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SECTION I—Concurrent Negligence, Causal Connection and the Rule of *Massie* v. *Firmstone*, Violation of Statute as Negligence Per Se, Death by Wrongful Act, Surface Water and Tort Liability, Duty Towards Infants, Wilful or Wanton Negligence, Last Clear Chance.

Proximate Cause, Concurrent Negligence. In *Petcosky* v. *Bowman*,[1] the Supreme Court of Appeals found that there was sufficient evidence before the jury to uphold a verdict finding both parties to an auto accident concurrently negligent as to a third party who subsequently collided with the automobile of one of the joint tort-feasors. It was conceded by both defendants that the negligence which had caused the first collision also proximately caused the second collision, but the defendants argued that there was not sufficient evidence to support the finding of concurrent negligence. Having disposed of this contention by careful examination of the evidence, which was sufficient to indicate negligence on the part of both parties, the Supreme Court of Appeals allowed the judment against the joint tort-feasors to stand, under the well-settled rule that the liability of concurrent tort-feasors is joint and several.[2]

Causal Connection, Evidence Sufficient to Establish. The Rule of Massie v. Firmstone. It is elementary law that an act of negligence, standing by itself, is not actionable. To serve as the basis of a cause of action, a causal connection must be established between the defendant's negligence and the plaintiff's injury.[3] Prosser refers to the "but for" or "sine qua non" rule[4] as an expression of this idea and as a test to determine the existence of such causal connection. In the case of *Edmonds* v. *Mecklenburg Electric Cooperative*[5] the quantum of evidence necessary to establish causal connection appears to have reached a minimum. In rendering its decision in this case, the Supreme

[1] 197 Va. 240, 89 S.E.2d 4 (1955).
[2] Luck v. Rice, 182 Va. 373, 29 S.E.2d 238 (1944); Milam v. Settle, 127 W.Va. 271, 32 S.E.2d 269 (1944). Prosser, *Handbook of the Law of Torts* (1941), 329.
[3] 13 M.J., *Negligence* §23.
[4] Prosser, *Handbook of the Law of Torts* (1941), 322.
[5] 197 Va. 540, 90 S.E.2d 188 (1955).

Court of Appeals has made a significant clarification of the doctrine of *Massie* v. *Firmstone*,[6] which clarification happily will outweigh the ultimate decision. The plaintiff had testified that her child was walking or running along a rocky downhill path to an outdoor privy, that the child fell in the path at a point near the hole, which was about three feet from the path, that the plaintiff picked up the child and "when, all I know is I was in the hole the next thing." She had fainted from severe pain, and when she recovered, she was sitting on the side of the hole with her daughter in her arms, her right leg crumpled under her and her left leg dangling in the hole. Defendant argued that on the basis of plaintiff's testimony, her case could be no stronger than her personal evidence made it, under the doctrine of *Massie* v. *Firmstone*. The court ruled that under *Massie* v. *Firmstone* the plaintiff would not be concluded unless her evidence ". . . clearly and unequivocally testifies to facts which show as a matter of law that he has no case . . ."[7] In other words, the court indicates that a plaintiff by his personal testimony, may effectively bar his right to recover, but in order to do so his testimony must be "clear and unequivocal." If the plaintiff's personal testimony does not clearly and unequivocally show that he has no case, a jury question is presented to consider the plaintiff's testimony along with all other evidence. This is a valuable exposition of the rule of *Massie* v. *Firmstone* and the most definitive yet pronounced by the court.

It is difficult to avoid the conclusion, however, as pointed out by Justice Spratley in his dissent, that no causal connection between the hole and the accident was established. At no time did the plaintiff say she stepped in the hole. "She frankly said she did not know what happened."[8] In the absence of other evidence establishing causation, the jury was allowed to reach a verdict based not on evidence, but upon implication, supposition, or speculation. It is possible that in reversing the trial court's action setting aside the verdict, the Supreme Court of Appeals has encouraged future litigation relying on nebulous evidence to establish causation.

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[6] 134 Va. 450, 114 S.E. 652 (1922).
[7] 197 Va. 540, 543; 90 S.E.2d 188, 191 (1955).
[8] 197 Va. 540, 544, 90 S.E.2d 188, 191 (1955).

Violation of Statute as Negligence Per Se. It is well settled that where the violation of a statute or ordinance is the proximate cause of the injury, or contributed thereto, the wrongdoer is liable therefor.[9] And Virginia has provided by statute that damages sustained from the violation of a statute may be recovered.[10] But it would be going too far to conclude that in Virginia such violation would constitute negligence as a matter of law, as many qualifications and exceptions have been made in the cases.[11] Indeed, in West Virginia it has been held that even where the violation is the proximate cause of an injury, such violation is only prima facie actionable.[12] The four cases decided in Virginia in 1955 which touch upon this proposition indicate that the Virginia rule is in accord with that expressed in West Virginia. "The arbitrary classification of all branches of statute as negligence per se or no negligence at all leaves too little flexibility for the standard of reasonable care."[13]

Brown v. *Damron*[14] was a case wherein the plaintiff was found contributorily negligent as a matter of law for his failure to yield the right of way as required by Section 46-240, Code of Virginia (1950). It is clear from the discussion of the court, however, that, finding the plaintiff contributorily negligent as a matter of law, the court did not rely solely upon the statute, for it repeats the proposition that whether contributory negligence is a question for the jury or one of law for the court depends on the facts of the case, citing *Nehi Bottling Co.* v. *Lambert,* 196 Va. 949 at 955, 86 S.E.2d 156 at 159: "In other words where reasonable men can draw but one inference from the facts, negligence becomes a question of law."

In *Hopson* v. *Goolsby*[15] the court upheld the lower court's action in refusing an instruction offered by the defendant which would have found the plaintiff contributorily negligent as a matter of law for her failure to cross the street at an intersection, as required by Section 46-243 of the Code. The court agreed with the plaintiff that to have crossed at the intersection under the

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9 13 M.J., *Negligence,* §15 and cases therein cited.
10 Va. Code §8-652, (1950) as revised.
11 See note 9, *supra.*
12 Morris v. Wheeling, —W.Va.—, 82 S.E.2d 536 (1954).
13 Prosser, *Handbook of the Law of Torts,* (1941), 276.
14 197 Va. 309, 89 S.E.2d 54 (1955).
15 196 Va. 832, 86 S.E.2d 149 (1955).

peculiar conditions of this case would have been more dangerous than at the crossing she chose later, and the court held that her violation of the statute in this instance was not negligence. Thus, we see that violation of a statute in Virginia sets up, at most, a rebuttable presumption of negligence.

On the other hand, a refusal of a trial court to inform the jury of a statute's command was held prejudicial error in *Marshall* v. *Shaw*.[16] The plaintiff had requested an instruction setting forth a driver's duty under Code Section 46-244 to yield the right of way to a pedestrian crossing a highway within any clearly marked crosswalk . . . except when traffic is being regulated by an officer or traffic regulating device. The defendant had a verdict which was reversed and remanded by the Supreme Court of Appeals, which repeated the rule in *Lucas* v. *Craft*,[17] and *Reese* v. *Snelson*:[18]

> The language and intent of the general assembly is so plainly expressed in the statute that it needs no interpretation or construction. It means what is said.

Thus, while the court acknowledges that a standard of duty set up by the Legislature is subject to rebuttal according to a particular fact situation, yet where the Legislative standard is clear, it will be prejudicial error to deny the jury the benefit of the statute's guidance.

The laudable flexibility of the Virginia view is further demonstrated in *Gough* v. *Shaner, Admr.*,[19] an action for damages for death by wrongful act. Here, the concept of violation of statute as negligence *per se* ran headlong into the Virginia view on the standard of care required of children. The deceased, a boy of thirteen, was killed while riding a motorcycle in violation of an ordinance declaring it unlawful ". . . for any such person to ride, or be transported upon, any such vehicle unless he or she occupies a regular seat."[20] In dealing with this question the court said:

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[16] 196 Va. 678, 85 S.E.2d 223 (1955).
[17] 161 Va. 228, 234, 170 S.E. 836, 838, (1933).
[18] 192 Va. 479, 485, 487, 65 S.E.2d 547, (1951).
[19] 197 Va. 572, 90 S.E.2d 171 (1955).
[20] *Id.* at 573, 90 S.E.2d at 173.

> Virginia applies the rule that the violation of a statute or ordinance by an adult is negligence *per se*. Yet it adheres to the principle that an infant between the age of seven and fourteen years is *prima facie* presumed incapable of negligence. Wash. v. Holland, 166 Va. 45, 183 S.E. 236.[21]

The court then ruled that the defendant was entitled to an instruction embodying these principles, thus allowing the jury to construct its own standard of care to be required of the deceased boy of thirteen, with the standard of the ordinance serving merely as a guide, subject to the general law concerning the negligence of infants.

Death by Wrongful Act. (A) Damages. In *Gough* v. *Shaner, Admr.*, the defendant argued upon appeal that no pecuniary loss was suffered by his statutory beneficiaries, because he was only thirteen years old, and there was no proof he had earned anything in the past or was earning anything when killed. Further, the defendant asserted that the phrase "fixing such sum with reference to the probable earnings of the deceased . . . taking into consideration his age, intelligence, and health during what would have been his probable lifetime if he had not been killed,"[23] was error in an instruction and prejudicial because (a) there was no proof of earnings, and (b) decedent's life expectancy had not been proved by mortality tables or other evidence.

The Supreme Court of Appeals pointed out that Section 8-636 of the Code of Virginia allows the jury to award within the the statutory limit such damages as "to it may appear fair and just", and that the court has historically given the phrase "fair and just" a broad and liberal construction.[24] The court reviewed authorities in Virginia and other states, and concluded that it is not necessary that a child have earned money or have a present earning capacity for his statutory beneficiaries to suffer pecuniary loss because of his death.[25] Further, the court found that when the age, sex, health and mental capacity of the decedent

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[21] *Id.* at 576, 90 S.E.2d at 175.
[22] See note 19 *supra.*
[23] *Id.* at 578, 90 S.E.2d at 176.
[24] Matthews v. Warner, 29 Grat. 570, 573, 70 Va. 570 (1877). Matthews v. Hicks, 197 Va. 112, 118, 87 S.E.2d 629, 633 (1955).
[25] Cooke v. Griggs, 183 Va. 851, 33 S.E.2d 764; Ratcliffe v. McDonald Admr., 123 Va. 781, 97 S.E. 307, 308 (1918).

are proved, it is not essential that mortality tables be proved in the case.[26]

The decision is in accord with past decisions in this area of the law.

Death by Wrongful Act. (B) Right of Adulterous Wife to Share in Recovery. The right of a wife who is living in adultery at the time of her husband's death to share in the recovery had never been squarely before the court prior to the case of *Matthews* v. *Hicks*.[27] It had been decided, however, that a statute[28] which bars a wife who wilfully deserts or abandons her husband from all interest in his estate as a tenant by dower, distributee or otherwise, does not preclude her from sharing in a recovery for his wrongful death.[29] In view of the failure of passage of legislation[30] which would have barred the adulterous spouse, the court declined to hold that he or she is barred. The court pointed out, however, that ". . . if evidence of satisfactory conjugal relations is admissible to show the loss sustained by a surviving spouse, then evidence that such relations have in fact been terminated is admissible for the consideration of the jury in determining what is a fair and just amount to award an unfaithful spouse for the loss of the mate."[31] Accordingly, the court ruled that such evidence is admissible on the issue of quantum of damages, unless the evidence clearly shows a reconciliation.

One sympathizes with the court's reluctance to declare a rule of law which has been specifically foregone by the Legislature. And it is safe to feel that on this issue, defendants have nothing to fear from ". . . the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case."[32] The difficulty in this solution, however, lies in Section 8-636, which provides that "nothing shall be apportioned to the parents, brothers and sisters of the deceased, if there be a surviving widow or husband . . ." In a hypothetical case wherein

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[26] Gough v. Shaner, 197 Va. 572, 580, 90 S.E.2d 171, 177 (1955).
[27] 197 Va. 112, 87 S.E.2d 629 (1955).
[28] Va. Code §64-35, (1950).
[29] Mitchell v. Kennedy, 166 Va. 346, 186 S.E. 40 (1936).
[30] House Bill No. 205, House Journal 1950, p. 157.
[31] Matthews v. Hicks, 197 Va. 112, 121, 87 S.E.2d 629, 633 (1955).
[32] Simmons v. McConnell, 86 Va. 494, 497, 10 S.E. 838, 839 (1890).

the decedent is survived by an adulterous spouse and by parents, brothers, or sisters, who by family association and solicitude are deserving, there appears to be no way whereby the recovery may be apportioned to them. An analogous situation is that in which the sole beneficiary in the first class is a spouse whose contributory negligence bars him or her from sharing in the recovery.[33] Here also Section 8-636 bars an apportionment to those who comprise the second class—parents, brothers, and sisters.

The solution to this problem which most readily presents itself is (1) an amendment to our statute which would bar a spouse who is shown to have been living in adultery at the time of the death of the decedent, and (2) a revision of the language of Section 8-636 to allow an apportionment to parents, brothers and sisters of the decedent in the event the sole beneficiary in the first class is a person who is barred by law from sharing in the recovery.

It is, therefore, most desirable that the Legislature deal with the problem, which, while possibly rare, is nevertheless capable of inflicting very real hardship.

Surface Water—Defendant Liable for Pouring Upon Plaintiff's Land. *Hodges Manor Corp.* v. *Mayflower Park Corp.*[34] was a case wherein the plaintiff sought damages for injuries inflicted by defendant when he collected surface water into an artificial channel and poured it upon the plaintiff's land. The case was decided upon principles well settled in Virginia, where the common-law rule upon the subject prevails.[35] The essence of the decision is contained in the language which the court quoted from the *Carter* case, 91 Va. 587 at page 592, 593:

> Where the common law rule is in force, as in this state, surface water is considered a common enemy, and the courts agree that each landowner may fight it off as best he

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[33] Richmond, etc., Co. v. Martin, 102 Va. 201, 45 S.E. 894 (1903); Reid v. Medley, 118 Va. 462, 87 S.E. 616 (1916); Ratcliffe v. McDonald Adm'r., 123 Va. 781, 97 S.E. 907 (1918).

[34] 197 Va. 344, 89 S.E.2d 59 (1955).

[35] Norfolk and Western R.R. Co. v. Carter, 91 Va. 587, 22 S.E. 517 (1895); Third Buckingham Community v. Anderson, 178 Va. 478, 17 S.E.2d 433 (1941); Mason v. Lamb, 189 Va. 348, 53 S.E.2d 7, 12 A.L.R.2d 1332 (1949); Hamlet v. South Norfolk, 193 Va. 564, 69 S.E.2d 346 (1952).

> may . . . This right in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly; but is modified by that golden maxim of the law, that one must so use his own property as not to injure the rights of another. * * *
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> The right thus modified has also its exceptions. One exception is that the owner of the land cannot collect the water into an artificial channel or volume and pour it upon the land of another to his injury. The right to fend off surface water does not extend that far.

What is a Vehicle? *Jesse* v. *Slate Adm'r.*,[36] an action for damages for death by wrongful act, is distinguished by defendant's novel position that although a person riding a horse upon the highway is subject to the same rules and regulations applicable to the driver of a motor vehicle, except those provisions which by their very nature can have no application,[37] drivers of other vehicles are not under a reciprocal duty to regard the horse and rider as a vehicle. The court did not dignify this argument with much discussion, merely pointing to the statute,[38] but in holding that motorists are under such a duty, the court also repeated the settled idea that a highway includes the shoulders as well as the hard surface of the road.[39]

The Doctrine of Last Clear Chance. There is general agreement that the doctrine of last clear chance has had a perplexing history in the courts of Virginia.[40] Also that the difficulty has centered upon that class of case where the plaintiff has negligently placed himself in a situation of danger from which he has the ability to remove himself, but fails to do so because he is inattentive and unconscious of his danger. Specifically, the question has been: Is such a plaintiff entitled to a last clear chance instruction placing liability upon the defendant who "should have discovered" the plaintiff's peril, or should liability be fastened upon the defendant only where there is evidence that the defendant *actually* knew of the plaintiff's position and realized, or had

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[36] 196 Va. 1074, 86 S.E.2d 821 (1955).
[37] Va. Code, §46-183 (1950).
[38] *Ibid.*
[39] Crouse v. Pugh, 188 Va. 156, 49 S.E.2d 421 (1948). Burton v. Oldfield, 195 Va. 544, 79 S.E.2d 660 (1954).
[40] Van Dyke, *Last Clear Chance in Virginia*, 40 Va. L. Rev. 637 (1954).

reason to realize his danger and was thereafter negligent?[41] The latter view is that adopted by the Restatement.[42]

A further point of difficulty arose because of the failure of the Supreme Court of Appeals to distinguish between the plaintiff who is physically helpless to remove himself from the danger and the merely inattentive plaintiff described above, in its application of the rule.[43]

In the past the Court has followed the "humanitarian" doctrine embodying the "should have discovered" concept, and applied it to both the inattentive and the helpless plaintiff, alike. The court nevertheless, denied the operation of a last clear chance instruction to a plaintiff whose negligence was found to be a "continuing" or "proximate cause, as distinguished from a remote cause". This position has been attacked as a rationalization of comparative negligence notions.[44]

This was the state of the law when *Hopson* v. *Goolsby*[45] was decided on March 7, 1955. In this case the plaintiff was struck when she was crossing a street in the middle of a block, having failed to look before she started across the street and failing to keep a proper lookout as she crossed. On these facts the court held that she was contributorily negligent as a matter of law, that the "doctrine of last clear chance does not supersede the defense of contributory negligence, and a plaintiff who is guilty of contributory negligence cannot recover in any event."[46] Hence, the court ruled, an instruction on last clear chance was error, especially since ". . . the burden is on the plaintiff to show by a preponderance of the evidence that the defendant was negligent in what he did or failed to do after he discovered or *should have discovered* that the plaintiff was in a situation of *helpless or unconscious peril.*"[47] [Italics supplied] Thus it is clear that the court decided this case under the humanitarian concept and, further that the court made no distinction between the helpless and the unconscious (inattentive) victim, at least in its pronouncement of the rule.

[41] Note, 40 Va. L. Rev. 666 at 673 (1954).
[42] Restatement, Torts, §480 (1934).
[43] Anderson v. Payne, 189 Va. 712, 54 S.E.2d 82 (1949).
[44] *Id.* at 727, 54 S.E.2d at 89.
[45] 196 Va. 832, 86 S.E.2d 149 (1955).
[46] *Id.* at 839, 86 S.E. at 154.
[47] *Id.* at 840, 86 S.E. at 154.

Hodgson v. *McCall*,[48] decided on June 13, 1955, was strikingly similar to the *Hopson* case on the facts, and a similar result was reached, the court ruling that the actions of the lower court in striking plaintiff's evidence and refusing plaintiff's instruction was proper.

On September 14, 1955, the court made a definitive clarification of the rule to be applied to cases wherein the negligent plaintiff was not helpless but merely unconscious of his danger. In *Greer* v. *Noland Co.*,[49] the plaintiff was standing a foot off the paved portion of a highway, talking to occupants of a parked vehicle, when he was struck by the bed of a truck which protruded beyond the sides of the cab of the truck. The driver of the truck testified that he had seen the plaintiff standing in that position while about a quarter of a mile distant from him, that he did not slacken his speed, sound his horn, or move from the right hand lane of the highway.

Recognizing the need for a "more precise method of applying the last clear chance doctrine"[50] in this class of case, the court adopted the following rule:

> Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself, the defendant is liable if he saw, or should have seen, him in time to avert the accident by using reasonable care. Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to remove himself but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care.[51]

This view is substantially that of the Restatement.[52]

Duty Towards Infants and Children of Tender Age. Jury Question. *Conrad* v. *Taylor*[53] was an action for damages

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[48] 197 Va. 52, 87 S.E.2d 791 (1955).
[49] 197 Va. 233, 89 S.E.2d 49 (1955).
[50] *Id.* at 238, 89 S.E.2d at 53.
[51] *Id.* at 239, 89 S.E.2d at 53.
[52] See Note 41 *supra.*
[53] 197 Va. 188, 192; 89 S.E.2d 40, 43 (1955).

for the death of a three-year-old child who had been playing in front of the defendant's car and was killed when the latter drove off. On appeal from an adverse verdict, the defendant contended that the plaintiff had failed to make out a case of negligence as a matter of law, citing *White* v. *Edwards Chevrolet Co.*[54] wherein the court quoted the following language from Michie's Law of Automobiles, 1938 Ed., Section 96, pp. 229, 230, "A driver is under no legal obligation to make a search around and under his car lest a child too young for discretion and undirected by parents has tucked himself away in an obscure place, beyond the usual and convenient notice of the driver."

The Court distinguished the *White* case from the case at bar in that in the *White* case ". . . there was no evidence on which a jury could have concluded that an ordinarily prudent person in the situation occupied by Davis would have been on notice that the deceased child might be in or near the truck at the time it was moved."[55] On the other hand, in the case at bar, ". . . the facts and circumstances of the instant case presented a question for the jury as to whether the driver should have made a reasonable inspection to determine whether he could move his car without injury to the three young children he knew were playing around the car almost immediately before he started."[56] Thus, the factor of notice, and the time elapsing between the notice and the starting of the vehicle were sufficient to raise a jury question as to the duty owed the child by the driver.

Wilful or Wantan Negligence. Duty to Trespasser. In *Boward* v. *Leftwich*[57] plaintiff was suing for damages for the death of his decedent, who had been picked up by defendant's driver in violation of the defendant's orders. Under established Virginia law, plaintiff's decedent was, therefore, a trespasser, who could recover only for willful or wanton injury.[58] The driver's negligence consisted of looking down at the floor of the truck in an effort to get the truck into gear. While he was so engaged,

[54] 186 Va. 669, 43 S.E.2d 870 (1947).
[55] 197 Va. 188, 89 S.E.2d 40 (1955).
[56] *Id.* at 193, 89 S.E.2d at 43.
[57] 197 Va. 227, 89 S.E.2d 32 (1955).
[58] Morris v. Dame's Ex'r., 161 Va. 545, 572 ff, 171 S.E. 662-673 (1933); Stone v. Rudolph, 137 W.Va. 335, 32 S.E.2d 742 (1944).

the truck went off the road, overturned, and the rider was killed. It was held that this was not willful or wanton negligence.

The court quoted the following from *American Jurisprudence:* "Willfulness or wantoness imparts premeditation or knowledge and consciousness that injury is likely to result from the act done or from the omission to act . . . Wanton misconduct is positive in nature, while mere negligence is materially negative . . ."[59]

Lawrence L. Lieberman

[59] 38 Am. Jur. *Negligence*, §48 (1941).