

PROVING DAMAGES IN WRONGFUL DEATH AND PERSONAL INJURY ACTIONS IN VIRGINIA

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I. WRONGFUL DEATH DAMAGES

A. Amount of Damages

Va. Code § 8.01-52 provides that damages may include:

1. Sorrow, mental anguish and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent.
2. Compensation for reasonably expected loss of:
 - a) Income of decedent
 - b) services, protection, care and assistance provided by decedent
3. Care, treatment, hospitalization of decedent incident to injury
4. Reasonable funeral expenses

B. Purpose of Wrongful Death Damages

To compensate the beneficiaries for the losses they suffer as a result of the death of the decedent, not to accumulate an estate for the decedent. *Carroll v. Speed*, 211 Va. 540 179 S.E.2d 620 (1971); *Conrad v. Thompson*, 195 Va. 714, 80 S.E.2d 561 (1954); *Richmond, F. & P.R.C. v. Martin*, 102 Va. 201, 203, 45 S.E. 894 (1903).

C. General Provisions

1. While § 8.02-52 broadly provides for award of damages as seems fair and just, it also requires damages sought be

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provide with reasonable certainty, and evidence which is too speculative is inadmissible. *Howell v. Cahoon*, 236 Va. 3, 8, 372 S.E.2d 134 (1988); *Cassady v. Martin*, 220 Va. 1093, 1100, 266 S.E.2d 104, 108 (1980).

2. Competent Expert Testimony to prove loss of income of and services, protection, care and assistance provided by decedent. *Va. Code* § 8.01-52.

D. Specific Damages in Wrongful Death Actions

1. Pecuniary Damages

- a. Damages may be awarded as compensation for reasonably expected loss of the income, services, protection, care and assistance provided by decedent. *Va. Code* § 8.01-52.
- b. Any pecuniary loss suffered by statutory beneficiaries is clearly a proper element of damages. *Gough v. Shaner*, 197 Va. 572, 90 S.E.2d 171 (1955).
- c. Include present and prospective loss of services, nurture and care and other advantages and benefits of a pecuniary nature which have been cut off or will probably be lost in future by reason of death of the decedent. *Pugh v. Yearout*, 212 Va. 591, 186 S.E.2d 58 (1972); *Gough v. Shaner, supra*.
- d. The jury may consider the decedent's age, earning capacity, physical and mental health and experience and habits during his expected lifetime and expected lifetime of the decedent's beneficiaries. *Graddy v. Hatchett*, 233 Va. 65, 353 S.E.2d 41 (1987); *Gough v. Shaner, supra*; *Cooke v. Griggs*, 183 Va. 851, 33 S.E.2d 764 (1945); *Ratcliffe v. McDonald*, 123 Va. 781, 97 S.E. 307 (1918).
- e. "Reasonably expected" loss of decedent's income means such loss as the beneficiaries have suffered, or might suffer. It must clearly refer to the beneficiaries as the decedent cannot expect loss of earnings after death. *Wilson v. U.S.*, 637 F.Supp. 669 (E.D. Va 1986).

2. Sorrow and Mental Anguish

- a. Damages may be awarded not only for pecuniary loss suffered by beneficiaries but also for loss of deceased's care and society and solatium for their sorrow and mental anguish. *Wilson v. Whittaker*, 207 Va. 1032, 154 S.E.2d 124 (1967).
- b. Statutory beneficiaries may recover whether or not they were dependent on the decedent. *Graddy v. Hatchett, supra*.

- c. Actual proof of suffering, sorrow and anguish is not necessary. Sorrow and mental anguish can be inferred from fact of death without other direct proof on the subject. Wrongful death action presents little threat of feigned trauma, and no evidence need be advanced to establish existence of genuine emotional distress. *Gamble v. Hill*, 208 Va. 171, 156 S.E.2d 887 (1967)
- e. Indirect physical injuries are allowed as illustration of mental anguish. *El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483 (4th Cir. 1986) ; *Hughes v. Moore*, 214 Va. 27, 197 S.E.2d 214 (1973); *Bowles v. May*, 157 Va. 419, 166 S.E. 550 (1932).
- f. The plaintiff cannot recover for the physical pain and mental anguish of the decedent. *Wilson v. Whittaker*, *supra*; *Seymour & Buford Corp. v. Richardson*, 194 Va. 709, 75 S.E.2d 77 (1953).
- g. However, mental anguish of the beneficiaries may be shown to have been increased by the mental and physical suffering of the decedent. *Virginia Iron, Coal and Coke Co. v. Odle's Adm'r.*, 128 Va. 280, 105 S.E. 107 (1920).

3. Care, Treatment and Hospitalization

Damages may be awarded for medical and hospital expenses incident to the injury and resulting in death. *El-Meswari, supra*.

4. Reasonable Funeral Expenses

Reasonable funeral expenses include recovery for a foreign burial of a foreign citizen. *El-Meswari, supra*.

E. Where Controversy About Cause of Death

If there is a divergence of opinion on whether a tortfeasor's injury was the cause of death, a plaintiff may plead in the alternative, death was caused by the injury or was not caused by the injury and proceed to trial seeking damages for wrongful death or alternatively, a survival personal injury action. *Centra Health, Inc. v. Mullins*, 277 Va. 59, 670 S.E.2d 708 (2009).

II. DAMAGES IN PERSONAL INJURY CASES

A. Damages That May Be Recovered

1. Any bodily injuries sustained and their effect on health according to degree and probably duration;
2. Any physical pain and mental anguish suffered in the past and that may reasonably expect to suffer n the future;
3. Any disfigurement or deformity and any associated humiliation or embarrassment;
4. Any inconvenience caused in the past and any that probably will be caused in the future;
5. Any medical expenses incurred in the past or reasonably expected to occur in the future;
6. Any earnings lost because of inability to work at calling;
7. Any loss of earnings and lessening of earning capacity, or either, that may reasonably be expected to sustain in the future;
8. Any property damage sustained.

See *Exxon Corp. v. Fulgham*, 224 Va. 235, 294 S.E.2d 894 (1982); *Doe v. West*, 222 Va. 440, 281 S.E.2d 850 (1981).

B. Proving Damages

Damages need not be proven with mathematical certainty. Reasonable certainty or preponderance of the evidence are the only requirements. *Bulala v. Boyd*, 239 Va. 218, 232-33, 389 S.E.2d 670, 677 (1990); *Thomas P. Barkins, Inc. v. Reynolds Associates*, 221 Va. 1128, 277 S.E.2d 222 (1981). According to *Washington Golf & Country Club, Inc. v. Briggs & Brennan Developers, Inc.*, 198 Va. 586, 592, 95 S.E.2d 233, 237-38 (1956):

“Damages are not rendered uncertain because they cannot be calculated with absolute exactness or because the consequences of the wrong are not precisely definite in pecuniary amount. Moreover, one whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by a plaintiff is not

entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. An element of uncertainty in the assessment of damages or the fact that they cannot be calculated with mathematical accuracy or with reasonable certainty or exactness is not a bar to their recovery. Nor is mere difficulty in the assessment of damages a sufficient reason for refusing them where the right to them has been established.’ 15 Am. Jur., Damages, § 21, p. 412. 15 Am. Jur., Damages, § 356, p. 795.

‘Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded.’ 5 M.J., Damages, § 13, p. 501. 5 M.J., Damages, § 19, p. 507. *White Sewing Machine Co. v. Gilmore Furniture Co.*, 128 Va. 630, 105 S.E. 134.

C. Specific Damages in Personal Injury Actions

1. Bodily Injuries

- a. In determining amount of damages to award, jury may consider bodily injury. *McGowan v. Tayman*, 144 Va. 358, 132 S.E. 316 (1926).
- b. Any damages for bodily injury are considered separately from pain and suffering or medical expenses. *Beasley v. Bosschermuller*, 205 Va. 360, 143 S.E.2d 881 (1965).
- c. If plaintiff has a pre-existing condition, the tortfeasor is responsible for recurrence or for aggravation of the condition. However, the plaintiff may not recover for the pre-existing condition. *Bradner v. Mitchell*, 234 Va. 483, 362 S.E.2d 718 (1987); *State Farm Mut. Auto Ins. Co. v. Futrell*, 209 Va. 266, 163 S.E.2d 181 (1968).
- d. Test of permanency of injury is whether plaintiff will be cured of the injury and whether it will have any disabling effects. Continuing pain, weakness and nervousness deemed sufficient residual effect to support instruction. *Allen v. Brooks*, 203 Va. 357 (1962). Plaintiff entitled to instruction on permanent disability even when treating physician did not formally pronounce residual disability was the result of the complained of fall where the testimony of

physician detailed a sequential chain of cause and effect. *Roll 'R' Rinks, Inc. v. Smith*, 218 Va. 321 (1977).

2. Pain, Suffering and Mental Anguish

- a. Pain, suffering and mental anguish may be inferred from the nature of the injury. *Bell v. Kirby*, 226 Va. 641, 311 S.E.2d 799 (1984).
- b. A per diem calculation of plaintiff's pain and suffering is not permitted in Virginia. *Reid v. Baumgarner*, 217 Va. 769, 232 S.E.2d 778 (1977). *Certified T.V. & Appliance Co. v. Harrington*, 201 Va. 109, 109 S.E.2d 126 (1959).
- c. There is no exact method by which to measure and value in monetary terms the degree of pain and anguish of a suffering human being. *Virginia Elect and Power Co. v. Dungee*, 258 Va. 235, 263, 520 S.E.2d 164, 180 (1999).

3. Disfigurement or Deformity and Any Associated Humiliation or Embarrassment

- a. If there is an existing deformity or disfigurement, no direct testimony or humiliation or embarrassment is required. *Armstead v. James*, 220 Va. 171, 257 S.E.2d 767 (1979).
- b. There is no fixed rule by which to measure a definite amount of damages for bodily disfigurement in personal injury cases. *Lilley v. Simmons*, 200 Va. 791, 108 S.E.2d 245 (1959).

4. Medical Expenses

- a. Va. Code § 8.01-413.01 creates a presumption of authenticity and reasonableness of medical bills and also provides that an expert's affidavit can be used to prove reasonableness of charges.
- b. Plaintiff's testimony alone may be used to offer medical bills, provided that the bills are regular on their face and bills appear to relate to treatment, nature and

details explained by the plaintiff. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989).

- c. If no bill has been rendered instances such as treatment by a health maintenance organization, the usual and customary fee charged for the service rendered may be established by the testimony or the affidavit of an expert having knowledge of the usual and customary fees charged for the services rendered. If the fee is to be established by affidavit, the affidavit shall be submitted to the opposing party or his attorney at least twenty-one days prior to trial. *Va. Code* § 8.01-418.01 B.
- c. Use requests for admissions or stipulation to authenticate medical expenses and bills.

5. Future Medical Expenses

- a. May be awarded if it is proven that such damages are reasonably certain to be incurred as a result of the injury.
- b. Will not be inferred from continuing problems or permanent injury. *Hailes v. Gonzales*, 207 Va. 612, 151 S.E.2d 388 (1966); *Minnix v. Hall*, 211 Va. 512, 178 S.E.2d 519 (1971).
- c. Collateral sources including reductions in face amounts of bills due to contractual agreements between providers and health benefits plans and public benefits programs such as Medicaid are not admissible into evidence. *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316, 320 (2000); *Wright v. Smith*, 641 F.Supp.2d 536 (W.D.Va. 2009).

6. Lost Earnings and Services

- a. Lost earnings may be awarded where the evidence allows a reasonable computation. *Clark v. Chapman*, 238 Va. 655, 385 S.E.2d 885 (1989); *Gwaltney v. Reed*, 196 Va. 505, 84 S.E.2d 501 (1954).

- b. Even if the plaintiff received sick pay from the employer, he is still entitled to recover for damages for lost earnings. To deprive the plaintiff of sick leave he may need in the future would be unjust. *Tallant Transfer Co. v. Bingham*, 216 F.2d 254 (4th Cir. 1954).
- a. These damages are the actual amounts of money plaintiff would have earned had he been able to continue working.
- b. If future damages are too speculative, they will not be awarded. *Howell v. Cahoon*, supra.
- c. Prospective profits or gains may be recovered if they are proven with reasonable certainty. *Landmark Comm. v. Macione*, 230 Va. 137, 334 S.E.2d 587 (1985).

7. Loss of Earning Capacity

- a. A person who has a permanent injury hindering the performance of work for which the person is qualified to perform by education, training or experience, a damage award for diminished or lost earning capacity is appropriate. *Exxon Corp. v. Fulgham*, 224 Va. 235, 294 S.E.2d 894 (1982).
- b. Although the plaintiff may be earning more post injury, the plaintiff may still be entitled to damages for the impairment of earning capacity. *Exxon Corp.*, 224 Va. at 241, 294 S.E.2d at 897. It is based upon capacity to earn, not on earnings alone. *Anthes v. Anthes*, 258 Iowa 260, 139 N.W.2d 201 (1965).
- c. Courts routinely admit evidence of numerous factors including the injured person's age, health, intelligence, capacity to work, experience, training, record of employment and future avenues of employment to establish earning capacity and changes in earning capacity. *Overstreet v. Shoney's Inc.*, 4 S.W.3d 694, 704 (Tenn.Ct.App. 1999).
- d. Self employed injured persons present special problems in establishing lost earning capacity. If the person uses a solely owned or closely held corporation or similar business entity, a defendant may claim the

individual has no loss but that any “loss” is that of the entity. See *Landmark Comm. v. Macione*, 230 Va. 137, 334 S.E.2d 587 (1985). One approach is to present the cost of hiring replacement employees or contractors as evidence of the individual’s diminished earning capacity. See *Stein on Personal Injury* §§ 6:25, 6:28, 6:30, 6:31; *Cost of Hiring Substitute or Assistant During Incapacity of Injured Party as Item of Damages in Action for Personal Injury*, 37 A.L.R.2d 364. For a discussion of methodologies of economic analysis of self employed earning capacity, see Spizman, *Loss of Self-Employed Earning Capacity*, 12 J. Legal Econ. 7 (Spring/Summer 2002).

- d. Loss of earning capacity cannot be grounded solely on statistical evidence. *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670 (1990). This rule creates difficulties in proving lost earning capacity of infants. If an infant’s lost earning capacity claim is grounded upon facts specific to the infant, a court will allow recovery for the lost earning capacity. *Musick v. Dorel Juvenile Group, Inc.*, 2011 WL 4851552, __F. Supp.2d__ (W.D. Va. 2011).

III. PROVING DAMAGES IN WRONGFUL DEATH ACTIONS

A. Mortality Tables

1. Mortality tables may be used to determine the decedent’s life expectancy.
 - a. *Va. Code* § 8.01-419 – Life Expectancy Table
 - b. The expectancy of continued life of the decedent is relevant and necessary to establish the extent of loss for decedent’s society, companionship, comfort, guidance, advice, services, protection, care and assistance set out in § 8.01-52. *Graddy v. Hatchett, supra*.
 - c. It is not essential to prove life expectancy with a mortality table. *Eisenhower v. Jeter*, 205 Va. 159, 164, 135 S.E.2d 786 (1964).

B. Expert Testimony in Proving Damages

1. Expert testimony is admissible to prove pecuniary damages under § 8.01-52.
2. Expert testimony of grief may be excluded by some courts. See *El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483 (4th Cir. 1986). But see *Samayoa v. Function Enterprises*, 1993 WL 946080, Va. Cir. (Fairfax 1993).

C. Beneficiaries' Physical Condition of Financial Status

Under the predecessor to Virginia's current wrongful death statute, the beneficiaries' physical condition or financial status is not admissible to determine damages. *Matthews v. Hicks*, 197 Va. 112, 87 S.E.2d 629 (1955); *Crawford v. Hite*, 176 Va. 69, 10 S.E.2d 561 (1960). These cases, however, recognized that such evidence would be admissible to determine apportionment of damages among the beneficiaries.

IV. PROVING DAMAGES IN PERSONAL INJURY ACTIONS

A. Proving Bodily Injuries. Both expert and lay testimony can be used to prove a condition or impairment is caused by an injury. “[G]enerally, lay testimony is admissible to prove proximate causation. *Todt v. Shaw*, 223 Va. 123, 127, 286 S.E.2d 211, 213 (1982) (lay testimony sufficient to raise a jury question even when expert testimony failed to establish causation); *Sumner v. Smith*, 220 Va. 222, 226, 257 S.E.2d 825, 827 (1979) (“[direct medical] evidence is not a prerequisite to recovery”). In *Sumner*, we held that testimony of the plaintiff, indirect medical evidence, and the reasonable inferences derived therefrom presented a jury issue as to causal connection. 220 Va. at 225-26, 257 S.E.2d at 827. See also *Gwaltney v. Reed*, 196 Va. 505, 509, 84 S.E.2d 501, 503 (1954) (plaintiff's testimony of pain occurring soon after an accident was sufficient to raise a jury question on causation). “All that is required is that a jury be satisfied with proof which leads to a conclusion with probable certainty where absolute logical certainty is impossible.” *Bly v. Southern Ry. Co.*, 183 Va. 162, 176, 31 S.E.2d 564, 570 (1944).” *Bussey v. E.S.C. Restaurants, Inc.*, 270 Va. 531, 620 S.E.2d 764 (2005). The following cases illustrate the use of lay testimony to prove causation and damages:

- *Norfolk & Western Ry. v. Chittum*, 251 Va. 408, 468 S.E.2d 877 (1996). Plaintiff's own testimony without expert testimony on breakdown of skin graft by walking on spikes is sufficient.
- *Parker v. Elco Elevator Corp.*, 250 Va. 278, 462 S.E.2d 98 (1995). Plaintiff can testify on medical treatment received and cause of his injuries. Case involved elevator fall claiming knee and back injuries which resulted in retirement from employment.
- *Pepsi-Cola Bottling Co. of Norfolk v. McCullers*, 189 Va. 89, 52 S.E.2d 257 (1949). Plaintiff and her family permitted to testify about her change in physical condition following ingestion of soft drink with mouse in bottle even after period of time physician would opine her condition was due to incident. Jury entitled to decide issue of causal connection considering both opinion of physician and the lay witnesses. The plaintiff's expert would not say whether her continued nausea, stomach upset and loss of appetite was due to the incident. The plaintiff's family testified that she continued to suffer those symptoms. Defendant had contended that such evidence must only come from experts. The Court found that changes in physical condition that are plainly observable do not require expert testimony:

“In the case before us the evidence complained of related merely to the physical condition of the plaintiff and not to the existence or character of a disease. It came from the plaintiff herself and the members of her family who had ample opportunity of judging her apparent physical condition. It requires no medical training to perceive that a person is nauseated, lacks appetite, or is losing weight. These physical characteristics are incidents of everyday life.” 189 Va. at 99, 52 S.E.2d at 261 (1949).

- *Phillips v. Stewart*, 207 Va. 214, 148 S.E.2d 784 (1966). Opinions of lay or nonexpert witnesses, who are familiar with person whose physical condition is in question, and who have had opportunity for observing him, are competent evidence on issues concerning general health, strength, and bodily vigor of such person, his feebleness or apparent illness, or change in his apparent state of health or physical condition from one time to another.
- *Sumner v. Smith*, 220 Va. 222, 257 S.E.2d 825 (1979). Allegation that m.v.a. caused back injury. Plaintiff created a jury question on causation even when testimony of physicians failed to establish causal connection and plaintiff's testimony contradicted by

hospital records. Medical evidence of causal connection not a prerequisite to recovery.

- *Todt v. Shaw*, 223 Va. 123, 127, 286 S.E.2d 211, 213 (1982). MVA allegedly causing back injury. Plaintiff and her husband permitted to testify about plaintiff's physical disability, inability to work and lost wages. Do not have to have expert medical testimony on issue of ability to perform ordinary labors as housewife, mother and waitress. Plaintiff testified still suffering from injuries at trial. This testimony supported instruction on future inconvenience etc.

B. Proving Pain, Suffering and Mental Anguish

1. Testimony of Experts and Lay Witnesses

- a. Familiar with day-to-day impact of the plaintiff's pain and suffering.
- b. Have witnesses testify to any of plaintiff's confusion, anxiety, nervousness, depression, loss of appetite and accompanying weight loss, difficulty sleeping, inability to work, or loss of concentration.

2. Evidence of Pain Method

Use evidence of type of pain suffered, duration, extent and impact on life, reflecting the pain during varying periods of plaintiff's day.

Examples: pain while working, pain during rest, pain which prohibits plaintiff from performing personal tasks.

3. Lost Wages/Earning Capacity Method

- a. Plaintiff's expected annual earnings, but for injury, must be determined for the remainder of his or her expected working life.
- b. Plaintiff's expected annual earnings, if any, with the injury must be established and then deducted from expected annual earnings to equal net annual earnings lost.

- c. Net losses must be adjusted to take into account mortality of plaintiff.
 - d. Resulting estimated future or part losses calculated by an economist or accountant will be expressed in terms of present value by discounting losses with an appropriate interest rule and taking into account inflation.
 - e. Reduction to present value is an affirmative defense and a plaintiff is not required to reduce future losses to present value. *CSX Transp., Inc. v. Casale*, 247 Va. 180, 186, 441 S.E.2d 212, 216 (1994).
 - e. Damages will be based upon gross earnings. Evidence of income taxes is not admissible to reduce the potential award for lost income. *Hoge v. Anderson*, 200 Va. 364, 106 S.E.2d 121 (1958).
 - f. A plaintiff claiming loss of income from specific employment (as opposed to diminishment of earning capacity) should be prepared to present competent evidence that but for the injury, the specific employment would have been available to the plaintiff. See *Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 148, 704 S.E.2d 83 (2011).
4. Demonstrative Evidence Method
- a. Display the injury to the jury.
 - b. Demonstrate the actual effect of injury.
 - c. Use anatomical charts and models, diagrams, photographs, motion pictures, surgical hardware and prosthetic or orthopedic devices.
5. Other Evidence
- a. Medical bills constitute evidence of pain and suffering. *Barkley v. Wallace*, 593 S.E.2d 190, 267 Va. 369 (2004), withdrawn from bound volume, republished at 267 Va. 369, 595 S.E.2d 271.

C. Proving Disfigurement

1. Any damages due to disfigurement are generally a result of behavioral changes including loss of psychological, social or personal adjustment.
2. Some disfigurement may result in loss of employability and resultant loss of earnings. Use expert witnesses who can identify those jobs affected by cosmetic injuries and any resulting damages.
3. To prove any non-economic damages, use expert witness or lay witnesses who are familiar with plaintiff's pre-injury and post-injury lifestyle.
4. Consider using the plaintiff's treating physician who can provide testimony as to whether the disfigurement is permanent in nature and as to any continuing emotional problems suffered by plaintiff.
5. Focus on the plaintiff's interpersonal relationships as affected by injury, effects on plaintiff's life and sense of personhood.
6. Scars
 - a. Scars can cause loss of body function or interference in daily activities of the plaintiff.
 - b. Scars may also carry psychological loss depending on their size and location.

D. Proving Medical Expenses

1. Hospital Records
2. Physicians' Records
3. Nursing Records
4. Home Health Care Records
5. Medical Appliances Records
6. Medication Records
7. Itemized Charges

F. Proving Future Income Loss and Diminished Earning Capacity

1. Expert testimony is permitted to assist the jury in assessing future lost earnings.

- a. Experts may use mortality tables and work-life expectancy evidence. *Clark v. Chapman, supra.*
 - b. Expert testimony must be grounded in facts specific to the injured individual's history. *Vasquez v. Mabini*, 269 Va. 155, 606 S.E.2d 809 (2005); *Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 406 S.E.2d 28 (1991).
2. Evidence on the amount recoverable for future lost wages should include:
 - a. documented weekly wages
 - b. evaluation of plaintiff's current income and permanency of decrease in earning capacity
 - c. testimony from physician as to period of time in which plaintiff will not be able to work
 - d. testimony from vocational rehabilitative agent about limitations in employment and income
 - e. testimony from economist on value of future lost wages if plaintiff's injury and disability are substantial or permanent
 - f. assessment of monetary award (which will compensate for extent and length of impairment) reduced to its present worth
 3. Lost benefits include bonuses, commissions, opportunities for overtime and pension contributions.

G. Pre-Judgment Interest

1. It is within the discretion of the jury to award pre-judgment interest not to exceed the judgment rate of interest. *J.W. Creech, Inc. v. Norfolk Air Conditioning Corp.* 237 Va. 320, 377 S.E.2d 605 (1989)
2. A defendant may argue pre-judgment interest can only be awarded on the liquidated damages and therefore no prejudgment interest should be awarded for non-economic damages. See *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106, 126, 501 S.E.2d 148, 160 (1998).

V. SELECTED METHODS OF PROVING DAMAGES

A. Demonstrative Evidence

1. The Supreme Court of Virginia has traditionally admitted illustrative evidence. See e.g. *Muhammad v. Commonwealth*, 269 Va. 451, 519, 619 S.E.2d 16, 55 (2005); *Moore v. Warren*, 203 Va. 117, 122 S.E.2d 879 (1961); *Peoples v. Commonwealth*, 147 Va. 692, 137 S.E. 603 (1927); *Curtis v. Commonwealth*, 3 Va.App. 636, 352 S.E.2d 536 (1987).

- a. Models
- b. Sketches
- c. Maps

See e.g. *Barber v. Commonwealth*, 206 Va. 241, 142 S.E.2d 484 (1965); *Anchor Motor Freight, Inc. v. Paul*, 198 Va. 480, 95 S.E.2d 179 (1956).

2. It is usually clear to the jury that this evidence is only a general representation or explanatory device and little prejudice will result in its use. C. Friend, *Evidence in Virginia*, § 13-11 at 537 (6th Ed. 2003).
3. X-rays have been held admissible provided the proponent demonstrates the following:
 - a. X-rays are of the plaintiff.
 - b. taken by a competent technician.
 - c. accurately portray condition of person's body.

See *Lugo v. Joy*, 215 Va. 39, 205 S.E.2d 658 (1974).
Meade v. Belcher, 212 Va. 796, 188 S.E.2d 211 (1972).

4. Scars may also be shown to the jury to demonstrate bodily injury.

B. Photographs

1. Generally admissible in trial. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert denied*, 451 U.S. 1011 (1981).
2. Must be relevant to a material issue in the case. *Wright v. Kelly*, 203 Va. 135, 122 S.E.2d 670 (1961). In *Kelly*, a wrongful death action, the Supreme Court reversed the trial court's decision to admit into evidence a photo of the deceased child stating "it was not material or relevant to the issues being tried". This case illustrates the importance of always laying a foundation linking the photo to one of the elements of claimed damages.
3. Must accurately represent what witness observed. *Bailey v. Commonwealth*, 259 Va. 723, 738, 529 S.E.2d 570, 579 (2000).
4. Cannot be unduly prejudicial. *Wright v. Kelly, supra.* (those that are calculated to arise sympathies or prejudices of jury are properly excluded).
5. Purposes of Photographic Evidence:
 - a. Illustrate testimony of witness. *Bailey v. Commonwealth*, 259 Va. 723, 738, 529 S.E.2d 570, 579 (2000).
 - b. Direct evidence of an issue in the case. *Bailey, supra.* This purpose is supported by the silent witness rule where photographic evidence is held to be sufficient to speak for itself without support of oral testimony.
6. Graphic Medical Testimony

Where bodily injuries must be described by graphic medical testimony, the Supreme Court of Virginia seems ready to admit photographs that provide corroboration and amplification of testimony. *Juniper v. Commonwealth*, 271 Va. 362, 626 S.E.2d 383 (2006); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). *Smith v. Commonwealth*, 207 Va. 459, 150 S.E.2d 545 (1966); *Westry v. Commonwealth*, 206 Va. 508, 144 S.E.2d 427 (1965).

7. Wrongful Death Cases

In wrongful death cases photographs can be effective to show the loss to the statutory beneficiary of the care and attention of the decedent.

Examples: show a photograph of the decedent playing catch with his son, coaching a little league game, or teaching his daughter how to swim.

C. Day-in-the-Life Films

A Admissibility of Day-in-the-Life Films. For a thorough exposition, see *Using or Challenging a "Day-in-the-life" Documentary In a Personal Injury Lawsuit* 40 AMJUR TRIALS 249.

From: Funk, et. al., *Admissibility of "Day in the Life" Films in Virginia*, 18 U.Rich.L.Rev. 751 (1984).

1. Purposes of Day-in-the Life Films
 - a. These films serve as illustrations of the expert testimony that will be presented to the jury.
 - b. They fill evidentiary gaps, showing the plaintiff in a typical day and showing the jury the constant care needed and constant struggles, tedium and frustration of performing simple, routine activities.
2. Examples of Cases Using Day-in-the-Life Films
 - a. *Grimes v. Employers Mutual Liability Insurance Co.*, 73 F.R.D. 607 (D. Alaska 1977) – in personal injury action arising from an industrial accident. Plaintiff was allowed to use day-in-the-life film to portray nature and extent of damages.
 - b. *Pisel v. Stamford Hospital*, 423 N.Y.S.2d 694 (1979), aff'd, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981) – medical malpractice case in which film was admitted to show decedent in her daily routine as a patient in the hospital.
 - c. *Capara v. Chrysler Corp.*, 423 N.Y.S.2d 694 (1979), aff'd, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d

251 (1991) – products liability case in which film was admitted to illustrate injuries suffered by quadriplegic in auto collision.

3. Laying the Proper Foundation
 - a. Relevance to the litigation
 - 1) Pain and Suffering
 - 2) Deprivation of Enjoyment of Life
 - 3) Extent of Injury
 - b. Authentication
 - 1) testimony of uninterested witness present during the filming
 - a) identify persons involved in production
 - b) testify that film accurately represents that which proponent is attempting to portray.
 - c) contents equal typical day in plaintiff's life
 - d) amount of staging, rehearsal was minimal.
 - c. Make sure defense counsel has opportunity to view entire film prior to trial to demonstrate good faith and nullify any unfair surprise arguments.
4. Handling Objections to Day-in-the-Life Films
 - a. Prejudicial Content
 - 1) Some courts have excluded day in the life films on the basis that the films contain footage depicting expressions and utterances of pain. e.g. *Peters v. Hockley*, 53 P.2d 1059 (Or. 1936). *Butler v. Chrestman*, 264 So.2d 812 (Miss. 1972).
 - 2) Pay attention to the contents of the film, being careful to exclude expressions of pain. A graphic portrayal is permissible if the footage illustrates the injury in an informative manner. *Capara, supra*.

- 3) Also allow defense to view the film completely before trial. That way, any prejudicial matter can be deleted before trial.
 - 4) Request a pre-trial hearing to determine the admissibility of the film. See *Grimes, supra*.
- b. Cumulative Evidence
- 1) An objection of cumulative evidence states that a presentation of such evidence will only delay the proceeding without adding anything of substantive value. This objection frequently occurs when plaintiff attempts to offer a film after having already presented substantial testimony regarding physical condition. *Grimes, supra; Butler v. Chrestman, supra; Capara, supra*.
 - 2) Courts have generally held that films are only cumulative of previously introduced photographic evidence. *Grimes, supra*; But see *Balian v. General Motors*, 269 A.2d 317, 324 (1972) (films per se cumulative).
 - 3) Courts have generally held the films not to be cumulative of medical testimony because the films illustrate the testimony and demonstrate the impact of injury on plaintiff's life. *Grimes, supra; Capara, supra*.
 - 4) Consider introducing only necessary medical testimony prior to introduction of the film. Additional medical testimony can always be introduced later. 18 U.Rich.L.Rev. 751 at 763, n. 92 (1984).
- c. Hearsay
- 1) The objection: nonverbal assertive conduct on part of plaintiff offered to show truth of its contents, to demonstrate plaintiff's injuries. See *Foster v. Crawford Shipping Co.*, 496 F.2d 788, 791 (3d Cir. 1974) (film was assertive conduct

because it had “communicative content other than merely pictorial”).

- 2) Arguments against hearsay objections:
 - a) The nature of the film renders the conduct nonassertive. The recorded events are designed to represent a routine day of the plaintiff. There is no implied assertion to be derived from viewing everyday activities.
 - b) The film does not suffer from traditional hearsay infirmities, (i.e. inability to confront or cross-examine, speaker was not under oath at the time statement was made). The plaintiff, film-maker and others involved in the film are available at trial to be cross-examined under oath about the film. Therefore, the traditional risks of hearsay evidence are not present.
 - c) Film is being offered not for the truth of the matter asserted, but for the narrow purpose of illustrating prior testimony.
- 3) Even if the court finds that the day in the life film is hearsay, it can be admitted under an exception to the hearsay rule. Example: present bodily condition.

5. Admissibility in Virginia. Although there is not Virginia Supreme Court decision addressing the issue of day in the life films, analogies can be drawn from existing authority involving similar evidence. A plaintiff can argue for the admission of day in the life films based on the Court’s views on:

- a. Admissibility of Illustrative Evidence. See e.g. *Moore v. Warren*, 203 Va. 117, 122 S.E.2d 879 (1961); *Peoples v. Commonwealth*, 147 Va. 692, 137 S.E. 603 (1927).
- b. Use of Photographs at Trial. See e.g. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

- c. Use of Videotapes in Criminal Trials. See e.g. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979).

Note: The Virginia Supreme Court adheres to the general rule that admissibility of demonstrative evidence rests to the sound discretion of the trial court.

Mackall v. Commonwealth, 236 Va. 240, 254, 372 S.E.2d 759, 768 (1988), *cert. denied*, 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989).

Virginia Cases: *Talbot v. Martin*, 6 Va. Cir. 165, No. LH45 (Cir. Ct. City of Richmond, Va. Sept. 1984) (plaintiff's counsel used day in the life film successfully).

B. Deciding Whether to Use a Day in the Life Film

From: William S. Bailey, *Making the Most of Day-in-the-Life Films*. 44 Trial 28 (1994).

1. The lawyer must consider whether a video will be more effective than live testimony in the particular case. Use of a day in the life video may limit the number and scope of live witnesses who can testify on the plaintiff's quality of life.
2. The lawyer needs to consider the personal biases of the jurors against the injury victims and their lawyers when considering how and whether to use a day in the life film.
3. Using a videotape is effective if the plaintiff's injuries or condition is so severe that seeing the victim in the courtroom would shock the jury.
 - a. The lawyer should ask: "Would seeing the plaintiff in the courtroom make jurors so uncomfortable that they would revolt against their natural sympathies and resent the plaintiff's lawyer for making them this uncomfortable?"
 - b. Consider how much uncomfortableness and stress you are willing to put a jury through, remembering that each juror has a point of numbness where the shock wears off and they become used to plaintiff's condition.

Example: Wheeling a plaintiff who is hooked up to a respirator through the courtroom on a stretcher is probably too much for a jury to handle.

C. Presenting the Day-in-the-Life Film

1. Select only those details that demonstrate the reality of the plaintiff's limitations.
2. Use understatement to allow the jurors to use their imaginations to fill in the gaps.
 - a. Show injuries and damages indirectly, avoiding the obvious.
 - b. Understate the horror of what has happened to the plaintiff. This avoids feeding any jury biases that lawyers are manipulative.
 - c. Avoid presenting a "poor me" video and use instead a "before" video depicting the plaintiff's high energy, active lifestyle before her injuries.
3. The length of the video is important.
 - a. Too much of the same thing may condition the jury and the injuries and limitations of the plaintiff may become more acceptable to the jury.
 - b. Try to keep the film shorter than 10 to 15 minutes.
 - c. If is longer than 10 to 15 minutes they jury becomes suspicious as to why.
 - 1) Is there a weakness in the case that needs to be covered up by this lengthy play for sympathy?
 - 2) The jury's sense that they are being manipulated rises as the length of the film increases.

D. Planning the Video

1. Starting planning the video as you are retained by a client with a catastrophic injury.
2. Document physical therapy of the plaintiff.

3. Document stages of recovery.
4. These provide graphic views of the pain and suffering the victim endured immediately following the accident.
5. Spend time in plaintiff's home after discharge from hospital.