REPRINT

REPORT OF THE

JOINT SUBCOMMITTEE STUDYING THE

DESIRABILITY OF ADOPTING A STANDARD

OF COMPARATIVE NEGLIGENCE IN VIRGINIA

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 15

COMMONWEALTH OF VIRGINIA
RICHMOND
1982

MEMBERS OF SUBCOMMITTEE

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Report of the Joint Subcommittee Studying the Desirability of Adopting a Standard of Comparative Negligence in Virginia

To

The Governor and the General Assembly of Virginia

Richmond, Virginia
February, 1982

To: The Honorable Charles S. Robb, Governor of Virginia
and
The General Assembly of Virginia

I. INTRODUCTION

At its 1980 regular session the Virginia General Assembly adopted House Joint Resolution No. 45, which provides as follows:

HOUSE JOINT RESOLUTION NO. 45

Requesting the Senate and House of Delegates Committees for Courts of Justice to study the desirability of adopting a standard of comparative negligence for use in tort cases.

WHEREAS, the all-or-nothing rule of contributory negligence may be very harsh on the plaintiff in some tort cases; and

WHEREAS, the harshness of the contributory negligence rule has not properly been ameliorated by the several exceptions to the contributory negligence rule developed at common law; and

WHEREAS, regardless of whether the contributory negligence rule or an exception to it applies in a case, one party or another is often treated unfairly; and

WHEREAS, the federal government and approximately two-thirds of the other states have seen fit to ameliorate the harsh effects of the contributory negligence rule by adopting some form of comparative negligence standard; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Committees for Courts of Justice of the House of Delegates and the Senate are requested to form a joint subcommittee to study the desirability of adopting a standard of comparative negligence for use in tort cases, consisting of four (4) members from the House Committee for Courts of Justice; three (3) members from the Senate Committee for Courts of Justice and four (4) members from the citizenry of the Commonwealth at large, two (2) of which shall be appointed by the Chairman of the Senate Committee on Privileges and Elections.

Upon completion of the study, the joint subcommittee shall submit a final report, including recommended legislatation, to the Governor and the General Assembly.

The joint subcommittee was appointed in April, 1980, with Delegate Bernard S. Cohen as Chairman, and three meetings of the joint subcommittee were held in July, October and December of 1980. Other members of the joint subcommittee are Senator Frederick T. Gray, Delegate Theodore V. Morrison, Jr., Delegate J. Samuel Glasscock, Delegate Raymond R. Robrecht, Senator William F. Parkerson, Jr., Senator Willard J. Moody, Mr. Garnett S. Moore, Professor Harvey S. Pearlman, Mr. L. Eldon James, and Dean Thomas A. Edmonds of the University of Virginia School of Law.

After hearing the views and expert opinions of a number of persons and groups interested in the

subject, the joint subcommittee discussed the matter at considerable length without achieving any concensus on what, if any, change should be recommended in current Virginia law. It was felt that additional comment and input from The Virginia State Bar, the Virginia Bar Association, and other groups within the legal profession not already heard from by the joint subcommittee would be desirable before formulating final recommendations. Accordingly, a subcommittee consisting of Senator Frederick T. Gray and Dean Thomas A. Edmonds was appointed at the last meeting of the joint subcommittee on December 3, 1980. This special subcommittee was charged with the responsibility of preparing a brief summary and analysis of present Virginia law, as well as the various alternatives which have been adopted in other states, and outlining the positive and negative aspects of each approach. The report of the special subcommittee is to be circulated to the bar for comment prior to a final meeting of the joint subcommittee during the fall of 1981, at which time final recommendations under House Joint Resolution No. 45 will be prepared.

After a draft of the special subcommittee report was prepared by Dean Edmonds, Senator Gray found it necessary to resign from both the special subcommittee and the joint subcommittee because of personal reasons.

Attached hereto is the report of the special subcommittee. The assistance of Mr. Will Harvey, a third year student at The T. C. Williams School of Law who served as research assistant to the special subcommittee, is gratefully acknowledged.

Respectfully submitted,

Thomas A. Edmonds

II. FINDINGS OF THE SPECIAL SUBCOMMITTEE

Presently, Virginia is one of only twelve states that continues to follow the early common law rule that contributory negligence on the part of a plaintiff suing in tort for damages due to personal injury or property loss constitutes a complete bar to his recovery. This rule embraces the notion that one claiming such damages must not, through his own lack of care and diligence, have exposed himself to the risk of danger which caused his damages. The standard of care required of the plaintiff does not demand that he absolutely refrain from exposure to harm, but it does require that the person be as watchful and cautious in avoiding danger as an ordinarily prudent person would under the same circumstances. Virginia Electric and Power Co. v. Whitehurst, 8 S.E.2d 296, 299 (Va. 1940).

The doctrine is generally traced back to the case of Butterfield v. Forrester , 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). The rule was first adopted in America in a Massachusetts case, Smith v. Smith , 2 Pick 621 (1824), and was later followed by the rest of the country.

There are a number of reasons advanced in support of the original common law rule. Many are of historical significance only. For example, the contributory negligence as a bar doctrine was formulated during the time period in which the industrial revolution was gaining strength; the rule apparently was designed to provide protection for fledgling industries against plaintiff-minded juries. A second reason for the rule was simplicity. The courts of the early 19th century felt more comfortable if they could point to a single principal or primary cause of a loss. Third, the early common law courts were unable or unwilling to devise a satisfactory method by which damages for a single, indivisible injury could be divided between two or more parties. Prosser, LAW OF TORTS, § 65 (4th Ed. 1971). Finally, another popular rationale was that a plaintiff should not benefit where his own lack of due care contributed to his injury. This reason is curious, since implementation of the doctrine effectively benefits the defendant by releasing him from all liability, even though his lack of due care may also have clearly contributed to the plaintiff's loss.

Modern justifications for retention of the original common law rule are predicated primarily on the presence in our tort system of several concepts and factors which are believed to mitigate against the apparent harshness of the absolute bar rule.

The first of these concepts is the last clear chance doctrine. This limitation on the contributory negligence rule was first articulated in Davies v. Mann , 10 M. & W. 546, 152 Eng. Rep. 588 (1842), a scant thirty-three years after the birth of contributory negligence as a bar to recovery. The basic concept provides that if the jury decides that despite the plaintiff's contributory negligence the defendant could nevertheless have avoided the accident, then the defendant's negligence becomes the proximate cause of the plaintiff's damages. Thus, last clear chance shifts the entire burden of the loss back to the defendant, despite some culpability on the part of the plaintiff.

It has been argued that last clear chance is in fact a form of comparative negligence analysis. The jury compares the actions of both parties and determines the most significant proximate cause of the incident. The engrafting of last clear chance in practically every American jurisdiction was an admission that strict adherence to the contributory negligence as a bar doctrine was simply too harsh in some cases. However, while the jury in such cases is allowed to compare the parties' actions to determine whether the burden of loss should be carried by plaintiff or defendant, the end result is still unfair. One party or the other must carry the entire responsibility for an accident, even though both may have been culpable.

A second ameliorating factor often cited is the jury system. Even assuming the harshness and unfairness of the original common law rule as formulated, many persons see no need for any express change because the jury is thought in appropriate cases to ignore the letter of the law in order to mete out what they feel is justice. According to this view, jurors are often either unable to comprehend or unwilling to follow the trial judge's instructions on proximate cause, contributory negligence, or last clear chance. While they listen to the instructions given, they proceed to ignore the legal refinements and render compromise verdicts based upon their own ideas of justice. Thus, a plaintiff's contributory negligence seldom bars recovery altogether. Powell, Contributory Negligence: A Necessary Check on the American Jury , 43 A.B.A.J. 1005 (1957).

While it cannot be denied that juries sometimes ignore the instructions given them, this can hardly be a rationale for retaining a rule of law. Reliance on a jury's refusal to follow instructions

is at best a questionable form of mitigation. Certainly not all jurors ignore the instructions. Furthermore, if the jury does have a tendency to ignore or minimize the plaintiff's contribution, a comparative negligence system would better allow the jury to do justice to both parties and follow the instructions given. Endorsing the method employed now causes the law to tolerate "blatant jury departure from even-handed application of the legal rules of negligence and contributory negligence, with the consequence that a kind of rough apportionment of damages occurs, but in an unpoliced, irregular, and unreasonably discriminatory fashion." Keeton, Comments on Maki v. Frelk - Comparative v. Contributory Negligence: Should the Court or Legislature Decide? , 21 Vand. L. Rev. 906, 916 (1968). Such a system cannot help but detract from the public's confidence that our laws are administered in a just and consistent manner.

Some persons opposed to changing the original common law rule base their argument on the fact that lawyers, judges and others who must function within our tort system are used to working with the present rules, as well as a fear that fundamental changes could increase the number and size of damage awards and thus lead to increased liability insurance premiums. All of the evidence received to date by the joint subcommittee, however, suggests that states which have departed from the common law rule have been pleased with the results. No state has experienced insurmountable difficulties of a technical nature after modifying its law in this area, and no state has returned to the original common law rule after making a change. Furthermore, there is simply no evidence that any of the various modifications which have been adopted in thirty-eight states has caused liability insurance costs to rise.

A final note regarding the original common law rule: In addition to the thirty-eight states which have departed from the rule, it has been abandoned in its place of origin by Parliamentary Act, and comparative negligence is now the order of the day in admiralty cases at the federal level in this country, as well as in FELA cases. Moreover, Virginia already follows comparative negligence principles in cases involving railroad employees and certain railroad crossing cases. (§§ 8.01-57 through 8.01-62; 56-416 Code of Virginia).

Assuming then, as the General Assembly apparently did in adopting the language of House Joint Resolution No. 45, that some change in the contributory negligence as a bar rule in Virginia may be desirable, the question becomes what should replace it? Changes adopted in other American jurisdictions range from the so-called "slight in comparison" rule formulated by two mid-western states to pure comparative negligence now embraced by ten states. A total of four different approaches to the problem will be examined in the balance of this report, and examples of implementing legislation from several states are included in the appendices.

SLIGHT IN COMPARISON APPROACH

Two mid-western states, Nebraska and South Dakota, modified the common law contributory negligence as a bar rule early in the twentieth century by statute. Both measures originally provided that when negligence on the part of both parties was established, the plaintiff would not be barred from recovery if his negligence was determined to be slight and that of the defendant gross in comparison. In such cases the plaintiff's recovery was simply reduced to reflect his contribution to the loss sustained.

The basic problem with this approach is definitional. What is slight negligence becomes relative, since the determination of how much negligence is required to overcome the characterization as "slight" will be made by comparing the plaintiff's negligence with the defendant's. Thus, plaintiff may be denied recovery, but at an ill-defined point. The result was numerous appeals in these two states seeking greater specificity in defining the terms "slight" and "gross." This led South Dakota to amend its statute in 1967, basically changing from a "slight/gross" comparison to one in which the plaintiff will not be barred if his contributory negligence was simply "slight in comparison with the negligence of the defendant." The current Nebraska and South Dakota statutes are set out in Appendix B.

In effect, these two jurisdictions are actually operating on the basis of a limited comparative negligence system which ameliorates the harshness of the original common law rule, at least in those extreme cases where the plaintiff's contribution has been minimal and the defendant's negligence clearly established. Should this approach be adopted in Virginia, it might be wise to include a provision clearly allocating responsibility to the trier of fact finally to determine how the

plaintiff's negligence should be characterized in each case, with review and reversal by the trial judge or an appellate court only in situations where there is no evidence to support the jury's conclusion. Indeed, this already appears to be the position of the Virginia Supreme Court under present law with regard to decisions as a matter of law that a plaintiff was guilty of contributory negligence. See, e.g., Coleman v. Blankenship Oil Corp. , 267 S.E. 2d 143 (Va. 1980.)

Tennessee is a third state which follows a similar approach, although the focus there is upon whether or not the plaintiff's negligence was a "proximate cause" of his loss. The jury is simply told that the plaintiff's negligence will bar recovery if it is determined to be a proximate cause of his loss, but that it will not it it is remote when compared with the defendant's causal negligence. See Bejach v. Colby , 141 Tenn. 686, 214 S.W. 869 (1919). This is not, of course, a comparative negligence system, since damages are not apportioned. It does, however, reflect basic dissatisfaction with the original common law rule.

COMPARATIVE NEGLIGENCE

A total of thirty-five states have expressly adopted one of three basic forms of comparative negligence to replace the original common law rule under which contributory negligence on the part of the plaintiff served as a bar to any recovery. Ten of these jurisdictions have opted for pure comparative negligence, while twenty-five states have chosen to adopt so-called modified comparative negligence. Within this latter group, thirteen states have chosen a "not-as-great-as" or 49% approach, and twelve states have adopted a "not-greater-than" or 50% system.

Under a pure comparative negligence analysis, the trier of fact, after hearing and assessing all of the evidence, simply assigns a percentage fault factor to each party whose negligence is determined to have been causally related to the established damages. The total dollar amount of the damages is also fixed by the trier of fact, and each party is then required to absorb that percentage of his own proven loss attributable to his negligence as well as to respond in damages for that percentage of the other party's proven loss attributable to his negligence. For example, assume that in an automobile crash the plaintiff is determined to have been 20% at fault, or negligent, and to have sustained $10,000 in damages, and the defendant is found to have been 80% at fault, or negligent, and, upon his counterclaim, is found to have sustained $1,000 in damages. The plaintiff's recovery, instead of being barred altogether on the basis of his contributory negligence, would be reduced to $8,000, and he would be accountable for $200 of the defendant's loss. The two recoveries would either be set off or independently enforceable as judgments, depending upon local procedure.

The modified comparative negligence systems differ in that they prescribe a fault factor or percentage of negligence for the plaintiff beyond which his recovery will continue to be absolutely barred as under the original common law rule. In "not-greater-than" jurisdictions a plaintiff who is found to have been 50% at fault or less is permitted to recover on a comparative negligence basis, while a plaintiff who is found to have been 51% at fault or more is completely barred from recovery. In "not-as-great-as" states a plaintiff who is found to have been 49% at fault or less is permitted to recover on a comparative negligence basis, while a finding that a plaintiff was 50% at fault or more bars any recovery on his part.

Pure comparative negligence was first adopted by statute in Mississippi just after the turn of the century. The current version of the Mississippi provision appears in Appendix A. The most recent adoptions have occurred in Florida, California and Illinois by judicial decisions modifying the original common law rule.

Proponents of the pure form of comparative negligence contend that it is the most equitable method of adjusting losses between two or more parties, each of whose negligence has contributed to the loss-producing incident. The trier of fact, in a comprehensive review of the conduct of all of the parties, can determine the loss sustained by each and the proportion of fault attributable to each. Each party is then required to absorb a portion of his own loss and to compensate others for a portion of their losses based upon the percentage of negligence assigned to him. No party is penalized except to the extent of his own misconduct, and all parties are required to bear the full consequences of their misconduct.

Critics of pure comparative negligence, including supporters of one or the other of the two modified comparative negligence systems, take the position that one who has contributed in a

substantial manner to his own loss simply should not be permitted to recover any part of that loss, and that the pure system serves to reward carelessness and ignores the value of encouraging prudent behavior. They point out that a plaintiff found to have been 90% at fault with $100,000 in damages could recover under the pure comparative negligence system from a defendant who was only 10% at fault with nominal damages. Proponents, however, would respond that the plaintiff in such a case would be required to absorb 90% of his own loss, as well as bear 90% of whatever damages the defendant could establish; this result is unlikely to be viewed as rewarding carelessness or encouraging imprudent conduct. Moreover, the original common law rule and both modified comparative negligence systems could equally be viewed as encouraging misconduct by allowing a clearly negligent defendant to escape all responsibility for his actions on the basis of the plaintiff's contributory negligence. It is questionable in the minds of some whether conduct is seriously influenced on the basis of which approach obtains in a given jurisdiction. Others would hold, however, that imposing liability on a defendant is likely to have a greater impact on the defendant's behavior than denying recovery to the plaintiff is likely to have on the plaintiff's behavior. This is because the defendant's liability is based on conduct that puts other persons at risk. If he is not liable for the injuries he inflicts on others, he has no incentive to be careful. The negligence of the plaintiff, on the other hand, is conduct that places him at risk. Regardless of whether he can recover from the defendant, one has some incentive to avoid injuring himself – we all recognize that money damages will never fully compensate for the pain and disability associated with injury. Thus if there is a choice required between imposing liability on a defendant to encourage safer conduct toward others and denying liability to an injured plaintiff to encourage him to be more careful on his own account, it can be argued that the tort system would be better served by imposing liability on the defendant. Some would contend that this is the major theoretical justification for a rule of comparative negligence.

As previously intimated, the modified comparative negligence systems are philosophically rooted in the notion that while some relief is clearly in order from the harshness of the original common law rule, nevertheless a plaintiff who has contributed in a major way to his own loss should not be permitted to recover. This is obviously a compromise position which lies somewhere between pure comparative negligence and the "slight in comparison" approach.

A focal point for much of the criticism of the modified forms of comparative negligence has been the fact that once the magic trigger point has been reached, a contributorily negligent plaintiff is then barred from any recovery and a demonstrably negligent defendant is completely exonerated. This problem is especially acute in the "not-as-great-as" or 49% system in view of the tendency of the jury to decide upon a 50/50 allocation of fault in close or problematic cases, resulting in a complete bar to any recovery by the plaintiff. Examples of both kinds of modified systems are contained in appendices C and D.

Two principal reservations have been advanced about adoption of any form of comparative negligence: (1) That the number of claims filed and the size of awards would increase, leading to more court congestion and higher liability insurance premiums, and (2) That needless complexity and confusion would be injected into a relatively simple and easily understood area of the law. Studies conducted in a number of adopting states, however, have effectively refuted these claims, and no adopting state has returned to the common law rule after making a change. See, e.g., Rosenburg, Comparative Negligence in Arkansas: A Before and After Survey , 13 Ark. L. Rev. 89 (1959); Note, Comparative Negligence - A Survey of the Arkansas Experience, 22 Ark. L. Rev. 692 (1969); Peck; Comparative Negligence and Automobile Liability Insurance , 58 Mich. L. Rev. 689 (1960). Moreover, the insurance industry has failed to document any instance in any of the thirty-five adopting states of increased liability insurance premiums attributable to the change.

There are, of course, a number of technical questions which must be addressed when comparative negligence is being considered. For example: Will juries be permitted to return general verdicts, or will special verdicts be required in order to be certain how the jury intended to allocate fault and adjust the damages? Will the concept of joint and several liability be preserved, or will some type of comparative fault principle be adopted, making each person responsible only for that portion of the damages attributable to him? If joint and several liability remains, are any adjustments in the law relating to contribution required, and what is the effect of a settlement by plaintiff with one of several defendents? What becomes of related concepts such as assumption of risk and last clear chance?

Some jurisdictions have chosen to deal with some or all of these questions in the adopting

statute itself, and several of the provisions reproduced in the appendices provide examples. Other states have adopted very simple statutes, or have embraced comparative negligence by judicial decision, leaving it to subsequent judicial treatment to fill the interstices. This is a decision which would have to be made in drafting any implementing legislation for Virginia.

Appended to this report also are comments submitted by the Virginia Association of Defense Attorneys and the insurance industry. These comments were received by the joint subcommittee at its final meeting on December 22, 1981. One idea injected by these comments is to move all the way to a no-fault insurance system, and two possible no-fault proposals submitted by the insurance industry are attached, along with the present Florida no-fault provisions.

III. CORRESPONDENCE RECEIVED BY THE SUBCOMMITTEE

(attached)

The University of Iowa
Iowa City, Iowa 52242

College of Law

1847

December 2, 1981

Mr. Oscar R. Brinson
Staff Attorney
Joint Subcommittee Studying
Comparative Negligence
General Assembly Building
910 Capitol Street
Richmond, VA 23208

Dear Mr. Brinson:

I recently wrote Chairman Cohen explaining that I am on a one year leave of absence from the University to teach at the University of Iowa and am not in a position to attend committee meetings. I did receive a copy of Dean Edmonds report and decided to write my observations to you for whatever use the committee may desire. At the outset I should observe that if the issue were raised and I were present I would vote in favor of recommending enactment of a "pure" form of comparative negligence or, that failing, a modified approach.

My comments on the report are threefold:

(1). On page 6, I believe the suggestion as to the standard for review by the trial or appellate court of jury decisions should be deleted. I suspect Virginia already has a significant body of law on that issue and I see no reason why some special rule should be applied here.

(2). On page 7, I would delete the reference to Tennessee. It is not a comparative negligence rule in that, to my understanding, damages are not apportioned.

(3). On page 10, it is observed that the liability rule may not have an effect on conduct. I do not believe that to be the case.

I would add to the report the observation that imposing liability on a defendant is likely to have a greater impact on the defendant's behavior than denying recovery to the plaintiff is likely to have on the plaintiff's behavior. This is because the defendant's liability is based on conduct that puts other persons at risk. If he is not liable for the injuries he inflicts on others he has no incentive to be careful. The negligence of the plaintiff, on the other hand, is conduct that places himself at risk. Regardless of whether he can recover from the defendant, one has some incentive to avoid injuring himself -- we all recognize that money damages will never fully compensate for the pain and disability associated with injury. Thus if there is a choice required between imposing liability on

a defendant to encourage safer conduct toward others and denying liability to an injured plaintiff to encourage him to be more careful on his own account, the Commonwealth would be better served by liability on the defendant.

I suggest this above analysis is the major theoretical justification for a rule of comparative negligence.

I am sorry that I will be unable to attend the December meeting. I wish the committee well in its deliberation, and if I can be of further service from this distance please let me know.

Sincerely,

Harvey S. Perlman
Ida Beam Dist. Visit. Professor of Law

HSP/cjj

cc: The Honorable Bernard Cohen
Dean Thomas Edmonds

December 22, 1981

Honorable Bernard S. Cohen
House of Delegates
General Assembly Building
910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Cohen:

The Virginia Association of Defense Attorneys wishes to express its opposition to the adoption of a comparative negligence system for Virginia. With the exception of the adoption of the Virginia Malpractice Review Panel legislation, it seems that every change in the law in the last few years had as its underlying purpose to make the recovery of damages in personal injury and wrongful death actions easier.

While the VADA had no quarrel with the removal of the monetary limitation on actions for wrongful death, the present statute subverts the purpose of the original wrongful death statute. Lord Campbell's Act attempted to compensate the statutory heirs of the deceased for the monetary losses which they had sustained by reason of his death. The Virginia statute goes far beyond this purpose and not only permits recovery even in cases where the heirs have suffered no economic loss but also imposes no limit upon the amount which may be recovered for loss of companionship, etc. The General Assembly has repealed the guest statute which had its origin in common law.

Title 8.01 grants great latitude in forum selection. Further, Title 8.01 permits the plaintiff to take a nonsuit where the statute of limitations previously would have run. Nonsuits made some sense when discovery was not permitted and surprise was the order of the day, but they have no place in present day practice.

While the Supreme Court prompted by the existence of insurance took the lead in abolishing inter-spousal immunity in automobile cases, the Legislature followed suit and adopted a statute formalizing the abolition of the doctrine of inter-spousal immunity and extending it to all negligence cases.

In other subtle ways, the right of recovery by injured parties has been enhanced. The Collateral Source Rule has been around for years but the adoption of the statutes prohibiting subrogation on hospitalization and medical expense policies and medical payment provisions of automobile policies has had the effect of permitting injured parties to recover twice and sometimes three times for the same expenses.

In summary, it appears to the defense bar that monetary recoveries in negligence cases have become easier with each session and that the justification for these actions is rooted in the fact that insurance is available in most cases. However, it seems that the Legislature has not given proper consideration that every statute which makes recovery for personal injuries easier has to increase in some measure the cost of insurance for the citizens of Virginia.

Several years ago, the insurance industry came to the Legislature with a proposal on no-fault insurance which would have permitted every person injured in an automobile accident to recover their medical expenses but would have reduced the amount that might be recovered for pain and suffering. The Legislature showed very little enthusiasm for any such legislation, yet this committee now has under consideration a proposal that Virginia adopt some system of comparative negligence. While the insurance industry cannot produce statistics which show the extent to which liability premiums will be affected by the enactment of a comparative negligence statute, it is obvious that any system of comparative negligence will have an adverse impact on automobile insurance premiums. First, any comparative negligence system is bound to require more investigation by the insurer and its counsel. Further, a study done in Arkansas indicates that attorneys are more likely to take plaintiffs' cases than they were before, that there are more settlements and that plaintiffs generally recover in more cases. All of these factors lead to the inescapable conclusion that automobile insurance has to be more expensive under a comparative negligence system. Moreover, contributory negligence will no longer form the basis for summary judgment. The issues of primary and contributory negligence will always be sumitted to the jury for an apportionment of fault.

Advocates of comparative negligence have suggested that it is fairer because it allocates fault, yet many statutes preserve joint and several liability. If the goal of comparative negligence is the appointment of fault, then joint and several liability must be eliminated. A person who is responsible for 20% of the fault should be responsible to pay for only 20% of the damages regardless of the fact that the other defendant may be insolvent, uninsured or protected by some specific defense such as workmen's compensation.

The fact that 38 other states have adopted some system of comparative negligence does not necessarily mean that Virginia should follow suit. A number of states have adopted no-fault laws but that has not influenced our legislature nor should it. Yet, slowing but inevitably Virginia has moved toward a system under which every injured party is compensated regardless of fault. If this Committee is of a mind to recommend a further move in this direction, then the Virginia Association of Defense Attorneys would recommend that the Committee present a specific legislative proposal which can be submitted to the bar for its comment. The VADA does not like to be in the position of being a nay-sayer. However, each time the General Assembly has considered a change in the laws which affect personal injury cases, the balance is almost always tipped in favor of those who are asserting the claims rather than in favor of those who pay for those injuries through the purchase of insurance. On the other hand, each time the defense bar has supported legislation which would aid the defendant such as the elimination of place of employment as a potential venue and the repeal of the statutory prohibition against mostion for summary judgment based on discovery depositions, the General Assembly seems disinclined to follow the arguments advanced by the defense bar. We hope that our comments in respect to comparative negligence will receive more favorable consideration.

Sincerely,

VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

By _____
J. J. Corson, IV

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December 22, 1981

Honorable Bernard S. Cohen
House of Delegates
General Assembly Building
910 Capitol Street
Richmond, Virignia 23219

Re: Comparative Negligence

Dear Mr. Cohen:

The report prepared for your committee by Dean Thomas A. Edmonds clearly seems to suggest that comparative negligence is an idea whose time has arrived. However, it recites the history of the development of the doctrine of contributory negligence and the reasoning supporting its development which seems to be as valid today as it was when it was adopted.

The public continues to complain about the rise in insurance premiums for all types of liability insurance. Since insurance is nothing more than a mechanism for spreading the losses, the high cost of insurance, particularly automobile insurance, seems to suggest that juries are as plaintiff-minded, it not more plaintiff-minded, today than they were when the doctrine of contributory negligence was adopted. Secondly, our litigation has become so complex that we owe an obligation to keep the questions which must be decided by a jury as simple as possible. If the courts of the nineteenth century were more comfortable if they could point a single principal or primary cause of a loss, present-day juries may well be similarly comforted.

The nineteenth century courts did no more than recognize a system of discipline which is as accepted today as it was then. How many times have each of us seen a child go crying to his mother because some other child has struck him? If the child who was struck was teasing the other, the parent's response is "you brought it on yourself" even though the provocation did

not justify the response. Where several children in a family are throwing a ball around the living room when all have been told by their parents that ball throwing must be done outside, the one who happens to miss the ball which then breaks the mother's Ming vase does not receive more punishment than his siblings.

The contributory negligence system does not "benefit" the defendant by releasing him from all liability. Where two parties are both at fault, to suggest that the defendant benefits simply because he prevails in a case in which the plaintiff was contributorily negligent conveniently ignores the fact that the defendant had the same right to assert a claim for his injury or damage but is also denied the same. This "curious rationale" seems to suggest that the first party to the court house loses a benefit while the other party gains some benefit. The plain truth is that both parties are equally penalized because each is denied his right of recovery if he was guilty of negligence which proximately contributed to cause his injuries.

Common law is an evolutionary process and it is constantly changing. Concepts, such as last clear chance, have emerged not as an effort to mitigate against the apparent harshness of contributory negligence but becuase of the requirement that a party's negligence, whether primary or contributory, be a proximate cause of the injury. To suggest that the doctrine of last clear chance and other doctrines are simply efforts to ameliorate the harshness of the doctrine of contributory negligence is a simplistic explanation to a very complex problem. Proximate cause is a legitimate question to be decided by a jury. A last clear chance situation is not the only time where a jury may conclude that the plaintiff's negligence did not contribute to his injury.

Everyone concedes that juries sometimes apply their own system of comparative negligence and refuse to deny the plaintiff's recovery where he has been severely injured and may not be equally culpable with the defendant. Juries sometimes ignore the instruction which requires that they not be influenced by their sympathy for one of the parties. Yet no one suggests that the instruction that a jury should not be influenced by the sympathy for one of the parties should be eliminated. The plain truth is that juries always apply their own system of justice. Those who advocate the adoption of a system of comparative negligence admit that, where the plaintiff's negligence is very slight in relation to the defendant's negligence, the jury seldom penalizes the plaintiff by concluding that he is 5% to 10% negligent. Moreover, they admit that if a jury is told that a plaintiff will be denied recovery if he

is 50% negligent they will vary the allocation of negligence to make sure that the plaintiff is permitted some recovery. Proponents assert that some type of comparative negligence system is fairer, but a system which permits a plaintiff who is 90% negligent to recover for any injury hardly seems fair. Further, permitting one who is 49% negligent to recover slightly over half of his claimed injuries when the defendant who is 51% negligent is denied any recovery is also unfair. Is not a fairer system one which says to the parties that if you contributed at all to your injury you may not recover?

The report suggests that there can be an easy transition to a system of comparative negligence and that it will have no effect on insurance liability rates. It ignores however valid points which have been raised by those opposed to the change. There were two surveys in Arkansas after the adoption of a comparative negligence system and the second survey clearly indicates that a comparative negligence system makes more cases acceptable to plaintiffs' lawyers, and that courts must obviously spend more time dealing with personal injury cases under a comparative negligence system. Historically, in Virginia, a very small percentage of personal injury claims end up in litigation, much less go to trial, and the adoption of a comparative negligence system will not significantly change this. While insurers may be more inclined under comparative negligence to offer settlements in cases which they consider to be cases of contributory negligence, more cases will be accepted by plaintiffs' attorneys and they will be more likely to take those cases to trial since the likelihood of their losing altogether will be reduced. The second Arkansas study clearly indicates that the bar, regardless of its orientation, concluded that comparative negligence had a significant impact on their practice. To sweep aside financial considerations by simply saying that the insurance industry has been unable to document the effect on premiums of the change from a contributory to a comparative system begs the question. The industry clearly stated that the adoption of a pure comparative negligence system will have at least a 10% impact on liability premiums in the fist year. The industry further pointed out that because of other changes in market conditions from year to year it is impossible to determine what effect the adoption of some sort of modified comparative negligence system will have on liability premiums. The insurance industry has indicated that claims asserted in comparative negligence jurisdictions require more investigation. Under the present system, where there is a clear defense of contributory negligence, the investigation may be rather superficial. On the other hand, where insurers are required to compare the fault of their insured against the fault of the claimant, considerable investigation is necessary to determine in whose favor the balance is likely to be tipped.

Moreover, the Arkansas study indicates that more verdicts are won by the plaintiffs under a comparative negligence system and that those verdicts are higher. If those conclusions are correct, it is simply inescapable that the change from a contributory neligence system to a comparative negligence system must have some adverse impact on liability premiums. The fact that the insurance industry is unable to quantify the extent to which liability premiums will be affected does not justify a conclusion that there will be no impact. If the liability premium for every one of the approximately 3,000,000 automobile owners in Virginia went up only $10, the cost of the consuming public would be $30,000,000.

A decision as to whether Virginia should adopt comparative negligence cannot be made in the abstract for its acceptability to the bar and to the General Assembly will depend on what decisions are made in respect to other matters. If the purpose of a comparative negligence system is truly to allocate fault, then joint and several liability must be abolished. A defendant who is 20% negligent should not be held liable for more than his fair share of a judgment recovered by the innocent plaintiff against two defendants simply because the co-defendant had inadequate insurance coverage. Nor should a manufacturer be held liable for the entire injury suffered by a plaintiff where the major fault lay with the plaintiff's employer which removed or failed to provide an appropriate protective device simply because the employer's liability is limited to workmen's compensation. This committee must deal with the thorny questions of what to do about joint and several liability, apportioning of the fault among all responsible parties, proximate cause, res judicata and estoppel by judgment as well as the defenses of last clear chance and others before it can make a valid determination of whether a system of comparative negligence should be adopted. It needs to decide whether Interrogatories are to be submitted to the jury and, if so, whether the jury is to be permitted to apply the formula or whether that is to be left to the trial judge. This committee cannot ask the bar or the General Assembly to buy a pig in a poke. One only need recall that the appeal to the bar of the concept of intermediate appellate court depends on how that court is to function.

In conclusion, the impetus for comparative negligence has its roots in the fact that there is often liability insurance applicable to losses of all kinds. It is submitted that if it were not for the invention of the automobile and the providing of automobile liability insurance, the question of comparative negligence would never have been considered. The Committee should not lose sight of what liability insurance was intended to do. It was never intended as a means by which to compensate injured parties. It was intended as a means by which a person

could protect himself from liability to a party injured by the person's negligence. If however automobile insurance for example is to be viewed as a means by which injured parties are to be compensated, then logic suggests that this committee should recommend some type of no-fault legislation under which every injured party would be compensated. This is an option which the General Assembly has been unwilling to consider. If this committee is not willing to consider the option, does it not have the obligation to recommend as a part of any comparative negligence legislation the repeal of the collateral source rule and those statutes prohibiting subrogation for medical payments so that the only true losses will be allocated and double and triple recovery as now permitted will be eliminated?

If this committee is going to submit a report to the Legislature on comparative negligence, the insurance industry suggests that arguments, both pro and con, should be fairly set forth and that, the report set forth explicitly how the important corrollary issues will be addressed so that comparative negligence can be judged in the appropriate context.

For those of us who have represented the insurance industry before this committee, we wish to acknowledge with appreciation the courtesy of the Committee in allowing us to express our views both in this letter and in presentations before the Committee.

Sincerely,

AMERICAN INSURANCE ASSOCIATION

By _____
James C. Roberts

ALLIANCE OF MUTUAL INSURERS

By _____
C. William Waechter, Jr.

STATE FARM MUTUAL AUTOMOBILE INS. CO.

By _____
Philip B. Morris

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS

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Henry H. McVey, III

pak
cc: Members of Committee

Virginia Trial Lawyers Association

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February 2, 1982

Honorable Bernard S. Cohen
General Assembly Building
910 Capitol Street
Richmond, Virginia 23219

Dear Delegate Cohen:

The Virginia Trial Lawyers Association supports the adoption of a system of comparative negligence in Virginia. We endorse the thorough and well-documented report prepared by Dean Edmonds of the special sub-committee, and we believe it speaks eloquently of the need for comparative negligence in Virginia.

The report documents the fact that some form of comparative negligence has been adopted by the citizens of 38 states. No one would suggest that Virginia should adopt comparative negligence merely "to jump on the bandwagon," but the fact that it works and works well, according to the report, in 38 states, establishes that it is a viable alternative to the rule of contributory negligence in Virginia. In addition, the report provides persuasive evidence indicating that it is a preferable alternative.

Opponents of the concept in Virginia pose many arguments in opposition to comparative negligence. Most of these arguments fall into three general categories: (1) comparative negligence favors plaintiffs; (2) comparative negligence would cause insurance premiums to go up; and (3) there would be difficulties in applying the new concept in actual cases.

Before attempting any specific discussion on the merits of comparative negligence or points of opposition to it, it should be noted that VTLA's analysis of whether or not Virginia should adopt comparative negligence proceeds from this basic question: "All things considered, will comparative negligence provide better justice for Virginia citizens than a liability system based on negligence/contributory negligence?" We believe the answer to this question is an unequivocal, "Yes."

Civil suits for damages in Virginia are based on the common law notion of fault, i.e., that he who negligently causes damages should bear the burden of monetary reparations. Dean Edmonds' report traces the development of the fault doctrine and the various concepts (e.g., last clear chance) that have been engrafted onto the law of negligence in an attempt to maintain a fair balance of justice between parties who sue and parties being sued. It is our firm position that fault must remain as the cornerstone of tort law, but contrary to those who oppose comparative negligence, we submit that comparative negligence is a truer fault system than are the negligence/contributory negligence standards of current law.

Under current law, juries are supposed to decide whether the defendant negligently caused the plaintiff's injury, and in cases where contributory negligence is a defense, whether plaintiff's alleged contributory negligence interposed in the chain of causation in a manner and in a degree sufficient to relieve the defending party of liability. Theoretically, the jury will then decide whether or not plaintiff is contributorily negligent and then, depending on this decision, whether plaintiff gets all or nothing.

But many lawyers agree that this is not what happens, because the cases that go to trial rarely present clear cut factual situations. Instead, juries often seem to apply their own ad hoc, undisclosed rules of comparative negligence to apportion fault as seems fair under the circumstances. Thus, although it may seem that plaintiff's own negligence is slight, the jury may return with a verdict favoring defendant, or although it may seem that plaintiff's negligence is great, the jury may return with a verdict favoring plaintiff.

It may seem that the foregoing is an excellent argument for maintaining the present system, which seemingly provides justice to parties based on a rough and ready system of comparative negligence. When properly analyzed, however, we think the apparent strengths of the current system actually are weaknesses and that the current rules are seriously deficient in at least four major respects:

1. Undisclosed vs. Disclosed Standards - While the propensity of juries to apply their own standards may "do justice" in individual cases, it also may lead them to do injustice in just as many cases. While no one has greater respect for juries than VTLA's members, we think the jury system would be strengthened if jurors were given an articulated standard of comparative negligence on which to base decisions. We believe this would provide more uniform justice and would allow counsel and parties to predict with greater certainty the result of individual cases.

2. Rule of Law - To the degree that juries ignore the court's instructions in individual cases, this should be viewed as a weakness in our system of justice rather than a strength. If they ignore or "bend" the rules of law, the question must be whether the rules adequately serve the needs of our society. A related question is whether citizens can respect rules that they find necessary to subvert, whether done unconsciously or consciously.

3. Bar's Responsibility - We think that the law should provide articulable standards that citizens can understand and will follow because the law serves their needs. If the Bar tacitly agrees that current rules don't meet these criteria, we think the Bar has not lived up to its responsibility. A deficiency in the current situation, therefore, is a facet of a larger problem often pointed to by the public: that lawyers make laws and retain laws that don't make sense to the public. While we do not suggest that rules of law should be adopted or changed by reference to public opinion polls, we think comparative negligence meets the criteria suggested at the outset of this paragraph, while current rules do not.

4. Rules that Work - As stated above, we believe that the current negligence/contributory negligence rules work only because juries often disregard the rules. VTLA's position is that comparative negligence would provide, in fact, articulated rules similar to those that juries often apply on an ad hoc basis. These standards would be completely understandable to juries and would be completely consistent with the notions of fault so deeply ingrained into our legal system. Those who argue that juries would not be able to understand comparative negligence and would not be comfortable applying it seem to be arguing out of the other side of their months when they concede that juries have been applying similar standards all along. Perhaps it is more appropriate to concede that juries have been wiser than lawyers in understanding how to apply fault concepts in modern society.

We submit that comparative negligence dispenses equal justice to both plaintiffs and defendants, because, as stated above, fault would be apportioned to each party as the facts of the case dictate. It is difficult to see why it is unfair to require the parties to a lawsuit to pay the share of damages proportional to their share of fault. However, it is much easier to see how it is unfair to require a plaintiff to absorb all the loss, no matter what his share of the fault, or to require a defendant to pay for all the loss, even though the plaintiff may have had some culpability.

The real, but unstated, premise of the opposition's argument seems to be that comparative negligence is unfair to defendants because they have a better deal under the present all or nothing rule than do plaintiffs. That is, that it is far more likely that defendants will pay nothing under the present rule than that plaintiffs will receive all. It is hardly surprising that defendants prefer this situation, but hardly an argument against the rule of comparative negligence which, as stated above, requires parties to pay according to their share of fault.

While financial considerations must weigh heavily in any legislative decision, there is no evidence that the adoption of comparative negligence has caused liability insurance premiums to increase in any adopting state, as Dean Edmonds' report states on page 4 and again at page 11. Unfortunately, although insurers are always eager to pose the threat of increased insurance premiums, they are equally reluctant to offer any hard data as to why the increases will be necessary. Dean Edmonds' comprehensive report concludes that the experience of other states is that there have been no increases in rates attributable to comparative negligence. On the other hand, in spite of the fact that comparative negligence has been adopted in 38 states and in some states for more than 20 years, insurers, many of whom do business throughout the nation, have no data to support their threat that premiums will increase.

While we do not pretend to understand the arcane accounting techniques that insurers use to justify rate increases, it seems logical to suppose that rates depend somewhat on the ratio of dollars paid out to premiums collected. It would seem to be a simple matter to see how this ratio was affected, if at all, by the adoption of comparative negligence in other states and also to determine whether the rates in those states compare unfavorably to those in Virginia. The fact that this information is not available suggests to us that Dean Edmonds' report is correct.

As shown in Dean Edmonds' report, some states have adopted comparative negligence by means of simple, one-part statutes, while others have preferred a more elaborate statutory scheme. While either approach may leave some unanswered questions, this certainly should be no bar to the legislation. Almost all legialation leaves some unanswered questions, as, for example, did the Medical Malpractice Review Panel legislation. With comparative negligence, the Bar will have ample precedents in the case law of 38 states to offer guidance, or, if the Committee patterns its legislation after that of a particular state, it can be guided by the experience of that state.

In summary, VTLA reaffirms our belief that negligence law in Virginia should be firmly grounded on the notion of fault and that fault should be determined by juries in individual cases. Further, we believe that fault should be determined not on an all or nothing basis or by some undisclosed standards adopted by a particular jury, but by articulated standards that apportion fault in a manner consonant with today's society. No evidence has been presented that comparative negligence will increase insurance premiums or create unsolvable problems in negligence law. Finally, there is overwhelming evidence that comparative negligence will provide equal justice for those of Virginia's citizens who become involved in negligence lawsuits, whether they be plaintiffs or defendants.

For all these reasons, the Virginia Trial Lawyers Association supports the adoption of a comparative negligence standard in Virginia, and we wish to have on record that we believe any form of comparative negligence is preferable to current law.

In closing, we congratulate your Committee for the excellent work you have done throughout the past year, and we express our gratitude for your courteous attention to our position in this matter.

Very truly yours,

W. Roger Adams

W. Roger Adams
Executive Director

WRA/a

Respectfully submitted,

Bernard S. Cohen, Chairman

Thomas E. Edmonds

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APPENDIX A

PURE COMPARATIVE NEGLIGENCE

MISSISSIPPI

§ 11-7-15. Contributory negligence no bar to recovery of damages jury may diminish damages.

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

APPENDIX B

SLIGHT IN COMPARISON

SOUTH DAKOTA

20-9-2. Comparative negligence -- Reduction of damages.

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant, but in such case, the damages shall be reduced in proportion to the amount of plaintiff's contributory negligence.

NEBRASKA

25-1151. Actions for injuries to person or property; contributory negligence; comparative negligence.

In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

APPENDIX C

NOT GREATER THAN

TEXAS

Art. 2212a. Comparative negligence; contribution among joint tortfeasors.

Modified comparative negligence

Section 1. Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.

Contribution among joint tort-feasors

Section 2. (a) In this section:

(1) "Claimant" means any party seeking relief, whether he is a plaintiff, counterclaimant, or cross-claimant.

(2) "Defendant" includes any party from whom a claimant seeks relief.

(b) In a case in which there is more than one defendant, and the claimant's negligence does not exceed the total negligence of all defendants, contribution to the damages awarded to the claimant shall be in proportion to the percentage of negligence attributable to each defendant.

(c) Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him.

(d) If an alleged joint tort-feasor pays an amount to a claimant in settlement, but is never joined as a party defendant, or having been joined, is dismissed or nonsuited after settlement with the claimant (for which reason the existence and amount of his negligence are not submitted to the jury), each defendant is entitled to deduct from the amount for which he is liable to the claimant a percentage of the amount of the settlement based on the relationship the defendant's own negligence bears to the total negligence of all defendants.

(e) If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury, and his percentage of negligence is found by the jury, the settlement is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.

(f) If the application of the rules contained in Subsections (a) through (e) of this section results in two claimants being liable to each other in damages, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

(g) All claims for contribution between named defendants in the primary suit shall be determined in the primary suit, except that a named defendant may proceed against a person not a party to the primary suit who has not effected a settlement with the claimant.

OHIO

2315.19 Contributory negligence not bar to recovery; damages to be diminished; calculation; procedures.

Sec. 2315.19 (A)(1) In negligence actions, the contributory negligence of a person does not bar the person or his legal representative from recovering damages that have directly and proximately resulted from the negligence of one or more other persons, if the contributory negligence of the person bringing the action was no greater than the combined negligence of all other persons from whom recovery is sought. However, any damages recoverable by the person bringing the action shall be diminished by an amount that is proportionately equal to his percentage of negligence, which percentage is determined pursuant to division (B) of this section. This section does not apply to actions described in Section 4113.03 of the revised code.

(2) If recovery for damages determined to be directly and proximately caused by the negligence of more than one person is allowed under division (A)(1) of this section, each person against whom recovery is allowed is liable to the person bringing the action for a portion of the total damages allowed under that division. The portion of damages for which each person is liable is calculated by multiplying the total damages allowed by a fraction in which the numerator is the person's percentage of negligence, which percentage is determined pursuant to division (B) of this section, and the denominator is the total of the percentages of negligence, which percentages are determined pursuant to division (B) of this section

to be attributable to all persons from whom recovery is allowed. Any percentage of negligence attributable to the person bringing the action shall not be included in the total of percentages of negligence that is the denominator in the fraction.

(B) In any negligence action in which contributory negligence is asserted as a defense, the court in a nonjury trial shall make findings of fact, and the jury in a jury trial shall return a general verdict accompanied by answers to interrogatories, that shall specify:

(1) The total amount of damages that would have been recoverable by the complainant but for his negligence;

(2) The percentage of negligence that directly and proximately caused the injury, in relation to one hundred per cent, that is attributable to each party to the action.

(C) After the court makes its findings of fact or after the jury returns its general verdict accompanied by answers to interrogatories, the court shall diminish the total amount of damages recoverable by an amount that is proportionately equal to the percentage of negligence of the person bringing the action, which percentage is determined pursuant to division (B) of this section. If the percentage of the negligence of the person bringing the action is greater than the total of the percentages of the negligence of all other persons from whom recovery is sought, which percentages are determined pursuant to division (B) of this section the court shall enter a judgment for the persons against whom recovery is sought.

NEW HAMPSHIRE

507:7-a [New] Comparative Negligence.

Contributory negligence shall not bar recovery in an action by any plaintiff, or his legal representative, to recover damages for negligence resulting in death, personal injury, or property damage, if such negligence was not greater than the causal negligence of the defendant, but the damages awarded shall be diminished, by general verdict, in proportion to the amount of negligence attributed to the plaintiff; provided that where recovery is allowed against more than one defendant, each such defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The burden of proof as to the existence or amount of causal negligence alleged to be attributable to a party shall rest upon the party making such allegation. This section shall govern all actions arising out of injuries and other damages sustained on and after August 12, 1969, and none other.

APPENDIX D

NOT AS GREAT AS

KANSAS

60-258a. Contributory negligence as bar to recovery in civil actions abolished, when; award of damages based on comparative negligence; imputation of negligence, when; special verdicts and findings; joinder of parties; proportioned liability.

(a) The contributory negligence of any party in a civil action shall not bar such party or said party's legal representative from recovering damages for negligence resulting in death, personal injury or property damage, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

(b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

(c) On motion of any party against whom a claim is asserted for negligence resulting in death, personal injury or property damage, any other person whose causal negligence is claimed to have contributed to such death, personal injury or property damage shall be joined as an additional party to the action.

(d) Where the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of his or her causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.

IDAHO

6-801. Comparative negligence -- Effect of contributory negligence.

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence

or gross negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence or gross negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

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19. Wade, A Uniform Comparative Fault Act - What Should It Provide?, 10 U. MICH. J. LAW REFORM, 220 (1977).

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HOUSE BILL NO. 359

Offered January 31, 1974

A BILL to amend and reenact §§ 38.1-5, 38.1-21, 38.1-98.1, 38.1-282, 38.1-381, 38.1-381.4, 38.1-381.5, 46.1-1, 46.1-167.2, 46.1-444, 46.1-472, 46.1-504 and 46.1-506, as severally amended, of the Code of Virginia relating to definitions of kinds of insurance; definitions of the transacting of insurance business in this State; liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause"; uninsured motorist coverage; the right of an insurer to receive credit for other medical expense insurance; grounds and procedure for cancellation of or refusal to renew motor vehicle insurance policies and procedures for review by Commissioner of Insurance; the definition of "financial responsibility"; the definitions of "insured motor vehicle" and "uninsured motor vehicle"; and relating to certain agreements that policies of automobile insurance must contain; and to further amend the Code of Virginia by adding a section numbered 46.1-390.1, relating to the construction of Chapter 6 of Title 46.1; and to further amend the Code of Virginia by adding in Chapter 8 of Title 38.1 an article numbered 4.1, consisting of sections numbered 38.1-389.3 through 38.1-389.27, relating to compensation of motor vehicle accident victims through the prompt and efficient reparation of losses from accidental bodily injuries and deaths arising out of the maintenance or use of a motor vehicle without regard to fault of the injured person and in relating to security required therefor; and to repeal §§ 38.1-380.1 and 38.1-381.2 of the Code of Virginia, relating to optional coverages to be afforded with motor vehicle liability insurance policies and rights in subrogation of automobile liability medical benefit insurer to recover from third parties.

Patrons-Messrs. Slayton, DeBruhl, Ball, Stambaugh, Fickett, Ragsdale, Barry, Jones, G. W., Dillard, Garland, Callahan, Pickett, Councill, Mann, Mrs. Hailey, Messrs. Grayson, Reynolds, Mrs. Scott, Messrs. Thomas, Elliott, Robrecht, Stafford, Cranwell, and Dickinson

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Referred to the Committee on Corporations, Insurance and Banking

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Be it enacted by the General Assembly of Virginia:

1. That §§ 38.1-5, 38.1-21, 38.1-98.1, 38.1-282, 38.1-381, 38.1-381.4, 38.1-381.5, 46.1-1, 46.1-167.2, 46.1-444, 46.1-472, 46.1-504 and 46.1-506, as severally amended, are amended and reenacted and that the

Code of Virginia is further amended by adding a section numbered 46.1-390.1 and by adding in Chapter 8 of Title 38.1 an article numbered 4.1, consisting of sections numbered 38.1-389.3 through 38.1-389.27, as follows:

§ 38.1-5. Accident and sickness.—Accident and sickness insurance means and includes insurance against loss resulting from sickness, or from bodily injury or death by accident or accidental means, or both , *but does not mean or include the kind or kinds of insurance required by the provisions of Article 4.1 of Chapter 8 of this title.*

§ 38.1-21. Motor vehicle and aircraft.—Motor vehicle and aircraft insurance means and includes insurance against:

(1) Loss of or damage resulting from any cause to motor vehicles, which shall include trailers, or semitrailers or other attachments designed for use in connection therewith, or aircraft and their equipment, and against legal liability of the insured for loss or damage to the property of another resulting from the ownership, maintenance or use of motor vehicles or aircraft and against loss, damage or expense incident to a claim of such liability, and

(2) Legal liability of the insured, and liability arising under paragraph (b) of § 38.1-381 and against loss, damage, or expense incident to a claim of such liability, arising out of the death or injury of any person resulting from the ownership, maintenance or use of motor vehicles or aircraft, *and including the kind or kinds of insurance required by the provisions of Article 4.1 of Chapter 8 of this title,* but not including any kind of insurance specified in § 38.1-17.

Any policy of motor vehicle and aircraft insurance ~~covering legal liability of the insured under paragraph (2) of this section and liability arising under paragraph (b) of § 38.1-381~~ *as defined under paragraph (2) of this section* may include appropriate provisions whereby the insuring company assumes the obligation of payment of medical, hospital, surgical and funeral expenses arising out of the death or injury of any person, and any such policy of motor vehicle insurance may include appropriate provisions whereby the insuring company assumes the obligation of payment of weekly indemnity or other specific benefits to persons who are injured and specific death benefits to dependents, beneficiaries or personal representatives of persons who are killed, if such injury or death is caused by accident

and sustained while in or upon, entering or alighting from, or through being struck by a motor vehicle, provided that such obligations are irrespective of any legal liability of the insured or any other person.

§ 38.1-98.1. Enjoining unlicensed foreign or alien companies from transacting business in State.—Whenever a foreign or alien insurance company not licensed to do an insurance business in this State shall engage in any insurance transaction or do any insurance business in this State, the Commission shall have jurisdiction and the powers of a court of equity to issue, on its own motion or on motion of any party in interest, temporary or permanent injunctions restraining such insurance company from engaging in any such insurance transaction or business.

For the purposes of this section, the following acts, effected by mail or otherwise, shall constitute the transacting of an insurance business in this State: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein; (2) the solicitation of applications for such contracts; (3) the collection of premiums, membership fees, assessments or other considerations for such contracts; or (4) the transactions of any other insurance business in connection with such contracts.

Process may be served in accordance with § 13.1-119 of this Code or any other manner prescribed by law.

This section shall not apply to any life insurance or annuity company organized and operated, without profit to any private shareholder or individual, exclusively for the purpose of aiding educational or scientific institutions organized and operated without profit to any private shareholder or individual by issuing insurance and annuity contracts only to or for the benefit of such institutions and individuals engaged in the service of such institutions, provided such company snall be deemed, as to all Virginia policyholders and contract holders, to have appointed the clerk of the Commission its attorney for service of process in Virginia, such appointment to be irrevocable and to bind the company and any successors in interest and to remain in effect as long as there is in force in this State any contract made by that company or any obligation arising therefrom;

nor shall this section apply to any insurance or annuity contracts issued by any such life insurance or annuity company; nor shall it apply to the following acts or transactions: (1) the procuring of a policy of insurance upon a risk within this State where the applicant is unable to procure coverage in the open market with a company or companies licensed to do business in this State and is otherwise in compliance with article 3.1 (§ 38.1-314.1 et seq.), chapter 7, Title 38.1; (2) contracts of reinsurance; (3) transactions in this State involving a policy lawfully solicited, written and delivered outside of this State covering only subjects of insurance not resident, located, or to be performed in this State at the time of issuance of such policy; (4) transactions in this State involving group or blanket insurance and group annuities where the group or blanket policy of such insurance or annuities was lawfully issued and delivered in a state where the company was authorized to transact business; *(5) the filing by an insurance company of the forms referred to in § 38.1-389.6 (f);* ~~(5)~~ *(6)* the procuring of contracts of insurance issued to an "industrial insured" as hereinafter defined. For the purposes of this section an "industrial insured" is an insured (a) who procures the insurance of any risk or risks by use of the services of a full-time employee acting as an insurance manager or buyer, (b) whose aggregate annual premiums for insurance on all risks total at least twenty-five thousand dollars, and (c) who has at least twenty-five full-time employees.

Nothing in this section shall apply to nonprofit Railroad Brotherhood or other similar fraternal organizations.

§ 38.1-282. Insurance transacted through resident agents or company representatives.—Except as otherwise provided in this title, no insurance company, other than a mutual company, shall transact insurance in this State except through regularly constituted resident agents licensed in this State; and no mutual insurance company shall transact insurance in this State except through regularly constituted resident agents licensed in this State, or through its officers or employees who are licensed as company representatives. *The filing by an insurance company of the forms referred to in § 38.1-389.6 (f) shall not constitute the transacting of insurance in this State.*

§ 38.1-381. Liability insurance on motor vehicles, aircraft and watercraft; standard provisions; "omnibus clause"; uninsured mo-

torist coverage.—(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, aircraft or any private pleasure vessel, ship, boat or other watercraft, shall be issued or delivered in this State to the owner of such vehicle, aircraft or such watercraft, or shall be issued or delivered by any insurer licensed in this State upon any motor vehicle, aircraft 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, aircraft 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, aircraft 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 aircraft, 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, aircraft 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; provided, however, that in the case of aircraft liability insurance, such policy or contract may contain the exclusions enumerated in § 38.1-389.2; provided, however, notwithstanding any other provisions of law, no policy or contract shall require pilot experience greater than that prescribed by the Federal Aviation Agency, except for those pilots operating air taxis.

(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.

(a3) Such policy or contract of bodily injury liability insurance, or of property damage liability insurance, which provides insurance to a named insured in connection with the business of selling, repairing, servicing, storing or parking motor vehicles, against liability arising from the ownership, maintenance or use of any motor vehicle incident thereto shall contain a provision that the insurance coverage applicable to such motor vehicles afforded a person other than the named insured and his employees in the course of their employment, including a motor vehicle loaned or leased to such other person as a convenience during the repairing or servicing of a motor vehicle for such other person, shall not be applicable if there is any other valid and collectible insurance applicable to the same loss covering such other person under a policy with limits at least equal to the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.

In the event that such other valid and collectible insurance has limits less than the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia, then the coverage afforded a person other than the named insured and his employees in the course of their employment shall be applicable to whatever extent may be

necessary to equal the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.

(a4) Any policy or contract of bodily injury liability insurance or of property damage liability insurance shall exclude coverage to persons other than named insured, directors, stockholders, partners, agents or employees thereof, or residents of the same household of either, while such person is employed or otherwise engaged in the business of selling, repairing, servicing, storing or parking motor vehicles if there is any other valid or collectible insurance applicable to the same loss covering such person under a policy with limits at least equal to the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.

In the event that such other valid and collectible insurance has limits less than the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia, then the coverage afforded a person other than the named insured while such person is employed or otherwise engaged in the business of selling, repairing, servicing, storing or parking motor vehicles shall be applicable to whatever extent may be necessary to equal the financial responsibility requirements specified in § 46.1-504 of the Code of Virginia.

(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, that 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. Such endorsement or provisions shall also provide for no less than five thousand dollars coverage for injury to or destruction of the property of the insured in any one accident but may provide an exclusion of the first two hundred dollars of such loss or damage.

(c) As used in this section, the term "bodily injury" shall include

death resulting therefrom, the term "insured" as used in subsections (b), (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 a motor vehicle 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, and (iv) the owner of such motor vehicle has not qualified as a self-insurer under the provisions of § 46.1-395. A motor vehicle shall be deemed to be uninsured 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.

There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Division of Motor Vehicles certifies that, from the records of the Division of Motor Vehicles, it appears: (i) that there is no bodily injury liability insurance and property damage liability insurance, both in the amounts specified by § 46.1-1 (8), covering the owner or operator thereof; or (ii) that no bond has been given or cash or securities delivered in lieu of such insurance; or (iii) that the owner or operator of such vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.1-395.

(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 paragraph (b) 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.

This subsection shall not apply to any cause of action arising prior to April twenty-seven, nineteen hundred fifty-nine.

(f) Any insurer paying a claim under the endorsement or provisions required by paragraph (b) 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 and such person's insurer, notwithstanding that it may deny coverage for any reason, 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, or such person's insurer denying coverage for any reason;

provided, that any recovery against such owner or operator, or insurer as heretofore referred, shall be paid to the insurance company to the extent that such insurance company paid the named 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 provisions 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.

(i) No policy of insurance shall exclude coverage to an employee of the insured in any controversy arising between employees, even though any one employee shall be awarded compensation as provided in Title 65.1 of the Code of Virginia.

(j) All references in this section to policies or contracts of bodily injury insurance covering liability arising from the ownership, maintenance or use of any motor vehicle shall also refer to and be deemed to include any policy or contract providing the security required by Article 4.1 of this chapter, and all such policies or contracts of insurance shall be subject to the provisions of said article.

§ 38.1-381.4. Automobile liability insurer not to receive credit for other medical expense insurance.—On and after January one, nineteen hundred sixty-nine no policy or contract or bodily injury li-

ability insurance, or of property damage liability insurance which contains any representation by an insurance company to pay medical expenses incurred for bodily injury caused by accident to the insured or relative or any other person coming within the provisions thereof, shall be issued or delivered by any insurer licensed in this State upon any motor vehicle then principally garaged or principally used in this State, if such policy provides for credit against such medical expense coverage for other medical expense insurance to which such injured person may be entitled. Nothing herein shall be construed to allow such injured person to collect more than his actual medical expenses as a result of such accident from any one or combination of all policies providing automobile medical payment coverage applicable to such accident , *except as permitted under the provisions of Article 4.1 of this chapter.*

§ 38.1-381.5. Grounds and procedure for cancellation of or refusal to renew motor vehicle insurance policies; review by Commissioner of Insurance.—(a) As used in this section the following definitions shall apply:

(1) "Policy of automobile insurance" or "policy" means a policy or contract for bodily injury or property damage liability insurance delivered or issued for delivery in this State covering liability arising from the ownership, maintenance or use of any motor vehicle, insuring as the named insured one individual or husband and wife residents of the same household, and under which the insured vehicle therein designated is either

(i) A motor vehicle of a private passenger or station wagon type that is not used as a public or livery conveyance (which terms shall not be construed to include car pools) nor rented to others, or

(ii) Any other four wheel motor vehicle with a load capacity of 1500 pounds or less which is not used in the occupation, profession or business (other than farming) of the insured, or as a public or livery conveyance or rented to others. The term "policy of automobile insurance" or "policy" as used in this section shall not include (a) any policy issued through the Virginia Automobile Insurance Plan, or (b) any policy insuring more than four motor vehicles, or (c) any policy covering the operation of a garage, sales agency, repair shop, service station, or public parking place, or (d) any policy providing

insurance only on an excess basis, or (e) any other contract providing insurance to such named insured even though such contract may incidentally provide insurance with respect to such motor vehicles.

(2) "Renewal" or "to renew" means the issuance and delivery by an insurer of a policy superseding at the end of the policy period a policy previously issued and delivered by the same insurer, such renewal policy being written in the same rating program and providing types and limits of coverage at least equal to those contained in the policy being superseded, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term with types and limits of coverage at least equal to those contained in, and written in the same rating program as, the policy being extended; provided, however, that any policy with a policy period or term of less than twelve months or any policy with no fixed expiration date shall for the purpose of this section be considered as if written for successive policy periods or terms of six months from the original effective date.

(2a) "Cancellation" or "to cancel" means a termination of a policy during the policy period.

(3) "Insurer" means any insurance company, association or exchange authorized to transact the business of automobile insurance in the Commonwealth of Virginia.

(b) This section shall apply only to that portion of a policy of automobile insurance providing *the security required by Article 4.1 of this chapter,* bodily injury and property damage liability, and uninsured motorists coverage.

(c) No insurer shall cancel or refuse to renew a policy of automobile insurance solely because of the age, sex, residence, race, color, creed, national origin, ancestry, marital status or lawful occupation (including the military service) of anyone who is insured. But nothing contained herein shall require any insurer to renew a policy for an insured where the insured's occupation has changed so as to materially increase the risk.

(d) No insurer shall cancel a policy except for one or more of the following specified reasons;

(1) The named insured or any other operator who either resides

in the same household or customarily operates a motor vehicle insured under such policy has had his driver's license suspended or revoked after the effective date of the policy if said policy has been in effect less than one year or within ninety days prior to the last anniversary of the effective date if the policy has been in effect longer than one year.

(2) The named insured fails to discharge when due any of his obligations in connection with the payment of premium for the policy or any installment thereof, whether payable to the company or its agent either directly or indirectly under any premium finance plan or extension of credit.

(e) No cancellation or refusal to renew by an insurer of a policy of automobile insurance shall be effective unless the insurer shall deliver or mail, to the named insured at the address shown in the policy, a written notice of the cancellation or refusal to renew. Such notice shall:

(1) Be approved as to form by the Commissioner of Insurance prior to its use;

(2) State the date, which shall not be less than thirty days after mailing to the insured of the notice of cancellation or notice of refusal to renew, on which such cancellation or refusal to renew shall become effective, except that such effective date may be not less than fifteen days from the date of mailing or delivery when the policy is being cancelled or not renewed for the reason set forth in clause (2) of paragraph (d);

(3) State the specific reason or reasons of the insurer for cancellation or refusal to renew;

(4) Advise the insured of his right to request in writing, within ten days of the receipt of the notice, that the Commissioner of Insurance review the action of the insurer;

(5) Advise the insured of his possible eligibility for insurance through the Virginia Automobile Insurance Plan.

Nothing in paragraph (e) shall prohibit any insurer from including in the notice of cancellation or refusal to renew any additional disclosure statements required by State or federal laws.

(f) Nothing in this section shall apply:

(1) If the insurer or its agent acting on behalf of the insurer has

manifested its willingness to renew by issuing or offering to issue a renewal policy, certificate or other evidence of renewal, or has manifested such intention in writing to the insured;

(2) If the named insured has notified in writing the insurer or its agent that he wishes the policy to be cancelled or that he does not wish the policy to be renewed, or if he fails to accept the offer of the insurer;

(3) To any policy of automobile insurance which has been in effect less than sixty days, unless it is a renewal policy.

(g) There shall be no liability on the part of and no cause of action of any nature shall arise against the Commissioner of Insurance or his subordinates; any insurer, its authorized representative, its agents, its employees; or any firm, person or corporation furnishing to the insurer information as to reasons for cancellation or refusal to renew; for any statement made by any of them in complying with this section or for the providing of information pertaining thereto. No insurer shall be required to furnish a notice of cancellation or refusal to renew to anyone other than the named insured and the Commissioner of Insurance.

(h) Notwithstanding any provision herein contained, any insured or his attorney shall, within ten days of the receipt of the notice of cancellation or notice of refusal to renew, be entitled to request in writing to the Commissioner of Insurance that he review the action of the insurer in cancelling or refusing to renew the policy of such insured. Upon receipt of such request, the Commissioner of Insurance shall promptly initiate a review to determine whether the insurer's cancellation or refusal to renew complies with the requirements of this section. The policy shall remain in full force and effect during the pendency of the review by the Commissioner of Insurance except where the cancellation or refusal to renew is for the reason set forth in clause (2) of paragraph (d), in which case the policy shall terminate as of the date provided in the notice. Where the Commissioner finds from such review that the cancellation or refusal to renew has not been effected in compliance with the requirements of this section, he shall forthwith notify the insurer and the insured that the cancellation or refusal to renew is not effective. Nothing herein shall be construed as authorizing the Commissioner

of Insurance to substitute his judgment as to underwriting for that of the insurer.

(i) Each insurer shall maintain for a reasonable period of time not less than two years, records of cancellation and refusal to renew and shall forward to the Commissioner of Insurance, for his use and information purposes only, copies of every notice or statement referred to in paragraph (e) of this section which it shall at any time send to any of its insureds.

(j) The provisions of this section shall not apply to any insurer who shall limit the issuance of policies of automobile liability insurance to one class or group of persons engaged in any one particular profession, trade, occupation or business. Nothing herein shall be construed to require an insurer to renew a policy of automobile insurance if the insured does not conform to the occupational or membership requirement of an insurer who limits its writings to an occupation or membership of an organization. Nor shall any insurer be required to renew should the insured become a nonresident of Virginia.

(k) All acts and parts of acts are hereby repealed insofar as they are inconsistent herewith. If any provision or clause of this section or application thereof to any person or situation is held invalid, such invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

§ 46.1-1. Definitions.—The following words and phrases when used in this title shall, for the purpose of this title have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning:

(1) "Business district". - The territory contiguous to a highway where seventy-five per centum or more of the property contiguous to a highway, on either side of the highway, for a distance of three hundred feet or more along the highway is occupied by land and buildings actually in use and operation for business purposes.

(2) "Chauffeur". - Every person employed for the principal purpose of operating a motor vehicle and every person who drives a motor vehicle while in use as a public or common carrier of persons

or property.

(3) "Commission". - The State Corporation Commission.

(4) "Commissioner". - The Commissioner of the Division of Motor Vehicles of this State.

(4a) "Crosswalk". - (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway;

(b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface.

(4b) "Decal". - A device to be attached to a license plate that validates the license plate for a predetermined registration period.

(5) "Division". - The Division of Motor Vehicles of this State.

(6) "Essential parts". - All integral parts and body parts, the removal, alteration or substitution of which will tend to conceal the identity of a vehicle.

(7) "Farm tractor". - Every motor vehicle designed and used as a farm, agricultural or horticultural implement for drawing plows, mowing machines and other farm, agricultural or horticultural machinery and implements including self-propelled mowers designed and used for mowing lawns.

(8) "Financial responsibility". - Ability to respond in damages for liability thereafter incurred arising out of the ownership, maintenance, use or operation of a motor vehicle, in the amount of twenty thousand dollars because of bodily injury to or death of any one person and, subject to such limit for one person, in the amount of forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of five thousand dollars because of injury to or destruction of property in any one accident , *and ability to respond to the security requirements contained in Article 4 of Chapter 8 of Title 38.1 of the Code of Virginia.*

(9) "Foreign vehicles". - Every motor vehicle, trailer or semitrailer which shall be brought into this State otherwise than in the ordinary course of business by or through a manufacturer or dealer and which has not been registered in this State.

(10) "Highway". - The entire width between the boundary lines

of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns.

(10a) "Roadway". - That portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the shoulder. A highway may include two or more roadways if divided by a physical barrier or barriers or unpaved area.

(10b) "Traffic lane" or "lane". - That portion of a roadway designed or designated to accommodate the forward movement of a single line of vehicles.

(10c) "Shoulder". - That part of a highway between the portion regularly travelled by vehicular traffic and the lateral curb line or ditch.

(11) "Intersection". - (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at, or approximately at, right angles, or the area within which vehicles travelling upon different highways joining at any other angle may come in conflict.

(b) Where a highway includes two roadways thirty feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways thirty feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.

(11a) "License plate". - A device containing letters, numerals or a combination of both, attached to a motor vehicle, trailer or semitrailer to indicate that such motor vehicle, trailer or semitrailer is properly registered with the Division.

(12) "Manufacturer". - Every person engaged in the business of constructing or assembling motor vehicles, trailers or semitrailers at an established place of business in this State.

(12a) "Dealer". - Every person engaged in the business of buying, selling or exchanging motor vehicles, trailers, and semitrailers in this State and who has an established place of business for such purpose in this State at which place of business the books and re-

cords of such dealer are kept and at which a substantial part of the business of such dealer is conducted.

(13) "Metal tires". - All tires the surface of which in contact with the highway is wholly or partly of metal or other hard, nonresilient material.

(14) "Motorcycle". - Every motor vehicle designed to travel on not more than three wheels in contact with the ground and any four-wheeled vehicle weighing less than five hundred pounds and equipped with an engine of less than six horsepower, except any such vehicle as may be included within the term "farm tractor" as herein defined.

(14a) "Motorhome". - Every private motor vehicle with a normal seating capacity of not more than ten persons, including the driver, designed primarily for use as living quarters for human beings.

(15) "Motor vehicle". - Every vehicle as herein defined which is self-propelled or designed for self-propulsion except that the definition contained in § 46.1-389(d) shall apply for the purposes of chapter 6 (§ 46.1-388 et seq.) of this title.

(15a) "Antique Motor Vehicle". - Every motor vehicle, as herein defined, which is designated by the manufacturer as a nineteen hundred forty-three or prior year model, or which was actually manufactured in the calendar year nineteen hundred and forty-three or a calendar year prior thereto and is owned solely as a collector's item, and is used for participation in club activities, exhibits, tours, parades, and similar uses, but in no event used for general transportation, may be classified by the Commissioner as an antique motor vehicle.

(16) "Nonresident". - Every person who is not domiciled in this State, except:

(a) Any foreign corporation which is authorized to do business in this State by the State Corporation Commission shall be deemed a resident of this State for the purpose of this title; provided, however, that in the case of corporations incorporated in this State but doing business without the State, only such principal place of business or branches located within this State shall be dealt with as residents of this State.

(b) A person who becomes engaged in a gainful occupation in this State for a period exceeding sixty days, shall be deemed a resident for the purposes of this title.

(c) A person who has actually resided in this State for a period of six months, whether employed or not, or who has registered a motor vehicle, listing an address within this State in the application for registration shall be deemed a resident for the purposes of this title.

(16a) "Nonresident student". - Every nonresident person who is enrolled as a full-time student in an accredited institution of learning in this State and who is not gainfully employed.

(17) "Operator". - Every person who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.

(18) "Owner". - A person who holds the legal title of a vehicle or, in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this title, except that in all such instances when the rent paid by the lessee includes charges for services of any nature or when the lease does not provide that title shall pass to the lessee upon payment of the rent stipulated, the lessor shall be regarded as the owner of such vehicle and the vehicle shall be subject to such requirements of this title as are applicable to vehicles operated for compensation; provided, however, that a "truck lessor" as hereinafter defined shall be regarded as the owner, and his vehicles shall be subject to such requirements of this title as are applicable to vehicles of private carriers.

(18a) "Passenger car". - Every motor vehicle designed and used primarily for the transportation of not more than ten persons including the driver, except motorcycles.

(19) "Peace" or "police" officers. - Every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations.

(20) "Person". - Every natural person, firm, partnership, association or corporation.

(20a) "Pick-up or panel truck". - Every motor vehicle designed for the transportation of property with a registered gross weight of five thousand four hundred ninety-nine pounds or less.

(21) "Pneumatic tires". - All tires inflated with compressed air.

(22) "Private road or driveway". - Every way in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons.

(23) "Reconstructed vehicle". - Every vehicle of a type required to be registered hereunder materially altered from its original construction by the removal, addition or substitution of essential parts, new or used.

(24) "Residence district". - The territory contiguous to a highway, not comprising a business district, where seventy-five per centum or more of the property contiguous to such highway, on either side of the highway, for a distance of three hundred feet or more along the highway is occupied by dwellings and land improved for dwelling purposes, or by dwellings, land improved for dwelling purposes and land or buildings in use for business purposes.

(25) "Road tractor". - Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon independently or any part of the weight of a vehicle or load so drawn.

(26) "Safety zone". - The area or space officially set apart within a roadway for the exclusive use of pedestrians and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

(27) "Semitrailer". - Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle.

(28) "Solid rubber tires". - Every tire made of rubber other than a pneumatic tire.

(29) "Specially constructed vehicles". - Any vehicle which shall not have been originally constructed under a distinctive name,

make, model or type by a generally recognized manufacturer of vehicles and not a reconstructed vehicle as herein defined.

(30) "Superintendent". - The Superintendent of the Department of State Police of this State.

(31) "Town". - An incorporated town.

(32) "Tractor truck". - Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the load and weight of the vehicle attached thereto.

(33) "Trailer". - Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle.

(34) "Vehicle". - Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

(35) "Operation or use for rent or for hire," etc. - The terms operation or use for rent or for hire, for the transportation of passengers, or as a property carrier for compensation, and the term business of transporting persons or property, wherever used in this title, mean any owner or operator of any motor vehicle, trailer or semitrailer operating over the highways of this State who accepts or receives compensation for the service, directly or indirectly; but such terms shall not be construed to mean a "truck lessor" as defined herein.

(36) "Truck lessor". - A person who holds the legal title to any motor vehicle, trailer or semitrailer which is the subject of a bona fide written lease for a term of one year or more to another person, provided that: -

(a) Neither the lessor nor the lessee is a common carrier by motor vehicle or restricted common carrier by motor vehicle or contract carrier by motor vehicle as defined in § 56.273 of the Code; and

(b) The leased motor vehicle, trailer or semitrailer is used exclusively for the transportation of property of the lessee; and

(c) The lessor is not employed in any capacity by the lessee; and

(d) The operator of the leased motor vehicle is a bona fide employee of the lessee and is not employed in any capacity by the les-

sor; and

(e) A true copy of such lease, verified by affidavit of the lessor, is filed with the Commissioner.

(37) "School bus". - Any motor vehicle, except commercial bus, station wagon, automobile or truck, which is designed and used primarily for the transportation of pupils to and from public, private or parochial schools, which is painted yellow with the words "School Bus, Stop, State Law" in black letters of specified size on front and rear, and which is equipped with warning devices prescribed in § 46.1-287.

§ 46.1-167.2. "Motor vehicle," "insured motor vehicle" and "uninsured motor vehicle" defined.—(a) For purposes of this article, a "motor vehicle" is defined as a vehicle capable of self-propulsion which is required to be titled and licensed and for which a license fee is required to be paid by the owner thereof.

(b) As used in this article, the term "insured motor vehicle" means a motor vehicle as to which there is bodily injury liability insurance and property damage liability insurance, both in the amounts specified in § 46.1-504, as amended from time to time, issued by an insurance carrier authorized to do business in this State, or as to which a bond has been given or cash or securities delivered in lieu of such insurance; or as to which the owner has qualified as a self-insurer in accordance with the provisions of § 46.1-395 *and, as to motor vehicles required to be covered by insurance or other security under the provisions of Article 4.1 of Chapter 8 of Title 38.1 of the Code of Virginia it includes the coverages required by such Article*; and the term "uninsured motor vehicle" means a motor vehicle as to which there is no such bodily injury liability insurance and property damage liability insurance, or no such bond has been given or cash or securities delivered in lieu thereof, or the owner of which has not so qualified as a self-insurer. *But no motor vehicle may be operated as an uninsured motor vehicle for purposes of this article if it is required to be insured under the provisions of Article 4.1 of Chapter 8 of Title 38.1 of the Code of Virginia.*

§ 46.1-444. When judgment deemed satisfied.—(a) Every judgment for damages in any motor vehicle accident herein referred to shall for the purpose of this chapter only be deemed satisfied:

(1) When paid in full or when twenty thousand dollars has been

credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of one person as the result of any one accident *and when basic reparation benefits have been paid in accordance with Article 4.1 of Chapter 8 of Title 38.1*;

(2) When, subject to the limit of twenty thousand dollars because of bodily injury to or death of one person, the judgment has been paid in full or when the sum of forty thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to or death of two or more persons as the result of any one accident *and when basic reparation benefits have been paid in accordance with Article 4.1 of Chapter 8 of Title 38.1*; or

(3) When the judgment has been paid in full or when five thousand dollars has been credited upon any judgment or judgments rendered in excess of that amount because of injury to or destruction of property of others as a result of any one accident;

(4) When the judgment has been discharged in bankruptcy.

(b) Payments made in settlement of any claims because of bodily injury, death or property damage arising from a motor vehicle accident shall be credited in reduction of the amount provided in this section.

§ 46.1-472. Certificate for nonresident may be by carrier not qualified in State.—A nonresident owner of a vehicle not registered in Virginia may give proof of financial responsibility by filing with the Commissioner a written certificate or certificates of an insurance carrier not authorized to transact business in this State but authorized to transact business in any other state, any territory or possession of the United States and under its exclusive control, the Dominion of Canada or its provinces or the territorial subdivisions of such states or countries, in which such motor vehicle described in the certificate is registered or, if the nonresident does not own a motor vehicle, then in the like jurisdiction in which the insured resides and otherwise conforming to the provisions of this chapter. The Commissioner shall accept the same if the insurance carrier, in addition to having complied with all other provisions of this chapter as requisite, shall:

(a) Execute a power of attorney authorizing the Commissioner to accept service on its behalf of notice or process in any action aris-

ing out of a motor vehicle accident in this State;

(b) Duly adopt a resolution, which shall be binding upon it, declaring that its policies are to be deemed to be varied to comply with the law of this State and the terms of this chapter relating to the terms of motor vehicle liability policies issued herein;

(c) Agree to accept as final and binding the judgment of any court of competent jurisdiction in this State from which judgment no appeal is or can be taken, duly rendered in any action arising out of a motor vehicle accident;

(d) Deposit with the State Treasurer cash or securities such as are mentioned in § 46.1-485 or the surety bond of a company authorized to do business in Virginia equal in value to forty thousand dollars for each insurance policy filed as proof of financial responsibility.

(e) Deposit with the State Treasurer cash or securities such as are mentioned in § 46.1-485 or the surety bond of a company authorized to do business in Virginia equal in value to ten thousand dollars for each insurance policy filed as proof of security for the payment of basic reparation benefits in accordance with Article 4.1 of Chapter 8 of Title 38.1.

§ 46.1-504. Coverage of owner's policy.—Every owner's policy shall:

(a) Designate by explicit description or by appropriate reference, all motor vehicles with respect to which coverage is intended to be granted.

(b) Insure as insured the person named and any other person using or responsible for the use of the motor vehicle or motor vehicles with the permission of the named insured.

(c) Insure the insured or other person against loss from any liability imposed by law for damages, including damages for care and loss of services, because of bodily injury to or death of any person and injury to or destruction of property caused by accident and arising out of the ownership, use or operation of such motor vehicle or motor vehicles within this State, any other state in the United States, any territory, district or possession of the United States and under its exclusive control or the Dominion of Canada, subject to a limit exclusive of interest and costs, with respect to each motor vehicle, of twenty thousand dollars because of bodily injury to or

death of one person in any one accident and, subject to the limit for one person, to a limit of forty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and to a limit of five thousand dollars because of injury to or destruction of property of others in any one accident.

(d) Provide security for the payment of basic reparation benefits in accordance with Article 4.1 of Chapter 8 of Title 38.1 of the Code of Virginia.

§ 46.1-506. Policy must contain certain agreement; additional coverage.—Every policy of insurance subject to the provisions of this chapter:

(a) Shall contain an agreement that the insurance is provided *in accordance with the coverage required by Article 4.1 of Chapter 8 of Title 38.1 and* in accordance with the coverage defined in this chapter as respects bodily injury, death, property damage and destruction and that it is subject to all the provisions of this chapter and of the laws of this State relating to this kind of insurance; and

(b) May grant any lawful coverage in excess of or in addition to the coverage herein specified and this excess or additional coverage shall not be subject to the provisions of this chapter but shall be subject to other applicable laws of this State.

§ 46.1-390.1. Construction of chapter with regard to Article 4.1 of Chapter 8 of Title 38.1.—It is the legislative intent of Article 4.1 of Chapter 8 of Title 38.1 of the Code of Virginia that every owner of a motor vehicle as defined therein which is registered in this State or operated in this State by him or with his permission shall continuously provide with respect to such motor vehicle while it is either present or registered in this State the insurance or other security required by such article. The owner of any such motor vehicle which is operated in this State in violation of any provision of said Article 4.1 shall be deemed for purposes of this chapter to be in violation of the financial responsibility requirements hereof.

ARTICLE 4.1.

COMPENSATION OF MOTOR VEHICLE ACCIDENT VICTIMS.

§ 38.1-389.3. Short title.—This article may be cited as the Virginia No-Fault Direct Payment Plan Act.

§ 38.1-389.4. Purposes and Rules of Construction.

(1) This article shall be liberally construed and applied to promote its underlying purpose and policies.

(2) The underlying purpose and policy of this article is to provide for the prompt and

efficient reparation of losses from accidental bodily injuries arising out of the maintenance or use of a motor vehicle without regard to fault of the injured person except as provided in § 38.1-389.9.

§ 38.1-389.5. Definitions.—As used in this article:

(a) "Accidental bodily injury" means bodily injury, sickness or disease, including death resulting therefrom, arising out of maintenance or use of a motor vehicle and which is accidental as to the person claiming basic reparation benefits. Bodily injury is accidental as to the person injured unless sustained or caused intentionally by him.

(b) "Basic reparations benefits" means benefits for economic loss required by this article.

(c) "Basic reparations insurer" means an insurer or a qualified self-insurer.

(d) "Dependent survivors":

(1) The following persons are conclusively presumed to be dependents of a deceased person:

(i) A wife is dependent on a husband with whom she lives at the time of his death.

(ii) A husband is dependent on a wife with whom he lives at the time of her death.

(iii) A child while under the age of eighteen years, or over that age but physically or mentally incapacitated from earning, is dependent on the parent with whom he lives or from whom he receives support regularly at the time of the death of the parent.

(2) In all other cases, questions of dependency and the extent of dependency shall be determined in accordance with the facts as they exist at the time of death.

(3) The dependency of a surviving spouse terminates upon death or remarriage. The dependency of any other person terminates upon the death of the person, or continues only so long as the person is under the age of eighteen years, or is physically or mentally incapacitated from earning, or engaged full time in a formal program of academic or vocational education or training.

(e) "Economic loss" means one or more of the following as defined herein: medical expenses, work loss and survivors loss.

(f) "Injured person" means a person who sustains accidental bodily injury as defined herein.

(g) "Maintenance or Use of a Motor Vehicle" means maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (i) conduct within the course of a business of repairing, servicing or maintaining motor vehicles unless the conduct occurs off the business premises, or (ii) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.

(h) "Medical Expenses" means reasonable expenses incurred by or on behalf of an injured person for necessary medical, surgical, X-ray, and dental services, necessary ambulance, hospital and professional nursing services, necessary medical and occupational rehabilitation as provided in this article and necessary funeral and burial services up to a maximum of one thousand dollars for all expenses in any way related to funeral and burial. Medical expenses do not include that portion of the charge for a room in any hospital, clinic, convalescent or nursing home, extended care facility or any similar facility in excess of the reasonable and customary charge for semi-private accommodations unless intensive care is medically required.

(i) "Motor Vehicle" means a vehicle of the kind required to be registered under the laws of this State relating to motor vehicles, including an attached trailer, and which has more than three wheels.

(j) "Occupying" means to be in or upon a motor vehicle as a passenger or operator or engaged in the act of entering into or alighting from the vehicle.

(k) "Owner" means the person in whose name the motor vehicle has been registered. If no registration is in effect at the time of an accident involving the motor vehicle, "owner" means the person who holds the legal title thereto, or in the event the motor vehicle is the subject of a security agreement or lease with option to purchase with the debtor or lessee having the right to possession, "owner" means the debtor or lessee.

(l) "Pedestrian" means any person not occupying a motor vehicle or other vehicle normally powered by a motor or engine.

(m) "Relative" means a person related to the owner by blood, marriage or adoption and residing in the same household. A person resides in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

(n) "Survivors loss" means loss sustained after an injured person's death by his dependent survivors during their dependency and consisting of the loss of the contributions they would have received for their support from the decedent out of income from work he would normally have performed had he not died and expenses reasonably incurred by his dependent survivors in obtaining ordinary and necessary services from others not members of the decedent's household in lieu of the services he would have performed for the benefit of his household.

(o) "Work Loss" means:

(1) Income actually lost by a person as a result of accidental bodily injury reduced by income from substitute work actually performed by an injured person, income he would have earned in available substitute work he was capable of performing but unreasonably failed to undertake, or income he would have earned by hiring an available substitute to perform self-employment services but unreasonably failed to do.

(i) In calculating payments for work loss which an injured person is entitled to receive, his monthly income, or, if the injured person is self-employed and not compensated by salary at the time of the loss, an amount equal to one-twelfth of his annual income for the year immediately preceding the date of injury shall be used in determining the monthly income which he would have earned if he had not been injured. If payments for work loss would not be taxable under federal or state income tax laws, work loss shall be computed by reducing the income by fifteen per centum or any lesser amount which constitutes the income tax which would have been levied upon the income.

(ii) Any wage continuation benefits which an injured person receives or is entitled to receive shall not be considered in determining his work loss; and

(2) Expenses reasonably incurred by or on behalf of the injured person in obtaining usual and necessary services in lieu of those, had he not been injured, he would have performed not for income but for the direct benefit of himself or his household.

§ 38.1-389.6. Security requirements.—(a) Every owner of a motor vehicle required to be registered in this State, or operated in this State by him or with his permission, shall continuously provide with respect to the motor vehicle while it is either present or registered in this State, and any other person may provide with respect to any motor vehicle, by a contract of insurance or be qualified as a self-insurer, security for the payment of basic reparation benefits in accordance with this act and security for payment of tort liability, arising from maintenance or use of the motor vehicle. Except as modified to provide the benefits and exemptions contained in this chapter, security shall be provided with respect to such motor vehicle by an insurance policy or a certificate of self-insurance which qualifies as proof of financial responsibility under § 46.1-1(8) of the Code of Virginia.

(b) The owner of any motor vehicle required to be registered in this State who operates it or permits it to be operated in this State is guilty of a misdemeanor if he fails to provide the security required by this article. Each person convicted of a misdemeanor under the terms of this section shall, in addition to any other penalties provided by law, have his operator's license and his vehicle registration revoked or suspended, until he shall provide the security required by this article.

(c) An owner of a motor vehicle required to be registered in this State with respect to which security is required who fails to have such security in effect at the time of an accident shall be personally liable for the payment of basic reparations benefits. Such an owner shall have all of the rights and obligations of an insurer under this act and shall remain subject to the financial responsibility requirements as defined in § 46.1-1(8) of the Code of Virginia.

(d) An insurance policy which purports to provide coverage for basic reparations benefits for economic loss or is issued with the representation that it fulfills the require-

ments of security as required by this article is deemed to include all coverage required by this article.

(e) Every insurer licensed to transact the business of motor vehicle liability insurance in this State shall file with the Commissioner as a condition of its continued transaction of such business within this State a form approved by the Commissioners declaring that its policies, wherever issued, shall be deemed to provide the security required by this article. Any other insurer may file such a form.

§ 38.1-389.7. Optional added reparations benefits.—Each insurer which issues a policy containing basic reparations benefits as required by this article shall also make available added reparations benefits coverage providing for the payment of benefits for excess economic loss commencing upon the exhaustion of basic reparations benefits up to a total of fifty thousand dollars for accidental bodily injury to any one person in any one accident. Nothing contained herein shall prevent any insurer from providing greater benefits than the basic reparations minimum benefits prescribed in this article, nor shall this section be construed as preventing any insurer, with the approval of the Commissioner, from incorporating in excess economic loss coverage such terms, conditions and exclusions as may be consistent with the premium charged. The benefits payable under this section may be duplicative of benefits received from any collateral sources or may be written in excess of such collateral source benefits, or may provide for reasonable waiting periods, deductibles or coinsurance provisions. An insurer may provide that it be subrogated to the insured's right of recovery for optional added reparations benefits against any responsible third party.

§ 38.1-389.8. Persons entitled to benefits.—The insurer of a motor vehicle with respect to which security is provided shall pay basic reparations benefits without regard to fault for economic loss resulting from:

(a) Accidental bodily injury sustained within the United States of America, its territories or possessions or the Dominion of Canada by the owner or any relative of the owner

(1) while occupying any motor vehicle, or

(2) while a pedestrian as the result of being struck by a motor vehicle which, for the purpose of this sub-paragraph (2) alone, shall include a motorcycle.

(b) Accidental bodily injury sustained by any other person while occupying the owner's motor vehicle with the consent of the owner, or the person having lawful custody thereof, if the accident occurs within the United States of America, its territories or possessions or the Dominion of Canada.

(c) Accidental bodily injury sustained by any other person as a result of being struck by the owner's motor vehicle while a pedestrian in this State.

§ 38.1-389.9. Persons not entitled to benefits.—Notwithstanding the provisions of §

38.1-389.8, basic reparations benefits for economic loss shall not be payable to or on behalf of any of the following persons:

(1) An owner of a motor vehicle required to be registered in this State if the owner is an operator or occupant of such motor vehicle with respect to which the security required by this article has not been provided.

(2) A nonresident of this State who is occupying a motor vehicle owned by him and not insured for the benefits of this act unless uninsured solely because the liability insurer of such owner has not filed a form pursuant to § 38.1-389.6(f).

(3) An operator of a motor vehicle who intentionally causes an injury and was not acting or refraining from acting for the purpose of averting another injury.

(4) Any person operating or willfully riding in a motor vehicle known by him to be stolen; or

(5) Any person using a motor vehicle in the commission of a felony or while seeking to elude lawful apprehension or arrest by a police officer.

§ 38.1-389.10. Payment of basic and optional added reparations benefits.—Basic and optional added reparations benefits are payable to or on behalf of the persons entitled to benefits not when the injury occurs but as economic loss is incurred. In the event of death, the insurer may pay basic or optional added reparations benefits to or on behalf of the person entitled to such benefits without the appointment of an administrator or executor. If an insurer in good faith pays such benefits to or for the benefit of a person who it believes is entitled to such benefits such payment shall discharge the insurer's liability to the extent of such payments unless the insurer has been notified in writing of the claim of some other person prior to the making of any such payment.

§ 38.1-389.11. Priority of Applicability.—The basic reparations insurance or other security applicable to accidental bodily injury to which this article applies on a primary basis is the insurance or other security on the vehicle which the injured person is occupying at the time of the accident or, if the injured person is a pedestrian, the insurance or other security on the vehicle which struck such pedestrian. If there is no such insurance or other security on such vehicle, any other insurance or security providing basic reparations benefits to the injured person shall apply on a secondary basis.

§ 38.1-389.12. Limits of liability.—(a) The maximum amount of basic reparations benefits payable for all economic loss resulting from accidental bodily injury to any one person as the result of any one accident shall not exceed ten thousand dollars, regardless of the number of persons entitled to such benefits or the number of insurers obligated to pay such benefits: provided, that

(1) all such economic losses for which benefits are payable shall be incurred within two years from the date of the accident giving rise to such losses; and

(2) benefits payable for loss of income under work loss or loss of contribution for support under survivors loss shall not exceed one hundred fifty dollars per week, and shall apply pro rata to any period less than one week; and

(3) benefits payable for expenses for usual and necessary replacement services under work loss or survivors loss shall not exceed twelve dollars per day.

(b) If two or more basic reparations insurers are liable to pay benefits for such injury on the same basis, whether all on a primary basis or all on a secondary basis, any insurer paying the benefits due shall be entitled to recover from any other insurer having the same obligation to pay benefits, an equal share of the benefits paid and expenses incurred in processing the claim.

§ 38.1-389.13. Insurer's right of subrogation and reimbursement.—(a) Policies of insurance issued pursuant to this act shall provide that subject to the provisions of subsection (d) hereof the insurer is subrogated to the rights of action of persons receiving basic reparations benefits, except as to such benefits which have been or may be subject to binding arbitration under this article. A release of liability given by a person who is or may be entitled to receive benefits under a policy of insurance issued pursuant to this act shall be void and unenforceable, with respect to benefits paid or to be payable under such a policy, against a subrogee who has not joined in the execution of the release.

(b) Every insurer licensed to write insurance in this State shall be deemed to have agreed, as a condition to maintaining such license after the effective date of this act,

(1) that subject to the provisions of subsection (d) hereof where its insured is or would be held legally liable for damages for injuries sustained by any person to whom basic reparations benefits have been paid by another insurer, it will reimburse such other insurer to the extent of such benefits, but not in excess of the amount of damages so recoverable for the types of loss covered by such benefits or in excess of the limits of its liability under its policy, and

(2) that the issue of liability for such reimbursement and the amount thereof shall be decided by mandatory, binding inter-company arbitration procedures approved by the insurance commissioner.

(c) Notwithstanding any statute of limitations to the contrary, any demand for initial arbitration proceedings shall be brought within one year of the first payment of basic reparations benefits by the insurer claiming for reimbursement. Arbitration proceedings need not await final payment of benefits, and the award, if any, shall include provisions for reimbursement of subsequent benefits. Arbitration proceedings may be reopened on the question of propriety of subsequent benefit payments, but no question of fact decided in an arbitration proceeding shall be reconsidered in a subsequent arbitration proceeding.

(d) An insurer shall have no right of subrogation or reimbursement unless the person

suffering the bodily injury is eligible to receive non-pecuniary damages as provided in § 38.1-389.15 of this article or where the person has sustained an injury where the amount of benefits paid exceeds one thousand five hundred dollars. In either of such events, benefits paid by such insurer for any one person shall be subject to subrogation reimbursement in full under the procedure set forth herein.

§ 38.1-389.14. Collateral sources of indemnity.—A basic reparations insurer shall have the primary obligation to indemnify for economic loss because of accidental bodily injury arising out of the maintenance or use of a motor vehicle: Provided, that the amount of all benefits a claimant recovers or is entitled to recover under any workmen's compensation act or the United States Longshoremen and Harbor Workers' Compensation Act because of accidental bodily injury shall be subtracted from the basic reparations benefits otherwise payable for the injury.

§ 38.1-389.15. Limitations on recovery for non-pecuniary loss.—(a) In any action in tort instituted in this State for bodily injury caused by accident occurring on or after the effective date of this article arising out of the maintenance or use of a motor vehicle within this State, brought against owners, operators, registrants or occupants of a motor vehicle, or any party legally responsible for the acts or omissions of such person, there shall be no damages recoverable for pain, suffering, mental anguish, inconvenience, discomfort, fright, shock, humiliation, indignity, insult, loss of enjoyment of life, loss or consortium, worry about future consequences of the injury and non-pecuniary loss of any kind unless the reasonable value of the medical treatment expenses incurred by the person suffering the bodily injury exceed the sum of one thousand dollars or the bodily injury results in death, dismemberment, serious permanent disfigurement or other significant permanent disability. In the event the injured person was furnished reasonably needed products, services or accommodations without charge or at less than the average reasonable charge therefor in this State, an action for non-pecuniary loss may be maintained under this subsection (a) if the court determines that the fair and reasonable value of such products, services or accommodations exceeds one thousand dollars.

(b) In any action in tort for bodily injury caused by accident occurring on or after the effective date of this article arising out of the maintenance or use of a motor vehicle within this State, brought against owners, operators, registrants or occupants of a motor vehicle, or any party legally responsible for the acts or omissions of such party, the party liable for damages shall be entitled to an exemption reducing his liability by the amount of taxes that would have been payable on account of income the injured person would have received if he had not been injured.

(c) The limitations set forth in subsection (a) of this section do not apply with respect to persons not entitled to basic reparations benefits from any owner or his insurer or

through the Assigned Claims Plan, other than persons excluded by reason of § 38.1-389.9.

§ 38.1-389.16. Residual liability insurance; basis for payment.—Residual liability insurance applies to the amounts which the owner or insured is legally obligated to pay as damages because of accidental bodily injury and accidental property damage arising out of the ownership, maintenance, operation or use of a motor vehicle, if the accident occurs within the United States of America, its territories or possessions or the Dominion Canada and the terms of the policy of insurance issued theretofore shall comply with the terms and conditions of § 38.1-381.

§ 38.1-389.17. Basic reparations benefits payable periodically.—Basic reparations benefits shall be payable monthly as loss accrues. Such benefits are overdue if not paid within thirty days after the insurer receives reasonable proof of the fact and the amount of loss sustained except that an insurer may accumulate claims for periods not exceeding one month, and benefits are not overdue if paid within fifteen days after the period of accumulation. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within thirty days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within thirty days after such proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue; payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery. Basic reparations payments may be assigned by the insured directly to persons supplying necessary products, services or accomodations to the claimant. All overdue payments shall bear interest at the rate of ten per centum per annum.

§ 38.1-389.18. Exemption of benefits.—An agreement for assignment of any right to benefits payable in the future is unenforceable, except medical expense to the extent the benefits are for the cost of products, services, or accommodations provided or to be provided by the assignee.

Basic reparation benefits are exempt from garnishment, attachment, execution, and any other process or claim to the extent that wages or earnings are exempt under any applicable law exempting wages or earnings from process or claims, except upon a claim of a creditor who has provided products, services or accommodations to the extent benefits are for medical expense for such products, services or accommodations.

§ 38.1-389.19. Lump sum settlements.—Rights and obligations arising under basic reparations benefits insurance, either with respect to a claim for a limited period of time or with respect to all future loss arising from an accidental bodily injury, may be discharged by lump sum settlement: Provided, that such settlement may not be discounted more than six per centum compounded semiannually, and if the amount of such settlement exceeds

two thousand five hundred dollars, such proposed settlement must receive the approval of a court of competent jursidiction.

§ 38.1-389.20. Limitation of actions.—(a) If no basic or added reparation benefits have been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the injured person suffers the loss and either knows, or in the exercise of reasonable diligence should know that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If basic or added reparation benefits have been paid for loss arising otherwise than from death, an action for recovery of further benefits, other than survivor's benefits, may be commenced not later than two years after the last payment of benefits.

(b) If no basic or added reparation benefits have been paid to the decedent or his survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for recovery of further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If basic or added reparation benefits have been paid for loss suffered by an injured person before his death resulting from the injury, an action for recovery of survivor's benefits may be commenced not later than one year after the death or four years after the last payment of benefits, whichever is earlier.

(c) If timely action for basic reparation benefits is commenced against an insurer and benefits are denied because of a determination that the insurer coverage is not applicable to the claimant under the provisions on priority of applicability of basic reparation benefits, an action against the next applicable reparation insurer or the assigned claims plan may be commenced not later than sixty days after the determination becomes final or the last date on which the action could otherwise have been commenced, whichever is later.

(d) Except as subsections (a), (b), or (c) prescribe a longer period an action by a claimant on an assigned claim which has been timely presented may be commenced not later than sixty days after the claimant receives written notice of rejection of the claim by the insurer to which it was assigned.

(e) If a person entitled to basic or added reparation benefits is under legal disability when the right to bring an action for the benefits first accrues, the period of his disability is not a part of the time limited for commencement of the action.

§ 38.1-389.21. Mental and physical examinations.—Whenever the mental or physical condition of a person is material to any claim that has been made or may be made for past or future basic or added optional reparations benefits, the person shall submit, if requested by the insurer, to mental or physical examination by a physician or physicians of the insurer's choice employed by the insurer. A written report of the examination shall be made

by the physician or physicians, and a copy thereof shall be furnished to the person so examined. Nothing contained herein shall prevent such person from securing at his own expense additional mental or phsical examination by a physician or physicians of his choice.

§ 38.1-389.22. Rehabilitation.—(a) A person who has suffered injury as a result of a motor vehicle accident and who is entitled to basic reparations benefits shall be entitled, as part of those benefits, to prompt medical rehabilitation services. When, as the result of such injury he is unable to perform work for which he had previous training or experience, he shall be entitled to such occupational rehabilitation services, including retraining, as may be reasonably necessary to restore him to suitable employment.

(b) A person entitled to basic reparations benefits who wishes to undertake rehabilitation procedures or treatment must give thirty days notice and receive the approval of the insurer responsible for payment of benefits prior to undertaking such treatment in order to be eligible for such payment. The notice shall include information sufficient to determine that the procedures, treatment or course of rehabilitation meet the standards set forth in subsection (c) hereof. Any dispute as to the reasonableness or necessity of any rehabilitation procedure or treatment shall be submitted to arbitration in accordance with rules promulgated by the Commissioner of Insurance.

(c) An insurer responsible for payment of basic reparations benefits to a person injured as a result of a motor vehicle accident may propose and is responsible for rehabilitation procedures or treatment, and rehabilitative occupational training for the injured person. The procedure, treatment or course of rehabilitation shall meet the following standards:

(1) A procedure or treatment, whether or not involving surgery, shall be recognized and medically accepted.

(2) A course of occupational training shall be a recognized form of training and be reasonable and appropriate for the particular case.

(3) A procedure, treatment or training shall contribute substantially to rehabilitation.

(4) The cost of a procedure, treatment or training shall be reasonable in relation to its probable rehabilitative effects.

(d) After a hearing upon application by an interested person and reasonable notice to all other interested persons, and upon findings, supported by evidence, as stated in subsection (c)(3) and further findings that the injured person has refused or has by his conduct caused the insurer reasonbly to believe that he may refuse to submit to such procedure, treatment or training, and that he does not have reasonable grounds to continue the refusal, a court of competent jurisdiction may enter an order invoking reasonable sanctions against the injured person and other persons whose claims are based on his injury.

In determining whether an injured person has reasonable grounds for continuing re-

fusal to submit to the specified procedure, treatment or training, the court shall take into account, among all other relevant factors, the extent of the probable benefit, the attendant risks, the extent to which the procedure, treatment or training is or is not recognized as standard and customary, and whether the imposition of sanctions because of the injured person's refusal would abridge his right to the free exercise of his religion.

(e) The sanctions that may be invoked in an order under subsection (d) hereof include, but are not limited to:

(1) An order that basic reparations benefits payable be reduced or terminated at such time as necessary to limit recovery of benefits to an amount equal to the benefits that in reasonable probability would have been due if the injured person had submitted to such rehabilitative procedure, treatment or training.

(2) An order that the physical or mental condition of the injured person shall be taken to be established for the purposes of the claim in accordance with the contention of the insurer.

(3) An order that, if the insurer elects to pay a specified lump sum, found to be fair and reasonable compensation in lieu of benefits that in reasonable probability would be due if the injured person submitted to the specified procedure, treatment or training, the insurer shall be discharged from all liability arising from the injury.

§ 38.1-389.23. Discovery of facts about an injured person.—(a) Upon request of an insurer, information relevant to a claim for basic or added optional reparations benefits shall be disclosed as follows:

(1) An employer shall furnish a statement of the work record and earnings of an employee upon whose injury the claim is based. The statement shall cover the periods specified by the claimant or insurer making the request and may include a reasonable period before, and the entire period after, the injury.

(2) Every claimant shall deliver to the insurer a copy of every written report available to him concerning any medical treatment or examination of a person upon whose injury the claim is based previously or thereafter made, relevant to the claim, and the names and addresses of physicians and medical care facilities rendering diagnoses or treatment in regard to the injury or to a relevant past injury, and the claimant shall authorize the insurer to inspect and copy relevant records of physicians and of hospitals, clinics, and other medical facilities.

(3) A physician or hospital, clinic, or other medical facility furnishing examinations, products, services or accommodations to an injured person in connection with a condition alleged to be connected with an injury upon which a claim is based, upon authorization of the claimant, shall furnish a written report of the history, condition, diagnoses, medical tests, treatment, and dates and costs of treatment of the injured person, and permit inspec-

tion and copying of all records and reports as to the history, condition, treatment, and dates and costs of treatment.

(b) Any person other than the claimant providing information under this section may charge the person requesting the information for the reasonable cost of providing it.

(c) In case of dispute as to the right of a claimant or insurer to discover information required to be disclosed, the claimant or insurer may petition such court as would have jurisdiction and venue in an action for damages brought by the injured person for an order for discovery of such information. Upon notice to all persons having an interest, the order may be entered for a good cause shown. It shall specify the time, place, manner, conditions, and scope of the discovery. To protect against annoyance, embarrassment, or oppression, the court may enter an order refusing discovery or specifying conditions of discovery in directing payment of costs and expenses of the proceeding, including reasonable attorneys' fees.

§ 38.1-389.24. Assigned claims plan.—(a) Insurers authorized to provide basic reparations benefits in this State are hereby directed to organize and maintain an assigned claims plan to provide that any person who suffers loss or expense as a result of any injury arising out of the maintenance or use of a motor vehicle or as a result of being struck by a motorcycle while the vehicle is upon the highways of this State or in any place therein to which the public has a right of access without the payment of admission, may obtain basic reparations benefits through said plan if:

(1) Basic reparations benefits are not applicable to the injury for some reason other than those specified in the provision in § 38.1-389.9 of this article.

(2) Basic reparations insurance or self-insurance applicable to the injury cannot be identified.

(3) Basic reparations benefits applicable to the injury, because of financial inability of an insurer or self-insurer to fulfill its obligations, are inadequate to provide the contracted-for benefits. However, benefits available through the assigned claims plan shall be excess over any benefits paid or payable through the Virginia Insurance Guaranty Association. If the basic reparations benefits are not paid by the Virginia Insurance Guaranty Association within the limitation of time specified in § 38.1-389.20 of this act, such benefits shall be paid by the assigned claims plan. Payments made by the assigned claims plan pursuant to this section shall constitute covered claims under Chapter 20 of Title 38.1 of the Code of Virginia.

(b) If a claim qualifies for assignment under this section, the assigned claims plan or any insurer or self-insurer to whom the claim is assigned shall be subrogated to all of the rights of the claimant against any insurer or self-insurer, its successor in interest or substitute, or any other person or entity legally obligated to provide basic reparations benefits to

the claimant, for basic reparations benefits provided by the assignment.

(c) A person shall not be entitled to basic reparations benefits through the assigned claims plan with respect to injuries sustained if, at the time of such injury, the person was the owner of a motor vehicle for which security is required under this article and the person failed to have such security in effect.

(d) The assigned claims plan shall contain such rules and regulations for the operation and for the assessment of costs as shall be approved by the Commissioner. Any claim brought through the said plan shall be assigned to an insurer in accordance with the approved regulations of operation and that insurer, after such assignment, shall have the same rights and obligations it would have if prior to such assignment it has issued a policy providing basic economic loss benefits applicable to the loss or expenses incurred. Any party accepting such benefits hereunder shall have such rights and obligations as he would have if a policy providing basic reparations benefits were issued to him.

(4) No insurer may write any basic reparations benefits policy in this State unless the insurer participates in the assigned claims plan organized pursuant to this section.

§ 38.1-389.25. Disclosure and offset of benefits.—Any person who has received or may be entitled to basic or optional added reparations benefits shall disclose the identity of the insurer providing such benefits to any person who may have legal liability for his injuries, and to the insurer of such person. If any such person who has received or may be entitled to such benefits with respect to injuries received in a motor vehicle accident files any action in this State for damages for injury or death arising out of the same accident, such benefits must be disclosed to the judge but shall not be made known to the jury. The amount of such benefits recovered or which will become recoverable and subject to binding inter-company arbitration, as determined by the court, shall be deducted by the court from any amount awarded to such person in such proceedings. The existence or result of arbitration proceedings shall not otherwise be admissible in evidence in any action for death or damages to persons or property arising out of the accident.

§ 38.1-389.26. Severability and constitutionality.—If any provisions of this article or the application thereof to any person or circumstances is held to be unconstitutional or otherwise invalid, the remainder of this article and the application of such provision to other persons or circumstances shall not be affected thereby, and it shall be conclusively presumed that the General Assembly would have enacted the remainder of this article without such invalid or unconstitutional provision; provided, that if all of § 38.1-389.15 is found to be unconstitutional or invalid as to substantially all persons and circumstances, it shall be conclusively presumed that the legislature would not have enacted the remainder of this article without such limitations and the entire article shall be held invalid.

§ 38.1-389.27. Rules and regulations.—All rules and regulations called for under this

article shall be adopted and promulgated by the Commissioner of Insurance and shall be effective as of the effective date of this article.

2. That §§ 38.1-380.1 and 38.1—381.2 of the Code of Virginia are repealed.

3. This act shall take effect July one, nineteen hundred seventy-five. Motor vehicle accidents occurring before such effective date are not covered by or subject to this act.

Official Use by Clerks

Passed By The House of Delegates	**Passed by The Senate**
with / without amendment	with / without amendment
Date:	Date: .....
.....	.....
Clerk of the House of Delegates	Clerk of the Senate

ATTACHMENT # 2

Council of the District of Columbia
Memorandum

District Building, 14th and E Streets, N.W. 20004 Fifth Floor 724-8000

To MEMBERS OF THE COUNCIL

From JOHN P. BROWN, III SECRETARY TO THE COUNCIL

Date MARCH 18, 1981

Subject REFERRAL OF PROPOSED LEGISLATION

Notice is herewith given that the following proposed legislation has been filed with the Office of the Secretary on March 18, 1981. Copies are available in Room 28, Legislative Services Unit.

TITLE: District of Columbia Motor Vehicle Accident Protection Act of 1981, Bill 4-190

INTRODUCED BY: Chairman Dixon
CO-SPONSORED BY: Councilmembers Moore, Winter, Crawford, Spaulding, Kane and Jarvis

The Chairman is referring this proposed legislation to the Committee on Public Services and Consumer Affairs with comments from the Committee on Transportation and Environmental Affairs.

cc: General Counsel
Legislative Counsel
Legislative Services Unit

MAR 23 1981

Chairman Arrington L. Dixon

'81 MAR 18 A11 :16

A BILL

4-190

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

March 18, 1981

Councilmember Arrington Dixon introduced the following bill which was referred to the Committee on Public Services and Consumer Affairs with comments from the Committee on Transportation and Environmental Affairs.

To protect residents of, and persons in, the District of Columbia from the consequences of motor vehicle accidents.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA.

That this act may be cited as the "District of Columbia Motor Vehicle Accident Protection Act of 1981".

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Sec. 2. FINDINGS, PURPOSES, AND POLICY.

(a) FINDINGS--The Council of the District of Columbia finds the following:

(1) Motorists, motor vehicle passengers, and pedestrians in the District of Columbia are not adequately protected, by current law and practice, from the consequences of motor vehicle accidents.

(2) If a person suffers personal injuries because of an accident involving a motor vehicle in the District of Columbia, he or she is unlikely to recover the amount of his or her actual losses because--

(A) approximately 50 percent of such victims do not satisfy the prerequisites to compensation under the present law; and

(B) approximately 40 percent of the motor vehicle operators in the District of Columbia do not maintain any motor vehicle insurance or have other financial resources sufficient to pay losses; and

(C) the average motor vehicle insurance policy in the District will pay only up to $10,000 for the personal injuries of any one victim, a sum that is insufficient to compensate adequately a victim with serious injuries.

Satisfaction of the prerequisites to compensation under the present law is time-consuming and expensive to policyholders. A victim must establish that the accident

was the fault of another person; that the person injured was free from contributory fault; and that the injuries suffered were natural and probable consequences of the accident.

(3) Far greater protection to victims is available at a lower price than that for today's coverage. The purchase of this better protection should be compulsory because of the great potential of a motor vehicle to cause personal injury.

(b) PURPOSE.-- It is the purpose of this Act to provide adequate protection for victims who are injured in the District or who are injured while riding in motor vehicles registered in the District.

(c) POLICY.-- It is the policy of this Act to require each owner or operator of a motor vehicle registered or operated in the District of Columbia to provide and maintain personal injury protection insurance covering all named beneficiaries wherever located, all otherwise uninsured occupants of the vehicle so registered or operated, and all pedestrians struck by that vehicle. It is further the policy of this Act to mandate that personal injury protection insurance in the District pay all victims injured as a result of an accident all of their economic losses up to $100,000 for medical and rehabilitation expenses, $24,000 for work loss including replacement services loss; and

$1,000 for death benefits. It is also the policy of this Act to require each insurer selling personal injury protection insurance to include property damage liability insurance in each policy of required insurance unless waived in writing and to offer all of its customers residual bodily injury liability insurance.

Sec. 3. REQUIRED INSURANCE.

(a) RESIDENTS OF THE DISTRICT.--Each owner of a motor vehicle required to be registered in the District of Columbia shall maintain insurance or other approved security for payment of the benefits required by this Act for personal injury protection. Such security shall be in effect continuously for any such vehicle during the period of registration.

(b) NONRESIDENTS OF THE DISTRICT OWNING OR OPERATING MOTOR VEHICLES IN THE DISTRICT.--A person who is not a resident or the District of Columbia who owns a motor vehicle shall not operate such vehicle, or permit such vehicle to be operated, in the District of Columbia, unless insurance or other approved security for payment of the benefits required by this Act for personal injury protection is provided and maintained for such time as such vehicle is present in the District.

(c) FORM.--Any policy of motor vehicle insurance which is represented or sold as providing security covering a motor vehicle or required insurance shall be deemed to provide insurance for payment of the benefits required by this Act for personal injury protection. The security required by this section may be provided under a valid policy of insurance issued by an insurer duly authorized to transact business in the District or by any other method approved by the superintendent as afforded by a policy of personal injury protection insurance.

(d) ADMINISTRATION OF REQUIREMENT.--

(1) No certificate of registration shall be issued or transferred in the District to the owner of a motor vehicle unless the owner or prospective owner of that vehicle attests, subject to the penalties provided by the law of the District of Columbia with respect to perjury, that the insurance or other security required by this section is in effect with respect to that vehicle and that this insurance or other security, or its equivalent, shall remain in effect during the entire period of that registration. Upon request, such an owner shall promptly produce such verification as the Department of Transportation requests.

(2) If, at any time, the insurance or other security required of any person by this section lapses or terminates,

and the motor vehicle is registered in the District of Columbia, the certificate of registration of that motor vehicle shall, as of the date that such security lapses or terminates, be automatically suspended by operation of law until the security required by this section is once again in force and valid. A motor vehicle with respect to which the certificate of registration is suspended under this paragraph may be immobilized by the Department of Transportation or the Metropolitan Police Department until the security required by this section is in effect. The certificate of registration and the tags of any motor vehicle, the registration of which is suspended under this paragraph, shall be recovered whenever possible.

(3) The Director of the Department of Transportation may, in addition to exercising any authority granted by any other paragraph of this subsection or any other law, issue such rules as are necessary to expeditiously and economically administer and enforce the obligations set forth in subsections (a) and (b) of this section, in accordance with the District of Columbia Administrative Procedure Act (D.C. Code, 1-1501 et seq.).

(4) The Director of the Department of Transportation of the District may request insurers authorized to transact motor vehicle insurance in the District of Columbia to

furnish verification that the insurance or other security required by this section is in effect for owners of motor vehicles registered in the District, as such director may request. Such insurers shall provide information with respect to, and cooperate in, prosecutions under paragraph (3). Such insurers shall also cooperate with, assist, and advise such director with respect to the detection of persons who have registered, or who attempt to register, motor vehicles in the District without first obtaining the insurance or other security required by this Act or who cancel or otherwise terminate such insurance or other security subsequent to registration.

(e) PENALTIES.—A person is guilty of a crime if that person—

(1) makes any false material statements with respect to his or her compliance with the obligation to maintain required insurance; or

(2) is the owner of a motor vehicle that is required to be registered in the District or that is operated in that District and required insurance is not in effect with respect to that vehicle; or

(3) is the owner of a motor vehicle who knowingly permits that vehicle to be operated in the District without

required insurance being in effect with respect to that vehicle; or

(4) is the operator of a motor vehicle owned by another person who operates that vehicle in the District knowing or having reason to believe that required insurance is not in effect with respect to that vehicle, or

(5) operates a motor vehicle as to which the certificate of registration has been automatically suspended by operation of subsection (d)(2); or

(6) fails or refuses to return or give a certificate or registration or tags or an operator's permit to the Department of Transportation or an autorized agent thereof to a law enforcement officer, upon demand; or

(7) refuses to present proof that required insurance is in effect with respect to a motor vehicle operated by that person, upon demand by a law enforcment officer.

Upon conviction for the first such offense, a person shall be sentenced to up to 30 days imprisonment or to pay a fine of up to $300, or both. Upon conviction for the second or any subsequent such offense, a person shall be sentenced to up to 90 days imprisonment or to pay a fine of up to $300, or both. The Office of the Corporation Counsel is authorized to prosecute any offense described in this subsection.

(f) COSTS.--The reasonable costs, to the Government of the District of Columbia, or administering and enforcing the requirements of this sections, shall be paid from the Administration Fund established and maintained under section 8. Such payments shall be made for the benefit of the Department of Insurance and for the benefit of the Department of Transportation, but no such payments shall be made for costs incurred by either department prior to the effective date of this Act or which would probably have been made if this Act had not been enacted.

Sec. 4. BENEFITS UNDER REQUIRED INSURANCE.

(a) IN GENERAL.--An applicable insurer or other person liable to pay for other approved security shall provide all of the benefits set forth in his section for personal injury protection for each person covered by security for any injury sustained by that person as a result of an accident in the Distric of Columbia or arising out of the maintenance or use of a motor venicle registered in the District in any State of the United States or Province of Canada.

(b) PAYMENT WITHOUT REGARD TO FAULT.--The benefits set forth in this section shall be provided without regard to, and irrespective of, negligence, freedom from negligence, fault, or freedom from fault on the part of any person.

(c) MEDICAL AND REHABILITATION EXPENSES.--Personal injury protection benefits shall be paid for each victim for that victim's medical and rehabilitation expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for the victim's care, recovery, or rehabilitation. The medical and rehabilitation expenses paid by personal injury protection shall not include charges for a hospital room which are in excess of a reasonable and necessary charge for semiprivate accommodations, except when the victim requires special or intensive care. The term "rehabilitation" means any reasonable and necessary equipment, personnel, or services, and transportation thereto, which with a reasonable degree of medical certainty will reduce the duration or degree of a victim's disability, or restore a victim's physical or vocational functioning to the pre-accident level or a reasonable equivalent of that level, or enable a victim to function independently and productively in daily activities. No obligation exists under this section unless the provider of the product, service, or accommodation involved is licensed or approved and complies with any applicable laws or regulations pertinent thereto. The benefits payable pursuant to this subsection for medical and rehabilitation

expenses for any one victim, resulting from any one accident, shall not exceed $100,000.

(d) WORK LOSS.—Personal injury protection benefits shall be paid pursuant to his subsection to each victim for that victim's work loss consisting of--

(1) loss of income, not to exceed $1,000 per month, for work which a victim would have performed after the date of the accident if he or she had not been injured in the accident (not counting any expected reduction in the amount payable by that victim for purposes of Federal and District of Columbia income taxation); and

(2) expenses, not to exceed $20 per day, which a victim reasonably incurred in obtaining ordinary and necessary services in lieu of those that the victim would have performed for personal or family benefit (but not for income) during the first three years after the date of the accident if he or she had not been injured in the accident.

The benefits payable for work loss for any one victim, resulting from any one accident, shall not exceed $24,000.

Work loss does not include any loss incurred after the date of a victim's death, if the victim dies for any reason.

(e) DEATH BENEFITS.--Personal injury protection benefits shall be paid to the survivors of each victim as death benefits. The benefits payable pursuant to this subsection

for death benefits for any one victim shall not exceed $1,000.

Sec. 5. LAWSUIT RESTRICTION TO FINANCE BENEFITS UNDER REQUIRED INSURANCE.

(a) RESTRICTION.--No person is entitled to maintain a civil action based on liability against any other person, with respect to an injury as to which personal injury protection benefits are payable under this Act, unless that other person is or may be liable in accordance with one of the exceptions set forth in subsection (b).

(b) EXCEPTIONS TO RESTRICTION.--

(1) A person may be liable for damages for any medical and rehabilitation expenses of a victim or his or her survivors and any work loss of a victim or his or her survivors in excess of the personal injury protection benefits available therefor under this Act.

(2) A person may be liable to the victim or his or her survivors for noneconomic loss sustained as the result of death arising out of the maintenance or use of a motor vehicle and recoverable under applicable law.

(3) A person may be liable for any injury arising out of the maintenance or use of a motor vehicle with intent to injure himself or herself or any other person.

(4) A person may be liable for noneconomic loss, in accordance with otherwise applicable law, caused a victim and arising from the maintenance or use of a motor vehicle only if the victim suffered an injury directly resulting in death, substantial permanent scarring or disfigurement, substantial and medically demonstrable permanent impairment which has significantly affected the ability of the victim to perform his or her usual and customary daily activies, or a medically demonstrable impairment that prevents the victim from performing all or substantially all of the material acts and duties which constitute his or her usual and customary daily activities for more than 180 continuous days.

(5) A person may be liable for any loss or damages, in accordance with otherwise applicable law, if, at that time of the accident, that person is an owner of a motor vehicle involved in that accident and required insurance was not in effect with respect to that vehicle.

Sec. 5. AVAILABILITY OF INSURANCE AND BENEFITS.

(a) PERSONAL INJURY INSURANCE.--

(1) After consultation with insurers authorized to transact motor vehicle insurance in the District of Columbia, the superintendent shall from time to time approve, with any reasonable modifications, a reasonable

plan or plan to assure the availability, to all owners of motor vehicles, of the insurance required to be maintained by this Act; and of the insurance required to be included with required insurance, under paragraph (2); and of the insurance required to be offered to all such owners, under subsection (b). Any such plan shall be equitable and may provide for apportionment, by the manager or committee designated to operate such plan, among such insurers of applicants for any such insurance who are unable to obtain such insurance reasonably through ordinary methods. When any such plan has been approved, all such insurers shall subscribe thereto, cooperate therewith, and participate therein. Any applicant for any such policy, any named beneficiary or insured under a policy issued pursuant to such a plan, and any such insurer may appeal to the Superintendent from any ruling or decision of the manager or committee designated to operate such plan.

(2) The Superintendent shall require that each insurer selling or offering to sell personal injury protection insurance in the District of Columbia offer to provide to each of its policyholders and potential policyholders personal injury liability insurance coverages, in the amounts set forth in section 19(a) of the Motor

Vehicle Safety Responsibility Act (D.C. Code Sec. 40-435(a)).

(3) An insurer authorized to transact motor vehicle insurance in the District of Columbia shall sell or offer to sell personal injury protection insurance, and any liability policies described in this section, to the owner of any vehicle that would be defined as a motor vehicle under this act except that it has only two wheels or is specially expected.

(4) The superintendent shall establish and maintain a program designed to assure that purchasers of any insurance described in this section are adequately informed with respect to the availability and comparative cost thereof, and to assure that all policies of such insurance are understandable to policyholders.

(b) PROPERTY DAMAGE INSURANCE.--Each insurer selling or offering to sell personal injury protection insurance in the District of Columbia shall include with such insurance a policy of insurance pursuant to which any liability to a named insured to pay for property damage to any vehicle or other property not owned or controlled by such insured, in accordance with applicable law, shall be paid by the insurer involved up to $5,000 per accident. Notwithstanding the preceding sentence, such policy of property damage insurance

shall not be included if the person involved, in writing, waives such protection in accordance with any rules prescribed by the Mayor upon the recommendation of the superintendent. The authorization to waive this protection, as set forth in the preceding sentence, is subject ot any reasonable limitation prescribed by the Mayor, upon the recommendation of the superintendent, to ensure that owners of motor vehicles covered by collision insurance policies recover the amount of any deductible from any other owner of a motor vehicle whose fault caused the damage involved.

(c) BENEFITS.--Except as otherwise provided in subsection (d), personal injury protection benefits are payable by the applicable insurer or the assigned claims plan for any victim if the accident involved occurs (1) in the District of Columbia; or (2) in any other jurisdiction of the United States or in Canada if the victim was, at the time of the accident, a named beneficiary under a personal injured protection policy or the occupant of a motor vehicle owned or registered by a person who is such a beneficiary.

(d) INELIGIBILITY FOR BENEFITS.--

(1) Personal injury protection benefits shall not be paid with respect of any victim if that victim.

(A) is as of the date of the accident, the owner of a motor vehicle involved in the accident resulting in that victim's injury; and

(B) failed, as of the date of the accident, to provide and maintain insurance or other security for payment of the benefits required by this Act for personal injury protection.

(2) A victim is not entitled to personal injury protection benefits if, at the time of the accident resulting in injury--

(A) that victim was using a motor vehicle which he or she has taken unlawfully, unless that victim reasonably believed at that time that he or she was entitled to take and use that vehicle; or

(B) that victim (1) was not a resident of the District of Columbia; and (2) was operating or occupying a motor vehicle that was not registered in the District; and (3) was not a beneficiary of a policy of personal injury protection insurance or a policy of insurance deemed to provide personal injury protection benefits for accidents occurring in the District.

Sec. 7. PRIORITIES FOR THE PAYMENT OF BENEFITS.

The insurer responsible for the payment of personal injury protection benefits shall be determined in accordance

with, and in the order of, the priorities set forth in this section. The insurer liable to pay such benefits is-- 8.24

(1) the insurer providing required insurance of an 8.26
employer, if the victim is an employee or relative of an 8.27
employee and the injury occurs while the victim is in a
motor vehicle provided or made available by that employee's 8.28
employer in the course of his or her employment;

(2) the insurer providing required insurance to the 8.30
owner or operator of a motor vehicle in the business of 8.31
transporting passengers for hire, if the victim is such a
passenger, except that this priority is not applicable to a 8.32
victim who is a passenger on a school bus or a bus operating
under a government-sponsored transportation program, unless 8.34
the victim is not entitled to such benefits from any source 8.36
other than an assigned claims plan;

(3) the insurer providing required insurance under 8.38
which the victim is an insured;

(4) the insurer providing required insurance with 8.40
respect to the motor vehicle in which, at the time o the 8.41
accident, the victim is present, if the victim is not an
insured under any policy;

(5) the insurer providing required insurance with 8.43
respect to any motor vehicle involved in the accident, if 8.44
the victim is not an insured under any policy;

(b) the assigned claims plan, pursuant to section 8.

A parked and unoccupied motor vehicle is not a motor vehicle involved in an accident, for purposes of this section, unless that vehicle is parked is such a manner as to create an unreasonable risk of injury. If two or more obligations to pay personal injury protection benefits apply equally to an injury, the insurer against which the claim is asserted first shall process and pay the claim as if wholly responsible, subject to subsequent contribution pro rata from any other insuer for the amount of such benefits paid and for the cost of processing such claim.

Sec. 8. ASSIGNED CLAIMS AND ADMINISTRATION.

(a) MAINTENANCE OF BUREAU AND PLAN.--Insurers authorized to transact motor vehicle insurance in the District of Columbia shall, subject to the approval of and regulation by the superintendent, organize and maintain an assigned claims bureau and an assigned claims plan, and pursuant to subsectin (e), an Administration Fund. Such insurers shall adopt and may amend regulations and rules, subject to such approval and regulation, for the operation of the bureau and plan and for the assessment among insurers of the costs of such operation, on a fair and equitable basis. Each insurer selling or offering to sell personal injury protection

insurance in the District of Columbia shall participate in and contribute to the cost of the bureau and plan.

(b) ELIGIBILITY FOR BENEFITS THROUGH PLAN.—A victim entitled to personal injury protection benefits, and not ineligible pursuant to section 6(d) of this Act, as a result of an injury arising out of the maintenance or use of a motor vehicle in the District of Columbia may obtain such benefits through the assigned claims plan maintained in accordance with subsection (a) if—

(1) no identifiable policy of personal injury protection insurance is applicable to that injury; or

(2) the only identifiable policy of personal injury protection insurance is inadequate to provide all of the benefits established by law, because of the financial inability of one or more insurers to fulfill their obligations.

If personal injury protection benefits are paid through the assigned claims plan for the reasons described in paragraph (2), the insurer to which the claim is assigned, or the assigned claims bureau itself, is entitled to reimbursement from the defaulting insurers for the amount of any benefits paid and for costs, to the extent of the responsibility of the defaulting insurers.

If personal injury protection benefits are paid through the assigned claims plan for the reasons described in paragraph (2), the insurer to which the claim is assigned, or the assigned claims bureau itself, is entitled to reimbursement from the defaulting insurers for the amount of any benefits paid and for costs, to the extent of the responsibility of the defaulting insurers.

(c) PROCEDURE.--

(1) A victim allegedly entitled to personal injury protection benefits through the assigned claims plan shall notify the assigned claims bureau of that claim within the time that would have been allowed, pursuant to section 10(a) of this Act, if an identifiable and adequate policy of personal injury protection insurance applicable to that victim's injury had been in effect on the date of the accident.

(2) Upon notification under paragraph (1), the assigned claims bureau shall assign a claim for benefits to a participating insurer, in accordance with the provisions of the assigned claims plan. Such bureau shall also promptly notify each claimant of the name, address, and telephone number of the insurer to which such a claim is assigned or of such bureau itself, if such a claim is assigned to it. A civil action by a claimant for personal

injury protection benefits against such plan, insurer, or bureau shall not be commenced less than 30 days after a claimant's receipt of such notification of assignment or later than the last date on which such an action could be commenced, pursuant to section 10(a) of this Act, against an applicable insurer obligated on a basis other than this section.

(3) Claims shall be assigned by the assigned claims bureau, in accordance with rules that provide for fair allocation of the burden of processing and paying such claims, among all of the insurers transacting motor vehicle insurance in the District of Columbia on a basis that is reasonably related to the volume of personnal injury protection insurance which each such insurer writes in the District. Persons providing required insurance personally, through approved self insurance or other security, shall contribute financially to the cost of such plan and bureau, in accordance with rules of the superintendent, but no claims shall be assigned for processing and payment to such a person.

(4) An insurer to which a claim is assigned under this subsection shall promptly commence payment of any benefits required in accordance with this Act. Such insurer is entitled to prompt reimbursement by the assigned claims

bureau for the amount of any payments made and for the established loss adjustment cost. An insurer to which a claim is assigned under this subsection shall preserve and enforce any rights to indemnity or reimbursement by any third party, subject to accounting therefor to such bureau.

(5) Losses paid, the cost of adjusting losses, and costs incurred in operating the assigned claims bureau shall be assessed on the same or equivalent basis as that set forth in paragraph (3), except that all insurers shall receive and pay assessments. With respect to vehicles that would be defined as motor vehicles except that they only have two wheels, or are the subject of a special finding and that are not covered by required insurance, such losses and cost (the losses and cost such vehicles as a class are likely to impose on the assigned claims plan and bureau) shall be determined by the Mayor on an equitable basis; each owner of such a vehicle registered in the District of Columbia shall pay his or her pro rata share thereof upon annual registration of that vehicle.

(d) RATEMAKING.--Reasonable costs incurred in the handling and disposition of assigned claims, including the cost of paying assessments under subsection (c)(5), shall be taken into account in the making and regulating of motor vehicle insurance rates.

(e) ADMINISTRATION FUND.--The insurers who contribute to the maintenance of an assigned claims plan shall also contribute to a fund for the administration of this Act, in accordance with this subsection. Such Administration Fund shall be established and maintained by the assigned claims bureau establish under subsection (a). Assessment shall be made, on a fair and equitable basis, among all insurers, in accordance with projections of the Government of the District of Columbia as to added costs required for reasonable administration and enforcement of this Act. Payments to the Government from the Fund shall be made semiannually by such bureau.

Sec. 9. CONSUMER PROTECTION.

(a) ELECTION OF A DEDUCTIBLE.--An insurer offering to provide personal injury protection insurance in the District may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount up to the amount prescribed by the Mayor, upon the recommendation of the superintendent. This deductible may be applicable to all or any specified type of personal injury protection benefit, except that it may not be applicable to any medical, paramedical, ambulance, or hospital services furnished to a victim on an emergency basis during the 72 hours immediately following an accident.

(b) SUBTRACTION OF CERTAIN OTHER BENEFITS.--All personal injury protection benefits (less reasonably incurred collection costs) that an individual receives or is entitled to receive, with respect to an injury, from--

(1) social security (except benefits under title XIX of the Social Security Act);

(2) workmen's compensation;

(3) temporary nonoccupational disability insurance that is required by a State or the District; and

(4) any government (except the proceeds of government life insurance);

shall be subtracted in calculating personal injury protection unless the law authorizing or providing for those benefits makes them secondary to or duplicative of basic no-fault benefits.

(c) PENALTY FOR OVERDUE PAYMENT OF PERSONAL INJURY PROTECTION BENEFITS.--Personal injury protection benefits are payable as loss accrues, subject to receipt by the applicable insurer of reasonable proof of the fact and amount of loss sustained. If personal injury protection benefits are not paid within 30 days after receipt of such proof, the payment due is overdue. An overdue payment of personal injury protection benefits bears interest at the prime rate of interest generally prevailing in the District

of Columbia on the date upon which such payment is first overdue per annum from the date upon which such payment is first overdue. For purposes of this subsection, payment is made on the date a draft or other valid instrument is placed in the United States mails in a properly addressed and posted envelope or on the date of delivery thereof, whichever is applicable.

(d) ASSIGNMENT OF CLAIMS TO FUTURE BENEFITS.--An agreement for the assignment of a right to any personal injury protection benefits payable in the future is void.

(e) PAYMENT OF ATTORNEYS FEES.--

(1) An attorney is entitled to a reasonable fee for advising and representating a claimant in an action for personal injury protection benefits which are overdue. Such a fee shall be paid by the applicable insurer in addition to the amount of the personal injury protection benefits which are overdue and the penalty under subsection (c) if a court finds that this insurer did not promptly pay the amount due.

(2) An insurer may be allowed, by a court, an award of a reasonable sum for a fee for its attorney for the legal cost of defending against a claim that is or was fraudulent in some significant respect. Such award may be treated as an offset against the amount of any

personal injury protection benefits then or thereafter owing by that insurer to the person making that claim.

(f) PRIMACY OF PERSONAL INJURY PROTECTION.--Personal injury protection benefits and insurance or other approved security for the payment of such benefits shall be primary over any other applicable insurance, except as otherwise provided under subsections (a) and (b).

Sec. 10. MISCELLANEOUS PROVISIONS.

(a) STATUTE OF LIMITATIONS.--A civil action for the recovery of any personal injury protection benefits payable under this Act shall be commenced not later than one year after the date of the accident resulting in the injury giving rise to entitlement to such benefits, except as otherwise provided in this subsection. If an appropriate written notice setting forth the name and address of the victim and the time, place and nature of the injury is given to the insurer or any of its authorized agents reasonably promptly after the date of the accident resulting in such injury, such a civil action may be commenced at any time within one year after the date such a notice is given by a person claiming to be entitled to personal injury protection benefits or by a person acting on behalf of such a victim. If the applicable insurer makes any payment of benefits for personal injury protection with respect to a particular

victim and injury, such a civil action may be commenced at any time within one year after the most recent such payment.

(b) PHYSICAL OR MENTAL EXAMINATION OF VICTIM.—

(1) If a person's physical or mental condition is material to any claim that has been made or that may be made for personal injury protection benefits, the person involved shall submit to physical or mental examination by physicians, in accordance with provisions of the policy of insurance pursuant to which such claim has been or may be made. A policy of insurance providing for payment of the benefits required for personal injury protection may include reasonable provisions for physical and mental examination of persons claiming any such benefits.

(2) If requested by the person examined, a copy of every written report concerning an examination under this subsection which is made by an examining physician shall be delivered or mailed to such person without charge. At least one such report shall set forth in detail the findings and conclusions of the examining physicians. Upon such request and delivery or mailing, the party causing a person to be examined under this subsection may request the person examined to furnish its representative with a copy of every written report

available to that person concerning any examination which is relevant to that person's claim for personal injury protection benefits. An applicable insurer may request a person claiming personal injury protection benefits to submit the name and address of each physician or medical-care facility that has diagnosed or treated the victim for or with respect to the injury claimed and any relevant past injury, as a prerequisite to the payment of benefits under this Act. Such a person shall also authoriz such an insurer to inspect and copy records relevant to such a claim which are prepared or maintained by any physician, hospital, clinic, rehabilitation center, nursing facility, or other person or institution.

(3) A court may make any order which is just in case a person refuses to comply with any provision of paragraph (1) or (2), except that an order shall not be entered directing the arrest of a person for disobeying an order to submit to a physical or mental examination.

(c) GOOD-FAITH MISTAKE.-- Personal injury protection benefits that are paid by an insurer in good faith to or for the benefit of a person believed to be entitled thereto discharges such insurer from its obligation to the extent of the amount of such payment, unless such insurer has been

notified in writing prior to such payment of the claim of some other person. If there is doubt about the proper person to receive the benefits involved or the proper apportionment to be made among the persons entitled to such benefits or about whether an item of medical or rehabilitation expense was reasonably necessary or whether the charge for such an item is reasonable, the insurer, the claimant, or any other interested person may apply to the Superior Court of the District of Columbia for an appropriate order. If such an application is made by an insurer before the benefit claimed is overdue, the provisions of subsections (c) and (e) of section 9 are not applicable with respect to such amount.

(d) SUBROGATION.--

(1) An insurer shall have a right of reimbursement from any other insurer, based upon a determination of fault, for any personal injury protection benefits paid or obligated to be paid by that insurer as a result of an accident that involved two or more motor vehicles, at least one of which was of a type other than a passenger motor vehicle. As used in this paragraph, the term 'passenger motor vehicle' means any motor vehicle other than (A) a vehicle having less than four wheels; or (B) a truck which

is not designed primarily to carry an operator and any passengers.

(2) An insurer which has paid or become obligated to pay personal injury protection benefits in any case not covered by paragraph (1) may agree to receive a right of reimbursement from any other insurer with respect to some or all of those benefits.

(3) Entitlement to reimbursement and the amount of any reimbursement under this subsection shall be determined by agreement between any insurers who are involved under paragraph (1) or who agree under paragraph (2). If such insurers fail to reach agreement as to entitlement or amount or both, these issues shall be determined by inter-company arbitration in accordance with any applicable agreement between the insurers involved under procedures established by the superintendent. The determination of any right of reimbursement under this subsection shall not be affected by the provisions of section 5 of this Act.

Sec. 11. DEFINITIONS.

As used in this Act, unless the context otherwise requires, the following terms shall have the following meanings:

(1) The term 'accident' means an untoward and unforeseen occurrence arising out of the maintenance or

use of (A) a motor vehicle; or (B) a vehicle, including a trailer, operated or designed for operation upon a public street or highway by power other than muscular power if such vehicle is not a motor vehicle for purposes of this Act, with respect only to any pedestrian or any occupant of that vehicle other than the owner or operator of that vehicle; or (C) any other vehicle covered by personal injury protection insurance.

(2) The term "beneficiary" means a person who is named in a policy of personal injury protection insurance as a person who is entitled to the benefits of personal injury protection.

(3) The term "District means the District of Columbia.

(4) The term "injury" means bodily harm to an individual that is sustained in an accident, and any illness, disease, or death resulting from that bodily harm.

(5) The term "insured" means a named insured and any other individual who (A) is the spouse or other relative of a named insured or who is less than 18 years old and in the custody of (i) a named insured; or (ii) a relative of a named insured; (B) is not a named insured under any contract of insurance providing compulsory

coverage; and (C) usually makes his or her home within the same family unit as a named insured even if he or she temporarily resides elsewhere.

(6) The term "insurer" means (A) a person who is authorized to provide insurance in the District pursuant to applicable law; (B) the owner of a motor vehicle who maintains insurance or other approved security for the payment of personal injury protection benefits; and (C) any instrumentality, facility, or program pursuant to section 6(a).

(7) The term "loss" means economic detriment incurred as a result of an accident resulting in injury, consisting of and limited to medical and rehabilitation expenses, work loss, and death benefits. The term does not include noneconomic loss.

(8) The term "maintenance or use" with respect to vehicle or a vehicle means any activity involving or related to transportation by a motor vehicle, including occupying, entering into, alighting from, repairing, or servicing, except that the term does not include conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct is off the business premises or unless it is

conduct in the course of loading or unloading a motor vehicle.

(9) The term "motor vehicle" means a vehicle, including a trailer, operated or designed for operation upon a public street or highway by power other than muscular power and which has more than two wheels, except that such term shall not include any taxicab if the Mayor finds, after a hearing and in accordance with the District of Columbia Administrative Procedure Act, that such action is necessary to preserve the economic strength of the taxicab industry.

(10) The term "noneconomic loss" means pain, suffering, inconvenience, physical impairment, and other nonpecuniary damage recoverable under the tort law applicable to injury arising out of the maintenance or use of a motor vehicle.

(11) The term "person" means any natural person, firm, copartnership, association, government, or government agency or instrumentality.

(12) The term "personal injury protection" means the benefits provided by sections 4(c), 4(d) and 4(e) of this Act.

(13) The term "superintendent" means the superintendent of insurance of the District of Columbia.

(14) The term "survivor" means an individual identified, in the wrongful death statute of the District of Columbia, as one entitled to receive benefits by reason of the death of this victim.

(15) The terms "victim" and "motor vehicle accident victim" mean a natural person who sustains injury as a result of an accident.

Sec. 12. EFFECTIVE DATES.

(a) DATE OF EFFECT.-- This act shall take effect after a thirty (30)-day period of Congressional review following approval by the Mayor (or in the event of veto by the Mayor, action by the Council of the District of Columbia to override the veto) as provided in section 602(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act, approved December 24, 1973 (87 Stat. 813; D.C. Code, sec. 1-147(c)(1)).

(b) DATE OF APPLICABILITY.--The provisions of this Act apply to accidents involving motor vehicles which take place on or after July 1, 1980 and to the registration or operation of motor vehicles in the District of Columbia on or after that date. The provisions of this Act shall not apply to any accident occurring or injury sustained prior to that date.

ATTACHMENT #3

TITLE XXXVI

INSURANCE

Title XXXV was renumbered as Title XXXVI in Fla.St.1979.

CHAPTER 624. INSURANCE CODE: ADMINISTRATION AND GENERAL PROVISIONS

Repeal of Chapter

Laws 1976, c. 76-168, the Regulatory Reform Act of 1976, which provides for legislative review of programs and functions which regulate professions, occupations, business, industry and other endeavors in Florida, provided in section 3 of the law for repeal of this chapter on July 1, 1982. Laws 1977, c. 77-237, § 1, and Laws 1977, c. 77-457, § 1, excepted part IV from the repeal. For the provisions directing the regulatory review and a listing of all statutes affected by Laws 1976, c. 76-168, see § 11.61 and notes thereunder.

PART I. SCOPE OF CODE

624.01, 624.02 Repealed by Laws 1976, c. 76-168, § 3, eff. July 1, 1982 [See § 11.61]

SECTION 624.02

Supplementary Index to Notes

3. Legislative regulation

Insurance is an industry affected with a public interest and subject to regulation by the states. Production Credit Ass'ns of Florida v. Department of Ins., App., 356 So.2d 31 (1978).

4.5 Assignments

There is no duty on insurer to notify an assignee of policy of premiums or assessments due thereon unless a statute or contract of insurer to the contrary or conduct of insurer giving rise to duty to notify assignee exists. Lewis State Bank v. Travelers Ins. Co., App., 356 So.2d 1344 (1978).

Where terms of insurance contract made no provision for notice to either insured or assignee, who took subject to those terms, no agreement existed between the insurer and assignee amending contract, and there was no conduct on part of insurer to create duty to notify assignee, policy could be cancelled by insurer for nonpayment of premiums without notice to assignee. Id.

14.5 Pension plan death benefits

Death benefits in a municipal pension or retirement plan for its employees funded by contributions to a pension trust fund, which benefits are payable out of the pension or retirement trust fund, are not "life insurance" or a contract for life insurance. The providing of municipal pension plan death benefits under such circumstances does not fall within the competitive bidding or other requirements of § 112.08 relating to payment by a unit of local government of all or part of the premiums for contracts of group life insurance for its employees. Op.Atty. Gen., 078-70, May 2, 1978.

627.730 Short title

Sections 627.730–627.741 may be cited and known as the "Florida automobile reparations reform act."

627.731 Purpose

The purpose of §§ 627.730–627.741 is to require medical, surgical, funeral and disability insurance benefits to be provided without regard to fault under motor vehicle policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience.

Historical Note

Derivation:

Laws 1971, c. 71-252, § 2.

627.732 Definitions

As used in §§ 627.730–627.741:

(1) "Motor vehicle" means any self-propelled vehicle which is of a type both designed and required to be licensed for use on the highways of this state except mopeds, as defined in s. 316.003(2), and any trailer or semi-trailer designed for use with such vehicle and includes:

(a) A "private passenger motor vehicle" which is any motor vehicle which is a sedan, station wagon, or jeep-type vehicle not used at any time as a public or livery conveyance for passengers and, if not used primarily for occupational, professional, or business purposes, a motor vehicle of the pickup, panel, van, camper, or motor home type.

(b) A "commercial motor vehicle" which is any motor vehicle which is not a private passenger motor vehicle.

The term "motor vehicle," however, does not include any self-propelled vehicle with fewer than four wheels or a mobile home.

Amended by Laws 1978, c. 78-374, § 2, eff. Jan. 1, 1979.

(2) "Owner" means a person who holds the legal title to a motor vehicle, or, in the event a motor vehicle is the subject of a security agreement or lease with option to purchase with the debtor or lessee having the right to possession, then the debtor or lessee shall be deemed the owner for the purposes of §§ 627.730–627.741.

(3) "Named insured" means a person, usually the owner of a vehicle, identified in a policy by name as the insured under the policy.

(4) "Relative residing in the same household" means a relative of any degree by blood or by marriage who usually makes his home in the same family unit, whether or not temporarily living elsewhere.

627.733 Required security

(1) Every owner or registrant of a motor vehicle required to be registered and licensed in this state shall maintain security as required by subsection (3) of this section in effect continuously throughout the registration or licensing period.

(2) Every nonresident owner or registrant of a motor vehicle which, whether operated or not, has been physically present within this state for more than ninety days during the preceding three hundred sixty-five days shall thereafter maintain security as defined by subsection (3) of this section in effect continuously throughout the period such motor vehicle remains within this state.

(3) Such security shall be provided by one of the following methods:

(a) Security by insurance may be provided with respect to such motor vehicle by an insurance policy delivered or issued for delivery in this state by an authorized or eligible motor vehicle liability insurer which is actually writing such insurance as otherwise defined in this code, which provides the benefits and exemptions contained in ss. 627.730-627.741. Any such policy of motor vehicle insurance covering motor vehicles registered or licensed in this state and any policy of insurance represented or sold as providing the security required hereunder for registered and licensed motor vehicles under ss. 627.730-627.741 shall be deemed to provide insurance for the payment of such benefits; or

(b) Security may be provided with respect to any motor vehicle by any other method authorized by s. 324.031(2), (3), or (4) and approved by the Department of Highway Safety and Motor Vehicles as affording security equivalent to that afforded by a policy of insurance, if such security is continuously maintained throughout the motor vehicle's registration or licensing period. The person filing such security shall have all of the obligations and rights of an insurer under ss. 627.730-627.741.

Amended by Laws 1977, c. 77-118, § 8, eff. Aug. 2, 1977; Laws 1977, c. 77-468, § 31, eff. Sept. 1, 1977.

(4) An owner of a motor vehicle with respect to which security is required by this section who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under § 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an insurer under §§ 627.730–627.741.

627.734 Proof of security; security requirements; penalties

(1) The provisions of chapter 324 which pertain to the method of giving and maintaining proof of financial responsibility and which govern and define a motor vehicle liability policy shall apply to filing and maintaining proof of security or financial responsibility required by §§ 627.730–627.741. It is intended that the provisions of chapter 324 relating to proof of financial responsibility required of each operator and each owner of any motor vehicle shall continue in full force and effect.

(2) Any person who:

(a) Gives information required in a report or otherwise as provided for in §§ 627.730–627.741, knowing or having reason to believe that such information is false;

(b) Forges or, without authority, signs any evidence of proof of security; or

(c) Files or offers for filing any such evidence of proof, knowing or having reason to believe that it is forged or signed without authority,

shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

(3) Sections 627.730–627.741 do not apply to any motor vehicle owned by the state, a political subdivision of the state, or the federal government.

627.735 Operation of a motor vehicle illegal without security; penalties [Repealed by Laws 1976, c. 76-168, § 3, eff. July 1, 1982. See § 11.61]

Any owner or registrant of a motor vehicle with respect to which security is required under s. 627.733 who operates such motor vehicle or permits it to be operated in this state without having in full force and effect security complying with the terms of s. 627.733 shall have his operator's license and registration suspended.

Amended by Laws 1977, c. 77-468, § 32, eff. Sept. 1, 1977; Laws 1978, c. 78-374, § 11, eff. Jan. 1, 1979.

Laws 1977, c. 77-468, deleted "subsection (1) or subsection (2) of" preceding s. 627.733 in two instances in subsec. (1), and rewrote subsec. (2).

Laws 1978, c. 78-374, § 11, repealed subsec. (2) which, as it appears in Fla. St.1977, provided:

"(2) Any motor vehicle liability insurance policy shall be deemed to comply with the applicable limits of liability required under the financial responsibility or compulsory [insurance] laws of any other state."

Laws 1978, c. 78-374, § 12, provides that the act take effect January 1, 1979, and apply to all accidents occurring on or after that date.

627.736 Required personal injury protection benefits; exclusions; priority [Repealed by Laws 1976, c. 76-168, § 3, eff. July 1, 1982. See § 11.61]

(1) Required benefits.—Every insurance policy complying with the security requirements of s. 627.733 shall provide personal injury protection providing for payment of all reasonable expenses incurred for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices; necessary ambulance, hospital, and nursing services; and funeral and disability benefits to the named insured, relatives residing in the same household, persons operating the insured motor vehicle, passengers in such motor vehicle, and other persons struck by such motor vehicle and suffering bodily injury while not an occupant of a self-propelled vehicle, all as specifically provided in subsection (2) and paragraph (4)(d), to a limit of $10,000 for loss sustained by any such person as a result of bodily injury, sickness, disease, or death arising out of the ownership, maintenance, or use of a motor vehicle as follows:

(a) *Medical benefits.*—Eighty percent of all reasonable expenses for necessary medical, surgical, X-ray, dental, and rehabilitative services, including prosthetic devices, and necessary ambulance, hospital, and nursing services. Such benefits shall also include necessary remedial treatment and services recognized and permitted under the laws of the state for an injured person who relies upon spiritual means through prayer alone for healing, in accordance with his religious beliefs.

(b) *Disability benefits.*—Eighty percent of any loss of gross income and loss of earning capacity per individual, unless such benefits are deemed not includable in gross income for federal income tax purposes, in which event such benefits shall be limited to 60 percent, from inability to work proximately

caused by the injury sustained by the injured person, plus all expenses reasonably incurred in obtaining from others ordinary and necessary services in lieu of those that, but for the injury, the injured person would have performed without income for the benefit of his household. All disability benefits payable under this provision shall be paid not less than every 2 weeks. Any insurer providing medical or disability benefits which have been reduced under this section shall also provide a corresponding rate reduction to the insured in proportion to the reduction of benefits provided.

(c) *Funeral, burial, or cremation benefits.*—Funeral, burial, or cremation expenses in an amount not to exceed $1,000 per individual.

Only insurers writing motor vehicle liability insurance in this state may provide the required benefits of this section, and no such insurer shall require the purchase of any other motor vehicle coverage as a condition for providing such required benefits. Such insurers shall make such benefits available through normal marketing channels. Any insurer writing motor vehicle liability insurance in this state failing to comply with such availability requirement as a general business practice shall be deemed to have violated part VII of chapter 626, and such violation shall constitute an unfair method of competition or an unfair or deceptive act or practice involving the business of insurance, and any such insurer committing such violation shall be subject to the penalties afforded in such part, as well as those which may be afforded elsewhere in the insurance code.

(2) Authorized exclusions.—Any insurer may exclude benefits:

(a) For injury sustained by the named insured and relatives residing in the same household while occupying another motor vehicle owned by the named insured and not insured under the policy or for injury sustained by any person operating the insured motor vehicle without the express or implied consent of the insured.

(b) To any injured person, if such person's conduct contributed to his injury under any of the following circumstances:

1. Causing injury to himself intentionally;
2. Being convicted of driving while under the influence of alcohol or narcotic drugs to the extent that his driving faculties are impaired; or
3. Being injured while committing a felony.

Whenever an insured is charged with conduct as set forth in subparagraphs 2. or 3., the 30-day payment provision of paragraph (4)(b) shall be held in abeyance, and the insurer shall withhold payment of any personal injury protection benefits pending the outcome of the case at the trial level. If the charge is nolle prossed or dismissed or the insured is acquitted, the 30-day payment provision shall run from the date the insurer is notified of such action.

(3) Insured's rights to recovery of special damages in tort claims.—No insurer shall have a lien on any recovery in tort by judgment, settlement, or otherwise for personal injury protection benefits, whether suit has been filed or settlement has been reached without suit. An injured party who is entitled to bring suit under the provisions of s. 627.737, or his legal representative, shall have no right to recover any damages for which personal injury protection benefits are paid or payable. The plaintiff may prove all of his special damages notwithstanding this limitation, but if special damages are introduced in evidence, the trier of facts, whether judge or jury, shall not award damages for personal injury protection benefits paid or payable. In all cases in which a jury is required to fix damages, the court shall instruct the jury that the plaintiff shall not recover such special damages for personal injury protection benefits paid or payable.

(4) Benefits; when due.—Benefits due from an insurer under ss. 627.730–627.741 shall be primary, except that benefits received under any workers' compensation law or Medicaid as provided under 42 U.S.C. s. 1396 et seq. shall be credited against the benefits provided by subsection (1) and shall be due and payable as loss accrues, upon receipt of reasonable proof of such loss and the amount of expenses and loss incurred which are covered by the policy issued under ss. 627.730–627.741. Any credits taken as a result of Medicaid benefits received shall be subject to the provisions of s. 409.266(3)(a).

(a) An insurer may require written notice to be given as soon as practicable after an accident involving a motor vehicle with respect to which the policy affords the security required by ss. 627.730–627.741.

(b) Personal injury protection insurance benefits shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same. If such written notice is not furnished to the insurer as to the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. However, any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the United States mail in a properly addressed, postpaid envelope or, if not so posted, on the date of delivery.

(c) All overdue payments shall bear simple interest at the rate of 10 percent per annum.

(d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:

1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a self-propelled vehicle if the injury is caused by physical contact with a motor vehicle.

2. Accidental bodily injury sustained outside this state, but within the United States of America or its territories or possessions or Canada by the owner while occupying the owner's motor vehicle.

3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., provided the relative at the time of the accident is domiciled in the owner's household and is not himself the owner of a motor vehicle with respect to which security is required under ss. 627.730–627.741.

4. Accidental bodily injury sustained in this state by any other person while occupying the owner's motor vehicle or, if a resident of this state, while not an occupant of a self-propelled vehicle, if the injury is caused by physical contact with such motor vehicle, provided the injured person is not himself:

a. The owner of a motor vehicle with respect to which security is required under ss. 627.730–627.741, or

b. Entitled to personal injury benefits from the insurer of the owner or owners of such a motor vehicle.

(e) If two or more insurers are liable to pay personal injury protection benefits for the same injury to any one person, the maximum payable shall be as specified in subsection (1), and any insurer paying the benefits shall be entitled to recover from each of the other insurers an equitable pro-rata share of the benefits paid and expenses incurred in processing the claim.

(5) Charges for treatment of injured persons.—Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for a bodily injury covered by personal injury protection insurance may charge only a reasonable amount for the products, services, and accommodations rendered, and the insurer providing such coverage may pay for such charges directly to such person or institution lawfully rendering such treatment, if the insured receiving such treatment or his guardian has countersigned the invoice or bill upon which such charges are to be paid for as having actually been rendered, to the best knowledge of the insured or his guardian. In no event, however, may such a charge be in excess of the amount the person or institution customarily charges for like products, services, or accommodations in cases involving no insurance.

(6) Discovery of facts about an injured person; disputes.—

(a) Every employer shall, if a request is made by an insurer providing personal injury protection benefits under ss. 627.730-627.741 against whom a claim has been made, furnish forthwith, in a form approved by the Department of Insurance, a sworn statement of the earnings, since the time of the bodily injury and for a reasonable period before the injury, of the person upon whose injury the claim is based.

(b) Every physician, hospital, clinic, or other medical institution providing, before or after bodily injury upon which a claim for personal injury protection insurance benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, furnish forthwith a written report of the history, condition, treatment, dates, and costs of such treatment of the injured person, together with a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained and identifying which portion of the expenses for said treatment or services was incurred as a result of such bodily injury, and produce forthwith, and permit the inspection and copying of, his or its records regarding such history, condition, treatment, dates, and costs of treatment. Said sworn statement shall read as follows: "Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged are true, to the best of my knowledge and belief." No cause of action for violation of the physician-patient privilege or invasion of the right of privacy shall be permitted against any physician, hospital, clinic, or other medical institution complying with the provisions of this section. The person requesting such records and said sworn statement shall pay all reasonable costs connected therewith.

(c) In the event of any dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, or treatment, or the dates and costs of such treatment, the insurer may petition a court of competent jurisdiction to enter an order permitting such discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and it shall specify the time, place, manner, conditions, and scope of the discovery. Such court may, in order to protect against annoyance, embarrassment, or oppression, as justice requires, enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.

(d) The injured person shall be furnished, upon request, a copy of all information obtained by the insurer under the provisions of this section, and shall pay a reasonable charge, if required by the insurer.

(e) Notice to an insurer of the existence of a claim shall not be unreasonably withheld by an insured.

(7) Mental and physical examination of injured person; reports.—

(a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection insurance benefits, such person shall, upon request of an insurer, submit to mental or physical examination by a physician or physicians. The costs of any examinations requested by an insurer shall be borne entirely by the insurer. Such examination shall be conducted within the city of residence of the insured. If there is no qualified physician to conduct the examination within the city of residence of the insured, then such examination shall be conducted in an area of the closest proximity to the insured's residence. Personal protection insurers are authorized to include reasonable provisions in personal injury protection insurance policies for mental and physical examination of those claiming personal injury protection insurance benefits.

(b) If requested by the person examined, a party causing an examination to be made shall deliver to him a copy of every written report concerning the examination rendered by an examining physician, at least one of which

reports must set out the examining physician's findings and conclusions in detail. After such request and delivery, the party causing the examination to be made is entitled, upon request, to receive from the person examined every written report available to him or his representative concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered, or by taking the deposition of the examiner, the person examined waives any privilege he may have, in relation to the claim for benefits, regarding the testimony of every other person who has examined, or may thereafter examine, him in respect to the same mental or physical condition. If a person unreasonably refuses to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits.

(8) With respect to any dispute under the provisions of ss. 627.730–627.741 between the insured and the insurer, the provisions of s. 627.428 shall apply.
Amended by Laws 1976, c. 76–266, § 4; Laws 1977, c. 77–468, § 33, eff. Sept. 1, 1977; Laws 1978, c. 78–374, § 3, eff. Jan. 1, 1979; Laws 1979, c. 79–40, § 114, eff. July 1, 1979; Laws 1979, c. 79–164, § 165, eff. Aug. 5, 1979; Laws 1979, c. 79–400, § 239, eff. Aug. 5, 1979; Laws 1980, c. 80–206, § 3, eff. June 25, 1980.

627.737 Tort exemption; limitation on right to damages

(1) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by §§ 627.730–627.741, and every person or organization legally responsible for his acts or omissions, is hereby exempted from tort liability for damages because of bodily injury, sickness, or disease arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state to the extent that the benefits described in § 627.736(1) are payable for such injury, or would be payable but for any exclusion or deductible authorized by §§ 627.730–627.741, under any insurance policy or other method of security complying with the requirements of § 627.733, or by an owner personally liable under § 627.733 for the payment of such benefits, unless a person is entitled to maintain an action for pain, suffering, mental anguish, and inconvenience for such injury under the provisions of subsection (2).

(2) In any action of tort brought against the owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by ss. 627.730–627.741, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation, or use of such motor vehicle only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scaring or disfigurement.

(d) Death.

Amended by Laws 1976, c. 76–266, § 5; Laws 1978, c. 78–374, § 4, eff. Jan. 1, 1979.

(3) When a defendant, in a proceeding brought pursuant to ss. 627.730–627.741, questions whether the plaintiff has met the requirements of s. 627.737(2), then the defendant may file an appropriate motion with the court, and the court shall, on a one-time basis only, 30 days before the date set for the trial or the pre-trial hearing, whichever is first, by examining the pleadings and the evidence before it, ascertain whether the plaintiff will be able to submit some evidence that the plaintiff will meet the requirements of s. 627.737(2). If the court finds that the plaintiff will not be able to submit such evidence, then the court shall dismiss the plaintiff's claim without prejudice.
Added by Laws 1976, c. 76–266, § 5.

(4) In any action brought against an automobile liability insurer for damages in excess of its policy limits, no claim for punitive damages shall be allowed.

Added by Laws 1977, c. 77–468, § 35, eff. July 1, 1977.

627.7372 Collateral sources of indemnity

(1) In any action for personal injury or wrongful death arising out of the ownership, operation, use, or maintenance of a motor vehicle, the court shall admit into evidence the total amount of all collateral sources paid to the claimant, and the court shall instruct the jury to deduct from its verdict the value of all benefits received by the claimant from any collateral source.

(2) For purposes of this section, "Collateral sources" means any payments made to the claimant, or on his behalf, by or pursuant to:

(a) The United States Social Security Act;[1] any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits.

(b) Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits except life insurance benefits available to the claimant, whether purchased by him or provided by others.

(c) Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

* * *

(d) Any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

(3) Notwithstanding any other provision of this section, benefits received under the Workers' Compensation Law shall not be considered a collateral source.

Added by Laws 1977, c. 77-468, § 34, eff. July 1, 1977. Amended by Laws 1978, c. 78-374, § 5, eff. Jan. 1, 1979; Laws 1979, c. 79-40, § 115, eff. July 1, 1979.

627.7375 Renumbered as 817.234 and amended by Laws 1979, c. 79-81, § 1, eff. Oct. 1, 1979

627.7377 Physical damage deductibles

In providing collision coverage for physical damage to an insured's motor vehicle, insurers shall make available, upon request, deductibles of $500, or any other amount for which the parties may contract, subject to the insurer's filed rating plan.

Added by Laws 1976, c. 76-266, § 11.

Laws 1976, c. 76-266, § 16, provides:
"This act shall take effect October 1, 1976, and shall apply to all claims arising out of accidents occurring on or after said date."

Reviser's Note—1976:
This section was created subsequent to the enactment of ch. 76-168, and is therefore presumed to be excluded from the blanket repeal of ch. 627 by that act. [See the italicized note at the head of this chapter.]

627.7378 Comprehensive coverage; deductible not to apply to motor vehicle glass

The deductible provisions of any policy of motor vehicle insurance providing comprehensive coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy.

Added by Laws 1979, c. 79-241, § 1, eff. Oct. 1, 1979.

Library References
Insurance ⇨435.18(1).
C.J.S. Insurance § 829.

627.738 Property damage, basic or full coverage; tort liability

(1) The owner of a motor vehicle as defined in § 627.732 is not required to maintain security with respect to property damage to his motor vehicle, but may elect to purchase either full or basic coverage for accidental property damage to his motor vehicle.

(2) Every insurer providing security under §§ 627.730–627.741 shall offer the owner either full or basic coverage for accidental property damage to the insured motor vehicle, as follows:

(a) Full coverage shall provide insurance without regard to fault for accidents occurring within the United States or its territories or possessions or Canada.

(b) Basic coverage shall be limited to insurance against damage caused by the fault of another resulting from contact between the insured vehicle and a vehicle with respect to which security is required under §§ 627.730–627.741.

(3) The insurer may include within the terms and conditions applicable to full or basic coverage such other provisions as it customarily applies to collision coverage for private passenger automobiles in other states, including deductibles without limitation.

(4) Every owner, registrant, operator, or occupant of a motor vehicle with respect to which security has been provided as required by §§ 627.730–627.741, and every other person or organization legally responsible for the acts or omissions of such an owner, registrant, operator, or occupant, is hereby exempted from tort liability for damages because of accidental property damage to motor vehicles arising out of the ownership, operation, maintenance, or use of such motor vehicle in this state. However, a person shall not be exempt from such liability if he was operating the motor vehicle without the express or implied consent of its owner or an insured under the owner's policy or if his willful and wanton misconduct was the proximate cause of the accident. This exemption applies only with respect to property damage to motor vehicles subject to §§ 627.730–627.741 but shall not be applicable as to a motor vehicle damaging a parked vehicle.

(5) Notwithstanding subsection (4), an owner who has elected not to purchase insurance with respect to property damage to his motor vehicle may maintain an action of tort therefor against the owner, registrant, operator or occupant of a motor

vehicle causing such damage if such damage exceeds five hundred and fifty dollars, and the insurer of an owner who has elected to purchase full or basic collision coverage for his motor vehicle shall have the right, if the damage to such motor vehicle exceeds the above amount, to recover the amount of the benefits it has paid and, on behalf of its insured, any deductible amount from the insurer of the owner, registrant, operator, or occupant of a motor vehicle causing such damage. The issues of liability in such a case and the amount of recovery shall be decided on the basis of tort law, and shall be determined by agreement between the insurers involved or, if they fail to agree, by arbitration.

627.739 Personal injury protection; optional limitations; deductibles; optional methods of payment for repair work [Repealed by Laws 1976, c. 76-168, § 3, eff. July 1, 1982. See § 11.61]

In order to prevent duplication with other private or governmental insurance or benefits for senior citizens and others with access to such insurance or benefits, each insurer providing the coverage and benefits described in s. 627.736(1) shall offer to the named insureds modified forms of personal injury protection as described in this section. Such election may be made by the named insured to apply to the named insured alone, or to the named insured and dependent relatives residing in the same household. Any person electing such modified coverage or subject to such modified coverage, as a result of the named insured's election, shall have no right to claim or to recover any amount so deducted from any owner registrant, operator, or occupant of a vehicle or any person or organization legally responsible for any such person's acts or omissions who is made exempt from tort liability by ss. 627.730-627.741. Premium reductions for each modification or combination of modifications shall be adequate to recognize the reduction in hazard and shall be subject to the approval of the Department of Insurance.

(1) Insurers shall offer to each applicant and to each policyholder, upon the renewal of an existing policy, deductibles, in amounts of $250, $500, $1,000, $2,000, $3,000, $4,000, $6,000, and $8,000, said amount to be deducted from the benefits otherwise due each person subject to the deduction, and shall explain to each applicant or policyholder that if they have coverage under private or governmental disability plans, they may avail themselves of deductibles or other modifications as provided in subsections (1), (2), and (3).

(2) Insurers shall offer coverage wherein at the election of the named insured all benefits payable under 42 U.S.C. s. 1395, the federal "Medicare" program, or to active or retired military personnel and their dependent relatives shall be deducted from those benefits otherwise payable pursuant to s. 627.736 (1).

(3) Insurers shall offer coverage wherein at the election of named insured the benefits for loss of gross income and loss of earning capacity described in s. 627.736(1)(b) shall be excluded.

(4) Insurers shall offer, at the election of the named insured, one of the following options:

(a) Either a direct payment to the policyholder or a payment to any person, corporation, association, or other business entity which performs repair work upon the motor vehicle, or a combination of the foregoing; or

(b) A payment to any person, corporation, association, or other business entity performing repair work upon the motor vehicle, where the payee is under contract with the insurer to perform such work at stipulated rates which are no greater than 85 percent of prevailing rates for similar work within the county where the payee performs the work upon the motor vehicle.

(5) Each insurer may prepare and distribute to each of its policyholders a listing of all business entities under contract with the insurer to perform motor vehicle repair work at the rates described in paragraph (4)(b) of this section. The listing shall include a clear and plain explanation of the options provided as required by this section, and shall further state that if the policyholder elects to have required motor vehicle repair work done by any such business entity, the rates stipulated in the contract with the insurer shall be all of the consideration which the business entity will demand for such work and shall be paid by the insurer.

(6) Insurers may offer coverage wherein, at the election of the named insured, medical services shall be limited to specified medical providers, including hospitals, which specified medical providers may be health maintenance organizations, as provided in chapter 641, part II.

Amended by Laws 1976, c. 76-266, § 6; Laws 1977, c. 77-468, § 37, eff. Sept. 1, 1977; Laws 1978, c. 78-374, § 6, eff. Jan. 1, 1979.

627.740 Tort claims against persons not subject to §§ 627.730–627.741

Notwithstanding any other provision of §§ 627.730–627.741, the rights of residents of this state to claim damages in tort shall not be diminished when such residents are involved in motor vehicle accidents with persons not required to provide security under §§ 627.730–627.741.

627.7403 Mandatory joinder of derivative claim

In any action brought pursuant to the provisions of s. 627.737 claiming personal injuries, all claims arising out of the plaintiff's injuries, including all derivative claims, shall be brought together, unless good cause is shown why such claims should be brought separately.

Added by Laws 1977, c. 77–468, § 38, eff. July 1, 1977.

Library References
Action ⇐48(2).
C.J.S. Actions § 92.

627.7405 Subrogation

Notwithstanding any other provisions of ss. 627.730–627.741, any insurer providing personal injury protection benefits on a private passenger motor vehicle shall have, to the extent of any personal injury protection benefits paid to any person as a benefit arising out of such private passenger motor vehicle insurance, a right of reimbursement against the owner or the insurer of the owner of a commercial motor vehicle, if the benefits paid result from such person having been an occupant of the commercial motor vehicle or having been struck by the commercial motor vehicle while not an occupant of any self-propelled vehicle.

Added by Laws 1978, c. 78–374, § 7, eff. Jan. 1, 1979.

627.741 Implementation of §§ 627.730–627.741 [Repealed by Laws 1976, c. 76–168, § 3, eff. July 1, 1982. See § 11.61]

The Department of Insurance shall adopt rules and regulations necessary to implement the provisions of ss. 627.730–627.741.

Amended by Laws 1976, c. 76–266, § 13.