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Administrative

Robert L. Stewart Jr.
West Virginia University College of Law

CIVIL

ADMINISTRATIVE

I. Indemnification for Attorneys Fees to Public Officials

Powers v. Goodwin, 291 S.E.2d 466 (W. Va. 1982)
Martin v. Mullens, 294 S.E.2d 161 (W. Va. 1982)

In *Powers v. Goodwin*[1] the court considered the issue of whether a public official is entitled to indemnification for attorney fees where the underlying action arises from the discharge of an official duty.

The issue of indemnification arose in the context of a removal suit brought against the three members of the Boone County Commission. The commission reimbursed one of its members for attorney fees he incurred in defense of preliminary criminal proceedings before the grand jury, arising from the alleged misuse of a county credit card. The plaintiff claimed the expenditure was improper and grounds for removal.

The court adopted a three part test in *Powers* to determine when a public official is entitled to indemnification for attorney fees:

> In order to justify indemnity from public funds, the underlying action must arise from the discharge of an official duty in which the government has an interest; the officer must have acted in good faith; and the agency seeking to indemnify the officer must have either the express or implied power to do so.[2]

Justice Neely, writing for the court, noted that the expansion of the personal liability of government officials, and the restriction of sovereign immunity has increased the importance of the indemnification question.[3] In support of allowing indemnification the court reasoned that, "the voters have a legitimate interest in protecting their duly elected officials from being hectored out of office through the constant charge of bankrupting attorney fees on their own personal resources."[4]

Two factors complicated the court's decision in *Powers.* First, the county commission's action directly benefited one of its own members, raising a conflict with the basic principle that no man can be the judge of his own cause.[5] The court held that this concern did not prevent indemnification, but noted, "[w]here a public body must make a determination of whether to indemnify itself for attorney fees, there is no presumption of regularity."[6] In order to avoid this problem in the future, the court explained that in questionable cases a prior determination of the legality of indemnification could be obtained through an Attorney General's opinion or a mandamus proceeding.[7]

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[1] 291 S.E.2d 466 (W. Va. 1982).
[2] *Id.* at 472.
[3] *Id.* at 470.
[4] *Id.* at 476.
[5] *Id.* at 474.
[6] *Id.*
[7] *Id.* at 475.

The second complicating factor in *Powers* was that the underlying case was a criminal action. Many courts distinguish between civil and criminal proceedings, disallowing indemnification in the latter.[8] The rationale for the distinction is the existence of greater obstacles to criminal indictments than to civil suits, and the reluctance of prosecutors to bring charges against a public official discharging his duties. *Powers* however extends indemnification for attorney fees to criminal prosecutions.[9] In making this extension the court reasoned that because any citizen may seek a grand jury indictment in West Virginia,[10] there are fewer barriers to frivolous criminal prosecutions in this jurisdiction than in other states.[11]

The decision in *Powers* gave little definition to the good faith standard. However, in *Martin v. Mullins*[12] the court was presented with an opportunity to further develop the good faith test. In *Martin,* nine school board employees brought an action in United States district court under 42 U.S.C. § 1983 against the members of the Lincoln County Board of Education, claiming that they had been wrongfully discharged. The district court found for three of the employees, and ordered them reinstated with back pay. The school board subsequently voted a settlement of back pay and damages that came entirely from school board funds. The plaintiffs in *Martin* brought a removal suit against the members of the board claiming that the settlement was an illegal diversion of funds for the purpose of insulating the board members from personal liability.

Although there was no issue of indemnification for attorney fees before the court, it held that the three part *Powers* test was the proper standard to determine whether an indemnification of a public official for a personal judgment was appropriate.[13] The court, focusing on the good faith element of the test, held that good faith in the context of indemnification for attorney fees and personal judgments is identical to the federal standard for good faith immunity for public officials in a civil rights suit.[14] Under the federal standard there is both a subjective and an objective element to good faith: the official must act sincerely with a belief that he is doing right, and furthermore the official must have an objectively reasonable basis for that belief.[15] Justice Neely noted that given the diverse backgrounds of public officials there could not be one standard of reasonableness, and emphasized that reasonableness must be determined in light of all the circumstances in a particular case.[16]

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[8] *Id.* at 472.

[9] *Id.* at 473.

[10] State *ex rel.* Miller v. Smith, 285 S.E.2d 500 (W. Va. 1981).

[11] *Powers,* 291 S.E.2d at 473.

[12] 294 S.E.2d 161 (W. Va. 1982).

[13] *Id.* at 165.

[14] *Id. See* Gomez v. Toledo, 446 U.S. 635 (1980); Scheur v. Rhodes, 416 U.S. 232 (1973).

[15] *Martin,* 294 S.E.2d at 167.

[16] *Id.* at 168.

II. Recoverability of Attorneys Fees by Successful Plaintiffs in Mandamus Proceedings

Nelson v. State Public Employees Insurance Board, 300 S.E.2d 86 (W. Va. 1982)

In *Nelson v. State Public Employees Insurance Board*[17] the court had the opportunity to address the issue of whether attorney fees are recoverable by successful petitioners in mandamus proceedings. The court held in *Nelson* that attorney fees will be awarded to a prevailing petitioner in a mandamus proceeding where a public officer willfully fails to obey the law.[18] The petitioners in *Nelson* filed a petition for a writ of mandamus to compel the Insurance Board to provide group insurance to the dependants of deceased members of the public employees group insurance plan. The petitioners asked for court costs and attorney fees. The court found that the Board had willfully failed to provide coverage to dependants of deceased members as required by statute and granted the writ.

In considering the award of attorney fees, Justice McGraw noted that the traditional rule is that attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule.[19] However, costs will be awarded in a mandamus proceeding where a public official willfully fails to obey the law,[20] and some jurisdictions have permitted awards of attorney fees in mandamus proceedings under statutes permitting recovery of costs.[21] The court did not rest the award of attorneys' fees on this ground, however, noting that attorney fees are not costs and are not recoverable as such.[22] Rather, the court recognized a well established exception to the general rule prohibiting recovery of attorney fees. The exception is that attorney fees will be awarded where the losing party has acted in bad faith.[23] Under this bad faith exception the Board's willful refusal to perform their clear statutory duty justified an award of attorney fees.[24]

In support of allowing attorney fees Justice McGraw explained that:

> Citizens should not have to resort to lawsuits to force government officials to perform their legally prescribed nondiscretionary duties. When, however, resort to such action is necessary to cure willful disregard of law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action. No individual citizen ought to bear the legal expense incurred in requiring the government to do its job.[25]

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[17] 300 S.E.2d 86 (W. Va. 1982).
[18] *Id.* at 92.
[19] *E.g.*, Burdette v. Campbell, 126 W. Va. 591, 30 S.E.2d 713 (1944).
[20] *E.g.*, State *ex rel.* Bd. of Educ. v. Cavendish, 81 W. Va. 266, 94 S.E. 149 (1917).
[21] *E.g.*, Cities Serv. Oil Co. v. Board of City Comm'ns, 224 Kan. 183, 578 P.2d 718 (1978).
[22] *Nelson*, 300 S.E.2d at 92.
[23] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).
[24] *Nelson*, 300 S.E.2d at 92.
[25] *Id.*

III. Judicial Review of Department of Welfare Decisions

State ex rel. Ginsberg v. Watt, 285 S.E.2d 367 (W. Va. 1981)
Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982)

The court twice considered questions concerning the proper method and scope of judicial review of Department of Welfare decisions during the survey period. In *State ex rel. Ginsberg v. Watt*[26] the court determined that the State Administrative Procedure Act (APA)[27] does not apply to the Department of Welfare, and therefore that certiorari is the proper means for obtaining judicial review of welfare department decisions.[28]

The issue arose when the plaintiff sought review under the APA of a welfare department decision excluding the plaintiff from participation in the state medical assistance program. The court found the Act did not apply to the Department of Welfare given the language that: "[t]he provisions of this chapter do not apply to rules relating to, or contested cases involving . . . the receipt of public assistance . . . ."[29] The court concluded that certiorari is the proper means to obtain review of agency decisions not covered by the APA.[30]

The appropriate standard for judicial review of an agency decision on certiorari was considered in *Harrison v. Ginsberg*.[31] In *Harrison*, a hearing officer of the Welfare Department denied the appellant Aid to Families with Dependent Children benefits, and the appellant sought appeal in circuit court by writ of certiorari. The circuit court, holding that the hearing officer's decision was not arbitrary, capricious or contrary to the law and evidence, affirmed the decision.

The Supreme Court of Appeals, in reversing the circuit court, held, *inter alia*, that the "arbitrary and capricious" standard was too narrow a scope of review.[32] While the court noted that the original scope of review under writs of certiorari was quite limited, it explained that West Virginia Code § 53-3-3[33] had expanded the scope of review of circuit courts. The statute gives the circuit court the power to rehear the issues on the evidence certified from the inferior tribunal and enter such judgment as the inferior tribunal should have made.[34]

Justice McGraw, writing for the court, reasoned that this expanded review is inconsistent with the "arbitrary and capricious" standard applied by the cir-

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[26] 285 S.E.2d 367 (W. Va. 1981).
[27] W. Va. Code §§ 29A-1-1 to 29A-7-4 (1980 & Supp. 1982).
[28] *Ginsberg*, 285 S.E.2d at 369.
[29] W. Va. Code § 29A-1-3 (Supp. 1982).
[30] *Ginsberg*, 285 S.E.2d at 369.
[31] 286 S.E.2d 276 (W. Va. 1982).
[32] *Id.* at 283.
[33] W. Va. Code § 53-3-3 (1981). The relevant portion of the statute provides, "such circuit court shall . . . review such judgment, order or proceeding, of the county court, council, justice or other inferior tribunal upon the merits, determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter as law and justice may require."
[34] *Harrison*, 286 S.E.2d at 282-83.

cuit court in this case.[35] Furthermore, the court found the "arbitrary and capricious" standard to be inconsistent with *North v. West Virginia Board of Regents*,[36] which allows a circuit court to take evidence on certiorari under appropriate circumstances independent of the record of the lower tribunal.[37]

The court distinguished two recent West Virginia cases[38] which held that an arbitrary and capricious agency decision should not be affirmed on certiorari, reasoning that this language was not intended to limit the scope of review.[39] Thus, the court held that "on certiorari the circuit court is required by W. Va. Code § 53-3-3 to make an independent review of both law and fact in order to render judgment as law and justice may require."[40]

IV. Corporal Punishment

Smith v. Board of Education, 295 S.E.2d 680 (W. Va. 1982)

In *Smith v. Board of Education*[41] the court was confronted with the issue of the permissibility of corporal punishment in public schools. The court held in *Smith* that the doctrine of *in loco parentis* as embodied in West Virginia Code § 18A-5-1[42] does not permit corporal punishment of public school children by means of paddle, whip, stick or other mechanical device.[43] The case developed out of the paddling of the eleven year old petitioner by a Roane County elementary school principal. The petitioner challenged the constitutionality of the *in loco parentis* statute on the basis of the cruel and unusual punishment provision[44] and the substantive due process provision of the West Virginia Constitution.[45] Given the court's construction of the statute, it did not reach the constitutional question.

In reaching its holding, the court, per Justice Miller, reasoned that the statute is merely an embodiment of the common law doctrine of *in loco parentis*, and therefore the legislature intended to impart the common law contours of the doctrine into the statute.[46] The court noted that the right to punish had never been absolute under the doctrine of *in loco parentis*.[47] Justice Miller found two further limits on the doctrine by way of analogy. First, the enactment of statutes to curtail child abuse[48] suggests, according to the court, that

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[35] *Id.* at 283.
[36] 233 S.E.2d 411 (W. Va. 1977).
[37] *Id.* at 419.
[38] North v. West Virginia Bd. of Regents, 233 S.E.2d 411 (W. Va. 1977); Beverlin v. Board of Educ., 216 S.E.2d 554 (W. Va. 1975).
[39] *Harrison*, 286 S.E.2d at 283.
[40] *Id.* at 283-84.
[41] 295 S.E.2d 680 (W. Va. 1982).
[42] W. Va. Code § 18A-5-1 (1977).
[43] *Smith*, 295 S.E.2d at 687.
[44] *Id.* at 682; W. Va. Const. art. III, § 5.
[45] *Id.*; W. Va. Const. art. III, § 10.
[46] *Smith*, 295 S.E.2d at 684.
[47] *Id.* at 686.
[48] W. Va. Code § 49-1-3 (1980).

in loco parentis has been legislatively curtailed.[49] Second, the limitation of physical punishment of prisoners in the penal system indicates that similar limits should be placed on the common law doctrine of *in loco parentis*.[50]

The court was careful to point out its holding "does not prohibit the spanking by hand, the physical seizure and removal of unruly students from the classroom nor the use of physical force to restrain students from fighting or engaging in destructive or illegal acts."[51] However, before even manual corporal punishment may be imposed for disciplinary purposes, some minimal due process must be afforded the student.[52] The court established two procedural requirements:

> First, the student should be given an opportunity to explain his version of the disruptive event as such an explanation may convince a fair minded person that corporal punishment is not warranted. Second, in the absence of some extraordinary factor the administration of corporal punishment should be done in the presence of another adult.[53]

V. School Board Immunity

Ohio Valley Contractors v. Board of Education, 293 S.E.2d 437 (W. Va. 1982)

In *Ohio Valley Contractors v. Board of Education*[54] the court held that local boards of education do not have state constitutional immunity nor common law governmental immunity from suit.[55] The case arose out of a contract claim brought against the Wetzel County school board, and a tort claim against the Kanawha county board, which were consolidated on appeal. In abolishing school board immunity the court expressly overruled *Boggs v. Board of Education*[56] which had held:

> County boards of education are instrumentalities of the state of West Virginia, created by statute in furtherance of a state purpose mandated by W. Va. Const. art. 12, § 1, receive substantial funds from the state, and are under such direct state control and supervision as to bring them within the constitutional immunity from suit of the State of West Virginia established by W. Va. Const. art. 6, § 35.[57]

West Virginia Constitution article VI, § 35 provides that the state shall never be a defendant in any court of law or equity except in garnishment or attachment proceedings. Thus, the constitutional immunity issue turned on whether a county board of education is part of the state. The court listed the relevant factors in *Ohio Valley Contractors* for determining whether a particu-

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[49] *Smith*, 295 S.E.2d at 686.
[50] *Id.* at 687.
[51] *Id.*
[52] *Id.* at 688.
[53] *Id.*
[54] 293 S.E.2d 437 (W. Va. 1982).
[55] *Id.* at 441.
[56] Boggs v. Board of Educ., 244 S.E.2d 799 (W. Va. 1978), *overruled*, 293 S.E.2d 437 (W. Va. 1982).
[57] *Id.* at 800.

lar body is part of the state: (1) whether the body functions statewide; (2) whether it does the state's work; (3) whether it was created by an act of the legislature; (4) whether it is subject to local control; and (5) whether it is dependent on state coffers.[58] Applying these factors, the court reasoned that although county boards of education are financially dependent upon the state, they should not be considered state entities because: (1) they are locally accountable; (2) their members must be county residents; (3) they spend locally generated taxes; and (4) they are represented by county prosecutors.[59]

Ohio Valley Contractors also eliminated common law government immunity for school boards. This abolition is an extension of the holding in *Long v. City of Weirton.*[60] In *Long* the court abolished municipal common law governmental immunity, finding that municipal governmental immunity was historically indefensible, and that the governmental-proprietary distinction was arbitrary and unpredictable.[61] The court in *Ohio Valley Contractors* found that county school board immunity arises from the same historical source that was disposed of in *Long,*[62] adopting Justice Miller's dissent in *Boggs.*[63]

It is arguable that *Ohio Valley Contractors* stands for the proposition that all common law governmental immunity has been abolished in West Virginia. The court notes that governmental immunity, even if it were historically predicated, was judicially created and may be judicially abolished.[64] Additionally, the court concluded that there is little to recommend common law immunity. It may result in irresponsible sovereigns. It is contrary to the principle that where there is a right there is a remedy, and experience shows that fiscal costs of abolishing immunity are moderate.[65] Nevertheless, the court limited its holding to just abolishing school board immunity.[66] However, *Ohio Valley Contractors* indicates the extent to which governmental immunity has fallen into judicial disfavor.

VI. Public Service Commission Procedure

Appalachian Power Co. v. Public Service Commission, 296 S.E.2d 887 (W. Va. 1982)
Chesapeake and Potomac Telephone Co. v. Public Service Commission, No. 41-82 (W. Va. March 4, 1982)

The court was presented with two cases during the survey period concerning procedural aspects of the public service commission. In *Appalachian Power Co. v. Public Service Commission*[67] the issue was whether the broad contempt

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[58] *Ohio Valley Contractors,* 293 S.E.2d at 438.
[59] *Id.* at 439, 440.
[60] 214 S.E.2d 832 (W. Va. 1975).
[61] *Id.* at 858, 859.
[62] *Ohio Valley Contractors,* 293 S.E.2d at 440.
[63] *Id.*
[64] *Id.* at 441.
[65] *Id.* at 440, 441.
[66] *Id.* at 441.
[67] 296 S.E.2d 887 (W. Va. 1982).

powers given to the commission by West Virginia Code § 24-4-5 violate the separation of powers provision of the West Virginia Constitution.[68] The case arose from a $5,000 fine assessed against Appalachian Power under the commission's contempt power for Appalachian's violation of a commission rule regarding termination of residential utility service during winter months. While recognizing the commission exercises *quasi* judicial power,[69] and that there must be some flexibility in interpreting the separation of powers doctrine,[70] the court held the commission's broad contempt powers violate the separation of powers provision of the West Virginia Constitution.[71] The court reasoned that the lack of legal training of administrative personnel, combined with the broad range of subject matter presented to them, prevents the delegation of a general contempt power.[72] The court noted that a broad contempt power would make parties and their attorneys subject to contempt for whatever conduct the commission might feel was contemptuous.[73]

The court was careful to note in *Appalachian* that the commission may still enforce its rules under West Virginia Code § 24-4-3. This provision allows the commission to impose a civil penalty up to $5,000 for refusal to comply with rules or orders entered under West Virginia Code § 24-3-2, 24-2-7, or 24-2-9.[74] By allowing the commission to still impose civil penalties, the court may be subject to the criticism that it is elevating form over substance. In this regard it should be noted that the $5,000 fine against Appalachian was sustainable under the civil penalty power of the commission, if the commission would have relied on the civil penalty provision.[75] In defense of the court, it would appear that the civil penalty provision, which is limited to refusals to comply with rules and orders, is less subject to abuse than the broad contempt power. Therefore, there may be less justification to hold the civil penalty to be in violation of the separation of powers doctrine.

In *Chesapeake and Potomac Telephone v. Public Service Commission*[76] the court considered what the correct standard of judicial review should be for public service commission decisions. The dispute in *C & P* developed from the commission's denial of part of a rate increase requested by C & P. The commission's order disallowed, for rate-making purposes, expenditures representing more than 10.25% profit (the rate of return the commission found to be just and reasonable) on equipment C & P had purchased from its affiliate Western Electric over a twenty year period. The commission also disallowed C & P's cost of providing its employees' telephone service at reduced rates.

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[68] W. VA. CONST. art. V, § 1.

[69] *Appalachian Power Co.*, 296 S.E.2d 887 (W. Va. 1982).

[70] *Id.*

[71] *Id.* at 891.

[72] *Id.* at 890.

[73] *Id.* at 891.

[74] *Id.*

[75] In its notice to Appalachian, the Commission cited its civil fine power under W. VA. CODE § 24-4-3 as well as its contempt power.

[76] Chesapeake and Potomac Telephone v. Public Serv. Comm'n, No. 41-82 (W. Va. March 4, 1982).

The court in *C & P* held that the proper standard of review was given in *Monongahela Power Co. v. Public Service Commission*:[77]

> In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in the light of relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of these factors.[78]

This standard establishes a three part test: "(1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the commission's findings; and, (3) whether the substantive result of the Commission's order is proper."[79] The focus of C & P's objection to the order was on the second element, hence the relevant question was whether the order was supported by substantial evidence.

On the question of Western Electric's profits the court held that there was sufficient evidence of excess profits to justify the commission's order. In this regard the court noted:

> Where the evidence discloses that a utility has purchased the bulk of its equipment from an affiliated manufacturer, and that manufacturer enjoys a unique position of market power which renders a comparison of its prices and profits with those of general trade manufacturers inadequate as a measure of the reasonableness of its charges, the failure by the utility to provide additional evidence of reasonableness may be relied upon by the Public Service Commission as a basis for disallowing from the utility's rate base those portions of the charges which represent a return to the affiliated manufacturer greater than that allowed the utility itself.[80]

However, the court did overrule the order to the extent it was retroactive. The order required C & P to refund excess profits earned by Western Electric from 1959 onward. The court found this order to contain an element of retroactivity, especially in light of the fact that the commission had three times in the period from 1959 determined Western Electric's profits to be reasonable. The court held that rate making authority is a legislative action which operates only prospectively, and therefore the retrospective element of the order was invalid.[81]

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[77] Monongahela Power Co. v. Public Serv. Comm'n, 276 S.E.2d 179 (W. Va. 1981).
[78] *Id.* at 180.
[79] *C & P Telephone*, No. 41-82 at 4.
[80] *Id.* at 22.
[81] *Id.* at 23.

The court also reversed the disallowance of the cost of providing employees reduced rate service. The standard for determining the permissibility of such discounts was established by the commission in *Bluefield Gas Co.*[82] There the commission held discounts are reasonable and nondiscriminatory "when there is a showing that the disallowance of such rates would not decrease the company's expenses, but rather would simply reappear in the form of higher wages or other benefits necessary to hire and retain employees."[83] The court in *C & P* found that the discount was considered by management and employees as a concession in lieu of compensation which should be considered in rate making as part of the employment agreement, and that the commission's contrary finding was not supported by evidence.[84]

C & P, when compared to *Harrison*,[85] appears to create an anomalous situation in relation to the scope of judicial review of agency decisions. *Harrison* allows for significant review of Department of Welfare decisions, amounting almost to a *de novo* hearing, while under *Monongahela Power* and *C & P* judicial review of public service commission decisions is limited to the narrow review of "substantial evidence."

VII. Municipal Liability

Smith v. City of Morgantown, 289 S.E.2d 223 (W. Va. 1982)

In *Smith v. City of Morgantown*[86] the court held that negligence was the correct standard for determining liability for damages caused by water escaping from utility mains.[87] This view is in accord with the majority of jurisdictions.[88] The court held that the application of *res ipsa loquitur* to such cases in *Royal Furniture Co. v. City of Morgantown*,[89] did not dispense with the need to prove negligence.[90] Justice Neely dissented, taking the position that strict liability as originated in *Rylands v. Fletcher*[91] should be the applicable standard.[92]

Robert L. Stewart, Jr.

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[82] Bluefield Gas Co., Case No. 9460 (W. Va. Pub. Serv. Comm'n Sept. 7, 1979).
[83] *Id.* at 2.
[84] *C & P Telephone*, No. 41-82 at 28.
[85] Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). *See supra* notes 28-36 and accompanying text.
[86] Smith v. City of Morgantown, 289 S.E.2d 223 (W. Va. 1982).
[87] *Id.* at 225.
[88] *E.g.*, Stein v. Louisville Water Co., 249 S.W.2d 750 (Ky. 1952); *see generally* 78 Am. Jur. 2D *Waterworks & Water Companies* § 62 (1975).
[89] 263 S.E.2d 878 (W. Va. 1980).
[90] Smith v. City of Morgantown, 289 S.E.2d at 225.
[91] Rylands v. Fletcher, (1868), L.R.3H.L. 330.
[92] Smith v. City of Morgantown, 289 S.E.2d at 226.