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# Torts--Governmental Immunity--Municipal Immunity Abolished

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## TORTS—GOVERNMENTAL IMMUNITY—MUNICIPAL IMMUNITY ABOLISHED

The City of Weirton, a municipal corporation, was excavating a public street in preparation for future curbing and paving. The excavators struck a buried gas transmission line and, as a result of the ensuing gas leak, an explosion and fire occurred at a private residence. An action was instituted in the Circuit Court of Hancock County on behalf of Susan Marie Long, an infant, by her co-guardians for damages resulting from personal injuries suffered in the explosion and fire caused by the alleged concurrent negligence of the city, the gas company, and two other defendants. Judgment was entered on a jury verdict against the city and the gas company. The trial court granted the city's post-trial motion for judgment notwithstanding the verdict based upon the doctrine of governmental immunity, thereby allowing the judgment to stand against the gas company alone. The gas company appealed. *Held*: judgment against the gas company affirmed, order exonerating the city reversed and remanded for reinstatement of the verdict against the city. The rule of municipal government immunity from tort liability is now abolished in West Virginia. *Long v. City of Weirton*, 214 S.E.2d 832 (W. Va. 1975).

With the decision in *Long v. City of Weirton*, West Virginia has joined "the ever-increasing number of jurisdictions which have judicially abrogated [the] antiquated doctrine"<sup>1</sup> of governmental immunity from tort liability. The court was careful to note, however, that the abrogation of immunity in *Long* applied only to municipal corporations; the question of immunity from suit of counties was reserved for future consideration.<sup>2</sup>

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<sup>1</sup> *Long v. City of Weirton*, 214 S.E.2d 832, 859 (W. Va. 1975).

<sup>2</sup> "We wish to note that the instant decision abolishing the doctrine of municipal immunity from tort liability should not be taken likewise to have abrogated the supposed immunities of county governments. The question of immunity, or lack thereof, of counties in respect to their governmental activities represent an analogous and similar but different body of law in this jurisdiction. The distinctions are noted and made in the representative cases of *Watkins v. County Court*, 30 W. Va. 657 (1888) and *Cunningham v. County Court*, 148 W. Va. 303, 134 S.E.2d 725 (1964).

Prior to *Long*, the law of governmental immunity in West Virginia was a hodge-podge of distinctions and exceptions. The State itself is immune from suit by virtue of article VI, section 35 of the West Virginia Constitution.<sup>3</sup> This provision also protects state agencies,<sup>4</sup> but those agencies immune from suit are within the jurisdiction of the court of claims.<sup>5</sup> Additionally, a state agency which is covered by a policy of liability insurance may be subject to suit in a circuit court if the proper procedure is followed.<sup>6</sup>

Historically, a municipality was liable for tortious conduct only when liability was statutorily imposed,<sup>7</sup> or when the injury-producing activity was characterized as a "proprietary function"<sup>8</sup> of the municipality, i.e., a function normally undertaken by a pri-

Review of those matters shall remain for another day."

*Id.* at 860.

<sup>3</sup> W. VA. CONST. art. VI, § 35 provides: "The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee."

<sup>4</sup> *Kondos v. West Virginia Bd. of Regents*, 318 F. Supp. 394 (S.D.W. Va. 1970); *Mahone v. State Rd. Comm'n*, 99 W. Va. 397, 129 S.E. 320 (1925); *Schippa v. West Virginia Liquor Control Comm'n*, 132 W. Va. 51, 53 S.E.2d 609 (1948); *Hesse v. State Soil Conservation Comm.*, 153 W. Va. 111, 168 S.E.2d 293 (1969); *State ex rel. C & D Equip. Co. v. Gainer*, 154 W. Va. 83, 174 S.E.2d 729 (1970) (state office building commission).

<sup>5</sup> The court of claims was created by the State Legislature to deal with claims brought against the State and State agencies within the court's jurisdiction. See W. VA. CODE ANN. § 14-2-1 *et seq.* (1972 Replacement Volume). See also, Note, 76 W. VA. L. REV. 543, 559 & n.60 (1974).

In *Morgantown v. Ducker*, 153 W. Va. 121, 168 S.E.2d 298 (1969), the court devised six criteria to determine whether a particular entity is a state agency, and then held that any entity meeting these criteria is within the jurisdiction of the court of claims. *Id.* at 125-31, 168 S.E.2d at 301-04.

<sup>6</sup> In *State ex rel. Scott v. Taylor*, 152 W. Va. 151, 160 S.E.2d 146 (1968), the court gave effect to a pre-trial stipulation whereby the plaintiff agreed to refrain from enforcing any portion of a judgment in excess of policy limits in return for the Attorney General's agreement not to assert the state's immunity. See generally, Note, 76 W. VA. L. REV. 543, 557 (1974).

<sup>7</sup> W. VA. CODE ANN. § 17-10-17 (1974 Replacement Volume) imposes liability on municipalities for defective streets and sidewalks when the defect is due to negligence on the part of the municipality. See, *Miller v. Morgantown*, 208 S.E.2d 780 (W. Va. 1974).

<sup>8</sup> Examples of proprietary functions include swimming pools (*Ashworth v. Clarksburg*, 118 W. Va. 476, 190 S.E. 763 (1937)), public parks (*Warden v. Grafton*, 99 W. Va. 249, 128 S.E. 375 (1925)), and a waterworks system (*Wigal v. Parkersburg*, 74 W. Va. 25, 81 S.E. 554 (1914)).

vate corporation.<sup>9</sup> If the injury-producing activity was held to be a "governmental function" of the municipality, it was immune from suit.<sup>10</sup> Arguably, liability could also be imposed if the municipality was protected by liability insurance.<sup>11</sup> However, the jurisdiction of the court of claims specifically excludes municipalities.<sup>12</sup>

The *Long* decision cannot be utilized as the basis for an attack on the immunity of the State since the State's immunity is expressly granted by the West Virginia Constitution. However, the methodology employed by the court in *Long* does provide the analytical vehicle for mounting an attack on the immunity of all governmental units not protected by the State's sovereign immunity. In *Long*, before the court abrogated municipal immunity, it initially determined that (1) the immunity of a municipal corporation was not derived from article VI, section 35 of the State constitution,<sup>13</sup> and (2) that municipal corporations were not immune by virtue of the constitutional and statutory incorporation of the common law into West Virginia jurisprudence.<sup>14</sup> These potential inhibitions against judicial abrogation of municipal immunity neces-

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<sup>9</sup> 49 Op. Att'y Gen. 133 (1961).

<sup>10</sup> Examples of activities held to be governmental functions include airports (*Van Gilder v. Morgantown*, 136 W. Va. 831, 68 S.E.2d 746 (1949)), fire departments (*Mendel & Co. v. Wheeling*, 28 W. Va. 233, 57 Am. R. 664 (1886)), and jails (*Shaw v. Charleston*, 57 W. Va. 433, 50 S.E. 527 (1905)).

<sup>11</sup> See note 6, *supra*.

<sup>12</sup> W. VA. CODE ANN. § 14-2-3 (1972 Replacement Volume).

<sup>13</sup> 214 S.E.2d at 850.

<sup>14</sup> 214 S.E.2d at 850-54. The court construed W. VA. CONST. art. XI, § 8 (1863) and W. VA. CODE § 2-1-1 (1931). The current constitutional and statutory provisions are W. VA. CONST. art. VIII, § 13 and W. VA. CODE ANN. 2-1-1 (1972 Replacement Volume).

W. VA. CONST. art. XI, § 8 (1863) provided:

Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of this State until altered or repealed by the legislature.

W. VA. CODE ANN. § 2-1-1 (1972 Replacement Volume) provides:

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

sarily had to be eliminated as bars to dealing with the immunity rule itself. If the court had determined that municipal immunity was derived from either the state's sovereign immunity or the common law, the court would have held that it lacked the authority to effect any change in the law.<sup>15</sup>

The first bar to abolishing municipal immunity—the state's constitutionally granted sovereign immunity—was essentially eliminated in *Higginbotham v. City of Charleston*.<sup>16</sup> Language in earlier cases had extended the state's immunity to municipalities;<sup>17</sup> however, this notion was dispelled in *Higginbotham*:

The defendant city contends that Code 1931, 17-10-17, as amended, is unconstitutional in that it attempts to deprive the City of Charleston of its governmental immunity from suit. It argues that such immunity exists by virtue of Article VI, Section 35 of the West Virginia Constitution . . . . It asserts that the City of Charleston as a "branch" of the state comes within the ambit of such constitutional provision. We do not agree with the contention of the defendant. *The clear and unambiguous language of Article VI, Section 35 of the West Virginia Constitution precludes only the State of West Virginia from being made a defendant.* (Emphasis added.)<sup>18</sup>

The second bar to abrogation of the immunity of municipal corporations—the constitutional and statutory incorporation of the common law into the law of West Virginia—was eliminated by the court's determination that wholesale governmental immunity from tort liability had never been a part of the common law mandated into West Virginia jurisprudence.<sup>19</sup> The common law immunity of local governmental units supposedly had its genesis in the English decision in *Russell v. Men of Devon*,<sup>20</sup> wherein an action was held not to lie against the inhabitants of the County of Devon. The actual rationale for the *Russell* decision has been the

<sup>15</sup> See, W. VA. CONST. art. XIV, § 2 (re: amending the state constitution); 71 W. VA. L. REV. 341 (1969).

<sup>16</sup> 204 S.E.2d 1 (W. Va. 1974).

<sup>17</sup> *Hayes v. Cedar Grove*, 126 W. Va. 828, 30 S.E.2d 726 (1944); *Brown's Adm'r v. Guyandotte*, 34 W. Va. 299, 12 S.E. 707 (1890).

<sup>18</sup> 204 S.E.2d at 7.

<sup>19</sup> "Based upon this juridical chronology of the governmental rule,—from English decisions, American adoption and Virginia cases, it is our view that the rule of governmental immunity for municipal corporations was not incorporated into our jurisprudence by the constitutional provision or by W.Va.Code 1931, 2-1-1 or its predecessor version." 214 S.E.2d at 854.

<sup>20</sup> 2 Term Rep. 667, 100 Eng. Rep. 359 (1788).

subject of much scholarly debate;<sup>21</sup> however, in *Long* the West Virginia Supreme Court of Appeals placed great weight on the fact that the men of Devon were unincorporated.<sup>22</sup> A subsequent English case, *The Mayor and Burgesses of Lyme Regis v. Henley*,<sup>23</sup> was cited for the proposition that an incorporated public body was not immune from suit at common law.<sup>24</sup> The court noted that no Virginia decisions had adopted governmental immunity prior to 1863;<sup>25</sup> and, therefore, concluded that "the power to adopt, abrogate or modify the so-called rule of 'municipal immunity' from tort liability is not within the exclusive province of the Legislature."<sup>26</sup>

Having determined that it was competent to do so, the court then reconsidered the doctrine of municipal immunity on policy grounds. Noting the confusion generated by the "nightmarish distinction in the law of municipal liability: the 'governmental-proprietary dichotomy,'" <sup>27</sup> the pervasive impact of governmental activities on private life,<sup>28</sup> and the uncertainty as to what risks a municipality should insure against,<sup>29</sup> the court concluded that the previously existing body of law surrounding municipal liability was "unsound and unworkable."<sup>30</sup> Thus, the new rule was announced: "Now and hereafter, a municipal corporation shall be liable as if a private person, for injuries inflicted upon members of the public which are proximately caused by its negligence in the performance of functions assumed by it."<sup>31</sup>

The court's reasoning in *Long* strongly foreshadows the fall of county immunity because the same arguments raised to abolish the immunity of municipal corporations are applicable to counties. As was pointed out in *Higginbotham*, only the sovereign immunity

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<sup>21</sup> W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 131 at 978 (4th ed. 1971).

<sup>22</sup> "Significantly, the defendants were characterized as mere individuals, unorganized as a public body and unincorporated. Moreover, because there was no such official body, the court found no treasury, public or otherwise, from which a judgment could be satisfied . . . (I)t seems apparent that the court might have reached a different conclusion had the men of Devon been incorporated." 214 S.E.2d at 852.

<sup>23</sup> 3 B & AD 77, 110 Eng. Rep. 29 (1832).

<sup>24</sup> 214 S.E.2d at 853.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 854.

<sup>27</sup> *Id.* at 856.

<sup>28</sup> *Id.* at 857.

<sup>29</sup> *Id.* at 858.

<sup>30</sup> *Id.* at 859.

<sup>31</sup> *Id.*

of the state is beyond the reach of the court.<sup>32</sup> The abolition of municipal immunity in *Long* turned upon the fact that the governmental defendant was incorporated, not that it was a municipality as opposed to a county.<sup>33</sup> County courts—now county commissions<sup>34</sup>—are incorporated<sup>35</sup> and have means whereby a judgment may be satisfied.<sup>36</sup> The same governmental-proprietary distinction that the court referred to as “nightmarish” in the law of municipal liability exists in the law of county liability,<sup>37</sup> and the county, like the municipality, is excluded from the jurisdiction of the court of claims.<sup>38</sup> Moreover, the fact that a county court has procured liability insurance does not waive its immunity.<sup>39</sup> In short, the factors that influenced the court to abolish the immunity of municipal corporations from tort liability exist in the law of county liability.

An attempt to predict the future of governmental immunity should not stop with counties. There are many governmental units created or authorized by statute which have the capacity for tortious conduct.<sup>40</sup> These units can be termed “public corporations,”<sup>41</sup>

<sup>32</sup> 204 S.E.2d at 7.

<sup>33</sup> 214 S.E.2d at 852.

<sup>34</sup> W. VA. CONST. art. IX, § 9 (Supp. 1975).

<sup>35</sup> W. VA. CODE ANN. § 7-1-1 (1969 Replacement Volume).

<sup>36</sup> W. VA. CODE ANN. § 7-5-3 (1969 Replacement Volume) sets forth a procedure for making claims against a county. W. VA. CODE ANN. § 7-5-8 (1969 Replacement Volume) requires that a demand for payment be made prior to institution of suit. W. VA. CODE ANN. § 7-5-9 (1969 Replacement Volume) provides that a judgment may be satisfied out of the next county levy.

<sup>37</sup> *Ward v. County Court*, 141 W. Va. 730, 738-39, 93 S.E.2d 44, 48-49 (1956).

<sup>38</sup> W. VA. CODE ANN. § 14-2-3 (1972 Replacement Volume).

<sup>39</sup> In *Cunningham v. County Court*, 148 W. Va. 303, 309, 134 S.E.2d 725, 729 (1964), the court held that “the county court’s immunity is not affected by the fact that it carried the policy of liability insurance.” The decision in *State ex rel. Scott v. Taylor* certainly weakens this decision. See *supra*, note 6. It is patently absurd that the purchase of insurance by the State effects a waiver of immunity within coverage limits, whereas, the purchase of insurance by a county court does not affect its immunity.

<sup>40</sup> Included are watershed improvement districts (W. VA. CODE ANN. § 19-21B-1 *et seq.* (1972 Replacement Volume)), sanitary districts (W. VA. CODE ANN. § 16-12-1 *et seq.* (1972 Replacement Volume)), public service districts (W. VA. CODE ANN. § 16-13A-1 *et seq.* (1972 Replacement Volume)), regional airports (W. VA. CODE ANN. § 8-29-1 *et seq.* (1969 Replacement Volume)), and building commissions (W. VA. CODE ANN. § 8-33-1 *et seq.* (1969 Replacement Volume)).

<sup>41</sup> “Public corporations are classified as municipal, quasi-municipal, and public-quasi corporations. Public corporations include not only municipal corpora-

and are distinguished from governing bodies—municipal corporations, county commissions and the state—on the ground that they are created for a limited, specific purpose.<sup>42</sup>

The first bar to suing a public corporation in tort that must be eliminated is the state's sovereign immunity. In *Hesse v. State Soil Conservation Committee*,<sup>43</sup> the West Virginia Supreme Court of Appeals held that the State Soil Conservation Committee was immune from suit as a state agency, but the Potomac Valley Soil Conservation District was local in nature and, hence, not immune under the provisions of article VI, section 35 of the State constitution.<sup>44</sup> This "local in nature" distinction dovetails with the criteria set forth in *Morgantown v. Ducker*<sup>45</sup> that are determinative of a state agency: (1) the entity's property is held in trust for the state; (2) the entity is dependent on the state legislature for its financial support; (3) the entity functions along lines similar to other state agencies; (4) the entity performs a function which is properly the responsibility of the state; (5) a judgment against it would adversely affect the state; and (6) a judgment would have to be paid out of public funds.<sup>46</sup> Indeed, *Hesse* and *Ducker* are flip sides of the same coin. If a public corporation meets the *Ducker* criteria, it is "state" and immunized by article VI, section 35. However, if the public corporation does not meet the *Ducker* criteria, it must be "local in nature" and, therefore, not immune by virtue of article VI, section 35.<sup>47</sup> *A priori*, it would seem that virtually all public corporations are local in nature,<sup>48</sup> and that the immunity of the

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tions, but all other incorporated agencies of government of whatever size and form or degree . . . . Cities, towns and villages are regarded as true municipalities whereas counties, highway districts, and school districts are considered not to be municipalities but 'quasi municipalities' or public corporations." *State v. Board of Park Comm'rs*, 131 W. Va. 417, 424, 47 S.E.2d 689, 694 (1948).

<sup>42</sup> 131 W. Va. at 426, 47 S.E.2d at 695.

<sup>43</sup> 153 W. Va. 111, 168 S.E.2d 293 (1969).

<sup>44</sup> *Id.* at 118, 168 S.E.2d at 297. In determining that a soil conservation district is local in nature, the court noted, *inter alia*, that no specific district is created by the legislature, that a soil conservation district is not funded by the legislature, and that a soil conservation district has no greater standing than a county board of education, which is excluded from the definition of "state agency" in W. VA. CODE § 14-2-3 (1931). *Id.* at 118, 168 S.E.2d at 297.

<sup>45</sup> 153 W. Va. 121, 168 S.E.2d 298 (1969).

<sup>46</sup> *Id.* at 125-31, 168 S.E.2d at 301-04. *See*, Note, 76 W. VA. L. REV. 543, 548 & n.17 (1974).

<sup>47</sup> *See*, *Higginbotham v. City of Charleston*, 204 S.E.2d 1,7 (W. Va. 1974).

<sup>48</sup> No public corporation cited in note 40 holds property in trust for the State,

state is not a bar to public corporation liability.

The *Long* decision clearly impacts upon the significance of the common law as a bar to suing a public corporation. The determination that the common law did not immunize the City of Weirton was grounded upon the sole criterion that Weirton is incorporated.<sup>49</sup> By this rationale, common law governmental immunity can no longer be utilized as a defense to a tort action by an incorporated governmental unit in West Virginia. Thus, the common law should not bar a suit against a public corporation.

The long-range significance of the *Long* decision is that it teaches how to attack governmental immunity—eliminate the sources of immunity. This does not necessarily indicate that the attack will be successful; but, at the very least, the court is now in a position to decide a governmental immunity case on the proper ground, i.e., whether the immunity of a particular governmental unit can be justified as a matter of public policy. The West Virginia Supreme Court of Appeals has apparently committed itself to cleaning out the “Augean stable”<sup>50</sup> of governmental immunity. Only time will tell whether that task will be accomplished *in toto*, but *Long v. City of Weirton* is a bold step in that direction.

*James Albert Russell*

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nor are any funded by the State Legislature, nor would a judgment against any be paid out of the State treasury. See statutes cited note 40 *supra*.

<sup>49</sup> 214 S.E.2d at 850-54.

<sup>50</sup> According to legend, Augeus, King of Elis, was possessed of an immense stable which had been left unclean for thirty years. The task of cleaning it was given to Hercules who diverted the course of a river and flushed out the Augean stable. The term “Augean stable” was applied to governmental immunity by the Wyoming Supreme Court in *Collins v. Memorial Hospital of Sheridan County*, 521 P.2d 1339, 1341 (Wyo. 1974).

