Sovereign Immunity: Can The King Still Do No Wrong?

By David N. Anthony and Beth V. McMahon

A recent pronouncement by the Supreme Court of Virginia on the topic of sovereign immunity illustrates the power of the doctrine and why every practicing attorney should be familiar with the concept. In Virginia v. Luzik,[1] a group of juvenile probation officers who worked for the Virginia Department of Youth and Family Services filed suit against the Commonwealth alleging violations of the Fair Labor Standards Act (the "FLSA") and seeking overtime pay under the federal law. The FLSA provides that states have concurrent jurisdiction over FLSA claims. The Commonwealth argued that the doctrine of sovereign immunity barred the claim. The Supreme Court agreed and entered judgment for the Commonwealth. The Supreme Court was not sympathetic to the claim that the state workers were deprived of a remedy, noting that depriving a claimant of recovery "is the very nature of the doctrine when it is properly applied."[2]

Credit: The Virginia Fire and Police Museum

A municipality's governmental functions that are generally immune include police protection and firefighting. Above, the C&O Office Building fire on Main Street, Richmond in 1917.

What Is Sovereign Immunity?

Sovereign immunity offers governmental entities and their employees protection against suits for tort liability. The doctrine under Virginia law has evolved over time and is a complex, confusing patchwork of case law and statutory provisions. The level of protection it offers to any particular employee or agency varies considerably according to the characteristics and particular facts of each case. This article briefly summarizes the doctrine and its applications, but lawyers are forewarned that sovereign immunity is not a static legal concept and that an exception likely exists to every generalization.

In the seminal case of Messina v. Burden,[3] the Supreme Court of Virginia generally summarized the doctrine of sovereign immunity as follows: It is a "rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities."[4] According to the Court, sovereign immunity, also called official immunity, protects the public purse, protects against vexatious lawsuits, encourages citizens to assume important governmental positions by alleviating employees' fear of being sued, and promotes the orderly administration of government.[5] Because of these reasons, the Court has rejected repeated invitations to abolish the doctrine and the Virginia General Assembly likewise has refused to eliminate sovereign immunity by legislation. Accordingly, sovereign immunity remains "alive and well" in Virginia.[6]

What Entities Are Protected By Sovereign Immunity?

The Commonwealth of Virginia

The immunity of the Commonwealth itself is the strongest under Virginia law. The Commonwealth's immunity is absolute unless waived, such as by the Virginia Tort Claims Act. State agencies and universities simply are immune from most tort suits. Accordingly, a myriad of suits has been summarily dismissed without any substantive consideration of their merits.[7]

Counties

Historically, counties were created as geographical subdivisions for the administration of state authority at the local level; therefore, counties are viewed as "political subdivisions" of the Commonwealth entitled to the same immunity as the Commonwealth. Although for most present day purposes cities

and counties have assumed similar functions,[8] because of counties' different historical origins, they receive a greater level of sovereign immunity protection than do cities unless a statute provides otherwise.[9] A county retains sovereign immunity even when the county takes on characteristics of a city and exercises powers and performs services rendered by a city.[10] County actions are not assessed under the governmental-proprietary distinction applicable to municipalities. Instead, county immunity extends to acts that would be considered governmental or proprietary.[11] County immunity extends to cover county officers and employees who negligently cause injury to another.[12] Authorities or municipal corporations created by a county, however, may be analyzed as a municipality.

Cities

Unlike counties, cities receive a reduced level of sovereign immunity protection. The Commonwealth and its counties receive sovereign immunity because of the nature of the governmental entity regardless of the characteristics of the act giving rise to the claimed liability. In contrast, the particular function a city has engaged in that gave rise to the tort liability determines the level of protection offered a city. A city or municipality engages in two types of functions: governmental functions (which are like the functions undertaken by the state) and proprietary functions (which are more akin to the functions of a private corporation).[13] As explained by the Supreme Court of Virginia, "[t]he underlying test [as to whether an act is governmental rather than 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."[14]

Governmental/Proprietary Distinction

A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions.[15] A function is characterized as governmental if it is carried out solely for the public good or welfare.[16] A governmental function advances or protects general public health and safety.[17] Examples of governmental functions are: municipal designing, planning, and construction (such as public street and sidewalk construction);[18] designing dams and seawalls;[19] responding to public emergencies (such as removing felled trees after a hurricane or snow after a storm);[20] maintaining traffic signals and railroad crossings;[21] operating hospitals and health departments;[22] capturing and impounding of stray animals;[23] operating police and firefighting forces;[24] operating ambulance services;[25] maintaining governmental buildings (such as courts and jails);[26] operating schools;[27] removing trash and operating landfills;[28] and inspecting buildings.[29]

In contrast, a municipality is not entitled to absolute immunity when it engages in a proprietary function, and it may be held liable for failing to exercise the function or for negligence in the exercise of a proprietary function.[30] Proprietary functions, also called ministerial functions, are carried out primarily for the benefit of the municipality rather than the public.[31] A municipality engages in a proprietary function when it assumes a task that a private corporation would, such as operating tollgates.[32] Other examples include: operating a water department,[33] operating a market,[34] operating utilities,[35] operating an airport,[36] renting property as a landlord,[37] and operating a public housing authority.[38]

Applying the Governmental/Proprietary Distinction

Although the governmental/proprietary distinction is simple in theory, it often proves troublesome in application. Some functions defy easy categorization, and often courts will disagree on the characterization of a task. For example, one circuit court held that street sweeping is a governmental function, despite a decision by the Supreme Court of Virginia issued the year before, which concluded that street cleaning is proprietary.[39] In many cases, specific facts dictate whether immunity will be granted. For example, a bicyclist injured on an icy bridge that had not been cleared sued the Richmond Metropolitan Authority, which pled sovereign immunity.[40] The Court reasoned that removal of newly fallen snow is a governmental function because it is a governmental response to an emergency, but the removal of old snow is a more routine task that is proprietary.[41] Because the authority did not introduce any evidence indicating how long the snow and ice had been on the ground, the Court rejected its plea of sovereign immunity.[42] Similarly, firefighting is a clearly established governmental function. In Burson v. Bristol, 176 Va. 53, 10 S.E.2d 541 (1940), however, sovereign immunity was denied to firefighters who were pulling down a building's walls because the fire had occurred five days before. Because no emergency existed at the time of the action, the task was characterized as proprietary, and the Court refused to grant immunity to the city.

Operating recreational facilities is another troublesome area—one that highlights the complexity of the sovereign immunity doctrines. An older case held that the operation of recreational facilities was proprietary, Hoggard v. City of Richmond, 172 Va. 145, 157, 200 S.E. 610, 615 (1939), but the case subsequently was abrogated by a statute granting immunity. Virginia Code Ann. § 15.2-1809 provides that cities and towns are liable only for gross negligence in the operation of pools, parks, playgrounds and other recreational facilities. The Supreme Court recently ruled that § 15.2-1809 grants cities immunity even for nuisances, which traditionally have been regarded as an exception to the sovereign immunity shield.[43] The case of Hutchinson v. Richmond Metro. Auth.,[44] illustrates how the common law doctrine interacts with statutory provisions. In Hutchinson, the court denied common law immunity for personal injury suit at a baseball diamond because running the facility was a proprietary task, but granted immunity pursuant to the statute governing recreational facilities. The lesson to be learned is that the Virginia Code should always be checked to determine whether any provisions modify the normal application of sovereign immunity doctrines. Unfortunately, the Virginia Code does not list all immunity statutes in one place.

If the activity has characteristics of both governmental and proprietary actions jointly, immunity generally is granted.[45] Furthermore, unless otherwise prescribed by applicable enabling legislation, special purpose governmental units partake of the immunity of the governmental body that creates them.[46] Some dispute exists about whether independent contractors assuming a governmental role should be given immunity.[47]

Which Employees Are Protected By Sovereign Immunity?

The immunity of employees of governmental entities is even more complicated—with a similar framework governing which

employees will receive immunity. Persons who occupy the highest levels of the three branches of government, such as governors, judges, members of state and local legislative bodies, and other high level government officials, have generally been accorded absolute immunity.[48] Virginia Code Ann. § 15.2-1405 provides that the members of governing bodies of counties, cities, towns or political subdivisions are immune from suit for failing to exercise discretionary or governmental authority, except for gross negligence, intentional misconduct, or misappropriation of funds.

In contrast, the immunity of a municipality's employees is referred to as qualified immunity because it is more limited in nature.[49] An employee's qualified immunity under Virginia law on sovereign immunity, however, must be distinguished from the concept of qualified immunity available to municipal officials under 42 U.S.C. § 1983, which has different prerequisites for application.[50] Whether to immunize a municipality's employees traditionally has been a thorny issue for courts. Early Virginia decisions were inclined to deny immunity to employees.[51] The Supreme Court eventually extended sovereign immunity to those individuals who help run the government.[52]

The Supreme Court of Virginia has utilized a multi-factored test to determine when employees of an immune governmental entity should receive sovereign immunity. The test for employee immunity was set forth first in James v. Jane[53] and refined in Messina v. Burden and later case law. The following factors are considered:

(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 discretion exercised by the state over the employee; and

(4) whether the act complained of involved the use of judgment and discretion.

The test was arguably recently modified slightly as the Supreme Court listed the following factors:[54]

(1) the employee's function and the Commonwealth's interest and involvement therein;

(2) the employee's use of judgment and discretion; and

(3) the Commonwealth's control over and direction of the employee.

If the assessment of these factors favors giving immunity and the employee is engaged in a governmental task, immunity should be given. If, however, the employee is engaged in a proprietary or ministerial task, the employee receives no immunity.[55] A ministerial act is "one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon propriety of the act being done."[56] The recent decision of McDonald v. Hoard provides a good example of the detailed analysis of these factors.[57] In McDonald, the Court carefully assessed whether a negligence claim against a graduate student dentist could proceed. The Court analyzed the James factors separately and concluded that the student was more akin to a private physician with no significant amounts of governmental control. Accordingly, the Court denied the graduate student's plea of sovereign immunity.

The list of employees given immunity is lengthy and includes: school employees—such as school board supervisors, teachers, school superintendents, principals, and coordinators of school grounds;[58] employees engaged in engineering and operations;[59] county attorneys;[60] sheriffs;[61] police officers;[62] and correctional employees.[63]

Because governmental entities are involved in health care, many sovereign immunity cases include medical employees. Employees such as physicians, residents, interns and nurses are eligible for immunity if the involved act relates to the provision of essential health care services or training.[64] Qualified immunity can extend to medical research and testing,[65] administration of medical facilities,[66] and even housekeeping at hospitals.[67] When the negligent acts at issue relate only to care of a particular patient, or when they cannot be linked to training or administrative functions, courts are much less likely to grant sovereign immunity.[68]

Another frequent scenario involves a governmental employee who is in an automobile accident. If the driver was on government business, courts should grant sovereign immunity. Examples are: a police officer driving a car in hot pursuit of suspect,[69] an ambulance driver responding to an emergency,[70] a driver of a truck spreading salt to melt snow,[71] a driver of a volunteer rescue squad ambulance in association with a county;[72] and a city employee driving a truck to get parts for work on a storm water pipe.[73] All of these cases granted immunity. In contrast, a volunteer firefighter driving his own car to a fire was denied immunity because the government exercised little control over him, and driving to the scene required little judgment or discretion.[74]

Once again, the Virginia Code always should be checked. A patchwork of provisions extends specific immunity to an assortment of employees. Examples of employees given immunity by a specific statute include: local government officials and employees who report suspected child abuse cases, Va. Code Ann. § 63.1-248.5; library personnel who cause the arrest of persons suspected of stealing library books, Va. Code Ann. § 42.1-73.1; local government employees assisting in disasters, Va. Code Ann. § 44-146.23; public safety officials assisting in emergencies, Va. Code Ann. § 8.01-225; persons who serve on family assessment and planning teams or who serve on a community policy team unless they act with malicious intent, Va. Code Ann. §§ 2.1-751, -753; school teachers for good faith acts related to the supervision, care and discipline of students, Va. Code Ann. § 8.01220.1:2; school personnel who report suspected drug or alcohol abuse, Va. Code Ann. § 8.0147; employees at free clinics absent gross negligence or willful misconduct, Va. Code Ann. § 32.1127.3; health professionals investigating a professional peer's potential drug or alcohol problems, Va. Code Ann. § 8.01581.13; health care professionals serving as members or consultants on specified review boards, Va. Code Ann. § 8.01581.16; and emergency medical technicians, Va. Code Ann. § 27-1. Note that many of the statutes provide that employees should not be given immunity if

their act is malicious or constitutes gross negligence. In the absence of such qualifying language, the immunity given by statute may provide protection even against willful conduct.[75]

Exception To Sovereign Immunity

Sovereign immunity is by no means a bulletproof vest, and many exceptions to the doctrine exist.

Intentional Torts and Outside Scope of Employment; Gross Negligence; and Bad Faith Acts

The most common exceptions to the doctrine of sovereign immunity are acts outside the scope of employment,[76] grossly negligent conduct,[77] intentional torts,[78] or acts characterized as bad faith.[79]

Contract Claims

Sovereign immunity applies only to tort actions and has never protected governmental units from contractual liability arising from contracts entered into by duly authorized agents of government or quasi-contracts.[80] A takings claim is considered a contractual claim and the governmental entity has no immunity from suits alleging an unlawful taking.[81]

Statutory Exceptions

As discussed previously, statutes expressly enact numerous exceptions. Statutes, however, are not interpreted as waiving immunity unless the intent to waive sovereign immunity is clear.[82] For example, a recent decision determined that Va. Code Ann. § 22.1-194 waived a school board's sovereign immunity to a limited degree when the school board is insured under a valid policy covering a vehicle involved in an accident.[83]

Virginia Torts Claims Act

The Virginia Tort Claims Act, codified at Va. Code Ann. §§ 8.01-195.1 et seq., is the most significant statute that waives sovereign immunity. It partially waives the Commonwealth's sovereign immunity for torts. Virginia's immunity is waived up to $100,000 or the amount of its insurance coverage, whichever is greater. Va. Code Ann. § 8.01-195.3. The Virginia Tort Claims Act applies only to claims against the state and its transportation districts. It does not abrogate the immunity of counties, cities, state agencies, or school boards. The act contains numerous exemptions listed in Va. Code Ann. § 8.01-195.3, such as issues in connection with assessment of taxes or acts related to the execution of a court order. Because the Virginia Tort Claims Act waives immunity, it is strictly construed.[84] The act's waiver applies only in state courts; the Virginia Tort Claims Act does not waive immunity in federal court and does not affect immunity given under the 11th Amendment to the United States Constitution.[85]

Notice Requirements

Some exceptions to sovereign immunity have important notice requirements imposed by statute. For instance, the Virginia Tort Claims Act provides a generous waiver of sovereign immunity, but also requires a plaintiff to follow certain procedural requirements. The plaintiff must give the defendant notice of his or her claim within one year of when the claim accrued. If the notice does not comply with the requirements, the suit will be dismissed and forever barred.[86] Courts strictly apply the notice requirement and have held that even a defendant's actual notice of the claim did not excuse a plaintiff's failure to comply with the requirements.[87]

Claims against cities are also subject to statutory provisions governing notice. A notice requirement similar to the notice provisions of the Virginia Tort Claims Act is found in Va. Code Ann. § 8.01-222. The statute bars any action against a city or town for injury to any person or property, or for wrongful death alleged to have been sustained by reason of the negligence of the city or town or any officer, agent or employee unless, within six months after the cause of action shall have accrued, a written statement as to the nature of the claim and the time and place of injury is filed with the city or town attorney or with the mayor or chief executive. Notice may not be required for intentional torts,[88] but notice is required for nuisance claims.[89] The statute was enacted: (1) to enable a city to make a prompt investigation of tort claims; (2) to correct dangerous or defective conditions; and (3) to encourage voluntary settlements.[90] Likewise, the Supreme Court of Virginia has strictly enforced this notice requirement.[91]

Counties also have their own notice requirements found at Va. Code Ann. §§ 15.2-1246 and -1248. Monetary claims against a county must be presented at a board meeting and appealed within the specified times. The appealing party must serve written notice on the board and execute a bond to the county with surety.

Conclusion

Because sovereign immunity can completely bar an otherwise meritorious suit, Virginia practitioners should remain aware of the continuing development of the sovereign immunity doctrine under Virginia law. This complex doctrine is often confused, and lawyers should return to the fundamental rules of sovereign immunity for guidance. ⚖

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Endnotes

1 Case No. 982635 (Decided Jan. 14, 2000).

2 The applicability of the FLSA to state workers has generated a rash of recent litigation nationally that has coincided with numerous other cases considering other doctrines related to sovereign immunity, such as the constitutional concept of federalism and the 11th Amendment of the United States Constitution. E.g., Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir. 1999), cert. granted sub nom., 120 S. Ct. 11 (1999).

3 228 Va. 301, 321 S.E.2d 657 (1984). The court considered two fact patterns in this case—a school superintendent who was sued when an actor fell off a stage at a college theater and a public works chief who was sued by a plaintiff injured on a defective manhole cover. The court immunized both employees. Because the case sets forth the rationale for Virginia's continued adherence to sovereign immunity, attorneys should be familiar with the case.

4 Messina v. Burden, 228 Va. 301, 308, 321 S.E.2d 657 (1984) (quoting Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983)).

5 Id. at 308, 321 S.E.2d at 660.

6 Id. at 307, 321 S.E.2d at 668.

7 E.g., Baumgardner v. Southwestern Va. Mental Health Inst., 247 Va. 486, 489, 442 S.E.2d 400 (1994); Bowers v. Virginia, 225 Va. 245, 253, 302 S.E.2d 511 (1983) (Virginia Department of Highways and Transportation immune); Stancil v. Chesterfield Health Dep't, 40 Va. Cir. 156 (Richmond 1996) (health department immune); James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980) (university); Faculty for Responsible Change v. Visitors of James Madison Univ., 38 Va. Cir. 159 (Rockingham County 1995) (university); Childress v. Clement, 44 Va. Cir. 169 (Richmond 1997) (university).

8 Some advocates want to abolish the county-city distinction legislatively, claiming that the distinction is no longer meaningful in light of their modern functions.

9 Mann v. Arlington County Bd., 199 Va. 169, 173-74, 98 S.E.2d 515, 518 (1957); Fry v. Albemarle County, 86 Va. 195, 197-98, 9 S.E. 1004, 1005 (1889).

10 Mann v. Arlington County Bd., 199 Va. at 175, 98 S.E. 2d at 519.

11 Fry v. Albemarle County, 86 Va. at 199, 9 S.E. at 1005; Stancil v. Chesterfield Health Dep't, 40 Va. Cir. 156 (Richmond 1996).

12 Mann v. Arlington County Bd., 199 Va. at 174, 98 S.E.2d at 518 (citing Fry v. Albemarle County, 86 Va. 195, 9 S.E. 1004 (1889)).

13 Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 1005, 254 S.E.2d 62, 63 (1979).

14 Hoggard, 172 Va. at 150, 200 S.E. at 612.

15 Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 254 S.E.2d 62 (1979).

16 City of Virginia Beach v. Carmichael Dev. Co., Record No. 990919 (Va. March 3, 2000); Edwards v City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989); City of Richmond v. Long's Admin'rs, 58 Va. (17 Gratt.) 375, 384 (1867).

17 Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962).

18 City of Norfolk v. Hall, 175 Va. 545, 551, 9 S.E.2d 356, 359 (1940); Jones v. City of Williamsburg, 97 Va. 722, 725, 34 S.E. 883 (1900); Brizendine v. City of Roanoke, 43 Va. Cir. 353 (Roanoke Sept. 17, 1997); Evans v. City of Richmond, 33 Va. Cir. 93 (Richmond 1993).

19 Va. Code Ann. § 15.2-971.

20 Va. Code Ann. § 44-146.23; Va. Code Ann. § 8.01-225; Fenon v. City of Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962); Stanfield v. Peregoy, 245 Va. 339, 429 S.E.2d 11 (1993); Lester v. City of Roanoke, 20 Va. Cir. 319 (Roanoke 1990); Artis v. City of Alexandria, 11 Va. Cir. 110 (Alexandria 1987).

21 Freeman v. City of Norfolk, 221 Va. 57, 60, 266 S.E.2d 885, 886 (1980); Taylor v. City of Charlottesville, 240 Va. 367, 397 S.E.2d 832 (1990); Transportation, Inc., 219 Va. at 1006, 254 S.E.2d at 64; Beach v. Mid-Atlantic Coca Cola Bottling Co., 17 Va. Cir. 253 (Fairfax County 1989); Williams v. City of Alexandria, 14 Va. Cir. 128 (City of Alexandria 1988); Chandler v. National R.R. Passenger Corp., 875 F. Supp. 1172 (E.D. Va. 1995).

22 Va. Code Ann. § 32.1-127.3; Stevens v. Hospital Auth. of Richmond, 42 Va. Cir. 321 (Richmond 1997); City of Richmond v. Long's Adm'rs, 58 Va. (17 Gratt.) 375 (1867); Stancil v. Chesterfield Health Dep't, 40 Va. Cir. 156 (Richmond 1996).

23 McAfee v. City of Richmond, 46 Va. Cir. 420 (Richmond 1998).

24 Coward v. Richmond, 40 Va. Cir. 333 (Richmond 1996); Talbert v. City of Charlottesville, 48 Va. Cir. 94 (Charlottesville 1998); City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927); Kane v. City of Richmond, 18 Va. Cir. 442 (Richmond 1990); Downs v. City of Roanoke, 16 Va. Cir. 330 (Roanoke 1989).

25 Edwards v. City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989).

26 Hoggard v. City of Richmond, 172 Va. 145, 147, 200 S.E. 610 (1939); Lewis v. City of Charlottesville, 47 Va. Cir. 313 (Charlottesville 1998); Miles v. City of Richmond, 26 Va. Cir. 170 (Richmond 1991); Slaughter v. Duling, 33 Va. Cir. 476 (Richmond 1972); Franklin v. Town of Richlands, 161 Va. 156, 168, 170 S.E. 718, 719 (1933).

27 Carr v. School Bd. of City of Salem, 48 Va. Cir. 84 (Salem 1999).

28 Taylor v. City of Newport News, 214 Va. 9, 197 S.E.2d 209 (1973); Ashbury v. City of Norfolk, 152 Va. 278, 283, 147 S.E. 223, 224 (1929); Gayda v. Gibbs, 45 Va. Cir. 176 (Norfolk 1998).

29 Bergen v. Fourth Skyline Corp., 501 F.2d 1174 (4th Cir. 1974); Dunn v. City of Williamsburg, 35 Va. Cir. 420 (Williamsburg & James City County 1995); Combs v. City of Winchester, 25 Va. Cir. 207 (1991); Boyd v. Brown, 12 Va. Cir. 54 (Newport News 1986).

30 Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962).

31 City of Virginia Beach v. Carmichael Dev. Co., Record No. 990919 (Va. March 3, 2000); Edwards v City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989); City of Richmond v. Long's Admin'rs, 58 Va. (17 Gratt.) 375, 384 (1867).

32 Hobbs v. Richmond Metro. Auth., 36 Va. Cir. 488 (Richmond 1995).

33 City of Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 71, 138 S.E. 503 (1927); City of Richmond v. Hood Rubber Prods. Co., 168 Va. 11, 190 S.E. 95 (1937).

34 City of Norfolk v. Anthony, 117 Va. 777, 86 S.E. 68 (1915).

35 Holt v. Bowie, 333 F. Supp. 843 (W.D. Va. 1971); City of Richmond v. James, 170 Va. 553, 197 S.E. 416 (1938).

36 Bowling v. City of Roanoke, 568 F. Supp. 446 (W.D. Va. 1983).

37 City of Richmond v. Grizzard, 205 Va. 298, 136 S.E.2d 827 (1964).

38 VEPCO v. Hampton Redevelopment & Hous. Auth., 217 Va. 30, 225 S.E.2d 364 (1976).

39 Compare Clingenpeel v. City of Lynchburg, 28 Va. Cir. 105 (Amherst County 1992) with Bialk v. City of Hampton, 242 Va. 56, 405 S.E.2d 619 (1991).

40 Chiles v. Gray, 37 Va. Cir. 459 (Richmond 1996).

41 Id. at 461-62.

42 Id. at 462.

43 Hawthorn v. City of Richmond, 253 Va. 283, 484 S.E.2d 603 (1997) (reviewing former § 15.1291).

44 37 Va. Cir. 280 (Richmond 1995).

45 City of Virginia Beach v. Carmichael Dev. Co., Record No. 990919 (Va. March 3, 2000) (granting immunity when the city's acquisition of land had both governmental and proprietary characteristics); Edwards v City of Portsmouth, 237 Va. 167, 375 S.E.2d 747 (1989); City of Richmond v. Long's Admin'rs, 58 Va. (17 Gratt.) 375, 384 (1867); Bialk v. City of Hampton, 242 Va. 56, 405 S.E.2d 619 (1991) (granting immunity when the governmental task of emergency snow removal was combined with proprietary street maintenance); Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 254 S.E.2d 62 (1979) (granting immunity when governmental traffic regulation coincided with proprietary street maintenance); Taylor v. City of Newport News, 214 Va. 9, 197 S.E.2d 209 (1973) (granting immunity when governmental trash collection occurred at the same time as proprietary sidewalk maintenance).

46 See VEPCO v. Hampton Roads Development Auth., 217 Va. 30, 225 S.E.2d 364 (1976).

47 Compare Browning v. Vecellio & Grogan, Inc., 945 F. Supp. 930 (W.D. Va. 1996) (refusing to grant sovereign immunity protection to independent contractor for state who allegedly left a ditch uncovered causing personal injuries to plaintiff); Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961) (holding sovereign immunity never applies to independent contractors); Hewlett v. Virginia, 37 Va. Cir. 402 (Richmond 1995) (ruling that a health service independent contractor was not immune) with Wesley v. Mercy Ambulance Corp., 37 Va. Cir. 354 (Richmond 1995) (giving an independent contractor ambulance service immunity); see also National R.R. Passenger Corp. v. Catlett Volunteer Fire Co., Inc., 241 Va. 402, 404 S.E.2d 216 (1991) (applying Va. Code Ann. § 27-23.6, which provides immunity to firefighting contractors).

48 Messina, 228 Va. 309, 321 S.E.2d at 661 (citing Prosser, Handbook of the Law of Torts § 132 (4th ed. 1971)).

49 James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864 (1980).

50 See Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (Under § 1983 a government employee acting in good faith is immune from civil liability unless their conduct violates a clearly established statutory or constitutional

right of which a reasonable person would have known.).

51 See Crabbe v. County Sch. Bd., 209 Va. 356, 164 S.E.2d 639 (1968), overruled by Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988).

52 Messina v. Burden, 228 Va. at 30708, 321 S.E.2d at 66061 ("[i]f an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the [sovereign immunity] doctrine."

53 221 Va. 43, 282 S.E.2d 864 (1980).

54 Lohr v. Larsen, 246 Va. 81, 431 S.E.2d 642 (1993) (although the Lohr Court represented that it was applying the James test).

55 Heider v. Clemons, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991), First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983); Berry v. Hamman, 203 Va. 596, 125 S.E.2d 851 (1962); Rives v. Bolling, 180 Va. 124, 21 S.E.2d 775 (1942); Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939); Wynn v. Gandy, 170 Va. 590, 197 S.E. 527 (1938).

56 Dovel v. Bertram, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945).

57 48 Va. Cir. 421 (Charlottesville 1999).

58 Mattox v. Campbell County Sch. Bd., 37 Va. Cir. 221 (Campbell County 1995); Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988); Summerell v. Wolfskill, 34 Va. Cir. 518 (Southampton County 1994); Locklear v. Pometto, 28 Va. Cir. 307 (Fairfax County 1992); accord Bowers v. Martin, 116 F.3d 472, 1997 U.S. App. LEXIS 15169 (4th Cir. June 23, 1997); Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982); Young v. Young, 22 Va. Cir. 46 (County of Fairfax 1990); Pusey v. Riner, 26 Va. Cir. 321 (Fairfax County 1992).

59 Shelton v. Cooper, 10 Va. Cir. 260 (Henrico 1987); Bowers v. Commonwealth, 225 Va. 246, 302 S.E.2d 511 (1983); Messina, 228 Va. 301, 321 S.E.2d 657.

60 Grites v. Clarke County, 14 Va. Cir. 165 (Clarke 1988).

61 Smith v. Daniel, 47 Va. Cir. 541 (Richmond 1999); Sickles v. Peed, 25 Va. Cir. 487 (Fairfax County 1991); Ferguson v. Foster, 12 Va. Cir. 130 (1988); Donaldson v. Kunkle, Law No. 89-684 (Arlington County Cir. Ct. Aug. 16, 1989).

62 LaPrade v. Hopkins, 47 Va. Cir. 332 (Roanoke 1998).

63 Harlow v. Clatterbuck, 230 Va. 490, 339 S.E.2d 181 (1986).

64 Lohr v. Larsen, 246 Va. 81, 431 S.E.2d 641 (1993) (upholding immunity because of high degree of governmental control, low level of physician discretion, and essential governmental purpose of providing health care); Floyd v. Chan, 37 Va. Cir. 361 (Albemarle County 1995); Booth v. Virginia, 30 Va. Cir. 359 (Albemarle County 1993); Robertson v. Virginia, 30 Va. Cir. 71 (Richmond 1993); First Va. Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983) (overruling Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973); Rogers v. Virginia, 38 Va. Cir. 217 (Albemarle County 1995).

65 Garguilo v. Ohar, 239 Va. 209, 387 S.E.2d 787 (1990); Hicks v. Pollart, 27 Va. Cir. 7 (Albemarle County 1991).

66 Benjamin v. University Internal Med. Found., 254 Va. 400, 492 S.E.2d 651 (Va. 1997); Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973); overruled by First Va. Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983).

67 Stevens v. SRMC, VLW 098-8-070 (Richmond Cir. March 5, 1998).

68 Gray v. Commonwealth, 40 Va. Cir. 419 (Richmond 1996); McCandlish v. Kron, 38 Va. Cir. 302 (Albemarle County 1996); Houchens v. Rector & Visitors of the Univ. of Virginia, 23 Va. Cir. 202 (Charlottesville 1991); A.B. v. C.D., 37 Va. Cir. 244 (Albemarle County 1995); Lee v. Bourgeois, 252 Va. 328, 477 S.E.2d 495 (1996); James v. Jane, 221 Va. 43, 282 S.E.2d 864 (1980); Deeds v. DiMercurio, 30 Va. Cir. 532 (Albemarle County 1991); Booth v. Commonwealth, 30 Va. Cir. 359 (Albemarle County 1993).

69 Colby v. Boyden, 241 Va. 125, 400 S.E.2d 184 (1991); Shenk v. Spengler, 46 Va. Cir. 277 (Rockingham County 1998); Campbell v. Compton, 28 Va. Cir. 317 (Essex County 1992); Robbins v. Wessell, 12 Va. Cir. 231 (Chesterfield County 1988).

70 Smith v. Settle, 254 Va. 348, 492 S.E.2d 427 (1997).

71 Stanfield v. Peregoy, 245 Va. 339, 429 S.E.2d 11 (1993).

72 Toms v. Greene County Rescue Squad, 48 Va. Cir. 520 (Charlottesville 1999).

73 Lea v. Senedecor, No. L97-877 (Norfolk Cir. Ct. Dec. 3, 1997).

74 Daddio v. Ashley, 43 Va. Cir. 283 (Loudoun County 1997).

75 See Bowen v. Scott County Lifesaving & First Aid Crew Inc., 43 Va. Cir. 28 (Scott County 1997) (granting immunity to members of rescue squad for manner in which they transported decedent even though alleged to be "willful and wanton conduct").

76 Burnam v. West, 681 F. Supp. 1169, 1172 (E.D. Va. 1988); Leathers v. Serrell, 376 F. Supp. 983 (W.D. Va. 1974); Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d 882 (1996); Fox v. Deese, 234 Va. 412, 422-25, 362 S.E.2d 699, 706 (1987); Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984); Crabbe v. School Bd., 209 Va. 356, 164 S.E.2d 639 (1968); Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942); Deeds v. DiMercurio, 30 Va. Cir. 532 (Albemarle County 1991).

77 McLenagan v. Karnes, 27 F.3d 1002 (4th Cir. 1994); Glasco v. Ballard, 249 Va. 61, 452 S.E.2d 854 (1995); Meagher v. Johnson, 239 Va. 380, 389 S.E.2d 310 (1990); Messina v. Burden, 228 Va. 301, 310, 321 S.E.2d 657, 662 (1984); Frazier v. City of Norfolk, 234 Va. 388, 362 S.E.2d 688 (1987); Bowers v. Commonwealth, 225 Va. 245, 253, 302 S.E.2d 511 (1983); James v. Jane, 221 Va. 43, 53 (1980).

78 Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d (1996); Fox v. Deese, 234 Va. 412, 362 S.E.2d 699 (1987); Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967); Agyeman v. Pierce, 26 Va. Cir. 140 (Richmond 1991); but see Coward v. Richmond, 40 Va. Cir. 333 (Richmond 1996) (granting municipality immunity from police officer's intentional assault and battery).

79 Tomlin v. McKenzie, 251 Va. 478, 468 S.E.2d 882 (1996); Schnupp v. Smith, 249 Va. 353, 457 S.E.2d 42 (1995) (immunity lost by showing of malice in a slander action); Harlow v. Clatterbuck. 230 Va. 490, 339 S.E.2d 181 (1986).

80 Bell Atlantic-Va., Inc. v. Arlington County, 254 Va. 60, 486 S.E.2d 297 (1997); Jenkins v. County of Shenandoah, 246 Va. 467, 436 S.E.2d 607 (1993); Wiecking v. Allied Medical Supply Corp., 239 Va. 548, 551, 391 S.E.2d 258 (1990); Cole v. Kyle, 41 Va. Cir. 273 (Richmond 1997); Burns v. Board of Supervisors of Fairfax County, 218 Va. 625, 238 S.E.2d 823 (1977).

81 Bell Atlantic-Va., Inc. v. Arlington County, 254 Va. 60, 486 S.E.2d 297 (1997); Jenkins v. County of Shenandoah, 246 Va. 467, 436 S.E.2d 607 (1993).

82 Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983).

83 Wagoner v. Benson, 256 Va. 260, 505 S.E.2d 188 (1998).

84 Baumgardner v. Southwestern Virginia Mental Health Inst., 247 Va. 486, 489, 442 S.E.2d 400, 401 (1994).

85 Medicenters of America, Inc. v. Virginia, 373 F. Supp. 305 (E.D. Va. 1974); Reynolds v. Sheriff, City of Richmond, 574 F. Supp. 90 (E.D. Va. 1983).

86 Va. Code Ann. § 8.01195.7; Kim v. Virginia, 34 Va. Cir. 116 (Fairfax County 1994).

87 Halberstam v. Virginia, 251 Va. 248, 467 S.E.2d 783 (1996) (notice insufficiently described place of injury); Stancil v. Chesterfield Health Dep't, 40 Va. Cir. 156 (City of Richmond 1996) (holding hand-delivery of notice insufficient compliance with the notice statute).

88 Talbert v. City of Charlottesville, 48 Va. Cir. 1994 (Charlottesville 1999).

89 Breeding v. Hensley, 258 Va. 207, 519 S.E.2d 369 (1999).

90 Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (1984); Heller v. City of Virginia Beach, 213 Va. 683, 685, 194 S.E.2d 696, 698 (1973).

91 See Town of Crewe, 228 Va. at 113-14, 319 S.E.2d at 750 (notice failed to comply substantially with statute even though City had actual notice of time and place of the accident).