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**Torts**

Bryan R. Cokeley

*West Virginia University College of Law*

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TORTS

I. GOVERNMENTAL IMMUNITY


During the survey period, the West Virginia Supreme Court of Appeals decided two cases which will continue the trend of stripping governmental entities of their traditional tort immunity. In Gooden v. County Commission the court abolished county commission immunity from tort liability. The court then declared in Pittsburgh Elevator Co. v. Board of Regents that the state itself could be sued up to the limits of applicable liability insurance.

The plaintiff in Gooden was purportedly injured "when she stumbled and fell over a cinderblock negligently placed in a public corridor of the Webster County Courthouse." In holding that the plaintiff was not barred from bringing the action against the county commission, the court, speaking through Justice Harshbarger, effectually combined the holdings of two prior decisions in this area of the law—Long v. City of Weirton and Boggs v. Board of Education.

In Long the court had abolished municipal immunity and in doing so had departed from a bifurcated concept whereby a government entity was immune for those functions categorized as "governmental" but was susceptible to suit for "proprietary" functions. The Long court found the distinction un-

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1 For a collection of cases representing the national trend of significantly altering the governmental immunities for local political subdivisions or entities, see Ohio Valley Contractors v. Board of Educ., 293 S.E.2d 437, 441 n.5 (W. Va. 1982).
2 298 S.E.2d 103 (W. Va. 1982).
4 298 S.E.2d at 103.
7 The foundation for the abolition of municipal tort immunity was actually laid in Higginbotham v. City of Charleston, 204 S.E.2d 1 (W. Va. 1974), overruled, O'Neil v. City of Parkersburg, 237 S.E.2d 504 (W. Va. 1977), where the plaintiff alleged that the negligence of the defendants had caused her to suffer injuries from a fall on a public street. A state statute, W. Va. CODE § 17-10-17 (1974), provides for the potential liability of a municipality which fails to keep its streets in repair. The court found that since a municipality's immunity is derived from the common law and not from the constitution, the legislature could rightfully narrow that immunity.
8 "Governmental" functions have been defined as those which can be performed adequately only by the government, are more or less generally agreed to be "governmental" in character, and so immune from tort liability. On the other hand, when the city performs a service which might as well be provided by a private corporation, and particularly when it collects revenue from it, the function is considered a "proprietary" one, as to which there may be liability for the torts of... agents within the scope of their employment.


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workable and prone to uncertainty. Hence, while the court in Gooden readily agreed that the operation of the Webster County Courthouse was governmental in nature, it reasserted that the distinction was no longer significant to the immunity question.10

The court had earlier decided in Boggs v. Board of Education11 that county commissions were similar to municipal corporations in that they should not receive immunity under the purview of article 3, section 6 of the West Virginia Constitution.12 Rather, the immunity accorded to county commissions in past years13 had its source in the common law and not the constitution.14 The holding in Boggs was narrow in that the court there decided the constitutionality of a statute which exposed a county commission to suit15 and not whether the entire concept of immunity should be abrogated. With the Gooden decision, the last vestiges of tort immunity have been removed from county commissions in West Virginia.

Justice Harshbarger seemed especially influenced by the availability of liability insurance to the county commissions. "Where liability insurance is present, the reasons for immunity completely disappear."16 While it may be true that liability insurance does ease the fear of having the public treasury looted to pay the successful claim of an individual citizen,17 the price of that insurance may rise as more successful suits are brought against the commissions. The counties will not have the luxury—as will the state per the Pittsburgh Elevator Co.18 case—of choosing which risk they will consent to being sued upon by the selective purchase of liability insurance. The county commissions will be held liable for all torts proximately caused by the negligence of employees performing their duties.19

Pittsburgh Elevator Co. v. Board of Regents20 is a case that is as signifi-

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9 214 S.E.2d at 858.
10 298 S.E.2d at 104.
11 The Boggs court held that while county commissions were not immune from suit, boards of education, as dependent instrumentalities of the state, were. The decision was overruled by Ohio Valley Contractors v. Board of Educ., 293 S.E.2d 437 (W. Va. 1982), wherein the court declared that boards of education no longer are immune from suit.
12 W. VA. CONST. art. VI, § 35 provides in pertinent part: "The State of West Virginia shall never be made defendant in any court of law or equity."
13 See, e.g., Watkins v. County Court, 30 W. Va. 657, 5 S.E. 654 (1888).
14 244 S.E.2d at 802.
16 298 S.E.2d at 105.
17 Professor Prosser lists the diversion of public money as one of the arguments invoked in support of government immunity. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131 (4th ed. 1971).
19 298 S.E.2d at 103.
cant for what it says as for what it actually provides. The parents of a child who was injured in a fall from the main stage of the Creative Arts Center at West Virginia University instituted an action in the Circuit Court of Monongalia County against the Board of Regents and other defendants involved in the design and manufacture of the stage. Because of the exclusive venue provision in the state code, the Board of Regents was dismissed from the action in Monongalia County and was subsequently sued in Kanawha County by a co-defendant seeking contribution for any potential judgment rendered against it. The co-defendant, Pittsburgh Elevator Co., then moved the court in Monongalia County to consolidate the two suits by transferring the original action to Kanawha County. The court consolidated the actions but left them both in Monongalia County. Pittsburgh Elevator's complaint was then dismissed without prejudice on the ground that venue was improper in Monongalia County.

The supreme court first held that the order dismissing the complaint without prejudice was an appealable order. "If the effect of a dismissal of a complaint is to dismiss the action, such that it cannot be saved by amendment of the complaint, or if a plaintiff declares his intention to stand on his complaint, an order to dismiss is final and appealable."23

Chief Justice McGraw, writing for the majority, then went on to consider the "effect of [section 29-12-5], which authorizes the State Board of Insurance to procure liability insurance on behalf of the state, upon the exclusive venue provisions of W. Va. Code section 14-2-2 and the specious tenet of law that state agencies are immune from suit under W. Va. Const. art. VI, section 35."24 At this point in his opinion, Justice McGraw entered into a philosophically-based discussion, which Justice Neely deemed to be answering "questions which this court has not been asked."25 The Chief Justice's major concern was with the apparent irreconcilability of provisions in the state constitution. "In the past this Court has stated that the constitutional bar to suit contained in article VI, section 35, is apparently irreconcilable with the fundamental rights of due process and access to the courts guaranteed by article III."26 His proposition is that the separate provisions of the constitution are not so much in conflict with each other as is the historical interpretation of one immunity with the clear reading of the others.27 Justice McGraw would take a more
esoteric view of the "state" which is accorded immunity under the state constitution, relying upon concepts articulated in the early West Virginia case of Coal & Coke Railway Co. v. Conley:28 "The state and the government of the state are two different things, the former being an ideal person, intangible, invisible, immutable; the latter a mere agent, and, within the spirit of the agency, a perfect representative, but outside of that, a lawless usurper."29 As to the conclusion which flows from his interpretation of the supposedly irreconcilable constitutional provisions, Chief Justice McGraw states:

Once the distinction between the state as an "ideal person, intangible, invisible, immutable," and the government of the State as an agent accountable for its wrongful acts is recognized, the asserted irreconcilability of the freedoms guaranteed by article III and the bar to suit contained in article VI, section 55 loses all validity.20

The Chief Justice's thoughts on the concept of the state as an elusive entity spouting inferior organs susceptible to suit may indicate the path that later courts will take in attacking sovereign immunity in West Virginia. The Chief Justice may have recognized the decreased utility and constitutional inconsistencies which might result from further diminishing the immunity of the "state" as that entity has been defined for the greater part of this century in West Virginia.21

The court's holding, however, was not based upon any changed notions of the state's identity. Rather, since the appellant accepted the Board of Regents' immunity as a proper statement of the law,22 the court examined how that immunity was affected by the purchase of liability insurance. The court found that "[t]he paramount justification underlying the constitutional grant of immunity is to protect the financial structure of the State."23 With the purchase of liability insurance, that justification was deemed to vanish.24 Earlier

29 No. 15438, slip op. at 17 (quoting Railway Co. v. Conley and Avis, 67 W. Va. 129, 142, 67 S.E. 613, 619 (1910)).
30 No. 15438, slip op. at 19.

I perceive no countervailing interest to government of sufficient importance to make its minions immune to suit by those who, when injured, are made just as lame as if injured by any other corporate or private person. And, if it were not for the Constitution, I would say the same for State immunity.

244 S.E.2d at 808 (Harshbarger, J., dissenting) (emphasis supplied).
32 No. 15438, slip op. at 24.
33 Id. at 27.
34 Id. at 28.
cases had declared that the legislature or an agency could not waive the constitutional immunity by purchasing insurance.\textsuperscript{35} This court, however, found that the enactment of West Virginia Code section 29-12-5\textsuperscript{36} was not an attempt by the legislature to waive immunity but a "recognition of the fact that where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable."\textsuperscript{37}

The court concluded that when an action is in effect brought against the liability insurance coverage of a state agency, the exclusive venue provisions of West Virginia Code section 14-2-2 do not apply.\textsuperscript{38} Since an insurance carrier is obligated, the court said, to control and direct the defense of such a suit, the purpose of the statute in alleviating trouble and expense to state officials no longer was served by exclusive venue in Kanawha County.\textsuperscript{39}

Justice Neely agreed with this narrow holding, but "vigorously" dissented to any suggestion that the state is not entitled to immunity under the state constitution.\textsuperscript{40}

The obvious effect of this holding will be that more suits will be filed against the state throughout West Virginia. Fewer suits will probably be filed in Kanawha County, but more suits will surely be forthcoming in such counties as Monongalia where the state has a heightened presence.

\section{II. Products Liability}


The United States District Court for the Southern District of West Virginia certified three questions to the West Virginia Supreme Court of Appeals in the case of \textit{Star Furniture Co. v. Pulaski Furniture Co.}\textsuperscript{41} (1) whether strict liability in tort applies when recovery is sought only for property damage rather than personal injury; (2) whether strict liability is available to a


\footnotesize{\textsuperscript{36} W. Va. Code § 29-12-5 (1980) provides in pertinent part: Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and stopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits.}

\footnotesize{\textsuperscript{37} No. 15438, slip op. at 30. The argument could be made that if the legislature could decide which constitutional provisions were "simply inapplicable," it would never have to waive anything.}

\footnotesize{\textsuperscript{38} \textit{Id.} at 31.}

\footnotesize{\textsuperscript{39} \textit{Id.}}

\footnotesize{\textsuperscript{40} \textit{Id.} at 34 (Neely, J., dissenting).}

\footnotesize{\textsuperscript{41} 297 S.E.2d 854 (W. Va. 1982).}
commercial entity; and (3) whether comparative negligence may be asserted as an affirmative defense in strict liability actions. In answering all three questions in the affirmative, the court settled issues which were "natural outgrowths" of the court's decisions in Morningstar v. Black and Decker Manufacturing Co. and Bradley v. Appalachian Power Co.

The issues in the case stemmed from the damage caused by a September, 1975, fire at Star Furniture Company's business establishment. The plaintiff, Star Furniture, had purchased a clock from the defendant for "display and retail purposes;" it claimed that a malfunction in the clock or its wiring had caused the fire.

The first issue addressed by the court was whether property damage, rather than just personal injury damages, could be recovered under a strict liability theory. The court noted that property damage in this type of action can be classified as: (a) damage to property other than the defective product, (b) damage to the defective product itself and (c) loss of goodwill or profits. That strict liability could be employed to recover damages to property other than the defective product was a precept that the court had no difficulty in accepting. "Ability to utilize strict liability does not depend on the fortunate fact that the defective product did not result in personal injury. To permit such a distinction would penalize the fortunate who escape personal injury." Every jurisdiction follows this principle, but there are differences from jurisdiction to jurisdiction on the question of recovering damages to the defective product itself. Damage to the product, together with the loss of profits and goodwill, was recognized by the court to be of an economic nature. Because of this element of economic loss, or loss of bargain, the court saw principles of contract law tugging with tort principles to control the issues.

Two recent Alaska cases, both involving mobile homes, were utilized by the court to demonstrate when strict liability would and would not apply. In the first case, the plaintiff had purchased a mobile home which had a leaky roof; this condition generally reduced the value of his purchase. The Alaska

42 Id. at 856.
43 Id.
44 253 S.E.2d 666 (W. Va. 1979).
45 256 S.E.2d 879 (W. Va. 1979).
46 297 S.E.2d at 856. Another defendant, Hemco Corporation, had manufactured the component parts of the clock.
47 Id. at 857.
48 Id.
49 Id.
50 Id.
51 Id.
52 Id. at 858.
Supreme Court refused to allow the plaintiff to proceed under a strict liability theory, requiring instead that he pursue a warranty theory. In the other case, the plaintiff's mobile home had been damaged by a fire caused by a heating unit under the dwelling. The Alaska court held that the plaintiff could proceed on a strict liability theory.

The West Virginia court adopted the distinction set forth by the Alaska high court. If a defect in a product merely reduces that product's intrinsic value without a sudden destructive event which causes danger to people or other property, a strict liability theory cannot be used. However, "when a defective product creates a situation potentially dangerous to persons or other property, and loss occurs as a result of that danger, strict liability in tort is an appropriate theory of recovery, even though the damage is confined to the product itself." Finally, the court felt that its holding on the damage element of "loss in value" also meant that a plaintiff could not recover under a strict liability theory for lost profits and goodwill.

On the second issue, the court summarily dismissed arguments by the defendant that the plaintiff, as a commercial entity, should be denied the use of a strict liability theory since it was in a position to pass along costs of insurance and judgments to its customers. The defendant argued that the plaintiff here did not stand in the same position as the typical economically disadvantaged consumer. Rejecting this argument, the court reasoned that the focus should be on the safety of the product, and that safety would not be promoted if a manufacturer or retailer was sanctioned differently for passing along defective products at one level of the commercial process than at another.

In answering the third question before it, the court decided that the doctrine of comparative negligence could be used against a plaintiff in a strict liability case as an affirmative defense. The court noted the "conceptual" problems which this defense posed when used in conjunction with strict liability. Under a strict liability theory the safety of the product receives the focus rather than the conduct of the defendant; hence, any negligence of the defendant would not be considered in a way such as to easily balance it

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5 297 S.E.2d at 858 (quoting Northern Power & Eng'g Corp. v. Caterpillar Tractor Co., 623 P.2d 324, 329 (Alaska 1981)).
6 297 S.E.2d at 859-60. The court stated: "The proper relationship between tort law and the Uniform Commercial Code requires that lost profits be pursued under a warranty or contract theory cause of action rather than strict liability."
7 Id. at 860.
8 Id.
9 Id.
10 Id. at 861.
11 Id.
against the purported negligence of the plaintiff. Despite this technical nicety, the court felt compelled to abide by its earlier established principle that strict liability did not make a manufacturer an insurer of his products. Thus, a consumer who substantially contributed to his own injuries while using a defective product would be barred from recovery. However, the court excluded from the comparative negligence defense the failure to discover defects or to guard against them. It held that to include those type of acts in the defense would be to place “a burden on consumers which strict liability was intended to remove.”

The significance of *Star Furniture* is found in the new parameters that it gives to the strict liability theory in West Virginia. Of particular import to future utilizers of the theory is its simultaneous expansion and limitation by the court. The court broadened the theory’s utility by including commercial entities under its umbrella of protection, while limiting its use to particular types of injuries. This solidification of boundaries and concepts is consistent with the growth and development of any fledgling theory; more refinements and innovations can be expected as the theory is tested by time and experience.

Another case involving a product liability theory during the survey period was *Ilosky v. Michelin Tire Corp.* Karen Ilosky, the plaintiff and a resident of Hancock County, was seriously injured in a single-car accident in October, 1974. She claimed that her car went out of control in a curve because it was equipped with radial tires on the front and conventional tires on the rear—a dangerous condition. The radial tires, manufactured by Michelin, had originally been on the rear but were moved to the front when Ilosky’s father took the car to Ferguson Tire Service Company for the installation of new snow tires. Miss Ilosky sued Michelin and Ferguson on two theories. First, she claimed that Michelin and Ferguson had been negligent in failing to warn her of the dangers related to mixing radial tires with conventional tires. Alternatively, she sued on the strict liability ground that lack of such warning was a defect which made the tires unreasonably dangerous. At trial she received a verdict for $500,000, with the fault being apportioned seventy-five percent to Michelin and twenty-five percent to Ferguson.

On appeal, Michelin raised a number of issues. On the question of liability, Michelin claimed that the trial court had relied on an overly broad defini-

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62 Id.
64 297 S.E.2d at 862.
66 The other defendant, Ferguson Tire Service Co., chose not to appeal.
67 Not all the issues assigned as error by Michelin need to be discussed. The court found either no validity or harmless error in every point brought up by the appellant. Its application of established law is best illustrated by the fact that 11 of the case’s 20 syllabus points were ex-
tion of "defect" and had erred in allowing the plaintiff to proceed on both theories of negligence and strict liability.

The plaintiff's theory of the case and the court's decision were natural extensions of *Morningstar v. Black and Decker Manufacturing Co.*, 68 in which the court adopted strict liability for West Virginia. In *Morningstar* the court had stated that "a defective product may fall into three broad, and not necessarily mutually exclusive, categories: design defectiveness, structural defectiveness, and use defectiveness arising out of the lack of, or the adequacy of, warnings, instructions, and labels." 69 The plaintiff, Ilosky, did not allege that the tires were designed defectively or that they were manufactured such as to be defective; rather, she claimed that Michelin's and Ferguson's attempts to warn her of the dangers inherent to mixing conventional and radial tires were inadequate and consequently did not meet the legal standard. The court noted that in order "[f]or the duty to warn to exist, the use of the product must be foreseeable to the manufacturer or seller." 70 The court then deferred to the trial court's finding that the plaintiff's use of the product was foreseeable. 71 Hence, the defendants were found to have a duty to warn.

The appellant objected to the trial court's instruction as to the scope of its duty to warn. 72 The evidence showed that Michelin had been aware of the danger of mixing the tires and had mentioned that danger in company literature. Nevertheless, for someone in the plaintiff's position, the warnings were found to be inadequate. Ilosky had purchased her car with the Michelin radial tires already on it. Furthermore, Ferguson was not an official Michelin dealer. Thus, although it was found to be foreseeable that someone in Ilosky's situation could obtain Michelin radials and mix them with conventional tires, no provision had been made for a warning of the resultant dangers to reach such a user.

The court emphasized that it did not interpret the jury's decision as finding that the only way to adequately warn a user was to put a warning on the tires. 73 Noting that was not the issue, the court said the focus should be on

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Tracted from earlier cases. The court reaffirmed its holding that per diem arguments could not be presented to the jury. Also, the court held that a plaintiff did not have to forego the collateral source rule to recover prejudgment interest.

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69 Id. at 682.
70 307 S.E.2d at 609.
71 Id. at 610.
72 The appellee's instruction, which was accepted by the court, read:
The seller of a product has the duty to:
1. Warn that the product, even if harmless or safe in itself, is, when mixed or used
   in conjunction with another product, dangerous or potentially dangerous to users, where
   it is reasonably foreseeable that uninformed users may mix the products.

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Id. at n.6.
73 Id. at 611.
whether Michelin's efforts to warn were adequate;\textsuperscript{14} moreover, that question should be decided by the jury.\textsuperscript{15}

The appellant further objected to the trial court allowing the jury to consider the plaintiff's case under both a theory of negligence and a theory of strict liability. It argued that the plaintiff should be forced to choose which theory to pursue. The court disagreed. It stated that a product liability suit could be prosecuted under three theories—strict liability, negligence and warranty.\textsuperscript{16} "To permit plaintiffs to plead alternative causes of action, but to force them to choose one theory to submit to the jury after the taking of evidence would force some plaintiffs to forego the strict liability cause of action if they believed they had stronger negligence or warranty cases."\textsuperscript{17} The court concluded that it would allow as many theories to go to the jury as were supported by the evidence.\textsuperscript{18}

Although the court disposed of most of the issues raised in Michelin by the application of established law, including a deferential standard to findings by the trier of fact, this case does indicate the broadness with which the court defines a manufacturer's duty to warn the public of potential dangers stemming from its product. If a product, though not dangerous in and of itself, could become dangerous when used in a foreseeable manner, then the manufacturer should take steps to ensure that a warning gets into the hands of that consumer. Depending upon the product and its means of distribution, the warning may have to be of the type which could overcome the foreseeable nonfeasance of a middleman.

### III. Punitive Damages

\textit{Wells v. Smith, 297 S.E.2d 872 (W. Va. 1982).}

\textit{Perry v. Melton, 299 S.E.2d 8 (W. Va. 1982).}

The question of whether a defendant can be assessed punitive damages and no compensatory damages while his co-defendants are assessed both was answered in the affirmative in \textit{Wells v. Smith}.\textsuperscript{19} The plaintiffs (appellants) instituted a civil conspiracy action against John Settimio and various other defendants as a result of the theft of jewels and rare coins from their home. Settimio allegedly became involved after the theft in efforts to "fence" the stolen goods. Evidence at the trial showed he was a lesser actor in the alleged conspiracy. While the civil trial resulted in large compensatory and

\textsuperscript{14} Id.

\textsuperscript{15} Id.

\textsuperscript{16} Id. at 613.

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} 297 S.E.2d 872 (W. Va. 1982).
punitive damages being assessed against Settimio's co-defendants, Settimio was found liable for $10,000 in punitive damages only. Upon motion, the trial court set aside that part of the award directed against Settimio.

On appeal, the appellee, Settimio, argued that since the punitive damages did not bear a "reasonable relation" to the compensatory damages, the trial court did not err in striking that portion of the plaintiffs' award. He relied on the "reasonable relation" rule as set forth in the 1946 case of Toler v. Cassinelli.62 The court, after reviewing the history of punitive and compensatory damages in this country and in West Virginia in particular, concluded that the statement of the rule in Toler was flawed. The court quoted the following language from a case decided twenty-six years before Toler which the Toler court had relied upon: "[P]unitive damages are proper only where compensatory damages are allowable, and they must bear some reasonable proportion to the actual damage sustained."63 The Toler court interpreted this language as stating that an award for punitive damages must be in a reasonable proportion to the compensatory damages awarded.64 The court in Wells found the better interpretation to be that punitive damages may be awarded where there is evidence of actual damage to the plaintiff.65 Thus, the validity of the punitive award does not depend upon the amount of actual damages actually recovered.

Having found that the reasonable relation rule had been overstated in West Virginia, the court then offered a mild criticism of the rule as it existed in any form.66 In the court's opinion, an emphasis on the mathematical ratio of the respective awards failed to properly prioritize the role of punishment in the jury's award. It found the idea of punishment to be reason enough to support punitive damages "in cases where the defendant's conduct has been egregious but where the plaintiff has suffered indeterminate or nominal damages."67 The court reaffirmed language recently set forth in Leach v. Biscayne Oil and Gas Co.68 which states that a jury should consider the totality of the circumstances in awarding punitive damages.69 The court also noted a

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64 129 W. Va. at 601, 41 S.E.2d at 674.
65 297 S.E.2d at 880.
66 Id. at 878.
67 Id.
68 299 S.E.2d 197 (W. Va. 1982).
69 "In assessing [punitive] damages, the trier of fact should take into consideration all of the circumstances surrounding the particular occurrence including the nature of the wrongdoing, the extent of the harm inflicted, the intent of the party committing the act, the wealth of the perpetrator, as well as any mitigating circumstances . . . ." 297 S.E.2d at 878 (quoting Leach v. Biscayne Oil & Gas Co., 289 S.E.2d 197, 201, which had quoted Leimgruber v. Claridge Assoes. Ltd., 78 N.J. 450, 456, 375 A.2d 652, 655-56 (1977)) (brackets in original).
trend in its recent decisions away from a strict adherence to the "reasonable relation" rule.\textsuperscript{68}

Although the court criticized the "reasonable relation" rule, it was not willing to allow a jury a completely free hand in dispensing punitive damages. "[W]here the award of punitive damages has no foundation in the evidence so as to evince passion, prejudice or corruption in the jury ... the award [should] be set aside as excessive."\textsuperscript{98} In this case the court found the "foundation in the evidence" to be tied to the civil conspiracy theory upon which the plaintiffs prosecuted their claim.\textsuperscript{99} It found the instruction tendered by the plaintiffs, and refused by the trial court, to be a correct statement of the law: the acts by members of a civil conspiracy are the acts of all.\textsuperscript{99} Hence, evidence of Settimio's implication in the civil conspiracy and the rendering of compensatory damages against his co-conspirators provided the basis for the punitive award against him. The civil conspiracy theory was significant only in that it allowed the evidence of actual damage to be imputed to Settimio.

As an added note, the court remarked that it did not address the issue of "whether an independent cause of action lies for punitive damages. ..."\textsuperscript{92} It did, however, indicate that recent decisions pointed in that direction.\textsuperscript{93} Such a development would be contrary to the established principle of tort law that the tortious act must have caused damage.\textsuperscript{94}

Less than a month after the \textit{Wells} decisions was handed down, the court, in \textit{Perry v. Melton},\textsuperscript{95} declared that the estate of a deceased tortfeasor could be held liable for punitive damages. This case stemmed from a violent car accident in which the appellant's decedent and the tortfeasor were killed. Since the deceased tortfeasor was found to be intoxicated at the time of the accident, the administratrix of the victim's estate asked that the jury be instructed to consider punitive damages. The trial court ruled that punitive damages would serve no purpose against a dead tortfeasor since the sole motivation for assessing punitive damages, in its opinion, is to punish the wrongdoer.\textsuperscript{95} The administratrix appealed the denial of her instruction.

\textsuperscript{68} Mauck v. City of Martinsburg, 289 S.E.2d 216 (W. Va. 1981), holding that the insulting words statute authorized the recovery of damages without proof of actual harm; Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982), allowing recovery for emotional distress without proof of physical trauma.

\textsuperscript{69} 297 S.E.2d at 880.

\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id. at 881.

\textsuperscript{73} See Mauck v. City of Martinsburg, 289 S.E.2d 216 (W. Va. 1981); Harless v. First Nat'l Bank in Fairmont, 289 S.E.2d 692 (W. Va. 1982).

\textsuperscript{74} W. PROSSER, \textsc{Handbook of the Law of Torts} § 30 (4th ed. 1971).

\textsuperscript{75} 299 S.E.2d 8 (W. Va. 1982).

\textsuperscript{76} Id. at 11.
Justice Harshbarger, writing for a unanimous court, found that punitive damages served other purposes than the mere punishment of the individual wrongdoer. He concentrated on the general deterrent to society and the additional compensation afforded to the aggrieved party. Harshbarger especially relied upon *Hensley v. Erie Insurance Company*, where the court found that punitive damages provided the plaintiff with an "extra measure of recovery" for a defendant's outrageous and wanton conduct. In light of the emphasis put on the extended compensation of the wronged plaintiff, the court could not find "sufficient justification ... for denying punitive damages simply because the tort-feasor is dead."

The court's expansive perception of the role of punitive damages can only lead to their greater utilization by the bar in West Virginia, especially where a defendant's conduct is deemed to be outrageous or grossly wanton.

IV. INSURANCE


In *Meadows v. Employers' Fire Ins. Co.* the court reexamined for the first time in more than fifty years the standard fire policy limitation for filing suit. The appellant, Acel Meadows, was the owner of a building, insured by the appellee, which was damaged by fire on or about April 15, 1972. His insurance claim was denied on October 17, 1972; he did not file suit until February 21, 1979. The Circuit Court of Braxton County dismissed the appellant's suit on the ground that the action was barred by the twelve-month limitation on actions specified in the fire insurance contract. On appeal the appellant argued that the ten-year statute of limitations for written contracts should apply and that the one-year limitation provision in the policy was unconscionable.

The court, speaking through Justice Miller, rejected appellant's argument that the ten-year general statute of limitations for contracts should apply to this case. The court held that the state legislature, in adopting the text of the New York Standard Fire Policy and its one-year limitation period, had specifically rejected the longer limitation term for insurance policies. The court then turned its attention to the question of just when the one-year period set forth in the policy begins to run.

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97 Id. at 13.
99 Id. at 233.
100 299 S.E.2d at 13.
101 298 S.E.2d at 874 (W. Va. 1982).
102 Id. at 875.
103 Id.
104 Id. at 876.
The court noted that it had last addressed the issue in *Kirk v. Firemen's Insurance Company of Newark*. The *Kirk* court held that the one-year limitation on actions must be read together with the provision in the policy which states that payment shall be due sixty days after proof of loss. Hence, in *Kirk* the court announced the rule that the one-year limitation on actions does not begin to run until sixty days after the proof of loss. The insurance company in *Meadows* relied upon *Kirk* and *Prete v. Royal Globe Ins. Co.* in arguing that actions are barred one year and sixty days from the date of loss. The court declared first that *Kirk* could be interpreted as allowing a longer period than one year and sixty days from the date of loss; the *Kirk* court focused on the date the proof of loss was returned to the company, not the date of loss. Secondly, the court declared that the *Kirk* court had been derelict in examining all the wording of the loss payable clause in the standard policy.

The *Meadows* court, upon careful reading of the loss payable clause, found that the wording was such that the insurer did not automatically have a duty to pay the insured's claim sixty days after the proof of loss was received by the company. Rather, the court's interpretation of the clause was that the proof of loss had to be received and "ascertainment of the loss . . . made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided." Both of these conditions had to be satisfied before the insurer

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108 The language of the policy clauses between *Kirk* and *Meadows* changed little. The present language of the limitation of suit clause is as follows:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

298 S.E.2d at 876 n.7. The present loss payable clause provides:

The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

298 S.E.2d at 876 n.8.

107 W. Va. at 666, 150 S.E. at 2.

109 533 F. Supp. 332 (N.D. W. Va. 1982). The *Prete* case points out the confusion which the one-year limitation period can produce. A landlord had brought suit against his insurance company on October 11, 1979, for a water damage claim, the source of which he discovered in July, 1978. The court, citing *Kirk* as implicitly holding that the limitation period was one year plus 60 days from the date of loss (or discovery of loss), ruled that the action was time barred. But *Kirk* did not hold that the 60 days ran from the date of loss; rather, it stated that the 60 days and the year commenced to run from the date of the proof of loss. Clearly, the *Prete* court misread *Kirk*.

298 S.E.2d at 877.

110 Id.

107 W. Va. at 666, 150 S.E. at 2.

111 298 S.E.2d at 877.

112 Id.
was obligated to pay under the terms of the policy. As a result, the court concluded that the better rule was to toll the running of the one-year limitation until the insurer had given written notice to the insured of the claim denial.\textsuperscript{114}

Finally, the court summarily dismissed any argument that a clause of a legislatively approved contract, such as the standard fire policy, could be against public policy as unconscionable. Unconscionability, the court said, was usually a result of disparity in the bargaining positions of the respective parties.\textsuperscript{115} The court found no bargaining to have occurred here.

V. COMMON CARRIERS


In deciding \textit{Adkins v. Slater},\textsuperscript{116} the West Virginia Supreme Court of Appeals did not take any radical departures from the law governing common carriers. Indeed it applied law which has been settled for more than a hundred years.\textsuperscript{117}

The appellants were the owners of a mobile home located in Putnam County, West Virginia. Wanting to move their home to another parcel of property, they retained the appellees, Benjamin Moles and Claude Slater (Slater was doing business as Buster's Garage), to do the moving. On May 31, 1978, the appellees attempted to move the mobile home. As a result of their efforts, the mobile home sustained damage which prevented it from being transported more than a short distance from the starting point. The damaged dwelling, which was blocking street traffic, was impounded by the Putnam County Sheriff's Office and sold when the appellants were unable to pay the resulting costs. To recover their damages, the appellants brought suit against the two movers in the Circuit Court of Kanawha County. The appellants then appealed from a verdict directed against them by the trial court on the ground that they had failed to establish a prima facie case for negligence.

The supreme court, in a per curiam opinion, declared that the trial court had erred in deciding as a matter of law that the appellees were not common law common carriers and therefore were not in the position of an insurer for the goods they carried.\textsuperscript{118} The court also found that the trial court should have allowed the issue of the appellees' negligence to go to the jury.\textsuperscript{119}

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} 298 S.E.2d 236 (W. Va. 1982).
\textsuperscript{117} The court cited several older cases. See \textit{Maslin v. B. & O. R.R. Co.}, 14 W. Va. 180 (1878); Baltimore & Ohio R.R. Co. v. Morehead, 5 W. Va. 233 (1872); \textit{Brown v. Adams Express Co.}, 15 W. Va. 812 (1879).
\textsuperscript{118} 298 S.E.2d at 240.
\textsuperscript{119} Id. at 242.
First, the court dusted off a couple of old West Virginia cases which set forth the definition of a common law common carrier 120 and which point out the breadth of the category. 121 The court then determined that the trial court should have allowed the jury to decide if the appellees were acting as common carriers. "What constitutes a common carrier is a question of law, but whether a party in a particular instance comes within the class is a question of fact, to be determined as the case may arise." 122

Assuming the appellees were found to be acting as common carriers, the court would also apply the common law rule that the carrier was strictly liable for damages caused to goods under his care, with a few exceptions. 123 One of these exceptions to this rule applies if a defect in the good itself caused the damage. The appellees argued that it was not their negligence but a tire blowout on the mobile home which caused the damage. The court recognized the defense but added that "[i]f they are able to prove that there was a defect in the mobile home which caused or contributed to the damages, they must also prove that by the exercise of due care they could not have prevented the damage." 124

The court agreed with the trial court's refusal to apply the doctrine of res ipsa loquitur. The appellants had not proved two of the three elements essential to that doctrine. 125 The appellants did not show that the appellees were in exclusive control of the instrumentality which caused the damage, nor did they present evidence "that the injury in this case was such that in the course of events would not have happened had the appellees used due care." 126

The court, however, did find that the appellants should have been allowed to send the issue of negligence to the jury. 127 The moving of a mobile

122 298 S.E.2d at 240 (quoting State v. Vaughan, 97 W. Va. 563, 568, 125 S.E. 583, 585 (1924)).
123 In McGraw v. B. & O. R.R. Co., 18 W. Va. 361 (1881), the court stated in syllabus point one: A common carrier at common law is liable for the loss or damage to goods received for transportation from whatever cause arising, except the act of God, the public enemy or the conduct of the owner of the goods unless such loss or damage arises from the nature and inherent character of the property carried, provided he has used foresight, diligence, and care to avoid such damage and loss.
124 298 S.E.2d at 241.
125 In syllabus point two of Royal Furniture Co. v. City of Morgantown, 263 S.E.2d 878 (W. Va. 1980), the court said: Before the doctrine of res ipsa loquitur is applicable, three essentials must exist: 1) the instrumentality which causes the injury must be under the exclusive control and management of the defendant; 2) the plaintiff must be without fault; and, 3) the injury must be such that in the ordinary course of events it would not have happened had the one in control of the instrumentality used due care.
126 298 S.E.2d at 242.
127 Id.
home is not so complex, according to the court, as to require expert testimony to establish the standard of care. In addition, "in common carrier cases, evidence of delivery to the carrier of goods in good condition and their delivery to the consignee in bad condition makes out a prima facie case of negligence." 

For West Virginia, this case might seem aberrational in one respect—the vintage of the authority relied upon by the court. It appears, however, that at least one area of the law from the Victorian age—the duties placed upon common carriers—is compatible with the present court's ideology.

VI. MASS TORT CLASS ACTIONS


Although class actions are not a common occurrence in West Virginia, the state's highest court recently injected new blood into the rule of civil procedure under which class actions may be maintained.

In Burks v. Wymer the court was faced with issues stemming from the denial of the appellant's motion to proceed by class action in the Circuit Court of Kanawha County. Mrs. Thomas Burks, the appellant, had sought to represent a class of Charleston homeowners whose homes and personal property were purportedly damaged by the negligent or intentional acts of adjacent but higher located landowners. The appellees, who jointly owned the adjacent property, had allegedly altered the topography of their land in such a way as to cause the properties below to be damaged by rockslides and floods. Mrs. Burks, as one of the injured homeowners, appealed the denial of her class action motion.

The court initially noted that under the 1938 version of Rule 23 of the Federal Rules of Civil Procedure, which was similar to West Virginia Rule 23, three types of class actions were authorized: true, hybrid and spurious. The court placed Mrs. Burks' proposed class action under the type labeled "spurious." Referring to Moore's Federal Practice, the court defined spurious class actions "as a class action where the character of the right is several and a common question of law or fact is presented and a common relief is sought." It then concluded that a mass tort class action, such

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123 Id.
124 Id.
125 Burks v. Wymer, 307 S.E.2d 647, 652. The court notes the rarity of class actions.
126 Id.
127 FED. R. CIV. P. 23.
128 W. VA. R. CIV. P. 23.
129 307 S.E.2d at 652 n.6.
as Mrs. Burks', "must fall into this category of class actions, as the claims of plaintiffs in a tort action are, by their nature, several as opposed to joint, common or secondary."\(^{117}\)

Justice McHugh, writing for the court, compared the 1938 and 1966 versions of Federal Rule 23 and found that the latter version was more restrictive of the so-called "spurious" class action in that it required a finding that common issues predominated the action and a determination that the class action was superior to other methods of bringing the suit.\(^{118}\) The 1938 and West Virginia versions of the rule contained no predominance or superiority requirements.

The 1966 version of Federal Rule 23 authorizes mass tort class actions under part (B)(3) of that rule.\(^{119}\) As mentioned, that provision requires findings of predominance and superiority; it also lists four factors to be considered in deciding the predominance and superiority questions.\(^{140}\) In adopting nine factors\(^{141}\) for West Virginia trial courts to consider before allowing a "spurious"
class action to proceed, the court incorporated the four factors found in the federal rule. Hence, the new Federal Rule 23 and the West Virginia Rule 23, as modified by the court's nine factors, would appear on their faces to be roughly equivalent in nature and effect. However, the court deemed it unnecessary for West Virginia to adopt the strict federal approach to the findings of predominance and superiority. "West Virginia courts do not face the flood of class actions which the federal courts seek to limit by rigid requirements. Accordingly, we adopt a more flexible approach." Having said that, however, the court did not specify the level of scrutiny which would apply to the determination of these two crucial issues. Instead, West Virginia Rule 23(a)(3) is left somewhere between the 1938 rule, which required no findings of predominance and superiority, and the 1966 rule which requires absolute findings. By stopping short of the strict structure of the federal rule, the court appears to be signalling that its forum will be more receptive to "spurious" or mass tort class actions than the federal court system.

The court also declared that when a class action motion is before a court, that court can direct limited discovery to take place regarding the propriety of bringing the class action. This discovery, however, cannot reach the merits of the case.¹⁴³

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(2) whether other means of adjudicating the claims and defenses are practicable or inefficient;
(3) whether a class action offers the most appropriate means of adjudicating the claims and defenses;
(4) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;
(5) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;
(6) whether it is desirable to bring the class action in another forum;
(7) whether management of the class action poses unusual difficulties;
(8) whether any conflict of laws issues involved pose unusual difficulties; and
(9) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

¹³ Id.
¹⁴² Id. at 654.