

Medical Malpractice Law in Virginia

Virginia faced a medical malpractice crisis in the mid-1970s that gave rise to the Virginia General Assembly passing The Medical Malpractice Act in 1976. This landmark legislation included a provision to establish a medical malpractice cap, which was initially set at \$750,000. The rationale articulated by the General Assembly for passage of the legislation centered on the need to preserve the availability of medical malpractice insurance at an affordable price to health care providers, in order to ensure a stable health care environment for the citizens of the Commonwealth.

The medical malpractice cap was designed as a total cap, meaning it applies to all damages (pain and suffering; medical bills; wages; interest; and punitive damages). The cap applies to all defendants collectively, not per defendant. The cap was successful in achieving its purpose of availability and affordability. Subsequently, the medical malpractice cap was increased in legislation passed in 1983 to \$1 million.

The last full fledged battle on the medical malpractice cap occurred during the 1999 General Assembly session when the Virginia Trial Lawyers Association launched a full scale attack on the medical malpractice cap. At the end of the day, the General Assembly advanced legislation to increase the cap from \$1 million to \$1.5 million effective August 1, 1999 and would thereafter prescribe annual incremental increases to the cap through July 1, 2008 when the cap would mature to \$2 million. After July 1, 2008, the \$2 million cap will continue to exist absent legislative change.

In addition to a comprehensive cap on medical malpractice damages, Virginia has several reforms in place that contribute to the Commonwealth's stable liability market. Virginia's medical malpractice law includes:

- **Aggregate Cap on Damages:**
Virginia's aggregate cap matured at \$2 million on July 1, 2008 after ten years of annual increases. The cap applies to both economic and non-economic damages, and has been upheld by the courts. Six other states have aggregate caps on damages. Virginia's is the highest.
- **Cap on Punitive Damages:**
Virginia has a cap of \$350,000 on punitive ("pain and suffering") damages.
- **Statutes of Limitations:**
The general statute of limitations for medical malpractice cases is within two years from the date the cause of action accrued. Exceptions are noted for the following actions: foreign objects and concealment; wrongful death; minors; and incapacitation.ⁱ
- **Contributory Negligence:**
Virginia recognizes the doctrine of contributory negligence in medical malpractice cases. A plaintiff's contributory negligence may bar his recovery entirely, but it must be concurrent with the defendant's negligence.ⁱⁱ



- **Periodic Payments:**
Periodic payments and structured settlements are allowed; however, no requirement exists for such payments in personal injury cases. ⁱⁱⁱ
- **Medical Malpractice Review Panels:**
Any party may request a review by a medical malpractice review panel made up of two attorneys, two health care providers, and one circuit court judge. The panel must issue a written opinion stating whether or not the defendant met the standard of care and, if not, whether it was the proximate cause of damages. The panel's opinion may be admissible as evidence, but shall not be conclusive. ^{iv}
- **Binding Arbitration:**
Parties may agree to binding arbitration in advance of treatment, but the plaintiff must have the ability to opt out of the proceeding within 60 days after termination of treatment. ^v
- **Expert Testimony Requirements:**
An expert witness shall testify as to the standard of care. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action. Physicians licensed in Virginia or another state with similar educational and examination requirements are presumed qualified. ^{vi}
- **Certificate of Merit:**
When the plaintiff files a claim, the plaintiff must certify that they have contacted an expert who has determined that, based upon a reasonable understanding of the facts, the defendant deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. The expert does not need to meet the same qualifications as an expert who testifies at trial. ^{vii}
- **Immunities:**
Physicians employed by the state may be subject to the immunity limitations of the Commonwealth, depending upon the degree of control exercised over them. These limitations dictate that no claimant may recover more than \$100,000 or the limits of applicable insurance, whichever is greater. This limitation will never be extended to independent contractors. ^{viii}

Immunity is available to licensed physicians who act in good faith and absent gross negligence or willful misconduct when rendering emergency obstetrical care or assistance to a female in active labor who has not previously been cared for in connection with the pregnancy by such person or by another professionally associated with such person and whose medical records are not reasonably available to such person. In addition, physicians are immune from liability when serving in certain advisory capacities within Virginia's emergency services infrastructure. ^{ix}

- **Patient Compensation Funds:**

The Birth-Related Neurological Injury Fund (BIF) provides for lifetime medical expenses plus 50 percent of the Virginia average weekly wage after the age of 18 for those infants who suffer permanent, disabling damage to the brain or spine caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation. This no-fault program is the exclusive remedy for such infants and their parents against participating physicians and hospitals, who must pay an annual assessment.

These reforms have resulted in a liability climate that discourages frivolous lawsuits while fairly compensating the plaintiffs in medical malpractice claims.

ⁱ Va. Code Ann. §§ 8.01-243 and 243.1

ⁱⁱ *Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002); *Ponirakis v. Choi*, 262 Va. 119, 546 S.E.2d 707 (2001).

ⁱⁱⁱ Va. Code Ann. § 8.01-424

^{iv} VA Code § 8.01-581.1 et al.

^v VA Code § 8.01-581.12

^{vi} VA Code § 8.01-581.20

^{vii} VA Code § 8.01-20.1; § 8.01-50.1; and § 16.1-83.1

^{viii} Va. Code Ann. § 8.01-195.3; *Lohr v. Larsen*, 246 Va. 81, 431 S.E.2d 642, (1993); *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001)

^{ix} Va. Code Ann. § 8.01-225