

BOYD-GRAVES CONFERENCE

Sovereign Immunity Committee

Comments of Committee Members Favoring Extension of the Virginia Tort Claims Act to Local Governments

Most of us intuitively agree with what we are taught in law school; that for every wrong there is, or should be, a legal remedy. The fact that this is manifestly untrue with respect to torts committed by Virginia local governments should offend both the conscience and the sense of justice and fair play of every lawyer in the Commonwealth. The remedies currently available to citizens who are injured or damaged by the torts of Virginia local governments are not only confusing, inconsistent, and unpredictable, but are also inherently unfair. Those of us who have subscribed to these Comments believe strongly that the bringing local governments in Virginia under the coverage of the Commonwealth's Tort Claims Act is the simplest and most effective way of addressing the problem. These Comments represent our collective effort to explain why we support this solution.

1. The doctrine of sovereign immunity, as applied to torts committed by local governments, is fundamentally unjust.

It is neither logical or rational that a Virginia local government cannot take a citizen's house for a road or a park without paying just compensation for the taking, but can negligently damage or even destroy the same house with impunity. Equally irrational is the fact that a citizen who cannot be deprived of his liberty without due process can be deprived of his life by the negligence of a local government and be totally without a remedy. This is not to suggest that the doctrine of sovereign immunity has not survived many due process challenges over the centuries. Its continuing viability is confirmation of its durability; but longevity does not in and of itself justify the perpetuation of an archaic doctrine which no longer comports with our sense of justice. Every common law doctrine, regardless of its age, must be able to stand the test of fundamental fairness, and by any objective standard, the doctrine of sovereign immunity, as applied to governmental torts, cannot pass that test. For the law to deny a compensatory remedy to an innocent citizen who, without personal fault has been killed or injured, or whose property has been damaged or destroyed, solely because the tort was committed by an agency of local government, is in our judgment fundamentally wrong.

2. The distinction between the liability of Virginia cities and the liability of Virginia counties for an identical tort, which is mandated by the doctrine of sovereign as it has evolved in the Commonwealth, is totally irrational.

We have been unable to discern a rational justification for the distinction between the way the doctrine of sovereign immunity is applied to torts committed by Virginia cities and the way it is applied to torts committed by Virginia counties. As a general rule, cities are immune from tort liability for injury and damage that occurs during the performance of a governmental function, but

are subject to unlimited tort liability for injury and damage which occurs during the performance of a proprietary function. Counties, on the other hand, have absolute immunity for tort liability regardless of the nature of the function being performed at the time of the injury or damage. *The subscribers to these Comments strongly believe that the right of an innocent citizen who has been damaged or injured as the result of the negligence of a Virginia local government ought not to depend on whether his injury occurs in a city or in a county. The distinction is irrational, contrary to common sense, and should be abolished.* Unfortunately, however, those who support sovereign immunity appear willing to support abolition of the distinction only if the qualified immunity enjoyed by cities is replaced with the total immunity enjoyed by counties. This cure, in our opinion, is even worse than the disease.

3. The cases addressing when, and under what circumstances a Virginia city is liable in tort are confusing, frequently inconsistent, and difficult to reconcile.

Adding to the inequities caused by an inherently irrational system is the inability of most lawyers to predict with confidence when a Virginia city will be liable for the consequences of its torts, and when it will be protected from liability by the doctrine of sovereign immunity. As noted above, cities are immune from tort liability for injury or damage that occurs during the performance of a governmental function, but are subject to unlimited tort liability for injury and damage which occurs during the performance of a proprietary function. Aside from the question of whether it is fair to deprive an injured citizen of a compensatory remedy regardless of the nature of the function being performed at the time of the injury, the cases which attempt to distinguish between municipal functions which are governmental, and therefore immune, and municipal functions which are proprietary, and therefore subject to liability, are hopelessly confusing and inconsistent. As the functions routinely performed by Virginia municipalities continue to grow in both scope and complexity, the task of drawing the judicial line between proprietary functions and governmental functions is certain to become even more complex. Is this situation fair to anyone? Should it make any difference, in terms of an injured citizen's right to compensation, what duty the negligent employee was performing at the time of the injury? Is there any rational justification for permitting this irrational situation to continue?

4. The present method of collecting compensation for injuries and damages caused by the negligence of local governments unfairly subjects local government employees to the burden and harassment of a lawsuit, and potentially to personal liability.

Because Virginia counties are completely immune to tort liability and Virginia cities enjoy a qualified immunity, the practice of filing suit against the employee whose negligence is alleged to have caused the damage or injury has become common. Many, but not all, of Virginia's local governments have adopted the policy of defending any employee who is sued in such a case and, except for instances of intentional misconduct, of indemnifying such employees against any resulting liability. Lawyers who customarily represent injured plaintiffs in tort actions are fully aware of this policy and, as a result, suits seeking compensation for torts committed by cities or counties are routinely filed against the employee or employees whose negligence is alleged to have caused the injury. Because local government employees are not protected from liability by sovereign immunity, this practice subjects local governments which have adopted the policy to unlimited compensatory and punitive damages. To the extent that a local government elects not to

cover the tort liability of one of its employees, the employee may become personally liable for the consequences of a tort committed during the course of his or her employment.

5. Extending the Virginia Tort Claims Act to cover all Virginia local governments will replace confusion, uncertainty and inconsistency with simplicity, predictability, and rationality; it will provide a clear, fair and comprehensive remedy to those who are injured or damaged by the torts of local governments; it will enhance the ability of local governments to make accurate budgetary accruals for potential tort liabilities by eliminating their exposure to punitive damages and by placing reasonable limits on compensatory damages; it will provide a fair and just remedy for those who have been injured by the torts of local governments, and it will very likely be less expensive than the present system.

The only argument we have heard in opposition to an extending the Virginia Tort Claims Act so as to cover local governments has been one variation or another of a common theme: it will be far more costly; it will increase the number and variety of tort claims; it will require an increase in taxes; it will jeopardize bond ratings, and so on. Yet, as far as we have been able to determine, none of these arguments is based on solid, empirical evidence. Despite our best efforts, no one has been willing or able to provide our Committee with even a definitive estimate of the cost of the present system. The Attorney General, who is responsible for the administration of the current Tort Claims Act, is unable to provide accurate figures covering the annual cost of the Tort Claims Act to the Commonwealth, yet no one seriously contends that in the some 30 years since its adoption the Act has jeopardized the solvency of the Commonwealth, or adversely affected its tax rate, or threatened it's triple-A bond rating. It cannot be denied that almost every local government in Virginia purchases insurance (or self-insures by accrual), investigates accidents, negotiates and pays tort claims, and that when sued that they pay lawyers, employ expert witnesses and court reporters, and incur other litigation costs. Several times each year, a growing number of local governments are paying multi-million dollar verdicts or settlements in tort cases. The very unpredictability of these verdicts and settlements, and the related costs, inevitably drive up insurance premiums and the size of claims accruals. Although we know that Virginia local governments are regularly incurring such expenses; no one has yet been able to determine the total. When the amount of our current costs is not known, how can it be said with certainty that the Tort Claims Act would increase those costs?

We think that the advantages of extending the Tort Claims Act to local governments are many and obvious. By providing a defined and clearly understood remedy for damages caused by the tortuous conduct of local governments, the Tort Claims Act would eliminate the unpredictability, unfairness, confusion and inconsistency inherent in the present system. The potential disadvantage, if there is one, is the potential for added costs. This potential should, however, be considered in the light of the following:

(a) There is at least an equally likely potential that extending the Tort Claims Act to local governments would, by capping liabilities and eliminating the exposure to punitive damages, reduce local government costs, at least in the aggregate.

(b) Is there any empirical evidence that subjecting municipalities in other states to a Tort Claims Act with a modest cap on damages has adversely affected their tax rates, bond ratings, or insurance costs? Has the Commonwealth of Virginia suffered any such adverse effects as a result of its thirty

year experience with the Tort Claims Act? Have those who handle risk management for local governments expressed concern over the proposal?

(c) Those who insist that extending the Tort Claims Act to local governments would result in "dramatic" increases in costs have provided the Committee with a letter from a Richmond-based financial advisor who, without providing a shred of hard evidence, opines that the "potential" of extending the Tort Claims Act to local governments in Virginia "is at best to dramatically increase costs and at worse create an unlimited liability for Virginia localities." This comment appears to ignore the fact that no one seems to know what the current system is costing local governments; that Virginia cities are already subject to unlimited tort liability for proprietary torts, and that all Virginia localities who have agreed to indemnify their employees currently have exposure to unlimited damages.

(d) The suggestion that the present system of dealing with the tort liability of local governments is more predictable than if they were covered by the Tort Claims Act, or that large judgments against local government would be more likely under the Tort Claims Act than under the present system, is simply inconsistent with the reality of the current situation. . We believe that the Tort Claims act will enhance predictability, reduce exposure to large judgments, and more likely than not, reduce overall costs to local governments.

It would be easy for those of us who believe that extending the Tort Claims Act to local governments would be in the best interests of the Commonwealth to permit ourselves to be diverted by an endless argument with our opponents over costs. In the absence of hard, empirical evidence, that is an argument that neither the proponents nor the opponents is likely to win. We can only hope that, in time, the Virginia General Assembly will assist by approving the JLARC study the Conference has repeatedly requested. However, whatever the truth may be with regard to costs, *it is our belief that the failure to provide an innocent citizen who has been damaged or injured by the negligence of a local government, with a simple, understandable, and efficient judicial remedy is an intolerable violation of our collective sense of justice and fair play, which should be remedied even if it entails an increase in costs. As is the case across society, the cost of tortuous misconduct should be borne by the tortfeasor, not by the innocent victim, and even if the tortfeasor is a Virginia local government.*

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BOYD-GRAVES CONFERENCE

Sovereign Immunity Study Committee

The undersigned members of the Boyd-Graves Sovereign Immunity Study Committee believe it would not be appropriate to recommend that the Virginia Tort Claims Act be expanded to apply to all counties, cities, and towns in Virginia.

The bases for our opposition to expanding the Tort Claims Act are as follows:

There has been no showing of a need to expand the Tort Claims Act. On our committee, the proponents of expansion offer only philosophical, scholarly, and conjectural arguments in favor of expansion. While classical symmetry might be appreciated in art, it is rarely found in life. Indeed, there has been no showing that the present system of resolving tort claims against localities results in actual, much less widespread inequities that might be corrected by this possible change in law. In fact, we have not heard even anecdotal evidence of particular inequities that could be corrected.

The consequences of expanding the Tort Claims Act could have widespread and potentially harmful effects on our local governments and the communities they serve. At best, the nature and extent of these effects is unknown, and the uncertainty associated with such a change, by itself, could be detrimental. As a general proposition, the extent of a government's potential liability to tort claims is proportional to the extent of its interaction with the public. Unlike the Commonwealth, local government interacts with the public in many ways that create vast potential liability. By way of example, some of those areas of interaction include - -

- law enforcement
- fire, rescue, and emergency services
- streets and sidewalks
- public schools
- water, sanitary sewers, and storm sewers
- traffic control
- social services
- behavioral healthcare services
- parks and recreational activities
- planning and zoning
- building inspection
- code enforcement
- operation of public buildings
- vehicles in various forms of public use and service

Most of these areas of local government activity presently find some degree of protection in sovereign immunity and related judicial doctrines. If the Tort Claims Act were expanded to cover local government, then those defenses would largely be eliminated. Every county, city, and town in Virginia would be subject to liability for ordinary negligence in virtually all of the activities described above. Even with a cap on liability (which would inevitably increase over

time), the potential for new claims is vast, as is the cost for additional defense expenditures.

The attached letter from Davenport & Company describes how the rating agencies and financial markets would be likely to respond to such an expansion of the Virginia Tort Claims Act.

Last year, Boyd-Graves asked the General Assembly to study the financial consequences of expanding the Tort Claims Act. The General Assembly - - which alone has authority to make such an expansion - - declined even to authorize the study.

If the additional liability and defense costs for localities even approaches its potential, then the inevitable consequences will be a combination of increased local taxes and decreased local services. Those consequences would be harmful to our communities, may generate widespread public criticism, and may be viewed as a proposal to benefit the legal profession itself, at the expense of the broader public interest.

The recommendation would be inconsistent with the purposes of Boyd-Graves. The stated purpose of Boyd-Graves is "to reach consensus about ways to improve the law." As is obvious from the two reports of our committee, there is anything but consensus about expanding the Tort Claims Act. Not only has this issue polarized our committee into two adversarial groups, it has paralyzed our committee into inaction on other aspects of sovereign immunity that have greater potential for improvement.

Respectfully submitted,

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DAVENPORT & COMPANY LLC

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MEMORANDUM

To: G. Timothy Oksman, City Attorney
City of Portsmouth, Virginia

From: James E. Sanderson, Jr., Davenport & Company LLC

RE: Potential Impacts to Virginia Municipalities Due to the Elimination or
Limitation of Virginia Sovereign Immunity

Date: May 27, 2009

Cc: David P. Rose, Davenport & Company, LLC

You have asked our advice regarding the potential implications to Virginia municipal credits by national bond rating agencies should (a) sovereign immunity no longer be available as a defense to tort claims in Virginia, or (b) all Virginia localities be placed under the Virginia Tort Claims Act, such that municipalities may be liable for all claims of alleged negligence with no availability of immunity as a defense to a claim.

Davenport Background

As you are aware, Davenport & Company LLC ("Davenport") has substantial experience representing Virginia towns, cities and counties of all size and financial strength. Davenport has consistently ranked as the top Financial Advisor in the Mid-Atlantic region according to the leading national database for the financial services industry, maintained by Thomson Financial in New York. In addition, Davenport has ranked in the Top 10 nationally among financial advisors for competitive bond issues. Through this experience, Davenport has a unique insight into the concerns and considerations of the national bond rating agencies as they relate to municipal governments.

Impact to Local Governments

It is important to understand that Virginia local governments operate under strict limitations placed on them by the Constitution of the Commonwealth of Virginia. A locality is required to operate on a balanced budget with limited ability to raise revenue

either through taxes or debt issuance. The potential outcome of the suggested changes you have described is at best to dramatically increase operating costs and at worse to create an unlimited liability for Virginia localities.

Bond rating agencies will be concerned with a locality's ability to react to such a potential situation from an operating perspective, as well as its ability to repay outstanding debt obligations. We would expect localities to significantly increase their cash reserves and insurance coverage to appropriately manage the potential costs of unknown liabilities and address the concerns of rating agencies. The need to fund these increased operating costs themselves may significantly strain a locality's operating budget.

Should a locality be subject to identifiable claims, rating agencies may look for funds to be reserved to satisfy a potential judgment. In addition, until the claim is resolved, the rating agencies will continue to monitor the claim. The uncertainty surrounding unresolved claims could reasonably preclude a credit rating upgrade for a locality resulting in unnecessary, increased borrowing costs. In the event that a locality is subject to an actual judgment, the only responses would be to dramatically increase taxes, decrease services or debt finance the liability. Each of these actions will directly impact the credit analysis of the rating agencies. As a result of this increased strain, a locality's credit rating and its cost of borrowing may be negatively impacted. If a locality is unable to obtain financing to pay a large judgment due to its poor credit quality or generate additional, sufficient tax revenue, the locality may be forced into bankruptcy or insolvency.

Summary

Regardless of whether sovereign immunity is no longer available as a defense to tort claims in Virginia or all Virginia localities are placed under the Virginia Tort Claims Act, the uncertainty of future expenses to Virginia localities will dramatically increase. This uncertainty will require increases in cash reserves and insurance coverage. Based on our experience as financial advisors to Virginia localities, these likely results will cause heightened review by bond rating agencies with the potential for significant, negative impacts. The potential results to all Virginia localities of these changes are serious, and any consideration of such changes requires a complete understanding of the impacts to local governments.

If we can be of further assistance, please do not hesitate to contact us.