George Mason University
American Inn of Court

TRYING THE MEDICAL MALPRACTICE CASE IN VIRGINIA

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BIOGRAPHIES

Scott Perry

Scott Perry is a Board Certified Civil Trial Lawyer. A founding partner of Perry Charnoff PLLC, Mr. Perry has consistently obtained the largest medical malpractice verdicts in Virginia and D.C. In 2019 alone, Mr. Perry (with co-counsel) obtained the top two tort verdicts in Virginia ($36 million and $12 million). Prior to starting his own firm, Mr. Perry was integral in obtaining a $22 million FTCA Virginia medical malpractice verdict, and a $27 million D.C. verdict.

In addition to medical malpractice, Mr. Perry enjoys representing brain-injured people in atypical injury cases. Having a brain-injury survivor in his immediate family, Mr. Perry is well aware of the challenges faced by these individuals. For example, Mr. Perry has obtained seven-figure settlements in several catastrophic sports injury cases and in medical device cases. Mr. Perry is currently litigating several sex abuse cases and (what is believed to be) a first-in-the-nation case against an electronic medical record vendor for a product defect that left a 24 year old permanently brain damaged.

Mr. Perry and his wife, JoAnn, volunteer, support, and sit on the Board (JoAnn) of Brain Injury Services (BIS), a Virginia organization dedicated to helping brain-injured adults build the skills and confidence they need to lead a fulfilling and productive life. Through BIS, they have “adopted” a brain-injured adult who is like a member of their family. Scott and JoAnn live in Falls Church with their two young children.

Mike Charnoff

Mike Charnoff graduated from the University of Virginia School of Law in 1999, and clerked for the Hon. Frank Schwelb of the District of Columbia Court of Appeals. Mike is licensed in all state and federal courts in Virginia, Maryland, and the District of Columbia. He enjoys a broad civil litigation practice, and has appeared in over thirty-five Circuit Courts in Virginia. Mike defended medical malpractice cases for a dozen years before founding Perry Charnoff PLLC, in Arlington, Virginia, where plaintiff side medical malpractice is part of his practice.

Matt Perushek

Matt Perushek is partner at the firm Frei, Mims & Perushek, L.L.P., in Fairfax. He practices in all areas of personal injury law, including cases involving medical malpractice, products liability, premises liability, and automobile collisions. He has tried cases throughout the Northern Virginia courts. He has also argued before the Supreme Court of Virginia, the most recent of which was *Gross v. Stuart*, Record Number 180758. In that case, Matt successfully defended the jury's verdict of $800,000, arguing that it was appropriate to cross-examine the defense expert about his own disciplinary problems.

Matt has been a member of the George Mason University Inn of Court since 2015. He is on the Board of Directors of the Fairfax Bar Association and the Board of Governors of the Virginia State Bar's Young Lawyers Conference. He is also a member of the VTLA Amicus Committee.

Matt has been recognized as a SuperLawyers Rising Star since 2015 and by the National Trial Lawyers' Top 40 Under 40 since 2017. He is rated AV Preeminent by Martindale-Hubbell.

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Ben Charlton

Ben Charlton is an associate attorney at the firm Frei, Mims & Perushek, L.L.P., in Fairfax. He practices in personal injury law, representing victims of automobile collisions, premises liability, and medical negligence, and he has argued motions before trial courts across Northern Virginia.

Ben first joined the George Mason University Inn of Court as a student member, and this past summer joined as an attorney member. He also serves as the President-Elect of the Young Lawyer's Section of the Fairfax Bar Association and as a Fifth District Representative to the Virginia State Bar's Young Lawyer's Conference. Before joining Frei, Mims & Perushek, L.L.P., Ben clerked for the Honorable Louise M. DiMatteo of the Arlington County Circuit Court.

INTRODUCTION TO MEDICAL MALPRACTICE

Medical malpractice is negligence, and professional negligence in particular. So just as one would need to present evidence of duty, breach of duty, causation, and damages in an ordinary negligence case, the plaintiff must prove each of the four elements of medical malpractice:

(1) establish the standard of care,

(2) demonstrate that the defendant's actions breached the standard of care,

(3) prove that the defendant's breach was the proximate cause

(4) of the plaintiff's injuries or death.

See Bryan v. Burt, 254 Va. 28, 34 (1997). Each element must be established by expert testimony. *See Raines v. Lutz*, 231 Va. 110, 113 (1986), and *Bly v. Rhoads*, 216 Va. 645, 653 (1976).

In Virginia, "malpractice" is defined in Code of Virginia § 8.01-581.1 as "any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." And "health care" is also defined in Code § 8.01-581.1, which "means any act, professional services in nursing homes, or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical diagnosis, care, treatment or confinement."

"Ordinarily the doctrine of res ipsa loquitur does not apply in a malpractice suit against a dentist or physician, but negligence must be affirmatively proven." *Alexander v. Hill*, 174 Va. 248, 252 (1940).

The full text of Code of Virginia § 8.01-581.20 is included at the end of these materials for reference.

PLEADING ISSUES

There is no heightened pleading standard for medical malpractice, such as with a claim for fraud. Indeed, pleading is technically no higher than any negligence case, and Rule 3:18(b) plainly states that "[a]n allegation of negligence . . . is sufficient without specifying the particulars of the negligence."

Despite this jurisprudence, and despite the average plaintiff having no ability to precisely articulate standards of care and deviations from the standard of care, in recent years Motions for Bill of Particulars have become common. Especially because medical malpractice is so dependent upon expert testimony, such motions are seldom productive.

Code of Virginia § 8.01-20.1 and § 8.01-50.1 were instituted about 15 years ago to deter meritless medical malpractice cases from being pursued. They require a plaintiff to certify, if requested by defense counsel, that at the time of service (not filing) of the Complaint that he or she has a written, signed letter from an expert witness (that you reasonably expect to qualify) that there was a deviation from the standard of care and that the deviation was a proximate cause of the injury. Code of Virginia § 8.01-20.1 applies to medical malpractice injuries and § 8.01-50.1 solely applies to wrongful death actions against healthcare providers.

In response to a request, plaintiff's counsel has 10 business days to so certify in writing. The underlying letter is not discoverable, although subject to an in camera review if there is some sort of challenge to it. Failure to certify in response to a request can result in sanctions pursuant to Code of Virginia § 8.01-271.1 including dismissal.

The statute of limitations for medical malpractice cases is generally two years like any other personal injury cause of action, as set forth in Code of Virginia § 8.01-243. The three exceptions in the statute are:

1. one year from when a foreign object is discovered or reasonably should have been discovered;

2. where fraud prevented discovery of the injury within the ordinary two-year window;

3. certain claims for the negligent failure to diagnose a malignant tumor, cancer, or an intracranial, intraspinal, or spinal schwannoma, for a period of one year from the date the diagnosis.

EVIDENTIARY ISSUES

- Admissibility of medical bills:
    - Key case: *McMunn v. Tatum*, 237 Va. 558 (1989):

- Relevant facts: The Supreme Court of Virginia was presented with judgment for the Plaintiff in a dental malpractice case, and the relevant question for our purposes was whether the trial court erred in admitting proof of plaintiff's medical bills.

- Rule 1: Proof of medical expenses by the introduction of bills through testimony of the plaintiff requires consideration of four elements: (1) authenticity, (2) reasonableness in amount, (3) medical necessity, and (4) causal relationship.

- Rule 2: A plaintiff may offer medical bills into evidence through his testimony if he lays a foundation by showing (1) that the bills are regular on their face, and (2) that they appear to relate to treatment, the nature and details of which the plaintiff has explained. If the Defendant challenges the authenticity of the bills, independent proof will be necessary. If the Defendant challenges the reasonableness of the bills, then the jury can consider it. If the Defendant contests their necessity or causal relationship, then expert foundation testimony will be required for admission.

> We now hold that where the defendant objects to the introduction of medical bills, indicating that the defendant's evidence will raise a substantial contest as to either the question of medical necessity or the question of causal relationship, the court may admit the challenged medical bills only with foundation expert testimony tending to establish medical necessity or causal relationship, or both, as appropriate.

- *Practice pointer → While you should always be prepared to introduce evidence of medical specials at jury trial, you may not want to unless they are well into the six-figures. In any case involving permanent injury, loss of limb, or paralysis, the intangible award for bodily injury, past and future pain and suffering, and disfigurement or deformity may be linked to the amount of medical expenses. Evidence of medical expenses may psychologically anchor the jury to a lower base number. Conversely, in cases where there is a significant care plan, which often can exceed the medical malpractice cap, then you do want to introduce such evidence. The protocol for future medical expenses is essentially the same as for past medical expenses, as you need a physician to testify as to the medical necessity and causal relationship to the injury.*

- Hearsay issues within medical records:

    - Rule 2:803(6) provides a hearsay exception for "Records of a Regularly Conducted Activity." The requirements of this rule are:

        - the record was made at or near the time of the acts, events, calculations, or conditions by—or from information transmitted by—someone with knowledge;

        - the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

        - making and keeping the record was a regular practice of that activity;

        - all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

        - neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

    - Rule 2:902(6): Business records which are material or otherwise admissible may be authenticated and foundation laid by either witness testimony, a certification of authenticity by the custodian of the records, or a combination of both.

        - A party wishing to authenticate business records under this code section must provide a copy of the records and notice of their intention to certify the records under this section no less than fifteen days before the relevant hearing or trial.

        - If this section is satisfied, such records become self-authenticating.

        - The opposing party has five days to object. Following such objection, authenticity and foundation will need to be established by witness testimony unless the objection is withdrawn.

    - Key case: *Neeley v. Johnson*, 215 Va. 565 (1975):

        - Relevant facts: Plaintiff was in a stopped vehicle which was struck from the rear by the defendant. The plaintiff treated at the Veterans Administration Hospital and wished to enter into evidence a duly authenticated, fifteen-page photocopy of the VA hospital's entire record, which included handwritten and typewritten notes of both fact and opinion covering the entirety of his treatment.

        - Holding: The record could not be admitted as a whole, but it was proper to admit portions of the document.

        - Rule: Opinions within a medical record are not admissible even if the record is authenticated.

- Testimony of treating physicians:

    - Code of Virginia § 8.01-399: Communications between physicians and patients. This statute provides the limits of treating physician testimony. Rule of Evidence 2:505 tracks the code section.

        - Request or consent of the patient is required unless disclosure or testimony by a treating physician is otherwise required by court order or law.

        - In a civil matter which concerns the physical or mental condition of the patient, a treating physician may disclose: the diagnoses, signs and symptoms, observations, evaluations, treatment, together with the facts communicated to or otherwise learned by the physician in connection with his interaction with the patient.

        - Only a diagnosis offered to a reasonable degree of medical probability is admissible.

        - These disclosures can only occur in discovery pursuant to the Rules of the Court or through testimony at trial.

        - A court may prevent disclosure at the request of the patient if the information requested is not relevant to the subject matter of the case or reasonably calculated to lead to admissible evidence.

- Key case: *Graham v. Cook*, 278 Va. 233 (2009):
    - Relevant facts: Plaintiff fell from his roof and injured his hip. He had a subsequent surgery but continued to experience pain and sought opinions from several other physicians. The issue of the admissibility of their testimony came down to whether statements by the physicians regarding the possibility or suspicion of a medical condition were diagnostic statements. If the statements were a diagnosis, then they were not established to an appropriate degree of medical probability, and were not admissible. But factual impressions formed at the time are not diagnoses.
    - Holding: The statements did not impart a diagnosis and were thus admissible under Section 8.01-399(B) regardless of the degree of medical probability.

- The standard of care:
    - The standard of care as necessarily articulated by expert witnesses dates at least as far back as 1918 in Virginia. *See Hunter v. Burroughs*, 123 Va. 113, 136 (1918).
    - Code of Virginia § 8.01-581.20, part (A) establishes the definition of the standard and the two requirements an expert must meet to be able to testify about the standard.
        - The standard of care by which health care providers will be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth.
        - The testimony of an expert witness regarding such standard of care will be admitted if he demonstrates expert

knowledge of the standards of the defendant's specialty and he has had active clinical practice in the specialty or a related field of medicine within one year of the date of the alleged act or omission.

- Key case: *Perdieu v. Blackstone Family Practice Center*, 264 Va. 408 (2002)

  - Relevant facts: The trial court refused to qualify three of plaintiff's proposed expert witnesses, stating that they either did not have experience in the correct specialty or did not have the proper experience in the relevant time period. Specifically, the plaintiff was a resident in a nursing home whose hip was fractured when she fell. Plaintiff's claim also involved the ineffective supervision of a resident physician. According to the trial court, the experts needed to have experience either with nursing home patients, regular treatment and diagnosis of fractures, or supervision of resident physicians within the relevant time period.

  - The question of whether an expert witness is qualified is largely at the trial court's discretion and will be reviewed based on an abuse of discretion standard. In this case, the trial court had sufficient reasons for its holding and did not abuse its discretion.

Can you use something other than expert testimony to establish or to challenge the standard of care?

- Policies and procedures do not set the standard of care as a matter of law in Virginia. Policies and procedures are expressly inadmissible for that purpose in a medical malpractice case, and they are also inadmissible on other grounds. They could only confuse a jury as to

what the standard of care is as set forth in Code of Virginia § 8.01-581.20, or give them an improper basis to reach a decision.

- Private rules adopted by a defendant do not set the duty or standard of care to others. *See Pullen v. Nickens*, 226 Va. 342, 350-51 (1983); *Virginia Rwy. & Power Co. v. Godsey*, 117 Va. 167 (1915). In a medical malpractice case the Supreme Court of Virginia referenced "hospital policies or procedures of the type involved in *Godsey* and *Pullen*," to distinguish them from different evidence at issue in that case. *See Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 529 (2006).

- Moreover, the evidenced care is what it is—either it is consistent with the standard of care or it is not. Whether or not a particular act or omission also violates an internal policy, procedure, or protocol of the health care provider is of no significance. "[T]he relevant inquiry in a negligence action is not whether a defendant has a habit of compliance with the type of duty at issue, but whether the defendant breached a specific duty owed to plaintiff at a particular time." *See Ligon v. Southside Cardiology Assoc.*, 258 Va. 306, 313 (1999).

No. The standard of care is only whatever the qualified expert witnesses testify it is for the jury, pursuant to Code of Virginia § 8.01-581.20(A).

Other medical malpractice evidentiary issues:

- The Supreme Court of Virginia specifically stated in *Stottlemyer v. Ghramm*, 268 Va. 7 (2004) that the health care provider's "alleged prior bad acts do not constitute evidence of habit or routine practice within the intendment of Code § 8.01-397.1" in medical malpractice cases. So the fact that a surgeon committed the same error several times before generally will not be admissible.

- As to causation, in *John v. Im*, 263 Va. 315 (2002) and *Combs v. Norfolk & Western Ry. Co.*, 256 Va. 490 (1998), the Supreme Court of Virginia strictly precluded non-doctors from opining as to medical causation and from diagnosing whether or not injuries stem from an alleged incident. "An opinion concerning the causation of a particular physical human injury is a component of a diagnosis, which is part of the practice of medicine." *Id.* at 322 (citing *Combs v. Norfolk & W. Ry. Co.*, 256 490 (1998)). As the *John* court wrote, "[the expert] was a licensed psychologist, not a medical doctor. Therefore, since [the expert] was not a medical doctor, he was not qualified to state an expert medical opinion regarding the cause of John's injury."

- Code of Virginia § 8.01-581.20(C) expressly states that "each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented."

    - A recent tactic has been to name 3 or 4 experts on a given issue, claiming that they will be narrowed to 2 experts for trial. The prejudice is that it costs time and money to depose 3 or 4 experts on a given issue, it allows the sponsoring party to weed out the experts who did less well in deposition, and allows later experts to be prepared for lines of questioning. More importantly, the practice is specifically prohibited by the statute.

    - This is a statutory remedy to an old practice where the defense, usually funded by an insurance company, would name multiple experts on the same topic, which could be very misleading to a jury especially where the plaintiff could only afford one expert.

    - The perverse effect in litigation that can come down to a battle of the experts is that the jury often only gets to hear from 4 experts on a given issue, 2 from each side, and may infer that

the consensus is evenly split, when in reality one side may have found the 2 out of 100 experts who espouse a minority opinion.

EXPERT ISSUES

- Designations
    - Rule 4:1(b)(4)(A)(i) states what an expert designation must include
        - Applies to every witness the other party expects to call at trial
        - Must . . .
            - State the subject matter on which expert expected to testify; and
            - State the substance of facts and opinions to which expert is expected to testify; and
            - A summary of the grounds for each opinion
    - Key case: *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017)
        - Relevant facts: Carbon monoxide levels in plaintiffs' apartment fell outside the acceptable range. After multiple failed repairs and diagnoses, plaintiffs sued for the exposure contending "that the CO exposure resulted from faulty maintenance of the furnace and the associated vent and flue system and that this exposure resulted in their injuries." The pre-trial discovery order required disclosure of all expert opinion and sources relied upon pursuant to

Rule 4:1(b)(4)(A)(i). In the designation, the doctor referenced the fact that one plaintiff should take nutritional supplements to minimize the effects of dementia. However, during the doctor's deposition, the doctor referenced a recent paper he read that explained "the long-term effect of people who have been exposed to carbon monoxide is that of dementia." At trial, the doctor testified about dementia referencing the scholarly articles. Defendant objected as the doctor's reliance on the dementia study was not disclosed prior to trial, as required by the pre-trial discovery order. Additionally, defendant objected to testimony about a "latency period" for symptoms secondary to carbon monoxide.

- Holding: The circuit court abused its discretion by overruling defendant's objection to the doctor's statements regarding the dementia study and the testimony about the "latency period."

- Rule: Previously undisclosed opinions concerning effects of long-term exposure to carbon monoxide (being dementia) were prejudicial to defendant because the doctor's referenced study was not disclosed prior to trial as required by the scheduling order and discussed a "latency period" that was never disclosed.

- *Practice pointer → This is the most-recent high-profile case that deals with expert designations, and it weaves together the principles articulated in the prior cases. <u>John Crane</u> is frequently misunderstood and misapplied; it*

holds that an opinion that is not disclosed "in any form" is inadmissible at trial. After the release of the opinion, it was used aggressively to argue that designations were inadequate. In what seemed like an effort to curb this practice, the Supreme Court decided Condominium Services, where the Court held that as long as an opinion is disclosed, the question of whether there is sufficient detail is really a matter of discretion for the trial court. This case seemed to swing the pendulum in the opposite direction, with trial courts often mistakenly believing that they could cure inadequate designations under discretionary principles. Emerald Point—and Mikhaylov shortly before it—clarify the framework: First, was the opinion disclosed "in any form"? If not, the opinion is excluded. If it was, the trial court can still prevent some testimony related to the opinion if those specifics were not sufficiently designated under Condominium Services.

- *Practice pointer → Interestingly, the Supreme Court discussed the discovery–supplementation rule in footnote three. The Court noted that the plaintiff never attempted to supplement the expert designation after the deposition had occurred to include the testimony offered at the designation. The Supreme Court did not, however, clarify whether such a supplementation would necessarily be appropriate or allowed. It would seem that absent further clarification from the Court, whether a supplementation after a designation due date is allowed would be a matter for the trial court. The Uniform Pre-Trial Scheduling Order sets the deadlines for expert designations, but it*

also permits modification of any deadline "for good cause shown." It would seem that a litigant could argue for good cause to allow supplementation of a deposition after a deadline.

- Key case: *Mikhaylov v. Sales*, 291 Va. 349 (2016)
  - Relevant facts: The plaintiff's pretrial expert designation did not disclose the doctor's opinion on the subject of "the need for [the plaintiff's] future medical treatment." The pre-trial scheduling order required disclosure of all expert opinions. That subject was never addressed prior to or during the expert's deposition. At trial, the plaintiff sought to introduce expert testimony regarding the plaintiff's future medical treatments. Defendant objected because that subject had not been previously disclosed. The trial court denied the motion.
  - Holding: The trial court erred in denying the defendant–appellant's objection to plaintiff introducing previously undisclosed opinions on future medical treatment. A ruling to the contrary would unjustly relieve plaintiff from his obligations under Rule 4:1(b)(4)(A)(i) to disclose expert opinions pretrial.
  - Rule: Unless the defendant was complicit in the plaintiff violating Rule 4:1(b)(4)(A)(i), defendant "was under no obligation to file a pretrial motion to contest the admissibility of expert testimony on a subject that had never been disclosed to him." The party who failed to

disclose (part) of the expert designation has the duty to cure the violation before trial.

- Key case: *Condominium Services v. First Owners' Association*, 281 Va. 561 (2011)
    - Relevant facts: An expert designation stated that the expert would opine about the underpayment of taxes and accompanying penalties. At trial, when the expert testified as to the specific amounts of the taxes and penalties, the opposing party objected. The trial court denied the objection.
    - Holding: The Virginia Supreme Court affirmed the judgment of the trial court and held that it did not abuse its discretion in finding the expert designation was proper. There was sufficient evidence "to support the circuit court's determination that FOA's designation was sufficient to satisfy the purpose of Rule 4:1(b)(4)(A)(i), which is to 'allow the litigants to discover the expert witnesses' opinions in preparation for trial.'"
- Key case: *John Crane, Inc. v. Jones*, 274 Va. 581 (2007)
    - Relevant facts: Pursuant to Rule 4:1(b)(4)(A)(i), the defendant company made pretrial disclosures concerning an expert; however, the defendant company did not include "any reference to levels of asbestos in the ambient air." Defendant company tried to introduce that evidence

at trial, plaintiff's estate objected, and the trial court sustained the objection.

- Holding: The Virginia Supreme Court affirmed the trial court's ruling under the abuse of discretion standard. Since the defendant company did not disclose something it tried to introduce at trial, the plaintiff's objection was properly sustained.

- Rule: "[A] party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert. Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert testimony." The inquiry begins by "determining whether the opinion at issue was disclosed in any form."

- Reasonable degree of medical probability standard

  - Rule 2:702(b) says that all expert testimony must be stated to a reasonable degree of probability

    - "Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the

credibility of another witness, is not admissible." Va. Sup. Ct. R. 2:702(b) (emphasis added).

- Key case: *Spruill v. Commonwealth*, 221 Va. 475 (1980) → **need more than a possibility.**
  - "Opinion based on a 'possibility' is irrelevant, purely speculative and, hence, inadmissible. In order for such testimony to become relevant, it must be brought out of the realm of speculation and into the realm of reasonable probability; the law in this area deals in 'probabilities' and not 'possibilities.'"
  - In other words, testimony that deals in possibilities is inadmissible.
  - *Practice pointer → The word "possible" is a key buzzword. Most trial judges who hear this know immediately that the opinion does not meet the requisite standard. When presenting your experts, make sure they know to avoid this word. Judges routinely allow testimony that an outcome was "likely," which they view as another way of saying probability. Possibility is not enough, but probability is.*

- Factual impression v. opinion
    - Key case: *Graham v. Cook*, 278 Va. 233 (2009)
        - In this case, the Supreme Court reviewed its prior cases about whether testimony from a physician was an "opinion" or a "factual impression."
        - The Court explained that impressions and conclusions formed while treating a patient are factual impressions, and they are admissible under Virginia Code § 8.01-399(B) even if they were not held to a reasonable degree of medical probability.
        - Conversely, a diagnosis—which purports to identify the cause of a health condition—is like an opinion and must be stated to a reasonable degree of medical probability.
        - *Practice pointer → This case can cause problems during testimony of treating physicians. They key of whether the testimony must be stated to a reasonable degree of medical probability lies in whether the testimony offers the cause (i.e., the diagnosis) of the patient's health condition.*
    - Key case: *Pettus v. Gottfried*, 269 Va. 69 (2005)
        - The Virginia Supreme Court held that a cardiologist's testimony—which indicated the patient "could have" suffered from a central nervous system event in response to a question about the treatment—was factual in nature,

and the reasonable degree of medical certainty standard did not apply. “The answer did not impart an expert medical opinion at trial because” the cardiologist “was not stating his present opinion regarding [the patient’s] mental disorientation and the functioning of his central nervous system.” Further, the cardiologist was not providing a diagnosis.

- The Court also considered the cardiologist’s response to the question “Do you have an opinion with a reasonable degree of medical certainty what the cause of Mr. Puttus’ death was?” The cardiologist responded that he did not know and explained an autopsy is usually done because “it’s really difficult to know what may have happened.” The reasonable degree of medical certainty rule applied to that statement because it was his present opinion, which was speculative, and hence inadmissible.

- Foundation issues
  - Key case: *Valazquez v. Commonwealth*, 263 Va. 95 (2002), which has good language on the purpose of expert testimony and the knowledge an expert must have to testify.
    - “The sole purpose of permitting expert testimony is to assist the trier of fact to understand the evidence presented or to determine a fact in issue.”
    - “Generally, a witness is qualified to testify as an expert when the witness possesses sufficient knowledge, skill, or

experience to make the witness competent to testify as an expert on the subject matter at issue."

- Key case: *Toraish v. Lee*, 293 Va. 262 (2017) and the cases cited therein (including *Tittsworth v. Robinson*, 252 Va. 151 (1996)), discuss that an expert's testimony must be founded upon assumptions that have a basis in fact. If they are not, the remedy is to exclude the expert, not merely cross examine him/her.

  - "Generally, expert testimony is admissible in civil cases if it will assist the fact finder in understanding the evidence. Such testimony, however, must meet certain fundamental requirements." *Tittsworth*

    - "Such testimony cannot be speculative or founded upon assumptions that have an insufficient factual basis." *Tittsworth*
    - "[E]xpert testimony founded upon assumptions that have no basis in fact is not merely subject to refutation by cross-examination or by counter-experts; it is inadmissible." *Toraish*

    - "Such testimony is also inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deducted from the facts observed." *Tittsworth*

  - "Further, where tests are involved, such testimony should be excluded unless there is proof that the conditions

existing at the time of the tests and at the time relvant to the facts at issue are substantially similar." *Tittsworth*

- *Practice pointer → This case is an important expert-foundation case. In medical malpractice cases, experts frequently want to make assumptions beneficial to their ultimate opinion. Toraish reiterates what the Supreme Court has long held: the expert cannot create assumptions to fit their opinions. To the contrary, each assumption must be based upon fact. Importantly, the remedy is to exclude the expert, not merely to allow cross-examination of his or her opinions.*

- *Practice pointer → This case can be used to exclude experts when you find one that refuses to recognize/acknowledge a fact because it could be detrimental to their opinion. The key is that the evidence that will be admitted at trial must align with the expert's assumptions.*

- *Practice pointer → This case can be applied outside of medical malpractice cases. In a premises liability case, if an architect makes assumptions about how the accident occurred and it in fact occurred a different way, they could be attacked. In a business valuation case, an economist who makes assumptions about revenue that are a long stretch could be attacked.*

Cap on Damages

- Virginia Code § 8.01-581.15, which is the cap
    - Schedule of incremental increase to the cap every year from August 1999 ($1.50 million) to June 2031 ($2.95 million)
    - Apply corresponding cap by determining if "the act or acts of malpractice occur on or after the effective date of the increase"
    - Date that the malpractice acts occurred are the dates of the cap to apply
- Key case: *Etheridge v. Medical Center Hospitals*, 237 Va. 87 (1989)
    - Facts
        - A healthy 35-year-old woman went in for surgery to restore a deteriorating jaw bone and was left "brain damaged with limited memory and intelligence. She is paralyzed on her left side, confined to a wheelchair, and unable to care for herself or her children."
        - A jury awarded her $2.75 million and the trial court reduced the verdict to $750,000 under the prescribed VA recovery limit. Plaintiff appealed.
    - Issue
        - Does the VA cap violate the VA Constitution?

- Answer
    - No
- Reasoning
    - Plaintiff is still afforded a trial by jury.
    - The limitation on recoveries establishes the outer limit of a remedy, which is a matter of law, not fact.
    - The cap is constitutional because it applies only after a jury has completed its function of fact-finding.
    - Plaintiff was still permitted to present her case and be heard on its merits in spite of the outer limit of a remedy so there was no due process violation.
    - The General Assembly found that the increase in medical malpractice claims affected the premium for malpractice insurance.
    - The General Assembly enacted the cap to allow providers to obtain insurance with limits at affordable rates so providers could continue providing medical care

- Key case: *Boyd v. Bulala*, 905 F.2d 764 (4th Cir. 1990)
    - Facts:
        - Alleged negligence of a doctor that led to serious birth defects in a child, emotional distress and serious injury to the mother, and emotional distress in the father
        - Jury found the doctor liable and the doctor appealed the verdict on the grounds that the trial court did not limit the total jury verdict to the medical malpractice cap, but instead aggregated the jury's award for each plaintiff
    - Issue
        - Was the jury award subject to adjustment under the VA medical malpractice law?
        - Several aspects of VA medical malpractice were unclear to the court and unsettled so it warranted certification to the VA Supreme Court
        - The Supreme Court of VA answered a series of questions posed by the 4th Ciruit.
    - Rationale
        - Yes, the award was subject to adjustment

        - "The total damages recoverable for 'any injury' to a single 'patient,' regardless of the number of claims and claimants and theories of recovery related to that injury."

        - "The cap applicable to any single patient's injury covers both compensatory and punitive damage claims of the patient and any claims by others that, by substantive law, are 'derivative' of the patient's claims."

        - "Where the aggregate of the damage awards subject to a separate cap exceeds the cap, reduction of the awards, in whole or part, to reach the cap level (with any consequent apportionment between claimants) should occur in the following order of reduction: first, awards based on derivative claims of others than the patient; next, punitive damage awards to the patient; last, compensatory damage awards to the patient."

- Key case: *Pulliam v. Coastal Emergency Services*, 257 Va. 1 (1999)

    - Facts

        - Patient went to the hospital for aching legs, was treated for flu and sent home, she returned to the hospital that day and died from bacterial pneumonia

        - Trial court awarded plaintiff $1 million, in excess of the cap, and did not allow interest to run from the date of death

- Issue
    - Plaintiff argues that *Etheridge* should be reversed and the cap is a state and federal constitutional violation
- Answer
    - The cap is constitutional, and the court will follow *stare decisis*
- Rationale
    - Upheld *Etheridge*
    - Trial by jury
        - "'[T]he jury trial guarantee secures no rights other than those that existed at common law [and] the common law never recognized a right to a full recovery in tort.' It follows, therefore, that the medical malpractice cap does not impinge upon the right to trial by jury."
        - Further, legislatures are able to abolish causes of action, therefore they may permissibly establish an outer bound to a remedy for a cause of action

- Special Legislation
    - Plaintiff argued the cap was “special legislation” applying to a small class, which is impermissible under the VA constitution, unless the classification is reasonable and bears a substantial relation to the object sought to be accomplished,
    - “The cap bears a reasonable and substantial relation to the General Assembly’s objective to protect the public’s health, safety, and welfare by insuring the availability of health care providers in the Commonwealth” and does not constitute special legislation.
- Taking of Property
    - “One cannot obtain a property interest in a cause of action that has not accrued, and there was nothing to prevent the General Assembly from limiting the remedy,” so the medical malpractice cap does not act in effect to deprive an individual of property
- Due Process
    - Cap is subject to rational basis test as it is not a fundamental right, and the cap passes that level of scrutiny as it has a reasonable relation to a proper purpose and promotes a legitimate state purpose

- Separation of Powers
  - Plaintiff argues that the cap invades the judiciary's functions
  - The Court has already held that General Assembly can determine the jurisdictions of VA courts, and can provide, modify, or repeal a remedy

§ 8.01-581.20. Standard of care in proceeding before medical malpractice review panel; expert testimony; determination of standard in action for damages.

A. In any proceeding before a medical malpractice review panel or in any action against a physician, clinical psychologist, podiatrist, dentist, nurse, hospital or other health care provider to recover damages alleged to have been caused by medical malpractice where the acts or omissions so complained of are alleged to have occurred in this Commonwealth, the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard. Any health care provider who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of practice in which he is qualified and certified. This presumption shall also apply to any person who, but for the lack of a Virginia license, would be defined as a health care provider under this chapter, provided that such person is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia. An expert witness who is familiar with the statewide standard of care shall not have his testimony excluded on the ground that he does not practice in this Commonwealth. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine

within one year of the date of the alleged act or omission forming the basis of the action.

The provisions of this section shall apply to expert witnesses testifying on the standard of care as it relates to professional services in nursing homes.

B. In any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury.

C. In any action described in this section, each party may designate, identify or call to testify at trial no more than two expert witnesses per medical discipline on any issue presented. The court may permit a party, for good cause shown, to designate, identify, or call to testify at trial additional expert witnesses. The number of treating health care providers who may serve as expert witnesses pursuant to § 8.01-399 shall not be limited pursuant to this subsection, except for good cause shown. If the court permits a party to designate, identify, or call additional experts, the court may order that party to pay all costs incurred in the discovery of such additional experts. For good cause shown, pursuant to the Rules of Supreme Court of Virginia, the court may limit the number of expert witnesses other than those identified in this subsection whom a party may designate, identify, or call to testify at trial.