, and did not authorize arbitrarily extending the statutory period of 21 years by ten months "when there [is] no actual period of gestation of a measuring life or of a person receiving an interest."<sup>29</sup>

Furthermore, Virginia's addition of the ten months period may merely be a departure from English precedent. Until 1833, it was uncertain whether the perpetuities period included *actual* periods of gestation or an in gross period of nine or ten months. In the English case of *Cadell v. Palmer*,<sup>30</sup> the court decided that only actual periods of gestation could be allowed. It is at least arguable that nineteenth-century Virginia courts and legislatures, like those in its sister state Kentucky, found the *Cadell* decision unpersuasive and declined to follow it, opting instead to adopt the ten months in gross concept. Finally, Virginia courts may have never bothered to read the *Cadell* decision. Through continued precedential usage, the ten months became part of Virginia's general statement of the rule, even in cases where gestational periods did not apply.<sup>31</sup> Thus, a grant in Virginia must vest or fail to vest, if at all, within a life or lives in being plus 21 years and ten months.<sup>32</sup>

In other respects, Virginia's application of the common-law rule against perpetuities has not differed from the application of the rule in most other jurisdictions. Virginia has, however, shown a great deference toward charitable gifts, often attempting to save invalid charitable gifts on public policy grounds.<sup>33</sup> Virginia courts may validate otherwise invalid charitable gifts through the cy pres statute

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<sup>27</sup> Note, *supra* note 22, at 848. See *Layne v. Henderson*, 232 Va. 332, 351 S.E.2d 18 (1986) (which applied the 21 years and ten months statutory period to a real property option to purchase contract).

<sup>28</sup> Note, *supra* note 22, at 848 (construing V.A. CODE ANN. § 55-13 (1950)).

<sup>29</sup> *Id.*

<sup>30</sup> 1 Cl. & Fin. 372 (1833). See also Dukeminier, *Kentucky Perpetuities Law Restated and Reformed*, 49 Ky. L.J. 3 (1960). Kentucky's subscription to the 21 years and ten months language is equally as murky. As Professor Dukeminier, drafter of Kentucky's wait-and-see statute wrote, "Why the 1852 revisers added 'and ten months' to the common law period is unknown. . . . Whether 'and ten months' meant a period of actual gestation or a futher period in gross has never been decided by the [Kentucky] Court of Appeals, and since the statute has been repealed, probably never will be." Dukeminier, *supra*, at 10-11.

<sup>31</sup> See *Lake of the Woods Ass'n, Inc. v. McHugh*, 238 Va. 1, 4-5, 380 S.E.2d 872, 873 (1989) (applying the rule against perpetuities to a right of first refusal).

<sup>32</sup> *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 51, 197 S.E.2d 174, 177 (1973).

<sup>33</sup> Note, *supra* note 22, at 856.

enacted in 1946.<sup>34</sup> Before the court will use cy pres to alter an invalid gift, however, it must be substantially certain that the gift was intended for charitable purposes.<sup>35</sup> The courts will not use cy pres to save invalid private trusts or convert private trusts into charitable trusts in order to evade the rule against perpetuities.<sup>36</sup>

#### *Requirement of "Vesting"*

Prior to Virginia's adoption of wait-and-see in 1982, the Commonwealth followed other jurisdictions which subscribed to the common-law rule against perpetuities: an interest must vest or fail to vest within the perpetuities period or be stricken as void *ab initio*.<sup>37</sup> Thus, the future interest was void as remote if, upon its creation, there was a possibility that the interest might not take effect during lives in being plus 21 years and ten months, despite a high probability or a near certainty that the interest would become effective within the prescribed time.<sup>38</sup>

As in other jurisdictions, the following future interests are subject to the rule against perpetuities in Virginia: executory interests,<sup>39</sup> contingent remainders,<sup>40</sup> option agreements,<sup>41</sup> and rights of first refusal.<sup>42</sup> The rule against perpetuities does not apply to interests which are considered "vested". These "vested" interests include vested remainders, possibilities of reverter,<sup>43</sup> and powers of termination (rights of re-entry for condition broken).<sup>44</sup> In determining whether a future interest will "vest" or fail to vest within lives

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<sup>34</sup> VA. CODE ANN. § 55-31 (1986). See Reynolds, *Racially Discriminatory Trusts & the Cy Pres Doctrine in Virginia*, 19 COL. LAW. 161 (1990) for a discussion of the application of the cy pres doctrine to racially discriminatory trusts in Virginia.

<sup>35</sup> *Massanetta Springs v. Keezell*, 161 Va. 532, 542, 171 S.E. 511, 514 (1933).

<sup>36</sup> *Shenandoah Valley Nat'l Bank v. Taylor*, 192 Va. 135, 149, 63 S.E.2d 786, 795 (1951). The Supreme Court of Virginia reiterated this point by refusing to use its cy pres power to save an invalid option agreement in *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 52, 197 S.E.2d 174, 177 (1973). The Court restated this position in *Hagemann v. National Bank & Trust Co.*, 218 Va. 333, 339 n.2, 237 S.E.2d 388, 392 n.2 (1977).

<sup>37</sup> *Lake of the Woods Ass'n, Inc. v. McHugh*, 238 Va. 1, 4-5, 380 S.E.2d 872, 873 (1989).

<sup>38</sup> *Burruss v. Baldwin*, 199 Va. 883, 887, 103 S.E.2d 249, 252 (1958); *Griffith v. Thomson*, 28 Va. (Leigh) 321 (1829); *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 403, 119 S.E. 89, 90 (1923); *Austin v. Dobbins*, 219 Va. 930, 937, 252 S.E.2d 588, 592 (1979).

<sup>39</sup> See *Claiborne v. Wilson*, 168 Va. 469, 192 S.E. 585 (1937).

<sup>40</sup> See *Smith v. Chapman*, 11 Va. (1 Hen. & M.) 240 (1807).

<sup>41</sup> See *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 119 S.E. 89 (1923).

<sup>42</sup> See *Lake of the Woods Assoc., Inc. v. McHugh*, 238 Va. 1, 380 S.E.2d 872 (1989).

<sup>43</sup> *Leach*, *supra* note 3, at 647.

<sup>44</sup> GRAY, *supra* note 6, at 288.

in being plus 21 years and ten months, the decision-maker must first determine whose life is the measuring life that will determine the validity of the interest.<sup>45</sup>

*Ascertaining the "Measuring Lives"*

The question most often raised when ascertaining the validity of a questionable future interest is: Who are the measuring lives? In applying the rule against perpetuities, it is absolutely critical that this question be answered correctly.<sup>46</sup> This holds true because the rule is a rule of logical proof, requiring us to find some life or lives in being during which, or 21 years and ten months after the death of which, the interest in question will either vest or fail to vest.<sup>47</sup> The measuring life is the person or persons from whom the interest will or will not be validated.<sup>48</sup> If no measuring life can be found during which the interest will vest or fail, then the interest must vest or fail within 21 years and ten months after its creation.<sup>49</sup>

The measuring life must be a person or a class of persons who are alive at the time of the creation of the interest.<sup>50</sup> If the grant is made by an irrevocable inter vivos deed or trust, then the measuring life must be in being at the time of the conveyance.<sup>51</sup> If the interest is created by a will, then the measuring life must be alive at the testator's death.<sup>52</sup> If the interest is created by a revocable trust, the period begins upon the death of the settlor, unless the settlor surrenders his right to revoke at a time prior to his death, in which case the period begins at the time of surrender.<sup>53</sup>

Logically, the measuring life will be found only among persons who can affect the vesting of

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<sup>45</sup> Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1648 (1985).

<sup>46</sup> *Id.* at 1648, 1650.

<sup>47</sup> Dukeminier, *supra* note 17, at 1870.

<sup>48</sup> *Id.* at 1873; Dukeminier, *supra* note 45, at 1650.

<sup>49</sup> *United Va. Bank/Citizens and Marine v. Union Oil*, 214 Va. 48, 51-52, 197 S.E.2d 174, 177 (1973). Common cases where no measuring life can be found are those dealing with option agreements and rights of first refusal created between corporations. *Lake of the Woods Ass'n, Inc. v. McHugh*, 238 Va. 1, 5, 380 S.E.2d 872, 873 (1989). Since a corporation is a nonhuman, fictitious entity, normally with an indefinite duration, a corporation cannot be said to be a "life in being" for purposes of the rule against perpetuities. In such cases, where "the parties do not contract with reference to a life or lives in being," a gross term of 21 years is the determinative period. *Id.*

<sup>50</sup> Leach, *supra* note 3, at 641.

<sup>51</sup> T. BERGIN & P. HASKELL, *supra* note 26, at 181.

<sup>52</sup> *Id.* Bergin and Haskell's preface provides an excellent overview of the common-law rule against perpetuities as found in most jurisdictions.

<sup>53</sup> VA. CODE ANN. § 55-13.2 (1986).

the interest. People who are completely unrelated to the vesting of the interest are irrelevant and should be excluded from the list of possible measuring lives.<sup>54</sup> Furthermore, the measuring life need not be expressly mentioned in the instrument and may be determined by implication.<sup>55</sup> The measuring lives must also be reasonable in number, so that evidence of their deaths may be readily obtained.<sup>56</sup> For purposes of the rule, periods of gestation are allowed so that persons may be used as measuring lives even though they were unborn, but conceived, at the time of the creation of the interest.<sup>57</sup> Dukeminier suggests that the measuring life or lives (or those "persons who can affect vesting"), which must be in being at the creation of the interest, will be found among the following group of people: (1) "a beneficiary or beneficiaries of the contingent interest;" (2) "a person who can affect the identity of the beneficiary or beneficiaries (such as A in a gift to A's children);" and (3) "a person who can affect any condition precedent attached to the gift . . . ."<sup>58</sup>

Once a list of possible measuring lives is compiled, the contingent future interest should be tested to see if it will either vest or fail to vest during the life or within twenty-one years and ten months after the death of any of the possible measuring lives.<sup>59</sup> If it can be said that the interest will necessarily vest or fail within the life or within 21 years and ten months after the death of any person or class of persons on the list, then that person or class may be used as the measuring life/lives and the interest is valid under the common-law rule against perpetuities.<sup>60</sup> If there is any possibility, however remote, that the interest will vest or fail to vest beyond 21 years and ten months after the death of all of the people on

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<sup>54</sup> Dukeminier, *supra* note 17, at 1873. See also Dukeminier, *Wait-and-See: The Causal Relationship Principle*, 102 L.Q. REV. 250, 251-54 (1986). But see Waggoner, *Perpetuities: A Perspective on Wait-And-See*, 85 COLUMBIA L. REV. 1714 (1985).

<sup>55</sup> Leach, *supra* note 3, at 641. For example, in a devise to "my grandchildren who shall reach the age of 21," the testator's children can be used as measuring lives by implication even though they were not expressly mentioned. In this example, the gift to the grandchildren would be valid since they will necessarily reach age 21 within 21 years and ten months after the death of their parents, who are the measuring lives. *Id.*

<sup>56</sup> GRAY, *supra* note 6, at 193; T. BERGIN & P. HASKELL, *supra* note 26, at 183. A class of 120 people will likely represent the outer limit of the number of permissible measuring lives. T. BERGIN & P. HASKELL, *id.*, at 184.

<sup>57</sup> Note, *supra* note 22, at 847. See also *Otterback v. Bohrer*, 87 Va. 548, 12 S.E. 1013 (1891). In *Otterback*, the testator devised land, "until the youngest child of all my said children shall have attained the age of 21 years," to a trustee to apply the net proceeds to his grandchildren's education, with orders to divide the land when the youngest child reached age 21. *Id.* at 549-50, 12 S.E. at 1014. The court held that the gift was valid and the testator had not exceeded "lives in being, and the utmost period of gestation, and [21] years thereafter." *Id.* at 552, 12 S.E. at 1014.

<sup>58</sup> Dukeminier, *supra* note 17, at 1875.

<sup>59</sup> *Id.* at 1874.

<sup>60</sup> *Id.* at 1873; see *White v. National Bank & Trust Co.*, 212 Va. 568, 571, 186 S.E.2d 21, 23 (1972).

the list, then it is void *ab initio* under the common-law rule.<sup>61</sup>

#### *Effect of Violating the Common-Law Rule*

The effect of finding an interest void under the common-law rule is to strike out the interest, as if it had never been placed in the instrument.<sup>62</sup> Once it is stricken, the other interests created in the instrument take effect as if the void interest had never been written.<sup>63</sup>

### VIRGINIA'S WAIT-AND-SEE REFORMS

In 1982, Virginia adopted a full-scale "wait-and-see" reform of the common-law rule against perpetuities.<sup>64</sup> Part A of Virginia Code Section 55-13.3 now provides that "a transfer of an interest in property fails, if the interest does not vest, if it ever vests, within the period of the rule against perpetuities."<sup>65</sup> Thus, with the adoption of Section 55-13.3, contingent future interests are to be judged according to events that actually happen, not by what might happen.<sup>66</sup>

#### *Retroactive Application of "Wait-and-See"*

Virginia's wait-and-see statute was made retroactive, applying to all interests that were created before the enactment of the statute, except where reliance upon the common-law rule occurred when creating the interest.<sup>67</sup> Recently, however, the Supreme Court of Virginia, in *Lake of the Woods Association v. McHugh*,<sup>68</sup> refused to apply the wait-and-see statute retroactively on the grounds that to do so would destroy a vested property interest and would substantially alter substantive rights.<sup>69</sup> The Court

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<sup>61</sup> *Skeen v. Clinchfield Coal Corp.*, 137 Va. 397, 403, 119 S.E. 89, 90 (1923); *Burruss v. Baldwin*, 199 Va. 883, 887, 103 S.E.2d 249, 252 (1958).

<sup>62</sup> *Leach*, *supra* note 3, at 656.

<sup>63</sup> *Id.*

<sup>64</sup> VA. CODE ANN. § 55-13.3 (1986).

<sup>65</sup> *Id.* § 55-13.3(A) (1986).

<sup>66</sup> *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463 n.2, 331 S.E.2d 399, 402 n.2 (1985).

<sup>67</sup> VA. CODE ANN. § 55-13.3(D) (1986).

<sup>68</sup> 238 Va. 1, 380 S.E.2d 872 (1989).

<sup>69</sup> *Id.* at 9, 380 S.E.2d at 876. In *Lake of the Woods*, a complaint was filed by a lot owner (the Jameses) against their neighbor (the Burts) on the grounds that they had failed to offer to sell their lot to them pursuant to a right of first refusal contained in the subdivision restrictions. *Id.* at 4, 380 S.E.2d at 873. The trial court granted summary judgment for the Burts. The Virginia Supreme Court affirmed, holding that rights of first refusal were subject to the rule against perpetuities, but that

stated that it "is unwilling to . . . permit the destruction of vested or substantive rights by retroactive application of [the wait-and-see] legislation."<sup>70</sup> In these cases, the interest must necessarily comply with the common-law rule against perpetuities or be stricken *ab initio*.<sup>71</sup> The effect of the ruling is to declare retroactive application of the wait-and-see statute unconstitutional, at least where substantive rights would be altered. In so doing, the Court revived the common-law rule for purposes of interests which were created prior to the statute's adoption on July 1, 1982.<sup>72</sup>

#### *Exception for Charities*

Charities may be excepted from Virginia's wait-and-see statute. In cases where a gift to a charity has not vested, even after the wait-and-see period has run, the gift will still be held valid if it operates to "divest a valid interest in another charity."<sup>73</sup> If the interest does not divest an interest in another charity, and cy pres is not used to modify the donation, the interest is invalid if it has not vested within the perpetuities period.<sup>74</sup>

#### *The "Wait-and-See" Test of Actual Events*

The goal of Virginia's wait-and-see statute is to modify the harshness of the common-law rule against perpetuities. The modified rule examines the validity of contingent future interests on the basis of whether they do in fact vest or fail to vest within the period of the rule. This approach is based

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retroactive application of Virginia's wait-and-see statute to the preemptive right in this case was improper. The Court reasoned that to do so would destroy the Burts vested property interest in conveying their lot to whomever they desired. The Supreme Court of Virginia then applied the common-law rule against perpetuities to the right of first refusal and determined that the right was void. *Id.* at 7-9, 380 S.E.2d at 875-76.

<sup>70</sup> *Id.* at 9, 380 S.E.2d at 876. The Virginia Supreme Court has refused to retroactively apply other legislation that would destroy substantive rights: *City of Norfolk v. Kohler*, 234 Va. 341, 345, 362 S.E.2d 894, 896 (1987) (rights of city employees are guaranteed in the city's charter) and *Rotunda Condominium Unit Owner's Ass'n v. Rotunda Assocs.*, 238 Va. 85, 89, 380 S.E.2d 876, 879 (1989) (statute making the condominium association the attorney-in-fact of individual condominium owners). These two cases were cited along with others by the Court in support of its refusal to retroactively apply Virginia's wait-and-see statute, section 55-13.3. *Lake of the Woods*, 238 Va. at 8-9, 380 S.E.2d at 875-76.

<sup>71</sup> *Lake of the Woods Ass'n, Inc. v. McHugh*, 238 Va. 1, 8-9, 380 S.E.2d 872, 875 (1989). See also *BERGIN & HASKELL*, *supra* note 26, at 221.

<sup>72</sup> Although the Supreme Court of Virginia found that this application of Code Section 55-13.3 was unconstitutional, other states have found retroactive application of wait-and-see statutes to be constitutional. See, e.g., *Henderson v. Millis*, 373 N.W.2d 497 (Iowa 1985); *In re Frank*, 480 Pa. 116, 389 A.2d 536 (1978).

<sup>73</sup> VA. CODE ANN. § 55-13.3(C) (1986).

<sup>74</sup> *Id.* See also *supra* pp. 5-6.

upon actual events, rather than a determination of whether there exists a remote possibility that the interests might not vest in time.<sup>75</sup> The idea of adopting wait-and-see in Virginia was suggested as early as 1973, when the Supreme Court of Virginia was urged to judicially adopt the theory.<sup>76</sup> At that time, the Court refused to adopt wait-and-see and continued to apply the common-law rule.<sup>77</sup> The Court reiterated its position in 1977, stating that "absent statutory mandate," the Court would continue to reject the wait-and-see doctrine and abide by the common-law rule.<sup>78</sup> This statutory mandate came, however, in 1982, when Virginia joined almost half of the American states, as well as Great Britain, in adopting wait-and-see.<sup>79</sup>

The policy motivations underlying adoption of wait-and-see reformation of the common-law rule are compelling. By giving the interest a chance to vest, wait-and-see not only preserves the probable intent of the creator of the interest, but also operates to save interests that would automatically have been rendered invalid because of some circumstance unforeseen by the attorney who drafted the instrument.<sup>80</sup> Wait-and-see reforms appear to eliminate much of the harshness of the common-law rule that lays "traps" for even the most competent attorney. Adoption of wait-and-see, however, does not assure the validity of every interest. "Therefore, the good draftsman continues to draft as if the rule in traditional form were still in force, regardless of the fact that a reform version of the rule has been enacted in his jurisdiction."<sup>81</sup> Virginia's wait-and-see reform has the effect of adding a third step to the common-law rule.<sup>82</sup> The first step under the common law was to compile a list of possible measuring lives.<sup>83</sup> The second step was to test the interest with each of the possible measuring lives to see if it would vest or

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<sup>75</sup> *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463 n.2, 331 S.E.2d 399, 402 n.2 (1985); T. BERGIN & P. HASKELL, *supra* note 26, at 213.

<sup>76</sup> *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 53, 197 S.E.2d 174, 177 (1973).

<sup>77</sup> *Id.* at 53-54, 197 S.E.2d at 178.

<sup>78</sup> *Hagemann v. National Bank & Trust Co.*, 218 Va. 333, 339, 237 S.E.2d 388, 392 (1977).

<sup>79</sup> *Dukeminier*, *supra* note 45, at 1655; VA. CODE ANN. § 55-13.3 (1986).

<sup>80</sup> *Maudsley*, *supra* note 9, at 361. *Dukeminier*, *supra* note 45, at 1656, suggests that large attorney malpractice judgments for drafting provisions that violated the common-law rule against perpetuities has been a strong motivation for reformation of the Rule. Professor Chaffin concurs on this point. *Chaffin*, *supra* note 5, at 62.

<sup>81</sup> E. HALBACK & E. SCOLES, *supra* note 8, at 321.

<sup>82</sup> *Dukeminier*, *supra* note 45, at 1654.

<sup>83</sup> *Id.* at 1650.

fail to vest within 21 years and ten months after the person's death.<sup>84</sup> If the interest must necessarily vest within that time period, then the interest is valid and neither the rule against perpetuities nor the wait-and-see doctrine apply since the interest is considered "vested."<sup>85</sup> However, if no measuring life can be found that will validate the interest, then Virginia's wait-and-see statute adds the third step: to "wait and see" whether the interest actually vests during any of the possible lives in being plus 21 years and ten months.<sup>86</sup> If the interest actually vests during this period, then the disposition is valid.<sup>87</sup> However, if the interest neither vests nor fails to vest within the wait-and-see period, then it is invalid unless there is a donative transfer, in which case the court could use cy pres to validate the disposition.<sup>88</sup>

#### *The "Measuring Lives" Under Wait-and-See*

The most important question under the wait-and-see statute is: During which lives does the decision-maker "wait and see"? Dukeminier suggests waiting out only those lives in being that are causally related to the vesting--the same lives in being used under the common-law rule.<sup>89</sup> Applying this approach, the lives in being at the time of creation that affect the vesting of the interest in some way are the ones that determine the length of the wait-and-see period.<sup>90</sup> As a result, any life in being at the creation of the interest that can affect its vesting, either in interest or possession, may be used as a measuring life under wait-and-see.<sup>91</sup> Once the causally related lives in being are identified, they may be placed on a list of hypothetical measuring lives. This list dictates the length of time during which the decision-maker "waits and sees."<sup>92</sup> If the contingent interest actually vests during any of the lives on the

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<sup>84</sup> *Id.*

<sup>85</sup> See *Shirley v. Van Every*, 159 Va. 762, 776-77, 167 S.E. 345, 350 (1933).

<sup>86</sup> Dukeminier, *supra* note 45, at 1656. See *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 53, 197 S.E.2d 174, 178 (1973).

<sup>87</sup> *Lake of the Woods Ass'n v. McHugh*, 238 Va. 1, 7, 380 S.E.2d 872, 875 (1989); *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463 n.2, 331 S.E.2d 399, 402 n.2 (1985); Dukeminier, *supra* note 45, at 1648.

<sup>88</sup> VA. CODE ANN. § 55-13.3(A) (1986). See *infra* pp. 14-15 for a discussion of cy pres in Virginia.

<sup>89</sup> Dukeminier, *supra* note 45, at 1648.

<sup>90</sup> *Id.*; T. BERGEN & P. HASKELL, *supra* note 26, at 215-16. Dukeminier states that "if you do not find a validating life from among the causally-related lives you wait-and-see what happens within those lives." Dukeminier, *supra* note 45, at 255.

<sup>91</sup> Dukeminier, *supra* note 45, at 1660. See *infra* pp. 6-7 regarding the common-law rule for the list of lives that can affect the vesting of an interest.

<sup>92</sup> Dukeminier, *supra* note 45, at 1662

list, or within 21 years and ten months after the death of the last person on the list, then the interest will be valid. If the interest has not vested during that time, then it is void.<sup>93</sup> If no measuring lives are found, as in the case of an option agreement between corporations, then the wait-and-see is a gross period of 21 years in which the interest must vest.<sup>94</sup>

Although Virginia is one of the states that has not explicitly mandated that the causal relationship principle be used in determining measuring lives for wait-and-see purposes, Leach, Dukeminier, and other scholars find that the principle is inherent in wait-and-see and need not be expressly set forth by statute.<sup>95</sup> A few states have expressly stated that the causal relationship principle is to be used.<sup>96</sup> Given the fact that the causal relationship test can be applied "easily and accurately" in every case, it seems to be the simplest method for ascertaining the measuring lives for wait-and-see purposes.<sup>97</sup>

The Restatement and other authorities have suggested an alternative approach to ascertaining measuring lives for wait-and-see purposes: develop a set list of people who may be measuring lives.<sup>98</sup> However, as Dukeminier points out, the list espoused by the Restatement may "churn up several or many or hundreds of ascertainable persons" in any given circumstance, a situation that may prove unworkable and time consuming.<sup>99</sup> As the policy of the rule against perpetuities is to curtail the "dead hand", it may be more appropriate to limit the measuring lives to only those that are causally related to vesting.<sup>100</sup>

As of this date, no cases applying the new wait-and-see statute have come before the Supreme Court of Virginia. No such interest has yet been validated by the Virginia Supreme Court under wait-and-see. Of the cases decided since the wait-and-see reform, the Court has refused to retroactively apply the statute, even though retroactive application is expressly authorized in Section 55-13.3.<sup>101</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463, 331 S.E.2d 399, 402 (1985); *United Va. Bank/Citizens & Marine v. Union Oil Co.*, 214 Va. 48, 51, 197 S.E.2d 174, 177 (1973).

<sup>95</sup> Dukeminier, *supra* note 45, at 1657; Morris & Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 497-99 (1964).

<sup>96</sup> Dukeminier, *supra* note 45, at 1658 n.29. See ALASKA STAT. § 34.27.010 (Supp. 1990); KY. REV. STAT. § 381.216 (Michie 1970); NEV. REV. STAT. ANN. § 111.103 (Michie 1986); N.M. STAT. ANN. § 47-1-17.1 (Supp. 1990); R.I. GEN. LAWS § 34-11-38 (1984).

<sup>97</sup> Dukeminier, *supra* note 45, at 1648.

<sup>98</sup> *Id.* at 1675; RESTATEMENT (SECOND) OF PROPERTY § 1.3(2) (1983). Professor Maudsley also suggests developing a statutory list of measuring lives. See Maudsley, *supra* note 9, at 366-78.

<sup>99</sup> Dukeminier, *supra* note 45, at 1710.

<sup>100</sup> *Id.* at 1710-11.

<sup>101</sup> VA. CODE ANN. § 55-13.3 (1986). See *Lake of the Woods Ass'n v. McHugh*, 238 Va. 1, 380 S.E.2d 872 (1989). See also *Layne v. Henderson*, 232 Va. 332, 351 S.E.2d 18 (1986) (holding wait-and-see statute inapplicable because case at hand was in litigation at the time of the statute's

Therefore, it now appears that the Virginia Court is only willing to apply wait-and-see to contingent interests created after the statute's passage on July 1, 1982.

### CY PRES DOCTRINE IN VIRGINIA

In addition to its adoption of wait-and-see reformation of the common-law rule against perpetuities, Virginia has enacted limited cy pres power for donative transfers. Virginia Code Section 55-13.3(b) provides:

If under a donative transfer an interest in property fails because it does not vest or cannot vest within the period of the rule against perpetuities, the transferred property shall be disposed of in the manner which most closely effectuates the transferor's manifested plan of distribution, which is within the limits of the rule against perpetuities.<sup>102</sup>

Cy pres allows the court to modify a void donative transfer in order to make it comply with the rule against perpetuities, in terms which closely approximate the intent of the grantor.<sup>103</sup>

While the cy pres doctrine has been adopted in at least fifteen states in some form, it should be noted that Virginia has only adopted cy pres for *donative transfers*.<sup>104</sup> The court is only authorized to use cy pres to alter bequests and other gifts so as to make them comply with the rule against perpetuities. All other non-donative transfers must vest or fail within the period allowed under wait-and-see or be stricken as void.<sup>105</sup>

The 1982 enactment of limited cy pres for donative transfers was not the first use of the doctrine in Virginia. Since 1946, Virginia has had a cy pres statute for charitable trusts which authorized the court to carry out the benevolent intent of the settlor by modifying an invalid charitable trust so as to make it comply with the rule against perpetuities.<sup>106</sup> At least, however, where private or non-charitable transfers were involved, the Court refused to use the 1946 cy pres statute to "alter an agreement so as

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enactment).

<sup>102</sup> VA. CODE ANN. § 55-13.3(B) (1986).

<sup>103</sup> Maudsley, *supra* note 9, at 360.

<sup>104</sup> VA. CODE ANN. § 55-13 (1988). The following states have enacted cy pres: ALASKA STAT. § 34.27.010 (Supp. 1990); CAL. CIV. CODE § 715.5 (West 1982); IDAHO CODE § 55-111 (1988); IOWA CODE ANN. § 558.68 (Supp. 1990); KY. REV. STAT. § 381.216 (Michie 1970); OHIO REV. CODE ANN. § 2131.08(c) (1990); MO. ANN. STAT. § 442.555 (Vernon 1986); OKLA. STAT. ANN. tit. 60, § 75-78 (West Supp. 1991); PA. CONS. STAT. ANN. tit. 20, § 6105 (Purdon Supp. 1991); R.I. GEN. LAWS § 34-11-38 (1984); VT. STAT. ANN. tit. 27, § 501 (1989); WASH. REV. CODE ANN. § 11.98.150 (1987).

<sup>105</sup> VA. CODE ANN. § 55-13.3(A) (1986).

<sup>106</sup> Shenandoah Valley Nat'l Bank v. Taylor, 192 Va. 135, 148-49, 63 S.E.2d 786, 794 (1951); Note, *supra* note 22, at 856-57.

to evade the rule against perpetuities."<sup>107</sup>

With the adoption of limited cy pres in 1982, it would appear that Virginia courts now have explicit authorization to modify all invalid donative transfers in order to make them comply with the rule against perpetuities. The proper time for applying cy pres to a donative transfer violative of the rule against perpetuities may depend "upon the happenstance--or the tactical choice--of the time at which the question is presented to the court."<sup>108</sup> In some states, cy pres may only be applied upon the expiration of the wait-and-see period.<sup>109</sup> In other jurisdictions, including Virginia, it is presumably at the discretion of the court to determine the best time to use cy pres in modifying a transfer.<sup>110</sup> To date, however, the Supreme Court of Virginia has not decided any cases where the new limited cy pres was used to modify an invalid donative transfer.

#### A METHODOLOGY FOR SOLVING PERPETUITIES PROBLEMS IN VIRGINIA

In determining whether an interest is void under the rule against perpetuities in Virginia, the following analysis may prove helpful:

**1. Does the rule against perpetuities apply to the future interest in question?**

(a) If the interest is an executory interest, contingent remainder, option agreement, or right of first refusal, then the rule applies.

(b) If the interest is vested (e.g. a vested remainder, possibility of reverter, or power of termination), then the rule does not apply.

(c) If the interest is in a charity which operates to divest a valid interest in another charity, then the rule against perpetuities does not apply and the interest is valid.

**2. Is the contingent interest valid under the common-law rule against perpetuities? That is, will the interest necessarily vest or fail to vest within lives in being plus 21 years and ten months?<sup>111</sup>**

(a) Compile a list of lives in being at the time of the creation of the interest which are causally related to the vesting.

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<sup>107</sup> *United Va. Bank v. Union Oil*, 214 Va. 48, 52, 197 S.E.2d 174, 177 (1973); *see* *Shenandoah Nat'l Bank v. Taylor*, 192 Va. 135, 149, 63 S.E.2d 786, 794 (1951); *Hagemann v. Nat'l Bank & Trust Co.*, 218 Va. 333, 339 n.2, 237 S.E.2d 388, 392 n.2 (1977).

<sup>108</sup> *Maudsley*, *supra* note 9, at 361.

<sup>109</sup> *Id.* at 360.

<sup>110</sup> *Id.* at 360-61. Virginia Code Section 55-13.3(B) authorizes the use of cy pres for a donative transfer that "does not vest or cannot vest." VA. CODE ANN. § 55-13.3(B) (1986). The words "cannot vest" would seem to indicate that if it is clear that the interest will not vest, then cy pres may be applied before the wait-and-see period begins to run.

<sup>111</sup> If the interest is of the type where no lives in being can be found, as in an option agreement between corporations, then the interest must vest or fail within a gross period of twenty-one years. *Ryland Group, Inc. v. Wills*, 229 Va. 459, 463, 331 S.E.2d 399, 402 (1985). *See supra* note 49 for a more detailed discussion.

(b) Test the interest in question against each candidate on the list to see if the interest will vest or fail to vest within the 21 years and ten months.

1. If the interest must necessarily vest or fail, then there exists a measuring life that validates the interest. The interest is valid.

2. If there is any remote possibility that the interest will not vest or fail, then the interest is void under the common-law rule, and wait-and-see must be applied.

**3. Is the interest valid under wait-and-see reform legislation?**

(a) "Wait and see" until all of the causally related lives in being are dead. If the interest vests or fails to vest before 21 years and ten months after the death of the last life in being on the list, then the interest is valid.

(b) If the interest has not vested after the death of all of the candidates plus 21 years and ten months, then the interest is void, unless cy pres may be applied.

**4. May the interest be reformed and saved through the court's cy pres power?<sup>112</sup>**

(a) If the interest was created by a donative transfer, then the interest may be reformed and saved by the court using cy pres. If the transfer was not donative, then cy pres may not be used.

**CONCLUSION: HINTS FOR THE DRAFTSMAN**

Virginia's enactment of wait-and-see reformation of the common-law rule against perpetuities, followed by a limited cy pres power for donative transfers, may go a long way towards eliminating the harshness of the common-law rule. Virginia's reform legislation operates to effectuate the probable intent of the grantor, while also protecting the practicing attorney by validating contingent interests which could otherwise be voided by some remote possibility unforeseen when drafting the instrument. However, most scholars agree that such reforms do not allow the attorney to completely disregard the common-law rule against perpetuities, since wait-and-see only gives invalid interests a "chance" to vest. Wait-and-see does not guarantee that any interest will vest; it only makes it more likely. Therefore, when drafting instruments which contain contingent future interests, attorneys should continue to draft with the aim of compliance with the common-law rule against perpetuities; the contingent interest must vest or fail within lives in being plus 21 years and ten months. This is the safest way to ensure that all interests will vest or fail to vest, eliminating the need to "wait and see" for the statutory time period.

Furthermore, a clear understanding of the common-law rule is essential to comprehending how to apply the wait-and-see and cy pres doctrines. Given this need, and the fact that all instruments should

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<sup>112</sup> There is some uncertainty as to when the interest could be reformed by the court using cy pres. Some jurisdictions feel that cy pres may only be applied upon the expiration of the wait-and-see period. Scholars such as Maudsley seem to think that it is at the court's discretion as to when to apply cy pres, even allowing its application prior to the expiration of the wait-and-see period. See *supra* notes 108-10 and accompanying text.

be drafted to comply with the common-law rule, the common-law rule will continue to be important in Virginia. This is especially true considering that the Supreme Court of Virginia has refused to retroactively apply the wait-and-see statute and has instead adhered to the common-law rule regarding interests created prior to the enactment of wait-and-see in 1982.

Nevertheless, Virginia's enactment of perpetuities reform marks a new era for the law of future interests in the state. Whether this era will be one of confusion or clarity remains to be seen, although many scholars think that Virginia's choice of reforms may be the best way to alleviate the problems of the common-law rule against perpetuities.

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

Anne D. Bowling  
James W. Reynolds

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,<sup>1</sup> and the Virginia Tort Claims Act.<sup>2</sup> 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

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<sup>1</sup> VA. CODE ANN. §§ 8.01-581.1 to -581.20 (1984 & Supp. 1990).

<sup>2</sup> 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."<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> This increase was caused by the frequency of malpractice claims and the high amount of damages being sought.<sup>6</sup>

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.<sup>7</sup> In order to remedy the situation, the General Assembly passed the Virginia Medical Malpractice Act in 1976.<sup>8</sup>

#### *Overview of the Medical Malpractice Act*

The Medical Malpractice Act<sup>9</sup> 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,<sup>10</sup> statute of limitations tolling,<sup>11</sup> a medical claim review panel,<sup>12</sup> and a cap on recovery.<sup>13</sup>

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<sup>3</sup> H.R.J. Res. 174, 1975 Va. Gen. Assembly 1478 (1975).

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> 1976 Va. Acts ch. 611.

<sup>9</sup> VA. CODE ANN. §§ 8.01-581.1 to -581.20 (1984 & Supp. 1990).

<sup>10</sup> *See id.* § 8.01-581.2(A) (Supp. 1990).

<sup>11</sup> *See VA. CODE ANN.* § 8.01-581.9 (Supp. 1990).

<sup>12</sup> *See id.*

<sup>13</sup> *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.<sup>14</sup> 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.<sup>15</sup> The purposes of the medical review panel are primarily to facilitate settlement and prevent vexatious claims.<sup>16</sup> The Medical Malpractice Act also institutes a cap of one-million dollars on the recovery of all malpractice claims.<sup>17</sup>

#### *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.<sup>18</sup> A health care provider is a "person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services . . . ."<sup>19</sup> 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).<sup>20</sup>

*Richman v. National Health Laboratories, Inc.*<sup>21</sup> 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.

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<sup>14</sup> V.A. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>15</sup> *Id.*

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

<sup>17</sup> V.A. CODE ANN. § 8.01-581.15 (1984).

<sup>18</sup> *Stone & Hilton, Medical Malpractice: The Year in Review*, 23 U. RICH. L. REV. 731, 731 (1989).

<sup>19</sup> V.A. 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.*

<sup>20</sup> *See id.*

<sup>21</sup> 235 Va. 353, 367 S.E.2d 508 (1988).

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

Affirming the decision of the circuit court, the Virginia Supreme Court found that the Richman's suit was barred by the statute of limitations.<sup>24</sup> 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<sup>25</sup> found in the Act could be applied.<sup>26</sup> 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.<sup>27</sup> Furthermore, clinical laboratories are not specifically included in the Code's list of persons and facilities protected.<sup>28</sup> 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.<sup>29</sup>

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 health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement."<sup>30</sup> 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."<sup>31</sup>

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<sup>22</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>23</sup> *Richman*, 235 Va. at 355-56, 367 S.E.2d at 510.

<sup>24</sup> *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").

<sup>25</sup> See VA. CODE ANN. § 8.01-581.9 (Supp. 1990). See *infra* notes 63-76 (discussing tolling provisions).

<sup>26</sup> *Richman*, 235 Va. at 359, 367 S.E.2d at 512.

<sup>27</sup> *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).

<sup>28</sup> *Id.* at 357, 367 S.E.2d at 511 (citing VA. CODE ANN. § 8.01-581.1 (1977 & Supp. 1987)).

<sup>29</sup> *Id.* at 358, 367 S.E.2d at 511.

<sup>30</sup> VA. CODE ANN. § 8.01-581.1 (Supp. 1990).

<sup>31</sup> *Id.*

## *Notice of the Malpractice Claim*

### 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.<sup>32</sup> "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."<sup>33</sup> Once again, a health care provider must be licensed in Virginia to provide health care services.<sup>34</sup> The notice of claim is vitally important because it activates a ninety-day period in which the plaintiff cannot file suit<sup>35</sup> and tolling provisions for the statute of limitations.<sup>36</sup>

The notification must be written and include "the time of the alleged malpractice and a reasonable description of the act or acts of malpractice."<sup>37</sup> In *Grubbs v. Rawls*,<sup>38</sup> 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."<sup>39</sup> 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."<sup>40</sup>

In *Grubbs*, the notice of claims referred to the doctors' "negligent treatment and surgery of the . . . patient while under [their] care."<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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<sup>32</sup> *Id.* § 8.01-581.2(A) (Supp. 1990).

<sup>33</sup> Stone & Hilton, *supra* note 18 at 734 (citing VA. CODE ANN. § 8.01-581.2 (1984 & Supp. 1989)).

<sup>34</sup> *Id.* at 735 (citing VA. CODE ANN. § 8.01-581.1 (1984 & Supp. 1989)).

<sup>35</sup> *Id.* at 737 (citing VA. CODE ANN. § 8.01-581.2 (1984 & Supp. 1989)).

<sup>36</sup> *Id.* (citing VA. CODE ANN. § 8.01-581.9 (1984 & Supp. 1989)). *See infra* notes 63-76 and accompanying text (discussing tolling provisions).

<sup>37</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>38</sup> 235 Va. 607, 369 S.E.2d 683 (1988).

<sup>39</sup> *Id.* at 614, 369 S.E.2d at 687.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 614, 369 S.E.2d at 688.

In *Hudson v. Surgical Specialists, Inc.*,<sup>44</sup> 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.<sup>45</sup> 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."<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> If the notice is not sufficient to identify the case, however, the defendant may request notice that meets the above requirements.<sup>49</sup>

## 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.<sup>50</sup> Once the notice of claim is sent by certified or registered mail,<sup>51</sup> 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

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<sup>44</sup> 239 Va. 101, 387 S.E.2d 750 (1990).

<sup>45</sup> *Id.* at 106, 387 S.E.2d at 753.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 106-07, 387 S.E.2d at 753.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 107, 387 S.E.2d at 753.

<sup>50</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>51</sup> *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.<sup>52</sup> The claimant must wait ninety days, after giving notice to the health care provider, before he can file an action on the alleged malpractice.<sup>53</sup> If a medical malpractice review panel is requested, no action can be brought during the period of the panel's review.<sup>54</sup>

In *Glisson v. Loxley*,<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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."<sup>60</sup>

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<sup>52</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>53</sup> *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).

<sup>54</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>55</sup> 235 Va. 62, 366 S.E.2d 68 (1988).

<sup>56</sup> *Id.* at 64, 366 S.E.2d at 69 (citing VA. CODE ANN. § 8.01-581.2(A) (1984)).

<sup>57</sup> *Id.* at 67, 366 S.E.2d at 71.

<sup>58</sup> VA. CODE ANN. § 8.01-581.2(D) (Supp. 1990).

<sup>59</sup> *Id.*

<sup>60</sup> *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."<sup>61</sup> 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.<sup>62</sup>

The Medical Malpractice Act, however, provides for tolling the statute of limitations in malpractice suits against health care providers covered by the Act.<sup>63</sup> 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."<sup>64</sup> "This provision is intended to avoid unfairness to the plaintiff who must wait ninety days after giving notice of claim to file suit."<sup>65</sup>

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.<sup>66</sup> If the requesting party decides to rescind the request for a medical review panel,<sup>67</sup> or when the Chief Justice of the Supreme Court gives notice of his

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<sup>61</sup> *Id.* § 8.01-243(A), (C) (Supp. 1990).

<sup>62</sup> *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)).

<sup>63</sup> VA. CODE ANN. § 8.01-581.9 (Supp. 1990).

<sup>64</sup> *Id.*

<sup>65</sup> Stone & Hilton, *supra* note 18, at 732.

<sup>66</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>67</sup> *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,<sup>68</sup> the statute of limitations will be tolled for sixty days following the giving of such notice.<sup>69</sup>

*Dye v. Staley*<sup>70</sup> 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.<sup>71</sup> 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,<sup>72</sup> and the plaintiff filed a notice of claim, the statute of limitations was tolled for 120 days.<sup>73</sup> 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.<sup>74</sup> Once the 120-day toll period following the notice of claim terminated on July 19, 1980, the statute of limitations resumed running.<sup>75</sup> Therefore, the plaintiff had filed her action with 105 days remaining on the limitation period.<sup>76</sup>

#### *The Medical Malpractice Review Panel*

##### 1. Composition of the Panel

The medical review panel consists of two impartial attorneys and two impartial health care providers who are "licensed and actively practicing their professions in the Commonwealth . . . ."<sup>77</sup> An "impartial attorney" is an attorney who has not represented the claimant or the health care provider, or

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<sup>68</sup> *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).

<sup>69</sup> *Id.* § 8.01-581.2(A) (Supp. 1990).

<sup>70</sup> 226 Va. 15, 307 S.E.2d 237 (1983).

<sup>71</sup> *Id.* at 17, 307 S.E.2d at 238.

<sup>72</sup> *See* VA. CODE ANN. § 8.01-581.1 (Supp. 1990).

<sup>73</sup> *Dye*, 226 Va. at 18, 307 S.E.2d at 239 (citing VA. CODE ANN. § 8.01-581.9).

<sup>74</sup> *Id.* at 18, 307 S.E.2d at 239.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> VA. CODE ANN. § 8.01-581.3 (Supp. 1990).

the family, partners, or business interest of either party.<sup>78</sup> 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.<sup>79</sup> Further, the health care provider cannot be an employee or partner of the defending health care provider.<sup>80</sup> Finally, the panel will have a sitting or retired judge of a circuit court acting as the chairman.<sup>81</sup> The chairman can only vote if it is necessary to break a tie.<sup>82</sup>

## 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.<sup>83</sup> Any discovery may be used in a subsequent civil proceeding based upon the same claim.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

## 3. Conduct of the Proceedings

A hearing before the panel will be allowed upon the request of either party.<sup>88</sup> Once the medical review panel is appointed, the respective parties must promptly submit their evidence, in written form,

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<sup>78</sup> *Id.* § 8.01-581.1 (Supp. 1990).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* § 8.01-581.3 (Supp. 1990).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* § 8.01-581.3:1 (Supp. 1990).

<sup>84</sup> *Id.* § 8.01-581.4 (Supp. 1990).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* § 8.01-581.5 (1984).

<sup>88</sup> *Id.* § 8.01-581.4 (Supp. 1990).

to each member of the panel.<sup>89</sup> During the hearing, witnesses will give testimony, if any, under oath.<sup>90</sup> The parties need not observe the rules of evidence,<sup>91</sup> they can be heard and cross-examined,<sup>92</sup> and subpoenas for attendance can be issued.<sup>93</sup> 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."<sup>94</sup>

#### 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.<sup>95</sup> Upon a showing of extraordinary circumstances, the chairman can extend this six month period, only once and not for a period exceeding ninety days.<sup>96</sup> 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.<sup>97</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* § 8.01-581.6(1) (Supp. 1990).

<sup>91</sup> *Id.* § 8.01-581.6(2) (Supp. 1990).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* § 8.01-581.6(3) (Supp. 1990).

<sup>94</sup> *Id.* § 8.01-581.6(5) (Supp. 1990).

<sup>95</sup> *Id.* § 8.01-581.7:1 (1984).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

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

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.<sup>101</sup> Furthermore, either party, at his own expense, can call as a witness any panel member, except the chairman.<sup>102</sup> In *Klarfeld v. Salisbury*,<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> Any question designed to test the probative value or credibility of the panel's opinion is valid.<sup>106</sup>

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<sup>98</sup> *Id.* § 8.01-581.7(A) (Supp. 1990).

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

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.

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

<sup>99</sup> *Id.* § 8.01-581.7(C) (Supp. 1990).

<sup>100</sup> *Id.*

<sup>101</sup> *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.

<sup>102</sup> VA. CODE ANN. § 8.01-581.8 (1984).

<sup>103</sup> 233 Va. 277, 355 S.E.2d 319 (1987).

<sup>104</sup> *Id.* at 279, 355 S.E.2d at 320.

<sup>105</sup> *Id.* at 285, 355 S.E.2d at 323.

<sup>106</sup> *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."<sup>107</sup> In *Etheridge v. Medical Center Hosps.*,<sup>108</sup> the one-million dollar cap on recovery was deemed fully constitutional.<sup>109</sup> 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.<sup>110</sup>

### *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 . . . ."<sup>111</sup> The standard of care in a locality, which differs from the state standard of care, may be used in certain circumstances.<sup>112</sup>

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

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<sup>107</sup> VA. CODE ANN. § 8.01-581.15 (1984).

<sup>108</sup> 237 Va. 87, 376 S.E.2d 525 (1989).

<sup>109</sup> *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.*

<sup>110</sup> 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.

<sup>111</sup> VA. CODE ANN. § 8.01-581.20(A) (Supp. 1990).

<sup>112</sup> *Id.*

[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.

*Id.*

standard of care in the specialty or field of medicine in which [they are] qualified and certified."<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

## THE VIRGINIA TORT CLAIMS ACT

### *Introduction*

The Virginia Tort Claims Act (the Act),<sup>116</sup> modeled upon the Federal Tort Claims Act,<sup>117</sup> 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.<sup>118</sup> It is also reflected in the Eleventh Amendment of the United States Constitution.<sup>119</sup> The doctrine protects the sovereign, or in the case of the United States, the government, from lawsuits brought against it by citizens.<sup>120</sup> Founded on the principle that "there can be no legal right as against the authority that makes

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 8.01-581.20(B) (Supp. 1990).

<sup>116</sup> *Id.* §§ 8.01-195.1 to -195.9 (1984 & Supp. 1990).

<sup>117</sup> 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).

<sup>118</sup> 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.*

<sup>119</sup> 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).

<sup>120</sup> BLACK'S LAW DICTIONARY 1396 (6th Ed. 1990).

the law on which the right depends,"<sup>121</sup> 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.<sup>122</sup>

In Virginia, state immunity from torts suits is part of the common law.<sup>123</sup> A suit against the Commonwealth may only be brought with the Commonwealth's permission, expressly set forth by statute.<sup>124</sup> 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.<sup>125</sup> Courts do not imply a waiver of this protection.<sup>126</sup>

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.<sup>127</sup> *Garguilo v. Ohar*<sup>128</sup>

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<sup>121</sup> *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1906).

<sup>122</sup> *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.

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

<sup>123</sup> 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).

<sup>124</sup> *Taylor v. Williams*, 78 Va. 422 (1884).

<sup>125</sup> *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).

<sup>126</sup> *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).

<sup>127</sup> *Virginia's Law of Sovereign Immunity: An Overview*, 12 U. RICH. L. REV. 429, 431 (1978) [hereinafter *Overview*].

<sup>128</sup> 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.<sup>129</sup> 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."<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup>

Sovereign immunity has been the subject of nationwide abrogation,<sup>133</sup> either through legislative enactments or judicial action.<sup>134</sup> Reasons for this trend are numerous, but they center around the idea that "negligence is negligence,"<sup>135</sup> 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."<sup>136</sup> 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.<sup>137</sup> Though the resulting report recommended that the doctrine be legislatively abolished in a number of cases,<sup>138</sup> the General Assembly did not pass the Tort Claims Act until 1981.

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

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 215, 387 S.E.2d at 791.

<sup>132</sup> *Overview*, *supra* note 127, at 433.

<sup>133</sup> *Taylor*, *supra* note 122, at 261-64.

<sup>134</sup> *Id.*

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

<sup>136</sup> *Taylor*, *supra* note 122, at 255.

<sup>137</sup> *Id.* at 264.

<sup>138</sup> 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,<sup>139</sup> and Section 195.2 sets forth the definitions of "state agency" and "state employee," as used in the Act.<sup>140</sup>

Section 8.01-195.3<sup>141</sup> 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.<sup>142</sup>

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.<sup>143</sup> 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.<sup>144</sup> 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."<sup>145</sup>

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.<sup>146</sup> If the amount of the claim is

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<sup>139</sup> VA. CODE ANN. § 8.01-195.1 (1984).

<sup>140</sup> 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.*

<sup>141</sup> VA. CODE ANN. § 8.01-195.3 (Supp. 1990).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *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.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* § 8.01-195.4 (Supp. 1990).

between \$1,000 and \$7,000, the district and circuit courts have concurrent jurisdiction.<sup>147</sup> The money figures determining jurisdiction do not include amounts for attorneys' fees or interest charges.<sup>148</sup> 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."<sup>149</sup>

Section 8.01-195.5 gives the Attorney General authority to settle claims against the Commonwealth brought under the Act.<sup>150</sup> If the claim is against one of the entities of the Commonwealth (i.e., a "department, institution, division, commission, board or bureau"<sup>151</sup>), 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.<sup>152</sup> 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.<sup>153</sup>

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.<sup>154</sup> This statement must include the time and location where the injury took place and the state entities that the claimant believes are liable.<sup>155</sup> 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,<sup>156</sup> which allows for tolling of statutes of limitations in the event of disabilities.<sup>157</sup> Finally, in a medical malpractice claim against the Commonwealth, Chapter 21.1 of the

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* § 8.01-261(18) (Supp. 1990).

<sup>150</sup> *Id.* § 8.01-195.5 (Supp. 1990).

<sup>151</sup> *Id.* § 2.1-127 (Supp. 1990).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* § 8.01-195.6 (Supp. 1990).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *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 8.01-195.3<sup>158</sup> (\$25,000 if the cause of action occurred before July 1, 1988, or \$75,000 if the cause of action occurred after that date).<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup>

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.<sup>163</sup> 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.<sup>164</sup>

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."<sup>165</sup>

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<sup>158</sup> *Id.* § 8.01-195.6 (Supp. 1990).

<sup>159</sup> *Id.* § 8.01-195.3 (Supp. 1990).

<sup>160</sup> *Id.* § 8.01-195.7 (Supp. 1990).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See id.* § 8.01-195.7 (Supp. 1990).

<sup>164</sup> *Id.*

<sup>165</sup> V.A. 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.<sup>166</sup> 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."<sup>167</sup> If the prerequisites are not met, however, the claim is again subject to the Commonwealth's defense of sovereign immunity.<sup>168</sup> The survival of sovereign immunity has been judicially affirmed by the Virginia Supreme Court.<sup>169</sup> 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.<sup>170</sup>

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

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<sup>166</sup> 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.*

<sup>167</sup> 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.

<sup>168</sup> *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).

<sup>169</sup> 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).

<sup>170</sup> See VA. CODE ANN. §§ 8.01-195.6, -195.7 (Supp. 1990).

<sup>171</sup> See *id.* §§ 8.01-195.6, -581.2 (Supp. 1990).

registered mail to the health care provider.<sup>172</sup> 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.<sup>173</sup> 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 . . . ." <sup>174</sup> 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 . . . ." <sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> Neither party may file suit while the panel is reviewing the claim.<sup>178</sup> If no panel is requested, the parties must wait ninety days to bring a cause of action.<sup>179</sup> Even if no panel is requested, however, the claimant must still wait six months to file his claim because of the six-month

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<sup>172</sup> VA. CODE ANN. § 8.01-581.2(A) (Supp. 1990).

<sup>173</sup> 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).

<sup>174</sup> *Id.* § 8.01-195.6 (Supp. 1990).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* § 8.01-195.7 (Supp. 1990).

<sup>177</sup> *Id.* § 8.01-581.2 (Supp. 1990).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

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

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.<sup>181</sup> 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.<sup>182</sup>

As mentioned previously, giving notice under the Medical Malpractice Act tolls the statute of limitations for 120 days.<sup>183</sup> 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.<sup>184</sup>

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.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup>

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<sup>180</sup> *Id.* § 8.01-195.7 (Supp. 1990).

<sup>181</sup> *Id.*

<sup>182</sup> *See infra* note 188.

<sup>183</sup> V.A. CODE ANN. § 8.01-581.9 (Supp. 1990).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See supra* note 62 and accompanying text.

<sup>187</sup> V.A. 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.<sup>188</sup> 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.<sup>189</sup> 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.

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<sup>188</sup> *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.*

<sup>189</sup> *Id.* § 8.01-581.9 (Supp. 1990).