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# Five Myths about Immunity of Governmental Employees

by Roger T. Creager and Thomas J. Curcio<sup>1</sup>

America's great writer Mark Twain said, "The report of my death has been greatly exaggerated."<sup>2</sup> America's great general Ulysses S. Grant said, "The distant rear of an army engaged in battle is not the best place from which to judge correctly what is going on in front."<sup>3</sup> Two related principles emerge: First, rumors and misunderstandings have a tendency to arise. Second, the best way to dispel misunderstandings is by close examination of the facts at the source. Both these principles apply to the determination of the immunity of governmental employees. Misunderstandings of the controlling legal principles tend to develop, but those misunderstandings are readily dispelled by a careful examination of the actual decisions of the Supreme Court of Virginia.

## **Myth Number 1: There is an easily applied all-purpose pass-or-fail test for the immunity of governmental employees.**

Attorneys litigating immunity issues frequently ask a court to apply the "*James v. Jane* four-part test" to determine whether a governmental employee is protected by immunity. They argue that the test is met or not met, as though immunity analysis merely involves checking off boxes on a four-item list to produce a "yes" or "no" answer. This erroneous notion is perhaps somewhat understandable, since the case law does refer at times to the "four-part test enunciated in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980)."<sup>4</sup> Closer examination of the full text of the decisions of the Court clearly shows, however, that *James v. Jane* did not establish an easily applied litmus test or list of check-off boxes. *James v. Jane* set forth four nonexclusive factors that courts should consider in evaluating whether immunity should apply.<sup>5</sup>

There is no simple litmus test for immunity.<sup>6</sup> An overly broad application of immunity would unsoundly protect and encourage irresponsible, reckless, and even unlawful actions by public employees. An unduly narrow application of immunity would have an unwarranted chilling effect on public service. What is required in all cases is a close consideration of all the facts and circumstances, the pertinent factors, and the competing public policies involved.

## **Myth Number 2: The actions of governmental employees usually are entitled to the special protection of governmental-employee immunity.**

Only the immunity of the sovereign itself is automatic and absolute (unless waived).<sup>7</sup> There is no automatic or absolute immunity for governmental employees.<sup>8</sup> Whether they are entitled to the special protection of immunity depends upon the particular facts of each case,<sup>9</sup> and the employee has the burden of proving that his or her actions are entitled to immunity.<sup>10</sup> Even when a governmental employee's actions are entitled to immunity, the employee is still not protected from liability for breach of a ministerial duty or for gross negligence.<sup>11</sup> Determination of governmental-employee immunity issues necessarily "requires line-drawing" and the courts "must engage in this difficult task."<sup>12</sup> "Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles . . . , and by examining the facts and circumstances of each case this task can be simplified."<sup>13</sup>

## **Myth Number 3: If an activity involves "judgment and discretion," then the governmental employee is always protected by immunity.**

The governmental employee will, of course, usually insist that the conduct in question required her to use "judgment and discretion" and thus she is protected by governmental-employee immu-

nity. This assertion is, quite simply, the legal equivalent of an exaggeration. The true rule of law is set forth in the *James v. Jane* decision, where the Virginia Supreme Court made very clear: “Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion.”<sup>14</sup>

Moreover, it is evident from the case law that the fact that a governmental actor used “discretion” may in some cases support immunity, but in other cases will oppose immunity. Thus, the argument for extending immunity to a governmental employee is strongest at the “highest levels of the three branches of government,” where the exercise of judgment and discretion is an inherent and assigned part of the responsibilities involved but becomes weaker “the farther one moves away from the highest levels of government.”<sup>15</sup> This is because in the case of governmental employees at the highest levels, the exercise of “judgment and discretion” (in the fullest, immunity-protected sense) is centrally and quintessentially important to the job and the responsibilities assigned to them. The exercise of judgment and discretion by high-level governmental employees is fundamentally necessary in the public interest and warrants granting them immunity. By contrast, in the case of a lower-level employee, the fact that the employee used little or no discretion would usually support granting immunity (since the employee had little or no discretion and essentially did what he was ordered to do), while the exercise of judgment and discretion might well favor denying immunity (since the exercise of judgment and discretion do not lie at the heart of the low-level employee’s assigned role). Thus, the Supreme Court of Virginia has held that the argument for extending immunity to a low-level employee is strongest when there is “no evidence that they did anything other than exactly what they were required to do by the sovereign” and “were simply carrying out instructions given them.”<sup>16</sup> On the other hand, there is little or no public interest in protecting a low-level governmental employee from liability for conduct that involved the exercise of a judgment and discretion that was not actually entrusted to or required of her.

The governmental employee’s own descriptions of the nature of his conduct are not controlling. As previously noted, the governmental employee facing liability will almost always say that he had to use judgment and discretion in the

activity in question. In many cases, the governmental employee will say that he was confronted with an emergency or at least with a situation that was unusual and required urgent actions. These self-serving labels assigned by the employee to his own actions may perhaps be relevant in some cases, but they surely cannot be controlling or determinative. If they were, the immunity decision would, in effect, be made by the employee himself by virtue of self-serving assertions rather than by the courts to which the decision is properly entrusted. The mere fact that the employee claims he used his judgment and discretion to determine and implement a particular course of action does not automatically mean immunity applies to any and all conduct involved.<sup>17</sup> Moreover, as noted above, virtually every action involves the use of some kind of judgment and discretion. The critically important issue is whether the action in question involved an exercise of the “special kind of judgment and discretion” which, under the circumstances presented, merit the special protection of governmental-employee immunity.

**Myth Number 4: Policy manuals and instructions are irrelevant and inadmissible with respect to the immunity issue.**

Governmental employees asserting immunity sometimes contend that violations of the employer’s guidelines or orders or the employee’s training and instructions are inadmissible “private rules” and cannot have any bearing on the issues raised by a plea in bar. This assertion is illogical and contrary to Virginia law. The Supreme Court

*...virtually every action involves the use of some kind of judgment and discretion.*

of Virginia has held that private rules are not admissible to establish the standard of care in a negligence action, but they can be introduced into evidence for other purposes.<sup>18</sup> Moreover, it is obvious that the public interest is not well served by granting immunity protection to conduct that is contrary to the limitations the governmental entity has deliberately and specifically imposed upon the employee’s activities and conduct. As noted above, the Supreme Court of Virginia has

long held that an employee who exceeds his authority does not deserve immunity protection. In a 2004 decision that rejected immunity, the Supreme Court relied repeatedly on the written procedures of the Fairfax County Fire Department.<sup>19</sup>

**Myth Number 5: The fact that an employee exceeded his authority, violated the law, or violated his employer's instructions and requirements is of no consequence in the immunity analysis.**

Governmental employees seeking the protection of immunity often argue that the fact that they exceeded their authority, violated the law, or violated their employer's instructions and requirements is of no consequence in the immunity analysis. Once again, this argument is contrary to the decisions of the Supreme Court of Virginia. When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity. "There is no statute which authorizes the officers or agents of the state to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those that they are authorized by law to perform. If they exceed their authority, or violate their duty, they act at their own risk[.]"<sup>20</sup>

*When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity.*

Defendants arguing that immunity applies even though their conduct violated applicable laws, duties, orders, training, or instructions frequently rely upon a misinterpretation of the Supreme Court's decision in *Colby v. Boyden*.<sup>21</sup> In *Colby*, the issue was whether a police officer engaged in a vehicular pursuit was entitled to governmental-employee immunity. A statute enacted by the General Assembly sets forth<sup>22</sup> conditions that must be present in order for a police officer to be exempt from complying with the usual motor vehicle laws and thus be allowed to speed, run red lights, and engage in other conduct

that would usually be unlawful.<sup>23</sup> In the course of holding that under the circumstances presented (which the Court assumed did comply with the requirements of the emergency-response statute), the Court said that the emergency-response statute "neither establishes nor speaks to the degree of negligence necessary to impose civil liability on one to whom the section applies. The degree of negligence required to impose civil liability will depend on the circumstances of each case."<sup>24</sup> Police defendants sometimes incorrectly interpret this statement as meaning that whether or not their conduct violated the law (including the emergency-driving statute) makes no difference and is irrelevant and inadmissible on the issue of whether their conduct is protected by immunity. The *Colby* decision cannot, however, fairly be understood to establish such an illogical conclusion. After all, decades of Supreme Court decisions (previously cited) establish that whether an employee has violated the law or exceeded his authority and instructions does matter.<sup>25</sup> It would be illogical to think that the public interest requires granting the special protection of immunity to a governmental employee who violates the law or exceeds his authority

Defendants also sometimes cite *Colby* in support of an argument that whether they violated guidelines or requirements governing their conduct is irrelevant with respect to the immunity determination. It is important to understand the arguments and issues that the Court ruled upon in *Colby*. In *Colby*, the injured plaintiff argued that because the police department had guidelines addressing emergency-response driving and all emergency driving was ministerial in nature and a police officer engaged in emergency driving (even emergency driving that complied with all applicable laws, orders, guidelines, training, and instructions) would never be protected by immunity. It is not surprising that the Supreme Court of Virginia rejected this absurd argument. The Court held:

The City exercised administrative control and supervision over Officer Boyden's activities through the promulgation of guidelines governing actions taken in response to emergency situations. However, those guidelines do not, and cannot, eliminate the requirement that a police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt, original, and crucial decisions in a highly stressful situation. Unlike the driver in rou-

tine traffic, the officer must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks in an emergency situation. Such situations involve necessarily discretionary, split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective.<sup>26</sup>

It would be a mistake, however, to conclude that this language means that any time a police officer or other public official claims he was confronted with an emergency, he is always automatically entitled to immunity, and that he should be granted immunity regardless of whether he violated applicable rules, guidelines, or statutes. Any such conclusion would be contrary to the explicit holding of the Court in *Colby* that was tied to the facts and circumstances presented.<sup>27</sup>

In *Colby*, the Supreme Court also rejected an illogical argument that where all the requirements of the emergency-response statute were met the statutory reference to “civil liability for failure to use reasonable care” in effect eliminated the immunity that would otherwise apply.<sup>28</sup> Once again, the Supreme Court of Virginia soundly rejected this absurd argument which would have stood logic and immunity law on its head.<sup>29</sup>

Nothing in the *Colby* opinion, however, stands for the proposition that whether the police officer complied with the emergency-response statute or other applicable guidelines or duties should be completely disregarded for purposes of the immunity analysis. To the contrary, the *Colby* decision itself recognized that in enacting the emergency-response statute the legislature struck a critically important balance between competing policy considerations and decided how the proper balance should be achieved. The Supreme Court of Virginia held:

In enacting the statute, the legislature balanced the need for prompt, effective action by law enforcement officers and other emergency vehicle operators with the safety of the motoring public. A similar concern for balance underlies the Virginia sovereign immunity doctrine. Both concerns are satisfied here without conflict.<sup>30</sup>

The public interest in the safety of the motoring public that underlies both the statutory emergency-response requirements and the immunity analysis is a profound and important public interest indeed. Studies show that when a high-

speed police chase ends in a fatality, an innocent bystander is likely to be the one killed a third of the time.<sup>31</sup> The governmental-employee immunity analysis must include consideration of the statutory requirements, because “a similar concern for balance underlies” both the immunity analysis and the statutory provisions. It would be an anomalous result to conclude that a police officer who runs a red light in direct violation of statutory mandates and in direct violation of her orders, guidelines, training, and instruction should be granted the special protection of governmental-employee immunity. The public interest is not served by actions by governmental employees who exceed their authority or violate the law. If a governmental employee expects his conduct to be accorded the special protection of immunity, it is reasonable and just, and serves the public interest, to insist that the employee must comply with the law and with orders, requirements, and guidelines that govern his conduct. If they fail to do so, they “act at their own risk.” This is the balance struck by the law of Virginia and this balance properly promotes and serves the competing public interests involved. ☪

#### Endnotes:

- 1 The authors were recently co-counsel in a major police-response case in Fairfax County. A Fairfax County police officer responding to a report of a fight at a grocery store ran a red light, struck a car in the intersection, and killed the driver of that car. Fairfax County was protected by absolute sovereign immunity. The authors sued the police officer, who then asserted she was entitled to governmental-employee immunity. The immunity plea was tried to the court. Judge R. Terrence Ney of the Fairfax Circuit Court overruled the plea and held the police officer would be liable for simple negligence. Judge Ney stated that the police officer’s “belief that it was an emergency, simply put, does not make it an emergency.” Volume II, Transcript of August 12, 2009, Trial at page 337 lines 21-22. See *McIntosh v. Perry*, Case No. 2009-00354, Order entered August 12, 2009 (Fairfax Cir. Court). Shortly before the subsequent jury trial on the tort claims, Fairfax County agreed to pay \$1.5 million to settle the case. The *Washington Post* reported that Supervisor Gerald W. Hyland, who represents the district where the accident occurred, said the settlement was the first time during his time on the board (since 1988) that the county had agreed to pay any amount to settle a lawsuit involving a vehicular collision. See <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012603513.html>.
- 2 Clemens, Clara, *My Father, Mark Twain* 184 (New York: 1931).

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- 3 Ulysses S. Grant, *Personal Memoirs* 182 (Modern Library Paperback Ed. 1999).
- 4 *Heider v. Clemons*, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991).
- 5 The Supreme Court of Virginia has explained:  
In *James [v. Jane]* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:
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 act complained of involved the use of judgment and discretion.
- Messina v. Burden*, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984) (citing *James v. Jane*, 221 Va. at 53, 267 S.E.2d at 113). All emphasis in this article is added to the original quoted material unless otherwise indicated.
- 6 "Admittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement" to immunity. *James*, 221 Va. at 53, 282 S.E.2d 864, 869.
- 7 See, e.g., *Messina v. Burden*, *supra*.
- 8 *Id.*
- 9 "The degree of negligence required to impose civil liability will depend on the circumstances of each case" and "[e]ach case must be evaluated on its own facts[.]" *Colby v. Boyden*, 241 Va. 125, 130, 132, 400 S.E.2d 184, 187 (1991). Immunity has been extended to lower-level governmental employees only on a "case-by-case basis." *Messina*, 228 Va. at 309, 321 S.E.2d at 661.
- 10 See *Tomlin v. McKenzie*, 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).
- 11 *Colby v. Boyden*, 241 Va. at 128-29, 400 S.E.2d at 186-87.
- 12 *Messina v. Burden*, 228 Va. at 310, 321 S.E.2d at 662.
- 13 *Id.*
- 14 *James v. Jane*, 221 Va. at 53, 282 S.E.2d at 869.
- 15 *Messina*, 228 Va. at 309, 321 S.E.2d at 661.
- 16 *Id.*
- 17 See, e.g., *Friday-Spivey v. Collier*, 268 Va. 384, 387 n.3, 390, 601 S.E.2d 591, 592 n.3, 594 (2004) (where the evidence showed that the fire truck driver was "driving in a nonemergency manner without lights and sirens" and that department procedures for emergencies required lights and siren, and the trial court erred in applying immunity). In *Friday-Spivey*, the Supreme Court held that immunity did not apply despite the fire truck driver's testimony he felt an urgent response was necessary since an infant was locked in a car and "we just [did not] know what to expect when we [got] there" and "despite a natural inclination to classify the report of a child in a locked car as an 'emergency.'" *Id.* Even though the fire truck driver thought that an urgent response was necessary, the evidence showed that the fire truck driver "knew nothing about the infant's condition at that time." 268 Va. at 387, 601 S.E.2d at 594. As *Friday-Spivey* shows, what matters is not the governmental employee's after-the-fact, self-serving, subjective claim of urgency but rather what all of the evidence shows regarding whether the officer was actually required to use and did use the kind of "judgment and discretion" that warrants the application of governmental immunity. See *McIntosh v. Perry*, *supra*; *Lake v. Mitchell*, 77 Va. Cir. 14, \*; 2008 Va. Cir. LEXIS 118 (Prince George Cir. Ct. 2008) (police officer's subjective claim of "emergency" was rejected as a matter of law since the actual evidence showed he did not respond in an emergency manner and violated his departmental orders). In *Lake*, the Court held:  
Defendant fails all four prongs of the test first set forth in *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864 (1980). (1) Mitchell [the police officer] was not performing an emergency function at the time he was driving to the homicide scene; (2) the Commonwealth had no interest in Mitchell's use of excessive speeds; (3) there was not a sufficient degree of control and direction exercised by the Commonwealth over Mitchell; and (4) nor was Mitchell using discretion to act in a manner, which is integral to the Commonwealth's interest of public safety.  
*Lake v. Mitchell*, 77 Va. Cir. at 15.
- 18 The evidentiary rule in Virginia is that private rules are not admissible to establish the standard of care in a negligence action. See *Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S.E. 1072 (1915); *Pullen v. Nickens*, 226 Va. 342, 310 S.E.2d 452 (1983). The Supreme Court of Virginia has recognized that evidence regarding "private rules" is admissible when offered for other purposes. Thus, for example, the Court has held that a defendant's safety policies may be relevant and admissible in a negligence action on the issue of defendant's knowledge of a potential danger and as evidence of the foreseeability of the occurrence that caused injury. See *New Bay Shore v. Lewis*, 193 Va. 400, 408-409, 69 S.E.2d 320, 325-326 (1952) ("The safety rules adopted by defendant, and its instructions to its employees, clearly indicate that defendant was aware of the potential dangers involved"). Similarly, the Court has held that training and instruction that a defendant has received is relevant and admissible evidence on the issue of whether his conduct constituted willful and wanton negligence. See *Alfonso v. Robinson*, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999). Rules may also be relevant and admissible evidence with respect to issues such as vicarious liability and sovereign immunity. See *Houchens v. Univ. of Va.*, 23 Va. Cir. 202 (Charlottesville Cir. Ct. 1991). In 2006, the Supreme Court of Virginia held that no error had been committed when the trial court admitted evidence of private rules where the evidence was admitted for a purpose other than proving the standard of care required in a negligence action. See *Riverside Hospital, Inc. v. Johnson*, 272 Va. 518, 636 S.E.2d 416 (2006).
- 19 In *Friday-Spivey*, the Supreme Court of Virginia, in rejecting an immunity plea, observed that under the Fairfax County Fire and Rescue Department Standard Operating Procedures a "Priority 1" call means that there is a "great potential for loss of life or serious injury" and a "[r]esponse to a Priority 1 [emergency] call requires the use of warning equipment," and stressed that at the time of the collision he was "driving in a nonemergency manner without lights and sirens" and under such circumstances he "was required [by department procedures] to obey all traffic regulations." 268 Va. 387 n.1, 390, 601 S.E.2d 591, 592 n.3, 594.
- 20 *James v. Jane*, 221 Va. at 55, 282 S.E.2d at 870 (quoting *Eriksen v. Anderson*, 195 Va. 655, 660-61, 79 S.E.2d 597, 600 (1954)). See *Bowers v. Commonwealth, Dep't of Highways & Transp.*, 225 Va. 245, 248-249, 302 S.E.2d 511, 513 (1983) ("Our conclusion is that the immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by

- a party who has suffered injury by their negligence”) (quoting *Sayers v. Bullar*, 180 Va. 222, 230, 22 S.E.2d 9, 13 (1942).
- 21 241 Va. 125, 400 S.E.2d 184 (1991).
- 22 The emergency-response statute is currently set forth at Virginia Code 46.2-920. At the time of the *Colby* decision, the emergency-response statute was set forth at former Virginia Code § 46.1-226.
- 23 Under Virginia law, a police officer must abide by all traffic laws unless his conduct is within some express statutory exception. See *Virginia Transit Co. v. Tidd*, 194 Va. 418, 425 (1952) (even police officer responding to an emergency has a duty to comply with all motor vehicle laws unless some statutory exemption applies); *White v. John Doe*, 207 Va. 276 (1966) (all statutory duties imposed by motor vehicle statutes applied to the police officer unless some statutory provision specifically exempted him); *Yates v. Potts*, 210 Va. 636, 640 (1970) (police officer who brought personal injury action against speeder he was pursuing was not guilty of negligence per se “if the exemption [established by a predecessor to current Virginia Code § 46.2-920] is applicable”). The General Assembly has expressly provided that the statutory duties governing motor vehicle operation are applicable to all drivers, including police officers, unless some specific exception is proved to apply. See Virginia Code § 46.2-801 (“The provisions of this chapter applicable to the drivers of vehicles on the highways shall apply to the drivers of all vehicles . . . subject to such exceptions as are set forth in this chapter”).
- 24 241 Va. at 132, 400 S.E.2d at 188.
- 25 See footnote 20 *supra*.
- 26 241 Va. at 129-130, 400 S.E.2d at 187.
- 27 “While each case must be evaluated on its own facts, to hold that Officer Boyden’s acts here were merely ministerial, thereby denying him the protection of the sovereign immunity defense for the actions complained of in this case, not only ignores the realities of the circumstances under which he performed his **job**, but also would inhibit law enforcement officers faced with similar decisions regarding vehicular pursuit in the future. Applying the four-part test of *James*, we concur with the trial court that the defense of sovereign immunity was applicable to Officer Boyden’s actions in this case.” 241 Va. at 130, 400 S.E.2d at 187.
- 28 241 Va. at 132, 400 S.E.2d at 188 (quoting statutory language).
- 29 “Adopting *Colby*’s position would create the anomalous result of requiring a showing of simple negligence in order to impose civil liability on a policeman who complies with Code § 46.1-226 [now § 46.2-920] during a vehicular pursuit, while requiring gross negligence as a prerequisite for imposing liability upon an officer who fails to comply with the statute. If, for example, an officer in hot pursuit failed to have the requisite insurance in force, the statute would be inapplicable and he would be civilly liable only on a showing of gross negligence. Yet, if his colleague had the requisite insurance, simple negligence would be sufficient to impose liability upon him. Such a result is illogical and is not required by the statute or by the cases decided thereunder.” *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at 188.
- 30 *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at 188.
- 31 See editorial, April 21, 2010, “Law Enforcement; Deadly Pursuits,” *Richmond Times-Dispatch* reprinted at [http://www2.timesdispatch.com/news/2010/apr/21/ed-chas21\\_20100420-175804-ar-156137](http://www2.timesdispatch.com/news/2010/apr/21/ed-chas21_20100420-175804-ar-156137).