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GOVERNMENTAL LIABILITY FOR TORT IN WEST VIRGINIA

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Any attempt to analyze the West Virginia decisions upon the tort liability of governmental bodies and officials reveals a tangle of common law principles, statutory provisions and constitutional doctrines. The inter-action of these various elements has produced a mass of cases which fall into a number of groups. The cases in each group are reasonably consistent with each other, but difficult to coordinate with those in other groups. It is a growing field of the law, dealing with problems of increasing importance to property owners and the public at large. New and troublesome questions frequently arise, and the search for sound principles and analogies to apply to them has not always been highly successful. A classification of the decisions and some analysis of the underlying principles may be helpful.

Before entering the special field of tort, one general doctrine must be examined. It is a basic principle of our system of jurisprudence that the state, by reason of its sovereign character, cannot be sued without its own consent. In West Virginia the constitution provides that the state shall never be made defendant in any court of law or equity.¹ How far this provision modifies the general common law principle is an interesting subject for speculation which has not been discussed in the decisions. At any rate, it is clear that there is a general immunity from suit applying to state officials;² to state boards, commissions and similar

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¹ W. Va. Const., art. 6, § 35.

² See *Blue Jacket Consolidated Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514 (1901).

agencies of a governmental character;³ to counties as governmental or administrative sub-divisions of the state;⁴ and to cities, towns, boards of education, and all municipal corporations or quasi-corporations in so far, and so far only, as they are engaged in activities of a governmental character.⁵

This immunity from suit from its very nature does not depend upon the character of the claim asserted. As against the state and its direct and immediate agencies, actions based upon contract are precluded as effectively as those sounding in tort.⁶

³In the following cases certain state boards, commissions and agencies were held exempt from suit under the circumstances indicated: Sayre v. Northwestern Road, 10 Leigh 454 (Va. 1839) (an early public improvement company, chartered for the construction of a highway,—consequential liability for negligence); Miller v. State Board of Agriculture, 46 W. Va. 192, 32 S. E. 1007 (1899) (the State Board of Agriculture,—attempt to enforce a contract by mandamus); Miller Supply Company v. State Board of Control, 72 W. Va. 524, 78 S. E. 672 (1913) (the State Board of Control, holding and managing state institutions,—action of contract); Gordon v. State Board of Control, 85 W. Va. 739, 102 S. E. 688 (the same board,—attempt to enforce a contract by mandamus); Barber's Adm'r. v. Spencer State Hospital, 95 W. Va. 463, 121 S. E. 497 (1914) (the same board,—tort claim for wrongful death); Mahone v. State Road Commission, 99 W. Va. 397, 129 S. E. 320 (1925) (the State Road Commission,—tort claim for damage to real estate); Lambert v. County Court, 103 W. Va. 37, 136 S. E. 507 (1927). But by reason of the terms of the special acts under which they were incorporated, the following agencies which claimed to represent the state were held liable to suit: Dunnington v. Northwestern Road, 6 Gratt. 160 (Va. 1849) (an internal improvement company, chartered for the construction of a highway,—action upon contract directly involved in enterprise); James River & Kanawha Company v. Early, 13 Gratt. 541 (Va. 1856) (a company in which the state was a stockholder, organized for the improvement of river navigation,—action for negligence in leaving a snag in the river); Tompkins v. Kanawha Board, 19 W. Va. 257, 21 W. Va. 224 (1882) (a similar board, chartered to improve river navigation,—action for negligence in leaving an obstruction in the river).

⁴See Watkins v. County Court, 30 W. Va. 657, 5 S. E. 654 (1888); Shipley v. Jefferson County, 72 W. Va. 656, 659, 78 S. E. 792 (1913); Corrigan v. Board of Commissioners, 74 W. Va. 89, 81 S. E. 566 (1914); Rader v. County Court, 94 W. Va. 493, 119 S. E. 479 (1923); Douglass v. County Court, 90 W. Va. 47, 110 S. E. 439 (1922).

⁵See the cases listed *infra* n. 8. Early Virginia cases, particularly Dunnington v. Northwestern Road, *supra* n. 3, discuss extensively the English cases upon the liability of commissioners for constructing public improvements under special acts of Parliament. See Plate Manufacturers v. Meredith, 4 T. R. 794; Boulton v. Crowther, 2 B. & C. 703 (1824); Sutton v. Clark, 6 Taunt. 29 (1815). These are treated as though they were authorities that the defendants were immune from suit as representatives of the sovereign. In fact, the cases seem to go no further than to hold that the commissioners were not liable for damages necessarily incurred in properly performing what was directed by Parliament; but that they might be liable if they acted wantonly or even negligently. This seems at most to be a doctrine of the omnipotence of Parliament and cannot be readily fitted in with the usual principle applied by American courts.

⁶Miller v. State Board of Agriculture, 46 W. Va. 192, 32 S. E. 1007 (1899); Miller Supply Co. v. State Board of Control, *supra* n. 3; Gordon v. State Board of Control, *supra* n. 3.

However, upon descending into the lower forms of governmental organizations, we find a marked difference in attitude toward the two classes of claims. Counties, boards of education, towns and cities are usually sued as a matter of course upon their contractual obligations, and only in tort actions is the familiar defense asserted that the defendant is an agency of the government and immune from suit. By statute and by charter, these subordinate governmental agencies have in general been vested with powers and duties of such character that the courts, almost without discussion, have found consent on the part of the state to the judicial enforcement of their contractual obligations even in governmental matters.⁷ In the field of tort, however, no such consent has been given, and the right to sue depends upon the question whether the tort was committed within or without the field of governmental administration. It is obvious that the situations in which tort liability can be enforced must lie within a very limited compass.

Just what activities of municipal corporations are governmental, and what tests shall be applied in fixing the boundaries of this field, are familiar questions discussed by a multitude of legal authorities. The West Virginia cases are grouped in a footnote.⁸ While not wholly consistent, the cases follow the generally

⁷ See generally as to the status of county courts and their liability to suit, W. VA. REV. CODE (1931) c. 7, art. 1, § 1 and art. 5, §§ 8, 9; Exchange Bank of W. Va. v. Lewis County, 28 W. Va. 273, 286 (1886); County Court v. Holt, 53 W. Va. 532, 44 S. E. 887 (1903). Upon the same matters relating to boards of education, see W. VA. REV. CODE (1931) c. 18, art. 5, § 5; Eakle v. Board of Education, 97 W. Va. 434, 439, 125 S. E. 165 (1924).

⁸ The difficulty of analyzing the cases of this class is increased by confusion in many of the opinions between (a) the governmental immunity from suit here discussed and (b) the absence of liability deduced from the doctrine that defaults of public officials or agents are not chargeable to the government,—a wholly different principle considered hereafter. It is virtually impossible to say how far the court in many cases is invoking one rule or the other, and consequently the pertinent cases have been collected and cited here, although many are equally applicable to the later discussion.

The following activities of municipalities have been held to be of governmental character: Richmond v. Long's Adm'r., 17 Gratt. 375 (Va. 1867) (maintaining a city hospital from which a slave was negligently allowed to escape); Brown's Adm'r. v. Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890) (maintaining a jail which burned, causing the death of a prisoner); Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527 (1906) (the death of a child from incarceration in an unsanitary jail); *Contra*: Edwards v. Pocahontas, 47 Fed. 268 (C. C., W. D. Va. 1891); Charleston v. Beller, 45 W. Va. 44, 30 S. E. 152 (1898) (prosecuting an alleged violation of a city ordinance for which it was sought to impose costs upon the city); Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918 (1898) (permitting fireworks to be set off in a street, frightening a horse); Holsberry v. Elkins, 86 W. Va. 487, 103 S. E. 271 (1920) (permitting children to coast on a snowy sidewalk, causing a slippery condition); Wood v. Hinton, 47 W. Va. 645, 35 S. E. 824 (1901) (granting and subsequently revoking a permit for the erection of a carpenter

accepted pattern. The results achieved are best explained by applying a historical test,—is the activity of a character such as governments have usually performed? Certain theoretical principles, however, stand out in the opinions. Thus it is considered an indication of non-governmental character that the function is sometimes performed by private corporations for profit, and is undertaken by the municipality only under an optional power; but, on the other hand, whether the activity actually produces, or could produce, a profit is not controlling.⁹ Some distinction is taken on the basis of imposing responsibility for owning and managing property; thus an attempt is made to divide the city's activities into governmental and "proprietary" classes,—an antithesis that evidently cannot be carried far.¹⁰ Things done for the mere pleasure of the citizens are ordinarily not governmental, but in matters of "welfare" the line is difficult to draw. The statements of principle and the terminology employed in most of the decisions are derived largely from *Richmond v. Long's Administrator*¹¹ through *Gas Company v. Wheeling*.¹² The usual at-

shop using steam machinery); *Carder v. Clarksburg*, 100 W. Va. 605, 131 S. E. 349 (1926) *semble* (grading and paving streets); *Javins v. Dunbar*, 110 W. Va. 271, 157 S. E. 586 (1931) *semble*; *Mendel v. Wheeling*, 28 W. Va. 233 (1886) (supplying water for fire protection, — negligence alleged in failing to repair main); *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993 (1898) (maintaining a reservoir for municipal water system). But see cases *infra* holding that municipal water supply system is generally not a governmental activity. *Gas Co. v. Wheeling*, 8 W. Va. 320 (1875) (acquiring a municipal gas plant) *semble, sed quaere*; *Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368 (1897) (whether to provide or omit drains in connection with construction of streets) dictum.

The following activities of municipalities have been held to be of non-governmental character: *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S. E. 554 (1914) (operating municipal water system,—damage caused by bursting of reservoir); *Prager v. Wheeling*, 91 W. Va. 597, 114 S. E. 155 (1922) (operating municipal water works plant); *Nutter v. Salem*, 110 W. Va. 180, 157 S. E. 592 (1931); *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447 (1893) (permitting a dangerous embankment to stand on city-owned property alongside road) *semble*; *Warden v. Grafton*, 99 W. Va. 249, 128 S. E. 375 (1925) (maintaining shoot-the-chute in amusement park); *Hyre v. Brown*, 102 W. Va. 505, 135 S. E. 656 (1926) (supplying electricity from municipal plant) *semble*.

The following activities of boards of education have been held to be of governmental character: *Krutili v. Board of Education*, 99 W. Va. 466, 129 S. E. 486 (1925) (maintaining a planing machine in a manual training class, which caused injury to a pupil from an unguarded blade); *Boice v. Board of Education*, 160 S. E. 566 (W. Va. 1931) (operating a bus on the highway for transportation of children to and from school).

⁹ *Richmond v. Long's Adm'r.*, *supra* n. 8; *Wigal v. Parkersburg*, *supra* n. 8; *Warden v. Grafton*, *supra* n. 8.

¹⁰ *Ritz v. Wheeling*, *supra* n. 8; *Gibson v. Huntington*, *supra* n. 8; *But of Warden v. Grafton*, *supra* n. 8.

¹¹ *Supra* n. 8.

¹² *Supra* n. 8.

tempt at division is between activities that are "ministerial and specified, or assumed in consideration of privileges conferred" and those that are "discretionary or governmental".¹³ Some guidance, perhaps, can be secured from language of this sort, but no test can be devised so satisfactory as the historical approach resting upon the traditional character of the governmental functions.

The rigor of the rule forbidding suit against the state and its agencies is considerably mitigated by permitting some measure of judicial control over the acts of public officials by *mandamus* proceedings and injunctions. It is well settled that even state officials, as well as subordinate public officers, boards, *etc.*, may be required by *mandamus* to perform strictly ministerial functions definitely prescribed by law, and may be prevented by injunction from wrongful or negligent acts under claim or color of official position or authority. As to matters of a political character, or which involve official discretion, the reverse is true; upon such points the action, or inaction, of public officials cannot be controlled or coerced by the courts.¹⁴ These familiar rules bear upon our question in two ways. The injunction and *mandamus* cases throw light upon the division of public activities into the governmental and non-governmental categories, a division that must frequently be applied in the field of public torts. Furthermore, the power to enjoin a threatened wrongful act before its commission, or to compel the performance of a duty that has been denied, while it affords no redress for injuries committed, does make it possible to forestall and prevent wrongs which would otherwise be perpetrated, and thus leaves the citizen not so devoid of remedy as he would be if obliged to wait and sue for damages afterward.

The question has arisen several times whether and how this governmental immunity to suit may be waived or surrendered. Directly, or by necessary implications from statutes and municipal charters, it is usually waived in the wide field of the con-

¹³ See *Richmond v. Long's Adm'r.*, *supra* n. 8; *Mendel v. Wheeling*, *supra* n. 8; *Clay v. St. Albans*, *supra* n. 8. But *cf.* *Gibson v. Huntington*, *supra* n. 8; *Wigal v. Parkersburg*, *supra* n. 8.

¹⁴ See *Chesapeake & Ohio Railway Company v. Miller*, 19 W. Va. 408 (1882); *Blue Jacket Consolidated Copper Company v. Scherr*, *supra* n. 2; *Coal and Coke Railway Company v. Conley*, 67 W. Va. 129, 67 S. E. 613 (1910); *State v. Shawkey*, 80 W. Va. 638, 93 S. E. 759 (1917); *Downs v. Lazzelle*, 102 W. Va. 663, 136 S. E. 195 (1926); *Fidelity and Deposit Company v. Shaid*, 103 W. Va. 432, 137 S. E. 878 (1927). The foregoing are merely typical cases; it is beyond the scope of this article to present an exhaustive digest of *mandamus* or injunction cases.

tractual obligations of municipal corporations and quasi-corporations. Can it be waived by the immediate agencies of the state? Can it be waived in respect of governmental torts? Can it be waived indirectly or involuntarily? The cases afford a partial answer to these questions. Thus the present workmen's compensation law, which subjects to its operation county courts and municipal corporations as employers, has extended the field of liability of such agencies to employees injured through their negligence, and to that extent has worked a waiver of the immunity from suit which they formerly enjoyed in cases arising from their governmental activities.¹⁵ But a state board holding and managing a hospital for the insane, by failing to subscribe to the workmen's compensation fund, did not thereby waive its immunity to suit for the negligent injury of an employee, although the statute expressly makes the state an employer.¹⁶ And a board of education, which was exempt from suit for negligence in connection with the transportation of children to school, did not become liable to suit because it voluntarily took out liability insurance covering the operation of its vehicles.¹⁷ So far as these cases cover the field, they seem to indicate that the direct governmental agencies of the state cannot be subjected to liability for tort, even by reasonably clear statutory language, and that counties and municipal corporations lose their immunity only by the operation of statutes, and not by any voluntary recognition or admission of liability.¹⁸

A second defense to governmental liability for tort arises from a doctrine associated with the law of principal and agent. Governments are intangible entities. They act only through human beings. The assertion of a claim against a governmental agency necessarily involves the contention that the defendant is chargeable with the acts, or inaction, of a human agent. But under our decisions the state and other governmental agencies are not

¹⁵ *Rader v. County Court*, 94 W. Va. 493, 119 S. E. 479 (1923); *Esque v. Huntington*, 104 W. Va. 110, 139 S. E. 469 (1927).

¹⁶ *Barber's Adm. v. Spencer State Hospital*, *supra* n. 3.

¹⁷ *Boice v. Board of Education*, *supra* n. 8.

¹⁸ It might be supposed that the plainest statutory form of waiver of exemption from suit would be to confer upon the governmental agency in question the power "to sue and be sued". Certain of the early cases appear to give great weight to the use of these words in such statutes, but recently the court seems practically to ignore them. On this compare the following early cases: *Dunnington v. Northwestern Road*, *supra* n. 3; *James River and Kanawha Company v. Early*, *supra* n. 3; and *County Court v. Holt*, *supra* n. 7, with the following showing the more recent attitude; *Barber's Adm. v. Spencer State Hospital*, *supra* n. 3; *Krutili v. Board of Education*, *supra* n. 8. Upon the most acute issue,—the right to sue the State Road Commission,—the court seems to have disregarded these words in the statute except when an injunction was sought. See *Downs v. Lazzelle*, *supra* n. 14.

chargeable with the wrongful or negligent conduct of their representatives. The state can do no wrong; and whoever does wrong, to that extent does not represent the state.¹⁹

Obviously, some qualification of this principle seems necessary, but it is surprising to find how nearly it has been carried to its logical (or illogical) extreme. Elsewhere in the law one who employs another, has control over his operations and claims the benefit of his acts, is held also to responsibility for the negligence or misconduct of the latter while acting for the employer's benefit within the proper field of his duties. But otherwise when a governmental agency is the employer. In such case the law stands ready with a keen blade to pare the flaw of negligence from the sound fruit of the agent's service, and thus permit the state to reject whatever is evil in the activity of its representatives, while claiming the benefit of all they do rightfully.

"If the State's agents traveled outside their lawful rights and committed an unlawful act against respondents, they did not represent the State and can not claim the protection of the State against a suit for their wrongdoing. For such a wrong the State is not liable, and such a wrong can not be imputed to the State. Only the individuals responsible therefor are liable, and they in their collective or individual capacities. . . . But as the State, the King, can do no wrong, it can not be sued for a tort; a tort will not be imputed to it; the wrongdoer in every such case is the one doing the unlawful act."²⁰

Certain minor variations appear in the presentation of this doctrine. Thus in some cases stress is laid on the idea that those who act for the government or its agencies are public officers, not merely agents of the defendant. The theory seems to involve two elements; that the agent is an autonomous power by virtue of the public position he holds, and that the real principal is not so much the governmental agency as the people at large.²¹ In the well-known case of *Coal & Coke Railway Company v. Conley*,²² a striking differentiation is made between the state and its government. The theory there presented is that the government, which is the active and visible representative of the state, is a fallible

¹⁹ See *Richmond v. Long's Adm'r.*, *supra* n. 8; *Mendel v. Wheeling*, *supra* n. 8; *Wood v. Hinton*, *supra* n. 8; *Coal and Coke Railway v. Conley*, *supra* n. 14; *Downs v. Lazzelle*, *supra* n. 14.

²⁰ *Downs v. Lazzelle*, *supra* n. 14.

²¹ See *Bartlett v. Clarksburg*, *supra* n. 8; *Charleston v. Beller*, *supra* n. 8; *Thomas v. Grafton*, 34 W. Va. 282, 12 S. E. 478 (1890).

²² *Supra* n. 14.

human instrument which may do wrong; but the state itself, an intangible, abstract concept, somewhat like the ultimate *substance* discussed in Greek metaphysics, cannot be affected by the failings of the outward and visible government.

Another variation of the rule is sometimes presented as an application of the principle of *ultra vires*. The powers of counties and municipalities, being strictly limited by statute, and no statute having ever granted the power to commit tortious acts, a loose and easy escape from unpleasant consequences seems to present itself by dismissing all negligence and misconduct of public officials as *ultra vires*.²³ At bottom the principle is always the same,—it asserts that the incidental injuries and wrongs growing out of governmental activities are no part of the activities with which they are associated, but are the mere private trespasses of the persons who commit them and who are alone responsible.

The doctrine applies with its full force to officials of the state and to its boards, commissions and other agencies.²⁴ It applies to counties as governmental sub-divisions of the state.²⁵ Its application to municipal corporations involves again the distinction between the governmental and non-governmental activities of such bodies. The rule of *respondeat superior* is applied against municipalities in the non-governmental situations, where they are held liable to suit under the principle already discussed. The questions of immunity from suit and liability as principal for the torts of employees involve the same issue. Yet while both defenses turn upon the character of the activity, they are of widely different natures. One is a matter of remedy,—whether the defendant can be brought into court for the enforcement of the claim; the other involves substantive law,—whether what was done by the human agent imposes liability upon the defendant municipality. Yet many of the opinions mix up indiscriminately the question of whether a city can be sued and the question of its responsibility for the acts of its officials or employees.

²³ The idea is suggested in the interesting case of *Brown's Adm. v. Guyandotte*, *supra* n. 8. But *cf.* *Hyre v. Brown*, *supra* n. 8; *Rutherford v. Williamson*, 70 W. Va. 402, 74 S. E. 682 (1912).

²⁴ *Coal and Coke Railway v. Conley*, *supra* n. 14; *Downs v. Lazzelle*, *supra* n. 14.

²⁵ *Watkins v. County Court*, *supra* n. 4; *Moss Iron Works v. County Court*, 89 W. Va. 367, 109 S. E. 343 (1921). But where the agents of a county court wrongfully removed coal from certain land and the county authorities claimed the benefit of the trespass, used the coal, and defended the claims of their agents, the county was held to have ratified the trespass and become chargeable with the damages. But *quaere* why the acts of county officials in attempting to ratify a wrong should be any more effective to bind the county than the act of committing the wrong. *Boyer v. County Court*, 92 W. Va. 424, 114 S. E. 750 (1922).

As a necessary corollary from the view that no governmental liability attaches, it would seem to follow that the individual who has caused the wrong complained of is personally liable for the damage incurred. If, by reason of committing the tort, he is excluded from official recognition, he should at least be liable as a private person. Apparently the court has applied this view in good faith in the limited number of cases where the question arose.²⁵ Yet, in certain cases involving this individual liability, it has been necessary to recognize that a public officer may act tortiously in his official capacity. In actions for damages for wrongful action, or inaction, upon official bonds of public officers, the question arises whether the wrong was committed within the apparent scope of official duty, for otherwise the bondsman cannot be held liable.²⁷ In these cases the court has recognized that acts may be done in the usual course of conducting the official business of a public office, presumably in the public interest, which involve the commission of actionable torts. It is thus not inherent in the nature of things that whatever is done wrongfully in public office is unofficial and unauthorized.

So far, we have found no situations in which governmental agencies can be held liable for torts, except in the non-governmental activities of municipal corporations, but we have now to consider the effect of certain statutory and constitutional provisions which modify the principles just considered. The most prolific source of tort cases against public authorities is the statutory liability for damages resulting from a road, bridge, street, or sidewalk, being out of repair. Without analyzing this legislation in detail it is sufficient to bear in mind that the West Virginia statutes have always imposed a general liability of this character upon the county courts with respect to public roads outside the limits of incorporated cities and towns, and upon municipalities with respect to the streets and sidewalks within

²⁵ See *Clark v. Kelly*, 101 W. Va. 650, 133 S. E. 365 (1926). But *cf.* *Sawyer v. Corse*, 17 Gratt. 241 (Va. 1867). The distinction is generally taken that no personal liability attaches by reason of acts done in the exercise of judicial or discretionary powers, but only for failure to perform or neglect in performing ministerial acts. *Henderson v. Smith*, 26 W. Va. 829 (1885). This analysis hardly expresses the point of view necessary for our purpose. We are only concerned with cases where a tort has been committed, and tort liability cannot usually be deduced from a discretionary or judicial governmental power. The case cited, however, was in fact one of plain negligence and the principle invoked by the court was probably misapplied (notary incorrectly certifying acknowledgement of a married woman).

²⁷ In fact, a rather fine distinction has arisen between wrongful acts done under color of office and those done under color of authority; and, under some circumstances at least, liability upon the bond requires that there should

their bounds; but since the system of state highways was created under the jurisdiction of the State Road Commission, the counties have been relieved of liability for the state of repair of these latter highways.²⁸ An interesting preliminary question, not wholly academic, is whether the counties or municipalities would be liable for damages occasioned by the bad condition of roads or streets independently of statute. It is certain that constructing and repairing roads, streets and sidewalks is a governmental function,²⁹ and it seems settled that the liability of the counties exists only by virtue of the statute.³⁰ A county is not liable to one who cannot invoke the statutory provision. The liability of municipalities, however, independently of the general statute, is usually held to depend upon whether, under the particular charter involved, the city is given control of the streets and sidewalks, the power and duty to repair them, and means to exercise such power and duty, *i. e.*, the right to levy taxes or otherwise to raise funds for the purpose.³¹ Under this rule, cities are usually liable for *negligence* in failing to keep their streets and sidewalks in a safe condition on the theory of an implied assumption of the duty.

But the general statute in this state imposes a liability of a

be at least some purported official warrant for what was done. See *State v. Mankin*, 68 W. Va. 772, 70 S. E. 764 (1911); *State v. Miller*, 104 W. Va. 226, 139 S. E. 711 (1927).

²⁸ W. VA. REV. CODE (1931) c. 17, art. 9, § 33. And see the earlier legislation to the same general effect. See also *Clayton v. County Court*, 96 W. Va. 333, 123 S. E. 189 (1924); *Parsons v. County Court*, 92 W. Va. 490, 115 S. E. 473 (1922).

²⁹ See cases cited in n. 8, *supra*, and in the following note.

³⁰ *Watkins v. County Court*, *supra* n. 4; *Shipley v. Jefferson County*, *supra* n. 4; *Corrigan v. Board of Commissioners*, *supra* n. 4; *Clayton v. County Court*, *supra* n. 28. It is obvious that no defense to this liability can be asserted on the ground that the defect in the thoroughfare was caused by a governmental activity, for the very business of maintaining and repairing streets and highways is governmental. The remarkable result follows that a road-making vehicle in motion cannot give rise to an enforceable cause of action against the county, for it is used in a governmental employment. *Douglass v. County Court*, *supra* n. 4. Yet as soon as such a vehicle stops moving, it may become an obstruction creating a dangerous condition of the highway, for which the county could be liable. *Hersman v. County Court*, 86 W. Va. 96, 102 S. E. 810 (1920).

³¹ *Wilson v. Wheeling*, 19 W. Va. 323 (1882); *Curry v. Mannington*, 23 W. Va. 14 (1884). And where the power and means to maintain streets and highways is conferred, a municipal corporation cannot evade liability on the ground that no express duty is imposed by its charter, nor even by undertaking formally to repudiate such a duty. See *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732 (1908); *Waddell v. Williamson*, 98 W. Va. 547, 127 S. E. 396 (1925). But for reasons of some historical validity, even if logically unsatisfactory, boards of education are not held responsible for negligence in the performance of duties relating to property entrusted to their care, and as to which they have the power and duty to make repairs and means and facilities for doing so. See *Krutilli v. Board of Education*, *supra* n. 8.

different character. In contrast to the constitutional provision later discussed, this statute creates an original affirmative liability,—it affects rights, not merely remedies. Thus, although at common law no liability could attach without negligence, it has long been settled in this state, after some early decisions *contra*, that the statutory liability is absolute and exists independently of negligence. The defendant may have been as careful as could be wished but, if despite such care, the street or road was, in fact, out of repair, the traveler injured thereby may recover.³² Again, this liability may be imposed even though the defendant had no notice of the existence of the dangerous condition and even if there was only a hidden, or latent, defect, which caused the damage.³³ The liability, moreover, grows out of the mere lack of repair of the street or highway, regardless of whose act, or inaction, caused the condition. Cities and counties are liable if private

³² There is probably no very serious variance in the holdings in the cases, but it is impossible to reconcile the language of the numerous opinions. In the following cases it seems to be clearly held that negligence is not necessary in order to hold liable a county or municipality: *Sheff v. Huntington*, 16 W. Va. 307 (1880); *Chapman v. Milton*, 31 W. Va. 384, 7 S. E. 22 (1888); *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51 (1889); *Gibson v. Huntington*, *supra* n. 8; *Campbell v. Elkins*, 58 W. Va. 308, 52 S. E. 220 (1906); *Burke v. County Court*, 70 W. Va. 174, 73 S. E. 304 (1911); *Shipley v. Jefferson County*, *supra* n. 4; *Williams v. Coal Company*, 83 W. Va. 464, 98 S. E. 511 (1919); *Carder v. Clarksburg*, *supra* n. 8; *Blankenship v. Williamson*, 101 W. Va. 199, 132 S. E. 492 (1926). In the following cases the language of the court indicates with greater or less force the view that negligence on the part of county or municipal authorities is an essential element of the plaintiff's case, but a reading of the cases will indicate that this language is probably not to be taken too seriously: *Griffin v. Williamstown*, 6 W. Va. 312 (1873); *Childrey v. Huntington*, 34 W. Va. 457, 12 S. E. 536 (1890); *Bowen v. Huntington*, 35 W. Va. 682, 14 S. E. 217 (1891); *Parrish v. Huntington*, 57 W. Va. 286, 50 S. E. 419 (1906) (in this case the court speaks both of absolute liability and of a duty to exercise due and reasonable care, almost as though they were interchangeable expressions); *Corbin v. Huntington*, 74 W. Va. 479, 82 S. E. 323 (1914); 81 W. Va. 154, 94 S. E. 38 (1917). See also *Curry v. Mannington*, *supra* n. 31. The following case seems to be an express holding that negligence is the basis of the cause of action, but if so, is doubtless to be treated as ill considered: *Ice v. County Court*, 77 W. Va. 152, 87 S. E. 75 (1915). And in a recent case the court has again discussed the issue as one of negligence,—a surprising lapse. *Silverthorn v. Chester*, 106 W. Va. 613, 146 S. E. 614 (1929).

³³ The following cases hold or express the view that a county court or municipality may be held liable regardless of whether it is chargeable with notice of the existence of the defect; *Sheff v. Huntington*, *supra* n. 32; *Chapman v. Milton*, *supra* n. 32; *Phillips v. County Court*, 31 W. Va. 477, 7 S. E. 427 (1888); *Biggs v. Huntington*, *supra* n. 32; *Arthur v. Charleston*, 51 W. Va. 132, 41 S. E. 171 (1902); *Stanton v. Parkersburg*, 66 W. Va. 393, 66 S. E. 514 (1909); *Warth v. County Court*, 71 W. Va. 184, 76 S. E. 420 (1912). The following case, holding that the county court or municipality must be charged with notice, is stated in later cases to have been overruled: *Curry v. Mannington*, *supra* n. 31. Yet as late as 1926 the court stated again that notice was an essential element of the cause of action. *Blankenship v. Williamson*, *supra* n. 32.

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persons negligently, or even maliciously, cause dangerous conditions in the streets or highways.⁵⁴ The test frequently expressed is, in substance, whether the street or road is reasonably safe for persons using ordinary care to travel by day or night in a usual or proper manner.⁵⁵

⁵⁴ See *Williams v. Coal Co.*, *supra* n. 32; *Pollock v. Wheeling Traction Co.*, 83 W. Va. 768, 99 S. E. 267 (1919).

⁵⁵ There are difficulties in classifying the cases upon what state of facts constitutes actionable lack of repair of a street or highway, because the court has frequently discussed that question in terms of the duty of care imposed upon the plaintiff and the elements of causation involved in the occurrence of the particular accident. Allowing for these factors the following is a rough indication of some of the most interesting holdings. The street, highway or sidewalk was held to be out of repair within the meaning of the statute in the following situations: *Biggs v. Huntington*, *supra* n. 32 (where a well had been dug on private property at the edge of a street) *semble*; *Bowen v. Huntington*, *supra* n. 32 (where a slope or bank had been left in a sidewalk that was being graded); *Rohrbough v. Barbour County Court*, 39 W. Va. 472, 20 S. E. 565 (1894) (where the edge of a bridge approach was left without a guard rail); *Arthur v. Charleston*, *supra* n. 33 (where a rope had been tied across the sidewalk to hold a wharf boat in time of flood); *Rucker v. Huntington*, 66 W. Va. 104, 66 S. E. 91 (1909) (where a large stone had been left in a street); *Townley v. Huntington*, 68 W. Va. 574, 70 S. E. 368 (1911) (where a trench was dug for a water pipe in a grass plat between the roadway and sidewalk and left open several months); *Burke v. County Court*, *supra* n. 32 (where a wooden bridge was weakened by a latent defect); *Shipley v. Jefferson County*, *supra* n. 4 (where a highway bridge was too weak to support a traction engine and stone crusher) *semble*; *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344 (1917) 82 W. Va. 458, 95 S. E. 1044 (where a scaffold erected over a sidewalk for protection during building operations was broken by a timber falling upon it); *Hersman v. County Court*, *supra* n. 30 (where a road roller was left parked on a highway at night) *semble*; *Waddell v. Williamson*, *supra* n. 31 (where a ditch was left dangerously close to the edge of a street) *semble*; *Blankenship v. Williamson*, *supra* n. 32 (where a pile of dirt and lumber was placed in the street).

The street, highway or sidewalk was held not to be out of repair within the meaning of the statute in the following situations: *Watkins v. County Court*, *supra* n. 4 (where a dead tree growing by the roadside fell upon a traveler); *Smith v. County Court*, 33 W. Va. 713, 11 S. E. 1 (1890) (where a road graded along a hillside was merely narrow); *Gibson v. Huntington*, *supra* n. 8 (where a dangerous embankment stood upon city property near the edge of a street); *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878 (1896) (where a deep frozen chuck hole existed in a street); *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752 (1895) (where a street crossing was made slippery by accumulation of mud in winter); *Bartlett v. Clarksburg*, *supra* n. 8 (where fireworks were set off in a street); *Hungerman v. Wheeling*, 46 W. Va. 761, 34 S. E. 778 (1899) (where a bank at the edge of a street was unprotected by a guard rail); *Post v. Clarksburg*, 74 W. Va. 48, 81 S. E. 562 (1914) (where a sidewalk elevator of the usual type was installed); *Boylard v. Parkersburg*, 78 W. Va. 749, 90 S. E. 347 (1916) (where ice formed on a sidewalk from water descending a downspout); *Whittington's Adm'r. v. County Court*, 79 W. Va. 1, 90 S. E. 821 (1916) (where a pile of stones was placed at the edge of a highway); *Holsberry v. Elkins*, *supra* n. 8 (where children made a sidewalk slippery by coasting); *Douglass v. County Court*, *supra* n. 4 (where a county truck was driven recklessly on a highway); *Riley v. Ronceverte*, 108 W. Va. 222, 151 S. E. 174 (1929) (where an obstruction was placed in the middle of the street intersection to act as a "silent policeman").

Further, this statutory liability is peculiar in that it is for the benefit only of a limited class,—those who traverse the road, street or sidewalk as lawful travelers. No rights are conferred upon one who is injured by reason of the dangerous condition of the road if he is not a traveler. For example, a workman engaged in road repairs cannot recover for injuries sustained because of a dangerous excavation made in the course of other work being done where he was employed.²⁵ And a most interesting application of this doctrine is afforded by two cases arising from road machines left standing in the highway. A man who drove his car at night into a parked road roller had a cause of action, because he was a traveler injured by an obstruction in the highway.²⁷ But no liability arose in consequence of the death of a child who played upon a tractor left standing in the street and managed to start it, so that it ran downhill and caused the fatality.²⁸ The tractor was doubtless an obstruction, and the street was out of repair within the purview of the statute, but this was not an injury to a traveler and did not result from the situation of the machine as an obstruction to the street. The same accident could have happened in a field.

Even so, the statute, as construed by the court, has been the source of innumerable judgments against counties and municipalities; and at one period certainly, the court, apparently concerned over the volume of this litigation, applied to these cases some very stringent views upon the principles of contributory negligence and proximate cause to preclude recovery. These matters are outside the field of our discussion, but some of the more vigorous holdings (superseded now by a very different attitude on the part of the court) are listed in the footnotes.²⁹

²⁵ *Corrigan v. Board of Commissioners*, *supra* n. 4.

²⁷ *Hersman v. County Court*, *supra* n. 30.

²⁸ *Carder v. Clarksburg*, *supra* n. 8.

²⁹ See *Phillips v. County Court*, *supra* n. 33; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211 (1890); *Waggener v. Point Pleasant*, 42 W. Va. 798, 26 S. E. 352 (1896); *Van Pelt v. Clarksburg*, *supra* n. 35; *Slaughter v. Huntington*, 64 W. Va. 237, 61 S. E. 155 (1909). For some interesting distinctions in matters of proximate and remote causation, see *Smith v. County Court*, *supra* n. 35; *Rohrbough v. County Court*, *supra* n. 35; *Hungerman v. Wheeling*, *supra* n. 35; *Rucker v. Huntington*, *supra* n. 35. Another obstacle formerly placed in the path of the plaintiff in these cases was a requirement of proving by municipal records the public character of the street involved. *Childrey v. Huntington*, *supra* n. 32; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266 (1896). But this has long since been changed. The public character may be established by evidence that municipal authorities recognized the street by improving or repairing it. See *Phillips v. Huntington*, 35 W. Va. 406, 14 S. E. 17 (1891); *Campbell v. Elkins*, *supra* n. 32; *Warth v. County Court*, *supra* n. 33; *Burke v. County Court*, *supra* n. 32; *Williams v.*

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A more sweeping modification of the fundamental principles previously considered flows from the constitutional provision that private property shall not be taken or damaged for public use without just compensation.⁴⁰ The general purpose of this provision is to provide for and require condemnation of property rights under the power of eminent domain, and superficially it might appear that this is its entire effect. But, in fact, this provision has created a whole system of tort liabilities for damage to property, involving principles remote from the field of condemnation.

The first requirement of the section, that property shall not be taken for public use without compensation, has been made operative by the familiar condemnation statutes. But the legislature has never implemented by statute that part of the clause relating to property which is merely damaged.⁴¹ It might well be supposed, and apparently was once contended, that this part of the constitutional provision merely enlarged the scope of what should be covered by condemnation proceedings,—that it broadened the field of the property and rights that must be purchased and paid for when used for public purposes. Such a construction would require that the public authorities should acquire by eminent domain a right akin to an easement to damage the property, and that they should be responsible only by condemnation proceedings to restore to the property owner such permanent value as is taken away.

It has long been settled, however, that the constitutional provision has a more far reaching effect. It requires governmental agencies to answer in damages for torts committed to private property on terms wholly inconsistent with any theory of condemnation or purchase. Although no statute can be invoked, the constitutional provision is self-executing and the remedy is an ordinary action on the case for trespass or negligence.⁴² Oddly enough, however, under the terms of the constitution, the plaintiff has the right to demand a jury of freeholders; and this, historically

Coal Company, *supra* n. 32. And see Chapman v. Milton, *supra* n. 32; Zirkle v. Elkins, 93 W. Va. 39, 115 S. E. 875 (1923). For the best general summary of the principles applied in this class of cases, see Williams v. Coal Company, *supra* n. 32.

⁴⁰ W. Va. Const., art. 3, § 9.

⁴¹ See White v. Charleston, 98 W. Va. 143, 126 S. E. 705 (1925).

⁴² Johnson v. Parkersburg, 16 W. Va. 402 (1880); Thorne v. Clarksburg, 88 W. Va. 251, 106 S. E. 644 (1921); Martin and Shaffer v. Martinsburg, 102 W. Va. 138, 134 S. E. 745 (1926).

the procedure in condemnation only, is here invoked to try an ordinary damage suit.⁴³

The operation of this clause of the constitution cuts sharply across the whole field of governmental liability heretofore discussed. The court has frequently stated that it operates only to remove the immunity to suit which flows from the exercise of governmental powers. It is held to allow a remedy otherwise denied, although it seems to speak solely in terms of substantive right. Furthermore, the judicial construction is that no substantive right is created: on the contrary, the plaintiff can invoke only such rights as would exist independently of the constitutional provision.⁴⁴

One fundamental defect in the application of this theory seems not to have troubled the court. In governmental matters, as we have seen, wrongful or negligent conduct on the part of public officials is not imputed to a governmental agency,—*respondeat superior* does not apply. Now, although the court holds that no substantive right is created by this constitutional provision, it finds that the governmental master is responsible for the negligence or misconduct of the governmental servant whenever the constitutional liability is invoked. The rigid fiction that the wrongful acts are those only of the agent could easily be here applied by ruling that no public use is subserved when private property is wrongfully damaged. Such a view would limit the operation of the constitutional provision to cases where the damage is necessary and rightful from the governmental standpoint, and such cases are doubtless the majority. It seems clear, however, that the court has gone beyond this and has imposed liability for acts of an ordinary tortious character growing out of governmental operations to the detriment of private property rights.⁴⁵

The pardonable uncertainty in the early cases upon the ques-

⁴³ *Thorne v. Clarksburg*, *supra* n. 42.

⁴⁴ See *Jordan v. Benwood*, *supra* n. 39; *Tracewell v. County Court*, 58 W. Va. 283, 52 S. E. 185 (1906). In contrast with the statutory liability for bad repair of streets and highways the governmental agency is liable here only for its own negligence, not for the acts or omissions of strangers. See *Mason v. Bluefield*, 105 W. Va. 209, 141 S. E. 782 (1928).

⁴⁵ Many of the cases cited here upon this topic seem to support this conclusion; but for a particularly clear and recent decision to this effect, see *Javins v. Dunbar*, *supra* n. 8. The tort in that case was damage to the plaintiff's dwelling from smoke and vibration caused by the unloading of paving materials. The city defended on the ground that the paving was a governmental function, but the court held that the property was tortiously damaged for the public use, although the injury seems sufficiently indirect and avoidable.

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tion whether this constitutional provision relates to eminent domain or tort liability has been reflected in confusion over the measure of damages to be applied. The court, at one period, seems to have believed that compensation could be awarded only for a permanent depreciation in the value of the property affected, corresponding to the idea that some fraction of the value had been appropriated by the public authorities and must be paid for, as though in consequence of a forced purchase. In accordance with this idea, it was held that the measure of damages must necessarily be the difference in market value of the property before and after the damage was committed.⁴⁶ But this theory has long gone by the board. It is settled that the constitutional provision may be invoked to cover temporary and transitory damage to property, as well as damage of a permanent nature; and the plaintiff is to be compensated in the one case by the usual rules for making good what he has suffered, and, in the other case, by the measure of the permanent depreciation in the property value.⁴⁷

The theory expressed by the court as to the operation of this constitutional provision would seem to give little ground for distinction between the right to sue an official or agency of the state itself, and the similar right against a county or municipal corporation in the governmental aspect of the latter. If immunity to suit depends upon whether the defendant represents the state and partakes of its sovereign character, a waiver of this restriction might well apply equally to a governmental agency of any class or rank (subject to such limitations as are imposed by the constitutional prohibition against making the state a defendant). The court seems never to have wrestled with this point in any explicit way, but the decisions draw the usual line of demarkation between state agencies on the one hand and counties and subordinate bodies on the other. In practical effect the constitutional provision removes the barrier to actions against counties, municipal corporations and other governmental agencies of no higher grade, but leaves all state officials and agencies still beyond the power of the courts.⁴⁸

⁴⁶ *McCray v. Fairmont*, 46 W. Va. 442, 33 S. E. 245 (1899); and see *Blair v. Charleston*, 43 W. Va. 62, 26 S. E. 341 (1896).

⁴⁷ *Tracewell v. County Court*, *supra* n. 44; *McHenry v. Parkersburg*, 66 W. Va. 533, 66 S. E. 750 (1910); *Mason v. Bluefield*, *supra* n. 44. See *Holt v. Weston*, 110 W. Va. 184, 157 S. E. 176 (1931).

⁴⁸ This seems to follow without escape from the rule established by *Mahone v. State Road Commission*, *supra* n. 3, that the commission, as a direct agency of the state, cannot be sued for damages committed against private prop-

The State Road Commission in recent years has had to bear the brunt of most of the attempts to enforce liability for tort against state agencies. To a large extent these attacks have been turned aside and directed against the county courts under the statutory provision requiring the latter to pay for all necessary rights and easements required by the state road commission.⁴⁹ After an early period of hesitancy, the court held that this language made the county courts liable for incidental damage done to property in constructing state highways.⁵⁰ Apparently, the full effect of claims that might be asserted under the constitutional provision was to be allowed against the counties. One exception has been made, however, which makes it difficult to understand the court's reasoning. Only damages of a permanent character may be recovered against the county courts, and, for transitory and temporary damage, the property owner is left remediless,⁵¹ yet, as already mentioned, the constitution, as interpreted by the court, requires that compensation be made for damage of the latter character. If committed by the county's own agents, the county would have to pay. When committed by the State Road Commission the county escapes, apparently because temporary damage is not covered by the statutory language requiring the counties to pay for "necessary rights and easements"; and no action has been permitted to be maintained against the State Road Commission, despite the court's view that the constitutional provision waives exemption from suit.⁵²

erty for public use. Such an action would be a suit against the state. Yet, according to *Downs v. Lazzelle*, *supra* n. 14, the commission or its agents may be enjoined from wrongfully damaging property and the result is considered to be authorized, at least in part, by the statutory language giving the commission power to "sue and be sued". A state agency of this sort, it is said, may thus be controlled "where no affirmative relief is sought",—thus excluding actions for damages. Some further elucidation of the court's theory is badly needed.

⁴⁹ W. VA. REV. CODE (1931) c. 17, art. 4, § 4.

⁵⁰ See *Mahone v. State Road Commission*, *supra* n. 3; *Kinney v. County Court*, 110 W. Va. 17, 156 S. E. 748 (1931); *Lambert v. County Court*, *supra* n. 3; *Carden v. County Court*, 110 W. Va. 195, 157 S. E. 411 (1931).

⁵¹ *Carden v. County Court*, *supra* n. 50.

⁵² And where the commission itself condemns property at the expense of the county court, the owner cannot be compensated for tortious damage committed in the construction of the highway, *State Road Commission v. Moss*, 108 W. Va. 267, 150 S. E. 722 (1929). The effect of this statute is thus to be limited apparently to the eminent domain-purchase theory of compensation in contrast with the broad scope of the constitutional provision already discussed. For tortious damage property owners have a right created by the constitution which cannot be enforced against the commission for lack of a remedy, nor against the county courts because of the narrow construction of the statute fixing the liability of the latter. The only redress seems to be by action against the contractor or employee who committed the injury.

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This section of the constitution protects only private property and thus, in effect, creates a privileged class of claims based on damage to property, while governmental torts against the person are left without redress. The cases present many interesting variations in the type of facts from which the claims arise, but nearly all fall into three principal classes, (a) cases of damage from grading and constructing highways, (b) cases of damage from changing the elevation of street grades in cities, and (c) cases of damage from interference with drainage and water courses, usually in connection with street or highway work.⁵³

The actual operation of the principle just discussed produces consequences that reflect little credit upon the law as a social agency. The citizen is obliged by law to entrust the safety and welfare of his children during the helpless years of their lives to the care of boards of education and their employees. If such a board of education, in the course of grading a school lot raises or lowers the surface of the ground a few feet, the court will compel it to pay the adjoining land owner the damage, however trifling, he may have sustained.⁵⁴ Yet, if such a board of education by the negligence of its employees injures or kills a child while transporting it in the school bus, or provides a dangerous machine which maims a child who is compelled to operate it in a manual training course, the law affords no redress.⁵⁵ These are actual cases, not theoretical assumptions.

There is need of a critical revision of the rules now controlling in this field of the law to achieve more just and intelligent practical results. A really detailed and critical survey will reveal many more inconsistencies in the legal theory and unsatisfactory results of its operation than can here be discussed. The whole subject should be overhauled and scanned in the light of utilitarian principles. Obviously we need first an intelligent restatement of fundamentals, followed by carefully drawn legislation to modernize and harmonize the present somewhat antiquated conceptions. The ground work must be a study of the rules now applied by the court, a task whereof the foregoing is submitted as a modest beginning.

⁵³ The cases are numerous and reasonably accessible through the digests; they throw little light upon ultimate questions of liability. Those of any special significance have already been cited and it seems needless to collect the others.

⁵⁴ *Lindamood v. Board of Education*, 92 W. Va. 387, 114 S. E. 800 (1922).

⁵⁵ *Krutli v. Board of Education*, *supra* n. 8; *Boice v. Board of Education*, *supra* n. 8.