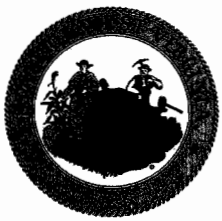
STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1948-1950



Volume

5

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from December 1, 1948,
to November 30, 1950.

By

W. H. PERRY

Clerk

VOLUME V

(Published by authority Code 14-2-25)

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PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE ROBERT L. BLAND . Presiding Judge

HONORABLE A. D. KENAMOND . Judge

HONORABLE JAMES CANN . . Judge

HONORABLE WALTER T. CROFTON, JR.

. Alternate Judge

W. H. PERRY . . . Court Clerk

LENORE THOMPSON . . . . . Law Clerk

WM. C. MARLAND Attorney General

Letter of Transmittal

To His Excellency

The Honorable Okey L. Patteson

Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March sixth, one thousand none hundred forty-one, I have the honor to transmit herewith the report of the State Court of Claims for the peirod from December first, one thousand nine hundred forty-eight to November thirtieth, one thousand nine hundred fifty.

Respectfully submitted,

W. H. PERRY

Clerk.

TERMS OF COURT

Four regular terms of court are provided for annually—the second Monday of January April July and October.

STATE COURT OF CLAIMS LAW

Passed March 6, 1941; amended March 8, 1945

CHAPTER 14, CODE

Article 2. Claims Against the State.

Section

1. Purpose.
2. Definitions.
3. Proceedings against state officers.
4. Court of claims.
5. Court clerk.
6. Terms of court.
7. Meeting place of court.
8. Compensation of members.
9. Oath of office.
10. Qualifications of judges.
11. Attorney general to represent state.
12. General powers of the court.
13. The jurisdiction of the court.
14. Claims excluded.
15. Rules of practice and procedure.
16. Regular procedure.
17. Shortened procedure.
18. Advisory Determination Procedure.
19. Claims under existing appropriations.
20. Claims under special appropriations.
21. Limitations of time.
22. Compulsory process.
23. Inclusion of awards in budget.
24. Records to be preserved.
25. Reports of the court.
26. Fraudulent claims.
27. Repealer.
28. Provisions severable.

Section 1. *Purpose.*—The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and statutory restrictions, inhibitions or limitations cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest.

Sec. 2. *Definitions.*—For the purpose of this article "Court" means the state court of claims established by section four of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of the state government: *Provided, however,* That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

Sec. 3. *Proceedings Against State Officers.*—The following proceedings shall be brought and proecuted only in the circuit court of Kanawha county:

1. Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

2. Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the state obtained in any circuit court.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the state from suit under section thirty-five, article six of the constitution of the state.

Sec. 4. *Court of Claims.*—There is hereby created a "State Court of Claims" which shall be a special instrumentality of

the Legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be heard in a court of law or equity, and recommending the disposition thereof to the Legislature. The court shall not be invested with or exercise the judicial power of the state in the sense of article eight of the constitution of the state. A determination made by the court shall not be subjected to appeal to or review by a court of law of equity created by or pursuant to article eight of the constitution.

The court shall consist of three judges who shall be appointed by the governor with the advice and consent of the senate. The terms of judges shall be six years, except that the first membership of the court shall be appointed as follows: One judge for two years; one judge for four years, and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be members of the same political party. An appointment to fill a vacancy shall be for the unexpired term. The court shall each year elect one of its members as presiding judge.

The governor shall appoint three persons as alternate judges. Whenever a regular judge is unable to serve or is disqualified, the governor shall designate an alternate judge to serve in the place and stead of the regular judge. Alternate judges shall be appointed for six-year terms except that the first alternates appointed shall be designated to serve for two, four, and six year terms as in the case of regular judges. Not more than two alternate judges shall belong to the same political party. The provisions of sections eight to ten, inclusive, of this article with respect to judges shall apply with equal effect to alternates.

Sec. 5. *Court Clerk.*—The court shall have authority to appoint a clerk, and shall fix his salary at not to exceed the sum of three thousand six hundred dollars per annum to be

paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer oaths and affirmations and shall issue all official summonses, orders, statements and awards.

Sec. 6. *Terms of Court.*—The court shall hold at least four regular terms each year, on the second Monday in January, April, July and October. If, however, one week prior to the date of a regular term, no claims are ready for hearing or consideration the clerk, with the approval of the presiding judge, shall notify the members that the court will not be convened. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the presiding judge whenever the number of claims awaiting consideration, or any other pressing matter of official business, makes such a term advisable.

Sec. 7. *Meeting Place of the Court.*—The regular meeting place of the court shall be at the state capitol, and the board of public works shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

Sec. 8. *Compensation of members.*—Each judge of the court shall receive twenty dollars for each day actually served, and actual expenses incurred in the performance of his duties. Requisition for traveling expenses shall be accompanied by a sworn and itemized statement, which shall be filed with the auditor and preserved as a public record. For the purposes of this section, days served shall include time spent in the hearing of claims, in the consideration of the record, and in the preparation of opinions. In no case, however, shall a judge

receive compensation for more than one hundred fifty days' service in any fiscal year.

Sec. 9. *Oath of Office.*—A judge shall, before entering upon the duties of his office, take and subscribe to the oath prescribed by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

Sec. 10. *Qualifications of Judges.*—A judge shall not be a state officer or a state employee except in his capacity as a member of the court. A member shall receive no other compensation from the state.

A judge shall not hear or participate in the consideration of a claim in which he is personally interested. Whenever a member is thus disqualified, the clerk shall notify the governor, and thereupon the governor shall assign an alternate to act during such disqualification. Whenever a judge is unable to attend and serve for any reason, the governor shall, when so notified by the clerk, assign an alternate to act in the absence of the regular judge.

Sec. 11. *Attorney General to Represent State.*—The attorney general shall represent the interests of the state in all claims coming before the court.

Sec. 12. *General Powers of the Court.*—The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or of some statutory restrictions, inhibitions or limitations, could be maintained in the regular courts of the state. But no liability shall be imposed upon the state or any of its agencies by a determination of the court of claims approving a claim and recommeding an award, unless the Legislature has previously made an appropriation for the payment of a claim subject only to the determination of the court. The court shall consider claims in accordance with sections sixteen to twenty, inclusive, of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by three judges. If, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. If the determination of the court is not unanimous, the reasons of the dissenting judge shall be separately stated. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

Sec. 13. *The Jurisdiction of the Court.*—The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counter claim on the part of the state or any of its agencies.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

Sec. 14. *Claims Excluded.*—The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For injury to or death of an inmate of a state penal institution.

3. Arising out of the care or treatment of a person in a state institution.

4. For a disability or death benefit under chapter twenty-three of this code.

5. For unemployment compensation under chapter twenty-one-a of this code.

6. For relief or public assistance under chapter nine of this code.

7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Sec. 15. *Rules of Practice and Procedure.*—The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims.

The court shall also adopt and may from time to time amend rules pertaining to persons appearing as representatives of claimants. Rules shall permit a claimant to appear in his own behalf, or to present his claim through a qualified representative. A representative shall be a person who, as further defined by the rules of the court, is competent to present and protect the interests of the claimant.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh in accordance with its evidential value any information that will assist the court in determining the factual basis of the claim.

Sec. 16. *Regular Procedure.*—The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is *prima facie* within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During a period of negotiations and pending hearing, the state agency and the attorney general's office shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearings. If the parties are unable to agree upon the facts, an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability. Any judge may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible within thirty days.

Sec. 17. *Shortened Procedure.*—The shortened procedure authorized by this section shall apply only to a claim possessing all the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court. The record shall be filed with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

Sec. 18. *Advisory Determination Procedure.*—The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or one of its agencies. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk the record of the claim including a full statement of the facts, the contentions of claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the records submitted and if he

finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When the claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the offier who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be *de novo*.

Sec. 19. *Claims Under Existing Appropriations.*—A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the state agency, the state auditor, and the governor. The governor may thereupon in-

struct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and verified by the court.

Sec. 20. *Claims Under Special Appropriations.*—Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing biennium, determination of claims and the payment thereof may be made in accordance with this section. But this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount of the award shall be fixed by the court. The clerk shall certify each approved claim and award to the governor. The clerk shall issue his requisition to the auditor who shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpanded balance in the appropriation.

Sec. 21. *Limitations of Time.*—The court shall not take jurisdiction over a claim unless the claim is filed within five years after the claim might have been presented to such court. If, however, the claimant was for any reason disabled from maintaining the claim, the jurisdiction of the court shall continue for two years after the removal of the disability. With respect to a claim arising prior to the adoption of this article, the limitation of this section shall run from the effective date of this article: *Provided, however,* That no such claim as shall have arisen prior to the effective date of this article shall be barred by any limitation of time imposed by any other statutory provision if the claimant shall prove to the satisfaction of the court that he has been prevented or restricted from pre-

senting or prosecuting such claim for good cause, or by any other statutory restriction or limitation.

Sec. 22. *Compulsory Process.*—In all hearings and proceedings before the court, the evidence of witnesses and the production of documentary evidence may be required. Summons may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a summons or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers, and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

Sec. 23. *Inclusion of Awards in Budget.*—The clerk shall certify to the director of the budget on or before the twentieth day of November of each year next preceding the year in which the Legislature meets in regular session, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include subsequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the legislature.

Sec. 24. *Records to Be Preserved.*—The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the legislature or any committee thereof for the reexamination of the claim.

Sec. 25. *Reports of the Court.*—The clerk shall be official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for

publication and submission to the Legislature in the form of a biennial report.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the Legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payments out of regular appropriations for the biennium.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the biennium.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its biennial report to the governor who shall transmit a copy thereof to the presiding officer of each house of the Legislature. The biennial reports of the court shall be published by the clerk as a public document.

Sec. 26. *Fraudulent Claims.*—A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer who knowingly and wilfully participates or assists in the preparation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction, of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer he shall, in addition, forfeit his office.

Sec. 27. *Repealer.*—Section three, article three, chapter twelve of the official code, one thousand nine hundred thirty-one, is hereby repealed. Any other provision of law in conflict with the provisions of this act is hereby repealed.

Sec. 28. *Provisions Severable.*—If any part of this act is held unconstitutional, the decision shall not affect any portion of the act which remains. The remaining portions shall be in full force and effect as if the portion declared unconstitutional had never been a part of the act.

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court July 30, 1941, and
Revised July 19, 1945)

TABLE OF RULES

Rules of Practice and Procedure

RULE

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Rules of Practice and Procedure

OF THE

State Court of Claims

RULE 1. CLERK'S OFFICE, LOCATION AND HOURS.

The office of the Clerk of the Court shall be at the State Capitol, in the City of Charleston, and shall be kept open in charge of the Clerk, or some competent employee of the Court under the direction of the Clerk, each weekday, except legal holidays, for the purpose of receiving notices of claims and conducting the business of the Office, during the same business hours as other public offices in the State Capitol are kept open, except when otherwise required by the Court during a regular or special session of the court.

RULE 2. CLERK, CUSTODIAN OF PAPERS, ETC.

The Clerk shall be responsible for all papers, claims or demands filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim or demand. The Clerk shall also properly endorse all such papers, claims, or demands showing the title of the claim or demand, the number of the same, and such other data as may be necessary to properly connect and identify the document or writing, claim or demand.

RULE 3. FILING PAPERS.

(a) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents received or filed in the office kept by the Clerk of this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

(b) The Clerk, upon receipt of a notice of claim, shall enter of record in the docket book, indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly

RULE 4. RECORDS.

The Clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(1) Minute and Order Book, in which shall be recorded at large, on the day of their filing, all orders or recommendations made by the court in each case or proceeding, and the Minutes of all official business sessions of the Court including Rues of Procedure, orders paying salaries of members and expenses of the Court, and the salaries, compensations and expenses of its employees, and all orders pertaining to the organization and administration of the Court, together with such other orders as may be directed to be entered therein by the Court.

(2) Docket Book in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(3) Financial Ledger, in which shall be entered chronologically, all administrative expenditures of the Court under suitable classifications

RULE 5. FORM OF CLAIMS.

Notices of all claims and demands must be filed with the Clerk of the Court and may be by a written statement, petition, declaration, or any writing without regard to form, which sufficiently sets forth the nature of the claim or demand, the facts upon which it is based, the time, and place of its origin, the amount thereof, and the State Agency, if any, that is in-

volved. Technical pleadings shall not be required. The Court, however, reserves the right to require further information before hearing, when, in its judgment, justice and equity may require. It is recommended that notices of claims be furnished in triplicate.

RULE 6. COPY OF NOTICE OF CLAIMS TO ATTORNEY GENERAL AND STATE AGENCY.

Upon receipt of a notice of claim or demand to be considered by the Court, the Clerk shall forthwith transmit a copy of the notice to the State Agency concerned, if any, and a copy thereof to the Office of the Attorney General of the State, and the Clerk shall make a note of the time of said delivery of such notice to the Attorney General's office.

RULE 7. JURISDICTION, PRIMA FACIE.

A reasonable time before the printing of the docket, as provided by these rules, the Court will examine each claim to ascertain whether it is *prima facie* within its jurisdiction. If it is found that the Court has jurisdiction, the claim will then be ordered to be placed upon the docket. If it is found that the Court is without jurisdiction, the claimant or representative presenting the claim will be notified accordingly, by letter from the Clerk; leave being granted the claimant or his representative to appear before the Court at any time during a regular or special session thereof, to show cause, if any, why the Court has or should assume jurisdiction of the claim.

RULE 8. PREPARATION OF HEARING DOCKET.

The Clerk shall prepare fifteen days previous to the regular terms of Court a printed docket listing all claims and demands that are ready for hearing and consideration by the Court, and showing the respective dates, as fixed by the Court, for the hearings thereof. The said claims or demands shall appear

on the said docket in the order in which they were filed in the office of the Clerk. The Court, however, reserves the right to rearrange or change the order of hearing claims or demands at any regular term, when in its judgment such rearrangement or change would help to expedite and carry on the work of the term. As soon as the docket is completed and printed, a copy thereof shall be mailed to the address of record of each claimant or his representatives of record, and a copy furnished the office of the Attorney General.

RULE 9. PROOF, AND RULES GOVERNING TESTIMONY.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as provided under Rule 11 of the Court, before an award will be made in any case. Affidavits are not admissible as proof of claims under the regular procedure.

(b) While it is not intended or contemplated that the strict rules of evidence governing the introduction of testimony shall control in the hearing or presentation before the Court of any claim or demand; and while, so far as possible, all technicalities shall be waived, yet the Court reserves the right to require or outline from time to time certain formalities to be required in presenting testimony in support of a claim or in opposition thereto, and to preserve the proper sequence of procedure in the hearing of each individual claim, as the circumstances may demand or require. Such requirements or formalities may be announced from time to time during sessions of the Court.

(c) Under its rules, the Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weight, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim.

RULE 10. CLAIMS, ISSUES ON.

In order to promote a simple, expeditious and inexpensive consideration of the claim made, the Attorney General shall within ten days after a copy of the notice has been furnished his office file with the clerk a formal or informal statement or notice in writing, either denying the claim, requesting postponement of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigation of the claim, otherwise after said ten-day period the Court may order the claim placed upon its regular docket for hearing, if found to be a claim *prima facie* within its jurisdiction.

RULE 11. STIPULATIONS OF FACT, INTERROGATORIES TO DETERMINE.

(a) It shall be the duty of claimants or their attorneys or representatives, in claims under the regular procedure, to negotiate with the office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon, as for example, such factual data as the following if material and applicable to the particular claim:

The control and jurisdiction over, location, grade, width, type of surface and condition of particular roads, right of ways and bridges; exact or approximate dates; identities of persons; identity, description and ownership of property; and any and all other evidential facts directly involved or connected with the claim, without regard to the foregoing enumeration of data, and which the parties may be able properly and definitely to agree upon and stipulate, for the purpose of expediting the hearing, simplifying and shortening the transcript or record of the claim and to facilitate the labour of the Court in arriving at and resolving the controverted questions and issues involved;

and to the further end, where the claim is small, to avoid, if possible, the necessity for the introduction of evidence.

(b) Where there is a controversy between a claimant and any State Agency, the Court may require each party to reduce the facts to writing, and if the parties are not in agreement as to the facts, the Court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

RULE 12. CLAIMANTS, APPEARANCES.

Any claimant may appear in his own behalf or have his claim presented through a duly qualified representative. The representative may be either an attorney-at-law, duly admitted as such to practice in the courts of the State of West Virginia, or one who has the qualifications, in the judgment and opinion of the Court, to properly represent and present the claim of a claimant. Where the representative is not an attorney-at-law, then such representative must have the written authority of the claimant to act as such.

RULE 13. BRIEFS, NUMBER OF COPIES.

(a) Claimants or their duly authorized representatives, as well as the Attorney General or the State Agency concerned, may file with the Court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. The Court may designate the time within which reply briefs may be filed.

(b) All briefs filed with, and for the use of, the Court shall be in quadruplicate—original and three copies. As soon as any brief is received by the Clerk he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 14. AMENDMENTS TO NOTICES, PETITIONS, ETC.

Amendments to any notice, petition, or other pleading may be made by filing a new statement of claim, petition, or such other pleading, unless the Court otherwise directs.

RULE 15. CONTINUANCES; DISMISSAL FOR FAILURE TO PROSECUTE.

(a) After claims have been set for hearing continuances are looked upon by the Court with disfavor, but may be allowed *when good cause is shown therefor*, or when the state and the claimant jointly move for a continuance.

(b) A party desiring a continuance should file a motion showing good cause therefor, *before the first day of the term*, or otherwise at the earliest possible date, so that if the motion be granted the opposing party may be notified, if possible, in time to obviate the attendance of witnesses on the day set for hearing.

(c) Whenever any claim regularly filed shall not be moved for trial by the claimant during the time that four regular terms of Court have been held at which the claim might have been prosecuted, and the state shall be ready to proceed with the trial thereof, the Court may, upon its own motion or that of the State, dismiss the claim unless sufficient reason appear or be shown by the claimant why such claim cannot be tried.

(d) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the Clerk or the Court prior thereto, advising of his inability to attend and the reason therefor, and if it further appear that the claimant or his representative had sufficient notice of the docketing of the claim for hearing, the Court may, upon its own motion or that of the State, dismiss the claim.

(e) Within the discretion of the Court, no order dismissing

a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of Court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

RULE 16. ORIGINAL PAPERS NOT TO BE WITHDRAWN; EXCEPTIONS.

No original paper in any case shall be withdrawn from the Court record, except upon special order of the Court, or one of the Judges thereof in vacation, and except when an official of a State Department is testifying from an original record of his department a certified copy of the original record of such department may be filed in the place and stead of the original without special order of the Court.

RULE 17. WITHDRAWAL OR DISMISSAL MOTION BY PARTY FILING CLAIM.

(a) Any claimant may move to withdraw his claim and the same shall be dismissed. Should the claimant later refile the claim, the Court shall consider its former status, such as previous continuances and any other matters affecting its standing, and may redocket or refuse to redocket the claim as in its judgment justice and equity may require under the circumstances.

(b) Any department or state agency, having filed a claim for the Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may move to withdraw the claim and the same shall be dismissed, but without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 18. WITNESSES.

(a) For the purpose of convenience and in order that

proper records may be preserved claimants and State Departments desiring to have subpoenas for witnesses shall file with the Clerk a memorandum in writing giving the name and number of the claim and setting forth distinctly the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(b) Request for subpoenas for witnesses should be furnished to the Clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(c) The payment of witness fees, and mileage where transportation is not furnished, of any witness subpoenaed by or at the instance of either the claimant or the respondent state agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 19. DEPOSITIONS.

(a) Depositions to be read as part of the record in any claim under the regular procedure shall not be taken, recognized or allowed except in accordance with this Rule of the Court.

(b) Before any deposition shall be taken, permission shall be obtained from the Court if in session, or from the Presiding Judge, or one of the other regular Judges in the vacation of the Court. Application for such permission shall be made in writing and show good and sufficient reason why the designated witnesses, whose deposition are sought to be taken, cannot appear and testify before the Court when such claim shall come up in regular order for hearing and investigation.

(c) If such permission is granted to take the depositions of any designated witnesses, reasonable notice of the time and place shall be given the opposite party or counsel, and the party taking such depositions shall pay the costs thereof and

file an original and three copies of such depositions with the Court. Extra copies of exhibits will not be required; however it is suggested that where exhibits are not too lengthy and are of such a nature as to permit it, they should be read into the deposition.

RULE 20. REHEARINGS AND REOPENINGS OF CLAIMS AFTER DETERMINATION.

(a) Rehearings may not be allowed except where good cause is shown why the case should be reconsidered. Motions for rehearings may be entertained and considered *ex parte*, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the rehearing. Such petition and brief shall be filed within 30 days after notice of the Court's determination of the claim, and the filing of the Court's opinion therein, unless good cause be shown why the time should be extended.

(b) Unless the petitioner expressly shall seek that the case also be reopened upon the rehearing for the introduction of new testimony, and unless such request for reopening the case appears proper and is supported by affidavits showing good cause why the case should be reopened, such petition shall be treated only as seeking a reconsideration of the claim upon the record already made and before the Court. If a rehearing is allowed it shall be only for the purpose of a reconsideration and redetermination of the case upon the record already before the court unless the court, in its discretion shall, by its order, otherwise direct.

RULE 21. RECORDS OF SHORTENED PROCEDURE CLAIMS SUBMITTED BY STATE AGENCIES.

When claims are submitted under the shortened procedure section of the Court Act, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence,

bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record, among other things which may be peculiar to the particular claim, should show as definitely as posisble that:

(1) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. In other words, it should appear he was innocent or without fault in the matter.

(2) The department, by or through neglect, default or failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(3) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for as to the correctness and reasonableness by some one in authority in the department.

The State Agency shall ascertain that it and the claimant are in agreement as to the amount of the claim as proposed to be presented to the Court. Before the record of the claim is filed with the Clerk it must bear the concurrence of the head of the State Agency concerned and the approval for payment by the Attorney General.

REPORT OF THE COURT OF CLAIMS

For the Period December 1, 1948, to ~~February 7, 1949~~ November 30, 1950

(1-a) Approved claims and awards referred to the Legislature, 1949, for the period December 1, 1948, to February 7, 1949, after Report No. 4 had gone to press; allowed by the Legislature, 1949; opinions therein included in this report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
630	Brown, Sarah Ann	State Road Commission	$ 3,000.00	$ 500.00	February 4, 1949
655	Cabell, Hewitt L.	State Road Commission	226.07	226.07	January 12, 1949
651	Charleston Electrical Supply Company	W. Va. Board of Education and/or W. Va. Institute of Technology.	300.00	300.00	January 24, 1949
658	Continental Foundry and Machine Co.	State Tax Commissioner	14,836.80	14,836.80	February 3, 1949
653	Leonard, Clifford	State Road Commission	56.62	56.62	January 12, 1949
654	Lycans, Grace	State Road Commission	374.49	374.49	January 12, 1949
657	Lowe, R. B.	State Road Commission	217.67	217.67	January 13, 1949
622	McGraw, Della J.	State Board of Control	5,200.00	2,500.00	January 24, 1949
647	Palmer, Virginia S.	State Adjutant General	131.48	131.48	January 31, 1949
650	Price, A. S.	State Road Commission	1,620.00	300.00	February 2, 1949
656	Weaver, James M.	State Road Commission	16.00	16.00	January 13, 1949
			$25,979.13	$19,459.13	

REPORT OF THE COURT OF CLAIMS (Continued)

1. Approved Claims and award not satisfied but referred to the Legislature 1951 for final consideration and appropriation

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
163	Brannan, Dorsey, M. D.	State Department of Public Assistance	$ 256.00	$ 256.00	July 22, 1949
685	Brown, Albert and Odessa	State Road Commission	8,484.20	2,134.20	June 23, 1950
676	Caplinger, W. T.	State Road Commission	4.08	4.08	April 21, 1950
680	Charleston National Bank, *committee* for Carl A. Urban, *incompetent*	State Road Commission	200.00	200.00	April 21, 1950
682	Cox, J. A. and North British and Mercantile Insurance Co.; North River Insurance Co.; Standard Fire Insurance Co.; Firemen's Insurance Co., and Mechanics and Traders Insurance Company	State Road Commission	24,080.71	22,580.71	June 23, 1950
667	Epperly, Robert E.	State Adjutant General	37.84	37.84	July 21, 1949
687	Fisher, B. E.	State Board of Control	3,509.43	3,509.43	October 26, 1950
644	Freeman, Rosa Webb	State Road Commission	3,000.00	100.00	October 21, 1949
703	Goldsboro, Luther	State Board of Control	880.45	880.45	November 15, 1950
677	Green Hill Church, by Orr Minear *Trustee*	State Road Commission	36.22	36.22	April 21, 1950
701	Hildreth, J. O., *admr.*	State Road Commission	10,000.00	1,000.00	November 15, 1950
692	Huffman, J. E.	State Road Commission	12.95	12.95	July 10, 1950

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved Claims and awards not satisfied but referred to the Legislature, 1951, for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
661	Jackson, R C.	State Conservation Commission	390.00	390.00	April 16, 1949
694	Kennan, Kenneth	State Road Commission	100.00	100.00	July 12, 1950
686	Kipp, John	State Adjutant General	78.39	78.39	April 19, 1950
164	Maxwell, Ralph, M. D.	State Department of Public Assistance	165.00	165.00	October 14, 1949
684	Pelfrey, H. A.	State Adjutant General	65.85	65.85	April 18, 1950
664	Proctor & Gamble Distributing Co	State Road Commission	13.84	13.84	April 15, 1949
683	Radford, C. E.	State Adjutant General	500.60	500.60	April 17, 1950
678	Reynolds Transportation Co	State Road Commission	160.88	160.88	April 20, 1950
691	Sabol, Russell D. and Travelers Fire Insurance Co.	State Road Commission	25.50	25.50	July 11, 1950
668	Spradling, Dalton	State Road Commission	96.33	96.33	July 22, 1949
693	Taylor & Maun Lumber Company	State Road Commission	22.50	22.50	July 11, 1950
679	Webb, Arnold P. and Emmco Insurance Co	State Road Commission	295.90	295.90	April 21, 1950
670	Weirton Cigar and Candy Co	State Road Commission	75.38	75.38	July 19, 1949
			$52,492.05	$35,742.05	

(2) Approved claims and awards satisfied by payments out of regular appropriations for the biennium: (None.)
(3) Approved claims and awards satisfied by payments out of special appropriation made by the Legislature to pay claims arising during the biennium: (None.)

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
652	Ballard, Althea T.	State Road Commission		Denied	January 10, 1949
690	Barr, Lena	State Road Commission	$ 500.00	Denied	July 17, 1950
688	Beard, Harry W.	State Road Commission	2,000.00	Denied	October 26, 1950
695	Bennett, Henry B.	State Road Commission	10,000.00	Denied	July 28, 1950
648	Brown, Doris, *infant,* under the age of twenty one years, by Romie Brown, *her next friend.*	State Road Commission	10,000.00	Denied	April 16, 1949
673	Chartrand, Ruth	State Road Commission	804.00	Denied	April 17, 1950
637	Corder, Fleta	State Road Commission	50,000.00	Denied	January 10, 1949
638	Eskew, E. B.	State Road Commission	619.14	Denied	February 4, 1949
669	Farm Bureau Mutual Automobile Insurance Co. and Barbara Jane (Bucy) Hinchman	State Adjutant General	366.49	Denied	July 21, 1949
702	Garten, Billy G.	State Adjutant General	215.84	Dismissed	October 13, 1950
662	Hamill Coal Sales Co.	State Tax Commission	737.22	Dismissed	June 24, 1949
672	Hamilton, Adam	State Road Commission	5,000.00	Denied	June 23, 1950
634	Jacobson, Robert S.	State Road Commission	24.69	Denied	February 2, 1949
689	Keystone, Hardware and Furniture Co.	State Road Commission	480.00	Denied	July 28, 1950

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
666	Lowers, Margaret Elizabeth	State Road Commission	20,000.00	Denied	July 19, 1949
706	McKinney, Loraine *infant*, by D. L. McKinney, *next friend*.	State Road Commission	100,000.00	Denied	October 26, 1950
674	Mason, Margaret	State Road Commission	22.82	Dismissed	April 28, 1950
708	Nuckolls, George R.	State Adjutant General	250.00	Dismissed	October 9, 1950
645	Prince, Minnie C.	State Road Commission	8,500.00	Dismissed	January 14, 1949
671	Pruett, S. W.	State Tax Commission	308.02	Dismissed	July 11, 1949
635	Roberts, James S., *infant*, by A. D. Roberts Jr. *father and next friend*.	State Road Commission	525.00	Denied	February 3, 1949
696	Roten, Robert P.	State Conservation Commission	251.00	Denied	July 28, 1950
660	Sears, Estel	State Road Commission	24.64	Dismissed	July 21, 1949
705	Taylor, Beatrice Snyder	State Road Commission	2,500.00	Denied	November 15, 1950
697	Thompson, Howard E.	State Road Commission	39.27	Dismissed	October 9, 1950
665	United Telephone Co.	State Tax Commission	253.52	Dismissed	June 24, 1950
681	Warren Pontiac Co.	State Road Commission	6,807.16	Dismissed	October 10, 1950
675	Watts, Bertie	State Road Commission	10,000.00	Denied	October 21, 1949
704	Whited, Earl	State Board of Control	3,200.00	Denied	November 15, 1950
700	Wright, Charles	State Road Commission	5,000.00	Denied	July 28, 1950
699	Wright, Pauline	State Road Commission	10,000.00	Denied	July 28, 1950
			$248,428.91		

(5) Advisory determinations made at the request of the Governor or the head of a state agency: (None.)

NOTE: Subsections (1), (2), (3), (4), and (5), respectively, of the above table conform to and correspond with the similarly numbered subsections of section 25 of the Court of Claims Law.

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Cases Submitted and Determined in the Court of Claims in the State of West Virginia

(No. 637—Claim denied.)

FLETA CORDER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 10, 1949

The right of a person to use the highways of the state is subject and subordinate to the right of the state to exercise and discharge its governmental functions; and the State does not guarantee freedom from accident of persons using such highways.

Frank B. Everhart, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Fleta Corder prosecutes this proceeding against the state road commission of West Virginia for the purpose of obtaining an award in the sum of $50,000.00 to compensate her by way of damage for personal injury sustained and suffered by her at a time and under circumstances and conditions as hereinafter detailed and set forth.

The state road commission having deemed it expedient and necessary to make certain changes and relocations on U. S. highway No. 50, in Preston county, West Virginia, entered

into a contract with the Keeley Construction Company, a corporation, for the completion of project F-151-(8), Buffalo Creek Bridge and approaches at Macomber Road, in said county. It was necessary to secure certain rights of ways. For that purpose condemnation proceedings were instituted in the circuit court of said county of Preston, against certain persons owning property bordering on said project, including claimant Fleta Corder and Vaughan Corder, her husband, who jointly owned the land on which they resided in a small one-story cottage. To enable the work to progress with necessary speed and diligence, orders of entry upon the premises through which said project extended were granted by said circuit court. The right of way through the land owned by claimant and her husband embraced a few inches of their residence property, it being understood that upon the completion of the work the location of said residence would necessarily have to be changed. The proximity of the residence to the road to be rebuilt was so close that claimant had at all times a clear and unobstructed view of the work and grading done on the road. The grade of the road was a few feet higher than the land upon which claimant resided, thus creating a small embankment on the side of the highway in front of her home. For the purpose of convenience in enabling claimant to enter her premises from the new grade of the highway, an approach was made from the road to her premises. This was done by depositing several truckloads of dirt. The approach was near a small wooden garage.

On the night before Christmas of 1947, claimant and her husband drove in their automobile from their home to the home of a near relative for the purpose of exchanging Christmas presents. After their visit they returned to their home. Upon arriving there the automobile was not stopped at the point where the approach from the new road to their premises had been constructed. On the contrary the automobile was driven approximately seventy-five feet beyond the approach. Claimant being in a hurry to get out of the car did not wait for her husband to assist her in doing so, but preceded him; and, as she testified before the court, "stumbled and fell." As a

result of the fall her left ankle was very seriously fractured. When the accident occurred it was in the early hours of Christmas morning, the evidence before the court being conflicting as to the exact time. The extent of her injuries necessitated hospitalization. She was first taken to the Grafton hospital and afterward removed to St. Mary's hospital in Clarksburg, West Virginia. The period of her hospitalization extended to February 3, 1948. Heavy expenses were incurred in the way of hospitalization and surgical treatment.

After all evidence had been heard by the court, in support of the claim and against it, the members of the court visited and inspected the scene of the accident in Preston county, and are unanimously of opinion that there is no merit in the claim so far as the responsibility of the state to pay it, or any part of it, is concerned. Claimant knew the condition of the roadbed. Day by day for a long period of time she was personally aware of what was going on in the construction of the road. On the morning of the accident, without lantern, torchlight or illumination of any kind she hurriedly got out of her automobile and crossed the road. There was no occasion for her to go from the approach to her premises to the point seventy-five feet distant where she alighted from the automobile. She did not exercise ordinary prudence. We are impressed by the thought that her accident, unfortunate as it proved to be, was the result of her own imprudence and negligence. Her claim is not one which the state as a sovereign commonwealth should discharge and pay. The work of the road commission was being done under due authority of law. In the relocation of the highway the road commission was engaged in the exercise of a governmental function.

The right of a person to use the highways of the state is subject and subordinate to the right of the state to exercise and discharge its governmental functions; and the state does not guarantee freedom from accident of persons using such highways.

An award is denied and the claim dismissed.

(No. 653-S—Claimant awarded $56.62.)

CLIFFORD LEONARD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1949

CHARLES J. SCHUCK, JUDGE.

Claimant Clifford Leonard claims damages in the amount of $56.62 for injuries caused to his truck while traveling on secondary road No. 56 in Marion county, West Virginia, on October 25, 1948.

The record reveals that the truck struck a stump extending out of the roadbed of the said secondary road and which stump was obscured due to a growth of weeds and other debris in and about it, seemingly making it impossible for the driver of the truck to observe the obstruction at the time he was traveling along the said route. The state road commission, through its proper agent and investigating officer, made an investigation and found that the stump was still present in the road at the time of the said investigation and the assistant maintenance superintendent of Marion county knew of its existence prior to the time of the accident, but failed to remove it from the highway.

In view of these facts, the majority of the court is of the opinion that claimant is entitled to recover the damages sustained and should be compensated accordingly.

The state road commission recommends payment and the attorney general's department approves the claim. The record reveals that claimant was free from any negligence, and an award is therefore recommended in the amount of fifty-six dollars and sixty-two cents ($56.62).

ROBERT L. BLAND, JUDGE, dissenting.

I do not agree with my esteemed colleagues that the claim is one for which a legislative appropriation of public revenues should be made. It is not, in my judgment, a claim that, in view of the purposes of the act creating the court of claims, should be paid. The state does not guarantee the safety or freedom from accident of persons traveling on its highways. If the state were suable the facts disclosed by the record, prepared by the road commission, do not present a case in which a judgment could properly be obtained in a court of law.

(No. 654-S—Claimant awarded $374.49.)

GRACE LYCANS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1949

CHARLES J. SCHUCK, JUDGE.

Claimant, while driving her automobile on a bridge over Two Mile Creek on secondary road 21/17 in Kanawha county, West Virginia, on August 22, 1948, crashed and turned over after a broken treadway on the bridge threw her car into a large hole in the flooring causing her to strike the steel superstructure, and resulting in personal injuries to herself and damages to the said automobile.

The investigation made by the claim agent of the state road commission shows that the bridge was badly in need of maintenance and that there was negligence on the part of the state road commission in not keeping the said bridge in proper repair as required. A photograph of the bridge showing its

condition at the time of the accident is submitted and made part of the record involving the said claim, and clearly shows the defective condition hereinbefore referred to. Claimant originally presented a claim for $742.49, which included fees for medical attention, loss of wages, garage repair bill, loss and damage to clothing, loss of produce, loss of transportation for seven weeks, and personal injuries to her arm and leg. After conferences between the state authorities and claimant, she agreed to settle the claim for the sum of $374.49, which settlement includes not only her property damage but damages for her injuries and loss of clothing, as well as the medical services.

The state road commission, the agency concerned, concurs in the claim and recommends payment and the claim is approved by the attorney general as one that should be paid. A majority of the Court is of the opinion that an award in the said sum of three hundred seventy-four dollars and forty-nine cents ($374.49) should be made, and accordingly an award in this amount is recommended to the Legislature for payment.

ROBERT L. BLAND, JUDGE, dissenting.

Section 17 of the court of claims act provides a shortened procedure for the consideration of certain claims against the state or any of its agencies. Such procedure shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of the court of claims act, should be paid.

When a claim is submitted to the court of claims for determination under said shortened procedure provision of the statute it is informally considered by the court upon a record prepared and filed in the court by the head of the agency submitting such claim. It is expressly provided that if the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under said section shall not bar its resubmission under the regular procedure

It does not necessarily follow that when a claim against the State or any of its agencies has been submitted to the court of claims, under said section 17, concurred in by the head of the agency concerned and approved by the attorney general that an award shall be made by the court of claims. Whether an award should be made in a particular case depends upon the merit of the claim and whether or not it is a claim for which the Legislature should make an appropriation of the public revenues. Obviously the Legislature never contemplated that the court of claims should be a mere ratifying body. No where in the court of claims act does it appear that authority has been vested in the head of a state agency and the attorney general to make an award of public funds. The court of claims is distinctly an investigating instrumentality and should never at any time lose sight of that fact.

In the case of claim No. 511-S, *Appalachian Electric Power Company* v. *State Road Commission,* 3 Ct. Claims, (W. Va.) 150, I referred to a statement of the Legislative Committee as follows: "A shortened procedure is provided for small claims where no question of fact or liability is in issue." I stated further in the opinion that "For such purposes only should the shortened procedure provision of the court act be used."

It cannot be said that no question of fact or liability is not presented by the record of the instant claim. Manifestly very serious questions of fact and liability are presented by such record. In the case there has been no sufficient investigation of these questions of fact and liability. All that a majority of

the Court has done is to approve the view taken of the claim by the head of the agency concerned and the attorney general's office. All that has been done amounts to a mere ratification, without independent action or investigation of what the head of the road commission and his employes and the attorney general's office have concluded sufficient to warrant an appropriation of the public revenues. The record of the claim prepared by the head of the agency concerned merely presents one side of the case and wholly ignores the questions of issue and fact arising in the case. I do not think that even under the *ex parte* facts presented the Legislature would be warranted in making an appropriation of the public revenues to pay the claim. I do not think that it is a claim that should be determined under the shortened procedure provision of the court act. The Legislative Interim Committee which worked out the scheme of the court, in its report to the Legislature, stated that the shortened procedure was not intended to apply in the determination of a claim where any question of fact or liability should be in issue.

State agencies have too frequently, since the creation and organization of the court of claims, used the shortened procedure provision of the statute in the submission of claims to this court for determination. Doubtless in many instances it has been assumed by such agencies that it would be easier to pay a claim filed against the state than to defend it, thus losing sight of the embarrassment that might result from the indiscriminate use of such shortened procedure and the precedents created thereby.

A photograph of the bridge on which claimant's accident happened is found in the record. This photograph discloses a hole in the floor of the bridge near one side of its entrance between two heavy and substantial treadways. These treadways were placed in the bridge for the purpose of reenforcing it and it was clearly intended that persons traveling over the bridge in vehicles should use the treadway. Notwithstanding the hole any person driving a motor vehicle over the bridge on the treadway could do so in safety and without accident.

Drivers of motor vehicles are supposed to have their cars under control at all times and to keep their eyes on the road on which they are traveling. The accident in this case was not, as I conclude from my examination of the one-sided record presenting the claim, proximately caused by the hole at the entrance of the bridge. The real cause of the accident was the result of claimant's lack of prudence and her failure to exercise ordinary judgment. The state does not gaurantee freedom from accident of persons using the highways.

Being of opinion that the award made in the case is improper. and neither supported by law or facts, and amounts to a recommendation to the Legislature of an appropriation of public revenues to a private individual for a private and not a public purpose, I respectfully record my dissent to the action of my worthy colleagues. I would deny an award in the case.

(Claim No. 655-S—Claimant awarded $226.07)

HEWITT L. CABELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1949

MERRIMAN S. SMITH, JUDGE.

The wife of claimant Hewitt L. Cabell was driving claimant's Plymouth sedan along state route No. 79, about noon, on August 28, 1948, when nearing Leewood, Kanawha county, it was necessary for her to cross a state-owned wooden-floor bridge. As the car proceeded over the bridge the front wheels of the car threw a loose floor board up under the car, damaging the differential housing, broke an axle, cut a tire and a wheel, necessitating repairs to the extent of $226.07.

This accident was investigated by Wm. S. Walker, maintenance superintendent of district one of the state road commission, and statements were obtained from three or four witnesses, and constitute a part of the record in this claim, to the effect that the loose floor board was the proximate cause of the damage to claimant's car.

The state is not a guarantor of the safety and condition of the state roads and highways. However, the Legislature, in its wisdom, enacted a statute, code 17-4-33, pertaining to that portion of the highways known as bridges, and as respects the instant claim the bridge was not in a reasonably safe condition for traffic to drive across it. The claimant's car was being driven in a legal manner in the regular course of traffic. and through no contributory negligence on the part of the driver, but solely because of the defective condition of the bridge, this damage was sustained.

The state road commission concurs in this claim and it is approved by the attorney general. .A majority of the court of claims hereby makes an award in the amount of two hundred twenty-six dollars and seven cents ($226.07) in behalf of claimant Hewitt L. Cabell, and recommends that same be authorized by the Legislature.

ROBERT L. BLAND, JUDGE, dissenting.

I am unable to view this claim as my colleagues see it. I perceive nothing in the record prepared by respondent and know of no law that would warrant an appropriation of the public revenues for the payment of the claim. All questions of contributory negligence are ignored. The award made by majority of the court amounts to a mere ratification of what the state road commissioner and his employes think should be done in the case. There has been no sufficient investigation of the facts by the members of this court in whom, alone. authority is vested by statute to investigate the merits of all claims asserted against the state. I respectfully dissent.

(No. 656-S—Claimant awarded $16.00.)

JAMES M. WEAVER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1949

MERRIMAN S. SMITH, JUDGE.

On Sepember 16, 1948, James Weaver, the claimant, was driving his 1941 Plymouth coupe across a state-owned steel structure bridge with wooden floor, in Rowlesburg, Preston county, West Virginia, and while crossing said bridge a loose floor board tilted up, striking the left rear fender and running board, damaging it to the extent of $16.00. While the state does not guarantee, nor is it responsible for, the absolute safety of the highways throughout its borders, as respects bridges the Legislature has imposed a duty upon the state road commission to keep them in a reasonably safe condition for the regular flow of traffic.

As soon as this accident was reported to R. O. Hart, maintenance superintendent for district four, which includes Preston county, he dispatched a crew to make the necessary repairs.

When the floor planks of a bridge become loose and unsafe for public travel the condition should be remedied, and to wait until an accident damages the property of an individual before making repairs does not meet with the statutory requirement, and the state should make reparation for such loss or damage sustained.

The state road commission concurred in the claim, it was approved by the attorney general, and a majority of this court hereby makes an award in the sum of sixteen dollars ($16.00)

in favor of claimant James M. Weaver, and recommends payment thereof to the Legislature.

ROBERT L. BLAND, JUDGE, dissenting.

I am unable to view this claim as my colleagues see it. I perceive nothing in the record prepared by respondent and know of no law that would warrant an appropriation of the public revenues for the payment of the claim. All questions of contributory negligence are ignored. The award made by majority of the court amounts to a mere ratification of what the state road commissioner and his employes think should be done in the case. There has been no sufficient investigation of the facts by the members of this court in whom, alone, authority is vested by statute to investigate the merits of all claims asserted against the state. I respectfully dissent.

(No. 657-S—Claimant awarded $217.67.)

R. B. LOWE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 13, 1949

MERRIMAN S. SMITH, JUDGE.

About eleven o'clock A. M. on August 18, 1948, state road commission employes were blasting stone from a ditch where two holes had been drilled, using dynamite in each hole. The blast blew out stone which fell across the road into and against the house of R. B. Lowe who lived near Fairview, Marion county. West Virginia, on secondary road No. 17.

The investigation made by Vincent P. Ryder, district maintenance superintendent, shows that the state employes did not

use blasting mats or any type of safety precaution to prevent possible damage. An itemized statement was made a part of the record showing a total cost of materials and labor amounting to $217.67 to repair the damage done to claimant's dwelling, which damage was done at the instance of the employes of the state road commission.

This court has consistently held that where employes of the state, through negligence, damage or destroy property of individuals that reparation will be made in the interest of the general welfare.

The amount having been concurred in by the state road commissioner and approved by the attorney general, an award is hereby made by this court in the amount of two hundred seventeen dollars and sixty-seven cents ($217.67), to be paid to the claimant R. B. Lowe.

ROBERT L. BLAND, JUDGE, concurring.

Although I think it would have been preferable for this claim to have been submitted under the general procedure of the court act, especially because I believe that the shortened procedure provided by the statute was never intended to apply to the consideration of any claim where issues of law or fact are involved, I nevertheless concur in the award made by the court because I concede the claim to be just and meritorious.

(No. 622—Claimant awarded $2500.00.)

DELLA J. McGRAW, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed January 25, 1949

Syllabus in re *Hayes* v. *State Board of Control*, 4 Court of Claims (W. Va.), page 202, adopted and reaffirmed.

Appearances:

D. Grove Moler, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

This claim was before this court for consideration during the October term, 1948, at which time an award was denied on the ground that claimant had not shown by certain and definite evidence that her husband had been afflicted with silicosis contracted during the several years of his employment as a miner, nor that the said disease was in fact the real cause of his ailment and subsequent death. After the rendering of an opinion in support of the denial of the said claim, claimant sought and obtained the right to reopen the hearing on said claim, and accordingly on the 11th day of January of the present term, presented new and further evidence to sustain her claim that her deceased husband had contracted silicosis, a compensable disease under the laws of the state of West Virginia, while employed as a miner in our state and was therefore entitled to an award.

For the first time throughout the hearings involving the merit of this claim we have before us competent evidence of a

definite and convincing character showing silicosis as an ailment and disease of the deceased in connection with tuberculosis, the ultimate cause of death.

As shown by our previous opinion in Volume 4, page 178, court of claims reports, claimant's husband, before his death, had been a patient at several hospitals and sanitaria, finally having been received in a veterans' hospital at Oteen, North Carolina, where he died on August 8, 1945. At the time of his death at the Oteen hospital, pneumonoconiosis was reported as the cause of death, which diagnosis did not necessarily embrace or indicate the presence of silicosis, and thus left the whole matter in an indefinite, uncertain state and not sufficient for us to determine whether or not silicosis had been present, so as to warrant an award by this court.

It has now been shown that the government pathologist at the Oteen institution, having been convinced that pulmonary silicosis did exist, nevertheless, to be absolutely certain, sent the lung slides of postmortem sections to the Army Institute of Pathology in Washington, D. C. for an authoritative diagnosis, and thereafter received the following report: "George Thomas McGraw Army Institute of Pathology diagnosis silicotuberculosis." So, also has it now been shown by a statement dated November 17, 1947, heretofore prepared and signed by one Dr. Edward L. King, the physician immediately in charge of the care and treatment of the deceased husband of claimant while a patient at the Pinecrest sanitarium at Beckley, that her husband was afflicted with silico-tuberculosis and permanently disabled for regular employment.

All of these newly presented facts, taken in connection with the deceased's employment as a miner for the Koppers Company, his exposure to silicon dioxide dust and sand as a "slusher" operator in and about the mine, have now convinced us, as heretofore indicated, that claimant's husband was afflicted with silicosis at the time of his death, and that the disease was caused by his exposure while employed as such miner, and that therefore she is entitled to an award both as

the widow of the said George McGraw and as the administratrix of his estate.

The claim here involved was originally presented to the workmen's compensation department for consideration, but compensation was refused on the ground "that her application for compensation benefits was not filed within one year from the date of last injurious exposure of the deceased George Thomas McGraw to silicon dioxide dust in harmful quantities, as provided by statute." An appeal from the foregoing order was taken to the workmen's compensation appeal board, but the commissioner's ruling was affirmed by that board, by an order to that effect entered on May 9, 1947.

A careful review of the transcripts of all the evidence and exhibits offered show conclusively that neither the claimant nor her husband during his lifetime had been informed as to the true nature of his ailment in ample time to present his claim for benefits to the compensation commissioner before the expiration of the one-year period from the last injurious exposure. Claimant's husband, George McGraw, died August 8, 1945. It was not until November 1947 that she first learned that her husband had been afflicted with silicosis, and still later that silico-tuberculosis was the cause of death. All of which was several years after McGraw was last exposed to silicon dioxide dust and therefore too late for the claim to receive favorable consideration under the law making silicosis a compensable disease.

Recently, in the matter of the claim of *Isaac Hayes,* where a similar question was presented for our consideration, Vol. 4, court of claims reports, page 202, we held, *inter alia,* that where one (a miner) is not informed by attending physicians of the nature of his ailment, to wit, silicosis, in time to make his application for benefits to the state and is subsequently denied relief by reason of his failure to do so, through no fault of his, that a moral obligation devolves upon the state nevertheless, and that benefits should be paid accordingly. We are inclined to, and do, apply the holding in the *Hayes* case, *supra,*

to the facts and evidence adduced in the instant case, and therefore hold that awards payable to claimant in her own right, and as administratrix of her deceased husband's estate should be made.

The amount of the award to be allowed presents a rather difficult problem in view of the nature of the facts adduced, which give us no firm basis to classify the disease of the deceased as to degree. However, as he died on August 8, 1945, nearly two years after his last exposure, he would have been entitled in any event to benefits for one hundred and one weeks at the rate of sixteen dollars per week or sixteen hundred and sixteen dollars; in addition, the widow's benefits, considering her age, expectancy of life, and bearing in mind as well the possibility of her again marrying, would increase the said amount considerably.

We are therefore of the opinion to and do recommend an award in the amount of twenty-five hundred dollars ($2500.00) payable to claimant Della J. McGraw.

(No. 651-S—Claimant awarded $300.00.)

CHARLESTON ELECTRICAL SUPPLY COMPANY,
Claimant,

v.

STATE BOARD OF EDUCATION, *and/or* WEST VIRGINIA INSTITUTE OF TECHNOLOGY, Respondents.

Opinion filed January 25, 1949

MERRIMAN S. SMITH, JUDGE.

On September 4, 1947, Carl Riggs, director of purchases, placed an order with the Charleston Electrical Supply Company, a West Virginia corporation, located at 914 Kanawha

Boulevard, east, Charleston, West Virginia, for certain items of electrical equipment, at a total price of $2,146.71, to be shipped to the West Virginia institute of technology, a state institution, located at Montgomery, West Virginia. The said items of electrical equipment so ordered were not standard articles of equipment ordinarily carried in stock, but were items which required manufacture according to specifications as set forth in said purchase orders. Claimant immediately caused an order to be placed for manufacture and delivery of said items of electrical equipment with the Weston Electrical Instrument Corporation, through the Russell F. Clark Company, its sales representative, of Pittsburgh, Pennsylvania. On or about November 13, 1947, the said Carl Riggs, director of purchases, requested claimant to cancel six items, totaling $1,720.11. Upon receipt of said request for cancellation, claimant at once notified the Weston Electrical Instrument Corporation, through the said Russell F. Clark Company, its sales representative, that it desired to cancel six items of the original order aforementioned. At the date of cancellation the electrical equipment ordered by the state was in process of manufacture by the Weston Electrical Instrument Corporation, and some of the articles were completely finished while others were from fifty to ninety-eight percent complete. The manufacture of many of said items required the purchase of special material and many of the items so ordered were not of standard make and were not of such character that resale could be made, although an attempt was made to sell them to another college in an effort to mitigate the cancellation charges. On November 4, 1948, claimant received from the Weston Electrical Instrument Corporation a statement for the sum of $300.00 representing termination charges, which amount did not take into consideration any profit, but actual loss sustained by virtue of the cancellation of the contract which amount claimant paid under date of November 22, 1948, to the Weston Electrical Instrument Company. Both the state agency and the claimant entered into this contract in good faith. However, about sixty days later the state discovered that it could secure several of the items through the war

surplus division of the federal government, at a saving of $408.00 to the state, so it cancelled the order as to the items obtainable at the reduced price. Due to the fact that the items in the original order were not standard but had to be manufactured according to specifications and by the time the cancellation was made, some of the items had been completed and a large percent of the remaining items were already processed, the Weston Electrical Equipment Corporation took an actual loss of $300.00 without taking any profit into consideration, and the state after reimbursing it in this amount would still realize a saving of $108.00.

The confidence in and credit of the state should be maintained at all times and whenever it executes a contract in the regular and statutory manner it should abide by its provisions and live up to it to the letter. The head of the agency concerned concurred in the payment of this claim and it was approved by the attorney general's office. This court therefore makes an award in the sum of three hundred dollars ($300.00) in favor of the Charleston Electrical Supply Company, and recommends payment in the prescribed manner.

(No. 647—Claimant awarded $131.48.)

VIRGINIA S. PALMER, Claimant,

v.

ADJUTANT GENERAL'S DEPARTMENT, Respondent.

Opinion filed January 31, 1949

An award will be made where an agency of the state damages or destroys property of an individual and such claim would be judicially recognized as legal or equitable between private individuals.

Appearances:

Claimant, in her own right.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

About eight o'clock on the morning of September 7, 1948, while driving her Buick automobile west along Gaines Street, in Montgomery, Fayette county, West Virginia, claimant Virginia Palmer became involved in a collision with a national guard truck, the details being as follows. As she approached the armory a national guard truck being driven by sergeant Melvin McDaniel pulled into the lot in front of the armory, and Gaines Street being narrow, claimant noticed that she did not have room to pass, whereupon she stopped her car and lowered the window and called to the driver of the truck to pull up so she might drive by. Instead of driving the truck forward, the truck backed into the left side of her car which was standing still. The affidavit of Sergeant McDaniel was to the effect that his foot slipped off the clutch and the gears being in reverse the truck eased backward into the Buick automobile, crushing the rear door and denting the top and breaking the rear door glass. The estimated cost of repairs was $131,48.

This claim presents a situation wherein there is dual function of government, for under our constitution and under the national defense act of 1916, as amended, there is a dual sharing of the cost in the national guard organization. The national guard is organized in peace time to be totally under the control of the governor of the state, as *ex officio* commander-in-chief. During such peace time there is a sharing of expense. The state is, under the national defense act, required to furnish armory facilities to recruit organizational units, train the men and determine their responsibilities and activities. The federal government furnishes the equipment and allots the funds to the state to pay drill expense and full-time employe remuneration. The care, operation and maintenance of this equipment, however, is a responsibility of the state for if a vehicle is damaged at the fault of the state, the state must pay for it, and if a vehicle is in collision with another vehicle and the state is at fault, then the state is liable for whatever damages are inflicted upon the adverse vehicle. While the title remains in the federal government, actual possession and complete control is vested in the state. The liability should be imposed upon the agency having complete control and consent, and in the instant claim there can be no doubt but that the state was in complete control and that sergeant McDaniel was acting within the scope of his assigned duties and orders at the time of this accident.

An award in the sum of one hundred thirty-one dollars and forty-eight cents ($131.48) is made by a majority of this court to claimant Virginia S. Palmer.

ROBERT L. BLAND, JUDGE, dissenting.

Claimant did not own the car in which she was driving at the time of her accident. Title to the vehicle was vested in her husband, who has not asserted a claim for damages thereto.

The driver of the national guard truck was engaged in the discharge of his legitimate and necessary duties at the time of claimant's accident. He was guilty of no negligence in the

premises. He saw claimant for a distance of about seventy-five feet, driving very slowly on the highway. He waited to see whether she would stop or drive on past his truck. She could have stopped before reaching the truck, but elected to try to pass. When she saw that she would be unable to do so she stopped and completely cut her motor off and called to the driver of the truck to "drive up a little." All the while the driver of the truck had his machine in neutral. His foot slipped off the clutch and the truck backed into the car driven by claimant. It was an unavoidable accident. I do not see any meritorious reason for making the award. The public revenues are not to be indiscriminately appropriated.

(No. 650—Claimant awarded $300.00.)

A. S. PRICE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1949

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspections as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for the damages caused by the said neglect of duty.

Appearances:

Paul J. Kaufman, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, A. S. Price, during the year 1948 was engaged in cutting timber in the woods near Whittington Hill on Copen

Branch of Kanawha Two Mile, in Kanawha county, West Virginia, and conveying the logs and timber to a sawmill, to be converted into lumber and sold in the nearby markets.

On June 24, 1948, while claimant's truck, used in connection with his said business and loaded with logs, was crossing a state-controlled and maintained bridge, located in Copen Branch of Kanawha Two Mile, the bridge broke and collapsed, throwing and precipitating the truck into the creek below and causing damages for which claimant seeks an award here. Fortunately, the occupants of the truck were not hurt or injured.

The evidence shows that at least one stringer supporting the floor of the bridge had rotted and decayed causing it to break away from its support and bringing about the collapse of the bridge. The evidence reveals that no inspection of the bridge, as required by our laws, had been made by the road authorities in charge. No warning signs of any kind had been posted or placed at the approaches to the bridge, nor were there any signs as to load limits and, while there is some conflicting testimony as to the load and weight of the truck at the time of the accident, we are convinced by the evidence that the truck was not overloaded and that claimant was not guilty of any negligence in the operation of the truck in attempting to cross the bridge in question at the time of the accident. The unsafe condition of the bridge, about which claimant had no knowledge, was the proximate cause of the accident, and the state is therefore morally bound, in view of all the facts and circumstances, to compensate claimant for his loss.

Claimant asks damages for the loss of time during which the truck was undergoing repairs, for the loss of sales of timber and for cancellations by prospective purchasers, by reason of which he lost profits that would have been made had he been in position to make deliveries of his lumber. In all of these instances, however, the testimony is weak, unsatisfactory and mostly speculative. No prospective pur-

chasers are named or produced to testify. No specific loss or losses are shown by proper and creditable evidence, and we are concerned therefore only with the damages to the truck and for which, as heretofore indicated, the claimant ought to be compensated.

The exhibits introduced in connection with claimant's testimony show total damages to the truck of approximately $325.00. However, a part of this amount is estimated and the exhibits themselves seem to show an overlapping of some of the items of repair. Therefore, in view of all the foregoing facts and in consideration of the further fact that claimant was deprived of the use of the truck for a period of eight days after the accident, a majority of the court is of opinion that claimant is entitled to be compensated in the amount of three hundred dollars ($300..00), and accordingly recommends an award in that amount to Legislature for its consideration.

ROBERT L. BLAND, JUDGE, *dissenting.*

The court of claims has repeatedly held that the state does not guarantee the safety or freedom from accident of persons using its highways. Bridges are part of the state highway system. In the case of *Charlton* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 132, this rule was declared:

> "No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways."

The rule of *respondeat superior* does not apply to the state. An award may, however, be made of the public revenues when a claim is founded in equity and justice and a clear moral obligation exists to pay it. I do not perceive the existence of a moral obligation of the state in the instant case, in view of the disclosures of the evidence. The driver of the truck

had been crossing the bridge every day in safety for a period of about five months. On the day of the accident his truck was carrying an overload of about five tons. A representative of the road commission examined the truck on the day of the accident, but could find no injury to the vehicle. It is true that the truck overturned and had to be removed from its position. May not any actual damage sustained have been the result of such removal rather than its overturn? Evidence indicates that others who used the bridge daily did so successfully and safely.

I would dismiss the claim.

(No. 634—Claim dismissed.)

ROBERT S. JACOBSON, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1949

Syllabus in re Brann v. *State Road Commission*, 3 Ct. Claims (W. Va.) 118, adopted and reaffirmed.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, Robert S. Jacobson, prosecutes his claim in the amount of $24.69 for damages to his automobile occasioned by striking a hole in the road on what is known as the Old Kingwood Pike in Monongalia county, West Virginia. The

accident occurred in June 3, 1948, at about five o'clock P. M., at a point on said pike just outside the city limits of Morgantown. The weather was clear and bright and claimant admits in his testimony (record p. 7) that he could see the road, although he could not pass an automobile going in the opposite direction without striking the hole in question. It necessarily follows from claimant's own testimony that as he could plainly see the road he either saw or ought to have seen the hole; if he did not see it, he was negligent in not driving as carefully as he should have driven. On the other hand if he saw the hole and did not stop to let a car going in the opposite direction pass, he assumed the risk of any injury or damages occurring to his own automobile, and cannot now complain by reason of his own acts that were the the proximate cause of the accident.

It is true that the said pike was not much used or traveled, and that it was partially abandoned and that it was in need of repair. But a driver of an automobile on such a road must still use and exercise such care and caution as the conditions and circumstances require, and failure to do so will bar him from recovery for damages occasioned by injuries to his automobile.

The state is not a guarantor of the safety of persons using the highways within its boundaries.

The facts adduced by the evidence before us do not support the claimant's contention, and an award is therefore denied and the claim dismissed.

(No. 635—Claim dismissed.)

JAMES S. ROBERTS, *infant*, by A. D. ROBERTS, JR., his father and next friend, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 3, 1949

When the record shows that claimant's automobile was being driven at a reckless, unlawful rate of speed at the time of the accident, he is thus barred from an award by reason of his negligence, which negligence was the proximate cause of the accident.

Appearances:

Goshorn & Goshorn, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant James S. Roberts, an infant twenty years of age, seeks an award for injuries to a pick-up truck he was driving on the morning of July 21, 1948, the injuries to the truck having occurred by reason of an accident on U. S. route 60, within the western corporate limits of the city of South Charleston, in Kanawha county, West Virginia, and, as alleged in claimant's petition, caused by a defect in the highway at and near the place indicated. The accident occurred about six forty-five o'clock A. M., while he was driving westward on the morning in question. The weather was clear, the highway and road dry, visibility good, and seemingly no obstruction present to interfere in any manner with the proper operation of the truck. The highway (route U. S. 60) is extensively traveled and is the main artery between the city of Charleston and the city of Huntington. Claimant alleges and attempts to prove that defects or an uneven surface in the highway created humps or

small anticlines and these, together with several breaks or cracks in the concrete roadbed caused him to lose control of the truck, which jumped the "island" between the east and west lanes of the highway (it being a four-lane road approximately forty to forty-five feet wide), struck and injured an automobile traveling on the opposite outer lane in an easterly direction. The truck turned over and landed on its top or roof in the opposite or east bound lane. Both the truck and the said automobile were damaged as shown by the evidence adduced.

The traffic "island" referred to is about three feet wide and has a six inch high concrete border over which claimant's truck had to pass before reaching the east bound lane where the collision took place. The driver of the east bound automobile was approximately two hundred feet from claimant's truck when he first saw the truck veer and jump to the eastbound lane, and fearing the truck would strike his automobile, immediately drove his car to the extreme right of the lane and against the guardrail to avoid a collision. A careful consideration of these facts leads us to the conclusion that claimant at the time was driving his truck in a highly reckless manner and thus by his negligence caused or at least highly contributed to his accident and therefore he is not entitled to an award.

No defect of any kind in the truck is shown. Its mechanism was seemingly in good repair and if it had been operated in a proper, safe and careful manner, as required by the laws of the state, the accident would never have happened.

As to the alleged defects in the highway the testimony shows no unusual or dangerous dips or breaks, but only such conditions as are daily present on a much traveled highway and over which the state is only called upon to exercise reasonable supervision and maintenance for the safety of the traveling public. The State is not, and cannot be, a guarantor of the safety of an automobile driver while using a highway, and the driver is still charged with the duty of having his car

under control at all times, not only as a matter of safety for himself but of fellow travelers as well.

The best evidence as to the condition of the highway at the place of and near the accident was given by the chief of police of the city of South Charleston, who testified that at the place indicated he had driven over the highway in pursuit of violators, at a rate of from fifty to eighty miles an hour, never had anything happen, and that of two hundred sixty-five accidents in the city of South Charleston during the year 1948, the one under consideration was the only one to happen at and near where claimant lost control of the truck and experienced the accident in question. We repeat that a truck under control as required could not pass over or jump a space three feet wide encased in a six inch high concrete border, then travel approximately two hundred feet on the opposite lane if the highway before striking another automobile and turning over on its top or roof. The truck must have been driven at a highly excessive and unlawful rate of speed, and therefore the claimant must be denied an award.

Accordingly, an award is denied and the claim dismissed.

(Claim No. 658—Claimant awarded $14,836.80.)

CONTINENTAL FOUNDRY & MACHINE COMPANY,
Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed February 3, 1949

A claim properly filed with the court within the five-year period for refund of overpayment of gross sales taxes which were paid to the state tax commissioner and the returns notified the commissioner that the values reported therein were subject to adjustment upon renegotiation in an amount unknown to the claimant and that the claimant would expect refund of the tax upon such reduction in value after it had been ascertained constitutes a moral obligation upon the state to refund the overpaid taxes and an award will be made accordingly.

Appearances:

Hall, Paul & Phillips, for claimant.

Burns Stanley, for respondent.

MERRIMAN S. SMITH, JUDGE.

The facts including the amounts of overpayments which form the basis of this claim are not disputed. They have been stipulated, and are as follows:

> "It is stipulated by and between the claimant, Continental Foundry and Machine Company, and the State Tax Commissioner of the State of West Virginia and the office of the Attorney General of the State of West Virginia as follows:
>
> "The statement of claim of the Claimant contained in the notice of claim filed herein insofar as said statement of claim asserts and alleges facts is accurate and

correct in all respects. The Claimant did on January 5, 1944, file its business and occupation tax returns to the State of West Virginia for the fiscal year 1943, reporting and paying as tax the amount of $54,801.47; that subsequent thereto and on the 27th day of April, 1945, the gross value of the manufactured products of the Claimant was redetermined in renegotiations proceedings with the Price Adjustment Boards of the Federal Government, such renegotiation proceedings resulting in a refund by the Claimant to the Federal Government in the amount of $9,300,000; that allocating the proportion of said renegotiation refund which is properly applicable to the products manufactured in the State of West Virginia to the State of West Virginia resulted in a reduction in the gross value of the manufactured products of the Claimant in West Virginia for that year in the amount of $2,917,600; and applying the applicable rates of the business and occupation taxes of the State of West Virginia to that reduced value shows that the Claimant overpaid its business and occupation taxes to the State of West Virginia in that year in the amount of $10,925.21.

"Similarly, for the tax year 1945, the Claimant filed its final return for business and occupation taxes on December 26, 1945, reporting the gross value of its manufactured products subject to the business and occupation taxes at $11,898,590.61, and did report and paid taxes thereon in the amount of $41,213.72; subsequent thereto and on the 18th day of March, 1948 as the result of renegotiation proceedings a renegotiation agreement was arrived at by the terms of which the Claimant was obliged to refund to the Federal Government the amount of $3,272,027; allocating the proportion of the said negotiation refund to West Virginia which is properly chargeable as to the value of the manufactured products in West Virginia resulted in a reduction of the gross value of the manufactured products as reported in the Claimant's 1945 return in the amount of $1,114,419.68, and this reduction, after applying to the reduced value the proper rates of tax, showed an indicated overpayment by the Claimant to the State of West Virginia for business and occupation tax in the year 1945 in the amount of $3,911.59.

"The notice of claim also contains certain allegations with reference to the business and occupation tax for the year 1944, but the claim arising from the overpayment of tax in that year was determined and allowed in administrative procedure by the State Tax Commissioner and is not part of the Claiman't claim here.

"It is further stipulated that the method of allocation of the renegotiation refunds made by the Claimant to the West Virginia business and to the gross value of the products manufactured in West Virginia is proper and that the computations shown upon Exhibit A and Exhibit B respectively and the notice of claim are accurate."

While the claimant's request for refunds for tax overpayment for both years 1943 and 1945 is based on different equitable and legal grounds, the majority of this court has consistently held that such overpayments constitute a moral obligation upon the state of West Virginia to make a refund, and awards have been made and so recommended to the Legislature for payment. However, the petition for refund of the 1945 tax overpayment is the first claim we have had presented wherein the renegotiation contract was not completed until after the two-year administrative remedy set forth in code 11-1-2a had expired, and this court recognizes that it was impossible for the claimant to put itself within the two-year limitation because the amount of the tax could not be determined within the two-year administrative period. This is all the more reason why the court of claims five-year statutory limitation should apply to such meritorious claims under the business and occupation tax.

The state has not suffered and detriment by reason of the failure of this claimant to present its claim for administrative action to the tax commissioner within the two-year period. It has had the use of the money and from the standpoint of the taxpayer merely held the money in escrow until such time as a definite determination of the proper and exact tax could be calculated.

The court of claims was set up by the Legislature in its wisdom and understanding to have jurisdiction over such situations whereby the state of West Virginia is morally obligated to, and under all rules of equity and good conscience should, fulfill its obligation to its citizens. The state is not a master over the people but should be the servant of the people and the old conception that the state can do no wrong is a false theory if it be permitted to take advantage of an administrative technicality as in the instant claim, by taking the monetary substance of the claimant to which it is not justly and fairly entitled. The Supreme Court of our state in *Cashman* v. *Sims,* 43 S. E. (2d) 805, defined what constitutes a moral obligation, cited in the majority opinion, as:

> "* * * or an obligation or a duty, legal or equitable, not imposed by statute but created by contract or resulting from wrongful conduct, which would be judicially recognized as legal or equitable in cases between private persons."

There can be no doubt but that an action would be legal between private individuals should similar conditions arise between them.

As to the tax commissioner's plea to the jurisdiction of the court of claims in the instant claim, he bases his plea upon Michie's code chapter 11, article 13, section 8, which reads as follows:

> "If any person, having made the return and paid the tax as provided by this article, feels aggrieved by the assessment so made upon him for any year by the tax commisisoner, he may apply to the board of public works by petition, in writing, within thirty days after notice is mailed to him by the tax commissioner, for a hearing and a correction of the amount of the tax so assessed upon him by the tax commissioner, in which petition shall be set forth the reasons why such hearings should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petioner shall be forthwith notified thereof; if granted, the board shall

notify the petitioner of the time and place fixed for such hearing. After such hearing, the board may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the tax commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable. Upon presentation of a certified copy of a judgment so obtained, the auditor shall issue his warrant upon any funds in the treasury available for the payment thereof.

"No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this article, or any part of them, due from any person, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this State; or that the same were fraudulently assessed; or that there was a mistake made in the amount of taxes assessed upon such person. In the latter case, no such injunction shall be awarded, unless application shall first have been made to the board of public works to correct the alleged mistake and the board shall have refused to do so, which fact shall be stated in the bill, and unless the complainant shall have paid into the treasury of the state all taxes appearing by the bill of complaint to be owing."

The majority of this court is of the opinion that the remedy offered the claimant under this section of the code only runs concurrently with the administrative remedy applicable to the state tax commissioner in which event the two-year administrative limitation remedy would apply equally to the circuit court which likewise would bar the instant claim,

since the proceeding by claimant would be by way of prior administrative action, and in this case no administrative action was involved in the determination of the taxes paid. The tax was self-assessed by the claimant in filing its returns and voluntarily paid by the claimaint at the same time calling attention to and serving notice upon the tax commissioner that the contracts were to be renegotiated and that a proper refund should be made after such determination. Our Supreme Court has denied the power of the Legislature to delegate such administrative functions to a court, *State* v. *Huber*, 40 S. E. (2d) 11, in which the Legislature attempted to give the circuit courts concurrent power with the state tax commissioner over the question of licensing and revoking licenses for the sale of beer.

The court of claims is not a court of law and does not have the authority to pass upon the constitutionality of any statute. However, it is a fact-finding arm of the Legislature and within a five-year limitation period from which the cause of action arose it has the duty of investigating and making awards and recommending same to the Legislature in respect to all agencies of the state except in those instances where *prima facie* jurisdiction is specifically excluded.

We are thoroughly cognizant of the fact that under section 35, article 6 of the constitution of the state, that the state of West Virginia cannot be sued. However, the Legislature in its creation of the court of claims refers to this section of the constitution, and it is the opinion of the majority of the court, as now constituted, that it should entertain and hear all claims against the state prosecuted before it within the statutory period, and if jurisdiction be not *specifically barred* that a proper determination and recommendation should be made, after weighing the evidence and all the facts, and with every consideration of the statutes and due respect to the decisions of the Supreme Court.

A majority of this court hereby makes an award in the sum of $10,925.21 for the year 1943 and $3,911.59 for the year 1945,

thereby making a total award of fourteen thousand eight hundred thirty-six dollars and eighty cents ($14,836.80) to the Continental Foundry and Machine Company, and recommends that same be authorized by the Legislature.

ROBERT L. BLAND, JUDGE, dissenting.

I think the most serious question in this case arises upon the motion of the state tax commissioner to dismiss the claim for want of jurisdiction to entertain it. As indicated in the majority opinion the claim was submitted to the court upon a stipulation of agreed facts. Thereupon the respondent challenged the jurisdiction of the court to make an award upon such facts. The majority opinion wholly ignores the motion to dismiss, and has made an award upon the ground and for the reasons set forth in said majority opinion. I find myself unable to subscribe to or agree with the views expressed by my colleagues, Judges Smith and Schuck.

Section 14 of the court act, relating to claims excluded from consideration by the court of claims, reads:

> "The jurisdiction of the court shall not extend to any claim: * * * 7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

The majority opinion sets forth the statute relied upon by respondent as affording claimant a remedy in a court of law of the state.

In the United States District Court for the southern district of West Virginia, in the case of *United Artists Corporation* v. *James*, reported in 23 Federal Supplement, page 353, in the finding of facts therein contained and in referring to article 13, chapter 11 of the code of West Virginia, being the statute relied upon by respondent in this case, in order to show that the claimant has a remedy in the courts of law of the state, Judge McClintic, who rendered the opinion therein, takes

notice of and recognizes the existence of such statute in this language:

> "Such article further provides that (section 8, p. 229) any person, having made the return and paid the tax as provided therein, who feels aggrieved by the assessment made upon him, may apply to the Board of Public Works within thirty days after notice is mailed to him by the Tax Commissioner for a hearing and correction of the amount of the tax so assessed against him, said Board may grant or deny such hearing, and upon a hearing, if granted, may make such order as shall appear to it just and lawful: any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the Tax Commissioner, and the Circuit of the county in which the taxpayer resides or is located shall have original jurisdiction of any such action and shall adjudge costs to such extent and in such manner as may be deemed equitable, and upon presentation of a certified copy of a judgment in any such action the Auditor of the State of West Virginia shall issue his warrant upon any funds in the State Treasury available for the payment thereof; no injunction shall be awarded to restrain the collection of taxes imposed thereby except upon the ground that the assessment thereof was in violation of the Constitution of the United States or the Constitution of the State of West Virginia, or that the same were fraudulently assessed, or that there was a mistake made in the amount of taxes assessed upon such person, and in the latter case the bill must show an application to the Board of Public Works for the correction of the assessment and the payment into the treasury of all taxes appearing by the bill of complaint to be owing."

In the case of *State* v. *Penn Oak Oil & Gas, Inc.*, 36 S. E. (2d) 595, in point three of the *syllabi*, this binding rule of law is stated:

> "The provisions of code, 11-14-19, as amended by Chapter 124, Acts of the Legislature, 1939, relating to a refund of the excise tax on gasoline, create the exclusive remedy which may be used to obtain such

> refund. Any refund provided for therein must be based on an application for the return of a tax theretofore paid."

Judge Fox, who wrote the opinion of the court in that case, uses this significant language:

> "Where a statute imposing a tax provides the taxpayer with a specific remedy against injustices arising thereunder, and the taxpayer fails to avail himself of the remedy so provided, he cannot go outside the statute for other and different remedies."

Claimant argues that the statute relied upon by respondent to show a remedy in a court of law is unconstitutional and unenforceable.

It is expressly provided in section 4 of the court act as follows:

> "The court shall not be invested with or exercise the judicial power of the state in the sense of article eight of the constitution of the state."

I think that it is obvious that this court has no power to declare a statute of the state unconstitutional. I think, moreover, that this court is bound and controlled by the provisions of the code and acts of the Legislature. For us to declare any such act unconstitutional or unenforceable would certainly be an act of superarrogation upon our part.

Believing as I do, after much thought and reflection, that claimant does have a remedy in the courts of the state, I deem it unnecessary to discuss, at least at any length, the claim upon its merits. Indeed I am impressed by the thought that the claim is meritorious in many respects. It has undoubted equities. If I could persuade myself that the court of claims has jurisdiction of the claim I do not think that I would encounter much difficulty in voting for an award.

The claim has been most capably presented to this court. It has been ably argued. The briefs filed on both sides show the

seriousness with which the claim is regarded by both parties. I do not think that the majority opinion is in any respect an answer to the convincing argument of respondent.

The majority opinion dealing with the claim upon its merits says:

> "While the claimant's request for refunds for tax overpayment for both years 1943 and 1945 is based on different equitable and legal grounds, the majority of this court has consistently held that such overpayments constitute a moral obligation upon the state of West Virginia to make a refund, and awards have been made and so recommended to the Legislature for payment."

So far as I can recall, the instant case is the first one that this court has ever had dealing with renegotiations with the Federal Government. I believe that the case stands upon a distinct basis. I do not agree with the majority opinion stated. It is true that since the determination made in The *Raleigh County Bank* case the court, as now constituted, has been making awards, notwithstanding the failure of claimants to make application to the state tax commissioner for refunds within the period prescribed by statute. This policy did not prevail during the period that Judge Elswick sat as a member of the court of claims. In my second dissenting statement in *The Raleigh County Bank* v. *State Tax Commissioner*, 4 Ct. Claims (W. Va.) 42, I set forth my views at some length, and now refer to said statement.

The court is divided on the question of making refunds where there has been failure on the part of a claimant to make application to the tax commissioner for a refund within the period prescribed by law to do so. The court has not, notwithstanding its recent holdings, disapproved the *Del Balso* case or the *Fairmont Coal Company* case. Since that time Judge Schuck has concurred in the *State Construction* case and in the *Long* cases, in both of which awards were denied following the policy outlined in the very beginning of the court's work.

I desire to acknowledge the splendid help which I have received from the very able brief filed in the case on behalf of claimant and the like able brief furnished by counsel for respondent.

Since I believe that a remedy exists in the courts of law on behalf of claimant and that this court is by statute precluded from taking jurisdiction of the claim, I would sustain the motion of respondent to dismiss said claim.

(No. 630—Claimant awarded $500.00.)

SARAH ANN BROWN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 4, 1949

When a county road superintendent of the state road commission, being desirous of relocating a portion of a secondary road, without authority of the road commission and solely of his own volition, enters into a verbal contract in the name and on behalf of the road commission, with a landowner, by the terms whereof the landowner agrees to give a right of way over and through her land for a distance of one thousand feet, of the width of thirty or forty feet, without monetary consideration, but on condition that the road commission will construct a bridge on said land, and do and perform other acts for the benefit of said land, and such road is relocated and constructed upon said land, but the road commission fails to observe and perform the contract for the construction for such right of way and violates such contract, an award will be made in favor of such landowner by way of compensation for such breach of contract.

Eakle & Eakle, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant Sarah Ann Brown, a widow, and in the evening of her life at the advanced age of ninety-four years, resides on her farm of about thirty-five acres of land situate on the waters of Big Sycamore Creek, in Pleasants District, Clay county, West Virginia. Her adult daughter, Azora Brown, makes her home with her aged mother. During the summer of 1944 one Ray Noe, county road superintendent for the state road commission in said Clay county, met claimant's daughter in the county seat. He informed claimant's said daughter that the state road commission wanted to construct a road through her mother's farm in front of the residence on said land. The daughter advised the representative of the road commission

that she would confer with her mother on the subject and talk with him on the following day at their home. Mr. Noe accordingly visited the home on the following day, where the proposed relocation of an existing secondary road would be constructed on claimant's land. The details of the proposed construction or relocation of the new road through claimant's land were discussed at length and fully understood and agreed to by both claimant and the county road superintendent, as well as by claimant's daughter. No monetary consideration was to be paid by the road commission to claimant for the right of way over her premises, but certain things were to be done and performed by the road commission which, in the judgment of claimant and her daughter, would be of benefit to claimant. Prior to this time a primary road known as route 16 had been constructed in the vicinity of claimant's land and certain drains built from this road through claimant's land to the creek. It was distinctly understood that the road commission was to build a bridge at a point definitely designated, which bridge would be adjacent to and promote the convenience of claimant and her family in their use of their property. Certain culverts were also to be constructed and a number of other incidental acts unnecessary, for the purposes of the determining of this case, to be detailed at this time. The right of way agreed upon would traverse some of the most valuable part of the land. During the construction of said right of way certain blasting of rocks or stones would have to be done, many of which fell upon and did injury to the improved portion of claimant's land. Some of these rocks or stones fell upon the roof of the small residence in which claimant lived and did serious damage thereto. In the course of the work of relocation, a drain which had served the home was removed and never reinstated.

Members of the court made a personal inspection of the premises and could see for themselves what should have been done under the terms of the contract and what was not done in pursuance of said contract. Claimant did all that she was called upon to do on her part. She gave the land on which the right of way was constructed. She relied in good faith upon the representations made to her by the county superintendent

with respect to what would be done in return for such right of way by the road commission. Except in a few minor circumstances the road commission wholly failed and neglected to comply with the agreement made on its behalf with claimant by its said county road superintendent. He testified in the case and frankly admitted his failure to build the bridge or to do other things which constituted the real consideration for the right of way. He said that the road commission had not at the completion of the work been in a situation to obtain certain materials that would be necessary to the construction of the bridge in question, but that later when such material was available he found it necessary to make improvement in other sections of the county. In a word, the county superintendent having acquired the right of way through claimant's premises and relocated the secondary road on her land, was not nearly so interested as he professed to be when he sought to obtain the contract. He frankly admitted that he obtained the right of way, made the relocation of the road and reconstructed the new road without any direction by the commission and entirely by his own volition. Of course the contract for the relocation of the road was irregular and unauthorized, but since the road commission has received the benefit accruing from the acquirement of the new location and the building of the new road thereon, the state is and should be estopped from relying on such irregularities. The road commission at the time of the hearing of the claim had acquired no title to the land on which the right of way was constructed. No agreement, deed or other muniment of such title is in existence. It has no record whatever of what was done at the behest and under the direction of its Clay county superintendent. It seems to the court of claims to be a very loose and unsatisfactory way to do such important business. Claimant, feeling that she has been aggrieved in the premises and that she has a just and meritorious claim against the road commission, has come into the court of claims for such relief as it may be able to afford her under the circumstances so clearly set forth both by the evidence heard and the personal inspection made by the court. She seeks an award of $3000.00. We are unable however to make or approve an award in that amount. We feel that the road commission

has violated the terms of the contract which it made under the circumstances hereinbefore set forth with claimant. We believe that she has a good, sound, meritorious claim arising out of the contract which she made in good faith and relied upon. The road commission has taken claimant's land without paying her any money therefor or doing the things which it agreed to do in consideration of obtaining such right of way. We find it somewhat difficult to itemize the damages sustained by claimant, but after a careful consideration of her claim we are of opinion that in equity and good conscience and upon every principle of sound law she has been damaged at least to the extent of $500.00.

An award is therefore now made in favor of claimant, Sarah Ann Brown, for the sum of five hundred dollars ($500.00), but with the understanding that she shall make, execute and deliver to the state road commission any such deed or agreement as is proper and necessary for the right of way through her land.

(No. 638—Claim denied.)

E. B. ESKEW, Claimant,

v.

STATE ROAD COMMISSION, Respondent

Opinion filed February 4, 1949

The state does not guarantee freedom from accident to persons traveling the highways; nor is there a duty to maintain the highways in more than a reasonably safe condition.

Appearances:

Frank Love, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

On June 8, 1948, one Walter Caldwell was driving a 1947 Nash sedan along state secondary road No. 8, in Fayette county, West Virginia, enroute to the 4-H camp. The said automobile belonged to claimant E. B. Eskew. Caldwell was accompanied by claimant's daughter Wilda Eskew, Anna Maxwell and Janice Ritz.

Upon rounding a righthand curve Wilda Eskew, who was on the front seat with Caldwell, the driver, saw a bee in the car, and Caldwell momentarily took one of his hands off the wheel to flip the bee out of the front left window. Upon so doing, the automobile struck a large rock which was lying on the righthand berm of the road and the car, being practically off the hard surface of the road at the time, was greatly damaged by the impact.

The visibility from the point of rounding the curve to the position of the large rock was about one hundred seventy-five feet. The hard surface of the road was nine feet in width and

the berm on the left side of the road was eight feet wide. The rock was about eighteen inches from the highway on the right berm, thus making a width of eighteen and one-half feet available for driving. There was no other vehicle on the highway.

The rock had been on the berm for a period of years and the driver testified that he had driven and ridden over the road from thirty to forty times prior to this occasion.

The state is not a guarantor of the safety of the highways. The hard surface together with the berm of eighteen and one-half feet in width afforded ample room for driving and passing other vehicles. There was no negligence on the part of the state. The lone bee was the proximate cause of the accident, causing the driver of the automobile to momentarily lose control of the car.

Under such circumstances this court is of the opinion that an award be denied, and, therefore, an award is denied and the claim dismissed.

(No. 664-S—Claimant awarded $13.84.)

PROCTOR & GAMBLE DISTRIBUTING COMPANY,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 15, 1949

MERRIMAN S. SMITH, JUDGE.

On the morning of January 4, 1949, one Edward Dougher, a representative of the Proctor & Gamble Distributing Company, was driving a company-owned Ford automobile west towards Clarksburg, West Virginia, along U. S. route 50, in

Harrison county. It was a wintry morning and the highway was icy and slick. A state road commission truck was going in an easterly direction with two employes on the rear who were cindering the roadbed. At this particular point U. S. route 50 is a three-lane highway, and the truck was in the center lane, traveling at about the rate of three miles per hour. One of the employes was spreading cinders on the north lane. When Dougher started to pass the approaching truck he blew his horn. Notwithstanding this warning, the state employes threw the cinders against the left section of the windshield and broke it. The cost of the material and labor for repairs amounted to $13.84, for which sum the claimant asks this court to reimburse it.

Upon affidavit filed as evidence, the state employe stated he did not see the passing automobile until too late to check his shoveling action. From the report of the investigation by the department involved, there was no contributory negligence shown on the part of the driver of the automobile.

Since the state employe did not exercise due care under the circumstances, the state road commissioner concurs in the claim and it is approved by the attorney general, as provided for in the state court of claims act. Therefore, an award in the sum of thirteen dollars and eighty-four cents ($13.84) is hereby recommended by a majority of the court, to claimant, Proctor & Gamble Distributing Company.

ROBERT L. BLAND, JUDGE, dissenting.

The amount of the claim involved in this case is small, but the principle involved is important and far-reaching. It will be observed upon the statement of facts contained in the majority opinion that at the time of the accident the state road commission, a governmental agency, was engaged in the exercise of a governmental function. It must be manifest that one who uses the highways of the state is charged with the exercise of certain prudence and care. The right of the state in the exercise of a governmental function, in this case the spreading of cinders upon a highway or slippery road for the protection of

those using the highway, is superior to the right or usage of said highway by the driver of a motor vehicle.

The record of the claim, prepared and filed in this court by the state road commission, is exceedingly meagre in its statement of facts, and such record does not support the assumption of facts set forth in the majority opinion. Cinders were being spread upon the entire three-lane highway by two employes of the commission. The statement of claimant discloses that the driver of the motor vehicle recognized the work in which the employes of the commission were engaged, and contented himself with the mere blowing of the horn on the vehicle, and attempted to bypass the two workmen. He could not have been unaware of the danger into which he was driving his car. I cannot agree with the statement of the majority of the court that he was guiltless of contributory negligence, such contributory negligence as would defeat a claim for damages in a court of law of the state, if the state could be sued.

Since taxes may only be levied and collected for public purposes, any appropriation by the Legislature for the payment of the claim, for which the award is made, would necessarily have to be based upon the moral obligation of the state to pay it. Relying upon the West Virginia case of *Bennett* v. *Sims, Auditor,* 46 S. E. 13, which, in my judgment, would prohibit the Legislature from making an appropriation in favor of the claimant, I am unable to concur in the action of my colleagues.

(No. 661—Claimant awarded $390.00.)

R. C. JACKSON, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed April 16, 1949

When a purchase order is given to a dealer in lumber to furnish a state agency with certain specified lumber, and one-half thereof is delivered in accordance with such purchase order, but he is prevented from delivering the remaining one-half of such lumber by a purported and attempted cancellation of the order for the whole quantity of such lumber, an award will be made for the payment of so much of said lumber as was actually delivered according to the contract price therefor.

Dayton R. Stemple, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

In this case claimant R. C. Jackson prosecutes his claim against the conservation commission of West Virginia, a governmental agency of the state, for the purpose of obtaining an award in the sum of $390.00. His claim to such award is resisted by respondent.

Claimant is engaged in the business of operating a sawmill and manufacturing timber or lumber products in Upshur county, West Virginia. He has been engaged in the sawmill business for thirty-five years. During that time he has manufactured and sold lumber to various concerns or businesses.

The state of West Virginia maintains, under the jurisdiction and supervision of the conservation commission, a project known as Raccoon Farm, on French Creek, in the county of Upshur. Since November 1945, one "Bill" Jarrell has been superintendent of the project, popularly and generally known as the "Game Farm." Many animals of various species are to be found there. It is one of the attractions of the state.

Under date of August 15, 1947, the department of purchases of West Virginia, of which the Honorable Carl Riggs is director, issued and sent to claimant R. C. Jackson a purchase order calling for 6000 board feet of rough poplar lumber, 1″ x 6″ x 12′ or 14′, at $65.00 per 1000 feet, amounting to $390.00, and also for 6000 board feet of 2″ x 4″ x 12′ or 14′ rough poplar hemlock, at $65.00 per 1000 feet, amounting to $390.00. All of this lumber was to be shipped to "Bill" Jarrell, superintendent of the said Raccoon Farm at French Creek.

Claimant proceeded promptly to deliver the lumber called for in the purchase order. He delivered one load of the 6000 feet specified in the purchase order to the game farm. Some person there requested that it be taken to a planing mill, a distance, from the farm, operated by a man by the name of Queen. This was done. Soon thereafter a second load was delivered on the farm premises. It seems, however, from the evidence, that Mr. Jarrell, the superintendent of the game farm, was of opinion that the lumber furnished was unfit for the purposes for which it was intended to be used, and raised the question as to the quality of the timber, which fact was communicated to claimant. The third load, being all of the order for the first 6000 feet of lumber to be furnished, was delivered at the planing mill, but not received by the representatives of respondent, and was therefore unloaded on a public road adjacent to the game farm, and left there. On the eighteenth of February, 1948, following August 15, 1947, the date of purchase order, at the request of Mr. Jarrell, superintendent of the game farm, the department of purchases attempted to cancel the entire order for lumber, including all of the lumber actually delivered, and the second mentioned 6000 feet of timber which had not been delivered. No payment was made to claimant for the first 6000 feet actually delivered and he made no attempt to deliver the remaining 6000 feet of timber after notification of the purported cancellation of the lumber contract. The claim is limited to the payment of the 6000 feet of lumber delivered at the farm for and on behalf of the conservation commission.

The contention of respondent is that the lumber delivered and proposed to be delivered under the terms of the purchase order was not adapted to the purposes for which it was intended to be used and that it was worthless to the commission. Seemingly, a very considerable controversy arose between representatives of respondent and claimant. The purchase order merely specified rough lumber of certain dimensions and the claimant had no notice of the purposes for which the conservation commission intended to use the lumber. Claimant stated upon the hearing that he was of opinion that such lumber was proposed to be used in the building of raccoon and quail pens. This question, however, is immaterial in making a determination of the claim. The superintendent of the farm stated to claimant that he favored the cancellation of the order and an invitation to new bids for lumber of greater value than that mentioned in the contract of purchase made with claimant. The evidence shows very clearly that claimant was fair at all times and willing to supply new pieces of lumber to replace such as could be found that did not measure up to or correspond with the purchase order. It is needless to go into any detailed discussion of the evidence presented to the court upon the hearing of the claim. The claimant himself was very positive that the lumber furnished by him was actually of a superior quality to that specified in the purchase order. Representatives of respondent based their objection to the lumber supplied upon the ground that it should have been a different type of lumber, a type not specified in the purchase order, and for which a higher price would necessarily have to be paid. The evidence shows no such actual examination and familiarity with the quality of the lumber furnished as would justify or support the defense made to the payment of the claim filed. We are of opinion from the evidence that the claimant did all within reason to make a delivery of the lumber purchased from him. We are further of the opinion from this evidence that the representatives of the commission were entirely too exacting and demanded much more than the contract of purchase called for. We are moreover of opinion that the superintendent of the game farm and other representatives of the conservation commission were negligent and indifferent in taking care of

the lumber delivered by claimant. The last load was permitted to lie on the roadside or highway until it rotted, and seemingly no care whatever was exercised either to use or protect the lumber actually delivered on the game farm. The state bought and had the benefit of claimant's lumber. In all fairness the state should pay for what it purchased and what was delivered. Contracts cannot be disposed of or destroyed by a mere wave of the hand. So far as any defense to the claim made in the court of claims by the conservation commission is concerned, it is, in our judgment, futile and wholly insufficient. All of the evidence, carefully considered, satisfies the three members of the court, in the investigation that has been conducted of the claim, that it is an honest claim, possessed of merit, and should be paid.

An award is, therefore, made in favor of claimant R. C. Jackson in the sum of three hundred and ninety dollars ($390.00).

(No. 648—Claim denied.)

DORIS BROWN, an *infant*, by ROMIE BROWN, her father and next friend, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 16, 1949

No duty rests upon the state to protect either an adult or child trespasser or is broken by failure of the state to safeguard and barricade a state-owned bridge, during its construction, from such trespassers and no award will be granted for injuries received by them in its use.

Appearances:

L. F. Poffenbarger and *Williamson Watts*, for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

G. H. A. KUNST, JUDGE.

At about five o'clock on the evening of Saturday, August 24, 1948, Doris Brown, a child several months over seven years of age and the daughter of Romie and Dovie Brown, while playing with two other children on a steel girder, about fourteen inches in width at its upper face, of a partially constructed bridge over Paint Creek, near the town of Holly Grove in Kanawha county, West Virginia, fell a distance of about eighteen feet into the water and on rocks in the bed of the stream. She sustained severe bruises and a broken arm as a result of this fall. She was taken to Laird Memorial Clinic, at Montgomery, West Virginia, and her injuries were treated. The charges for such treatment amounted to $53.00.

The doctor who treated her injuries, although summoned as a witness by claimant did not appear at the hearing, and his attendance was not compelled by claimant's attorney, and no expert testimony was introduced as to her injuries. The child

was presented to the court and asked to wave, raise, lower and move her arm, which she did, and her attorney rotated it. This demonstration showed no obstruction in her use of it.

The witnesses Henry Seacrist and his grandson, Gordon Lloyd Swartz, while passing over the road under the structure in an automobile saw the child fall. Swartz went to the creek and carried her to the bank. She struggled out of his arms, was crying, and ran around for a little while in a confused manner, but soon she seemed to realize that her arm was injured and, holding it, started to run home. Swartz stayed with her until she reached home. She kept repeating that she was not hurt, but was scared and did not want to go home for she feared her father would whip her for slipping off.

Zack Phillips, respondent's foreman in charge of construction, stated that each day during the construction of the bridge, before leaving workmen placed at the entrance to the bridge heavy wooden trestles or barriers, admittedly insufficient to prevent any one from going upon the structure, on which was hung a sign with the words "Bridge Closed." This had been done on the evening of the accident. These trestles were often found the following morning in the creek.

No roads then approached the entrances to the bridge, but were to be constructed later. The bridge was not at a stage of construction for vehicular or pedestrian use. The abutments on which the two girders rested were several feet above the ground.

The evidence is that during every stage of the construction of this bridge although parents and children were warned of the danger, and children repeatedly driven from the structure it was impossible to keep them off. Parents and children alike were apparently indifferent to the danger.

The child Doris Brown, by Romie Brown, her father and next friend, alleged negligence of the state road commission in not having provided guards and barricades sufficient to have

prevented children from trespassing on the incompleted and unsafe structure, and asked damages in the amount of $10,000.00 from respondent for her injuries.

The state owes no legal duty to a trespasser to so barricade and safeguard a partially constructed bridge across a stream as would prevent trespassers getting on it. The fact that such trespasser was a child of tender years did not make such precaution a legal duty that was broken when such trespassing child, having strayed from its parents, passed the barricade and, while playing with other children on a steel girder of the structure, fell about eighteen feet into the water and rocks below. The fact that the dangerous structure was attractive to children did not cause the child to be other than a trespasser, nor shift the duty of its protection from its parents to the state.

The following decisions of our Supreme Court are referred to for the law governing this opinion as well as two analogous decisions of this Court: *Conrad* v. *Baltimore and Ohio Railroad Co.*, 64 W. Va. 176, 61 S. E. 44; *Uthermohlen* v. *Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410; *Ritz* v. *City of Wheeling*, 45 W. Va. 262, 51 S. E. 369; *Sims, admx.* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 360; *Gill* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 290.

Therefore an award for injuries sustained by the child is not granted.

(No. 662 and 665—Claims dismissed.)

HAMILL COAL SALES COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

THE UNITED TELEPHONE COMPANY, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed June 24, 1949

The jurisdiction of the state court of claims does not extend to any claim with respect to which a proceeding may be maintained by or on behalf of a claimant in the courts of the state.

Claimant on its own behalf.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The claimant in the first above styled case seeks an award for refund of what is commonly known as gross sales taxes contended by it to have been erroneously paid on income earned outside of the state of West Virginia, in the sum of $737.22. The claimant in the second styled case seeks an award by way of refund of gross sales taxes contended to have been overpaid through error of the taxpayer, in the sum of $253.52. The court having carefully considered both of said claims on the 24th day of June, 1949, determined that it is without *prima facie* jurisdiction of said two claims, or either of them, and accordingly dismissed both of them.

Section 14 of the court of claims act expressly excludes from the jurisdiction of the court seven classes of claims, as follows:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For injury to or death of an inmate of a state penal institution.

3. Arising out of the care or treatment of a person in a state institution.

4. For a disability or death benefit under chapter twenty-three of this code.

5. For unemployment compensation under chapter twenty-one-a of this code.

6. For relief or public assistance under chapter nine of this code.

7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Thus it will be observed that by subsection 7, of the said article 14 the jurisdiction of the court of claims does not extend to any claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

A remedy is provided by general law for relief of the above two claimants. Section 8, article 13, chapter 11 of the code, 1943, reads as follows:

> "If any person, having made the return and paid the tax as provided by this article, feels aggrieved by the assessment so made upon him for any year by the tax commissioner, he may apply to the board of public works by petition, in writing, within thirty days after notice is mailed to him by the tax commissioner, for a hearing and a correction of the amount of the tax so assessed upon him by the tax commissioner, in which petition shall be set forth the reasons why such hear-

ings should be granted and the amount such tax should be reduced. The board shall promptly consider such petition, and may grant such hearing or deny the same. If denied, the petitioner shall be forthwith notified thereof; if granted, the board shall notify the petitioner of the time and place fixed for such hearing. After such hearing, the board may make such order in the matter as may appear to it just and lawful, and shall furnish a copy of such order to the petitioner. Any person improperly charged with any tax and required to pay the same may recover the amount paid, together with interest, in any proper action or suit against the tax commissioner, and the circuit court of the county in which the taxpayer resides or is located shall have original jurisdiction of any action to recover any tax improperly collected. It shall not be necessary for the taxpayer to protest against the payment of the tax or to make any demand to have the same refunded in order to maintain such suit. In any suit to recover taxes paid or to collect taxes, the court shall adjudge costs to such extent and in such manner as may be deemed equitable. Upon presentation of a certified copy of a judgment so obtained, the auditor shall issue his warrant upon any funds in the treasury available for the payment thereof.

"No injunction shall be awarded by any court or judge to restrain the collection of the taxes imposed by this article, or any part of them, due from any person, except upon the ground that the assessment thereof was in violation of the constitution of the United States, or of this State; or that the same were fraudulently assessed; or that there was a mistake made in the amount of taxes assessed upon such person. In the latter case, no such injunction shall be awarded, unless application shall first have been made to the board of public works to correct the alleged mistake and the board shall have refused to do so, which fact shall be stated in the bill, and unless the complainant shall have paid into the treasury of the state all taxes appearing by the bill of complaint to be owing."

Since by general law a proceeding may be maintained by the above claimants in the courts of the state for their relief,

it necessarily follows that they can have no standing in the court of claims. The court of claims can exercise no jurisdiction that is expressly denied to it by the court act.

We have repeatedly announced and followed the rule herein set out.

The state court of claims will not entertain jurisdiction of a claim upon which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Cottle* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 84.

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Scaveriello* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 86.

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Burns* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 439.

The act creating this court, section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Mallow* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 411.

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Wright* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 405.

The state court of claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of

the state. *Soloman* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 434.

The State Court of Claims has no power to make an award for a claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state. *Williams* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 408.

The act creating this court, Section 14, relating to the jurisdiction of the court, specifically excludes from its jurisdiction any claim which may be maintained by or on behalf of the claimant in the courts of the state. *Miller* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 441.

It is expedient that precedent should be observed and followed. All holdings of the court in conflict with the statement contained in the *syllabus* of this opinion are now expressly disapproved.

(No. 671—Claim dismissed.)

S. W. PRUETT, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed July 11, 1949

Where a statute, code 1943 11-14-20, provides a specific remedy for refund of excise gasoline tax, such remedy is exclusive and the court of claims does not have *prima facie* jurisdiction.

MERRIMAN S. SMITH, JUDGE.

Claimant seeks a tax refund covered by U. S. Government tax exemption certificates for purchases made by the U. S.

Post Office department at Bluefield, Mercer county, West Virginia, during the months of September 1946 to September 1948 inclusive, in the amount of $308.12, which refund was refused by the state tax commissioner because the applications were not made within the sixty-day period from the respective dates of sale or delivery as provided for under code 1943, 11-14-20.

In the case of *State* v. *Penn Oak Oil & Gas, Inc.*, 128 W. Va. 212; 36 S. E. (2d) 595, point three of the *syllabi* is:

> "The provisions of Code 11-14-19, as amended by Chapter 124, Acts of the Legislature, 1939, relating to a refund of the excise tax on gasoline, create the exclusive remedy which may be used to obtain such refund. Any refund provided for therein must be based on an application for the return of a tax theretofore paid."

In the instant claim the dealer had ample notice of the statutory provisions which were printed on the back of each application sent out by the tax commissioner, and as stated in the *syllabus*, the court of claims is without *prima facie* jurisdiction, and the claim will not be placed on the trial docket for hearing.

(No. 670-S—Claimant awarded $75.38.)

WEIRTON CIGAR & CANDY COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 19, 1949

JAMES CANN, JUDGE.

The claimant, Weirton Cigar & Candy Company, of Weirton, West Virginia, seeks reimbursement in the amount of $75.38,

which amount claimant was obliged to pay for repairs to its automobile, damaged by fragments of a large stone which had rolled off a slope onto West Virginia state route NO. 30, at Stewart's Cut, in Hancock county, West Virginia.

The record reveals that one Nick Dimos, on the fourth day of May, 1949, at about three o'clock P. M. of that day, was operating a 1941 De Luxe Ford two-door automobile, belonging to claimant, driving west on state route NO. 30; that as he approached Stewart's Cut, where a crew of the state road commission was shooting and sloping stone at said cut, he was stopped by the flagman stationed at the east end. Flagmen were stationed at both the east and west end of said cut where the state road commission crew was working. After a short time the driver of claimant's car was given the signal by the flagman at the east end to proceed, and when he had driven for about fifty to seventy-five yards, a large stone, thrown over the top of said cut, rolled to the highway with such force that it splintered and some of the fragments struck claimant's automobile causing the damages complained of.

From the record it appears that the employes of the state road commission working at said Stewart's Cut were negligent and careless in the performance of their duties, and that no negligence is attributed to the driver of claimant's automobile.

The state road commission does not contest the claimant's right to an award for the said amount claimed, but concurs in the claim for that amount, and the claim is approved by the assistant to the attorney general as one that should be paid. We have carefully considered the case upon the record submitted, and a majority of the court is of opinion that it should be entered as an approved claim and an award is accordingly made in the sum of seventy-five dollars and thirty-eight cents ($75.38).

ROBERT L. BLAND, JUDGE, dissenting.

The maintenance of a public highway is a governmental function. On the day of the accident on account of which the claim in this case is made, the state, through its road commission, was engaged in shooting and sloping stone at Stewart's Cut, as shown in the majority opinion.

In the exercise of a governmental function the state is not liable for the negligence—if there actually be negligence—of its agents and servants in the absence of a statute making it so liable. There is no such statute in West Virginia.

The state does not guarantee safety or freedom from accident of persons using its highways. Persons using such public highways assume all risks incident to such travel. The state owes no duty to persons using its highways further than to keep them in reasonably safe condition for public travel thereon.

The fact that flagmen were stationed at the eastern and western ends of said cut or road was sufficient to put the driver of claimant's vehicle on notice of any danger that he might assume or incur in proceeding upon the highway. His privilege of using such highway was subordinate to the greater right of the state to repair the road. The mere signal given by the flagman at the eastern end of the cut to proceed did not constitute actionable negligence. The driver actually did travel from fifty to seventy-five yards before his automobile was struck by a falling rock. This case only strengthens and confirms my conviction that the shortened procedure provision of the court act should never be used in cases where facts are controversial. In the instant case the record in which the claim is presented to this court is a one-sided affair. The road commission concurs in the claim and presents it to the court from its point of view and it is approved by an assistant attorney general. As a matter of fact the award is made by the state road commission and the attorney general's office. The court of claims is merely used in the premises as a

ratifying instrumentality. Its consideration of the facts is necessarily limited to one side of the case, that side being the one considered by the road commission alone.

(No. 666—Claim denied.)

MARGARET ELIZABETH LOWERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 19, 1949

1. Every user of the highway travels thereon at his own risk. *State ex rel. Adkins* v. *Sims, Auditor,* 46 S. E. (2d) 81.

2. The state does not and cannot assure him a safe journay. *Id.*

3. The failure of the state road commission to provide guardrails and road markers, and to paint a center line on the highway, constitutes no negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the state to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof. *Id.*

Appearances:

Linn Mapel Brannon, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

JAMES CANN, JUDGE.

On the second day of April, 1948, claimant Margaret Elizabeth Lowers, in company with several other persons, was a passenger in an automobile owned by one Hugh Squires, and driven by one Lloyd Butcher, all being residents of the state of Ohio. The party had left Akron, Ohio, on the above men-

tioned date and was enroute to Troy, Gilmer county, West Virginia, to visit friends or relatives. After crossing the Ohio river at Sistersville, West Virginia, the party proceeded on West Virginia state route NO. 18 for several miles to a point beyond the intersection of state routes NOS. 18 and 47, when the driver of the said automobile failed to negotiate what he described as an abrupt curve and which resulted in said automobile leaving the highway and plunging down a ravine approximately twenty feet deep and injuring the claimant and driver of said automobile.

The evidence shows that for same distance the automobile herein mentioned was driven by the owner, Squires. Then about ten or twelve miles from the scene of the accident Lloyd Butcher became the driver. All of this time claimant was occupying the rear seat of said automobile. Butcher testified that after he became the driver of said automobile the road approaching the scene of the accident was curvy or winding and he was traveling at about forty miles per hour: when he approached the intersection of state routes 18 and 47, about midnight of the second day of April, or very early morning of the third, he slowed down to about thirty or thirty-five miles per hour, and after crossing said intersection continued at forty miles per hour. After crossing the intersection he was in a slight curve bearing to the right which proceeded to a more abrupt curve to the left, and which became sharper at the point of the accident. When the driver of the said automobile entered the sharper part of the curve, for some reason the automobile left the road at the right, crossed the berm and plunged into a ravine causing severe injuries to both the claimant and the driver of said vehicle.

Squires, the owner of said automobile, claimant, and the driver of said vehicle were all former residents of the state of West Virginia. Squires who was sitting in the front seat of the automobile at the time of the accident, testified that he had driven over the route on which the accident occurred "a lot of times"; claimant testified that she had travelled over the same route the year before, and the driver, Butcher,

testified he had travelled over the same route once, two years before, in daylight.

The testimony of one of the witnesses for claimant shows that the berm to the right of the paved portion of the highway at the point of the accident was about ten feet in width. The testimony of one Russell H. McLain, surveyor for respondent, the state road commission, shows that the width of the paved portion of the highway at the scene of the accident was approximately twenty-four feet, with a usable berm of fifteen feet to the right, and that the overall width of the highway and berm on the right and left thereof was approximately fifty feet. The report of C. R. Holbert, a member of the department of public safety, shows that the curve at the point of the accident was well elevated and there was a good berm on both sides. No one testified that the highway was not in good condition. All of the witnesses for claimant testified that the weather was clear, highway dry and visibility good, except that, prior to reaching the point of accident, fog pockets had been encountered; that the said automobile was in good order mechanically, the lights in good order, having shortly before the time of the accident been checked, and the driver, Butcher, testified that he could see from seventy-five to one hundred feet ahead of him practically all of the time.

At the conclusion of the hearing, counsel for claimant contended, in effect, that the state road commission was negligent in failing to provide proper signs and markers to indicate the presence of abrupt or sharp curves, and that the lack of such signs or markers was the proximate cause of the accident in question, and which negligence on the part of the state road commission is such that a moral obligation rests upon the state of West Virginia to compensate claimant for her injuries. With this contention the court cannot and does not agree, for the facts and the evidence do not justify such a conclusion. The court believes that this case is controlled by the opinion of our Supreme Court of Appeals in the case of

State ex rel. Adkins v. *Sims, Auditor,* 46 S. E. (2d) 81, decided November 4, 1947. Judge Fox in his opinion said:

> "* * * every user of the highways travels thereon at his own risk. The State does not, and cannot, assure him a safe journey."

Our court has on a number of occasions adhered to the same proposition of law. Let us stop and consider some of the pertinent factors and circumstances in this case. Claimant, and the owner and the driver of the automobile in question are all natives of West Virginia. Surely they must have known that this is mountainous country and that practically all of our highways are replete with curves and sharp turns. The condition of the highway where the accident occurred was well known to them for each had travelled and driven over the same within the past two years; the sharp or reverse curve involved in this case, in our opinion, presented no extraordinary or unusual hazardous condition to them. On the night in question the driver of the automobile drove over what he called a winding road and approaching the scene of the accident he was already in a slight curve which became sharper as he neared the scene of the accident, travelling at about forty miles per hour. Was this not sufficient notice to him to cut his speed and proceed with caution and care? Instead, when he entered the sharp curve at the above speed he found it difficult to negotiate the curve, resulting in the automobile leaving the highway. This in our mind was due to the speed in which the automobile was travelling and if the driver had used reasonable care in the operation of said vehicle, regardless of how sharp the ensuing curve, he could have avoided the accident by proper application of his brakes and negotiated the curve in safety, since there was sufficient space at this point with which to do so, and since there is no contention that the road proper was in an unsafe condition. This leads us to conclude as did Judge Fox in the *Adkins* case, *supra*:

> "Here the simple proposition is: No fault was found with the road; but only that certain precau-

> tion had not been taken to guard against accidents at a particular point, that point being only one of many points, some possibly of even greater danger."

And further quoting:

> "We do not think the failure of the State Road Commissioner to provide guardrails and road markers, and to paint a center line on the highway, constitutes negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the State to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof."

Therefore, for the reasons stated herein we deny an award and dismiss the claim.

(No. 669—Claim denied.)

FARM BUREAU MUTUAL INSURANCE COMPANY and BARBARA JANE (BUCY) HINCHMAN, Claimants,

v.

ADJUTANT GENERAL OF WEST VIRGINIA, Respondent.

Opinion filed July 21, 1949

1. Under the act creating the state court of claims negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made.

2. The mere fact that an automobile skidded on slippery black top road was not evidence of negligence. *Sigmon* v. *Mundy*, 125 W. Va. 591.

Appearances:

Jackson, Kelly, Morrison & Moxley (*David D. Johnson*), for claimants.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

Claimant Farm Bureau Mutual Automobile Insurance Company seeks an award for the sum of $296.50, the amount it was obliged to pay for damages done to the automobile owned by Barbara Jane Hinchman, the co-claimant, under the provisions of a policy of insurance which it had issued to her, and the said claimant Barbara Jane Hinchman seeks an award for the sum of $50.00, which she was compelled to pay for said damages by reason of a fifty-dollar deductible clause contained in said policy. In other words, the damages complained of in this case amounted to $346.50, of which amount the insurance company was obliged to pay the sum of $296.50 and the said Barbara Jane Hinchman was obliged to pay the sum of $50.00. Claimant Farm Bureau Mutual Automobile Insurance Company presents its claim by reason

of a subrogation agreement executed by insured, said Barbara Jane Hinchman, and the co-claimant, to it, assigning to said company any claim which insured had against the state for the damages complained of in this case.

The facts in this case are substantially as follows. On the evening of the 28th day of February, 1949, about six thirty o'clock Robert L. Hinchman, a student at Davis and Elkins College, Elkins, West Virginia, was operating a 1939 Oldsmobile sedan owned by his wife, Barbara Jane Hinchman, on U. S. route 219-250, proceeding to his home in Beverly, Randolph county, West Virginia. He was proceeding northwest on the above mentioned route, and somewhere near the Elkins Country Club he began to travel upgrade, traveling about fifteen or twenty miles an hour. One Alvin Robinson Jack, also a student at said Davis and Elkins College, and a staff sergeant in the National Guard of West Virginia, was operating a jeep belonging to said National Guard, in the performance of his duties, picking up other members of the National Guard to bring them to the armory at Elkins. He had picked up one member at Beverly and was proceeding south to Elkins on U. S. Route 219-250. At the crest of the grade upon which Hinchman was traveling upgrade Jack negotiated a curve and began to proceed downgrade at a speed of about eighteen or twenty miles per hour, and after traveling about one third of the way down his jeep hit an icy spot on the highway and began to skid, which resulted in a collision between his jeep and the automobile driven by Hinchman, and causing considerable damage to the Hinchman automobile. Both Hinchman and Jack testified that it had previously snowed and that snowplows were out clearing the roads, leaving a thin film of snow or ice on the highway. At the time of the accident it was dark and the drivers of both vehicles were compelled to use their lights. Hinchman testified that he estimated that Jack was operaing his jeep at about the same speed that he (Hinchman) was operating his automobile, because, as he says, "He didn't seem to be approaching me very fast." (Record p. 11). Jack testified that after negotiating the curve at the crest of the grade he

"shoved" his car into second gear before proceeding downgrade, because, as he says, "The road was in bad condition and it was downgrade and I didn't want any more speed than I could possibly control." (Record p. 33). There is no denial of this fact in the record in this case.

At the beginning of this hearing counsel for claimant in his opening statement, after stating the facts on which he would rely, stated that their theory is that the driver of the jeep was negligent in the manner in which he operated his vehicle on the ice and snow on the highway in question. (Record p. 6). With this theory we cannot agree, for, from the facts presented to us, negligence of the driver of the jeep or of the respondent is not proven to the satisfaction of the court.

Negligence is defined by our Supreme Court of Appeals and competent text writers as follows:

> "Three elements enter indispensably into the constitution of negligence in order to render it actionable, and without which there can be no recovery. * * * (1) A legal duty to use care. (2) A breach of that duty. (3) An injury or damage to the person or property in the natural and continuous sequence of events resulting from, or uninterruptedly connected with, the breach of that duty. Absence of intention, actual or constructive, to cause an injury or damage is, of course, also an element of negligence. But for all practical purposes its presence or absence may be ignored, since, in either case, if the other elements are present, the injury or damage is actionable regardless of intent, and not any the less or any the more actionable for lack or presence of intent. * * *" Law of Automobles, Michie's Jurisprudence Va. and W. Va., Vol. 2, p. 528.

Considering the facts in this case, what do we have before us that we can rightly conclude that the respondent, or its agent, was guilty of such negligence as to create a moral obligation of the state arising from misconduct of its agents,

officers and employes, and which would justify an award to claimants?

All witnesses in interest are in accord with the fact that the highway was covered with snow or ice. There is no dispute as to the speed in which both vehicles were travelling. No doubt both drivers were proceeding cautiously, having due regard to the condition of the road. Hinchman testified that he was proceeding at a speed of eighteen or twenty miles per hour and also says that Jack was travelling at about the same speed. Jack says that before proceeding downgrade near the scene of the accident, he placed his car in second gear as an added precaution. Who denies this? How can the driver of the jeep, travelling at a slow speed and in second gear, as an added precaution, be charged with lack of duty in using care in the operation of his jeep? Where is the breach of duty? As we see it, Jack was doing everything possible that was required of any driver of a motor vehicle under the circumstances. Can we say that the fact that he skidded on the highway, under the circumstances in this case, is evidence of negligence? We think not.

Judge Fox, in the case of *Sigmon, admx.* v. *Mundy,* 125 W. Va. 591, says:

> "Assuming, as the jury must have assumed, that the taxicab did skid, does that, alone, necessarily convict its driver of negligence? We think not. 'The mere fact that an automobile skids on the road is not evidence of negligence.' *Woodley* v. *Steiner,* 112 W. Va. 356; *Schade* v. *Smith,* 117 W. Va. 703."

Judge Fox further goes on to say:

> "It is true, of course, that an automobile may skid without the slightest negligence on the part of its driver. On the other hand, an automobile may be caused to skid by the negligence of the driver, and *if established* has the same consequences as to liability as negligence of any other character. The condition of the highway; the failure to take that

> condition into account; the speed of the vehicle considering the condition of the road; and the use of breaks are all matters which can be taken into consideration in determining the question of whether skidding was caused by some negligent act of the driver of a motor vehicle." (Underscoring ours).

In the case of *Woodley* v. *Steiner*, 112 W. Va. 356, the *syllabus* as follows:

> "Where the driver of an automobile in descending a hill on a highway which is in a slippery condition due to snowfall, attempts, *without the exercise of due care*, to pass a vehicle parked near the curb on his side of the highway and in so doing his car skids, becomes unmanageable and collides with an automobile of another on the berm of the highway on the latter's side of the road, the driver may properly be held liable for damages to the car struck." (Underscoring ours).

Although the facts in the case before us and the case last above cited are not similar, we quote the *syllabus* for the purpose of showing that the gist of the law stated is this important exception: "*Without the exercise of due care.*"

Judge Maxwell, in *Woodley* v. *Steiner*, *supra*, defines negligence as:

> "The failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."
>
> "A motorist finding himself in a place of danger, through no fault of his own, requiring him to act without time to consider the best means of avoiding danger, is not negligent in failing to adopt the best means, and is not required to exercise the same degree of care as one having ample opportunity for full exercise of his judgment. He is not guilty of negligence if he makes such choice as a person of ordinary prudence placed in such position might make, even though he did not make the wisest choice." Michie's Jurisprudence Vol. 2, p. 531.

The evidence unequivocally discloses that the highway over which Jack and Hinchman were operating their respective motor vehicles at the time of the collision was slippery, or slippery in spots; that Jack was proceeding downgrade and Hinchman upgrade, both travelling at about the same speed—about eighteen or twenty miles per hour; that Jack was in second gear as an added precaution due to the condition of the road, and that he skidded on said highway, resulting in a collision between his jeep and the automobile driven by Hinchman, causing damages to the latter vehicle. Can we say that the skidding of Jack's jeep which caused it to become unmanageable and collide with the Hinchman automobile was due to the lack of exercise of due care by Jack? Under the facts we believe not.

We find the state, and its agent, free from any negligence and therefore hold that negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. This has not been done, and this claim is dismissed.

(No. 667-S—Claimant awarded $37.84.)

ROBERT E. EPPERLY, Claimant,

v.

ADJUTANT GENERAL OF WEST VIRGINIA, Respondent.

Opinion filed July 21, 1949

MERRIMAN S. SMITH, JUDGE.

About four o'clock P. M. on April 6, 1949, claimant Robert E. Epperly, of Montgomery, West Virginia, legally parked his Plymouth coupe in the area beside the National Guard Armory in Montgomery, Fayette county, West Virginia.

Sergeant N. J. Redmond, Company A, 150th Infantry, West Virginia National Guard, while operating and turning a 2½ ton military truck backed into claimant's car, bending the left rear fender, the rear bumper and knocking off the gasoline filler pipe, and breaking the lock cap, damaging same in the amount of $37.84.

The state is morally bound to reimburse the claimant for damages sustained through no negligence on his part, since under similar circumstances and conditions a legal right would exist as between individuals, and such claimant would obtain a judgment for damages sustained.

The state agency involved concurred in this claim and it was approved by the attorney general as one that, in view of the purposes of the court of claims statute, should be paid.

The majority of this court hereby makes an award in the sum of thirty-seven dollars and eighty-four cents ($37.84) to be paid to claimant Robert E. Epperly.

ROBERT L. BLAND, JUDGE, dissenting.

I do not think that the facts set forth in the record of this claim, prepared by the head of the department concerned and submitted to the court of claims under section 17 of the court act warrant an appropriation of the public revenues. I have heretofore had occasion in other statements to say that the public funds of the state are not to be indiscriminately appropriated by the Legislature. In some former dissenting opinion I said:

> "The scheme for the creation of the court of claims was carefully considered and worked out by an interim committee of the Legislature. In its report to the Legislature that committee expressly stated: 'A shortened procedure is provided for small claims where no question of fact or liability is in issue.' For such purposes only should the shortened procedure provision of the court act be used."

It does not necessarily follow that by reason of the happening of an accident that the public funds of the state should be appropriated to compensate an injured person. It is well understood that taxes may only be levied and collected for public purposes. The public revenues may not be appropriated in favor of a private individual unless such appropriation be for a public purpose. I see no moral obligation on the part of the state to pay the claim in question. As a matter of fact it occurs to me that entirely too much stress has been placed upon the term "moral obligation." Certainly the claimant has no legal right to the award made by majority members of the court. Equity follows the law. The head of an agency might look with favor upon an award in certain circumstances when such award would not be proper under the law and could not be sustained if challenged. It is not what the head of an agency may wish to have done but what the court of claims is warranted in doing that should in all instances be our guide in making determinations. The value of recommendations made by the court of claims, a special instrumentality of the Legislature, will be measured by the correctness under the law of the advice given. I think the claim in question, which was originally presented to the court under its regular procedure, should have been investigated under that procedure and not informally considered under section 17 of the court act. I do not think that it can appear from the record of the claim, by any stretch of imagination, that "No question of fact or liability is in issue." The record clearly shows that at the time of the accident the driver of the state truck was engaged in the discharge of his official duties. Why was claimant's vehicle parked at the point where the accident took place? Questions of this character should be investigated by the court. When cases come to the court under its shortened procedure they are only informally considered and permit of no investigation beyond the facts set forth in the concurrence of the head of the department involved. It seems to me that for all practical purposes the shortened procedure provision of the court act should be repealed, and that all claims coming before the court should be considered by the three members of the court and a determination made upon the whole evidence.

(No. 668—Claimant awarded $96.33.)

DALTON SPRADLING, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 22, 1949

Situations may arise where negligence on the part of the state road commission to eliminate unusual hazards existing over a period of years, thereby causing injury and damages to persons and vehicles lawfully using said highway, presents a moral obligation for which a claim should be allowed.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

About eight o'clock P. M. on January 20, 1949, claimant, accompanied by his wife, was enroute home traveling east on U. S. route No. 60. At the intersection of route 60 and secondary state road No. 73, which is about three miles from Charleston in Kanawha county, claimant turned north onto state road No. 73, and after traveling about fifty feet he saw an avalanche of rock and dirt falling towards the highway on his right. He cut his car to the left to avoid being struck, but he was too late; a large rock struck the car, damaging it to the extent of $96.33, the actual cost of the repairs including towing, wrecker service and labor.

The members of the court viewed the scene of the accident and found the conditions as follows: At the intersection of U. S. 60 and state road No. 73, a cut through the edge of a hill to the east was made by the state road commission in order to widen the road at this point. Route No. 73 is a twenty-foot

concrete highway running several hundred feet from the intersection, and since U. S. route No. 60 is one of the most heavily traveled highways in the state—running east and west from coast to coast—and this being a dangerous intersection, the state has built a concrete sidewalk about thirty feet along the east side of route No. 73 for pedestrians, the sidewalk being between and alongside the concrete road and the cut, which consists of a large, soft rock seam or ledge, supported only by soft shale and dirt which rises from the berm of the road and forms a precipitous cliff which overhangs the berm of the road.

The slide causing the accident in this claim was in January. About six months later, in July to be exact, when the court viewed the scene, another large rock was lying on the berm at practically the same point of the accident which occurred in January, and which had fallen only a *few days* before. There were large crevices in the seam of rock above, and unless proper steps to remedy the condition be taken by the state road commission other slides will occur, endangering the lives and property of motorists and pedestrians lawfully using the highway.

While the state is not a guarantor of the safety of the highways, on the other hand it should not permit and perpetuate a hazard which endangers the life, limb and property of the traveling public. This is a short cut and at very little expense, time and labor this flagrant and unusual hazard could be eliminated at least from being dangerous to the users of the highway. It is impossible to prevent slides due to erosion and changing weather conditions. However, at this particular cut, by blasting away a few feet into the hill, the danger of large rocks falling on the highway could be eliminated under normal slide conditions, since by thus widening the berm the rock and debris would fall on the berm and not reach the concrete surface of the highway along which the public travel. The existing hazard is so exposed and obvious even to the average layman that there is no excuse for experienced members of the state road commission, whose duty it is to provide against such dangers, not to take proper steps to remedy such a hazard

which has existed since the construction of the cut, and which still exists.

It has been repeatedly held by this court that the state is not a guarantor of the safety of the highway. *Earl Hutchison* v. *State Road*, 3 Ct. Claims (W. Va.) 217. *Clark* v. *State Road*, 1 Ct. Claims (W. Va.) 230. *Presson* v. *State Road*, 4 Ct. Claims (W. Va.) 92.

The Supreme Court in *State ex rel. Adkins* v. *Sims, Auditor*, 46 S. E. (2d) 81, upholds the law that the state is not a guarantor of the safety of the highways. However, Judge Fox in his opinion states:

> "We do not mean to say that situations may not arise where the failure of the road commissioner properly to maintain a highway, and guard against accidents, occasioned by the condition of the road, may not be treated as such positive neglect of duty as to create a moral obligation against the State, for which the Legislature may appropriate money to pay damages which proximately resulted therefrom."

The majority of this court is of the opinion that the instant claim presents such outstanding negligence on the part of the employes of the state road commission as to create a moral obligation upon the state for which in equity and good conscience it should compensate the claimant for damages sustained, which damages proximately resulted from such wanton negligence. Furthermore, in the *Adkins* case, *supra*, there was a degree of contributory negligence on the part of the claimant, whereas in the instant case there is not a scintilla of evidence that would compute contributory negligence on the claimant.

It is unfortunate, however, that aggrieved claimants with meritorious claims under all rules of law, equity and good conscience, should be denied awards and be subjected to the political ambitions and unreasonable attitude of a state auditor who sets himself up above the profound decisions of the Supreme Court, the laws of the majority members of the State Legislature and the studious and conscientious awards

handed down by the State Court of Claims. A little power in the hands of some oftentimes reaches out like an octopus and inflicts its oppression on the rights of the majority and of the minority, the just and the unjust alike.

The majority of this court recommends the payment of ninety-six dollars and thirty-three cents ($96.33) to claimant Dalton Spradling, and an award is hereby granted.

ROBERT L. BLAND, JUDGE, dissenting.

The claim in this case is prosecuted upon the theory of the negligence of the state department proceeded against, on account of its alleged failure to do and perform all things that might have prevented the accident which happened to claimant, particularly mentioned and described in the majority opinion.

I find myself in sharp conflict with the views maintained by my esteemed colleagues so clearly manifested by the majority statement. It is not every accident that may happen to an individual travelling on a state controlled highway that is or could under the law be actionable. It devolves upon a claimant to prove his claim and establish its merit before the court would be justified in recommending to the Legislature an appropriation of the public revenues to satisfy his claim. In all instances a claimant bears the "laboring oar." As I construe the evidence contained in the transcript consisting of the testimony of the claimant himself and that of Zeeland Hammond, an official of the maintenance division of the state road commission in Kanawha county, I find nothing to satisfy my mind that this claim is meritorious or that it is one which within the meaning of the act creating the state court of claims should be paid by the state. The case, as I view it, could have no meritorious standing whatever in a court of law. If the state or the state road commission would be held to the measure of responsibility claimed by claimant and upheld by the majority statement, it could not long survive bankruptcy. The majority opinion seemingly overlooks the topography of the state and what an award in this case would mean as a precedent if fol-

lowed. The only duty that the road commission owes to persons traveling upon its highways is to make such highways reasonably safe for public travel thereon.

The record shows that claimant had three methods of travel to and from his home from the city of Charleston on the day of the accident. He traveled one route, and, because as he stated upon the hearing that road was rough, he concluded to return over the route on which the accident occurred because it was smoother and a better road. He testified before the court that he traveled over the road upon which the accident occurred approximately three times a week. The picture of the hillside bordering on the road from which the slide took place did not appear nearly so gruesome and horrifying as it is pictured in the majority statement, showing how different persons may observe different objects in different ways. In a very able opinion prepared at the present term by Judge Cann he cited and relied upon the well recognized law in West Virginia that the state does not guarantee freedom from accident to persons using its public roads. He further asserts what the Supreme Court has held and what every lawyer in the state understands, that a person who travels upon the public highways of the state does so at his own risk. The official who testified upon behalf of respondent upon the hearing of the claim said that he traveled the road every day and had traveled it the day before the accident and that he observed nothing that would indicate that the road was not safe for public travel. It is further shown by the evidence that the weather had been rainy and the falling of the stone was something that might occur at any time and any place and on any road of the state, under conditions such as existed at the time of the accident.

Claimant has not met the burden of proof imposed upon him to establish the merit of his claim and I would deny an award to him.

(No. 163—Claimant awarded $256.00.)

DORSEY BRANNON, M. D., Claimant,

v.

STATE DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed July 22, 1949

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment.

L. Steele Trotter, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Dorsey Brannon, a physician and surgeon of high standing and reputation who was engaged in the practice of his profession in the City of Morgantown, West Virginia, filed a claim in the court of claims on the 19th day of August, 1942, against the state department of public assistance, which said claim was thereafter placed upon the trial calendar of the court. Subsequently, and before an opportunity to investigate the claim was afforded, Dr. Brannon was inducted into the military service of the United States where he served with the rank of Major. Having returned to his home and resumed his practice at Morgantown, his claim was placed on the trial calendar for the present term and duly investigated and heard.

In the month of December, 1936, claimant was duly contracted with and employed by a duly authorized official of the department of public assistance of Monongalia county, that being the county of his residence, and directed to take certain medical and surgical cases of individuals who were at that

time being provided for, under the statute in such cases made and provided, by the said department of public assistance of Monongalia county. In pursuance of such employment he did take such cases and administered to them, giving them the benefit of his professional skill. Altogether he treated and rendered professional aid to sixteen charity patients. In the course of his duties it became necessary for him to perform several delicate surgical operations. For all of the services which he rendered under the terms of the contract of his employment he charged $256.00. In each instance the charge made was in accordance with the schedule of professional fees provided by the department. All of these fees are exceedingly reasonable and far below the amounts that are charged by physicians and surgeons for such cases and treatment at the present time. Claimant was never paid for his professional services so rendered by virtue of the express contract of his employment, nor has he received any part of such scheduled fees. It is made to appear to the court that by virtue of the misapprehension of the officials in charge of the county department as to their authority to pay claims, they refused absolutely to pay any portion of the doctor's bill. Notwithstanding this fact, however, the county department, which is a unit or integral part of the state department of public assistance, paid for the services of the anesthetist and for the hospitalization of the several patients who were treated in hospitals. We think that the confusion or lack of understanding of the officials in charge of the county department of public assistance was due largely to their imaginary self-importance, and "little brief authority."

The State of West Virginia has held itself out to furnish public assistance and been duly authorized so to do under a statute enacted by its Legislature. It cannot be thought that a great and sovereign state would enter into a solemn and binding contract with a physician and surgeon of high reputation and standing to render gratuitous professional services to the indigent and needy persons on the rolls of the department of public assistance. It would be unconscionable on the part of the state to avail itself of the skill of claimant and say that he is entitled to no reward or compensation for his professional

services. The state has received value from the claimant in the instant case. It has had the benefit of his great learning and outstanding skill. It is obvious that claimant is just as much entitled to be reimbursed and compensated for the professional services which he has rendered as a landowner would be entitled to be paid for land taken by the state without being paid compensation therefor.

The members of this court are unanimously of opinion that the claim of Doctor Brannon is just and meritorious and should be allowed as an approved award. The integrity of the state should at all times be maintained.

An award is made in favor of claimant, Dorsey Brannon, M. D., in the sum of two hundred and fifty-six dollars ($256.00).

(No. 164—Claimant awarded $165.00.)

RALPH MAXWELL, M. D., Claimant,

v.

DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed October 14, 1949

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special insatnce and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment.

The Honorable Clarence W. Meadows and *The Honorable L. Steele Trotter*, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The claim in this case arises out of the same facts adduced before the court of claims *in re* claim No. 163, *Dorsey M. Brannon, M. D.*, and is controlled by the determination made in that case.

Dr. Maxwell, claimant in the instant case, was duly employed by the department of public assistance of Monongalia county, West Virginia, to render professional services to certain charity or indigent persons in said county of Monongalia. He accordingly treated eight patients. For his services he charged the regular scheduled fees adopted by the department of public assistance of Monongalia county. As we stated in the opinion in the *Brannon* case, *supra*, "It would be unconscionable on the part of the state to avail itself of the skill of claimant and say that he is entitled to no reward or compensation for his professional services. The State has received value from the claimant in the instant case. It has had the benefit of his great learning and outstanding skill. It is obvious that claimant is

just as much entitled to be reimbursed and compensated for the professional services which he has rendered as a landowner would be entitled to be paid for land taken by the state without being paid compensation therefor."

For the reasons set forth in the opinion in the *Brannon* case, now adopted and made a part of this statement, an award is made in favor of claimant Ralph Maxwell, M. D., in the sum of one hundred and sixty-five dollars ($165.00).

(No. 675—Claim denied.)

BIRTIE WATTS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 21, 1949

A claimant seeking an award in the court of claims by way of compensation for personal injuries sustained on account of alleged defective condition of a state-controlled highway must, in order to be entitled to such award, establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature.

Salisbury, Hackney & Lopinsky and *W. C. Haythe,* for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding claimant seeks to obtain an award of the public revenues in the sum of $10,000.00 to compensate her for personal injuries suffered in an accident which she maintains occurred on a state-controlled highway in Wayne county, West

Virginia. She is the wife of Boyd Watts, a farmer, who resides on a tract of land near Genoa, on what is known as Big Lynn Creek. She represents that the state of West Virginia owns a stretch of road approximately six miles in length, called the Napier Ridge Road, which is a connecting link between West Virginia state routes Nos. 37 and 52, and contends that said stretch of road is the most praticable route to be used by herself and other members of her family in traveling to and from her home to a farm owned by her son and operated in part by claimant's husband.

On the 21st day of June, 1949, petitioner's husband, the said Boyd Watts, had occasion to go from his home to the home of his son in conjunction with whom he operated a farm on Napier Ridge Road. The method of travel was a wagon, drawn by two horses and driven by claimant's husband. It was decided that claimant should accompany him. She concluded that while her husband attended to other affairs she could do the family laundry on a machine recently purchased.

The route traveled was the Big Lynn Creek Road. At the point where this road intersects with the Napier Ridge Road there is a short turn, well defined by continuous travel. This small stretch of road was used in proceeding from the Big Lynn Road to the Napier Road. Between five and six o'clock in the evening of that day when claimant and her husband were ready to return to their home they decided to take their small grandchild with them for a short visit. When the wagon reached the point of intersection between Big Lynn Road and Napier Ridge, a parked car was observed in the roadway. This car was owned by a young man by the name of Parsons. When he observed that it was the purpose of claimant and her husband to proceed over the intersection to Big Lynn Road he left his father's home to move the parked car so as to enable the wagon to proceed over the road. Claimant's husband, however, said that he could travel around the car, but instead of doing so he proceeded a few feet from the intersecting road and drove over a steep and precipitous embankment on which a large rock—possibly six feet in length—was in plain view. When the wagon

reached this rock it overturned and the horses became frightened, bolted and ran away, throwing claimant, her husband and their little granddaughter out of the wagon. All three were injured. The child's shoulder was dislocated, two ribs of claimant's husband were dislocated, and claimant herself was very badly and seriously injured. Her condition necessitated protracted hospitalization and heavy expenses were incurred.

Claimant contends that the state road commission was negligent in the maintenance of the road where the accident happened, in allowing large and dangerous rock to remain in the traveled portion of the highway and endangering the safety and even the lives of persons using the road. Respondent offered evidence to show that the point at which the accident occurred was no part of the Big Lynn Road and in fact was not a road at all. A great mass of testimony was adduced for the purpose of establishing that the point of the accident was a public thoroughfare. The members of the court visited the scene of the accident and made a careful observation and examination of the existing conditions. It is apparent to the court, not alone from the evidence adduced before the court upon the hearing of the claim but especially from the personal inspection of the road made by its members, that the position of claimant has not been established by evidence and that the state could not under any circumstances be called upon to compensate the claimant for the serious injuries which she received as a result of the unfortunate accident. If her husband had waited a few moments the young man who owned the parked car would have removed it in order that the wagon could proceed over the intersection to the Big Lynn Road. This was not done. As a matter of fact there was room even between the outside line of the intersecting road and the large rock, which was responsible for the accident, for the wagon to have proceeded in safety from the Napier Ridge Road to the Big Lynn Road. Moreover, the driver of the wagon could have proceeded a comparatively short distance in the direction of Stiltner and then intersected in perfect safety with the Big Lynn Road.

A claimant seeking an award in the court of claims by way of compensation for personal injuries sustained on account of

alleged defective condition of a state-controlled highway must, in order to be entitled to such award, establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature.

This responsibility has not been met successfully by the claimant in the prosecution of the instant proceeding. It is realized that she has not only suffered extremely as a result of her accident and been subjected to heavy hospital, and other, expenses. but has in all probability sustained permanent injuries. These facts alone, however, are insufficient in the judgment of the members of the court of claims to recommend to the Legislature an appropriation in her favor to compensate her, so far as a monied allowance could compensate her, for her unfortunate accident. No prudent person would, we conclude, deliberately drive over a precipitous embankment and a large exposed rock on any part of a public highway.

An award in this case is, therefore, denied and the case dismissed.

(No. 644—Claimant awarded $100.00.)

ROSA WEBB FREEMAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 21, 1949

The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence.

Appearances:

Claimant in her own behalf.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

Claimant Rosa Webb Freeman prosecutes this claim against the state road commission of West Virginia for injuries received while a passenger in an automobile owned and operated by her son, Arnold Webb, which broke through an opening or rotten flooring of a state owned bridge. On the morning of July 20, 1948, at about one o'clock, while the automobile in which claimant was riding was proceeding towards Charleston from Burnwell it fell or broke through a bridge known as the Burnwell bridge, located on West Virginia secondary route No. 83, at Burnwell, West Virginia, the right wheel of the automobile fell or broke through the rotten boards, which at the time constituted the roadway of said bridge, causing considerable damage to the said automobile and injuring the claimant.

At the hearing of this case the evidence revealed that the state road commission began repairs to correct the condition

of the above mentioned bridge sometime in December, 1947, and continued off and on until the tenth day of July, 1948, when work was stopped; and the claims agent for the state road commission testified "Exactly why the work was stopped at that time, I have not been able to find out." (Record 2, page 19). During the above mentioned time considerable repairs were made to said bridge but only half of the flooring had been completed when work was stopped, and further work to complete all the necessary repairs to said bridge was not begun until the 26th day of July, 1948, six days after the occurrence of the accident mentioned in this case. During the period between the 10th day of July, 1948 and the 26th day of July, 1948, the said bridge was open to the travelling public, in spite of the fact that only one-half of the flooring was completed, and as to the condition of the other half, the court was given a very good picture from a photograph introduced as part of the evidence in this case. The photograph showed several large holes in the unfinished portion of the bridge floor and its general appearance indicated a dangerous condition in need of immediate repairs. During the time that work was stopped as above mentioned, immediately prior to the time of the accident complained of in this case, the public was permitted to travel over said bridge without any apparent protection. Nothing in the record indicates that the holes above mentioned were covered up or that the unfinished half of the bridge flooring was strengthened or made safe for the travelling public; and further, the record shows that no warning signs of danger were posted. (Record 1, page 18).

It is expressly provided by statute, West Virginia code title 17, art. 4, sec. 33:

> "The Commissioner shall inspect all bridges upon the state roads. If any bridge is found to be unsafe, the Commissioner shall promptly condemn, close and repair it."

In the case of *Wells* v. *Marion County Court,* 102 S. E. 472, it is held in point 1 of the *syllabi*:

> "The law imposes upon a County Court or other public authority in maintaining public roads and bridges the duty to so guard all dangerous places by suitable railings or barriers as to render them reasonably safe for travel therein by day or night."

In the case of *Farr* v. *Keller Lumber and Construction Co.*, 144 S. E. 881, the court held:

> "We are committed to the view that a statutory disregard constitutes 'actionable negligence' or 'prima facie negligence' when it is the natural and proximate cause of the injury."

In the case of *Norman* v. *Virginia-Pocahontas Coal Co.*, 69 S. E. 857, it is held in point 2 of the *syllabi*:

> "The violation of the statute is rightly considered the proximate cause of an injury which is a natural, probable and anticipated consequence of the nonobservance."

This court has held in different cases, particularly in the case of *Saunders* v. *State Road Commission*, 4 Ct. Claims (W. Va.) 143:

> "The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of accident, if caused by such negligence."

Considering the evidence offered before us in this case, and in view of the established law of this state, we therefore conclude that th state road commission was negligent in its failure to keep in proper repair the bridge in question, and that said negligence was the proximate cause of the accident causing the injuries sustained by the claimant.

We come now to the question of the extent of claimant's personal injuries in this matter. Claimant testified at great

length as to her injuries and the amount of money necessarily expended in connection therewith. At the later hearing of this case, had on the 14th day of October, 1949, two reputable physicians, who treated claimant for her alleged injuries after the accident herein mentioned, testified before us. Dr. Marion Fisher Jarrett testified that he examined claimant on the 9th day of September, 1948, at the request of Ralph Smith, the then attorney for claimant, and in answer to a question by W. Bryan Spillers, Assistant Attorney General, Dr. Jarrett said:

> "On the 9th day of September, I did not find any evidence on physical examination that would indicate to me that the patient had an accident." (Record 2, page 8).

Dr. Joseph P. Seltzer testified that he saw and examined claimant on the 29th day of July, 1948; on the 2nd day of August, 1948; on the 9th day of August, 1948, and on the 13th day of August 1948. The doctor was asked the following question by Mr. Spillers and he made the following answer:

> "Q. Dr. Seltzer could you attribute any examinations made by x-ray or otherwise a condition, disability or partial disability resulting from the accident on July 20, 1948.
>
> A. No, No I couldn't." (Record 2, page 16).

So, to us it is evident that the claimant's injuries received in connection with the accident herein mentioned were not as severe and numerous as she had testified; but we are not unmindful of the fact that claimant was put to some expense in having the various medical examinations herein mentioned, and, further, that no doubt she was somewhat shaken up and suffered some shock when the automobile in which she was a passenger fell through the bridge in question, and therefore we are of the opinion that an award should be made in this case.

Accordingly, an award of one hundred dollars ($100.00) is hereby made to claimant.

(No. 683– Claimant awarded $500.60)

C. E. RADFORD, Claimant,

v.

WEST VIRGINIA NATIONAL GUARD (Adjutant General), Respondent.

Opinion filed April 17, 1950

1. Failure of motorist to stop at stop sign constitutes *prima facie* negligence and he was responsible for all damage resulting proximately from his failure to stop at stop sign. *Somerville* v. *Dellosa*, 56 S. E. (2d) 756.

2. The violation of a statute alone is sufficient to make the violator *prima facie* guilty of negligence, but to justify recovery it must be shown by a preponderence of the evidence that the violation was the proximate cause of the injury. *Id.*

Appearances:

Davis & Heavener (Carl L. Davis), for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

JAMES CANN, JUDGE.

On the evening of the 20th day of December, 1949, at approximately ten-forty o'clock, claimant C. E. Radford, of Huntington, West Virginia, an employe of the Chesapeake & Ohio Railroad Company, was the owner and operator of a 1949 Mercury automobile, at which time he, in company with one James Edward Tipton, was proceeding in an easterly direction from Huntington toward the city of Charleston upon and over U. S. route 60. While so proceeding and having just crossed what is known as the Mud River Bridge, he approached and entered the intersection of said U. S. route 60 and what was referred to as the "Old Barboursville Pike"

which intersects at right angles with said U. S. route 60 in a northerly and southerly direction, when a national guard truck, operated by Pfc. Bernard H. Belvin, proceeding in a northerly direction on said pike attempted to and did enter the said intersection onto U. S. route 60 in the path of the automobile driven by claimant, causing damage to claimant's automobile in the amount of $500.60.

It appears from the evidence introduced in the case that the state road commission had installed a "blinker" in the center of the intersection of the two roads above mentioned, said "blinker" showing an orange light to traffic proceeding on U. S. route 60 and showing red to traffic proceeding on the intersecting pike. In addition to the blinker—no doubt considering this inntersection perilous—the state road commission also installed stop signs on the said pike at or near the said intersection. The evidence further disclosed that the night this accident occurred the weather was clear and visibility good; that claimant, who was proceeding at a speed between twenty and twenty-five miles per hour, entered the intersection when suddenly the national guard truck entered the intersection, without stopping at the stop sign, directly in front of claimant's vehicle, at or about the middle of the intersection. Upon being confronted with this sudden situation claimant immediately applied his brakes and cut his car to the left in an endeavor to avoid the truck, but being only about fourteen feet away from each other the above maneuver was too late and the vehicles collided causing the damages complained of. The fact that the evidence showed that claimant's car skidded about twenty-six feet (this included the length of claimant's car) indicates that claimant was only travelling at the rate of speed he stated and that the vehicles were rather close at the time of the collision.

Chapter 17, article 8, section 10 (1537) of our code provides:

> "An operator of a vehicle shall have the right of way over the operator of another vehicle who is approaching from the left of an intersecting highway, and shall give the right of way to an operator ap-

> proaching from the right on an intersecting highway: Provided, however, That the state road commissioner is hereby authorized to erect stop signs or traffic lights at any highway intersection where, in his opinion, such stop signs or traffic lights are desirable to control traffic, otherwise as above provided, and wherever the state road commissioner shall have erected and maintained a stop sign or traffic light at any road intersection in this state, then said stop sign or traffic light shall govern the traffic movement, and it shall be unlawful for the driver of any vehicle approaching said intersection on the road upon which said stop sign or traffic light has been erected and is maintained to fail to obey the sign or traffic light."

The state introduced no evidence but the assistant attorney general, representing the state agency involved, made a statement in open court to the effect that from all reports received by the adjutant general concerning this accident their investigation of the same led them to conclude that the evidence introduced by the claimant was substantially correct and that the driver of the truck was at fault.

Our Supreme Court, in the case of *Somerville* v. *Dellosa*, 56 S. E. (2d) 756, stated:

> "It is an established principle in this jurisdiction that the violation of a statute alone is sufficient to make the violator *prima facie* guilty of negligence. Of course to justify a recovery it must be shown by a preponderance of the evidence that the violation was the proximate cause of the plaintiff's injury."

The court also stated:

> "However, here we are not dealing with the mere question of a right of way. The State Road Commission felt that this junction was perilous enough to require a stop sign on the secondary road. That sign bears no relation to actual traffic. Its violation under any and all circumstances constitutes *prima facie* negligence. The violator is responsible for the damage which results proximately from his conduct."

From the evidence introduced in this case we are of the opinion that the driver of the national guard truck was negligent and at fault in not stopping at the stop sign before entering the intersection in question and that the violation of that sign and of the statute herein quoted was the proximate cause of the damages done to claimant's automobile, making the state agency involved liable to claimant for said damages.

Accordingly we make an award to the claimant in this case in the sum of five hundred dollars and sixty cents ($500.60).

(No. 673—Claim denied)

RUTH CHARTRAND, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 17, 1950

1. No duty express or implied rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than a reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Hutchison* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 217, *et als.*

2. The failure of the state road commissioner, in the exercise of the jurisdiction vested in him to expend public moneys appropriated by the Legislature for the construction, maintenance and repair of the public highways of this state, to provide guardrails, place road markers or danger signals, and paint center lines on paved highways at a particular point on any highway in this state, does not create a moral obligation on the part of the state to compensate a person injured on such highway, allegedly resulting from such failure. *Adkins, et als* v. *Sims*, 130 W. Va. 646.

Appearances:

Claimant, in her own behalf.

W. Bryan Spillers, Assistant Attorney General, for the State

MERRIMAN S. SMITH, JUDGE.

On the rainy night of June 26, 1949, between the hours of nine and ten o'clock, claimant Ruth Chartrand, was driving her Chevrolet sedan from Clarksburg enroute to Kingwood, Preston county, West Virginia, along state road No. 26. At a point about three miles southwest of Kingwood, near Sniders Crossing, while driving downgrade and around a slight curve, her automobile skidded on the slippery black top road surface causing her to completely lose control of same and the

car headed into the bank to the right, throwing her out, after which the car crossed to the other side and ran into a maple tree. As a result of the said accident the radius bone of her right arm was broken and considerable damage was done to the automobile due to the impact with the maple tree, for all of which damages in the sum of $604.00 are requested in this claim to reimburse her for such financial loss sustained as a result of said accident.

This state road No. 26 is a black top and asphalt highway and during certain hours of the day is heavily traveled and by virtue of the composition of black top road material, especially during the hot days, the surface is known to "bleed" —that is tar in the mixture oozes or sweats causing a slippery condition which is greatly aggravated when it is rained upon; consequently at the point of this accident such condition existed while claimant was driving over it. At no point alongside the highway were there any road signs or markers warning the traveling public of the slippery condition of the highway. It is for such failure on the part of the state road commission to erect such warning signs that the claimant bases her claim.

The Supreme Court of West Virginia, in *Adkins* v. *Sims*, 130 W. Va. 646, holds that the failure of the state road commissioner to erect markers or danger signals at a particular point on any highway in this state does not create a moral obligation on the part of the state to compensate a person injured on such highway. However, in Judge Fox's opinion he stated that the court did not mean to say that situations may not arise where the failure of the road commissioner properly to maintain a highway, and guard against accidents, occasioned by the condition of the road may not be treated as such positive neglect of duty as to create a moral obligation against the state for which the Legislature may appropriate money to pay damages which proximately resulted therefrom. This court does not believe that the instant claim could possibly come within the exception to the general rule applicable to such claims for damages.

This court has repeatedly held that no duty express or implied rests upon the state road commissioner of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. Claimant testified that she had driven over this same route several times in traveling to and from her home in Clarksburg to Kingwood. Therefore, she was more familiar with the road conditions than if it had been her first attempt. One witness stated that he had traveled over the same highway daily for years under various weather conditions without any mishaps and another stated that he considered this as good a highway as was in the entire county and that he had traversed the said highway for months at least eight times daily without accident.

Considering the fact that this roadbed was made of black top which by the very nature of the substance is disposed to "bleed" where subjected to the suns rays and becomes slippery under weathering conditions, and at the point of the accident the terrain was not such as to be considered a dangerous curve; the traveling public of this state is familiar with such universal conditions and the state should not be charged with any negligence where the highways are kept and maintained in a reasonably safe condition.

Accordingly an award is denied and the claim is dismissed.

JAMES CANN, JUDGE, dissenting.

I respectfully desire to record my dissent to the majority opinion filed in the above case. There is no need to repeat the facts and circumstances leading to the accident which caused the injuries and damages complained of in this case for Judge Smith in his opinion states them very clearly and concisely. However, I do not agree with the majority opinion when it states that "At no point alongside the highway were there any road signs or markers warning the traveling public of the

slippery condition of the highway. It is for such failure on the part of the state road commissioner to erect such warning signs that the claimant makes her claim." This is not a complete statement of the claim of the claimant. She states her claim on the theory that not only because the state road commission failed to erect warning signs warning the traveling public of the slippery condition of the highway, but that the highway or road itself, because of the neglect and omission on the part of the servants and employes of the state road commission, was permitted to exist and remain in a dangerous and hazardous condition, and therefore not reasonably safe for travel. The facts and evidence, in my opinion, clearly supports the theory. The majority opinion admits that by virtue of the composition of black top road material the surface is known to "bleed"—that is tar in the mixture oozes or sweats causing a slippery condition which is greatly aggravated when it is rained upon; consequently, at the point of this accident such condition existed while claimant was driving over it. With this admission I wholly agree, for it is those facts which I believe takes this case out of the theory expressed and relied upon in this case by a majority of this court, based upon the proposition of law stated by our Supreme Court in the case of *state ex rel. Adkins* v. *Sims, Auditor,* 130 W. Va. 646.

Judge Fox in his opinion in the Adkins case, *supra,* stated that the court did not mean to say that situations may not arise where the failure of the road commission properly to maintain a highway, and guard against accidents, occasioned by the condition of the road may not be treated as such positive neglect of duty as to create a moral obligation against the state for which the Legislature may appropriate money to pay damages which proximately resulted therefrom. The majority opinion states that the instant claim could not possibly come within this exception. I firmly believe and state that it does, for the following reason: The record clearly shows that this road covered with asphalt or tar, bled profusely in the summer and the mixture oozed or sweated causing a slippery condition to exist; that Mr. Deihl saw a number of accidents occur because of the condition of said road during the summer

months of 1949 and prior years; that he advised the servants and employes of the state road of this state of affairs; that on only one occasion was this stretch of road roughed up to make it safe for public use; that the supervisor of the state road commission for that district in which this accident occurred had skidded on at least one occasion near the scene of the accident; that the supervisor stated that they had not paid much attention to the several calls they had received concerning the condition of the road because the state police had not called them; that the servants and employes of the state road commission testified that the speed limit over this particular stretch of road was fifty miles per hour, yet they said that they did not believe said road to be dangerous at any time, providing the speed of an automobile was not over thirty or thirty-five miles per hour, which certainly left an inference and convinced me that something was wrong with said road; all of this being known by the servants and employes of the state road commission for some time and nothing done to make said road reasonably safe for the traveling public.

I am mindful of the fact that in the case of *Margaret Elizabeth Lowers* v. *State Road Commission* (reported elsewhere in this volume) in which I wrote the majority opinion, I based my finding on the proposition of law stated by our Supreme Court in the *Adkins* case, *supra*, which was that every user of the highway travels at his own risk and that the state cannot assure one of a safe journey; but the facts in the *Lower* case were different from those in this case. In that case the claimant claimed that the state should have erected proper guardrails and provided proper markers. In this case the claimant, in substance, claimed that the state should have kept the road in a reasonably safe condition for the traveling public. The court will note that at the close of my opinion in the *Lower* case, *supra*, I quoted Judge Fox, from the *Adkins* case, *supra*, in which he stated:

> "Here the simple proposition is: *No fault was found with the road;* but only that certain precautions had not been taken . . ." (Italics mine.)

This indicates to me that if some fault had been found with the road in that case the decision of the court might have been different and the case placed squarely within the exception stated by Judge Fox.

Judge Smith in his opinion makes reference to the fact that claimant had travelled over this particular road several times and therefore she was more familiar with its condition than if it had been her first attempt. This in my opinion does not excuse the state from its duty to maintain this road in a reasonably safe condition. In this connection let me call the court's attention to the case of *Katherine Presson* v. *State Road Commission,* 4 Ct. Claims (W. Va.) 92. In this case claimant was injured by stepping in a hole in state road No. 20. It developed in that case that claimant knew of the hole there, for she had seen the hole on previous occasions, yet because she stepped in this hole in the darkness, this court by a unanimous opinion, granted an award stating among other things:

> "The State, of course, is morally bound to make its highways reasonably safe for travel and to keep them in proper repair for the use of the public. This in our opinion was not done with the highway here involved, by reason of which neglect the hole in question continued as dangerous and a menace to those obliged to use the highway. . . ."

Why not use the same reasoning in the instant case? In my opinion the neglect of the state road commission to keep the road in question reasonably safe for travel and to keep it in proper repair for the use of the traveling public, by more frequent "roughing up" process or other means at their disposal to alleviate the slippery condition caused by bleeding and sweating, especially when that condition was known to them for some time, made the state liable.

For the reasons herein stated I would have made an award for the damages claimed.

ROBERT L. BLAND, JUDGE, concurring.

The claimant in this case is a machine shorthand reporter and maintains an office in the court house at Clarksburg, in Harrison county, West Virginia. She is a lady of superior intelligence and accomplishments. In addition to being an assistant reporter of said court of Harrison county, she is also official reporter of the circuit court of Preston county in this state and does freelance work for West Virginia corporations. For about four years she has been employed as reporter for the public service commission of West Virginia at Clarksburg, West Virginia. On account of the inability of her attorney of record to be present on the day her claim was fixed on the trial calendar of the court of claims for hearing and investigation, she personally took charge of the case and conducted it thenceforward, examining in chief her own witnesses and cross examining all witnesses introduced by the state in opposition to her claim with such skill and ability as would reflect credit upon the most experienced trial lawyer. By her own testimony she displayed a remarkable understanding of the gravity of the burden that rested upon her to establish a case that would justify the Legislature in making an appropriation of public funds in satisfaction of her claim. The transcript of evidence embraces one hundred and seventy-six pages. But unfortunately for claimant, in the judgment of two out of three members of the court, in all that vast record nothing can be found that would create a moral obligation of the state to pay the claim.

The court of claims has repeatedly held that "Under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made." The last declaration of this principle is contained in point one of the *syllabi* in the claim of *Farm Bureau Mutual Insurance Company, et al,* v. *Adjutant General's Department*, Case No. 669, in which Judge Cann prepared a very strong opinion, denying an award in these words:

> "We find the state and its agent free from any negligence and therefore hold that negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. This has not been done and the claim is denied."

In part two of the *syllabi* of the same case Judge Cann further declares this rule, based on the authority of *Sigmon* v. *Mundy,* 125 W. Va. 591:

> "The mere fact that an automobile skids on the road is not evidence of negligence."

In case No. 675, *Birtie Watts* v. *State Road Commission,* (reported elsewhere in this volume) this court announced this rule:

> "A claimant seeking an award in the court of claims by way of compensation for personal injuries sustained on account of alleged defective condition of a state-controlled highway must, in order to be entitled to such an award, establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature."

In case No. 637, *Fleta Corder* v. *State Road Commission* (reported elsewhere in this volume) this court declared in the *syllabus* of its opinion as follows:

> "The right of a person to use the highways of the state is subject and subordinate to the right of the state to exercise and discharge its governmental functions; and the state does not guarantee freedom from accident of persons using such highways."

I think that the court of claims of West Virginia can well afford to adopt and follow for its guidance the rule laid down by the court of claims of Michigan:

> "Sitting as the Court of Claims without a jury the Court is the judge of the facts and must apply the law to the facts as found, and of the weight of testimony and the credibility of the witnesses." See Reports of Michigan Court of Claims for the biennium ending December 3, 1942.

(No. 684—Claimant awarded $65.85)

H. A. PELFREY, Claimant,

v.

ADJUTANT GENERAL, Respondent.

Opinion filed April 18, 1950

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

Claimant H. A. Pelfrey is the owner of a 1948 Buick Roadmaster automobile which on the evening of the 10th day of January, 1950, was legally parked in front of his home situate at 725 Main Street, in the city of Ceredo, Wayne county, West Virginia; on this same evening about eleven-twenty o'clock, Sgt. David R. Joseph, a member of the West Virginia National Guard was operating a federal truck assigned by the federal government to the West Virginia national guard; he had just taken other members of the national guard who had attended a regularly scheduled drill in the armory building at Huntington, to their homes in said city of Ceredo; on his way back as he entered Main Street in said city, his truck skidded and struck the parked automobile of the claimant causing damages thereto in the sum of $65.85. From the evidence introduced it developed that it was raining on this particular evening the accident occurred and that Main Street, which was paved of brick, was slippery and slick; that the driver of the truck in-

volved had just driven over a muddy wet street which led into Main Street where claimant's automobile was parked; as he entered Main Street he attempted a left turn which was executed too sharply for the slippery condition of the road, causing the truck to skid and come in contact with claimant's automobile. It is apparent to the court that the damages done to claimant's automobile were caused by the independent and negligent act of the driver of the truck in attempting to turn into an intersecting street as sharply as he did, especially when the said streets were muddy and slippery, that this act was the proximate cause of said damages and was in no way brought about by any fault or act of claimant.

Lieutenant William E. Miller, representing the respondent, testified substantially that the claim should be paid and that the adjutant general feels that is is a just claim and that compensation should be made. The position of the adjutant general is approved by the office of the attorney general, through its assistant. Under the circumstances and the facts presented to us, we make an award in favor of claimant in the amount of sixty-five dollars and eighty-five cents ($65.85).

(Claim 686—Claimant awarded $78.39)

JOHN KIPP, Claimant.

v.

STATE ADJUTANT GENERAL, Respondent.

Opinion filed April 19, 1950

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *H. A. Pelfrey* v. *Adjutant General* (reported elsewhere in this volume).

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

Claimant John Kipp is the owner of a 1948 Buick automobile which on the 3rd day of November, 1949, was legally parked in front of his home situate at 725 West Third Avenue, in the city of Huntington, Cabell county, West Virginia; on this same date, at or about four-thirty o'clock P.M., Sgt. Arthur Strank, a member of the West Virginia national guard, was operating a national guard truck, which was towing a 105 M.M. Howitzer. Sgt. Strank had left the national guard garage situate on said Third Avenue, near the home of claimant, for the purpose of delivering the Howitzer at the armory at 119 5th Avenue in said city of Huntington; he had proceeded east over Third Avenue about one-half a block when the Howitzer became detached from the truck, veered to the right and struck claimant's parked automobile, causing damages thereto in the amount of $78.39. From the evidence introduced and from the affidavits which were made part of the record, it appears to

the satisfaction of the court that the Howitzer was either improperly fastened to the truck or that the spring lock on the truck that holds the latch down was weak and failed to hold. The operator of the truck attempts to indicate that because of the bumps and jarring caused by the ruts on the street over which he was travelling, caused the Howitzer to break loose. General Charles R. Fox, adjutant general of the state of West Virginia, testified substantially as follows: "There must have been some present (negligence or carelessness) because these locks normally should not become loose even over exceptionally rough ground." Record p. 14..

General Fox further testified substantially that the claim should be paid because he feels that the accident was entirely their fault. The position of the adjutant general is approved by the office of the attorney general, through its assistant. Under the circumstances and facts presented to us we conclude that the damages to claimant's automobile were caused by the independent and negligent act of the driver of the truck, agent of the state agency involved, in not properly securing the Howitzer to the truck in question; that this act was the proximate cause of the damages complained of and was in no way brought about by any fault or act of claimant. Therefore, we make an award to claimant in the sum of seventy-eight dollars and thirty-nine cents ($78.39).

(No. 678-S—Claimant awarded $160.88)

REYNOLDS TRANSPORTATION COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 20, 1950

ROBERT L. BLAND, JUDGE.

The record of the claim involved in this case was prepared by the state road commissioner and filed with the clerk of the court of claims on the 14th day of November, 1949, to be informally considered by the court upon the said record so made and submitted, as authorized by section 17 of the court act.

On the 7th day of July, 1949, employes of the state road commission were working on state route No. 28 in Randolph county. The commission's shovel, operated by one Ray Helmick, was being used on a portion of the highway which had been partially washed away during a recent flood and which had caused extensive damage to property in that section of West Virginia. At the point where the shovel was at work traffic could only pass when the cab and tracks of the shovel were in alignment. This situation required two flagmen, one behind and one in front of the traffic. The duties of the flagman behind were to stop all traffic and await a signal from the front flagman before allowing traffic to pass. It was the duty of the front flagman to notify the shovel operator when to align and stop the shovel to allow the traffic to pass and to notify the flagman behind to flag traffic through. It was then further the front flagman's duty to signal Mr. Helmick that all traffic was through and to resume work.

Claimant's bus was traveling on the highway in question while the shovel was at work. When its bus approached that point on the road where the shovel was being used the driver

of the bus was duly signaled to stop and did so. Thereafter one of the flagmen observed a motor vehicle approaching from the opposite direction and threw up his hand to signal it to stop. Helmick, the operator of the shovel, interpreted the signal as being an indication to proceed with the shovel. George B. Edmiston, who was temporarily acting as front flagman, in a very comprehensive report made to the road commission as to circumstances attending the accident stated that all usual procedure with respect to stopping and starting traffic was substantially carried out up to the point of the "all clear" sign to Helmick, the operator of the shovel. The traffic was coming through and the shovel was stopped. Claimant's bus was the last vehicle which was in line. Just before the bus started through Edmiston turned to flag an oncoming car from the opposite direction. As he threw up his hand to stop this vehicle Helmick apparently interpreted the action as an "all clear" signal to him and he started his vehicle. As claimant's bus passed the shovel swung. The counter weight on the rear of the shovel struck the bus causing the accident for which an award in the amount of $160.88 is sought by claimant to compensate it for the damages sustained to its vehicle.

The head of the agency concerned concurs in the claim and the attorney general's office approves it as a claim which in view of the purpose of the act creating the court of claims should be paid by the state.

It is observed that the proximate cause of the accident was the action of the operator of the shovel in swinging the shovel after claimant had been given the "go ahead" sign. Under the circumstances disclosed by the record we are of the opinion that the claim is a meritorious one and should be approved.

An award is therefore made in favor of claimant Reynolds Transportation Company for the said sum of one-hundred sixty dollars and eighty-eight cents ($160.88).

(No. 680-S—Claimant awarded $200.00)

CHARLESTON NATIONAL BANK, *Committee* for CARL A. URBAN, *Incompetent*, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 21, 1950

ROBERT L. BLAND, JUDGE.

By an agreement in writing bearing date on the 21st day of December, 1938, one Carl A. Urban leased to the state road commission of West Virginia one twelve-room two-story frame dwelling house and one four-room one-story frame dwelling house located at 1336 and 1336½ Wilson Street, in the city of Charleston, Kanawha county, West Virginia, at a monthly rental of one hundred dollars, the said building to be used by the road commission for office purposes. It was provided that either party might terminate said lease by giving sixty days notice of intent so to do. Said lease was to be in effect from January 20, 1939. The lessee was given the right to make necessary alterations to either or both of said buildings for office purposes. The lessor was to make necessary repairs and upkeep to the said building. It was agreed that the road commission should leave both of the buildings in as good condition as they were at the time of renting the properties, less normal depreciation, wear and tear.

The road commission entered into possession of said buildings under the terms of the lease and used them for district offices, and remained in possession of the two properties for a period of ten years and terminatd its lease and vacated the said properties on the first day of July, 1949. Thereafter, the Charleston National Bank, *Committee* for the said lessor Carl A. Urban, now an incompetent person, made an inspection of the properties and discovered that certain fixtures had been

removed from the building and not replaced therein. Said *Committee* took up the matter of its claim against the road commission with the district engineer of district No. 1. The *Committee* first claimed that it would cost $1859.40 to replace the missing fixtures. The road commission was unwilling to enter into negotiations upon such a basis. It was the intention of claimant to install modern bathtubs entirely different and more expensive than those which had been removed from the premises. According to the contention of claimant three bathtubs and three sinks had been removed by respondent from the properties. Estimates were obtained as to the cost of restoring these bathtubs and sinks. The road commission, however, could never satisfy itself that there was responsibility on the part of the state to pay to claimant a sum in excess of $200.00, in settlement of the actual fixtures removed from the premises. Conferences and negotiations resulted in an agreement by the road commission to concur in a claim of $200.00 and the willingness of claimant to accept that sum in full settlement of any and all claims that the said Carl A. Urban could assert and maintain against respondent. Accordingly respondent prepared a record of the claim and concurred therein. This record with the conclusions aforesaid was brought to the attention of the attorney general who approved the payment. The record was duly filed before the clerk of this court on the 14th day of November past, and the case is informally heard under the shortened procedure provision of the court act. From an examination of all the facts and circumstances disclosed by the record, the court is of opinion that the claim should be entered as an approved claim.

An award is therefore made in favor of Charleston National Bank, *Committee* for Carl A. Urban *an incompetent person*, for the sum of two hundred dollars ($200.00).

(No. 677-S—Claimant awarded $36.22)

GREEN HILL CHURCH, by
ORR MINEAR, *Trustee*, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 21, 1950

JAMES CANN, JUDGE.

On or about the 1st day of March, 1949, the state road commission in removing a slide from route 57, a primary road, maintained by the state road commission in Elk District of Barbour county, West Virginia, dumped dirt onto the property of Mrs. G. N. Radcliffe and Mrs. Bepe Drane, upon which the Green Hill Church had its gas line laid. The respondent while so engaged in dumping dirt on the above mentioned property caused a break in said gas line leading from the gas meter to the church. This break resulted in loss of gas amounting to $26.97, more than the ordinary bill for gas as rendered to said church. The church also replaced the pipe and fittings at a cost of $9.25, making the total damages suffered in the amount of $36.22.

The claim, after proper investigation, is recommended for payment by the head of the state agency involved and approved by the attorney general's office, through its assistant. We are of the opinion that the carelessness of the employees of the respondent was the immediate cause of the damages complained of and suffered by claimant.

We therefore make an award to the claimant in the amount of thirty-six dollars and twenty-two cents ($36.22).

(No. 676-S—Claimant awarded $4.08)

W. T. CAPLINGER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 21, 1950

MERRIMAN S. SMITH, JUDGE.

W. T. Caplinger of route 5, Cove Road, Parkersburg, West Virginia, was travelling east over the East Street Bridge in Parkersburg, Wood county, West Virginia, on May 29, 1949. An eighty-penny nail had worked loose from the defective wooden flooring of the bridge and punctured the tire and tube of his automobile. The cost of repairing same amounted to $4.08.

Under Statute Michie's code (17-4-33) the state road commission shall inspect all bridges upon state roads, *etc.* Upon investigation of this accident by F. M. Ferrell, safety director for the state road commission, it was discovered that the floor of the bridge was in bad condition, and he identified the eighty-penny nail which had punctured the tire and tube of the claimant.

This claim was concurred in by the commissioner of the state road commission as provided for under Michie's code (14-2-20) and approved by the attorney general. This court hereby makes an award in the sum of four dollars and eight cents ($4.08) to the said claimant.

(No. 679-S—Claimant [Emmco Insurance] awarded $295.90)

ARNOLD P. WEBB and EMMCO INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 21, 1950

MERRIMAN S. SMITH, JUDGE.

About two-thirty o'clock on the evening of July 20th, 1948, claimant Arnold P. Webb, of Charleston, West Virginia, accompanied by his mother, Rosa Webb Freeman, was driving his 1941 Pontiac sedan along secondary route No. 83, between Burnwell and Charleston, Kanawha county, West Virginia, and upon crossing the wooden floored bridge over Paint Creek met with an accident, the circumstances being as follows: On September 27, 1947, a special authorization was approved to repair the said bridge over Paint Creek near Burnwell. The actual work was started December 22, 1947 and work was done periodically until June 10, 1948, when the job was left half completed, so on the morning of July 20, 1948, while the said claimant Arnold P. Webb was driving across the bridge a large plank in the unfinished part of the floor of said bridge became dislodged leaving a large hole. When the claimant's car struck this hole the right wheel fell through into the hole and in trying to right the automobile it swerved into the guardrails and turned on its side damaging the automobile to the extent of $572.11, also injuring the claimant's mother Mrs. Rosa Webb Freeman who was an occupant of the car.

At the October 1949 term of court of claims, *Rosa Webb Freeman*, v. *State Road Commission*, claim No. 644, the said claimant was granted an award for the injuries sustained in the same accident for which claim for $295.90 is made in this

shortened claim as an agreed amount covering the cost of repairs to the damaged 1941 Pontiac sedan.

Claimant Arnold P. Webb had a seventy-five dollar deductible policy on the said automobile in the Emmco Insurance Company of South Bend, Indiana, whereupon the said Emmco Insurance Company by a compromise agreement secured an assignment and subrogation release from the said Arnold P. Webb in full for the sum of two hundred ninety-five dollars and ninety cents ($295.90).

Arnold P. Webb being a private individual having sustained damage to his automobile by negligence of the employes of the state road commission did voluntarily assign and subrogate the Emmco Insurance Company in the amount of $295.90. The state agency involved may deal with the substituted representative as it would have dealt with the claimant if there had been no substitution. The court of claims has recognized their right of substitution in the claim No. 500 *Aetna Casualty and Surety Company* v. *State Road Commission,* 3 Ct. Claims W. Va. 150.

For the reasons stated in the opinion of this court in the claim of *Rosa Webb Freeman* v. *State Road Commission,* No. 644, the majority of this court are in favor of an award in the sum of two hundred ninety-five dollars and ninety cents ($295.90) in favor of the Emmco Insurance Company.

ROBERT L. BLAND, Judge, dissenting.

I am not in agreement with my colleagues in the determination which they have made in the above two claims.

Claimant Arnold P. Webb asserts a claim in the amount of $75.00 and the Insurance Company claims the right to have an award in its favor by way of subrogation for the sum of $220.90. These respective claims are concurred in by the head of the agency concerned. The attorney general approved both

claims. The determination is made alone in favor of the Insurance Company for $295.90. I do not perceive anything in the record warranting such determination and therefore do not comprehend the reasoning of majority members. However, on the theory of subrogation I do not think the award to be proper. It is not a case in which the doctrine of subrogation may be properly invoked. The award is contrary to the express prohibition of a grant of the credit of the state, found in section 6, article 10 of the state constitution, which reads as follows:

> "The credit of the State shall not be granted to, or in aid of any county, city, township, corporation or person; nor shall the State ever assume, or become responsible for the debts or liabilities of any county, city, township, corporation or person; . . ."

I am persuaded that under the principles announced in the recent West Virginia Supreme Court case of *State ex rel. Baltimore & Ohio Railroad Company* v. *Sims, Auditor*, reported in 53 S. E. (2d) 505, there could be no valid appropriation of the public funds in satisfaction of the award made in the instant case.

(No. 673—Claim denied)

ADAM HAMILTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 23, 1950

A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries notwithstanding that respondent is not free from blame.

Appearances:

Watts, Poffenbarger & Bowles (*M. Williamson Watts*) for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

Claimant, at about five o'clock on the morning of the fourth day of June, 1949, while proceeding to his home over Kanawha county secondary route No. 31, known as Martin's Branch Road, leading to U. S. route 21, drove into a break on the right side of said road, overturned and rolled down a steep embankment, as a result of which he was injured and his automobile demolished, which he alleges was caused by respondent's negligence in permitting a break on the side of the road to exist unrepaired or to be guarded by suitable railings or barriers.

Claimant testified that on this particular morning, the weather was foggy and misty; that he was proceeding at a rate of about twenty-five to thirty miles per hour when the lights of an automobile coming from the opposite direction blinded him, causing him to drive off the paved portion of the road onto the berm; and after continuing thereon for a short distance he struck the break in the side of the road causing his automobile to roll over the embankment.

The evidence disclosed that the side of the road where this accident occurred had broken away and that the break extended almost to the edge of the blacktop, or paved portion of said road, and further disclosed that this break had existed for some considerable time. The evidence further disclosed that the paved portion of the road, at the point where the break existed, was approximately ten to twelve feet, and Mr. Null, one of the witnesses for the claimant, stated that at that point there was room for two cars to pass. (Record p. 40). All of the witnesses who testified knew of the existance of the break on the side of the road in question; in fact claimant further stated that he had traveled this road two or three times a week, sometimes every day, and knew that the road at the point of the accident had broken away, (Record p. 28).

Let us consider the testimony of the claimant concerning the occurrence of this accident. He states that while traveling over this particular road on his way home at about five o'clock in the morning, at a speed between twenty-five to thirty miles per hour in weather which, he states, was "real foggy and misty," he encountered another car proceeding in the opposite direction. He states he first saw the other car while he was "way back" from where the break existed; that when he was about fifteen feet from where the break existed, blinded by the lights of the other car, he drove off the paved portion of the road onto the berm, which the testimony shows to be six feet in width, to get around the other car or let that car get by. But what did he do? Instead of coming to a stop or slowing down he proceeded on the berm presumably at the same rate of speed he was traveling and drove into the break. (Record p. 27). Claimant knew the break was somewhere near the point where he drove off the road because he stated "I knowed the road was broke away, but didn't know it was broke away that bad *there*." (Record p. 27).

Our Court has held on several occasions that:

> "When the State Road Commission by the act of 1933 assumed control and authority over the primary and secondary roads of the state, the duty was imposed

> upon it to guard all dangerous places on the public roads and bridges by suitable railings and barriers, so as to render the said roads and bridges reasonably safe for travel thereon by day or by night." *Fry* v. *Road Commission,* 1 Ct. Claims (W. Va.) 48; *Upton* v. *Road Commission,* 2 Ct. Claims (W. Va.) 134.

We still adhere to the above proposition of law, provided, of course, that if one suffers injury because of the lack of duty imposed on the state he may not recover if in any way, by his own negligence, he contributes to his own injury.

A traveler on a public road must exercise ordinary care and caution. He cannot shut his eyes against apparent dangers.

The important factor that presents itself prominently in the consideration of this case is that the claimant, compelled, as he states, to drive off the road onto the berm to get around or let the other car by, knew he was somewhere near the break on the side of the road, yet in spite of this and in view of the adverse weather conditions and the fact that he was blinded by the lights of the other car, he continued on his journey, on the berm, without any attempt to stop or slow down despite the knowledge of possible danger. He had ample opportunity to do what any ordinarily prudent person using ordinary care and caution would have done—coming to a stop or proceeding cautiously, and then when the other car had passed to have driven back on the paved portion of the road and continued safely on his journey.

Our Supreme Court has held:

> "A plaintiff who contributes proximately to his own injury by assuming risks may not recover damages for injuries, notwithstanding that the defendant is not free from blame." *Love* v. *Norfolk & W. Ry. Co. et al,* 195 S. E. 593.
>
> "Even a traveler on a public road or street may not recover damages for personal injuries on account of a defect in the way, where the condition was known to him and he assumed the risk of proceeding on his

journey despite the danger." *Phillips et ux* v. *Ritchie County Court,* 31 W. Va. 477, 7 S. E. 427.

"If a traveler negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion." *Williams* v. *Main Island Creek Coal Co.* 98 S. E. 511.

". . . defects may be either patent or latent. Where the defect is open and easily discovered the traveler cannot, acting upon the presumption which exists in his favor, run blindly into it. In so doing the Courts hold that he will not be exercising ordinary care." *Boyland* v. *City of Parkersburg,* 90 S. E. 347.

The respondent's conduct in leaving the break in the side of the road open and unguarded may have constituted negligence which, in other circumstances of injury to person or property, would have afforded grounds for an award, but, for the reason stated and bearing in mind the facts and attendant circumstances, we feel that such is not the situation in the case. We feel that claimant contributed considerably, by his lack of ordinary care and caution, to his injury and loss. Therefore, we deny an award and dismiss the claim.

[Judge Bland did not participate in the consideration of this claim.]

(Claim No. 682—Claimants awarded $22,580.71)

J. A. COX, *in his own right and for the benefit of* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY; NORTH RIVER INSURANCE COMPANY; STANDARD FIRE INSURANCE COMPANY and MECHANICS AND TRADERS INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 23, 1950

If a fire negligently or accidentally originates on one's premises and does damage to his neighbor, he is liable therefor if he has failed to use ordinary care and skill to control or extinguish it, or to provide adequate means of doing so, the degree of care required depending on the facts and circumstances. The greater the danger, the greater will be the degree of care required to guard against it.

Appearances:

Keith Cunningham, W. Holt Wooddell and H. Clifton Carrico for claimants.

W. Bryan Spillers, Assistant Attorney General, and *Harry R. Bell,* State Claims Agent, for respondent.

A. D. KENAMOND, JUDGE.

On Wednesday, April 21, 1948, at about eight-ten o'clock in the morning a fire originated in the state road commission's garage in Huttonsville and the state road garage was completely destroyed down to its foundation, floor and platform, and the store building of J. A. Cox, immediately to the south thereof, but separated by a nine to eleven foot alley, was also, together with a substantial portion of its contents and fixtures, destroyed as a result of this fire originating in the state road commission's garage.

J. A. Cox and several fire insurance companies, as subrogees of J. A. Cox, have asked for damages totaling $24,080.71.

At seven-thirty o'clock on the morning of April 21, 1948, Walter Arbogast, a crew foreman for the state road commission, brought in, for repair, a pickup truck on which the gas tank was leaking. This truck was run in on the concrete floor just inside the door, which was left open, and about four feet away from the wall facing the store of J. A. Cox. Virgil Taylor, a mechanic working under the direction of Robert Rosencrance, maintenance foreman at the state road commission's Huttonsville garage, had gone underneath the said truck on a creeper and had drawn off a five-gallon open bucket of gasoline from the leaking tank and set it to the side next to the wall, when the gasoline which had spread over a portion of the floor under the front of the truck caught fire. This fire spread rapidly to the open bucket of gasoline, and thence readily to the wall next to the Cox store. The garage was not fireproof in any sense of the word.

The question for the determination of the court appears to be whether respondent was negligent in starting the fire and that such negligence was the proximate cause of the damages to the claimant J. A. Cox, or whether the agent—employe of the respondent failed to use ordinary skill and care in controlling or extinguishing the fire and preventing the communication thereof to the property of J. A. Cox.

Considerable testimony offered in this case, we believe, is immaterial to the question of origin of the fire; the type of the garage structure, the storage therein of inflammable and highly combustible materials, such as capped drums of kerosene, diesel oil and lubricating oils, the location of a gasoline pump therein, *et cetera,* had nothing to do with the origin of the fire, but they did create a situation which in the event of fire required great care and caution.

What was the cause of the fire originating in the respondent's garage? A brief submitted in behalf of the respondent by W. Bryan Spillers, assistant attorney general, states that "the

cause of the fire to this time remains unknown and obscure"; also, that "In the absence of violations of statutes where such violations are made *prima facie* negligence by the defendant, negligence is not presumed; it must be proved by a preponderance of the evidence in order to establish negligence and liability. This the claimants have utterly failed to do."

We readily concede that there were no violations of statutes, but a majority of the court is not ready to grant that the evidence does not establish negligence and liability.

The original notice prepared and filed on behalf of the claimants stated that sparks emanating from a creeper drawn across a concrete floor had set fire to the accumulated gasoline beneath the truck being repaired. When counsel for claimants amended the complaint by saying that upon further investigation the negligent handling of a blow torch by Virgil Taylor may have been the actual cause of the fire rather than sparks from the metal wheels of the creeper, they confused the issue and only drew attention from what we believe was a preponderance of evidence that sparks from the creeper started the fire.

One witness stating that Virgil Taylor was using what "looked like a blow torch" had to see this at a distance of seventy-five feet. A second witness at eight or ten feet outside the door of the garage stated that "it looked like the man working beneath the truck had an acetylene torch," but he saw no acetylene tank from which the torch would have been supplied. In both instances the fire was already blazing up under the truck. This testimony appears to be too vague to be given credence, especially since there was no record of such statements having been made immediately after the fire. Virgil Taylor, the mechanic, testified that the only blow torch, or soldering torch in the garge was kept and used at a workbench at the rear of the garage some thirty feet from the entrance door. Also, Robert Rosencrance, maintenance foreman, testified that after the fire he found this torch at or near where the workbench had been.

From attentive hearing and careful reading of the voluminous testimony in this case we find it evident that Virgil

Taylor, and Virgil Taylor only, would know from what particular act on his part the fire originated.

The testimony of Virgil Taylor was to the effect that the leaking gasoline which had spread a good—eight or ten feet—circle over the floor went up in flames when he slid out on the creeper from under the truck, but he didn't know what caused the fire. To be weighed against or with this testimony is that of Robert Rosencrance concerning Taylor's statement to him immediately after the fire. He testified that Taylor said he drained off one five-gallon bucket of gasoline and "brought it out on his creeper and took the other five-gallon bucket and put it back and went to creeping in under with his creeper and he said the creeper must have made a spark on the concrete floor and it caught." (Record p. 225). Rosencrance further stated and later reiterated that Taylor said the creeper was "bound to make a spark." (Record pp. 188-225). Rosencrance also, on being questioned, stated that Virgil Taylor was not using care when he attempted to roll a creeper under the truck, not if he had spilled gas there. (Record pp. 196, 197).

J. E. Landis, insurance adjuster, testified that he talked with Virgil Taylor in the afternoon of the day of the fire, when the latter stated that "gasoline had dripped down over a large area on the floor and when he went to pull his creeper across the concrete floor it caused sparks which ignited the gasoline."

J. A. Cox, the claimant, testified that Taylor, presumably on the day of the fire, said he was repairing a leaky tank and doing it near the door because of the fact that it was a dangerous job. He talked with Taylor several times after that about the fire and the latter stated that the fire originated from a creeper.

A majority of the court considers this a preponderance of evidence as to the cause of the fire and further that Virgil Taylor was not using proper care and caution to prevent a fire. The danger was great and a great degree of prudence and caution was called for. In a garage of frame construction as susceptible to fire as the subject garage and with no possible

ventilation other than through an open entrance door, unusual preventive care was called for. An operator of a commercial garage or service station would have been expected to observe fire prevention suggestions such as are given in an oil company's printed "Safety in the Service Station," by flushing away spilled gasoline with generous quantities of water either before operating a car or before using any equipment of an abrasive nature nearby. While Huttonsville had no system of water supply at the time to prevent spread of fire, there was a water pump near the front of the garage.

Did Virgil Taylor exercise proper care and skill to prevent spread of the fire? It is evident that control was much more difficult than prevention. However, there were from four to six ten-quart buckets of chemically treated sand distributed about the inner walls of the garage and three fire extinguishers, two of them—one small and another larger—on the wall of the office about twelve feet to the left of the truck. One of these buckets may have been too near the fire by the right wall to be reached. The rest of the fire fighting equipmnt appeared to be accessible. However, several witnesses said they saw no one using any of it.

It is held by respondent that Virgil Taylor had caught on fire and "had to flee" the garage. Taylor, however, was able to rid himself rather quickly of any fire on his person, "The flames didn't last but a second," he said, (record p. 301), and he used his time to other purposes than preventing spread of the fire in the garage. He admitted that use of the sand buckets "would have helped an awful lot." (Record p. 322). Instead he drove out the truck that was on fire and attempted to put out the fire on the truck by using the small fire extinguisher from the rack thereon. Under questioning he said he had first made an unsuccessful attempt to put out the fire in the garage with this small fire extinguisher.

We, a majority of the court, are convinced that the origin of the fire was due to the lack of care and prudence on the part of Virgil Taylor, an employe of the state road commission, and further that said Virgil Taylor by his lack of prudence

and skill failed to use the available and accessible equipment and materials for preventing the spread of the fire and its communication to the adjacent buildings in the circumstances. His lack of care and caution, prudence and skill compel us to hold that the state road commission is liable for damages to the claimants in this case.

The Supreme Court of Appeals of our state has held:

> "What is ordinary care and prudence depends on the circumstances of the particular case. The greater the danger of communicating fire to the property of others, the more precautions and the greater the vigilance necessary to constitute such care." *Orlander* v. *Stafford,* 98 W. Va. 502.
>
> "When a private owner of property sets out fire upon his own property for a lawful purpose, or fire accidentally starts thereon, he is not liable for the damages caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it." *Mahaffey* v. *Lumber Company,* 61 W. Va. 575.
>
> "One setting fire on his premises is charged with the duty of exercising ordinary care and skill in preventing it from spreading and from being communicated to the property of another, and if he fails to exercise care and by reason thereof the fire is communicated to the property of another causing him damage the one setting fire is liable for damages." *Catron* v. *Sims, Auditor,* 57, S. E. (2d) 465.

It was agreed and stipulated between the claimants and the state road commission that the damages to J. A. Cox resulting from destruction of his store building amounted to $8,324.00, constituting real property damages and that an award, if and when made by the court of claims, shall be broken down into three parts as follows:

Fifteen hundred dollars ($1500.00) to North British and Mercantile Insurance Company, Limited, subrogee of the rights of J. A. Cox to recover loss in said amount; fifteen hundred

dollars ($1500.00) to North River Insurance Company, subrogee of the rights of J. A. Cox to recover loss in said amount; and five thousand three hundred and twenty-four dollars ($5,324.00) to J. A. Cox, representing the uninsured real estate loss to him as a result of the subject fire.

It was agreed and stipulated between the claimants and the state road commission that the total amount of personal property loss as a result of the subject fire was $12,756.71 and that an award, if and when made by the court of claims, shall be broken down into four parts, as follows:

Two thousand Dollars ($2,000.00) to Standard Fire Insurance Company, of Hartford, Connecticut, subrogee of the rights of J. A. Cox to recover loss in said amount; one thousand dollars ($1000.00) to Mechanics and Traders Insurance Company, subrogee of the rights of J. A. Cox to recover loss in said amount; one thousand dollars ($1000.00) to Firemen's Insurance Company, subrogee of the rights of J. A. Cox to recover loss in said amount; and eight thousand seven hundred fifty-six dollars and seventy-one cents ($8,756.71) to J. A. Cox, representing his uninsured loss of personal property as a result of the subject fire.

In addition to the personal property destroyed by the subject fire and for which a claim against the state road commission has been made in the amount of $12,756.71, there was about $2000.00 worth of stock which the claimant J. A. Cox was able to remove from the burning store. This rescued stock was transferred to a store at Mill Creek operated by the said A. J. Cox.

With respect to an additional item of damages of $3000.00 to J. A. Cox as an individual for loss of use and occupancy of the store building at Huttonsville and loss of profits for a period of five months after the fire on April 21, 1948, there was no agreement between the counsel for J. A. Cox and counsel for the state road commission.

It is impossible to determine whether it would have required five months, or more or less than five months, to replace the

destroyed store building at the Huttonsville location. No immediate attempt to rebuild was made, Mr. Cox later deciding to erect a building for a different purpose on the site of the destroyed store building.

Also, the estimated profits of $600.00 per month were based on the complete stock of Mr. Cox at the Huttonsville store. About $2000.00 worth of stock had been saved and handled at his Mill Creek store with resulting profits from its sale and succeeding turnovers. The court also notes that Mr. Cox, though not waiving claim for loss of profits, frankly stated that the $3000.00 estimate "might be a little far-fetched" because he did not rebuild or attempt to rebuild. It would further appear from his testimony as to gross sales and net that the expense of handling his sales was underestimated in hitting upon a profit of $600.00 per month. We are therefore of the opinion that $1500.00 would be a more reasonable estimate of loss in profits during the time that would have been required to rebuild the store.

We, a majority of the court, recommend the payment of the amounts stipulated and agreed upon between the counsel for the claimants and the counsel for the state road commission to the several claimants as stipulated, the amount of damages $21,080.71 having been supported by inventory of stock three months prior to the fire, by invoices of stock purchased during the three months prior to the fire, and by consumer sales tax record during the period between taking of inventory and date of fire.

We recommend also the payment of $1500.00 to J. A. Cox for loss of profits during the time he might reasonably have been expected to replace the store lost by fire.

MERRIMAN S. SMITH, JUDGE, dissenting.

This is a claim in which the facts and circumstances surrounding the causes and beginning of the fire, as brought out in the evidence before this court are so meagre and hypothetical that I am unable to join in with my colleagues in making an

award. In the instant claim the claimant should prove by a preponderance of evidence or at least beyond a reasonable doubt that the state's employes were negligent. After a careful analysis of the evidence adduced by the claimant, I fail to find any such proof. Furthermore, I think there is a marked distinction between the degree of care to be exercised in the case of a friendly fire as distinguished from a hostile fire.

This was an unusual hostile fire in which not only gallons of gasoline but the dangerous fumes emanating from the floor only intensified the heat and increased the rapidity of the spreading flames which would render the efforts of a single person without effect.

At the beginning of the fire the only employe at work was entirely alone, consequently his testimony is the only authentic version of how the fire started, also as to his immediate efforts to exterminate the blaze. The name of this employe was Virgil Taylor and from his testimony, (record pp. 301 to 305) he first put out the flames which had enveloped him and his clothes, he then got the fire extinguisher from the truck upon which he was working and after attempting to extinguish the flames with no avail, he did the next most natural and logical thing, he ran to the store and asked Mr. Cox to get some help that the garage was on fire. In the words of the immortal poet "Who can be wise, amazed, temperate, furious, loyal and neutral in a moment?" The claimant, Mr. Cox stated the flames were three or four feet high when he saw the fire and he ran back into the store and secured a fifty pound sack of lime. By this time the fire had reached such proportions that he could not get close enough to throw the lime within five or six feet of the flames. Since this fire generated such intense heat from its inception, due to the inherent nature of gasoline and its fumes, how could the state's employe, Virgil Taylor, be required to use more skill and more care than the claimant, Mr. Cox in extinguishing it, since Mr. Cox really had much more at stake than did the state, as evidenced by the monetary value of the store building and contents. No evidence was introduced to prove that the fire originated from any negligence on the part of the state road commission's employe. In fact

this was the usual method of repairing a leaky truck tank. As a matter of fact this same truck's tank had leaked just a short time before April 28, 1948, and was similarly repaired by the same employe and he further testified that other state trucks with leaky tanks had been repaired by him in a similar manner and without mishap. The state road commission had provided ample buckets and extinguishers for an ordinary fire in a building of this size, however, such a fire as in the instant case was an extraordinary, exceptional and uncontrolable fire for any one person to cope with any degree of success. The circumstances under which this fire originated were entirly different from those in the *State ex rel. Catron* v. *Sims,* 57 S. E. (2d) 465, upon which claimant is largely relying upon for a reward, this being a hostile fire and no evidence was introduced to prove negligence in its inception and the state road commission employe, Virgil Taylor, I am convinced, used ordinary care in combatting the flames as would any prudent mechanic under the same conditions and circumstances.

I must respectfully record this my dissent in denying an award in this claim.

[Judge Bland did not participate in the determination of this case.]

(No. 685—Claimants awarded $2,134.20)

ALBERT BROWN and ODESIE BROWN, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 23, 1950

Appearances:

J. A. Cain, for claimants.

W. Bryan Spillers, Assistant Attorney General and *Harry R. Bell,* State Claims Agent, for respondent.

A. D. KENAMOND, JUDGE.

The fire which originated in the state road commission's garage in Huttonsville on April 21, 1948, spread to the properties to the south, first to J. A. Cox's store, then to the eight-room dwelling house of Albert and Odesie Brown, causing considerable damage to their dwelling and destroying household goods and clothing belonging to the eight members of the household. Since a majority of the court of claims has found the state road commission liable and the claimants, J. A. Cox *et al,* in claim No. 682 (reported elsewhere in this volume) should be awarded damages, it follows that the claimants in this case should also be awarded damages.

Itemized expenditures for repair of the dwelling, not including painting, amounted to $3,754.20, which included an item of $600.00 for concrete block foundation under parts of the house where no such foundation existed prior to the fire. In estimating replacement costs this item of $600.00 should have been deducted, thus leaving $3,154.20. To apply toward the latter amount Albert and Odesie Brown had received $2000.00 from insurance, so their total loss from structural damages was

$1,154.20. Exterior and interior painting made necessary because of damages caused by fire and estimated at $195.00 and $285.00 respectively, a total of $480.00 is accepted as a reasonable claim.

Odesie Brown testified that she and her husband had spent $2250.00 to refurnish their eight-room house. It was claimed that no furniture was rescued in usable condition. According to Odesie Brown the furniture that had to be replaced was "good furniture"; she and her husband had accumulated it over the period of thirty-two years since their marriage. Further than this no evidence was offered to show the value of the furniture destroyed nor were any receipts presented to show expenditures for the new furniture. Mrs. Brown stated that they paid cash to Montgomery Ward. The claimants also ask for $2000.00 to cover expenditures for new clothing to replace clothing lost by the eight members of the family, six of whom were away from home at the time of the fire.

In the lack of factual detail with reference to actual losses in furniture and clothing, and assuming that the quality and serviceable value of clothing and household furnishings destroyed would be inferior to new and unused replacements, we believe the following would be proper and reasonable amounts needed to restore losses of Albert and Odesie Brown:

Structural repairs not covered by insurance	$1,154.20
Painting, exterior and interior	480.00
Household furnishings and clothing	500.00
Total	$2,134.20

We, a majority of the court, recommend an award of two thousand one hundred thirty-four dollars and twenty cents ($2,134.20) to Albert and Odesie Brown.

MERRIMAN S. SMITH, JUDGE, dissenting.

The causes and circumstances which created this claim for damages are identical and the same as those which

grew out of Claim No. 682, *J. A. Cox et al* v. *State Road Commission.* As a result thereof, the same grounds for dissenting to an award in that claim apply equally to the instant claim. Therefore I hereby deny an award.

[Judge Bland did not participate in the determination of this case.]

(No. 692-S—Claimant awarded $12.95)

J. E. HUFFMAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1950

JAMES CANN, JUDGE.

On the twentieth day of February, 1950, claimant's wife, while attempting to park her husband's automobile on state route No. 2 and Emerson avenue, in Parkersburg, West Virginia, came in contact with the corner of a cast iron manhole cover protruding out over the curb, causing the right front tire of said automobile to be cut beyond repair. Claim is made for $12.95.

The record contains a statement by B. D. Shatto, District Safety Director for respondent, in which he states that he was informed by Lloyd Sholes, assistant maintenance superintendent, that all other manhole covers in the vicinity of this accident were back even with the curb, but that the cover which caused the damage to claimant's automobile did protrude out over the curb about one and one-half inches into the highway. He also states that this cover was repaired the following day.

From the record as a whole it appears that the employes of respondent were negligent and careless in the performance of

their duties, and that no negligence is attributed to the claimant or to his wife, who was operating his automobile.

The respondent concurs in the claim for the amount asked and the claim is approved by the assistant attorney general as one that should be paid. The court has carefully considered this matter upon the record submitted and is of the opinion to make an award in favor of claimant. Accordingly, an award is made for the sum of twelve dollars and ninety-five cents ($12.95).

(No. 693-S—Claimant awarded $22.50)

TAYLOR & MAUN LUMBER COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1950

JAMES CANN, JUDGE.

On the fourteenth day of October, 1949, a truck owned by claimant was being operated over and upon West Virginia route No. 80 in Logan county. As the said truck entered a bridge leading into South Man, West Virginia, a large sign, indicating weight capacity, which had previously been erected on the bridge overhead beam in the center, became loose and fell onto the cab of the truck, necessitating expenditures for repairs to said cab in the sum of $22.50.

After proper investigation this claim is approved and recommended for payment by the respondent and by the assistant attorney general.

From a careful investigation of the record submitted the court is of the opinion that the respondent's employes should have properly braced the sign to the overhead beam of the

bridge, so that the vibration caused by vehicles crossing said bridge would not cause it to become loose or dislodged.

For the reasons herein set out the court makes an award in favor of claimant in the sum of twenty-two dollars and fifty cents ($22.50).

(No. 691-S—Claimant awarded $25.50)

RUSSELL D. SABOL and TRAVELERS FIRE INSURANCE COMPANY, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 11, 1950

A. D. KENAMOND, JUDGE.

Claimant Russell D. Sabol, an employe of the Hagers Motor Sales in Wellsburg, West Virginia, parked his 1948 Studebaker maroon automobile on their used car lot, on June 1, 1949, and on getting the car to go home found a light mist of silver paint all over it. In the meantime employes of the State Road Commission were spray painting the under side of the bridge across Buffalo Creek, south of Wellsburg, on West Virginia Route No. 2. At the time when claimant Russell D. Sabol parked his car no one was spraying paint. Statements were made by the State Road Commission's maintenance superintendent and foreman for Brooke County that they did have a crew of men painting the above mentioned bridge and that it was a little windy, but that they did not think the mist would carry as far as it did. However, paint was blown by the wind to the north flecking Sabol's car, necessitating removal of paint, cleaning and waxing to the cost of $25.50, for which Mr. Sabol was reimbursed by the Travelers Fire Insurance Company, which looks to the state road commission

for recovery by virtue of the negligence of the commission's employes causing the damage.

There being no contributory negligence on the part of the claimant, and a bill from the Hagers Motor Sales showing $25.50 to be the cost of removing the paint from his car, and the said amount having been concurred in by the state road commission and the attorney general, the majority of this court hereby makes an award and recommends the payment of twenty-five dollars and fifty cents ($25.50) to claimants Russell D. Sabol and the Travelers Fire Insurance Company.

ROBERT L. BLAND, JUDGE. dissenting.

I am of opinion that an appropriation of public funds in satisfaction of the award made by majority members of the court is prohibited by section 6, chapter 10 of the constitution of West Virginia under the principle announced by the Supreme Court of Appeals of West Virginia in the case of *State ex rel. Baltimore & Ohio Railroad Company*, v. *Sims, Auditor*, 53 S. E. (2d) 505.

(No. 694-S—Claimant awarded $100.00)

KENNETH KENNAN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1950

ROBERT L. BLAND, JUDGE.

The claim in this case is prosecuted against the road commission, a governmental agency of the state of West Virginia. It is in the sum of $100.00. The head of the agency concerned concurs in the claim and it is approved by the attorney gen-

eral as a claim which, within the meaning of the court act, should be paid. It is informally heard upon a record prepared by the state road commissioner and submitted to and filed in the court pursuant to section 17 of the court act. The claim arises out of the following state of facts, *i. e.*:

The state road commission maintains a small wooden bridge or culvert at a certain point on secondary road 11-3 in Wood county, West Virginia. On January 4, 1950, claimant Kenneth Kennan was driving a team over the secondary road in question. While crossing the above mentioned small wooden bridge or culvert one of claimant's horses broke through the culvert with its left hind leg, and the other hind leg of the animal also slipped out from under it and over the end of the culvert. The injuries sustained by the horse were so serious that it became necessary to destroy the animal and relieve its suffering. It is shown that one hundred dollars was a reasonable value for the horse. It also appears that a very diligent investigation of the circumstances attending the accident was made by different employes of the road commission; and, since the head of the agency has seen fit to concur in the claim and the attorney general, charged with the duty of representing the state in respect to claims asserted against it in this court, has given the said claim his approval, and bearing in mind the holding of the Supreme Court of Appeals of West Virginia in the recent case of *State ex rel. Saunders* v. *Sims, Auditor,* 58 S. E. (2d) 654, this court is likewise disposed to ascertain and find the claim in question to be meritorious, and that an award of the public revenues should be made therefor. As a matter of fact the facts arising in the *Saunders* case, *supra,* which was heard in the court of claims, and the facts involved in the case now under consideration are strikingly similar. In the *Saunders* case, the Supreme Court of Appeals of West Virginia held in point one of the *syllabi,* as follows:

> "A moral obligation of the State, declared by the Legislature to exist in favor of a claimant for negligent injury to his property, will be sustained and a legislative appropriation of public funds made for its pay-

> ment will be upheld, when the conduct of agents or employes of the State which proximately caused such injury is such as would be judicially held to constitute negligence in an action for damages between private persons."

The court of claims is of opinion that the instant case is controlled by the last mentioned case, being one of the more recent decisions of the Supreme Court of Appeals of West Virginia giving information and guidance to this court.

An award is therefore now accordingly made in favor of claimant Kenneth Kennan for the sum of one hundred dollars ($100.00).

(No. 690—Claim denied)

LENA BARR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1950

The fact that a stone or rock falls from the hillside adjacent to a public road or highway, striking and damaging a passing automobile, does not of itself constitute negligence on the part of the state road commisson. See *Syllabus Clark* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 230, and *Hutchinson* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 172.

Appearances:

William Taylor George, Jr., for claimant.

W. Bryan Spillers, Assistant Attorney General and *Harry R. Bell*, State Claims Agent, for respondent..

A. D. KENAMOND, JUDGE.

Claimant Lena Barr sought compensation in the amount of $500.00 for loss resulting from damage to her automobile while driving on state route 72, charging the state road commission with negligence in permitting loose rocks to hang upon the bank of said road.

On March 14, 1950, claimant was driving her 1949 Dodge sedan on state route 72, enroute from her home at St. George to Parsons in Tucker County. She alleged that when rounding a blind turn a rock, about as large as a half gallon bucket, rolled down from her righthand side and struck her automobile from underneath, puncturing the oil pan and thereby causing all the oil to leak from it. Claimant, though knowing that the rock had struck the underside of her car, continued her journey

to Parsons, but when she had proceeded about four miles on her return to St. George the car stopped, the engine having been burned up by reason of the aforesaid loss of oil. She had the car hauled into St. George, and later hauled back to a Parsons garage by a wrecker.

The repair bill from the Parsons garage amounted to $257.86. The claimant's insurance company paid, or agreed to pay, for the oil pan, but declined to pay other damages on the ground that they were caused by driving the car after the accident.

The claimant had been driving over this road about three times a week, had never had any difficulty with falling rocks, and before the accident had never noticed any loose rocks on the hillside. At the point of accident the blacktopped roadway is sixteen feet wide with a berm of five to six feet on each side, and the adjacent hillside is clean cut. The road maintenance foreman for Tucker county stated that he knew no way of preventing some detrition from the shaly rock of the hillside. In recognition of such maintenance difficulty, there was a road sign about four feet above ground on route 72 near Parsons, warning against falling rock, and a similar sign on same route about one-tenth mile beyond the point of turning off to St. George.

It has been repeatedly held by this court that the state is not a guarantor of safety to the traveling public and no negligence on the part of the state or the agency involved was shown in this case. Accordingly, an award is denied and the claim dismissed.

(Nos. 698-699-700—Claims denied)

KEYSTONE HARDWARE & FURNITURE COMPANY, and FEDERAL INSURANCE COMPANY, *a corporation,* PAULINE WRIGHT and CHARLES WRIGHT,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1950

1. No duty express or implied rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Hutchison* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 217.

2. When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Lent* v. *State Road,* 3 Ct. Claims (W. Va.) 253.

3. A claimant seeking an award in the court of claims by way of compensation for personal injuries sustained on account of alleged defective condition of a state controlled highway, must, in order to be entitled to such an award, establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature. *Watts* v. *State Road,* Claim No. 675, (reported elsewhere in this volume).

Appearances:

Edmund D. Wells for claimants.

W. Bryan Spillers, Assistant Attorney General, and *Harry R. Bell,* State Claims Agent, for respondent.

JAMES CANN, JUDGE.

THESE CASES WERE HEARD BY THE COURT IN THE COUNTY COURT ROOM OF MERCER COUNTY, AT PRINCETON, WEST

VIRGINIA. THE KEYSTONE HARDWARE CASE WAS HEARD ON THE 18TH DAY OF JULY 1950, AND THE TWO WRIGHT CASES WERE CONSOLIDATED AND HEARD ON THE FOLLOWING DAY. THE COURT IS OF THE OPINION THAT SINCE THE ACCIDENTS AND INJURIES COMPLAINED OF GROW OUT OF THE SAME STATE OF FACTS AND THAT THE EVIDENCE, WITH THE EXCEPTION OF THE QUESTION OF DAMAGES, IS SIMILAR IN ALL OF THESE CASES, THIS OPINION WILL SUFFICE TO STATE THE FINDING OF THE COURT IN ALL OF THE THREE CASES IN QUESTION.

At about eleven-thirty o'clock of the morning of February 7, 1950, Richard H. Spicer, accompanied by his father-in-law, was operating a 1939 Ford automobile, owned by his mother-in-law, on U. S. Rt. 52, and was proceeding east towards Freeman, Mercer county, West Virginia. When he was about a mile west of Freeman, proceeding along a straight stretch of said Rt. 52, he was being followed by a 1935 Ford automobile, owned and operated by Charles Wright, who was accompanied by his wife, Pauline Wright, and their infant child. At a point approximately halfway along this stretch of road, Wright struck the left rear of the Spicer car, careened across the highway and struck a truck owned by the Keystone Hardware & Furniture Company, a corporation, operated by Dempsey H. White, and which was proceeding west towards Welch, McDowell county, West Virginia. As a result of this three-way accident the Keystone truck, as well as the Wright automobile, was totally destroyed, and both Mr. and Mrs. Wright were painfully and severely injured. These claims were filed against the state road commission by the claimants, named in caption of this opinion, to recover from respondent damages for the losses and injuries sustained in this accident. The Federal Insurance Company, a corporation, is made a party in the Keystone case as subrogee of the Keystone Hardware & Furniture Company for the sum it had to pay by reason of this accident, under a $100.00 deductible automobile accident policy.

The testimony presented to the court substantially disclosed the following facts. Sometime during the latter part of De-

cember, 1949, a slide occurred along the highway where this accident occurred. A large boulder, part of the slide, caused a depression or hole along the side of the road, which measured about one and a half to two feet in width and about two feet in length. The slide was removed in almost two weeks and repairs to permanently fix the depression or hole and other cracks in the highway were not made because of excessive rain (this was alleged in claimants' petition and substantiated by the testimony); pending better weather conditions the depression or hole, above mentioned, was periodically filled with gravel.

It was shown by the testimony that on the day this accident occurred the highway was wet and somewhat muddy, which latter condition was caused by strip mining trucks entering the highway at or about 200 to 300 feet from where this accident occurred. Spicer testified that as he rounded a curve and entered and proceeded along the straight stretch of the highway, where this accident occurred, he was traveling about thirty or thirty-five miles per hour. When about halfway along the stretch he noticed a wet spot or something that looked like a hole along the side of the highway ahead of him. He decreased his speed or slowed down, as he says, to about twenty-five miles per hour and was about to slow down more when he was suddenly struck in the rear by the Wright car and knocked over and across what seemed to him to be a wet spot or something that looked like a hole in the highway. Spicer further testified that if he had not been struck by the Wright car he wouldn't have had any trouble going on through. (R. p 48).

Wright testified that as he rounded the curve and entered the straight stretch he saw the Spicer car ahead and was following it at about a distance of twenty-five feet; he states he was proceeding cautiously because the highway was wet and muddy; he also states that he remarked to his wife that the road was slick as soap (r.p. 82). But the peculiar thing about the testimony offered by Wright is that he knows nothing about the accident. He does not know if and when Spicer slowed down,

and he does not know when, where or how he struck the Spicer car or the Keystone truck; all he remembers is that he was following the Spicer car and what was told him at the hospital about the accident.

White, the driver of the Keystone truck, testified that as he entered the straight stretch, proceeding west, he noticed the Spicer and Wright cars. He states that he noticed Spicer slowing down and that Wright, who was following Spicer, was having trouble with his car, or, as he states, the Wright car was acting kind of funny (r. p. 51); that it seemed that Wright was having trouble with his brakes for they "appeared to have caught or grabbed or something, and he started up onto the right of the berm, and it looked like when he got up there he pulled it back to the left of the road and hit the back end of the Spicer automobile and from that he collided with me." (R. p. 59). White, in a written statement given to N. C. Stanley, a representative of the respondent, states that the (Wright) car was following too close for safety and when he had to apply his brakes his car apparently went out of control (R. p. 64). This statement White did not deny.

Charlie Watson, operating a Smith Transfer Company truck, on the day this accident occurred, testified that as he rounded the curve and entered the straight stretch proceeding east he observed the Wright car about two hundred feet ahead of him driving along like any other car, when suddenly Wright seemed to be dodging something, proceeded across the highway and struck the Keystone truck.

Loren Walker and N. C. Stanley, road supervisor and inspector, respectively, for the respondent in the district where this accident occurred, testified about the slide, the removal of the same, the depression or hole along the side of the road, and about several cracks in the highway caused by the slide. They testified that the depression or hole along the highway was only about three inches deep and was always filled with gravel pending better weather conditions to make permanent repairs. They

also testified that in their opinion the depression or hole along the highway in question never was considered a hazard necessitating the erection of barriers or warning signs.

Colin Bird and Herschel Goade, two disinterested witnesses, testified that they both had traveled this particular stretch of road where the accident occurred, twice a day since the occurrence of the slide causing the depression or hole along the side of the highway. They both stated that the hole or depression, testified to in this case, was nothing serious; that it looked like the slide had pushed the pavement in four or five inches from the other level of the hard surface road, and that at no time did they have any trouuble negotiating this particular stretch of road.

McKinley Stacey, chief of police of the town of Bramwell, Mercer county, West Virginia, testified for both the claimants Mr. and Mrs. Wright. He was asked in effect whether the road condition at the scene of the accident was an apparent hazard. He replied that it was under certain conditions. Asked to explain those conditions he stated the condition of the road and weather conditions would govern that. On cross examination he in effect stated that the hazardous condition of the road which he meant was the fact that it was muddy and wet and that anyone operating their automobile as any prudent person would do then he would not say that the condition he spoke of would be a hazard.

We desire to make some particular reference to the testimony of Trooper O. E. Burner of the West Virginia department of public safety, who was the first witness called in both cases. Trooper Burner states that he arrived at the scene of the accident shortly after its occurrence and after a thorough investigation of the cause of the accident and speaking to the participants and other witnesses he conclued that the probable cause of the accident in this case was that the Wright vehicle was on the wrong side of the road. He states that the condition of the road at or near the scene of the accident was muddy.

He described the defect in the side of the road, at the scene of the accident, as being portion of the road surface broken which started at the berm and extended into the road in an oblong shape, with the widest portion being about a foot, and although he did not know the depth of the depression or hole that existed at that point, or make any investigation pertaining to the same, he stated that it created a hazardous condition. In his testimony given in the Wright cases he stated that after the slide had cleared away he did not recall receiving any reports that the road was hazardous; yet in spite of all this he testified in both cases that in his opinion if the drivers of the respective automobiles involved in this accident were obeying the law or driving their automobiles as required by law, this accident would not have happened. (Keystone r. p. 30; Wright r. p. 7).

At the conclusion of the hearing in the Keystone case the court stated the case had been submitted, subject to their investigation of the scene of the accident. Shortly thereafter the members of the court were taken to the scene of the accident and there viewed its surroundings. It was ascertained that the paved portion of the road at the scene of the accident, by actual measurements, was twenty feet, with a ten foot berm on the north side; that the road at the scene of the accident was a straight stretch extending at least one-fourth of a mile; that one third of a mile from the scene of the accident on the same side of the highway on which Spicer and Wright were traveling there appeared a large "Slippery when wet" sign which had to be passed by both drivers proceeding as they were before entering the straight stretch where the accident occurred, and that said sign had been at that place long prior to the day of the accident.

At the conclusion of the Wright cases counsel for all of the claimants summed up his position in these cases by stating that it was his theory that the proximate cause of the accident which resulted in the damages complained of was the failure of respondent to erect barriers or warning signs near the depression or hole which existed near the scene of the accident,

and that by its negligence and omission of duty the state was liable. With this statement the court does not agree for the evidence in these cases as a whole conclusively and without a shadow or doubt disproves such theory.

Our Supreme Court has held in the case of *Adkins, et al,* v. *Sims,* 130 W. Va. 646:

> "In the very nature of things the Road Commissioner must be permitted a discretion as to where the public money, entrusted to him for road purposes, should be expended, and at which point guardrails, danger signals and center lines should be provided, and the *honest exercise of that discretion cannot be negligence.* (Underscoring ours.)

We cannot find that the road commission, its agent or employees, abused such discretion for it is apparent from the evidence that they acted promptly in clearing the slide which occurred and because of the weather conditions, they did all that could be reasonably expected of them, and were duly diligent under the circumstances in keeping the depression or hole in the side of the road filled with gravel or other material so as to be passable by the traveling public.

Our Supreme Court also stated in the *Adkins* case, *supra*:

> "We do not mean to be heartless or cynical when we say that every user of the highway travels thereon at his own risk. The State does not and cannot assure him a safe journey."

Our court has held on several occasions, particularly the claim of *Hutchison* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 217:

> "No duty express or implied rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not

guarantee freedom from accident of persons traveling on such highways."

In the case of *Lent* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 253, our court held in effect.

> "When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied."

Chapter 17, art. 8, sec. 18 of the code of West Virginia provides:

> "No person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other condition then existing.
>
> "Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon or entering the highway in compliance with legal requirements, and with the duty of drivers and other persons using the highway to exercise due care."

In the case of *Deputy* v. *Kimmel*, 73 W. Va. 595, our Supreme Court in effect said:

> "Because of the character of the vehicle and the unusual dangers incident to its use, a greater degree of care is required of the operators of automobiles while on the public highways, than is required of persons using the ordinary or less dangerous instruments of travel. They should exercise such care in respect to speed, warnings or approach and the management of their cars as will enable them to anticipate and avoid collision which the nature of the locality may reasonably suggest likely to occur.

> "In whatever manner or for whatever lawful purpose one uses a public highway, he owes a double duty: (1) to avoid danger to himself by another having the right to such use, and (2) to avoid infliction of an injury upon such other person. Both must exercise such care as reasonably prudent persons would exercise under the same circumstances and conditions in order to avoid being injured or causing injury.
>
> "A person must run his car only at such speed as will enable him to timely stop to aviod collision. If he fails to do so, he is responsible for the damage he thereby causes."

We believe the law in this state to be quite clear. In this case it was clearly shown that proper signs were installed advising the traveling public of the danger of the highway in the event of wet weather. Spicer and Wright had ample opportunity to observe the condition of the road upon entering the straight stretch where this accident occurred. It then and there became the duty of both to operate their vehicles as any ordinarily prudent person would have done under the circumstances and conditions of the road. We believe that the duty Spicer owed Wright and the duty Wright owed Spicer and the Keystone Hardware vehicle to operate their respective automobiles in a prudent and lawful manner, considering the circumstances and conditions of the highway on the day this accident occurred, was far superior to any duty which the respondent may have owed either of them.

Who, in all of these cases, has testified and proved to the satisfaction of the court that the depression or hole in the side of the road was in any way responsible for the accident? In fact it was clearly shown that even if the hole or depression had not existed at the time of the accident, under the same circumstances which occurred, the accident would have happened anyway for Spicer clearly stated that he did not know what was ahead of him that caused him to slow down, whether it was a wet spot or hole. He wasn't taking any chances so he

acted as any ordinarily prudent person, under the same circumstances, would have done. Although it was intimated that Spicer came upon the depression or hole suddenly causing him to come to an abrupt stop thereby causing Wright to immediately swerve to the side and damage the Keystone truck, this was not borne out by the evidence. All of the witnesses who saw this accident testified that Spicer was in the act of slowing down when Wright struck him in the rear, careened across the road and damaged the Keystone truck. Although no negligence was shown on the part of the driver of the Keystone truck, we are convinced by all of the evidence that Wright was the principal person at fault. He knew nothing, or would not tell, of what happened. To strike a truck on the opposite side from which he was traveling with such force as to demolish it as well as his own car, and also cause the severe injuries to himself and his wife as were shown, only proves the fact that Wright was both going too fast and did not have his car under control. Suffice it to say that the claimants, and each of them, have not only failed to prove that a depression or hole in the side of the highway was the proximate cause of their accident and resulting injuries, but have wholly failed to establish any claim against the respondent. In order for claimants, or either of them, to be entitled to an award they must establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature. This they, or either of them, have wholly failed to do. Therefore, an award is denied to each of the claimants in these cases and their respective claims are dismissed.

(No. 695—Claim denied)

HENRY B. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 28, 1950

When claimant suffering damage from a flash flood, which brought disaster to many properties and people in the immediate vicinity of the claimant's property, fails to prove the negligence on the part of the state road commission was the proximate cause of his losses, an award will be denied.

Appearances.

J. Malcolm Orth, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

A. D. KENAMOND, JUDGE.

Claimant Henry B. Bennett owns a tract of land in Millroy District in Grant county, through which the state road commission, on December 5, 1936, obtained from claimant a parcel of land for the purpose of constructing a highway, now known as state route 28. Claimant alleged that in the construction of said highway in 1937 the state road commission installed a culvert inadequate to accomodate the natural flow of waters at all seasons of the year, and by reason of its inadequacy his lands were inundated on June 17, 1949, causing great damages to claimant's property, his log dwelling house and one chicken house being flooded or covered with water; a second chicken house, fuel wood and lumber being washed away; two thousand chickens and two thousand pounds of feed being destroyed; a building for carrying on a photographic business, together with

photographic equipment, being damaged and destroyed; and a large garden with growing vegetables being totally destroyed.

Claimant demanded damages to the extent of $10,000.00, of which amount $4,145.10 was for damage and destruction of property and the remainder for loss of his business.

June 17, 1949, is a memorable day in the history of South Branch valley. On that day a flash flood, a deluge of water, descended on Pendleton, Grant and Hardy counties in West Virginia and the portions of these counties along the South Branch river and its tributaries, the North Fork and South Fork, were widely publicized as a flood-stricken area. State road commissioner, Cavendish said then that damages to primary roads and major secondary roads in that area might run as high as $1,000,000.00. The National American Red Cross immedately made available a disaster fund of $100,000.00 and promised more if needed. Major General Lewis A. Pick, chief of army engineers, announced from Washington that his agency would spend $25,000.00 to repair flood damage in the area, and said: "Items under consideration include the reestablishment of the North Fork of the South Branch of the Potomac, which was blocked off and diverted by an extensive slide in the vicinity of Cabins, in Grant county, channel clearing and bank stabilization."

The property of claimant lies about 300 feet west of the North Fork river in Long Hollow, southwest of Cabins. Respondent in the case held that the claimant was the victim of an Act Of God.

Counsel for claimant asserted that the state road commision had intervened in an Act Of God by installing in a roadfill east of claimant's property a culvert inadequate to carry off the usual and to be expected volume of floodwater and had disregarded the history of climatic variations in the locality. Several witnesses were heard in testimony on amount of rainfall and floodwater at the Bennett location at different times

during the past thirty-six years. These facts stood out: One, In a 1936 flood there may have been as much rainfall as in June 1949, but not in such a short space of time; Two, the crest of the 1949 water in the immediate region was more than six feet higher than in 1936; and three, from 1937, when the subject (24 inch) culvert was installed, until the flash flood in July, 1949, the rainfall on and natural flow of water through the property of claimant had been adequately taken care of by said culvert in the state road fill east of said property.

Relative to expected rainfall and adequate provisions for drainage, it is pertinent to note that, while claimant stated he had protested to some one working on construction of the road east of his property that a larger culvert should be installed, said claimant afterward erected on his property several of the buildings that were damaged or destroyed on June 17, 1949.

Considerable testimony was presented relative to the size of culvert that should have been installed to take care of the drainage area of which the claimant's property was a part. Claimant relied on the Talbot formula for a drainage area of 115 acres in a mountainous region, calling for a culvert 6 feet by 6 feet, or 6 feet by 8 feet, while the respondent put dependence on the state road commission engineer's estimate of requirements for a drainage area of 118 acres in a hilly region, with due consideration of the amount of erosion shown there. The court claims no competence to pass judgment on the relative merit of the differing estimates, but is of the opinion that the deluge of water on June 17, 1949, was so great and sudden and unexpected as to preclude safeguard against damage and destruction, by any provision, within the province of the state road commission, for carrying off the water and debris that then descended upon the claimant's property.

The court is of the opinion, after a hearing of his case on July 25 and 26, 1950, that claimant did not prove that failure of the state road commission to install a larger culvert at the road fill east of his property was the proximate cause of claimant's loss, and therefore an award is denied.

(No. 696—Claim denied)

ROBERT P. ROTEN, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed July 28, 1950

An award will not be made in favor of a claimant for reimbursement for costs incurred and paid in the defense of a criminal offense with which he has been charged and tried, or for the value of property the title to which is vested in the state and not in himself.

Claimant, Pro se.

W. Bryan Spillers, Assistant Attorney Generay, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Robert P. Roten was hunting in Pocahontas county, West Virginia, in the open deer season of 1949. Upon complaint and information of one R. H. Holderby, a conservation official, Harper M. Smith, a justice of the peace of said Pocahontas county, issued his warrant, directed to said Holderby, charging the said Roten with having committed a misdemeanor, in that on the 28th day of November, 1949, in said county of Pocahontas, he did unlawfully kill a spiked buck without antlers one or more being branched, in violation of article 4, section 3, chapter 20 of the code of West Virginia as amended. The statute in question reads as follows:

> "No person shall hunt, capture or kill any deer in this State except in open season, or as provided under section three-b of this article. A licensed person may hunt, capture or kill a buck deer with one or both antlers branched, or an antlerless deer, but only during the open season fixed by the conservation commission for the counties or parts thereof; . . ."

The defendant was arrested and taken before the justice who issued said warrant on said 28th day of November. When arraigned he pleaded not guilty and demanded a trial by jury, advancing costs in the sum of $6.00 as provided by statute. After hearing the evidence adduced by the state and that offered by defendant the jury disagreed and was dismissed. A retrial was ordered and defendant again demanded a jury and advanced cost of $6.00 therefor. Upon said second trial the jury returned a verdict of not guilty.

Said defendant believing that he had committed no offense against the law, and having been duly acquitted of the offense with which he was charged, demanded possession of the deer, but the conservation officers, acting under authority of law, retained said deer in their possession to be disposed of in the manner directed by law. Claimant thereafter asserted a claim against the conservation commission in this court for the purpose of obtaining an award reimbursing him for costs incurred and paid by him and also for what he conceived to be the reasonable value of the deer which he had killed and to the possession of which he honestly, although mistakenly, believed himself to be justly entitled.

Upon investigation and hearing of the claim the head of the slain deer was brought before and inspected by the members of the court of claims. From such inspection it was made manifest that the deer was one which could not be lawfully killed at any time and was within the prohibitive class described in the statute above quoted.

The claimant testified in support of his claim and it was made clear from his testimony that he honestly believed that he had committed no wrong and that he was entitled to his kill. The writer of this statement was impressed with his straightforward statements and demeanor, and can readily make allowance for his misapprehension of the law.

In the case of *Morgan* v. *Conservation Commission,* 3 Ct. Claims (W. Va.) 266, we held that the state has a general right

to protect wild animals in the interest of the public. The title to such animals is vested in the state. The deer killed by claimant was shown by the testimony to be a spiked buck seventeen months of age. The claimant had no right, even though he had a license to hunt and was hunting in the open season, to kill the deer. It was under the protection of the conservation commission. Claimant was simply misguided in his opinion that he had a right to kill the deer and his right to possession thereof. As a matter of fact he stated that he had no purpose or intention of violating the law and that when he did kill the deer he believed he had a right to do so since he had a license to hunt and it was in the open deer season. There is no merit, however, in the claim which he has asserted in this case, and an award must necessarily be denied and his claim dismissed.

(No. 702—Claim dismissed)

BILLIE G. GARTEN, Caimant,

v.

STATE ADJUTANT GENERAL, Respondent,

Opinion filed October 13, 1950

The jurisdiction of the court shall not extend to any claim for loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state. Chapter 14, article 2, section 14, code of West Virginia.

Appearances:

Claimant, pro se.

W. Bryan Spillers, Assistant Attorney General, for the state.

JAMES CANN, JUDGE.

On the 20th day of May, 1950, prior to participating in the armed services day parade, conducted by the West Virginia national guard, in the city of Buckhannon, county of Upsher, state of West Virginia, claimant parked his private automobile on Kanawha street in said city of Buckhannon. At the conclusion of the parade a large military tank, operated by one Sgt. Cockrell, attempting to enter said Kanawha street from an intersecting side street, for the purpose of proceeding to the national guard armory, struck claimant's parked automobile causing considerable damage thereto.

It appeared from the evidence that claimant was legally parked; that the tank commander, who was standing at the intersection of Kanawha street and the side street from which the tank was proceeding, and who had charge of directing the course of said tank, had signalled the tank operator to swing the tank to the left as he entered Kanawha street; the

tank operator, who either failed to observe the signal or completely ignored the same, swung the tank to the right as he entered the above street and struck the rear of claimant's parked automobile causing the damages complained of.

At the conclusion of the hearing of this case, W. Bryan Spillers, an assistant attorney general representing respondent, called the court's attention to the fact that since it had developed from the testimony that claimant, himself, was a member of the national guard of the state of West Virginia, and that on the day the accident complained of occurred he was in the service of the state of West Virginia as a member of said national guard, this court was without jurisdiction to entertain this matter by reason of chapter 14, article 2, section 14 of the code of West Virginia, known as the court of claims act, wherein a pertinent part reads as follows:

"Sec. 14. Claims Excluded.—The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state."

A discussion occurred in open court between the members of the court and the assistant attorney general with respect to the question raised by the latter. Some of the members of the court were of the opinion that the above mentioned act did not cover a situation such as was presented in this case; that it was not the intent of the Legislature to bar recovery for damages done to the property of an individual caused by the agents of a state agency, merely because that individual at the time happened to be a member of the national guard in the service of the state, *particularly since the property of said individual was not used in, or had any part in, the service of the state;* that since the language of the act, above mentioned, was permissible of several constructions, one working a manifest injustice and the other equity and fairness, the latter should be adopted, upon the presumption that the Legisla-

ture did not intend the results flowing from the former; that to construe the statute to cover this particular situation would result in an absurdity, relying upon the able and well reasoned opinion of Judge Riley in the case of *Newhart* v. *Pennybacker,* 120 W. Va. 774.

The Court took time to maturely consider the question raised concerning jurisdiction, and after due and deliberate consideration concluded, and very reluctantly so, that the act above cited was far-reaching in its scope and intent; that the Legislature was the sole judge as to who could present a claim in our court and under what circumstances, and that therefore this court was without jurisdiction to entertain the instant claim.

However, the court desires to express itself in stating that had not the question of jurisdiction arisen, an award would have been made in favor of claimant for the damages claimed, for the reason that the evidence as a whole disclosed that the respondent or his agents were solely at fault.

The court being of the opinion that by virtue of the act cited in this opinion it is without jurisdiction to entertain this claim, therefore the same is ordered dismissed and stricken from the docket.

(No. 687—Claimant awarded $3,509.43)

B. E. FISHER, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed October 26, 1950

Pursuant to the purpose and spirit of the Act of the Legislature creating the state court of claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state has received distinct value and benefit.

Ritchie, Hill, Neff & Morris, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this proceeding claimant B. E. Fisher seeks to obtain an award against the board of control of West Virginia for the balance of money which he maintains is due to him under the terms and provisions of a certain written contract made and entered into by and between himself and said board, bearing date on the 30th day of October, in the year 1947, whereby he agreed to move six buildings then located at the TNT plant at Point Pleasant, West Virginia, to Lakin, West Virginia, and for the further sum of money claimed to be due and unpaid to him for furnishing additional material and doing extra work, not included in said written contract.

The facts developed upon the investigation and hearing of the claimant's case may be briefly stated as follows:

The Lakin state hospital, an institution for the care and treatment of mentally ill persons of the negro race, is located at Lakin, West Virginia. The hospital was in need of further

and additional housing facilities. The board of control was informed in August or September of 1947 that there were several buildings at the TNT plant, near Point Pleasant, on which the state of West Virginia had a prior claim, and that if the board would visit the plant and confer with the officials there, it would be possible to acquire such of the buildings as might be deemed necessary for practically nothing. Such visit was made and six houses purchased at a cost of $235.00. The board was then confronted with the problem of transporting the buildings so purchased to the Lakin institution, possibly three miles distant from the TNT plant. The Point Pleasant Products Company submitted a bid to remove the buildings to Lakin and erect them on such site as might be designated for the sum of $12,000.00. Claimant B. E. Fisher, residing in Charleston, West Virginia, had been engaged in removing and transporting houses for many years. The board of control, acting by and through its general engineer R. G. Hanlen, duly authorized for the purpose, visited said Fisher and requested him to submit a bid for transporting the houses from their then location at the TNT plant to the Lakin institution. In order that he might better familiarize himself with what he would be required to do he was asked to visit the government project in Mason county. This he did. The buildings purchased by the board of control were pointed out to him and he was told what was desired to be done in respect to the removal of said buildings from the TNT plant to the Lakin hospital. With such knowledge so acquired after personal investigation said Fisher seemingly with the aid of the board's general engineer, at Fisher's office in the city of Charleston, had a secretary to address a letter to the board of control setting forth the terms and conditions on which he would do the work, for the sum of $12,434.25. This proposition was $434.25 in excess of the bid submitted by the Point Pleasant Products Company. The Products Company by its bid for the work only agreed to bring the pipes and utilities to within three feet of the buildings. Fisher, however, by his bid proposed to bring said pipes and utilities into the buildings. For this reason the board of control accepted the bid submitted by Fisher. The board of control thereupon, by Joseph Z. Terrell, its then president, and Dell

White, its secretary, endorsed on said written proposition its acceptance and approval thereof. The bid in writing, so submitted by Fisher to do the work in question, by such acceptance and approval thereupon became and was a binding contract in writing. Although the board of control might have had the attorney general or any one of his several assistants, men learned in the law and trained for such purposes, or even Mr. Trotter, its most capable treasurer and an able lawyer, to prepare the contract, saw fit to accept and rely upon a paper written by laymen. To say the least the contract is a very poor instrument when so much money is involved, and has doubtless been the chief source and trouble for the confusion and misunderstanding that thereafter ensued between claimant and the board of control.

This contract contains this provision: "The State Board of Control agrees to furnish as many as twelve prison laborers to dig ditches, footers, etc., if needed." It further provided: "If this job be awarded me, work will start on or by November 5, 1947, and be completed on or by November 30, 1947. Unless the required materials can not be purchased immediately." Work was begun within a reasonable time and the buildings transported from the TNT plant to Lakin hospital promptly and there placed upon locations designated by persons representing the board of control.

Due to conditions incident to world war II Fisher experienced much difficulty in obtaining necessary materials for use in the work and on this account progress was often slow. However, at all times when weather conditions were favorable and materials available laborers provided by Fisher were at work on the job. Fisher, himself, by reason of the state of his health, found it necessary to sojourn in Florida for a time. During his absence his representatives were proceeding with the work at the hospital premises. It is, we think, very satisfactorily shown that the board of control did not at any time furnish twelve prison laborers to do the work specified to be done by them in the contract. At no time were more than eight of these prisoners engaged in the work which they were sup-

posed to do, and finally they discontinued work entirely, thus necessitating Fisher himself to provide labor to perform the work which should have been done by prison laborers. Mr. Hanlen, the general engineer for the board, had many important duties to perform and was only at the Lakin hospital periodically, but during such visits he could or should have seen the progress of the work being done by Fisher. Officials at the Lakin hospital were ambitious and desirous of having things done and performed, making no allowance for the inability of claimant to obtain materials impossible to get by reason of war conditions. Ultimately its financial secretary addressed a communication to the board of control making complaint of what was alleged the slow progress of the work and asking that the contract be terminated. During the progress of the work the board of control paid to Fisher the sum of $10,000 under the terms of the written contract.

Under date of April 11, 1949, Joseph Z. Terrell, president of the board of control, addressed a communication to Fisher advising him that the written contract was being cancelled for reasons in said letter contained. No other or further payment was made by the board to Fisher under the terms of said written contract. The work provided by said written contract to be done by Fisher was performed by him, notwithstanding such delays as occurred from time to time in its necessary performance. In addition to such work as was done by Fisher under the contract in writing he did, at the special instance and request of officers and agents of the board of control, furnish the following material and did the following work:

15 Window Frames at $7.50 each	$112.50
15 Windows	119.38
Extra wiring on cafeteria	93.30
Filling 500 cubic yards of dirt inside of building	500.00
Digging ditches, footers, etc. (which was intended to be done by prison labor)	250.00

It is apparent to the members of the court that the state has received the benefit of all of this additional work not required to be done under the written contract. The officers of the

Lakin hospital knew that this work was being done by Fisher. They knew also that it would not have been done by him if he had not been required to by persons representing the board of control who authorized it. The state cannot receive this benefit and deny its responsibility to pay for it. The probative value of the evidence contained in an enormous transcript, embracing approximately four hundred pages, discloses this fact. The great weight of the evidence supports the claim made by Fisher for the balance due to him under the terms of the written contract and the great weight of the evidence properly analyzed supports his contention that he did the extra work in controversy and for which he has not been paid.

In claim No. 534, *LeRoy Roberts* v. *State Board of Control*, 4 Ct. Claims (W. Va.) 235, we approved a claim for work done at Concord College for which payment had been denied by the board of control because of what was contended to be the absence of a contract duly authorizing such work. This claim was ratified by the Legislature and promptly and unhesitatingly paid by the auditor. In that case we held as follows:

> "Pursuant to the purpose and spirit of the act of the Legislature creating the state court of claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state has received distinct value and benefit."

The confusion and misunderstanding which has caused so much trouble in this case is largely due to the fact that there have been too many bosses, and in the last analysis the fact remains that the state of West Virginia has received the benefit of the claimant's work and should in equity and good conscience pay for it.

The president of the board of control could not arbitrarily terminate the board's contract with Fisher, and the letter which he addressed to Fisher attempting to do so was wholly abortive.

In view of the persuasive influence of the convincing record made upon the investigation of the claim in question, all three members of the court are of opinion and now find that claimant discharged the terms of his contract in writing with the board of control and now make an award in his favor for the sum of two thousand four hundred thirty-four dollars and twenty-five cents ($2,434.25) and a majority of the court do make a further award in favor of claimant for the sum of one thousand seventy-five dollars and eighteen cents ($1,075.18) for extra work and material furnished and performed at the Lakin state hospital as hereinbefore set out.

A. D. KENAMOND, JUDGE, concurring in part dissenting in part.

An award in the amount of $3,509.43 has been made by a majority of this court, said amount being for $2,434.25, the unpaid remainder of the amount fixed in claimant's contract, plus $1,075.18, for additional material furnished and extra work done by the claimant. I can concur only in awarding the unpaid remainder of the contract price, plus $93.30 for extra wiring, $112,50 for window frames, and $119.38 for windows, or $325.18 of claimant's bill for for additional material and extra work.

There are two items in claimant's bill for additional material and extra work—$250.00 for digging ditches, footers, etc., and $500.00 for filling 500 cubic yards of dirt inside of buildings—which I hold are unjust claims for which the Legislature should not appropriate.

The testimony in the case shows that the claimant and one of his witnesses held that the prison labor promised in the contract did not dig all the ditches, while two witnesses for the respondent held that all the digging had been done by the prison labor. The determining factor against the ditch digging claim is the statement by the claimant's plumber (r. p. 71) that what ditches had been dug by the prison labor, and the way they were dug, were not very good; that water had run

into them. So, it is reasonable to assume that the undeniable and extended delay by the claimant was responsible for whatever ditching, if any, was done by the claimant.

The majority members of this court have opined that the agreement of respondent to furnish prison labor "to dig ditches, footers, etc., if needed" obligated the respondent to furnish such labor in connection with filling 500 cubic yards of dirt needed as a base for concrete floor in one of the buildings. There is nothing in the record to show that claimant ever requested such labor in connection with the filling, and the record (p. 85) further shows that Thad Boggess, the claimant's foreman, understood that the prison labor was supposed "to do such as digging sewer ditches, water, and footings around the buildings." If there was any parol agreement under which the claimant was not expected to dig and haul the 500 cubic yards aforementioned, the evidence in the case fails to establish it.

For the reasons set forth, I dissent from that portion of the majority opinion allowing $750.00 for the two items—digging ditches and filling dirt—in claimant's bill for additional material and extra work.

(No. 706—Claim denied)

LORAINE McKINNEY, *an infant,* by D. L. McKINNEY, *father and next friend,* Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 26, 1950

1. To sustain a claim for damages caused by alleged negligence of a state road crew, the evidence must be clear and convincing and that the negligence of the said crew was the proximate cause of the injury to claimant. *Albright* v. *State Road Commission,* 4 Ct. Claims (W. Va.) 150.

2. Where the evidence clearly shows that the negligence acts of a third person were the proximate cause of the accident for which claimant seeks damages, an award will be denied.

Appearances:

Love & Abbott, for claimant.

W. Bryan Spillers, Assistant Attorney General, and *Harry R. Bell,* state claims agent, for respondent.

JAMES CANN, JUDGE.

On the 29th day of March, 1950, and for some time prior thereto, a state road commission crew was engaged in the construction of a new road leading from Beckwith to the 4-H camp in Fayette county. During the course of said work it became necessary to do some blasting by the use of dynamite, and it was the custom of the foreman of said crew, when dynamite was needed, to transport as much of the same as was needed, together with the detonating caps, in a state road pick-up truck from the state road garage, in that district, to the site of the road construction, where, approximately two hundred yards from said site, the truck was parked on an old sawmill site which was situate back and away from an old road known as

the old Laurel Creek road. The dynamite was packed in a corrugated carton which was enclosed in a wooden box and it was always transported and left on the bed of the truck. The detonating caps were stored separately in a steel box, under lock, which was attached to the cab of said truck. On or about the day before the accident, which injured claimant, the foreman had transported to the site of the road construction in the pick-up, a carton of dynamite and some caps and had parked at the usual place. One end of the carton was broken open and a sufficient amount of dynamite was taken by the foreman, or a member of his crew, and some caps from the steel box, to the construction site there to be used. The carton containing the rest of the dynamite was left on the bed of the pick-up. On this particular day, about one thirty o'clock in the afternoon, Donald McKinney, brother of the claimant, was riding on his bicycle along the old Laurel Creek road proceeding towards the site where the road commission crew was working. He had been there several times attempting to obtain employment at this particular project. When he reached the spot where he could see the pick-up, he alighted from his bicycle, proceeded to the truck, and, after ascertaining that none of the road crew could see him (although he stated that he could see their legs from where he was) deliberately and designedly took ten or twelve sticks of dynamite from the carton on the truck and then opened, or broke open, the steel box on said truck and from it took a quantity of detonating caps. He then proceeded to his home, which was approximately one to three miles away, and there hid the dynamite and caps in a drawer in his room. On the following day he, in company with the claimant his brother, and a still younger brother, took the dynamite and caps to a site about one hundred feet from his home where Donald and claimant blew out, or attempted to blow out, three tree stumps. In this operation Donald and claimant used about nine sticks of dynamite and a number of caps. At the beginning of this operation claimant, at the request of his brother, obtained some wire from their home. Donald then proceeded to attach the caps to the dynamite, and to the caps he connected two wires, about fifty feet in length, one of which he then connected to a dry

cell flashlight battery, which he held between the ring and little fingers of his right hand, and the other wire he held between the thumb and forefinger of said hand. Then, when all was in readiness Donald would take the wire that he held between the thumb and forefinger and make contact with the battery he held between the other fingers, with the result that the dynamite exployed. After completing the stump episode, Donald and claimant decided to see what dynamite would do in water, so Donald cut a stick of the dynamite with a knife, handed the claimant a piece about one and a half inches in length, made the necessary attachments with wire and battery as above mentioned, then proceeded to a knoll some distance away, leaving claimant holding the piece of dynamite near a creek nearby. Upon a prearranged signal claimant was to throw the dynamite in the creek and Donald would explode it. When Donald reached the knoll he became concerned about the younger brother and as he turned to observe his whereabouts accidently made contact with the wire and battery he held in his hand, causing the dynamite held by claimant to explode, which resulted in the loss of the left forearm and left eye of claimant. The testimony disclosed that Donald was nearly seventeen years of age and that claimant was fourteen years of age at the time this accident occurred.

At the conclusion of the hearing of this case, counsel for claimant requested permission to file a brief in support of his contention in this matter, which privilege was granted and an able brief was filed. In order to best ascertain how the final determination of the case was reached by the court, it is deemed best to discuss the several points raised by counsel in his brief and the testimony offered.

In support of proposition No. 1, counsel for claimant in his brief cites a number of West Virginia and Virginia cases in support of his contention that the state road commission of West Virginia was negligent in the manner in which its employees handled dynamite which was used on the road building project on the new Fayette county 4-H camp road. The cases cited deal with the proposition that one who handles

explosives, they being dangerous instrumentalities, should use ordinary care and prudence (some cases say utmost and highest degree of care) in handling the same so that injury will not be caused to *children or immature children who are accustomed to play at or near these dangerous instrumentalities, or especially when it is known that said children may be expected to meddle with it; the degree of care to be used must be commensurate with the danger.*

The evidence in this case disclosed that the truck which contained the dynamite to be used on the road project in question was parked on an old sawmill site; that though said truck could be seen by children and adults who at times traversed said road, yet not one scintilla of evidence was offered to indicate that said children were wont to, or expected to, play at or near the truck or dynamite, or that any of the said children were in the habit of, or ever engaged in, pilfering, handling, playing or meddling with said dynamite, or that said dynamite was accessible to said children; or that any of said children know or ever had any knowledge that the carton on said truck contained dangerous explosives. Even Donald McKinney testified, when asked if he had seen any dynamite around there the day before he took the dynamite, "No, I hadn't paid any attention to it." (r. p. 18). Therefore, it can be readily seen that the facts in this case differ very materially from those stated in the cases cited by counsel. If we are to follow the rule, stated by our Supreme Court and the courts of other states, that the degree of care to be used in the handling of explosives must be commensurate with the danger, then it follows from the facts presented to us that the agents of the respondent used all of the care necessary and therefore we must conclude that the respondent, or its agents and employes, was not negligent in the manner in which the dynamite used on the road building project in question was handled.

As to proposition No. 2, advanced by counsel in his brief, we must consider the question of proximate cause, and whether or not the intervention and negligence of Donald McKinney was the sole and proximate cause of the injury suffered by

claimant. Our Supreme Court has defined proximate cause as follows:

> "Proximate cause is a cause which in natural sequence *undisturbed by any independent cause* produces the result complained of."

For the sake of argument, let us assume the respondent was negligent in its handling of the explosives in question—what occurred? Donald McKinney, an infant about seventeen years of age, who possessed the discretion of an adult for the reasons hereinafter set out, without any apparent invitation deliberately and wrongfully took the dynamite from the state road truck. He knew that the best time to secure it would be when the road crew was engaged in its work and therefore less likely to detect his wrongful act. He knew when he took the dynamite that the said dynamite would be useless without the necessary detonating caps, (r. p. 29) and therefore went deliberately to the steel box where he found and took the necessary caps. He then proceeded to his home where he placed or hid the dynamite and caps in a drawer in his room —which, to us, clearly completed one episode. The next day Donald and his brother, the claimant, took the dynamite and caps to their back yard and there proceeded to blow out, or attempt to blow out, some tree stumps. The preparation made by Donald in the use of the wires and batteries to explode the dynamite amazed this court, especially the ingenuity and knowledge exhibited by him after testifying that he had never used dynamite and that his only knowledge of its use, and the method of exploding the same, was in watching his uncle on one occasion use and explode dynamite. Although one may say that the preparation and use of the required agents to explode the dynamite by Donald on the day in question were somewhat crude, still they were effective. In fact, when asked "Did you have any trouble in making those three blasts" he answered "I think it got tangled one time and didn't go off; you see, we didn't have tape in the middle. We had two pieces of wire." (r. p. 32). Where did Donald acquire this knowledge? As to the claimant, if , as he says, he had no knowledge of how explosive or powerful dynamite was, he certainly did or could

have acquired that knowledge after the use of dynamite on the first stump. He states that he realized (then) that an explosive that powerful would be dangerous to handle if you did not know very much about it. (r. p. 47). Yet, in spite of this knowledge he assisted his brother in exploding the dynamite and assisted his brother, after talking the matter over, to prepare for explosion the piece of dynamite which later was accidentally exploded by his brother Donald and resulted in the damages complained of. What occurred the day following the taking of the dynamite was a wholly different episode, an entirely separate and intervening act that had nothing to do with the original taking. Considering the facts to this point can we—or anyone—say that the actions of Donald were those of a youth considered as being retarded insofar as his mental capacities are concerned? That he is forgetful and not mentally equipped to exercise as good judgment as the normal boy of his age? We say not. Counsel for claimant would have us consider his experience, but can anyone say from the method by which Donald prepared and exploded the dynamite that he did not possess some experience? We think he had far more than the average boy his age; in fact far more than the average adult who had had the limited knowledge of dynamite and the method of exploding it that he says he had. As to the claimant and the part he played in the act or acts which led to his injuries, we can only say that he contributed considerably to his own injuries. Our Supreme Court has held that:

> "An infant fourteen years or over is presumed to possess sufficient mental capacity to comprehend and avoid danger and if he relies on his want of such capacity the burden of proving it is upon him." *Ewing* v. *Lanark Fuel Co.* 65 W. Va. 726; *Simmons* v. *Chesapeake & Ohio R. R. Co.*. 97 W. Va. 104.

This burden has not been met by claimant; in fact the court thought—from his appearance and demeanor—that he was quite an intelligent young man.

We repeat that the act of the respondent in leaving the dynamite and caps in question on the truck, under the circum-

stances of the case, was not negligence; that the intervention and negligence of Donald McKinney, having appreciably followed the act of the respondent in point of time, were the independent, efficient or proximate causes of the damage to claimant; they were happenings distinctly intervening between the act of respondent and the accident, without which the accident would not have happened. Under these circumstances could there possibly be a moral obligation on the part of the state to make an award of the public revenues? We think not. Therefore, an award is hereby denied and the claim dismissed.

IN VIEW OF THE CONCLUSIONS REACHED UPON THE FIRST TWO POINTS RAISED BY COUNSEL FOR CLAIMANT IN HIS BRIEF, IT IS UNNECESSARY TO ANSWER OR CONSIDER THE THIRD POINT.

(No. 688—Claim denied)

HARRY W. BEARD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 26, 1950

Where the conditions of a contract have been fulfilled, a subsequent claim in the nature of a liability exempted in the contract will be denied.

Appearances:

Hendricks & Bouldin, for claimant,

W. Bryan Spillers, Assistant Attorney General, and *Harry R. Bell*, state claims agent, for respondent.

A. D. KENAMOND, JUDGE.

Claimant's petition, seeking an award of $2,000.00, filed April 6, 1950, recites that during the early months of 1949, at re-

quest of the defendant, petitioner gave the defendant a right-of-way over a piece of property belonging to the petitioner and situate in Ashford, or Ashford Springs, Boone county, and that in return defendant agreed to make necessary ditches and take the necessary draining measures and precautions so that water accumulating on and near said right-of-way, and flowing off a certain hill adjacent thereto, would not cause damage to the remainder of petitioner's property. Defendant, not regarding his duties and although often promising to do so, has failed to comply, and still fails to comply, with his agreement, and by reason of such failure petitioner has suffered the following damages and injuries: Standing water has accumulated upon and about said right-of-way and has seeped into the petitioner's well causing the water therein to be ruined; petitioner's barnyard has been flooded and rendered practically worthless to him; water has seeped into the foundations and underneath petitioner's house and is causing the foundations to rot; water has flowed and seeped into and about petitioner's garage, and made it impossible for petitioner to use the garage for storing his automobile therein; accumulated and running water has pushed gravel and sediment onto petitioner's adjacent property and road thereon, blocking petitioner's entrance to his garage and making the same inaccessible for storing of his automobile, all of which injuries have caused petitioner great inconvenience and expense and will continue to cause same until the condition is remedied, and said damages have cause permanent depreciation in the value of petitioner's property, all to the damage of the petitioner in the amount of $2,000.00.

On October 10, 1950, six days prior to a hearing of the case, the members of the court went to Ashford, or Ashford Springs, in Boone county, and viewed the premises of claimant Harry W. Beard, and the state road in part adjacent thereto and in part cutting across a corner of his lots. During the day immediately preceding the viewing there had been fairly steady rainfall. The court noted the drainage provisions and each of the two points at which the state road commission had planned to place a pipe underneath the roadway, and the large culvert,

at the foot of the hill, installed at the request of the claimant, who objected to the two pipes as originally planned.

From a view of the claimant's premises several of the alleged damages were not apparent. However, a road fill at the abutment to a bridge over Lick Creek did appear to make ingress to claimant's garage or barn more difficult. Also, standing water was noted in a ditch about twenty feet above the claimant's well and just below the state road, and the outlet from the ditch had been blocked by the trunk of a large felled tree and, further along toward Lick Creek, by the road fill at the bridge abutment.

The hearing of this claim on October 16, 1950, threw a different light on the situation in controversy.

The claimant Harry W. Beard then testified that he first talked to Roy Sutphin, who was the first representative of the state road commission to whom he talked about a right-of-way through his lots in Ashford, or Ashford Springs, in June 1949. In this conversation reference was made to a blueprint showing a ford in the creek, whereupon the claimant said that he would give the right-of-way if the state road commission put a bridge across the creek so everybody could use it. Later another representative of the state road commission made some trips to discuss the right-of-way and on the last of such trips claimant said "The only hang-back was to take care of the water."

It thus appears that the claimant during these conversations overlooked the fact that he and Mary E. Beard, his wife, had on January 19, 1949 signed and acknowledged before W. W. Bucklow, a Notary Public for the county of Boone, an option giving the state of West Virginia, by the state road commission, the right to purchase from the said Harry W. and Mary E. Beard, within the term of six months from date thereof, the tract of land shown on the plans and profile of state road project No. 7248 (sometimes referred to as the Ashford-Brushton Road) Boone county. Under this option, acknowl-

edged by Harry W. and Mary E. Beard under the hand of a notary public on January 19, 1949, and for the good and sufficient consideration of one dollar ($1.00) and agreement of the state road commission to build a stringer bridge across Lick Creek, Harry W. and Mary E. Beard covenanted and agreed, upon being notified that the state road commission had elected to exercise its right under the option, that the state road commission should be permitted to take possession of said land, and further covenanted and agreed to execute and deliver deed of *general warranty* of title to the state of West Virginia conveying the said land and to execute a release, releasing the state of West Virginia from any and all claims for damages to the residue of the said land that may be occasioned by the construction and maintenance of a state road over and upon the tract of land therein described.

A deed, for the consideration mentioned in the option, dated January 19, 1949, giving the release from any and all claims for damages as set forth in said option, and conveying 13,680 square feet, more or less, being a portion of the land conveyed unto Harry W. Beard by deed of March 5, 1919, was prepared by the state road commission for the signature of Harry W. and Mary E. Beard.

The deed was not signed. Accordingly the state road commission sent by registered mail to Harry W. and Mary E. Beard a notice of acceptance, dated June 29, 1949, of the option granted January 19, 1949. Harry W. Beard signed a return receipt showing delivery of the registered notice of acceptance on July 1, 1949.

On July 19, 1949, the state road commission entered on the property involved in this case and began work on the road to be built on and adjacent to the said property. The road was finished sometime in March 1950, and the bridge across Lick Creek had been built.

Sometime after the road construction was begun Mr. Beard, the claimant, protested that under the plans of the state road

commission the drainage would be faulty. The state road engineer, at the claimant's request, then eliminated two 18 inch pipes to be placed under the road at points above lots 3 and 5 of his property, placed another pipe, about 200 feet farther up the road, well beyond his property, and built a 15 inch culvert leading from the drainage ditch between the road and hillside, under the old railroad at the foot of the hill, draining into Lick Creek.

The claimant still protested that drainage water has caused him to lose the use of his well on some three occasions for a day or two on each occasion. Harry W. Beard seems disinclined to make any extravagant statements as to what would be required to correct the situation of which he complains. It would be necessary only to open and continue the ditch above his well to an outlet into Lick Creek and to do some grading, allowing easier ingress into his garage or barn. Claimant thinks the state road commission should do this and the respondent holds that the road commission has no such obligation.

Under the terms of the option contract we are of the opinion that the respondent has no such obligation and is not liable for the claim made in this case. An award is therefore denied.

(No. 704—Claim denied)

EARL WHITED, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed November 15, 1950

Where a citizen of this state suffers damages caused by a person of unsound mind, and who had been duly committed to a state mental institution, and had escaped therefrom, the state agency involved will not be held liable for the damages, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmate.

Appearances:

Wm. S. Ryan, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

JAMES CANN, JUDGE.

Claimant filed his petition in this court alleging that one Arnold Weise, an insane patient regularly committed to the Spencer state hospital for the insane, at Spencer, West Virginia, on the 7th day of July, 1950, had escaped therefrom for the fifth time, through negligence of the employes of the institution. That while out of the institution and before being apprehended and returned thereto, he broke into a furnished dwelling belonging to claimant, located about halfway between Walton and Gandeeville, on U. S. route 119, in Walton district, Roane county, West Virginia, on the waters of Silketts Fork, and took therefrom a large amount of clothing and wearing apparel, several guns and a set of check lines (which were later recovered by the state police). That later, on the 21st day of July, 1950, said dwelling house of the claimant was set

afire, burned up and destroyed by the said Arnold Weise, and all of the furniture and contents therein were also destroyed, causing a total damage to claimant in the sum of $3,200.00.

The evidence disclosed that claimant's house was situated in a secluded and wooded district about half a mile from the Silketts Fork Road and was vacant, claimant having moved therefrom about June, 1948. That during a periodical visit to this house, sometime about the 16th day of July 1950, claimant discovered that a shotgun, rifle and check line had been stolen, the windows of the said house shot out, and evidence that someone had recently occupied said house by reason of the fact that a fire was still burning in the stove. The evidence further disclosed that a number of persons in that locality had seen or heard of a strange person thereabouts attempting to purchase gun shells and vegetables; that when Arnold Weise was apprehended, on the 23rd day of July, 1950, he was in another cabin or house situated about half a mile from claimant's property, and had in his possession the shotgun belonging to claimant; that the rifle and other personal property of the claimant, alleged to have been stolen from his house, were found in a barn belonging to one Starcher situated about a mile and a half from claimant's property. This barn bore evidence that someone had recently occupied the same. The evidence further disclosed that Arnold Weise had escaped only once before, on the 12th day of October, 1948; that he had gone to Kentucky, acquired a job with the United States Engineers, later quit, and returned to the state institution on the 22nd day of November, 1948; that during the time he was gone there was no evidence of any abnormal tendencies.

As we see it, claimant's position in this case rests upon two factors on which he hopes to gain an award. First, the fact that Weise, when apprehended, had in his possession the gun belonging to claimant, and had set fire to and destroyed claimant's house and its contents; second, that Weise's escape on the 7th day of July, 1950, was caused by and due to the negligence of the agents and employes of the state hospital, and that therefore respondent is liable for the damages suffered.

As to the first factor, no one saw Weise, at any time, at or near claimant's property. His possession of the shotgun belonging to claimant may be evidence that he had stolen it from claimant's house but certainly not sufficient evidence that he had set fire to claimant's home, thus destroying it and its contents. The evidence as to this fact is meager and circumtantial. Do the facts detailed by claimant and his witnesses, concerning the damages suffered by claimant, considered in the light of the circumstances warrant the conclusion that Arnold Weise set fire to claiman't house? We think not.

> "Where circumstantial evidence is relied upon to establish . . . crime . . . it is essential that all of the circumstances from which the conclusion of guilt is drawn and without which it cannot be drawn shall be established by full proof, and that each essential circumstance must be proved in the same manner and to the same extent as if the whole issue rested upon that particular essential circumstances." *State* v. *Harrison,* 127 S. E. 55.

> "Strong suspicion is not sufficient enough on which to base a verdict of guilty." *State* v. *Minnini,* 133 S. E. 320.

As to the second factor, from the evidence introduced there is very little offered to the court from which we can make a determination—concluding that the agents and employees of the respondent were negligent in their supervision of the patients at the state hospital and that such negligence contributed to or made possible the escape of the patient in question. The petition of the claimant alleges that Arnold Weise had escaped five times from the Spencer state hospital. This fact was not shown or proven. Weise escaped once before and on that occasion committed no harm. As to the second occasion, which occurred almost two years later, can we say that he escaped under such circumstances as would be conclusive that the agents and employees of the state hospital were at fault, or that they could reasonably expect him to escape, or that they in any manner contributed to his escape? We think not. It is not necessary to elaborate at any length concerning the cir-

cumstances surrounding the escape of Arnold Weise from the state hospital. Suffice it to say, as did Judge Schuck in a recent case before this court:

> "Only the matter of escape is revealed by the record and no evidence is presented to show that those in charge of the prison or state agency involved were in any manner responsible for or contributed to the escape of the prisoners in question." *Arrick* v. *Board of Control,* 3 Ct. Claims (W. Va.) 141.

Such may also be said to be true in this case.

Considering all of the facts and circumstances in this matter and for the reasons set out in this opinion, an award will be denied to claimant.

(No. 705—Claim denied)

BEATRICE SNYDER TAYLOR, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 15, 1950

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Lent* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 253.

Appearances:

Dodrill & Dodrill, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

JAMES CANN, JUDGE.

On the fourteenth day of December, 1949, claimant, accompanied by Dorothy Jones McGarry and one Mrs. Fondaw, were enroute in claimant's automobile from Fairmont to Grafton, traveling over U. S. route 250. When about two miles from the city of Fairmont, and still within the city limits, claimant, who had just rounded a slight curve, was proceeding down grade over a straight stretch of road and after traveling several hundred yards her automobile hit an icy spot in the road and began to skid which caused the automobile to go over an embrankment resulting in the injuries and damages complained of.

The evidence disclosed that this accident occurred about ten o'clock in the morning; that it was a clear, sunshiny day, but somewhat cool; that the road, which was of concrete, was

apparently in good condition; that claimant and her two companions were sitting in the front seat of claimant's automobile and were traveling approximately thirty miles per hour. Although claimant attempted to show that the icy spot in the road was caused by inadequate drainage, it developed from the evidence that the ditches alongside the road were dry and that the icy spot was caused by water seeping up through the highway and freezing.

In spite of what the respondent, or its agents, could or should have done with respect to the seepage of water on this road, from the evidence introduced a situation presents itself concerning what claimant did or could have done to prevent this accident prior to driving her automobile over the icy spot in question. Both claimant and Mrs. McGarry say they were traveling over a straight stretch of road; that they had a clear and unobstructed view of the road ahead; that they had traveled several hundred yards—Mrs. McGarry says several hundred feet—before coming onto the icy spot, yet neither they or their third companion saw or noticed the icy spot on the road until they were on it. Both say that they were very well acquainted with this particular stretch of road, having traveled over it a number of times. They further state that neither of them ever recalled having seen ice or water at the particular spot where the icy spot was or ever hearing, or knowing, of anyone having any accidents there.

It is a well settled proposition of law in this state that a traveller on the public highways must exercise ordinary care and caution; he or she cannot shut their eyes against apparent dangers. Claimant had ample oportunity to observe the condition of the road and if she had used the ordinary care and caution required of her, she surely could, or should, have seen the icy spot. Claimant when asked if she had not observed the ice replied, "I wasn't looking for any ice at all because it was such a lovely day." (r. p. 34). And on another accasion she was asked, "Of course finding ice in the road was an indication that it was freezing?" and she replied, "Yes, it was." Then she was asked, "Do you realize, Mrs. Taylor, that in the winter-

time you are likely to find frozen places on highways in this state?" and she replied, "I suppose I should have realized it, but we had such lovely weather. There was no sign of any freezes at all. I guess I wasn't looking for it that morning." (r. p. 20). From the above we can see that claimant was not using the ordinary care and caution required of her. Our Supreme Court has held:

> "If a traveller negligently fails to exercise ordinary care and caution for his own safety against defects in a public highway, which he knows or can readily see are dangerous, and has the opportunity to avoid them, he is not entitled to damages, but must bear the burden of his own indiscretion." *Williams* v. *Main Island Creek Coal Co.*, 98 S. E. 511.
>
> "Defects may be either patent or latent. Where the defect is open and easily discovered the traveller cannot, acting upon the presumption which exists in his favor, run blindly into it." *Boyland* v. *City of* Parkersburg, 90 S. E. 347.

Even assuming that respondent, or its agents, may have been negligent or remiss in their duty with respect to their taking care of the road situation in this matter, we conclude that claimant contributed proximately to her own injuries and damages sufficient to bar recovery, notwithstanding that respondent may have not been entirely free from blame. We believe the evidence in this case does not establish a claim which the state should discharge. Therefore, an award is denied and the claim dismissed.

(No. 703—Claimant awarded $880.45)

LUTHER GOLDSBORO, claimant,

v.

WEST VIRGINIA BOARD OF CONTROL, respondent.

Opinion filed November 15, 1950

An award will be made in favor of a claimant whose automobile was stolen and damaged by escapees from the West Virginia industrial school for boys at Pruntytown, when culpability on the part of the state agency involved, its officers, agents or servants is fully shown and such culpability contributed to and made possible the escape of such inmates.

Appearances:

Steptoe & Johnson (*Kingsley R. Smith*), for claimant,

W. Bryan Spillers, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

On August 29, 1946, the claimant Luther Goldsboro lived on U. S. route No. 50, about three miles east of Bridgeport, in Taylor county. Some time that night three escapees from the industrial school for boys at Pruntytown (Randolph Brewster, Jack Sproles and Jack Palmer) stole a 1937 Oldsmobile four-door sedan owned by claimant, breaking the padlock on the garage in which the car was stored, and driving the car to Clarksburg, West Virginia, where it was demolished about six thirty a. m. on August 30, 1946, in a head-on collison with a bus owned by City Lines of West Virginia, Inc., in front of Victory High School.

Claimant alleges that the West Virginia board of control was negligent in permitting Randolph Brewster, Jack Sproles and Jack Palmer to escape from said industrial school; that some or all of the escapees had previously escaped therefrom and had previous to August 29, 1946 committed crimes during

those other escapes; that, despite all of those escapes and crimes, respondent took no additional precautions for preventing them from escaping again; and that as a direct and proximate result of the aforesaid careless, negligent and improper conduct of the respondent, the claimant suffered damages, as itemized in the petition, amounting to $880.45.

At a hearing of the case on October 24, 1950, L. Steele Trotter, of the West Virginia board of control, appeared with the official records of the industrial school, at Pruntytown, with regard to Randolph Brewster, Jack Sproles and Jack Palmer.

The record of Randolph Brewster showed that at his first commitment on July 5, 1944, at the age of twelve years, he had been charged with theft of $138.00; that on a recommitment of August 2, 1944, he had been guilty of breaking and entering and auto theft; that he was returned on November 4, 1945, on violation of his parole of September 1, 1945, for stealing a car; and that on his sixth return "Randolph stated he broke and entered three stores in Logan, West Virginia, and stole an auto."

Between the time of commitment to Pruntytown on October 12, 1945, at the age of thirteen, for breaking, entering and theft, and the time of his escape resulting in theft of the Luther Goldsboro automobile, Jack Sproles had escaped only once, and that during the immediately preceding month, on July 10, 1946.

The third escapee in this case, Jack Palmer, was committed to Pruntytown on May 5, 1942, for breaking and entering and auto theft. His first escape on July 1, 1942, was of short duration, as he was caught two miles from the institution and returned. His second escape, on November 3, 1942, was in company with three other boys, all four going out the window and down the fire escape and proceeding to burn down a haystack and break into a house and take some food. He was returned from a third escape on December 11, 1942. His participation

in the theft of the Luther Goldsboro automobile was recited under "Statement of escape upon fifth return."

In the case of *Coy* v. *State Board of Control,* 3 Ct. Claims (W. Va.) 49, the West Virginia industrial school for boys at Pruntytown was held to be a penal institution within the meaning of section 14 of the act creating the court of claims. In this opinion the court was supported by a brief filed by counsel for the state maintaining "that said school is, in truth and fact, a penal institution."

In the case under consideration the relation of the state agency involved to the escapees can thus not be regarded as that of a father to a minor son who does some tortious act as an independent design of his own. Instead, we must consider the position of the state agency to be like that of a sheriff under duty bound to keep in custody those lawfully committed to him, said sheriff being liable when he voluntarily permits the escape of those committed. (19 American Jurisprudence 373.)

That the claimant suffered damages amounting to $880.45, as itemized in the petition, and at the hands of the escapees, was conceded by the respondent. The question of culpability on the part of the West Virginia board of control is to be determined by the court.

That the escapees had a bad record of escapes and thefts was fully shown, and altogether they had participated on four occasions in the theft of an automobile before they escaped from the lawns of the Pruntytown institution and stole and wrecked the Goldsboro automobile. That it was foreseeable and to be anticipated that some such damage would result from the escape of Randolph Brewster, Jack Sproles and Jack Palmer cannot be denied. We are of the opinion that those in charge of the institution at Pruntytown did heedlessly and consciously make the escape of these boys on August 29, 1946, easily possible, with results to be anticipated, in that these boys were given the liberty of the fields and lawns and in a group

of fifteen to twenty-five boys all under the surveillance of only one guard or some older boy powerless to prevent escape. The circumstances surrounding their commitment and confinement were such as to make the escapees in question objects of special restraint. Lack of discipline and control, in our opinion, brought about the commission of the tort, namely the theft and wrecking of Luther Goldsboro's automobile by the three escapees.

Respondent in the case granted that escape was made easily possible for the three boys. Lack of discipline and control calculated to prevent commission of the tort was explained, if not justified, as a matter of policy in line with modern trends in institutional attempts to reform and rehabilitate wayward, incorrigible or vicious youths. Respondent stated that the policy had proved advantageous in efforts to make normal citizens of a high percentage of the boys at Pruntytown, that "we figure if we can save twenty boys by letting two escape under such a system, that is well worthwhile, regardless of what the boys do when they escape." (r. p. 22.)

Saving the "twenty boys" is undoubtedly a noble purpose and "well worthwhile," but what can be said of the resulting loss and injury of property of a private citizen incurred by a few escapees with a record for theft? Is a private citizen to have imposed upon him the obligation to make such a substantial private contribution as that involved in this case to the reformation of the "twenty boys" who profit from the modern policy? We believe the intent and purpose of the act creating the court of claims is to give answer in the negative. The great and sovereign state of West Virginia has been not only magnanimous in providing for the rehabilitation of delinquent youth (nearly a quarter of a million dollars per year at Pruntytown), but has also shown grace in repeatedly recognizing a moral obligation.

In the recent case of *Price* v. *Sims,* 58 SE 2d 659, the Supreme Court of Appeals said:

> "Moral obligation of state, declared by legislature to exist in favor of claimant for negligent injury to his property, will be sustained, and a legislative appropriation of public funds for its payment will be upheld, when conduct of agents or employees of state which proximately cause injury is such as would be judicially held to constitute negligence in an action for damages between private persons."

Some of the best legalistic minds have differed as to the liability of the state for a claim such as is involved in this case without a statute specifically making it so. However, we have noted the opinion of the Supreme Court of Appeals in the related case of *State ex rel. Davis Trust Company* v. *Sims, Auditor,* 130 W. Va. 638:

> "The doctrine which gives rise to a moral obligation of the state, in any particular instance, is not rendered inoperative by, and is not incompatible with, the principle which recognizes the immunity of the State from suit, or the principle which denies the existence of a cause of action against it for the negligence of its officers, agents or employees. It rests upon consideration of an entirely different and independent character. If the State were subject to suit or action, or a cause of action existed against it for the negligence of its officers, agents or employees, while engaged in the discharge of a governmental function or in other activity or conduct; or if there were a legal liability upon the State, or any legally recognized remedy for such against it, there would be no occasion for one aggrieved or injured to seek from the State, upon the basis of a moral obligation, the relief which he is denied by positive law but to which he would be entitled if, in the identical situation, an obligation or duty would be judicially recognized in cases between private persons."

In consideration of all the facts, and under the circumstances in this case, we favor an award and accordingly recommend that the claimant, Luther Goldsboro, be compensated in the amount of eight hundred eighty dollars and forty-five cents ($880.45).

ROBERT L. BLAND, JUDGE, dissenting.

Since I am not in accord with the determination made by majority members of the court of the claim involved in this case and cannot concur in the majority opinion awarding the claimant the sum of $880.45, I most respectfully record this dissent from said award for the reasons hereinafter set forth.

The claim is asserted and prosecuted against the state board of control, which state agency exercises jurisdiction over the West Virginia school for boys at Pruntytown, to obtain an appropriation from the Legislature for the alleged theft of and damages done to a certain automobile in the possession of and owned by the claimant, by three escapees from said West Virginia school for boys. The proceeding is distinctly one predicated upon alleged negligence of the officials of the state charged with the duty of managing and operating said School for Boys. Negligence is the gist of the proceeding.

The Court of Claims, prior to the time it became presently constituted, in the case of *George Coy, Jr., by George Coy, Sr., his next friend,* v. *State Board of Control,* 3 Ct. Claims (W. Va.), held in point two of the *syllabi,* as follows:

> "II. The West Virginia industrial school for boys at Pruntytown is held to be a penal institution within the meaning of section 14 of the act creating the court of claims."

Since the majority opinion neither disapproves nor overrules such holding it is manifest that the claimant seeks to charge the sovereign state of West Virginia with negligence arising out of the conduct and management of said West Virginia school for boys, and a majority of the court have placed the stamp of approval upon said claim.

I think it is a sound and well recognized rule of law that the state in the conduct of its penal institutions is engaged in a governmental function, and in the exercise thereof it is

not responsible for the negligent acts of its servants, agents or inmates in the absence of a statute making it so liable.

Since the state is inherently sovereign at all times and in every capacity the state, by taking over an enterprise, usually of the nature of a private business, is not hampered by the private character thereof, and so there is no basis for charging the state thus engaged with liability for torts of its officers and agents. 59 Corpus Juris 195.

I think it may reasonably be said that the prevailing rule is that "The state in the conduct of its penal institutions is engaged in a governmental function, and in the exercise thereof is not responsible for the negligent acts of its servants, agents or inmates in the absence of a statute making it so liable."

The claim asserted against respondent in the instant case is not of the type or character for which the court of claims may properly make an award or for which the Legislature may make a valid appropriation of the public funds. The following excerpt taken from the opinion of the court in the case of *Murdock Parlor Grate Co.* v. *Commonwealth of Massachusetts,* reported in 8 L.R.A. (2nd), 399, is pertinent in the consideration of the instant case:

> "The object of the statute cannot have been to create a new class of claims for which a Sovereignty has never been held responsible, and to impose a liability therefor, but to provide a convenient tribunal for the determination of claims of the character which civilized governments have always recognized, although the satisfaction of them has been usually sought by direct appeal to the sovereign, or in our system of government, through the Legislature."

And the following statement, taken from an Illinois court of claims opinion, has peculiar significance in the interpretation of the act of the Legislature creating the court of claims of West Virginia:

> "In creating the Court of Claims the Legislature of Illinois did not create a cause of action nor a right of action in any given case, but merely provided a forum wherein claimants against the State might submit their grievance, and where, if a legal basis for redress was shown to exist, an award might be obtained."

Although I maintain that any award in favor of the claimant in this case is improper and contrary to public policy when made upon the basis of negligence, I may add that no negligence of the state or of the boys industrial school at Pruntytown is actually disclosed by the evidence heard upon the investigation of the claim in question. I do not think that any person reading the facts as set forth in the majority opinion can see any negligence. In the recent case of *Bennett* v. *Edgar B. Sims, Auditor,* the opinion set forth in detail the facts supporting an award made by the court of claims and held that nothing in said facts would support an appropriation of public funds.

The decision of our Court of Appeals in the late case of *Price* v. *State Road Commission* is no warrant for the award made in this case. Every claim must be determined upon the basis of its own facts. The *Price* decision merely held that under circumstances set forth in the opinion an award of public funds would be sustained. There is, however, quite a difference between the facts in the *Price* case and the facts in the instant case, and also quite a difference in the law controlling the determination made in the instant case. No support for the award is found in the Supreme Court case of *State ex rel, Davis Trust Company* v. *Board of Control.* In that case the Supreme Court sustained the legislative appropriation upon the ground of the gross negligence of the warden of the penitentiary. Such decision was based upon the peculiar facts of the case and could not, in my judgment, support the award made in the instant case.

I do not see how anything appearing in the testimony of L. Steele Trotter, a member of the board of control, could be

construed in any respect as supporting, much less tending to establish, the contention of claimant that the West Virginia industrial school for boys at Pruntytown, "heedlesly and consciously made the escape of these boys on August 29, 1946, easily possible, with results to be anticipated, in that these boys were given the liberty of the fields and lawns and in a group of fifteen to twenty-five boys all under the surveillance of only one guard or some older boy powerless to prevent escape." It very clearly appears from the testimony of Mr. Trotter that the Pruntytown institution is maintained and operated in accordance with the plan adopted and followed by similar institutions in many of the states of the Union. As a matter of fact, the evidence adduced before the court of claims showed the institution to be conducted most commendably. The care and treatment of such inmates is definitely performed as a governmental function and while the management of such institutions may see fit to have such inmates engage in various occupations, such activity is recognized as being for the primary purpose of occupying the time of such inmates. Apparently the majority opinion would take the position that inmates of the Pruntytown institution should be confined in cells and that high walls should enclose the several hundred acres of land belonging to the institution. The opinion loses sight of the testimony relative to the commandoes who are in charge of the inmates and of the older inmates who frequently exercise surveillance over the younger one. I do not think that it is within the province of the court of claims to establish or promulgate a plan for the care and treatment of the inmates of the institution. Men of wide experience in educational work, such as the present head of the institution and his predecessor, Mr. Mollohan, with high and skilled training and judgment have worked out a plan approved by similar institutions in other judisdictions. It must be borne in mind that all of the inmates of the institution have been committed therein by the order of courts of law of the state on account of incorrigibility. It would require a vivid imagination to find anything in the record that would support the conclusion that any official connected with the institution could foresee what happened in relation to the escapes made by the three boys under con-

sideration, or that they contributed in any way or were responsible in any way for such escapes. To hold the state responsible in damages in the instant case is foreign to all law that controls in cases like the present. The award could not be based upon any legal right possessed by the claimant and no equitable principle may properly be invoked to support the award. How, therefore, could there be a moral obligation upon the State to compensate the claimant for the damages suffered by him as set forth in his petition praying for compensation?

For a period awards made in the court of claims had three hurdles, the Legislature, the auditor (the guardian of the public revenues of the state) and the Supreme Court of Appeals. The latter tribunal has, however, in numerous recent decisions given the court of claims much enlightenment and guidance. We now have precedents which are helpful.

In conclusion, I can only say, that if the public revenues may be appropriated upon the facts set forth in the majority opinion,

God save the State!

(No. 701—Claimant awarded $4,000.00)

LERT HILDRETH, *administrator of the estate* of Richard Wayne Hildreth, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed November 15, 1950

The state is morally bound to use reasonable care and diligence in the maintenance of a state controlled highway, and failure to use such reasonable care and diligence by allowing a hazardous area to exist in the highway for several years, thereby causing the death of a person lawfully using said highway, presents a claim for which an award should **be made.**

Appearances:

Wyatt & Randolph (John B. Wyatt, Jr.), for claimant,

W. Bryan Spillers, assistant attorney general, for respondent.

A. D. KENAMOND, JUDGE.

Claimant, father of deceased and administrator of his estate, seeks an award of $10,000.00 for wrongful death of decedent. On December 27, 1948, decedent was driving a jeep automobile in state route 73, enroute from Fairmont to Morgantown, whereupon at a point near Meadowdale in Marion county, as he was rounding a turn his motor vehicle struck an icy portion of the road, causing it to skid and to be precipitated over an enbankment, resulting in death of decedent. Claimant alleges the state road commission permitted waters to seep through paved portions of road from a wet weather spring beneath the highway, which waters in freezing caused the icy condition.

Testimony adduced in this case revealed several facts concerning the highway at point of accident. The road was then

paved with tarvia with a berm of two or three feet on the upper side and four to six feet on the lower side; the road there goes uphill on the way from Fairmont to Morgantown; ice on the road at point of accident could not be seen at night until a driver, going toward Morgantown, was "right on it," by reason of a curve in the road causing headlights to be thrown against the bank at side of road; except at the hazardous area the highway was clear and dry at time of accident.

Convincing testimony was offered to the effect that the ice formed at point of accident resulted from freezing of water that oozed up through the road from wet weather springs; that even at times in summer this seepage made that portion of the road slippery; that this condition had existed for ten or twelve years; that formerly this condition had been obviated by a culvert under that portion of the road; that no road signs were near enough to be regarded as a warning of danger at point of accident.

Numerous accidents or near accidents have occurred there during the past ten years. Marcus Hayhurst, who lives near the scene of accident, testified that four or five years ago his mother-in-law with a man and his wife went over the bank at the same spot, but all were lucky, not getting hurt. A. J. Cassell, also living near the scene of accident, told of a woman driver of a milk truck going over the bank at the same spot ten years ago, and of a little Crosley hitting the ice at the same point and turning over on its side a year before the Hildreth accident. A grocery truck went over at the same place last winter when it appears the road there had been resurfaced with coarser material than that used on the road when young Hildreth met his death.

It would appear that the state road commission could not have been unaware of the hazardous area, though nothing had been done to correct the situation. At least the dangerous condition had been called to the attention of state police as late as a month before the Hildreth accident. That remedial measures might have been taken is shown from testimony

that road workers, about the first of last October, appeared at the point of accident and attempted to break up the water seepage from beneath the road and make it flow down and underneath the road.

In Judge Riley's opinion in the case of *Taylor* v. *City of Huntington*, 126 W. Va. 737, we find:

> "That the record does not disclose whether the city had actual notice of the driveway and that it extended above the adjacent terrain, does not preclude recovery. Since 1932 the driveway was in the same condition, except for wear and tear, as it was when plaintiff fell. In these circumstances defendant is charged with notice. Actual notice is, therefore, not required."

Was young Hildreth guilty of contributory negligence? It was conceded that he wore fairly thick-lensed glasses, but he was a licensed driver and had passed his driver's test about a year before, had a reputation for careful driving and was driving carefully and at a reasonable speed at time of accident, and, further, there was nothing in the testimony to show that he had ever before had a driving accident. With him in the jeep at the time were Margaret Austin and her infant sister, the latter being in the rear seat. Their ride from Fairmont toward Morgantown was not an episode in wild life, but was an orderly return from a visit to the Austin girls' grandmother in Fairmont. In view of the fact that two other drivers, earlier on the night of the accident, had difficulty getting over the icy spot on their way toward Morgantown, Margaret Austin was asked if the Hildreth jeep did not have difficulty there when they passed on the way to Fairmont about three hours earlier. She said the ice had not formed on that side of the road at that time. It is possible that young Hildreth might have realized that there would be ice on the side of the road to be traversed on return later at night, but there was no satisfactory testimony in reference thereto. It is our opinion that no contributory negligence was shown. Young Hildreth was none too well acquainted with the road and commanded

no fair approaching view of the dangerous spot. The facts and circumstances in this case appear identical with those in the case of *Presson* v. *State Road Commission*, 4 Ct. Claims (W. Va.) 93, in which case the members of the court were unanimous in an opinion that there was no contributory negligence.

Defense offered by respondent concentrated on two fishponds and two or more springs on property above the highway near the point of accident, and on the McQuain private roadway. Respondent attempted to show that drainage therefrom accounted for the hazardous condition resulting in the Hildreth accident. However, a preponderance of the evidence showed that overflow from fishponds and springs was properly kept from the highway by adequate drains. The McQuain private roadway joined state highway at a point lower in elavation than the point of accident, though water from this private roadway, during a hard rain could flow over state highway. Whether or not any liability was assumed, or should rightfully be assumed, by owner of private roadway for damage arising from permit to enter upon and under state roads of the state of West Virginia, as provided for in section 6, article 16, chapter 17, W. Va. code, 1931, is apparently not a matter bearing on this case.

Relative to a person killed as the result of defective condition of highway under control of state, we note the following from an opinion of our Supreme Court of Appeals in the case of PRICE v. SIMS, 58 SE 2d at 666:

> "That the personal representative of the decedent has no cause of action against the State and has no legal right to recover damages from it is not a sound or sufficient reason to deny the power of the Legislature voluntarily to declare a moral obligation in favor of a citizen whose life it has taken through negligence of its agents, or voluntarily to make an appropriation as compensation for its wrong."

From all the testimony in this case we conclude that the state road commission failed to give proper attention and

remedy to the hazardous condition involved in the accidental death of Richard Wayne Hildreth, and allowed to exist for several years prior thereto, and accordingly we favor an award of four thousand dollars ($4,000.00) to the claimant.

ROBERT L. BLAND, JUDGE, dissenting.

It is unfortunate and most regretable that the claimant's intestate, Richard Wayne Hildreth, should have met with an accident and lost his life on state route No. 73, but an award of the public funds may not be made on the ground of sympathy. Negligence of the state road commission in the maintenance of said highway is charged in the claiman't petition as the direct and proximate cause of said accident and death, and the burden rests upon the claimant to prove the truth of such allegations and that said Richard Wayne Hildreth was free from fault in the premises. This, in my judgment, has not been done; and, as I see my duty, I am unable to concur in the award of $4,000.00 made in favor of the claimant by majority members, and from which award I am obliged to note my dissent.

The accident and death occurred around about eleven thirty o'clock on the night of December 17th, 1948. The said Richard Wayne Hildreth was driving a jeep on said route No. 73, between Morgantown and Fairmont, accompanied by Margaret Austin, aged about seventeen, and her sister, aged about twelve. The decedent was eighteen years, six months and six days of age. Both he and Margaret Austin, who sat together on the front seat of the jeep, could not have been unfamiliar with the highway, since both had driven over it prior to the accident. Just beyond Meadowdale the jeep ran into a "spot" of ice and the accident occurred, resulting in the death of the young man. Miss Austin and the decedent had driven over the road several times before the happening of the accident. The young sister of the said Margaret Austin sat in the back seat of the jeep. The said Margaret Austin testified in the case. Her sister did not. The testimony of the said Margaret Austin clearly discloses the fact that there was discussion of

the icy point on the road before the accident occurred. It will be observed that the accident happened at nearly midnight on December 27, 1948. The alleged cause of such accident, relied upon by claimant to establish his right to an award and approved by the majority opinion was that respondent "permitted waters to seep through paved portion of road from a wet weather spring beneath the highway, which waters in freezing caused the icy condition." I do not think that it may be reasonably maintained that responsibility rests upon the state road commission to actually prevent seepage of water and formation of ice on the highways of the state in the wintertime. It occurs to me that such obligation would be preposterous. The court of claims hitherto has never sustained such responsibility on the part of the state in the maintenance and operation of its highways. No possible obligation or duty would demand such action. All that the state is required to do is to maintain its highways in a reasonably safe condition for public travel thereon. It appears from the testimony of Corporal E. D. Hamilton of the state department of public safety, who had been stationed in the county for approximately fifteen years, that the road commission spreads cinders upon the road on which the accident occurred from time to time and employed other measures to keep the thoroughfare in reasonably safe condition for public travel thereon.

In the case of *Artenis G. Morton* v. *Road Commission*, 2 Ct. Claims (W. Va.), 262, this court held that:

> "An award will be refused where alleged negligence of respondent is not proved, and when claimant, knowing the conditions and existence of a danger, voluntarily and unnecessarily exposed herself to it, when an ordinarily prudent person would not have incurred the risk of injury which such conduct involved."

We have held that under the act creating the court of claims negligence on the part of the state agency involved must be fully shown before an award will be made. This, in my judgment, has not been done in the instant case. We have also

held that no duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel. Such holding was based upon a West Virginia Supreme Court decision. We have also held that the state does not guarantee freedom from accident of persons traveling on such highways. We have also held that when the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge and pay, an award will be denied. I do not think that it anywhere appears from the evidence adduced before the court that the instant claim is one that a sovereign commonwealth should discharge and pay.

REFERENCES

ANIMALS

An award will not be made in favor of a claimant for reinbursement for costs incurred and paid in the defense of a criminal offense with which he has been charged and tried, or for the value of property the title to which is vested in the state and not in himself. *Roten* v. *State Conservation* 156

ASSUMPTION OF RISK

Syllabus in re Brann v. *State Road Commission*, 3 Ct. Claims (W. Va.) 118, adopted and reaffirmed. *Jacobson* v. *State Road* ... 25

A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries not withstanding that respondent is not free from blame. *Hamilton* v. *State Road* 119

1. Every user of the highway travels thereon at his own risk. *State ex rel. Adkins* v. *Sims, Auditor*, 46 S. E. (2nd) 81. *Lowers* v. *State Road* 64

ATTRACTIVE NUISANCE DOCTRINE

No duty rests upon the state to protect either an adult or child trespasser or is broken by failure of the state to safeguard and barricade a state-owned bridge, during its construction, from such trespassers and no award will be granted for injuries received by them in its use. *Brown* v. *State Road* 53

AUTOMOBILES

An award will be made where an agency of the state damages or destroys property of an individual and such claim would be judicially recognized as legal or equitable between private individuals. *Palmer* v. *Adjutant General* 20

2. The mere fact that an automobile skidded on slippery black top road was not evidence of negligence. *Sigmon* v. *Munday*, 125 W. Va. 591. *Farm Bureau Mutual et al* v. *Adjutant General* 69

BILLS (invoices) unpaid, see Contracts

BLASTING OPERATIONS

See

Lowe v. *State Road* 12

BRIDGES AND CULVERTS

No duty rests upon the state to protect either an adult or child trespasser or is broken by failure of the state to safeguard and barricade a state-owned bridge, during its construction, from such trespassers and no award will be granted for injuries received by them in its use. *Brown* v. *State* 53

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspections as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v. *State Road* 22

The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Freeman* v. *State Road* 90

See also

Lycans v. *State Road* 5

Cabell v. *State Road* 9

Weaver v. *State Road* 11

CONTRACTS

When a purchase order is given to a dealer in lumber to furnish a state agency with certain specified lumber, and one-half thereof is delivered in accordance with such purchase order, but he is prevented from delivering the remaining one-half of such lumber by a purported and attempted cancellation of the order for the whole quantity of such lumber, an award will be made for the payment of so much of said lumber as was actually delivered according to the contract price therefor. *Jackson* v. *Conservation Com.* 49

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Brannon* v. *Department Public Assistance* 82

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Maxwell* v. *Department Public Assistance* 85

Pursuant to the purpose and spirit of the Act of the Legislature creating the state court of claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious

and for which the state has received distinct value and benefit. *Fisher* v. *Board Control* 162

Where the conditions of a contract have been fulfilled, a subsequent claim in the nature of a liability exempted in the contract will be denied. *Beard* v. *State Road* 175

See also

Charleston Elec. Supply Co. v. *Board Education et al* 17

CONTRIBUTORY NEGLIGENCE

A claimant who contributes proximately to his own injury by assuming risks may not recover damages for injuries notwithstanding that respondent is not free from blame. *Hamilton* v. *State Road* 119

When the record shows that claimant's automobile was being driven at a reckless, unlawful rate of speed at the time of the accident, he is thus barred from an award by reason of his negligence, which negligence was the proximate cause of the accident. *Roberts* v. *State Road* 27

State Road 27

ESCAPEES

Where a citizen of this state suffers damages caused by a person of unsound mind, and who had been duly committed to a state mental institution, and had escaped therefrom, the state agency involved will not be held liable for the damages, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmate. *Whited* v. *Board Control* 180

An award will be made in favor of a claimant whose automobile was stolen and damaged by escapees from the West Virginia industrial school for boys at Pruntytown, when culpability on the part of the state agency involved, its officers, agents or servants is fully shown and such culpability contributed to and made possible the escape of such inmates. *Goldsboro* v. *Board Control* 187

FIRES

If a fire negligently or accidentaly originates on one's premises and does damage to his neighbor, he is liable therefor if he has failed to use ordinary care and skill to control or extinguish it, or to provide adequate means of doing so, the degree of care required depending on the facts and circumstances. The greater the danger, the greater will be the degree of care required to guard against it. *Cox et als* v. *State Road* 123

See also

Brown v. *State Road* 133

FLASH FLOODS

When claimant suffering damage from a flash flood, which brought disaster to many properties and people in the immediate vicinity of the claimant's property, fails to prove the negligence on the part of the state road commission was the proximate cause of his losses, an award will be denied. *Bennett* v. *State Road* 153

GOVERNMENTAL FUNCTIONS

The right of a person to use the highways of the state is subject and subordinate to the right of the state to exercise and discharge its governmental functions; and the State does not guarantee freedom from accident of persons using such highways. *Corder* v. *State Road* 1

GUARDRAILS

2. The failure of the state road commissioner, in the exercise of the jurisdiction vested in him to expend public moneys appropriated by the Legislature for the construction, maintenance and repair of the public highways of this state, to provide guardrails, place road markers or danger signals, and paint center lines on paved highways at a particular point on any highway in this state, does not create a moral obligation on the part of the state to compensate a person injured on such highway, allegedly resulting from such failure. *Adkins, et als* v. *Sims,* 130 W. Va. 646. *Chartrand* v. *State Road* 98

3. The failure of the state road commission to provide guardrails and road markers, and to paint a center line on the highway, constitutes no negligence of any character, and particularly no such negligence as would create a moral obligation on the part of the state to pay damages for injury or death, assumed to have occurred through such failure, and as the proximate cause thereof. *Lowers* v. *State Road* 64

JURISDICTION

Where a statute, code 1943 11-14-20, provides a specific remedy for refund of excise gasoline tax, such remedy is exclusive and the court of claims does not have *prima facie* jurisdiction. *Pruett* v. *State Tax* 60

The jurisdiction of the court shall not extend to any claim for loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state. Chapter 14, article 2, section 14, code of West Virginia. *Garten* v. *Adjutant General* 159

The jurisdiction of the state court of claims does not extend to any claim with respect to which a proceeding may be maintained by or on behalf of a claimant in the courts of the state. *Hamill Coal Sales and United Telephone* v. *State Tax* 56

MORAL OBLIGATION

The state is morally bound to use reasonable care and diligence in the maintenance of a state controlled highway and failure to use such reasonable care and diligence by allowing a hazardous area to exist in the highway for several years, thereby causing the death of a person lawfully using said highway, presents a claim for which an award should be made. *Hildreth* v. *State Road* 197

Pursuant to the purpose and spirit of the Act of the Legislature creating the state court of claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state has received distinct value and benefit. *Fisher* v. *Board Control* 162

When a purchase order is given to a dealer in lumber to furnish a state agency with certain specified lumber, and one-half thereof is delivered in accordance with such purchase order, but he is prevented from delivering the remaining one-half of such lumber by a purported and attempted cancellation of the order for the whole quantity of such lumber, an award will be made for the payment of so much of said lumber as was actually delivered according to the contract price therefor. *Jackson* v. *State Conservation* 49

The statute requiring inspection and proper maintenance of bridges controlled by the state road commission is mandatory, and failure to inspect and keep in repair a bridge so controlled and maintained is negligence, making the state liable in case of an accident, if caused by such negligence. *Freeman* v. *Road Commission* 90

Situations may arise where negligence on the part of the state road commission to eliminate unusual hazards existing over a period of years, thereby causing injury and damages to persons and vehicles lawfully using said highway, presents a moral obligation for which a claim should be allowed. *Spradling* v. *State Road* 77

If a fire negligently or accidentally originates on one's premises and does damage to his neighbor, he is liable therefor if he has failed to use ordinary care and skill to control or extinguish it, or to provide adequate means of doing so, the degree of care required depending on the facts and circumstances. The greater the danger, the greater will be the degree of care required to guard against it. *Cox et als* v. *State Road* 123

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *Pelfrey* v. *Adjutant General* 106

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspections as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being prop-

erly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v. *State Road* ... 22

NATIONAL GUARD Members of

The jurisdiction of the court shall not extend to any claim for loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state. Chapter 14, article 2, section 14, code of West Virginia. *Garten* v. *Adjutant General* ... 159

NEGLIGENCE

1. Failure of motorists to stop at stop sign constitutes *prima facie* negligence and he was responsible for all damage resulting proximately from his failure to stop at stop sign. *Somerville* v. *Dellosa,* 56 S. E. (2d) 756. *Radford* v. *Adjutant General* ... 94

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault of claimant. *H. A. Pelfrey* v. *Adjutant General* (reported elsewhere in this volume). *Kipp* v. *Adjutant General* ... 108

An award will be made where an agency of the state damages or destroys property of an individual and such claim would be judicially recognized as legal or equitable between private individuals. *Palmer* v. *Adjutant General* ... 20

Situations may arise where negligence on the part of the state road commission to eliminate unusual hazards existing over a period of years, thereby causing injury and damages to persons and vehicles lawfully using said highways, presents a moral obligation for which a claim should be allowed. *Spradling* v. *State Road* ... 77

1. Under the act creating the state court of claims negligence on the part of the state agency involved, or its agents, must be fully shown before an award will be made. *Farm Bureau Mutual et al* v. *Adjutant General* ... 69

The state is morally bound to keep its bridges in proper repair to protect the traveling public and to make the necessary inspections as to their condition. Failure to do so, causing a bridge to become in bad repair, unsafe, and to collapse while being properaly used, renders the state liable for the damages caused by the said neglect of duty. *Price* v *State Road* ... 22

2. Where the evidence clearly shows that the negligent acts of a third person were the proximate cause of the accident for which claimant seeks damages, an award will be denied. *McKinney* v. *State Road* ... 169

When claimant suffering damage from a fllash flood, which brought disaster to many properties and people in the immediate vicinity of the claimant's property, fails to prove the negligence on the part of the state road commission was the proximate cause of his losses, an award will be denied. *Bennett* v. *State Road* ... 153

2. When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Lent* v. *State Road*, 3 Ct. Claims (W. Va.) 253. *Keystone Hardware* v. *State Road* 143

The fact that a stone or rock falls from the hillside adjacent to a public road or highway, striking and damaging a passing automobile, does not of itself constitute negligence on the part of the state road commission. See *Syllabus Clark* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 230, and *Hutchinson* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 172. *Barr* v. *State Road* 141

An award will be made in favor of a claimant whose automobile was stolen and damaged by escapees from the West Virginia industrial school for boys at Pruntytown, when culpability on the part of the state agency involved, its officers, agents or servants is fully shown and such culpability contributed to and made possible the escape of such inmates. *Goldsboro* v. *Board Control* 187

Where a citizen of this state suffers damages caused by a person of unsound mind, and who had been duly committed to a state mental institution, and had escaped therefrom, the state agency involved will not be held liable for the damages, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmate. *Whited* v. *Board Control* 180

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Lent* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 253. *Taylor* v. *State Road* 184

See also

Proctor & Gamble v. *State Road* .. 46

Weirton Cigar & Candy Co. v. *State Road* .. 61

Epperly v. *Adjutant General* .. 74

Reynolds Transportation v. *State Road* .. 110

PAROL CONTRACTS

When a county road superintendent of the state road commission, being desirous of relocating a portion of a secondary road, without authority of the road commission and solely on his own volition, enters into a verbal contract in the name and on behalf of the road commission, with a landowner, by the terms whereof the landowner agrees to give a right of way over and through her land for a distance of one thousand feet, of the width of thirty or forty feet, without monetary consideration, but on condition that the road commission will construct a bridge on

said land, and do and perform other acts for the benefit of said land, and such road is relocated and constructed upon said land, but the road commission fails to observe and perform the contract for the construction for such right of way and violates such contract, an award will be made in favor of such landowner by way of compensation for such breach of contract. *Brown* v. *State Road* 41

PHYSICIANS

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Brannon* v. *Public Assistance* 82

An award will be made to compensate a physician and surgeon for professioinal services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Maxwell* v. *State Road* 85

PROXIMATE CAUSE

When the records show that claimant's automobile was being driven at a reckless, unlawful rate of speed at the time of the accident, he is thus barred from an award by reason of his negligence, which negligence was the proximate cause of the accident. *Roberts* v. *State Road* 27

An award will be made to claimant where it appears that the proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant, *H. A. Pelfrey* v. *Adjutant General* (reported elsewhere in this volume). *Kipp* v. *Adjutant General* 108

1. To sustain a claim for damages caused by alleged negligence of a state road crew, the evidence must be clear and convincing and that the negligence of the said crew was the proximate cause of the injury to claimant. *Albright* v. *State Road Commission*, 4 Ct. Claims (W. Va.) 150. *McKinney* v. *State Road* 169

When claimant suffering damages from a flash flood, which brought disaster to many properties and people in the immediate vicinity of the claimant's property, fails to prove the negligence on the part of the state road commission was the proximate cause of his losses, an award will be denied. *Bennett* v. *State Road* 153

2. The violation of a statute alone is sufficient to make the violator *prima facie* guilty of negligence, but to justify recovery it must be shown by a preponderence of the evidence that the violation was the proximate cause of the injury. *Radford* v. *Adjutant General* 94

An award will be made to claimant where it appears that the

proximate cause of the damages done to claimant's motor vehicle was the independent and negligent act of the agent of the state agency involved, and which is in no way brought about by any fault on the part of claimant. *Pelfrey* v. *Adjutant General* 106

PUBLIC ASSISTANCE

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Brannon* v. *Public Assistance* 82

An award will be made to compensate a physician and surgeon for professional services rendered by him to indigent persons of the state at the special instance and request of the department of public assistance, or an integral part of such department, in accordance with the terms of his contractual employment. *Maxwell* v. *Public Assistance* 85

RIGHT OF WAYS AND ROADS

When a county road superintendent of the state road commission, being desirous of relocating a portion of a secondary road, without authority of the road commission and solely on his own volition, enters into a verbal contract in the name and on behalf of the road commission, with a landowner, by the terms whereof the landowner agrees to give a right of way over and through her land for a distance of one thousand feet, of the width of thirty or forty feet, without monetary consideration, but on condition that the road commission will construct a bridge on said land, and do and perform other acts for the benefit of said land, and such road is relocated and constructed upon said land, but the road commission fails to observe and perform the contract for the construction for such right of way and violates such contract, an award will be made in favor of such landowner by way of compensation for such breach of contract. *Brown* v *State Road* 41

Syllabus in re Brann v. *State Road Commission,* 3 Ct. Claims (W. Va.) 118, adopted and reaffirmed. *Jacobson* v. *State Road* ... 25

The right of a person to use the highways of the state is subject and subordinate to the right of the state to exercise and discharge its governmental functions; and the State does not guarantee freedom from accident of persons using such highways. *Corder* v. *State Road* 1

1. No duty express or implied rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than a reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Hutchison* v. *State Road Commission,* 3 Ct. Claims (W. Va.) 217, et als. *Chartrand* v *State Road* 98

A claimant seeking an award in the court of claims by way of compensation for personal injuries sustained on account of alleged defective condition of a state-controlled highway must, in order to be entitled to such awards, establish facts and circumstances from which it appears that an appropriation of the public revenues should be made by the Legislature. *Watts* v. *State Road* 86

1. To sustain a claim for damages caused by alleged negligence of a state road crew, the evidence must be clear and convincing and that the negligence of the said crew was the proximate cause of the injury to claimant. *Albright* v. *State Road Commission*, 4 Ct. Claims (W. Va.) 150. *McKinney* v. *State Road* 169

1. No duty express or implied rests upon the state road commission of West Virginia to maintain the highway under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Hutchison* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 217. *Keystone Hardware* v. *State Road* 143

Where the conditions of a contract have ben fulfilled, a subsequent claim in the nature of a liability exempted in the contract will be denied. *Beard* v. *State Road* 175

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge, an award will be denied. *Lent* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 253. *Taylor* v. *State Road* 184

The state is morally bound to use reasonable care and diligence in the maintenance of a state controlled highway, and failure to use such reasonable care and diligence by allowing a hazardous area to exist in the highway for several years, thereby causing the death of a person lawfully using said highway, presents a claim for which an award should be made. *Hildreth* v. *State Road* 197

See also

Leonard v. *State Road* 4

ROCKS AND ROCK SLIDES

The state does not guarantee freedom from accident to persons traveling the highways; nor is there a duty to maintain the highways in more than a reasonably safe condition. *Eskew* v. *State Road* 45

The fact that a stone or rock falls from the hillside adjacent to a public road or highway, striking and damaging a passing automobile, does not of itself constitute negligence on the part of the state road commission. See *Syllabus Clark* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 230, and *Hutchinson* v. *State Road Commission*, 3 Ct. Claims (W. Va.) 172. *Barr* v. *State Road* 141

Situations may arise where negligence on the part of the state road commission to eliminate unusual hazards existing over a period of years, thereby causing injury and damages to persons and vehicles lawfully using said highway, presents a moral obligation for which a claim should be allowed. *Spradling* v. *State Road* 77

See also

Weirton Cigar & Candy Co. v. *State Road* 61

SILICOSIS

Syllabus in re *Hayes* v. *State Board of Control*, 4 Court of Claims (W. Va.), page 202, adopted and reaffirmed. *McGraw* v. *Board Control* 14

STATUTE OF LIMITATIONS

A claim properly filed with the court within the five-year period for refund of overpayment of gross sales taxes which were paid to the state tax commissioner and the returns notified the commissioner that the values reported therein were subject to adjustment upon renegotiation in an amount unknown to the claimant and that the claimant would expect refund of the tax upon such reduction in value after it had been ascertained constitutes a moral obligation upon the state to refund the overpaid taxes and an award will be made accordingly. *Continental Foundry* v. *State Tax* 30

SUBROGATION

If a fire negligently or accidentally originates on one's premises and does damage to his neighbor, he is liable therefor if he has failed to use ordinary care and skill to control or extinguish it, or to provide adequate means of doing so, the degree of care required depending on the facts and circumstances. The greater the danger, the greater will be the degree of care required to guard against it. *Cox et als* v. *State Road* 123

See also

Webb, et al v. *State Road* 116

Sabol, et al v. *State Road* 137

Farm Bureau Mutual v. *State Road* 69

TAXES

A claim properly filed with the court within the five-year period for refund of overpayment of gross sales taxes which were paid to the state tax commissioner and the returns notified the commissioner that the values reported therein were subject to adjustment upon renegotiation in an amount unknown to the claimant and that the claimant would expect refund of the tax upon such reduction in value after it had been ascertained con-

stitutes a moral obligation upon the state to refund the overpaid taxes and an award will be made accordingly. *Continental Fdry.* v. *State Tax* 30

The jurisdiction of the state court of claims does not extend to any claim with respect to which a proceeding may be maintained by or on behalf of a claimant in the courts of the state.

Hamil Coal Sales v. *State Tax* 56

United Telephone Co. v. *State Tax* 56

Where a statute, code 1943 11-14-20, provides a specific remedy for refund of excise gasoline tax, such remedy is exclusive and the court of claims does not have *prima facie* jurisdiction. *Pruett* v. *State Tax* 60

WORKMEN'S COMPENSATION

Syllabus in re *Hayes* v. *State Board of Control,* 4 Court of Claims (W. Va.), page 202, adopted and reaffirmed. *McGraw* v. *Board Control* 14