REPORT OF THE
SPECIAL AD HOC SUBCOMMITTEE OF THE
HOUSE AND SENATE COURTS OF JUSTICE
COMMITTEES STUDYING

IMMUNITY LEGISLATION

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Report of the Special Ad Hoc Subcommittee
of the House and Senate Courts of Justice Committees Studying
Immunity Legislation
To
The Governor and the
General Assembly of Virginia
Richmond, Virginia
1996

TO: The Honorable George F. Allen, Governor,
and
the General Assembly of Virginia

I. INTRODUCTION

During the 1995 Session of the General Assembly, several legislative measures relating to charitable and sovereign immunity were introduced and referred to the House and Senate Courts of Justice Committees. Because there was not enough time to review the immunity bills and because there was a need for analyzing in an organized and consistent manner the issues related to immunity legislation, the chairmen of the two committees decided to appoint members from their committees under the Rules of the House and Senate to study the issues presented by immunity legislation. The bills introduced during the 1995 Session were referred to this study committee for study during the 1995 interim.

The House members appointed were Delegates Joseph P. Johnson, Jr., Chairman, C. Richard Cranwell, Bernard S. Cohen, Thomas G. Baker, Jr., and William J. Howell. Delegate James F Almand served as an ex-officio member. The Senate members appointed were: Senators Joseph V. Gartlan, Jr., Vice-Chairman, Elmo G. Cross, Jr., and Joseph B. Benedetti.

The subcommittee met three times. At its first meeting the members heard from patrons of the legislation and from interested parties. At its second meeting, the subcommittee reviewed a matrix of the current immunity laws (see Appendix B) and reviewed some recent decisions of the Virginia Supreme Court. The subcommittee determined that the current laws in this area have been serving the public interest. At its last meeting, the subcommittee reviewed and approved the report and documented its findings.

II. FINDINGS AND CONCLUSIONS

A. CHARITABLE IMMUNITY.

The subcommittee found that the doctrine of charitable immunity enjoys continuing vitality in Virginia. Since the Supreme Court of Virginia first adopted the doctrine of charitable immunity for the Commonwealth in the early part of this century, Virginia has favored a limited form of immunity that does not exempt charitable organizations from all tort liability. See Weston's Adm'x v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (Va. 1921); Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13 (Va. 1914). Rather, under Virginia law, a charitable institution is immune only from liability to its beneficiaries for the negligent conduct of its employees, provided the institution used due care in selecting and retaining its employees. Thus, the doctrine precludes a charity's beneficiaries from recovering damages from the charity for the negligent acts of its servants or agents if due care was exercised in the hiring and retention of those agents and servants. See, e.g., Straley v. Urbanna Chamber of Commerce, 243 Va. 32, 413 S.E.2d 47, 49 (Va. 1992); Moore v. Warren, _ Va. _(Record No. 942157, Nov. 1995); Thrasher v. Winand, 239 Va. 338, 389 S.E.2d 699, 701 (Va. 1990); Memorial Hosp., Inc. v. Oakes, 200 Va. 878, 108 S.E.2d 388, 393 (Va. 1959); Weston's Adm'x, 107 S.E. at 792; see also Egerton, 395 F.2d at 382; Radosevic v. Virginia Intermont College, 633 F. Supp. 1084, 1086 (W.D. Va. 1986) (applying Virginia law).

According to the doctrine of limited immunity applicable to charities in Virginia, a charitable organization is liable to the beneficiaries of the charity for the negligence of its employees if it fails to exercise ordinary care in the selection and retention of those employees. Infant C v. Boy Scouts of Am., 239 Va. 572, 578, 391 S.E.2nd 322, 330 (1990). Further, that immunity does not extend to a person who is not a beneficiary receiving the bounty of the organization but who is an invitee or stranger having no beneficial relation to the charitable institution. Straley v. Urbanna Chamber of Commerce, 243 Va. 32, 36, 413 S.E.2nd 47, 52 (1992); Thrasher v. Winand, 239 Va. 338,340-341, 389 S.E.2nd 699, 701 (1990).

In Virginia, the doctrine rests on public policy; namely, that the Commonwealth is better served if the resources of charitable institutions are used to further the institution's charitable or eleemosynary purposes, rather than to pay tort claims lodged by those who benefited from the institution's bounty. See, e.g., Hill v. Leigh Memorial Hosp., Inc., 204 Va. 501, 132 S.E.2d 411, 415 (Va. 1963); see also Egerton, 395 F.2d at 382; Radosevic, 633 F. Supp. at 1086. Because the common law doctrine of charitable immunity has become firmly embedded in the law and public policy of Virginia, the Supreme Court of Virginia has indicated that any changes to the doctrine

must come from the legislature. Oakes, 108 S.E.2d at 396; see also Egerton, 395 F.2d at 382. In this regard, the Virginia General Assembly in 1974 eliminated charitable immunity for most hospitals, essentially limiting its application to hospitals that provide medical care free of charge. See Va. Code § 8.01-38 (Michie 1992 Repl. Vol.); Radosevic, 633 F. Supp. at 1087.

In any event, to cloak itself in charitable tort immunity, an organization must establish that it is "charitable," for purposes of the tort immunity doctrine, and that the plaintiff was a beneficiary of the organization's charitable activities at the time of the allegedly tortuous conduct. See, e.g., Egerton, 395 F.2d at 383; Straley, 413 S.E.2d at 49-50.

In broad terms, the inquiry into whether an organization is "charitable" for purposes of charitable immunity focuses on whether it is "maintained for gain, profit, or advantage." Purcell v. Mary Washington Hosp. Ass'n, Inc., 217 Va. 776, 232 S.E.2d 902, 904 (Va. 1977) (citation omitted); see also Radosevic, 633 F. Supp. at 1086; Oakes, 108 S.E.2d at 392; Danville Community Hosp., Inc. v. Thompson, 186 Va. 746, 43 S.E.2d 882, 884 (Va. 1947). In conducting this inquiry, Virginia courts apply a two-part test, examining (1) whether the organization's articles of incorporation have a charitable or eleemosynary purpose and (2) whether the organization is in fact operated in accordance with that purpose and not for gain, profit or advantage. See, e.g., Radosevic, 633 F. Supp. at 1086; Purcell, 232 S.E.2d at 904 (Va. 1977); Oakes, 108 S.E.2d at 392; Thompson, 43 S.E.2d at 884. There is a presumption that an institution operates in accordance with its charter purposes. Oakes, 108 S.E.2d at 392.

Whether an organization is "charitable" under this test turns on the facts of each case, not on the type of institution involved. Compare Purcell, 217 Va. 776, 232 S.E.2d 902 (holding hospital not entitled to charitable immunity) with Oakes, 200 Va. 878, 108 S.E.2d 388 (holding hospital entitled to charitable immunity); and Ettlinger, 31 F.2d 869 (examining purposes and manner of operation of college and holding it entitled to charitable immunity) with Radosevic, 633 F. Supp. 1084 (holding college not entitled to charitable immunity).

Although the inquiry into an organization's charitable status is fact-intensive, courts have considered the following factors indicative of a charitable purpose and operation: (1) whether the organization's charter limits it to charitable or eleemosynary purposes; see, e.g., Radosevic, 633 F. Supp. at 1089; Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392; (2) whether the organization's charter contains a "not for profit" limitation; see Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392; (3) whether the organization's goal is to break even; see Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392; (4) whether the organization earned a profit, see, e.g.,

Bodenheimer v. Confederate Memorial Ass'n, 68 F.2d 507, 508 (4th Cir.), cert. denied, 292 U.S. 629, 78 L. Ed. 1483, 54 S. Ct. 643 (1934); Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392; (5) whether any profit or surplus must be used for charitable or eleemosynary purposes; see, e.g., Bodenheimer, 68 F.2d at 508; Oakes, 108 S.E.2d at 392; (6) whether the organization depends on contributions and donations for its existence; see, e.g, Egerton, 395 F.2d at 381-82; Bodenheimer, 68 F.2d at 509; Ettlinger, 31 F.2d at 871; (7) whether the organization provides its services free of charge to those unable to pay; see, e.g., Radosevic, 633 F. Supp. at 1089; Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392; Thompson, 43 S.E.2d at 884; cf. Va. Code. § 8.01-38; and (8) whether the directors and officers receive compensation; see Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392. This list of factors is illustrative, not exhaustive, and no one factor is dispositive.

Whether an organization has exercised due care in its selection and retention of its employees depends on the facts of each case. The court reviews the personnel procedures of the organization, including: the application process, eligibility requirements for employment, facilities for investigating fitness, communication of personnel information within the organization, and procedures for maintaining the standards and goals of the organization. If the court finds that the organization was negligent in its selection and retention of an employee and that negligence was the proximate cause of the injury to the beneficiary, the court will find that immunity does not extend to the organization and that the organization is liable for damages to the beneficiary. Infant C, supra, at 576-577.

In light of the Supreme Court of Virginia's recent decision in Moore v. Warren, supra, and its line of decisions on charitable immunity, the subcommittee decided that the public interest is being served by the current state of the doctrine. The subcommittee expressed its belief that it is in the public interest to encourage charitable institutions in their good work. Like any organization, a charity performs it work only through the actions of its servants and agents. Without a charity's agents and servants, such as volunteers, no service could be provided to beneficiaries. Denying these servants and agents the charity's immunity for their acts effectively would deny the charity immunity for its acts. If the charity's servants and agents are not under the umbrella of immunity given the institution itself and they are exposed to negligent actions by the charity's beneficiaries, the good work of the charity will be adversely impacted.

The subcommittee concluded that the current state of the law on charitable immunity strikes the proper balance; however, if there are those who wish to explore changes to the existing doctrine, then a formal joint resolution should be introduced to study the issues in more detail (See Appendix C).

B. INSURANCE FOR CHARITABLE INSTITUTIONS.

During the course of its study, the subcommittee received from the Bureau of Insurance information relating to the availability of insurance for charitable institutions and their volunteers (See Appendix D). The Bureau advised that generally, coverage for actions of volunteers while performing in that capacity may be provided in two ways. First, the organization for which the volunteer is performing services may have its own comprehensive general liability (CGL) policy endorsed to cover volunteers as insureds. Usually, an endorsement is added without charge. The parent organization's policy must be endorsed to include volunteers because normally, under a CGL policy, the definition of insured does not extend coverage to volunteers. There also are endorsements available to cover extended liabilities, such as sexual abuse coverage, and there are additional costs for special coverages. Additionally, people who are volunteers may be personally covered under their homeowner's or umbrella policy. Generally, if the activity is not considered a business pursuit of the volunteer, a homeowner's policy will cover the actions of the person who performs the volunteer work for his or her liability. There is usually no charge under such policy for this coverage.

The Bureau also advised that information gathered from its survey of more than 6,000 businesses indicated that volunteer organizations were having no affordability or availability problem securing liability insurance. Also, the Bureau had received no complaints from nonprofit organizations regarding an inability to obtain insurance.

The subcommittee concluded from the information and advice proffered that charitable organizations were having no problems obtaining the necessary insurance coverage for volunteers.

C. SOVEREIGN IMMUNITY.

The study committee received materials and information on and found the following with regard to sovereign immunity. The Virginia Supreme Court has recently declared "the doctrine of sovereign immunity is 'alive and well' in Virginia." Virginia Board of Medicine, et al. v. Virginia Physical Therapy Association, et al., 13 Va. App. 458, 464, 413 S.E. 2nd 59, 64, aff'd. 245 Va. 125, 427 S.E.2nd 183 (1993 (quoting Wiecking v. Allied Medical Supply Corp., 239 Va. 548, 551, 391 S.E.2d 258, 260 (1990) and Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984)). "The doctrine of sovereign immunity from suit . . . is . . . often explained as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." Hinchey v. Ogden, 226 Va. 234,

240, 307 S.E.2d 891, 894 (1983) (quoting 72 Am. Jur. 2d States, Territories, and Dependencies § 99 (1974)). Most importantly, the doctrine of sovereign immunity provides for "smooth operation of government," eliminates public inconvenience and danger that might spring from officials being fearful to act, assures that citizens will be willing to take public jobs, and prevents "citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation." Messina, 228 Va. at 308, 321 S.E.2d at 660; accord Lentz v. Morris, 236 Va. 78, 81, 372 S.E.2d 608, 610 (1988). In order to fulfill those purposes, the reach of the doctrine is not limited solely to the sovereign, but is extended to "some of the people who help run the government." Id., 321 S.E.2d at 661. Because the government acts only through individuals, it could be crippled in its operations if every government employee were subject to suit.

As a general rule, "the sovereign is immune not only from actions at law for damages but also from suits in equity to restrain the government from acting or to compel it to act." Hinchey, 226 Va. at 239, 307 S.E.2d at 894; Virginia Board of Medicine, et al. v. Virginia Physical Therapy Association, et al., 13 Va. App. 458, 413 S.E.2nd 59, aff'd. 245 Va. 125, 427 S.E.2nd 183 (1993).

While the Commonwealth and its agencies are generally immune from suits, the Commonwealth may waive its sovereign immunity. The right to sue the Commonwealth is regulated by statute. Taylor v. Williams, 78 Va. 422 (1884). However, in Virginia, it has been "consistently held that waiver of immunity cannot be implied from general statutory language or by implication. Statutory language granting consent to suit must be explicitly and expressly announced." Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961); accord Hinchey, 226 Va. at 241, 307 S.E.2d at 895. The Commonwealth also may tailor its consent to be sued by prescribing certain modes, terms, and conditions. For instance, the Commonwealth may limit "the right to sue to certain specified causes, . . . and when it does so it can be sued only in the manner and upon the terms and conditions prescribed. Compliance with the conditions and restrictions set forth in the statute is jurisdictional." 72 Am. Jur. 2d States, Territories, and Dependencies § 124 (1974); Virginia Board of Medicine, et al. v. Virginia Physical Therapy Association, supra at 465.

The Commonwealth of Virginia functions only through its elected and appointed officials and its employees. If, because of the threat of litigation, or for any other reason, they cannot act, or refuse to act, the state also ceases to act. 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 areas formerly private, and because of the thousand-fold increase in the number of

government employees. The court has found 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 functions they perform and their manner of performance. Certain state officials and state employees must, of necessity, enjoy immunity in the performance of their duties. These officers are inclusive of, but not limited to, the Governor, state officials, and judges. They are required by the Constitution and by general law to exercise broad discretionary powers, often involving both the determination and implementation of state policy. James v. Jane, 221 Va. 43, 52-53, 267 S.E.2d 864, 869 (1980).

The subcommittee found that the difficulty in application comes when a state employee is charged with simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and then claims the immunity of the state. Under such circumstances, the court examines the function this employee was performing and the extent of the state's interest and involvement in that function. One of the critical factors in deciding whether an employee is entitled to immunity is whether he was acting within or without his authority at the time of doing or failing to do the act complained of. 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. James v. Jane, supra at 53. The extent of a government's control and direction of its employee also influences our consideration of that employee's claim of immunity. A high level of control weighs in favor of immunity; a low level of such control weighs against immunity. James, 221 Va. at 53-54, 282 S.E.2d at 269.

In Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942), the court was called upon for the first time to pass judgment upon a case where employees of the state were sued for a tort arising from work being done by them for the state. There, an action was brought by a landowner to recover damages sustained as a result of explosives set off by two employees of the state during the construction of a pipeline for the state on the state's property. The plaintiff claimed that as a result, a spring on his property ceased to flow. The court found that the acts of the defendants were the acts of the state and that there were no facts alleged that the employees had stepped beyond the course of their employment, had exceeded their authority or directions given them, were guilty of any wrongful conduct or acted wantonly or negligently, or were acting individually or on their own responsibility. The court found that the defendants were acting "solely in their representative capacity as lawful and

proper agents of the State and not in their own individual right." Id. at 229, 22 S.E.2d at 12. The court further observed that "[i]t would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction." Id. And the court recognized that a state employee may be liable for his conduct while performing work for the state if his conduct is wrongful or if his performance is so negligent as to take him outside the protection of his employment.

In Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967), Elder brought an action for common law defamation under the insulting-words statute. Holland filed a plea asserting his immunity from liability for the defamatory words he allegedly spoke, claiming that he spoke them in the scope of his official duties as a member of the Virginia Department of State Police, and that as an agent of the state he was protected by the state's immunity from tort liability. The court reviewed the several cases in which it had held or recognized that a state employee may be liable for his conduct while performing work for the state if his conduct is wrongful. Consistent with these cases, and having concluded that under certain conditions a state employee may be held liable for his negligent conduct, the court held that a state employee may be held liable for an intentional tort. The court found that Holland was, therefore, not immune from liability for defamatory words spoken while performing his duties as a state police officer.

In Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973), the court held that the chief administrator and the assistant administrator of the University of Virginia Hospital, and the surgical intern involved, were entitled to the sovereign immunity enjoyed by the Commonwealth of Virginia. The administrators were exercising discretionary powers in the performance of their duties. The intern was a salaried employee of the University of Virginia and subject to the direction and control of his employer. The court noted that the intern also exercised discretionary judgment in treating those persons who presented themselves as patients at the emergency room, had no contractual relationship with the hospital's patients, received no compensation from the patients for his services performed within the scope of his employment, and did not act independently as far as any patient was concerned or involved.

Admittedly, no single, all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity. In Elder v. Holland, supra, there was a wanton and intentional deviation by a state employee from his assigned duties and therefore a loss by him of his qualified immunity. In Sayers v. Bullar, supra, there was no such wrongful deviation and no loss. In Sayers, the control by the employer was absolute, and the discretion by the employees was minimal. In Lawhorne, the state's interest

and involvement were great, and all defendants were afforded immunity, but for widely divergent reasons. A state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually.

Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984), was a watershed decision on the subject of sovereign immunity. In that case, the Virginia Supreme Court reviewed prior decisions stemming from diverse factual settings and attempted to reconcile them. Reasserting the viability of the doctrine in the Commonwealth, the court endeavored to explicate the circumstances under which "an employee of a governmental body is entitled to the protection of sovereign immunity," given the facts of the cases under consideration in Messina. 228 Va. at 307, 321 S.E.2d at 660.

In Messina, against the background of the purposes of the doctrine, the general principles applicable to the concept, and the facts and circumstances of the cases at hand, the court proceeded to engage in a necessary "line-drawing" exercise to determine which government employees were entitled to immunity. Thus, in one case, the court held that a state supervisory employee who was charged with simple negligence while acting within the scope of his employment was immune, there being no charge of gross negligence or intentional misconduct. Id. at 310-11, 321 S.E.2d at 662.

In the other Messina case, the court decided that an employee of a county, which shares the immunity of the state, was entitled to the benefits of sovereign immunity where his activities clearly involved the exercise of judgment and discretion. Id. at 313, 321 S.E.2d at 664. In deciding that case, the court outlined the test, previously developed in James v. Jane, 221 Va. 43, 53, 267 S.E.2d 108, 869 (1980), to be used to determine entitlement to immunity. The factors to be considered include: (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion. Messina, 228 Va. at 313, 321 S.E.2d at 663.

Building on Messina's base, the court in Lentz v. Morris, 236 Va. 78, 372 S.E.2nd 608 (1988) held that the health and physical education teacher in that case was immune from suit. The defendant, an employee of an immune governmental entity, was charged with simple negligence in the supervision and control of the class to which he was assigned. The facts did not support a charge of either gross negligence or intentional misconduct. Implicit in the facts alleged was the conclusion that the defendant was acting within the scope of his employment at the time of the injury. The court said

that "factors included in the Messina test for entitlement to immunity were present in Lentz. The employee was performing a vitally important public function as a school teacher. The governmental entity employing the teacher, the local school board, had official interest and direct involvement in the function of student instruction and supervision, and it exercises control and direction over the employee through the school principal." See, e.g., Va. Const. art. VIII, § 7 ("The supervision of schools in each school division shall be vested in a school board...."); Code § 22.1-295 ("The teachers in the public schools of a school division shall be employed and placed in the appropriate schools by the school board upon recommendation of the division superintendent."); Code § 22.1-293 (school board employs principal who "shall be responsible for the administration of and shall supervise the operation and management of the school...."). "And, a teacher's supervision and control of a physical education class, including the decision of what equipment and attire is to be worn by the student participants, clearly involved, at least in part, the exercise of judgment and discretion by the teacher." Id. at 82, 372 S.E.2nd at 612. Consequently, the Messina test, given the purposes served by the doctrine, mandated immunity for Lentz.

In Lentz, the court expressly overruled the case of Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979), which held that an athletic director, baseball coach, and grounds supervisor did not enjoy the school board's immunity in a suit by a student injured when he fell on broken glass. Also, the court expressly overruled, insofar as it addressed the employee's liability the case of Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968), which held that the sovereign immunity of a school board did not extend to a high school teacher who was performing his duties as a shop instructor when a student was injured using a power saw which was allegedly defective. The court stated that "[i]f school teachers performing functions equivalent to Lentz are to be haled into court for the conduct set forth by these facts, fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large." Id. at 83, 372 S.E.2nd at 613.

Having reviewed the case law, the subcommittee concluded that (i) sovereign immunity is alive and well in Virginia; (ii) the line of immunity cases affords satisfactory and proper protection to government employees, including school teachers and to the public; and (iii) the law is clear in this regard and there is no need to legislate. The subcommittee also concluded that if legislation were introduced to codify what is the common law on sovereign immunity, the legislation must be stated in very clear and exact terms so that no provision of the legislation shall be construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth.

Respectfully submitted,

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Minority Report on Need for Teacher Immunity Legislation from William J. Howell

A minority of the subcommittee dissents from the views expressed by the majority with respect to the need for legislation to provide public school teachers immunity from civil suit based on allegations of negligence. The majority has concluded that there is no need for such legislation; the minority disagrees and believes that such legislation would be in the best interests of public education in Virginia.

The view of the majority is predicated on the decision by the Virginia Supreme Court in Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988). The Court held, under the particular facts of that case, that a public school teacher exercising judgment or discretion within the scope of his employment enjoyed sovereign immunity. While this was certainly a very favorable result for public school teachers, the minority believes that this judicial precedent does not give teachers the same degree of protection that legislation could provide.

Last year, in response to questions about a teacher immunity bill (HB 2282), the Attorney General of Virginia had this to say:

> *"[The teacher immunity bill] does not simply duplicate the judicial immunity provided for in Lentz. The proposed legislation would, in real effect, provide greater immunity and certainty in an important public policy area. It is important to recognize, first of all, that Lentz does not "legislate" per se immunity irrespective of the functions and activities at issue. Indeed, in writing the majority opinion, Justice Compton stated that "the* ***sole question*** *presented in this appeal is whether the doctrine of sovereign immunity protects a high school teacher supervising a physical education class...." In reaching its decision, and to emphasize the fact-sensitivity of Lentz, the majority opinion conditioned its judicial immunity on several factors, including the specific nature of the activity, the extent of the governmental entity's interest and involvement in the specific function, the extent of control and direction exercised by the governmental entity over the employee, and the degree of discretion expected of the employee under the circumstances.*
>
> *"It is also important to recognize that the decision in Lentz was reached by a divided court with the dissent criticizing a majority decision overruling 20 years of established law to the contrary. In the absence of legislation, there can be no assurance that the Court might not return to its previous,*

longstanding view or distinguish Lentz on the basis of the specific activity before it."

Letter of Attorney General James S. Gilmore III to Del. Robert F. McDonnell, February 23, 1995; emphasis added in letter.

Similarly, in commenting on a teacher immunity bill passed by the State Senate (SB 960), the Attorney General wrote:

"The decision in Lentz was issued by a divided court and was contrary to at least two decades of precedent that a negligent school teacher could not escape liability by invoking the doctrine of sovereign immunity. See Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968) and Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979). Given this background, creative attorneys may attempt to find exceptions to, or chop away at, Lentz by factually distinguishing future cases from Lentz. ***Enactment of [a teacher immunity bill] would help avoid these problems and would send a strong message that Virginia wishes to protect its public school teachers from the potentially disastrous consequences of lawsuits alleging simple negligence.***"

Letter of Attorney General James S. Gilmore III to Subcommittee Chairman, House Courts of Justice Committee, February 16, 1995; emphasis added.

The comments of the Attorney General are persuasive. The enactment of legislation would provide helpful guidance to trial court judges who might otherwise be disposed to read Lentz narrowly and deny immunity to a public school teacher based on the facts of his or her particular case. Providing such guidance legislatively, rather than relying on corrective action on appeal, is particularly important since Virginia does not provide an appeal of right in civil cases of this type and the Supreme Court is only able to hear a fraction of the cases in which an appeal is sought.

The minority is particularly concerned about one area not addressed by the majority report: *i.e.* the need to immunize school teachers from liability for acts or omissions resulting from the good faith rendering of health-related assistance. With the movement to mainstream students with disabilities, more and more teachers are being called upon to render such assistance, particularly to students who are medically fragile. Yet, such assistance has not traditionally been part of a public school teacher's responsibilities. Thus, it is an open question whether even an expansive reading of Lentz would provide immunity in such cases. Properly crafted legislation could resolve the issue now in favor of the teacher.

Some may suggest that the immunity provided by the "Good Samaritan" statute, Va. Code § 8.01-225, is sufficient to cover cases of health-related assistance. This statute would cover those cases where emergency care or assistance is rendered "at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital...." But not every case where teachers are called upon to provide medical assistance to students will necessarily fit one of those enumerated categories. Moreover, statutes, such as this one, that are in derogation of the common law, are narrowly construed. *See* Hyman v. Glover 232 Va. 140, 143, 348 S.E.2d 269, 271 (1986); Creasy v. United States, 645 F. Supp. 853 (W.D. Va. 1986). A teacher should not have to worry about how a court would apply this narrow statute in the event that his or her good faith efforts to help a student in distress are rewarded by a lawsuit. Again, properly crafted legislation could resolve the issue now in favor of the teacher.

While some legislators may debate the need for teacher immunity legislation in light of Lentz, the simple truth is that Virginia's public school teachers are entitled to legal protection that is *beyond debate*. Only through *legislation* can our teachers be *sure* that they will have the immunity from civil liability that they need and deserve.

Finally, the minority agrees with the majority view that legislation dealing with sovereign immunity "must be stated in very clear and exact terms" so as not to "diminish the sovereign immunity of any county, city or town in the Commonwealth." This should not be difficult, and can be achieved by an appropriately worded "savings clause" that expressly preserves the sovereign immunity now enjoyed by these governmental entities.

Comments of Bernard S. Cohen to the Report of the Special Ad Hoc Subcommittee of the House and Senate Courts of Justice Committee Studying Immunity Legislation

Some of my colleagues on this special subcommittee have concluded that the public interest is being served by the current state of the charitable immunity doctrine. I believe this view is erroneous and shortsighted and evinces a lack of understanding of the problem and the availability of an easy and practical solution.

While it is in the public interest to encourage charitable institutions in their good work, the charitable immunity doctrine as it now applies in Virginia is not necessary to encourage such good work as is shown by the documentation which follows. Equally important as encouraging the good work of charitable institutions is protecting the rights of those who are negligently injured, maimed and sometimes killed. A proper balance in Virginia law would both encourage charitable institutions in their good work and protect the rights of those negligently harmed.

It is important to recognize that persons who are injured, maimed or killed by the negligence of another and who have no resources or ability to recover from the wrongdoer frequently become charity patients and the cost of their care is thus transferred to the taxpayer. It is indeed ironic that these victims of the doctrine of charitable immunity are forced to, in turn, become beneficiaries of the good work of the charities that are immune from liability for injuring them. While the subcommittee made no effort to determine the costs to the taxpayer arising from the care of injured people who are made indigent, I have knowledge gained through my law practice of some of these costs. For example, many years ago when I visited the Woodrow Wilson Rehabilitation Center I was told that the cost to the state for rehabilitation and care of a person with a quadriplegic injury was at least $6 million.

There is a rather simple and available solution to accomplish the equally desirable goals of charitable good work and protection of injured victims. The solution lies in the availability of liability insurance to cover all volunteers and paid workers of the charitable institutions. The subcommittee was furnished information on insurance premium rates from the Bureau of Insurance for school teachers in Virginia. We learned that $1 million worth of liability coverage for each school teacher was provided under a group policy which the National Education Association had with the Horace Mann Insurance Company. The annual insurance premium which was effective December 1, 1991, was $4.14 per teacher and the rate

decreased effective September 1, 1992, to an annual premium of $3.89 per teach (See Appendix C).

If such inexpensive insurance is available, then how in the world can we justify the doctrine of charitable immunity which so unfairly punishes innocent victims? Those recognizing the noble work of charities should not ignore the evidence that immunity breeds irresponsibility.

While the doctrine of sovereign immunity differs from charitable immunity, there are certain factors common to both immunities.

The General Assembly recognized the harshness of the doctrine of sovereign immunity when it adopted the state Tort Claims Act in 1981. Under the terms of that Act, injured victims of the negligence of state employees may sue the state which has agreed to be liable t the extent of $100,000 or the maximum limits of any liability policy maintained by a state agency to insure against negligence or other tort.

Therefore, the legislature has correctly recognized the principle that a negligent actor ought to be held responsible for his negligence which results in injury to another. More important, however, is the acknowledgment by the state that liability insurance is available to deal with the problem in a fair and equitable manner.

Finally, the subcommittee failed to deal with recommending amendments which would do away with irrational inconsistencies in Virginia's statutory grants of immunities. For example, staff prepared a table of statutory grants of immunity showing who is immune, the immune activity, the standard set for granting immunity and exceptions to the rule (See Appendix A). It only takes a moment to examine the Exceptions column on the table to know that, without any rhyme or reason, both the procedural language and the substance of the granted exceptions are neither uniform nor consistent. For example, looking at the exceptions for the immunities included in § 8.01-225 of the Code, many of the persons granted immunity under that section still are liable for negligent operation of a motor vehicle; however, the motor vehicle operation exception is not granted to everyone in that section. This is not only bad statutory drafting, it is terrible policy.

In short, the immunity laws in Virginia are broken; they need to be fixed. The legislature should adopt an immunity policy which recognizes that the availability of liability insurance is the inexpensive, practical solution which will both encourage the good works of charities and protect injured victims. A thorough joint-legislative study is needed.

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 2.1-373.2:1	State Long-Term Care Ombudsman representative	Report/investigation of long-term care provider	Immune from any civil liability otherwise incurred imposed, if done in good faith	Malice; without reasonable cause
§ 2.1-526.17:1	Commonwealth officers, agents and employees	Asbestos inspections	Immune from civil liability arising from/undertaken pursuant to law	
§ 2.1-751	Members of community policy and management teams	Decisions regarding services for family or placement or treatment of child	Immune from any civil liability	Proof acted with malicious intent
§ 2.1-753	Members of family assessment and planning team	Decisions regarding services for family or placement or treatment of child	Immune from any civil liability	Proof acted with malicious intent
§ 8.01-38	Charitable hospital/§ 501 (c)(3) hospital	Services provided without fee or charge to or financial responsibility on part of patient	§ 501 (c)(3) - Immunity from liability in excess of $500,000 (or $1 million in med. mal.) if insured for $500,000.	
§ 8.01-44.1	Members of state/federal groups looking at hospital or college faculty or staff research programs or protocol (but not conducting programs)	Act, decision, omission or utterances in performance of duties	Immune from civil liability	Bad faith, malicious intent or knowingly authorizing program/protocol violating human research law
§ 8.01-47	Teacher...or other professional, administrative or clerical staff member or other personnel of elementary or secondary school/college/university	Reports/investigations made in good faith with reasonable cause into activities of students or others re: school-related drug use	Immune from all civil liability otherwise incurred/imposed	Malice
§ 8.01-220.1:1	Directors/officers/trustees of § 501 (c) or § 528 organizations **(uncompensated)**	Acts taken in official capacity	Immune from civil liability	Willful misconduct/knowing violation of criminal law/liability ensuing from motor vehicle operation/violation of fiduciary obligation
	Director/officers/trustees of § 501 (c) or § 528 organizations **(compensated)**	Acts taken in official capacity	Liability not to exceed last 12 mos. compensation	
§ 8.01-224				Governmental immunity not available for blasting/explosives work
§ 8.01-225	Any person **(uncompensated)**	Emergency care at accident scene or en route to hospital	Not liable for civil damages, if done in good faith	Motor vehicle operation

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 8.01-225 (Cont'd)	Any person	Emergency obstetrical care to woman (i) in active labor, (ii) not previously treated by person or associate and (iii) whose medical records are not reasonably available	Not liable for acts/omissions resulting from emergency medical care	Gross negligence; motor vehicle operation; negligence not involving emergency care
	Any person **(uncompensated)**	Administration of epinephrine to person with prescribed treatment kit believed to be suffering life-threatening anaphylactic reaction	Not liable for ordinary negligence in acts/omissions resulting from treatment, if done in good faith	Motor vehicle operation
	Any person	Omission/commission while rendering emergency haz. mat. assistance, upon request of police, etc.	Not liable for resulting civil damages, if done in good faith	Motor vehicle operation
	Certified emergency medical care. attendant/technician **(uncompensated)**	Emergency care/assistance to injured or ill (whether in person or by telephone or other means of communication)	Even if in violation of state regs, if done in good faith	Motor vehicle operation
	Completed CPR course **(uncompensated)**	Approved CPR in event of accident or emergency	Not liable for acts/omissions resulting from CPR, if done in good faith	Motor vehicle operation
	Licensed physician serving as operational medical director for licensed EMS agency **(uncompensated)**; agency dispatcher **(uncompensated)**	Acts/omissions by agency personnel	Not liable for acts/omissions resulting from services, if done in good faith	Gross negligence or willful misconduct by director/dispatcher; motor vehicle
	Licensed physician	Directing EMS through communications device	Not liable for act/omission related to care	Gross negligence or willful misconduct by physician; motor vehicle
	Any volunteer and a mine operator (but only re: mine not oowned or perated by him)	Rescue/recovery work at a mine	Not liable for civil damages for acts/omissions resulting from rescue work, if done in good faith	Gross negligence or willful misconduct; motor vehicle
§ 8.01-225.1	Licensed physician, surgeon or chiropractor acting as team physician **(uncompensated)**	Emergency medical care to participant in elementary, middle or high school athletic event	Not liable for civil damages resulting from act/omission related to care	Gross negligence or willful misconduct
§ 8.01-226.1	Any person	Act, decision, communication, etc., in connection with investigation/counseling of lawyer re: substance abuse or as member of VBA Committee on Substance Abuse	Immune from civil liability, if done in good faith	Malicious intent; claim by client against lawyer
	Virginia Bar Assn. officers, directors, employees, servants and agents	Activities of lawyers helping lawyers, Committee on Substance Abuse or establishment of committee's programs	Immune from civil liability, if done in good faith	Malicious intent; claim by client against lawyer

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 8.01-226.2	Licensed Professional Engineer (**uncompensated**)	Use of professional skills at or in connection with life-threatening emergency	Not liable for any civil damages, if done in good faith	Gross negligence or willful misconduct
§ 8.01-226.3	Officer, director or member of a not-for-profit organization which regularly assists police by soliciting and gathering information and offering rewards	Activities/omissions directly related to activities on behalf of organization	Not liable for any civil damages	Gross negligence or willful misconduct
§ 8.01-226.4	Any individual (**uncompensated**)	Rendering care to terminally ill patient pursuant to hospice program	Not liable for civil damages for acts/omissions resulting from care	Gross negligence or willful misconduct
§ 8.01-581.8	Members of med. malpractice review panel	Communications, findings, opinions and conclusions in course and scope of duties	Absolute immunity from civil liability	
§ 8.01-581.13	Active "health professional"	Membership on peer review (drugs/alcohol) committee or committee determining duration of patient stays, delivery of services, reasonableness of charges, etc.	Immune from civil liability for act/decision/omission	Bad faith or malicious intent; acts, etc. for which liability is limited under federal SSA
	Pharmacist or nurse or "health profession" student	Member of entity investigating impairment and recommending treatment	Immune from civil liability for act/decision/omission	Bad faith or malicious intent
§ 8.01-581.14	Member of rate review board of Va. Hospital Assn.	Performance of duties as member	Immune from civil liability for act/decision/omission	Bad faith or malicious intent
§ 8.01-581.16 (**Compare § 8.01-581.13 A(iii)?**)	Members of/consultants to hospital entities	Performance of duties review/recommend/evaluate duration of inpatient stays, professional services, efficient use of facilities/services, adequacy or quality of services and/or appropriateness of charges	Immune from civil liability for act/decision/omission/utterance	Bad faith or malicious intent
§ 8.01-581.18	Physician	Failure to review or respond to receipt of lab test or examination results which he did not request or authorize in writing	Immune from civil liability	Reports provided directly by patient or state Health Dept.
§ 8.01-581.19	Licensed physician/chiropractor/ clinical psychologist/podiatrist/ veterinarian/optometrist	Performance of duties as member of entity resolving issues of admission/discipline of peers	Immune from civil liability for communication/finding/ opinion or conclusion	Bad faith or malicious intent
§ 8.01-581.19:1	Any person	Providing information to specified entities investigating impairment of certain health care professionals	Immune from civil liability for act/utterance/communication	Bad faith/malicious intent/violation of federal law or regulation

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 8.01-581.23	Mediators/mediation programs	Efforts to assist/facilitate mediation	Immune from civil liability for or resulting from act/omission	Bad faith/malicious intent/willful, wanton disregard of another's rights/safety/ property
§ 9-173.10	CASA staff or volunteers	Acting within scope of duties	No personal liability	Gross negligence/intentional misconduct
§ 10.1-1008	Cave owner/agent acting within scope of authority	Allowing free use of cave for recreational/scientific purposes	Not liable for injuries sustained	
§ 10.1-1199	Any person	Making "voluntary" disclosure of environmental violation	Immunity from administrative or civil penalty **(not civil action?)**	Bad faith
§ 15.1-7.01	Members of local governing bodies/entities	Exercise or failure to exercise discretionary/governmental authority	Immune from suit arising from exercise/failure	Intentional willful misconduct or gross negligence/ unauthorized appropriation or misappropriation
§ 15.1-131	Police officers, agents, employees of locality or state college or university	Performing duties beyond territorial limits	All immunities from liability applicable within territorial limits	
§ 15.1-131.8:4	Chief of law enforcement; Director of Dept. of Criminal Justice Services or designee	Disclosure of sheriff/police/jail officer's prior job performance to prospective employer	Immune for disclosure and consequences, if done in good faith	Lack of good faith (clear/convincing evidence -- knowingly false, deliberate, misleading, malicious purpose, violation of civil rights)
§ 15.1-159.7:6	Criminal Justice Training Academy/directors, officers and employees	Causing damage or injury to person or property	Same immunity as counties/officers and employees/supervisors in any civil action	
§ 15.1-15 7:7	Members of Academy Board of Directors	Indebtedness of Academy	No personal liability	Willful misconduct
§ 15.1-291	County, city or town	Act/omission in operation or maintenance of beach, pool, park, playground or recreational facility	Not liable in civil action for damage/injury caused by simple/ordinary negligence	Gross or wanton negligence
§ 16.1-330.2	SHOCAP staff or agency	Sharing information within SHOCAP committee structure	Immune from civil/criminal liability that "might otherwise result"	
§ 18.2-412	Person authorized to disperse or assist in dispersing a riot or unlawful assembly	Actions taken after command to disperse (reasonably necessary under all the circumstances)	No civil or criminal liability	
§ 19.2-182.13	Members of DMH, MR, SAS Boards **(uncompensated)**	Actions within scope of duties	Immune from person liability	Intentional misconduct

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 22.1-3.1	School principals/designees	Notifying or failing to notify local law enforcement of pupil's lack of birth certificate	Immune from civil or criminal liability in connection with notice	
22.1-194	Locality or school board as owner or "operator through medium of a driver"	Vehicle accident	Immune beyond limits of "valid and collectible" insurance	
§ 22.1-236	Members of school board/officers or directors of corporation	Negligence of student or agent in connection with a vocational education project	No personal liability	
§ 22.1-258	Attendance officers/school personnel or volunteers	Giving notice/failure to notify parents of pupil's absence	Immune from civil or criminal liability	
§ 22.1-289	School superintendents/designees	Giving notice/failure to notify police or sheriff of pupil's lack of scholastic record	Immune from civil or criminal liability	
§ 22.1-303.1	Teacher/person conducting certain review of beginning teacher	Act/omission/statement in performance of duties conducting peer review	Immune from civil liability	Bad faith/malicious intent
§ 27-1	Firefighters/local EMTs	Performing duties beyond territorial limits	Same immunity as if within territorial limits	
§ 27-2.1	Localities/firefighters/local EMTs	Acts/expenditures in providing fire protection or emergency medical service to federal property	Same immunity as if within territorial limits	
§ 27-85.5	Insurance company or agent/arson investigator or prosecutor	Releasing/receiving information relating to fire loss	Immune from liability arising out of a civil action; penalty from criminal prosecution	Actual malice
§ 29.1-739	Operator of vessel involved in accident/casualty	Assistance at scene and providing /arranging salvage, towage, medical treatment or other assistance	Immune for acts/omissions constituting good faith assistance without danger to own crew/ vessel/passengers, if ordinary, reasonable, prudent person would have acted under the same or similar circumstance	Objection of person assisted
§ 32.1-38	Any person	Making required or authorized report concerning specified diseases	Immune from civil liability or criminal penalty connected with disclosure/report	Gross negligence/malicious intent
	Blood collection agency/tissue bank	Failure to notify other persons of test results	A cause of action shall not arise	

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 32.1-88	Members of Formulary Board/State Board of Health	Act or acts performed jointly or individually, in carrying out duties	Immune from any recourse, civil or criminal, arising from acts performed in good faith	
	Prescriber	Pharmacist's substitution of another drug for prescribed drug	Immune from civil/criminal liability	
	Pharmacist	Substitution of another (approved) drug for prescribed drug	Immune from civil/criminal liability if substitution in good faith	
§ 32.1-127.1	Chief administrative officer of hospital/his designee/or a representative of organ/tissue/eye procurement entity	Act/decision/omission/statement made in conformity with statute/regulations re routine contact and requests for organ/tissue/eye donations or assisting or performing removal	Immune from civil liability	Gross negligence/bad faith/malicious intent
§ 32.1-127.3	Hospital employee rendering health care services within scope of licensure, certification, or employment	Act/omission resulting from services to patient at free clinic (organized in whole/part to provide services without charge)	Not liable for civil damages	Gross negligence or willful misconduct applies only to services rendered without charge as evidenced by written agreement
§ 32.1-287	Chief Medical Examiner or assistant chief medial examiners	Act/decision/omission resulting from acceptance of dead body for disposition	Immune from civil liability	Bad faith/malicious intent
§ 32.1-288	Health Commissioner and Chief Medical Examiner	Act, decision or omission of acceptance of dead body for cremation or other disposition when dead body unclaimed	Immune from civil liability	Bad faith or malicious intent
§ 32.1-295	"Donees" of bodies/parts and authorized certain employees	Taking medically necessary steps to maintain viability of organs/tissues for transplantation	Immune from civil/criminal liability in connection with taking steps medically necessary	Gross negligence/willful misconduct
§ 32.1-331.16	Members of Medicaid Prior Authorization Advisory Committee/Board of Medical Assistance Services and staff of Dept. of Health	Act/decision/omission done or made in performance of duties	Immune, individually and jointly, from civil liability	Bad faith/malicious intent
§ 38.2-229	Any person	Furnishing information upon request/pursuant to law to the SCC Insurance Commissioner relating to investigation of insurance/reinsurance transaction	No liability and no cause of action if done in good faith	
	SCC/Commissioner of Insurance/agents or employees	Investigation or dissemination of official report relating to investigation	No liability and no cause of action if done in good faith	

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 38.2-618	Any person	Disclosure of personal or privileged information to insurance institution/agent/support organization	No cause of action in the nature of defamation, invasion of privacy or negligence shall arise	False information furnished with malice or willful intent to injure
§ 38.2-1321.1	SCC/authorized representatives/examiners	Statements/conduct made or performed while ensuring compliance by insurance holding companies	No cause of action shall arise nor any liability imposed if good faith	
§ 38.2-1321.1 (Cont'd)	Any person	Communicating/delivering information/data to SCC/representative/examiner	No cause of action shall arise nor any liability be imposed	Fraudulent intent or intent to deceive
§ 38.2-1713	Member insurer/agent/employee or VA life, accident, sickness ins.	Action taken in performance of statutory duties	No liability/no cause of action of any nature	
§ 38.2-2114	Commissioner of Insurance/ authorized representatives, agents, employees or any person furnishing information as to reasons for cancellation, etc.	Furnishing info. to fire insurer on reasons for cancellation/refusal to renew or statement made in complying with statutory requirements for cancellation/non-renewal	No liability/no cause of action of any nature	
§ 38.2-2711	Insurer or inspection service or residual market or facility/JUA/directors/officers/agents/ employees or SCC/authorized reps.	Actions in performance of statutory duties/any inspections/any statements made in reports, at hearings of in fundings	No liability/no cause of action of any nature if done in good faith	
§ 38.2-5511	SCC/Commissioner of Insurance/SCC employees or agents	Actions taken in performance of statutory duties under the Risk-Based Capital Act for insureds	No liability/no cause of action if done in good faith	
§ 44-146.23	State/political subdivision/federal agency/public or private agencies and their employees/reps engaged in emergency services	Compliance/attempted compliance with statute, rule, regulation or executive order	Not liable for resulting death or injury to person or damage to property	Willful misconduct of public or private employees
	Volunteer, owner/controller of property (**uncompensated**)	Permitting designation/use of property for shelter or other use related to emergency services during actual/impending disaster	Not liable for negligently causing injury/death or damage/loss on or about the property	
	Licensee or certificate/permit holder	**Gratuitously** rendering professional, mechanical or other skilled aid during a disaster	Not liable for negligently causing death/injury or loss/damage	
	Person, firm or corporation approved by state coordinator	**Gratuitously** servicing or repairing electronic devices/equipment	Not liable for negligently causing death/injury or loss/damage resulting from defect in equipment/device	

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 44-146.23 (cont'd)	Individual or other legal entity (**uncompensated**)	Voluntarily rendering care/assistance/advice under direction of state/local authorities with respect to actual/threatened discharge of hazardous substances	Not liable in civil damages	Gross negligence, recklessness or willful misconduct
Interstate Compact	Party state/officers/employees	Act/omission while rendering aid in another state --- Maintenance/use of equipment while rendering such aid	Not liable, if good faith	Willful misconduct, gross negligence or recklessness
§ 44-146.36	State public or private agencies/employees/representative	Engaging in emergency service activities while complying/attempting compliance with statutes/regulations/orders	Not liable for death, injury or damage	Willful misconduct, gross negligence or recklessness
§ 44-146.40	Appointed member of local emergency planning committee	Official act/decision/omission in performance of duties	Immune from civil liability	Bad faith/malicious intent/gross negligence
§ 46.2-342	DMV/employees	Making or failure to make notation of organ donor designation	Immune from civil/criminal liability	Gross negligence/willful misconduct
§ 46.2-1231.1	Towing/recovery operator	Response to police direction tow, recover, or store vehicle, etc.	Not liable for damages in any civil action, if good faith	Negligence in towing/recovery/ storage
§ 46.2-1557	Motor vehicle dealer/employees/agents	Furnishing vehicle (with dealer plates) for use in school's approved driver education programs	Immune from liability in any suit, claim, action or cause of action	
§ 46.2-1961	T & M vehicle dealers/employers or agents	Furnishing vehicle (with dealer plates) for use in school's approved driver education programs	Immune from liability in any suit, claim, action or cause of action	
§ 54.1-2400.1	Mental health service provider	Breaching confidentiality to conform with duty to warn/failing to predict dangerousness (absent threat) or failure to take precautions other than those specified	Not to be held civilly liable to any person	
§ 54.1-2502	Consultant under contract with Dept. of Health Professions	Communications/findings/opinions/ conclusions made in the course of duties	Immune from civil liability resulting from actions	Bad faith/malicious intent
§ 54.1-2906	Chief admin officer/chief of staff of hospital or health care institution	Making report/testifying regarding disciplinary actions/specified disorders of licensed health professionals	Immune from any resulting civil liability	Bad faith/malicious intent

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 54.1-2907	Practitioner of healing arts	Making report/testifying regarding certain disorders or additions of licensed health care practitioners under professional treatment	Immune from any civil liability alleged to have resulted	Bad faith/malicious intent
§ 54.1-2908	Presidents of specified health professionals associations	Making report/testifying regarding certain disciplinary actions taken	Immune for any resulting civil liability	Bad faith/malicious intent
	Presidents of specified health professionals associations	Participating in decision to refer certain complaints to the Board/testifying	Immune from any civil liability alleged to have resulted	Bad faith/malicious intent
§ 54.1-2909	Licensed health professionals/institutions; presidents of professional societies; malpractice carrier of person subject to a judgment ortwo settlements within three years	Reporting to state board re: disciplinary actions, judgments, settlements or probable professional incompetency/testifying	Immune from any resulting civil liability or criminal prosecution	Bad faith/malicious intent
§ 54.1-2922	Member of medical complaint, investigation committee	Communication/finding/opinion/ conclusion made in the course of duties	Immune from resulting civil liability	Bad faith/malicious intent
§ 54.1-2923	Member of medical practices audit committee	Communication/finding/opinion/ conclusion made in the course of duties	Immune from resulting civil liability	Bad faith/malicious intent
§ 54.1-2924	Members of Psychiatric Advisory Board	Communication/finding/opinion/ conclusion made in the course of duties	Immune from resulting civil liability	Bad faith/malicious intent
§ 54.1-2925	Expert in disciplinary investigation/evaluation under contract with executive director or voluntarily	Assistance in any investigation	Immune from any resulting civil liability or criminal prosecution	Bad faith/malicious intent
§ 54.1-2967	Physician or other rendering aid to victim of wounding by firearm, knife, etc.	Making report/participating in judicial proceeding	Immune from any civil liability in connection therewith	Proof of bad faith/malicious intent
§ 54.1-2988	Health care facility/physician/person acting under physician's direction	Withholding/withdrawing of life-prolonging procedure	Not subject to criminal prosecution, civil liability or professional discipline	Failure to comply with statute in good faith
§ 54.1-3925.3	Any person	Furnishing information/giving testimony to Board of Bar Examiners/character and fitness committee	Immune from civil liability	Actual malice
§ 56-265.25	State	Underground utility damage prevention	Sovereign immunity not abrogated	
§ 56-545	State	Participation in or approval of roadway application or operation	Sovereign immunity not waived	

Cite	Who is Immune	Immune Activity	Standard	Exceptions
§ 56-573	State/responsible public entity/affected locality/officer or employee	Participation in or approval of a qualifying transportation facility or operation	Sovereign immunity not waived	
§ 63.1-55.3	Persons statutorily required to report suspected abuse of adult (e.g., doctors)	Reporting/testifying	Immune from civil or criminal liability	Bad faith/malicious purpose
§ 63.1-248.5	Persons suspecting child abuse	Reporting/taking child into custody/participating in judicial proceeding	Immune from civil or criminal liability	Proof of bad faith/malicious intent
§ 63.1-274.6	Public or private peron or entity of the state	Release of information to DSS relating to its support collection duties	Immune from resulting civil/criminal liability	Gross negligence/willful misconduct/breach of ethical duty
§ 65.2-1307	Member of State-Wide Coordinating Committee/peer review committee (medical costs), agents	Act/decision/omission/utterance made/done in performance of duties	Immune from civil liability	Bad faith/malicious intent

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HOUSE JOINT RESOLUTION NO. 33

Establishing a joint subcommittee to study the immunity laws.

Agreed to by the House of Delegates, February 8, 1996
Agreed to by the Senate, February 21, 1996

WHEREAS, only the General Assembly can offer immunity from liability, and currently, there are over eighty statutes in the Code of Virginia which afford charitable or sovereign immunity to various persons and entities; and

WHEREAS, those statutes are spread across the entire Code, offer complete or conditional immunity from certain types of actions or inactions, and are inconsistent in their wording, even when affording immunity from the same action or inaction; and

WHEREAS, there is a long line of case decisions which interpret the public policy of charitable and sovereign immunity; and

WHEREAS, each year several bills are introduced during the session of the General Assembly to add new immunity laws or modify the existing law; and

WHEREAS, there is a need to analyze (i) the existing immunity laws to assure that the public policy established by statute is organized and consistent; (ii) the issues attendant to such laws, such as insurance coverage for the immune entities and their employees and volunteers; and (iii) the case law; and

WHEREAS, after the 1995 Session members of the House and Senate Committees of Courts of Justice were appointed to review immunity legislation introduced during the 1995 Session, and reported their findings, but were not able to fully study all of the issues because of time; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That a joint subcommittee be established to study the laws, the case decisions, and issues attendant to legislation relating to charitable and sovereign immunity.

The joint subcommittee shall be composed of seven members as follows: four members of the House of Delegates to be appointed by the Speaker of the House of Delegates; and three members of the Senate to be appointed by the Senate Committee on Privileges and Elections.

The direct costs of this study shall not exceed $6,250.

The Division of Legislative Services shall provide staff support for the study. All agencies of the Commonwealth shall provide assistance to the joint subcommittee, upon request.

The joint subcommittee shall complete its work in time to submit its findings and recommendations to the Governor and the 1997 Session of the General Assembly as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents.

Implementation of this resolution is subject to subsequent approval and certification by the Joint Rules Committee. The Committee may withhold expenditures or delay the period for the conduct of the study.

STEVEN T. FOSTER
OMMISSIONER OF INSURANCE

COMMONWEALTH OF VIRGINIA

BOX 1157
RICHMOND, VIRGINIA 23209
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STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

September 28, 1995

The Honorable Bernard S. Cohen
Member, House of Delegates
221 S. Alfred St.
Alexandria, VA 22314

Dear Delegate Cohen:

Thank you for your letter dated September 14, 1995, regarding charitable immunity. I have answered the questions which you felt might be asked by the members of the committee. I hope this information will meet your needs. Please let me know if we can assist you with any other request.

Sincerely,

Mary M. Bannister

Mary M. Bannister
Deputy Commissioner
Property and Casualty Division
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MMB/tm
attachments

cc: Steven T. Foster, Commissioner of Insurance
C. William Cramme', III, Deputy Director, Division of Legislative Services

Response to questions posed in September 14, 1995 Letter:

Q. How is coverage made available to volunteers?

A. Generally, coverage for actions of volunteers while performing in this capacity may be covered in two ways. First, the organization for which the volunteer is performing services may have their own comprehensive general liability (CGL) policy endorsed to add volunteers as insureds. This is accomplished by adding ISO form CG 20 21, Additional Insured – Volunteers. Generally, this form is added without charge. Additionally, people who do volunteer work may be personally covered under their homeowner's or umbrella policy. There is usually no charge under the homeowner's or umbrella policy for this coverage.

Q. Are volunteers covered under the CGL of the parent organization?

A. Yes, if the organization has their CGL policy endorsed to add volunteers as insureds. Otherwise, there is no coverage under a CGL policy, as the definition of an insured does not extend the policy's coverages to volunteers. There are endorsements also available which cover some of the extended liabilities of some organizations, such as sexual abuse coverage. While the endorsement adding volunteers to the CGL is added without charge, endorsements which provide these additional coverages for otherwise excluded exposures do carry premium charges. It is possible that volunteers could need coverage for some of these special areas, depending on the work performed.

Q. Does a homeowner's policy cover volunteers for their liability while functioning in a volunteer capacity?

A. Generally, if the activity is not considered a business pursuit, a homeowner's policy will cover the actions of a person who does volunteer work for his or her liability, with some limitations.

Q. If coverage for volunteers is an additional cost, how much is it?

A. Only applies in the case of specialized coverages on the CGL policy, as the volunteers as additional insureds endorsement is added at no cost. The charges for the special coverages such as sexual abuse are varied based on the type of operation to be insured. Coverage under a homeowner's or umbrella policy would generally be without cost.

Q. Is there any data or information to indicate that carriers take immunity into consideration when they set premiums?

A. Carriers generally use a pure premium rate setting methodology which takes the actual losses incurred for a type of coverage, and divides this by the exposures to come up with a pure loss cost figure. This number is then adjusted for credibility, trended, developed, and has expenses added to it to come up with a final rate. This rate will consider immunity if it exists through lower incurred losses, which will ultimately hold down the pure loss cost.

Q. If the answer to the above question is yes, what is the actual practical decrease in dollars or percent?

A. Not applicable.

Q. If the decrease in premium is slight or *de minimus*, why is this so?

A. Does not apply.

Q. Do you have any way of determining what the rates were for school teachers in Virginia with the Horace Mann Insurance Company prior to the 1988 *Lentz* decision and what the rates were following the 1988 decision?

A. The latest Horace Mann rates for school teachers in Virginia were filed in 1992. These rates are for the insurance provided to teachers who are members of the NEA, and are included in their dues.

Effective 9-1-92:	$1,000,000 Liability ($25,000 Civil Rights) $30,000 Attorney Fee Reimbursement $1,000 Bail Bond $250 Personal Property - Assault Related	$3.89 per member
Effective 12-1-91:	Limits as per above	$4.14 per member
Effective 9-1-84:	$1,000,000 Liability ($25,000 Civil Rights) $25,000 Attorney Fee Reimbursement $1,000 Bail Bond $250 Personal Property - Assault Related	$1.26 per member

Effective 9-1-80:	$250,000 Liability $10,000/$2,500 Attorney Fee Reimbursement $1,000 Bail Bond $250 Personal Property - Assault Related	$1.39 per person
Added Limits of Liability	$250,000 excess $250,000	+$0.40
	$500,000 excess $250,000	+$0.65
Effective 9-1-79:	Limits as per above	$1.54 per person
Added Limits of Liability	$250,000 excess $250,000	+$0.40
	$500,000 excess $250,000	+$0.65

In addition to the specific questions asked in your letter, the Bureau has additional information on the affordability and availability of various coverages in Virginia. This information is collected by the Virginia Commonwealth University Survey Research Laboratory (SRL) on behalf of the Bureau of Insurance. It is used by the Bureau to assist in preparing the Commission's biennial report to the General Assembly on the level of competition, affordability, and availability of commercial liability insurance in the Commonwealth.

This year, more than 6,000 businesses were randomly selected from a list provided by the Virginia Employment Commission. These businesses were asked to list coverages they found unaffordable or unavailable. In terms of volunteer organizations, the only coverage mentioned as being unavailable was Directors and Officers Liability, but we are not able to determine if this is for profit or non-profit organizations. This coverage was listed by 6 respondents out of the 2,223 survey responses received.

Additionally, the SRL also surveys insurance agents to ascertain if there are any coverages that they or their clients find unaffordable or unavailable. Only one out of 135 agencies mentioned D&O as being unavailable.

The SRL collects more detailed information on Volunteer Firefighters and Rescue Squads as part of the identification process for potentially non-competitive lines of commercial insurance as required by §38.2-1905.1. These surveys indicated no problem with this line.

Volunteer Firefighters and Rescue Squads is the only line with a volunteer exposure for which information is collected in any detail in the supplemental reports. We do not have any other information available in sufficient detail to make any determinations as to the availability of coverage for volunteer exposures.

We have checked with our Consumer Services Section, and our Commercial Rules, Rates, and Forms Section, and there have been no complaints filed by non-profit organizations with either section regarding their inability to obtain insurance.