

GEORGE MASON AMERICAN INN OF COURT



SOVEREIGN IMMUNITY IN VIRGINIA: HOW TO SLAY THE GIANT

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I. Introduction

Sovereign immunity in the Commonwealth of Virginia is a legal doctrine that arose out of English crown immunity where the royal sovereign was historically immune from civil suit or criminal prosecution. This concept came down from Roman times. Sovereign immunity arose from the “divine right of kings” and was based on the maxim “Rex non potest peccare—the king can do no wrong.” The immunity not only protected the sovereign but it extended to agents of the king such as ministers and judges. The Commonwealth of Virginia inherited the doctrine through its adoption of the common law of England.

The principle of absolute immunity has mostly been discarded in modern times. The doctrine has evolved and has been eroded by statutes and court decisions. In the Commonwealth of Virginia, it primarily applies to tort actions. It does not apply to contract claims. See *Bell Atlantic-Virginia v. Arlington County*, 254 Va. 60, 62 (1997). However, numerous exceptions have been established and myriad conditions imposed. Despite this, the Virginia Supreme Court has as recently as 2017 affirmed that “the doctrine of sovereign immunity is ‘alive and well’ in the Commonwealth.” *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469 at 484 (2017)(citing *Messina v. Burden*, 228 Va. 301, 307 (1984)). The doctrine has been described as more of 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.” *Id.* Public service might be obstructed and public safety endangered if the government could be sued at the whim of citizens, and the means for the proper administration of the government controlled. The doctrine serves many purposes: it protects public funds, promotes the smooth operation of government, eliminates inconvenience and danger from officials being afraid to act, eliminates fear of public employment, and prevents improper influence over governmental affairs through the threat or use of vexatious litigation. *Id.*

This presentation is concerned only with tort claims against government actors. Litigators must be aware of the application of the doctrine of sovereign immunity as it may eliminate the existence of a remedy to a client wronged by tortious governmental action. However, because of the numerous exceptions, it may be possible to “slay the giant.” There are numerous landmines along the way, including strict notice requirements that may bar the claim. Application of the doctrine is complicated and confusing. In addition to statutory waivers of immunity, there are numerous cases discussing the application of sovereign immunity and establishing circumstances where it does not apply. Some of those cases would seem to be inconsistent. As one judge put it, “the Supreme Court of Virginia has sought to achieve, under the sovereign immunity rubric, a synthesis of common law immunity principles that will be useful for all the ‘constantly shifting facts and circumstances’ that come before the courts of the Commonwealth.” *Burnham v. West*, 681 F. Supp. 1169, 1171 (1988).

In determining whether sovereign immunity applies to a particular case, a litigator must first determine if the actor was an agent of a governmental entity and if so, which one. Then it must be determined if that governmental entity and/or its employee(s) are entitled to immunity. The litigator must then determine if exceptions exist and if the actions fall within one or more of those exceptions. All this must be considered quickly for the litigator must then determine if any required notice has been or can be timely given. The litigator must then provide the necessary notice to the proper person in the prescribed time.

II. Who is entitled to Immunity?

A. The Commonwealth

The Commonwealth and its agencies are entitled to absolute immunity unless that immunity is expressly waived. The Virginia Tort Claims Act (VTCA) provides limited and conditional waivers to the immunity of the Commonwealth. Va. Code § 8.01-195.1, et seq. The VTCA also contains procedures for making claims and time limitations for giving notice of claims. Agencies of the state include departments and divisions, mental health institutions, hospitals, state universities, park authorities, etc.

B. Counties

Counties were created for the administration of state policies, only have the power delegated by the Commonwealth, and are only subject to liability imposed by law. Counties are more than just political subdivisions of the Commonwealth. As governmental agencies, counties enjoy the same immunity as the Commonwealth and are not liable for tortious injuries caused by negligence on the part of its officers, servants and employees. See *Mann v. County Bd. of Arlington County*, 199 Va. 169 (1957), and *Seabolt v. County of Albemarle*, 283 Va. 717 (2012). The VTCA expressly excludes counties from the limited waivers of immunity granted by the Act. Va. Code § 8.01-195.3.

C. Cities and Towns

A municipality, incorporated community, or municipal corporation refers to a city or a town. Va. Code § 15.2-102. Similar to counties, the VTCA expressly excludes cities and towns from the limited waivers of immunity granted by the Act. Va. Code § 8.01-195.3. However, cities and towns are not entitled to the same immunity as the Commonwealth or a county. This is ostensibly because cities and towns are granted proprietary in addition to governmental powers. Compare and contrast Va. Code § 15.2-1100, et seq. (powers granted to Cities and Towns) with § 15.2-1200, et seq. (powers granted to counties). While they are political subdivisions, they are not considered as agencies of the Commonwealth unless they are carrying out “governmental” functions. Cities and towns performing governmental functions are entitled to the same immunity as counties. If they are performing proprietary functions, they are not entitled to immunity.

D. Employees

Governments can only act through people. Therefore sovereign immunity may be extended to government employees. Employees “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." *Messina v. Burden*, 228 Va. 301, 309 (1984). Certain "tests" have been established to determine whether a particular employee is entitled to immunity as set forth below.

III. Exceptions

A. The Commonwealth

The Virginia Tort Claims Act, Va. Code § 8.01-195.1, et seq., is the only exception to the absolute immunity of the Commonwealth against tort claims. It waives immunity up to \$100,000.00 in damages or to the extent of applicable insurance coverage, if higher. § 8.01-195.3. It bars pre-judgment interest and punitive damages. It includes Transportation Districts. It does not waive any inherent immunity of counties, cities, school boards, state agencies, and numerous other actors. It limits jurisdiction to state courts. § 8.01-195.4. It also requires a notice of claim to be filed and contains its own statute of limitations.

B. School Boards

Immunity for school boards is waived to the extent of liability insurance for vehicles (school buses) owned or operated by the board, and used to transport students up to the limits of applicable insurance. Va. Code § 22.1-190, et seq. § 22.1-194 states that the "school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of or, in cases set forth in subsection D of § 22.1-190, up to but not beyond the amounts of insurance required under subsection A of § 22.1-190 and the defense of governmental immunity shall not be a bar to action or recovery." Va. Code § 22.1-190(D) states that insurance required by paragraph 190(A) is not required if the School Board has a certification of financial responsibility equal to the insurance coverage required under paragraph (A). The insurance required by subsection A is a minimum of \$50,000.00 liability coverage per person for bodily injuries, among other terms. A school board with the certification of financial responsibility therefore may not be liable for more than \$50,000.00 for personal injuries per

person. Where the school board did not obtain the certification of self-insurance, the \$50,000.00 cap on the waiver does not apply. See *Frederick County Sch. Bd. v. Hannah*, 267 Va. 231 (2004). The driver of the bus is not included in the abrogation of immunity under this statute. However, if the bus was transporting students at the time of the accident, the driver is entitled to sovereign immunity. See *Roach v. Botetourt County Sch. Bd.*, 757 F. Supp. 2d 591 (2010).

C. Employees

“[I]n order to fulfill those purposes the protection afforded by the doctrine [of sovereign immunity] cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed.” *Messina v. Burden*, 228 Va. 301 (1984).

1. The Commonwealth and Counties

The *James Test*. Whether an employee of an immune government body enjoys immunity depends on a number of factors. A four pronged inquiry was established in *James v. Jane*

- i. The nature of the function performed by the employee;
- ii. The extent of the state’s interest and involvement in the function;
- iii. The degree of control and direction exercised by the state over the employee; and
- iv. Whether the act complained of involved the use of judgment and discretion.

See *Messina v. Burden*, 228 Va. 301 (1984) (articulating the test set forth in *James v. Jane*, 221 Va. 43 (1980); see also *Lentz v. Morris*, 236 Va. 78 (1988) and *Gargiulo v. Ohar*, 239 Va. 209 (1990).

The list of employees given immunity includes the following:

- i. School employees
- ii. School board supervisors

- iii. Teachers
- iv. School superintendents, principals, and coordinators of school grounds
- v. Employees engaged in engineering and operations
- vi. County attorneys
- vii. Sheriffs
- viii. Police officers
- ix. Correctional employees
- x. Medical employees such as physicians, residents, interns, and nurses
- xi. Governmental employee who is in an automobile accident

2. Cities and Towns

Governmental v. Proprietary Function –Test to be applied when a city, town, or subdivision of the municipality or an employee thereof is being sued in tort. Sometimes referred to as the “*Hoggard test*” based on the case of *Hoggard v. City of Richmond*, 172 Va. 145 (1939). “When governmental and proprietary functions coincide, the governmental function is the overriding factor and the doctrine of sovereign immunity will shield the locality from liability.” *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493 (2000).

- a. Governmental Function = sovereign immunity applies. Governmental functions are “powers and duties performed exclusively for the public welfare” and “a function is governmental if it entails the exercise of an entity’s political, discretionary, or legislative authority.” *City of Chesapeake v. Cunningham*, 268 Va. 624 (2004).

Examples of governmental functions:

- Plan or design of sewer system or other such municipal service. *City of Chesapeake v. Cunningham*
- Plan and design of a sidewalk. *Maddox v. Commonwealth*, 267 Va. 657 (2004)

- Provision of emergency snow removal services. *Bialk v. City of Hampton*, 242 Va. 56 (1991).
- Planning, designing, laying out of streets and roads. *Taylor v. City of Charlottesville*, 240 Va. 367 (1990).
- Provision of ambulance services. *Edwards v. City of Portsmouth*, 237 Va. 167 (1989).
- Regulation of traffic, such as through traffic signals. *Freeman v. City of Norfolk*, 221 Va. 57 (1980); *Transportation Inc. v. City of Falls Church*, 219 Va. 1004 (1979).
- Provision of emergency cleanup services. *Fenon v. City of Norfolk*, 203 Va. 551 (1962)
- Provision of garbage collection services. *Ashbury v. City of Norfolk*, 152 Va. 278 (1929).
- Maintaining a police force. *Hoggard v. City of Richmond*, 172 Va. 145 (1939); *Niese v. City of Alexandria*, 264 Va. 230 (2002) (sovereign immunity of municipality applies even for intentional tort committed by an employee in performance of a governmental function).
- Provision of nursing services. *Carter v. Chesterfield County Health Comm'n*, 259 Va. 588 (2000)
- By statute, Va. Code § 32.1-111.4:3, sovereign immunity applies to a government contractor, such as volunteer fire and rescue companies, who contracts with a county, city, or town to provide for emergency medical services. *Davis v. Bryson*, 2018 U.S. Dist. LEXIS 69571 (W.D. Va. Apr. 25, 2018); *National R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402 (1991) (operation of a fire truck en route to the scene of a fire is incident to fighting the fire entitling both the volunteer company and the driver to sovereign immunity).

b. Proprietary Function = sovereign immunity does not apply. “Proprietary functions are performed primarily for the benefit of the municipality” and

“if the function is a ministerial act and involves no discretion, it is proprietary.” *City of Chesapeake v. Cunningham*, 268 Va. 624 (2004).

Examples of proprietary functions:

- **Routine maintenance or operation of a municipal service, such as sewer system. *City of Chesapeake v. Cunningham*; *Chalkley v. City of Richmond*, 88 Va. 402 (1891).**
- **Maintenance of sidewalks. *City of Virginia Beach v. Flippen*, 251 Va. 358 (1996).**
- **Routine maintenance of existing streets. *City of Richmond v. Branch*, 205 Va. 424 (1964).**
- **Faulty maintenance or street construction. *City of Norfolk v. Hall*, 175 Va. 545 (1940).**

D. Gross Negligence

Sovereign immunity usually applies only to simple negligence. Immunity generally does not apply to claims of gross negligence. *Colby v. Boyden*, 241 Va. 125, 128 (1991). In the case of *Elliott v. Carter*, 292 Va. 618 (2016), a case involving charitable immunity, the Court cited prior precedent defining the concept as follows:

Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004).

It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important

evidence on the question of gross negligence. *Chapman v. City of Virginia Beach*, 252 Va. 186, 190 (1996) (citations and internal quotation marks omitted).

Gross negligence "requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Cowan*, 268 Va. at 487; see also *Thomas v. Snow*, 162 Va. 654, 661 (1934) ("Ordinary and gross negligence differ in degree of inattention"; while "[g]ross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," "it is something less than . . . willful, wanton, and reckless conduct.").

Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule." *Frazier v. City of Norfolk*, 234 Va. 388, 393, (1987).

It may be difficult to conceive of a case where gross negligence could be established in light of *Elliot*, but see *Chapman v. City of Virginia Beach*, 252, Va. 186 (1996).

E. Willful and Wanton Negligence, Intentional Torts, Criminal Activity

Just as gross negligence removes employees from the protection of sovereign immunity, so do higher levels of culpable behavior. See *Elder v. Holland*, 208 Va. 15, 19 (1967).

F. Scope of Employment

An employee is not entitled to immunity if they are not acting within the scope of their employment. "[T]he 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." *Sayers v. Bullar*, 180 Va. 222, 230 (1942).

IV. Notice and Limitations of Action

A. VTCA

The Act requires that any claim against the Commonwealth or its agencies or employee will be barred unless the claimant files "a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued." The Act further prescribes who the Notice must go to, and that the claimant must prove actual receipt of the Notice. Va. Code § 8.01-195.6. Further, an action can be commenced upon denial of a claim or after six months following the filing of the claim, but no later than 18 months after filing the claim and no more than two years following the accrual of the cause of action. Va. Code § 8.01-195.7.

B. Counties, Cities and Towns

Va. Code § 15.2-209 requires that any city, town or county be provided a "written statement of the nature of the claim" within six (6) months of the date of the incident. The statement must be filed with the county, city, or town attorney or with the chief executive or mayor. Written statements *shall* include notice of the time and place of the claimed injury and may be provided by the claimant, his agent, or his counsel. The failure to adhere to the notice requirement will bar the claim unless "the attorney, chief executive, or mayor of such locality, or any insurer or entity providing coverage or indemnification of the claim, had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred,

within six months after such cause of action accrued.” The burden is on the claimant to establish that notice was actually received.

This section does not contain any specific limitations period within which an action can or must be filed.

V. How To Slay The Giant

A. The Big Picture

The very nature of sovereign immunity is to deny a remedy to a claimant when properly applied. *Commonwealth v. Luzik*, 259 Va. 198, 208 (2000). It has been argued that the doctrine of sovereign immunity has become so eroded over time, is so complex, and is unfair that it should be done away with. However, the Supreme Court of Virginia has not only refused to do so, but has expanded its protections through its interpretations of the facts. And immunity has been statutorily expanded for certain activities such as for cities and towns in the operation of recreational facilities, Va. Code §15.2-1809, and for cities and towns and park authorities with respect to trails and water activities.

B. Procedure

1. Identify the tortfeasor as soon as possible and the existence and identity of their employer
2. Determine if statutory notice of a claim is required and timely file the proper notice
3. Identify any statutes conferring immunity under specific circumstances
4. Investigate the circumstances of the tort
5. Determine if the tort was simple negligence or otherwise
6. Determine if the tort fell within the scope of employment
7. Apply the *James* test or the *Hoggard* Test
8. Review the case law
9. Distinguish your case, argue for an exception

A decision tree in the Appendix may be a useful place to start the analysis.

C. Uninsured motorist coverage

In motor vehicle accident cases, where the driver is entitled to sovereign immunity, uninsured motorist coverage will apply. Va. Code § 38.2-2206(B)(v) includes in the definition of an uninsured motor vehicle one where “the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer.”

D. Strategies

1. Complaint

In any suit against a governmental entity or employee, counsel should anticipate a plea of sovereign immunity. It is therefore of extreme importance that counsel plead the case to allege facts sufficient to defeat immunity if possible.

2. Plea

If a plea of sovereign immunity is asserted, discovery can still be had pending resolution of the plea. Rule 4:1(d)(2) of the Rules of the Supreme Court of Virginia. This may allow for the discovery of facts sufficient to defeat the plea. A demand for a trial by jury of any plea should be made immediately upon scheduling any plea for an evidentiary hearing.

3. Discovery

Any and all methods of discovery should be used to obtain job descriptions, internal policies, incident reports, witness identities, and any other evidence pertinent to the application of

immunity to a particular situation. Try to establish that the act was outside the course of employment, that the action was proprietary v. governmental, and/or that the act was more than simple negligence.

APPENDIX

1. Virginia Tort Claim Act
2. School Board Insurance Requirements
3. James v. Jane, 221 Va. 43 (1980)
4. Hoggard v. City of Richmond, 172 Va. 145 (1939)
5. Elliott v. Carter, 292 Va. 618 (2016)
6. Sayers v. Bullar, 180 Va. 222 (1942)
7. Chapman v. City of Virginia Beach, 252, Va. 186 (1996)
8. Frazier v. City of Norfolk, 234 Va. 388 (1987)
9. Cowan v. Hospice Support Care, Inc., 268 Va. 482 (2004)
10. City of Norfolk v. Hall, 175 Va. 545 (1940)
11. Frederick County Sch. Bd. v. Hannah, 267 Va. 231 (2004)
12. Bell Atlantic-Virginia v. Arlington County , 254 Va. 60 (1997)
13. AGCS Marine Ins. Co. v. Arlington County, 293 Va. 469 (2017)
14. Messina v. Burden, 228 Va. 301 (1984)
15. Jason J. Ham, *Sovereign and Charitable Immunity in the Commonwealth of Virginia*, VADA Journal of Civil Litigation, Vol. X, No.4

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