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Edward W. Taylor

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A RE-EXAMINATION OF SOVEREIGN TORT IMMUNITY IN VIRGINIA

*Edward W. Taylor**

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I. INTRODUCTION — *James v. Jane*

In a hair splitting decision on June 5, 1980, the Virginia Supreme Court ruled in *James v. Jane*,¹ that attending physicians at the University of Virginia Hospital are not immune from tort liability but affirmed that the state, interns and residents of state hospitals, and employees of the state still enjoy tort immunity. The court made a distinction between the sovereign Commonwealth of Virginia and its employees, and a governmental agency created by the Commonwealth and its employees. However, apparently not all state employees are immune; and not all employees of state agencies are subject to tort liability. The court stated:

Although a valid reason exists for state employee immunity, the argument for such immunity does not have the same strength it had in past years. This is because of the intrusion of government into

* J.D., University of Richmond, 1964. Vice-president, Virginia Trial Lawyers. Sole practitioner, 601 N. Courthouse Rd., Richmond, Virginia.

1. ___ Va. ___, 267 S.E.2d 108 (1980).

areas formerly private, and because of the thousand-fold increase in the number of government employees. We find no justification for treating a present day government employee as absolutely immune from tort liability, just as if he were an employee of an eighteenth century sovereign. It is proper that a distinction be made between the state, whose immunity is absolute unless waived, and the employees and officials of the state, whose immunity is qualified, depending upon the function they perform and the manner of performance. . . .

Admittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity. . . . The difficulty in application comes when a state employee is charged with simple negligence. . . . Under such circumstances we examine the function this employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved. . . .²

Concurring with the result, Justice Cochran wrote a separate opinion joined by Justice Poff, stating:

that *Lawhorne v. Harlan*,³ should be forthrightly overruled rather than distinguished to extinction. . . .

The majority opinion attempts, unsuccessfully in my view, to distinguish 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*. Negligence is negligence—want of care and caution as an ordinarily prudent and reasonable man would have exercised under the same circumstances. Agents and employees of an immune employer who fail to meet the reasonable man test are negligent and should be held liable for their negligent acts that proximately cause injury to others.

Therefore, I would overrule *Lawhorne*, so that the judiciary and the bar will understand that the principles approved in *Crabbe* will

2. *Id.* at ___, 267 S.E.2d at 113.

3. 214 Va. 405, 200 S.E.2d 569 (1973).

be followed in Virginia as they are in the majority of other jurisdictions. The uncertainty arising from hair-splitting distinctions will then give way to a sound, logical, and certain rule of general application.⁴

Defendants in the *Jane* decision were full time faculty members at the University's medical school. Dr. Jane was Chairman of the Department of Neurosurgery at the medical school and Chief of Neurosurgery at the University Hospital. Dr. Riddervold was an associate professor of radiology and Dr. Hakala was an assistant professor of orthopedic surgery at the medical school. It was alleged on separate bases that each had committed malpractice upon private patients at the University Hospital.

Few of the fifteen pages of the court's opinion in *Jane* are necessary to justify its ultimate holding that physicians employed by a state agency and practicing in a hospital operated by such an agency are not immune from an action for malpractice. The decision, however, represents a further, laudable inroad into the waning doctrine of sovereign immunity, which is long overdue for extinction. It is regrettable that the majority restated the proposition that the immunity of the state "is absolute unless waived."⁵

II. ORIGINS OF THE SOVEREIGN IMMUNITY DOCTRINE

The history of sovereign immunity has been carefully traced by many writers. One commentator capably points out that sovereign immunity was "windblown" across the Atlantic; how the doctrine, in light of the Revolutionary War, ever came to America is "one of the mysteries of legal evolution."⁶

The birth of the doctrine of sovereign immunity was in the celebrated 1788 English case of *Russell v. Men of Devon*,⁷ twelve years

4. — Va. at —, 267 S.E.2d at 115.

5. *Id.* at —, 267 S.E.2d at 113.

6. Eichner, *A Century of Tort Immunities in Virginia*, 4 U. RICH. L. REV. 238 (1970). See generally *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975); *Jones v. Knight*, 373 So. 2d 254, 259 (Miss. 1979) (Bowling, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 895A (Tent. Draft No. 19, 1973); Note, *Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future*, 10 SUFFOLK U.L. REV. 521 (1975) [hereinafter cited as *Governmental Tort Immunity*].

7. *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1788).

after the Declaration of Independence and the enactment of the Constitution of Virginia.⁸ In *Men of Devon*, the English court, influenced by the lack of insurability and the absence of county funds, extended the immunity of the King to an unincorporated county. For the same reasons twenty-four years later, the first American court, adopted the doctrine of sovereign immunity.⁹

While reception statutes such as that enacted in Virginia¹⁰ recognized prior English common law as the rule of decision, it is debatable whether English common law prior to 1776 was ever intended to be the substantive law of this state.¹¹ How the doctrine ever took hold in Virginia is especially curious since the Virginia court recognized as early as 1806 that "no decision in England since our independence commenced, has any authority in this Court."¹² Why the doctrine, first recognized in Virginia in 1839¹³ or 1849,¹⁴ has remained is even more curious since the English Parliament abolished sovereign immunity in 1947.¹⁵

8. The Declaration of Independence was signed July 4, 1776; The Constitution of Virginia was enacted in June of the same year.

9. *Mower v. Leicester*, 9 Mass. 247 (1812).

10. VA. CODE ANN. § 1-10 (Repl. Vol. 1979) provides: "The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

11. See, e.g., Judge Seiler's explanation in *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 228 (Mo. 1977) that the Missouri reception statute "did not adopt the English common law as a substantive statute, but rather as decisional law."

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

13. *Sayre v. Northwestern Turnpike Rd.*, 37 Va. (10 Leigh) 474, 476 (1839) (action would not lie against Turnpike Company "composed as it is exclusively of officers of the government, having no personal interest in it or in its concerns, and only acting as the organ of the Commonwealth in effecting a great public improvement"; sovereign immunity not expressly mentioned).

14. *Dunningtons v. Northwestern Turnpike Rd.*, 47 Va. (6 Gratt.) 160 (1849). In dictum, the Virginia Supreme Court, without cited authority, made what appears to be its first express pronouncement of the sovereign immunity doctrine.

It is not pretended that an individual can maintain an action against the State, unless she consents to submit herself to the jurisdiction of the Courts; but this exemption the State may waive, and in fact has done so, by authorizing individuals to proceed against her in certain designated Courts for claims against her.

Id. at 170.

15. Crown Proceedings Act, 1947, 10 & 11 Geo., 6, c.44, § 2 (Crown liable for tortious acts of its servants or agents). Furthermore, it was judicially recognized in England 71 years ago that a public hospital is liable for its torts. See *Hillyer v. St. Bartholomew's Hosp.*, [1909] 2 K.B. 820, 825.

III. THE CASE FOR JUDICIAL ABROGATION

“That the doctrine was adopted in this country after the Revolutionary War, which in part resulted from the ‘King can do no wrong’ concept, seems to have been against what the framers of the Constitution fought for at that time.”¹⁶ Since Americans have never had a king, this monarchastic view of immunity is contrary to the principle of American tort law—that liability follows tortious injury. It furthermore appears to contradict the prevailing notions of *respondeat superior*. Perhaps the most convincing reason advanced for the doctrine’s continued existence is simply that it has become deeply embedded in the common law and now exists “only by the force of inertia.”¹⁷

Where the legitimate purpose of a doctrine no longer exists and its application produces unjust results, it should not be retained on the grounds of *stare decisis*. As Justice Holmes stated:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.¹⁸

Where precedent can no longer be supported by reason and justice, it is the duty of the courts to re-examine and overrule court-made law. Chief Justice Erickstand of the North Dakota Supreme Court perceived that:

If it were the sole purpose of this court to decide today’s controversies in light of its earlier decisions, much of our work could be taken over, after proper programming, by a computer, and in this instance our labor would end by applying the 1910 decision to the facts of this case.¹⁹

The doctrine of sovereign immunity was created by judicial edict; therefore, the judiciary has the power to correct, and should be

16. *Jones v. Knight*, 373 So. 2d 254, 259 (Miss. 1979) (Bowling, J., dissenting).

17. *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961).

18. O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 187 (1920).

19. *Lembke v. Unke*, 171 N.W.2d 837, 840 (N.D. 1969).

willing to accept the responsibility for correcting, its own error.

Indeed, the Virginia Supreme Court has previously recognized this responsibility with respect to other immunity doctrines. In *Smith v. Kauffman*,²⁰ the court abolished the immunity between parent and child. Reversing a 1934 decision, the court pronounced:

In later years, economic, social and legislative changes have caused a judicial reaction to the earlier views. Modern methods of business, new or enlarged occupational capacities and the advent of the automobile and liability indemnity insurance have placed the parties in a different position. Therefore, the effect of the earlier decisions must be considered in relation to the occasion, facts and laws upon which they are based. A correct determination of each case must necessarily depend upon its facts and circumstances and the law applicable thereto. Rules of thumb must give way to rules of reason.²¹

On the same day that *Kauffman* was decided, the court held in *Surratt v. Thompson*²² that part of the rule of interspousal immunity deserved the same fate. In overruling a 1918 decision, Justice Gordon wrote for the majority that the nature of the common law must be considered.

“One of the great virtues of the common law is its dynamic nature that makes it adaptable to the requirements of society at the time of its application in court. There is not a rule of the common law in force today that has not evolved from some earlier rule of common law, gradually in some instances, more suddenly in others, leaving the common law of today when compared with the common law of centuries ago as different as day is from night. The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Dean Pound posed the problem admirably in his *Interpretations of Legal History* (1922) when he stated, ‘Law must be stable, and yet it cannot stand still.’”

Nothing in the nature of the common law required us in . . .

20. 212 Va. 181, 183 S.E.2d 190 (1971).

21. *Id.* at 183, 183 S.E.2d at 192-93 (quoting *Worrell v. Worrell*, 174 Va. 11, 20, 4 S.E.2d 343, 346-47 (1939)).

22. 212 Va. 191, 183 S.E.2d 200 (1971).

[*Kauffman*] . . . to adhere to a parental immunity rule that no longer appeals to reason under today's high incidence of insurance covering automobile accidents. Likewise, nothing in the nature of the common law requires us to adhere to an outmoded concept that a wife cannot so separate herself from her husband's flesh as to be capable of maintaining an action against him. We therefore hold that the plaintiff can maintain this action.²³

Furthermore, the Virginia Supreme Court abandoned the parent-child and husband-wife immunity rules in the face of legislative inaction. Accordingly, bills relating to the abrogation of governmental immunity that have been introduced in the legislature but have failed to gain approval should not militate against judicial correction of an outmoded concept.²⁴

A. *Reasons Advanced in Support of the Doctrine*

Various substantive arguments have been advanced in favor of governmental immunity: (1) the absurdity of a wrong committed by an entire people; (2) a preference that one individual should suffer a loss rather than inconvenience all the people; (3) the idea that whatever the state does must be lawful; (4) the derivative theory that an agent of the state is always outside the scope of his authority when he commits any wrongful act (since the King could do no wrong, he could not, of course, validly authorize one of his ministers to do wrong); (5) a reluctance to divert public funds to compensate for private injuries; and (6) the inconvenience and embarrassment which would descend upon the state government should it be subjected to such litigation.²⁵

The recent Missouri decision²⁶ abolishing sovereign immunity in that state pointed out the foundations and weaknesses of these arguments offered by the English common law to justify the exist-

23. *Id.* at 193-94, 183 S.E.2d at 202 (quoting *State v. Culver*, 23 N.J. 495, 505, 129 A.2d 715, 721 (1957)). *But see* *Counts v. Counts*, ___ Va. ___, ___ S.E.2d ___ (June 6, 1980) (limited revival of interspousal immunity in intentional tort suit); *see also* Senate Bill No. 542 (Feb. 5, 1981) (to be codified at VA. CODE ANN. § 8.01-220.1) abolished interspousal immunity in tort cases.

24. *See* notes 74-87 *infra* and accompanying text. *See also* Appendices.

25. *See* note 6 *supra*.

26. *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977).

tence of the doctrine:

The first justification came from the early English cases in which it was said that a suit against a governmental unit such as a town or village was actually a suit against all members of the public, as at that time such governmental units did not have corporate or quasi-corporate existence and were without corporate funds to satisfy judgments. Great inconvenience to the public would result as defendants of means who were required to pay sought contribution from other members of the public. . . . [T]his argument has lost all forcefulness since today government units have a corporate or quasi-corporate existence and possess corporate funds.

Second, public policy as expressed in the early English cases held that it was better for the injured individual to bear a loss than the public which would then be forced to suffer an inconvenience. This concept was rejected by us in *Garnier v. Saint Andrew Presbyterian Church*, 446 S.W.2d 607 (Mo. 1969).

Third, the often quoted maxim that the king can do no wrong has been offered frequently to justify the continued existence of the doctrine. Modern governmental entities cannot, however, lay claim to that inheritance.

The fourth justification declares that public officers are without authority to bind the sovereign without constitutional or statutory authorization. Moreover, the argument continues, any such ability to bind the sovereign would lead inexorably to the wasteful and dishonest dissipation of public funds. We cannot expect that plaintiffs in suits against governmental units will take on any particular personality trait any more so than plaintiffs in other tort actions. Likewise, it cannot be expected that if government is to be subject to suit in tort that government employees will dishonestly dissipate public funds or disburse them in any fashion except in response to court judgments. Additionally we believe that government should both have the benefits of its agents' and employees' acts and the responsibility of them. The doctrine of respondeat superior, in short, should apply to government and its employees.

The fifth justification advanced is the trust fund theory. Its premise is that money which is appropriated to various governmental units is allocated to special purposes for which the funds are held in trust and that to use them to satisfy tort judgments would violate the trust. . . . [T]he rationale of this theory relates to satisfaction of a judgment, not with whether there is or should be a cause of action. It does not provide a sound basis for maintaining the doc-

trine of sovereign immunity.

The sixth justification is that without the doctrine, the financial stability of government will be threatened and the proper performance of government functions will be impaired. . . . First, it is a proper purpose of government to stand responsible for its tortious conduct. Second, there is no empirical data demonstrating that the abrogation of the doctrine will substantially impair the financial stability of government to such an extent that there will be an interference with the performance of governmental functions. In addition, the prospective application of the doctrine . . . provides a transition period, giving time for financial planning to accommodate the change. Continuation of the doctrine is not justified on the basis that financial stability of government will be threatened or proper performance of its functions impaired.²⁷

B. *Reasons Advanced Against the Doctrine*

The rule of governmental immunity has been said to be "[l]ogically indefensible" and contrary to fundamental tort principles that liability should follow negligence.²⁸ Individuals and corporations should respond in damages for the negligence of employees acting within the scope of their employment; and, by extension, state and local governmental entities should not be allowed to deny responsibility for the same types of wrongdoing in the course of public business that would incur tort liability in private business. As Justice Cochran stated in his concurring opinion in *James v. Jane*, "Negligence is negligence."²⁹ Thus the prevailing notion in the country is that the government should compensate tort victims for the negligence of its employees just as it must pay for goods, services and other costs of carrying out the public business.³⁰

Courts have a duty to insure that litigants secure substantial justice. To deny plaintiffs access to the courts on the basis of governmental immunity is an abdication of that responsibility. The

27. *Id.* at 228-29 (citations and footnotes omitted).

28. *Morash & Sons, Inc. v. Commonwealth*, 363 Mass. 612, ___, 296 N.E.2d 461, 465 (1973).

29. ___ Va. ___, ___, 267 S.E.2d 108, 115 (1980) (Cochran, J., concurring).

30. *See, e.g., Dalehite v. United States*, 346 U.S. 15, 24 (1953) (government should assume obligation to pay damages caused by public employees); *Evans v. Board of County Comm'rs*, 174 Colo. 97, 100, 482 P.2d 968, 970 (1971) (local government should respond in damages, just as business must, for torts of employees).

Commonwealth of Virginia has long been amenable to suit in contract;³¹ and no principle appears to justify distinguishing a contract from a tort for the purpose of determining state liability. Presumably, if the state can do no wrong, then it cannot breach a contract. A citizen's right to redress should not depend on whether his claim sounds in tort or in contract. Indeed, the old distinctions of tort and contract are less important today. By statute, Virginia now permits joinder of suits in tort and contract.³²

Liability is the rule for negligent or tortious conduct; immunity is the exception. As has been pointed out, abrogation of the outmoded immunity rule does not transgress the proper limits of *stare decisis* or the judicial function. When a rule, after it has been tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be no hesitation to completely abandon it.³³

The doctrine and its exceptions operate in such an illogical manner that serious inequality results. One commentator has noted that the governmental-proprietary distinction in municipal torts has led to recovery by a citizen injured *in* a vehicle of the city *water* department, whereas a citizen negligently injured by a vehicle of the city *health* department of the same city could not recover.³⁴ A dissenting justice in a recent Ohio case observed that a citizen

may risk injury by walking down a street where a sewer is being *maintained* or by attending a program at a municipal auditorium or by unwittingly placing himself in the range of a policeman driving negligently and know that he may sue the municipality for his injuries. . . . If, however, he walks down a street where a sewer is being *constructed*, or visits a municipal zoo, or, . . . he unwittingly places himself in the range of a policeman who allegedly negligently shoots

31. See Higginbotham's Ex'rx v. Commonwealth, 66 Va. (25 Gratt.) 627, 637-38 (1874); VA. CODE ANN. §§ 8.01-192, -255 (Repl. Vol. 1977).

32. VA. CODE ANN. § 8.01-272 (Repl. Vol. 1977 & Cum. Supp. 1980) (overruling prior case law and permitting joinder of tort and contract claims provided all claims so joined arise out of the same transaction or occurrence).

33. B. CARDOZO, SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, 107, 152 (1947), quoted in *Nieting v. Blondell*, 306 Minn. 122, ___, 235 N.W.2d 597, 601 (1975).

34. Eichner, *supra* note 6, at 255.

him, he has no recourse against the city.³⁵

As Justice Cochran has repeatedly pointed out in his opinions for the Virginia Supreme Court, there is no logic to being able to sue an employee of a state "agency" but being forbidden to sue an employee of the state itself;³⁶ or for that matter, being able to sue a state employee for defamation (an intentional tort),³⁷ but not for simple negligence for injury to his property.³⁸ A school board, by statute, can be sued for the negligence of its school bus driver³⁹ but cannot be sued for its negligent maintenance of an aisle of a school auditorium⁴⁰ or for negligently maintaining a defective and improperly equipped power saw in a school shop class.⁴¹ A city housing authority can be sued in tort because it enjoys the same status as the municipality which brings it into existence;⁴² but a tunnel district created by legislative act, with the provision that it "may sue and be sued," cannot be sued by a passenger for the negligent

35. *Haas v. Hayslip*, 51 Ohio 135, —, 364 N.E.2d 1376, 1381 (1977) (Brown, J., dissenting).

36. *See, e.g., James v. Jane*, — Va. at —, 267 S.E.2d at 115. *Compare Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973) (plaintiff could not sue intern, resident and hospital administrator because they were performing "discretionary" duties as state employees) *with Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968) (student could sue a shop teacher for negligently permitting him to use a defective power saw and failing to instruct him properly in its use) *and Short v. Griffiths*, 220 Va. 53, 255 S.E.2d 479 (1979) (student who cut his feet on glass while running on school track could sue the athletic director, baseball coach and building and grounds supervisor because the school board is a state "agency").

37. *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967) (state police officer could be sued for defamation).

38. *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942) (landowner could not sue state employees for damaging his property by negligently using explosives during construction of a pipeline).

39. VA. CODE ANN. § 22.1-194 (Repl. Vol. 1980) (governmental immunity no defense to action against school board up to limits of its insurance for negligent operation of school bus).

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

41. *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968) (student's action against school board dismissed, but upheld as against the shop teacher); *see note 36 supra* and accompanying text.

42. *Virginia Elec. & Power Co. v. Hampton Redev. & Housing Auth.*, 217 Va. 30, 225 S.E.2d 364 (1976) (Housing Authority not immune to suit by children who came in contact with an electric switching panel box allegedly negligently located, installed, and maintained on housing project property).

operation of a bus.⁴³ If a city fireman negligently injures someone while putting out a fire, the city is immunized from liability; but if the fireman tears a wall down five days after the fire has been extinguished, the city will be liable for damages to an adjoining property owner caused by the fireman's negligence.⁴⁴ A city is liable for the negligent maintenance of its streets; but a town or county is not.⁴⁵

The doctrine leads to still other unbalanced results. In 1978, a state prisoner settled (for \$519,000) a personal injury suit against the Director, Medical Director, Warden, Administrator and several doctors and nurses of the Virginia Department of Corrections and Central State Hospital. Plaintiff alleged the defendants repeatedly administered excessive and unprescribed amounts of dangerous behavior modifying drugs which resulted in the permanent and almost total paralysis of his legs and arms. Due to further alleged indifference by the defendants, the prisoner thereafter developed massive bedsores over his entire body, which, left untreated and neglected, became severely infected with maggots and threatened his life. The action was initiated in federal court pursuant to the Civil Rights Act, 42 U.S.C. § 1983, to redress the alleged deprivation, under color of state law, of rights secured by the eighth and fourteenth amendments of the United States Constitution.⁴⁶

43. *Elizabeth River Tunnel Dist. v. Beecher*, 202 Va. 452, 117 S.E.2d 685 (1976) (Tunnel District which operated shuttle bus during construction to a tunnel under the Elizabeth River held immune from suit by woman who was injured while boarding a bus).

44. *Burson v. City of Bristol*, 176 Va. 53, 10 S.E.2d 541 (1940).

45. *City of Norfolk v. Travis*, 149 Va. 523, 140 S.E. 641 (1927). See generally 17 M.J., *Streets and Highways* §§ 114-37 (Repl. Vol. 1979); Comment, *Liability of Virginia Municipalities for Defects in Streets and Sidewalks*, 29 VA. L. REV. 960 (1943).

46. *Henry Tucker v. Terrell Don Hutto*, C.A. No. 78-0161-R (E.D. Va. 1978); conversation with Stephen W. Bricker (Bricker and Zerkin, Richmond, Virginia, counsel for plaintiff).

Title 42 U.S.C. § 1983 (1976) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Governmental immunity does not shield individual defendants against § 1983 claims. See *Gomez v. Toledo*, 446 U.S. 1031 (1980); *Carlson v. Green*, 446 U.S. 14 (1980) (damage action in federal court against federal officials for violations of deceased inmate's eighth amendment rights held available notwithstanding availability of remedy in Federal Torts Claims

In contrast, in 1979, the Virginia Supreme Court refused to grant a writ of error and sustained a plea of sovereign immunity in a case brought by a thirteen year old boy who had suffered deafness because of the overprescription and overdose of streptomycin while the boy was an infant patient at the Medical College of Virginia Hospital in 1964.⁴⁷ Thus, prisoners whose civil rights are violated can sue for the malpractice of state physicians (including interns and residents) but private paying patients still cannot sue for the negligence of a state hospital or its interns and residents. Other anomalous results are apparent. For instance, a young court-appointed attorney can be sued for damages for malpractice in representing his court-appointed client;⁴⁸ but a resident at M.C.V. Hospital, although he also serves the state, is immune from such suits.⁴⁹

Furthermore, the legislative claims procedure⁵⁰ is an inadequate means of compensating deserving plaintiffs who are injured as a result of state negligence. The claims system is fraught with politi-

Act); *Owen v. City of Independence*, 445 U.S. 622 (1980) (municipalities are "persons" under Act and not entitled to qualified immunity by asserting good faith of municipal officials as defense to § 1983 violation). A right of action for damages can also be inferred from the Constitution. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See generally Crocker, *When Cops are Robbers: Municipal Liability for Police Misconduct Under Section 1983 and Bivens*, 15 U. OF RICH. L. REV. 295 (1981).

47. *Goodall v. M.C.V. Hospital*, Record No. 790732, (writ of error refused 1/11/80).

48. *Ferri v. Ackerman*, 444 U.S. 193 (1979). An attorney who had been appointed by a federal district court to represent an indigent defendant in a federal criminal trial pursuant to the Criminal Justice Act of 1964 was not immune to a civil suit for damages for malpractice in a Pennsylvania state court.

[H]is duty is not to the public at large, except in [a] general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.

Id. at 204 (footnotes omitted).

49. *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973).

50. See Special Relief Bills indexed under Appropriations, *Acts of General Assembly of the Commonwealth of Virginia*. See generally VA. CODE ANN. § 2.1-223.1 to -223.6 (Repl. Vol. 1979), providing for claims against the Commonwealth, and VA. CODE ANN. § 8.01-192 to -194 (Repl. Vol. 1977), providing for recovery of such claims.

cal favoritism and its further maintenance is an unnecessary financial and administrative burden to the General Assembly.⁵¹ No one can seriously maintain that the damages awarded by the Legislature in such cases are consistent or constitute fair and just compensation to those injured. Furthermore, the state might not have been held liable for the damages in all cases if sovereign immunity had been waived and these claims fully litigated. Moreover, considerable legislative time is expended in handling these claims when more pressing business is at hand.

51. For example, in 1979 a total of \$36,250.40 was awarded to ten separate claimants under private relief bills. See 1979 Va. Acts, Vol. 1, 843-45, 850-53. The largest award of \$15,423.68 went to the parents of a fifteen year old girl who was admitted to MCV Hospital with a high temperature, was negligently released, went into a coma and died; \$5,000 was awarded to a College of William & Mary student who was abducted and shot in the head; \$999 was awarded to the owner of an automobile that had been stolen and wrecked by youthful prisoners who were improperly supervised; \$3,000 was awarded for the death of a Central State Hospital inmate who had been murdered by another inmate who was improperly supervised; \$2,650 was awarded to an inmate of a penal unit whose hand was caught in a meat grinder due to the negligence of a fellow prisoner; \$1,000 was awarded to a prisoner who had been placed in a hole after refusing to work because lard had fallen on his back and he suffered back pain; \$700 was awarded to the family of a man for the loss of a car after the man had been shot and his body had lain in the highway for thirty-six hours without discovery by the State Police which failed to patrol; \$1,700 was awarded to a landowner for expenses in reopening a ditch wrongfully closed by the Department of Highways and Transportation, causing damages to crops; \$10,447.60 was awarded to a claimant whose property was damaged as a result of the Division of Forestry's negligence in burning woodland; \$4,853.23 was awarded to a thirty year old carpenter, burned while saving the residents of a burning home, and subsequently awarded the Carnegie Medal; \$5,900.57 was awarded to an electric company for an error in a contract for services at the College of William & Mary involving the installation of electric fixtures.

During the period 1970-1980, the General Assembly awarded a total of \$1,017,728.15 to claimants, as follows:

1970	\$122,475.00
1972	70,277.61
1973	88,041.32
1974	56,094.02
1975	132,977.30
1976	110,283.00
1977	178,018.44
1978	179,803.58
1979	36,250.40
1980	43,507.48
TOTAL	\$1,017,728.15

Letter from K. Marshall Cook, Esq., Staff Attorney, Division of Legislative Services, to members of the Courts of Justice Subcommittee Studying Senate Bill No. 196 (Nov. 26, 1980) (copy in the *University of Richmond Law Review* office).

The threat of multiple lawsuits is not a tenable basis for denying plaintiffs access to the courts of this state. Every citizen of this state has a right to be protected by the government in the enjoyment of his life, liberty and property.⁵² No individual can match the state's vast resources. Placing the financial burden upon the state, which is able to distribute its losses throughout the populace, is more just and equitable than forcing the individual who is injured to bear the entire burden alone. Moreover, the state can self-insure against such losses or adequate insurance can be secured to eliminate the potential burden in a satisfactory manner.

Governmental responsibility is needed more today than ever. There is hardly any sector of private life and activity free from governmental intervention. As Justice Harrison observed, government has intruded "into areas formerly private" and there has been a "thousand-fold increase in the number of government employees."⁵³ The various state agencies and their employees not only defy inventory, but also enjoy immeasurable control over the people whom they purport to serve. It is not the policy of the Commonwealth of Virginia to permit employees of agencies to injure private citizens, whether intentionally or carelessly. Indeed, suits against state employees for intentional and grossly negligent torts have been permitted.⁵⁴

It is and should be the policy of the state, enforced through its courts, to require boards and agencies to act responsibly, or be subject to answer in court. To say that there is a right for every wrong, except in cases of injury by the sovereign state, is contrary to the notion that the courts shall always be open to redress wrongs. Why should innocent victims be protected under the law requiring businesses to purchase insurance but not be protected from the state or its agencies who could also be adequately insured?

C. National Trend to Abolish the Doctrine

Sovereign immunity is now the exception rather than the rule in

52. VA. CONST. art. 1, §§ 1, 3.

53. *James v. Jane*, ___ Va. at ___, 267 S.E.2d at 113.

54. *Crabbe v. School Bd.*, 209 Va. 356, 164 S.E.2d 639 (1968); *Elder v. Holland*, 208 Va. 15, 155 S.E.2d 369 (1967); *Sayers v. Bullar*, 180 Va. 222, 22 S.E.2d 9 (1942).

most states, Virginia being an obvious exception. It is generally conceded that only about four states now retain the traditional rule of sovereign immunity at both the state and local levels.⁵⁵

In abolishing sovereign immunity in that Commonwealth in 1977, the Massachusetts Supreme Judicial Court observed:

Massachusetts is one of only five remaining States which retain the common law immunity at both the State and local levels. Forty-five States have modified and at least partly eliminated the defense of immunity in tort actions against municipal corporations. All except thirteen States have abolished or limited the defense in suits against the State.⁵⁶

One month later, the Supreme Court of Missouri observed, with respect to state immunity, "as of the date of this opinion, twenty-nine States and the District of Columbia, have, by judicial decision, either completely or to varying degrees, abrogated the doctrine of sovereign immunity from tort liability."⁵⁷

A year earlier, the Minnesota Supreme Court noted:

The modern trend in this country supports our decision to abolish governmental immunity. A large number of states have abolished the defense of sovereign immunity as it applies to local governmental units. Many of the states, including Minnesota, have done so judicially, although some states have done so by statute.

A significant number of states have also abolished the tort immunity of the state itself. While most of these states have done so by statute, ten states and the District of Columbia have abolished immunity judicially.⁵⁸

55. See, e.g., *Whitney v. City of Worcester*, 373 Mass. 208, ___, 366 N.E.2d 1210, 1213 (1977) (abolishing sovereign immunity in Massachusetts subsequent to the 1975 publication of Note, *Governmental Tort Immunity*, *supra* note 6); *Hicks v. State*, 88 N.M. 588, ___, 544 P.2d 1153, 1158 (1976); RESTATEMENT (SECOND) OF TORTS § 895B, C (Tent. Draft No. 19, 1973); Lambert, *Tort Law*, 36 ATLA L.J. 20, 36 (1976); Note, *Governmental Tort Immunity*, *supra* note 6, at 523 n.12.

56. *Whitney v. City of Worcester*, 373 Mass. at ___, 366 N.E.2d at 1213.

57. *Jones v. State Highway Comm'n*, 557 S.W.2d 225, 227 n.1 (Mo. 1977) (citing the relevant judicial authorities).

58. *Nieting v. Blondell*, 306 Minn. at ___, 235 N.W.2d at 602 & n.11, 12 (citing relevant statutory and judicial authorities).

Also in 1976, one commentator observed:

Forty-five jurisdictions now refuse to recognize the defense of immunity in tort actions against municipal corporations. In addition, all except thirteen states have abolished or limited the defense in suits against the state. [At this time,] Massachusetts is one of only five jurisdictions retaining common-law immunity at both state and local levels. . . . The others are Delaware, Maryland, South Dakota, and Virginia.⁵⁹

States which in the last decade have judicially abolished sovereign immunity in one form or another are: New Jersey (1970);⁶⁰ Idaho (1970);⁶¹ Louisiana (1973);⁶² New Mexico (1974);⁶³ Minnesota (1975);⁶⁴ Alabama (1975, municipalities);⁶⁵ Kansas (1975);⁶⁶ Missouri (1977);⁶⁷ Massachusetts (1977);⁶⁸ Pennsylvania (1978);⁶⁹

59. Note, *Governmental Tort Immunity*, *supra* note 6, at 524 & n.14. An excellent description of the trend is contained in Lambert, *supra* note 55, at 22.

The progressive repudiation of governmental immunity, while not complete, continues at an accelerating pace. In Restatement (2d) Torts, Special Note § 895B at 21 (Tent. Draft No. 19, March 30, 1973), some 38 states are listed which have totally or partially abolished governmental immunity or held that specific statutory authority to buy liability insurance constitutes a waiver of immunity to the extent that authorized insurance coverage is actually procured.

At least 2 dozen of these states have abolished the tort immunity of the state itself, about half by statute and half by judicial decision. The nose-count is also given in the *Nieting [v. Blondell]* opinion. . . . Note that since our nose-count in 1974, another half dozen states must be added to the procession of those discarding or limiting the unjust governmental immunity rule. . . .

. . . .

The accelerating retreat toward extinction of the governmental immunity doctrine thus encourages the hope that Roche's poem, "The Net of the Law," has been amended by the current drive to place the state and subordinate governmental agencies under the Rule of Law: "The net of law is spread so wide,/No sinner from its sweep may hide./Its meshes are so fine and strong,/They take in every child of wrong./Wondrous web of mystery,/The biggest fish along [the States] escape from thee."

60. *Willis v. Department of Conservation and Economic Dev.*, 55 N.J. 534, 264 A.2d 34 (1970).

61. *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).

62. *Board of Comm'rs v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973).

63. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1976).

64. *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975).

65. *Jackson v. City of Florence*, 294 Ala. 592, 320 So. 2d 68 (1975).

66. *Brown v. Wichita State Univ.*, 217 Kan. 279, 540 P.2d 66 (1975).

67. *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977).

68. *Whitney v. City of Worcester*, 373 Mass. 208, 366 N.E.2d 1210 (1977).

Oklahoma (1980, state hospital liable).⁷⁰ Two states have recently retained the doctrine. Although declaring in 1979, "Abrogation of sovereign immunity strongly appeals to the sentiments of us all," the Mississippi Supreme Court refused to abandon it.⁷¹ In 1977, Ohio judicially retained the doctrine as to municipalities although a statute abrogates state immunity.⁷² Some of the states which have recently abolished the doctrine have done so prospectively, thus allowing the legislatures an opportunity to pass enabling legislation.⁷³

IV. LEGISLATIVE ATTEMPTS IN VIRGINIA TO ABOLISH SOVEREIGN IMMUNITY

In 1974, House Resolution Number 20 authorized the Committees for Courts of Justice to study the doctrine of sovereign immunity, and resulted in the preparation of House Document Number 31, "Report of the Senate and House Committees for Courts of Justice on Governmental Immunity to the Governor and the General Assembly of Virginia" (1975). The Report found the doctrine to be "firmly embedded in the common law of the Commonwealth." The subcommittee drafted a "model" bill which was made a part of the Report, and recommended its circulation to all localities and state agencies with the hope that "enough interest will be generated so that in the 1976-1977 session of the General Assembly, appropriate legislation may be put together that will be mutually beneficial to the Commonwealth and its citizens." The "model" bill would only have waived immunity in certain cases. These were listed as follows:

- (a) Contractual obligations
- (b) Injury resulting from the negligent operation of a motor vehicle by an employee;
- (c) Injuries caused by dangerous or defective conditions of public buildings, or the premises adjacent thereto which are open to the

69. *Mayle v. Pennsylvania Dep't of Highways*, 479 Pa. 384, 388 A.2d 709 (1978).

70. *Hershel v. University Hosp. Foundation*, 610 P.2d 237 (Okla. 1980).

71. *Jones v. Knight*, 373 So. 2d 154, 257 (Miss. 1979).

72. *Haas v. Hayslip*, 51 Ohio St. 2d 135, 364 N.E.2d 1376 (1977).

73. *E.g.*, *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977); *Nieting v. Blondell*, 306 Minn. 122, 235 N.W.2d 597 (1975).

public;

- (d) Negligence in performing services related to the supplying of water, electricity, gas, food, lodging, recreation and the collection of sewerage, garbage, liquid and solid waste, or repairing or maintaining streets, highways, sidewalks, curbs or street gutters.

In addition, section 13 of the "model" bill excepted discretionary functions, regardless of whether the discretions involved were abused.

The "model" bill defined "state" as meaning "the Commonwealth of Virginia or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality thereof." Despite the recommendations of the Courts of Justice committees, the legislature decided not to adopt the "model" bill as it then stood.⁷⁴

Several bills to abolish sovereign immunity were introduced during the 1980 Virginia legislative session.⁷⁵ House Bill Number 833 would have abolished governmental immunity as to the state, counties, agencies and employees thereof

where at the time of the alleged negligence such governmental body or employee, as the case may be, is covered against liability for such negligence by insurance; provided, however, that the amount of any recovery available in such negligence action shall be limited to the amount of such liability insurance coverage available.⁷⁶

This is the same approach that was used in Virginia to abolish by statute the immunity of charitable hospitals; recovery is limited to \$100,000 or the limits of insurance coverage, if greater.⁷⁷ Because House Bill Number 833 contains permissive rather than mandatory language authorizing the purchase of insurance, its insurance waiver approach would not appear to afford an effective

74. See Brief for Appellee at 20-21, *James v. Jane*, ___ Va. ___, 267 S.E.2d 108, wherein the history of the subject legislation is capably outlined by counsel; appellees maintained that the doctrine of sovereign immunity should remain in force until such time as the Commonwealth through the General Assembly consents to be sued.

75. For ease of reference, the bills and subsequent amendments discussed herein are reproduced in full in the Appendices.

76. H.B. 833 (Feb. 4, 1980). See Appendix 1.

77. VA. CODE ANN. § 8.01-38 (Repl. Vol. 1977).

means of abolishing tort immunity in Virginia. For instance, only those counties, towns, and agencies which, in their discretion, might elect to carry the insurance would ultimately bear the cost of a plaintiff's injury. Other deserving plaintiffs would go uncompensated. Also introduced during the 1980 legislative session was Senate Bill Number 196.⁷⁸ This Bill would enact a State Torts Claims Act with a \$25,000 limit upon liability and a strict six months notice provision. There seems to be little justification for these limiting provisions, making that bill an equally undesirable resolution to the problem in Virginia. Both of these bills were carried over to the 1981 Session of the General Assembly.

House Bill Number 938⁷⁹ offered an approach similar to House Bill Number 833 but was directed toward state health care providers. It had a similar proviso: "Provided, however, where the health care provider is covered against liability for malpractice by insurance, the amount of recovery available to the plaintiff in any such malpractice action shall be limited to the amount of the liability coverage available." Again, presumably if the state health care provider chose not to carry insurance there would be no waiver of immunity. As a practical matter, however, the state hospitals do carry insurance, usually up to \$1,000,000 coverage. House Bill Number 938 passed the House Courts of Justice Committee by a narrow 9-7-1 vote and was amended by agreement on the House floor⁸⁰ to track the language of the statute mentioned above governing charitable hospitals⁸¹ and to limit recovery to physicians only. The original proviso was deleted, substituting the following language: "Provided that where such physician is insured against liability for negligence or other tort in an amount not less than one hundred thousand dollars for such occurrence, he shall not be liable for damages in excess of such insurance."

According to the *Richmond Times-Dispatch*, "That measure was shouted down by the delegates after opponents warned that it could force up the malpractice insurance premiums paid by state-

78. S.B. 196 (Jan. 22, 1980). See Appendix 2.

79. H.B. 938 (Feb. 4, 1980). See Appendix 3.

80. The Cohen Amendment to H.B. 938 is set forth in Appendix 3.

81. VA. CODE ANN. § 8.01-38 (Repl. Vol. 1977). See text accompanying note 77 *supra*.

supported hospitals."⁸² One of the delegates represented to the House that he had received a letter from counsel for the Virginia Hospital Association to the effect that premiums for some 16 state hospitals, including Medical College of Virginia (MCV) and University of Virginia (U. Va.) Hospitals, would increase from approximately \$860,000 per year to \$5,820,000 annually.⁸³ Proponents of the Bill maintained that the \$860,000 ought to be deleted from the state budget if the bill did not pass because the state would be getting little or nothing for its premium dollar. In a surprise move, the Bill failed to pass the Virginia House on the second reading by a show of hands vote of 46 to 31. Regrettably, those insurance statistics were not carefully verified. The \$5,820,000 premium figure which was bandied about at the last minute on the House floor was merely an estimate based on assumed claims of \$250,000 each and assuming further that the present MCV medical malpractice insurance rate is 10 percent of the private hospital rate.⁸⁴ The actual premium at Norfolk General Hospital in 1975 was approximately \$300,000 annually; at MCV during 1979, slightly less than \$200,000; at U. Va. Hospital, about \$300,000.⁸⁵

A review of the claims against MCV Hospital during the past five years indicates that the State is receiving little or no benefit from its approximately \$200,000 in medical malpractice insurance premium expense. During the fifteen to sixteen month period ended April 30, 1980, which period is stated to be fairly representative of the past five years, no personal injury tort suits had been

82. Richmond Times-Dispatch, Feb. 17, 1980, § D.

83. Letter from John W. Crews, General Counsel for Virginia Hospital Association, to Del. Franklin M. Slayton, 28th District.

84. Conversation with John W. Crews (Mar. 11, 1980).

85. The 1976-77 premium for the University of Virginia house staff policy with the St. Paul Companies was \$313,031 for professional liability. Named insured under this policy are interns, residents or fellows employed by the University of Virginia Hospital. (Copy of insurance policy on file in the *University of Richmond Law Review* office). MCV Hospital has two policies with the St. Paul Companies with a level \$1,000,000 coverage. One of these covers professional employees other than physicians, such as nurses and technicians; the other covers house staff physicians, including interns and residents. There is no deductible provision in either MCV policy, and the annual premiums paid for both policies is slightly under \$200,000. St. Paul writes a separate policy on the full-time MCV faculty and attending physicians through the School of Medicine, the premium for which was unavailable. Conversation with Gerald J. Maier, Assistant Director for Ambulatory Care at MCV (Apr. 30, 1980).

filed against MCV itself, probably because of the availability of an assured sovereign immunity defense. Approximately twenty notices of claims were received by MCV during this period; only about five of those were formal notices of claim as required under the Medical Malpractice Review Act.⁸⁶ Only one of the five actually proceeded to a hearing before a panel, which found in favor of the health care provider. Two of the twenty claims which arose during this period were settled by MCV's insurance carrier; one of the two was settled for \$300 (this claim did not involve malpractice but concerned a bug discovered in a glass of tea and was considered a nuisance claim). The second claim was settled when MCV agreed to cancel its bill to the claimant of \$400. Defense costs during this fifteen to sixteen month period were less than \$10,000.⁸⁷ It is, then, a fair statement that out of its annual premium expense of approximately \$200,000, MCV gets the benefit of about \$10,300, most of which consists of administrative claims handling.

V. THE MODEST COST OF ABRIGATION

The traditional justification for sovereign immunity, and apparently that perceived by many in the Virginia legislature, has been that government would be crippled by the expense of judgments and insurance premiums. Yet it has never been shown that a governmental unit has been forced into insolvency proceedings because of adverse tort judgments.⁸⁸ This "crippling expense" argument simply lacks any evidence to support it.

First, all sovereign immunity need not be abolished. In fact, immunity should be preserved where judicial review of governmental action would endanger the quality and efficiency of the governing process. Judges, the Governor, legislators, agency heads who issue regulations and perform quasi-judicial functions—such as State Corporation Commissioners, Industrial Commissioners—and those whose functions rest on the exercise of judgment and discretion

86. VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1950).

87. Conversation with Gerald J. Maier of MCV, *supra* note 85.

88. See *Jones v. State Highway Comm'r*, 557 S.W.2d at 229; *Ayala v. Philadelphia Bd. of Pub. Educ.*, 45 Pa. 584, 305 A.2d 877 (1973); *Board of Comm'rs v. Splendour Shipping & Enterprises Co.*, 273 So. 2d 19 (La. 1973); *Governmental Tort Immunity*, *supra* note 6, at 533; see also *Jones v. Knight*, 373 So. 2d at 263 (Bowling, J., dissenting).

and involve planning and policy making ought to be immune. Those who implement and execute governmental policy or planning ought not be immune.⁸⁹ The appropriateness of such a dividing line is recognized in the Federal Torts Claims Act.⁹⁰ Legislatures in at least eighteen states have adopted discretionary function exceptions.⁹¹ Care should be taken, however, that all discretionary functions are not excepted from liability. As Justice Harrison pointed out in *James v. Jane*,⁹² virtually every act performed by a person involves the exercise of some discretion. For example, a governmental entity should not be liable in the planning of sewers but should be liable for negligence in their construction and maintenance.

Second, the experience of other states reveals that the expense of abolishing immunity is manageable. Hawaii's reported tort liability expenditures for 1972 totaled only \$120,453.90; and California found the cost of satisfying judgments and administering the most complete tort claims system in the country to be approximately \$1,198,000 per year between 1963 and 1972.⁹³ A closer examination of the experience of California as well as other states builds a particularly strong case against the "crippling expense" argument.

California first purchased excess insurance in 1964. Between 1964 and 1976 these policies cost a total of \$2,086,998 in premiums, an average of \$173,917 per year. In 1972, California self-insured the first \$2,000,000 of liability and had excess coverage between \$2,000,000 and \$50,000,000 at an annual cost of approximately \$200,000. In 1976, due to rising insurance rates, California changed

89. See *James v. Jane*, ___ Va. at ___, 267 S.E.2d at 113; *Nieting v. Blondell*, 306 Minn. at ___, 235 N.W.2d at 603; *Governmental Tort Immunity*, *supra* note 6, at 546-47.

90. 28 U.S.C. §§ 2671-80 (1976).

91. See *Whitney v. City of Worcester*, 373 Mass. at ___, 366 N.E.2d at 1216. With respect to claims against the United States government for the tortious acts of federal employees, the Federal Torts Claims Act bars suits arising out of the performance of "discretionary acts." 28 U.S.C. § 2680(a) (1976). In interpreting this statute, the federal courts have distinguished discretion at the planning level from discretion at the operational level, preserving immunity for the former while imposing liability for the latter. *Dalehite v. United States*, 346 U.S. at 32-36; *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-20 (1957); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 75 (D.C. Cir.), *aff'd*, 350 U.S. 907 (1955).

92. ___ Va. at ___, 267 S.E.2d at 113.

93. *Governmental Tort Immunity*, *supra* note 6, at 533.

from a \$2,000,000 to a \$5,000,000 self-insurance retention at a premium cost of \$949,520 per year. In 1978, California declined to renew any part of its excess policy when the annual premium was quoted at \$1,194,000.⁹⁴

A legislative study, prepared in October 1977,⁹⁵ had recommended that the state not maintain further excess tort insurance because California already had an elaborate claims management system, the coverage was ambiguous, and any budget crunches resulting from substantial adverse judgments could be avoided by paying the judgments over time.⁹⁶ The study gave several possible explanations for the premium increases, including: (1) stock market fluctuations, (2) insurance company losses in the liability/casualty insurance lines, (3) insurance company perceptions of an increasingly litigious public as well as further erosions of governmental immunity; and (4) the reluctance, for whatever reason, of reinsurers to insure excess carriers. Moreover, it was reported that two court cases had impacted the excess tort insurance between 1964 and 1976. In one case, the verdict resulted in an insurance company payment of \$562,300. In the other case, the verdict resulted in an ultimate or potential liability to the excess carrier of \$1,582,350. It was noted that neither New York, Michigan, nor the federal government carries excess insurance for tort claims. Furthermore, California is protected by statute from a sudden fiscal crunch brought on by a large, adverse judgment.⁹⁷ The statute provides the state cannot be required to pay a judgment by garnishment, execution or attachment unless the legislature has authorized the payment. Accordingly, in case of an astronomical verdict, the legislature could escape the literal terms of the judgment calling for immediate payment and, instead, appropriate funds for payment over time. For this reason and the others cited, California presently has no insurance for the payment of tort claims.⁹⁸

94. See correspondence between Mr. Victor A. Bradshaw, Jr., Assistant Insurance Officer, California Dept. of General Services, and author (Feb. 19, 1980, Feb. 29, 1980, Mar. 14, 1980, and Apr. 18, 1980) (copies in the *University of Richmond Law Review* office).

95. See PROGRAM EVALUATION UNIT, CALIFORNIA DEP'T OF FINANCE, STATE EXCESS TORT INSURANCE: ANALYSIS AND RECOMMENDATIONS, REPORT No. D77-37 (Oct. 1977).

96. *Id.*

97. CAL. [GOVERNMENT] CODE § 955.5 (West 1980).

98. California's rising premiums, however, could be further explained by rising insurance company earnings. On May 1, 1978, *Business Week* reported that in 1977 the insurance

The experience of New Mexico offers further evidence. In 1975, New Mexico judicially abolished state sovereign immunity.⁹⁹ In 1976, the legislature enacted a Torts Claims Act and established the Risk Management Division of the Department of Finance and Administration.¹⁰⁰ This division administers the newly created Torts Claims Act for state agencies and universities as well as all other insurance programs of the state, including workmen's compensation, bonds, and group insurance. The sum budgeted for this division with seventeen employees in 1980 was \$403,800. The state self-insures many, if not most, areas, including medical malpractice. Annual legal defense costs are estimated to be \$300,000; however, the actual cost of privately contracted legal services has been: July 1, 1977 to June 30, 1978, \$9,433.00; July 1, 1978 to June 30, 1979, \$70,467.00; July 1, 1979 to December 30, 1979, \$129,723.00. Total claims paid in the self-insured area of medical malpractice, law enforcement and civil rights coverage on behalf of state agencies, universities and local public bodies since 1977 is approximately \$303,260.00. New Mexico carries reserves of \$1,669,694.00. Self insurance rates have reportedly saved New Mexico 30% of standard medical malpractice rates, 40-45% of standard law enforcement rates, and as much as over 200% of the rate for its cities and counties. New Mexico has been particularly successful in fighting frivolous claims by taking a strong defense stand.¹⁰¹

Minnesota judicially abolished sovereign immunity in 1975.¹⁰² In

industry had profits at a level that it had never before even approximated. The *Business Week* article quoted the president of Kemper Insurance Companies as expressing surprise that the company's earnings were so great and quoted the president of State Farm as saying there had been a substantial reduction in claims made in 1977 and "property-casualty insurers were the recipients of what can only be called a windfall." Travelers reported the highest earnings in its 111-year corporate history in 1977, and Aetna reported the highest earnings in its 124-year corporate history. Sears, Roebuck & Company reportedly makes over one-half of its profits from the Allstate booth. Therefore, the rising premium in California could be related to the so-called insurance crunch across the nation which has affected the fields of medical malpractice and products liability. See Wilson, *Interesting Insurance Information*, TEXAS TRIAL LAWYERS FORUM (Jan.-Mar. 1980).

99. Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1976).

100. N.M. STAT. ANN. § 41-4-1 to -25 (Cum. Supp. 1980).

101. Letter from Taylor Hendrickson, Director, Risk Management Division, Dept. of Finance and Administration, State of New Mexico to author (Apr. 8, 1980) (copy in *University of Richmond Law Review* office).

102. Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975).

1976, a Tort Claims Division was established within the Attorney General's Office. The following sums have been budgeted for this division: 1977-\$147,785; 1978-\$148,245; 1979-\$197,981; 1980-\$274,827. Actual payments of claims during the period 1976 through 1979 are as listed.¹⁰³

<u>Year</u>	<u>Number of Claims Paid</u>	<u>Amount</u>
1976	28	\$ 509.00
1977	34	\$ 25,823.00
1978	61	\$ 51,966.00
1979	96	\$116,229.00

Missouri judicially abolished sovereign immunity in 1977.¹⁰⁴ To date, the cost reportedly has been minimal. No exact premium information was furnished but the state carries insurance to cover tort claims with limits of \$800,000 for all claims arising out of one occurrence and \$100,000 per person for one occurrence, with a \$10,000 deductible. Exact premiums for this coverage were not discovered.¹⁰⁵

In *Whitney v. City of Worcester*,¹⁰⁶ Massachusetts judicially abolished sovereign immunity in 1977, retroactive to 1973. The Massachusetts legislature, at judicial urging, subsequently enacted the 1978 Torts Claims Act,¹⁰⁷ limiting retroactivity to claims arising after August 16, 1977, the date of the *Whitney* decision. Liability is limited to \$100,000 and further precludes claims against the Commonwealth for interest prior to judgment or for punitive damages.¹⁰⁸ The 1978 Torts Claims Act permits the purchase of insurance; as of March 10, 1980, no agency had purchased it. It was proposed that any monies paid out under the new Act would be paid from legislative appropriation. It is too early to evaluate the ultimate annual cost in Massachusetts.¹⁰⁹

103. Letter from Linda Lunzer, State Claim Officer, Office of the Attorney General, State of Minnesota to author (Mar. 7, 1980) (copy in the *University of Richmond Law Review* office).

104. *Jones v. State Highway Comm'n*, 557 S.W.2d 225 (Mo. 1977).

105. Letter from Terry C. Allen, Asst. Attorney General, State of Missouri, to author (Apr. 11, 1980) (copy in the *University of Richmond Law Review* office).

106. *Whitney v. City of Worcester*, 373 Mass. 888, 366 N.E.2d 1210 (1977).

107. MASS. ANN. LAWS ch. 258, §§ 1-11 (Michie/Law. Co-op 1980).

108. *Id.* § 2.

109. See letter from Paul J. Donaher, Chief, Torts, Claims, Collections, Asst. Attorney

VI. 1981 VIRGINIA LEGISLATIVE ACTION

On January 22, 1981, Senate Bill Number 196¹¹⁰ passed the Virginia Senate by a vote of 26 to 11. On February 19, 1981, the Bill was defeated in the House by a vote of 47 to 46; however, on February 20, 1981, upon reconsideration, Senate Bill Number 196 passed the House by a vote of 54 to 35.¹¹¹

It is significant that the Bill, as passed, does not negate the effect of prior decisions of the Virginia Supreme Court in *James v. Jane*,¹¹² *Crabbe v. School Board*,¹¹³ *Elder v. Holland*,¹¹⁴ *Short v. Griffiths*,¹¹⁵ and similar decisions permitting suits against employees of state agencies. The last paragraph of section 8.01-195.3 specifically provides, "Nothing contained herein shall operate to reduce or limit the extent to which the Commonwealth, any State agency or employee was deemed liable for negligence as of July one, nineteen hundred and eighty-two."

Further effects of the legislation are somewhat uncertain. The Bill, which originally limited recovery to \$25,000, was amended to allow as an alternative "the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of"¹¹⁶ if this latter amount is greater. Presumably, those state agencies which now carry greater limits of insurance will continue to do so; and there will be an avenue for relief for claimants with more egregious injuries. If not, plaintiffs claiming damages in excess of \$25,000 would face the same insurmountable barrier of sovereign immunity that existed prior to the passage of this Bill. The Bill thus contains at least part of the same limitations inherent in

General of Massachusetts to author (Mar. 10, 1980) (copy in the *University of Richmond Law Review* office); see also *Vaughan v. Commonwealth*, ___ Mass. ___, 388 N.E.2d 694, 695 (1979) explaining legislative action.

110. See note 78 *supra* and accompanying text. S.B. 196, as amended, is reproduced in Appendix 2.

111. Conversation with K. Marshall Cook, Esq., Staff Attorney, Division of Legislative Services.

112. ___ Va. ___, 267 S.E.2d 108 (1980). See notes 1-5 *supra* and accompanying text.

113. 209 Va. 356, 164 S.E.2d 639 (1968). See note 41 *supra* and accompanying text.

114. 208 Va. 15, 155 S.E.2d 369 (1967). See note 37 *supra* and accompanying text.

115. 220 Va. 53, 255 S.E.2d 479 (1979). See note 36 *supra* and accompanying text.

116. S.B. 196; Appendix 2.

House Bill Number 833¹¹⁷ and House Bill Number 938.¹¹⁸ No program of self-insurance is provided, and should any state agency not choose to purchase liability insurance against the particular negligence or tortious act complained of, the injured victim is without a remedy beyond the \$25,000 statutory maximum recovery.

Furthermore, the notice requirement of section 8.01-195.6 is quite restrictive. Every claim under the act shall be "forever barred" unless the claimant "has filed a written statement of the nature of the claim and the time and place at which the injury is alleged to have occurred . . . within six months after such cause of action shall have accrued."¹¹⁹

VII. CONCLUSION

Government ought to be responsible for the consequences of its negligent conduct just as any private citizen. Immunity is a no duty rule which breeds irresponsibility at a time when government encroachment upon individual privacy is pervasive. Immunity is contrary to the notion that there ought to be a right for every wrong and that the courts ought to be available for redress. The rule ought to be that liability follows negligence; the violative exception is immunity.

No one defends government immunity, except out of fear of financial ruin. It has been shown that those states which have abrogated immunity have not suffered ruin; in fact, their costs have been relatively modest.¹²⁰ Virginia is already paying insurance premiums for which it is getting little or nothing in return.¹²¹ This money could provide an adequate self-insurance fund. The state could have enacted a statute similar to that of California, prohibiting garnishment or execution against the state to protect it from a potentially catastrophic award. In the unforeseeable event of such a judgment, were sufficient funds not available in the state treasury to pay the judgment, the state could pay the judgment over time. However, the possibility of the state being unable to meet

117. H.B. 833; Appendix 1. See notes 75-77 *supra* and accompanying text.

118. H.B. 938; Appendix 3. See notes 79-85 *supra* and accompanying text.

119. S.B. 196; Appendix 2.

120. See notes 93-105 *supra* and accompanying text.

121. See notes 84-87 *supra* and accompanying text.

the demands of the unusual award is remote. Such has not been the case in any other state; and, as a practical matter, there have been few awards in Virginia in negligence actions which have exceeded one million dollars. This is not to say that Virginia juries would not return larger awards in appropriate cases; rather, the observation is offered to allay fears of a crippling expense.

In the face of judicial inaction, the Virginia General Assembly has responded with legislation that abolishes sovereign immunity, but with somewhat arbitrary limitations. The rather harsh notice provisions and the \$25,000 ceiling on liability, coupled with the permissive language concerning state agency liability insurance in excess of that amount create serious doubt that every innocent tort victim with a meritorious claim would be adequately compensated.

While this legislative response is certainly a step in the right direction, the Virginia Supreme Court can still fulfill its role to provide an adequate remedy for injured plaintiffs in its construction of the statute. A liberal construction by the court would uphold the legislative policy of abrogating sovereign immunity and better serve the rule that liability follows negligence.

APPENDIX 1

HOUSE BILL NO. 833
Offered February 4, 1980

A BILL to amend the Code of Virginia by adding a section numbered 8.01-224.1, providing defense of governmental immunity not available in certain cases; limitation on recovery.

Patrons-Allen and Marks

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-224.1 as follows:

§ 8.01-224.1. *Defense of governmental immunity not available in certain cases; limitation on liability.—The defense of governmental immunity shall not be available to any governmental body or employee thereof in any tort case involving the alleged negligence of such body or employee where at the time of the alleged negligence such governmental body or employee, as the case may be, is covered against liability for such negligence by insurance; provided, however, that the amount of any recovery available in such negligence action shall be limited to the amount of such liability insurance coverage available.*

APPENDIX 2

SENATE BILL NO. 196

Offered January 22, 1980

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 18.1, consisting of sections numbered 8.01-195.1 through 8.01-195.7, so as to create a tort claims act for claims against the Commonwealth of Virginia in certain cases.

Patron-Mitchell

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 8.01 an article numbered 18.1, consisting of sections numbered 8.01-195.1 through 8.01-195.7, as follows:

*Article 18.1**

Tort Claims Against the Commonwealth of Virginia

§ 8.01-195.1. *Short title.*—*This article shall be known and may be cited as the "Virginia Tort Claims Act."*

§ 8.01-195.2. *Definitions.*—*As used in this article:*

1. *"State agency" means any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia; and*

2. *"State employee" means any officer, employee or agent of any State agency, or any person acting on behalf of a State agency in an official capacity, temporarily or permanently in the service of the Commonwealth, whether with or without compensation.*

§ 8.01-195.3. *Commonwealth liable for damages in certain cases.*—*Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July one, nineteen hundred eighty-two, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any State employee*

* The contents of the original bill are italicized; the Committee Amendments, agreed to by the Senate on the 16th and 21st of January, 1981, are printed in roman typeface.

while acting within the scope of his employment under circumstances where the Commonwealth, if a private person, would be liable to the claimant for such damage, loss, injury or death; provided, however, that the Commonwealth shall not be liable for interest prior to judgment or for punitive damages, nor shall the amount recoverable by any claimant exceed twenty-five thousand dollars, or the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.

Notwithstanding any provisions hereof, the individual immunity of judges, the Attorney General, Commonwealth's Attorneys, and other public officers, their agents and employees from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized. Any recovery based on the following claims are hereby excluded from the provisions of this act:

(1) Any claim based upon an act or omission which occurred prior to the effective date of this act.

(2) Any claim based upon an act or omission of the legislature, or any member or staff thereof acting in his official capacity, or to the legislative function of any agency subject to the provisions of this act.

(3) Any claim based upon an act or omission of any court of the Commonwealth, or any member thereof acting in his official capacity, or to the judicial functions of any agency subject to the provisions of this act.

(4) Any claim based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court.

(5) Any claim arising in connection with the assessment or collection of taxes.

(6) Any claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause.

Nothing contained herein shall operate to reduce or limit the extent to which the Commonwealth, any State agency or employee was deemed liable for negligence as of July one, nineteen hundred eighty-two.

§ 8.01-195.4. *Jurisdiction of claims under this article.—The cir-*

cuit court of the county or city wherein the claimant resides or wherein the act or omission complained of occurred shall have original and general jurisdiction to hear, determine and render judgment on any claim against the Commonwealth cognizable under this article; provided, however, that any action under the provisions of this article may be commenced and determined in the general district court of such county or city if the amount claimed is within the jurisdictional limits imposed upon such court by law. Judgments in general district and circuit courts in cases under this article may be appealed as in other cases provided.

§ 8.01-195.5. Settlement of certain cases.—The Attorney General shall have authority in accordance with § 2.1-127 of the Code of Virginia to compromise and settle claims cognizable under this article.

§ 8.01-195.6. Notice of claim.—Every claim cognizable against the Commonwealth shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim and the time and place at which the injury is alleged to have occurred. The statement shall be filed within six months after such cause of action shall have accrued with the head of the State agency for which the State employee was acting when the alleged injury occurred. A copy of such written statement shall also be filed with the Attorney General. In the event the claimant is unable to determine the State agency for which the State employee was acting when the alleged injury occurred, the claimant, his agent, attorney or representative shall file such written statement with the Governor and a copy shall also be filed with the Attorney General.

§ 8.01-195.7. Statute of limitations.—Every claim cognizable against the Commonwealth under this article shall be forever barred, regardless of whether a notice of claim shall have been properly filed within the six-month period required by § 8.01-195.6, unless within two years after the cause of action shall have accrued to the claimant an action shall be commenced pursuant to § 8.01-195.4.

2. That the provisions of this act shall be effective on and after July 1, 1982.

Jan 22 S Presented and ordered printed

Jan 22 S Referred to Committee for Courts of Justice
Feb 19 S Continued from 1980 Session in Committee
Jan 14 S Reported with amendments 9-Y 5-N
Jan 15 S Read first time
Jan 16 S Read second time
Jan 16 S Reading of amendments waived
Jan 16 S Committee amendments agreed to
Jan 16 S Motion to rerefer to committee agreed to
Jan 16 S Rereferred to Committee on Finance
Jan 20 S Reported with amendment 9-Y 5-N
Jan 21 S Read second time
Jan 21 S Committee amendment agreed to
Jan 21 S Engrossed
Jan 22 S Read third time and passed 26-Y 11-N
Jan 22 S Communicated to House
Jan 23 H Placed on Calendar
Jan 26 H Read first time
Jan 26 H Referred to Committee for Courts of Justice

APPENDIX 3

HOUSE BILL NO. 938
Offered February 4, 1980

A BILL to amend the Code of Virginia by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.21, pertaining to the defense of governmental immunity.

Patrons-Allen, Marks, and Morrison

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Article 2 of Chapter 21.1 of Title 8.01 a section numbered 8.01-581.21 as follows:

§ 8.01-581.21. Defense of governmental immunity not available in certain cases.—The defense of governmental immunity shall not be available to any health care provider in any malpractice action for damages for personal injury or death brought under the provisions of this chapter. Provided, however, where the health care provider is covered against liability for malpractice by insurance, the amount of recovery available to the plaintiff in any such malpractice action shall be limited to the amount of the liability coverage available.

COHEN FLOOR AMENDMENT AGREED TO BY HOUSE

Page 1, Strike out lines 13 through 19 and insert § 8.01-581.21. Defense of governmental immunity not available in certain cases. No physician shall be immune from liability for negligence or any other tort on the ground that the hospital in which he practices is a governmental institution; provided that where such physician is insured against liability for negligence or other tort in an amount not less than one hundred thousand dollars for such occurrence, he shall not be liable for damages in excess of the limits of such insurance.

Feb 4 H Presented and ordered printed

Feb 4 H Referred to Committee for Courts of Justice

Feb 15 H Reported with amendment 9-Y 7-N

Feb 15 H Read first time

Feb 16 H Read second time

Feb 16 H Committee amendment rejected

Feb 16 H Floor amendment agreed to

Feb 16 H Engrossment refused