TORTS, DAMAGES AND RELATED SUBJECTS

REPORT OF THE

VIRGINIA ADVISORY LEGISLATIVE COUNCIL

To

THE GOVERNOR

And

THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1967

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VIRGINIA ADVISORY LEGISLATIVE COUNCIL

Richmond, Virginia, October 19, 1967

TO:
HONORABLE MILLS E. GODWIN, JR., *Governor of Virginia*
and
THE GENERAL ASSEMBLY OF VIRGINIA

The subject matter of the law of torts is varied and interesting. As a practical matter, its application to the average citizen is limited to civil actions for personal injuries or death that have come about through automobile accidents, or by persons falling in public places. Not ignoring the other very important aspects of the practice of law, it can be stated that the great bulk of civil law suits pending on the dockets of our courts are involved with issues arising from automobile accidents. Each Session of the General Assembly is involved with considering proposals recommending changes in Virginia's legal procedure and substantive provisions of our Code relating to legal liability for the negligent operation of motor vehicles.

As a consequence the Honorable Mills E. Godwin, Jr., Governor, requested that the Virginia Advisory Legislative Council undertake a study involving the problem. Excerpts from his letter are as follows:

"I make reference to Senate Joint Resolution No. 30 which makes reference to various bills that have been introduced in every recent Session of the General Assembly under the category commonly called 'Plaintiff's Bills' and 'Insurance Company Bills.'

This resoluton is addressd to a very important subject, and a problem that is of much concern to many people in Virginia.

In view of the importance of this question, I respectfully request the Virginia Advisory Legislative Council to undertake a study of the laws and rules which affect the liability of motor vehicle operators to other persons who may be injured, the enforcement of claims by injured parties, the procedures in connection with the trial of negligence cases, and the cost incident to any changes which might be recommended in the liability of such operators and the procedures for enforcing such liability."

The Council selected Senator Joseph C. Hutcheson, member of the Council, Lawrenceville, as Chairman of the Committee to make the study and report to it. Selected to serve with Senator Hutcheson were the following: John Alexander, Warrenton, former State Senator; Senator M. M. Long, St. Paul; Garnett S. Moore, member of the House of Delegates, Pulaski; C. Stuart Wheatley, former member of the House, Danville; Judge Rayner V. Snead, Washington, Virginia; F. C. Bedinger, Jr., Boydton; E. I. Bostwick, Richmond; Fred B. Gentry, Roanoke; James A. Howard, Norfolk; Eugene J. Meyung, Charlottesville; H. Marston Smith, Warsaw, Wm. Earle White, Petersburg, Alexander L. Wilson, Arlington, and R. R. Young, Jr., Martinsville, all members of the legal profession.

The Committee organized and elected Senator Long as Vice-Chairman. G. M. Lapsley and Daniel E. Bray, Jr., were appointed Secretary and Recording Secretary, respectively.

The Committee collected information on the various aspects of the subject under study. A public hearing was held in the State Capitol and was well attended.

The Committee formed a subcommittee which gave detailed consideration to the aspects of uninsured motorist coverage.

The Committee discussed many other aspects of the subject matter extensively at a number of meetings.

The Committee reviewed at length the applicable Code sections and drew on the combined wisdom of its membership who are active members of the legal profession and practice extensively in the areas related to the study.

The Committee completed its study and made its report to the Council. After thorough consideration and review of these matters we submit the following:

RECOMMENDATIONS

1. The adoption of an amendment to § 8-220 of the Code of Virginia relating to non-suits of civil actions, to provide for discretion in the court to impose the taxable costs and reasonable expenses not to exceed $200.00 incurred by the defendant where there is an obvious abuse of the non-suit privilege.

2. The adoption of amendments to § 18.1-55.1 and the enactment of a new statute, § 8-269.1, which provide for the admission in civil actions of evidence, in the form of a certificate of the chief medical examiner or any other certificate filed by any doctor other than the chief medical examiner, of blood-alcohol test results taken pursuant to Virginia's Implied Consent Law. The amendment and new section do not rule out the possibility of cross examination where the results of the tests are in dispute. The recommended changes merely permit the certificates filed in the criminal action to be admissible in the civil action when the contents are not in dispute.

3. The repeal of §§ 8-320 and 8-324 relating to discovery depositions and the discovery of written materials which are now permitted in civil actions. These statutes are now superfluous since the adoption by the Supreme Court of Appeals of Virginia of its amended rules, which permit such procedures in both civil actions and equity suits.

4. The adoption of an amendment to § 8-636 (death by wrongful act; limits) which amendments first, lower the limit of recovery for solace to $25,000, second, permit recovery up to $5,000 for medical expenses, and third, permit a recovery to dependents for pecuniary loss not to exceed $50,000. The total possible recovery is limited to $80,000.

5. The adoption of amendments to § 38.1-381 (uninsured motorist coverage) which amendments concern themselves specifically with four problem areas: the pyramiding of coverages; a clearer definition of what constitutes an uninsured motor vehicle; the alleviation of the problem created when insurance companies become insolvent and the subsequent denial of coverage by the uninsured carrier because the insured failed to provide the required statutory notice; and the clarification of the provision permitting additional coverage for protection against uninsured motorists.

In the following areas of Virginia tort law, the Committee recommends that no changes be made.

(a) Compelling insurance carriers to disclose the limits of policies or permitting discovery as to these.

(b) The duty of operators of motor vehicles owed to gratuitous guest passengers.

(c) Broadening of matters which may be the subject of comment to juries by trial attorneys, including any suggestion for calculating damages on a "per diem" basis.

(d) Any amendment to § 8-317 which would broaden the perpetuation of testimony of witnesses where there is no suit or action pending to permit use of the procedure for discovery purposes.

(e) Any amendment to § 8-218 which would limit a trial judge in granting a motion to strike the evidence of either party.

(f) Permitting third party practice.

(g) Admission in evidence of any opinion testimony by non-experts as to the effects of alcohol or drugs.

(h) Permitting exemplary or punitive damages against a defendant in a civil action wherein it was determined that the negligence was due to the operator's being under the influence of intoxicant or drug.

(i) Making it negligence, as a matter of law, for a person to operate a motor vehicle with brakes that are inadequate or not in good working order.

(j) Permitting covenants not to sue as between joint tort feasors so that a release of one would not release all.

(k) Any amendment to § 46.1-231.1 that would tend to require drivers, strange to an area, to be aware of what constitutes a "customarily used crosswalk" when not at an intersection.

(l) Abolishing contributory negligence as a bar to recovery in cases involving motor vehicles or the adoption in Virginia of the doctrine of comparative negligence.

Background and Findings

Traffic accidents in Virginia based upon statistics furnished by the Department of State Police show an increasing trend. From 1961 through 1966 vehicle registrations rose 27%. Accidents increased 35.9%, from 85,508 to 116,275. In the same period of time injuries increased 43.1% from 29,237 to 41,849. Similarly, deaths from automobile accidents rose by 29.2%, from 856 to 1,106.

Concomitant with the increases in numbers of accidents and injuries there has been an inevitable increase in the amount of litigation arising therefrom. There have also been efforts to liberalize the rules of law applicable to such cases and to increase the limit imposed by statute on recoveries for death resulting from the wrongful act of another.

Most of the other states do not impose a statutory maximum on recovery in death cases. The tabulation which follows indicates the amounts now fixed in those which do.

MAXIMUM AMOUNTS OF RECOVERY IN STATES WITH SPECIFIC DOLLAR LIMITATIONS

State		
Colorado	$25,000	
Illinois	30,000	
Kansas	25,000	
Massachusetts	30,000	(1)
Minnesota	35,000	
Missouri		
New Hampshire	20,000	(2)
Oregon	25,000	
South Dakota	30,000	
Virginia	40,000	
West Virginia	10,000	(3)
Wisconsin	3,000	(4)

(1) With exceptions, maximum amount for common carrier is $50,000.

(2) With exception that maximum amount for surviving spouse, minor child or dependent parent is $40,000.

(3) Absent pecuniary loss but an additional amount up to $100,000 may be recovered if supported by evidence of pecuniary loss.

(4) For loss of society to parents, spouse, unemancipated or dependent children. If decedent leaves dependent children under 18, the maximum limit is increased $2,000 per child but not more than $10,000 in all. An additional $1,000 is allowed for funeral expenses plus additional amount up to $22,500 for pecuniary loss.

One other facet of the law applicable specifically to injuries received in motor vehicle accidents is the rule established by the Supreme Court of Appeals in Virginia that a gratuitous passenger in a motor vehicle can recover damages he may suffer from the negligent operation of the vehicle only if the operator thereof was guilty of gross negligence. This rule is rather widely adhered to by courts in other states. We set forth below a list of the states where the rule or a variation of it is in effect with an indication of what their law is.

STATES REQUIRING PROOF OF MORE THAN ORDINARY NEGLIGENCE IN GUEST CASES

Alabama	Willful or wanton misconduct
Arkansas	Willful or wanton operation
California	Intoxication or willful negligence
Colorado	Intoxication or willful and wanton
Delaware	Intentional or willful and wanton
Florida	Gross, or willful and wanton
Georgia	Gross negligence
Idaho	Intentional or reckless
Illinois	Willful or wanton
Indiana	Wanton or willful misconduct
Iowa	Reckless or intoxication
Kansas	Gross and wanton
Massachusetts	Gross negligence
Michigan	Gross negligence or willful and wanton

STATE REQUIRING PROOF OF MORE THAN ORDINARY NEGLIGENCE IN GUEST CASES

Montana	Gross negligence and reckless
Nebraska	Intoxication or gross negligence
Nevada	Intoxication, willful or gross
New Mexico	Heedless or reckless
North Dakota	Willful or gross neglect
Ohio	Willful or wanton
Oregon	Gross negligence, reckless disregard
South Carolina	Heedless or reckless
South Dakota	Willful or wanton
Texas	Heedless or reckless
Utah	Intoxication or willful misconduct
Virginia	Gross negligence
Washington	Gross negligence or intoxication
Wyoming	Willful or wanton or gross

New Jersey and Massachusetts exclude guest cases from the benefits of the Unsatisfied Judgment Fund and Compulsory Insurance policies.

The above are only two of the subjects involved in the field of the study. Careful consideration was given to many proposals for changes in the law of torts, including those proposed by "plaintiff's lawyers" and "defense lawyers". Some were deemed meritorious and others we think would be inequitable or might be too drastic a change in our present law. We set forth in the next section of this Report reasons for the decisions we've reached.

Reasons for Recommendations

1. Concerning the proposed amendment to the Code Section 8-220, relating to nonsuits, we recognize this is an inherent right of plaintiffs and in many cases a nonsuit is fully justified. However, we have been advised that in certain areas of the Commonwealth this privilege is often abused to the detriment of the court system and the rights of defendants. We do not feel that nonsuits should be permitted to harass defendants or to constitute, in effect, legal blackmail in frivolous cases. Accordingly, we propose an amendment to this section to give the court discretion, where there is an obvious abuse of the nonsuit privilege, to impose upon a plaintiff who frivolously clogs the court docket and imposes an undue burden on a defendant the penalty of paying the defendant's taxable costs and expenses in preparation for the trial. It is noteworthy that plaintiffs can usually obtain continuances when necessity dictates. It is also significant to note that the language of the amendment places the discretion on the judge hearing the case and the amendment does not affect the nonsuit of cases thirty days or more prior to the trial.

2. Concerning the amendment to § 18.1-55.1 and the enactment of the new statute § 8-269.1 which provide for the admission in civil actions as evidence the certificate by the Chief Medical Examiner or the other certificate filed by any doctor or laboratory, it is the sense of the Council that these procedural changes will greatly assist the Chief Medical Examiner's Office in the sheer physical problem of being in many places to testify at the same time. Neither the amendment nor the new section prohibit a subpoena of the proper party where the contents of the certificates differ and thereby create a dispute because of the discrepancy.

Other official documents are similarly admissible in evidence and it is felt that there is no reason why the certificates filed pursuant to Virginia's implied consent law should not be similarly entitled to the same status.

3. Concerning the repeal of §§ 8-320 and 8-324 pertaining to discovery depositions and the discovery of certain written materials in civil actions, it was initially thought that these should be applicable in suits in equity as well. Since the adoption by the Supreme Court of Appeals of Virginia of its amended rules which now permit discovery in equity suits, the statutes are obsolete and accordingly we recommend their repeal.

4. Concerning the amendments to § 8-636—Virginia's death by wrongful act limits statute, we believe that the amendments strike a compromise between opposing philosophies. Initially, it often happens that the medical expenses incurred in attempting to cure the decedent of his injuries which ultimately lead to his death represent a sizeable expense, and recognizing that under current Virginia procedural law in certain cases where there are no proper beneficiaries, these expenses can go unpaid, the Council is attempting to provide for recovery in those situations where applicable, up to $5,000, for reasonable and just medical expenses incurred.

Recognizing both the objections to an unlimited recovery for wrongful death on the one hand and on the other, the injustice of a refusal to consider all pertinent elements of damage, the Council is of the opinion that the amendments as offered suggest a realistic approach to the problem. As is often the case in jury awards under the present statute exemplary, punitive and *in solatium* elements enter into the final award. Accordingly, we recommend a reduction from $40,000 to $25,000 for this aspect of damages. On the other hand, recognizing that oftentimes there is an unrealistic appraisal by the jury and undue economic distress is placed upon dependent survivors, we recommend the reenactment of the statute permitting a recovery for pecuniary loss, where applicable, but subject to a limitation. It is felt that this is a compromise again between two opposing philosophies present in the Commonwealth. It is significant to note that the maximum recovery under the proposed amended statute is $80,000.

5. Concerning the uninsured motorist statute, § 38.1-381, the Council recommends the adoption of the amendments as proposed. Many problem areas which confront the Commonwealth in connection with this statute were considered. Specifically, the amendments concern themselves with these problem areas: the pyramiding of coverages of many insurance policies under certain circumstances; the definition of what actually constitutes an uninsured motor vehicle; the alleviation of the procedural problem created when an insurance company becomes insolvent and as a consequence unable to answer any judgments rendered against its insureds; the subsequent denial of coverage by the injured's carrier because of the fact that the insured failed to provide the required statutory notice; and finally a clarification of the language added at the 1966 General Assembly that provided for an extra premium added coverage under certain circumstances. It is our belief that the language adopted in 1966 fails to provide the proper procedure and language to make such coverage applicable as was intended.

Also in the amendments as suggested to subsection (b1), we propose giving an opportunity for a person to be able to adequately protect himself when his damages due to injuries are in excess of the minimum ($15,000) requirement.

It is believed that the concept of the pyramiding of coverages as construed in the case of *Bryant v. State Farm,* 205 Va. 897, was not the

original intent of the Legislature in adopting the statute providing the Uninsured Motorist Endorsement. Accordingly, the suggested amendments provide for the elimination of such practice; however, the provisions of the additional premium coverage have been extended to provide for protection against both uninsured motorists and motorists with only the minimum coverage ($15,000/$30,000).

Other aspects of this statute have also been considered.

One such item was the arbitrary action by carriers in asserting or attempting to assert policy defenses to involve the potential uninsured carrier into actively participating in the settlement of claims. It is the Council's belief that this privilege is abused. However, we are of the opinion that the best way the abuse can be handled is through action on the part of the insurance industry itself. It is the hope of the Council that the industry will be self-policing.

Another problem area is brought about due to the fact that self-insureds are not included under the ambit of the uninsured motorist coverage. However, the Council recognizes that since the basis of participation in the statute is predicated upon participation in the uninsured motorist fund, there is no way which self-insured can so participate.

Additionally, the Council considered problems in "John Doe" accidents where there is no corroboration of testimony or physical evidence required to maintain such an action. Not ignoring the problem, but recognizing that its effect is minimal, we are of the opinion that any legislation would defeat one of the reasons for establishing the statute in the first instance.

Another problem area which was considered is the statutory requirement of notice to an uninsured carrier as an absolute defense for denial of coverage. The problem, of course, is that plaintiffs' counsel inevitably name the potential uninsured carrier as codefendant in the action to preclude any ultimate denial of coverage. Since the right to notice is a prerequisite in any civil proceeding, it is our opinion that statutorily this could not be eliminated and again is something that should be worked out by the industry itself.

Finally, there were considered problems created by, and the unfairness of, not allowing subrogation on the part of a carrier involved under workmen's compensation coverage. Again, however, we note that the premise for participation in the uninsured motorist coverage is predicated upon participation in the uninsured motorist fund and there is no equitable way to permit participation by workmen's compensation carriers in this fund.

Concerning the many areas in which no changes are recommended, the Council offers the following rationale. It would appear that the crux of the problem is a philosophy. That is to say, we are not criticizing or accusing proponents of change as merely being interested in change for change's sake, nor are we attempting merely to maintain the status quo. During the study, many arguments were heard as to the changing economy, and the unrealistic approach of Virginia law, and the like. However, we are aware of the corollary—that is, as larger judgments are permitted and more liberalization occurs by permitting larger recoveries, this will ultimately adversely affect all citizens of the Commonwealth. We take pride in a statement made to our Committee: "Virginia has long had a reputation for an evenhanded justice and solicitude for the welfare of its citizens." It is the hope of the Council that this statement can be continued to be true.

CONCLUSION

The Council desires to express its appreciation to all those who assisted in connection with this study and also to all who afforded the Committee the benefit of their knowledge and views both at the public hearing and in conference. We particularly wish to thank the members of the Committee for their generous contribution of their time and effort in the consideration of these difficult problems.

Respectfully submitted,

Tom Frost, *Chairman*

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A BILL to amend and reenact § 8-220, as amended, of the Code of Virginia, relating to nonsuits of civil actions; when not allowed; venue of new action; penalty for abuse.

Be it enacted by the General Assembly of Virginia:

1. That § 8-220, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 8-220. When nonsuit not allowed; no new proceeding after nonsuit.—A party shall not be allowed to suffer a nonsuit unless he do so before the jury retire from the bar or before the suit or action has been submitted to the court for decision or before a motion to strike the evidence has been sustained by the court; *provided, however, the court shall have discretion to impose upon any plaintiff, who shall take a nonsuit either within the thirty days preceding trial or during the trial, the taxable costs and reasonable expenses incurred by the defendant(s) in preparation for trial not exceeding in the aggregate two hundred dollars. The court shall direct the manner and to whom such costs and expenses shall be paid.* And after a nonsuit no new proceeding on the same cause of action shall be had in any court other than that in which the nonsuit was taken, unless that court is without jurisdiction, or not a proper venue, or other good cause be shown for proceeding in another court *nor shall any such new proceeding be permitted until any costs and expenses imposed as a result of a nonsuit shall have been paid.*

A BILL to amend and reenact § 18.1-55.1, as amended, of the Code of Virginia, relating to use of chemical tests to determine alcoholic content of blood and failure to take such tests under certain circumstances.

Be it enacted by the General Assembly of Virginia:

1. That § 18.1-55.1, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 18.1-55.1. Use of chemical test to determine alcohol in blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions.—(a) As used in this section "license" means any operator's, chauffeur's or learner's permit or license authorizing the operation of a motor vehicle upon the highways.

(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after July one, nineteen hundred sixty-four, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, if such person is arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town within two hours of the alleged offense.

(c) If a person after being arrested for a violation of § 18.1-54 or of a similar ordinance of any county, city or town and after having been advised by the arresting officer that a person who operates a motor vehicle upon a public highway in this State shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood taken for a chemical test to determine the alcoholic content thereof, and that the unreasonable refusal to do so constitutes grounds for the revocation of the privilege of operating a motor vehicle upon the highways of this State, then refuses to permit the taking of a sample of his blood for

such tests, the arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal, and so declares again his refusal in writing upon a form provided by the Chief Medical Examiner of Virginia (hereinafter referred to as Chief Medical Examiner), or refuses or fails to so declare in writing and such fact is certified as prescribed in paragraph (j), then no blood sample shall be taken even though he may thereafter request same.

(d) Only a physician, registered professional nurse, graduate laboratory technician or a technician or nurse designated by order of a court of record acting upon the recommendation of a licensed physician, using soap and water to cleanse the part of the body from which the blood is taken and using instruments sterilized by the accepted steam sterilizer or some other sterilizer which will not affect the accuracy of the test, or using chemically clean sterile disposable syringes, shall withdraw blood for the purpose of determining the alcoholic content thereof. No civil liability shall attach to any person authorized to withdraw blood as provided herein as a result of the act of withdrawing blood from any person submitting thereto, provided the blood was withdrawn according to recognized medical procedures; and provided further that the foregoing shall not relieve any such person from liability for negligence in the withdrawing of any blood sample.

(d1) Portions of the blood sample so withdrawn shall be placed in each of two vials provided by the Chief Medical Examiner, which vials shall be sealed and labeled by the person taking the sample or at his direction, showing on each the name of the accused, the name of the person taking the blood sample, and the date and time the blood sample was taken. The vials shall be placed in two containers provided by the Chief Medical Examiner, which containers shall be sealed so as not to allow tampering with the contents. The arresting or accompanying officer shall take possession of the two containers holding the vials as soon as the vials are placed in such containers and sealed, and shall transport or mail one of the vials forthwith to the Chief Medical Examiner. The officer taking possession of the other container (hereinafter referred to as second container) shall, immediately after taking possession of said second container give to the accused a form provided by the Chief Medical Examiner which shall set forth the procedure to obtain an independent analysis of the blood in the second container, and a list of those laboratories and their addresses, approved by the State Health Commissioner; such form shall contain a space for the accused or his counsel to direct the officer possessing such second container to forward that container to such approved laboratory for analysis, if desired. The officer having the second container, after delivery of the form referred to in the preceding sentence (unless at that time directed by the accused in writing on such form to forward the second container to an approved laboratory of the accused's choice, in which event the officer shall do so) shall deliver said second container to the chief police officer of the county, city or town in which the case will be heard, and the chief police officer who receives the same shall keep it in his possession for a period of seventy-two (72) hours, during which time the accused or his counsel may, in writing, on the form provided hereinabove, direct the chief police officer having possession of the second container to mail it to the laboratory of the accused's choice chosen from the approved list. As used in this section, the term "chief police officer" shall mean the sheriff in any county not having a chief of police, the chief of police of any county having a chief of police, the chief of police of the city or the sergeant or chief of police of the town in which the charge will be heard.

(d2) The testing of the contents of the second container shall be made in the same manner as hereafter set forth concerning the procedure to be followed by the Chief Medical Examiner, and all procedures established herein for transmittal, testing and admission of the result in the trial of the case shall be the same as for the sample sent to the Chief Medical Examiner.

(d3) A fee not to exceed $15.00 shall be allowed the approved laboratory for making the analysis of the second blood sample which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.1-54, or of a similar ordinance of any county, city or town, the fee charged by the laboratory for testing the blood sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(d4) If the chief police officer having possession of the second container is not directed as herein provided to mail it within seventy-two (72) hours after receiving said container then said officer shall destroy same.

(e) Upon receipt of the blood sample forwarded to his office for analysis, the Chief Medical Examiner shall cause it to be examined for alcoholic content and he or an Assistant Chief Medical Examiner shall execute a certificate which shall indicate the name of the accused, the date, time and by whom the blood sample was received and examined, a statement that the container seal had not been broken or otherwise tampered with, a statement that the container was one provided by the Chief Medical Examiner and a statement of the alcoholic content of the sample. The certificate attached to the vial from which the blood sample examined was taken shall be returned to the clerk of the court in which the charge will be heard. The certificate attached to the container forwarded on behalf of the accused shall also be returned to the clerk of the court in which the charge will be heard, and such certificate shall be admissible in evidence when attested by the pathologist or by the supervisor of the laboratory approved by the State Health Commissioner.

(f) When any blood sample taken in accordance with the provisions of this section is forwarded for analysis to the office of the Chief Medical Examiner, a report of the results of such analysis shall be made and filed in that office. Upon proper identification of the vial into which the blood sample was placed, the certificate as provided for in this section shall, when duly attested by the Chief Medical Examiner, or any Assistant Chief Medical Examiner, be admissible in any court, in any criminal *or civil* proceeding, as evidence of the facts therein stated and of the results of such analysis.

(g) Upon the request of the person whose blood sample was taken for a chemical test to determine the alcoholic content thereof, the results of such test or tests shall be made available to him.

(h) A fee not exceeding five dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.1-54 or of a similar ordinance of any county, city or town, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury.

(i) In any trial for a violation of § 18.1-54 of the Code or of a similar ordinance of any county, city or town, this section shall not otherwise limit the introduction of any relevant evidence bearing upon any question at issue before the court, and the court shall, regardless of the result of the blood test or tests, if any, consider such other relevant evidence of the condition of the accused as shall be admissible in evidence. The failure of an accused to permit a sample of his blood to be withdrawn for a chemical test to determine the alcoholic content thereof is not evidence and shall not be subject to comment at the trial of the case; nor shall the fact that a blood test had been offered the accused be evidence or the subject of comment.

(j) The form referred to in paragraph (c) shall contain a brief statement of the law requiring the taking of a blood sample and the penalty for refusal, a declaration of refusal and lines for the signature of the person from whom the blood sample is sought, the date and the signature of a witness to the signing. If such person refuses or fails to execute such declaration, the committing justice, clerk or assistant clerk shall certify such fact, and that the committing justice, clerk or assistant clerk advised the person arrested that such refusal or failure, if found to be unreasonable, constitutes grounds for the revocation of such person's license to drive. The committing or issuing justice, clerk or assistant clerk shall forthwith issue a warrant charging the person refusing to take the test to determine the alcoholic content of his blood, with violation of this section. The warrant shall be executed in the same manner as criminal warrants.

(k) The executed declaration of refusal or the certificate of the committing justice, as the case may be, shall be attached to the warrant and shall be forwarded by the committing justice, clerk or assistant clerk to the court in which the offense of driving under the influence of intoxicants shall be tried.

(l) When the court receives the declaration of refusal or certificate referred to in paragraph (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood taken for the determination of the alcoholic content thereof, the court shall fix a date for the trial of said warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants.

(m) The declaration of refusal or certificate under paragraph (k), as the case may be, shall be prima facie evidence that the defendant refused to submit to the taking of a sample of his blood to determine the alcoholic content thereof as provided hereinabove. However, this shall not be deemed to prohibit the defendant from introducing on his behalf evidence of the basis for his refusal to submit to the taking of a sample of his blood to determine the alcoholic content thereof. The court shall determine the reasonableness of such refusal.

(n) If the court shall find the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of 90 days for a first offense and for six months for a second or subsequent offense or refusal within one year of the first or other such refusals; the time shall be computed as follows: The date of the first offense and the date of the second or subsequent offense.

(o) The court shall forward the defendant's license to the Commissioner of the Division of Motor Vehicles of Virginia as in other cases of similar nature for suspension of license unless, however, the defendant shall appeal his conviction in which case the court shall return the license to the defendant upon his appeal being perfected.

(p) The procedure for appeal and trial shall be the same as provided by law for misdemeanors.

(q) No person arrested for a violation of § 18.1-54 or a similar ordinance of any county, city or town shall be required to execute in favor of any person or corporation a waiver or release of liability in connection with the withdrawal of blood and as a condition precedent to the withdrawal of blood as provided for herein.

(r) The court or the jury trying the case shall determine the innocence or the guilt of the defendant from all the evidence concerning his condition at the time of the alleged offense.

(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.

(t) The governing bodies of the several counties, cities and towns are authorized to adopt ordinances paralleling the provisions of (a) through (s) of this section.

A BILL to amend the Code of Virginia by adding a section numbered 8-269.1 to provide for the admission in evidence in civil actions of the certificate of the Chief Medical Examiner, other physician or laboratory, as to the alcohol content of blood, taken pursuant to § 18.1-55.1.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia be amended by adding a section numbered 8-269.1 as follows:

§ 8-269.1. The certificate of the Chief Medical Examiner or any Assistant Chief Medical Examiner and every other certificate prepared in compliance with § 18.1-55.1 shall be admitted in evidence in any civil action and shall be prima facie evidence of what is stated in such certificate and that it was prepared in compliance with such section.

When the certificate purports to be signed in accordance with such section it may be admitted as evidence without proof of the signature.

A BILL to repeal §§ 8-320 and 8-324 of the Code of Virginia, relating to interrogatories and the compelling of the production of book accounts or other writings.

Be it enacted by the General Assembly of Virginia:

1. That §§ 8-320 and 8-324 of the Code of Virginia are hereby repealed.

A BILL to amend and reenact § 8-636, as amended, of the Code of Virginia, to provide for amounts and distribution of damages recoverable under actions for death by wrongful act.

Be it enacted by the General Assembly of Virginia:

1. That § 8-636, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 8-636. Amount and distribution of damages.—The jury in any such action may award such damages *for solace* as to it may seem fair and just, not exceeding * *twenty-five* thousand dollars, and may direct in what proportion they shall be distributed to the surviving widow or husband and children and grandchildren of the deceased, or if there be none such, then to the parents, brothers and sisters of the deceased. Nothing shall be apportioned to the parents, brothers and sisters of the deceased, if there be a surviving widow or husband, children or grandchildren, but between members of the same class the jury shall have absolute discretion as to who shall receive the whole or any part of the recovery. * *In addition to the recovery above, in every such action, the personal representative of the deceased person shall be entitled to recover the just and reasonable hospital and medical expenses, not exceeding five thousand dollars, incurred by the decedent as a result of the wrongful act. Any recovery hereunder, of the hospital and medical expenses shall be expended by the personal representative in the payment of such expenses, the funds available being apportioned pro rata among such specific creditors, as their respective interests may appear. In addition to the damages set forth above, the jury may award such further damages, not exceeding fifty thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent or dependents of such decedent and shall further direct in what proportion such damages shall be distributed to such dependents, regardless of class.*

No recovery hereunder shall be deemed to be assets of the estate of the decedent and the court shall apportion the costs of recovery as it shall deem proper.

Such reduced damages for solace and such additional damages *for medical and hospital expenses and pecuniary loss* that may be awarded under this section * shall not apply to any cause of action arising prior to July one, nineteen hundred sixty-**eight.*

A BILL to amend and reenact § 38.1-381, as amended, of the Code of Virginia, relating to liability insurance on motor vehicles and watercraft; standard provisions, "omnibus clause"; to provide for clarification of terms and provisions of the uninsured motorist endorsement and redefine the definition of uninsured vehicle.

Be it enacted by the General Assembly of Virginia:

1. That § 38.1-381, as amended, of the Code of Virginia be amended and reenacted as follows:

§ 38.1-381. Liability insurance on motor vehicles and watercraft; standard provisions, "omnibus clause."—(a) No policy or contract of bodily injury liability insurance, or of property damage liability insurance, covering liability arising from the ownership, maintenance or use of

any motor vehicle or any private pleasure vessel, ship, boat or other watercraft, shall be issued or delivered in this State to the owner of such vehicle or such watercraft, or shall be issued or delivered by any insurer licensed in this State upon any motor vehicle or any private pleasure vessel, ship, boat or other watercraft then principally garaged or docked or principally used in this State, unless it contains a provision insuring the named insured and any other person responsible for the use of or using the motor vehicle or private pleasure vessel, ship, boat or other watercraft with the consent, expressed or implied, of the named insured, against liability for death or injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle or such watercraft by the named insured or by any such person; provided, that every automobile liability insurance policy or contract, or endorsement thereto, insuring private passenger automobiles principally garaged and/or used in Virginia, and every policy of liability insurance, contract or endorsement thereto insuring private pleasure vessels, ships, boats or other watercraft principally docked or used in Virginia, when the named insured is an individual or husband and wife, which includes, with respect to any liability insurance provided by the policy, contract or endorsement for use of a nonowned automobile or private pleasure watercraft, any provision requiring permission or consent of the owner of such automobile or such watercraft in order that such insurance apply shall be construed to include permission or consent of the custodian in such provision requiring permission or consent of the owner.

(a1) Nor shall any such policy or contract relating to ownership, maintenance or use of a motor vehicle be so issued or delivered unless it contains an endorsement or provision insuring the named insured and any other person responsible for the use of or using the motor vehicle with the consent, expressed or implied, of the named insured, against liability for death or injury sustained, or loss or damage occasioned within the coverage of the policy or contract as a result of negligence in the operation or use of such vehicle by the named insured or by any such person, notwithstanding the failure or refusal of the named insured or such other person to cooperate with the insurer under the terms of the policy; provided, however, that if such failure or refusal prejudices the insurer in the defense of an action for damages arising from the operation or use of such motor vehicle, then this endorsement or provision shall be void.

(a2) Any endorsement, provision or rider attached to, or included in, any such policy of insurance which purports or seeks in any way to limit or reduce in any respect the coverage afforded by the provisions required therein by this section shall be wholly void.

(b) Nor shall any such policy or contract relating to ownership, maintenance or use of a motor vehicle be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46.1-1 (8), as amended from time to time, of the Code herein; provided, however, *nothing herein shall be construed to enable or permit recovery hereunder by any one person because of the liability of any one owner or operator of an uninsured motor vehicle, even though partially insured, except from assets, other than automobile liability insurance, of such owner or operator, of any amount in excess of the limits set forth in § 46.1-1 (8), costs and interest excepted, except under conditions as provided in the following subsection; initial protection up to the limits of its policy shall be afforded by the insurance carrier providing liability coverage for the person injured. Such endorse-*

ment or provision may provide an exclusion of the first two hundred dollars of such loss or damage for injury to or destruction of the property of the insured.

* *(b1) The* said insured, after January one, nineteen hundred sixty-seven, shall be offered the opportunity to contract, at an additional premium, for limits higher than those provided in § 46.1-1 (8) so long as such limits do not exceed the limits of the automobile liability coverage provided by such policy * *and such additional limits shall be available to the insured for recovery for all sums which he shall be legally entitled to recover as damages not in excess of such additional limits and as to such policies issued with higher uninsured motorist limits the definition of an "uninsured motor vehicle" as defined in subsection (c) hereafter shall also include any such motor vehicle as to which there is not sufficient bodily injury liability and property damage liability insurance to pay the full amount of the insured's damages, but no one person entitled to recover the excess provided under this subsection shall be entitled or permitted to recover as such excess an amount greater than the maximum limits provided in any one policy.*

(c) As used in this section, the term *"bodily injury"* shall include death, resulting therefrom; the term *"insured"* as used in subsections (b), *(b1),* (d), (f) and (g) hereof, means the named insured and, while resident of the same household, the spouse of any such named insured, and relatives of either, while in a motor vehicle or otherwise, and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above; and the term "uninsured motor vehicle" means * *any* vehicle, *as defined in § 46.1-1 (34) whether or not required to be licensed* as to which there is no (i) bodily injury liability insurance and property damage liability insurance both in the amounts specified by § 46.1-1 (8), as amended from time to time, or (ii) there is such insurance but the insurance company writing the same denies coverage thereunder for any reason whatsoever including failure or refusal of the insured to cooperate with such company, (iii) there is no bond or deposit of money or securities in lieu of such bodily injury and property damage liability insurance, * (iv) the owner of such motor vehicle has not qualified as a self-insurer under the provisions of § 46.1-395, *or (v) there is such insurance but the insurance carrier writing same is insolvent or is in such financial position as may cause it to be unable to respond to judgment.* A * vehicle shall be deemed to be *an* uninsured *motor vehicle* if the owner or operator thereof be unknown; provided that recovery under the endorsement or provisions shall be subject to the conditions hereinafter set forth.

(d) If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured be unknown, the insured or someone on his behalf, in order for the insured to recover under the endorsement, shall report the accident as required by § 46.1-400, unless such insured is reasonably unable to do so, in which event the insured shall make such report as soon as reasonably practicable under the circumstances.

(e) If the owner or operator of any vehicle causing injury or damages be unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivery of a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought and service upon the insurance company issuing the policy shall be made as prescribed by law as though such

insurance company were a party defendant. The insurance company shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

* *(e1)* Any insured intending to rely on the coverage required by * *subsection* (b) *or provided by subsection (b1)* of this section shall, if any action is instituted against the owner or operator of an uninsured motor vehicle, serve a copy of the process upon the insurance company issuing the policy in the manner prescribed by law, as though such insurance company were a party defendant; such company shall thereafter have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured motor vehicle or in its own name; provided, however, that nothing in this paragraph shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding.*

(f) Any insurer paying a claim under the endorsement or provisions required by * *subsections* (b) *or (b1)* of this section shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made; provided that the bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not constitute a bar to the insured, if the identity of the owner or operator who caused the injury or damages complained of becomes known, from bringing an action against the owner or operator theretofore proceeded against as John Doe, provided that any recovery against such owner or operator shall be paid to the insurance company to the extent that such insurance company paid the * insured in the action brought against such owner or operator as John Doe, except that such insurance company shall pay its proportionate part of any reasonable costs and expense incurred in connection therewith including reasonable attorney's fees. Nothing in an endorsement or provisions made under this paragraph nor any other provision of law shall operate to prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing such injury as a party defendant and such joinder is hereby specifically authorized.

(g) No such endorsement or provision shall contain any provision requiring arbitration of any claim arising under such endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

(h) The provisions of paragraphs (a) and (b) of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workmen's compensation law, but no provision or application of this section shall be construed to limit the liability of the insurance company, insuring motor vehicles, to an employee or other insured under this section who is injured by an uninsured motor vehicle.

2. This act shall be in force on and after July one, nineteen hundred sixty-eight.