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Torts--Governmental Immunity in West Virginia--Long Live the King

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TORTS—GOVERNMENTAL IMMUNITY IN WEST VIRGINIA—LONG LIVE THE KING?

I. INTRODUCTION

The enormous expansion of governmental activity in providing goods and services prompts a need for re-examination of the obligation of government to compensate individuals for injuries which occur in the course of the government's activities. At the federal level, some assumption of responsibility for compensating losses caused by federal employees was brought about by the Federal Tort Claims Act of 1946.[1] At the state level, however, the concept of governmental immunity from tort liability has remained firmly entrenched. While some states, pursuant to the federal approach, have taken steps to examine and abrogate governmental or sovereign immunity, West Virginia is among those states which continue to adhere to the doctrine.[2] This note will delineate the basis for the governmental immunity doctrine in West Virginia by examining its sources, limitations imposed by statutes and judicial decisions, possible ways of avoiding the effects of the doctrine as it presently exists, and factors to be considered with regard to an eventual abolition of the doctrine.

II. HISTORICAL BACKGROUND

The common law doctrine of governmental immunity arose under the English monarchical system where the king, as sover-

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[1]28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80.

[2]Governmental immunity has been judicially abrogated in:

Alaska	Indiana	New Jersey
Arizona	Kentucky	Ohio
California	Louisiana	Pennsylvania
Colorado	Michigan	Rhode Island
Florida	Minnesota	Wisconsin
Idaho	Nebraska	District of Columbia
Illinois	Nevada	

The doctrine has been statutorily abrogated in:

Hawaii	Oregon
Iowa	Utah
Oklahoma	Washington
New York	

RESTATEMENT (SECOND) OF TORTS § 895A, at 12-20 (Tent. Draft No. 19, 1973).

eign, possessed the personal privilege of immunity[3]—"the king can do no wrong." The sovereign was deemed incapable of acting unlawfully or improperly.[4] As a practical matter, no court could obtain jurisdiction over the sovereign because jurisdiction, in the sense that it constitutes power, presupposed a power superior to that of the king.[5]

When a personified sovereign exists, the personal privilege of immunity can logically apply because the sovereign is a single, ascertainable entity. Under a non-monarchical system of government such as the American system, however, the concept of immunity is inconsistent with the basic democratic premise that there is no sovereign power except as it resides in the people collectively.[6]

The initial appearance of governmental immunity in the American legal system occurred in an 1812 Massachusetts case. The defendant, in *Mower v. Leicester*,[7] was an incorporated county which derived financial support from taxation. In dealing with the question of the county's liability for the tortious conduct of its employees in repairing a highway, the court relied on the English decision of *Russell v. Men of Devon*[8] where a county was deemed *not* liable for an injury caused by its failure to repair a bridge. However, the county in *Russell*, unlike that in *Mower*, was without the available funds to pay for any damages it caused. As a practical matter, it was judgment-proof, and the court, recognizing this disability, awarded judgment in the county's favor. The decision evidenced no reliance on the premise that "the king can do no wrong" nor on any rationale other than the county's inability to pay any judgment levied against it. The *Mower* court's reliance on *Russell* as a basis for its own reasoning appears misplaced owing to the lack of similarity between the financial situation of the two counties involved. The theory behind the holding in *Russell* would seem to lend no support to a finding of immunity in *Mower*. Yet, the Massachusetts court attempted to justify its decision against

[3]Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 129, 229 (1924-25). This series of articles presents the first in-depth study of the subject of governmental immunity.

[4]*Id.* at 4.

[5]*Id.* at 5.

[6]*Id.*

[7]9 Mass. 247 (1812).

[8]100 Eng. Rep. 359 (K.B. 1788).

liability by construing the county as a state agency entitled to immunity.

On the basis of this poorly reasoned American decision, which utilized an inapplicable English case, the concept of sovereign immunity became a part of American common law. Apparently, there was never any direct link between the English idea of the immunity of the sovereign and American case law because no English decision upon which an American court relied was ever based on the idea that "the king can do no wrong."

Following the *Mower* decision, and despite the lack of a rational foundation based on English law, the doctrine of sovereign immunity was reiterated in subsequent American cases, both state and federal.[9] In addition to its adoption into case law, governmental immunity has been embodied in some state statutes and constitutions. Such codification has raised questions with regard to the ability of courts to abrogate the doctrine. This problem is of particular importance in West Virginia where constitutional sanction presents one of the greatest barriers to potential abrogation.

III. Functional Aspects of Immunity in West Virginia

A. Legal Basis

The immunity of the State of West Virginia is derived from two sources—the constitutional and statutory incorporation of the common law into the law of West Virginia and the constitutional provision granting immunity from suit to the State. Sovereign immunity appears to have been a part of the English common law in 1863, at the time of the original enactment of the predecessor of chapter two, article one, section one of the West Virginia Code, whereby all parts of the common law which were neither inconsistent with the constitution nor repealed by the Legislature were adopted as the law of the State.[10] Following this enactment, a

[9]*E.g.*, Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907); Hill v. United States, 50 U.S. 386, 389 (1850); State v. Hill, 54 Ala. 67 (1875); Lewis v. State, 96 N.Y. 71 (1884).

[10]There appears to have been no abrogation of the doctrine from the time of the decision in *Russell v. Men of Devon* until the enactment of the predecessor of W. Va. Code Ann. § 2-1-1 (1971 Replacement Volume), which reads:

> The common law of England, so far as it is not repugnant to the principles of the Constitution of this State, shall continue in force within the same, except in those respects wherein it was altered by the general assembly of Virginia before the twentieth day of June, eighteen hundred and sixty-

provision for the adoption of the common law into the West Virginia constitution was ratified.[11] There is no evidence of the abrogation of the doctrine either in England or in the State of Virginia prior to this time.[12]

The West Virginia Supreme Court of Appeals has interpreted both the statutory and constitutional provisions as granting the Legislature sole power to change the common law so adopted by the State.[13] This interpretation seems to indicate that the court has exceeded its power in cases decided since 1863 to the extent the immunity doctrine has been construed to vary from its early English construction. Absent legislative change, the court should be bound by the common law as it existed in 1863, the time of the adoption of article VIII, section 21 of the West Virginia constitution. Only in situations where the common law has been changed by statute—*e.g.*, the imposition of liability for failure to keep streets in repair[14]—has there been a valid exercise of power to change this law. Therefore, governmental immunity, to the extent

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three, or has been, or shall be, altered by the legislature of this State.

[11]W. VA. CODE ANN. § 2-1-1 (1971 Replacement Volume) is to be read *in pari materia* with W. VA. CONST. art. VIII, § 21 which states:

> Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the legislature. All civil and criminal suits and proceedings pending in the former circuit courts of this State, shall remain and be proceeded in before the circuit courts of the counties in which they were pending.

The effective date of the enactment is 1880, but it has been conjectured that the date apparently followed by the courts as the base date is 1872 since the provision was substantially carried over from Article VIII, § 36 of the constitution of 1863 and embodied in the constitution of 1872. Cady, *Law of Products Liability in West Virginia*, 74 W. VA. L. REV. 283, 294 & n.40 (1971).

[12]A Virginia case, Richmond v. Long's Adm'rs, 17 Gratt. 383 (1867), applied the doctrine to a municipal corporation which maintained a city hospital. A slave-owner whose slave had died while he was being treated at the hospital was denied recovery.

[13]Seagraves v. Legg, 147 W. Va. 331, 338, 127 S.E.2d 605, 608 (1962). The case involved a wife's attempt to maintain an action for loss of consortium. The opinion states:

> It is clear, from the constitutional provisions and the statute pertaining thereto, that the legislature has the power to change the common law, and inasmuch as it has not done so in connection with the question involved in this case, the common law relating thereto remains the law of this State.

See also, Note, 71 W. VA. L. REV. 341 (1969).

[14]W. VA. CODE ANN. § 17-10-17 (1966).

that it is a common law doctrine adopted as a part of the State constitution, is not within the power of the court to change.

B. Nature and Scope of Constitutional Immunity

The other constitutional provision, which is the source of the immunity of the State, is found in article VI, section 35, which states:

> The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.

The immunity granted by article VI, section 35, has been interpreted by the court as an absolute exemption from suit,[15] its inclusion in the constitution placing it beyond change by the courts and

[15]The principle that the State could not be sued was stated as early as 1882 in the case of Chesapeake & O. Ry. v. Miller, 19 W. Va. 408 (1882). Article VI, § 35, was apparently first cited for the proposition that the State acting through its officers or agents, cannot be sued in Miller v. Board of Agriculture, 46 W. Va. 192, 32 S.E. 1007 (1899), where a writ of mandamus sought against a State board was denied. The State's absolute immunity has been reiterated in a number of other decisions by the court. Ward v. County Court, 141 W. Va. 730, 93 S.E.2d 44 (1956), focused on the question of whether the Raleigh County Park Board, a public corporation, qualified for the immunity specified in W. VA. CONST. art. VI, § 35, because it was either an agent, arm, or subdivision of the State. The court acknowledged that while this entity may be construed as governmental in nature, its functions were proprietary and, hence, it was not entitled to immunity. In Hamill v. Koontz, 134 W. Va. 439, 59 S.E.2d 879 (1950), a suit against the State tax commissioner was held a suit against the State which was barred by the State's absolute immunity. The effect of the Hamill decision has since been circumvented by statutes which provide the taxpayer with a remedy for challenging decisions made by the State Tax Commissioner. See, for example, W. VA. CODE ANN. § 11-13-8 (1966), which was held to be non-violative of W. VA. CONST. art. VI, § 35, in Walter Butler Bldg. Co. v. Soto, 142 W. Va. 616, 97 S.E.2d 275 (1957). Hayes v. Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944), applied the State's absolute immunity to a municipal corporation while it was engaged in the performance of a "governmental" activity. Stewart v. State Road Comm'n, 117 W. Va. 352, 353, 185 S.E. 567 (1936), categorized the immunity provision as "absolute and unqualified" in denying a writ of mandamus against a State agency. The "unqualified" nature of the State's immunity was changed by an amendment to W. VA. CONST. art. VI, § 35, in 1936 whereby garnishment and attachment proceedings against the State were authorized. Finally, Mahone v. State Road Comm'n, 99 W. Va. 397, 129 S.E. 320 (1925), emphasized the extension of absolute immunity to agencies to which the state has delegated performance of certain duties.

the Legislature.[16] While the wording of the provision refers only to the State as an entity, the court has interpreted the provision to include State agencies and subdivisions through which the State acts or which have a direct financial connection with the State.[17]

The criteria for determining whether or not an agency of the State qualifies for inclusion within the State immunity provision appear to be of two basic types—financial and functional. The financial criterion focuses on the monetary aspects of an agency's maintenance—specifically, the source of the funds by which its operations are supported. Thus, an institution supported entirely by direct State funding through legislative appropriations is pro-

[16]A change of W. VA. CONST. art. VI, § 35, would require compliance with the procedural requirements of W. VA. CONST. art. XIV, § 2, concerning amendments to the State constitution.

[17]Kondos v. Board of Regents, 318 F. Supp. 394 (S.D.W. Va. 1970), recognized the West Virginia Board of Regents as an arm of the State entitled to immunity under W. VA. CONST. art. VI, § 35, while engaged in the governmental function of education. In Morgantown v. Ducker, 153 W. Va. 121, 168 S.E.2d 298 (1969), the Board of Governors of West Virginia University was adjudged a State agency and, hence, immune from suit. The opinion used six criteria to determine the Board's immunity: (1) Its property was held in trust for the State; (2) it depended on the State legislature for its financial support; (3) it performed duties which were the same as those performed by the State Board of Control, a State agency; (4) it performed a function which is properly a state responsibility; (5) a judgment against it would adversely affect the rights of the State; (6) a judgment against it would have to be paid from public funds. In Schippa v. Liquor Control Comm'n, 132 W. Va. 51, 53 S.E.2d 609 (1948), the court decided that the Liquor Control Commission was an agency of the State and, therefore, immune from suit. The opinion stated that "when the Legislature based its enactment for the control of liquor traffic upon the police power of the State, it was certainly intended to bring to the aid of such control the sovereign power of the State." In Miller v. Board of Agriculture, 46 W. Va. 192, 32 S.E. 1007 (1899), the plaintiff sought a writ of mandamus to compel the State Board of Agriculture to proceed with a contract under which he was to do certain printing for the Board. The court denied the writ on the ground that this suit was really a suit against the State. The court held that the nature of the case presented from the record as a whole must be considered in determining whether the State is an actual party. The fact that the suit is not brought against the State by name is not controlling. If the State is the real party against whom relief is sought and the judgment will operate, then the suit, even if brought against agents or officers of the State, is, in truth, a suit against the State itself. In Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S.E. 704 (1890), the court recognized that the State's governmental powers are exercised not only by itself but also by municipal and quasi-municipal organizations, such as cities, towns, counties, and boards, "to which . . . the state delegates portions of its sovereignty to be exercised within particular portions of territory for certain well-defined public purposes."

tected by the immunity rule.[18] Likewise, when all monies received by an entity are channeled through the State treasury, the entity is immune.[19] A notable distinction is made when the source of operational funds is self-liquidating revenue bonds.[20] In such a case, where no direct connection with State funds is established, immunity is denied.[21] The rationale for extending the immunity of the State to its financially dependent agencies is based on the impracticality of having to satisfy judgments out of public monies, thereby depleting the State treasury of the means for carrying on its multiple functions.[22]

The second criterion—that of determining whether an entity is a State agency by examination of its functional aspects—focuses on the activities performed by the entity. If such activities are ones which are properly the obligation and responsibility of the State,

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[18]*E.g.*, Barber v. Spencer State Hosp., 95 W. Va. 463, 121 S.E. 497 (1924), where a claim against a state psychiatric hospital which received State monies and was subject to the State Board of Control, a State agency (see note 17 *supra*), was held a claim against the State and, hence, barred by the State's immunity.

[19]Morgantown v. Ducker, 153 W. Va. 121, 168 S.E.2d 298 (1969). In addition to other criteria used by the court to determine that the immunity of W. VA. CONST. art. VI, § 35, applied, the court discussed the financial support of the Board of Governors of West Virginia University. It determined that the Board was entirely dependent on legislative appropriations and that all monies it received—*e.g.*, tuition fees and hospital fees—were paid directly into the State treasury, and were, in effect, public funds. Not only was the Board maintained by direct government funding, but its own collected revenues were placed directly into the State coffers. Hence, the judgment sought would have had to have been paid from funds in the State treasury, and the interest of the State would have been directly affected thereby. The court concluded by awarding a writ of mandamus requiring the court of claims to assume jurisdiction over this claim against the State.

[20]Self-liquidating revenue bonds are repaid with funds generated by the agency which issued them. For example, in the case of the West Virginia Turnpike Commission, funds collected as tolls from turnpike users are used to repay bond indebtedness.

[21]Hope Natural Gas Co. v. Turnpike Comm'n, 143 W. Va. 913, 105 S.E.2d 630 (1958). Even though road construction is properly a governmental function, it does not entitle the Turnpike Commission to the State's immunity if a dependency on the State is not otherwise established. The court said:

> The constitutional provision [W. VA. CONST. art. VI, § 35] does not limit the power of the State to delegate governmental functions to *quasi*-public corporations which have no taxing power or dependency upon the state for their financial support or success. Yet such corporations are afforded no immunity from suit or liability.

Id. at 926, 105 S.E.2d at 637. Where it was shown that the Turnpike Commission's revenues were obtained from revenue bonds which it was authorized to issue, and no direct financial link with the State was established, immunity was denied.

[22]Mendel v. Wheeling, 28 W. Va. 233, 57 Am. R. 664 (1886).

immunity may apply. Education,[23] construction and maintenance of highways,[24] control of liquor,[25] and control of aviation,[26] have all been construed as proper obligations of the State, the performance of which is entitled to immunity.[27] An examination of the court's rationale in each of these cases reveals no ascertainable pattern of reasoning or determinable factors whereby such categorization is made.

Some corporate organizations, such as public hospitals and

[23]In Krutili v. Board of Educ., 99 W. Va. 466, 129 S.E. 486 (1925), a suit was brought for injuries sustained by a pupil at a Weirton high school. The court determined that school districts, the affairs of which are administered by boards of education, are involuntary corporations organized solely for public benefit. The court stated that since the board of education was created by the legislature to carry out the constitutional mandate to provide for a system of free schools, it was engaged in what has been universally recognized as a distinct governmental function, and was, therefore, entitled to immunity.

[24]Mahone v. State Road Comm'n, 99 W. Va. 397, 129 S.E. 320 (1925). Construction of public highways is the duty of the State, which, when delegated to an agency, may entitle the agency to immunity under W. VA. CONST. art. VI, § 35.

[25]Schippa v. Liquor Control Comm'n, 132 W. Va. 51, 53 S.E.2d 609 (1948).

[26]Van Gilder v. Morgantown, 136 W. Va. 831, 68 S.E.2d 746 (1949). The court examined the legislative act creating the West Virginia State Aeronautics Commission and determined that the State exercises absolute control over State and municipal airports as a valid assertion of its police power. Two sections of the act were read *in pari materia* by the court. The rental of hangar space was expressly permitted by the act which also stated that the operation of airports and air navigation facilities involved the exercise of a governmental function. The court determined that the rental of hangar space, since it was incident to the operation of the airport, could be included as a part of the exercise of a governmental function, thereby entitling the performer—the municipality which operated the airport—to immunity.

[27]Hesse v. Soil Conservation Comm., 153 W. Va. 111, 168 S.E.2d 293 (1969). This recent case involved an analysis of the meaning of "state agency." The court dealt with the classification of two entities, the Soil Conservation Committee and the Soil Conservation District. In determining that the Committee was a State agency, the court applied the functional-financial criteria test used in its previous decisions. In its examination of the District, however, the court used the definition of State agency given in the statute which defines the jurisdiction of the court of claims and which specifically excludes certain entities from classification as State agencies. This was a novel approach and one which would seem to nullify earlier decisions which categorized as State agencies some of the entities which are not deemed State agencies for purposes of court of claims' jurisdiction. Two such decisions are Boice v. Board of Educ., 111 W. Va. 95, 160 S.E. 566 (1931), and Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950). It would be more consistent with the pattern of reasoning exhibited by the court in its previous decisions to regard this particular decision as a mistaken application of a definition which was intended by the legislature to apply solely to the jurisdiction of the court of claims.

the State Road Commission, which are categorized as "public corporations," have also been afforded State immunity on the basis of functions performed. These organizations are usually so classified because they are operated under a corporate format and engage in activities directed toward public-oriented, State-related purposes. The term "public corporation" has, in some cases, been used synonymously with "State agency."[28] These "corporations" are usually created by legislative acts which often grant authority to sue and be sued. The court has often repudiated the express liability included in the provisions creating State agencies[29] and public corporations,[30] reiterating the absolute nature of governmental immunity as it pertains to the State and charging the Legislature with having exceeded its constitutional powers by attempting to authorize suits against such entities.[31]

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[28]A discussion of municipal corporations as distinguished from public corporations can be found in State *ex rel.* Koontz v. Board of Park Comm'rs, 131 W. Va. 417, 47 S.E.2d 689 (1948). *See also* Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950).

[29]Schippa v. Liquor Control Comm'n, 132 W. Va. 51, 53 S.E.2d 609 (1948). The court stated:

> Since our constitution was adopted there have been many boards and commissions brought into being by the legislature, and many of them termed corporations, with the provision that they might sue and be sued. Generally speaking, these corporations have been treated as agencies of the State, and suits against them not permitted.

Id. at 53, 53 S.E.2d at 610. The court apparently prefers to determine whether an entity is entitled to immunity on the basis of other considerations—*i.e.*, financial and functional aspects of its operation—rather than on the words of the act creating it. Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950), involved the court's use of the terms "public corporation" and "governmental agency" to refer to the same type of institution. In Stewart v. State Road Comm'n, 117 W. Va. 352, 185 S.E. 567 (1936), The State road commission, was deemed a State agency, although categorized as a corporation by the act creating it. Boice v. Board of Educ., 111 W. Va. 95, 160 S.E. 566 (1931), and other board of education cases cited therein contain language which refers to boards of education as governmental agencies. A previous case, Krutili v. Board of Educ., 99 W. Va. 466, 129 S.E. 486 (1925), had referred to such entities as involuntary corporations working for a public purpose.

[30]Stewart v. State Road Comm'n, 117 W. Va. 352, 185 S.E. 567 (1936). The court recognized that other jurisdictions have established corporate entities with public funds and allowed suits to be maintained against them despite a constitutional provision prohibiting suits against the State. It refused, however, to follow this line of authority, adhering instead to the absoluteness of W. VA. CONST. art. VI, § 35, as it pertains to the State and its agencies.

[31]Schippa v. Liquor Control Comm'n, 132 W. Va. 51, 53 S.E.2d 609 (1948). Acts of the 35th W. Va. Leg. ch. 4, Reg. Sess. (1935), whereby the Liquor Control Commission was created, provided that it could sue and be sued. The court stated

IV. Limitations on Immunity in West Virginia

While the court has made attempts to include within the State's immunity many agencies and corporate organizations which perform functions for the public welfare and engage in activities which are a proper responsibility of the State, these entities perform other activities which have not been so protected by the immunity doctrine. The limitations afforded by this distinction of activities may facilitate recovery for injuries caused by State agents and officials.

A. The Governmental-Proprietary Distinction

While the immunity of the State itself, as expressed in article VI, section 35, remains secure, the immunity of State agencies, public corporations, and municipalities has been subjected to certain qualifications. Beginning with the case of *Bailey v. New York,*[32] the common law recognized a distinction between activities which are governmental and those which are proprietary. Although the line of demarcation between these two types of activities is often difficult to draw, and classifications vary from state to state, some insight into the West Virginia viewpoint is afforded by *Hayes v. Cedar Grove*, which set forth this general premise:

> Any activity of the sovereign authority, or one to whom its powers are delegated, is presumed to be governmental; and it follows, we think, that if there be uncertainty as to the classification into which the particular activity falls, the doubt should be resolved in favor of its being governmental rather than proprietary, for the reason that the usual function of government is to act in the interest of the public as a whole. In such a case, where no profit to the municipality is involved, its acts are governmental. Generally speaking, it is only where it steps aside, and in a sense, enters a zone of private business, or into activities which may be and frequently are carried on through private enterprises, that its activities become proprietary.[33]

The basic rationale is to provide immunity for those functions which are performed for the common benefit of the public and to

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that W. Va. Const. art. VI, § 35, mandates that "the State of West Virginia shall never be made defendant in any court of law or equity . . ." and held that it applied in this case. Therefore, "the Legislature exceeded its Constitutional power when it authorized suits against said commission." 132 W. Va. at 53, 53 S.E.2d at 610.

[32]3 Hill, [N.Y.] 531 (1842).

[33]126 W. Va. 828, 835-36, 30 S.E.2d 726, 730 (1944).

deny immunity where an entity engages in activities for its own benefit or from which it derives profit.[34]

Tompkins v. Kanawha Board[35] was one of the earliest cases in which the court imposed liability on an entity which, though it was engaged in activities related to a State purpose, was deemed to have the same liabilities as a private corporate body engaging in a business. The case involved an action brought against the Kanawha Board, a corporation created by the Legislature for the purpose of controlling and supervising the Kanawha River. Plaintiff alleged that the Board's failure to keep the river free of obstructions caused the loss of plaintiff's barge and its cargo. The court refused to allow the Board to escape liability for its actions, despite the fact that it was created by the Legislature, and its property was owned by the State. The court stated that "[i]t would be against all our ideas of State government, if a corporation created by the State to carry on a work of improvement should not be liable like any other corporation for the damage it inflicted . . . ."[36] Immunity was denied because the court determined that "[s]overeignty does not reside in such a corporation. The State cannot delegate her sovereignty. There is no creature of the State above the law and irresponsible."[37]

The court's willingness to impose liability upon State agencies became apparent in decisions following *Tompkins* where certain activities were adjudged proprietary functions for which liability accrued for injuries caused during their performance. Liability was imposed on a municipal corporation for a death which resulted from maintenance of a waterworks system.[38] In addition, the main-

[34]Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950).

[35]19 W. Va. 257 (1881).

[36]*Id.* at 264.

[37]*Id.* The language in this opinion conveys a reserved attitude on the part of the court with regard to application of immunity to a State agency. Such an attitude did not prevail in later cases. In 1925, the court, in Mahone v. State Road Comm'n, 99 W. Va. 397, 129 S.E. 320 (1925), distinguished *Tompkins* on the ground that the entity there involved was not an agency having to do directly with the administration of the State government and decided in favor of the application of immunity to the State Road Commission. While the decision in *Tompkins* was not based on the governmental-proprietary distinction, it indicated a willingness on the part of the court to place limitations on the application of immunity and to impose liability whenever an entity engaged in a function in its private, corporate capacity.

[38]Wigal v. Parkersburg, 74 W. Va. 25, 81 S.E. 554 (1914). A water tank owned by the municipality burst, drowning plaintiff's intestate. The municipality argued for immunity on the ground that maintenance of the waterworks served at least one

tenance of a public park by a municipality authorized by charter,[39] or by a commission created by the Legislature,[40] has been held proprietary. Activities recognized as governmental by the court, in addition to those attributable to State agencies, have included maintenance of a municipal jail,[41] maintenance of equipment and instrumentalities used for governmental purposes,[42] municipal garbage collection which involved no charge to residents,[43] operation

purpose that was governmental in nature, for, in addition to providing water for domestic purposes for which it collected a fee, the municipality also maintained the waterworks system for the purely governmental purpose of providing fire protection for the city's inhabitants. The court refused to accept this argument, finding instead that, since the cause of action had not arisen as a result of the use of the waterworks in a fire-extinguishing capacity, the municipality was liable to the same extent as any private corporation maintaining such a waterworks. The fact that the municipality charged a certain rate for providing water did not seem to be the decisive variable. The court looked at the activity from the viewpoint of whether a private corporation could have engaged in such an activity and, on this basis, determined that it was proprietary in nature. *But see* the early case of Mendel v. Wheeling, 28 W. Va. 233, 57 Am. R. 664 (1886), in which the court held this type of activity to be governmental.

[39]Warden v. Grafton, 99 W. Va. 249, 128 S.E. 375 (1925). The court seemed influenced by a growing body of case law from other states with regard to municipal parks. Most of these decisions imposed liability on the municipality for injuries to individuals using the park. Language in the opinion also indicated that the court recognized a distinction between activities engaged in by municipalities, which are similar to those normally engaged in by the State government, and activities more in the nature of conveniences and amusements, which are often a subject for private enterprise.

[40]Ward v. County Court, 141 W. Va. 730, 93 S.E.2d 44 (1956). The court cited Warden v. Grafton, 99 W. Va. 249, 128 S.E. 375 (1925), and a later decision, Ashworth v. Clarksburg, 118 W. Va. 476, 190 S.E. 763 (1937), where liability was imposed on municipalities which maintained public parks. The court reasoned: "If the function is proprietary when performed by a municipality, it is proprietary when performed by such a corporation as the Raleigh County Park Board." 141 W. Va. at 740, 93 S.E.2d at 49.

[41]Brown v. Guyandotte, 34 W. Va. 299, 12 S.E. 707 (1890). The court determined that, in its maintenance of a municipal jail, a municipality was entitled to share in the State's immunity. This activity was viewed as one delegated to the municipality by the State for the public benefit. Officers employed at the jail were to be construed not as agents of the municipality but as agents of the "greater public"—the State.

[42]Carder v. Clarksburg, 100 W. Va. 605, 131 S.E. 349 (1926). A child was killed when brakes dislodged on a tractor owned by the City of Clarksburg for use in street repair. The court found immunity because the tractor was maintained and used by the city for the governmental purpose of road construction, even though, at the time the injury occurred, it was not engaged in the performance of a governmental activity.

[43]Hayes v. Cedar Grove, 126 W. Va. 828, 30 S.E.2d 726 (1944). The court

of a public hospital,[44] rental of hangar space at an airport maintained by a municipality in conjunction with a State commission,[45] maintenance of a municipal fire department,[46] and maintenance and repair of public roads by either a county[47] or a municipality[48] wherein no liability for repair is imposed by statute.

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construed garbage collection as a proper exercise of power under the home rule provisions of the West Virginia Code. In addition, it was viewed as an extension of the police power of the State. The fact that no fee was charged for this service was further evidence that it was carried on in the municipality's governmental capacity of providing for the public benefit rather than for any profit-making motive. Compare Wigal v. Parkersburg, 74 W. Va. 25, 81 S.E. 554 (1914), where the maintenance of a waterworks system by a municipality which imposed a fee on users was determined to be a proprietary function.

[44]Shaffer v. Monongalia Gen. Hosp., 135 W. Va. 163, 62 S.E.2d 795 (1950). The hospital was created by a legislative act and maintained as a public hospital. The court viewed it as analogous to a public charity in that it was obligated to provide for the health and welfare of the individual, regardless of his ability to pay. Hence, its function was a governmental one of fulfilling the State's obligation to provide for the public welfare, rather than a profit-making activity. Its dispensation of services was not conditioned on payment of fees and any monies collected by it from patients were utilized solely for maintenance and in building a reserve fund for future expansion.

[45]Van Gilder v. Morgantown, 136 W. Va. 831, 68 S.E.2d 746 (1949). In this case, as in Hayes v. Cedar Grove, 12 W. Va. 828, 30 S.E.2d 726 (1944), the court construed the activity engaged in by the municipality as an extension of the State's police power.

[46]Cawley v. Board of Trustees, 138 W. Va. 571, 76 S.E.2d 683 (1953).

[47]Douglass Adm'r v. County Court, 90 W. Va. 47, 110 S.E. 439 (1922). Plaintiff's intestate was killed upon being thrown from his wagon when his horse was frightened by the approach of defendant's truck. Since the truck was held to be an instrumentality used for the governmental purpose of construction, maintenance, and repair of public highways, no liability for negligence was imposed. Plaintiff argued that the fact that the truck was being driven at a high rate of speed made the road unsafe and within the definition of "out of repair" as defined by a statute imposing liability for failing to maintain public highways adequately. The court, however, rejected this contention and denied recovery. The opinion did not indicate the purpose for which the truck was being used at the time the injury occurred—*i.e.*, whether it was engaged in the performance of a governmental function. The fact that the truck was being driven at a high rate of speed and on the wrong side of the road, likewise, did not seem to influence the court in making its decision.

[48]Jones v. Mannington, 148 W. Va. 583, 136 S.E.2d 882 (1964). Absolute liability is imposed on a municipality for permitting its streets or sidewalks to fall out of repair. W. VA. CODE ANN. § 17-10-17 (1966), creates a liability which did not exist at common law, since maintenance of public streets was construed as a governmental function. The *Jones* case exemplifies the court's unwillingness to broaden the scope of liability imposed by the statute. A strict, almost literal, interpretation was given to the words "out of repair" and recovery was not allowed where a mere dangerous obstruction or nuisance existed on a public road. The particular fact situation in *Jones* apparently also influenced the court's refusal to impose liability.

B. The Ministerial-Discretionary Distinction

In addition to the governmental-proprietary distinction, which has been used primarily to limit the scope of immunity granted to municipalities, another qualification of activities has been used to limit the immunity of public officers. An attempt has been made by some courts to separate the activities performed by policemen, prosecuting attorneys, school board members and other public officers into those acts which are ministerial and those which are discretionary or quasi-judicial in nature.[49] Discretionary activities—those activities involving the exercise of personal deliberation and judgment — are entitled to immunity as long as they are performed honestly and in good faith.[50] In contrast, where specific duties to act are imposed by virtue of an officer's particular job or position, these duties are deemed to be ministerial acts for which liability will accrue if improperly performed, regardless of whether they are performed honestly and in good faith.[51]

West Virginia has applied this distinction to activities involving municipalities as well as to public officers. Thus, when a municipality is charged with the performance of a certain definable duty, liability accrues to the municipality for its own negligence and impropriety as well as for the improper performance by its municipal officers. When an activity is discretionary, however, the municipality, both for its own exercise of discretion and that of its municipal officers, is relieved of liability and entitled to immunity.

Few tort cases in West Virginia have dealt with the ministerial-discretionary distinction.[52] Those that have mentioned this analysis have combined it with the governmental-proprietary distinction. In *Gibson v. Huntington,* the court categorized a munici-

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A boulder fell from privately owned property onto a right of way located between the public road and the private property. Even though the municipality had previously cleared fallen rocks from the right of way, the court determined that this was not such an exercise of control as to make the right of way a part of the public road system. *Compare* Gibson v. Huntington, 38 W. Va. 177, 18 S.E. 447 (1893), an early decision in which liability was imposed on a municipality for death of an infant caused by a cave-in of a dangerous embankment adjacent to the public road.

[49]W. PROSSER, THE LAW OF TORTS 987 (4th ed. 1971), contains a general discussion of the scope of immunity of public officers.

[50]*Id.* at 989.

[51]*Id.* at 990.

[52]State *ex rel.* Printing-Litho, Inc. v. Wilson, 147 W. Va. 415, 128 S.E.2d 449 (1962), was not a tort case, but the court discussed the ministerial-discretionary distinction.

pality's use of a natural embankment as a barrier between a public road and a creek as imposing on the municipality a "ministerial duty, neither governmental nor discretionary, to see that it [the embankment] was not dangerous to anyone lawfully using the road or any part thereof."[53] In *Charleston v. Beller*, the court reiterated this dual analysis by stating:

> In its governmental capacity, a municipality is strictly a branch of the State government, within the extent of its limitations, both as to territory and powers granted. And in the discharge of their duties, governmental and discretionary, its officers are public officers for whose acts the municipality is in no wise liable.[54]

While there is arguably no relationship between the two methods of categorization, the case for liability is strengthened since each of the tests applies separately and distinctly to a given activity. Because of the dearth of West Virginia case law defining criteria used by the court to distinguish between ministerial duties and discretionary activities, decisions of courts of other states are helpful.[55]

C. The Influence of Insurance

The acquisition of liability insurance by the State removes an important rationale for the existence of governmental immunity, that is, preventing the depletion of the public treasury. Likewise, the purchase of insurance seems to abrogate by implication the absolute immunity defined in article VI, section 35, of the State constitution since only if the State were subject to liability would the purchase of insurance be a necessary and justified expenditure of public funds.

Authorization for the establishment of a program of State insurance is found in the West Virginia Code.[56] The authorization statute contains a provision barring an insurer from using the con-

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[53]38 W. Va. 177, 179, 18 S.E. 447, 448 (1893).

[54]45 W. Va. 44, 48, 30 S.E. 152, 153 (1898).

[55]*See, e.g.*, Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970); Mower v. Williams, 334 Ill. App. 16, 78 N.E.2d 529 (1948), and cases collected; W. PROSSER, THE LAW OF TORTS 987-92 (4th ed. 1971).

[56]W. VA. CODE ANN. § 29-12-5 (1971 Replacement Volume) provides: "Any policy of insurance purchased or contracted for by the [state insurance] board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits."

stitutional immunity of the State as a defense against claims or suits. This provision, attempting to justify maintenance of the State insurance program, appears to constitute an attempt at legislative modification of the absolute immunity afforded to the State by article VI, section 35. Yet, in *Cunningham v. County Court,* the court stated that the purchase of insurance by a county court had no effect on its status as an immune entity.[57] *State ex rel Scott v. Taylor*[58] seems to indicate, however, that insurance *does* have at least a potentially influential effect. The parties in this case agreed to a stipulation whereby plaintiffs expressed a willingness to limit their recovery to fifty thousand dollars—the amount available from insurance policies held by the State—in return for the Attorney General's agreement to withdraw a motion to dismiss based on the State's sovereign immunity. This, in effect, constituted a waiver of immunity by the State to the extent of its insurance coverage.[59] Had the State not agreed to waive its constitutional immunity and permit a suit to be maintained, it would have been admitting that its purchase of the insurance policies was a fruitless expenditure. While the court did not deal with the validity of the Code provisions establishing the State's insurance program, the Attorney General may have waived immunity to the extent of insurance coverage to avoid a potential lawsuit against the State for an illegal expenditure of funds. *Taylor* indicates that the influence of insurance on State immunity is at present an unresolved issue surrounded by gross inconsistencies.

The insurance provision and the decision in *Taylor* may be means of curbing the extent of the State's immunity. Under this rationale, if the State is found liable, the injured party would be entitled to recover, at least to the extent of the State's insurance coverage. Thus, the State insurance dilemma provides potential grounds for abrogating the immunity doctrine and obtaining relief for an injured client. The key questions raised by *Taylor* are: (1)

[57]148 W. Va. 303, 134 S.E.2d 725 (1964). *See also* Boice v. Board of Educ., 111 W. Va. 95, 160 S.E. 566 (1931), in which the purchase of insurance by a board of education was held insufficient to change the board's status as a governmental agency entitled to immunity.

[58]152 W. Va. 151, 160 S.E.2d 146 (1968).

[59]Since the State's constitutional immunity has been construed to be absolute, and case law has interpreted this absoluteness to preclude waiver by the Legislature, it appears that the Legislature may have exceeded its powers by attempting to achieve through a legislative enactment what can only rightfully be changed by a constitutional amendment.

Is the clause which prohibits an insurer of the State from asserting governmental immunity as a defense a valid exercise of the Legislature's power, constituting a genuine waiver of the immunity established in article VI, section 35; and (2) if constitutional immunity is absolute and incapable of being abrogated by legislative enactment, is there a legal basis for the continued expenditure of funds for the State insurance program?

D. The Concept of a Moral Obligation

The most well-known limitation on governmental immunity in West Virginia is the recognition of a moral obligation by the State through its court of claims.[60] When an injury is caused by agents or employees of the State who are engaged in governmental activities, a valid moral obligation may be incurred by the State, thus justifying compensation of the injured party through an appropriation of public funds.[61] This means of obtaining relief, however, is not without severe limitations.

Two basic criteria are used in determining whether a claim ought to be paid: (1) The legal liability of the State must be shown; and, (2) depending on the type of claim, either negligence or breach of contract must be established.[62] A claim brought before

[60]W. VA. CODE ANN. § 14-2-1 *et seq.* (1972 Replacement Volume). The court of claims is a creature of the State Legislature established to deal with claims brought against the State and State agencies within the court's jurisdiction. The recovery procedure is initiated by filing written notice of a claim with the clerk of the court. The clerk sends a copy of the notice to the State agency involved and to the Attorney General, and the claim is docketed for hearing. Negotiations between the aggrieved party and the Attorney General's office take place prior to the hearing so that stipulations can be made a part of the record. Briefs can be filed with the court on any questions involved. Following presentation of arguments by both sides, a decision is rendered. The Rules of Civil Procedure apply in the court except where they conflict with the Rules of Practice and Procedure of the court of claims. Rules of evidence, both common law and statutory, are not binding on the court.

[61]W. VA. CODE ANN. § 14-2-13 (1972 Replacement Volume) provides for the satisfaction of claims "which the State as a sovereign commonwealth should in equity and good conscience discharge and pay." The West Virginia court has called the State's responsibility to a claimant a "moral obligation" but has analyzed it from the legal perspective of liability incurred by failure to perform a "duty" owed to the claimant. *See* Price v. Sims, 134 W. Va. 173, 58 S.E.2d 657 (1950), State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 43 S.E.2d 805 (1947).

[62]W. VA. CODE ANN. § 14-2-13 (1972 Replacement Volume). Grateful acknowledgment is made of the assistance of Ms. Cheryle M. Hall, clerk of the court of claims, in obtaining information concerning implementation of the statute and procedural aspects of the court's activities.

the court for consideration can have one of three possible outcomes. First, the court can approve the claim and present it to the Legislature in a claims bill. Subcommittees of the Senate Finance Committee and House Finance Committee can add their approval, and the claim will be paid by the State Auditor or by the State agency involved through a legislative appropriation.[63] Despite approval of a claim by both the court and the Legislature, there is no guarantee that it will eventually be paid. Because approval by both entities provides the claimant with no assurance that his grievance will be automatically satisfied,[64] he may need to pursue additional legal routes to force the Auditor or State agency to pay the approved claim. A writ of mandamus can be obtained to require the Auditor to comply with the decision of the court and the Legislature. This procedure was utilized in the case of *State ex rel. Stollings v. Gainer*.[65]

Second, the court of claims and the Legislature may disagree on the validity of a claim. The court can approve the claim, and the subcommittee members in either house can remove it at their discretion from the claims bill, thereby denying satisfaction to the aggrieved party. Even though a claim has not been considered by the court, the subcommittee members can add the claim to the claims bill. Individual legislators can submit claims from their constituents to the subcommittees for their consideration and possible inclusion in the claims bill.[66]

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[63]W. VA. CODE ANN. § 14-2-19,-20 (1972 Replacement Volume).

[64]W. VA. CODE ANN. § 12-3-1 (1972 Replacement Volume) provides for payment of claims against the State and specifies that the auditor shall "examine the claim, and the vouchers, certificates and evidence, if any, offered in support thereof, and for so much thereof as he shall find to be justly due from the State . . . he shall issue his warrant on the treasurer, specifying to whom and on what account the money mentioned therein is to be paid, and to what appropriation the same is to be charged." The West Virginia court has supported the exercise of discretion by the auditor in allowing or rejecting claims. *See* Robinson v. La Follette, 46 W. Va. 565, 33 S.E. 288 (1899). Although this particular case contains language stating that mandamus will not lie to compel the auditor to allow a claim, a more recent case, State *ex rel.* Stollings v. Gainer, 153 W. Va. 484, 170 S.E.2d 817 (1969), indicates that mandamus proceedings have been successfully maintained to compel payment by the auditor.

[65]153 W. Va. 484, 170 S.E.2d 817 (1969).

[66]W. VA. CONST. art. VI, § 39, provides that "in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case. . . ." By its actions in approving privately introduced claims, the Legislature is apparently passing special laws which benefit private individuals rather than the general public. Although the existence of this practice has been acknowledged by

State ex rel. Stollings v. Gainer involved the resolution of a difference of opinion between the court of claims and the Legislature.[67] In a mandamus proceeding brought against the State Auditor, who refused to pay a claim when there was a difference in the decisions rendered by the court and the Legislature, the West Virginia Supreme Court of Appeals allowed new evidence to be introduced and used in determining the validity of the claim. The court justified its review of the determination of the court of claims on the ground that it involved a judicial question—the question of whether a moral obligation on the part of the State existed. *Stollings* offers a potential procedural remedy for a claimant whose situation is similar factually. If a claim has been rejected by the court of claims and approved by the Legislature, a writ of mandamus will lie to compel the State Auditor to provide payment. The doctrine of *Stollings* might also apply when a claim has been inserted in a claims bill by a subcommittee without consideration by the court of claims, but probably only where a refusal to pay was also involved which necessitated the bringing of a mandamus proceeding to elicit payment.

Finally, both the court of claims and the Legislature can reject a claim. Whether a claimant can then pursue his claim in the West Virginia Supreme Court of Appeals and bring in additional evidence to support its validity, as was done in *Stollings*, or whether *Stollings* will be confined to its particular fact situation, is an

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the court in case law—State *ex rel.* Cashman v. Sims, 130 W. Va. 430, 43 S.E.2d 805 (1947)—its constitutionality is questionable.

[67]153 W. Va. 484, 170 S.E.2d 817 (1969). Marilyn Stollings brought a claim against the State Road Commission for injuries sustained by her when the car she was driving slid off the highway. The road was covered with an experimental type of surface material which became extremely slick when wet. The court of claims denied the claim on the ground that the claimant was contributorily negligent in failing to drive at a speed commensurate with the road condition. The Legislature approved the bill as part of an omnibus claims bill. The State Auditor, upon receipt of a requisition from the State Road Commission to pay the claim, refused to honor the requisition until the judiciary resolved the inconsistency between the decisions of the court of claims ane the Legislature. The West Virginia Supreme Court of Appeals, in considering the matter, allowed new evidence concerning the circumstances of the accident to be introduced. In overruling the State Auditor's objection to this additional evidence, the court justified its conduct by categorizing the case as an extraordinary proceeding to be governed by its own rules and not bound by the procedural requirements involved in an appeal or review of the findings of the court of claims. Thus, new exhibits and affidavits were deemed to be proper matters for consideration by the court in deciding to award a writ of mandamus to compel the State Auditor to honor the claim.

unanswered question.[68]

The procedural uncertainties which underlie the present court of claims system have a debilitating effect on the court as a resource powerful enough in and of itself for obtaining satisfaction of claims against the State. Two other aspects serve further to limit its effectiveness in dealing with many claims now barred by immunity. Although the court has jurisdiction over claims against the State and State agencies, the definition of State agency given in the statute granting jurisdiction to the court is restricted to include only boards and commissions directly connected with the State and specifically excludes some entities that the courts have otherwise recognized as State agencies.[69] In addition, an expansion of court of claims jurisdiction by the Legislature would still not result in a guaranteed means of providing satisfaction of claims because a second aspect of the system—its discretionary nature—would remain unchanged. The recognition of a moral obligation and the amount of public funds to be appropriated to satisfy such an obligation are decisions made on a case by case basis. The court of claims is not specifically required to grant relief in any particular situations or amounts.

V. Conclusion

Two possible approaches to the question of governmental immunity in West Virginia should be considered. The traditional doctrine may be retained intact, or it can be abrogated as an antiquated concept which is inconsistent with modern views of governmental responsibilities. Governmental immunity, as embodied in the constitution and case law of West Virginia, appears to be solidly entrenched. Some inroads have been made, however, which offer prospects for limiting the immunity granted to the State and its agencies.

The court has evidenced a willingness to stifle the far-reaching effects of the governmental immunity doctrine by recognizing distinctions in the types of activities performed by governmental sub-

[68]Arguably, the only basis for the court's involvement in the consideration of the claim in *Stollings* was because a mandamus proceeding was required by the State Auditor's refusal to pay the claim. If the court's purpose was to compel the performance of a mandatory duty by the State Auditor rather than to provide the unsatisfied claimant with an additional remedy, then *Stollings* may be limited to its facts.

[69]W. Va. Code Ann. § 14-2-13 (1972 Replacement Volume).

divisions and agencies. These distinctions have been employed by the court as devices for avoiding the bar of immunity and providing recovery for injured claimants. Aside from the fact that many of these distinctions are based on semantical differences, the utilization of this method for avoiding immunity has the effect of eroding immunity on a case by case basis.

The Legislature has also taken steps to provide for recovery by recognizing the moral obligation of the State to an aggrieved party. The creation of the court of claims and the immunity waiver provision of the State insurance statute manifest a realization that there are certain claims which ought justly to be paid.

The crux of the problem involved in abrogating the doctrine of governmental immunity in West Virginia lies in the fact that it is embodied in the State constitution. The West Virginia Supreme Court of Appeals is incapable of reaching its very source and can only seek to erode it on a piecemeal basis. Therefore, the arguments in support of abrogation must be presented to the legislators and the voting public.

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