



# STATE OF VIRGINIA RETAIL COMPENDIUM OF LAW

**Prepared by**

Susan Childers North

Jay K. Sinha

Naomh M. Stewart

LeClairRyan

5388 Discovery Park Boulevard,

Third Floor

Williamsburg, VA 23188

Tel: (757) 941-2800

[www.leclairryan.com](http://www.leclairryan.com)

# Retail, Restaurant, and Hospitality Guide to Virginia Premises Liability

<b>I. Introduction</b>	<b>2</b>
A. The Virginia State Court System	3
B. Virginia Federal Courts	3
<b>II. Negligence</b>	<b>4</b>
A. General Negligence Principles	4
B. Elements of a Cause of Action of Negligence	4
C. Defenses to Negligence Claims	5
<b>III. Examples of Negligence Claims</b>	<b>7</b>
A. “Slip and Fall” Type Cases	7
B. Liability for Violent Crime	8
C. Claims Arising From the Wrongful Prevention of Thefts	11
D. Food Poisoning	15
<b>IV. Virginia Employee Protection Laws</b>	<b>16</b>
A. Virginia Code § 40.1-51.1.	16
B. Employer’s Duty to Maintain Safe Premises for Employees	16
<b>V. Indemnification and Insurance-Procurement Agreements</b>	<b>18</b>
A. Indemnification	18
B. Insurance Procurement Agreements	20
<b>VI. Damages in Premises Liability Cases</b>	<b>22</b>
A. Compensatory Damages	22
B. Punitive Damages	24
C. Duty to Mitigate Damages	24
D. Wrongful Death Damages	25
E. Collateral Source Rule	25
F. Liability Insurance	25

## I. Introduction

The following guide was created to assist businesses operating in the Commonwealth of Virginia by providing information on the variety of legal standards that govern premises liability. Virginia has a unique legal system where general legal complaints can be brought before two different courts, and where a variety of legal claims and damages can be claimed under premises liability tort law. The guide below gives an overview of Virginia's premises liability framework, and we hope it will serve as an informative reference guide for business owners and corporations seeking to limit their legal liability in these types of actions.

In Virginia, business owners owe a duty of reasonable care to customers and business associates to ensure that the premises are maintained and safe for entry. The liability owed to those entering a business owner's premises will depend on the status of the person entering the owner's land. These designations are: (1) a trespasser; (2) a licensee; or (3) an invitee.

This reference guide will assist business owners in understanding the statuses of these entrants, causes of action they can expect when injuries occur, and the kinds of damages that can be expected as a result of an injury on the premises. It is important for business owners with storefronts to understand the landscape of premises liability actions. Those that are more knowledgeable and active in understanding their legal responsibilities and liabilities will inherently be better protected from lawsuits and other legal troubles.

## **A. Virginia State Court System**

At the initial level, Virginia has two courts which hear civil liability cases: the General District Court, and the Circuit Court. The General District Court hears civil controversies up to \$25,000, and has exclusive jurisdiction over claims valued below \$4,500. The Virginia Circuit Court can hear controversies, valued over \$25,000, and share jurisdiction over claims valued between \$4,500 and \$25,000 with the General District. A unique element of Virginia courts is the opportunity to appeal a decision rendered in the General District Court, as matter of right, to the Circuit Court, under *de novo* review, which means that a completely new trial is held.

While the Court of Appeals of Virginia is an intermediate appellate level judicial court, the Court of Appeals only reviews a certain cases that generally do not encompass premises liability actions, such as divorce matters.

The Supreme Court of Virginia is the state's highest court. It has the ability to review the decision of any Virginia state court below it. However, this court does not review controversies as a matter of right except in very limited circumstances, and instead, appellants must petition the Supreme Court to have their matter heard, which the Supreme Court is at liberty to deny.

Virginia's procedural rules are embodied in the Code of Virginia, Title 8.01 - Civil Remedies and Procedures.

## **B. Virginia's Federal Court System**

Virginia resides in the Fourth Circuit of the United States federal court system. The Virginia federal courts are divided into two geographic regions: The Eastern District of Virginia and the Western District of Virginia. The Courthouses of the Western District of Virginia are located in Abingdon, Big Stone Gap, Charlottesville, Danville, Harrisonburg, Lynchburg and Roanoke, while the Eastern District has courthouses in Alexandria, Richmond, Norfolk, and Newport News.

The federal court system possesses a separate and distinct set of procedural rules for hearing controversies arising under Virginia state law. The Eastern District of Virginia is considered the Rocket Docket, so called because of its comparatively rapid filing and discovery deadlines. An advanced guide to the Eastern District of Virginia can be found on LeClairRyan's website, here:

[http://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20FAQ%20revised%20mjk%2002\\_19\\_13.pdf](http://www.leclairryan.com/files/Uploads/Documents/Rocket%20Docket%20FAQ%20revised%20mjk%2002_19_13.pdf).

## II. Negligence

### A. General Negligence Principles

Negligence actions compose a large percentage of the civil actions litigated in Virginia courts and can take many forms. For example, negligence actions include actions based on premises liability, automobile accidents, general personal injury, medical malpractice, products liability, and an array of other theories.

Virginia recognizes three degrees of negligence: ordinary negligence, gross negligence, and willful or wanton negligence.<sup>1</sup> Ordinary negligence is the “failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another.”<sup>2</sup> Gross negligence “is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness.”<sup>3</sup> Lastly, is defined as “acting consciously in disregard of another person’s rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.”<sup>4</sup>

### B. Elements of a Cause of Action of Negligence

In order to set forth a prima facie case of negligence, a party must prove the existence of a legal duty, a breach of that duty, and that breach proximately caused damages.<sup>5</sup> Plaintiff bears the burden of proving all elements of negligence against the defendant.<sup>6</sup>

---

<sup>1</sup> VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:15 (citing *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486-87, 603 S.E.2d 916, 918 (2004)).

<sup>2</sup>; *Cowan*, 268 Va. at 486-87, 603 S.E.2d at 918. (citing *Gossett v. Jackson*, 249 Va. 549, 554, 457 S.E.2d 97, 100 (1995); *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 210, 212–13 (1984)); VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:15.

<sup>3</sup> *Cowan*, 268 Va. at 487, 603 S.E.2d at 918 (citing *Koffman v. Garnett*, 265 Va. 12, 15, 574 S.E.2d 258, 260 (2003); *Griffin*, 227 Va. at 321, 315 S.E.2d at 213; *Ferguson v. Ferguson*, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971)); VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:15.

<sup>4</sup> *Cowan*, 268 Va. at 487, 603 S.E.2d at 919 (2004) (citing *Etherton v. Doe*, 268 Va. 209, 213–14, 597 S.E.2d 87, 90 (2004) (quoting *Griffin*, 227 Va. at 321, 315 S.E.2d at 213)); VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:15.

<sup>5</sup> *McGuire v. Hodges*, 273 Va. 199, 205-06, 639 S.E.2d 284, 288 (2007).

<sup>6</sup> *Bowers v. Bristol Gas & Elec. Co.*, 100 Va. 533, 42 S.E. 296, 297 (Va. 1902).

In analyzing whether a duty exists, Virginia law does not require laypersons to be good Samaritans. The common law differentiates between the two types of conduct, terming them, respectively, “malfeasance” and “nonfeasance.” A party ordinarily is not liable for nonfeasance.<sup>7</sup> This rule applies even if providing assistance would impose no hardship on the defendant and where the consequence of inaction is death.<sup>8</sup> However, although a person does not have a duty to act, if a person assumes to act, he has the duty to act carefully and is subject to liability for physical harm as a result of his failure to act reasonably.<sup>9</sup>

There is a narrow exception to this rule for “special relationships,” and this exception is very important in the context of premises liability. Under the special relationship exception, a special relationship between the defendant and the plaintiff may give a right of protection to the plaintiff.<sup>10</sup> If a special relationship exists between a defendant and a plaintiff, the defendant may have a duty to act. Additionally, the Defendant may have a duty to protect the Plaintiff from the conduct of third persons.<sup>11</sup> Virginia has recognized specific special relationships which may give rise to a duty to act or protect another from the conduct of third persons, including innkeeper-guest, employer-employee, common carrier-passenger, and business proprietor-invitee.<sup>12</sup> While this list is not exhaustive, Virginia courts have exercised extreme caution in expanding on this list of special relationships.<sup>13</sup>

## C. Defenses to Negligence Claims

### 1. Contributory Negligence and Assumption of the Risk

Just because a dangerous condition or defect exists does not mean that a Plaintiff is necessarily entitled to recover for an injury stemming from that condition or defect. In Virginia, the defenses of contributory negligence and assumption of the risk act as a complete bar to

---

<sup>7</sup> *Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 606 (W.D. Va. 2002) (“Ordinarily, there is no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility.”). *See also* VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:10.

<sup>8</sup> *See* VA. PRAC. TORT AND PERSONAL INJURY LAW § 3:10.

<sup>9</sup> *Kellermann v. McDonough*, 278 Va. 478, 489, 684 S.E.2d 786, 791 (2009) (citing *Nolde Bros. v. Wray*, 221 Va. 25, 28, 266 S.E.2d 882, 884 (1980) (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276 (1922))).

<sup>10</sup> *Burns v. Gagnon*, 283 Va. 657, 668-69, 727 S.E.2d 634, 641-42 (2012) (quoting *Burdette v. Marks*, 244 Va. 309, 312, 421 S.E.2d 419, 420 (1992)).

<sup>11</sup> *See Burns v. Gagnon*, 283 Va. 657, 670, 727 S.E.2d 634, 642 (2012).

<sup>12</sup> *Burns v. Gagnon*, 283 Va. 657, 669, 727 S.E.2d 634, 642 (2012) (quoting *Kellermann v. McDonough*, 278 Va. 478, 492, 684 S.E.2d 786, 793 (2009)).

liability.<sup>14</sup> Contributory negligence is an affirmative defense based on whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances.<sup>15</sup> These two doctrines are similar, but distinct, as the Supreme Court of Virginia has explained:

Contributory negligence and assumption of risk likewise are jury issues unless reasonable minds could not differ about their resolution. When contributory negligence and assumption of risk are asserted as defenses, the defendant has the burden of proving each by the greater weight of the evidence. The doctrines of contributory negligence and assumption of risk, though closely related, are not identical. The essence of contributory negligence is carelessness and involves an objective test, *i.e.*, whether a plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances. Assumption of risk, on the other hand, connotes venturousness and involves a subjective test, *i.e.*, whether a plaintiff fully understood the nature and extent of a known danger and voluntarily exposed himself to it.<sup>16</sup>

In slip and fall cases, the Supreme Court has repeatedly held that “when a plaintiff knows of the existence of a condition but, without any reasonable excuse, forgets about the condition and falls in, off, or over it, he is guilty of contributory negligence as a matter of law.”<sup>17</sup> When a person slips and falls over an open and obvious condition, he is contributorily negligent as a matter of law.<sup>18</sup> The fact that a plaintiff was given warning of a dangerous condition prior to a slip and fall weighs in favor of a contributory negligence defense.<sup>19</sup>

## 2. The Doctrine of Charitable Immunity

Unlike many states, Virginia adheres to the doctrine of charitable immunity as a defense to tort liability. This doctrine “precludes a charity's beneficiaries from recovering damages from the charity for the negligent acts of its servants or agents if due care was exercised in the hiring and retention of those servants.”<sup>20</sup>

---

<sup>13</sup> *Burns v. Gagnon*, 283 Va. 657, 671, 727 S.E.2d 634, 643 (2012)

<sup>14</sup> See *Estate of Moses ex rel. Moses v. Sw. Virginia Transit Mgmt. Co., Inc.*, 273 Va. 672, 643 S.E.2d 156 (2007); *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 265 Va. 59, 64, 574 S.E.2d 246, 249 (2003).

<sup>15</sup> *Estate of Moses*, 273 Va. at 678, 643 S.E.2d at 159 (2007).

<sup>16</sup> *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358, 397 S.E.2d 821, 823-24 (1990) (internal citations omitted).

<sup>17</sup> *Scott v. City of Lynchburg*, 241 Va. 64, 67, 399 S.E.2d 809, 811 (1991).

<sup>18</sup> *Scott*, 241 Va. at 66, 399 Va. at 810.

<sup>19</sup> See *Westby v. Eighth Skyline Assoc.*, 25 Va. Cir. 140 (1991).

<sup>20</sup> *Bhatia v. Mehak, Inc.*, 262 Va. 544, 546, 551 S.E.2d 358, 360 (2001) (citing *Moore v. Warren*, 250 Va. 421, 422–23, 463 S.E.2d 459, 459 (1995) (citing *Straley v. Urbanna Chamber of Commerce*, 243 Va. 32, 35, 413 S.E.2d 47, 49 (1992)).

### **3. Sovereign Immunity**

The Virginia Tort Claim Act essentially renders the government immune to liability in ordinary negligence cases in excess of \$100,000.<sup>21</sup> Under the Act, Plaintiff can only recover a maximum of \$100,000 “on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment.”<sup>22</sup>

## **III. Specific Examples of Negligence Claims**

### **A. “Slip and Fall” Type Cases**

#### **1. Virginia Rules for Slip and Fall Cases**

In Virginia, slip and fall cases are quite common and make up a considerable amount of negligence cases. As such, “the rules applicable to slip-and-fall cases are well settled.”<sup>23</sup> Indeed, a premises owner owes a customer a variety of duties, including the duty to:

- (i) exercise ordinary care toward her as its invitee upon its premises;
- (ii) have the premises in a reasonably safe condition;
- (iii) to remove, within a reasonable time, foreign objects from its floors which it may have placed there or which it knew, or should have known, that other persons had placed there;
- (iv) to warn the [customer] of the unsafe condition if it was unknown to her, but was, or should have been, known to the owner.<sup>24</sup>

#### **2. Common Types of Slip and Fall Cases**

Typically, slip and fall cases in Virginia take on one of three forms:

- (1) The defendant negligently creates a dangerous condition;

---

<sup>21</sup> Va. Code § 8.01-195.3.

<sup>22</sup> Va. Code § 8.01-195.3.

<sup>23</sup> Winn-Dixie Stores, Inc. v. Parker, 240 Va. 180, 182, 396 S.E.2d 649, 650 (1990).

<sup>24</sup> Winn-Dixie Stores, Inc. v. Parker, 240 Va. 180, 182, 396 S.E.2d 649, 650 (1990).

- (2) The defendant negligently markets goods in a way that makes them likely to fall or become dislodged by other persons;
- (3) An unknown person creates a dangerous condition and defendant negligently fails to inspect the premises and discover the condition within a reasonable amount of time.<sup>25</sup>

### **3. Common Elements of a Slip and Fall Case**

To prevail in Virginia and state a *prima facie* case of negligence against a premises owner or occupant, a Plaintiff must establish (i) evidence of actual or constructive notice of a dangerous condition on the part of the defendant; and (ii) a failure by the premises owner to reasonably remedy or warn of such condition.<sup>26</sup> In addition to the proof necessary for each element of his case, the plaintiff who alleges negligence against the defendant must show, as a preliminary matter, how and why the accident happened, and if these questions are left to conjecture, guess, or random judgment, he may not recover.<sup>27</sup>

If the plaintiff cannot show actual notice, he or she must establish constructive notice. Constructive knowledge or notice of a defective condition of a premise or a fixture may be shown by evidence that the defect was noticeable and had existed for a sufficient length of time to charge its possessor with notice of its defective condition.<sup>28</sup> Using a constructive notice analysis, the plaintiff must produce evidence establishing when the condition occurred and for how long it occurred.<sup>29</sup>

#### **B. Liability for Violent Crime**

Jury verdicts for liability arising from criminal acts perpetrated upon a shopper, restaurant, or hotel guest or visitor to a property can expose a business owner to significant damages. This exposure can exist despite the fact that the criminal act is committed by someone over whom the defendant has little or no control. In addition to the damages for personal injury,

---

<sup>25</sup> VA. PRAC. TORT AND PERSONAL INJURY LAW § 7:7

<sup>26</sup> *Winn-Dixie Stores v. Parker*, 240 Va. 180, 396 S.E.2d 649 (1990); *Ashby v. Faison & Associates*, 247 Va. 166, 440 S.E.2d 603 (1994).

<sup>27</sup> *Murphy v. Saunders, Inc.*, 202 Va. 913, 917, 121 S.E.2d 375, 378 (1961); *Winn-Dixie Stores* 240 Va. 180, 396 S.E.2d 649; *Colonial Stores v. Pulley*, 203 Va. 535, 538, 125 S.E.2d 188,190 (1962).

<sup>28</sup> *Grim v. Rahe, Inc.*, 246 Va. 239, 242, 434 S.E.2d 888, 890 (1993).

<sup>29</sup> *Grim v. Rahe, Inc.*, 246 Va. 239, 242, 434 S.E.2d 888, 890 (1993).

the economic impact of a highly publicized trial can cause damage to a restaurant's, hotel's, retailer's, or retail center's reputation in the community.

Under Virginia law, as a general rule, a business owner does not have a duty to warn or protect another from the criminal acts of a third person. Certain exceptions to the general rule exist depending on whether a special relationship between the business owner and the victim and the degree of foreseeability of the crime.

## **1. General Rule and Exceptions**

In Virginia, the general rule is that a business owner or occupier of land ordinarily is under no duty to protect an invitee from a third person's intentional or criminal act committed while the invitee is upon the premises.<sup>30</sup> There are certain "special relationships," however, that may exist between particular plaintiffs and defendants, either as a matter of law, or because of the particular factual circumstances in a given case, which may give rise to a duty of utmost care on the part of the defendant to warn and/or protect the plaintiff against the danger of harm from reasonably foreseeable criminal acts committed by a third person, and examples of such "special relationships" would include a common carrier and its passengers, an employer and its employees, an innkeeper and its guests, and a business owner and its invitees.<sup>31</sup> Despite the existence of such a "special relationship" between a business owner and an invitee, however, the business owner does not owe a duty of care to protect its invitee unless the danger to invitees is foreseeable.

## **2. Foreseeability**

Foreseeability is the critical point of analysis in claims for liability arising from criminal acts. Virginia courts have recognized two levels of foreseeable harm: (i) known or reasonably foreseeable harm; and (2) imminent probability of harm.<sup>32</sup> Known or reasonably foreseeable harm is the lower of the two standards, and arises only in situations where there is a special relationship between the invitee and the owner occupier as a result of the latter's duty of utmost

---

<sup>30</sup> *Thompson ex rel. Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123 (2001); *Wright v. Webb*, 234 Va. 527, 530, 362 S.E.2d 919, 920 (1987).

<sup>31</sup> *Thompson ex rel. Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123 (2001); *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 327, 626 S.E.2d 428, 435 (2006) *aff'd on reh'g*, 273 Va. 269, 641 S.E.2d 68 (2007).

<sup>32</sup> *Com. v. Peterson*, 286 Va. 349, 357-58, 749 S.E.2d 307, 311-12 (2013).

care with regard to the former.<sup>33</sup> When the applicable standard of foreseeability is know or reasonably foreseeable harm, liability can arise only where the owner knew or should have known of the probability of conduct on the part of a third-party which was likely to endanger the safety of those lawfully on the premises. In general, this notice can be established only by proof of a prior pattern of criminal behavior or based on the location, nature, and extent of previous criminal activities and similarity, proximity, or other relationship to the crime in question.<sup>34</sup>

In all other instances, the higher imminent probability of harm standard applies.<sup>35</sup> To establish foreseeability under the imminent probability of harm standard, a plaintiff must plead and prove that a business owner or occupier knew that criminal assaults against persons were occurring, or were about to occur, on the premises based upon notice of a specific danger just prior to the assault.<sup>36</sup>

### **3. Joint and Several Liability**

In Virginia, it is generally recognized that if a third person and a business owner or land occupier both acted negligently toward an invitee, then they may be jointly and severally liable to the plaintiff, or only the third party may be liable to the invitee, depending on whether the third party actor was a foreseeable or an unforeseeable intervening cause.

### **4. Security Contractors**

Virginia courts have not had occasion to determine whether a separate standard applies to a company contracted to provide security services on the premises where his or her injury occurred than that which applies to a business owner or land occupier. It is, however, likely that

---

<sup>33</sup> *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 626 S.E.2d 428 (2006) *aff'd on reh'g*, 273 Va. 269, 641 S.E.2d 68 (2007) (innkeeper/guest); *A.H. v. Rockingham Publishing Co., Inc.*, 255 Va. 216, 221, 495 S.E.2d 482, 486 (1998) (employer/employee); *Connell v. Chesapeake & Ohio Ry. Co.*, 93 Va. 44, 62, 24 S.E. 467, 470 (1896) (common carrier/passenger).

<sup>34</sup> *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 626 S.E.2d 428 (2006) *aff'd on reh'g*, 273 Va. 269, 641 S.E.2d 68 (2007) (innkeeper/guest); *A.H. v. Rockingham Publishing Co., Inc.*, 255 Va. 216, 221, 495 S.E.2d 482, 486 (1998) (employer/employee); *Connell v. Chesapeake & Ohio Ry. Co.*, 93 Va. 44, 62, 24 S.E. 467, 470 (1896) (common carrier/passenger).

<sup>35</sup> *Taboada v. Daly Seven, Inc.*, 271 Va. 313, 322–23, 626 S.E.2d 428, 432 (2006) *aff'd on reh'g*, 273 Va. 269, 270, 641 S.E.2d 68, 68 (2007); *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 106, 540 S.E.2d 134, 139 (2001), *aff'd on reh'g*, 273 Va. 269, 270, 641 S.E.2d 68, 68 (2007).

<sup>36</sup> *Thompson ex rel. Thompson v. Skate America, Inc.*, 261 Va. 121, 128-29, 540 S.E.2d 123, 127 (2001); *Wright v. Webb*, 234 Va. 527, 533, 362 S.E.2d 919, 922 (1987).

the general rule of liability that applies between business owners and their invitees would apply as to a security company retained by a business owner or land occupier.<sup>37</sup>

## 5. Defenses

In cases where a plaintiff is injured by a criminal attack, the lack of foreseeability is a defense, however, there is no indication that a business owner or premises occupier's affirmative steps to prevent criminal attacks, such as the provision of security guards or operable locks that would have served to prevent the attack, is sufficient to avoid liability for a plaintiff's injuries.<sup>38</sup>

### C. Claims Arising From the Wrongful Prevention of Thefts

"Inventory shrinkage" is the phenomenon of the loss of retail inventory due to theft. It is a multi-billion-dollar problem faced by retailers worldwide. The biggest threat facing store owners is employee theft, which accounts for nearly half of all inventory shrinkage.<sup>39</sup> However shoplifting by non-employees remains a significant concern. In addition to the financial impact of the loss of inventory and sales, the threat of shoplifting poses an additional problem when retailers attempt to thwart a perceived attempt to shoplift — i.e., lawsuits for assault, battery, wrongful detention, and negligence, along with claims for punitive damages.

#### 1. False Arrest and Imprisonment

False imprisonment, including false arrest, traditionally is defined as intentionally confining or restraining the plaintiff, against his or her will, within a bounded area.<sup>40</sup> Thus, a claim

---

<sup>37</sup> *Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 136, 509 S.E.2d 494, 497 (1999) (holding that negligence claim could not arise out of contract and upholding trial court's instruction that plaintiff could not recover on a breach of contract claim as an incidental beneficiary of a contract); *Roe v. Spotsylvania Mall Co.*, 145 F.3d 1325 (4th Cir. 1998) (holding that: (i) plaintiff could not proceed on an "assumption of duty" theory that established a heightened standard against defendant mall based on defendant's contracting of a security company; (ii) duty of care that applied between business invitees and business owners or land occupiers applied to defendant mall; and (iii) defendant security contractor had no special relationship with defendant mall's invitees cognizable under Virginia law, so it had no duty to protect those invitees from the criminal acts of third parties).

<sup>38</sup> *Wright v. Webb*, 234 Va. 527, 362 S.E.2d 919 (1987); *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 540 S.E.2d 134 (2001).

<sup>39</sup> *Retail Fraud, Shoplifting Rates Decrease, According to National Retail Security Survey*, June 15, 2010, (available at [http://www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=945](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=945)).

<sup>40</sup> *Restatement Second of Torts* §§ 35 to 45A. Prosser and Keeton on Torts pp. 47 to 54 (West 5th ed. 1984); Dobbs, *The Law of Torts* pp. 67 to 75 (West 2000).

for false imprisonment in Virginia includes the following elements: (1) an intentional restriction of a person's freedom of movement without legal right; and (2) the intentional use of force, words, or acts which the person restrained is afraid to ignore, or to which he reasonably believes he must submit.<sup>41</sup> Generally, there is no liability for false imprisonment unless the plaintiff has knowledge of such confinement.<sup>42</sup> There are various defenses to assert claims of false imprisonment, such as no detention took place; a reasonable cause to detain the plaintiff, under the merchants' liability statute; probable cause to detain the plaintiff; no vicarious liability for the acts of security guards or other employees; release from liability; qualified immunity; and collateral estoppel.<sup>43</sup>

## 2. Malicious Prosecution

Claims for wrongful detention that result in arrests by law enforcement personnel often lead to claims for malicious prosecution. Actions for malicious prosecution arising from criminal proceedings have been sustained in Virginia but are not favored.<sup>44</sup> The requirements for maintaining an action for malicious prosecution arising from a criminal case are more stringent than those applied to other tort actions. To establish a claim for malicious prosecution, the plaintiff must allege and prove that: (1) the prosecution was set on foot by the defendant and was terminated in a manner not unfavorable to the plaintiff; (2) it was instituted or procured by the cooperation of the defendant; (3) it was without probable cause; and (4) it was malicious.<sup>45</sup> Probable cause serves as a complete defense to an action for malicious prosecution even if the legal advice is wrong.<sup>46</sup> The stringent requirements imposed upon the action for malicious prosecution arising from a criminal case are designed to encourage persons to bring criminal actions in appropriate cases without fear of reprisal by civil actions, criminal prosecutions being essential to the maintenance of an orderly society.<sup>47</sup>

---

<sup>41</sup>*Ware v. James City County*, Virginia, 652 F. Supp. 2d 693, 712 (E.D. Va. 2009), aff'd, 380 Fed. Appx. 274 (4th Cir. 2010); *Cheatham v. Johnson*, 2010 WL 597412, (E.D. Va. 2010); *Lewis v. Kei*, 281 Va. 715, 724–725, 708 S.E.2d 884 (2011).

<sup>42</sup>Restatement Second of Torts § 42.

<sup>43</sup>*Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 568 S.E.2d 19 (2002).

<sup>44</sup>*Ayyildiz v. Kidd*, 220 Va. 1080, 1082-83, 266 S.E.2d 108, 110-11 (1980).

<sup>45</sup>*Ayyildiz v. Kidd*, 220 Va. 1080, 1082-83, 266 S.E.2d 108, 110-11 (1980).

<sup>46</sup>*Pallas v. Zaharopoulos*, 219 Va. 751, 250 S.E.2d 357 (1979).

### 3. Defamation

Claims of defamation may arise when a shopper is wrongfully accused of a crime. Virginia recognizes a “qualified privilege,” when communications are made in good faith and in conjunction with the performance of security or operational functions in guarding against the theft of goods.

The qualified privilege is applicable when a defamatory communication is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, if made to a person having a corresponding interest or duty.<sup>48</sup>

### 4. Negligent Hiring, Retention, or Supervision of Employees

Plaintiffs who claim they were wrongfully accused of shoplifting may also claim that the employee was improperly hired, trained, or supervised. A claim based on negligent hiring and supervision requires the plaintiff to prove that the employer knew of the employee’s propensity to commit the alleged acts or that the defendant should have known of such propensity by conducting a background search on the employee.<sup>49</sup> Conclusory statements in opposition to proof of pre-hiring investigation into an employee’s qualifications will be insufficient to overcome a motion for summary judgment.<sup>50</sup>

### 5. Shopkeeper Immunity

Virginia, like most other states, recognizes a so-called “Shopkeeper’s Privilege,” exempting from civil liability a merchant and the merchant’s employees from unlawful detention, false imprisonment, or false arrest claims brought by another person, *if* the merchant or its employee had probable cause to believe that the person had shoplifted or had willfully concealed goods or merchandise. However, this privileged detention under Virginia law shall *not* exceed *one hour* in length.<sup>51</sup>

---

<sup>47</sup> *Lee v. Southland Corp.*, 219 Va. 23, 26, 244 S.E.2d 756, 758 (1978).

<sup>48</sup> *Larimore v. Blaylock*, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000).

<sup>49</sup> *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 539 S.E.2d 426, (2000).

<sup>50</sup> *Interim Pers. of Cent. Virginia, Inc. v. Messer*, 263 Va. 435, 441, 559 S.E.2d 704, 708 (2002).

<sup>51</sup> Va. Code Ann. §§ 18.2-105 and 18.2-105.1. *Tweedy v. J. C. Penney Co., Inc.*, 216 Va. 596, 221 S.E.2d 152 (1976); and *F. B. C. Stores, Inc. v. Duncan*, 214 Va. 246, 198 S.E.2d 595 (1973).

**Liability Checklist/Considerations for  
Wrongful Attempts to Stop Thefts**

**1. False arrest/imprisonment**

- Intent to confine plaintiff?
- Plaintiff conscious of the confinement?
- Applicable privilege?  
(i.e., Probable Cause)
- Did defendant merely report the facts to the  
authorities?

**2. Malicious prosecution**

- Criminal proceeding commenced?
- Proceeding terminated in favor of accused?  
(i.e., not a plea or defective warrant)
- Absence of probable cause?
- Existence of actual malice?

## **D. Food Poisoning**

Food poisoning and contamination claims are often brought under a variety of theories including negligence, product liability, and breach of warranty. A negligence cause of action against a restaurateur is predicated upon its duty to exercise care and prudence respecting the fitness of the food it furnishes for consumption. A defendant will be held liable if a plaintiff can show that it is reasonably certain that the product, when put to normal use, would be dangerous if it were defective.<sup>52</sup> As in any personal injury action, a plaintiff must show a causal relationship between the contaminated product and their illness. That evidence must be in the form of competent medical proof.<sup>53</sup>

---

<sup>52</sup>*Bussey v. E.S.C. Restaurants, Inc.*, 270 Va. 531, 536, 620 S.E.2d 764, 767 (2005).

<sup>53</sup>*Goins v. Wendy's Int'l, Inc.*, 242 Va. 333, 410 S.E.2d 635 (1991).

#### **IV. Virginia Employee Protection Laws**

Employer liability (including construction contractors) for job-related injuries is governed by Virginia’s Labor and Employment laws, as well as Virginia and Federal case law. This section will address Virginia Code § 40.1-51.1. pertaining to “Duties of employers”, and case law discussing an employer’s responsibility for maintaining safe premises for his employees.

##### **A. Virginia Code § 40.1-51.1.**

Virginia Code § 40.1-51.1. requires, in pertinent part, “every employer to furnish to each of his employees safe employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, and to comply with all applicable occupational safety and health rules and regulations promulgated under this title.”<sup>54</sup> Despite the broad language of this statute, a general contractor will not be found liable for a subcontractor’s violation of the Virginia Occupational Safety and Health Act (“VOSHA”), Virginia Code § 40.1-1 *et seq.*, unless it fails to exercise ordinary care to inspect the worksite and to remedy any violations found.<sup>55</sup>

The Virginia Safety and Health Codes Board (“the Board”) is responsible for the promulgation of all occupational safety and health standards for enforcement by the Department of Labor and Industry.<sup>56</sup> The Board adopted most, but not all, of the federal Construction Industry Standards. Examples of these standards include requiring employees to wear hard hats, and requiring employers to provide handrails or other forms of fall protection for employees working on elevated work platforms.<sup>57</sup>

##### **B. Employer’s Duty to Maintain Safe Premises for Employees**

The Supreme Court of Virginia has held that as a general rule an employer is required to provide safe premises where its employees are required to work.<sup>58</sup> A court will use a negligence

---

<sup>54</sup> Virginia Code § 40.1-51.1(A).

<sup>55</sup> *Davenport v. Summit Contractors, Inc.*, 45 Va. App. 526, 532, 612 S.E.2d 239, 242 (2005).

<sup>56</sup> <https://www.osha.gov/dcsp/osp/stateprogs/virginia.html>.

<sup>57</sup> 29 C.F.R. §§ 1926.100(a), 1926.451(g)(1)(vii), 1926.501(b)(1), 1926.1052(c). Virginia’s construction industry standards can be found in 16 Va. Admin. Code § 25–175–1926, which incorporates various provisions of 29 C.F.R. § 1926 *et seq.*, the federal safety and health regulations for the construction industry.

<sup>58</sup> *Colonna Shipyard v. Bland*, 150 Va. 349, 361, 143 S.E. 729, 732 (1928).

standard in determining whether an employer has met this requirement. Specifically, the court has held that the obligation of an employer is not to provide a safe place for its employees, but to use ordinary care to provide a reasonably safe place, and that the employee assumes all of the ordinary risks of the employment.<sup>59</sup> Therefore, employers should be certain that they are observing the ordinary usages and customs of their business and industry in order to avoid being found to have negligently failed to maintain safe premises for their employees.

---

<sup>59</sup> *Rinehart & Dennis Co. v. Brown*, 137 Va. 670, 120 S.E. 269, 274 (1923) (“The master is under no obligation to provide against contingencies which are not to be reasonably anticipated.”); *S. Ry. Co. v. Lewis*, 113 Va. 117, 73 S.E. 469, 470 (1912) (“It is well settled that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and reasonable safety means safe according to the usages of the business. His duty is also to use ordinary care to provide a reasonably safe place in which his servant is to work, considering the character of work in which the servant is engaged, and he is liable for injuries to the servant resulting from his failure to exercise such care. Absolute safety is unattainable, and employers are not insurers. They are liable for negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.”).

## V. Insurance Agreements and Insurance-Procurement Agreements

### A. Indemnification Agreements

An indemnification provision in an agreement is nothing more than a contract between parties to pre-determine the allocation of a potential risk of loss.<sup>60</sup> Virginia law favors the making of contracts between competent parties for a valid purpose.<sup>61</sup> A party to an indemnification agreement is entitled to enforce the agreement according to its agreed terms.<sup>62</sup>

Virginia Courts review of indemnity agreements with the principle that “the law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes.”<sup>63</sup> Furthermore, although contracts that violate public policy are void, courts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain.<sup>64</sup>

#### 1. Statutory Limitations on Indemnification

Virginia has a statutory limitation on express agreements to indemnify one party for its own sole negligence where bodily harm or property damage is involved.<sup>65</sup> Va. Code § 11-4.1 provides in relevant part:

Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, structure or appurtenance thereto, including moving, demolitions and excavation connected therewith, or any provision contained in any contract relation to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract, caused by or resulting solely from the negligence of

---

<sup>60</sup>*Farmers Ins. Exch. v. Enter. Leasing Co.*, 281 Va. 612, 619, 708 S.E.2d 852, 856 (2011) (citing *Estes Express Lines, Inc. v. Chopper Express, Inc.*, 273 Va. 358, 366, 641 S.E.2d 476, 479 (2007)).

<sup>61</sup>*Farmers Ins. Exch. v. Enter. Leasing Co.*, 281 Va. 612, 619, 708 S.E.2d 852, 856 (2011) (citing *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997)).

<sup>62</sup>*Safeway, Inc. v. DPI Midatlantic, Inc.*, 270 Va. 285, 290, 619 S.E.2d 76, 79 (2005)).

<sup>63</sup>*Estes Exp. Lines, Inc. v. Chopper Exp., Inc.*, 273 Va. 358, 364, 641 S.E.2d 476, 478 (2007) (quoting *Shuttleworth, Ruloff & Giordano, P.C. v. Nutter*, 254 Va. 494, 498, 493 S.E.2d 364, 366 (1997)).

<sup>64</sup>*Jessee v. Smith*, 222 Va. 15, 17–18, 278 S.E.2d 793, 795 (1981); *Ryan v. Griffin*, 199 Va. 891, 895, 103 S.E.2d 240, 244 (1958).

such other party of his agents or employees, is against public policy and is void and unenforceable. This section applies to such contracts between contractors and any public body, as defined in § 2.2-4301.

The requirement that the offending indemnification clause must be contained in a contract “relating to the construction, alternation, repair or maintenance of a building” has been narrowly construed.<sup>66</sup> For instance, § 11-4.1 did not apply to a contract for the sale of chemical roofing materials to a roofing contractor because it was a “sales agreement” and not a “construction contract,” even though the transaction might have appeared to be “relating to construction” in general.<sup>67</sup>

Furthermore, the injuries did not arise “in the course of performance” of the sales agreement, but rather from the eventual use of the materials under the roofing contractor's construction contract.<sup>68</sup> In barring clauses providing for indemnification for liability resulting “solely” from one's own negligence, it appears that § 11-4.1 would not apply to a clause providing for indemnification for harm caused only partially by the indemnitee.

Because an express indemnification provision is a written contract, it is subject to a five-year statute of limitations.<sup>69</sup> The statute of limitations for implied indemnification and equitable indemnification can be either two years (if sounding in tort) or three years (if sounding in implied contract).<sup>70</sup> Normally, the statute of limitation on actions for indemnification begins to run when the party seeking indemnification pays or discharges the obligation to a third party.<sup>71</sup> Theoretically, an indemnification action could accrue several years after the project is complete.<sup>72</sup> However, Virginia has a statute of repose for injuries arising from unsafe improvements to real property, which provides a five-year limit on bringing certain actions for indemnity.<sup>73</sup>

---

<sup>65</sup>Va. Prac. Construction Law § 10:20.

<sup>66</sup>Va. Prac. Construction Law § 10:20.

<sup>67</sup>Va. Prac. Construction Law § 10:20

<sup>68</sup>*Carpenter Insulation & Coatings v. Statewide Sheet Metal & Roofing*, 937 F.2d 602 (4th Cir. 1991).

<sup>69</sup> Va. Code § 8.01-246.2.

<sup>70</sup> Va. Code §8.01-246.4.

<sup>71</sup> Va. Code §8.01-249(5)( although the statute of limitations does not run until payment is made, Va. Code § 8.01-281(A) allows an indemnification claim to be brought in an existing lawsuit before any payment is made.)

<sup>72</sup>Va. Prac. Construction Law § 10:20.

## **2. Partial Indemnification**

Virginia case law is silent on the issue of partial indemnification, indicating that the doctrine has not been adopted by the jurisdiction. Some jurisdictions do not allow indemnity based upon the active-passive doctrine.<sup>74</sup> However, a growing number of jurisdictions which have abandoned the “active-passive” basis of indemnity allow “partial indemnification” based upon the relative degrees of fault of the parties.<sup>75</sup> The active-passive criterion is of little practical value, but rather serves as a convenient catch phrase for compromising the common-law requirement that one who was at all negligent could not recover indemnity.<sup>76</sup>

### **B. Insurance Procurement Agreements**

#### **1. Duty to Defend**

The insurer's obligation to defend is broader than its obligation to pay.<sup>77</sup> The obligation to defend arises whenever the complaint against the insured alleges facts and circumstances, some of which, if proved, would fall within the risk covered by the policy.<sup>78</sup> Blanket liability policy provision that insurer has right and duty to defend any suit against insured seeking damages on account of bodily injury or property damage, even if any of the allegations in suit are groundless, false or fraudulent does not place obligation on insurer to defend an action against insured when, under allegations of complaint, it would not be liable under contract for any recovery therein had.<sup>79</sup> Blanket liability policy provision providing that insurer had right and duty to defend any suit against insured seeking damages on account of bodily injury or property damage, even if any of allegations of suit were groundless, false or fraudulent, obligated insurer to defend insured against claim for punitive damages, as well as compensatory damages, since duty to defend

---

<sup>73</sup>Va. Prac. Construction Law § 10:20

<sup>74</sup>2 Modern Tort Law: Liability and Litigation § 20:15 (2d ed.); See, e.g., *Level 3 Communications, LLC v. Webb, Inc.*, 2012 WL 2199262 (E.D.Va. 2012) (In Virginia, if defendant is guilty of active negligence, he may not obtain indemnification from any other defendant) (party is actively negligent when its conduct was proximate cause of underlying plaintiff's injury and where nature of legal liability is more than vicarious).

<sup>75</sup>2 Modern Tort Law: Liability and Litigation § 20:15 (2d ed.); See *American Trust & Sav. Bank v. U.S. Fidelity and Guar. Co.*, 439 N.W.2d 188 (Iowa 1989).

<sup>76</sup>2 Modern Tort Law: Liability and Litigation § 20:15 (2d ed.); See *American Trust & Sav. Bank v. U.S. Fidelity and Guar. Co.*, 439 N.W.2d 188 (Iowa 1989).

<sup>77</sup>*Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189, 397 S.E.2d 100, 102 (1990); See *Lerner v. General Ins. Co. of America*, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978).

<sup>78</sup>*Brenner v. Lawyers Title Ins. Corp.*, 240 Va. 185, 189, 397 S.E.2d 100, 102 (1990); See *Lerner v. General Ins. Co. of America*, 219 Va. 101, 104, 245 S.E.2d 249, 251 (1978).

extended to occurrence and both compensatory and punitive damage claims arose therefrom; insurer's refusal to defend punitive damages claim constituted breach of its covenant with insured.<sup>80</sup>

Under Virginia law, insurer's duty to defend is triggered pursuant to Potentiality Rule if there is any possibility that judgment against insured will be covered under terms of insured's policy.<sup>81</sup> Under Virginia law, Exclusive Pleading Rule requires that insurer's duty to defend be determined solely by claims asserted against insured in underlying action.<sup>82</sup>

---

<sup>79</sup>*Lerner v. Gen. Ins. Co. of Am.*, 219 Va. 101, 245 S.E.2d 249 (1978).

<sup>80</sup>*Lerner v. Gen. Ins. Co. of Am.*, 219 Va. 101, 245 S.E.2d 249 (1978).

<sup>81</sup>*Transcontinental Ins. Co. v. Caliber One Indem. Co.*, 2005, 367 F.Supp.2d 994.

<sup>82</sup>*Transcontinental Ins. Co. v. Caliber One Indem. Co.*, 2005, 367 F.Supp.2d 994.

## VI. Damages in Premises Liability Cases

The calculation of damages is the final requirement a jury is tasked with when rendering a verdict. Once the trial is complete, the jury is given a verdict sheet and asked to elicit a monetary sum for several categories of damages. In general, damages can be categorized as actual damages and special damages.

### A. **Compensatory Damages**

Compensatory damages – often referred to as actual damages – encompass both economic and non-economic losses. Actual damages are awarded with the purpose of making the plaintiff whole again.<sup>83</sup> The amount of damages plaintiff is required to prove must not be calculated to absolute certainty. Only an “intelligent and probable” estimate of damages is necessary.<sup>84</sup> There are three basic categories of compensatory damages: (1) lost income and lost earning capacity; (2) medical and other expenses; and (3) physical and mental pain and suffering.

Compensatory damages in the form of loss of income and loss of earning capacity are awarded if the plaintiff can no longer work and earn future income.<sup>85</sup> A prospective plaintiff must present evidence of what the loss of earning capacity would be.<sup>86</sup> Loss of earning capacity refers to plaintiff’s inability to pursue employment, or his or her diminished capacity to perform required job functions as a result of the injury. This includes plaintiff’s loss of earning potential that would result from an increase in wages in the industry in general and future increases that would normally be expected under the circumstances. If plaintiff is unable to gain employment, either wholly or partially, due to the company’s negligence, lost wages and fringe benefits can be recovered. Even if a plaintiff is not employed at the time of the injury, damages for future loss of income will be awarded if the injury reduces a plaintiff’s earning capacity.<sup>87</sup>

It is imperative to understand the intricacies of this aspect of compensatory damages because the cost of plaintiff’s loss of income and earning capacity can be staggering. For instance, a 40-year old surgeon slips and falls on a company’s property due to an employee negligently failing to clean up a spill. As a result of the injury, the surgeon loses functionality in both hands. The company will be required to pay for the surgeon’s loss of income while

---

<sup>83</sup> Restatement Second of Torts §§ 903 and 904.

<sup>84</sup> *Oden v. Salch*, 237 Va. 525, 379 S.E.2d 346 (1989)

<sup>85</sup> *Virginia & S.W. Ry. Co. v. Bailey*, 103 Va. 205, 49 S.E. 33 (1904).

<sup>86</sup> *Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 406 S.E.2d 28 (1991).

<sup>87</sup> *American Nat. Watermatress Corp. v. Manville*, 642 P.2d 1330 (Alaska 1982).

recovering from the injury and decades of lost future earnings due to the surgeon's inability to perform the most vital function required of his or her position; performing surgery. Plaintiff's injury could possibly cost the company tens of millions in loss of earnings capacity alone. This component of damages is often the most costly and exemplifies the importance of maintaining safe conditions for those on the premises.

Medical expenses and similar costs are referred to as special damages. These costs incurred as a result of the injury do not just apply to past billings. A plaintiff may also recover for future medical expenses so long as such expenses can be supported by credible evidence that they were incurred due to the injury suffered as a result of the company's negligence.<sup>88</sup> Depending on the injury, these costs are wide-ranging. The severity and nature of the injury could require treatment and rehabilitation for the duration of plaintiff's life, creating millions of dollars in potential liability for the company. For example, if plaintiff becomes bed-ridden as a result of the injury, the company will be responsible for medical bills and services costs associated with tending to plaintiff for the rest of his or her natural life. This represents a massive financial liability. The damages associated with plaintiff's medical costs is demonstrative of the importance in the duty to exhibit reasonable care in maintaining company property,

Actual damages, such as physical pain and suffering, mental anguish, and loss of enjoyment of life, are recoverable if a defendant's negligence is the proximate cause of a plaintiff's injuries, including future expenses.<sup>89</sup> Pain includes all forms of conscious suffering, both emotional and physical. This includes the pain that results from the medical treatment itself.<sup>90</sup> The state of Virginia does not allow for loss of consortium actions.<sup>91</sup>

Businesses should be aware of the varying types of damages that include pain and suffering. The sensation of pain itself is compensable.<sup>92</sup> Plaintiff can also be compensated for the mental pain and suffering associated with permanent disfigurement.<sup>93</sup> These are just a few examples of pain and suffering damages claims. The nature of the injury and its lasting effects have a profound impact on the substantiality of these claims. The only degree of control a company possesses is ensuring that the duty of reasonable care owed to its customers is fulfilled. The failure to meet this duty could lead to millions of dollars in liabilities for the business.

---

<sup>88</sup>*Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388 (1966); *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 254 Va. 206, 491 S.E.2d 286 (1997).

<sup>89</sup>*Bell v. Kirby*, 226 Va. 641, 311 S.E.2d 799 (1984).

<sup>90</sup>*Abrams v. City of Mattoon*, 148 Ill. App. 3d 657, 101 Ill. Dec. 780, 499 N.E.2d 147 (4th Dist. 1986).

<sup>91</sup> Va. Code Ann. § 55-36.

<sup>92</sup> Dobbs, *The Law of Torts* pp. 1050-53 (West 2000).

<sup>93</sup>*Crawford v. Quarterman*, 210 Va. 598, 172 S.E.2d 739 (1970).

Occasionally, a jury verdict awarding damages can be deemed either excessive or insufficient. In this instance, the trial court judge will ask the plaintiff to remit part of the recovery (*remittitur*) or order a new trial, or order the defendant to pay plaintiff in excess of the jury award (*additur*).<sup>94</sup> In Virginia, it is not customary to incorporate plaintiff's attorney's fees in the calculation of compensatory damages.<sup>95</sup>

## **B. Punitive Damages**

Juries are sometimes asked to award damages in excess of compensatory damages in order to punish defendant for conduct deemed especially egregious, such as willful and wanton negligence.<sup>96</sup> Simple negligence or gross negligence is insufficient to meet this standard.<sup>97</sup> Though punitive damages are rare in premises liability actions, it is a component of damages that business owners should be cognizant of. Normally a defendant is not required to pay punitive damages under the doctrine of vicarious liability for the acts of an employee unless the employer authorizes or ratifies the employee's negligent conduct.<sup>98</sup> The Virginia General Assembly has capped punitive damages at \$350,000.<sup>99</sup>

## **C. Duty to Mitigate Damages**

Plaintiff must make a reasonable effort to mitigate any costs incurred as a result of the injury. For instance, plaintiff is expected to obtain medical care to prevent exacerbation of the injury.<sup>100</sup> Defendant is not liable for losses incurred as a result of plaintiff failing to mitigate injuries.<sup>101</sup>

---

<sup>94</sup> Va. Code Ann. § 8.01-383.1.

<sup>95</sup> *Kemp v. Miller*, 166 Va. 661, 186 S.E. 99 (1936).

<sup>96</sup> *Green v. Ingram*, 269 Va. 281, 608 S.E.2d 917 (2005).

<sup>97</sup> *Green v. Ingram*, 269 Va. 281, 608 S.E.2d 917 (2005).

<sup>98</sup> *Freeman v. Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963).

<sup>99</sup> Va. Code Ann. § 8.01-38.1.

<sup>100</sup> Restatement Second of Torts § 918(1).

#### **D. Wrongful Death Damages**

Statutory law determines damages resulting from a wrongful death action.<sup>102</sup> Once a jury has deemed the business liable for the plaintiff's death, the jury is asked to calculate damages that should be awarded to plaintiff's estate. The only requirement the jury must make is whether the award of sums is just and fair. Virginia courts liberally construe this jury standard; there are virtually no limitations when determining the amount of damages. Compensatory damages under a wrongful death action are also recoverable. These include the litany of damages available under a simple negligence claim, but also comprise other expenses such as reasonable funeral expenses.<sup>103</sup> Plaintiff's estate can also recover punitive damages for defendant's willful and wanton conduct.<sup>104</sup> The punitive damages award may not exceed \$350,000.<sup>105</sup>

#### **E. Collateral Source Rule**

The collateral source rule prevents a defendant from receiving a credit for damages due based on other sources of aid provided to plaintiff made necessary by defendant's negligence. Virginia has adopted the collateral source rule, codified in the Code of Virginia § 8.01-35, which states:

In any suit brought for personal injury or death, provable damages for loss of income due to such injury or death shall not be diminished because of reimbursement of income to the plaintiff or decedent from any other source, nor shall the fact of any such reimbursement be admitted into evidence.

These other sources referred to include: insurance proceeds, employment benefits, donations from friends, and the like.<sup>106</sup>

#### **F. Liability Insurance**

Liability insurance protects the assets of a business from a variety of monetary obligations that typically occur, such as property damage and premises liability actions. Across the country, states are divided as to whether businesses can receive liability insurance coverage

---

<sup>101</sup>Restatement Second of Torts § 918(1)

<sup>102</sup> Va. Code Ann. § 8.01-52; Va. Prac. Tort and Personal Injury Law § 17:2.

<sup>103</sup> Va. Code Ann. § 8.01-52(1)-(4).

<sup>104</sup> Va. Code Ann. § 8.01-52(5); Va. Prac. Tort and Personal Injury Law § 17:56.

<sup>105</sup> Va. Code Ann. § 8.01-38.1.

for an award of punitive damages against a covered entity. The Virginia legislature enacted a statute stating that it is *not* contrary to the public policy of the Commonwealth for a person to purchase insurance providing coverage against punitive damages resulting from a death or injury as a result of the insured's actions.<sup>107</sup> This statute only applies to negligence; it does not include intentional acts.

---

<sup>106</sup> Va. Prac. Tort and Personal Injury Law §3:36.

<sup>107</sup> Va. Code Ann. § 38.2-227.