SETOFF IN TORT CASES UNDER VIRGINIA CODE SECTION 8.01-35.1—FOR WHAT, WHEN, AND FOR HOW MUCH?

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On its face, the purpose[1] of Virginia Code section 8.01-35.1 is a simple one: to allow a plaintiff to compromise her claim through a release or covenant not to sue with one party willing to settle, without waiving her right to proceed against other jointly liable parties who may not wish to settle.[2] One of the main provisions of section 8.01-35.1 is to provide the nonsettling tort defendant with a right to a setoff against any amount recovered against him in the amount of the settlement.[3]

Presumably, the intention behind section 8.01-35.1 was to simplify matters, increase judicial economy, and to avoid unnecessary litigation by encouraging settlement.[4] Indeed, it seems like it should be simple enough: the plaintiff sues Alleged Joint Tort-feasors A and B, after which Plaintiff settles with Tort-feasor A for $X and proceeds with her claim against Tort-feasor B. Both the Plaintiff and Tort-feasor B should know that any judgment against Tort-feasor B should be reduced by $X. Unfortunately, as is often the case, things are much easier in theory than in real life. Thus, what many Virginia practitioners are finding is that, instead of simplicity, predictability, and efficiency, cases with section 8.01-

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1 The General Assembly amended Virginia Code § 8.01-35.1 to broaden that provision's reach from covering tort injuries only to covering any and all injuries "to a person or property" and removed the limiting tort language. *See* 2007 House Bill 1797, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?071§um+HB1797. This article addresses § 8.01-35.1 only with regard to claims sounding in tort.

2 *See* Hayman v. Patio Prods., Inc., 226 Va. 482, 487, 311 S.E.2d 752, 755 (1984). Before the General Assembly enacted § 8.01-35.1 in 1979, "a release of, or an accord and satisfaction with, one of several joint tort-feasors operated as a release of all." *Id.* (citing Wright v. Orlowski, 218 Va. 115, 235 S.E.2d 349 (1977)). This rule applied even when a release expressly provided that it did not release other tort-feasors. *Id.* at 486, 311 S.E.2d at 755 (citing Shortt v. Hudson Supply Co., 191 Va. 306, 60 S.E.2d 900 (1950); Ruble v. Turner, 12 Va. (2 Hen. & M.) 38 (1808)). "[T]his is a rule of law, the operation of which the tortfeasor cannot defeat by a unilateral reservation of rights." *Wright*, 218 Va. at 120, 235 S.E.2d at 353.

3 VA. CODE ANN. § 8.01-35.1(A)(1).

4 *See Hayman*, 226 Va. at 487, 311 S.E.2d at 752 ("[T]he legislative intent, as shown by the statutory language, was to promote the use of a covenant not to sue by permitting payment thereunder and discharge of one joint tort-feasor without causing the covenant to effect the release of the other joint tort-feasors.").

35.1 set-off issues often bring confusion, complication, and even abuse of this statutory provision.

The purpose of this article is to examine some of the nuances of section 8.01-35.1 and to explore some of the gray areas and ambiguities of that statute. By identifying where some of the trouble spots lie, the defense bar may be able to answer the questions of whether anything can and should be done about those trouble spots, and, if so, what these actions should be.

I. For What?

The first question when looking at a possible section 8.01-35.1 set-off issue should be, does the set-off provision even apply? In other words, was the plaintiff's settlement with a third party "for the same injury to a person or property, or the same wrongful death" for which she is now suing your client? If it was, then your client and the settling party are alleged joint tort-feasors or jointly liable parties and the set-off provision should apply. However, this question of "what is the same injury" is sometimes easier asked than answered.

The Supreme Court of Virginia has often used the term "single indivisible injury" when discussing who will be jointly liable for the "same injury" under section 8.01-35.1.[5] For instance, in *Sullivan v. Robertson Drug Co.*, a physician sued a pharmacist and his pharmacy for contribution after the physician settled for $735,000 a patient's claim that he was injured from taking medication that the physician prescribed and that the pharmacist filled.[6] At the close of the evidence, the trial court instructed the jury that if it found that the pharmacist and his pharmacy were negligent in causing the patient's injuries, then the jury was to "determine how much of the amount of that settlement [was] related to [their] negligence . . . and apportion that amongst all of the wrongdoers on a pro-rata basis."[7]

The jury returned a verdict for the physician, but for only $73,500.[8] The physician appealed, arguing that the trial court erred in permitting the jury to apportion the amount of damages based on its allotment of the degree of negligence.[9] The Supreme Court agreed with the physician. "Only when there are multiple, divisible injuries covered by a compromise settlement is the finder of fact required to attempt an allocation of the amount in contribution a wrongdoer must pay for his negligent act or acts in causing one of more of those divisible injuries."[10] The Court reversed, concluding, "the record before us lacked

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[5] *See, e.g.,* Sullivan v. Robertson Drug Co., 273 Va. 84, 92, 639 S.E.2d 250, 255 (2007) ("If separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury.") (citing Maroulis v. Elliott, 207 Va. 503, 511, 151 S.E.2d 339, 345 (1966); Tazewell Oil Co. v. United Va. Bank, 243 Va. 94, 115, 413 S.E.2d 611, 622 (1992)).

[6] 273 Va. at 87-88, 639 S.E.2d at 252-53.

[7] *Id.* at 90, 639 S.E.2d at 254.

[8] *Id.*

[9] *Id.* at 91, 639 S.E.2d at 254.

[10] *Id.* at 92, 639 S.E.2d at 255.

evidence of a separate, divisible injury for which [the pharmacist] was not liable."[11] Unfortunately, the issue of whether a set of injuries comprises a "single indivisible injury" or "multiple, divisible injuries" is often a fact-specific inquiry, making it difficult to rely on precedent.

For example, one circuit court held that a plaintiff's injuries from a car crash and his later-caused injuries from medical malpractice caused by the plaintiff's treating physicians in the course of treating the original car crash injuries were the "same injury or set of injuries."[12] Therefore, each driver who caused the crash along with the treating physicians were all joint tort-feasors under section 8.01-35.1.[13]

In a slightly different legal context, the Supreme Court of Virginia reached a different result a few years later in *Powers v. Cherin*.[14] In *Powers*, the plaintiff was injured as a passenger in a car crash.[15] During her treatment for those injuries, she suffered additional medical malpractice injuries.[16] She first sued the driver, and then she amended her claim to include her treating physician.[17] Even though the plaintiff alleged that the treating physician aggravated her original injuries, in addition to causing new injuries, the Supreme Court affirmed the trial court's dismissal of the count against the treating physician on grounds of misjoinder.[18]

The Supreme Court wrote:

> Manifestly, the plaintiff's claim against [the driver] for negligent operation of an automobile does not arise out of the same transaction or occurrence as the plaintiff's claim against [her physician] for medical malpractice. The difficulty with allowing joinder of these causes of action is demonstrated when one focuses on the fact that the plaintiff seeks a joint and several recovery for separate injuries caused in the motor vehicle accident, for which [the physician] cannot be liable, and for separate injuries for medical malpractice, for which [the defendant-driver] cannot be liable.[19]

Given the fact that the plaintiff in *Powers* alleged both aggravation of the original injuries as well as infliction of distinct, new injuries by her treating physician, it is not difficult to see why the Supreme Court reached the result it did for the purposes of that action. Also, the Court conducted its analysis not under

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[11] *Id.* at 93, 639 S.E.2d at 256.

[12] Courtney v. Fogelson, 1989 WL 646377 (Richmond Cir. Ct. 1989).

[13] *Id.*

[14] 249 Va. 33, 37, 452 S.E.2d 666, 669 (1995).

[15] *Id.* at 35-36, 452 S.E.2d at 668.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 36-38, 452 S.E.2d at 668-69.

[19] *Id.* at 37, 452 S.E.2d at 669.

section 8.01-35.1, but under section 8.01-6 instead. Nonetheless, it is easy to see how a plaintiff may try to rely on the *Powers* ruling to argue that, since an original injury and a later distinct or aggravated injury caused by medical malpractice are not part of the "same transaction or occurrence," then they likewise cannot be the "same injury" for purposes of section 8.01-35.1. In other words, if the tort-feasors cannot be joined in the same action, then they cannot be "joint tort-feasors" liable for the "same injury."

Indeed, it may not always be clear where the "joint" line should be drawn between alleged tort-feasors. In the automotive products liability context, at least, the ruling in *Cauthorn v. British-Leyland, U.K., Ltd*.[20] provides a sound result and, it is hoped, additional helpful precedent.

In *Cauthorn*, the minor plaintiff suffered injuries in a car crash.[21] Her guardian first settled with the driver under his insurance policy before filing a products liability action against the automobile manufacturer, the tire manufacturer, and the dealer, alleging negligence and breach of warranty.[22] In resolving whether the settlement with the driver's insurance company released the plaintiff's claims against the products defendants, the court explained, "It is not the relationship of the several wrongdoers among themselves, which is the foundation for the rule that a release of one wrongdoer releases all others from liability for the same wrong, it is the fact that the injured party is entitled to *but one satisfaction for the same cause of action*."[23] The court added:

> In this case, the injuries complained of are those for which the compromise settlement provided compensation. [The plaintiff] sustained *injuries* which, although they *may have had more than a single cause*, constituted *a single indivisible injury*. Her settlement with and release of the insurance companies and their insureds constituted an accord and satisfaction of her cause of action for her single indivisible injury. As such, this release also released all other parties allegedly responsible for her injuries.[24]

Cauthorn is important because it specifically describes a set of injuries as one "single indivisible injury." Although *Cauthorn* was decided based on law predating section 8.01-35.1, its holding with regard to what is a single indivisible injury in the products liability context should still be good law.[25] However, in

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[20] 233 Va. 202, 355 S.E.2d 306 (1987).

[21] *Id*. at 203-04, 355 S.E.2d at 307.

[22] *Id.*

[23] *Id.* at 205, 355 S.E.2d at 308 (emphasis added); *see also* Cox v. Geary, 271 Va. 141, 147-48, 624 S.E.2d 16, 19 (2006) ("It is a generally recognized principle that there can be only one recovery of damages for a single wrong or injury."); McLaughlin v. Siegel, 166 Va. 374, 377, 185 S.E. 873, 874 (1936) ("the injured party is entitled to but one satisfaction for the same cause of action").

[24] *Id.* (emphases added).

[25] *But see* Benitez v. Ford Motor Co., 69 Va. Cir. 323 (Fairfax County 2005) (court declining to follow *Cauthorn* because it predated § 8.01-35.1).

actions dealing with multiple vehicle collisions separated by even a small period of time, the determination of whether there is one single indivisible injury or set of injuries as opposed to multiple divisible injuries is less clear and will depend on a number of facts, including the time between the occurrence of plaintiff's injuries, the number of injuries she sustains, the ability to attribute any specific injury to a specific cause, the number of alleged tort-feasors, and even how the plaintiff pursues her claims and offers her proofs.[26]

II. WHEN?

Under section 8.01-35.1, the trial court must determine the amount of consideration paid by the settling party that is to be applied as a setoff against any recovery from the nonsettling party.[27] However, the question on many practitioners' minds should be, when is this set-off amount determined and when will it be applied? In *Torloni v. Commonwealth*, the Supreme Court recently addressed the second half of this question in the context of a claim under the Virginia Tort Claims Act[28] ("VTCA").[29]

In *Torloni*, the plaintiff was a passenger injured in a crash of a vehicle driven off a state-maintained road.[30] She settled her claim with the driver for $100,000.[31] She then sued the Commonwealth for $1,500,000 under the VTCA, which has a statutory cap of $100,000 on the amount of the recovery against the Commonwealth.[32] The Commonwealth first moved to have the ad damnum reduced to $100,000, based on the statutory cap.[33] It then filed a special plea in bar to have the case dismissed based on the fact that, considering the setoff to which the Commonwealth was entitled under section 8.01-35.1, *Torloni* could

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[26] *See, e.g.,* Dickenson v. Tabb, 208 Va. 184, 192, 156 S.E.2d 795, 801 (1967). *Dickenson* involved two separate collisions caused by two different at-fault drivers, happening several minutes apart, and resulting in multiple injuries to the plaintiff Tabb. That court explained:

> The causation of each special injury, each bruise, each broken bone, or particular damage to Tabb could not be established mathematically. It was impossible to ascertain with certainty which part of his injuries was attributable to the negligence of [the first at-fault driver] in the first collision, and which was caused by [the second at-fault driver] in the second collision. As his injuries were not susceptible of apportionment between the two collisions, that trial court properly told the jury that the injuries sustained by Tabb were indivisible.

But see Dwyer v. Yurgaitis, 224 Va. 176, 294 S.E.2d 792 (1982) (indicating that a plaintiff may be permitted, upon appropriate pleading and proof, to segregate out injuries sustained in a multiple-vehicle crash involving two at-fault drivers and impacts occurring only approximately one minute apart).

[27] Tazewell Oil Co. v. First Va. Bank, 243 Va. 94, 115, 413 S.E.2d 611, 622 (1992).

[28] VA. CODE ANN. § 8.01-195.1 *et seq.*

[29] __ Va. __, 645 S.E.2d 487 (2007).

[30] *Id.* 645 S.E.2d at 489.

[31] *Id.*

[32] *Id.*

[33] *Id.*

not recover more than the setoff. The trial court granted the special plea and dismissed the action with prejudice.[34] The Supreme Court reversed.[35]

First, the court held that the statutory limitation under the VTCA must be applied only *after* the jury returns a verdict and sets an amount for damages.[36] Next, the court ruled that the section 8.01-35.1 setoff should be applied to the jury's uncapped award.[37] In other words, the jury could award Torloni $1,500,000, as she demanded, then the verdict would be reduced by the prior $100,000 settlement, and after that the VTCA cap would be applied to reduce the ultimate recovery to $100,000.

In the context of this one case, the result makes sense. Indeed, nothing in the history or language of either the VTCA or section 8.01-35.1 reveals any intent to allow the Commonwealth to avoid completely any liability where there is a prior settlement with a joint tort-feasor in an amount above the VTCA's statutory cap. However, to the extent that *Torloni* can be argued to stand for the general proposition that a determination of the set-off amount must always wait until *after* a jury returns a verdict could greatly complicate a large number of cases and will, in many of those cases, frustrate settlement and increase litigation expense.

For instance, in *Benitez v. Ford Motor Co.*, the plaintiff was the front-seat passenger in a car crash in which her air bag deployed. Benitez suffered some minor assorted injuries, but by far her biggest injury was blindness in one eye, which she claimed was caused by the air bag.[38] The driver of the other vehicle caused the crash, and Benitez first pursued a claim against her.[39] She settled with the other driver and her insurance company for $280,000.[40]

The settlement and release agreement, crafted by Benitez's counsel, stated that the settlement was for "$10,000.00 for any claims against [the driver] arising out of injury attributable to any defective design, and/or manufacture, and/or maintenance of the automobile in which [Benitez] was traveling or its constituent parts including exclusively any injury to [her] eye sight and in further consideration for $270,000.00 for any claims against [the driver]" for Benitez's other assorted, minor injuries. That release further provided that "any such other tort-feasors liable for any injury attributable to any defective design, and/or manufacture, and/or maintenance of the automobile in which I was traveling or its constituent parts including exclusively any injury to my eye sight shall be credited $10,000.00 of the funds received by [Benitez] towards any judgment, if any, obtained as against such other tort-feasors." In other words, on her own

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[34] *Id.*

[35] *Id.* at 490-92.

[36] *Id.* at 490.

[37] *Id.* at 490-92.

[38] 66 Va. Cir. 323 (Fairfax County 2005).

[39] *Id.*

[40] *Id.*

and through her private settlement with the insurance company, Benitez sought to apportion the amount of setoff and, in effect, to apportion liability among alleged joint tort-feasors for her alleged injuries.

Benitez later sued Ford Motor Company for $21,000,000, alleging that the air bag in the car in which she was riding was defectively designed, causing her eye injury.[41] Citing *Hayman v. Patio Products, Inc.*,[42] Ford moved to dismiss on the grounds that the release was in bad faith, that it did not fall under section 8.01-35.1's protection for a release in good faith, that Benitez's release of the driver was, therefore, subject to the common-law rule of "release of one equals release of all," and that, as a result, her claim against Ford was barred by release. The court disagreed and denied Ford's motion.[43]

In the alternative, Ford requested that the court determine, pretrial, the amount of setoff to which Ford would be entitled in the event of a plaintiff's verdict.[44] The court denied this request as well. Citing *Tazewell Oil Co. v. United Virginia Bank*,[45] the *Benitez* court wrote that "[t]he amount of consideration paid for the release is a matter to be determined at such time as judgment may be entered in this case."[46]

While section 8.01-35.1 states that the setoff should be applied to reduce the amount "recovered," meaning only after a jury has returned a verdict,[47] nothing in that Code section or in *Tazewell* addresses when the trial court can or should fulfill its role to determine the amount of the setoff that may be applied in the event of a plaintiff's verdict. There is a good reason for a court to want to wait until after a jury returns a plaintiff's verdict to determine the set-off amount; indeed, doing so will avoid proceedings that would be mooted by a defense verdict. However, there is also a strong argument for determining the setoff amount earlier, before trial.

The problem with a bright-line rule of waiting until after a jury verdict to determine the set-off amount is that it can hamper both parties' abilities to value their cases, to plan their strategies, and to explore a possible settlement. For instance, using the example above, a party in Benitez's shoes may be much less inclined to take a smaller amount to settle her claim if she thought that the setoff against her potential recovery would be capped at $10,000. Conversely, she might be much more inclined to accept a reasonable offer if the full $280,000 setoff were to apply.[48] However, with the issue of the amount of setoff unresolved before trial and with a $270,000 swing either way, the parties are left

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41 *Id.*

42 *See supra* note 2.

43 66 Va. Cir. 323.

44 *See id.*

45 243 Va. 94, 115, 413 S.E.2d 611, 622 (1992).

46 *Id.*

47 *See Torloni*, 645 S.E.2d at 491.

48 In the end, setoff was not an issue in *Benitez*, since the jury returned a complete defense verdict. The Supreme Court later denied Benitez's petition for appeal.

with a glaring uncertainty that, contrary to section 8.01-35.1's intended overall purpose, would likely preclude settlement and an early resolution to that litigation.

III. For How Much?

The final question (at least for this article) is, assuming your client is entitled to a setoff, to what amount is she entitled? Of all of the questions raised in this article, this one, at least in terms of tort claims, should be (but is not necessarily) the easiest to answer.

At common law, both before and after section 8.01-35.1's enactment, joint tort-feasors were and still are jointly and severally liable. "If separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury."[49] Moreover, there is no apportionment of liability among joint tort-feasors by fault or percentages. "Thus, in determining the liability of a person whose concurrent negligence results in such an injury, comparative degrees of negligence shall not be considered and both wrongdoers are equally liable irrespective whether one may have contributed in a greater degree to the injury."[50]

Nothing in section 8.01-35.1 changed this longstanding law. Thus, it would seem evident that a plaintiff cannot attempt to apportion fault among tort-feasors by apportioning the amount of setoff to which the nonsettling party would be entitled. Yet, the plaintiff in *Benitez v. Ford Motor Co.* succeeded in doing just that.

Specifically, in denying Ford's motion to dismiss on the grounds that the plaintiff's apportioned settlement and release were not in good faith, the trial court held that section 8.01-35.1 envisioned that a settling plaintiff may apportion certain amounts to certain claims, citing *Tazewell Oil Co. v. United Virginia Bank*.[51] The court ultimately held that Benitez's orchestrated $10,000-$270,000 split[52] was neither in bad faith nor contrary to Virginia law, because "§ 8.01-35.1 contemplates that a court may have to choose between 'the amount stipulated

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[49] *Sullivan*, 273 Va. at 92, 639 S.E.2d at 255 (citing Maroulis v. Elliott, 207 Va. 503, 511, 151 S.E.2d 339, 345 (1966); Murray v. Smithson, 187 Va. 759, 764, 48 S.E.2d 239, 241 (1948)); *see also* Dickenson v. Tabb, 208 Va. 184, 156 S.E.2d 795 (1967) ("Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."); 18 Michie's Jurisprudence, *Torts* § 3 (1996).

[50] *Sullivan*, 273 Va. at 92, 639 S.E.2d at 255 (citing *Maroulis*, 207 Va. at 510, 151 S.E.2d at 344; Von Roy v. Whitescarver, 197 Va. 384, 393, 89 S.E.2d 346, 352 (1955); *Murray*, 187 Va. at 764, 48 S.E.2d at 241; Richmond Coca-Cola Bottling Works, Inc. v. Andrews, 173 Va. 240, 250-51, 3 S.E.2d 419, 423 (1939)); *see also* 4B Michie's Jurisprudence, *Contribution and Exoneration* § 22 (1999).

[51] 69 Va. Cir. 323 (citing 243 Va. 94, 413 S.E.2d 611 (1992)).

[52] The record evidence in *Benitez*, including deposition testimony, medical records, pleadings and other evidence, established that the settling party paid $280,000 because of the eye injury, and not because of Benitez's other assorted bumps and bruises. Ford's primary concern with Benitez's settlement and release was not that she attempted to apportion her various injuries between Ford and the other driver. Rather, Ford's concern was that Benitez attempted to apportion fault for her eye injury between Ford and the other driver by so blatantly rigging the amount of setoff that Ford would be entitled to on Benitez's air bag/eye injury claim and apportioning the other driver as only 3.8% ($10,000 ÷ $280,000) negligent in causing that eye injury.

by the covenant or release, or in the amount of consideration paid for it, whichever is greater.'"[53] The court concluded, "The recitation of the amount of consideration paid the parties to the release attributed to this defendant is not of itself bad faith."[54]

Ford argued that the *Benitez* court's reliance on *Tazewell Oil* was inappropriate because *Tazewell* dealt with a release that covered multiple claims, including both tort- and contract-based claims, involving banking and lending issues against multiple parties, some of whom were not joint tort-feasors with the nonsettling defendant.[55] It is easier to see why the *Tazewell* court declined to find that the attempted apportionment of a certain amount for one of the tort claims in that global settlement agreement did not offend the notions of good faith and fair dealing. However, *Benitez* dealt solely with personal-injury tort claims from one automobile crash. Virginia law has historically classified even multiple injuries from one car crash as "a single indivisible injury"[56] and not subject to apportionment of negligence or liability among the allegedly jointly responsible tortfeasors.[57]

The problem with the result in *Benitez* is that it could embolden plaintiffs to craft their settlements with apportionments like that case's $10,000-$270,000 split to try to "double dip," which is exactly what longstanding Virginia law and section 8.01-35.1 prohibit.[58] Moreover, instead of promoting efficiency, these plaintiff-contrived apportionments will prompt more litigation over their propriety.

IV. Some Possible Solutions

Virginia Code section 8.01-35.1 is well intentioned, and it can serve a valuable role in Virginia trial practice. However, as evidenced by the discussion above, it needs some work.

Given that defense practitioners and their clients will be at times in the role of the settling party and at other times in the role of the nonsettling party who may wish to challenge the release, there is a question whether it is in best interests of the defense bar as a whole to clear up some of these trouble spots with section 8.01-35.1. In certain cases, a defense attorney may be able to work some of the statute's flaws to his advantage. But overall, the benefits to be gained from a consistent and predictable statutory scheme clearly defining contribution and

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[53] 69 Va. Cir. 323.

[54] *Id.*

[55] 243 Va. 94, 114, 413 S.E.2d 611, 622 (1992).

[56] *Cauthorn*, 233 Va. at 205, 355 S.E.2d at 308.

[57] *Sullivan*, 273 Va. at 92; 639 S.E.2d at 255.

[58] *See* Wilkins v. Peninsula Motor Cars, Inc., 266 Va. 558, 561, 587 S.E.2d 581, 583 (2003) ("We had previously stated that the trial court must assure that a verdict, while fully and fairly compensating a plaintiff for loss, does not include duplicative damages . . . . However, when the claims, duties, and injuries are the same, duplicative recovery is barred.") (citing *Tazewell Oil*, 243 Va. at 113, 413 S.E.2d at 621-22; Moore v. Virginia Int'l Terminals, 254 Va. 46, 49, 486 S.E.2d 528, 529 (1997)).

set-off rights and preventing attempted abuses should be in all litigants' best interests. The question then becomes, what can we as the defense bar do to fix the problems with section 8.01-35.1?

When it comes to the issue of what is the "same injury," one possible statutory amendment would include stating specifically that nothing in section 8.01-35.1 changes Virginia's common law on what comprises a single indivisible injury. This change would at least clarify that cases like *Cauthorn*, *Dwyer,* and *Yurgaitis* remain good law for answering the "same injury" question. Beyond that, it is unlikely that a statutory amendment could solve all of the problems of the "same injury" analysis, since the issue is often so case-specific. Over time, though, more case law and more precedent should provide more useful analogies and guidance for courts to address this factual inquiry. The task for the defense bar is to look for and pursue opportunities to make good law on this issue.

On the question of when the court should determine the amount of setoff to be applied, an appropriate amendment could be to revise the statute to allow the trial court, in its discretion, to answer this question at any time before trial on motion of either party. Specifically, a third sentence could be inserted into section 8.01-35.1(A)(1) to read: "The court, in its discretion, may determine the amount of consideration to be applied as a setoff at any time either before or after trial." This revision would allow courts to provide the parties with some certainty in those cases in which knowing the set-off amount might facilitate a settlement or other resolution.

Finally, on the issue of how much the set-off amount should be, the statutory amendment suggested above on the "same injury" question might resolve some of the concerns. In addition, it could be clarified, either by statute or Supreme Court pronouncement, that the attempted apportionment of an injury or set of injuries that would be indivisible under Virginia common law may be considered as evidence that the covenant not to sue or release is not in good faith. In addition, the statute could be amended to include a statement that it is not to be construed as permitting, through the terms of the release or covenant not to sue, the apportionment of fault between two tort-feasors liable for the same injury. The possibility that a court could use an apportionment of a likely indivisible set of injuries or an attempted apportionment of liability to find that the release was not in good faith and therefore subject to the common-law rule of "release of one equals release of all" could be just the disincentive necessary to prevent attempted abuses of section 8.01-35.1.

Whether any of these suggested changes will ever come about remains to be seen. In the meantime, section 8.01-35.1 will remain susceptible to abuse. Therefore, defense counsel faced with covenants not to sue and releases given to potential joint tort-feasors should scrutinize them closely for possible abuse. A vigilant, focused, and consistent response to attempted section 8.01-35.1 misuse should, with any luck, develop the law to prevent further abuses and to ensure that section 8.01-35.1's aims of promoting efficiency, increasing judicial economy, and encouraging good faith settlements are met.