

March 1962

Virginia Procedure: Parties to Litigation Involving Automobiles

Emeric Fischer

William & Mary Law School

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Torts Commons](#)

Repository Citation

Emeric Fischer, *Virginia Procedure: Parties to Litigation Involving Automobiles*, 3 Wm. & Mary L. Rev. 403 (1962), <https://scholarship.law.wm.edu/wmlr/vol3/iss2/11>

Copyright c 1962 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

VIRGINIA PROCEDURE — PARTIES IN
LITIGATION INVOLVING AUTOMOBILES

EMERIC FISCHER

"Torts are in their nature joint and several and it is so universally conceded that the injured party has the right to sue all, or anyone, or any intermediate number of tortfeasors, that it is not deemed necessary to cite authorities to sustain the proposition."¹ In general this statement holds true, for as a matter of justice one who is injured or damaged ought to have a remedy against the wrongdoer. But is it *always* true? An examination of various statutes will disclose that procedural impediments exist barring recovery in certain situations.

Guest Statutes

The owner or operator of a vehicle is not liable for injuries or death to a non paying guest (or to his personal representative) whom he is transporting unless caused by the owner's or operator's gross negligence or willful and wanton disregard of the safety of the guest or his property.² The wording of the statute indicates that a plaintiff, in order to recover for injuries or damage sustained while riding in another's vehicle, must plead and prove that (1) he was a paying passenger and the operator was negligent, or (2) if he was not a paying passenger that the operator was grossly negligent. The first inquiry must be directed to the question of who is a non paying passenger. In *Hale v. Hale*³ it was held that a passenger is a non paying guest when there is no contractual relationship between the parties under which the passenger was obligated to pay for the transportation. And the mere benefit (to the host) resulting from companionship (of the guest) or from assistance in driving (by the guest) is not of a legal value sufficient in itself to transfer a gratuitous undertaking into an undertaking for payment.⁴ But the plaintiff-owner does not lose his character

¹ BURKS, PLEADING AND PRACTICE § 55 (4th ed., Boyd, 1952).

² VA. CODE ANN. § 8-646-1 (1950).

³ 219 N. C. 191, 13 S.E.2d 221 (1941), tried under the Virginia statute.

⁴ Mayer v. Puryear, 115 F.2d 675 (1940), tried under the Virginia statute.

of host and become the guest of his companion when he permits the guest to drive the car for her own pleasure.⁵ And where payment, without request, amounts to more than a mere social amenity and in fact is consideration for the transportation over a considerable period of time, then the payor is a paying passenger.⁶ And in *Richardson v. Charles*⁷ a salesman of used cars offered to drive plaintiff to a neighboring town on business because the salesman was unable to deliver the car purchased by the plaintiff. On the return trip a collision occurred. *Held*, that plaintiff was a passenger rather than a guest since the trip was clearly motivated by the business transaction between the parties. Payment does not have to be in cash, services or other benefits can amount to payment. But assisting defendant and his friend in transporting friend's materials in defendant's truck does not amount to such mutual benefits to both plaintiff and defendant as to remove plaintiff from the status of a mere guest.⁸ And teaching plaintiff to park is merely a friendly act and a gratuity.⁹ In *White v. Gregory*¹⁰ plaintiff was the employee of the owner of the auto and the driver of the automobile was also the agent of the owner. Plaintiff was injured while riding home in the auto for the convenience of the employer. The court found from these facts that plaintiff was not a guest of either the driver or the owner and therefore ordinary negligence was sufficient to make them both liable.¹¹

The second inquiry revolves around the problem of what is gross negligence. "In this class of actions the plaintiff must, since the burden is on him to prove his case by a preponderance

⁵ *Leonard v. Helms*, 267 F.2d 48 (1959), tried under the Virginia statute. See also *Parker v. Leavitt*, 201 Va. 919, 114 S.E.2d 732 (1960).

⁶ *Davis v. Williams*, 194 Va. 541, 74 S.E.2d 58 (1953); *Thomas v. Dowdy*, 201 Va. 581, 112 S.E.2d 868 (1960). See also *Gammon v. Hyde*, 199 Va. 918, 103 S.E.2d 221 (1958) where payments were not continuous, but the single unrequested payment was substantial (\$50).

⁷ 201 Va. 426, 111 S.E.2d 401 (1959).

⁸ *Miller v. Ellis*, 188 Va. 207, 49 S.E.2d 273 (1948).

⁹ *Jenkins v. Womack*, 201 Va. 68, 109 S.E.2d 97 (1959).

¹⁰ 161 Va. 414, 170 S.E. 739 (1933).

¹¹ See also *Garrett v. Hammack*, 162 Va. 42, 173 S.E. 535 (1934); *Dickenson v. Miller*, 196 Va. 659, 85 S.E.2d 275 (1955). But see *Miller v. Ellis*, 188 Va. 207, 49 S.E.2d 273 (1948).

of the evidence, establish not only the fact that the defendant was negligent but that his negligence amounted to more than a mere failure to exercise ordinary care. The burden was on the plaintiffs in this case to establish how and why the accident occurred and that this defendant was guilty of gross negligence."¹² In *Alsbaugh v. Diggs*¹³ the court said:

A mere failure to skillfully operate an automobile under all conditions, or to be alert and observant, and to act intelligently and operate an automobile at a low rate of speed may, or may not, be a failure to do what an ordinarily prudent person would have done under the circumstances, and thus amount to lack of ordinary care; but such a lack of attention and diligence, or mere inadvertence, does not amount to wanton or reckless conduct, or constitute culpable negligence for which defendant would be responsible to an invited guest.

In this case the defendant, while rounding a gradual curve at a normal speed, leaned forward to light his cigar and suddenly struck a light pole. There being no evidence that he took his eyes off the road or failed to keep a proper lookout, plaintiff's contention of deliberate inattention was not established. And in *Dishman v. Pitts*¹⁴ defendant travelled at a lawful speed when suddenly his car, which was in good condition, went out of control, crossed over the center line, made a 180 degree turn and was struck from the rear. There was nothing to show why he lost control of it or that he was guilty of deliberate inattention in crossing the center line. *Held*, that this was insufficient evidence to establish gross negligence. In *Wright v. Osborne*¹⁵ it was held that violation of traffic statutes is negligence but it is not gross negligence per se even though the statute defines such violation as reckless driving. Gross negligence is that degree of negligence which shows an utter disregard of prudence, amounting to complete neglect of the safety of another. The distinction between negligence and gross negligence is a

¹² *Crabtree v. Dingus*, 194 Va. 615, 74 S.E.2d 54 (1953).

¹³ 195 Va. 1, 77 S.E.2d 362 (1953).

¹⁴ 202 Va. 548, 118 S.E.2d 509 (1961).

¹⁵ 175 Va. 442, 9 S.E.2d 452 (1940).

matter of degree.¹⁶ And neither is a series of consecutive violations, per se, gross negligence. Thus, defendant in making a turn violated section 46-234 VA. CODE ANN. (1950)¹⁷ by failure to give the hand signal, failed to pass beyond the center of intersection in violation of §46-231¹⁸ and failed to use reasonable care to see that such movement could be made in safety (violation of section 46-233¹⁹). *Held* that the cumulative effect amounted to no more than lack of reasonable care.²⁰ And where defendant, a competent driver, had failed to renew his license²¹, and was operating his employer's truck without a license at the time of the accident, did not constitute negligence per se as to render defendant and his employer liable for the death of a person killed by falling from the truck.²²

As to civil liability for damages resulting from criminal violations see discussion under sections 8-646.3 to 8-646.8 *infra*.

The gross negligence rule is applicable to passengers who are minors as well as to adults. Though a high degree of care is owed children, being greater as the child is younger and less able to look out for himself, an infant guest must prove gross negligence to recover from the host operator or owner.²³

Death by Wrongful Act Statutes

VA. CODE ANN. section 8-633 (Supp. 1960) provides for the right to recover damages for the death of a person caused by

¹⁶ See also *Sibley v. Slayton*, 193 Va. 470, 69 S.E.2d 466 (1952) and *Hailey v. Johnson*, 201 Va. 775, 113 S.E.2d 664 (1960). The Virginia Court has consistently held that negligence to be characterized as gross negligence has to be conducted of a wanton and willful nature such as to shock fair minded men. *E. G. Dingus v. Salyers*, 194 Va. 615, 74 S.E.2d 54 (1953); *Hailey v. Johnson*, 201 Va. 775, 113 S.E.2d 664 (1960).

¹⁷ Now VA. CODE ANN. § 46.1-217 (1950) (1958 Repl. Vol.).

¹⁸ Now VA. CODE ANN. § 46.1-215 (1950) (1958 Repl. Vol.).

¹⁹ Now VA. CODE ANN. § 46.1-216 (1950) (1958 Repl. Vol.).

²⁰ See also *Brown v. Peters*, 202 Va. 382, 117 S.E.2d 695 (1961).

²¹ In violation of VA. CODE ANN. § 46.1-349 (1950) (1958 Repl. Vol.).

²² *White v. Edwards Chevrolet Co.*, 186 Va. 669, 43 S.E.2d 870 (1947).

²³ *Ruett v. Nottingham*, 200 Va. 722, 107 S.E.2d 402 (1959).

the wrongful act of another. This section withdraws from the wrongdoer the shield of immunity from civil liability which the rule of the common law provided him. In so doing, however, it was not the intention *to continue or cause to survive* his right of action for the injury, but to substitute for it and confer upon his personal representative a *new and original* right of action.²⁴ The Supreme Court of Appeals (of Va.) construes the wrongful death statute as creating no new *cause of action* but a *right of action* where no right before existed. The "cause of action" is complete and accrued the moment the tort is committed, but the "right of action" for wrongful death does not arise during the continued life of the injured person, nor does the injured person's "right of action" for personal injury survive his death, if death results from the injury.²⁵ Problems of assignability and revival of actions under this section are discussed under sections 8-628.1 and 8-640 *infra*.

This right of action (under section 8-633) survives the death of the wrongdoer and may be enforced against his executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death.²⁶ The primary object of this section and sections 8-634 to 8-638 is to compensate the family of the deceased and not to benefit his creditors.²⁷ But in cases where the specified beneficiaries²⁸ don't exist (or are barred from recovery) and action for death by wrongful act may be maintained for the general benefit of the decedent's estate.²⁹ But the right of action of the personal representative stands upon no higher ground than that of the deceased and the action for wrongful death can be maintained upon the condition that the deceased might have maintained

²⁴ *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S.E. 269 (1896); *Brammer v. Norfolk Southern Railroad Company*, 107 Va. 206, 57 S.E. 593 (1907), leading cases.

²⁵ *Grady v. Irvine*, 254 F.2d 224 (4th Cir. 1958), tried under Virginia law. See also *Sherley v. Lotz*, 200 Va. 173, 104 S.E.2d 795 (1958).

²⁶ VA. CODE ANN. §§ 8-633 and 8-640 (1950) (1960 Supp.).

²⁷ *Withrow v. Edwards*, 181 Va. 344, 25 S.E.2d 343 (1943).

²⁸ See discussion under § 8-636 *infra* as to who are the beneficiaries.

²⁹ *Smith v. Bevins*, 57 F. Supp. 760 (D. Md., 1944) tried under Virginia law.

an action, had he lived, for the injury resulting from the same act or omission.³⁰ Thus a party who consents to and participates in an immoral or illegal act cannot recover damages from the other participants in the act and therefore the personal representative is also barred.³¹ And the right of action must exist at decedent's death. Thus the statute of limitation for recovery for personal injuries being two years,³² and the statute of limitations for recovery under this section³³ being two years, the maximum time during which the personal representative could bring an action is four years from the date of the injury, unless the deceased started an action prior to his death.³⁴ And only *one* recovery can be had whether the action is brought by the injured party in his lifetime and revived after his death, or a new action be brought by the personal representative within the statutory period. Thus if the injured person sues and recovers or sues and loses it is *res judicata* and the personal representative cannot bring an action for wrongful death if the injured person later dies. Or if the injured person dies during the pendency of the action that he brought, the personal representative can either *revive that* action or sue for wrongful death, but he cannot do both.³⁵ Similarly, a fully executed compromise settlement by the injured party bars the personal representative from any further suits.³⁶

The two year statute of limitations operates as a limitation of the liability itself as created and not of the remedy alone. It is a substantive limitation and not just an ordinary statute of limitation.³⁷ For this reason defendant may plead the statute

³⁰ *Virginia Electric and Power Co. v. Decatur*, 173 Va. 153, 3 S.E.2d 172 (1939).

³¹ *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217 (1949). One example that comes to mind; deceased, in concert with others, hauling illegal whiskey or other contraband.

³² VA. CODE ANN. § 8-24 (1950) (Repl. Vol. 1957).

³³ VA. CODE ANN. § 8-634 (1950) (Supp. 1960).

³⁴ *Street v. Consumers Mining Corporation*, 185 Va. 561, 39 S.E.2d 271 (1946).

³⁵ *Branner v. Norfolk Southern Railroad Company*, 107 Va. 206, 57 S.E. 593 (1907).

³⁶ *Id.* at 213, 57 S.E. at 596.

³⁷ *Continental Casualty Co. v. The Benny Skou*, 200 F.2d 246 (4th Cir. 1952); *Birmingham v. Chesapeake and Ohio Railway Co.*, 98 Va. 548, 37 S.E. 17 (1900).

by demurrer.³⁸ In light of this it is important to remember that all matters pertaining to the substantive right of recovery under this section, including the right to recover the nature of the right, and the party in whom it is vested, are governed by the law of the state where the injury resulting in death occurred.³⁹ And it is also well to remember that this section and sections 8-634 to 8-638 have no extraterritorial effect.⁴⁰ Thus in a suit in Virginia under the Tennessee death act, which act does not provide for a statute of limitation, the ordinary statute of limitations (section 8-24) will be applied, and not the one under section 8-634.⁴¹ And a Federal Court in another state may entertain a suit based on this statute *in spite of dissimilarities* between this statute and the statute of the other state.⁴²

At this point it is appropriate to determine who cannot sue or be sued under this section. A negligent plaintiff cannot recover if he would benefit. Thus plaintiff's action for the negligent killing of his infant son is barred if he proximately contributed to the accident and would benefit from a recovery.⁴³ Under section 55-36⁴⁴ a married woman may sue and be sued as if she were unmarried. In personal injury cases she may recover the entire damage sustained including the expenses arising out of the injury, with the provision that all persons discharging such expenses shall be reimbursed. Medical bills, whether paid by her or by the husband, are included in what *she* can recover.⁴⁵ She, and not the husband, can recover for *his* loss of her consortium.⁴⁶ But *Furey v. Furey*⁴⁷ held that

³⁸ Dowell v. Cox, 108 Va. 460, 62 S.E. 272 (1908).

³⁹ Betts v. Southern Railway Co., 71 F.2d 787 (4th Cir. 1934), tried under Virginia law.

⁴⁰ Sherley v. Lotz, 200 Va. 173, 104 S.E.2d 795 (1958); Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943).

⁴¹ Additional implications of the "no extraterritorial effects" rule are discussed under § 8-636 *infra*.

⁴² Rose v. Phillips Packing Co., 21F. Supp. 485 (D. Md., 1937); Lauria v. Du Pont de Nemours & Co., 241 F.687 (E.D. N.Y., 1917).

⁴³ Ratcliffe v. McDonald, 123 Va. 781, 97 S.E. 307 (1918).

⁴⁴ VA. CODE ANN. (1950).

⁴⁵ United Dentist v. Bryan, 158 Va. 880, 164 S.E. 554 (1932).

⁴⁶ Ford Motor Co. v. Mahone, 205 F.2d 267 (4th Cir. 1953); Floyd v. Miller, 190 Va. 303, 57 S.E.2d 114 (1950).

⁴⁷ 193 Va. 727, 71 S.E.2d 191 (1952).

section 55-36 does not confer the right to sue a husband, not even for antenuptial torts. (It is the rule of the common law that all liability for antenuptial torts is extinguished by marriage.)⁴⁸ And *Keister v. Keister*⁴⁹ held that the personal representative of a wife who was killed by her husband has no right of action against the husband or his personal representative notwithstanding Virginia Code section 2286-a (1904) (now section 55-36).⁵⁰ And an unemancipated minor child cannot sue his parent to recover for personal injuries resulting from an act of negligence.⁵¹ But an unemancipated child may maintain a personal injury action against his unemancipated brother. Such action is not contrary to public policy, nor can it be assumed that to allow such actions will disrupt family harmony or open the door to fraud and collusion because of liability insurance.⁵² And one more CAVEAT: The rules discussed under the heading "Guest Statutes" apply to this section as well as to sections 8-634 to 8-638 *infra*.

VA. CODE ANN. section 8-634 (Supp. 1960) provides that every action under section 8-633 shall be brought *only* by and in the name of the personal representatives of the deceased within two years of his or her death. If the action is brought within such period and for any reason abates or is dismissed without determining the merits of the case, the time such action is pending shall not be counted as any part of the two year limitation, and another suit may be brought within the remaining period of such two years, as if the former suit had not been instituted. However, the time within which such action shall be brought shall not, as to any person who could

⁴⁸ Reaffirmed in *Vigilant Insurance Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

⁴⁹ 123 Va. 157, 96 S.E. 315 (1918).

⁵⁰ See also *Hargrow v. Watson*, 200 Va. 30, 104 S.E.2d 37 (1958) where one of the defendants was unable to prove a legal marriage at the time of the accident.

⁵¹ *Norfolk Southern Railroad Company v. Gretakis*, 162 Va. 597, 174 S.E. 841 (1934). See also *Brumfield v. Brumfield*, 194 Va. 577, 74 S.E.2d 170 (1953). But see *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939) where it was held that an infant is allowed to maintain an action against the parent for negligence where "the injuries [sustained] were occasioned in the performance of the duties of a common carrier, not in the parental relation[ship]."

⁵² *Midkiff v. Midkiff*, 201 Va. 829, 113 S.E. 2d 875 (1960).

be made a party defendant but who has been without the State, and who could not be served within the State, be construed to include the time such person is without the State; the absention of himself from the State shall be construed as a waiver of the defense of the statute of limitations as to such periods of absence.

Under section 26-59⁵³ only residents of Virginia can act as personal representatives and non resident fiduciaries must have resident cofiduciaries. Where federal jurisdiction of a personal injury action between a Maryland citizen and a Virginia citizen depended on diversity of citizenship and the plaintiff died during the pendency of the action, the substitution of a citizen of Virginia, who was appointed administrator, as party plaintiff and the amendment of the complaint to convert the action into one for wrongful death, removed the diversity of citizenship and the federal court lost its jurisdiction over the action.⁵⁴ In effect, this means that an action for wrongful death against a Virginia citizen (in Virginia) can only be maintained in a Virginia State Court. But an Illinois appointed domiciliary administrator of an Illinois decedent killed in an auto accident in Virginia could maintain an action under the Virginia wrongful death act in a Federal Court in Maryland against a Maryland citizen, notwithstanding section 26-59, since bringing of an action in Maryland is not "acting" in Virginia.⁵⁵ Furthermore, a suit in a Maryland Federal District Court against Maryland residents under the Virginia wrongful death act by a North Carolina administrator of decedent who prior to his death was domiciled in North Carolina (but a citizen of Virginia) and who was killed in an automobile collision in Virginia is not prohibited by the Virginia Statute (section 8-633 through section 8-638) nor by the Code of Maryland of 1939 (Art. 67, sections 2 and 3). And the usual prohibition against a suit by a foreign administrator (Va. Code section 26-59) does not apply merely because section 8-638 in certain contingencies authorizes a suit for the benefit of the decedent's estate since in this case the decedent was survived by certain statutorily entitled beneficiaries.⁵⁶

⁵³ VA. CODE ANN. (1950).

⁵⁴ *Grady v. Irvine*, 254 F.2d 224 (4th Cir. 1958).

⁵⁵ *Kaufman v. Service Trucking Co.*, 139 F. Supp. 1 (D.Md.1956).

⁵⁶ *Smith v. Bevins*, 57 F. Supp. 760 (D.Md. 1944).

The two year statute of limitations may be pleaded by demurrer since this limitation is not only on the remedy but the right itself.⁵⁷ And the absence of the defendant will not alone defeat the limitation of the death act.⁵⁸ The portion of the provision of the statute excluding the time during which any action brought within the two year period is pending, where such action "for any cause abates or is dismissed without determining the merits," is remedial in purpose, is to be liberally construed and applies to a case of a voluntary non-suit.⁵⁹ But this saving clause applies only if the latter action is brought against the same person as named defendant in the prior action.⁶⁰

The personal representative is barred from suing for death by wrongful act where an injured person makes a compromise settlement therefor and accepts full satisfaction and dies afterwards.⁶¹ For additional situations where personal representative is barred see discussion under section 8-633 *supra*. As to substitution of parties procedures see discussion under sections 8-628.1 and 8-640 *infra*.

VA. CODE ANN. section 8-636 (1950) provides that the jury may award such damages as to it may seem fair and just not exceeding \$30,000, and apportion it among members of the *one class* of beneficiaries entitled to the damages in the following order:

FIRST CLASS: Surviving spouse, children, grandchildren.

SECOND CLASS: Parents, brothers, and sisters.

But under section 8-638 it is provided that when decedent has left a widowed mother and also a widow or widower, but no

⁵⁷ Dowell v. Cox, 108 Va. 460, 62 S.E. 272 (1908).

⁵⁸ Continental Casualty Co. v. The Benny Skou, 200 F.2d 246 (4th Cir. 1952).

⁵⁹ Norwood v. Buffey, 196 Va. 1051, 86 S.E.2d 809 (1955); McDonald v. North Carolina Pulp Company, 198 Va. 612, 95 S.E.2d 201 (1956).

⁶⁰ Lindgren v. United States Shipping Board Merchant Fleet Corporation, 55 F.2d 117 (4th Cir. 1932).

⁶¹ VA. CODE ANN. § 8-635 (1950) (Repl. Vol. 1957); Brammer v. Norfolk Southern Railway Company, 107 Va. 206, 213, 57 S.E. 593, 596 (1907). Powers of the personal representative to make compromises are discussed under § 8-639 *infra*.

children or grandchild, then the amount recovered shall be divided between the mother and the widow or widower as the case may be in such proportion as the jury may direct. If the jury, prior to its discharge failed to apportion the damages then the trial court shall do so in accordance with section 8-636, subject to the jury verdict. The amount recovered shall be paid to the personal representative and after payment of costs and reasonable attorneys' fees shall be distributed according to the apportionment, and shall be free from all debts and liabilities of the deceased.⁶² But if there be no such exclusive beneficiaries then the recovered amount shall be assets in the hands of the personal representative to be disposed of according to law.

Reading sections 8-636 and 8-638 together clearly indicates that the beneficiaries are really the interested parties and it was so held in *Crawford v. Hite*⁶³ and the *primary* object of the statute is to compensate the family of the deceased.⁶⁴ The class of beneficiaries described in these two statutes are *exclusive* and judicial interpretation cannot add others.⁶⁵ But the death of the class beneficiaries before recovery does not terminate the cause of action.⁶⁶ Nevertheless, there are circumstances in which a member of the class beneficiaries may be barred from participating in the distribution of the recovery. Thus a child of a meretricious relationship is barred.⁶⁷ And so

⁶² But see VA. CODE ANN. § 32-138 (1950) as to liens on the claim of an injured person: Any hospital, physician or nurse rendering medical attention or treatment to a person injured through the alleged negligence of another shall each have a lien, for the amount of a just and reasonable charge for the service rendered, on the claim of such injured person or his personal representative against the alleged tortfeasor. Such lien shall not exceed \$500.00 in the case of a hospital, \$100.00 for all physicians, \$100.00 for all the nurses. This section does not apply to payments made under the Workmen's Compensation Act. For additional problems in recovery of medical expenses by other than the injured party see *City of Richmond v. Hanes*, 203 Va. 102, 122 S.E.2d 895 (1961) and *Moses v. Akers*, 203 Va. 130, 122 S.E.2d 864 (1961).

⁶³ 176 Va. 69, 10 S.E.2d 561 (1940).

⁶⁴ *Conrad v. Thompson*, 195 Va. 714, 80 S.E.2d 561 (1954).

⁶⁵ *Porter v. Virginia Electric and Power Company*, 183 Va. 108, 31 S.E.2d 337 (1944).

⁶⁶ *Johns v. Blue Ridge Transfer Co.*, 199 Va. 63, 97 S.E.2d 723 (1957).

⁶⁷ *Grove v. United States*, 170 F. Supp. 176 (E.D. Va. 1959).

is a negligent plaintiff⁶⁸ (who also happens to be a beneficiary), but such contributory negligence of one party does not bar the whole recovery. Thus in *Godfrey v. Tucker*⁶⁹ plaintiff could sue as administrator of his wife even though he was contributorily negligent in the accident causing her death. The award of damages should not have been to him as beneficiary but to the other beneficiaries. However, the jury did in fact make such an award and since defendant's counsel did not object to an instruction that the jury could apportion damages between plaintiff and the children he was estopped on appeal to assert such judgment to be in error.⁷⁰ And the personal representative of the wife cannot bring an action against the husband who caused her death.⁷¹ But a child of a bigamous marriage may participate.⁷² Since the wrongful death act has no extraterritorial effect every provision thereof is applied according to Virginia law. Thus where the only beneficiary of a decedent is a child considered illegitimate in the State of birth (and therefore not entitled to participate in the distribution of the father's estate) but is considered legitimate in Virginia (section 64-7) and the decedent and child were domiciled in Virginia when the fatal accident occurred, the recovery obtained shall be distributed according to the Virginia statute.⁷³ And by the same token, where the beneficiary accepts workman's compensation under the law of the state of her residence, does not bar an action against a third party under the wrongful death statute of Virginia, since there is no provision prohibiting such compensation.^{73a}

Mere living apart does not bar a surviving spouse from participating.⁷⁴ Nor a spouse who deserted the decedent and

⁶⁸ *Ratcliffe v. McDonald*, 123 Va. 781, 97 S.E. 307 (1918).

⁶⁹ 196 Va. 469, 84 S.E.2d 435 (1954).

⁷⁰ But see *City of Danville v. Howard*, 156 Va. 32, 157 S.E. 733 (1931) where the Court held that it was error for the trial court to have refused to set aside that part of the verdict which allotted any sum to a father who was guilty of contributory negligence in the death of his infant son.

⁷¹ *Keister v. Keister*, 123 Va. 157, 196 S.E. 315 (1918).

⁷² *Withrow v. Edwards*, 181 Va. 344, 25 S.E.2d 343 (1943); VA. CODE ANN. § 64-7 (1950) states that the issue of marriages deemed null in law, or dissolved by a court shall nevertheless be legitimate.

⁷³ *Grove v. United States*, 170 F. Supp. 176 (E.D. Va. 1959).

^{73a} *Betts v. Southern Railway Co.*, 71 F.2d 787 (4th Cir. 1934).

⁷⁴ *Porter v. Virginia Electric and Power Company*, 183 Va. 108, 31 S.E.2d 337 (1944).

lived in adultery.⁷⁵ And the award may exclude the children and all given to the widow.⁷⁶ Furthermore the benefits can apply to statutory beneficiaries who may have had no reasonable expectance of support from the decedent. They may recover for loss of care, attention and society as well as for suffering and mental anguish caused them by his death.⁷⁷

To determine the elements and quantum of damages, what may and what may not be shown? *Crawford v. Hite*⁷⁸ held that:

(1) Evidence of the financial condition of deceased is not admissible.

(2) Nor is evidence to show the number of persons dependent on deceased.

(3) But it is proper to show who the beneficiaries are because they are really the interested parties.

(4) It is inadmissible to show the physical condition of the beneficiaries to determine the liability of the defendant or quantum of damages, but is admissible for purposes of apportionment of the awarded damages.

Evidence that the deceased was a heavy drinker and a poor family relationship existed can be introduced to mitigate damages for loss of "care, attention, and society".⁷⁹ But the damages are not confined to mere pecuniary loss and injury but the jury may give such damages as may seem fair and just.⁸⁰ They may be exemplary, punitive, and given as solatium.⁸¹ Recovery may be measured by determining the probable earnings during what would have been the prospective life of the decedent.⁸² In addition to financial loss it includes present

⁷⁵ *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955).

⁷⁶ *Patterson v. Anderson*, 194 Va. 557, 74 S.E.2d 195 (1953).

⁷⁷ *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953); *Basham v. Terry*, 199 Va. 817, 102 S.E.2d 285 (1958).

⁷⁸ 176 Va. 69, 10 S.E.2d 561 (1940).

⁷⁹ *Basham v. Terry*, 199 Va. 817, 102 S.E.2d 285 (1958).

⁸⁰ *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955).

⁸¹ *Harris v. Royer*, 165 Va. 461, 182 S.E. 276 (1935).

⁸² *Gough v. Shaner*, 197 Va. 572, 90 S.E.2d 171 (1955).

and prospective loss of services, nurture and care and other pecuniary advantages and benefits.⁸³ It is not necessary that a child have earned money or have a present earning capacity for his statutory beneficiaries to have suffered pecuniary loss because of his death.⁸⁴ It is erroneous to give an instruction limiting recovery to such sum as would equal the probable earnings of the deceased.⁸⁵ But that deceased received social security benefits is admissible.⁸⁶ Since the statute provides that an award "shall be free from all debts and liabilities of the deceased", hospital, medical, and funeral expenses are not recoverable.⁸⁷ The jury verdict assessing damages for wrongful death is final and the Supreme Court of Appeals cannot disturb it.⁸⁸ But under section 8-637 new trials can be granted as in other cases.⁸⁹

This section (8-638) controls over the statute of descent and distribution.⁹⁰ And brothers and sisters of the half blood fall in the same class as the parents.⁹¹ And the right of the widowed mother is not based on dependence nor is her remarriage a bar.⁹²

As to compromise powers of personal representative, non-assignability of these actions, and revival of actions see discussion *infra* under the appropriate headings.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953).

⁸⁶ *Jessee v. Slate*, 196 Va. 1074, 86 S.E.2d 821 (1955).

⁸⁷ *Conrad v. Thompson*, 195 Va. 714, 721, 80 S.E.2d 561, 566 (1954). But see note 62 *supra*.

⁸⁸ *Highway Express Lines v. Fleming*, 185 Va. 666, 40 S.E.2d 294 (1946).

⁸⁹ VA. CODE ANN. § 8-224 (1950) (Repl. Vol. 1957): "In any civil case or proceeding, the court before which a trial by jury is had, may grant a new trial, unless it be otherwise specially provided. A new trial may be granted as well where the damages awarded are too small as where they are excessive. Not more than two new trials shall be granted to the same party in the same cause on the ground that the verdict is contrary to the evidence, either by the trial court or the appellate court, or both."

⁹⁰ *Withrow v. Edwards*, 181 Va. 344, 25 S.E.2d 343 (1943).

⁹¹ *Wolfe v. Lockhart*, 195 Va. 479, 78 S.E.2d 654 (1953).

⁹² *Waters v. Harrell*, 183 Va. 764, 33 S.E.2d 194 (1945).

Incompetent Parties

It has been frequently overlooked (and for that reason it is reemphasized here) that it is mandatory that any minor entitled to sue must do so by his next friend.⁹³ The next friend need not be formally appointed and the court has the power to appoint another if it appears that the original one is not suitable.⁹⁴ The consent of the infant is not necessary to authorize a suit on his behalf, but upon objection the court will appoint a master to ascertain whether the suit is for the benefit of the infant and whether some other person would be more suitable as next friend, and will make such order as seems best for the infant's interest.⁹⁵ But the suit must be brought in the name of the infant, not in the name of the next friend, that is, the infant must be the real party plaintiff.⁹⁶ The next friend cannot waive the rights of the infant, and it is error to decree on such waiver.⁹⁷ If an infant sues to final decree in his own name, the Supreme Court of Appeals can remand with the direction that the decree be vacated and the cause be proceeded in by the next friend.⁹⁸ On the other hand an infant having properly sued under this section (8-87) is bound as an adult would be.⁹⁹

Infants and insane persons are sued in their proper names but a guardian ad litem shall be appointed to defend them.¹⁰⁰ A personal judgment rendered against an infant for whom no guardian ad litem has been appointed is void.¹⁰¹ If the decree is beneficial to the infant, failure to appoint a guardian ad litem is not reversible error.¹⁰² On compromises on behalf of in-

⁹³ VA. CODE ANN. § 8-87 (1950) (Repl. Vol. 1957).

⁹⁴ *Womble v. Gunter*, 198 Va. 522, 95 S.E.2d 213 (1956).

⁹⁵ *Kirby v. Gilliam*, 182 Va. 111, 28 S.E.2d 40 (1943).

⁹⁶ *Ibid.*

⁹⁷ *Armstrong v. Walkup*, 50 Va. (9 Gratt) 372 (1852); *Hite v. Hite*, 23 Va. (2 Rand.) 409 (1824).

⁹⁸ *Kilbourne v. Kilbourne*, 165 Va. 87, 181 S.E. 351 (1935).

⁹⁹ *Gimbert v. Norfolk Southern Railroad Company*, 152 Va. 684, 148 S.E. 680 (1929).

¹⁰⁰ VA. CODE ANN. §8-88 (1950) (Repl. Vol. 1957).

¹⁰¹ *Moses v. Akers*, 203 Va. 130, 122 S.E.2d 864 (1961); *Kanter v. Holland*, 154 Va. 120, 152 S.E. 328 (1930).

¹⁰² *Langston v. Bassette*, 104 Va. 47, 51 S.E. 218 (1905).

fants sections 8-169, 8-170, and 8-639¹⁰³ have the following provisions:

Section 8-169. The court shall have the power to approve and confirm a compromise of the matters before it, including claims under the provisions of an automobile insurance policy, on behalf of infants, idiots or lunatics and it shall be binding except where procured by fraud. An infant may not set aside such order or decree unless he proceeds to do so within six months after coming of age.

Section 8-170. In cases of personal injury¹⁰⁴ to an infant, idiot, or insane person, the parent(s) or guardian of such infant or the committee of such insane person, or the person who caused the injury, or the insurance carrier may on *petition* to the judge hearing the case ask for approval of a compromise on the claim, including any claim under the provisions of an automobile insurance policy. The judge shall appoint a guardian ad litem for the infant or insane person, convene all the interested parties and shall issue his order or decree in accordance with section 8-169 or section 8-639.

Section 8-639. The personal representative of the deceased may compromise any claim under section 8-633 (death by wrongful act statute), including claims under an automobile insurance policy, before or after action has been brought, by obtaining approval, by *petition*, from the judge of the court where the action has been brought or may be brought. All the parties in interest must be convened, except grandchildren whose parents are made parties to the proceeding. If the judge approves the compromise and the parties do not agree upon the distribution of the award, or any one of them is incapable of making a valid agreement, then the judge shall direct a distribution as a jury might direct under section 8-636 (discussed *supra*). Such a compromise has the same effect and force as an award under section 8-636.

This section (8-639), as well as sections 8-169 to 8-173 relating to compromises by fiduciaries on behalf of incompe-

¹⁰³ VA. CODE ANN. (1950) (Supp. 1960).

¹⁰⁴ When death did not ensue.

tent parties, does not apply when full demand is paid.¹⁰⁵ As to suit by nonresident guardian or representative see discussion under section 8-634 *supra*.

The common law rule that an unemancipated minor child cannot sue his parent to recover for personal injuries resulting from an act of negligence is still the law.¹⁰⁶ But the common law rule that a minor is liable for his own torts and another is not liable therefore has been modified by section 8-646.2¹⁰⁷ which provides that any owner of a motor vehicle who knowingly permits or causes, and any person who furnishes a motor vehicle, to a minor under 16 who is not permitted to drive under Chapter 5 Title 46 (now Chapter 5 Title 46.1) (section 46.1-357) shall be jointly or severally liable with such minor for any damages caused by the negligence of such minor in driving such vehicle. In *Hannabass v. Ryan*¹⁰⁸ it was held that since this statute is in derogation of the common law it must be strictly construed. Joint and several liability with the minor attaches only if he is not licensed by the state. A city ordinance is not applicable in dealing with the rights and liability of the owner of the motor vehicle. Thus where a minor under 16 is licensed by the state but prohibited to drive on the streets by a city ordinance, the permitting owner is not liable for damage caused by the negligence of the permittee minor driver.

The age limits for licensing of vehicle drivers are as follows:
School buses: Minimum age of 18, whether licensed or not.¹⁰⁹
Public passenger carrying vehicles: Minimum age of 21, whether licensed or not.¹¹⁰

Private vehicles: Age of 18, except that minors over 15 may be issued licenses if the application is signed by such persons as this section¹¹¹ requires and satisfactory evidence as to his physical and mental qualifications is furnished. But if a

¹⁰⁵ *Hinton v. Norfolk and Western Railway Company*, 137 Va. 605, 120 S.E. 135 (1923).

¹⁰⁶ For the most recent case on the subject see *Midkiff v. Midkiff*, *supra* note 52.

¹⁰⁷ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁰⁸ 164 Va. 519, 180 S.E. 416 (1935).

¹⁰⁹ VA. CODE ANN. § 46.1-169 (1950) (Repl. Vol. 1958).

¹¹⁰ *Id.* §46.1-170.

¹¹¹ *Id.* §46.1-357.

city ordinance prohibits a minor under 18 from driving on its streets he shall be bound by such ordinance.¹¹²

Other vehicles: Persons riding bicycles or riding or driving animals are subject to the same traffic regulations as drivers of motor vehicles.¹¹³

Driving without a license: It is prohibited by section 46.1-349.¹¹⁴

As to recovery of medical expenses for a minor's injuries, section 8-629¹¹⁵ provides that where there is an action by an infant plaintiff against a tortfeasor for a personal injury, the parent or guardian of such infant having an action against the same defendant for the expenses of curing or attempting to cure the injury to the infant, may join his action to that of the infant by *motion* of any party to either case made to the court at least one week before the trial, and both cases shall be tried together as parts to the same transaction. But separate verdicts, when there is a jury trial, shall be rendered in each case. In the event of the cases being carried to the Supreme Court of Appeals of Virginia, which may be done if there be jurisdictional amount in either case, they shall both be carried together as one case and record, but the Supreme Court of Appeals shall clearly specify the decision in each case, separating them in the decision to the extent necessary to do justice among the parties.

In *Moses v. Akers*¹¹⁶ the court said:

An infant is not entitled to recover the expenses incurred in healing or attempting to be healed of his injuries in an action brought against a tortfeasor to recover damages for personal injuries unless (1) he has paid or agreed to pay the expenses; or (2) he alone is responsible by reason of his emancipation or the death or incompetency of his parents;

¹¹² *Ibid.*

¹¹³ *Id.* §46.1-171. See also *Laubach v. Howell*, 194 Va. 670, 74 S.E.2d 794 (1953).

¹¹⁴ As to negligence aspects of driving without a license see text material to which *supra* note 22 is applicable.

¹¹⁵ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹¹⁶ 203 Va. 130, 122 S.E.2d 864 (1961).

or (3) the parent has waived the right of recovery in favor of the infant; or (4) recovery therefor is permitted by statute.

And in *Watson v. Daniel*¹¹⁷ it was held that an action by a father to recover medical expenses incurred as a result of injury to his infant was held to be an action for pecuniary loss suffered by his estate and therefore could be maintained by his (the father's) personal representative under section 5385 of the Code of 1930 (now section 64-135, Code of 1950) and the five year statute of limitation is applicable.¹¹⁸ The applicability of the guest statutes and death by wrongful act statutes has been discussed *supra* under the appropriate headings.

Under the common law a married woman had the status of a legally incompetent person. This English legal barbarism has been changed in Virginia (as well as in the rest of the States) by Married Women's Statutes. The sections applicable within the scope of this paper are: 55-35, 55-36, 55-37. Section 55-35 states that a married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried.¹¹⁹ *Edmonds v. Edmonds*¹²⁰ stated that this section has wiped aside every vestige of control the husband ever had under the common law, as well as all his rights as husband except as to curtesy. And *Vigilant Insurance Company v. Bennett*¹²¹ held that it also gives to her the substantive right to sue the husband for tortious damage to her property (as distinguished from a purely personal tort). But note that notwithstanding this section the presumption (rebuttable) prevails that the husband is the owner of all property in possession of the wife, especially if they are living together as husband and wife.¹²²

Section 55-36 contains the following: A married woman may sue and be sued as if she were unmarried. In personal injury cases she may recover the entire damage sustained in-

¹¹⁷ 165 Va. 564, 183 S.E. 183 (1936).

¹¹⁸ See VA. CODE ANN. § 8-24 (1950) (Repl. Vol. 1957).

¹¹⁹ VA. CODE ANN. § 55-35 (1950).

¹²⁰ 139 Va. 652, 124 S.E. 415 (1924).

¹²¹ 197 Va. 216, 89 S.E.2d 69 (1955).

¹²² *Childress v. Fidelity and Casualty Company*, 194 Va. 191, 72 S.E.2d 349 (1952).

cluding the expenses arising out of the injury, with the provision that all persons discharging such expenses shall be reimbursed.¹²³ Medical bills paid by the husband are recoverable by her, not by him (but he does receive reimbursement),¹²⁴ and it is she who recovers for his loss of consortium and not he.¹²⁵ But she cannot sue the husband for purely personal torts,¹²⁶ nor can her personal representative recover for her death caused by the husband.¹²⁷

Section 55-37 deals with the release of the husband from the common law liability for the wife's acts: A husband shall not be responsible for any contract, liability or tort of his wife, whether the contract or liability was incurred before or after marriage.¹²⁸ Since the husband's liability for his wife's torts is completely abolished by this section, no action by him against her be also against himself.¹²⁹

Substitution of Parties and Assignability of Tort Claims

Rule 3:17¹³⁰ states:

If a party becomes incapable of prosecuting or defending because of death, insanity, conviction of felony, removal from office, or other cause, his successor in interest may be substituted as a party in his place.

Substitution shall be made on motion of the successor or of any party to the action. If the successor does not make or consent to the motion, the party making the motion shall file it in the clerk's office and the procedure thereon shall be as if the motion were an original motion for judgment against the successor.

¹²³ VA. CODE ANN. § 55-26 (1950).

¹²⁴ *United Dentists v. Bryan*, 158 Va. 880, 164 S.E. 554 (1932).

¹²⁵ *Ford Motor Company v. Mahone*, 205 F.2d 267 (4th Cir. 1953).

¹²⁶ *Furey v. Furey*, 193 Va. 727, 71 S.E.2d 191 (1952).

¹²⁷ *Keister v. Keister*, 123 Va. 157, 96 S.E. 315 (1918).

¹²⁸ VA. CODE ANN. § 55-37 (1950).

¹²⁹ *Vigilant Insurance Company v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

¹³⁰ VA. SUP. CT. OF APPEALS RULES OF PRACTICE AND PROCEDURE.

Under section 8-628.1 no cause of action for injuries to a person or property shall be lost because of the death of the person liable for the injury or because of the death of the person in whose favor the cause of action existed, provided that in the latter situation no recovery can be had for mental anguish, pain or suffering. This section shall not be construed to permit the right to assign a claim for a tort not otherwise assignable or to extend the time within which an action for any other tort shall be brought.¹³¹ Compare now section 8-640 which states that the *right of action*¹³² for wrongful death shall not abate by the death of the defendant or the dissolution of the corporate defendants. When an action is brought by an injured person who dies during the pendency of the action, and his death being suggested, the action may be *revived* by his personal representative. If the death resulted from the injury, then the personal representative shall amend the motion for judgment and the pleadings to conform to sections 8-633 and 8-634. Only one recovery shall be allowed for the same injury.¹³³ To clarify this, it is *apropos* to state it as follows: If death is the result of the injury the personal representative can sue under the wrongful death act. If death is not the result of the injury the personal representative can revive the action for the injuries as such, *if* the deceased brought an action during his lifetime. Otherwise it dies with the deceased. It would, therefore, appear that in the light of the wording of section 8-24¹³⁴ the statute of limitations remains two years, not five years, as it would be if the action were to *survive*. However the language of these two sections (8-628.1 and 8-640) seems to confuse rather than enlighten. A very great amount of litigation has centered around the question of which statute of limitations applies. The Court in *Birmingham v. Chesapeake and Ohio Railway Company*¹³⁵ agreed that the language is ambiguous, but nevertheless it found no difficulty in holding that the object of the sections is to give the right of *revival* in cases where plaintiff in actions for personal injuries died pending the

¹³¹ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹³² For distinction between "cause of action" and "right of action" see text material to which *supra* note 25 is applicable.

¹³³ VA. CODE ANN. § 8-640 (1950) (Repl. Vol. 1957).

¹³⁴ The statute of limitation section applicable to personal injuries.

¹³⁵ 98 Va. 548, 37 S.E. 17 (1900).

action, without regard to the cause of death, and not to make all actions for personal injuries revivable (and thus holding that the shorter statute applies). Similarly in *Herndon v. Wickham*¹³⁶ it was held that under section 8-24 of the Virginia Code an action to recover damages for personal injuries must be brought within one year (now two) or within five years from the time such injury was inflicted, depending on whether the cause of action survives the death of either party. Section 8-628.1 did not change the one year (now two years) limitation because prior decisions and the construction of prior acts show that the legislature did not intend to change the period of limitation applicable to actions for personal injuries.

Under section 8-628.1 no recovery can be had for mental anguish, pain, or suffering,¹³⁷ and amended pleadings are required.¹³⁸

And the federal court loses jurisdiction where a resident administrator is substituted for a nonresident plaintiff.¹³⁹

By 8-146 if any of *several* plaintiffs or defendants die, become insane, convicted of a felony, etc., whether on trial or appeal of the case, the suit may proceed for or against the others if the action survive to or against them.

Where a party defendant sued *jointly* dies during the pendency of an action, except a personal action which dies with the person, the action shall not abate but may be revived against the personal representative of the decedent. If an action at law it shall proceed as a separate action against the personal representative as though the decedent had been a sole defendant.¹⁴⁰

The marriage of a female plaintiff or defendant shall not cause a suit or action to abate, but upon affidavit or other proof of the fact, the suit or action shall proceed in the new

¹³⁶ 198 Va. 824, 97 S.E.2d 5 (1957).

¹³⁷ *Seymour v. Richardson*, 194 Va. 709, 75 S.E.2d 77 (1953).

¹³⁸ *Ibid.*

¹³⁹ See text material applicable to *supra* note 54.

¹⁴⁰ PHELPS, HANDBOOK OF THE VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW, 237 (1959).

name, but if the marriage be not suggested before the judgment, the judgment shall be as valid, and may be enforced in like manner, as if no such marriage had taken place.¹⁴¹

. . . when a party dies, or becomes convicted of felony or insane, or the powers of a party who is a personal representative or committee cease, if such fact occurs after verdict, judgment may be entered as if it had not occurred.¹⁴²

8-148 provides in the case of marriage, death or other fact on appeal, writ of error or supersedeas the court may in its discretion, take or retain jurisdiction and enter judgment or decree in the case as if such marriage, death or other fact had not occurred.¹⁴³

8-150 provides that the new party may have in the discretion of the court a continuance *at the term* in which the change of parties is made. He may also be allowed to plead anew or amend the pleadings. Rule 3:13 may broaden the application of the statute in some cases.¹⁴⁴

8-152 provides where the party whose powers cease is defendant, the plaintiff may continue his suit against him to final judgment or decree.¹⁴⁵

By 8-67.1 the appointment by a non-resident operator (i. e., one operating either in person or by an agent or employee) of the Commissioner of the Division of Motor Vehicles as attorney for service of process or notice shall be irrevocable and binding upon the executor, administrator or other personal representative of such nonresident.

Where an action has been duly commenced against a nonresident operator (i. e., one operating either in person or by an agent or employee) pursuant to the provisions of law pertaining thereto and such nonresident dies after the commencement of such action, the action shall continue and shall be irrevocable and binding upon the executor, ad-

¹⁴¹ *Id.* at 236, quoting VA. CODE ANN. § 8-147 (1950) (Repl. Vol. 1957).

¹⁴² *Id.* at 235, quoting *id.* §8-145.

¹⁴³ *Id.* at 236.

¹⁴⁴ *Id.* at 235.

¹⁴⁵ *Ibid.*

ministrator or other personal representative of such non-resident, with such additional notice of the pendency of the action as the court deems proper.

When such nonresident has died prior to the commencement of an action against such nonresident, service of process or notice shall be made upon the executor, administrator or other personal representative of such non-resident in the same manner and on the same notice as is provided in the case of such nonresident motorist.¹⁴⁶

By 13.1-60 in the event the corporate name shall be changed by amendment, no suit brought by or against such corporation under its former name shall abate for that reason.¹⁴⁷

It is a well known rule of law that mere rights of action for personal injuries are not assignable and section 8-628.1 carefully spells out that it is not to be construed that it changes this rule. In *City of Richmond v. Hanes*¹⁴⁸ it was held that this section cannot be construed to give assignability to a claim of tort which was not assignable prior to the statute and therefore payment by the City of the injured employee's medical bills does not subrogate it to his claim for injuries. One cannot be subrogated to a cause of action not assignable to it. But an interesting situation is presented in *Betts v. Southern Railway Company*¹⁴⁹, where deceased's administrator commenced action in North Carolina under the Virginia statute for wrongful death. It was held that the administrator's right to maintain the action is not, under North Carolina law defeated as a result of the acceptance by the deceased's widow of compensation under the North Carolina Compensation Act. The law of the state in which an injury occurs cannot affect the right to workman's compensation under the law of the state of employment, unless the law of the state of employment so provides. Thus even though the Virginia Workman's Compensation law provides that acceptance of an award shall bar alternate remedies,

¹⁴⁶ *Id.* at 237. For a full discussion of service of process see pp. 151-171, and specially subpart J pp. 156-158.

¹⁴⁷ *Id.* at 238.

¹⁴⁸ 203 Va. 102, 122 S.E.2d 895 (1961).

¹⁴⁹ 71 F.2d 787 (4th Cir. 1934).

this only applies where the award is under the Virginia Act. Furthermore since North Carolina law does not prohibit the assignment of the right of recovery under the wrongful death statute, the insurance carrier is subrogated to the right of the beneficiary and has the right to elect to sue in the name of the administrator against the tortfeasor.¹⁵⁰

Multi-Party Actions

The discussion heretofore was mainly concerned with individual actions (except where joint parties were incidentally mentioned). This part analyzes certain problems concerning joint tortfeasors and third parties. Section 8-627¹⁵¹ provides that contribution among wrongdoers may be enforced when the wrong is a mere act of negligence and involves no moral turpitude. This changes the common law rule that there is no contribution among joint tortfeasors.¹⁵² But it gives a right of contribution only where the person injured has a right of action against two persons for the same indivisible injury. Thus in *Norfolk Southern Railroad Co. v. Gretakis*¹⁵³ it was held that an unemancipated minor child cannot sue his parent to recover for personal injuries resulting from an act of negligence. So where the parent and the railroad are joint wrongdoers (collision between train and auto caused by concurring negligence) and the railroad paid the judgment obtained by the infant, the railroad cannot sue the parent for contribution. Neither is the rule changed by the fact that the father carries liability insurance.¹⁵⁴ And under this statute not only a joint tortfeasor but

¹⁵⁰ As to recovery by a father for medical expenses incurred on account of his infant's injury see text material applicable to *supra* note 111.

¹⁵¹ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁵² It was held in *McKay v. Citizens Rapid Transit Co.*, 190 Va. 851, 59 S.E.2d 121 (1950) that the statute of limitations does not begin to run against the right to enforce contribution until the payment was made by one of the tortfeasors or his indemnitor. And the cause of action in cases of this kind arises out of an implied promise to pay and therefore the three year statute applies (and not the two year statute applicable to personal injuries). See also *Nationwide Mutual Insurance Company v. Jewel Tea Company*, 202 Va. 527, 118 S.E.2d 646 (1961).

¹⁵³ 162 Va. 597, 174 S.E. 841 (1934).

¹⁵⁴ But see *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939), where it was held that an infant is allowed to maintain an action against the parent for negligence where "the injuries [sustained] were occasioned in the performance of the duties of a common carrier, not in the parental relationship."

also his insurer, who has paid a judgment against him and another joint tortfeasor has the right of contribution from the latter.¹⁵⁵ Where a party is only a technical wrongdoer, and did not actually participate in the wrongful act, such party, on being compelled to pay damages to the injured party is entitled to contribution or indemnity from the actual wrongdoer. Thus in *McLaughlin v. Siegel*¹⁵⁶ a master, who is not a joint tortfeasor with his servant in the strict sense, is jointly and severally liable to the plaintiff for his servant's negligent acts and therefore if he paid off he can sue the servant for contribution.¹⁵⁷ The joint and several liability of a person who permits a minor under sixteen to drive such person's automobile has been referred to *supra*.¹⁵⁸

Section 8-368¹⁵⁹ provides that in an action against joint tortfeasors, a judgment against one is not a bar to an action against others. The injured party may bring separate suits against the wrongdoers and proceed to judgment in each, and no bar arises as to any of them until satisfaction is received. But plaintiff can enforce only one satisfaction and he must elect against which one he will proceed to execution. After such election and actual satisfaction it shall be a discharge of all, except as to costs. "If plaintiff sues all in a single action and all are found guilty, the verdict must be joint against all, and . . . [t]he jury have no power to apportion damages among them."¹⁶⁰ But a release of one joint tortfeasor releases all even if the release itself contains a statement reserving the right of action against the others.¹⁶¹ Under section 8-369¹⁶² if the original defendants are liable, but any of the defendants added

¹⁵⁵ McKay case, *supra* note 152.

¹⁵⁶ 166 Va. 374, 185 S.E. 873 (1936).

¹⁵⁷ But see *Drumgoole v. Virginia Electric and Power Company*, 170 F. Supp. 824 (E.D. Va. 1959): The United States is not liable for injuries to servicemen and therefore is not liable in a suit for contribution by the other tortfeasor.

¹⁵⁸ Text material applicable to *supra* note 107.

¹⁵⁹ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁶⁰ BURKS, PLEADING AND PRACTICE § 58 (4th ed., Boyd, 1952).

¹⁶¹ *McLaughlin v. Siegel*, 166 Va. 374, 185 S.E. 873 (1936); *Shortt v. Hudson Supply and Equipment Company*, 191 Va. 306, 60 S.E.2d 900 (1950).

¹⁶² VA. CODE ANN. (1950) (Repl. Vol. 1957).

under provisions of section 8-96 are not liable, plaintiff shall be entitled to judgment against those liable, and the ones not liable shall recover costs from the plaintiff who shall be allowed the same costs against defendants who caused them to be made parties. Section 8-96¹⁶³ referred to in the above section

. . . provides that no suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant. when such appears by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any stage of the case as the ends of justice may require.

The new party must, however, be a resident of the state or subject to service of process therein. The place of residence or service must be stated.

The new party cannot be added if it appears an action cannot be maintained against him because the statute of limitations has run (Ch. 2 of Title 8) or the statute of frauds applies (Ch. 2 of Title 11).

Further, 8-96 shall not be construed to permit the joinder, or addition as a new party, of any insurance company on account of the issuance to any party to a cause of any policy or contract of liability insurance, or on account of the issuance by any such company of any policy or contract of liability insurance for the benefit of or that will inure to the benefit of any party to any cause. This provision has been used more broadly to aid the court in interpreting the law applicable to fire insurance companies as well as in cases involving liability insurance. *Miller v. Tomlinson*, 194 Va. 367, 73 S.E. 2d 378 (1952).¹⁶⁴

*Hogan v. Miller*¹⁶⁵ stated that the settled rule in Virginia, which has not been disturbed by the enactment of section 6102 of the Code of 1919 (now section 8-96), is that co-trespassers are jointly and severally liable, and the party injured may sue all of them jointly, or two or more of them jointly, or one of them

¹⁶³ *Ibid.*

¹⁶⁴ PHELPS, HANDBOOK OF THE VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW, 186, (1959).

¹⁶⁵ 156 Va. 166, 157 S.E. 540 (1931).

severally, as he may see proper; and section 6264 of the Code of 1919 (now section 8-368) fortifies this conclusion. In distinguishing between "joinder" and "substitution" the Court in *Bardach Iron and Steel Company v. Tenenbaum*¹⁶⁶ held that "Nonjoinder means that a party has been omitted who ought to be *joined* with an existing party, not *substituted* for an existing party." That correcting a wrong name is not substitution is evident from section 8-97¹⁶⁷ which states that a plea in abatement for a misnomer is not allowed, but on affidavit of the right name, the pleading may be amended by inserting the right name.¹⁶⁸ *Jacobson v. Southern Biscuit Co.*¹⁶⁹ construed it to mean that if the right party is before the court although under a wrong name, an amendment to cure a misnomer will be allowed notwithstanding the running of the statute of limitations, provided there is no change in the cause of action originally stated.

Rule 3:9.1¹⁷⁰ abolishes third party practice in Virginia. "To conform to this Rule 8-96 was amended by deleting 'and such new parties defendant may be added upon the affidavit and motion of any defendant, where it appears that such parties are or may be liable to such plaintiff or defendant for all or part of plaintiff's claim.' "¹⁷¹

Rule 3:9¹⁷² provides for cross-claims arising out of the transaction sued on. The comment on this Rule¹⁷³ states that

Rule 9 allows a defendant to assert a cross-claim against a co-defendant if it grows out of the transaction sued on. The procedure will apply mainly in automobile accident cases in

¹⁶⁶ 136 Va. 163, 118 S.E. 502 (1923).

¹⁶⁷ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁶⁸ See also §13.1-60 in text material applicable to *supra* note 147.

¹⁶⁹ 198 Va. 813, 97 S.E.2d 1 (1957).

¹⁷⁰ *Supra* note 130.

¹⁷¹ PHELPS, *supra* note 164 at 206. For additional discussion of third party practice see *Ibid.*

¹⁷² *Supra* note 130.

¹⁷³ Judicial Council for Virginia, *Proposed Modifications of Practice and Procedure* (1949).

which plaintiff sues two or more defendants. The defendant is not allowed to bring in new parties.¹⁷⁴

Statements and Dispositions

Section 8-628.2¹⁷⁵ provides that any person who takes a signed written statement from a person who has sustained a personal injury relative to such injury shall leave a copy of such statement with such injured person at the time of taking such statement. And section 8-309¹⁷⁶ provides "No deposition shall be read in any suit against any infant, insane person, . . . , unless it be taken in the presence of the guardian ad litem, or upon interrogatories agreed on by him."¹⁷⁷

Miscellaneous Statutes

Section 8-646.3¹⁷⁸ provides that any person violating any provision of Chapter 1-4 of Title 46 (now 46.1) shall be liable, in addition to criminal punishment, for damages suffered by any person as a result of such violation. In *Kidd v. Little*¹⁷⁹ defendant truck driver was forced to stop suddenly to avoid hitting another vehicle as a result of which plaintiff's motor scooter following him struck him in the rear injuring plaintiff. It was reversible error for the court not to make it clear to the jury that defendant was not guilty of negligence solely because he failed to give the signal required by section 46-233 Code of 1950 (now section 46.1-216), if he, without negligence on his part, was forced to stop without time to give such signal.¹⁸⁰ But in *Jones v. Aluminum Window and Door Corporation*¹⁸¹ where plaintiff, a twelve year old boy, riding a bicycle on a dark, rainy night was struck by defendant's truck, it was held, *inter alia*,

¹⁷⁴ For a discussion of counterclaims and crossclaims see PHELPS, *supra* note 164 at 197-205.

¹⁷⁵ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁷⁶ *Ibid.*

¹⁷⁷ For a detailed discussion of "deposition under 8-304 and 8-305" see PHELPS, *supra* note 164 at 267-281.

¹⁷⁸ VA. CODE ANN. (1950) (Repl. Vol. 1957).

¹⁷⁹ 194 Va. 692, 74 S.E.2d 787 (1953).

¹⁸⁰ See also *Whitfield v. Dunn*, 202 Va. 472, 117 S.E.2d 710 (1961).

¹⁸¹ 201 Va. 283, 110 S.E.2d 531 (1959).

that an instruction that a driver who sees or should have determined that a bicyclist is a child has a duty to assume he might not operate the bicycle in a careful manner was properly given.

Under section 8-646.4¹⁸² if a person claiming damage as a result of such violation (the previous section) shall deposit with the court trying the criminal case a bond in an amount deemed by the trial court sufficient to cover the probable damage that the accused may suffer as a result of such prosecution, then the court shall require the violator, or the owner of the vehicle that was being driven by him, to deposit a bond or sum of money in an amount sufficient to cover the damages suffered by the injured party. But under section 8-646.5¹⁸³ if the owner or operator of the vehicle can show that he is covered by an approved insurance policy, then he should not be required to post bond as above described. If he cannot prove such coverage, and does not post bond or money, then the vehicle shall be impounded. If plaintiff recovers damages and costs, such impounded vehicle shall be sold to satisfy such judgment unless defendant, or someone for him, pays the judgment. Such seizure and sale of such vehicle is subject to all valid and recorded liens thereon.¹⁸⁴

Section 8-646.6¹⁸⁵ provides that for the purpose of service of process or notice, the operator of the motor vehicle which caused the damage shall be deemed the agent of the owner and service of process or notice upon such operator shall be equivalent to personal service upon the owner. But it shall be a valid defense to any such action for the owner of such vehicle to prove that the same was being driven or used without his knowledge or consent, express or implied, but the burden of proof thereof shall be on such owner.

Under section 46.1-7¹⁸⁶ every operator of a motor vehicle shall have in his possession, while driving the vehicle, his operator's license and owner's registration card and shall ex-

¹⁸² *Supra* note 178.

¹⁸³ *Ibid.*

¹⁸⁴ *Id.* §8-646.7.

¹⁸⁵ *Supra* note 178.

¹⁸⁶ VA. CODE ANN. (1950) (Repl. Vol. 1958).

hibit it upon demand to any authorized¹⁸⁷ police or peace officer. Failure to exhibit is a misdemeanor and subject to fine. However, if he shall exhibit them to the same officer prior to the return date of the summons, or produce them before the court at the return date of the summons, he shall be deemed to have complied with the provisions of this section, provided that the documents show that they were issued prior to the time of such demand. And under the following section¹⁸⁸ any authorized peace officer shall have the right to stop any motor vehicle for purposes of inspection. And under section 46.1-9¹⁸⁹ any authorized peace officer or Division officer or employee shall have the right to inspect any motor vehicle in any public garage or repair shop. Furthermore, sections 46.1-10 to -12¹⁹⁰ require that persons in charge of garages, repair shops, or automotive service, storage or parking place shall report to the nearest police station or to the State police any vehicle in their possession which:

(1) shows evidence of having been struck by a bullet (report within twenty-four hours)

(2) is left unclaimed for more than two weeks and he does not of his own knowledge know the name of the owner and the reason for such storage

(3) has any radio transmitter, any short wave radio receiver capable of receiving frequencies of more than 1600 kilocycles, any bullet proof glass, or any smoke screen device.

Under 46.1-14¹⁹¹ every person renting motor vehicles without drivers must keep records showing the identity of the person renting and the time during which it is in his possession. Such records shall be public and open to inspection by any person damaged as to his person or property by such vehicle and by any police or traffic officer in discharge of his duties.

¹⁸⁷ The term applies to one who shall be in uniform or shall exhibit his badge or other sign of authority.

¹⁸⁸ VA. CODE ANN. §46.1-8 (1950) (Repl. Vol. 1958).

¹⁸⁹ *Id.* §46.1-9.

¹⁹⁰ *Id.* §§46.1-10 to -12.

¹⁹¹ *Id.* §46.1-14.

Section 46.1-176¹⁹² requires that the driver of a vehicle involved in an accident in which there is personal injury or property damage shall immediately stop and report to a police officer or occupant or attendant of the vehicle or property damaged his name, address, driver's license number and vehicle registration number. He shall also render reasonable assistance to any person injured including the carrying of such injured person to a physician or hospital.

If the vehicle or property struck is unattended and the owner or custodian cannot be found he shall leave a note in a conspicuous place at the scene of the accident and report the accident within twenty-four hours to the Superintendent or, if the accident occurred in a city or town, to the Chief of Police of such city or town, giving the same information as required in the personal report.

If the driver fails to comply with these provisions then any person in the vehicle at the time of the accident shall report within twenty-four hours to the Superintendent or Chief of Police furnishing his name and address and such other information that the driver is required to report and which is within his (passenger's) knowledge. These provisions apply whether the accident occurs on the public highways or streets or on private property. Penalties are provided for failure to comply.

¹⁹² *Id.* §46.1-176.