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VIRGINIA'S LAW OF SOVEREIGN IMMUNITY: AN OVERVIEW

I. INTRODUCTION

The immunity of a sovereign and its agents from liability for tortious conduct has long been a part of our common law.¹ Its origin seems to be based on "the theory, allied with the divine right of kings, that 'the King can do no wrong', together with the feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued as of right in his own courts."² More modern justifications include the desire to limit judicial interference with the workings of government.³ Naturally this desire has left many wrongs unredressed. Thus, the law has been forced to accommodate two competing interests: (1) functional government unencumbered by the courts; and (2) the need of injured parties for judicial relief.

The purpose of this article is to examine this struggle within Virginia where, as in many other states, the law has undergone change and evolution over the years.⁴ Focus will be on the immunity of state officers and political subdivisions. As will be seen, the decision of a court whether to grant immunity in a particular case involves a myriad of considerations, including the character of the officer or subdivision seeking immunity and the nature of the tortious conduct.

II. OFFICER AND AGENTS: IMMUNITY FOR STATE PERSONNEL

A. *Negligent Acts*

In Virginia the need to protect officers and agents of the state from civil prosecution⁵ has been articulated in *Sayers v. Bullar*.⁶ The defendants were

1. Sovereign immunity was first given expression by the Supreme Court in *United States v. M'Lemore*, 45 U.S. (4 How.) 117 (1846).

2. PROSSER, *HANDBOOK OF THE LAW OF TORTS*, at 970 (4th ed. 1971) [hereinafter cited as PROSSER]. Sovereign immunity rests on the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1970) (Holmes, J.).

3. This has been especially true when the plaintiff is seeking specific relief as opposed to money damages. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Hawaii v. Gordon*, 373 U.S. 57 (1963).

4. See generally DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 25.00 to .18 (1976); Eichner, *A Century of Tort Immunities in Virginia*, 4 U. RICH. L. REV. 238 (1970) [hereinafter cited as Eichner]; Harley and Wasinger, *Governmental Immunity: Despotism or Creature of Necessity*, 16 WASHBURN L.J. 12 (1976). Approximately twenty-seven states have responded to the issue of sovereign immunity with some sort of legislative program. *Id.* at 33.

5. The complex process of legal administration requires that officers shall be charged with the duty of making decisions, either of law or of fact, and acting in accordance with their determinations. Public servants would be unduly hampered and intimidated

employees of the Commonwealth engaged in laying pipeline from a state owned spring to a state owned fish hatchery. Their activities caused damage to a spring on plaintiff's adjacent land.⁷ The first issue before the court was whether or not the defendants' conduct was imputed to the state. This issue was resolved in the affirmative.⁸

Having viewed the actions of the defendants as those of the state, the court held liability was precluded by the theory of sovereign immunity. "A state cannot be sued except by its permission, and even if the suit, in form, be against the officers and agents of the state, yet if, in effect, it be against the State, it is not maintainable."⁹ This case, however, dealt with more than just the right of a state to prohibit its capacity to be sued. The court was also forced to consider the existence and *scope* of the immunity to be extended by the state to individuals in their capacities as agents of the state.¹⁰ It was held that immunity should be extended whenever employees were "acting legally within the scope of their employment."¹¹ Thus, relief for plaintiff

would seem to require proof (and allegation) of some act done by the employee outside the scope of his authority, or some act within the scope of authority but performed *so negligently* that it can be said that its negligent performance takes him who did it outside the protection of his employment.¹²

The implication of the words "so negligently," as demonstrated by the subsequent case law, is that the liability of state employed individuals will

in the discharge of their duties, and an impossible burden would fall upon our agencies of government if the immunity to private liability were not extended to some reasonable degree.

PROSSER, *supra* note 2, at 975.

6. 180 Va. 222, 22 S.E.2d 9 (1942).

7. Blasting within 30 feet of the plaintiff's property was necessary to lay the pipe through limestone rock. Despite warnings from the plaintiff that such blasting would endanger his spring, the defendants went ahead with the excavation. As a result, the plaintiff's spring ceased to flow. *Id.* at 225, 22 S.E.2d at 10.

8. Gregory, J., writing for the majority quoted the opinion of the trial court as follows: "It seems from the . . . declaration that all the facts complained of were committed by the defendants as agents of the State and not as individuals in their own right and not of their own independent volition If a wrong was committed it was committed by the State." *Id.* at 229, 22 S.E.2d at 12.

9. *Id.* at 225, 22 S.E.2d at 10.

10. These were issues of first impression in Virginia.

11. 180 Va. at 230, 22 S.E.2d at 13.

12. *Id.* at 229, 22 S.E.2d at 12 (emphasis added). The court was quoting with approval from the defendant's brief. The cursory repetition of similar limitations has had little restrictive effect on the doctrine of sovereign immunity at the federal level. See *Barr v. Matteo*, 360 U.S. 564 (1959); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

be abrogated unless a certain requisite degree of negligence can be proven (assuming the act complained of is properly within the employee's scope of authority). Moreover, this degree of negligence will vary widely from case to case depending upon the nature of the acts involved. Generally, the courts will require proof of simple negligence to find liability for injuries resulting from the performance of ministerial tasks, while a greater degree of negligence is required to find liability resulting from the performance of discretionary tasks.¹³

Although beset by certain definitional problems,¹⁴ the ministerial-discretionary dichotomy is not without logical foundation. The distinction is based upon a recognized need to limit judicial interference with the administrative workings of government. This protection of certain official activities is in turn based upon two fundamental principles. First, to continually submit state agents, especially those with discretionary authority, to the constant threat of suit would surely hamper the provision of vital governmental services to the public. Second, many government officers build up an expertise over the years. The courts' own lack of knowledge should preclude intervention since they would be less qualified than the officer-expert to render a proper decision. In effect, judicial intervention in the form of imposing liability upon state officers is a type of judicial review of state administrative decisions, since it would often have the effect of discontinuing a particular course of administrative action.

The rule that simple negligence may operate to bring ministerial activi-

13. See notes 19-24 *infra*, and accompanying text. While it is clear that simple negligence will not support a claim against one with discretionary authority, it is unclear from present case law how much more the plaintiff must prove in order to impose liability. In *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973), the court seemed to indicate that a breach of duty somewhere between simple and gross negligence would support a claim against state officers charged with decision making. Unfortunately this middle ground has been left undefined. Justice Cochran's dissent in *Lawhorne* addresses the problem created by the lack of a definite standard:

[T]he majority casts the nebulous shadow of a new gradation of negligence, greater than ordinary negligence and sometimes perhaps less than gross negligence . . . I not only oppose any extension of the gross negligence rule into new areas of tort litigation but I also disapprove as unwarranted the application of an intermediate degree of negligence to employees whose employers are entitled to plead sovereign immunity.

214 Va. at 409, 200 S.E.2d at 573.

14. It is often difficult to determine whether a particular act is ministerial or discretionary. In Virginia a ministerial act is defined 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." *Dovel v. Bertrum*, 184 Va. 19, 22, 34 S.E.2d 369, 370 (1945). See also *Semler v. Psychiatric Inst.*, 538 F.2d 121 (1976). Yet, all acts necessarily involve some degree of discretion. See notes 25, 27 *infra*, and accompanying text; DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 26.02 (1976).

ties of a state officer outside his scope of authority worked to abrogate immunity for the defendant in *Rives v. Bolling*.¹⁵ Decided shortly before *Sayers*, this case imposed liability upon a police officer who negligently shot plaintiff's decedent while in the performance of official duty. The defendant was twirling his service revolver on his finger while cleaning it; it fired and killed a girl who was in the room at the time.

Although the defendant was required to maintain his service revolver in a clean condition, thus making this activity within his scope of authority,¹⁶ the court held that the manner in which the activity was performed was such that it brought the defendant from under the shield of immunity.

It was a negligent and improper performance of the officer's duty to twirl a loaded revolver upon his finger

Negligence is of itself no part of official duty. Negligence may be the failure to perform duty or the performance of duty in an unlawful or improper manner. Official acts may be lawfully or unlawfully performed, dependent upon their manner of performance.¹⁷

By refusing to extend the state's immunity to the defendant in *Rives*, the court underlined the notion that an extension of immunity, by its very nature, differs in form and scope from its source. Thus, it 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.¹⁸

Lawhorne v. Harlan,¹⁹ however, held that state employees performing *discretionary* functions were not liable for simple negligence. The case

15. 180 Va. 124, 21 S.E.2d 775 (1942). See also *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938), in which the court found the driver of a school bus liable for injuries to a child caused by the defendant's negligent driving. The court held it to be "well settled that public officers are liable for injury which is the result of their negligence in the performance of duties which do not involve judgment or discretion in their performance but which are purely ministerial." *Id.* at 595, 197 S.E. at 529.

16. As part of his regular responsibility, the defendant was required to keep his service revolver clean. It was a task which "devolves upon the officer himself." 180 Va. at 130, 21 S.E.2d at 777. It is important to note that this task is ministerial in nature and that the court required no more than a showing of simple negligence.

17. *Id.* at 130, 21 S.E.2d at 777.

18. See *Crabbe v. County School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968), in which it was held "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." *Id.* at 359, 164 S.E.2d at 641. The court went on to point out that this bifurcation is in accord with the majority of states. See 72 Am. Jur.2d *States* § 115 (1974); 81 C.J.S. *States* § 84 (1963).

19. 214 Va. 405, 200 S.E.2d 569 (1973).

concerned alleged improper diagnosis and care by state hospital administrators and a staff physician.²⁰

After briefly discussing the immunity of the hospital as a state agency,²¹ the court went on as follows: "This immunity is also available to an employee of a state or one of its agencies who performs *supervisory functions* or exercises *discretionary judgment* within the scope of his employment. He will not be held liable for simple negligence, because his acts are the acts of the Commonwealth."²² The court found that the duties and responsibilities of the defendants involved discretionary judgment of the type that would absolve them of liability under the facts of this case.²³ The force of this holding is that simple negligence in the performance of discretionary tasks is not enough to take that performance outside the scope of authority protected by the standard enunciated in *Sayers*.²⁴

As previously discussed, the "ministerial-discretionary" dichotomy is not without logical purpose.²⁵ However, it suffers from a major weakness which often obviates any positive effect it might otherwise have. How is a court to determine whether a particular activity in any given case is ministerial or discretionary? The question is an important one since it directly affects the degree of negligence the plaintiff must prove in order to impose

20. The defendants were two hospital administrators and one surgical intern employed by the University of Virginia Hospital. The plaintiff's decedent received a severe blow on the head for which he was taken to the hospital's emergency room. He was released from the hospital after his condition, a fractured skull, had been incorrectly diagnosed by the surgical intern. After his condition worsened, decedent was brought back to the hospital where he subsequently died, allegedly as the result of the improper diagnosis. *Id.*

21. Hospitals, which are organs of the state, enjoy immunity. *Id.* at 407, 200 S.E.2d at 51. *Accord* *Maia's Adm'r v. Eastern State Hosp.*, 97 Va. 507, 34 S.E. 617 (1899).

22. 214 Va. at 407, 200 S.E.2d at 571 (emphasis added).

23. For a discussion of the definitions of "ministerial" and "discretionary," see *Semler v. Psychiatric Inst.*, 538 F.2d 121 (1976).

24. The liability of employees of the University of Virginia Hospital has received extended treatment in federal district court. In *Nickell v. Westervelt*, 354 F. Supp. 111 (W.D. Va. 1973), a doctor on the staff of the university's hospital was granted immunity from his alleged negligence. The plaintiff's decedent arrived at the hospital hemorrhaging from the nose and mouth. The doctor was telephoned and on the basis of that communication decided that the hospital's facilities were adequate to care for the plaintiff's decedent until he arrived seven hours later. The court found this to be a "medical judgment" which it would not second guess in the absence of "gross negligence." *Id.* at 114.

25. See note 14 *supra*, and accompanying text.

In *Leathers v. Serrell*, 376 F. Supp. 983 (W.D. Va. 1974), the defendant's motion to dismiss on the grounds of sovereign immunity was refused. The defendant, a hospital-employed intern, treated an individual who was not officially a hospital patient. Although this was a discretionary judgment, the resulting injury occasioned the defendant's liability because he was not empowered to make such judgments. Such a decision was outside the scope of his authority as clearly delineated by statute. See VA. CODE ANN. § 54-276.7 (Repl. Vol. 1974).

liability. Moreover, it is difficult to answer. In *Crabbe v. County School Bd.*,²⁶ the defendant high school teacher was held liable for injuries to a student caused by the negligent operation of an electric saw. This holding seems to conflict with *Lawhorne*. Teaching certainly involves "supervisory functions" and "discretionary judgment" as does the administration of a hospital and the treatment of patients. Yet the court found liability in *Crabbe* for simple negligence.²⁷

B. *Intentional Torts*

If liability can be placed upon state personnel for negligent conduct under certain circumstances, it follows that liability will be imposed for intentional torts. The leading case of *Elder v. Holland*²⁸ supports this position. Elder brought a defamation action against Holland for words he repeated at a police hearing concerning Elder's character.²⁹ Holland demurred claiming that since he was required by the state, as a police officer, to testify, any damage inflicted by his words was inflicted by the state.³⁰

The court gave a brief history of Virginia's sovereign immunity cases noting that such immunity had some definite limitations: "Having concluded that a State employee may be held liable for negligent conduct, we must conclude that a State employee may be held liable for intentional

26. See note 18 *supra*.

27. This inconsistency was observed by Cochran, J., in his dissent to the majority opinion in *Lawhorne*:

In *Crabbe* we did not attempt to characterize [the teacher's] duties as either ministerial or discretionary. Indeed, the line between ministerial and discretionary functions is not always clear, for it is difficult to conceive of any official act that does not admit to some discretion in the manner of performance It would seem, however, that the duties of the teacher in *Crabbe* were no less discretionary than the duties of [the defendants in *Lawhorne*].

214 Va. at 408, 200 S.E.2d at 573.

28. 208 Va. 15, 155 S.E.2d 369 (1967).

29. Both Elder and Holland were state police officers. Elder had been charged with improperly receiving state funds to pad his expense account. While Holland was testifying at the hearing, he was asked to repeat what had been said to him previously by one of the investigators concerning Elder. "Holland said (in part): 'We talked at some length . . . and he made this statement, he said: Jack Elder is a vicious, evil, common person. He does not believe in God and you cannot do business with a man that doesn't believe in God, and you have no business with such a man in your police department.'" *Id.* at 16, 155 S.E.2d at 371.

30. The demurrer was not only based upon a claim of sovereign immunity, but also upon privilege for statements made at a hearing. The court afforded Holland a qualified privilege instead of an absolute privilege due to the informal nature of the police hearing. *Id.* at 22, 155 S.E.2d at 375. This seems contra to most jurisdictions. See Annot., 26 A.L.R.3d 505 (1969).

torts. Holland is, therefore, not immune from liability for defamatory words spoken while performing his duties as a State police officer."³¹

C. Summary

The case law discussed thus far indicates that the Virginia Supreme Court,³² although relatively traditional, is sometimes willing to grant relief against individuals for tortious conduct even though such individuals are agents or officers of the State. The burden of proof is on the plaintiff to argue one or more of the following:

1. The defendant's actions were outside his scope of authority. The plaintiff should bring to the attention of the court any statutory provisions defining the limits of the defendant's power.

2. The negligence³³ of defendant's actions brings him outside the protection of his authority. If the activity is ministerial in nature simple negligence may be enough to meet the plaintiff's burden. However, if discretionary judgment is involved, the case law indicates that a greater degree of negligence, perhaps gross negligence, must be shown.

3. The defendant's actions constitute an intentional tort. These are necessarily issues of fact. However, they are issues the court must consider before the merits are tried since the defendant will undoubtedly file a demurrer.³⁴

III. IMMUNITY FOR STATE POLITICAL SUBDIVISIONS

A. Municipal Corporations

As stated earlier, the extension of sovereign immunity to state employees and political subdivisions can best be analyzed as a function of the need for government activity free from judicial interference balanced against the

31. 208 Va. at 19, 155 S.E.2d at 372.

32. Resort to a state court is not necessarily a plaintiff's only recourse. Certain conduct by state officials subjects them to suit as individuals in a federal court under 42 U.S.C. § 1983 (1974).

33. Note that negligence may take the form of either malfeasance or nonfeasance. *Cf. Rives v. Bolling*, 180 Va. 124, 21 S.E.2d 775 (1942).

34. Sustaining the defendant's demurrer the court in *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942), said that:

There was no allegation that the defendants had stepped beyond the course of their employment. There were no facts alleged . . . to show that they were guilty of any wrongful conduct or acted wantonly or negligently. No facts were alleged to show that they were acting individually and on their own responsibility.

Id. at 228, 22 S.E.2d at 12.

need of injured parties for judicial relief. These competing needs have been greatly felt when the courts are forced to deal with issues of immunity for municipal corporations.³⁵ The logical extension of attempts to accommodate these needs has been to bifurcate municipal activities, allowing suits for wrongs committed in the performance of certain "proprietary" activities and denying liability for "governmental" functions.³⁶

Virginia is in harmony with the vast majority of jurisdictions which accept this position.³⁷ Justice Hudgins, writing for the majority of the Virginia Supreme Court in 1939,³⁸ stated the general rule of law as follows:

[A] municipality is clothed with two-fold functions; one governmental, and the other private or proprietary. In the performance of a governmental function, the municipality acts as an agency of the state to enable it to better govern that portion of its people residing within its corporate limits. To this end there is delegated to . . . a municipality . . . powers and duties to be performed exclusively for the public. In the exercise of these powers, a municipal corporation is held to be exempt from liability for its failure to exercise them or for the exercise of them in a negligent or improper manner.

There are granted to a municipal corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation. For an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages as an individual or private corporation.³⁹

Thus reads the common law of Virginia. The difficulty lies not in the statement of these basic principles of public policy, but in their application to particular circumstances.⁴⁰ In cases with unique factual settings, counsel

35. See generally Borchard, *Government Liability in Tort*, 34 YALE L. J. 1 (1924); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941); McQUILLAN, 18 MUNICIPAL CORPORATIONS §§ 52.01-53.171 (3d rev. ed. 1963).

36. PROSSER, *supra* note 2, at 977-78.

37. Virginia's first acceptance of municipal corporate immunity couched in these terms was in *Richmond v. Long's Adm'rs*, 58 Va. (17 Gratt.) 392 (1867). See also *Jones v. Williamsburg*, 97 Va. 722, 34 S.E. 833 (1900).

38. *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939). The defendant was charged with nonfeasance and misfeasance in the maintenance of a swimming resort (Shield's Lake), when the plaintiff was injured by a barbed wire fence while swimming.

39. *Id.* at 147-48, 200 S.E. at 611. The supreme court reversed a lower court judgment sustaining the defendant's demurrer based upon municipal immunity for performance of a "governmental function" (i.e., maintaining and operating the swimming resort).

40. Those who appreciate the tautology that may be involved in such reasoning know that lawyers and judges alike may be prone to decide first whether liability should be imposed (a decision reached by considering such factors as the extent of the injury,

would be wise to argue facts as they apply to his client's position and not to spend time pressing rules of law which are settled to the point of being case hard. Unique cases, then, must rely heavily upon policy not precedent.

A discussion of the Virginia Supreme Court's treatment of all the factual settings presented to it over the years is beyond the scope of this article. However, it may be of value to mention certain cases which are representative of the type of factual situations with which the court must frequently deal. For example, the court has been called upon more than once to rule upon the issues of municipal immunity with respect to proper maintenance of streets. Generally street maintenance is considered a "proprietary" function (i.e., primarily for the benefit of the municipality as a corporation rather than as an institution of government). As such, liability may be imposed upon the municipality for negligence occurring during its street maintenance operations,⁴¹ even though the public derives a common benefit therefrom.

However, in *Fenon v. City of Norfolk*,⁴² a seemingly contrary result was reached. Fenon, an infant, brought an action for injuries sustained when the automobile in which he was riding struck a tree which had fallen into a street during a storm. The storm, of hurricane proportion,⁴³ felled eight hundred trees into the streets of Norfolk. Fenon alleged that the city was under an obligation to keep the streets reasonably safe at all times, and that it had negligently failed to do so. The city answered that street maintenance was a "governmental function" and therefore no liability for negligence could be imposed. The court phrased the issue before it as such: "Was the City performing a governmental function or a proprietary function in an effort to clear its streets on *this occasion*?"⁴⁴

The court relied on its earlier ruling in *Ashbury v. City of Norfolk*,⁴⁵ in which it held that removal of garbage by the city is a governmental function: "The difficulty [in cases of this kind] lies not in the statement of

the palpability of the neglect which occasioned it, whether the imposition of liability would seriously hamper ordinary administration of the city's business, whether the harm resulted from nonfeasance or misfeasance . . .) and then express their result by classifying the function as governmental or proprietary.

Smith, *Municipal Tort Liability*, 48 MICH. L. REV. 41, 43 (1949).

41. *Nobel v. City of Richmond*, 72 Va. (31 Gratt.) 271 (1879).

42. 203 Va. 551, 125 S.E.2d 808 (1962).

43. Hurricane Donna struck the city on September 12, 1960.

44. 203 Va. at 553, 125 S.E.2d at 810 (emphasis added). Note the court's concern with the facts of this particular case, as opposed to broadly applying the general rules of law enunciated. See notes 35-39 *supra*, and accompanying text.

45. 152 Va. 278, 147 S.E. 223 (1929).

the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit."⁴⁶ It was held in the principal case that if removal of rubbish from streets is considered a "governmental function" then the removal of tree wreckage during an emergency situation is a fortiori governmental.

Similarly it has been held that operating a police force⁴⁷ is a governmental function affording the municipality immunity from suit for negligence.⁴⁸ However, it cannot be emphasized too strongly that the application of the rules of law on issues of municipal immunity is far from immutable. The amount of litigation in Virginia is not so extensive that most cases will not present factual situations which are significantly unique in some way. This is important because it allows counsel to argue persuasive authority from other jurisdictions before the court. Since there is virtually no consistency among the states on issues presented by any particular set of facts, counsel should have little difficulty in finding some support for his position.

The benefits of solidarity dictate that mention be made of the most recent case before the Virginia Supreme Court on the issues of immunity for municipal corporations. In *Virginia Electric & Power Co. v. Hampton Redevelopment & Housing Authority*,⁴⁹ VEPCO and the infant plaintiffs below sought reversal of a lower court ruling dismissing any cause of action against the Housing Authority. The infant plaintiffs, who resided in a housing project owned and operated by the Housing Authority, were injured when they came into contact with an electric "switch point box" owned by VEPCO and placed on the project property. It was alleged that both VEPCO and the Housing Authority were negligent in the maintenance, installation and location of the box. The Housing Authority claimed

46. *Id.* at 288, 147 S.E. at 226 (quoting *Bolster v. City of Lawrence*, 225 Mass. 387, 114 N.E. 722 (1917)).

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

48. Although there seems to be no Virginia case in point, it is arguable that Virginia municipalities will not be held liable even for intentional torts arising out of the operation of a police force. Support for this position may be found in *Bryant v. Mullins*, 347 F. Supp. 1282 (W.D. Va. 1972). In that case, plaintiff brought an action against a police officer of the Town of Coeburn under 42 U.S.C. § 1983 (1974), for the unlawful and intentional assault and battery of the plaintiff "with a large flashlight." The court first noted that under the Erie Doctrine it was bound by Virginia law in its consideration of the substantive issues. It continued, in dictum, as follows: "It is the opinion of this court that the Town of Coeburn, in operating and maintaining its police force, was acting in a governmental capacity and is not liable in tort for damages suffered by plaintiff in the alleged unlawful assault and battery upon him by the town's police officer." *Id.* at 1284.

49. 217 Va. 30, 225 S.E.2d 364 (1976).

that it was a political subdivision performing a "governmental function" and was, therefore, immune from suit. The lower court agreed.

The Virginia Supreme Court first dealt with the issue of whether a municipal housing authority (or any particular entity) should occupy the same status with respect to tort immunity as the municipality itself. The court, in making this determination, enunciated a two-part test: "first, what attributes of a municipality the entity possesses; and, second, in light of this initial consideration, the particular purpose for determining whether a municipal corporation is present."⁵⁰

The court held that a housing authority, brought into existence and overseen by a municipality, should occupy the same status as the municipality itself regarding tort immunity.

Thus, the second issue before the court was whether the placement of a housing project by the Housing Authority is "governmental" or "proprietary."⁵¹ In holding such function "proprietary" in nature, the court reasoned as follows:

In operating and maintaining its housing project, the Authority assumes the role ordinarily occupied by a private landlord . . . and performs functions which could as well be performed by private enterprise The special service performed by the Authority inures to the benefit of the few rather than to "the common good of all."⁵²

The lower court decision was reversed and remanded, the cause of action having been reinstated against the Housing Authority.

B. *Counties and School Boards*

In Virginia, counties are considered part of state government, organized to administer local governmental functions. As such, they enjoy the same immunity from tort liability as does the state itself. This is the unchallenged holding of *Fry v. County of Albermarle*.⁵³ In that case, the plaintiff was injured when her horse drawn buggy overturned on a county highway as the result of coming into contact with a county chain gang then working in the area. She claimed the county was liable for the negligence of the chain gang members which caused her personal injuries.

50. 217 Va. at 33, 225 S.E.2d at 367. See also *Hampton Rds. Sanitation Dist. Comm'n v. Smith*, 193 Va. 371, 68 S.E.2d 497 (1952).

51. 217 Va. at 34, 225 S.E.2d at 368. The court carefully pointed out that it was not ruling on the categorization of other Housing Authority functions.

52. 217 Va. at 36, 225 S.E.2d at 369 (citations omitted).

53. 86 Va. 195, 9 S.E. 1004 (1890).

The court rejected the plaintiff's contention that the principles governing municipal immunity should also apply to counties:

[Counties] are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . . A municipal corporation proper is created mainly for the interest, advantage and convenience of its locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large

We have been referred to numerous decisions concerning the character of the duty required of [municipal] officials, drawing a distinction where the duty is for the benefit of the general public and where it is for the benefit of a corporation, but we do not cite them. They are more distinctly applicable to municipal corporations proper than to such organizations as counties.⁵⁴

Thus, when the courts' treatment of municipal immunity is compared with that of county immunity, it becomes obvious that whether or not sovereign immunity exists depends, at least in part, upon the character of the political subdivision seeking immunity. "There is, of course, no logical reason why a county should enjoy any more immunity than a city or town."⁵⁵ But such has been the consistent position of the Virginia courts.⁵⁶

Moreover, this position invites interesting contrasts concerning the effects of decisions rendered in accordance therewith. For example, it was noted earlier⁵⁷ that municipalities may be held liable for negligent failure to maintain their streets in a safe condition. But in *Mann v. County Board*⁵⁸ it was held that under the Virginia view "no liability is incurred by a county for tortious personal injuries resulting from negligent construction, maintenance or operation of its streets, roads and highways."⁵⁹

Thus, similar injuries caused by similar public functions (e.g., street maintenance) occasion different results in terms of governmental liability depending upon the nature of the government institution involved. Justification for such divergent results is said to rest on the theory that a county occupies a different political position within the scheme of state government than does a city or town. But neither this theoretical distinction nor any pragmatic consideration seems to justify the resulting inconsistencies.

54. *Id.* at 199, 9 S.E. at 1006.

55. Eichner, *supra* note 4, at 258.

56. This seems to be contrary to the modern trend in most jurisdictions. For a comparison of Virginia with other states in this area, see Annot., 16 A.L.R.2d 1079 (1951 & Supp. 1973).

57. *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962).

58. 199 Va. 169, 98 S.E.2d 515 (1957).

59. *Id.* at 174, 98 S.E.2d at 518.

Like counties, Virginia school boards enjoy a rather wide and inflexible immunity. The issue was first brought before the Virginia Supreme Court in *Kellam v. School Board*.⁶⁰ The plaintiff in that case was injured when she slipped in the aisle of a school auditorium. She alleged that the aisle had negligently been maintained in a "slick and slippery" condition. The school board filed a demurrer which was sustained by the lower court. The Virginia Supreme Court affirmed on the grounds that a school board is an arm of the state and as such is immune from suit for tortious conduct. This decision was followed some years later, but the court found an employee co-defendant liable despite the board's immunity.⁶¹

IV. CONCLUSION

The law of sovereign immunity within the state of Virginia can best be understood as an attempt by the courts to balance the benefits of judicially unencumbered government administration against the detriments of allowing wrongful conduct to go unremedied.

Unfortunately, the effectiveness of this process is often impeded. The courts, in an attempt to reconcile long-standing principles of sovereign immunity with important modern policy considerations, have often been very unpredictable. This unpredictability is almost inevitable due to the many ambiguities surrounding the basic legal principles involved. The ministerial-discretionary dichotomy with its varying degrees of negligence is a prime example; as are the concepts of governmental and proprietary functions applied to municipalities.

Many times a plaintiff is unsure not only of his chances for a successful suit, but even of the grounds upon which his claim should be argued. Moreover, a factual situation that might allow recovery against one type of governmental defendant will prove unavailing against another type. Thus, injured parties are often left with no remedy as the result of some seemingly arbitrary judicial interpretation of key legal concepts, or because of some rigid categorization of the particular defendant involved.

In light of these impediments to the goals of sovereign immunity laws, perhaps a legislative remedy is called for. Legislatively formulated definitions of key legal concepts such as "ministerial" and "discretionary" would tend to solidify the dynamic legal mass with which we must currently deal. The legislature need not necessarily implement broad changes, sweeping away proven legal principles, but it could easily curb the judiciary's purely

60. 202 Va. 252, 117 S.E.2d 96 (1960).

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

case-by-case approach. While the value of the flexibility created through case-by-case analysis is recognized, it is submitted that some flexibility should be sacrificed to promote predictability. The ability to predict what actions of government and its agents will give rise to liability can only further the competing interests involved. Plaintiffs will benefit in that they will not waste time and money pursuing valueless litigation. Governmental administration and provision of public services will benefit because the number of frivolous and unfounded suits will be reduced.

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