



COMMONWEALTH of VIRGINIA

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March 15, 2013

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The Honorable Robert G. Marshall
Member, House of Delegates
Post Office Box 421
Manassas, Virginia 20108-0421

The Honorable Patrick A. Hope
Member, House of Delegates
Post Office Box 3148
Arlington, Virginia 22203

Dear Delegates Marshall and Hope:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether someone who was sterilized by the Commonwealth between 1924 and 1979 could successfully bring a claim against the Commonwealth under the Virginia Tort Claims Act ("VTCA").¹

Response

It is my opinion that, because the VTCA does not provide relief for torts committed by agents of the Commonwealth that occurred prior to July 1, 1982, it is unlikely that a claimant could successfully bring an action against the Commonwealth for having been sterilized.

Applicable Law and Discussion

At common law, the Commonwealth enjoyed absolute immunity from tort and other claims because "[i]t is an established principle of sovereignty, in all civilized nations, that a sovereign State cannot be sued in its own courts . . . without its consent and permission. . . ."² The Commonwealth

¹ VA. CODE ANN. §§ 8.01-195.1 through 8.01-195.9 (2007 & Supp. 2012).

² *Gray v. Va. Sec'y of Transp.*, 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (quoting *Bd. of Public Works v. Gantt*, 76 Va. 455, 461 (1882)).

retains its absolute immunity “[a]bsent an express statutory or constitutional provision waiving . . .” that immunity.³

In the 1981 session, the General Assembly enacted a statutory waiver of the Commonwealth immunity, the VTCA.⁴ The VTCA was and remains only a “limited waiver” of the Commonwealth’s immunity and is to “be strictly construed because the Act is a statute in derogation of the common law.”⁵

By its express terms, the VTCA waived the Commonwealth’s immunity only prospectively. Specifically, since the VTCA’s adoption, § 8.01-195.3 has provided that, subject to the law’s other provisions, “the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982”⁶

Generally, and for the purposes of your inquiry, causes of action accrue in Virginia at the time the tort occurs.⁷ Thus, the latest a cause of action could have accrued given the dates in your letter is 1979, which is prior to the enactment and effective date of the VTCA. Accordingly, no such claim falls within the VTCA, and therefore, the Commonwealth retains its absolute immunity from any such claims.

In addition, any potential claim also may be barred by the notice provisions of the VTCA. Section 8.01-195.6 provides that

[e]very 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, within one year after such cause of action accrued.

Obviously, no notices of claim were filed within one year of 1979, because there was no VTCA in 1980.

The only exception to the notice provisions would be if the tort victim were under a legal disability, and thus, entitled to a tolling of the notice requirement.⁸ While some of those who were sterilized were almost certainly under a disability, the prospective nature of the VTCA nevertheless would bar any claim.

Finally, for at least some of the potential claimants, there also could be general statute of limitations problems.⁹

³ *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 244, 591 S.E.2d 76, 78 (2004) (citing *Patten v. Commonwealth*, 262 Va. 654, 658, 553 S.E.2d 517, 519 (2001); *Baumgardner v. Sw. Va. Mental Health Inst.*, 247 Va. 486, 489, 442 S.E.2d 400, 401 (1994)).

⁴ 1981 Va. Acts ch. 449.

⁵ *Carter*, 267 Va. at 244-45, 591 S.E.2d at 78 (citations omitted).

⁶ The prospective nature of the VTCA is perhaps best demonstrated by the fact that, while it was first adopted in 1981, the General Assembly chose to make the waiver effective for the first time more than a year after the VTCA’s adoption.

⁷ *See* § 8.01-230 (2007).

⁸ *See* § 8.01-229(2007).

⁹ *See* §§ 8.01-228 (2007) ; 8.01-243 (Supp. 2012); 8.01-248 (2007).

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I therefore conclude that the VTCA does not waive immunity for any torts committed by agents of the Commonwealth that occurred prior to July 1, 1982.

Conclusion

Accordingly, it is my opinion that it is unlikely that a claimant could successfully bring an action against the Commonwealth for having been sterilized.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by "II" in a smaller font.

Kenneth T. Cuccinelli, II
Attorney General