

Why All the King's Horses and All the King's Men Couldn't Put  
Sovereign Immunity Back Together Again:  
An Analysis of the Test Created in *James v. Jane*

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## **Introduction**

In creating the test to determine whether government employees in the Commonwealth of Virginia are entitled to the benefit of sovereign tort immunity, the Supreme Court of Virginia stated, “[a]dmittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity.”<sup>1</sup> The court, however, managed to formulate a four-part test to be consistently applied to each situation requiring a determination of whether sovereign immunity should be granted to a state employee.<sup>2</sup> This article will examine the discretion prong of the four-part test created by the court in *James v. Jane* and the reasons why the court’s decision to not fully articulate how to apply this prong has produced non-uniform application of the test by the lower courts when they determine whether sovereign immunity shields an employee of the Commonwealth from tort liability.<sup>3</sup> Having examined the aftermath of the court’s decision in *James*, it has become clear that a significant number of cases were brought before the court regarding the appropriate application of the test, particularly with respect to the discretion prong. Furthermore, after speaking to several practitioners in the Commonwealth regarding their thoughts on the discretion prong of the four-part test, it has become clear that the test has not been interpreted uniformly.

Section I of this article will outline a brief discussion of the principles that validate the doctrine of sovereign immunity. Section II will discuss the history of sovereign immunity in Virginia leading up to the four-part test created in *James*. Section III will discuss the aftermath of *James* and examine the results in cases in which the Supreme Court of Virginia has applied the four-part test. Section IV will discuss the opinions of members of the professional community in the Commonwealth on the effectiveness of the four-part test. Finally, Section V

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<sup>1</sup> *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

<sup>2</sup> *Id.*

<sup>3</sup> *See id.*

will conclude this article with a suggestion on how to handle sovereign immunity cases in the future.

### **I. Why the King and His Men Should Not Be Sued: A Brief History of the Public Policy Reasons Behind the Doctrine of Sovereign Immunity**

The doctrine of sovereign immunity was introduced in 1788 in *Russell v. Men of Devon*, an English case.<sup>4</sup> The doctrine originally rested on the notion that “the king must not, was not allowed, not entitled, to do wrong.”<sup>5</sup> The idea was that the king could not be brought into his own court and sued because it was impossible for someone to be the “judge of his own cause.”<sup>6</sup> Over time, however, the doctrine came to stand for the belief that the king himself was *incapable* of doing wrong.<sup>7</sup>

Twenty-four years after *Russell* was decided in England, the doctrine of sovereign immunity was adopted by the first American court in *Mower v. Leicester*.<sup>8</sup> Critics of the doctrine asserted that “the ‘king can do no wrong’ concept seems to have been against what the framers of the Constitution fought for at that time.”<sup>9</sup> For example, in *Jones v. State Highway Commission*, the Supreme Court of Missouri abolished sovereign immunity for state employees, stating: “[i]nherent in the governmental-proprietary theory developed by the courts . . . is the

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<sup>4</sup> Edward W. Taylor, *A Re-examination of Sovereign Tort Immunity in Virginia*, 15 U. RICH. L. REV. 247, 250 (1981) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.)). Mr. Taylor points out that this decision was handed down in England after the signing of the Declaration of Independence. *Id.*

<sup>5</sup> Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 29 (2003) (quoting Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 4 (1963)).

<sup>6</sup> W. HAMILTON BRYSON, *BRYSON ON VIRGINIA CIVIL PROCEDURE* 177 (3d ed. 1997).

<sup>7</sup> *Id.* (quoting 1 William Blackstone, *Commentaries* \*244) (emphasis added); see also James E. Phander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 578-79 (1994). According to James E. Phander, Associate Professor of Law, University of Illinois College of Law, there are two schools of thought regarding the history of sovereign immunity, the “‘profound shock’ school of Eleventh Amendment thought” and the “revisionist” school of thought. *Id.* at 578-79. Profound shock theorists believe that the Supreme Court’s rejection of sovereign immunity in *Chisholm v. Georgia*, 2 U.S. 419 (1793) caused so much shock and surprise to the states that they chose to ratify the Eleventh Amendment “to restore the original understanding” of sovereign immunity. *Id.* at 578. Thus, profound shock theorists would adhere to the “King can do no wrong” concept. *Id.* at 579. Revisionists “emphasize that even in Great Britain, the doctrine did not establish a complete bar to relief against either the crown or its officers.” *Id.* at 580.

<sup>8</sup> 9 Mass. 247, 250 (1812).

<sup>9</sup> Taylor, *supra* note 4, at 251.

tacit recognition that courts do have the power to modify the doctrine of sovereign immunity, and if there is the power to abrogate in part, there is a right to abrogate completely.”<sup>10</sup> Just one year after the Supreme Court of Missouri’s decision, however, Missouri’s state legislature enacted a statute that codified the doctrine of sovereign immunity and nullified the court’s decision in *Jones*.<sup>11</sup>

Likewise, “the doctrine of sovereign immunity is ‘alive and well’ in Virginia.”<sup>12</sup> It is well established that the doctrine of sovereign immunity protects municipalities from tort liability arising from the exercise of governmental functions.<sup>13</sup> The court in *Hoggard v. City of Richmond* explained that a municipality is immune from liability for negligence when performing “governmental” functions, but can be held liable for negligence when performing “proprietary” functions.<sup>14</sup> While the court noted in *Hoggard* that the basis of the distinction between governmental and proprietary “is difficult to state,” the court stated, “[g]enerally 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 [municipal] corporations.”<sup>15</sup> Thus, the reasons the doctrine of sovereign immunity remains alive today vary and include, but are not limited to, the following:

[P]rotecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and

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<sup>10</sup> 557 S.W.2d 225, 229 (Mo. 1977).

<sup>11</sup> State of Missouri ex rel. Missouri Div. of Family Serv. v. Moore, 657 S.W.2d 32, 34 (1983).

<sup>12</sup> Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984).

<sup>13</sup> Hoggard v. City of Richmond, 172 Va. 145, 147-48, 200 S.E. 610, 611 (1939). Interestingly, the court also made reference to a ministerial act and a discretionary act stating, “[t]he operation of a swimming and bathing pool by a municipality under the provisions of its charter, or the general law, is a ministerial act, and that where a wrongful act causing injury is committed by the servants of a municipality in the performance of a purely ministerial act, the municipal corporation is liable as any other private corporation, even though it does not derive any pecuniary advantage from such activity.” *Id.* at 157, 200 S.E. at 615-16. See also Niese v. City of Alexandria, 264 Va. 230, 238, 564 S.E.2d 127, 132 (2002).

<sup>14</sup> *Hoggard*, 172 Va. at 147-48, 200 S.E.2d at 611.

<sup>15</sup> *Id.* at 154, 200 S.E.2d at 614.

preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.<sup>16</sup>

It follows then that these protections should be afforded to the sovereign's employees because "unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed."<sup>17</sup> "The State can only act through individuals," therefore, it would be nonsensical to limit protection to the sovereign only.<sup>18</sup> Although sovereign immunity shields the state and its employees from tort liability in certain situations, there is no law that precludes the state from voluntarily allowing itself to be sued.<sup>19</sup>

While the common law reasons for the doctrine of sovereign immunity traditionally rested on the notion that the "king can do no wrong,"<sup>20</sup> the more modern approach is based on the "desire to limit judicial interference with the workings of government."<sup>21</sup> In implementing this modern approach, the courts are "forced to balance two competing interests: (1) the functional government unencumbered by the courts; and (2) the need of injured parties for judicial relief."<sup>22</sup> The Supreme Court of Virginia has attempted to strike a balance between these modern competing interests while preserving some of the traditional theories behind sovereign immunity.

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<sup>16</sup> *Messina supra* note 12, at 308, 321 S.E.2d at 660. While sovereign immunity is "alive and well" in Virginia, the Commonwealth has allowed actions against the state or its governmental agencies based on tort with the passing of the Virginia Tort Claims Act in 1981. *Cf.* Va. Code Ann. § 8.01-195.1 (2006) *et. seq.* Of course, the liability of the Commonwealth in such actions is limited by the parameters set forth in the Act.

<sup>17</sup> *Messina*, 228 Va. at 308, 321 S.E.2d at 661.

<sup>18</sup> *Id.*

<sup>19</sup> Bryson, *supra* note 6, at 178.

<sup>20</sup> James A. Willet, *Virginia's Law of Sovereign Immunity: An Overview*, 12 U. RICH. L. REV. 429, 429 (1978).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

## II. Sovereign Immunity in Virginia and an Analysis of the Court's decision in *James v. Jane*

### A. Sovereign Immunity in Virginia Before *James v. Jane*

In *Rives v. Bolling*, the Supreme Court of Virginia held that a state police officer was liable in damages for the death of a twenty-six year old woman when he accidentally shot her while cleaning his revolver.<sup>23</sup> The police officer had twirled his loaded revolver on his finger while in the process of cleaning it and the revolver discharged, killing the victim.<sup>24</sup> Because the police officer was required to keep his revolver clean for inspection, he argued that he was acting within the scope of his employment with the state when the incident occurred, so he could not be liable for damages under the doctrine of sovereign immunity.<sup>25</sup> The court held that “[i]t was a negligent and *improper performance of the officer’s duty* to twirl a loaded revolver upon his finger while he was in the process of cleaning his revolver or in the act of returning it to his holster.”<sup>26</sup> That is, in order to clean the revolver, which was the officer’s duty, the officer was not required to twirl the revolver on his finger. The court analogized that

[I]t was as much an unlawful and improper performance of his duty as if he had, in patrolling his district, in the manner and means provided by the State, recklessly driven his service automobile against the decedent in an effort to show her how fast he could drive the vehicle.<sup>27</sup>

Consequently, the court opened the door for individual liability of a state employee who negligently performs an official duty.<sup>28</sup>

Shortly after its decision in *Rives*, and well before the passing of the Virginia Tort Claims Act, the Supreme Court of Virginia recognized in *Sayers v. Bullar*, “It would be an unwise

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<sup>23</sup> 180 Va. 124, 130-31, 21 S.E.2d 775, 777-78 (1942).

<sup>24</sup> *Id.* at 127, 21 S.E.2d at 776.

<sup>25</sup> *Id.* at 128-130, 21 S.E.2d at 776-77.

<sup>26</sup> *Id.* at 130, S.E.2d at 777 (emphasis added).

<sup>27</sup> *Id.*

<sup>28</sup> Willett, *supra* note 20, at 432 (noting that after the court’s decision in *Rives*, “[i]t is possible that an officer or agent of the state may be liable for simple negligence in the performance of ministerial tasks, while the state itself is not, even though the negligence occurred within the officer’s assigned duties.”).

policy to permit agents and employees of the state to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.”<sup>29</sup> In *Sayers*, employees of the state were laying pipeline from a state owned spring to a state-owned fishing hatchery, which required them to blast through limestone.<sup>30</sup> The blasting caused a spring on the plaintiff’s property to cease to flow.<sup>31</sup> The plaintiff sued the employees of the Commonwealth and the court found that the employees were agents of the state, thus there was no cause of action because the state could not be sued under the doctrine of sovereign immunity.<sup>32</sup> In finding that the employees were not liable because they were not acting as individuals, but as employees of the state, the court stated that there had been no allegation that the employees “were not acting in a purely ministerial capacity.”<sup>33</sup> In *Rives*, the issue was whether the state employee had negligently performance of an official duty,<sup>34</sup> while the issue in *Sayers* was whether the state employee was performing a *ministerial* act or a *discretionary* act.<sup>35</sup> In *Sayers*, the act of locating the water line was discretionary, while the act of blasting was ministerial.<sup>36</sup> It is clear that the focus of the analysis in both *Rives* and *Sayers* is different, yet both cases determine whether an employee of the Commonwealth is immune under the doctrine of sovereign immunity.

After *Sayers* and the introduction of the concept of distinguishing between ministerial and discretionary activities, the Supreme Court of Virginia decided *Crabbe v. County School Board*.<sup>37</sup> The court held that a teacher at a public high school was liable for negligently allowing

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<sup>29</sup> 180 Va. 222, 229, 22 S.E.2d 9, 12 (1942).

<sup>30</sup> *Id.* at 224-25, 22 S.E.2d at 10.

<sup>31</sup> *Id.* at 224, 22 S.E.2d at 10.

<sup>32</sup> *Id.* at 227-29, 22 S.E.2d at 11-12.

<sup>33</sup> *Id.* at 230, 22 S.E.2d at 13.

<sup>34</sup> 180 Va. at 126, 21 S.E.2d at 775.

<sup>35</sup> 180 Va. at 230, 22 S.E.2d at 12-13.

<sup>36</sup> *Id.* at 230, 22 S.E.2d at 12-13.

<sup>37</sup> 209 Va. 356, 164 S.E.2d 639 (1968).

a student to use a defective power table saw and failing to instruct the student properly on how to use the saw.<sup>38</sup> Both the student's teacher and the school board were sued in *Crabbe*.<sup>39</sup> With respect to the school board, the court held that "in the operation of a school a school board is performing a governmental function and hence is immune from personal liability for personal injuries sustained by a pupil and caused by the alleged negligence of an instructor . . . ."<sup>40</sup> With respect to the teacher, however, the court held that the teacher's actions were not imputed to the state because the teacher was negligent in performing his teaching duties.<sup>41</sup> The court stated that the teacher "knew or should have known" that the tool was defective and did not instruct the student properly.<sup>42</sup> Rather than basing its analysis on the "ministerial" versus "discretionary" issue outlined in *Sayers*, the court based its decision on its prior holding in *Elder v. Holland* (a case similar to *Rives* in that the issue was negligent performance of an official duty) that "a state employee may be held liable for negligent conduct in the performance of his duties, although the State itself is immune from liability by reason of such acts of its employee."<sup>43</sup>

At this point, it is beginning to become clear that not all sovereign immunity cases are alike. There are several ways that the issue of sovereign immunity can be analyzed, and which analysis applies will depend on the factual circumstances of each case. While the court chose to apply a negligent performance of an official duty analysis in *Crabbe*, as it did in *Rives*, it could

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<sup>38</sup> *Id.* at 359, 164 S.E.2d at 641.

<sup>39</sup> *Id.* at 359-60, 164 S.E.2d at 641-42.

<sup>40</sup> *Id.* at 358, 164 S.E.2d at 640.

<sup>41</sup> *Id.* at 359, 164 S.E.2d at 641-42.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 359-360, 164 S.E.2d at 641 (citing *Elder v. Holland*, 208 Va. 15, 18-19, 155 S.E.2d 369, 372 (1967)). The court also held in *Elder* that state employees will be held liable for intentional torts, regardless of whether they are acting within the scope of their employment as state employees. *Id.* at 19, S.E.2d at 372-73.



just have easily applied a discretionary versus ministerial analysis, as it did in *Sayers*. That is, in choosing how to instruct a student, are not a teacher's actions discretionary?<sup>44</sup>

Following its decisions in *Rives*, *Sayers*, and *Crabbe*, the Supreme Court of Virginia attempted to consolidate its prior holdings in *Lawhorne v. Harlan*.<sup>45</sup> The court held that the doctrine of sovereign immunity is available to "an employee of the state or of one of its agencies who performs supervisory functions or exercises *discretionary* judgment within the scope of his employment."<sup>46</sup> The court continued, "[h]owever, an employee of a state agency who performs duties which do not involve judgment or discretion but which are purely *ministerial*, is liable for injury which results from his negligence."<sup>47</sup> Thus, the court appeared to be clarifying that it would be appropriate to apply a discretionary versus ministerial analysis in a sovereign immunity case involving government employees. In *Lawhorne*, the plaintiff claimed that two hospital administrators and one surgical resident at the University of Virginia Hospital misdiagnosed a patient, causing the patient's death.<sup>48</sup> The court held that by virtue of their positions, the two hospital administrators were "exercising *discretionary power* in performing their duties as administrators of the hospital and they were clearly entitled to have their pleas of immunity sustained."<sup>49</sup> As for the surgical resident, the court held that he too was an employee of the Commonwealth, "vested with and required to exercise *discretion* and judgment in connection with those persons who presented themselves as patients at the emergency room of the

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<sup>44</sup> Willet, *supra* note 20, at 434. Willet poses this exact same question. Several years later, the Supreme Court of Virginia agreed with Willet. The court in *Lentz v. Morris* overruled *Crabbe v. County School Bd.* holding that a teacher's supervisory actions in the classroom "clearly involves, at least in part, the exercise of judgment and discretion by the teacher." *Lentz v. Morris*, 236 Va. 78, 83, 372 S.E.2d 608, 611 (1988). In overruling *Crabbe*, however, the court still declined to define "discretion" or clarify the weight to be given to each prong of the four-part test initially outlined in *James v. Jane*.

<sup>45</sup> 214 Va. 405, 200 S.E.2d 569 (1973).

<sup>46</sup> *Id.* at 407, 200 S.E.2d at 571 (emphasis added).

<sup>47</sup> *Id.* (citing *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938)); *see also* *Rives v. Bolling*, 180 Va. 124, 21 S.E.2d 775 (1942) (emphasis added).

<sup>48</sup> *Id.* at 406-07, 200 S.E.2d at 571.

<sup>49</sup> *Id.* at 407, 200 S.E.2d at 572 (emphasis added).

hospital.”<sup>50</sup> Thus, the court focused on discretion in this case, but it did not elaborate on the ministerial portion of the analysis.

Shortly after the court’s decision in *Lawhorne*, the United States Court of Appeals for the Fourth Circuit defined the term “ministerial act.” In *Semler v. Psychiatric Inst.*, the court defined a ministerial act as “. . . one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.”<sup>51</sup> While sovereign immunity is a state law issue, this federal case is instructive for purposes of determining what the Supreme Court of Virginia intended when it indicated that a discretionary act should be treated differently than a ministerial act for purposes of determining immunity. In *Semler*, a probation officer awarded several passes to a patient at the Institute for Psychiatric Treatment in Fairfax County, Virginia without submitting them to a state judge for approval as was required of him.<sup>52</sup> The officer arranged for the patient to live at home while participating in an outpatient program without submitting this arrangement for approval to a judge.<sup>53</sup> During this outpatient program, the patient murdered the daughter of the plaintiff and the plaintiff sued the probation officer (among others).<sup>54</sup> The court held that the probation officer’s “basic policy decisions are *discretionary* and hence immune, but his acts implementing the policy must be considered on a case-by-case basis to determine whether they are *ministerial*.”<sup>55</sup> The court held that the probation officer was required to submit his change of the patient’s status to a judge for approval, which was a

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<sup>50</sup> *Id.* at 408, 200 S.E.2d at 572 (emphasis added).

<sup>51</sup> 538 F.2d 121, 127 (4th Cir. 1976) (citing *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 376 (1945)).

<sup>52</sup> *Id.* at 123-24.

<sup>53</sup> *Id.* at 124.

<sup>54</sup> *Id.* at 123.

<sup>55</sup> *Id.* at 127 (emphasis added).

“ministerial” act by the court’s definition, thus the probation officer was not shielded from liability under the doctrine of sovereign immunity.<sup>56</sup>

The holding of the United States Court of Appeals for the Fourth Circuit in *Semler*, as well as the Supreme Court of Virginia’s holding in *Lawhorne*, stand for the proposition that when performing a ministerial act, an employee of the state will not be able to shield himself or herself from liability by using the doctrine of sovereign immunity if he or she fails to perform that ministerial act correctly.<sup>57</sup> By defining “ministerial act” in *Semler*, the Fourth Circuit Court of Appeals provided the Supreme Court of Virginia with a basis for solidifying its analysis of determining whether or not the doctrine of sovereign immunity will shield an employee of the Commonwealth from liability.<sup>58</sup> What *Semler* did not clarify, however, is the definition of “discretion” or a “discretionary act.” In addition, the question remained: How does the court decide whether an act is “discretionary” as opposed to “ministerial?”<sup>59</sup>

Despite the factual and analytical disparities in *Rives*, *Sayers*, *Crabbe*, and *Lawhorne*, at this point the Supreme Court of Virginia appeared to have a basis for creating a single test for determining when a government employee is immune from liability pursuant to the doctrine of sovereign immunity -- immunity rests upon a determination of whether the employee is performing a ministerial act or a discretionary act. Since the *Semler* decision defined what

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<sup>56</sup> See *id.*

<sup>57</sup> Willet, *supra* note 20, at 431.

<sup>58</sup> Keep in mind that this is assuming that the analysis continues to remain one of a discretionary act versus a ministerial act. As discussed more fully in upcoming portions of this article, the court’s analysis will vary depending on what type of case the court is dealing with. That is, when the court is deciding a case involving professional services (i.e. doctors), the court appears to abandon the discretionary act versus ministerial act analysis and apply a different type of analysis. This all begins, of course, with the deciding of *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980).

<sup>59</sup> Willet, *supra* note 20, at 433-34. Willet poses a similar question and states it “is an important one since it directly affects the degree of negligence the plaintiff must prove in order to impose liability.” *Id.* at 433-34. To make his point, Willet cites to *Crabbe v. County School Bd.*, 209 Va. 356, 164 S.E.2d 639, (1968). Willet notes that in *Crabbe*, the court found a teacher at a public high school liable for the negligent operation of an electric saw; however, teaching surely involves “discretionary judgment.” *Id.* at 434. Notably, *Crabbe* was eventually overruled by *Lentz v. Morris*, which held that teaching is a “discretionary” act. See *supra* note 44 and accompanying text; see also *infra* note 138 and accompanying text.

constituted a ministerial act, it seemed that all that was left for the Supreme Court of Virginia to do was adopt that definition and outline its own definition for what constituted a discretionary act.<sup>60</sup> Thus, one would anticipate that at its next opportunity to analyze a sovereign immunity case, the Supreme Court of Virginia would have followed the lead of the United States Court of Appeals by re-delineating its discretionary versus ministerial analysis in *Lawhorne*, adopting the Court of Appeals' definition of a ministerial act, and outlining its own definition of a discretionary act. This, however, is not what happened. The court's next opportunity to analyze a sovereign immunity case was *James v. Jane*, and as discussed below, rather than solidify an analysis that was already partially in place, the Supreme Court of Virginia decided to create a seemingly unprecedented four-part test.<sup>61</sup>

#### **B. The Four-Part Test Created in *James v. Jane***

Following the court's decisions in *Rives*, *Sayers*, *Crabbe*, and *Lawhorne*, the Supreme Court of Virginia created a four-part test in *James v. Jane*, purportedly combining the principles of the aforementioned cases, to determine whether an employee of the Commonwealth is entitled to protection from liability under the doctrine of sovereign immunity.<sup>62</sup> Unfortunately, however, the four-part test created in *James* did not make it any easier to determine whether an employee would be immune under the doctrine of sovereign immunity. Rather than elaborate on its analysis of a discretionary act versus a ministerial act, which seemed to be the next logical step for the court, the court created a new four-part test.<sup>63</sup> Not only was this test novel in comparison to prior cases dealing with sovereign immunity for government employees, but the court did not

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<sup>60</sup> *Semler*, 538 F.2d at 127.

<sup>61</sup> *James*, 221 Va. at 53, 282 S.E.2d at 869.

<sup>62</sup> *Id.* at 53, 282 S.E.2d at 869; see also *Messina v. Burden*, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984) (re-iterating the four-part test shortly after *James* was decided).

<sup>63</sup> *James*, 221 Va. at 53, 282 S.E.2d at 869.

address the issue of the determination of a ministerial versus a discretionary act and how it would fit into the four-part test.<sup>64</sup>

In *James*, two personal injury cases were consolidated because the issues involved in each suit were identical.<sup>65</sup> Plaintiff Paul S. James (“Plaintiff James”) sought to recover damages from Dr. John A. Jane and Dr. Hans O. Riddervold for personal injuries he sustained as a result of the alleged negligent acts of both doctors in connection with a myelogram performed on Plaintiff James.<sup>66</sup> Plaintiff David L. Lawrence (“Plaintiff Lawrence”) sought to recover damages from Dr. Michael W. Hackela, Jr. for personal injuries he sustained as a result of Dr. Hackela’s alleged negligent acts in performing an operation on Plaintiff Lawrence.<sup>67</sup> Each of the defendant doctors was licensed to practice medicine and each was employed as a full-time faculty member at the Medical School of the University of Virginia.<sup>68</sup> Dr. Jane was Chairman of the Department of Neurosurgery at the Medical School and Chief of Neurosurgery at the University of Virginia Hospital; Dr. Riddervold was an Associate Professor of Radiology at the Medical School and a member of the hospital staff in the Radiology Department.<sup>69</sup> Dr. Hakala was an Assistant Professor of Orthopedic Surgery and Rehabilitation as well as Pediatrics in the Medical School, and an attending staff physician at the hospital.<sup>70</sup> At trial there was testimony that attending physicians had “the privilege to select the patients they will treat and are under no obligation to accept any individual or class of persons as patients.”<sup>71</sup> Residents and interns in training did not enjoy the same privilege and were expected to treat any patient assigned to them.<sup>72</sup> The court

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<sup>64</sup> See generally, *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1981).

<sup>65</sup> *James*, 221 Va. at 46, 282 S.E.2d at 864.

<sup>66</sup> *Id.* at 45, 282 S.E.2d. at 864.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 46, 282 S.E.2d at 864.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 47, 282 S.E.2d at 866.

<sup>72</sup> *Id.*

explained that “the attending physicians of patients exercise *broad discretion* in selecting the methods by which they care for them,” which implies that residents do not.<sup>73</sup>

In deciding whether or not the doctors in this case would be entitled to immunity under the doctrine of sovereign immunity, the court considered four factors: (1) the nature of the function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and *discretion*.<sup>74</sup> The court held that none of these doctors were protected from liability under the doctrine of sovereign immunity stating:

[i]mplicit in the employment by the University of Virginia of physicians to teach in its Medical School and to attend patients in its Hospital, is the understanding that they will use reasonable care in the performance of their duties. A failure to use such care in the treatment of patients is a violation of their duty to the patients and a departure from a condition of their employment. A physician who fails to use reasonable care in the treatment of a patient acts at his own risk, and is not entitled to invoke the doctrine of sovereign immunity.<sup>75</sup>

The court's rationale was based on its prior holding in *Sayers* that if an employee of the state exceeds its authority and violates their duty, they “act at their own risk.”<sup>76</sup> The court further based its decision on the premise that, “[a]lthough a valid reason exists for state employee immunity, the argument for such immunity does not have the same strength it had in past years.”<sup>77</sup> The court explained that the government has intruded into areas that were “formerly private,” and because of this intrusion, the amount of government employees has dramatically increased.<sup>78</sup> The court pointed out that the present day employee is completely different from an

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<sup>73</sup> *Id.* at 48, 282 S.E.2d at 866 (emphasis added).

<sup>74</sup> *Id.* at 53, 282 S.E.2d at 869 (emphasis added).

<sup>75</sup> *Id.* at 55, 282 S.E.2d at 870.

<sup>76</sup> *Id.* (citing *Eriksen v. Anderson*, 195 Va. 655, 660-61, 79 S.E.2d 596, 600 (1954)).

<sup>77</sup> *Id.* at 52, 282 S.E.2d at 869.

<sup>78</sup> *Id.* at 52-53, 282 S.E.2d at 869.

employee of the eighteenth century sovereign, thus those who truly must remain immune “are inclusive of, but not limited to, the Governor, state officials, and judges” due to their requirement to “exercise broad *discretionary* powers, often involving both the determination and implementation of state policy.”<sup>79</sup>

While the policy reasons behind its holding are not unfounded, the court continued to refer to “discretion;” however it did not refer to the difference between performing a discretionary act versus performing a ministerial act, which had been the basis for its prior holdings in sovereign immunity cases involving government employees.<sup>80</sup> With respect to the first three prongs of the test it created, the court found that (1) the function of the employees in this case was to operate a “good medical school” and provide patients with “proper medical care;”<sup>81</sup> (2) the Commonwealth’s interest and involvement in that function was slight because their interest was not limited to this particular public hospital, but that the state has an interest in private hospitals providing proper medical care, and they had little involvement with each individual patient;<sup>82</sup> and (3) the degree and control by the state over each physician in the treatment accorded to each patient was also “slight” because it was the physicians rendering care to each individual.<sup>83</sup> With respect to the “discretion” prong of the test, however, the court did not fully elaborate. Instead, the court conceded that “[v]irtually *every act* performed by a person involves the exercise of some discretion.”<sup>84</sup>

Again, rather than defining a “discretionary act,” perhaps by comparing it to a ministerial act as the court had done in the past, the court seemed to lump together the “degree and control

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<sup>79</sup> *Id.* at 53, 282 S.E.2d at 869 (emphasis added).

<sup>80</sup> See Section II(A) of this Article, outlining the court’s sovereign immunity decisions prior to *James*.

<sup>81</sup> *James*, 221 Va. at 54, 282 S.E.2d at 870.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 53, 282 S.E.2d at 869 (emphasis added).

of the state” prong of its four-part test with the “use of judgment and discretion” prong of its four-part test.<sup>85</sup> The court explained, “[a]t the point when the physician agrees to treat or operate on a certain patient, although his employment by the University makes possible the arrangement, the relationship becomes the personal and confidential one of doctor and patient, not the Commonwealth of Virginia and patient.”<sup>86</sup>

The court then stated, “[t]he exercise by the attending physician of *his* professional skill and judgment in treating his patient, and the means and methods used, from the very nature of things, are not subject to the *control and direction of others*.”<sup>87</sup> Thus, the court took its focus away from the amount of “discretion” the employee used in doing his job, and focused instead on the amount of actual control the Commonwealth had over the employee when he is caring for any given patient.<sup>88</sup> Although the doctors exercised “broad discretion” in selecting the methods by which they cared for each patient, because they could choose which patients they would treat, they were not under enough “control and direction” of the state to be protected under the doctrine of sovereign immunity.<sup>89</sup>

The concurring opinion in this case pointed out that the majority unsuccessfully distinguished “between full-time members of the faculty of the University of Virginia Medical School, held not to be immune from liability for negligence in the present case, and the hospital administrators and the surgical intern of the same institution, held to be immune in *Lawhorne*.”<sup>90</sup> Arguably, the doctors in both situations exercised equal amounts of discretion, yet the court failed to define how the discretion was different in each case. Perhaps a definition of

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 50, 282 S.E.2d at 867.

<sup>87</sup> *Id.* at 50-51, 282 S.E.2d at 867-868 (emphasis added).

<sup>88</sup> *See id.* at 50-52, 282 S.E.2d at 867-68 (citing *Sayers v. Bullar*, 180 Va. 222, 229, 22 S.E.2d 9, 12 (1942)).

<sup>89</sup> *Id.* at 54, 282 S.E.2d at 870.

<sup>90</sup> *Id.* at 55, 282 S.E.2d at 870-871.



“discretion” or “discretionary act” would have clarified the court’s rationale. On the other hand, perhaps the court intended for the discretion prong of the four-part test in *James* to be applied as the “discretionary act versus ministerial act” analysis that the court had outlined in *Lawhorne*,<sup>91</sup> but merely failed to delineate such an intention. Because of a lack of clarity with respect to the proper application of the “discretion” prong, the lower courts continue to wrestle with the application of the *James* four-part test in conjunction with creating uniform results in cases where the doctrine of sovereign immunity is invoked, specifically with respect to applying the discretion prong.

### III. The Aftermath: A Case by Case Analysis of the Decisions Following *James v. Jane*

#### A. *Banks v. Sellers* – 1982

Following its decision in *James*, the Supreme Court of Virginia decided *Banks v. Sellers*.<sup>92</sup> In *Banks*, the issue was “whether a plea of sovereign immunity is available to a division superintendent of schools and a high school principal in a negligence action.”<sup>93</sup> A high school student was stabbed by another student during school hours and on school premises.<sup>94</sup> The parents of the injured student sued the superintendent and principal of the school for failing to provide a safe environment for their daughter.<sup>95</sup> After briefly chronicling the state of the law with respect to sovereign immunity, the court cited to *James* as the basis for its decision.<sup>96</sup>

The court stated, “[i]n *James* we enumerated the factors to be considered in deciding where the lines of immunity shall be drawn. They were (1) the function of the office; (2) the use

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<sup>91</sup> See *supra* notes 45-50 and accompanying text.

<sup>92</sup> 224 Va. 168, 294 S.E.2d 862 (1982).

<sup>93</sup> *Id.* at 169, 294 S.E.2d at 863.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 171, 294 S.E.2d at 864.

of judgment and discretion (a consideration not necessarily determinative); and (3) the degree of control and direction exercised by the state.”<sup>97</sup>

Notably, rather than cite the factors exactly how they had been outlined in *James*, the court in *Banks* chose not to include the “state’s interest and involvement in the function” as one of the factors to be considered in this case.<sup>98</sup> The court then went on to examine the method of selection of a superintendent and held that the superintendent was entitled to sovereign immunity because “a . . . superintendent is a supervisory official who exercises powers involving a *considerable degree of judgment and discretion*.”<sup>99</sup> Thus, while the court stated that the use of judgment and discretion prong is “not necessarily determinative,”<sup>100</sup> the court seemed to base its finding of immunity for the superintendent on this very factor.<sup>101</sup>

Similarly, with respect to the principal, the court held that the principal “performs a large number of *discretionary* and managerial functions in the school and, therefore, is entitled to the same immunity.”<sup>102</sup> The court, again, based its decision on “discretion” but did not define the meaning of “discretion” or a “discretionary act.” Furthermore, the court’s application of the four-part test was slightly different in this case than in *James*, as the court focused primarily on state control as the determinative factor in *James*.<sup>103</sup> Thus, at this point, the court has applied the four-part test that it created in *James* citing only three parts, and as in *James*, the court did not clarify how the discretion prong should be applied.

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<sup>97</sup> *Id.*

<sup>98</sup> *James*, 221 Va. at 53, 282 S.E.2d at 869.

<sup>99</sup> *Banks*, 224 Va. at 173, 294 S.E.2d at 865 (emphasis added).

<sup>100</sup> *Id.* at 171, 294 S.E.2d at 864.

<sup>101</sup> *Id.* at 173, 294 S.E.2d at 865.

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> See *supra* notes 97-98 and accompanying text.

**B. *Bowers v. Virginia Department of Highways & Transportation* – 1983**

A year after its decision in *Banks*, the court decided *Bowers v. Virginia Department of Highways & Transportation*.<sup>104</sup> Bowers was injured as a result of a fall through a “culvert-type bridge” installed by the Virginia Department of Highways and Transportation (the “Department”) and sued the Department, Mr. Marston, the Commissioner of the Department, and other employees of the state based on the alleged negligent installation of a culvert-type bridge.<sup>105</sup> One of Bowers’ theories of liability was based on the court’s analysis in *James*.<sup>106</sup> Bowers argued that Marston, much like the physicians in *James*, had “complete discretion” in constructing the culvert-type bridge.<sup>107</sup> The court rejected this argument and stated, “[i]n the typical situation where a state employee has been charged with simple negligence, the presence of discretion traditionally has been one of the indicia of entitlement to immunity. Indeed, *James v. Jane* recognizes this proposition, but cautions that ‘it is not always determinative.’”<sup>108</sup> The court went on to explain that, “although Marston may have been vested with broad discretion, he did not have the ‘complete autonomy and control’ the physicians possessed in *James*.”<sup>109</sup> The court held that Marston “did not enjoy absolute independence of decision and action,” and that Marston was “a subordinate employee of the Department and, by law, subject to the direction and control of the State Highway and Transportation Commissioner.”<sup>110</sup>

Thus, rather than define “discretion” or better articulate its intent with respect to the discretion prong, as noted above, the court stated, “[i]t is not always determinative.”<sup>111</sup> The court then shifted its focus to the “control and direction of the state” prong, presumably to avoid

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<sup>104</sup> 225 Va. 245, 302 S.E.2d 511 (1983).

<sup>105</sup> *Id.* at 247, 302 S.E.2d at 512.

<sup>106</sup> *Id.* at 250, 302 S.E.2d at 514.

<sup>107</sup> *Id.* at 252, 302 S.E.2d at 515.

<sup>108</sup> *Id.* at 253, 302 S.E.2d at 515 (citing *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980)).

<sup>109</sup> *Bowers*, 225 Va. at 253, 302 S.E.2d at 515.

<sup>110</sup> *Id.*

<sup>111</sup> *Bowers*, 225 Va. at 253, 302 S.E.2d at 515 (citing *James*, 221 Va. at 53, 282 S.E.2d at 869).

having to define discretion or outline how to apply the discretion prong.<sup>112</sup> In essence, the court found that Marston was entitled to immunity under the doctrine of sovereign immunity irrespective of discretion.<sup>113</sup> Therefore, at this point, the court had applied the *James* test in two cases, deciding one case on the basis of discretion (*Banks*),<sup>114</sup> while overlooking discretion in another case and deciding it on the basis of state control (*Bowers*).<sup>115</sup> Again, the court had not made any reference to a ministerial act, which, as discussed above, had been a fairly large part of the sovereign immunity analysis prior to *James*.

### C. *Messina v. Burden* – 1984

Four years after its decision in *James*, in *Messina v. Burden* the Supreme Court of Virginia again outlined the state of the law in Virginia on sovereign immunity and attempted to create a uniform application of the doctrine.<sup>116</sup> The court consolidated two appeals into one decision in *Messina* because each appeal presented “the same issue from slightly different perspectives.”<sup>117</sup> In the first case, Frank Messina was injured when he tripped and fell on a stairway behind the stage when performing in a play at the Frederick Campus of the Tidewater Community College.<sup>118</sup> Messina sued the college’s superintendent of buildings, William Burden, and was appealing the lower court’s decision sustaining Burden’s plea of sovereign immunity.<sup>119</sup> In the second case, Leonard Armstrong was injured when he stepped on a defective manhole cover in a street in Arlington County.<sup>120</sup> Armstrong sued Dennis R. Johnson,

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<sup>112</sup> See *id.*, 302 S.E.2d at 515.

<sup>113</sup> *Id.*

<sup>114</sup> *Banks*, 224 Va. at 173, 294 S.E.2d at 865.

<sup>115</sup> *Bowers*, 225 Va. at 253, 302 S.E.2d at 515.

<sup>116</sup> 228 Va. 301, 321 S.E.2d 657 (1984).

<sup>117</sup> *Id.* at 304, 321 S.E.2d at 658.

<sup>118</sup> *Id.* at 305, 321 S.E.2d at 659.

<sup>119</sup> *Id.* at 321 S.E.2d at 659.

<sup>120</sup> *Id.* at 305, 321 S.E.2d at 659.

the Chief of the Operations Division of the Department of Public Works, and appealed the trial court's decision to sustain Armstrong's plea of sovereign immunity.<sup>121</sup>

In *Messina*, neither discretion, nor any other prong of the *James* test, was a major issue on appeal; instead, the main issue was deciding which government employees (lower level versus higher level) were entitled to immunity.<sup>122</sup> In other words, the court examined the issue of which government employees are eligible to plead immunity pursuant to the *James* four-part test. The court first discussed the purposes of the doctrine of sovereign immunity as well as the general principles attributable to the doctrine.<sup>123</sup> With respect to *Messina's* appeal, the court held that Burden was clearly a supervisory employee of the Commonwealth of Virginia acting within the scope of his employment, thus was entitled to immunity.<sup>124</sup> As for Armstrong's appeal, the court held, "[i]f an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine [of sovereign immunity]" and in this case, Johnson met this standard.<sup>125</sup> Thus, while the court clarified who is eligible to plead immunity under the doctrine of sovereign immunity, the court's decision in *Messina* did not bring the Commonwealth closer to an understanding of how the discretion prong of the *James* test should be applied.

Acknowledging the inconsistencies in sovereign immunity cases both before and after *James*, the dissent in *Messina* stated that the court's prior opinions on sovereign immunity "cannot be reconciled."<sup>126</sup> The dissent explained that first, the court decided *Crabbe*, holding that the government employee was not entitled to immunity despite the fact that he exercised

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<sup>121</sup> *Id.* at 305-06, 321 S.E.2d at 659.

<sup>122</sup> *Id.* at 310, 321 S.E.2d at 662.

<sup>123</sup> *Id.* at 307-09, 321 S.E.2d at 659-61.

<sup>124</sup> *Id.* at 310, 321 S.E.2d at 662.

<sup>125</sup> *Id.* at 312-13, 321 S.E.2d at 663-64.

<sup>126</sup> *Id.* at 316-17, 321 S.E.2d at 665-66 (Cochran, J., dissenting).

discretion in performing his duties.<sup>127</sup> Subsequently, the court decided *Lawhorne*, and relied on the distinction between discretionary and ministerial acts to determine whether an employee was entitled to immunity.<sup>128</sup> Because the hospital employees in *Lawhorne* exercised discretion, they were immune.<sup>129</sup> Shortly after *Lawhorne*, however, the court decided *James* and, without overruling *Lawhorne*, held that “because they exercised complete discretion in their work,” the employees were not immune.<sup>130</sup> Thus, while *Messina* attempted to reconcile sovereign immunity case law by determining who is eligible to plead immunity under the doctrine, the court did not address the lingering issue of how the discretion prong of the *James* test should be applied or whether the court should consider the distinction between discretionary and ministerial acts as part of its analysis.

#### **D. *Lentz v. Morris* – 1988**

Following *Messina*, the Supreme Court of Virginia decided *Lentz v. Morris*, in which the court again attempted to reconcile the state of the law of sovereign immunity in the Commonwealth of Virginia.<sup>131</sup> *Lentz* involved facts extremely similar to those in *Short v. Griffitts*<sup>132</sup> and *Crabbe v. County School Board*.<sup>133</sup> In both *Short* and *Crabbe*, school employees were sued by students when the students were injured on school grounds during school hours.<sup>134</sup> The court declined to grant immunity to the officials involved in either *Short* or *Crabbe*.<sup>135</sup> In *Lentz*, however, the court overruled *Short* and *Crabbe* and extended immunity to a physical

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<sup>127</sup> *Id.* at 317, 321 S.E.2d at 666 (Cochran, J., dissenting).

<sup>128</sup> See *supra* notes 45-50 and accompanying text.

<sup>129</sup> *Messina*, 228 Va. at 317, 321 S.E.2d at 666 (Cochran, J., dissenting).

<sup>130</sup> *Id.*

<sup>131</sup> 236 Va. 78, 372 S.E.2d 608 (1988).

<sup>132</sup> 220 Va. 53, 54, 255 S.E.2d 479, 480 (1979).

<sup>133</sup> 209 Va. 356, 357, 164 S.E.2d 639, 640 (1968).

<sup>134</sup> See *Short*, 220 Va. at 56, 255 S.E.2d at 481; *Crabbe*, 209 Va. at 357, 164 S.E.2d at 640.

<sup>135</sup> See *Short*, 220 Va. at 56, 255 S.E.2d at 481; *Crabbe*, 209 Va. at 359, 164 S.E.2d at 641.

education teacher when he was sued for injuries Lentz sustained during class as a result of alleged negligent supervision of the physical education activities.<sup>136</sup>

The court based its holding on the factors set forth in the *Messina* case, that is, the four-part test created in *James*.<sup>137</sup> Essentially then, the court did not reconcile any prior case law. Instead, the court merely reaffirmed the test created in *James* and overruled *Short* and *Crabbe* to create uniform treatment of school officials.<sup>138</sup> Once again, the court declined to elaborate on the various prongs of the *James* test and did not take advantage of the opportunity to clarify how the discretion prong of the test should be applied.<sup>139</sup> Regarding the discretion prong, the court merely stated that “a teacher’s supervision and control of a physical education class . . . clearly involves, at least in part, the exercise of judgment and discretion.”<sup>140</sup>

#### **E. *Gargiulo v. Ohar* – 1990**

Shortly after its decision in *Lentz*, the Supreme Court of Virginia decided *Gargiulo v. Ohar*.<sup>141</sup> The issue decided by the *Ohar* court was similar to the issue in *James*. In *Ohar*, the issue was “whether . . . a licensed, board certified physician--a salaried employee of a state hospital engaged as a fellow in a medical research and training program conducted by the hospital--was entitled to sovereign immunity.”<sup>142</sup> The plaintiff, Patricia Gargiulo, suffered from a “chronic disease of the connective tissues” known as “progressive systemic sclerosis or

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<sup>136</sup> *Lentz*, 236 Va. at 82, 371 S.E.2d at 610.

<sup>137</sup> *See id.* at 82-83, 372 S.E.2d at 610-11.

<sup>138</sup> *Id.* The dissent notes that *Crabbe* was decided “[t]wo decades ago” and that it was affirmed by the court in *Short* only nine years prior to its decision in *Lentz*. *Id.* at 84, 372 S.E.2d at 611 (Stephenson, J., dissenting). The dissent further notes that “[i]t is significant that in the past 20 years the General Assembly has not enacted legislation overruling *Crabbe*. Presumably, therefore, a majority in the General Assembly believes that the decision in *Crabbe* represents sound public policy.” *Id.*

<sup>139</sup> The court merely states each factor of the four-part test that it is applying, then a sentence stating that the employee meets that factor so as to rise to the level of immunity. *Id.* at 82-83, 371 S.E.2d at 610-11 (majority opinion).

<sup>140</sup> *Id.* at 83, 372 S.E.2d at 611.

<sup>141</sup> 239 Va. 209, 387 S.E.2d 787 (1990).

<sup>142</sup> *Id.* at 210, 387 S.E.2d at 788.

scleroderma.”<sup>143</sup> Dr. Fowler, a member of the faculty and attending physician at the Medical College of Virginia (“MCV”), created “a protocol for a research and training program to study scleroderma.”<sup>144</sup> Following this protocol and under the supervision of Dr. Fowler, Gargiulo alleged that Dr. Jill Ohar negligently secured a heart catheter in Gargiulo thereby causing her to become comatose and suffer severe permanent injuries.”<sup>145</sup> Gargiulo sued Dr. Ohar for medical malpractice in negligently securing the heart catheter.<sup>146</sup>

The court applied the *James* four-part test and concluded that Dr. Ohar was entitled to immunity under the doctrine of sovereign immunity.<sup>147</sup> With respect to the discretion prong of the test, the court stated, “[t]he third element . . . ‘not always determinative,’ is whether the employee was performing judgmental rather than ministerial duties.”<sup>148</sup> The court determined that because Dr. Ohar was “required to make multiple professional judgments” she was “like the intern in *Lawhorne*, ‘vested with and required to exercise discretion and judgment in connection with those persons who presented themselves as patients.’”<sup>149</sup> Although this rationale is in accordance with *James*, it still presents the same dilemma. What did the court mean by “discretion,” and how should the discretion prong of the four-part test be applied? In other words, what is the difference between the professional judgments made by an attending physician and those made by a surgical intern; do they not both constitute discretion?

The court again declined to define “discretion” or a “discretionary act” and instead overlapped the discretion prong with the “control and direction of the state” prong. Dr. Ohar was treated like the intern in *Lawhorne* because she was “subject to review by physicians on the

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<sup>143</sup> *Id.* at 211, 387 S.E.2d at 788.

<sup>144</sup> *Id.* at 211, 387 S.E.2d at 788.

<sup>145</sup> *Id.* at 211, 387 S.E.2d at 789.

<sup>146</sup> *Id.* at 210, 387 S.E.2d at 788.

<sup>147</sup> *Id.* at 215, 387 S.E.2d at 791.

<sup>148</sup> *Id.* at 213, 387 S.E.2d at 790.

<sup>149</sup> *Id.* at 214, 387 S.E.2d at 790 (quoting *Lawhorne v. Harlan*, 214 Va. 405, 408, 200 S.E.2d 569, 572 (1973)).



faculty or medical staff at MCV” and thus was under more control of the state.<sup>150</sup> The court’s rationale was based on the fact that the physicians in *James* were “members of the faculty of a state medical school and doctors serving in the state hospital, but their relationship with the plaintiff was that of physician-patient.”<sup>151</sup> “By comparison, Dr. Ohar’s function was to assist as an employee and student in the conduct of a basic medical program,” thus she was like the intern in *Lawhorne*.<sup>152</sup> Again, while this reasoning is certainly consistent with the reasoning in *James*, it does not effectively advise the lower courts on how to uniformly apply the “discretion” prong of the four-part test.

Based on the review of the cases decided since *James*, it is clear that the distinctions made in the sovereign immunity cases involving professionals in the medical field have become fuzzy. It seems that the court chose not to define “discretion” or a “discretionary act” and chose not to instruct the lower courts on how to properly apply the discretion prong, but instead often blurred the discretion prong with the state control prong. In doing so, the court inadvertently opened the door for inconsistent results in cases involving professionals in the medical field.

#### F. *Colby v. Boyden* – 1991

One year after its decision in *Ohar*, the Supreme Court of Virginia again examined the issue of sovereign immunity for a state employee in *Colby v. Boyden*.<sup>153</sup> The facts in *Colby*, however, were far different from the facts in many of the cases the court had previously decided on the issue of sovereign immunity for state employees. Up to this point, the court’s decisions

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<sup>150</sup> *Id.* at 214, 387 S.E.2d at 790.

<sup>151</sup> *Id.* at 213, 387 S.E.2d at 790.

<sup>152</sup> *Id.* at 213, 387 S.E.2d at 790.

<sup>153</sup> 241 Va. 125, 400 S.E.2d 184 (1991); *see, e.g.*, *Nationwide Mut. Ins. Co. v. Hylton*, 260 Va. 56, 64, 530 S.E.2d 421, 424 (2000) (holding that a police officer who collided with another vehicle while in pursuit of a person who had committed a traffic violation was entitled to sovereign immunity); *see also* *Stanfield v. Peregoy*, 245 Va. 339, 343, 429 S.E.2d 11, 13 (1993) (holding that the operator of a snow plow was entitled to immunity because it “clearly involved, at least in part, the exercise of judgment and discretion by the driver”) (citing *Lentz v. Morris*, 236 Va. 78, 83, 372 S.E.2d 608, 611 (1988)).

were primarily based on facts that involved professional services (teaching, performing surgery, etc.) In *Colby*, the court examined the issue of the operation of a motor vehicle. Specifically, the issue was “the degree of negligence required to impose civil liability for injuries resulting from the actions of a police officer who violates traffic laws while pursuing a fleeing lawbreaker.”<sup>154</sup> It is important to note that this case involved the operation of a motor vehicle, as opposed to a case involving professional services, because it was at this point that the ministerial act versus discretionary act analysis was discussed in the context of the discretion prong of the *James* test.

The plaintiff, Patricia E. Colby, approached an intersection and the light for her lane had turned green.<sup>155</sup> “She slowed, looked to the left and right, and seeing or hearing nothing, proceeded into the intersection.”<sup>156</sup> When she reached the middle of the intersection, her car was struck by a vehicle operated by Officer William H. Boyden, who “activated his sirens for a short burst as he neared the intersection” in pursuit of another vehicle who had run the red light.<sup>157</sup> Officer Boyden argued that he was immune from suit under the doctrine of sovereign immunity.<sup>158</sup> The court held that Officer Boyden was entitled to immunity because he satisfied the four-part test in *James* and his actions did not amount to gross negligence, but simple negligence.<sup>159</sup>

The court began its analysis by stating, “the question of whether a particular act is entitled to the protection of sovereign immunity depends on whether the act under consideration is classified as discretionary or ministerial in nature.”<sup>160</sup> The court then applied the *James* four-part test. The court identified the function in this case as “enforcement of traffic laws” and noted

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<sup>154</sup> *Colby*, 241 Va. at 127, 400 S.E.2d at 185.

<sup>155</sup> *Id.* at 127, 400 S.E.2d at 185.

<sup>156</sup> *Id.* at 127, 400 S.E.2d at 185.

<sup>157</sup> *Id.* at 127, 400 S.E.2d at 185.

<sup>158</sup> *Id.* at 127, 400 S.E.2d at 185.

<sup>159</sup> *Id.* at 130, 133, 400 S.E.2d 187, 189.

<sup>160</sup> *Id.* at 128-29, 400 S.E.2d at 186.

the obvious important interests the sovereign has in this function.<sup>161</sup> In examining the discretion prong of the test, the court stated that when an officer is engaged in an emergency situation, “[s]uch situations involve necessarily *discretionary* split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective.”<sup>162</sup> As for the state control prong, the court noted that the city “exercised administrative control and supervision” over the officer by promulgating guidelines to govern an officer’s actions when responding to emergency situations.<sup>163</sup> Finally, the court re-visited its ministerial versus discretionary analysis, which was in place prior to the promulgation of the *James* four-part test, and the discretion prong seemed to have a concrete and uniform application. The court appeared to demonstrate that in order to determine whether the discretion prong of the *James* test had been satisfied, the question was whether the employee was performing a ministerial act or a discretionary act. That is, if the act is ministerial, and it is performed improperly, then the employee would not be immune. This is the exact analysis that the court made in *Lawhorne*, just prior to its decision in *James* creating the four-part test.<sup>164</sup>

While the court finally gave some teeth to the definition of discretion and the application of the discretion prong, critics might argue that there was still an inherent conflict in the court’s analysis. The argument would be that because there were guidelines to govern the officer’s response to emergency situations, just as there are guidelines to govern normal traffic operations, then the act the officer was performing was arguably ministerial. The court, however, noted that “those guidelines do not, and cannot, eliminate the requirement that a police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt,

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<sup>161</sup> *Id.* at 129, 400 S.E.2d at 187.

<sup>162</sup> *Id.* at 129-30, 400 S.E.2d at 187.

<sup>163</sup> *Id.* at 129, 400 S.E.2d at 187.

<sup>164</sup> *See supra* notes 45-50.

original, and crucial decisions in a highly stressful situation.”<sup>165</sup> The court continued, “[u]nlike the driver in routine traffic, the officer must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks in an emergency situation.”<sup>166</sup>

*Colby* was decided ten years after *James*, yet finally added some clarity to the issue of how the discretion prong of the *James* test should be applied. At this point, it seemed that the court was defining discretion for purposes of the discretion prong in the *James* test as a distinction between a ministerial act, one that can only be performed in a particular manner, and a discretionary act, one that can be performed in several different ways. If this were in fact what the court was accomplishing in *Colby*, then the lingering issue at this point would be whether this analysis is only applicable in cases involving the operation of motor vehicles, or whether it is also applicable to professional services cases (i.e. those involving teachers or doctors). The argument would be that motor vehicle cases often involve statutory mandates, while professional services cases often involve highly technical training. Thus, while a statutorily mandated duty would clearly be a ministerial act, a professionally mandated duty might be a ministerial act, a discretionary act, or a combination of both.

#### **G. *Heider v. Clemons* – 1991**

In the same year it decided *Colby*, the Supreme Court of Virginia again examined the issue of whether a law enforcement officer operating a motor vehicle was entitled to immunity in *Heider v. Clemons*.<sup>167</sup> The issue in *Heider* was “whether a sheriff is entitled to the defense of sovereign immunity when he is sued for damages incurred as a result of his operation of an automobile while serving judicial process.”<sup>168</sup> Deputy Ferdinand J. Heider was serving judicial

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<sup>165</sup> *Colby*, 241 Va. at 129, 400 S.E. 2d at 187.

<sup>166</sup> *Id.* at 129, 400 S.E.2d at 187.

<sup>167</sup> 241 Va. 143, 400 S.E.2d 190 (1991).

<sup>168</sup> *Id.* at 144, 400 S.E.2d at 190.

process at a private residence.<sup>169</sup> When Deputy Heider returned to his car to leave the parking space he, “in order to get over a ‘lip’ in the asphalt,” gave the car “a little more gas.”<sup>170</sup> As he pulled out, Deputy Heider collided with a motorcycle being operated by Demetrick Clemons.<sup>171</sup> Deputy Heider asserted that he was immune under the doctrine of sovereign immunity.<sup>172</sup> Unlike the Officer in *Colby*, the court held that Deputy Heider was not immune under the doctrine of sovereign immunity because the operation of his vehicle at that time was ministerial, not discretionary.<sup>173</sup>

The court began its analysis by citing *James*, and then stated that the defense of sovereign immunity “does not apply to ‘the performance of duties which do not involve judgment or discretion in their performance but which are purely ministerial.’”<sup>174</sup> The court held, “[w]hile every person driving a car must make a myriad of decisions, in ordinary driving situations, the duty of due care is a ministerial obligation.”<sup>175</sup> The court noted that sometimes the operation of a motor vehicle may fall into the category of “discretionary,” as it did in *Colby*, but based on the facts in this case, it did not rise to such a level.<sup>176</sup> Based on the court’s decisions in both *Colby* and *Heider*, it is apparent that the court had re-visited its discretionary act versus ministerial act analysis and incorporated it into the *James* test. As stated above, however, it is unclear how this analysis would play out in a case involving professional services, such as teaching or performing surgery.

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 145, 400 S.E.2d at 191.

<sup>174</sup> *Id.* (citing *Wynn v. Gandy*, 170 Va. 590, 595, 197 S.E. 527, 529 (1938) (holding that a bus driver was not entitled to sovereign immunity)).

<sup>175</sup> *Heider* at 145, 400 S.E.2d at 191.

<sup>176</sup> *Id.*

**H. *Lohr v. Larsen* – 1993**

Two years after the Supreme Court of Virginia decided the motor vehicle cases, *Colby* and *Heider*, the court decided *Lohr v. Larsen*, another professional services case.<sup>177</sup> Much like the issue in *Ohar*, the issue in *Lohr* was also “whether a state-employed public health physician is entitled to the protection of the doctrine of sovereign immunity from liability for his alleged acts of ordinary negligence.”<sup>178</sup> Paige Lohr sued Dr. George Douglass Larsen for failing to order the appropriate tests after detecting a lump in Lohr’s breasts.<sup>179</sup> Lohr went to the Waynesboro Public Health clinic to obtain birth control pills and the law of Virginia required Lohr to have a physical examination before she could be prescribed birth control pills.<sup>180</sup> Dr. Larsen was a board certified physician assigned to the clinic and according to the trial court, “[t]he State . . . controls, absolutely, when and where Dr. Larsen works, the number and identity of the patients he sees, the equipment he uses, the procedures he can perform . . . and . . . the medication he can prescribe.”<sup>181</sup> The court applied the *James* four-part test and held that the trial court did not err in sustaining Larsen’s plea of sovereign immunity.<sup>182</sup>

In making its decision, the court addressed the discretion prong of the *James* test, as well as the other three prongs of the *James* test, and how they should be applied to Dr. Larsen; however, it did not apply the discretionary versus ministerial analysis that it had applied just two years prior in *Colby* and *Heider*.<sup>183</sup> With respect to the “state’s interest in the function” prong, the court stated that “because the broad discretion vested in the physicians in *James* was not attendant to actions that were integral to the Commonwealth’s interest or function, there was no

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<sup>177</sup> *Lohr v. Larsen*, 246 Va. 81, 431 S.E.2d 642 (1993).

<sup>178</sup> *Id.* at 83, 431 S.E.2d at 643.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 83-84, 431 S.E.2d at 643.

<sup>182</sup> *Id.* at 85, 88, 431 S.E.2d at 643, 646.

<sup>183</sup> *Id.* at 85-88, 431 S.E.2d at 643-46.

immunity.”<sup>184</sup> The court then stated, “in this case, however . . . the exercise of discretion was an integral part of the Commonwealth’s health care program.”<sup>185</sup> Thus, the court indicated that while the factual circumstances were similar in *James* and *Lohr*, the interests of the Commonwealth in each case were different enough to warrant immunity in one case and not in the other.

In *James* the court stated that the “paramount interest of the Commonwealth of Virginia is that the University of Virginia operate a good medical school and that it be staffed with efficient and competent administrators and professors.”<sup>186</sup> In *Lohr*, the court stated that the interest was “to provide quality medical care in certain specified areas for citizens of this State who are economically unable to acquire those services in the private sector,” and that “these health care services could not be delivered without using skilled physicians.”<sup>187</sup> It is not exactly clear how these interests differ in such a way that would grant immunity to one doctor and not the other, but this was the result. Both interests require a state operated facility to be staffed with competent and skilled professionals. Why is it then, that Dr. Larsen was immune from liability while the doctors in *James* were not?<sup>188</sup>

Why the court abandoned its ministerial versus discretionary analysis for purposes of this case is unclear; however, in doing so, the court applied the same test to almost identical facts to achieve two different results. To explain the outcome in *Lohr*, despite the opposite outcome in *James*, the court stated that the discretion prong of the *James* test is “the level of discretion required of a government employee in performing his job and whether the employee is

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<sup>184</sup> *Id.* at 87, 431 S.E.2d at 645.

<sup>185</sup> *Id.*

<sup>186</sup> *James*, 221 Va. at 54, 282 S.E.2d at 870.

<sup>187</sup> *Lohr*, 246 Va. at 86, 431 S.E.2d at 644-645.

<sup>188</sup> The dissent in this case explains that the facts in this case are “indistinguishable” from the facts in *James*. *Lohr* at 92, 431 S.E.2d at 648 (Hassel, J., and Keenan, J., dissenting). The dissent notes that “the only reason that the majority has chosen not to adhere to *James v. Jane* is because it is concerned that the physicians might not participate in public health programs unless they are immune for their negligent acts.” *Id.*

exercising that discretion in the discharge of his duties when the allegedly negligent act occurred.”<sup>189</sup> The court explained that “if a broad discretion is vested in a government employee in performing the function complained of . . . it will weigh heavily in favor of a government employee’s claim of immunity.”<sup>190</sup> The court, however, stated that because Larsen could not choose his patients or waive their fees, as the doctors in *James* could, he was immune.<sup>191</sup> Thus, the court seemed to be indicating that what is needed to meet the discretion prong of the *James* test is not that “discretion” be used at the time of the actual negligent act, rather that the State be exercising a large amount of control over the employee when the negligence occurs.<sup>192</sup> This reasoning is slightly problematic. Is it possible for one to exercise a broad amount of discretion while being strictly controlled by someone else?

The court recognized this conflict:

[a]t first glance, the issue of wide discretion that influences our consideration of the grant of governmental immunity in applying the third element of the *James v. Jane* test appears to be at odds with our consideration of a higher level of governmental control in the application of the fourth element of that test in this case.”<sup>193</sup>

The court then attempted to reconcile the conflict by stating that “when a government employee is specially trained to make discretionary decisions, the government’s control must necessarily be limited in order to make maximum use of that training . . .”<sup>194</sup> In its next breath, the court stated that “the Commonwealth’s direction and control of Dr. Larsen was far greater than its control of the physicians in *James*. These physicians ‘exercised *broad discretion* in selecting the methods by which they cared for [their patients].”<sup>195</sup> Thus, the court essentially held that in

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<sup>189</sup> *Id.* at 87, 431 S.E.2d at 645.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.* at 86, 431 S.E.2d at 644-45.

<sup>192</sup> *Id.* at 88, 431 S.E.2d at 646 (emphasis added).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



order to be immune, one must be exercise a large amount of discretion, at the same time, however, be subject to strict control by the state.<sup>196</sup>

After the court's holding in *Lohr*, an entirely new issue arose with respect to the discretion prong. That is, how can the court reconcile the state control prong and the discretion prong? What had developed up to this point was a disparity in the application of the *James* test in several respects. First, there was the issue of whether the ministerial act versus discretionary act analysis remained applicable in light of the court's creation of the four-part test in *James*. While it appeared to have been taken out of the sovereign immunity analysis, it reappeared in the court's decisions in *Colby* and *Heider*. Second, there was the issue of the interplay between the discretion prong and the state control prong and whether the two prongs could be applied as the court had applied them in *Lohr*. That is, if the court required the exercise of a large amount of discretion to qualify for immunity, then how could it also require a large amount of state control to qualify for immunity?

### I. *Linhart v. Lawson* – 2001

With these two issues still lingering, the Supreme Court of Virginia again decided a sovereign immunity case involving the operation of a motor vehicle in *Linhart v. Larson*.<sup>197</sup> One of the main issues in *Linhart* was whether Thomas Lawson, an employee of the school board, was immune under the doctrine of sovereign immunity when he negligently struck Francis Linhart Jr.'s vehicle while operating a school bus.<sup>198</sup> The trial court found Lawson immune under the doctrine of sovereign immunity and the court affirmed this finding.<sup>199</sup> The court

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<sup>196</sup> See e.g., *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (1997). In *Adkins*, the court noted that “[a] high level of control weighs in favor of immunity; a low level of control weighs against immunity. *Id.* at 280, S.E.2d at 800-801 (citing *Lohr v. Larsen*, 246 Va. 81, 88, 431 S.E.2d 642, 646 (1993)). Because the Commonwealth “had almost no control” over the defendant in *Adkins*, the defendant was not granted immunity. *Id.* at 280, S.E.2d at 801.

<sup>197</sup> 261 Va. 30, 540 S.E.2d 875 (2001).

<sup>198</sup> *Id.* at 32-33, 540 S.E.2d at 876.

<sup>199</sup> *Id.* at 36-37, 540 S.E.2d at 878.

briefly re-examined the trial court's findings with respect to the four-part test in *James*.<sup>200</sup> As for the first two prongs of the test, the court agreed with the trial court that "the transportation of children in a school bus is a governmental function in which the government has a substantial interest."<sup>201</sup> With respect to the "control and direction of the state" prong, the court again agreed with the trial court finding that "the government exercises significant control [over bus drivers] as reflected in the regulations issued regarding the qualifications for and requirements of the job."<sup>202</sup>

As to discretion, the court found that "transporting school children involved discretion and judgment."<sup>203</sup> The court did not elaborate on its finding of the required "control and direction" of the state or the required "discretion" in its opinion, again leaving the issue open for discussion and interpretation by the lower courts. However, based on the court's rulings in the other motor vehicle operation cases, *Colby* and *Heider*, it is slightly easier to discern what the court meant by "discretion" in this case. That is, that the unpredictability of the children's actions on the bus made the function of operating the bus more discretionary as opposed to ministerial. Thus, at this point, the court affirmed its adoption of the ministerial act versus a discretionary act in cases involving the operation of a motor vehicle by government employees. What remains an unanswered question is whether the court intended for this analysis to also be applied in cases involving professional services, such as teaching and performing surgery.

**J. *Friday-Spivey v. Collier* – 2004**

More recently, the Supreme Court of Virginia decided *Friday-Spivey v. Collier*, another motor vehicle operation case, and attempted to extensively address the issue of "discretion"

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<sup>200</sup> *Id.* at 36, 540 S.E.2d at 876.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

under the doctrine of sovereign immunity.<sup>204</sup> The facts of this case are slightly analogous to those in *Linhart*.<sup>205</sup> Charles Lee Collier was operating a fire truck when he collided with Julian Friday-Spivey's vehicle.<sup>206</sup> Collier was on his way to a shopping mall in response to a "Priority 2" dispatch regarding an infant locked in a vehicle at the mall of whose condition he was not aware of when he responded to the dispatch.<sup>207</sup> When responding to a Priority 2 call, the Fairfax County Fire Department Standard Operating Procedures required that Collier "proceed without activating warning devices . . . and to obey all statutes governing the operation of motor vehicles," yet he needed to "drop everything and proceed to the call."<sup>208</sup> In deciding how to proceed to the call, Collier testified that he "decided to take the quickest route possible" because he "just did not know what to expect" when he got there.<sup>209</sup> The court applied the four-part test outlined in *James* and found that Collier (much like *Heider*) did not exercise the appropriate amount of discretion to rise above the level of a ministerial act, thus was not entitled to immunity.<sup>210</sup>

Collier argued that he was responding to an emergency situation and testified, "I have to be extra careful when I'm driving the fire truck, it's not like driving my personal car on the road."<sup>211</sup> In response to Collier's argument, the court stated, "[d]espite a natural inclination to classify the report of a child in a locked car as an 'emergency,' the facts of this case do not

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<sup>204</sup> 268 Va. 384, 386, 601 S.E.2d 591 (2004).

<sup>205</sup> See generally *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001).

<sup>206</sup> *Id.* at 386, 601 S.E.2d at 592.

<sup>207</sup> *Id.* at 387, 601 S.E.2d at 592.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 387, 601 S.E.2d at 593.

<sup>210</sup> *Id.* at 391, 601 S.E.2d at 595.

<sup>211</sup> *Id.* at 387, 601 S.E.2d at 593; see generally *James v. Jane*, 221 Va. 43, 282 S.E.2d 864; *Heider v. Clemons*, 241 Va. 143 400 S.E.2d 190.

support that the conclusion that Collier's driving involved the exercise of judgment and discretions beyond that required for ordinary driving in routine traffic situations."<sup>212</sup>

The court pointed out that during his deposition, Collier admitted that he knew "there was no danger" involved and he was supposed to respond in a "nonemergency manner" to Priority 2 calls.<sup>213</sup> Thus, because Collier knew that he was supposed to obey all traffic law and he did not, the court held that he was performing a ministerial function.<sup>214</sup>

This decision is clearly in line with the court's prior decisions involving the operation of a motor vehicle, such as *Colby* and *Hieder*. By contrast, critics of the court's decision in *Spivey* argue that "the case represents a significant departure from prior decisions."<sup>215</sup> These critics "anticipate that with the court's decision in *Spivey*, the argument will be made that sovereign immunity applies to a driver of an emergency vehicle, only if the lights and siren have been activated."<sup>216</sup> As is evidenced by the court's decision in *Colby* and *Spivey*, this is clearly not what the court intended. In *Colby*, the officer, by virtue of the emergency situation, was permitted to use discretion in deciding how to pursue the fleeing suspect,<sup>217</sup> while in *Spivey*, the officer, by virtue of the non-emergency situation, was not permitted to use any discretion in deciding how to respond to the Priority 2 call.<sup>218</sup>

As stated above, while the ministerial act versus a discretionary act analysis has been consistently applied to cases involving the operation of a motor vehicle, whether or not it also applies to cases involving professional services remains uncertain. In addition, what remains

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<sup>212</sup> *Id.* at 389, 601 S.E.2d at 594.

<sup>213</sup> *Id.* at 390, 601 S.E.2d at 594.

<sup>214</sup> *Id.* at 390, 601 S.E.2d at 595.

<sup>215</sup> John D. McGavin and Julia B. Judkins, *Sovereign Immunity: Is it Alive and Well In Virginia After Friday-Spivey v. Collier?*, 17 J. OF CIV. LITIG. 205, 205 (Nov. 3, 2005) (discussing the state of sovereign immunity after the court's decision in *Spivey*).

<sup>216</sup> *Id.* at 207.

<sup>217</sup> *Colby*, 241 Va. At 129-30.

<sup>218</sup> *See Spivey*, 268 Va. at 387, 601 S.E.2d at 592.

unclear is how the court can require an employee to exercise discretion and at the same time be under strict control by the state in order to be shielded from liability under the doctrine of sovereign immunity.

Perhaps applying the ministerial versus discretionary analysis when analyzing the discretion prong in professional services, as the court does in motor vehicle cases, would create more uniformity and better explain how the court can require the exercise of discretion while also requiring state control in order to be shielded from liability under the doctrine of sovereign immunity. For example, if this analysis were applied in professional services cases involving doctors, then the ministerial act would constitute whatever the medical protocol is in a particular situation. Thus, if a physician violates the appropriate protocol, that would constitute a violation of a ministerial duty and immunity would not be afforded to the employee. If, on the other hand, there is no uniform protocol in a particular medical situation, then the physician would be performing a discretionary act and immunity would be afforded to the employee. In that circumstance, whether or not the state is exercising a great deal of control would not affect the discretion prong.

#### **IV. Professional Commentaries**

In light of the variances in the Supreme Court of Virginia's rulings on the application of the four-part test created in *James*, at least with respect to professional services cases, it is beneficial to examine how practitioners in the Commonwealth view the discretion prong of the test. As one might expect, the practitioners interviewed for this article were split on how they viewed the application and meaning of the discretion prong.

For example, Mr. Thomas E. Albro of Tremblay & Smith, LLP in Charlottesville, Virginia, who represented the plaintiff in *James*, commented that what the court meant by

“discretion” in the four-part test is “the single greatest problem with analyzing sovereign immunity.”<sup>219</sup> Mr. Albro continued, “[a]t the end of the day, discretion as a concept is totally elastic. It can mean as little or as much as you want it mean . . . .”<sup>220</sup> When asked what would make the application of the test easier, Mr. Albro suggested, “Take [discretion] out and deal with a three-prong test. Do you have immunity; do you not have immunity? Then, if you have immunity, you can lose it if you’re grossly negligent, or if you’re performing a ministerial act that does not require the exercise of discretion.”<sup>221</sup>

Under Mr. Albro’s approach, the discretion concept would essentially be applied differently according to the function being performed. If the function is one involving professional services, then a gross negligence analysis would be applied in place of the discretion prong; and if the function is one involving the operation of a motor vehicle, then a “discretionary” versus “ministerial” act analysis would be applied as the discretion prong.

Mr. Albro’s suggested modification to the *James* test is not an unfounded one. For example, Mr. Gregory E. Lucyk, former Chief of the Trial Section in the Virginia Office of the Attorney General, and now the Chief Staff Attorney for the Supreme Court of Virginia, indicated that he believes the court is already applying the discretion prong of the test in that manner – that is, dependent upon what function the employee is performing. Mr. Lucyk stated:

it’s better to look at the discrete function that we are talking about -- vehicle operations is one category of cases; professional services, like physicians and court-appointed lawyers is another category of cases. Discretion is important in the analysis for vehicle operations cases; however, you probably don’t even need to address that prong in the doctor cases.<sup>222</sup>

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<sup>219</sup> Interview with Thomas E. Albro, Partner, Tremblay & Smith LLP, in Charlottesville, Va. (Mar. 8, 2006). Mr. Albro also represented the plaintiff in *Lohr v. Larsen*, 246 Va. 81, 431 S.E.2d 642 (1993).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> Interview with Gregory E. Lucyk, Chief Staff Attorney, Supreme Court of Virginia, Richmond Virginia (Mar. 9, 2006).

Mr. Lucyk pointed out that unlike the motor vehicle cases where the discretion prong is the determinative issue, it is typically the state control prong that is the determinative issue in professional services cases.<sup>223</sup> It is submitted that if this is the case, that the discretion prong is applied differently depending on the function at issue, then perhaps a clarification by the court as to the weight to be given to discretion in applying the test to various functions is warranted.

On the other hand, however, the Honorable Randall G. Johnson, now deceased, and the Honorable Theodore J. Markow of the Circuit Court of City of Richmond, pointed out that the reason a court focuses on discretion in one case and state control in another is simply because that is what the facts have necessitated.<sup>224</sup> In other words, just because discretion is not the main issue in a professional services case, but might be in a motor vehicle operations case, does not mean that the test is faulty or difficult to apply. Neither Judge Johnson nor Judge Markow felt that the test needed to be altered in any way to be appropriately and effectively applied.<sup>225</sup>

Conversely, the Honorable Edward L. Hogshire of the Circuit Court of City of Charlottesville, commented that while he had not yet been faced with the issue of discretion head on, it seems that the “more discretion an employee has, the *less* likely they are to be immune.”<sup>226</sup> Judge Hogshire stated that it “defies common sense” to conclude that someone has broad discretion, yet is simultaneously subject to a vast amount of control.<sup>227</sup> In other words, in order to satisfy both the discretion and the state control prong to achieve immunity as it has been outlined by the court thus far, a state employee must be able to exercise broad discretion, yet the state must have strict control over the employee.

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<sup>223</sup> *Id.*

<sup>224</sup> Interview with the late Honorable Randall G. Johnson, Judge, and the Honorable Theodore J. Markow, Chief Judge, Circuit Court of City of Richmond, in Richmond, Va. (Mar. 15, 2006).

<sup>225</sup> *Id.*

<sup>226</sup> Interview with the Honorable Edward L. Hogshire, Judge, Circuit Court of City of Charlottesville, in Charlottesville, Va. (Apr. 3, 2006).

<sup>227</sup> *Id.*

## V. Conclusion

The discretion prong of the four-part test that the Supreme Court of Virginia created in *James* has not been uniformly explained by the court, which has led to non-uniform application in certain cases. This is evident in the court's varying decisions since the creation of the test, as well as the differing opinions by professionals in the Commonwealth on how to appropriately apply the discretion prong of test. In support of this contention, one need not look any further than the amount of sovereign immunity cases taken to the Supreme Court of Virginia since *James* was decided. This article cites at least ten cases (a list which is not exhaustive) that the court has heard since the creation of the four-part test in *James*, most of which focus on the application of the discretion prong of the four-part test.<sup>228</sup>

In addition to the vast number of cases that have been brought before the court regarding the application of the four-part test, the fact that practicing attorneys and presiding judges have differing views on exactly how the four-test should be applied, particularly as to the discretion prong, is evidence that a clarification of how to apply the discretion prong of the test may be necessary. For instance, if the purpose of the law is predictability, then those who might benefit from sovereign immunity should be able to accurately predict whether or not their conduct will lead to liability.<sup>229</sup> Otherwise, many positions that are vital to the community, such as teachers, doctors, police officers, fire fighters, highway maintenance workers, and school bus drivers, will

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<sup>228</sup> See *supra* notes 92, 104, 116, 131, 141, 153, 167, 177, 197, 204. Interestingly, Mr. Albro commented that, "[t]he problem for those of us who do medical malpractice work, is that the successive decisions in the medical malpractice field incite more litigation because what they tell those of us practicing in this area is that the rules are so flexible and the tests are so vague that it's always worth taking an appeal to the Supreme Court of Virginia because [you] don't know what you're going to get." Interview with Thomas E. Albro, *supra* note 219.

<sup>229</sup> For example, Linda Walke Lilly of the Division of Risk Management for the Department of the Treasury for the Commonwealth of Virginia, commented that employees of the sovereign "most certainly" worry about whether or not they will be liable in certain situations. Interview with Linda Walke Lilly, Assistant Director, Division of Risk Management for the Department of the Treasury for the Commonwealth of Virginia, in Richmond, Va. (Apr. 5, 2006). Ms. Lilly noted that when one employee is sued for an incident that took place on the job, other similarly situated employees will inquire as to whether or not they would be liable had it happened to them. *Id.*



be that much harder to fill. Furthermore, there is a risk of disparate treatment of employees in similarly situated circumstances simply because the circuit courts in each area might interpret the same test in different ways.

While the discretion prong of the test is problematic, it is clear that the test should not be discarded in its entirety. Instead, perhaps Mr. Albro's suggestion would be best. On the other hand, perhaps the court could clarify in which cases the ministerial act versus discretionary act plays a part in the analysis. Furthermore, if the court intends for the discretion analysis to differ depending on the function the employee is performing, which appears to be the case given the varying analysis in motor vehicle cases versus professional services cases, delineating such a position would be beneficial to the legal community as a whole, as it would lead to a more uniform application of the test. Ultimately, until a clarification is made, the court may find itself hearing many more sovereign immunity cases in the future.