REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

CHARITABLE AND SOVEREIGN IMMUNITY

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 83

COMMONWEALTH OF VIRGINIA
RICHMOND
1997

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TABLE OF CONTENTS

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

I. INTRODUCTION

A. HJR 33's Scope and Background

House Document No. 63 of 1996 reports on the work of a special ad hoc subcommittee composed of members of the House and Senate Courts of Justice Committees studying immunity legislation which had been introduced, but was laid on the table for study, during the 1995 Legislative Session. That document includes: (i) a brief review of charitable and sovereign immunity case law, (ii) a matrix of the current statutes addressing immunity, (iii) the conclusion by the special subcommittee that the immunity laws are "alive and well" and any exploration of changes to the existing doctrines should be performed under a formal joint resolution, (iv) a minority report which discusses the need to enact a teacher immunity statute to protect teachers while rendering general supervision, care and discipline in the course of employment and while rendering health-related assistance, and (v) comments by a subcommittee member addressing the need for Virginia to repeal its doctrine of charitable immunity by enacting legislation recognizing that the availability of liability insurance to charities is the inexpensive, practical solution which will both encourage the good works of charities and protect injured victims.

In the 1996 Session, House Joint Resolution No. 33 was introduced to study further the issues reviewed by the 1995 special ad hoc subcommittee and to review suggested changes to the two immunity doctrines (Appendix A). The House Courts of Justice Committee also referred several immunity bills introduced during the 1996 Session and carried over for study (Appendix B).

HJR 33 was patroned by Del. Joseph P. Johnson, Jr., who also served as the subcommittee's chairman. Additional General Assembly members appointed to the joint subcommittee were as follows: Delegates John J. Davies III, of Culpeper; A. Donald McEachin of Richmond; and Thomas G. Baker, Jr., of Dublin, together with Senators Joseph B. Benedetti of Richmond; Henry L. Marsh III, of Richmond; and John S. Edwards of Roanoke.

B. Overview Of Charitable And Sovereign Immunity

1. Charitable Immunity

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). 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, 250 Va. 421, 463 S.E.2d 459 (Va. 1995); Thrasher v. Winand, 239 Va. 338, 389 S.E.2d 699, 701 (Va. 1990); Infant C v. Boy Scouts of Am., 239 Va. 572, 578, 391 S.E.2nd 322, 330 (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). That immunity does not extend to a person who is not a beneficiary receiving the bounty of the organization, i.e., 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). The doctrine rests on the public policy 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.

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.

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 tortious conduct. See, e.g., Egerton, 395 F.2d at 383; Straley, 413 S.E.2d at 49-50. 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); 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 (i) whether the organization's articles of incorporation have a charitable or eleemosynary purpose and (ii) 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:

a. 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;

b. 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;

c. Whether the organization's goal is to break even; see Purcell, 232 S.E.2d at 905; Oakes, 108 S.E.2d at 392;

d. 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;

e. 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;

f. 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;

g. 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

h. 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.

2. Sovereign Immunity

"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 v. Burden, 228 Va. 301, 308, 321 S.E.2d 657, 660 (1984); 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.

Although a valid reason exists for state employee immunity, the intrusion of government into areas formerly private and the thousandfold increase in the number of government employees have weakened the argument for such immunity.

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 include, but are 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).

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 as it has in the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). 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, supra, at 465.

When a state employee is sued for simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and the employee claims the immunity of the state, 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. The extent of a government's control and direction of its employee also influences the 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. 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." 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. at 229, 22 S.E.2d at 12. However, 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. 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 and 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.

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.

In Hinchey, supra, the plaintiff sued Ogden in his capacity as superintendent of the Norfolk-Virginia Beach Expressway, alleging in part that Ogden breached his duty to provide traffic barriers and other traffic control devices capable of containing vehicles in their lane of travel, such as the westbound vehicle that bounded into her lane and collided head-on with her eastbound motorcycle. The court offered another purpose for the rule of immunity, stating that since the public also has a vital interest in the orderly administration of government, 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. Id. at 239, 895. In Virginia, the court noted, waiver is an intentional relinquishment of a known right, and there can be no waiver of sovereign immunity by implication. The Commonwealth does not waive sovereign immunity when it elects to protect a governmental function with liability insurance. Id. at 241, 898.

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. Id. at 307, 321 S.E.2d at 660. In Messina, the court sought to achieve, under the sovereign immunity rubric, a synthesis of common-law immunity principles that will be useful for all the constantly shifting facts and circumstances that come before the courts of the Commonwealth. Messina at 307, 321 S.E.2d 657, 660 (1984).

The court considered two cases in one opinion, Messina v. Burden (Record No. 811485) and Armstrong v. Johnson (Record No. 820299). In Messina, the Superintendent of Buildings of Tidewater Community College was sued for alleged negligent injury to an actor by a fall on a stairway behind the stage of the college theater. In Armstrong, the chief of the operations division of the Department of Public Works of Arlington County was sued when the plaintiff sustained injuries by stepping on a defective manhole cover. In both cases it was argued that the doctrine of sovereign immunity should be rejected by the court.

The court in Messina, stated that the immunity enjoyed by governmental employees is not regarded in Virginia as independent of the immunity held by the Commonwealth itself; instead, the former is the logical and necessary extension of the latter. Id. at 308, 321 S.E.2d at 660. This conclusion is grounded partly in the agency-related principle that the state can act only through its individuals and partly in the policy-related principle that unless the protection of the doctrine

extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. Id., 321 S.E.2d at 661.

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. The rule announced was that if an individual works for an immune governmental entity, then, in a proper case, that individual will be eligible for the protection afforded by the doctrine. Id. at 312, 312 S.E.2d at 663. Thus, in one case, the court held that a state supervisory employee (Burden) 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. Messina, supra, at 310-11, 321 S.E.2d at 662.

The U.S. Supreme Court has ruled that political subdivisions of a state cannot enjoy sovereign immunity unless they function as "arms of the state" under state law. Mt. Healthy City Sch. Dist. Bd. v. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977). In the Commonwealth, counties are clearly regarded as "arms of the state." Both state and federal courts have treated counties as instrumentalities of the state. Mann v. County Bd., 199 Va. 169, 98 S.E.2d 515, 518 (1957); Daley v. Ferguson, 1995 U.S. Dist. LEXIS 14507 (E.D. Va. 1995). Counties and their employees are protected by sovereign immunity given the proper case where the James and Messina tests are met and enjoy the same degree of immunity as the state.

In the other Messina case (Armstrong), the court decided that an employee (Johnson) 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 and applied 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 test, the court stated, was applicable to employees of all immune governmental entities. The factors to be considered include: (i) the nature of the function the employee performs; (ii) the extent of the governmental entity's interest and involvement in the function; (iii) the degree of control and direction exercised by the governmental entity over the employee; and (iv) 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 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." Lentz 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.

In Virginia a municipal corporation, city or town, is clothed with a twofold function--one governmental and the other proprietary. A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions. It may be liable, just as a private individual or corporation, for the failure to exercise or for negligence in the exercise of its governmental or proprietary functions. Taylor v. Charlottesville, 240 Va. 367, 397 S.E.3d 832 (1990); Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 1005, 254 S.E. 62, 63 (1979 (quoting Fenon v. City of Norfolk, 203 Va. 551, 555, 125 S.E.2d 808, 811 (1962)).

Municipal corporations have never been afforded the same immunity as the state or counties. Under common law, a distinction was made between governmental functions, as to which immunity applied, and proprietary functions, as to which governmental entities could be subject to tort liability. The common-law governmental proprietary distinction was derived from the dual nature of municipal corporations. A municipal corporation is a corporate body, capable of performing the same proprietary functions as any private corporation and liable for its torts. On the other hand, a municipality is an arm of the state, and when acting in the governmental or public capacity, it shares the sovereign immunity traditionally accorded the Commonwealth. Generally, governmental functions are those performed by the municipal corporation acting merely as agent or representative of the Commonwealth in carrying out its public purposes, and proprietary functions are those acts carried out for the particular benefit of the inhabitants of the city or town. Thus, the nature of the function on which a tort claim is predicated will often determine whether immunity is available to a municipal corporation in a given case.

Governmental functions are involved when a municipal corporation exercises with a high degree of judgment or discretion the powers delegated to it by the state to promote the comfort, safety, health and overall welfare of the general public. These functions include such activities as police and fire protection, garbage collection, ambulance services, construction of public streets, repair of malfunctioning traffic signals, operation of hospitals, snow and ice removal, building code enforcement, emergency response, health and sanitation regulation, and public education.

Proprietary functions are involved when a municipal corporation acts in its private or corporate capacity and not in furtherance of the duties imposed on it as agent or representative of the Commonwealth. Proprietary functions are considered those which are conducted for the particular benefit or profit of the city or town and its inhabitants. These functions include such activities as maintenance of streets and sidewalks, operation of water works, construction and operation of sewer systems, operation of markets, electric and gas utilities, airports, swimming pools and public housing.

In Virginia the question of whether a particular act by a municipal corporation is entitled to the protection of sovereign immunity also depends upon whether the act under consideration is classified as discretionary or ministerial in nature. Colby v. Boyden, 241 Va. 125, 128-129, 400 S.E.2d 184, 187 (1991). The Virginia rule, which is applied by the court to resolve the question, goes beyond determining whether the act constitutes the formulation or execution of policy, but rather it is the four-factor test enunciated in James, and reiterated in Messina and Lentz.

C. Other States' Laws

1. Charitable Immunity

The subcommittee found that the courts of many states based their application of the doctrine of charitable immunity on one of the following grounds: (i) that to impose liability would divert trust funds for purposes outside the donor's intent; (ii) that respondeat superior should not apply to impose liability upon non-profit charities; (iii) that a beneficiary of a charity assumes the risk of the charitable negligence; (iv) that donations to charities would be discouraged if charities were held liable; and (v) that the imposition of liability on charities would prevent individuals from volunteering, thereby reducing the availability of the services offered by the charity and requiring government to step in and provide such services. No one of these reasons has proved convincing to most contemporary courts, and virtually all states have rejected the complete immunity of charities and favored a limited form of immunity This change is reflected in the Second Restatement of Torts in Section 895E, which provides that charitable and other benevolent enterprises obtain no immunity merely because of their charitable nature. As in Virginia, most states base their application of this immunity upon the belief that it is in the public interest to encourage charitable institutions in their good work and use of their resources to further the institution's purposes rather than pay tort claims lodged by those who benefited from the institution's bounty. Most states preclude a charity's beneficiary from recovering damages from the charity for the simple negligent acts of its servants or agents if due care is exercised in the hiring and retention of those servants and agents. Some states provide by statute a method for reaching any liability insurance funds covering the charity.

2. Sovereign Immunity

The subcommittee reviewed several law review articles and papers, as well as Virginia cases, relating to sovereign immunity. All of the literature suggested that 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. Commentators remark that governmental immunity has been said to be logically indefensible and contrary to fundamental tort principle that liability should follow negligence. 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 do likewise. The doctrine of sovereign immunity and its exceptions operate in such an illogical manner that serious inequality results. The commentators go further to point out that the trend in this country is to abolish sovereign immunity, but they are referring to the traditional rule of "complete" sovereign immunity.

According to the 1992 data reviewed by the subcommittee, 48 states, Virginia and the District of Columbia included, have abolished complete sovereign immunity for state and local governments. Three states, Alabama, Arkansas and West Virginia, have judicially abolished sovereign immunity for their local governments but retained by constitution or provision sovereign immunity for their state governments; however, each has established indemnification and claims settlement procedures and a separate state claims court or board to hear proceedings on claims against state governmental entities. With regard to the abolition of complete immunity for state government, 26 states abolished immunity by judicial action and seven states abolished immunity by constitutional provision. With regard to the abolition of complete immunity for local government, 22 states abolished immunity by legislative action, 24 states abolished immunity by judicial action and five states abolished immunity by constitutional provision. One state, Georgia, provides for a limited waiver of state and local immunity by legislative action, which included the establishment of indemnification provisions, the establishment of a separate state claims court, and the waiver of immunity upon the purchase of liability insurance.

Of the 47 states, including the District of Columbia, that abolished complete sovereign immunity for both state and local government either by legislative or judicial action or by constitutional provisions, 32 states have enacted a comprehensive tort liability law for compensating damages due to negligence by state or local employees; and two states, North Carolina and Virginia, have enacted comprehensive tort liability laws for compensating damages due to negligence by state employees.

These comprehensive laws define the scope of public agencies' liability (e.g., seven states' laws do not compensate noneconomic damages); establish what forms of immunity exist, if any (e.g., 49 states, including the District of Columbia, allow immunity for discretionary acts, Louisiana and New Mexico do not); establish indemnification and claims settlement provisions; establish certain procedures for bringing suit; set statutory caps for damages, if any; and normally have insurance-purchasing provisions. Some states' statutory schemes provide that the purchase of insurance by the governmental entity acts as a waiver of immunity.

In the 17 jurisdictions that have not enacted a comprehensive tort liability law, all but one have created provisions for indemnifying an injured person; 10 have claims settlement provisions; six provide that the purchase of insurance constitutes a waiver of immunity; six have abolished or modified joint and several liability; 10 establish a separate state claims court or board to hear claims; six provide for the purchase of self-insurance by governmental entities; seven have risk-sharing pool provisions; and seven have established structured settlement provisions, such as providing for periodic payments.

II. WORK OF THE JOINT SUBCOMMITTEE

A. MEETING AGENDAS

The joint subcommittee held five meetings in the General Assembly Building in Richmond, on August 5, October 8, December 11, and December 20 of 1996, and on January 10, 1997.

At its first meeting, the subcommittee reviewed the traditional doctrines of immunity, the immunity statutes and case law. Members discussed the common law features of sovereign and charitable immunity, the governmental and discretionary functions, and the different immunity protections afforded the agencies and employees of the state and of a county, city and town. The subcommittee heard from a representative of the Virginia Trial Lawyers Association, a private law firm representing a highway contractor, and a local community services board.

During their discussion, the members decided that the following issues should be reviewed during the course of the study:

(1) Whether counties and cities and towns should share the same degree of immunity and whether the discretionary v. ministerial test is more appropriate than the governmental v. proprietary test to decide if particular governmental conduct is protected from tort liability;

(2) Whether the notice of claim of injury required by cities and towns should be different from that required by counties;

(3) Whether private contractors, such as highway contractors, when working pursuant to a contract with a governmental agency, should be afforded the same type of immunity normally afforded the governmental agency;

(4) Regarding charitable immunity, whether insurance coverage should be discoverable and considered, whether charities should maintain some minimum level of insurance, whether there should there be a statutory cap, either money or insurance, to limit a charity's exposure, and whether, except for Good Samaritan acts, the distinction between volunteer and paid employee or for-profit and not-for-profit should remain; and

(5) Whether standardized language can be developed in order to locate all of the charitable and sovereign immunity statutes in one place in the Code of Virginia.

At the October 8 meeting, the Virginia Municipal League (VML), the Virginia Association of Counties (VACO) the Local Government Attorneys of Virginia

(LGAV) and the Virginia Trial Lawyers Association (VTLA) offered testimony on the first three issues set forth at the August 5 meeting. Also, the subcommittee heard from Del. John H. Tate, Jr., concerning proposed legislation to immunize physicians who, without compensation, assist in establishing protocols for E-911 Emergency Systems (Appendix C).

Charitable immunity was the main topic of discussion at the December 11 meeting. The subcommittee elicited testimony from the Red Cross, the United Way, the YMCA and the Virginia Trial Lawyers Association, whose representatives explained their position on maintaining or changing the status of the doctrine. They responded to two particular issues: (i) whether charities should be required to maintain a minimum level of insurance and whether their liability for simple negligence should be waived up to the greater of a statutory cap or the amount of liability insurance maintained, whichever is greater, and (ii) whether the uninsured motorist statute should be amended to provide recovery to the policyholder where a defense of charitable immunity bars recovery from the tort-feasor. The VTLA submitted draft legislation in response to the second issue (Appendix D). Also, an architect representing himself asked the subcommittee to consider legislation to provide immunity to architects who, without compensation, offer assistance during emergencies. Also during this meeting, the subcommittee recommended that all of the carry-over bills sent to it by the House Committee for Courts of Justice be reported to the full committee without recommendation (Appendix B). A copy of draft legislation amending the Virginia Tort Claims Act was handed out to members and interested persons for discussion at the next meeting (Appendix F).

At its December 20 meeting, the subcommittee discussed and received testimony on (i) Delegate McEachin's draft legislation on charitable immunity, creating the Volunteer Immunity and Charitable Organization Liability Limitation Act (Appendix E) and (ii) Senator Edwards' draft legislation that included localities under the Virginia Tort Claims Act, which was introduced as Senate Bill 789 of the 1997 Session (Appendix F). Also, the subcommittee heard from a private citizen from Alabama, Ms. Sandra Faffe, who after her grandmother had died in a nursing home in Virginia, unsuccessfully tried to sue the nursing home but lost on a defense of charitable immunity.

At its final meeting held on January 10, 1997, the subcommittee heard more testimony on Senator Edwards' legislation. It also decided to make no recommendations to change the state of the law governing immunity.

B. Charitable Immunity

The American Red Cross, the United Way of Virginia, and the YMCA spoke on behalf of charitable organizations. The common theme presented by the charities was that they are not in favor of any change which would result in greater exposure to liability than they currently have. As part of that theme, they pointed

out that charities are very sensitive to striking the proper balance in compensating persons injured by their volunteers' actions or inactions and providing the high level of services that the community has come to enjoy.

The following is a summary of the testimony that the joint subcommittee received from the charitable organizations. Charities are volunteer organizations, whose staff are comprised of more volunteers than paid staff. Volunteers perform at all levels within the charitable organizations. They perform senior-level and mid-level management tasks, assume supervisory and training responsibilities, and deliver client services. They provide a wide array of services to the elderly, the young and the disabled. Most charitable organizations are directed by volunteer boards of governors serving at the national or local level. Volunteers are not merely extensions of paid staff, nor are they in any sense supplementary workers; they are the lifeblood of the organizations. Volunteers are the reason that charities can deliver cost-effective and quality services to large numbers of people. Consequently, when a subcommittee of the General Assembly studies charitable immunity and tort liability, it is looking at issues which directly affect the ability of charitable organizations to provide the services on which so many rely and from which the government benefits by not having to provide.

Most charitable organizations assume fully what they consider to be their corporate and moral responsibility of providing tort liability coverage to staff, paid and volunteer. Through supervision and control, charitable organizations can minimize risk and provide quality services. Volunteers and paid staff are treated in identical fashion for questions of individual and corporate liability because volunteers perform the same work as paid staff, are held to the same high standards and run the same risks. Whenever someone is injured as a result of the action or inaction of a charity's paid staff or volunteer, the organization tries to settle the claim for the economic expenses suffered by the injured person. Because of their moral obligation to assist the community, charities are sensitive to the fact that such persons who are injured need help with economic losses and expenses, and they also want to protect their name and goodwill. They are also mindful of striking the proper balance between two interests, compensating injured persons for their economic losses and providing high quality services to people in the community.

The Virginia Trial Lawyers Association presented testimony in favor of abandoning or curtailing the doctrine of charitable immunity. The VTLA favored the adoption of an immunity policy which would recognize that the availability of liability insurance is the inexpensive, practical solution which will both encourage the good works of charities and protect persons injured. Just as the General Assembly has recognized the harshness of the traditional rule of sovereign immunity by adopting the Virginia Tort Claims Act, so too must the General Assembly adopt legislation allowing persons injured by charitable organizations to sue the charity up to an established statutory cap or the maximum limit of any

liability policy maintained by the charity. The General Assembly has in the former recognized the principle that a negligent actor ought to be responsible for his negligence which results in injury to another, and more importantly, acknowledged that liability insurance is available to deal with the problem in a fair and equitable manner.

The VTLA also presented the following testimony on charitable immunity. Since the Supreme Court of Virginia first adopted the doctrine of charitable immunity 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. Rather, under Virginia common law, as modified by further judicial decisions and by statute, 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. The court has adopted a test to examine whether an organization is charitable for purposes of immunity. Under this test, it is difficult to determine when immunity exists because the determination turns on the facts of each case, which is why all charities carry insurance. It is important to recognize that persons who are injured 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 transferred to the taxpayer. Ironically, these victims of the doctrine of charitable immunity are forced, in turn, to become beneficiaries of the good work of the charities that are immune from liability for injuring them.

C. Sovereign Immunity

The Association of Counties, the Virginia Municipal League and the Association of Local Government Attorneys were in favor of no change which would lessen the status of the doctrine of sovereign immunity as it applies to counties, cities and towns.

The Municipal League noted that counties currently have a little broader immunity than municipal corporations have, and that the league would support expansion of municipal immunity to the same level as the counties have. All disfavored changing any test used by the courts to determine the nature of the action or inaction and whether the governmental entity is liable. The common law in this area has been litigated thoroughly and carefully, and the standard for determining liability is now firmly fixed.

Representatives from the localities agreed that although the counties, cities and towns are immune in various degrees, a government employee will be sued if someone is injured. There are remedies available for claims to be settled and for claims to be filed in courts and go to juries. Localities already carry liability insurance and, as mentioned earlier, employees' and officials' acts of gross negligence, or wanton or willful misconduct are subject to liability. The concept

that there is some broad-based immunity in which injured persons are wronged and go uncompensated is not true.

Changes which would lessen or remove the protections of sovereign immunity for localities would have adverse consequences for all local governments.

For some time localities were not able to acquire adequate insurance for all types of liability coverage and some years ago decided as a necessary alternative to establish a self-insurance plan for the defense and payment of claims. While the insurance market has become more flexible since then, the probability of an onslaught of claims, if sovereign immunity were removed, is very real and would cause insurance companies to reconsider providing insurance to localities and threaten the self-insurance programs of localities. With or without private insurance, since some deductible payable by the locality will be necessary, removal of sovereign immunity will add a huge and somewhat unpredictable financial burden to local governments at a time when they are already highly fiscally stressed.

The Virginia Supreme Court has in numerous cases set forth the sound public policy behind giving sovereign immunity to local governments and extending that to their employees for actions in the scope of their employment when those actions are not grossly negligent. Virginia courts have said that this doctrine is necessary as a social policy, which protects against burdensome interference with the performance of property. As previously stated, it "provides for the smooth operation of government," eliminates public inconvenience and danger that might spring from officials being unwilling to act for fear of being sued, 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 v. Burden, 228 Va. 301, 308, 321 S.E.2d 657, 600 (1984). Changes to limit sovereign immunity would be detrimental to the public, because the changes would permit the evils which the courts, in developing the doctrine, have tried to prevent.

Obviously, local governments are not like the private sector because the public health, safety and welfare services which they provide expose them to extensive liability. Unlike the private sector, which can limit its liability by discontinuing services, localities are statutorily required to provide health, safety and welfare services. The escalating costs of these services, if sovereign immunity is removed and localities are liable, will have to ultimately be borne by the general citizenry through increased taxes.

The Virginia Trial Lawyers Association's position regarding sovereign immunity is that counties, cities and towns should have the same degree of immunity; they should not have any immunity at all. It is VTLA's view as a general policy that the negligent employee of a county, city or town who causes

harm in the course of his or her employment should be held liable for the harm caused--the same standard that applies to every single person in private industry. Short of that rule, the VTLA's position was that there was no reason why counties, cities and towns should have different tests for determining responsibility and liability For example, Fairfax County and Arlington County have similar responsibilities, perform the same tasks and provide the same services as the City of Alexandria and Fairfax City; yet they can do essentially the same thing and cause essentially the same harm, but there will be vastly different consequences depending upon whether the worker was a municipal or a county employee. Therefore, the VTLA suggested that counties be as liable for the harm caused by their employees as cities and towns are. The VTLA also pointed out the other side to the localities' most persuasive argument: that juries, imagining governmental deep pockets, will award big damages to plaintiffs suing a locality. To the contrary, the VTLA asserted, juries do not know that a locality will pay damages and assume that the individual employee, often with few assets, will have to pay the judgment; hence, they award small damages. The plaintiff cannot explain to the jury that the locality has insurance and is ready to back the defendant employee.

Additionally, because counties are considered subdivisions of the Commonwealth, they have derived their immunity from the Commonwealth. But, the VTLA pointed out, we now live in an anomalous situation where the Commonwealth has waived its immunity under the Tort Claims Act, leaving the counties, the subdivisions, with more protection under the doctrine than the entity which granted it. Therefore, the VTLA suggested, if the General Assembly does not extend the same degree of exposure to the counties as the cities now have, an alternative would be to enact legislation waiving the counties' immunity at least to the same extent that the Commonwealth has waived its immunity under the Tort Claims Act. The VTLA also observed that the localities have stressed that in the ordinary course of affairs, an injured person can expect the locality to stand by a negligent employee who is held liable for causing the harm; however, there is no legal requirement that they do so. So if all the plaintiff has is a judgment against a negligent local government employee who has no assets and no insurance, the plaintiff has nothing. The VTLA stated that it was unaware of any circumstance where the insurer issuing an automobile policy for coverage on a private motor vehicle owned by such an employee is going to pay for the harm caused by that employee when driving the local government vehicle.

The VTLA expressed its opinion that over the last 20 years the Virginia Supreme Court has been restricting those circumstances under which local government employees can be held liable. Particularly by broadly applying the "discretionary v. ministerial act" test, the Supreme Court has extended the circumstances under which a locality's employee has protection. Although the subcommittee has heard testimony that the localities should be immune from liability because the employee can be held responsible and the locality will stand behind the employee, the VTLA pointed out that there are a series of Supreme

Court decisions that protect the employee since he was engaged in a discretionary function. The VTLA could not offer the joint subcommittee a clear definition of "discretionary function" because nobody knows what it is. What is and what is not discretionary or ministerial cannot be determined from case to case. If it had to choose between the discretionary v. ministerial test or the governmental v. proprietary test, the VTLA suggested that the governmental v. proprietary test is more predictable since certain functions have been categorized and we can rely in case decisions. The VTLA position, however, is that neither test serves the people any longer and the General Assembly should enact legislation to make localities liable for the harmful actions or inactions of their employees.

With regard to the applicability of sovereign immunity to the Commonwealth and its employees, the subcommittee received testimony from both sides relating to draft legislation which would have included counties, cities and towns under the Virginia Tort Claims Act and would have increased the cap for which the Commonwealth was responsible. Subsection D below describes that draft legislation and the Commonwealth's sovereign immunity.

D. Legislation Considered By The Subcommittee

1. Carry-over Legislation

Six bills relating to immunity were carried over during the 1996 General Assembly in the House Committee for Courts of Justice. The six bills were: House Bills 996, 1040 and 1041 and Senate Bills 399, 472 and 524 (Appendix B). This subcommittee was asked by the chairman of the House Courts Committee to review the bills. With the consent of the patrons, the subcommittee reported all six bills to the full committee without recommendation, asking that the full committee hear the bills.

2. Private Contractors

The subcommittee heard testimony from an individual representing a private contractor preparing to undertake a job of highway maintenance, a government function traditionally performed by the Virginia Department of Transportation. Although the Tort Claims Act effectively waives sovereign immunity for tort liability up to the established limits, the Commonwealth and its agencies have not waived immunity completely. With the current interest in privatization of governmental services, the issue of whether sovereign immunity extends to private entities performing traditional governmental functions is emerging.

The following represents the observations offered in favor of such legislation. Many statutory and administrative provisions require contractors with the Commonwealth to maintain public liability insurance in a form and amount satisfactory to the responsible state agency and reasonably sufficient to insure

coverage of tort liability to the public and employees. The question arises as to whether such private contractors would be protected by the Commonwealth's sovereign immunity if a claim were made which exceeded the limits of any such public liability insurance.

While privatization of governmental service may be advanced for a variety of reasons, there is a tendency to reduce the overall benefits of privatization to "doing the job better for less expense." Whatever the particular reasons are that a specific project might benefit from privatization, cost will invariably be an important factor. In projects where issues of public health and safety may be implicated, liability is certain to emerge as a significant factor in the cost of the project.

It is a fair assumption that the reduction of the cost of providing governmental services will always be of paramount concern. Accordingly, the extent to which private contractors performing governmental function are sheltered from liability by being able to participate in sovereign immunity will have a direct and significant effect on the cost of privatization. Because the governmental services to be privatized are largely the same services which were rendered by a governmental entity which enjoyed some measure of sovereign immunity, it does not appear that public policy would require that simply because the services were privatized there ought not to be the same level of sovereign immunity enjoyed by the private contractor.

Representatives from the localities were neither proponents nor opponents of such proposed legislation. However, they did emphasize that if there is a need for immunity for private entities which have contracts with government agencies for the performance of governmental functions, that fact points out the need which localities have in performing governmental services.

The VTLA argued that all the reasons advanced for preserving governmental immunity do not apply to private contractors and that it serves no useful purpose to extend this doctrine to private entities. Such private contractors carry liability insurance and routinely are required to certify to government agencies with whom they contract that they have liability insurance.

3. E-911 Emergency Systems

Del. John H. Tate, Jr., brought to the subcommittee's attention the need to provide immunity from civil liability to a physician who, without compensation, advises a local E-911 system on establishing protocols to be used by system personnel when answering emergency calls, unless the act or omission which causes injury results from the physician's gross negligence or willful misconduct. Delegate Tate introduced this legislation in 1997 prior to the last meeting of the joint subcommittee (Appendix C - House Bill No. 1635).

The local government representatives agreed with Delegate Tate's position that the activity by the local physicians in reviewing national protocols is very helpful and it is very important for the local citizens and the community to have them involved. They agreed that to have them involved on a pro bono basis there is a need to offer them some degree of immunity.

The VTLA took no position on Delegate Tate's proposal; however, VTLA was unaware of physicians being held liable for reviewing these protocols that are subsequently adopted by local E-911 systems.

4. VTLA Uninsured Motorist Legislation

During the course of the study, the subcommittee heard a lot of testimony and had a good discussion on the effects of the defense of sovereign and charitable immunity in motor vehicle accident cases (i.e., Moore v. Warren, supra). In response to this discussion, the VTLA offered a draft proposal (Appendix D) to remedy the situation where a person is injured in a collision with a vehicle operated negligently by a person working for an immune entity or organization, and even though such negligence was the proximate cause of his injury, the person cannot recover due to the defense of immunity. The draft proposal included within the definition of "uninsured motor vehicle" a motor vehicle owned or operated by a person immune from liability for negligence under state or federal law. This would allow the injured insured to be paid all the sums that he is legally entitled to recover as damages from the owner or operator of a vehicle immune from liability. Further, the proposal provided that such immunity would not be a bar to an insured claimant obtaining a judgment against his own insurer under the uninsured motorist provisions of his own insurance policy and that an insurer may not raise immunity as a defense to its insured's uninsured motorist claim. The draft allowed subrogation rights to the insurer paying the claim. The VTLA observed that the beneficiaries of the current state of the law allowing such a defense were the motor vehicle liability insurance companies, not the charities or government.

Representatives from the charitable organizations emphasized that the change offered by the VTLA affects all charities, small and large. How the change will affect insurance premiums may be an issue that the subcommittee should

study. They also pointed out that suits in excess of coverage are filed not infrequently and such a change in charitable immunity coupled with a bad mishap could put the organization out of business.

5. Charitable Immunity

At the subcommittee's third meeting the Red Cross stated that it had supported federal volunteer legislation and the general principle of legislated volunteer protection. The Red Cross had supported House Bill No. 1854 of 1995, establishing a Volunteer Immunity and Charitable Organization Liability Limitation Act. That bill was later withdrawn when the Virginia Supreme Court rendered its decision in Moore v. Warren, supra, which provided even better protection for volunteers by extending charitable immunity to a charity's volunteers. The Red Cross encouraged the subcommittee to resurrect the provisions of House Bill No. 1854 of 1995 and consider it during the study.

The subcommittee reviewed draft legislation very similar to House Bill No. 1854 of 1995 (Appendix E). The proposal granted immunity to volunteers of § 501 (c)(3) charitable organizations while acting in good faith in the performance of their duties. The liability of these volunteers for injury and damages resulting from the operation of motor-driven equipment is capped at the limits of applicable motor vehicle insurance coverage, if any.

The liability for ordinary negligence of tax-exempt § 501 (c)(3) organizations is waived up to the policy limits of any liability insurance coverage, and the insurer is estopped from asserting as a defense that such organization is a charitable organization. The act would apply only to acts or omissions occurring on or after July 1, 1997, and does not apply to intentional wrongs, willful misconduct, criminal acts or breach of a fiduciary duty.

Some charitable organizations, including the YMCA, spoke in opposition to the proposed draft legislation. They noted that for over seven decades the Commonwealth has favored the doctrine of charitable immunity by supporting the provision of human services in certain areas by nonprofit charitable organizations rather than by government or private, for-profit businesses. The trade-off to society has had extremely slight injurious consequences. They opposed any legislation which would abrogate or constrict the status of the current doctrine. The change proposed by this legislation to allow beneficiaries of the organization's services to sue for damages up to the limit of the insurance coverage can affect some charitable organizations more significantly than others. The entire proposal will not only affect the large organizations like the Red Cross, the United Way and the YMCA, but also the small charitable organizations such as churches, scout troops, Big Brothers and day care centers. The effect will be great for volunteers who are most susceptible to mishaps. Cost of insurance will most likely rise and claims against such organizations will rise. Suits in excess of insurance coverage are often filed.

These were the reasons given by some charitable entities in opposition to the proposed legislation.

6. Sovereign Immunity

At its first meeting, the joint subcommittee discussed several issues regarding sovereign immunity, some of which were the current ceiling for awards under the Virginia Tort Claims Act; ways to compensate persons injured by acts or omissions by governmental entities and yet protect employees of governmental entities; differences in immunity protection currently enjoyed by the Commonwealth, counties, cities and towns; differences between the ministerial/discretionary test and the proprietary/governmental test; and notice of injury provisions currently applicable to counties and municipalities and under the Tort Claims Act. Delegate Johnson appointed Senators Edwards and Marsh to a subcommittee to draft legislation addressing these issues. As a result of its deliberations, the subcommittee prepared for discussion draft legislation which was eventually introduced into the 1997 General Assembly as Senate Bill No. 789 (Appendix F).

As drafted, the proposal included counties, cities, towns and school boards under the provisions of the Virginia Tort Claims Act and thereby statutorily abolished sovereign immunity for counties, cities, towns and school boards. It includes school board within the definition of "locality." The limitation on claims against the Commonwealth, which is currently $100,000, would be abolished. A locality's liability for claims for simple negligence would be limited to claims for property loss or damage or personal injury or death up to $100,000. If a claim against a locality exceeded $100,000, the Commonwealth would be liable for the amount above the $100,000 cap. The jurisdiction of claims for $10,000 or less would be in the general district court and would be in the circuit court when the claim exceeded $10,000, with the right to a jury trial. Service of process for claims against a locality not exceeding $100,000 would be on the attorney for the locality and on both the attorney for the locality and the Attorney General for claims exceeding $100,000. Authority to settle claims not exceeding $100,000 against the locality is given to the attorney for the locality, provided the governing body approves the written settlement. For claims exceeding $100,000, the attorney for the locality, subject to the approval of the Attorney General, would be authorized to settle the claim. Notice of a claim of injury would be abolished. Under the current act, the notice must be given within one year after the cause of action accrues, and the claim must be filed within that one-year period or it will be barred. The statute of limitations to file suit would be changed to two years after the cause of action accrues, the same as the limitation placed on suits for personal injury. The liability of the locality for the claim would be conditioned upon the execution of a release by the claimant. Persons representing localities were added to the group that is charged with the duty of developing and maintaining a program for evaluating and settling claims. Finally, a locality being sued for an act arising out of a student

discipline matter, would be given an immunity defense that the teacher or administrator acted in good faith and reasonably under the circumstances.

The Attorney General of Virginia, VML, VACO, LGAV, VTLA, the Virginia Association of Chiefs of Police, and the Fire Chiefs Association were opposed to all or various aspects of the sovereign immunity proposal. All were concerned that the proposal had hidden costs associated with the suggested changes. All suggested that while governmental entities carry liability insurance to protect agencies and employees, the cost of that insurance and reinsurance would necessarily increase as a result of the suggested legislation. As a result of such increased costs of doing the people's business, all suggested that many services currently provided by government, such as, but not limited to, parks, recreation, day care and after-school activities, would be curtailed or stopped.

In addition, the Virginia Trial Lawyers were opposed to certain aspects of the proposed draft. They suggested that the counties were the only localities which should be included under the Tort Claims Act and they should waive their immunity at least to the same amount as the Commonwealth has waived its immunity. County employees should not be included under the act. They favored the other changes made and in particular favored a uniform notice provisions.

The localities and their attorneys also opposed the entire draft proposal and, therefore, the bill as introduced. They recounted that this type of legislation was proposed and defeated in 1985, 1986 and 1988.

The following represent the reasons why they opposed the removal of sovereign immunity for local governments. Their testimony on the issue of sovereign immunity reflects these same general concerns. The abolition of sovereign immunity to any degree would have severe adverse consequences for all local governments. Many have not been able to acquire adequate insurance for all types of liability coverage and some years ago established a self-insurance plan for the defense and payments of claims. While the insurance market has become more flexible, the probability of an onslaught of claims, if sovereign immunity is abolished, is very real; would cause insurance companies to reconsider providing insurance and reinsurance to localities; and would threaten self-insurance programs of localities. With or without private insurance, since some deductible payable by the locality will be necessary, removal of sovereign immunity will add a huge, unpredictable financial burden to local governments at a time when they are already highly fiscally stressed.

More specifically, opponents charged, the legislation implies that localities are comparable to the state in providing a state tort claims model of eliminating immunity for counties for claims up to $100,000. As direct service providers, localities have a broader exposure to liability than the state. It goes without saying

that if such a cap were established, that there would be constant pressure to increase it upwards or eliminate it, again to the local general citizens' detriment.

With regard to notice of injury to the locality, it makes sense to have a uniform notice provision that establishes one notice that could be used to notify counties, cities or towns. But to repeal the notice provision would be to eliminate a provision that is very salutary at the local level. Once a legal letter from a lawyer or the injured person is received by the local government attorney or administrator the process will begin and the claim considered. Corrections are made to make sure that no one else is injured and to discipline or train employees, if they are at fault, so that the same acts or omissions will not recur. Advance notice allows claims to be settled expeditiously without the expense of a trial. Furthermore, many other adjustments to concepts such as collateral source rule, judge rather than jury trials and respondeat superior should necessarily be considered before embarking into an elimination strategy so that the General Assembly is aware of the full impacts of such a change.

The Virginia Association of Chiefs of Police and the Virginia Fire Chiefs Association were opposed to the recommendation or passage of legislation that would reduce or eliminate sovereign immunity. Their major concern was that police and fire personnel provide services in crises. They respond to accidents, weather emergencies, acts of crime and violence, and fires. They must make quick decisions at the scene, often making decisions involving the lives of individuals, including themselves. Providing immunity simply allows police and fire personnel to do their jobs and provide a level of public service that the citizens expect from these agencies. Police and fire personnel even perform acts of goodwill that go beyond their required duties. There are a lot of police and fire programs in the Commonwealth that provide services to needy citizens, such as free inspections of fire protection devices in homes for the elderly and seminars on ways to protect against fraud and scams. Police and fire chiefs in Virginia were concerned that if the proposed legislation were approved, the number of frivolous lawsuits against police and fire departments would increase, driving up the cost of protecting public safety in Virginia. Insurance costs would increase with the threat of lawsuits, and volunteer participation in the fire services and programs would be reduced Limited budgets and increasing demands for law-enforcement and fire services already have stretched the resources of police and fire agencies to their limit. The end result of such legislation would most likely be an increase in taxes and a decrease in services. The present system of immunity sufficiently provides avenues of relief to persons injured by acts of police and fire departments.

A representative of the Office of the Attorney General shared with the subcommittee statistical information relating to Virginia's self-insurance fund experience for claims under the Tort Claims Act and a summary of information of other states' experience with tort claims. The information showed the nature of the fiscal impact that the draft proposal would have. The Virginia self-insurance fund

experience information showed that claims have steadily increased since 1987 and they dramatically increased in 1988 when the cap for a tort claim was increased to $75,000 and in 1993 when the cap was increased to $100,000. That information showed incurred costs, the actual out-of-pocket dollars that have been paid out and dollars anticipated to be paid out, have increased every year. In 1987, the incurred costs to the fund were $484,000, in 1988 they were $3,029,000, in 1993 they were $5,745,000 and in 1996 they were $7,920,000. These numbers have been controlled and balanced by a current $100,000 cap for tort claims and a notice requirement which helps to reduce expenses. If these elements are increased or eliminated, the amount of incurred costs and number of claims will skyrocket.

The representative from the Attorney General's Office summarized information that he had received from other states' attorneys general relating to their experience in tort claims. Six states (Arizona, Ohio, Washington, Michigan, Pennsylvania and Tennessee) were reviewed. Arizona has no notice provision; no cap and 37 attorneys in the insurance defense division, whose full-time job is defending against claims; and an annual tort claims liability between $24 million and $30 million. Ohio has a special claims court to review tort claims, no juries deciding such cases;no cap and 19 attorneys in the claims section whose full-time job is defending against claims; and an annual liability between $10 million and $20 million. Washington has a 120-day notice provision; no cap and 32 attorneys working full time in the claims section; and an annual liability between $20 million and $30 million. Michigan has a $1 million cap and an annual liability of $32 million. Pennsylvania has a $250,000 cap and a $16.5 million annual liability. Tennessee has a $300,000 cap and a $15.6 million annual liability. The point is that if the cap is raised or eliminated on the Virginia Tort Claims Act, certain additional expenses will be required for the Commonwealth to administer and enforce the provisions of the act.

The representative from the Attorney General's Office also pointed out that there is no savings in purchased liability insurance because the type of coverage needed by the Commonwealth is not available, and if it were, the cost would be prohibitive. With purchased insurance the defense costs would be three to four times as much as what it costs under Virginia's self-insurance program.

Finally, the Office of the Attorney General suggested that the subcommittee, during its deliberations of the proposal, should consider eliminating the collateral source rule for such claims cases, as Kentucky and Ohio have done, so in fact Virginia would not be paying for damages covered by insurance or some other means. The subcommittee should consider a provision to limit attorney's fees collected in such claims cases, similar to what is the practice under the federal tort claims law. There fees are limited to 25 percent of the total judgment or 20 percent of an amount taken in settlement. The subcommittee should consider streamlining procedures for such claims cases by changing the summary judgment procedure to allow for disposition of cases through the use of depositions and affidavits as

practiced in federal court to allow for quick disposition, less litigation expense and lighter dockets.

III. JOINT SUBCOMMITTEE'S FINDINGS AND RECOMMENDATIONS

The joint subcommittee concluded that the legislative proposals which it reviewed presented numerous collateral issues which could be reviewed by the standing committees of the House and Senate having jurisdiction over the subject matter should the legislation be introduced in the 1997 Session of the General Assembly. The sovereign immunity legislation relating to the Virginia Tort Claims Act and the E-911 legislation were introduced in 1997 prior to the conclusion of the joint subcommittee's deliberations. The joint subcommittee had heard that the VTLA's uninsured motorist legislation was going to be introduced. The joint subcommittee decided not to recommend continuing the study. The joint subcommittee decided that the remainder of the issues which were not subject of legislation introduced during the 1997 Session and the public policy implications presented by those issues could be managed comprehensively by the standing committees, thereby providing an opportunity and forum for all of the members of the substantive committees to be fully informed.

The joint subcommittee expressed its sincere appreciation to all of those associations and individuals who offered their time and talents to the work of the subcommittee.

Respectfully submitted,

Joseph P Johnson, Jr., Chairman
Joseph B. Benedetti, Vice Chairman
Thomas G. Baker, Jr.
John J. Davies III
A. Donald McEachin
John S. Edwards
Henry L. Marsh III

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 7 members as follows: 4 members of the House of Delegates to be appointed by the Speaker of the House of Delegates; and 3 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.

1996 SESSION

966540236

HOUSE BILL NO. 996

Offered January 22, 1996

A BILL to amend the Code of Virginia by adding a section numbered 8.01-225.2, relating to immunity for those rendering emergency care to animals.

Patrons—Forbes and Spruill

Referred to 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 as follows:

§ 8.01-225.2. Immunity for those rendering emergency care to animals.

Any person, including a person licensed to practice veterinary medicine, who in good faith and without compensation renders emergency care or treatment to an injured animal at the scene of an emergency or accident shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or treatment.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

_____ _____

Clerk of the House of Delegates Clerk of the Senate

966352739

HOUSE BILL NO. 1040

Offered January 22, 1996

A BILL to amend the Code of Virginia by adding a section numbered 8.01-220.1:2, relating to health-related assistance; limited civil immunity for teachers.

Patron—Forbes

Referred to 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 8.01-220.1:2 as follows:

§ 8.01-220.1:2. Health-related assistance; limited civil immunity for teachers.

A. Any teacher employed by a local school board in this Commonwealth, or any teacher employed by a school operated by the Commonwealth having children in residence or custody, shall not be liable for any civil damages for any acts or omissions resulting from the good-faith rendering of health-related assistance during an emergency or upon authorization of the child's parent or guardian unless such acts or omissions were the result of gross negligence or willful misconduct. This provision shall not (i) apply to any instructional personnel who are health professionals regulated by any health regulatory board within the Department of Health Professions while rendering care within the scope of their practice or (ii) be construed to authorize an unqualified individual to render services which may only be provided by such regulated health care practitioners.

B. This section shall not be construed to limit, withdraw or overturn any defense or immunity already existing in statutory or common law or to affect any claim occurring prior to the effective date of this law.

966352739

HB1040

1/22/96 20:47

Official Use By Clerks

Passed By The House of Delegates		Passed By The Senate	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the House of Delegates

Clerk of the Senate

967457739

HOUSE BILL NO. 1041

Offered January 22, 1996

A BILL to amend the Code of Virginia by adding a section numbered 8.01-220.1:2, relating to supervision, care or discipline of students; civil immunity for teachers under certain circumstances.

Patron—Forbes

Referred to 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 8.01-220.1:2 as follows:

§ 8.01-220.1:2. Civil immunity for teachers under certain circumstances.

A. Any teacher employed by a local school board in this Commonwealth, or any teacher employed in any school operated by the Commonwealth having children in residence or custody, shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of the supervision, care or discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct.

B. This section shall not be construed to limit, withdraw or overturn any defense or immunity already existing in statutory or common law or to affect any claim occurring prior to the effective date of this law.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the House of Delegates

Clerk of the Senate

1996 SESSION
ENGROSSED

REPRINT

967705727

SENATE BILL NO. 399

Senate Amendments in [ ] —February 13, 1996

A BILL to amend of the Code of Virginia, by adding a section numbered 8.01-46.1, relating to defamation; immunity; exception.

Patrons—Reasor, Goode, Howell, Norment, Quayle, Saslaw, Stolle and Trumbo; Delegates: Albo and Howell

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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 8.01-46.1 as follows:

§ 8.01-46.1. Employer references; immunity.

Any employer of another, or any employee, agent or other representative of such employer, who, in good faith, provides information about the job performance, professional conduct or evaluation of a former or current employee to a prospective employer of that employee, at the request of the prospective employer [~~of~~ or] that employee, shall be immune from civil liability arising out of the disclosure unless it is shown by clear and convincing evidence that the employer disclosed the information with reckless disregard for its veracity, knowing that it was false or with intent to mislead.

In a civil action brought against an employer for words written or spoken relating to the job performance [~~or conduct~~ , professional conduct or evaluation] of a current or former employee, attorneys' fees may be awarded to [~~any employer who prevails~~ the prevailing party.]

2. That the provisions of this act shall apply to any cause of action accruing on or after July 1, 1996.

967705727

SB399E

2/14/96 14:23

Official Use By Clerks			
Passed By The Senate		**Passed By The House of Delegates**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐
Date: _____		Date: _____	
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Clerk of the Senate		Clerk of the House of Delegates	

966357739

SENATE BILL NO. 472

Senate Amendments in [ ] —February 13, 1996

A BILL to amend the Code of Virginia by adding a section numbered 8.01-220.1:2, relating to supervision, care or discipline of students; civil immunity for teachers under certain circumstances.

Patrons—Stolle, Benedetti, Holland, Norment, Potts, Stosch and Wampler

Referred to the Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-220.1:2 as follows:

§ 8.01-220.1:2. Civil immunity for teachers under certain circumstances.

A. Any teacher employed by a local school board in this Commonwealth, or any teacher employed in any school operated by the Commonwealth having children in residence or custody, shall not be liable for any civil damages for any acts or omissions resulting from the supervision, care or [maintenance of] discipline of students when such acts or omissions are within such teacher's scope of employment and are taken in good faith in the course of the supervision, care or [maintenance of] discipline of students, unless such acts or omissions were the result of gross negligence or willful misconduct.

B. This section shall not be construed to limit, withdraw or overturn any defense or immunity already existing in statutory or common law or [~~to affect any claim occurring prior to the effective date~~ to apply to any cause of action accruing on or after July 1, 1996] of this law.

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the Senate

Clerk of the House of Delegates

966358739

SENATE BILL NO. 524

Offered January 22, 1996

A BILL to amend the Code of Virginia by adding a section numbered 8.01-220.1:2, relating to health-related assistance; limited civil immunity for teachers.

Patrons—Williams, Quayle, Saslaw and Stolle

Referred to the Committee on Education and Health

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-220.1:2 as follows:

§ 8.01-220.1:2. Health-related assistance; limited civil immunity for teachers.

A. Any teacher employed by a local school board in this Commonwealth, or any teacher employed by a school operated by the Commonwealth having children in residence or custody, shall not be liable for any civil damages for any acts or omissions resulting from the good-faith rendering of health-related assistance during an emergency or upon authorization of the child's parent or guardian unless such acts or omissions were the result of gross negligence or willful misconduct. This provision shall not (i) apply to any instructional personnel who are health professionals regulated by any health regulatory board within the Department of Health Professions while rendering care within the scope of their practice or (ii) be construed to authorize an unqualified individual to render services which may only be provided by such regulated health care practitioners.

B. This section shall not be construed to limit, withdraw or overturn any defense or immunity already existing in statutory or common law or to affect any claim occurring prior to the effective date of this law.

966358739

SB524

1/23/96 1:12

Official Use By Clerks

Passed By The Senate		Passed By The House of Delegates	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

Clerk of the Senate

Clerk of the House of Delegates

1997 SESSION

971206466

HOUSE BILL NO. 1635

Offered January 8, 1997

Prefiled December 20, 1996

A BILL to amend and reenact § 8.01-225 of the Code of Virginia, relating to immunity from civil liability.

Patrons—Tate and Parrish

Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That § 8.01-225 of the Code of Virginia is amended and reenacted as follows:

§ 8.01-225. Persons rendering emergency care, obstetrical services exempt from liability.

A. Any person who, in good faith, renders emergency care or assistance, without compensation, to any ill or injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.

Any person who, in the absence of gross negligence, renders emergency obstetrical care or assistance to a female in active labor who has not previously been cared for in connection with the pregnancy by such person or by another professionally associated with such person and whose medical records are not reasonably available to such person shall not be liable for any civil damages for acts or omissions resulting from the rendering of such emergency care or assistance. The immunity herein granted shall apply only to the emergency medical care provided.

Any person who, in good faith and without compensation, administers epinephrine to an individual for whom an insect sting treatment kit has been prescribed shall not be liable for any civil damages for ordinary negligence in acts or omissions resulting from the rendering of such treatment if he has reason to believe that the individual receiving the injection is suffering or is about to suffer a life-threatening anaphylactic reaction.

Any person who provides assistance upon request of any police agency, fire department, rescue or emergency squad, or any governmental agency in the event of an accident or other emergency involving the use, handling, transportation, transmission or storage of liquefied petroleum gas, liquefied natural gas, hazardous material or hazardous waste as defined in § 18.2-278.1 or regulations of the Virginia Waste Management Board shall not be liable for any civil damages resulting from any act of commission or omission on his part in the course of his rendering such assistance in good faith.

Any emergency medical care attendant or technician possessing a valid certificate issued by authority of the State Board of Health who in good faith renders emergency care or assistance whether in person or by telephone or other means of communication, without compensation, to any injured or ill person, whether at the scene of an accident, fire or any other place, or while transporting such injured or ill person to, from or between any hospital, medical facility, medical clinic, doctor's office or other similar or related medical facility, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such emergency care, treatment or assistance, including but in no way limited to acts or omissions which involve violations of State Department of Health regulations or any other state regulations in the rendering of such emergency care or assistance.

Any person having attended and successfully completed a course in cardiopulmonary resuscitation, which has been approved by the State Board of Health, who in good faith and without compensation renders or administers emergency cardiopulmonary resuscitation, cardiac defibrillation or other emergency life-sustaining or resuscitative treatments or procedures which have been approved by the State Board of Health to any sick or injured person, whether at the scene of a fire, an accident or any other place, or while transporting such person to or from any hospital, clinic, doctor's office or other medical facility, shall be deemed qualified to administer such emergency treatments and procedures; and such individual shall not be liable for acts or omissions resulting from the rendering of such emergency resuscitative treatments or procedures.

B. Any licensed physician serving without compensation as the operational medical director for a licensed emergency medical services agency in this Commonwealth shall not be liable for any civil damages for any act or omission resulting from the rendering of emergency medical services in good faith by the personnel of such licensed agency unless such act or omission was the result of such physician's gross negligence or willful misconduct.

Any person serving without compensation as a dispatcher for any licensed public or nonprofit emergency services agency in this Commonwealth shall not be liable for any civil damages for any act or omission resulting from the rendering of emergency services in good faith by the personnel of such licensed agency unless such act or omission was the result of such dispatcher's gross negligence or willful misconduct.

Any individual, certified by the State Office of Emergency Medical Services as an emergency medical services instructor and pursuant to a written agreement with such office, who in good faith and in the performance of his duties, provides instruction to persons for certification or recertification as a certified basic life support or advanced life support emergency medical services technician, shall not be liable for any civil damages for acts or omissions on his part directly relating to his activities on behalf of such office unless such act or omission was the result of such emergency medical services instructor's gross negligence or willful misconduct.

B1. Any licensed physician serving without compensation as a medical advisor to an E-911 system in this Commonwealth shall not be liable for any civil damages for any act or omission resulting from rendering medical advice in good faith to establish protocols to be used by the personnel of the E-911 system, as defined in § 58.1-3813, when answering emergency calls unless such act or omission was the result of such physician's gross negligence or willful misconduct.

C. Nothing contained in this section shall be construed to provide immunity from liability arising out of the operation of a motor vehicle.

For the purposes of this section, the term "compensation" shall not be construed to include (i) the salaries of police, fire or other public officials or personnel who render such emergency assistance, nor (ii) the salaries or wages of employees of a coal producer engaging in emergency medical technician service or first aid service pursuant to the provisions of §§ 45.1-161.38, 45.1-161.101, 45.1-161.199 or § 45.1-161.263.

Any licensed physician who directs the provision of emergency medical services, as authorized by the State Board of Health, through a communications device shall not be liable for any civil damages for any act or omission resulting from the rendering of such emergency medical services unless such act or omission was the result of such physician's gross negligence or willful misconduct.

For the purposes of this section, an emergency medical care attendant or technician shall be deemed to include a person licensed or certified as such or its equivalent by any other state when he is performing services which he is licensed or certified to perform by such other state in caring for a patient in transit in this Commonwealth, which care originated in such other state.

Any volunteer engaging in rescue or recovery work at a mine or any mine operator voluntarily providing personnel to engage in rescue or recovery work at a mine not owned or operated by such operator, shall not be liable for civil damages for acts or omissions resulting from the rendering of such rescue or recovery work in good faith unless such act or omission was the result of gross negligence or willful misconduct. ~~Article 3.01. Statewide Emergency Medical Services System and Services.~~

1997 SESSION

973648655

SENATE BILL NO. 959

Offered January 17, 1997

A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to uninsured motorist insurance coverage; exception to immunity from liability.

Patron—Edwards

Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as follows:

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, ~~or~~ (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, *or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer.* A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. *Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer, and shall not be a defense to the action available to the insurer.* Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the

owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. Any recovery against the owner or operator, o. the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to thos' policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

Official Use By Clerks

Passed By The Senate		**Passed By The House of Delegates**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

_____ _____

Clerk of the Senate Clerk of the House of Delegates

973708236

HOUSE BILL NO. 2501

House Amendments in [ ] — February 1, 1997

A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to uninsured motorist insurance coverage; exception to immunity from liability.

Patrons—Forbes, Armstrong, Deeds, Howell, McDonnell and Mims; Senators: Benedetti, Edwards and Gartlan

Referred to Committee on Corporations, Insurance and Banking

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as follows:

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, ~~or~~ (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, *or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer.* A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other

claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. *Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense* [~~*to the action available to the insurer*~~ *available to the insurer to the action brought by the insured*] *, which shall procede against the named defendant although any judgment obtained would be enforceable against the insurer and any other nonimmune defendant.* Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the

person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

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Clerk of the House of Delegates Clerk of the Senate

973708236

HOUSE BILL NO. 2501

Offered January 20, 1997

A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to uninsured motorist insurance coverage; exception to immunity from liability.

Patrons—Forbes, Armstrong, Deeds, Howell, McDonnell and Mims; Senators: Benedetti, Edwards and Gartlan

Referred to Committee on Corporations, Insurance and Banking

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as follows:

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, ~~or~~ (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, *or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer.* A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other

claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. *Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer for the negligence of the immune owner or operator, and shall not be a defense to the action available to the insurer, which shall procede against the named defendant although any judgment obtained would be enforceable against the insurer and any other non-immune defendant.* Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage

for any reason, to the extent that payment was made. The bringing of an action against the unknow owner or operator as John Doe or the conclusion of such an action shall not bar the insured fr bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provid in subsection A of this section. Insurers issuing or providing liability policies that are of an excess o umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

Official Use By Clerks

Passed By The House of Delegates		**Passed By The Senate**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

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Clerk of the House of Delegates Clerk of the Senate

973648655

SENATE BILL NO. 959

Offered January 17, 1997

A BILL to amend and reenact § 38.2-2206 of the Code of Virginia, relating to uninsured motorist insurance coverage; exception to immunity from liability.

Patron—Edwards

Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 38.2-2206 of the Code of Virginia is amended and reenacted as follows:

§ 38.2-2206. Uninsured motorist insurance coverage.

A. Except as provided in subsection J of this section, no policy or contract of bodily injury or property damage liability insurance relating to the ownership, maintenance, or use of a motor vehicle shall be issued or delivered in this Commonwealth to the owner of such vehicle or shall be issued or delivered by any insurer licensed in this Commonwealth upon any motor vehicle principally garaged or used in this Commonwealth unless it contains an endorsement or provisions undertaking to pay the insured all sums that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits not less than the requirements of § 46.2-472. Those limits shall equal but not exceed the limits of the liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in subsection B of § 38.2-2202. This rejection of the additional uninsured motorist insurance coverage by any one named insured shall be binding upon all insureds under such policy as defined in subsection B of this section. The endorsement or provisions shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in subsection B of this section. The endorsement or provisions shall also provide for at least $20,000 coverage for damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first $200 of the loss or damage where the loss or damage is a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle.

B. As used in this section, the term "bodily injury" includes death resulting from bodily injury.

"Insured" as used in subsections A, D, G, and H of this section means the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards or foster children of either, while in a motor vehicle or otherwise, and any person who uses the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

"Uninsured motor vehicle" means a motor vehicle for which (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472, (ii) there is such insurance but the insurer writing the insurance denies coverage for any reason whatsoever, including failure or refusal of the insured to cooperate with the insurer, (iii) there is no bond or deposit of money or securities in lieu of such insurance, ~~or~~ (iv) the owner of the motor vehicle has not qualified as a self-insurer under the provisions of § 46.2-368, *or (v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer.* A motor vehicle shall be deemed uninsured if its owner or operator is unknown.

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 15 (§ 46.2-435 et seq.) of Chapter 3 of Title 46.2, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of policies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;

2. The policy covering a motor vehicle not involved in the accident under which the injured person is a named insured;

3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.

C. There shall be a rebuttable presumption that a motor vehicle is uninsured if the Commissioner of the Department of Motor Vehicles certifies that, from the records of the Department of Motor Vehicles, it appears that: (i) there is no bodily injury liability insurance and property damage liability insurance in the amounts specified by § 46.2-472 covering the owner or operator of the motor vehicle; or (ii) no bond has been given or cash or securities delivered in lieu of the insurance; or (iii) the owner or operator of the motor vehicle has not qualified as a self-insurer in accordance with the provisions of § 46.2-368.

D. If the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, and if the damage or injury results from an accident where there has been no contact between that motor vehicle and the motor vehicle occupied by the insured, or where there has been no contact with the person of the insured if the insured was not occupying a motor vehicle, then for the insured to recover under the endorsement required by subsection A of this section, the accident shall be reported promptly to either (i) the insurer or (ii) a law-enforcement officer having jurisdiction in the county or city in which the accident occurred. If it is not reasonably practicable to make the report promptly, the report shall be made as soon as reasonably practicable under the circumstances.

E. If the owner or operator of any vehicle causing injury or damages is unknown, an action may be instituted against the unknown defendant as "John Doe" and service of process may be made by delivering a copy of the motion for judgment or other pleadings to the clerk of the court in which the action is brought. Service upon the insurer issuing the policy shall be made as prescribed by law as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall have the right to file pleadings and take other action allowable by law in the name of John Doe.

F. If any action is instituted against the owner or operator of an uninsured or underinsured motor vehicle by any insured intending to rely on the uninsured or underinsured coverage provision or endorsement of this policy under which the insured is making a claim, then the insured shall serve a copy of the process upon this insurer in the manner prescribed by law, as though the insurer were a party defendant. The provisions of § 8.01-288 shall not be applicable to the service of process required in this subsection. The insurer shall then have the right to file pleadings and take other action allowable by law in the name of the owner or operator of the uninsured or underinsured motor vehicle or in its own name. *Notwithstanding the provisions of subsection A, the immunity from liability for negligence of the owner or operator of a motor vehicle shall not be a bar to the insured obtaining a judgment enforceable against the insurer, and shall not be a defense to the action available to the insurer.* Nothing in this subsection shall prevent the owner or operator of the uninsured motor vehicle from employing counsel of his own choice and taking any action in his own interest in connection with the proceeding.

G. Any insurer paying a claim under the endorsement or provisions required by subsection A of this section shall be subrogated to the rights of the insured to whom the claim was paid against the person causing the injury, death, or damage and that person's insurer, although it may deny coverage for any reason, to the extent that payment was made. The bringing of an action against the unknown

owner or operator as John Doe or the conclusion of such an action shall not bar the insured from bringing an action against the owner or operator proceeded against as John Doe, or against the owner's or operator's insurer denying coverage for any reason, if the identity of the owner or operator who caused the injury or damages becomes known. Any recovery against the owner or operator, or the insurer of the owner or operator shall be paid to the insurer of the injured party to the extent that the insurer paid the named insured in the action brought against the owner or operator as John Doe. However, the insurer shall pay its proportionate part of all reasonable costs and expenses incurred in connection with the action, including reasonable attorney's fees. Nothing in an endorsement or provisions made under this subsection nor any other provision of law shall prevent the joining in an action against John Doe of the owner or operator of the motor vehicle causing the injury as a party defendant, and the joinder is hereby specifically authorized.

H. No endorsement or provisions providing the coverage required by subsection A of this section shall require arbitration of any claim arising under the endorsement or provisions, nor may anything be required of the insured except the establishment of legal liability, nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.

I. Except as provided in § 65.2-309.1, the provisions of subsections A and B of § 38.2-2204 and the provisions of subsection A of this section shall not apply to any policy of insurance to the extent that it covers the liability of an employer under any workers' compensation law, or to the extent that it covers liability to which the Federal Tort Claims Act applies. No provision or application of this section shall limit the liability of an insurer of motor vehicles to an employee or other insured under this section who is injured by an uninsured motor vehicle; provided that in the event an employee of a self-insured employer receives a workers' compensation award for injuries resulting from an accident with an uninsured motor vehicle, such award shall be set off against any judgment for damages awarded pursuant to this section for personal injuries resulting from such accident.

J. Policies of insurance whose primary purpose is to provide coverage in excess of other valid and collectible insurance or qualified self-insurance may include uninsured motorist coverage as provided in subsection A of this section. Insurers issuing or providing liability policies that are of an excess or umbrella type or which provide liability coverage incidental to a policy and not related to a specifically insured motor vehicle, shall not be required to offer, provide or make available to those policies uninsured or underinsured motor vehicle coverage as defined in subsection A of this section.

K. A liability insurance carrier providing coverage under a policy issued or renewed on or after July 1, 1988, may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured insurance coverage in excess of the amount so paid. Any liability insurer making a payment pursuant to this section shall promptly give notice to its insured and to the insurer which provides the underinsured coverage that it has paid the full amount of its available coverage.

Official Use By Clerks

Passed By The Senate		**Passed By The House of Delegates**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐

Date: _____ Date: _____

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Clerk of the Senate Clerk of the House of Delegates

SENATE BILL NO. _____ HOUSE BILL NO. _____

A BILL to amend the Code of Virginia by adding in Chapter 3 of Title 8.01 an article numbered 20.1, consisting of sections numbered 8.01-217.1 through 8.01-217.4, relating to the Volunteer Immunity and Charitable Organization Liability Limitation Act.

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 20.1, consisting of sections numbered 8.01-217.1 through 8.01-217.4 as follows:

Article 20.1.

Volunteer Immunity and Charitable Organization Liability Limitation Act.

§ 8.01-217.1. Definitions.

As used in this article:

"Charitable organization" means an organization exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code provided the civil liability of the organization is not otherwise provided by law.

"Volunteer" means a person who renders service for a charitable organization without compensation, other than reimbursement for actual expenses incurred.

§ 8.01-217.2. Civil immunity for volunteers; limitation on liability if vehicle related.

A. Except as provided in subsection B of this section and § 8.01-217.4, a volunteer is immune from civil liability for any act or omission, provided the volunteer was acting in good faith and in the course and scope of his duties or functions within the organization.

B. A volunteer acting in good faith in the course of his duties or functions within the charitable organization may be liable for civil damages resulting from injury to the person or damage to property and arising out of the operation or use of any motor-driven equipment,

including an airplane, but only to the extent of any existing insurance coverage available for the act or omission.

C. If a conflict arises between the provisions of this article and those of § 8.01-220.1:1, the provisions of § 8.01-220.1:1 shall control.

§ 8.01-217.3. Limitation on liability of charitable organizations.

Except as provided in § 8.01-217.4, a charitable organization which has liability insurance shall be deemed to have waived its qualified immunity from liability for negligence up to the amount of the coverage provided. Each such policy of liability insurance shall be read so as to contain a provision or endorsement to the effect that the insurer shall be estopped from asserting, as a defense to any claim covered by such policy against the policyholder or beneficiary thereof, that such organization is immune from liability on the ground that it is a charitable organization.

§ 8.01-217.4. Exceptions to immunity.

The immunity granted under this article shall not apply to: (i) any act or omission for which a volunteer may be liable under subsection B of § 8.01-217.2, (ii) any intentional act or omission, (iii) any act or omission constituting willful misconduct or a knowing violation of the criminal law or (iv) any act or omission in violation of a fiduciary obligation imposed during the period of declarant control by § 55-79.74.

2. That the provisions of this act shall not apply to any cause of action accruing prior to July 1, 1997.

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971215655

SENATE BILL NO. 789

Offered January 8, 1997

A BILL to amend and reenact §§ 8.01-195.2 through 8.01-195.9, to amend the Code of Virginia by adding a section numbered 8.01-220.1:2 and to repeal § 8.01-222 of the Code Virginia, relating to the Virginia Tort Claims Act.

Patron—Edwards

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §§ 8.01-195.2 through 8.01-195.9 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 8.01-220.1:2 as follows:

§ 8.01-195.2. Definitions.

As used in this article:

"Agency" means any department, institution, authority, instrumentality, *school division or board, other* board or other administrative agency of the government of the Commonwealth of Virginia *or any locality thereof,* and any transportation district created pursuant to Chapter 32 (§ 15.1-1342 et seq.) of Title 15.1 and Chapter 630 of the 1964 Acts of Assembly.

"Employee" means any *employee of a school division or school board, or* officer, employee or agent of any agency, or any person acting on behalf of an agency in an official capacity, temporarily or permanently in the service of the Commonwealth, ~~or~~ any transportation district, *or any locality,* whether with or without compensation.

"Locality" means any school division, school board or county, city or town within the Commonwealth.

~~"School boards" as defined in § 22.1-1 are not state agencies nor are employees of school board state employees.~~

"Transportation district" shall be limited to any transportation district or districts which hav entered into an agreement in which the Northern Virginia Transportation District is a party with any firm or corporation as an agent to provide passenger rail services for such district or districts while such firm or corporation is performing in accordance with such agreement.

§ 8.01-195.3. Commonwealth, transportation district or locality liable for damages in certain cases.

A. 1. Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, ~~and~~ any transportation district shall be liable for claims for money only accruing on or after July 1, 1986, *and any locality shall be liable for claims for money only accruing on and after July 1, 1997,* 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 employee while acting within the scope of his employment under circumstances where the Commonwealth ~~or~~ , transportation district *or locality,* if a private person, would be liable to the claimant for such damage, loss, injury or death. However, except to the extent that a transportation district contracts to do so pursuant to § 15.1-1358, neither the Commonwealth ~~nor~~ , any transportation district, *nor any locality* shall be liable for interest prior to judgment or for punitive damages.

2. The amount recoverable by any claimant shall not exceed (i) $25,000 for causes of action accruing prior to July 1, 1988, $75,000 for causes of action accruing on or after July 1, 1988, or $100,000 for causes of action accruing on or after July 1, 1993, or (ii) 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.

3. For causes of action accruing on or after July 1, 1997, there shall be no limit on the amount recoverable by any claimant; provided, however, the Commonwealth shall be responsible for paying any recovery against a locality in excess of $100,000.

B. 1. Notwithstanding any *other* provision ~~hereof~~ *of this section,* the individual immunity of judges, the Attorney General, attorneys for the Commonwealth, and other public officers, their ager and employees from tort claims for damages is hereby preserved to the extent and degree that su persons presently are immunized.

2. Notwithstanding any other provision of law, on or after July 1, 1997, the extent and degree of individual immunity of public officers, their agents and employees of any locality from tort claims for damages shall be the same as for individuals mentioned in Subdivision 1 of this subsection.

C. Any recovery based on the following claims are hereby excluded from the provisions of this article:

1. Any claim against the Commonwealth based upon an act or omission which occurred prior to July 1, 1982.

1a. Any claim against a transportation district based upon an act or omission which occurred prior to July 1, 1986.

1b. Any claim against a locality based upon an act or omission which occurred prior to July 1, 1997.

2. Any claim based upon an act or omission of the General Assembly ~~or~~ , district commission of any transportation district, *or governing body of any locality,* or any member or staff ~~thereof~~ *of the General Assembly, or of such district or governing body* acting in his official capacity, or to the legislative function of any agency subject to the provisions of this article.

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 article.

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.

7. Any claim by an inmate of a state correctional facility, as defined in § 53.1-1, unless the claimant verifies under oath, by affidavit, that he has exhausted his remedies under the adult institutional inmate grievance procedures promulgated by the Department of Corrections; ~~provided, that~~ *however,* this exemption is applicable only if the Attorney General of the United States has certified under 42 U.S.C. § 1997e (c) (1) that those procedures are in substantial compliance with the minimal standards promulgated under 28 C.F.R. § 40 (1988), as may be amended from time to time. The time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure.

D. Nothing contained ~~herein~~ *in this article* shall operate to reduce or limit the extent to which the Commonwealth or any transportation district, agency or employee was deemed liable for negligence as of July 1, 1982, nor shall any provision of this article ~~be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth~~ *operate to reduce or limit the extent to which any locality or any agency or employee thereof was deemed liable for negligence as of July 1, 1997.*

§ 8.01-195.4. Jurisdiction of claims under this article; right to jury trial; service on Commonwealth, transportation district, or locality.

A. The general district courts shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim against the Commonwealth ~~or~~ , any transportation district, *or locality* cognizable under this article when the amount of the claim does not exceed $1,000, exclusive of interest and any attorneys' fees. Jurisdiction shall be concurrent with the circuit courts when the amount of the claim exceeds $1,000 but does not exceed $10,000, exclusive of interest and such attorneys' fees. Jurisdiction of claims when the amount exceeds $10,000 shall be limited to the circuit courts of the Commonwealth. The parties to any such action in the circuit courts shall be entitled to a trial by jury.

B. In all actions against the Commonwealth commenced pursuant to this article, the Commonwealth shall be a proper party defendant, and service of process shall be made on the Attorney General. ~~The notice of claim shall be filed pursuant to § 8.01-195.6 on the Director of the Division of Risk Management or the Attorney General.~~ In all such actions against a transportation district, the district shall be a proper party and service of process ~~and notices~~ shall be made on the chairman of the commission of the transportation district.

C. In all such actions against a locality, the locality shall be a proper party defendant and service

of process shall be made on the appropriate attorney for the locality; in all such actions where the amount of the claim is for more than $100,000, service of process shall also be made on the Attorney General.

§ 8.01-195.5. Settlement of certain cases.

The Attorney General shall have authority in accordance with § 2.1-127 to compromise and settle claims against the Commonwealth cognizable under this article.

The chairman of the commission for a transportation district against which a claim ~~was filed pursuant to this article~~ *is made*, or such other person as may be designated by the commission, shall have the authority to compromise, settle and discharge the claim provided (i) the proposed settlement and reasons therefor are submitted to the commission in writing and approved by its members or (ii) the settlement is made in accordance with a written policy approved by the transportation district commission for such settlements. The Director of the Division of Risk Management may adjust, compromise and settle claims against the Commonwealth cognizable under this article prior to the commencement of suit unless otherwise directed by the Attorney General.

The attorney for the locality against which a claim is made shall have the authority to compromise, settle and discharge the claim; if the settlement is for $100,000 or less, provided the proposed settlement and reasons therefor are submitted to the governing body of the locality in writing and approved by the governing body of the locality. The attorney for the locality, subject to the approval of the Attorney General, shall have the authority to compromise, settle and discharge the claim, if the settlement is in excess of $100,000, provided the proposed settlement and reasons therefor are submitted to the governing body of the locality in writing and approved by the governing body of the locality.

§ 8.01-195.6. ~~Notice of claim.~~ *Medical malpratice claims.*

~~Every claim cognizable against the Commonwealth or a transportation district shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable. The statement shall be filed with the Director of the Division of Risk Management or the Attorney General within one year after such cause of action accrued if the claim is against the Commonwealth. If the claim is against a transportation district the statement shall be filed with the chairman of the commission of the transportation district within one year after the cause of action accrued. However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply. The claimant or his agent, attorney or representative shall, in a claim cognizable against the Commonwealth, mail the notice of claim via the United States Postal Service by certified mail, return receipt requested, addressed to the Director of the Division of Risk Management or the Attorney General in Richmond. The notice, in a claim cognizable against a transportation district, shall be mailed via the United States Postal Service by certified mail, return receipt requested, addressed to the chairman of the commission of the transportation district.~~

~~In any action contesting the filing of the notice of claim, the burden of proof shall be on the claimant to establish mailing and receipt of the notice in conformity with this section. The signed return receipt indicating delivery to the Director of the Division of Risk Management, the Attorney General, or the chairman of the commission of the transportation district, when admitted into evidence, shall be prima facie evidence of filing of the notice under this section. The date on which the return receipt is signed by the Director, the Attorney General, or the chairman shall be prima facie evidence of the date of filing for purposes of compliance with this section.~~

Claims against the Commonwealth *or localities* involving medical malpractice shall be subject to the provisions of this article and to the provisions of Chapter 21.1 (§ 8.01-581.1 et seq.) of this title. However, the recovery in such a claim involving medical malpractice shall not exceed the limits imposed by § 8.01-195.3.

§ 8.01-195.7. Statute of limitations.

Every ~~claim~~ *action for damage to or loss of property or personal injury or death* cognizable against the Commonwealth ~~or~~ , a transportation district *or a locality* under this article shall be ~~forever barred, unless~~ *brought* within ~~one year~~ *two years* after the cause of action accrues to the claimant ~~the notice of claim required by § 8.01-195.6 is properly filed. An action may be commenced pursuant to~~

~~§ 8.01-195.4 (i) upon denial of the claim by the Attorney General or the Director of the Division of Risk Management or, in the case of a transportation district, by the chairman of the commission of that district or (ii) after the expiration of six months from the date of filing the notice of claim unless, within that period, the claim has been compromised and discharged pursuant to § 8.01-195.5. All claims against the Commonwealth or a transportation district under this article shall be forever barred unless such action is commenced within eighteen months of the filing of the notice of claim.~~

The limitations periods prescribed by this section ~~and § 8.01-195.6~~ shall be subject to the tolling provision of § 8.01-229 and the pleading provision of § 8.01-235. Additionally, claims involving medical malpractice ~~in which the notice required by this section and § 8.01-195.6 has been given~~ shall be subject to the provisions of § 8.01-581.9. ~~Notwithstanding the provisions of this section, if notice of claim against the Commonwealth was filed prior to July 1, 1984, any claimant so filing shall have two years from the date such notice was filed within which to commence an action pursuant to § 8.01-195.4.~~

§ 8.01-195.8. Release of further claims.

Notwithstanding any provision of this article, the liability for any claim or judgment cognizable under this article shall be conditioned upon the execution by the claimant of a release of all claims against the Commonwealth, its political subdivisions, agencies, and instrumentalities ~~or~~ , against the transportation district *or against the locality*, and against any officer or employee of the Com. onwealth ~~or~~ , the transportation district *or the locality* in connection with, or arising out of, the occurrence complained of.

§ 8.01-195.9. Claims evaluation program.

The Division of Risk Management of the Department of General Services ~~and~~ , the Attorney General *and four persons, one representing a school division or school board, one representing a county, one representing a city and one representing a town,* shall develop cooperatively an actuarially sound program for identifying, evaluating and setting reserves for the payment of claims cognizable under this article. *The four persons representing the localities shall be appointed by the Governor from a list recommended by the Superintendent of Public Instruction, the Virginia Municipal League and the Virginia Association of Counties.*

§ 8.01-220.1:2. Civil immunity for teachers under certain circumstances.

In any suit against a locality by or on behalf of a student arising out of a matter involving student discipline, it shall be a defense that the teacher or administrator acted in good faith and reasonably under the circumstances.

2. That § 8.01-222 of the Code of Virginia is repealed.

Official Use By Clerks			
Passed By The Senate		**Passed By The House of Delegates**	
without amendment	☐	without amendment	☐
with amendment	☐	with amendment	☐
substitute	☐	substitute	☐
substitute w/amdt	☐	substitute w/amdt	☐
Date: _____		Date: _____	
_____		_____	
Clerk of the Senate		Clerk of the House of Delegates	