SOVEREIGN AND CHARITABLE IMMUNITY IN THE COMMONWEALTH OF VIRGINIA

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I. Sovereign Immunity in Virginia

Sovereign immunity is an ancient rule of law which protects some governmental entities and their employees from certain kinds of lawsuits. The sovereign to which the rule originally referred was the king. Because the king was the source of law, the king could not violate the law. Immunity means "freedom or exemption from obligation in any respect."[1] Therefore, the sovereign was not only excused from having to pay damages, he was also exempt from any requirement to explain his actions in court. Today the power to make laws is disseminated among federal, state, and local governments and their officials and employees. Because governmental bodies can only act through people, some state employees and officials are clothed with sovereign immunity. This dissemination of political power has made the law of sovereign immunity very complex.

Sovereign immunity provides protection against most suits which are based on tort law. A tort is a violation of a legal duty which results in injury. The most common example of a tort is a car crash in which one person negligently hits another person with his car, injuring the victim and damaging the victim's car. The driver of the car that was hit may sue the other driver in tort for personal injuries and property damage. It is against this type of suit—and others based on tort—that sovereign immunity shields governmental bodies and certain of their officials and employees. However, sovereign immunity does not protect against an action claiming an infringement of constitutional rights or a breach of contract. Some erudite plaintiffs' attorneys have occasionally been successful in circumventing sovereign immunity by disguising their tort claims as contract claims or illegal takings claims which violate constitutional rights.[2] However, in most cases sovereign immunity cannot be so easily circumvented.

The assertion that the sovereign can do no wrong has understandably been questioned by many. Some believe that sovereign immunity is bad social policy because it often places the cost of an accident upon an innocent individual who

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[1] Webster's New Universal Unabridged Dictionary (Deluxe 2d ed. 1983).

[2] Hampton Roads Sanitation Dist. v. McDonnell, 234 Va. 235 (1987); Burns v. Board of Supervisors, 218 Va. 625 (1977); Morris v. Tunnel Dist., 203 Va. 196 (1962).

is less able to absorb the loss than a governmental body. There are several justifications for the continued existence of sovereign immunity, however. Sovereign immunity protects the public purse and ensures that the state is not "controlled in the use and disposition of the means required for the proper administration of the government."[3] Without sovereign immunity there would be a "danger to the public in the form of officials being fearful and unwilling to carry out their public duties" and "public service might be threatened because citizens might be reluctant to take public jobs."[4] In short, sovereign immunity ensures that the government's operations are not hindered by lawsuits.

A. Immunity of the State

State governments are immune from suit under the common law and the Eleventh Amendment to the United States Constitution.[5] In certain situations, plaintiffs have been able to circumvent these rules by suing a state official (such as the governor) who is closely aligned with the state, instead of suing the state directly. This type of suit is very rare, and the only relief available is prospective injunctive relief. For example, the court might require the state official to perform or not to perform some specific act(s), but the court will never require the state official to pay money damages when the money would come from the state government itself.[6] In light of the harsh results that such powerful immunity would cause, Virginia has elected to partially waive sovereign immunity by a statute entitled the Virginia Tort Claims Act.[7] This Act allows plaintiffs who have been injured in tort to sue the Commonwealth of Virginia.[8] The Act allows plaintiffs to recover a maximum of $100,000, and other restrictions apply. The Act specifically states that it does not apply to cities, towns, or counties.

B. County and School Board Immunity

Counties and school boards are political subdivisions of the state and are therefore clothed in the state's sovereign immunity. Unless a state statute provides otherwise, counties and school boards enjoy immunity from tort suits.[9] The governmental-proprietary distinction which applies to cities and towns (and which will be discussed later) does not apply to counties or school boards.[10]

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3 *The Siren*, 74 U.S. 152, 154 (7 Wall.) (1868).

4 Messina v. Burden, 228 Va. 301, 307 (1984).

5 U.S. CONST. amend. XI.

6 Ex parte Young, 209 U.S. 123 (1908); Seminole Tribe of Fla. v. Florida et al., No. 94-12 (Mar. 27, 1996).

7 VA. CODE § 8.01-195.1, *et seq.*

8 The Act also allows recovery against certain transportation districts.

9 Mann v. Arlington Co. Bd., 199 Va. 169 (1957); Fry v. Albemarle Co., 86 Va. 195 (1890); Kellam v. School Board, 202 Va. 252 (1960).

10 *Id.*

One significant waiver of this immunity by state statute is that school boards are not entitled to sovereign immunity for accidents involving school buses.[11]

C. The Immunity of Other Political Subdivisions of the State

Political subdivisions which have been created by the state government, such as the Virginia Department of Highways and Transportation, mental health institutions, health departments, and state universities, are always entitled to sovereign immunity.[12] However, subdivisions of the state which are created by cities or towns, such as hospital authorities, park authorities, and redevelopment authorities, are only immune when they perform governmental functions, as will be discussed in the next section.[13]

II. The Immunity of Cities and Towns

Cities and towns are immune only when they are engaged in governmental functions, as opposed to proprietary functions. A governmental function is a function which is carried out solely for the public good.[14] A proprietary function, while carried out partially for the public good, is also undertaken in order to be of special benefit to the municipal entity involved.[15] The governmental-proprietary distinction is difficult to understand and sometimes results in decisions which strain reason and logic. Because of the lack of clarity in the underlying rule, there are over twenty Supreme Court of Virginia cases which decide whether certain functions are governmental or proprietary. Finding lasting rules from all of these cases is difficult. However, almost every recent case quotes language from an early Supreme Court of Virginia case. That case states that the underlying test of whether a function is governmental or proprietary is "whether the act is for the common good of all without the element of special corporate benefit or pecuniary benefit. If it is, there is no liability, if it is not, there may be liability."[16] In order to understand this test one must realize that cities and towns have two primary functions. The first function is to benefit the residents of the city or town, and the second function is to benefit members of the general public who are not necessarily residents of the municipal corporation. When the municipality performs functions that benefit primarily its own residents, it is performing a proprietary function and is not immune. However,

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[11] Va. Code § 22.1-194.

[12] Bowers v. Virginia, 225 Va. 245 (1983); Baumgardner v. Southwestern Va. Mental Health Inst., 247 Va. 486 (1994); James v. Jane, 221 Va. 43 (1980); Faculty for Responsible Change v. Visitors of James Madison Univ. 38 Va. Cir. 159 (Rockingham Co. 1995).

[13] Stevens v. Hospital Auth. of the City of Petersburg, 42 Va. Cir. 321 (Richmond 1997); Prendergast v. Northern Va. Regional Park Auth., 227 Va. 190 (1984); VEPCO v. Hampton Redevelopment Auth., 217 Va. 30 (1976).

[14] Edwards v. City of Portsmouth, 237 Va. 167 (1989); City of Richmond v. Long's Adm'rs, 58 Va. 357 (1867); Fenon v. City of Norfolk, 203 Va. 551 (1962); Hoggard v. City of Richmond, 172 Va. 145 (1939).

[15] *Id.*

[16] *Hoggard*, 172 Va. at 150.

when the municipality acts in order to further the interests of the public at large, the municipality is clothed with sovereign immunity because it is acting as an agent of the state. When viewed with this distinction in mind, some of the cases make more sense, while others still seem somewhat arbitrary. However, two generalities can be gleaned from the numerous cases on sovereign immunity.

A. Claims of Negligent Planning

In general, a city or town is engaged in a governmental function when it plans, designs, and engineers local improvements. The rationale for this is that the streets are open for the use of all visitors to the municipality and are not primarily designed to benefit town or city residents. For example, municipalities will generally be immune from a suit which claims that a public street or sidewalk was negligently constructed.[17] A city or town would also be immune from a suit which claimed that the municipality was negligent in its placement or nonplacement of traffic signals, control devices, or signs.[18] Similarly, the municipality is immune when engaged in the engineering, designing, and planning of water, sewer, and drainage systems.[19] However, there is an exception to this general rule.

If a plaintiff can show that a municipality maintained a public nuisance then the city or town would not be immune.[20] A plaintiff alleging that a street constituted a public nuisance must show that the condition imperils the safety of a public highway, that it is dangerous and hazardous in itself, and that the municipality had notice of the danger.[21] A plaintiff alleging that a municipality created a nuisance must also show either that the "condition claimed to be a nuisance was not authorized by law or the act creating or maintaining the nuisance was negligently performed."[22]

B. Claims of Negligent Maintenance

The second generality that can be gleaned from the substantial case law is that, in general, municipalities are not immune from suits which allege that the municipality negligently maintained a sewer, street, or other municipal property.[23] The rationale for this rule is that while the maintenance of municipal property benefits the public at large, it primarily benefits the residents of the city or town and is therefore a proprietary function. In order to recover on a claim of negligent maintenance, however, the plaintiff must prove that the mu-

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[17] City of Norfolk v. Hall, 175 Va. 545 (1940); Jones v. Williamsburg, 97 Va. 722 (1900); Evans v. City of Richmond, 33 Va. Cir. 93 (Richmond 1993).

[18] Freeman v. City of Norfolk, 221 Va. 257 (1980).

[19] *Hall*, 175 Va. 545; Wilshin v. City of Fredericksburg, 26 Va. Cir. 329 (Fredericksburg 1992).

[20] Taylor v. City of Charlottesville, 240 Va. 367 (1990); Chapman v. City of Va. Beach, 252 Va. 186 (1996); Virginia Beach v. Steel Fishing Pier, 212 Va. 425 (1971).

[21] *Taylor*, 240 Va. 367.

[22] *Chapman*, 252 Va. at 192.

[23] *Hall*, 175 Va. 545; *Wilshin*, 26 Va. Cir. 329; Virginia Beach v. Roman, 201 Va. 879 (1960).

nicipality had actual or constructive notice of the danger.[24] A municipality is deemed to have constructive notice when "the defect be shown to be so notorious as to be observable by all for a sufficient time to enable the corporation to repair it."[25] There is, of course, an exception to this general rule as well.

If the city or town can show that it was attempting to fix the damage caused by a storm or other emergency situation then it will be immune from suit, regardless of the fact that the municipality would be performing maintenance on its property.[26] Two examples of this are the clearing of downed trees from streets following a hurricane and the removal of snow and ice after a substantial snow storm.[27]

C. Other Claims against Cities and Towns

There are no other general rules which allow an easy determination of whether a municipality is engaged in a governmental or proprietary function. However, several specific municipal activities have been deemed governmental or proprietary by Virginia courts.

Several municipal activities have been deemed governmental functions.[28] The operation of a hospital, providing health care through a clinic, providing emergency medical technicians and emergency services, and providing ambulance services are governmental functions. The operation and maintenance of a police force is a governmental function, as is fire fighting.[29] Driving to the scene of a fire is considered a part of fighting a fire and is also an immune activity.[30] Garbage removal is considered to be a governmental function, as is the maintenance and operation of a landfill.[31] The operation of a jail is also a governmental function.[32] By statute, cities and towns are only liable for gross negligence in the operation of pools, parks, playgrounds, and other recreational facilities.[33]

Other functions have been determined to be proprietary by Virginia courts. The operation of a water supply system is a proprietary function for which the municipality would not be immune.[34] While snow removal during an emergency is a governmental function, the routine removal of snow in a nonemergency situ-

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24 *Id.*

25 *Roman*, 201 Va. at 883.

26 Bialk v. City of Hampton, 242 Va. 56 (1991); Fenon v. City of Norfolk, 203 Va. 551 (1962).

27 *Fenon*, 203 Va. 551; Stanfield v. Peregoy, 245 Va. 339 (1993).

28 Asbury v. City of Norfolk, 152 Va. 278 (1929); Stevens v. Hospital Auth. of Petersburg, 42 Va. Cir. 321 (Richmond 1997); VA. CODE § 32.1-127.3; Edwards v. City of Portsmouth, 237 Va. 167 (1989).

29 Snyder v. City of Alexandria, 870 F. Supp. 672 (E.D. Va. 1994); Glasco v. Ballard, 249 Va. 61 (1995); National R.R. Passenger Corp. v. Catlett Fire Co., 241 Va. 402 (1991).

30 *Id.*

31 Taylor v. City of Newport News, 214 Va. 9 (1973); Churchill Apartment Assoc. v. City of Richmond, 36 Va. Cir. 204 (Richmond 1995).

32 Franklin v. Town of Richlands, 161 Va. 156 (1933).

33 CODE OF VA. § 15.2-1809.

34 City of Richmond v. Hood Rubber Prods. Co., 168 Va. 11 (1937).

ation (not during or immediately after a severe snowstorm) is a proprietary function.[35] The operation of tollgates, airports, and public housing authorities are all proprietary functions.[36] The routine maintenance of streets, sidewalks, and other property is also a proprietary function.

D. Conclusion

With few exceptions, cities and towns are immune from suit when they are engaged in the planning, designing, or engineering of local improvements. In general, cities and towns are not immune when they maintain municipal property. Outside of those two generalities, other municipal functions are decided to be immune or not on a case-by-case basis, with reference to the dual functions that municipalities perform.

III. Sovereign Immunity for Employees

Because a governmental body can only act through people, sovereign immunity is sometimes extended to protect governmental officers and employees. The theory is that governmental operations will be hamstrung if all of its officers and employees can be sued for performing their public duties. The Supreme Court of Virginia has stated that there is:

> very little debate regarding the extension of the doctrine to those who operate at the highest levels of the three branches of government. Governors, judges, members of state and local legislative bodies, and other high government officials have generally been accorded absolute immunity. However, general agreement breaks down the farther one moves away from the highest levels of government.[37]

Therefore, the rest of the discussion on employee immunity concerns the vast majority of individuals who are not at the very highest levels of government.

Business entities that undertake work on behalf of the state are sometimes entitled to immunity. The same rules apply regardless of whether the defendant is a person or some sort of business or corporate entity. Sometimes a court will determine that the business or employee is an independent contractor and therefore not entitled to immunity. However, the independent contractor issue is already addressed in the *James* test itself. In the present section on employee immunity, the term "employee" will refer to any person or business entity which performs work on behalf of a governmental body.

The first step in determining whether an employee is immune from suit is to determine if the entity for which the employee works is entitled to sovereign immunity. If the person is employed by the Commonwealth, a county, school

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[35] Chiles v. Gray, 37 Va. Cir. 459 (Richmond 1996).

[36] Hobbs v. Richmond Metro. Auth., 36 Va. Cir. 488 (Richmond 1995); Bowling v. City of Roanoke, 568 F. Supp. 466 (W.D. Va. 1983); VEPCO v. Hampton Redevelopment Auth., 217 Va. 30 (1976).

[37] Messina v. Burden, 228 Va. 301, 309 (1984).

board, or other subdivision of the state this first step is very easy because those entities are always immune from suit.[38] However, if the employee works for a city, town, or a subdivision thereof then it must first be determined whether the employee was engaged in a governmental function when he performed the actions that gave rise to the suit. (See page 00.) Once it is determined that the governmental entity for which the employee works is entitled to immunity, the next step is to determine whether the employee is entitled to share in that immunity.

A. The *James* Test

The Supreme Court of Virginia has stated that four factors must be considered in determining whether an employee is entitled to sovereign immunity. The factors to be considered are (1) the nature of the function performed by the employee, (2) the extent of the state's interest and involvement in the function, (3) the degree of control and direction exercised by the state over the employee, and (4) whether the acts complained of involve the use of judgment and discretion.[39] This test is called the *James* test, and it is quoted in almost every recent case in which the sovereign immunity of an employee is at issue. The *James* court stated that "the use of judgment and discretion is a consideration, but it is not always determinative."[40] The Supreme Court of Virginia has never explained whether each of the first three *James* factors must favor immunity before an employee will be deemed immune. Since the court does not always consider each of the *James* factors before deciding that an employee is immune, the *James* test has not been treated as a rigid formula requiring each part of the test to be passed in order for immunity to be granted.[41] However, the court has denied immunity on occasion because of the failure of the employee to meet one of the *James* factors.[42] Therefore, to be on the safe side an employee seeking sovereign immunity should address each of the factors enumerated in *James*.

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[38] The Virginia Tort Claims Act only allows recovery against the Commonwealth and certain transportation districts.

[39] James v. Jane, 221 Va. 43 (1980).

[40] *Id.* at 54.

[41] In Benjamin v. University Internal Medicine, 254 Va. 400 at 403 (1997), the court stated that "sovereign immunity determinations must be made on a case by case basis, balancing factors identified in a test established in *James v. Jane* and further enunciated in *Messina*." In *Benjamin* the court did not address each of the four factors of the *James* test, instead finding that the doctor was entitled to sovereign immunity as he was performing "administrative functions for the state." *Id.* at 404. In Smith v. Settle, 254 Va 348 (1997) the court found that the evidence supported the trial court's finding that the defendant was entitled to sovereign immunity without considering all of the *James* factors. Similarly, in Glasco v. Ballard, 249 Va. 61 (1995) the court again did not consider all of the *James* factors, instead finding that the defendant was entitled to sovereign immunity because he was "engaged in an essential governmental function involving the exercise of discretion and judgment." *Id.* at 64-65. In addition, in Banks v. Sellers, 224 Va. 168 (1982) the court did not consider all of the *James* factors, instead finding that the defendants were entitled to sovereign immunity because they exercised a substantial amount of judgment and discretion. However, the state must exercise some control over the employee; the employee cannot be an independent contractor.

[42] In Lee v. Bourgeois, 252 Va. 328 at 335 (1996) the court found that the defendant was not entitled to sovereign immunity because "the states interest and involvement are slight." It is possible that *Lee* indicates

One of the best explanations of the *James* test comes from a circuit court opinion.[43] In that tragic case, the defendant was an ambulance company which contracted with the city of Richmond to provide ambulance services. The company was required to respond to all emergency calls which were made within the city of Richmond and was paid a flat fee regardless of how many calls were answered. A young child's parents called the ambulance company stating that their child had been bitten by a snake. Upon arrival at the scene, employees of the ambulance company convinced the child's parents not to have the child transported to the hospital because they believed that the child had been bitten by an insect and not a snake. As it turned out, the child had been bitten by a snake and died as a result. The parents brought suit against the ambulance company, and the company sought sovereign immunity. The court discussed the four factors of the *James* test in detail. The first factor considered was the nature and function performed by the employee. The court stated that:

> if the function that a government employee was negligently performing was essential to a governmental objective this would weigh in favor of the employee's claim of sovereign immunity. Conversely, if that function has only marginal influence upon a governmental objective this factor would weigh against granting sovereign immunity.[44]

Here, the function that the ambulance company was performing was essential to the governmental objective of protecting the health and welfare of the public. The extent of the state's interest and involvement in the function was considered next. The court stated that "if the government has a great interest and involvement in the function this factor would weigh in favor of the employee's claim of sovereign immunity. Conversely, if the government's interest and involvement in the function are slight, this factor weighs against granting sovereign immunity."[45] The court found that the state had a great interest and involvement in providing emergency rescue care because Virginia Code sections authorize counties to create rescue zones and to contract for such services. The court next considered the degree of control and direction that the state exercised over the ambulance company. The court found that because the ambulance company was tightly controlled by the city of Richmond (the city owned the vehicles, required the ambulance company to respond to every emergency call within city limits, and set medical and dispatch protocols and pre-arrival instructions) this factor also weighed in favor of granting immunity. The fourth factor considers

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that each of the *James* factors must be met in order for the employee to share the sovereign's immunity. However, it is more likely that the court only addressed the factor that the court considered relevant to the case.

[43] Wesley v. Mercy Ambulance Corp., 37 Va. Cir. 354 (Richmond 1995). Although *Wesley* provides a good explanation of the *James* test, it has been criticized for ignoring the independent contractor issue in Hewlett v. Commonwealth, 37 Va. Cir. 402 (Richmond 1995).

[44] *Wesley*, 37 Va. Cir. at 356.

[45] *Id.*

whether the act complained of involved the use of judgment and discretion. The court found that the company's employees exercised considerable discretion because they were empowered to decide whether to transport patients to the hospital. The court held that the ambulance company was entitled to sovereign immunity. Although that circuit court case was not granted an appeal, the Supreme Court of Virginia has recently ruled that ambulance drivers are entitled to sovereign immunity.[46]

The apparent dichotomy between the governmental control element and the requirement that the employee exercise judgment and discretion was explained by the Supreme Court of Virginia in another case. The court stated that the factors to be considered under the *James* test were not at odds because "when a government employee is specially trained to make discretionary decisions, the government's control must necessarily be limited in order to make maximum use of the employee's special training."[47] The fourth factor simply seeks to ensure that employees who fail to perform straightforward ministerial tasks (such as driving a car in a nonemergency situation) are not granted immunity.

B. Employee Immunity Cases

What follows is a brief synopsis of the immunity status of other governmental employees. Volunteer fire fighting companies are by statute immune from suit for damages incident to fighting fires or providing rescue services.[48] Fire fighters are not immune when performing nonemergency work such as shoveling snow or pulling down the walls of a building that had been damaged by a fire five days previously.[49] The Supreme Court of Virginia has ruled that the term "fighting fires" includes driving to a fire.[50] Police officers are immune from suit when engaged in certain activities, such as a high-speed car chase.[51] The court reasoned that an essential governmental function was being performed in which the government was interested, involved, and exercised control over the employee through training and policy manuals. Moreover, those acts required the exercise of judgment and discretion because during a high-speed chase the officer "must make prompt, original and crucial decisions" which are discretionary.[52] However, a police officer who was driving back to a police station in a police vehicle after having served a summons was not immune because driving in a nonemergency situation did not involve the exercise of judgment and discretion.[53]

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[46] Smith v. Settle, 254 Va. 348 (1997).

[47] Lohr v. Larsen, 246 Va. 81, 88 (1993).

[48] CODE OF VA. § 27-23.6.

[49] M.E. Bersen v. City of Bristol, 176 Va. 53 (1940); Boyce v. City of Winchester, 39 Va. Cir. 21 (Winchester 1995).

[50] National R.R. Passenger Corp. v. Catlett Fire Co., 241 Va. 402 (1991).

[51] Colby v. Boyden, 241 Va. 125 (1991).

[52] *Id.* at 129.

[53] Heider v. Clemons, 241 Va. 143 (1991).

A police officer was afforded immunity, however, when he mistakenly shot a suspect.[54] The officer was approaching the suspects by car and drew his weapon as he started to exit his vehicle; but he had forgotten to put his car in park. As the car rolled forward the officer jumped back into the car and pushed the vehicle back into park, during the course of which his gun accidentally discharged, shooting a suspect in the neck. The court held that the policeman was engaged in an essential government function which required the exercise of judgment and discretion and was immune from suit.[55]

A school superintendent and a school principal were deemed immune from suit when a student brought a claim against them for failing to maintain a safe environment at the school.[56] The plaintiff was stabbed by another student while on school property. The court held that both defendants were performing essential government functions under guidelines set down by the state and that the functions performed required the exercise of judgment and discretion. In another case, a high school teacher was deemed to be immune from suit when the teacher was charged with negligently supervising a physical education class.[57] The teacher required the students to play tackle football without wearing protective equipment, resulting in the plaintiff's injury. The court ruled that the teacher was performing a vitally important public function in which the school board had a substantial interest and involvement, that the school board exercised control over the teacher through the principal of the school, and that the teacher's job required the exercise of judgment and discretion.[58] A recent statute gives immunity to state-employed teachers for damages resulting from the allegedly negligent "supervision, care or discipline of students" unless the teacher acts outside of his scope of employment or is grossly negligent.[59]

State employee counselors and supervisors of a juvenile detention hall who were empowered to release inmates of the hall were found to be immune from suit.[60] A former detainee who was released by the defendants stabbed the plaintiff within a few months of being released. The court held that the defendants' determination of when to release inmates was an important government function which required the exercise of judgment and discretion.

In a consolidated appeal of two lower court decisions, the Supreme Court of Virginia held that a superintendent of buildings of a public college and a county chief of operations of public works were immune from suit.[61] In both cases, plaintiffs were injured in trip and fall accidents which were allegedly the result

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54 Glasco v. Ballard, 249 Va. 61 (1995).

55 *Id.*

56 Banks v. Sellers, 224 Va. 168 (1982).

57 Lentz v. Morris, 236 Va. 78 (1988).

58 *Id.*

59 CODE OF VA. § 8.01-220.1:2.

60 Harlow v. Clatterbuck, 230 Va. 490 (1986).

61 Messina v. Burden, 228 Va. 301 (1984).

of the defendants' poor maintenance. The court held that both defendants performed administrative duties which were important to the state and which required the exercise of judgment and discretion.[62] Another maintenance case provides an interesting illustration of how different levels of immunity are granted to different defendants. In that case, the plaintiff was injured in a courthouse when a chair in which she was sitting collapsed.[63] The plaintiff brought suit against the county, the county administrator, and a janitor. The court ruled that the county was always immune as it was a political subdivision of the state and that the county administrator was immune from all actions based on ordinary negligence since he was performing an important government function (i.e., running the county) which required the exercise of judgment and discretion. The janitor, however, was not involved in any activities which required the exercise of judgment and discretion and could be held liable for negligent acts.[64]

A Virginia Department of Transportation engineer was given immunity against a claim of negligently designing a road.[65] The court held that the design of a street involved the exercise of judgment and discretion and was an essential government function.

A state employee who was engaged in the removal of snow was entitled to immunity as the employee exercised judgment and discretion in deciding which streets to plow and how best to clear the roads.[66] However, a recent statute states that "no private person . . . or contractor . . . employed to remove snow and ice from any public highway shall be afforded sovereign immunity."[67] This is a very recent statute, and no cases interpret it as yet. However, the statute only applies to persons or contractors who have entered into contracts with the Commonwealth Transportation Commissioner in Planning District 8 (northern Virginia).

A court clerk who negligently indexed a deed was not immune from suit as the act of indexing a deed did not require judgment and discretion.[68]

C. Independent Contractors versus Agents of the State

A business that is employed by the state is immune if the business passes the *James* test. However, an independent contractor is never immune.[69] An independent contractor is a person or business "who is employed to do a piece of work without restriction as to the means to be employed."[70] For example, if an

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62 *Id.*

63 Hammons v. Clarke County, 14 Va. Cir. 287 (Clarke Co. 1989).

64 *Id.*

65 Bowers v. Commonwealth, 225 Va. 245 (1983).

66 Stanfield v. Peregoy, 245 Va. 339 (1993).

67 CODE OF VA. § 33.1-200.2.

68 First Va. Bank Colonial v. Baker, 225 Va. 72 (1983).

69 Hewlett v. Commonwealth, et al., 37 Va. Cir. 402 (1995); holding that an ambulance company that was stipulated to be an independent contractor was not immune.

70 Tunnel Dist. v. Beecher, 202 Va. 452, 459 (1961); quoting Epperson v. DeJarnette, 164 Va. 482, 486 (1935).

immune governmental entity contracts with a business to construct a road, but is only concerned that the road be built and not with the means of construction, then the business is an independent contractor and is not entitled to immunity.[71] However, if the governmental entity tells the business how to build the road and if the business can pass the *James* test, then the business will be entitled to sovereign immunity.

In another Supreme Court of Virginia case, a plaintiff was injured while attempting to board a bus which was owned by a private company under contract with an immune government agency to supply bus services to the public.[72] The court held that the bus company was an independent contractor because the company "had complete control" over the maintenance, supervision, and operation of the buses, including the hiring and training of all operators of the buses.[73]

In a very recent case, the Supreme Court of Virginia considered whether a doctor who was employed by a hospital was an independent contractor.[74] The plaintiff had sued the hospital, alleging that the hospital was liable for its employee's negligence. The hospital had filed a motion alleging that the hospital was not responsible for the actions of the doctor because the doctor was an independent contractor. The trial court held that the doctor was an independent contractor as a matter of law because the doctor's contract stated that he was an independent contractor and the hospital could not interfere with the doctor's medical decisions. The Supreme Court of Virginia reversed, stating that the contract was not controlling and that the issue of whether the doctor was an independent contractor should be decided by the jury.

The independent contractor issue is addressed by the third factor to be considered under the *James* test. That factor examines the "degree of control and direction exercised by the state over the employee whose negligence is involved."[75] The independent contractor issue is mentioned here because a finding that an employee or business entity is an independent contractor will bar a claim of sovereign immunity and will prevent the governmental entity for which the employee works from being liable for the employee's actions.

D. The Immunity Status of State Employed Medical Doctors

The immunity status of medical doctors who are government employees is unclear, despite the fact that the case which spawned the *James* test concerned the immunity of state employee doctors. In *James,* several medical doctors who were full-time faculty members of the University of Virginia medical school were sued for medical malpractice.[76] The plaintiffs claimed that because the

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71 Boyd v. Mahone, 142 Va. 690 (1925).

72 *Beecher*, 202 Va. 452.

73 *Id.* at 458.

74 McDonald v. Hampton Training School, 254 Va. 79 (1997).

75 James v. Jane, 221 Va. 43, 53 (1980).

76 *James*, 221 Va. 43.

doctors selected the manner in which they treated patients, they were independent contractors. The court did not explicitly decide the independent contractor issue but instead created and applied the *James* test. The *James* test is an all-inclusive test which addresses the independent contractor issue as well as other issues. In applying the *James* test, the court stated that because the University of Virginia is a research hospital, the care of patients is not the primary function which the doctors were employed to perform. Therefore, the doctors were not performing a function that served a governmental objective. Because the doctors could decide which patients to see and whether to reduce patient bills, the court decided that the state's interest and involvement in the patient care function was not very great and that the degree of control and direction exercised by the state over the doctors was not substantial. Because the only factor in favor of granting the doctors immunity was the judgment and discretion factor, the court held that the doctors were not entitled to sovereign immunity. However, three later cases which applied the *James* test ruled that state employee doctors were entitled to sovereign immunity.

In one of the cases *James* was distinguished on the ground that the doctor was tightly controlled by the state.[77] The state government controlled when and where the doctor worked, the number and identity of the patients he saw, the equipment he used, and the procedures he could perform. In addition, because the doctor worked at a state-owned free clinic, the primary purpose of which was to care for the health of patients, the doctor was performing a function in which the state was very interested. Since the defendant's practice of medicine required the exercise of judgment and discretion, the doctor was held to be immune.[78]

In another case, the court found that a medical doctor, who was a salaried employee of a state hospital engaged in medical research, was entitled to sovereign immunity.[79] Although the defendant was a board certified physician, he was serving a fellowship at the time and was supervised by other doctors. The court distinguished *James* on the ground that the fellow's function was "to assist as an employee and student in the conduct of a basic medical research program."[80] Because the program was sponsored, directed, and funded by state entities, the state was interested and involved in the function that the defendant performed. Since the defendant was closely supervised by other state employees, the state exercised a great deal of control over the defendant. Since the defendant's research activities involved the exercise of judgment and discretion, the doctor was granted immunity.

In another recent case against a state-employed doctor, the Supreme Court of Virginia granted immunity to a doctor on the ground that the doctor was per-

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77 Lohr v. Larsen, 246 Va. 81 (1993).

78 *Id.*

79 Gargiulo v. Ohar, 239 Va. 208 (1990).

80 *Id.* at 212.

forming administrative duties and not medical duties. Although the doctor was a medical director, the doctor was not directly involved in patient care and was therefore immune from suit.[81]

In another Supreme Court of Virginia case on the sovereign immunity of a medical doctor, the court found that the doctor was not entitled to immunity.[82] Because the doctor was listed as an attending physician and had not given any medical care to the plaintiff, the doctor argued that he was performing administrative functions. The court did not agree, finding that the defendant was the person who was ultimately responsible for the plaintiff's medical care. Although the court cited the *James* test, it did not address each of the four factors, instead basing its ruling on the following:

> Because we find that Dr. Bourgeois' function as an attending physician in this case was related to patient care and that acts taken regarding patient care are within the professional medical judgment of the physician, we conclude that the state's interest and degree of involvement are slight.[83]

This language indicates a possible reduction in the number of state doctors who might be entitled to sovereign immunity.

It is apparent that there are no bright lines when it comes to physician immunity in Virginia. From these cases it appears that the more independent and senior a doctor is, the more likely it will be that he or she will not be entitled to sovereign immunity.

E. Exceptions to the Immunity of State Employees

Even if an employee passes the *James* test, the employee may still be liable if the employee was not acting within the scope of his employment at the time of the incident. An employee who is not acting within the scope of his or her employment is no longer acting on behalf of an immune entity and is therefore not entitled to share in the immunity of his employer. An employee is deemed to be acting outside of his scope of employment when the employee has either committed an intentional tort or acted in a grossly negligent manner. Gross negligence is defined as "the absence of slight diligence, or the want of even scant care."[84] This is a very high standard, so high that in only one of the employee immunity cases cited here was the defendant found to have been grossly negligent.[85]

An employee seeking to raise the defense of sovereign immunity must make a plea in bar, and that plea must be accompanied by some evidence. The Supreme

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[81] Benjamin v. University Internal Medicine Found. et al., 254 Va. 400 (1997).

[82] Lee v. Bourgeois, 252 Va. 328 (1996).

[83] *Id.* at 335.

[84] Frazier v. City of Norfolk, 234 Va. 388, 393 (1987).

[85] Chapman v. City of Virginia Beach, 253 Va. 181 (1996).

Court of Virginia has recently ruled that when a complaint alleges intentional, tortious acts or gross negligence, the defendant may only be granted a plea in bar on sovereign immunity grounds if the defendant comes forward with evidence refuting the allegations of intentional, tortious conduct or gross negligence.[86]

F. Conclusion

The immunity status of governmental employees is often difficult to determine. However, it must be remembered that these complex rules only apply to middle level governmental employees. In general, employees who operate at the very highest levels of the three branches of government are immune, while those who operate at the lowest levels are not.

IV. Charitable Immunity in Virginia

Charitable immunity is a rule of law which protects some charitable organizations and their volunteers from certain kinds of tort lawsuits.[87] The Supreme Court of Virginia has stated that immunity is granted to some charities because "it is manifestly desirable that they should be encouraged in their good work."[88]

In order to benefit from charitable immunity, an organization must show that it is charitable and that the plaintiff was a beneficiary of the organization's charity at the time of the accident which gave rise to the lawsuit. If both of these hurdles are cleared, the organization is immune from tort suits with two exceptions: it is not immune from claims that it was negligent in the hiring or in the retention of its employees.

A. Is the Organization Entitled to Charitable Immunity?

The defendant organization must bear the burden of proving that it is entitled to charitable immunity. Simply showing tax-exempt status or that the organization was created for a charitable purpose is not sufficient since other factors must also be addressed. Many of the tests used to determine whether an organization is entitled to charitable immunity were developed in cases that concerned hospitals. The principles stated in those cases are still good law and will be referred to here even though the Virginia legislature has largely abrogated charitable immunity for hospitals.[89]

In *Memorial Hospital v. Oakes*, a patient in the defendant hospital was burned to death as the result of a fire that occurred while he was undergoing treatment in an oxygen tent.[90] The hospital claimed charitable immunity, and the Supreme Court of Virginia relied on several factors in deciding whether the

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86 Tomlin v. McKenzie, 251 Va. 478 (1996).

87 See page 367 for a definition and an example of a tort.

88 Weston's Adm'x v. Hospital of St. Vincent, 131 Va. 587, 602 (1921).

89 Code of Va. § 8.01-38.

90 Memorial Hosp. v. Oakes, 200 Va. 878 (1959).

hospital was charitable. These factors were: whether the organization had stockholders, whether the organization was a nonprofit corporation, whether the members of the board of directors of the organization were compensated, whether the organization was profitable, how aggressive the organization was in collecting its debts, whether people who cannot pay are refused admittance, and whether the articles of incorporation specify that the organization was created for charitable purposes. In *Oakes*, the court found that all of the factors mentioned above favored granting immunity and held that the hospital was immune from suit. The factors used in the *Oakes* case have been referred to in many charitable immunity cases and not just in hospital cases. Moreover, in the *Oakes* case the court stated that if an organization was not formed for profit, a presumption arises that the organization is charitable. The *Oakes* presumption has been used in many recent charitable immunity cases. However, *Oakes* did not hold that all hospitals were charitable: the Supreme Court of Virginia held in later cases that a hospital was not charitable because it engaged in aggressive debt collection practices and was profitable.[91]

The following is a brief summary of the immunity status of various organizations.

By statute, hospitals are no longer entitled to charitable immunity unless the "hospital renders exclusively charitable medical services for which no bills are sent" or unless the plaintiff "was accepted as a patient by such institution under an express written agreement . . . providing that all medical services furnished . . . are to be supplied on a charitable basis."[92] Tax-exempt 501(c)(3) hospitals which carry $500,000 of liability insurance are not liable for judgments beyond $500,000.[93] Although an educational institution could be organized and operated for charitable purposes, most of the Virginia cases concerning the immunity of educational institutions have denied them charitable status for immunity purposes. In each of the cases, the organizations made profits and were very aggressive in their collection of debts; they would not release students' transcripts or allow students to take exams unless their debts to the school were paid in full.[94] An organization that maintained a museum was found to be charitable because the museum's charter contained a charitable purpose and the organization was not for profit.[95] A nonprofit group that ran a historic church was also held to be a charitable organization.[96]

Organizations such as the Wesley Foundation and the Peninsula Agency on Aging (hereinafter "PAA") which seek to better their communities have been

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91 Purcell v. Mary Washington Hosp., 217 Va. 776 (1977).

92 CODE OF VA. § 8.01-38.

93 *Id.*

94 Johnson v. St. Catherine's School, Case No. LL-932-W (Richmond 1988); Costello v. University of Richmond, Case No. LG-1720 (Richmond 1985); Morgan v. Marymount Univ., 18 Va. Cir. 428 (Arlington Co. 1990).

95 Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507 (4th Cir. 1934).

96 Edgerton v. Robert E. Lee Memorial Church, 395 F.2d 381 (4th Cir. 1934).

determined charitable institutions.[97] Both of these organizations were sued as a result of a slip and fall accident which occurred on Wesley Foundation property while the plaintiff was going to a function sponsored by the PAA. The Wesley Foundation's charter stated that it was incorporated for charitable, benevolent, and literary purposes, thereby invoking the *Oakes* presumption that the organization was charitable. Because the trustees of the foundation were not salaried, the organization was a tax-exempt nonprofit corporation, and the purpose of the foundation was to enrich the lives of residents of the local community, the court held that the foundation was a charitable organization entitled to immunity. The court next considered the immunity status of the PAA. The PAA was established for the purpose of assuring the highest level of service obtainable for every elderly person in Virginia Planning District 21. The PAA's articles of incorporation stated that it was a nonprofit corporation, the PAA was operated at a loss, and, with the exception of one nonvoting director, members of the board of directors worked for free. The court then held that the PAA was also charitable.

In some cases, the plaintiff has stipulated that the defendant is a charitable organization while arguing that he or she was not a beneficiary of the organization's charity. This tactic focuses the plaintiff's case and prevents the judge and jury from hearing the testimony of how worthy the defendant is. The YMCA, the American Legion, and the American Red Cross have all been stipulated to be charitable organizations.[98] However, stipulations by attorneys are not court orders, so the charitable nature of the organizations listed above could still be disputed by a plaintiff. However, as a practical matter it is unlikely that this would happen in light of the clearly charitable nature of these organizations.

B. Is the Plaintiff a Beneficiary of the Organization's Charity?

An organization which has charitable immunity is only immune from claims brought by beneficiaries of the organization's charity. In order to determine whether a plaintiff was a beneficiary, the court will usually investigate the charitable purpose that the organization serves. The plaintiff must benefit directly from the charity: residing in a community which is benefited by the charity is not sufficient. The fact that the plaintiff paid fair market value for the services provided by the charity generally does not affect the beneficiary status of the plaintiff.[99]

In the aforementioned case regarding the Wesley institute and the PAA, after deciding that both defendants were charitable institutions, the court next considered whether the plaintiff was a beneficiary of the charities.[100] The court found

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97 Roberts v. Wesley Found., 27 Va. Cir. 121 (City of Williamsburg and James City Co. 1992).

98 Boan v. Peninsula YMCA, 18 Va. Cir. 145 (Newport News 1989); Gaines v. YMCA, 32 Va. Cir. 346 (Richmond 1994); Stayton v. American Legion, 18 Va. Cir. 387 (Henrico 1990); Langston v. American Red Cross, 18 Va. Cir. 451 (Virginia Beach 1990); Taylor v. American National Red Cross, 8 Va. Cir. 108 (Norfolk 1984).

99 Weston's Adm'x v. Hospital of St. Vincent, 131 Va. 587 (1921).

100 *Roberts v. Wesley Found.*, 27 Va. Cir. 121 (City of Williamsburg and James City Co. 1992).

that the plaintiff was a beneficiary of the PAA's charity at the time of the accident because the PAA's charitable purpose was to assist elderly persons. The plaintiff, an elderly person, was attempting to attend a PAA-sponsored luncheon at the time of the accident and had in the past attended many lunches and other activities sponsored by the PAA. The court then considered whether the plaintiff was a beneficiary of the Wesley Foundation. The count found that the foundation essentially donated space in its building to the PAA. As the plaintiff attended numerous functions in the foundation's building, the plaintiff was a beneficiary of the Wesley Foundation. Since there was no claim that either defendant negligently hired or retained any of its employees, the court held that the defendants were entitled to immunity.

In another case, suit was brought by the plaintiff who was injured while playing in a YMCA-sponsored basketball game.[101] The plaintiff stipulated that the YMCA was a charitable organization but argued that he was not a beneficiary of the YMCA. The plaintiff's employer had paid a fee to the YMCA to allow the plaintiff to participate in a basketball tournament that was held on YMCA property. The plaintiff claimed that he was injured while playing basketball as a result of water which had negligently been allowed to accumulate on the floor of the basketball court. The court agreed that the YMCA's purpose (as noted in the YMCA's articles of incorporation) was to "provide . . . services and activities which develop and enrich their lives and help them achieve their fullest potential, spirituality, mentally, physically and socially."[102] The court decided the plaintiff was a beneficiary of the YMCA's charity because the YMCA provided the plaintiff the opportunity to play a game which benefited the plaintiff physically and socially. The fact that the plaintiff's employer had paid a fee to the YMCA for this opportunity did not change the plaintiff's beneficiary status. A plaintiff who was a paying guest at a summer camp and was injured when he fell from a tree was determined to be a beneficiary of the YMCA.[103] The plaintiff stipulated that the YMCA was a charity. The court held that the plaintiff was a beneficiary of the YMCA because the maintenance of a summer camp served the YMCA's charitable purpose and was provided to the plaintiff. It did not matter that the plaintiff had paid the YMCA a fee in order to attend the summer camp.

A nurse who was privately employed by a patient in the defendant hospital was deemed not to be a beneficiary of the hospital's charity.[104] The court stated that while it was to the plaintiff's advantage to be allowed to render her services at the hospital, it was equally, if not more, to the advantage of the hospital to have nursing services available. In another hospital case, a woman who fell down an unprotected elevator shaft when she accompanied a sick friend to a

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101 Gaines v. YMCA, 32 Va. Cir. 346 (Richmond 1994).

102 *Id.* at 347

103 Boan v. Peninsula YMCA, 18 Va. Cir. 145 (Newport News 1989).

104 Hospital Assoc. v. Hayes, 204 Va. 703 (1963).

hospital sued the hospital for negligence.[105] The court determined that the hospital was a charity but decided that the plaintiff was not a beneficiary of the hospital's charity because the plaintiff was simply accompanying a friend and was not seeking any services from the hospital.

In a suit brought against the Red Cross, the court ruled that a plaintiff who sustained injuries while attending a CPR class was a beneficiary of the defendant's charity.[106] The plaintiff had stipulated that the Red Cross was a charitable institution. The court stated that one of the purposes of the Red Cross was to "help people avoid, prepare for, and cope with emergencies."[107] The court stated that the CPR instruction could prove very helpful to the plaintiff and held that she was a beneficiary of the defendant's charity. It did not matter that she had paid a fee to attend the class. In another suit against the Red Cross, a blood donor was held to be a beneficiary of the charity.[108] The plaintiff stipulated that the Red Cross was a charitable organization. The court found that the activity of accepting donated blood was clearly within the charitable purposes for which the organization was created. Because the plaintiff had donated blood, the plaintiff and members of her family were eligible to receive free blood from the Red Cross if they ever needed it in the future. The court held that this eligibility to receive free blood made the plaintiff a beneficiary of the Red Cross. However, in light of the next case, this case may no longer be a correct statement of the law.

In another case, the plaintiff was injured allegedly because the defendant was negligent in the placement of a traffic barricade.[109] The defendant was a charitable corporation named Mountain Magic whose corporate purpose it was to organize and promote a spring festival in Buchanan, Virginia. The festival had parades and other live entertainment. Mountain Magic rented spaces to private vendors who sold food and other items during the festival. The fees and other moneys collected by Mountain Magic were given to local charities. The defendant argued that the plaintiff was a beneficiary of Mountain Magic's charity both because he was an employee of one of the booths at the fair and because he was a local resident eligible to receive Mountain Magic's charitable benefits should he need them in the future. The court ruled that the street vendors were engaged in a purely commercial activity and did not benefit from Mountain Magic's charity. The court then decided that the plaintiff's mere potential to receive future charitable benefits was not sufficient since these were "indirect benefits which are too remote to give rise to the defense of charitable immunity."[110] The court then held that Mountain Magic, despite being a charitable

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[105] Hospital of St. Vincent v. Thompson, 116 Va. 101 (1914).

[106] Langston v. American Red Cross, 18 Va. Cir. 451 (Virginia Beach 1990).

[107] *Id.* at 453.

[108] Taylor v. American National Red Cross, 8 Va. Cir. 108 (Norfolk 1984).

[109] Thrasher v. Winand, 239 Va. 338 (1990).

[110] *Thrasher*, 239 Va. at 342.

organization, was not entitled to charitable immunity since the plaintiff was not a beneficiary of the defendant's charity. This case indicates that the Red Cross case which determined that a plaintiff was a beneficiary of the Red Cross because she might receive free blood in the future may no longer be a correct statement of the law because the benefit might be too indirect.

An attendee at a parade organized by the Urbana Chamber of Commerce was not a beneficiary of the defendant's charity.[111] The plaintiff was injured when a piece of candy thrown by a clown in a parade struck her in the eye. The lower court found that the defendant was a charitable institution and that decision was not appealed. The plaintiff only appealed the lower court's finding that she was a beneficiary of the defendant. The money earned from the parade was donated to local charities. As the plaintiff was not even a resident of the locality that was benefited by the funds raised by the festival, the plaintiff was not a beneficiary of the charity and her claim was not barred by charitable immunity.

C. Claims of Negligent Hiring or Retention

If the defendant shows that it is a charitable institution and that the plaintiff was a beneficiary of that charity, the defendant will be entitled to immunity for acts of simple negligence, with two exceptions. The plaintiff beneficiary of the charitable institution may still bring a claim that the charity negligently hired or retained its employees.[112]

In another hospital case, the plaintiff, a patient and beneficiary of a charitable hospital, was negligently burned by two nurses employed by the defendant.[113] The plaintiff showed that according to the hospital's guidelines any nurses employed by the hospital should have had at least three years of high school. However, one of the negligent nurses only attained the tenth grade and had been repeatedly reprimanded for violating hospital rules. The nurse's supervisor stated that the only reason that she did not fire the nurse was because she felt sorry for her. The court found that this showing was sufficient to allow the plaintiff's claim of negligent hiring and retention of an employee to go forward. In another case, the plaintiff beneficiary of the defendant charitable hospital claimed that the hospital was negligent in hiring or retaining several hospital employees.[114] The plaintiff was injured when she fell out of a bed which allegedly should have had rails on it. Since the plaintiff had failed to show that the employees concerned had the authority to place side rails on the plaintiff's bed, the plaintiff's claim of negligent hiring or retention was barred.

A former boy scout's parents brought suit against the Boy Scouts of American (hereinafter "BSA") and the National Capital Area Council (hereinafter

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111 Straley v. Urbanna Chamber of Commerce, 243 Va. 32 (1992).

112 Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151 (1934); Hill v. Memorial Hosp., Inc., 204 Va. 501 (1963); Moore v. Warren, 250 Va. 421 (1995).

113 *Plunkett*, 162 Va. 151.

114 *Hill*, 204 Va. 501.

"NCAC") when their child was sexually abused by a scoutmaster.[115] The plaintiffs alleged that the defendants were negligent in the hiring or retention of the scoutmaster. The scoutmaster had been convicted of four counts of sexual assault against a boy scout in Rhode Island while acting as a scoutmaster there. The Rhode Island chapter had neglected to report the incident to the BSA, and the NCAC had failed to send the scoutmaster's application to the BSA for clearance until after the molestation had occurred. The jury found that the BSA did not select or retain the scoutmaster but did find that the NCAC was negligent in the hiring and retention of the scoutmaster.

In another child abuse case, the parents of a ten-year-old girl sued a church after their daughter was repeatedly sexually assaulted by a church employee.[116] The employee had recently been convicted of sexually assaulting a young girl and was on probation for this offense at the time he assaulted the plaintiff's daughter. The church had employed the offender to do various duties which involved contact with children and had entrusted him with keys to all of the church buildings. The court found that the plaintiff had proven that the defendant negligently hired or retained the employee.

D. The Immunity of Employees of the Charity

In a recent and unprecedented expansion of charitable immunity, the Supreme Court of Virginia has held that an unpaid volunteer of a charity may also be entitled to charitable immunity.[117] Prior to this decision only the charity itself was entitled to immunity and not the charitable organization's employees. The defendant was an unpaid volunteer of a charitable organization who was driving the plaintiff to a medical facility for routine medical care when the defendant's vehicle was involved in a collision with another vehicle. The plaintiff was injured in the crash and alleged that the defendant was negligent in the operation of his vehicle. The court used the same reasoning which justifies granting sovereign immunity to government employees, stating that "[l]ike any organization, a charity performs its work only through the actions of its servants and agents. . . . Denying these servants and agents the charity's immunity for their acts effectively would deny the charity immunity for its acts."[118] The court then held that "a volunteer of a charity is immune from liability to the charity's beneficiaries for negligence while the volunteer was engaged in the charity's work."[119] The court left unanswered the question of whether a paid employee of a charity would be immune from suit. In a footnote, the court expressly refused to apply the tests which have been developed in determining whether a government employee is entitled to sovereign immunity. Therefore, it appears

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115 Infant C. v. Boy Scouts of Am., 239 Va. 572 (1990).

116 J. v. Victory Tabernacle Baptist Church, 236 Va. 206 (1988).

117 Moore v. Warren, 250 Va. 421 (1995).

118 *Id.* at 423.

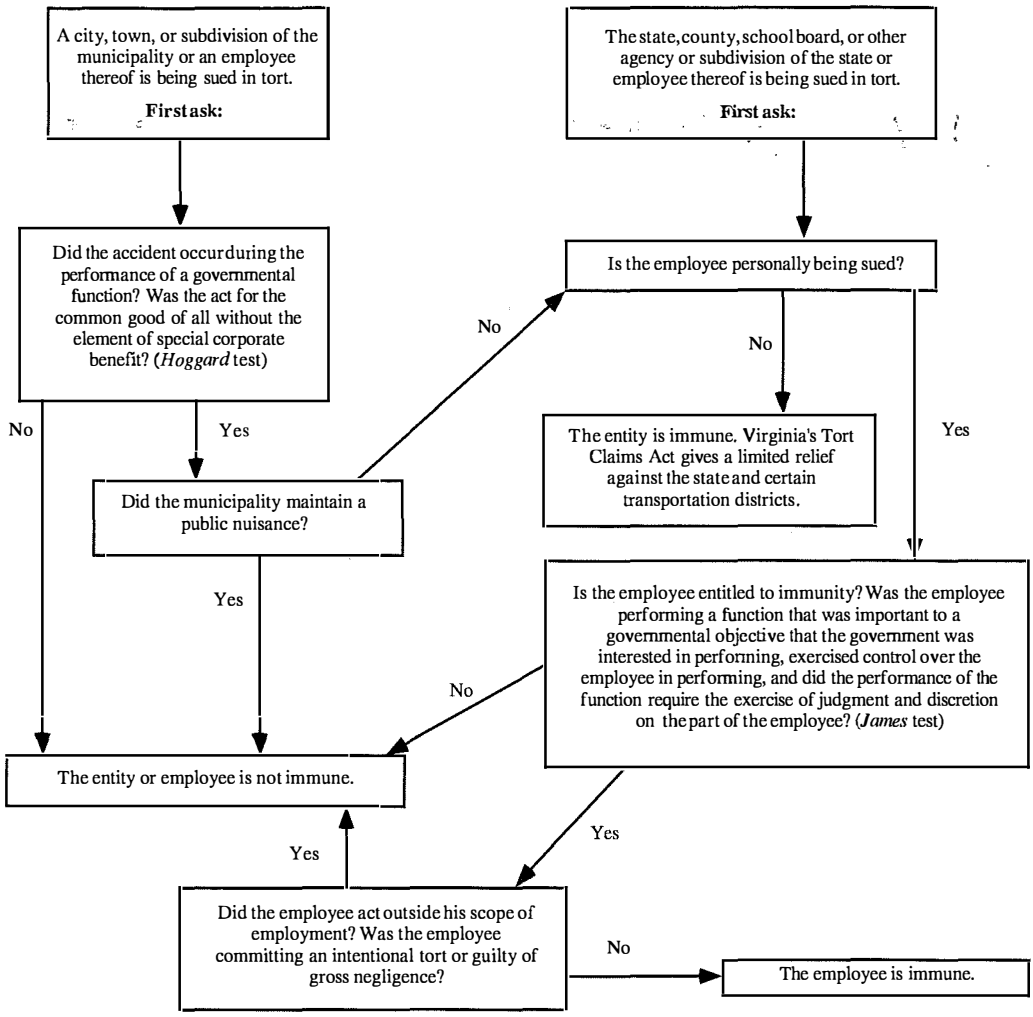
119 *Id.* at 425.

that all volunteers of a charity, regardless of status, are entitled to charitable immunity. This case is a strange deviation in the law of charitable immunity. The Supreme Court of Virginia has been stating for the last ninety years that if charitable immunity is to be broadened or abrogated, the General Assembly—and not the court—should act.

E. Conclusion

Charitable immunity provides much less protection than sovereign immunity since not all charities are protected and there are significant exceptions to the immunity which is granted. Some tax-exempt organizations that many people would view as charitable are not immune. In addition, the immunity which is provided only applies to tort suits which are brought by beneficiaries of the organizations' charity. Even if both of these hurdles are cleared, the organization is still liable on a claim that the charity was negligent in hiring or retaining an employee of the charity. If the organization is found to be immune, volunteer employees of the charity will also be immune.

APPENDIX A—SOVEREIGN IMMUNITY IN VIRGINIA



Sovereign immunity is a complicated area of the law that often changes and is subject to differing interpretations. This chart is a simplification of complicated legal concepts and should not be relied upon as legal advice.

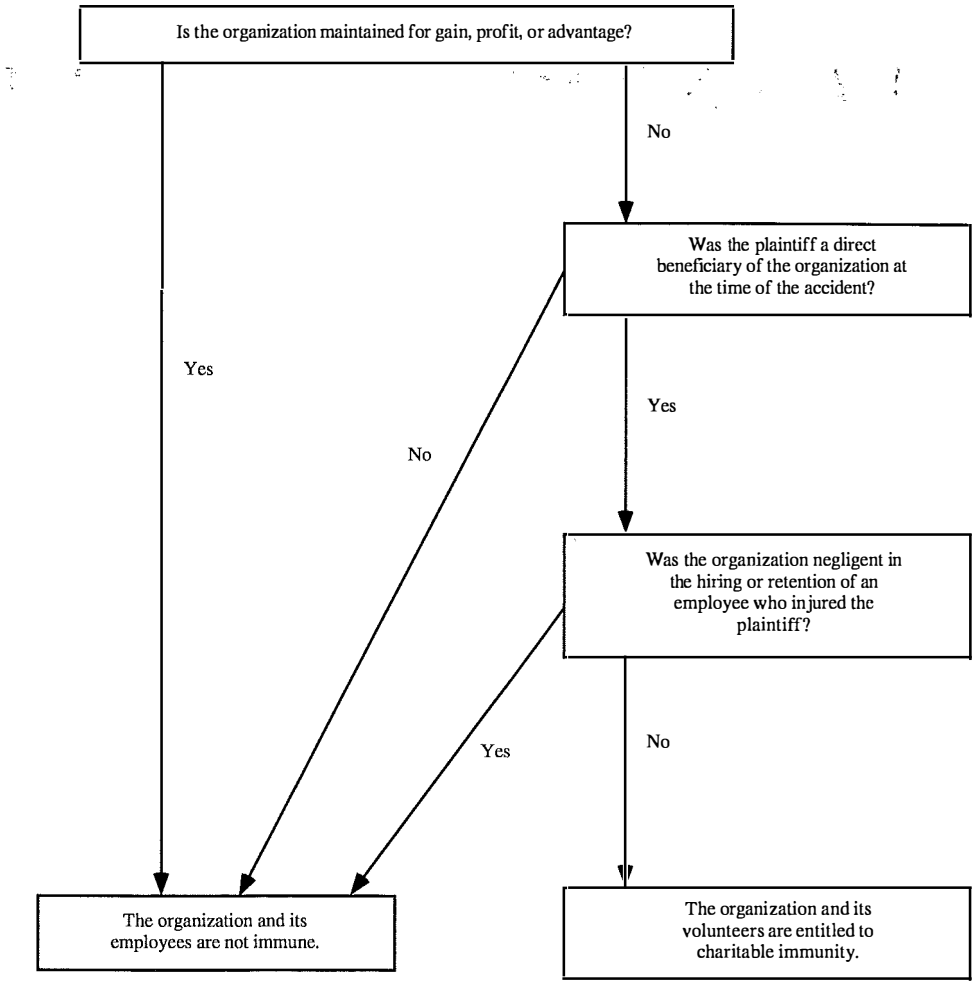
APPENDIX B—LIABILITY

	Snow	Water	Sewer	Parks	Drainage	Roads or Streets	Trash	Privatized Services
State	Never	Never	Never	Never	Never	Never	Never	Never
State Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
State: Tort Claims Act	Always	Always	Always	Always	Always	Always	Always	Always
City	Sometimes	Sometimes	Sometimes	Never	Sometimes	Sometimes	Never	Sometimes
City Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
City: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never
Town	Sometimes	Sometimes	Sometimes	Never	Sometimes	Sometimes	Never	Sometimes
Town Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
Town: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never
County	Never	Never	Never	Never	Never	Never	Never	Never
County Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
County: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never

This chart assumes that the person or entity in the left-hand column has negligently injured another person or his property. This chart also assumes that there has been neither intentional wrongdoing nor any gross negligence. In other words, in the absence of sovereign immunity, the person or entity in the left-hand column would always be liable.

Sovereign immunity is a complicated area of the law that often changes and is subject to differing interpretations. This chart is a simplification of complicated legal concepts and should not be relied upon as legal advice.

APPENDIX C—CHARITABLE IMMUNITY IN VIRGINIA



Charitable immunity is a complicated area of the law that often changes and is subject to differing interpretations. This chart is a simplification of complicated legal concepts and should not be relied upon as legal advice.