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A CENTURY OF TORT IMMUNITIES IN VIRGINIA

James A. Eichner*

*"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."*¹

SINCE the earliest days of tort litigation, the Virginia Supreme Court of Appeals, like the courts of its sister states, has been committed to the general view that legal responsibility follows negligence, and that the master is liable for his servants' torts committed within the scope of their employment. However, several years before the founding of the T. C. Williams School of Law, the Virginia court, in its landmark decision respecting governmental tort immunity, laid down a decision which has led to the creation of a number of tort immunities which it has never sought to justify on grounds of logic, which have not been demonstrated as compelled by precedent, and which have been weakly defended, if at all, on grounds of public policy.

At issue in 1867 was the death of a slave named Ben, who had been admitted to a municipal hospital for treatment of smallpox, and who, delirious with disease, escaped through a window because of the negligent supervision of hospital personnel and died of exposure. In *Richmond v. Long's Administrators*,² the court purported to acknowledge the principle that "I am liable for what is done for me and under my orders by the man I employ,"³ but went on to say that *respondeat superior* did not apply in the case of municipal hospitals engaged in the performance of their governmental functions. Said the court: "Their immunity from all liability for the misconduct, negligence and omissions of their subordinates, rests upon motives of public policy, the necessities of the public service and the perplexities and embarrassments of a contrary doctrine."⁴ Judgment in favor of Ben's owner was reversed.

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¹ O. W. HOLMES, COLLECTED LEGAL PAPERS 187 (1920), *quoted in* Williams v. Detroit, 364 Mich. 231, 257, 111 N.W.2d 1, 24 (1961) *and* Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795, 801 (1962).

² 58 Va. (17 Gratt.) 375 (1867).

³ *Id.* at 377.

⁴ *Id.* at 378.

Building on the tenuously supported grounds of reasoning established in *Long's Administrators*, the Virginia court, like those of most states, has extended immunity in tort to the state itself and to its agencies, including those modern state authorities created with the statutory power to sue and be sued; has created an intricate distinction between *proprietary* functions of cities and towns, in the performance of which they can be sued for negligence, and *governmental* functions, for which they may not; has held that courts of the Commonwealth have no jurisdiction to hear tort actions against counties; has held charitable hospitals immune from suit by paying patients but not by non-paying visitors; and has generally denied negligence suits of a child against parent, and by one spouse against the other. All of these rules of immunity are of judicial origin.⁵

It is the purpose of this article to attempt to trace the origins of these common law tort immunities in Virginia, a fairly typical state, and to point out the manner in which the courts of other states have been handling the problem of tort immunity.

In creating each of these immunities, the Virginia court has relied on judicial precedent from other jurisdictions, but curiously has never, except in the case of intrafamily torts, articulated any reasons *why* the immunities created represent sound public policy.

Other courts, however, have stated a number of reasons for barring the courtroom doors. As summarized by Prosser:

The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that an agent of the state is always outside the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injury; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.⁶

⁵ Space does not permit discussion of another tort immunity created through the process of statutory interpretation: the rule that an injured person covered under the Workmen's Compensation Act often may not sue a third party tortfeasor for injuries received on the job because the tortfeasor is engaged in the same occupation as the actual employer of the plaintiff. *See, e.g.,* *Bosher v. Jamerson*, 207 Va. 359, 151 S.E.2d 375 (1966); *Floyd v. Mitchell*, 203 Va. 269, 123 S.E.2d 369 (1962); *Anderson v. Thorington Constr. Co.*, 201 Va. 266, 100 S.E.2d 396 (1959).

⁶ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 125, at 1001 (3d ed. 1964).

Immunity of municipal corporations when engaged in "governmental" functions has been justified on the grounds "that the municipality derive[s] no profit from the exercise of governmental functions, which are solely for the public benefit; that in the performance of such duties public officers are agents of the state and not of the corporation, so that the doctrine of *respondeat superior* does not apply; that cities cannot carry on their governments if money raised by taxation for public use is diverted to making good the torts of employees; and that it is unreasonable to hold the corporation liable for negligence in the performance of duties imposed upon it by the legislature, rather than voluntarily assumed under its general powers."⁷

Charitable immunity is justified on the following grounds: charity "is working for the public good;" subjecting trust funds in the hands of charities to payment of tort claims would divert them "from the purpose intended by the donor;" "the recipient of the benefits of charity accepts them as they are given," and "assumes the risk of negligence;" and liability might discourage "donors with the fear that their gifts [will] go to pay tort claims."⁸

Denying suits between husband and wife once was based on "the common law doctrine of the legal identity of the two," but since the enactment of Married Women's Acts, has been justified by "the danger of fictitious and fraudulent claims" and by the feeling "that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home."⁹

Suits of a child against a parent have been denied because of the "danger of 'fraud'," the possibility that the defendant might inherit the amount recovered in case of [the] plaintiff's death," or the fear "that the family exchequer might be depleted at the expense of other children" and "that domestic tranquility and parental discipline and control would be disturbed by the action."¹⁰

It has been pointed out that there is no more danger of fraud in suits between husband and wife, or parent and child, than in the permitted suits between relatives and close friends; that family harmony is not necessarily served by a denial of remedy for a wrong; and that our adversary system is "reasonably well fitted to ferret out the chicanery which might exist in such cases."¹¹

⁷ *Id.* at 1004.

⁸ *Id.* § 127, at 1019-21.

⁹ *Id.* § 116, at 879, 83.

¹⁰ *Id.* § 116, at 887.

¹¹ *Briere v. Briere*, 107 N.H. 432, 224 A.2d 588, 590-91 (1966).

The fear of catastrophic effects to charities and public treasuries, if it ever was a threat, is hardly a credible basis for immunity in these days of easily available liability insurance, not commonly available when the immunity rules were first promulgated.¹² Even without insurance, it has been said that "tort liability is in fact a very small item in the budget of any well organized enterprise."¹³

I. GOVERNMENTAL IMMUNITY

*"[I]t is better that an individual should sustain an injury than that the public should suffer an inconvenience."*¹⁴

The popular origin of governmental immunity is found in a doctrine which extended back to the days of absolute monarchs and which, in effect, held that the personal sovereign could not be found guilty of a wrong against his subject for which a remedy was available in the courts.¹⁵

Scholars have pretty well demonstrated, however, that this doctrine is a misconception. "The expression 'the king can do no wrong' originally meant precisely the contrary to what it later came to mean. 'It meant that the king must not, was not allowed, not entitled, to do wrong' It was on this basis that the king, though not suable in his own court . . . nevertheless endorsed on petitions 'let justice be done,' thus empowering his courts to proceed. . . . Perhaps the major effect of the doctrine of sovereign immunity was procedural. Claims in form 'against the crown' were to be pursued by petition for right."¹⁶

¹² *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d 1, 24 (1961). See also *Thomas v. Broadlands Community Consol. School Dist.*, 348 Ill. App. 567, 109 N.E.2d 636, 640-41 (1952).

¹³ *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 24, 163 N.E.2d 89, 95 (1959); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795, 801 (1962). For the minimal effect of tort liability on municipal budgets, see Note, *The Law and Administration of Municipal Tort Liability*, 28 VA. L. REV. 360 (1942).

¹⁴ *Russell v. Men of Devon*, 2 T.R. (Durn. & East) 667, 673, 100 Eng. Rep. 359, 363 (1788).

¹⁵ See, e.g., *Hargrove v. Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1967), which declared the doctrine anachronistic.

¹⁶ L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4, 18 (1963). See *Brown v. Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968), where Judge Newton in his dissent explained: "A favorite cliché of the many who advocate a complete abolition of the immunity doctrine is that it is adopted from an English theory that 'the king can do no wrong.' The falsity of this statement is apparent. Long before the colonization and settlement of America, English law provided remedies against the Crown. To the contrary, the immunity theory has been based on what was considered to be the necessity of protecting the interests of the

With no personal sovereign after 1776, the remedy available in England by petition of right was not available in the former colonies, where such petition could be presented only to the legislature in the form of a private relief bill. "With the expulsion of the crown, the citizens of the new Republic lost half of the rights against government which as Englishmen they had previously enjoyed."¹⁷

Why the doctrine of the "immunity of the sovereign" came to be applied in the United States of America, where the prerogative was unknown, "is one of the mysteries of legal evolution."¹⁸ Doubtless, this misguided notion that the common law gave the subject no right against the king, together with the adoption of reception statutes like Virginia's typical one,¹⁹ led some courts to believe that immunity from tort suit was a rule inherited from the Mother Country. This reasoning, however, has rarely, if ever, been stated expressly and certainly not in Virginia, where the court has held other prerogatives of a personal sovereign not to have survived the Revolution.²⁰

A. *The United States*

The former tort immunity of the United States is of historical interest only since Congress gave its consent to be sued, with certain exceptions, by enactment of the Federal Tort Claims Act, effective in 1946.²¹

public, and the concept that since all rights were conferred by government, it was illogical to hold the law giver liable in tort actions." *Id.* at 437-38, 160 N.W.2d at 810.

¹⁷ Jaffe, *supra* note 16, at 19.

¹⁸ E. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4, (1924).

¹⁹ VA. CODE ANN. § 1-10 (1966), which provides: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

²⁰ Virginia's reception statute did not confer on Virginia localities the sovereign prerogative to preference in payment of debts. *United States Fidel. and Guar. Co. v Carter*, 161 Va. 381, 170 S.E. 764 (1933).

²¹ 28 U.S.C. §§ 1346(b), 2671 *et seq.* (1964). An interesting historical coincidence is provided by the almost contemporaneous adoption in England of the Crown Proceedings Act of 1947, effective January 1, 1948. Before this, it was possible to bring an action against a servant of the crown and the treasury would pay the damages awarded against him. The predecessor of the Federal Tort Claims Act was the Tucker Act of 1887. Representative John Randolph Tucker of Virginia, Chairman of the House Judiciary Committee, sought in his bill to extend jurisdiction of the Court of Claims to tort as well as contract claims, and this was provided for in the bill that passed the House, but the Senate, and the Conference Committee, deleted the provisions allowing the United States to be sued in tort.

In a suit characterized as involving a tort action,²² where a contractor said he was compelled to deliver oats under duress by a military officer, the Court did not discuss the theory of sovereign immunity, except to say: "No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power of its officers and agents."²³

In another tort action a few years later,²⁴ the Court considered the "King can do no wrong" principle and concluded, though denying recovery, as follows: "We have no king to whom it can be applied."²⁵ In a later case,²⁶ holding that the Territory of Hawaii could not be made a party to a foreclosure suit without its consent, Justice Holmes said, for the Court: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."²⁷

B. *The States*

The former immunity of the federal government from suit in tort would seem, under our system of dual sovereignty, to be equally applicable to states. As the Supreme Court, quoting from Hamilton in *The Federalist*, said in a suit brought by a foreign government against an American state to enforce payment of bonds and holding the state not sueable: "It is inherent in the nature of sovereignty not to be amenable to suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union."²⁸

Virginia did not, at first at least, enunciate a theory of sovereign immunity. In a suit to recover for damages to a mill caused by the washing away of a negligently built bridge, a demurrer was held properly sustained in a one sentence opinion which, citing no authority, stated:

²² *Gibbons v. United States*, 75 U.S. (8 Wall.) 269 (1868).

²³ *Id.* at 274.

²⁴ *Langford v. United States*, 101 U.S. 341 (1879).

²⁵ *Id.* at 343.

²⁶ *Kawananakoa v. Polybrank*, 205 U.S. 349 (1907).

²⁷ *Id.* at 353.

²⁸ *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934).

"The action does not lie in this case against the Northwestern Turnpike Company, composed as it is exclusively of officers of the government, having no personal interest in it, or in its concerns, and only acting as the organ of the Commonwealth in effecting a great public improvement."²⁹ In a later suit against the same corporation,³⁰ the court, in dictum, made what appears to be its first reported pronouncement on the sovereign immunity of the state: "It is not pretended that an individual can maintain an action against the State, unless she consents to submit herself to the jurisdiction of the Courts; but this exemption the State may waive, and in fact has done so, by authorizing individuals to proceed against her in certain designated courts for claims against her."³¹ Citing no authority for the statement, the court had earlier said "that, as a general rule, a sovereign state cannot be sued by an individual"³² The fact that the immunity of the state from suit in tort had not yet become a hardened principle in Virginia jurisprudence was indicated by an 1874 decision holding the Commonwealth liable for certain debts. In the opinion, Judge Bouldin, speaking for the court, said:

I do not mean to intimate that a state can be sued in any case either by her own citizens or others, in her own courts, without her authority and against her consent. But it has ever been the cherished policy of Virginia to allow her citizens and others the largest liberty of suit against herself; and there never has been a moment since October, 1778 (but two years and three months after she became an independent state), that all persons have not enjoyed this right by express statute. By the Fifth Section of the act of October, 1778, 9 Hen. Stat., p. 540, it was enacted, that where the auditors, acting according to their discretion and judgment, shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery, or the general court, according to the nature of his case, for redress Here then is the largest liberty of suit against the Commonwealth which can well be conceived I can conceive of no class of claimants not embraced by this law³³

A few years later, the court affirmed judgment against a state agency,

²⁹ Sayre v. Northwestern Turnpike Rd., 37 Va. (10 Leigh) 454, 456 (1839).

³⁰ Dunnington v. Northwestern Turnpike Rd., 47 Va. (6 Gratt.) 160 (1849).

³¹ *Id.* at 170.

³² *Id.* at 162.

³³ Higginbotham's Ex'rx v. Commonwealth, 66 Va. (25 Gratt.) 627, 637-38 (1874).

the Eastern Lunatic Asylum, in a trover action based on the consumption by asylum inmates of food belonging to the plaintiff and seized by federal troops during their occupation of the asylum and surrounding territory.³⁴

Twenty-three years later, in a suit against the same institution, now known as Eastern State Hospital, the Virginia court first held this agency of the state could be sued for negligence in causing the death of an inmate by collapse of an excavation in which he was working. It held that the trial court had erred in sustaining the demurrer to the declaration. A petition for rehearing was granted, and the court reversed itself and, for the first time, actually laid down the rule that an agency of the state government was immune from suit in tort.³⁵ Thus, the court overruled its earlier decision against the same hospital, but did not acknowledge that it had done so, saying: "Although the action in that case was in tort, it could as well have been in *assumpsit*."³⁶

Apparently what caused the court to change its mind was the obvious inconsistency in holding the state hospital liable for the death of an inmate when twenty-three years earlier, in *Long's Administrators*, it had held a city not liable for the negligent death of an inmate because, in operating its hospital, it was engaged in the governmental function of promoting public health.³⁷ The court explained:

If a municipal corporation which has a two-fold character, one public and the other private, is exempt from liability for the negligence of its agents when in the exercise and performance of its powers and duties as an agency of the government, a public corporation which was created and exists for no other than governmental purposes must necessarily be exempt from such liability. Otherwise there would be this anomaly, that for such negligence a corporation created partly for governmental purposes would be exempt from liability, whilst one created wholly for such purposes would not be, when the reason for such exemption is solely because it was in the exercise of governmental functions when the negligence occurred.³⁸

Thus it appeared that the court might adopt the same test in a suit against the state that it had already begun to articulate in suits against municipalities—the distinction that the state would be immune from

³⁴ *Eastern Lunatic Asylum v. Garrett*, 68 Va. (27 Gratt.) 163 (1876).

³⁵ *Maia's Adm'r v. Eastern State Hosp.*, 97 Va. 507, 34 S.E. 617 (1899).

³⁶ *Id.* at 514, 34 S.E. at 620.

³⁷ *Richmond v. Long's Adm'rs*, 58 Va. (17 Gratt.) 375 (1867).

³⁸ *Maia's Adm'r v. Eastern State Hosp.*, 97 Va. 507, 511, 34 S.E. 617, 618 (1899).

suit when engaged in governmental activity, but not when engaged in a proprietary one. However, by reference to an earlier decision denying recovery in an action against a turnpike company for negligent construction of a bridge, the court, in the same breath, laid the foundation for holding the state fully immune from suit in tort.³⁹

Another opportunity to apply the governmental-proprietary distinction to the state was rejected in a later case reversing judgment in trover and conversion in an action involving prohibition agents' seizure of malt.⁴⁰ The court pointed out that authority for its decision in *Eastern Lunatic Asylum v. Garrett*⁴¹ was "greatly weakened" by *Maia's Administrator v. Eastern State Hospital*,⁴² and that it had said in an earlier case involving a county that "there can be no doubt whatever about the fact that neither counties, which are political subdivisions of the State, nor the State or its governmental agencies, can be sued in tort."⁴³

That the governmental-proprietary test would not be applied in suits against the state was firmly, if tacitly, established in a 1939 case, which denied a suit against the State Highway Commissioner for negligent and unlawful acts in the construction of a highway,⁴⁴ a function which had been determined to be a proprietary function of a city when supporting an action in tort.⁴⁵ At last, the court, quoting with approval from a textbook, laid out its theory supporting state immunity from suit in tort:

It has long been settled that a state cannot be sued without its consent, in any event. That finds its origin in what may be termed a legal tradition. By stronger reasoning is it true that the State is immune from suability on account of the torts of its agents and officials. Nowhere have we seen this more aptly and tersely stated than in the work entitled *A Treatise on the Law of Torts* (Bohlen and Harper), page 665, section 297:

Neither the United States nor one of the States can be sued without its consent. The origin of this doctrine, it seems was the personal immunity of the Crown in English legal and polit-

³⁹ Sayre v. Northwest Turnpike Rd., 37 Va. (10 Leigh) 454 (1839).

⁴⁰ Commonwealth v. Chilton Malting Co., 154 Va. 28, 152 S.E. 336 (1930).

⁴¹ 68 Va. (27 Gratt.) 163 (1876).

⁴² 97 Va. 507, 34 S.E. 617 (1899).

⁴³ Nelson County v. Coleman, 126 Va. 275, 278, 101 S.E. 413, 414 (1919).

⁴⁴ Wilson v. State Highway Comm'r, 174 Va. 82, 4 S.E.2d 746 (1939).

⁴⁵ Noble v. Richmond, 72 Va. (31 Gratt.) 271 (1879).

ical theory. Later, when the more complicated theory of the 'state' replaced the concept of the individual 'sovereign,' the non-suability of the government was an attribute inherited from the older order. Like many other historic anomalies, it has caused much embarrassment in the modern social and legal structure.

But the immunity of the state for the tort of its servants and agents does not rest entirely upon the fact that the state can not be sued. It is said to rest on public policy, the incongruity of a 'wrong' by the state, and upon dubious grounds of the law of agency whereby an agent of the state is always regarded as acting outside the scope of his agency when he is committing a tortious act. 'It is also true, in respect to the state itself,' said the Supreme Court of the United States, 'that whatever wrong is attempted in its name is imputable to its government and not to the state, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the state, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.'

Accordingly, a statute permitting suit against the state, does not render it liable for the tort of its agents. Such statutes, it is argued, provide merely a remedy for the enforcement of liabilities existing independent thereof; they do not create liability for official torts.⁴⁶

Thus, the doctrine of a state's absolute immunity from suit in tort has become case-hardened. Absolute immunity in negligence has been similarly extended to state-created authorities,⁴⁷ despite the fact that such authorities have been held to be absolutely liable,⁴⁸ without negligence, for property damage on state constitutional grounds.⁴⁹

The rigor of the immunity doctrine is somewhat lightened by the final establishment, after some uncertainty, of the principle that a state officer can *personally* be sued for torts committed during the course of his employment,⁵⁰ and it has been suggested, in an admiralty case, that

⁴⁶ *Wilson v. State Highway Comm'r*, 174 Va. 82, 4 S.E.2d 746, quoting from F. V. HARPER, A TREATISE ON THE LAW OF TORTS § 297, at 665 (1933).

⁴⁷ *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 117 S.E.2d 685 (1961).

⁴⁸ *Morris v. Elizabeth River Tunnel Dist.*, 203 Va. 196, 123 S.E.2d 398 (1962); *Heldt v. Elizabeth River Tunnel Dist.*, 196 Va. 477, 84 S.E.2d 511 (1954).

⁴⁹ VA. CONST. art. 4, § 58, which provides in part: "The General Assembly . . . shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation."

⁵⁰ *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967).

a state agency may waive its immunity when it engages in interstate commerce.⁵¹

Courts of other states have attempted to abolish state immunity also, often by the creation of the same proprietary-governmental distinction respecting tort liability of municipalities,⁵² or by sweeping decisions abolishing all governmental and charitable⁵³ immunities.

C. Cities and Towns

No one has ever contended that a county, city or town is a "sovereign" in the sense that the federal or a state government is so considered.⁵⁴ Therefore, it is particularly curious that judges have created immunity from suit in tort for these political subdivisions.

Although there is some disagreement,⁵⁵ the weight of judicial opinion⁵⁶ seems to be that governmental immunity originated in the old, but post-American Revolution, English case of *Russell v. Men of Devon*,⁵⁷ and "seems to have been windblown across the Atlantic as were the Pilgrims on the Mayflower and landed as if by chance on Plymouth Rock, [where] the first American case arose in Massachusetts."⁵⁸

Russell, whose wagon was damaged because of the negligent maintenance of a bridge on a county road, brought his action against all the men of the County of Devon. Actually, recovery was denied because there was no county fund out of which reimbursement could be made.

The case is notable chiefly for the remarkable language of Judge Ashhurst, which provides a shining exposition of what we have been taught the common law is not:

⁵¹ Chesapeake Bay Bridge and Tunnel Dist. v. Lauritzen, 404 F.2d 1001 (4th Cir. 1968).

⁵² See, e.g., Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21 (1969), where the court held, unlike Virginia, that the operation of a hospital is a proprietary function of the state.

⁵³ See, e.g., Pierce v. Yakima Valley Memorial Hosp. Ass'n, 43 Wash. 2d 162, 260 P.2d 765 (1953). But see Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962).

⁵⁴ "Whether the rule of governmental immunity is traceable to the medieval concept that 'The king can do no wrong' or to the *Men of Devon* case, *supra*, which does not mention this outgrowth of the doctrine of the divine right of kings to govern, political subdivisions are not in fact the sovereign state." Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45, 51 (1968).

⁵⁵ Maffei v. Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

⁵⁶ See, e.g. Hargrove v. Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1967); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964).

⁵⁷ 2 T.R. (Durn. & East) 667, 100 Eng. Rep. 359 (1788).

⁵⁸ Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107, 110 (1967).

It is a strong presumption that that which never has been done cannot by law be done at all [b]ut it has been said that the is a principle of law on which this action might be maintained, namely, that where an individual sustains an injury by the neglect or default of another, the law gives him the remedy. But there is another general principal of law which is more applicable to this case, *that it is better that an individual should sustain an injury than that the public should suffer an inconvenience.*⁵⁹ (Emphasis added.)

Virginia judges do not appear to have given much weight to the *Russell* case; it appears that the *Virginia Reports* contain only two references to it.⁶⁰

Since *Russell* was decided after 1776, it would appear that it never became "the rule of decision" in Virginia under our reception statute, since, although it is not clear from doubt, it has been said that "no decision in *England* since our independence commenced, has any authority in this Court."⁶¹ However, it may be that the *Russell* decision was in turn based on a much earlier and anonymous decision prior to 1558, found in Brooke's *Abridgement*. It was cited by the defense attorney in the *Russell* case⁶² and by the Wyoming court in a more recent case.⁶³

Nevertheless, it may be that *Russell* is indirectly responsible for much of our immunity problem today, for, once its principle was "wind-blown across the Atlantic," it soon took root in the Massachusetts court.⁶⁴ Three years later, however, Virginia had still not extended tort immunity to its political subdivisions when the case of *Bailey*

⁵⁹ 2 T.R. at 673, 100 Eng. Rep. at 362.

⁶⁰ *Noble v. Richmond*, 72 Va. (31 Gratt.) 271, 279 (1897); *Fry v. Albemarle*, 86 Va. 195, 197, 95 S.E. 1004, 1005 (1890).

⁶¹ *Baring v. Reeder*, 11 Va. (1 Hen. & M.) 154, 158 (1806).

⁶² 2 T.R. at 669, 100 Eng. Rep. at 360.

⁶³ *Maffei v. Kemmerer*, 80 Wyo. 33, 338 P.2d 808, 810-11 (1959).

⁶⁴ *Mower v. Inhabitants of Leicester*, 9 Mass. 247 (1812). In arresting a verdict in favor of an owner whose horse was fatally injured by putting its foot in a hole in a negligently maintained stone bridge, the court held that there was no remedy against a "quasi-corporation" created by the legislature "for purposes of public policy," except under a statute, not there applicable, providing damages if the defect still existed after notice to local officials.

Actually the rule of the *Russell* case was considered earlier by the Massachusetts court in *Riddle v. The Proprietors of the Locks and Canals on Merrimack River*, 7 Mass. 169 (1810). There a verdict for a raft owner for damage resulting from failure to keep a canal in passable condition was reversed. Unlike *Russell*, however, the canal tolls provided a fund out of which to pay the damages, although this was not specified either in the *Riddle* or *Mower* cases.

*v. Mayor of the City of New York*⁶⁵ was decided. In the *Bailey* case, plaintiffs sued for damage to their property caused by the collapse of an allegedly negligently constructed water supply dam. They offered to prove negligence in construction. The defendants objected that the common law provided no remedy in such a case. The trial court rejected the proffered evidence and directed a non suit. A new trial was awarded in which the appellate court for the first time in America spelled out the distinction between the proprietary functions of municipalities, for which negligence actions lie, and governmental functions, in which no action lies.

The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city, as for the public good. The state, in its sovereign character, has no interest in it. . . . The whole investment under the law and the revenue and profits to be derived therefrom, are a part of the private property of the city

The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body—such as are granted exclusively for public purposes to counties, cities, towns and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.

⁶⁵ 3 Hill 531 (N.Y. 1842).

Suppose the legislature, instead of the franchise, in question, had conferred upon the defendants banking powers, or a charter for a rail-road leading into the city, in the usual manner in which such powers are conferred upon private companies; could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers in the eye of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body.⁶⁶

The *Mower, Riddle* and *Bailey* cases were cited with approval in Virginia's landmark case of *Richmond v. Long's Administrators*⁶⁷ where the court said:

The functions of such municipalities are obviously two-fold: *first*, political, discretionary and legislative, being such public franchises as are conferred upon them for the government of their inhabitants and the ordering of their public officers, and to be exercised solely for the public good rather than their special advantage; and *secondly*, those ministerial, specified duties, which are assumed in consideration of the privileges conferred by their charter. Within the sphere of the former, they are entitled to this exemption; inasmuch as the corporation is a part of the government to that extent, its officers are public officers, and as such entitled to the protection of this principle; but within the sphere of the latter, they drop the badges of their governmental offices and stand forth as the delegates of a private corporation in the exercise of private franchises, and amenable as such to the great fundamental doctrine of liability for the acts of their servants. This distinction might seem at first sight fanciful and shadowy; but when pursued through the different cases, it will be found to be real and substantial. . . .

The distinction is quite clear and well settled; and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company.⁶⁸

⁶⁶ *Id.* at 539-41.

⁶⁷ 58 Va. (17 Gratt.) at 380-82.

⁶⁸ *Id.* at 379.

Later, as the Virginia court made repeated efforts to distinguish between proprietary and governmental functions, it declared:

A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the State to enable it the better to govern that portion of its people residing within the municipality, and to this end there is granted to or imposed upon it by the charter of its creation powers and duties to be exercised and performed exclusively for public, governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them or from their improper or negligent exercise. In its corporate and private character there is granted unto it privileges and powers to be exercised for its private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or private corporation.⁶⁹

Applying this distinction to actual cases, and often referring back to *Long's Administrators*, the Virginia court proceeded to adjudicate that a municipality is liable for negligence in the performance of such functions as maintaining streets,⁷⁰ although, curiously, not for negligence in failure to remove street debris after a hurricane;⁷¹ operating a market,⁷² a ferry,⁷³ a wharf,⁷⁴ gasworks,⁷⁵ sewers and drains,⁷⁶ waterworks,⁷⁷ or a swimming pool;⁷⁸ tearing down buildings through its volunteer firemen;⁷⁹ operating a wagon hauling dirt from street grading oper-

⁶⁹ Jones v. Williamsburg, 97 Va. 722, 723-24, 34 S.E. 883 (1900).

⁷⁰ Noble v. Richmond, 72 Va. (31 Gratt.) 271 (1879).

⁷¹ Fenon v. Norfolk, 203 Va. 551, 125 S.E.2d 808 (1962).

⁷² Norfolk v. Anthony, 117 Va. 777, 86 S.E. 68 (1915).

⁷³ Portsmouth v. Madrey, 168 Va. 517, 191 S.E. 595 (1937).

⁷⁴ Petersburg v. Applegarth's Adm'r, 69 Va. (28 Gratt.) 321 (1877).

⁷⁵ Richmond v. James, 170 Va. 553, 197 S.E. 339 (1891).

⁷⁶ Chalkley v. Richmond, 88 Va. 402, 14 S.E. 339 (1891).

⁷⁷ Richmond v. Virginia Bonded Warehouse Corp., 148 Va. 60, 138 S.E. 503 (1927); Stansbury v. Richmond, 116 Va. 205, 81 S.E. 26 (1914).

⁷⁸ Hoggard v. Richmond, 172 Va. 145, 200 S.E. 610 (1939).

⁷⁹ Burson v. Bristol, 176 Va. 53, 1 S.E.2d 501 (1940).

ations,⁸⁰ but not for negligence while collecting garbage in a horse-drawn wagon;⁸¹ maintaining a jail;⁸² and operating a police force.⁸³

In a 1939 decision holding that the operation of a park was a proprietary function in the exercise of which the city was liable for negligence, the court said:

When the Commonwealth or a municipal corporation, whether acting in its governmental or proprietary capacity, seizes or damages the property of a citizen for public good, compensation, under a constitutional mandate (Const., secs. 6 and 58), must be made to the owner. Common justice demands that the right to be safe in life and limb should be as sacred to the citizen as his property rights. The rule that results in this unfairness of the community group to the individual citizen has become apparent to many courts, hence the tendency of all recent decisions is not to extend the immunity of municipalities.⁸⁴

The court also said, quoting from an *American Law Reports* annotation:

It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.

. . . The doctrine has been severely criticized by recent writers, and the courts have frequently been revolted by the hardships resulting therefrom in individual cases, and have introduced "fictions, artificial distinctions and concessions to expediency," in order to avoid the full rigor of the "legal anachronism canonized as a legal maxim."⁸⁵

⁸⁰ *Jones' Adm'r v. Richmond*, 118 Va. 612, 88 S.E. 82 (1916).

⁸¹ *Ashbury v. Norfolk*, 152 Va. 278, 14 S.E. 223 (1929).

⁸² *Franklin v. Richlands*, 161 Va. 156, 170 S.E. 718 (1933), refusing to follow an earlier contrary holding in *Edwards v. Pocahontas*, 47 F. 268 (W.D. Va. 1891).

⁸³ *Harman v. Lynchburg*, 74 Va. (33 Gratt.) 37 (1880).

⁸⁴ *Hoggard v. Richmond*, 172 Va. 145, 157, 200 S.E. 610, 615 (1939).

⁸⁵ *Id.* at 153, 200 S.E. at 613, 14, quoting from 75 A.L.R. 1196 (1931). This is a popular quotation. The Virginia court omitted from it the immediately preceding sentence: "The whole doctrine of governmental immunity from liability for torts rests upon a

Unfortunately, in the same opinion, the court went on to pronounce, in dictum, what some trial courts have interpreted as new rules of immunity, doing so by quoting at length from a United States Supreme Court decision involving a controversy between a city and state over water rights, and having nothing at all to do with tort law:

The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in cases involving the question of liability for negligent acts or omissions of its officers and agents. . . . It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations.⁸⁶

The peculiar nature of the governmental-proprietary distinction, which results in functions deemed governmental in some states being deemed proprietary in others, led the Virginia court in *Long's Administrators* to say in its opening sentence that it "is usually unsafe and

rotten foundation." *Barker v. Santa Fe*, 47 N.M. 85, 136 P.2d 480, 482 (1943). This is a fairly mild criticism compared to one doubtless influenced by World War II fervor. See *Warp, Municipal Tort Liability*, 28 VA. L. REV. 360 (1942). "This ancient idea really lies at the basis of Nazi and Fascist philosophy. It is peculiar to totalitarian political thought. It has no place in democratic ideology." *Id.* at 375.

⁸⁶ *Hoggard v. Richmond*, 172 Va. 145, 153, 200 S.E. 610, 613 (1939), quoting from *Trenton v. New Jersey*, 262 U.S. 182 (1923).

hazardous to seek to classify adjudicated cases upon any complex question of law, and to extract from them rules of general application."⁸⁷ This complexity led one state to reject the distinction completely and to grant total municipal immunity in tort except where otherwise provided by statute.⁸⁸ A more logical approach had been to abandon the governmental-proprietary distinction, and to abolish municipal immunity from suit in tort.

An outstanding example of this trend, although limited to motor vehicles,⁸⁹ is a recent decision by the Supreme Court of Nebraska, reversing the sustaining of a demurrer in a suit involving a police car.⁹⁰ Although it had "long ago adopted the traditional common law view that a public entity engaged in governmental activities is not liable for negligence," the court pointed out that under the governmental-proprietary distinction "the citizen who has been negligently injured by a vehicle of the city water department may recover, but the citizen who has been negligently injured by a vehicle of the city health department of the same city cannot recover. Such distinctions defy logical explanation."⁹¹

Other courts have abolished municipal immunity *in toto*. The Florida court, holding that a town might be sued for the negligence of its jailer, said:

The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

. . . [W]hen an individual suffers a direct, personal injury proxi-

⁸⁷ *Richmond v. Long's Adm'ts*, 58 Va. (17 Gratt.) 375, 376 (1867).

⁸⁸ *Irvine v. Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

⁸⁹ No opinion of the Virginia Supreme Court of Appeals holds a municipality immune from suit for operation of a *motor* vehicle. Apparently its only decisions concerning operation of vehicles on the highways are *Jones v. Richmond*, 118 Va. 612, 88 S.E. 82 (1916), involving a mule-drawn wagon (not immune because engaged in the proprietary function of dirt street grading) and *Ashbury v. Norfolk*, 152 Va. 278, 147 S.E. 223 (1929), involving a horse-drawn garbage wagon (held to be a governmental-proprietary distinction to motor vehicle cases in Virginia).

⁹⁰ *Brown v. Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968).

⁹¹ *Id.* at 431, 160 N.W.2d at 806.

mately caused by the negligence of a municipal employee while acting within the scope of his employment, the injured individual is entitled to redress for the wrong done.⁹²

Similarly, the Kentucky court, holding that a city might be sued for a drowning in a swimming pool, re-examined "this legal anachronism" and pointed out that there was "probably no tenet in our law that has been more universally berated by courts and legal writers than the governmental immunity doctrine." It consequently abolished the distinction.⁹³ The same criticism was made in another decision abolishing the proprietary-governmental distinction.⁹⁴ Governmental immunity was abolished for cities, counties, school districts, and all other subdivisions of the state, as well as for the state itself, in a Wisconsin case arising out of a municipal playground accident.⁹⁵ A similar sweeping revocation of immunity, applying to all subdivisions of the state but not the state itself, was ordered in Minnesota⁹⁶ in a case involving a defective slide on a playground. Similarly, a Nebraska case allowing a trial for a pole vaulter hurt at a municipal university wiped out immunity in certain cases of commission as to all governmental subdivisions.⁹⁷ In a decision limited to cities, by abolishing the governmental-proprietary test, the Arkansas court found a city suable for a garbage truck accident, although collection of garbage was clearly considered a "governmental function."⁹⁸

D. Counties

Twenty years after the rule of immunity of cities in performing governmental functions was established in *Richmond v. Long's Administrators*,⁹⁹ a Virginia lady was injured when her buggy overturned due to the negligence of a convict on a county road gang. The court rejected the suggestion that a county, like a city, might be sued for negligence in the exercise of certain of its functions and held she was without a remedy.¹⁰⁰ The court did not mention the *Long* case, basing its decision on the ancient English case of *Russell v. Men of Devon*:

⁹² Hargrove v. Cocoa Beach, 96 So. 2d 130, 133-34 (Fla. 1957).

⁹³ Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964).

⁹⁴ Holytz v. Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618, 621 (1962).

⁹⁵ *Id.*

⁹⁶ Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962).

⁹⁷ Johnson v. Municipal Univ., 184 Neb. 512, 169 N.W.2d 286 (1969).

⁹⁸ Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968).

⁹⁹ 58 Va. (17 Gratt.) 375 (1867).

¹⁰⁰ Fry v. County of Albemarle, 86 Va. 195, 9 S.E. 1004 (1890).

The legislature has given a remedy in cases growing out of contracts with counties, but it has given no remedy against a county for the negligence of a public officer or servant appointed by law, and we may observe, as did Lord Kenyon long ago, that the question here is, "Whether this body of men who are sued in the present action are a corporation, or a qua corporation against whom such an action can be maintained. If it be reasonable that they should be by law liable to such an action, recourse must be had to the legislature for that purpose." 2nd T. R. 671. And even if we could exercise legislative discretion in this case there would be great reason for not giving this remedy.

The rules established by the courts concerning municipal corporations have but slight application to counties organized as ours are. Our counties are parts of the state, political subdivisions of the state, created by the sovereign power for the exercise of the functions of local government.¹⁰¹

The court went on to suggest that those at fault were not really county employees:

In this case the county of Albemarle is sued to recover damages resulting from the alleged negligence of a state convict engaged in working on the public roads of the state; the public highways in the county of Albemarle belong to the commonwealth, not to the county; and of the alleged negligence of a superintendent who was appointed by the authority of a state law.

No suit can be maintained against the county of Albemarle upon the principles of *respondeat superior*, because the relation of master and servant did not exist; such officers are *quasi* public officers of the state. For although the officer in charge was appointed by the county, yet the office and duties incident to it were created by an act of the legislature, for the general public welfare, the public roads of Albemarle county being highways of the commonwealth for the common benefit of all the people of the state, who have a right to use them.¹⁰²

Finally, the court rejected the invitation to set up the same governmental-proprietary distinction it had established in the case of municipal corporations:

¹⁰¹ *Id.* at 197, 9 S.E. at 1005.

¹⁰² *Id.* at 199, 9 S.E. at 1005-06.

We have been referred to numerous decisions concerning the *character of the duty* required of these and other officials similarly situated, drawing a distinction where the duty is for the *benefit of the general public* and where it is for the *benefit of a corporation*, but we do not cite them. They are more distinctly applicable to municipal organizations proper than to such organizations as counties, which are rather political sub-divisions of the state, or, as sometimes denominated, *quasi* corporations.¹⁰³

Later, holding that under the "self-executing" section 58 of the Virginia Constitution, a landowner might recover against the county for damage to his land, the court said:

The position taken for the defendant county is, in substance, that the county, being a political subdivision of the State, occupies the same position with the respect to suits against it that the state does, and that it cannot be sued without the consent of the state This position is well taken so far as suits or claims for damages for personal injuries are concerned.¹⁰⁴

Immunity of a Virginia county from tort liability was reaffirmed in another case where, despite the county making every effort to waive its immunity, the court held that the county's "freedom from liability for this tort may be likened to the immunity that is inherent in the state. It is fundamental and jurisdictional and could not be waived by the Board."¹⁰⁵ The court further pointed out that there had been legislation enacted permitting counties to be sued in contract but not in tort. "If liability for negligence for personal injuries is to be imposed upon it, this should be accomplished through legislative action and not by judicial fiat."¹⁰⁶

The court, in the same case, rejected the suggestion that Arlington County should be treated like a city because it has all the powers of a Virginia city. There is, of course, no logical reason why a county should enjoy any more immunity than a city or town.

Elsewhere in the country, counties have been stripped of their tort immunity in decisions which abolish immunity for political subdivisions

¹⁰³ *Id.* at 199, 9 S.E. at 1006.

¹⁰⁴ *Nelson County v. Loving*, 126 Va. 283, 293, 101 S.E. 406, 409 (1919); *accord*, *Nelson County v. Coleman*, 126 Va. 275, 101 S.E. 413 (1919).

¹⁰⁵ *Mann v. County Board*, 199 Va. 169, 175, 98 S.E.2d 515, 519 (1957).

¹⁰⁶ *Id.* at 174, 98 S.E.2d at 519.

generally,¹⁰⁷ or refuse to extend sovereign immunity to counties in order to relieve them from liability in negligent operation of roads,¹⁰⁸ or deny a county general governmental immunity,¹⁰⁹ or hold a county jointly liable with a city for a vehicle accident involving negligence on the part of a person who was an employee of both subdivisions.¹¹⁰ There has also been a retreat from immunity in the refusal by one state supreme court to apply it when the county was engaged in a proprietary function,¹¹¹ followed by an intermediate appellate court opinion apparently abolishing county immunity entirely.¹¹²

E. School Boards

Local school boards are local governments in themselves, with powers varying widely from state to state but having in common the ownership of large amounts of real estate, control over large budgets, and, usually, operation of sizeable fleets of motor vehicles. Here, too, early decisions tended to confer tort immunity, although no early decision on the subject can be found in Virginia.

Despite the language in *Hoggard v. Richmond*,¹¹³ a 1939 decision which pointed out "the tendency of all recent decisions not to extend the immunity of municipalities," the question of a Virginia school board's immunity from suit was squarely presented for the first time in 1960. The court held the board immune from suit for personal injury suffered in a high school auditorium, despite the fact that the auditorium was leased for a concert at the time.¹¹⁴ The court, ignoring contrary authority, cited earlier decisions from Virginia and other states which had conferred tort immunity on counties. A few years later this decision was reaffirmed, although it was established that the co-defendant teacher was suable for his negligence.¹¹⁵

Meanwhile, in one of the leading cases in the field of governmental tort immunity, the Illinois Supreme Court overruled prior decisions and concluded "that the rule of school district tort immunity is unjust, un-

¹⁰⁷ *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Johnson v. Municipal Univ.*, 184 Neb. 512, 169 N.W.2d 286 (1969).

¹⁰⁸ *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963).

¹⁰⁹ *Young v. Juneau Co.*, 192 Wis. 646, 212 N.W. 295 (1927).

¹¹⁰ *Johnson v. Billings*, 101 Mont. 462, 54 P.2d 579 (1936).

¹¹¹ *Flowers v. Board of Comm'rs*, 240 Ind. 668, 168 N.E.2d 224 (1960).

¹¹² *Klepinger v. Board of Comm'rs*, 239 N.E.2d 160 (Ind. 1968).

¹¹³ 172 Va. 145, 200 S.E. 610 (1939).

¹¹⁴ *Kellam v. School Bd.*, 202 Va. 252, 117 S.E.2d 96 (1960).

¹¹⁵ *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968).

supported by any valid reason, and has no rightful place in modern-day society."¹¹⁶ The court pointed out:

The nation's largest business is operating on a blueprint prepared a hundred, if not a thousand years ago. The public school system in the United States, which constitutes the largest single business in the country, is still under the domination of a legal principle which in great measure continued unchanged since the Middle Ages, to the effect that a person has no financial recourse for injuries sustained as a result of a performance of the State's functions That such a gigantic system, involving so large an appropriation of public funds and so tremendous a proportion of the people of the United States, should operate under the principles of a rule of law so old and so outmoded would seem impossible were it not actually true.¹¹⁷

i.

Earlier, an intermediate Illinois court had held immunity waived to the extent of school bus insurance.¹¹⁸ Rejecting the suggestion that a statute waiving immunity to the extent of insurance purchased voluntarily by school districts meant the legislature intended boards otherwise to be immune, the court said:

The difficulty with this legislative effort to curtail the judicial doctrine is that it allows each school district to determine for itself whether, and to what extent, it will be financially responsible for the wrongs inflicted by it.¹¹⁹

To the same effect are recent decisions by courts of other states in cases involving school districts,¹²⁰ doing away with immunity for political subdivisions generally.

¹¹⁶ *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89, 96 (1959).

¹¹⁷ *Id.*, 163 N.E.2d at 92, quoting from Rosenfield, *Governmental Immunity from Liability for Tort in School Accidents*, 9 LAW & CONTEMP. PROB. 358, 359 (1942).

¹¹⁸ *Thomas v. Broadlands Community Consol. School Dist.*, 348 Ill. App. 567, 109 N.E.2d 636 (1952).

¹¹⁹ *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89, 92 (1959).

¹²⁰ *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962).

II. CHARITABLE IMMUNITY

*"Charity suffereth long and is kind, but in the common law it cannot be careless. When it is, it ceases to be kindness and becomes actionable wrongdoing."*¹

The doctrine of charitable immunity in England got a peculiar start and proved to be short-lived. *Duncan v. Findlater*² involved a suit against the trustees of a turnpike road, sued through their treasurer, for a personal injury occasioned by the negligence of employees while making or repairing a road. The House of Lords ruled for the defendant, Lord Cottenham pointing out that the applicable statute provided that turnpike funds should be

applied to the purposes therein set forth, 'and to no other purposes whatsoever'. It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good this private error or misconduct?³

*Heriot's Hospital v. Ross*⁴ involved a school for needy Edinburgh boys set up by the will of Mr. Heriot. The plaintiff was a fatherless, needy boy who had been refused admittance while others, less qualified, he thought, under the terms of the will, had been admitted. The boy sought, in addition to an order admitting him, damages for failure to do so. The Solicitor General denied he had a right to recover out of the fund, citing the *Duncan* case, which plaintiff's counsel distinguished on the ground that Ross sought to recover out of a fund created for his benefit. The House of Lords ruled against the boy:

¹ President and Dir. of Georgetown College v. Hughes, 130 F.2d 810, 813 (D.C. Cir. 1942).

² 7 Eng. Rep. 934 (1839).

³ *Id.* at 939.

⁴ 8 Eng. Rep. 1508 (1846).

There is not any person who ever created a trust fund that provided for payment out of it of damages to be recovered from those who had the management of the fund To give damages out of a trust fund would not be to apply it to those objects whom the author of the funds had in view, but would be to divert it to a completely different purpose

saying the matter was "very clearly settled in the case of *Duncan v. Findlater* . . ." ⁵

Holliday v. The Vestry of the Parish of St. Leonard, Shoreditch,⁶ like *Duncan*, was a suit by a traveler thrown out of his cart which struck stones placed on the surface of the road, which the parish vestry was charged by statute with maintaining. A plaintiff's verdict was reversed, the court saying that had employees of a private individual committed a wrong they would be liable, but trustees for public purposes would not, citing the *Duncan* case.⁷

Five years later came *Mersey Docks Trustees v. Gibbs*,⁸ in which owners of a cargo of guano, damaged by water when a ship struck a bank of mud in the Liverpool harbor, recovered a verdict which the trustees confidently sought to reverse under the authority of the *Duncan*, *Heriot's Hospital* and *Holliday* cases, and that old progenitor of governmental immunity, *Russell v. Men of Devon*.⁹ The House of Lords, however, sustained the verdict, saying "in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things."¹⁰ Furthermore, the rule of immunity apparently announced in the *Duncan* case, the Lords said, was really dictum, since "all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment, who were not shown to be their servants Lord Cottenham's language goes a great deal farther, and shows that, in his opinion, persons incorporated for the purpose of executing works, could never, in their official corporate capacity, be liable to damages at all, the remedy for any wrong or neglect being

⁵ *Id.* at 1510-11.

⁶ 142 Eng. Rep. 769 (1861).

⁷ *Id.* at 774.

⁸ 11 Eng. Rep. 1500 (1866).

⁹ 100 Eng. Rep. 359 (1788).

¹⁰ *Mersey Docks Trustees v. Gibbs*, 11 Eng. Rep. 1500, 1510 (1866).

only against the individual corporators for their individual wrong or neglect . . . but not being the point decided by the House, it is not conclusively binding"¹¹ Another Lord pointed out that "those observations of Lord Cottenham, which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done—would, if they were recognized as the law, undoubtedly lead to very great evil and injury."¹²

Despite this overruling of the charitable immunity doctrine in England, the rule announced in *Heriot's Hospital* and *Duncan* was "wind-blown across the Atlantic" and first took root in Massachusetts, where the case of *McDonald v. Massachusetts General Hospital*¹³ was decided in 1876—ten years after the *Mersey* case in England. McDonald, an employee, sued for negligent surgical treatment in the hospital, which treated him as a charity patient there. The court ruled against him, saying the hospital

. . . has offered to him freely those ministrations which, as the dispenser of a public charity, it has been able to provide for his comfort, and he had accepted them. It has no funds which can be charged with any judgment which he might recover, except those which are held subject to the trust of maintaining the hospital. If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. Where actions have been brought against commissioners of public works serving gratuitously, for negligence in carrying on the work, by which injury has occurred, it has been held that they were not liable if proper care had been used by them in selecting those who were actually to perform the work. *Holliday v. St. Leonard's*, 11 C.B. (N.S.) 192. The liability of the defendant corporation can extend no further than this; if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them

¹¹ *Id.* at 1513.

¹² *Id.* at 1518.

¹³ 120 Mass. 432, 21 Am. Rep. 529 (1876).

have done their whole duty in reference to those who have sought to obtain the benefit of them.¹⁴

So with that language a peculiar exception to the "trust fund" theory of charitable immunity was conceived: a charitable institution is liable for its negligence in the selection of its employees.

In the years following the *McDonald* decision, the doctrine of charitable immunity in America developed into "a state of great confusion, as to both reasoning and results."¹⁵

In addition to the "trust fund" theory, the charitable immunity doctrine was based on the following other theories:

(1) That charities are exempted from the doctrine of *respondet superior*, which rests on the idea that only when an enterprise is carried on for the master's financial benefit is it just that he should answer for his servant's tort;¹⁶

(2) That private charities are agencies of the government and hence entitled to its immunity from suit on the ground that charities deserve special consideration because of their intimate association with the state, and sometimes because a charity had a duty specifically delegated to it by a governmental agency;¹⁷

¹⁴ *Id.* at 436, 20 Am. Rep. at 532-33.

¹⁵ Annot., 25 A.L.R.2d 29, 41-2 (1952).

"On the one side, there is a growing number of jurisdictions which hold that charities are liable in tort to the same extent as individuals and private corporations. On the other side, there are jurisdictions which grant charities 'complete' immunity, that is, immunity irrespective of the victim's status as a servant of the charity, or as a beneficiary of its bounty, or as a stranger. An intermediate view is taken in jurisdictions in which a charity's immunity is limited to protecting its trust property from execution under a judgment rendered against it in a tort action, and in other jurisdictions in which charities are granted a partial (qualified, limited) immunity, depending upon any, or a combination, of the following factors: (1) the victim's status as a servant of the charity, or as a stranger, or as a beneficiary of its bounty; (2) the nature of the negligence as chargeable against the charitable institution itself (corporate negligence), such as negligence in selecting and retaining employees, or against subordinate employees only. A charity may also be immune from liability for torts committed in the performance of a governmental duty specifically delegated to it. Irrespective of whether a charity enjoys 'complete' or partial immunity from tort liability in a particular jurisdiction, it may be liable for torts committed in the course of noncharitable (commercial) activities, or for breach of a duty imposed upon it by statute, as distinguished from a common-law duty. As to each of these alternatives the courts are in disagreement. Equally conflicting are the various theories and factors upon which these conflicting results have been reached.

"On the other hand, as recognized by the courts, opinion among scholars outside the courts almost uniformly supports the doctrine of liability as against that of immunity."

¹⁶ *Id.* at 65.

¹⁷ *Id.* at 67.

(3) That the beneficiary is deemed to have waived any claim against the charity arising from its negligence, or to have assumed the risk of such negligence, despite the general weakness of proof that there was any such waiver, particularly in the case of unconscious or incompetent patients;¹⁸

(4) The "public policy" theory, really "not a theory at all, but rather a frank statement of the reason for immunity without resort to theoretical justifications which are themselves statements of policy in theoretical form."¹⁹

Immunity from liability in tort for a charitable enterprise was first suggested in Virginia in *Trevett v. Prison Association of Virginia*,²⁰ a suit by a dairy farmer for pollution of a stream by wastes from the school for confinement of youthful criminals, conceded to be a corporation with general objects "of a benevolent character." The court held this charity might be sued, and rejected the suggestion that an earlier decision exempting a state mental hospital from suit²¹ was applicable because the prison association was not "a public corporation."

Because the *Prison Association* case was not squarely argued as a charitable rather than a governmental immunity case, it was virtually ignored as precedent in *Hospital of St. Vincent of Paul v. Thompson*,²² holding judgment properly rendered against a charitable hospital by a visitor injured while attempting to assist a friend in entering the hospital for treatment. In an exhaustive review of decisions of other states, the Virginia court flatly rejected the "trust fund" doctrine because it "would establish absolute immunity, if carried to its logical conclusion, for all torts committed by such associations. . . . A charitable corporation is not exempt from liability for torts against strangers because it holds its property in trust to be applied to the purposes of charity."²³ The court, however, apparently approved, in dictum, the principle "that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts."²⁴

That dictum in *Thompson* hardened into a holding in the next charitable immunity case to come before the court. *Weston's Ad-*

¹⁸ *Id.* at 68.

¹⁹ *Id.* at 70.

²⁰ 98 Va. 332, 36 S.E. 373 (1900).

²¹ *Maia v. Eastern Hospital*, 97 Va. 507, 34 S.E. 617 (1899).

²² 116 Va. 101, 81 S.E. 13 (1914).

²³ *Id.* at 107, 81 S.E. at 15.

²⁴ *Id.* at 115, 81 S.E. at 18.

*ministratrix v. Hospital of St. Vincent*²⁵ involved a suit against the same hospital for death of a newborn child, born to a paying maternity patient, who was fatally burned by a hot water bottle. The court, in a 3-2 decision, denied recovery, again rejecting the "trust fund" doctrine and instead adopting the view that one who is a beneficiary of the services of a charitable hospital assumes the risk of its negligence in treatment. It refused to base this holding on a contractual assumption of risk, thereby sidestepping the plaintiff's argument that the newborn babe was incapable of contracting and did not, while in his mother's womb, have a part in selecting the institution at which he would be treated. The father of the yet unborn infant, by engaging the services of the hospital, and the prospective mother, by voluntarily entering it pursuant to that engagement, had ". . . thereby assumed the risk as well for the child as the mother," the court going on to say that assumption of risk "is not always and necessarily" a matter of implied contract. "The mere doing of an act, in the absence of any contract, may be the assumption of risk, as is illustrated by engaging in athletic sports and the like."²⁶ "The correct basis" of the rule of immunity "is public policy."²⁷

The court rejected the suggestion that the paying patient should be treated differently than a non-paying one, quoting with approval from a Massachusetts case which pointed out that often payment "does not make full pecuniary compensation for the services rendered" by a charity and saying:

. . . [T]hat such a hospital, in its treatment of a rich patient, shall be held to a greater degree of care than in its treatment of a pauper is not to be tolerated.²⁸

The court did not grant total immunity, saying charitable hospitals are liable for failure to exercise due care "in the selection and retention of their employees," lack of which was not alleged in the case at bar.²⁹ This was because

[t]he beneficiaries of charitable institutions are the poor, who have very little opportunity for selection, and it is the purpose of the founders to give to them skillful and humane treatment. If they

²⁵ 131 Va. 587, 107 S.E. 785 (1921).

²⁶ *Id.* at 592-93, 107 S.E. at 786.

²⁷ *Id.* at 609, 107 S.E. at 792.

²⁸ *Id.* at 604, 107 S.E. at 790.

²⁹ *Id.* at 610, 107 S.E. at 792.

are permitted to employ those who are incompetent and unskilled, funds bestowed for beneficence are diverted from their true purpose, and, under the form of a charity, they become a menace to those for whose benefit they are established.³⁰

The court expressly reaffirmed its holding in *Thompson* as to "the respective rights of charitable institutions and third persons" and expressed "no opinion on any other question."³¹

A strong dissent in *Weston* said the majority inferred "that there was a tender by the hospital of a qualified or limited service from the bare circumstance that it is a charitable institution," but since the father did not know the hospital was a charity, and undertook to pay the full price asked, the hospital "undertook to render the service without any qualification. It thereby held itself out as doing the business of undertaking the unqualified service aforesaid—precisely the same business as that done by non-charitable hospitals, and in competition with the latter . . . [R]easonably efficient service is, after all, the only service which can be regarded as true charity."³²

When the general question of a hospital's liability for its employee's negligence was presented again,³³ the court, reviewing foreign cases holding both ways, conceded "that the wisdom of the rule of immunity as applied to charitable institutions is debatable," but unanimously reversed a plaintiff's judgment because the immunity rule had "become a part of the general public policy of the State,"³⁴ saying a change in the rule of immunity should be left to the legislature. An unsuccessful legislative effort was apparently considered significant in a later decision again sustaining the immunity rule.³⁵

While most of the litigation in the charitable immunity field has been in the field of hospital negligence, there has also been a substantial body of opinion extending immunity to churches and other eleemosynary institutions.³⁶ So far the Virginia Supreme Court of Ap-

³⁰ *Id.* at 609, 107 S.E. at 792.

³¹ *Id.* at 610, 107 S.E. at 792.

³² *Id.* at 617, 107 S.E. at 794.

³³ *Norfolk Protestant Hosp. v. Plunkett*, 162 Va. 151, 173 S.E. 363 (1934), had affirmed a verdict for a patient because of the negligence of the hospital in the selection and retention of its nurse.

³⁴ *Memorial Hosp. v. Oakes*, 200 Va. 787, 108 S.E.2d 388 (1959).

³⁵ *Hill v. Memorial Hosp., Inc.*, 204 Va. 501, 506, 132 S.E.2d 411, 413 (1963). Meanwhile, the rule that a charitable hospital is liable for negligent injuries to an invitee was reaffirmed in several cases. See, e.g., *Roanoke Hosp. Ass'n v. Hayes*, 204 Va. 703, 133 S.E.2d 559 (1963).

³⁶ See, e.g., *Gable v. Salvation Army*, 100 P.2d 244 (Okla. 1940).

peals has rendered no opinion in this field, the only reported pronouncement by a state court being a trial court statement that a church is not immune from suit in tort, although holding that the trustees of the church were improper defendants.³⁷ The federal courts in Virginia, however, have extended the immunity doctrine, commencing with two decisions³⁸ rendered in the free-wheeling days before the *Erie* case³⁹ required federal courts in diversity of citizenship cases to follow the common law of the states in which they sit.

From coast to coast, courts have been rejecting the charitable immunity doctrine. As long ago as 1915, the Alabama court rejected the "implied assent" theory, since the plaintiff, a paying patient, asked and received no charity:

There can be no valid reason why such a patient, dealing as she does at arm's length with the hospital, should not stand in as favorable position as the stranger, and yet many of the cases grant relief to the latter and deny it to the former.⁴⁰

Likewise, the New Jersey court rejected the "implied assent" or "waiver" theory on the very obvious ground that "such waivers would be wholly fictitious and a figment of the imagination:"

The unmistakable fact remains that judges of an earlier generation declared the immunity simply because they believed it to be a sound instrument of judicial policy which would further the moral, social and economic welfare of the people of the State. When judges of a later generation firmly reach a contrary conclusion they must be ready to discharge their own judicial responsibilities in conformance with modern concepts and needs.⁴¹

A well-reasoned opinion from the District of Columbia,⁴² considering charitable hospital immunity as a case of first impression, rejected

³⁷ *Rohr v. City of Richmond*, 20 Va. L. Reg. 260 (1914).

³⁸ *Ettlinger v. Trustees of Randolph-Macon College*, 31 F.2d 869 (4th Cir. 1929); *Bodenheimer v. Confederate Memorial Ass'n*, 68 F.2d 507 (4th Cir. 1934). Cf. *Egerton v. R. E. Lee Memorial Church*, 395 F.2d 381 (4th Cir. 1968), decided after *Erie*. The court in *Egerton* acknowledged that it was bound by Virginia law to the effect that charities were exempt from tort liability to one who qualifies as a beneficiary.

³⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴⁰ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4, 11 (1915).

⁴¹ *Collopy v. Newark Eye and Ear Infirmary*, 27 N.J. 29, 14 A.2d 276, 283 (1958).

⁴² *President and Dir. of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942).

each of the theories of charitable immunity, pointing out that with insurance now available to guard against dissipation of charitable funds, it "is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums," and that against the cost to the charity should be weighed "the cost to the victim of bearing the full burden of his injury."⁴³

In abrogating the immunity, the court failed to draw any distinction between strangers to or beneficiaries of the charity,⁴⁴ and rejected the view that liability follows negligent injury to a paying patient, but not to a charity patient.⁴⁵

Other state court cases⁴⁶ have eliminated charitable hospital immunity on grounds of fundamental justice and fairness. In rejecting the "implied assent" theory, a California court pointed out that most judges applying it require proof only of the eleemosynary character of the institution:

To find an implied contract by the patron in the purpose of the charitable organization is to entirely disregard other factors which should be considered in determining whether any such agreement may be inferred from the conduct of the parties. There is no reason for a court to say that admission to a hospital is proof of an intention not to charge it with responsibility for tortious wrongdoing. Indeed, the agreement to pay the rates charged by the hospital for its services would ordinarily be sufficient basis for the opposite inference; certainly it is a strong indication that the patient did not agree that the charity should be exempt if injury resulted from the failure of its servants to act with ordinary care.⁴⁷

⁴³ *Id.* at 824.

⁴⁴ *Id.*

⁴⁵ *Id.* at 827.

⁴⁶ See, e.g., *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967); *Flagiello v. Pennsylvania Hosp.*, 417 Pa. 468, 208 A.2d 193 (1965). The Pennsylvania court reasoned:

The immunity doctrine offends against fundamental justice and elementary logic in many ways. Thus, while it closes the doors of the courts to the person whose body has been injured, it opens them wide where inanimate property has been damaged through the hospital's maintenance of a nuisance It becomes almost a matter of fantasy that a person should enter a hospital to be cured of an ailment and to have a broken back made whole, just as a ship enters dry-dock for repairs, and then emerge, because of the fault of those charged with repairing the ship, in worse shape to sail the sea of life than before. And, in addition, be required to pay for the work of the faulty mechanics. In no other phase of negligence law is there such a paradox, and it should not exist here.

⁴⁷ *Silva v. Providence Hosp.*, 14 Cal. 2d 762, 97 P.2d 798, 804 (1939).

It pointed out that a modern hospital "is a business enterprise, which, although it may be the recipient of some donations, is able to carry on its work because the aggregate amount received from paying patients is sufficient to meet the expenses of administering to those patients and also to a certain number who are accepted at a reduced rate or without any charge."⁴⁸

On the "public policy" question, the court went on to say as follows:

The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by servants of a charity, is to require him to make an unreasonable contribution to the charity, against his will, and a rule of law imposing such burdens can not be regarded as socially desirable or consistent with sound policy.⁴⁹

The "public policy" argument was also rejected by the Iowa court, overruling prior decisions which immunized charitable hospitals from liability:

Public policy simply means that policy recognized by the state in determining what facts are unlawful or undesirable, as being injurious to the public or contrary to the public good. It is not quiescent, but active. A policy adopted today as being in the public good, unlike the Ten Commandments, is not necessarily an ever enduring thing. As times and perspectives change, so changes the policy.⁵⁰

The court pointed out that the immunity theory originated when hospitals were relatively few and were created only through contributions of public-spirited people, with little if any governmental aid, and that immunity might have been originally called for as a basis for encouraging charitable donations. But "today the situation is vastly different. The hospital of today has grown into an enormous business. They own and hold large assets, much of it tax free by statute, and employ many persons. The state has become paternal to an astonishing degree. . . . Also, we take judicial notice of the extensive use of the many types of hospital insurance as well as liability insurance by the

⁴⁸ *Id.* at 803.

⁴⁹ *Id.* at 805.

⁵⁰ *Haynes v. Presbyterian Hosp. Ass'n*, 341 Iowa 1269, 45 N.W.2d 151, 153 (1950).

institutions. Thus it is evident that times have changed and are now changing in the business, social, economic and legal worlds. The basis for, and the need of, such encouragement is no longer existent."⁵¹

Just as in the hospital cases, the trend has been away from immunity in cases dealing with other charitable institutions. Some courts have made a distinction between commercial and non-commercial activities of charities. For example, the Ohio Supreme Court, in the same year, held a Y.W.C.A. immune from liability for a swimming pool drowning because of the doctrine of *stare decisis*,⁵² but held another charity liable for an injury occurring at a bingo party.⁵³ In like manner, Washington followed up its decision abolishing immunity of charitable hospitals⁵⁴ by sustaining immunity of a church for a bus accident which occurred while children were being transported to Sunday school,⁵⁵ then overruled the latter decision in a case involving a partaker of a church smorgasbord,⁵⁶ and on the same day allowed a plaintiff hurt at church while attending a funeral to recover.⁵⁷ California also abolished church immunity in an automobile accident suit against a church organization whose agents were transporting members to a church outing.⁵⁸

Abolition of charitable immunity (and of the other immunities discussed in this article) has been urged particularly in the area of motor vehicle cases, as evidenced recently by the American Bar Association's Special Committee on Automobile Accident Reparations:

To refuse to allow an injured person to recover merely because of the charitable organization status of the defendant shocks the modern conscience.⁵⁹

⁵¹ *Id.* at 154.

⁵² *Gibbon v. Young Women's Christian Ass'n*, 170 Ohio St. 280, 164 N.E.2d 563 (1960).

⁵³ *Blankenship v. Alter*, 170 Ohio St. 65, 167 N.E.2d 922 (1960).

⁵⁴ *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765 (1953).

⁵⁵ *Lyon v. Tumwater Evangelical Church*, 47 Wash. 2d 202, 287 P.2d 128 (1955).

⁵⁶ *Friend v. Cove Methodist Church*, 65 Wash. 2d 174, 396 P.2d 546 (1964).

⁵⁷ *Herbert v. Corporation of Catholic Archbishop*, 65 Wash. 2d 184, 396 P.2d 552 (1964).

⁵⁸ *Malloy v. Fong*, 35 Cal. 2d 356, 232 P.2d 241 (1951).

⁵⁹ REPORT, ABA SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS, at 85 (1969). The recommendations of the Special Committee were approved by the House of Delegates of the Association at its mid-winter meeting on February 27-8, 1969.

III. INTRAFAMILY IMMUNITY

*"It is difficult to see how an action for personal injuries would disrupt domestic peace and tranquility more than an action for damage to property."*¹

At common law neither husband nor wife could sue the other. This incapacity arose out of the legal unity of husband and wife. By marriage the husband and wife became one person in law. Her existence was merged or suspended in his.² In many jurisdictions, including Virginia, this absolute disability to sue has been modified by the adoption of Married Woman's Acts which vary greatly in language but typically provide that a married woman may sue and be sued as if she were unmarried.³

The right of a wife to sue her husband for a personal tort was not specifically raised in Virginia until 1918, long after adoption of the Virginia Married Woman's Act, when the court found the right of a wife to sue her husband for assault did not exist at common law and was not conferred by statute.⁴ Later the court held that a married woman could not sue her husband for negligently caused injury inflicted before they were married.⁵ One spouse may, however, sue the other for negligence which results in damage to property⁶ and may recover against the other in a proceeding under the Workmen's Compensation Act.⁷

Elsewhere in the country there has been a strong trend toward construing Married Women's Acts as permitting one spouse to sue the other for both intentional torts and negligence. In recognizing that it would be both fruitless and impossible to reconcile the decisions under the various statutes, the Colorado court pointed out:

At common law the legal existence of the wife was merged in that of her husband; they were regarded as one person in law, and the husband was that person. . . .

. . . .

As the nonliability of the husband to the wife for damages for a personal tort was founded upon the common law fiction that hus-

¹ *Brown v. Gosser*, 262 S.W.2d 480, 484 (Ky. 1953).

² *Alexander v. Alexander*, 85 Va. 353, 366, 7 S.E. 335, 340 (1888).

³ See, e.g., VA. CODE ANN. § 55-36 (1969).

⁴ *Keister's Adm'r v. Keister's Ex'rs*, 123 Va. 157, 96 S.E. 315 (1918).

⁵ *Furey v. Furey*, 193 Va. 727, 71 S.E. 2d 191 (1952).

⁶ See *Vigilant Ins. Co. v. Bennett*, 197 Va. 216, 89 S.E.2d 69 (1955).

⁷ See *Glassco v. Glassco*, 195 Va. 239, 77 S.E.2d 843 (1953).

band and wife were one . . . it would seem to follow that where the fiction is abolished, the nonliability does not survive. When the foundation is removed, the superstructure falls.⁸

In overruling prior decisions, the California court held that a wife could sue her husband for the intentional tort of assault and battery:

Of course, the general rule is and should be that, in the absence of statute or some compelling reason of public policy, where there is negligence proximately causing an injury, there should be liability. Immunity exists only by statute or by reason of compelling dictates of public policy. Neither exists here.⁹

On the same day, the court also held that one spouse could sue the other for negligently caused injury.¹⁰

In a case involving a negligently caused injury occurring before marriage, in which suit papers were served on the groom only hours before he and the plaintiff were married, it was held that the wife had the legal status to maintain the action. This view that domestic peace and conjugal bliss would be disturbed in the absence of the immunity doctrine was rebutted by the simple observation that the two are not causally related. Since a wife could already assert her property rights against her husband, it was but a small step to allow also the protection of personal interests.¹¹ The adversary and jury systems were adjudged entirely capable of coping with possible cases of collusion or fraud.¹²

The American Bar Association Committee also recommends doing away with the immunity in states where it still obtains:

Usually the reason given is that such suits would tend to destroy domestic tranquility but occasionally the realistic reasons, danger of fraud and of collusive suits with intent to mulct the insurance company, are stated. Of course, insurance companies are not devoid of ability to protect themselves because the policy requires the insured to cooperate with the company, and it would be a rare jury which did not view intraspouse suits with some skepticism.¹³

⁸ *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740, 741-42 (1935).

⁹ *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 69, 26 Cal. Rptr. 97 (1962).

¹⁰ *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

¹¹ *Brown v. Gosser*, 262 S.W.2d 480, 481 (Ky. 1953).

¹² *Id.* at 484.

¹³ REPORT, ABA SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS, at 88 (1969).

IV. THE EFFECT OF INSURANCE

*"There is no justification or reason for absolute immunity if the public funds are protected."*¹

The idea that government should not be responsible for the wrongs it does to the public is surely contrary to our democratic philosophy. The idea that intrafamily suits have a special propensity for fraud takes too pessimistic a view of the capabilities of our adversary system, and the idea that one who accepts care by a charity waives a future tort claim for negligence is contrary to reason. The one possible practical reason underlying tort immunities is protection of public, charitable, or family funds.

In the governmental immunity field, the leading decision of *Russell v. Men of Devon*² was based in large part upon the fact that there were no county funds out of which to pay the judgment. The early cases on immunity of charitable hospitals were concerned with diversion of trust funds from their intended purposes. When liability insurance is available to spread the risk of loss, the reason for immunity vanishes, and the modern cases almost unanimously hold that tort immunities are waived to the extent of liability insurance coverage. In some instances this waiver is specifically provided for by statute.³ In others the waiver is effected by judicial means. Thus, the Wisconsin court said:

The power of a city to waive its tort immunity need not rest upon an express grant of statutory authority. The immunity granted municipalities from tort liability was created by case law basically and primarily to protect public funds and property. Such immunity can be waived by the municipality when it has secured that purpose by insurance and believes a waiver to be advantageous or desirable. We find no merit so far as tort liability is concerned in the doctrine that "the king can do no wrong" and therefore a municipality by waiving its immunity gives up part of its sovereignty.⁴

¹ *Thomas v. Broadlands Community Consol. School Dist.*, 348 Ill. App. 567, 109 N.E.2d 636, 640 (1952).

² 2 Term Rep. 667, 100 Eng. Rep. 359 (1798).

³ See *Strickland v. Wayne County*, 113 Ga. App. 499, 148 S.E.2d 467 (1966); *Schoening v. United States Aviation Underwriters, Inc.*, 265 Minn. 119, 120 N.W.2d 859 (1963). Virginia has waived governmental immunity for school buses to the extent of liability insurance coverage. VA. CODE ANN. § 22-290 (1969).

⁴ *Marshall v. City of Green Bay*, 18 Wis. 2d 496, 118 N.W.2d 715, 717 (1963).

In holding that the plaintiff stated a cause of action in an action against a charitable institution which was fully insured, the Illinois court said:

We are of the opinion there is no justification for absolute immunity if the trust is protected, because that has been the reason for the rule of absolute immunity. Reason and justice require an extension of the rule in an attempt to inject some humanitarian principles into the abstract rule of absolute immunity. The law is not static and must follow and conform to changing conditions and new trends in human relations to justify its existence as a servant and protector of the people and, when necessary, new remedies must be applied where none exist.⁵

The Michigan court pointed out:

No such scheme for prepaying and sharing risk did exist in any common form at the time when the courts of the country adopted the doctrine of governmental immunity. The probabilities are strong that this fact, and the possibility of a crushing liability falling upon a small governmental unit, had as much to do with adoption of the rule as did *stare decisis* and the fact that Kings had no inclination to be liable in damage to their subjects.

In 1961, however, liability insurance is no new and untried device. We take judicial notice that it serves private citizens and private corporations as a means of prepaying and sharing just the sort of unexpected burden with which we deal in this case.⁶

In holding a minor child can sue his parent for personal injuries received in an automobile accident, the New Hampshire court said:

We further believe that family peace and parental authority, in the overwhelming majority of cases, will be threatened less by an unemancipated minor's suit for tort against a parent where the latter is generally protected from loss by insurance, than by an action for breach of contract or to enforce property rights where the parent would ordinarily have to pay a verdict from his own pocket.⁷

Another common sense approach to the relationship between insurance and the defense of immunity was provided by the Illinois

⁵ Moore v. Moyle, 405 Ill. 555, 92 N.E.2d 81, 86-87 (1950).

⁶ Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1, 24 (1961).

⁷ Briere v. Briere, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966).

court before governmental immunity was completely abolished in that state. In a situation where a city carried public liability insurance with a five hundred dollar deductible provision, governmental immunity was retained for the amount of the deductible provision, but not for judgments in excess thereof within policy limits.⁸ A city has been held to waive its immunity to amounts in excess of its liability insurance coverage by failure to offer evidence as to the existence of the insurance coverage during trial.⁹ Where immunity is waived by insurance, it has been held error to strike from a complaint allegations of insurance.¹⁰

The existence of liability insurance has also been held to determine whether a decision denying an immunity defense is retroactive. The Nebraska court, in abolishing the distinction between governmental and proprietary functions in actions involving municipal motor vehicles, applied its new rule to the case before it, to all causes of action arising more than thirty days after the date of its opinion, and to other causes of action "if, but only if, the city or other governmental subdivision was insured against such liability on the date the claim arose, and then only to the extent of the maximum applicable amount of its insurance coverage."¹¹

North Carolina, in overruling earlier cases which applied the defense of charitable immunity to hospitals, similarly provided that the new rule would apply only to the case at bar and to causes of action arising after its opinion was delivered.¹² Whether causes of action arising earlier could be prosecuted if covered by insurance was decided in a diversity case by the federal court, which held that the new rule would be applied retroactively, "where there is insurance protecting the hospital's trust funds against an adverse judgment."¹³

In Virginia whether liability insurance will be construed as an implied waiver of tort immunity has not been decided, although there are indications that liability insurance will be considered irrelevant. In one contribution suit by a railroad which had paid a judgment in favor of a minor automobile passenger against his driver-father, the plaintiff alleged that the father was "fully covered by liability insurance by the

⁸ See *Beach v. City of Springfield*, 32 Ill. App. 2d 256, 177 N.E.2d 436 (1961).

⁹ See *City of Terre Haute v. Deckard*, 183 N.E.2d 815 (Ind. 1962).

¹⁰ See *Wilkie v. Henderson County*, 1 N.C. App. 155, 160 S.E.2d 505 (1968); *Shermoen v. Lindsay*, 163 N.W.2d 738 (N.D. 1968).

¹¹ *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805, 809 (1968).

¹² *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485, 499 (1967).

¹³ *Hill v. James Walker Memorial Hosp.*, 407 F.2d 1036 (4th Cir. 1969).

solvent insurance company against all liability for such actions as occurred in this case” The court decided that the father was immune from a cause of action for contribution because he was immune from a direct cause of action by his son:

The fact that the father carried accident liability insurance does not create any liability against the father which would not exist were he uninsured.¹⁴

A few years later, however, in an action by a child bus passenger against her father, who was also the bus owner, the father was held liable because the tort occurred in his vocational rather than his parental capacity. The court considered significant the statute requiring motor carriers to carry liability insurance, and said in reference to earlier cases sustaining parent-child immunity:

In later years, economic, social and legislative changes have caused a judicial reaction to the earlier views. Modern methods of business, new or enlarged occupational capacities and the advent of the automobile and liability indemnity insurance have placed the parties in a different position. Therefore, the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they were based. A correct determination of each case must necessarily depend upon its facts and circumstances and the law applicable thereto. Rules of thumb must give way to rules of reason.¹⁵

This holding has not been construed, however, as an adoption of the rule that coverage by liability insurance is an implied waiver of immunity.

In *Mann v. County Board*,¹⁶ Virginia conclusively rejected the principle of waiver of immunity to the extent of liability insurance coverage. In that action the defendant county expressly waived its immunity, after being assured by its insurance carrier that the tort involved was within the terms of its insurance coverage, because it “had come to the conclusion that the court was without jurisdiction to entertain a suit against Arlington County based upon the county’s negligence or that

¹⁴ *Norfolk Southern R.R. Co. v. Gretakis*, 162 Va. 597, 600, 174 S.E. 841, 842 (1934).

¹⁵ *Worrell v. Worrell*, 174 Va. 11, 20, 4 S.E.2d 343, 346-47 (1939).

¹⁶ 199 Va. 169, 98 S.E.2d 515 (1957).

of its employees.”¹⁷ On appeal the judgment was affirmed because the county’s

freedom from liability for this tort may be likened to the immunity that is inherent in the State. It is fundamental and jurisdictional and could not be waived by the Board. It necessarily follows that neither withdrawal of the demurrer to the motion for judgment, nor the fact that the county was insured against loss for tortious injuries could render the Board liable in this action.¹⁸

Should the question of implied waiver of immunity by purchase of insurance again come before the Virginia court, it is submitted that the question should be treated in the spirit shown in the case of the child bus passenger:

Reason is not only the life of the law, but the inspiration and glory of the law. As reason is affected by facts and circumstances, so are legal principles based thereon. If that were not so, the elementary and fundamental principles and aim of the law to provide justice and fair dealing would be hopeless of attainment.¹⁹

¹⁷ *Id.* at 171, 98 S.E.2d at 516.

¹⁸ *Id.* at 175, 98 S.E.2d at 519.

¹⁹ *Worrell v. Worrell*, 174 Va. 11, 28-29, 4 S.E.2d 343, 350 (1939).

V. REFORM: LEGISLATIVE OR JUDICIAL TASK?

*"We closed our courtroom doors without legislative help, and we can likewise open them."*¹

Probably no thoughtful judge, in deciding an immunity case of first impression, would find good reason to apply any of the immunities thus far discussed. Precedent, not reason, causes these rules to persist.

Virginia has been particularly strict in the application of the doctrine of stare decisis. After considering recent cases from other states which embraced both viewpoints on immunity, the court recently reversed a verdict in favor of a paying patient injured in a charitable hospital. The court conceded that the wisdom of the rule of immunity was debatable, but held itself bound by stare decisis:

[T]he doctrine . . . is firmly embedded in the law of this Commonwealth and has become a part of the general public policy of the State. The General Assembly, though composed of many lawyers of outstanding ability throughout the years, has not seen fit to enact legislation abrogating the doctrine. By its silence, approval might well be inferred. If it be considered desirable to abolish such immunity, it would be more appropriate for the General Assembly to act, for the effect would be to operate prospectively. Abandonment of the rule by judicial decision would be retroactive and give life to tort claims not barred by the statute of limitations at the time of rendition of this opinion. It is probable that many charitable institutions, relying upon the existing doctrine, have not availed themselves of protective insurance or otherwise prepared themselves for such an event.²

The fear of retroactivity is a groundless one, for a decision to abrogate immunity may be made to take effect prospectively.³ Other states' solutions have been to make the decision apply only to the case at bar and to causes of action arising after the filing date of the decision,⁴ or to make the decision effective on a stated date in the future, in the absence of insurance coverage on the date of the filing of the opinion.⁵

¹ *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765, 774 (1953).

² *Memorial Hosp., Inc. v. Oakes*, 200 Va. 878, 889, 108 S.E.2d 388, 396 (1959).

³ See *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962).

⁴ See *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967).

⁵ *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968).

The main obstacle to abolition of immunity in Virginia by statute is the refusal of the legislature to act. Aside from permitting the waiver of immunity in school bus cases,⁶ recent statutes have been retrogressive. Shortly after *Hoggard v. City of Richmond*,⁷ which allowed an action to be maintained against the city for negligence in operation of a park, the General Assembly virtually reinstated immunity through enactment of a statute permitting recovery for injuries involved in operation of municipal recreational facilities only on a showing of gross or wanton negligence.⁸

At the time the Virginia court declared itself bound by *stare decisis* in affirming the charitable immunity doctrine, the Supreme Court of Washington was faced with precisely the same issue but reached an opposite result. In overruling prior decisions and holding that a charitable hospital could be sued, the court said:

We closed our courtroom doors without legislative help and we can likewise open them.⁹

This phrase was quoted with approval by the Wisconsin court in a sweeping decision which abolished governmental immunity:

We are satisfied that the governmental immunity doctrine has judicial origins. Upon careful consideration, we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's failure to adopt corrective enactments.¹⁰

The Minnesota court echoed the above sentiment:

Since we have repeatedly proclaimed that this defense is based on neither justice nor reason, the time is now at hand when corrective measures should be taken by either legislative or judicial fiat.¹¹

Likewise in recent years Florida,¹² Nebraska,¹³ Michigan,¹⁴ Arizona,¹⁵

⁶ See VA. CODE ANN. § 22-290 (1969). See also n. 36 and accompanying text.

⁷ 172 Va. 145, 200 S.E. 610 (1939).

⁸ See VA. CODE ANN. § 15.1-291 (1964).

⁹ *Pierce v. Yakima Valley Memorial Hosp. Ass'n*, 43 Wash. 2d 162, 260 P.2d 765, 774 (1953).

¹⁰ *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618, 623 (1962).

¹¹ *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795, 799 (1962).

¹² *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

¹³ *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968).

¹⁴ *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961).

¹⁵ *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 381 P.2d 107 (1963).

Arkansas,¹⁶ Kentucky,¹⁷ Illinois,¹⁸ and New Jersey¹⁹ have felt no restraint in judicially abolishing various immunity doctrines which had sprung from judicial origins.

Another argument in favor of immunities is that the legislature impliedly intends the retention of all immunities not expressly waived by statute.²⁰ This argument was summarily rejected by the Kansas court:

While the legislature has touched upon isolated features of immunity, as has been stressed in previous decisions, it has never considered the general policy to be applied even in the face of our great economic and social changes.²¹

Usually isolated statutes which waive immunity affect only an area where the result of the immunity doctrine is most disastrous for the individual.²² Sporadic attempts of reform should not be construed as a ratification of the general malaise.

Stare decisis is always subservient to the maxim which states that when the reason for a rule ceases, the rule itself should cease.²³ The next time an immunity rule, whether it be governmental, charitable, or intrafamily, is presented for review to the Supreme Court of Appeals of Virginia, it is respectfully submitted that the court should look not only to the past but also to what is being done in the great social laboratories which are the courts of our sister states, and should ask of the challenged rule, in the light of twentieth century conditions and the demands of those who urge retention of an immunity rule: "Is it rational? Is it just?"

¹⁶ *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968).

¹⁷ *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964).

¹⁸ *Mollitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959).

¹⁹ *Collopy v. Newark Eye & Ear Infirmary*, 27 N.J. 29, 141 A.2d 276 (1958).

²⁰ *See, e.g.*, VA. CODE ANN. § 22-290 (1969).

²¹ *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969).

²² *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

²³ *See, e.g.*, *Worrell v. Worrell*, 174 Va. 11, 4 S.E.2d 343 (1939).