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in all aviation accidents, but should be held applicable in some and not in others. The doctrine may be applied when all five proposed requisites of the doctrine are fulfilled and then only to establsh a form of circumstantial evidence against which the air carrier may introduce his defenses. But the air carrier's failure to offer any evidence should not burden him with a directed verdict.

Limiting the liability of air carriers is void as against public policy in domestic air travel; however, in international flight a limitation is applicable under the terms of the Warsaw Convention. By virtue of the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, Congress, recognizing a need for a federal control in aviation, granted to the Civil Aeronautics Authority the power to regulate both interstate and intrastate air navigation. Thus it would seem that legislation could be enacted limiting the liability of air carriers in the United States guided by the general outline of the Warsaw Convention. The desirability of such liability limitation, however, is a matter of legislative policy too broad for the scope of this Note.

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CLAIMS AGAINST THE STATE IN TENNESSEE—THE BOARD OF CLAIMS

The age-old doctrine of governmental immunity from suit seems gradually to be passing into the discard, first in the realm of contract liability, and of late in the field of torts. Recent years have seen its vitality substantially sapped by judicial decisions, and there is a distinct trend among governmental units to do away with it partially or entirely through legislation.[1] Thus, England in the Crown Proceedings Act of 1947,[2] the United States in the Federal Tort Claims Act,[3] and many of the states by similar legislation have renounced their shield of immunity from suit and, by means more regularized than the old special legislation method, have given their citizens redress for harms suffered at the hands of the government. A few states, like England and the United States, have opened their courts to suits by private individ-

1. See the symposium on recent developments in governmental tort liability in 9 LAW & CONTEMP. PROB. 179-370 (1942); Note, *Limitations on the Doctrine of Governmental Immunity from Suit,* 41 COL. L. REV. 1236 (1941).

2. 10 & 11 GEO. 6, c. 44; WILLIAMS, CROWN PROCEEDINGS (1948).

3. 60 STAT. 842 (1946), *as amended,* 28 U.S.C.A. §§ 2671-80 (1950). For leading articles on the Federal Tort Claims Act, see Baer, *Suing Uncle Sam in Tort,* 26 N.C.L. REV. 119 (1948); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation,* 35 GEO. L.J. 1 (1946); Hulen, *Suits on Tort Claims against the United States,* 7 F.R.D. 689 (1948). For good discussions of the cases and problems of interpretation which have arisen under the Act, see Tooze, *Uncle Sam—A Tort-Feasor,* 29 ORE. L. REV. 245 (1950); Yankwich, *Problems under the Federal Tort Claims Act,* 9 F.R.D. 143 (1950); Note, 98 U. OF PA. L. REV. 884 (1950).

uals, either by conferring jurisdiction of claims against the state on some existing court or courts within the judiciary system,[4] or by creating a special court of claims to try such cases.[5] Others have employed administrative methods, falling generally into two main groups: (1) those in which the administrative body is a relatively independent agency conducting investigations, holding hearings, and making the final determination as to whether or not an award should be granted;[6] and (2) those in which the administrative body acts in an advisory capacity to the legislature, the claims "allowed" by the board being referred to the legislature with a recommendation for an appropriation to the claimants.[7] Still others, without any general provision for suits against the state or for administrative settlement of claims, have permitted suits in very restricted classes of cases by statute, and in individual cases by legislative resolution.[8]

I. SOVEREIGN IMMUNITY AND SUITS AGAINST THE STATE IN TENNESSEE

Article 1, Section 17 of the Tennessee Constitution provides in part: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." This provision, found also in the Constitutions of 1796 and 1835,[9] is in derogation of the state's inherent exemption from suit, and has therefore been strictly construed.[10] Legislation under this section, in order to authorize suits against the state, "must strictly pursue the constitutional requirements, and be so plain, clear, and unmistakable in its provisions as to the manner and form in which such suits may be brought as to leave nothing to surmise or conjecture."[11]

Nearly 100 years ago, the Legislature purported to grant a general permission for suits against the state, but that permission was shortly withdrawn.[12] And in 1873 the Legislature went to the opposite extreme with

4. *E.g.*, MASS. ANN. LAWS c. 258, §§ 1-5 (1933), *as amended*, §§ 4a, 5 (Supp. 1950). This plan is suggested by Kuchel, *Should California Accept Tort Liability?* 25 CALIF. S.B.J. 146 (1950).

5. *E.g.*, ILL. REV. STAT. c. 37, §§ 439.1-439.24 (Supp. 1950); MICH. STAT. ANN. §§27.3548(1)—27.3548(41) (Supp. 1947). See Note, 9 OHIO ST. L.J. 491 (1948).

6. *E.g.*, ALA. CODE ANN. tit. 55, §§ 333-44 (1940), *as amended*, §§ 333, 335 (Supp. 1947); KY. REV. STAT. ANN. §§ 44.070—44.160 (Baldwin Cum. Supp. 1951); Oberst, *The Board of Claims Act of 1950*, 39 KY. L.J. 35 (1950). As will be seen from the discussion which follows, the Tennessee Board of Claims should probably be fitted into this category. For a treatment of administrative handling of tort claims against the state in general, see Nutting, *Legislative Practice Regarding Tort Claims against the State*, 4 MO. L. REV. 1, 7 (1939).

7. See Walsh, *The Ohio Sundry Claims Board*, 9 OHIO ST. L.J. 437 (1948).

8. See Note, 27 TEXAS L. REV. 337 (1949).

9. Williams v. Register, 3 Tenn. 213, 217 (1812) (Constitution of 1796); Railroad Co. v. Tennessee, 101 U.S. 337, 25 L. Ed. 960 (1879) (Constitution of 1835).

10. State *ex rel.* Allen v. Cook, 171 Tenn. 605, 609, 106 S.W.2d 858, 860 (1937).

11. State *ex rel.* Allen v. Cook, 171 Tenn. 605, 611, 106 S.W.2d 858, 861 (1937); *see* Insurance Co. v. Craig, 106 Tenn. 621, 629, 62 S.W. 155, 157 (1901).

12. Tenn. Pub. Acts 1855-56, c. 113, §§ 1-4 (providing for suits against the state "under the same rules and regulations that govern actions between private persons"),

an act which restated the doctrine of sovereign immunity from suit. This provision, now section 8634 of the Code, reads as follows:

> "No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property. . . ."[13]

It has been held that a suit for damages suffered by reason of a change in the grade of a state highway,[14] a suit for mandamus to compel a tax collector to take bank notes in payment of taxes,[15] and a suit for mandamus to compel a state official to issue warrants in payment for machinery allegedly sold to the state[16] were all suits against the state, not cognizable in the courts. On the other hand, it has been held that a suit to enjoin an official from enforcing an allegedly unconstitutional act is not a suit against the state, and may be maintained.[17] This is predicated upon the theory that an officer, while executing an unconstitutional act, is not acting by the authority of the state.[18]

Occasionally, the Legislature passes acts to allow suits against the state in special types of cases. But these statutes must be very explicit, and they must be strictly complied with, in order for a litigant to be successful in obtaining compensation from the state. Where a statute provides for state liability but contains no provision authorizing enforcement of the assumed liability by suit against the state or any of its officers,[19] or where a statute permits suits against the state in a particular class of cases but fails to designate the courts or to provide the "full and complete manner" in which the suits are to be brought,[20] the constitutional provision is not complied with, and suit may not be maintained. Furthermore, even though the statute is adequate to permit suits against the state, the plaintiff cannot collect interest

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repealed by Tenn. Pub. Acts 1865, c. 36, § 34. The Act seems to have been ineffective to accomplish its intended purpose, however, because of its failure to confer upon the courts the power to execute their judgments; its sole effect, therefore, was to provide for a court determination of liability. For cases discussing the Act, and the effect of its repeal, see Railroad Co. v. Tennessee, 101 U.S. 337, 25 L. Ed. 960 (1879); State *ex rel.* Bloomstein v. Sneed, 68 Tenn. 472 (1876).

13. TENN. CODE ANN. § 8634 (Williams 1934) (a codification of Tenn. Pub. Acts 1873, c. 13). The Act continues: "[A]ll such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

14. Sevierville v. Trotter, 170 Tenn. 431, 95 S.W.2d 920 (1936).

15. State *ex rel.* Bloomstein v. Sneed, 68 Tenn. 472 (1876).

16. State *ex rel.* Day Pulverizer Co. v. Fitts, 166 Tenn. 156, 60 S.W.2d 167 (1933).

17. Stockton v. Morris & Pierce, 172 Tenn. 197, 110 S.W.2d 480 (1937), 15 TENN. L. REV. 253 (1938); Lynn v. Polk, 76 Tenn. 121 (1881). The Tennessee Supreme Court reached a contrary result in General Oil Co. v. Crain, 117 Tenn. 82, 95 S.W. 824, 121 Am. St. Rep. 967 (1906); but its position was repudiated in the opinion of the United States Supreme Court, which affirmed the decision solely upon the basis that the statute under attack was valid. 209 U.S. 211, 28 Sup. Ct. 475, 52 L. Ed. 754 (1908).

18. Lynn v. Polk, 76 Tenn. 121, 130 (1881).

19. Phillips v. Marion County, 166 Tenn. 83, 59 S.W.2d 507 (1933).

20. State *ex rel.* Allen v. Cook, 171 Tenn. 605, 609, 106 S.W.2d 858, 860 (1937).

as a part of the judgment without specific statutory authority.[21] And where the state takes possession of land in the exercise of eminent domain, the landowner may sue for damages as provided by statute,[22] but he has no right to sue for possession of the land and the fair rental value thereof for the period of its occupation.[23]

In view of the Constitution, the statutes, and the case law, it appears that Tennessee is firmly committed to the legal theory of sovereign immunity from suit.[24] The state, however, has not been deaf to the continuing demands of private persons for the redress of wrongs visited upon them by the state and its employees. The method used for providing compensation and the way in which it functions may now be considered.

II. ORIGIN AND DEVELOPMENT OF THE BOARD OF CLAIMS

The present Tennessee Board of Claims, created by the Act of 1945,[25] is the result of amalgamation and extension of legislation enacted over a period of years. The original Board of Claims was set up in 1931 to investigate claims for damages to persons or property growing out of negligence in highway construction and maintenance, or in the operation of highway department equipment.[26] It was composed of four members, the Commissioner of Highways, the State Treasurer, the State Comptroller, and the State Attorney General. This Board investigated claims and made findings of fact; if the Attorney General held that such findings established a case of liability, an award was made, which became payable as soon as approved by the Governor.

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21. New England Mut. Life Ins. Co. v. Reece, 169 Tenn. 84, 83 S.W.2d 238 (1935). This case involved a suit for refund of taxes paid under protest, within the provisions of TENN. CODE ANN. §§ 1790-94 (Williams 1934). The statute was amended afterwards, to allow recovery of "such interest as the court may determine to be proper. . . ." Tenn. Pub. Acts 1937, c. 197.

22. TENN. CODE ANN. § 3131 (Williams 1934).

23. Chumbley v. State, 183 Tenn. 467, 192 S.W.2d 1007 (1946). On the relationship between Code section 8634 and condemnation suits by the state, in which a judgment is rendered for the landowner, see Stubblefield v. Warren County, 170 Tenn. 211, 93 S.W.2d 1269 (1936); Dep't of Highways v. Gamble, 18 Tenn. App. 95, 73 S.W.2d 175 (M.S. 1934); Dep't of Highways v. Roseborough, 17 Tenn. App. 403, 68 S.W.2d 132 (M.S. 1933).

24. "It is elementary that a state cannot be sued in its own courts, without its consent. This is a privilege of sovereignty." State *ex rel.* Allen v. Cook, 171 Tenn. 605, 609, 106 S.W.2d 858, 860 (1937).

"[O]bviously subjection of the State to litigation with travelers on State made and maintained highways, requiring it to go into the courts, and defend actions brought by every citizen with a real or alleged grievance would immeasurably impair respect for sovereignty, and make inroads upon a dwindling public revenue. . . ." Quinton v. Board of Claims, 165 Tenn. 201, 215, 54 S.W.2d 953, 957 (1932).

As to tort liability of public officers in Tennessee, see Note, 21 TENN. L. REV. 306 (1950).

25. Tenn. Pub. Acts 1945, c. 73, TENN. CODE ANN. §§ 1034.26—1034.36 (Williams Supp. 1950).

26. Tenn. Pub. Acts 1931, c. 75, TENN. CODE ANN. § 3252.1 (Williams 1934).

In 1935 the provisions of the act were extended to apply to claims arising out of the negligent operation of vehicles by employees of the State Highway Patrol.[27] The Commissioner of Finance and Taxation and the Secretary of State were added to the Board; and the Attorney General was directed to appoint an attorney to act as secretary *ex officio,* to keep minutes and records, and to investigate claims and make recommendations to the Board for their disposition. By 1939, the jurisdiction of the Board had been extended in another direction to include claims by all state employees for injuries incurred in the course of their employment and claims by their representatives in case of death.[28]

By the Act of 1945 all of these items were placed under the control of the present Board of Claims.[29] As the most outstanding feature of the Act, the Board's jurisdiction over claims against the state for personal and property damage was no longer limited to those arising out of the negligence of Highway Department and Highway Patrol employees, but was broadened to cover claims based upon the negligence of officials and employees of all departments in the operation of state vehicles and the management of state property.[30] Other significant phases of the Act lie in the items of standardized procedure which it laid down, and which are to be found in the Rules of the Board promulgated under the authority of the Act.[31]

III. Procedure

The detailed information which follows is derived from three primary sources: (1) the Act of 1945 and subsequent enactments, (2) the Rules of

27. Tenn. Pub. Acts 1935, c. 173, Tenn. Code Ann. §§ 3252.2—3252.4 (Williams 1934).

28. Tenn. Pub. Acts 1939, c. 108, Tenn. Code Ann. § 1034.18 (Williams 1934). Also included were similar claims by members of the Tennessee National Guard. Tenn. Pub. Acts 1937, c. 249, Tenn. Code Ann. § 845.33b (Williams 1934). The powers and duties of the Board relating to the reimbursement of county highway bonds (Tenn. Pub. Acts 1937, c. 165, *as amended,* Tenn. Pub. Acts 1939, c. 188), given to the present Board by the Act of 1945, are beyond the scope of the present discussion. Tenn. Code Ann. § 1034.33 (Williams Supp. 1950).

29. In 1941, the Board was given the power to make awards to levee and drainage districts for benefits to state highways resulting from flood protection afforded by such districts. Tenn. Pub. Acts 1941, c. 53. Although this power was not included in the Act of 1945, it was re-enacted in 1951 in Tenn. Code Supp. § 1034.11 (1950). Tenn. Pub. Acts 1951, c. 100.

30. Under the Act of 1931, which created the original Board of Claims, it was said that the remedy so provided was cumulative, not depriving the plaintiff of any remedy which he might have in the courts against a county. *See* Unicoi County v. Barnett, 181 Tenn. 565, 568, 182 S.W.2d 865, 866 (1944). This would seem to apply with equal force to the Act of 1945.

31. For an interesting parallel in development, see the discussion of the Kentucky Board of Claims in Oberst, *The Board of Claims Act of 1950,* 39 Ky. L.J. 35 (1950). A Highway Board of Claims was created in Kentucky in 1946; its rules may be found in Ky. Admin. Code 222 (1946). In 1950 its jurisdiction was extended to claims for negligence of the state and employees of all departments. Ky. Rev. Stat. Ann. §§ 44.070—44.160 (Baldwin Cum. Supp. 1951).

the Board, promulgated under section 6 of the Act,[32] and (3) the minutes of the meetings of the Board.[33]

A. *Membership.* The Board of Claims is composed of six members, the Commissioner of Highways and Public Works, the Commissioner of Finance and Taxation, the State Treasurer, the Secretary of State, the Attorney General and Reporter, and the State Comptroller.[34] Electing its own chairman and vice-chairman, the Board seems to have adopted the custom of choosing the Highway Commisssioner and the Attorney General, respectively, for these positions.[35] Although the Act of 1945 provided for no additional compensation for the services rendered by the officials in their capacity as members of the Board, the Legislature customarily makes an appropriation for this purpose in the amount of fifty dollars per month for each member.[36]

Section 7 of the Act authorized the Attorney General to appoint an assistant to investigate claims, conduct hearings, and make recommendations to the Board; this Assistant Attorney General, although not a voting member, acts as the Secretary of the Board, being responsible for keeping all minutes and records.[37] Under the provision authorizing the employment of clerical assistance, the Board created the office of Clerk, to give aid to the Assistant Attorney General in keeping records and processing claims.[38]

B. *Meetings.* The regular meetings of the Board are held at its offices in the Supreme Court Building at Nashville, on Tuesday after the first Monday in each month. While it frequently disposes of all claims ready for decision in a one-day session, a heavy docket of claims sometimes forces the Board to hold special sessions.[39] It is not clear what was intended by the provision of the Act that "the attendance of the members of said Board

32. 8 Min. Bk. 122 (July 10, 1945). The 1945 Act and the Rules of the Board have been printed in booklet form, and are available to the public. For a comparison of the procedure of the Board with Tennessee administrative procedure in general, see Boone, *An Examination of the Tennessee Law of Administrative Procedure,* 1 VAND. L. REV. 339, 359 (1948).

33. Citations to "Min. Bk." refer to the permanent records of the Board, on file in the Tennessee Supreme Court Building, Nashville.

34. Present members of the Board, in the order of the respective positions listed, are: Charles F. Wayland, Jr., *Chairman;* James Clarence Evans; W. N. Estes; James H. Cummings; Roy H. Beeler, *Vice-Chairman;* and Cedric Hunt. The Comptroller, although a member of the original Board of Claims under the Act of 1931, was omitted from the Board created in 1945. An item in the Miscellaneous Appropriation Bill of 1949 purported to put the Comptroller back on the Board, and he in fact has so served since the May meeting in 1949. Tenn. Pub. Acts 1949, c. 287, § 4, item 26. Because of doubt as to the validity of that provision, however, the 1951 General Assembly amended the Act of 1945 to include the Comptroller.

35. See 8 Min. Bk. 120 (July 10, 1945); 10 *id.* 148 (March 16, 1949); 13 *id.* 1 (August 15, 1950).

36. *E.g.,* Tenn. Pub. Acts 1949, c. 287, § 4, item 26.

37. Under this authority, John Ed O'Dell was appointed Assistant Attorney General in 1945, and has held that position to date. 8 Min. Bk. 120 (July 10, 1945).

38. The present Clerk, James E. Oakley, was selected by the Board for that position in 1949. 10 Min. Bk. 149 (March 16, 1949).

39. Rule 12.

at such meetings shall be mandatory."[40] But, at any rate, the problem has not troubled the Board, which has followed the plan established in Rule 13: "A majority of the membership of the Board shall constitute a quorum for the transaction of all business, but the concurrence of at least three members of the Board shall be necessary for the decision of any claim."

C. *Filing of Claims and Hearings.* Claims are presented to the Board by filing with the Secretary, in duplicate, a sworn petition and "affidavits of persons acquainted with the facts such as will be equivalent to the testimony of at least one credible and disinterested witness."[41] The petition must contain a statement showing the jurisdiction of the Board over the claim, preceding the statement of facts.[42]

After the filing of the claim, an investigation is conducted by the Assistant Attorney General, preparatory to making a written report and recommendation to the Board on the facts and the law.[43] This investigation is a fairly routine matter in the case of claims by employees for compensation; but in claims for personal or property damage for negligence of state employees, the investigation is a significant procedural step. In the latter type of case, the Board is forbidden to allow an award

> "based wholly upon ex parte affidavits of the claimant or his witness but the evidence upon which such award is based must be taken before the assistant attorney general . . ., or some other representative of the board, and reduced to writing for examination by the board."[44]

When a claim of this nature is filed, written notice is given to the head of the department or agency against which the claim is presented, and he is furnished with a copy of the petition and affidavits. A hearing must be conducted by the Assistant Attorney General, at a time set by him, within ninety days after the petition is filed. The place for the hearing is likewise selected by the Assistant Attorney General, with a view to economy of expense and convenience of the witnesses for both the claimant and the state; and the claimant or his attorney, and the head of the state agency, are given ten days' notice of the time and place of the hearing. At the hearing, witnesses are put on oath;[45] and the testimony is recorded by a court reporter and transcribed, becoming part of the "record" to be considered by the Board.[46]

40. Tenn. Pub. Acts 1945, c. 73, § 6, TENN. CODE ANN. § 1034.31 (Williams Supp. 1950).
41. Rules 1, 3.
42. Rule 2.
43. Rule 4.
44. TENN. CODE ANN. § 1034.31 (Williams Supp. 1950).
45. "The assistant attorney general . . . and all members of the board are hereby authorized and empowered to administer oaths to witnesses in connection with all proceedings relative to claims before the board." TENN. CODE ANN. § 1034.32 (Williams Supp. 1950).
46. Rule 6.

Following his investigation, the Assistant Attorney General files with the Chairman of the Board a written report, including findings of fact, conclusions of law, and a recommendation of allowance or denial of the claim.[47] The claim has now been completely "processed," and will be considered by the Board at its next meeting; the first action of the Board is taken solely upon an examination of the petition, affidavits, transcript of the hearing, and the report of the Assistant Attorney General, without the appearance of the claimant or his counsel.[48]

The Board does not, however, always reach a decision on the "record" first presented to it. If the claimant has a remedy elsewhere, or if litigation is pending on the subject-matter of the claim, the Board may defer its decision to await the claimant's exhaustion of his other remedies.[49] If the Board desires additional information as to facts or law, it may continue the case for further investigation by the Assistant Attorney General or by a state agency, or it may request additional evidence or briefs from the claimant.[50] Furthermore, while granting the relief asked for by the claimant (especially in claims by state employees for compensation), the Board may order that the claim be "left open" for additional relief, if the claimant should continue to suffer loss of wages, medical expenses, and the like; thus, a claimant may be able to obtain "continuing relief," without being forced to prove all his damages in a single claim.[51] A correction or modification of an earlier order of the Board may be secured through a supplemental petition by the claimant.[52]

47. Rule 4. The cases are infrequent in which the Board takes a contrary view to that of the Assistant Attorney General in his report.

48. Rule 5. Ordinarily, the Board hears at one time all claims which grow out of a single transaction. Thus, in Frazier v. Dep't of Highways, 10 Min. Bk. 138 (Dec. 14, 1948), the Board rendered a single order granting awards for injury to a state employee, death of a third person, and damage to a filling station, grocery store, and stock of goods, where all were occasioned by the explosion of a state-owned asphalt tank. See, also, Johnson v. Dep't of Highways, 8 Min. Bk. 257 (May 6, 1947), 8 *id.* 267 (June 11, 1947).

49. *E.g.*, Dover v. Tennessee National Guard, 12 Min. Bk. 171 (June 13, 1950) (claimant ordered to pursue his remedies against the Federal Government under the Federal Tort Claims Act): Dabbs v. Dep't of Highways, 12 Min. Bk. 62 (Nov. 9, 1949) (state employee seeking compensation ordered to pursue remedies against negligent third person who caused injury).

50. Rutldege v. Dep't of Highways, 13 Min. Bk. 71 (Jan. 9, 1951) (referred to engineering staff of Highway Department for report); Watts v. Dep't of Highways, 12 Min. Bk. 133 (Apr. 11, 1950), 12 *id.* 156 (May 9, 1950) (injured child ordered to obtain medical examination); Anderson v. Dep't of Highways, 10 Min. Bk. 111 (Sept. 14, 1948) (additional study of alleged "hazard" in highway ordered); Booten v. Tennessee, 8 Min. Bk. 225 (Dec. 16, 1946) (referred to Comptroller for audit); Lowry v. Dep't of Highways, 8 Min. Bk. 217 (Oct. 10, 1946), 8 *id.* 233 (Dec. 16, 1946) (additional briefs of counsel); Nashville v. Dep't of Highways, 8 Min. Bk. 172 (Apr. 9, 1946), 8 *id.* 189 (June 4, 1946) (request for additional evidence as to damages).

And in Pemberton v. Dep't of Highways, 10 Min. Bk. 111 (Sept. 14, 1948), where the claimant sought damages for the breaking of a pipe line in highway construction, the Board ordered the claim held in abeyance until determination that satisfactory repairs had been made by the state, whereupon the claimant was awarded damages in a reduced amount. 10 *id.* 115 (Oct. 12, 1948).

51. *E.g.*, Cocke v. Tennessee State Guard, 8 Min. Bk. 251 (Apr. 8, 1947).

52. Vaughan v. Dep't of Highways, 10 Min. Bk. 184 (June 7, 1949) (correction as

D. *Methods of Review.* The Act of 1931, which first established a Board of Claims, contained no provision as to the reviewability of the decisions of the Board.[53] In *Quinton v. Board of Claims,*[54] after a denial of his claim by the Board, the petitioner sought certiorari in chancery for a *de novo* review under Code section 9008,[55] which provides for this method of review of orders of boards and commissions. The Chancery Court granted the petition; but on appeal the Supreme Court reversed, saying of the Act of 1931:

> "This statute does not open up the broad field of litigation against the State. It confers no power to sue the State in an action of damages for injuries on a highway. . . . By thus safeguarding the State from suit, the legislature evinced a purpose to confine the inquiry and determination to the Board of Claims, the Attorney General and the Governor; and by implication excluded any other remedy."[56]

The Supreme Court therefore held that the general prohibition of suits against the state in Code section 8634 could not be avoided by the indirect method of assuming a power of review over orders of the Board of Claims under section 9008. The result of the *Quinton* case was to give finality to the decisions of the Board, with no possibility of review by the courts without express statutory authority.

The Legislature has made very clear its intention to limit consideration of claims to the Board in the 1945 Act, by providing that the "decision of the board of claims, upon any claim filed hereunder, shall be a final."[57] The Board, however, has established by its Rules a procedure whereby it may review its own decisions, when they are adverse to the claimant.[58] In such cases copies of the Board's order, and of the Assistant Attorney General's report and recommendation to the Board, are forwarded to the claimant or his attorney; and from the date of mailing, the claimant has fifteen days in which to file exceptions with the Board.[59] After the receipt of the excep-

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to payee of voucher); Meador v. Tennessee National Guard, 10 Min. Bk. 164 (May 17, 1949) (correction of error in damages); Jones v. Dep't of Institutions, 12 Min. Bk. 3 (Aug. 4, 1949) (petition to modify previous order, which granted awards to infants, to direct payment to mother rather than guardian; petition denied, and case continued to allow petitioner the opportunity to secure administration of the funds through Chancery); Eve v. Dep't of Conservation, 8 Min. Bk. 270 (June 11, 1947) (award for damage to realty modified, and ordered to be paid to subsequent purchaser of damaged property).

53. TENN. CODE ANN. § 3252.1 (Williams 1934).

54. 165 Tenn. 201, 54 S.W.2d 953 (1932).

55. TENN. CODE ANN. § 9008 (Williams 1934).

56. Quinton v. Board of Claims, 165 Tenn. 201, 217, 54 S.W.2d 953, 958 (1932).

57. TENN. CODE ANN. § 1034.35 (Williams Supp. 1950).

58. Rule 5. A decision is "adverse to the claimant" if it allows less than the damages claimed, or if it allows some items of the claim and denies others, as well as when it denies all relief. See, *e.g.,* Johnson v. Dep't of Highways, 8 Min. Bk. 267 (June 11, 1947); Eve v. Dep't of Conservation, 8 Min. Bk. 139 (Sept. 4, 1945). No provision is made by the Rules for a review at the petition of the state agency involved.

59. A claim was disallowed on May 4, and copies of the report and order were mailed to the claimant. No exceptions were filed; but on May 25 the Board received a letter postmarked May 24, which said, "Exceptions will be filed. . . . [A]pplication is hereby tendered for an Appeal to the Board. . . ." Held, the decision of the Board has

tions, the time for a new hearing is set, usually the next regular meeting; and ten days' notice is given to the claimant or his attorney and to the head of the state agency involved.

Although, as previously stated, the Board renders its original decision solely upon the "record," it hears argument of counsel and additional proof by either party in cases standing upon exceptions.[60] This hearing, held before the entire Board, is always conducted in its offices in the Supreme Court Building at Nashville.[61] Here again, the procedure of the Board as an administrative body is very flexible; before reaching a decision it may require further investigation by the Assistant Attorney General or additional information as to facts and law from the claimant.[62] In at least two cases, the hearing on exceptions has raised such serious doubts that the Board has continued the case and ordered the subpoena of witnesses to testify orally before the entire Board; and in each case, after hearing the testimony, the Board reversed its former position and allowed the claim.[63] Although the Act of 1945 did not expressly authorize the Board to subpoena witnesses, that defect has been remedied in the 1950 Supplement to the Code of Tennessee, enacted by the 1951 General Assembly.[64] Certainly, it is essential that the Board have such power at its disposal for use in important cases involving close factual issues.[65]

become final, and the case will not be reopened. Reaves v. Dep't of Highways, 10 Min. Bk. 89 (June 1, 1948).

In Schrantz v. Dep't of Highways, 12 Min. Bk. 110 (Feb. 21, 1950), 12 *id.* 171 (June 13, 1950), 13 *id.* 13 (Aug. 15, 1950), 13 *id.* 42 (Oct. 10, 1950), the Board allowed exceptions to be filed by the claimant more than four months after notice of disallowance was mailed to his attorney, because the attorney was no longer representing him at the time of the notice. And see Robinson v. Dep't of Highways, 10 Min. Bk. 123 (Nov. 9, 1948) (time extended for illness of attorney).

60. Rule 5.

61. If the claimant and his attorney fail to appear to argue the exceptions filed, the exceptions will be overruled and the decision made final. Seaton v. Dep't of Highways, 10 Min. Bk. 65 (Apr. 6, 1948); Brandenburg v. Dep't of Highways, 8 Min. Bk. 218 (Dec. 16, 1946). But the Board will review its original decision without the appearance of the claimant or his attorney if the claimant elects to stand upon his exceptions and written argument. *E.g.*, Kipp v. Dep't of Highways, 12 Min. Bk. 152 (May 9, 1950), 12 *id.* 170 (June 13, 1950).

62. Blankenship v. Tennessee, 12 Min. Bk. 3 (Aug. 4, 1949) (continued upon claimant's request for leave to produce further evidence); Beake v. Dep't of Institutions, 10 Min. Bk. 164 (May 17, 1949) (additional briefs from counsel); Stafford v. Dep't of Highways, 8 Min. Bk. 217 (Oct. 10, 1946) (employee claiming compensation ordered to obtain physical examination); Runions v. Dep't of Highways, 8 Min. Bk. 134 (Aug. 7, 1945) (Assistant Attorney General ordered to visit scene of accident).

63. Schrantz v. Dep't of Highways, 13 Min. Bk. 13 (Aug. 15, 1950), 13 *id.* 42 (Oct. 10, 1950); Roberts v. Dep't of Highways, 12 Min. Bk. 84 (Nov. 22, 1949), 12 *id.* 98 (Dec. 15, 1949), 12 *id.* 100 (Jan. 10, 1950).

64. Tenn. Pub. Acts 1951, c. 100; TENN. CODE SUPP. § 1034.7 (1950), in part: "The assistant attorney general . . . and all members of the board are authorized and empowered to administer oaths to witnesses. . ., and shall have power to summon such witnesses if necessary." The Assistant Attorney General has indicated that witnesses will be subpoenaed at the request of the claimant upon a showing of reasonable necessity.

65. *E.g.*, in Roberts v. Dep't of Highways, 12 Min. Bk. 84 (Nov. 22, 1949), 12 *id.* 98 (Dec. 15, 1949), 12 *id.* 100 (Jan. 10, 1950), there was a claim for the wrongful death of two persons, caused by the collapse of a bridge. The hearing upon exceptions, with the oral testimony of the subpoenaed witnesses, resulted in an award of more than $16,000.

In summary, a claimant who has been denied relief upon the original action of the Board has the opportunity to attack the order and the Assistant Attorney General's report, both as to the facts and the law. He has the opportunity to appear before the Board, to present additional evidence, and to have his case argued by counsel; if his claim is again denied, his remedy before the Board is exhausted.

During the period from the creation of the new Board to its meeting in February, 1951, it has disallowed 220 claims upon original petitions. During that same period, it has reviewed 94 such cases upon exceptions, affirming its first holding in 47 cases, and reversing it in 47 others.

E. *Petition to Reopen and Resort to the Legislature.* "When a claim has once been disallowed upon exceptions duly filed and argued before the Board of Claims, said claim shall not be reopened for any cause except upon the unanimous consent of the Board. . . ."[66] It is rarely necessary for a state employee seeking workmen's compensation to petition the Board to reopen his claim; this is true because the Board normally grants awards in those cases, and retains jurisdiction of the claim until it is satisfied that the claimant has been fully compensated for his injuries and loss of time. However, once the Board makes a "final settlement" of the calim, the claimant may seek further relief only through the petition to reopen;[67] of the four petitions to reopen presented by state emplyees since the creation of the new Board, only one has been granted.

After the denial of claims by third persons predicated upon negligence of state employees, virtually the only basis for filing a petition to reopen is the discovery of new evidence. And the fact that a unanimous vote is necessary to grant the petition[68] has made success of the petitioner rare, and then only when the new evidence tendered was "strong" evidence, likely to produce a different result.[69] Of the nine petitions to reopen heard by the new Board in negligence cases, only three have been granted.

When a claimant has exhausted the ordinary means of having his case tried before the Board, and still has not gained the relief which he seeks,

66. Rule 9.

67. Dorn v. Dep't of Highways, 13 Min. Bk. 48 (Nov. 14, 1950) (petition to reopen to determine extent of permanent disability granted, and claimant ordered to obtain physical examination). But compare the procedure in Porter v. Dep't of Highways, 8 Min. Bk. 141 (Nov. 8, 1945), 8 *id.* 151 (Jan. 8, 1946) (petitioner first ordered to obtain physical examination; petition to reopen denied upon receipt of physician's report).

68. See Holman v. Dep't of Highways, 10 Min. Bk. 112 (Sept. 14, 1948) (action on petition to reopen deferred because of absence of some Board members).

69. *E.g.*, Witherspoon v. Tennessee National Guard, 12 Min. Bk. 86 (Nov. 22, 1949) (claim reopened and award granted upon supplemental report by the state agency involved); Jewell v. Dep't of Highways, 10 Min. Bk. 193 (July 12, 1949) (petition to reopen on tender of new evidence denied); Moffitt-Casey Funeral Home v. Dep't of Highways, 10 Min. Bk. 123 (Nov. 9, 1948) (claim reopened upon tender of new evidence), 10 *id.* 141 (Dec. 14, 1948) (award granted after presentation of new evidence).

he may still retain one "trump card" by which to achieve success—an item in the miscellaneous appropriation bill in the Legislature. It has become the legislative practice generally to make such appropriations subject to the approval of the Board of Claims;[70] the effect of a claimant's obtaining such an appropriation is simply to place his claim before the Board *de novo*. Thus, a claimant whose application to the Board has proved fruitless, or whose case has been "finally settled," may yet utilize his political connections to the effect that he confronts the Board once more.[71] This reference of claims to the Board by the Legislature can hardly be justified in cases which are within the Board's original jurisdiction, and which have already been fully determined. The practice frequently amounts to little more than the tossing of political "hot potatoes" to the Board, or legislative intimidation to force the Board to grant unmerited awards.

One case in the annals of the Board stands out as the supreme example of the manner in which persistence may "pay off." On November 16, 1946, an oil truck was traveling along a state highway when a bridge collapsed, dumping the truck into the stream below. A claim was filed with the Board against the Highway Department, alleging negligence in the maintenance of the bridge. The Assistant Attorney General held a hearing and made his report to the Board, and the claim was disallowed in October, 1947. In December the claim was again denied when heard upon exceptions and argument, and a "petition to rehear" was denied in January, 1948.[72] Having exhausted all remedies before the Board, with no basis for a petition to reopen, the claimant obtained a miscellaneous appropriation in the 1949 General Assembly, which was conditioned upon approval by the Board.[73] Thus, the case was brought before the Board again in May, 1949; it was continued for further study by the chairman, and in September the Board again held that the state was not liable. By this time the members' resistance must have been worn down; for when the decision was reviewed upon exceptions in November, 1949, the Board finally awarded the damages claimed.[74]

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70. "All appropriations hereinafter made . . . shall not be paid until the Board of Claims has investigated the facts and determined the questions of law authorizing the payment and approved the same in writing. . . ." Tenn. Pub. Acts 1949, c. 287, § 1 (in part).

71. Dixon v. Tennessee National Guard, 12 Min. Bk. 130 (Apr. 11, 1950) (tried under Tenn. Pub. Acts 1949, c. 287, § 5, item 9, after previous denial by the Board); Cocke v. Tennessee State Guard, 10 Min. Bk. 185 (June 7, 1949) (employee's claim for additional compensation under Tenn. Pub. Acts 1949, c. 287, § 5, item 8, after previous final settlement by the Board).

72. Nothing in the Rules of the Board provides for any such item as a "petition to rehear."

73. Tenn. Pub. Acts 1949, c. 287, § 3, item 25.

74. Sanders v. Dep't of Highways, 10 Min. Bk. 23 (Oct. 10, 1947), 10 *id.* 40 (Dec. 2, 1947), 10 *id.* 50 (Jan. 13, 1948), 10 *id.* 168 (May 18, 1949), 12 *id.* 43 (Sept. 2, 1949), 12 *id.* 63 (Nov. 9, 1949).

F. *Limitation of Actions.* The Act of 1945 requires that petitions based upon negligence of state employees be filed with the Board within one year from the date when the claim accrued.[75] This is typical of the short periods of limitation provided by the statutes of other states, to protect the state against fraudulent claims, and to give it ample opportunity to investigate the claim on its own behalf.

When a claim is filed with the Board more than one year after its accrual, it is simply dismissed.[76] However, a person whose claim is now barred or has been dismissed by the Board on that basis may still obtain an award through an item in the miscellaneous appropriation bill, which normally provides that the Board may, in its discretion, grant the awards contained in the bill regardless of the running of the period of limitation.[77] In *Inter-Mountain Telephone Co. v. Dep't of Highways*,[78] a claim was filed for damage to a telephone cable caused by the alleged negligence of a state employee, whose vehicle had struck a telephone pole. The claim was originally dismissed because it was filed more than a year after the injury occurred, and the Board advised the Telephone Company that its only recourse was to obtain a legislative appropriation. The claimant followed the suggestion, secured an appropriation, and the Board approved the claim on the merits.[79] Except as to claims which accrued several years before,[80] the Board does not ordinarily dismiss such claims as barred by the statute of limitations, but its discretion to do so is a significant factor in the hearing of claims of doubtful merit; and, of course, the Board may still deny the claim purely upon the merits.[81]

G. *Costs.* No fees or costs are assessed against the claimant for the filing of claims with the Board, whether an award is made or not. All clerical expenses and the expenses incurred by the Assistant Attorney General in conducting hearings and investigations are, when approved by the chair-

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75. TENN. CODE ANN. § 1034.30 (Williams Supp. 1950). And the Rules of the Board provide: "Persons having claims against the State arising under the provisions of Chapter 73 Public Acts of 1945 or under any other Act by which the Board of Claims acquires jurisdiction must present said claim not later than one year from the date of the accrual of the claim. . . ." Rule 1.

76. *E.g.*, Steele v. Dep't of Highways, 8 Min. Bk. 219 (Dec. 16, 1946).

77. *E.g.*, Tenn. Pub. Acts 1949, c. 287, § 1.

78. 10 Min. Bk. 9 (Aug. 12, 1947), 10 *id.* 50 (Jan. 13, 1948), 10 *id.* 185 (June 7, 1949).

79. Tenn. Pub. Acts 1949, c. 287, § 5, item 3. And note the use of miscellaneous appropriations in cases where the injury continued over a period of time. *E.g.*, Sells v. Dep't of Highways, 8 Min. Bk. 236 (Apr. 8, 1947) (claim under Tenn. Pub. Acts 1947, c. 237, § 2, item 28, for damage to well water from leak in gasoline supply tank of the state).

80. *E.g.*, Johnson v. Dep't of Finance & Taxation, 12 Min. Bk. 81 (Nov. 22, 1949) (claim under Tenn. Pub. Acts 1949, c. 287, § 9, which accrued in 1937, denied).

81. *E.g.*, Brooks v. Dep't of Highways, 8 Min. Bk. 219 (Dec. 16, 1946) (original claim before the Board dismissed on statute of limitations), 8 *id.* 260 (May 6, 1947) (same claim presented under Tenn. Pub. Acts 1947, c. 237, § 2, item 45; *held*, no liability).

man of the Board, paid out of the appropriation for the Board.[82] Rule 11 provides that the "cost of taking depositions and of preparing other pleadings before the Board of Claims shall be paid by the party for whose benefit they are filed." As to the preliminary hearing, the Board of Claims and the claimant share equally the *per diem* expense of the court reporter who records the proceedings, and the claimant must pay the cost of having the testimony of his witnesses transcribed. Where the Board has subpoenaed witnesses, the fees and traveling expenses have been paid out of its appropriation, and have not been assessed against the claimant.[83]

Frequently, when a state employee claims compensation for permanent disability from injuries incurred within the scope of his employment, the Board orders him to obtain a physical examination for a report to the Board. The costs of this examination are borne by the Board and not by the claimant, even though the claim is disallowed.[84]

IV. SUBSTANCE

From July, 1945, through February, 1951, the Tennessee Board or Claims has made 2,206 orders on 1,866 individual cases, some of which involved more than one claim growing out of the same set of facts. The "business" of the Board has gradually increased each year, reaching a peak of 580 determinations in the calendar year 1950.

The claims heard by the Board may be divided into three main categories: (1) those by state employees for medical accounts and compensation for loss of time for injuries received in the course of employment;[85] (2) those by third persons for tort under section 5 of the Act;[86] and (3) miscellaneous claims, many relating to tax refunds, under miscellaneous appropriation bills of the Legislature. By way of statistics, the Board has heard 1,177 cases based upon injury to or death of employees, 586 claims by third persons, mostly in tort (and exclusive of claims for tax refunds), and 123 cases under miscellaneous appropriation bills.[87]

82. Tenn. Pub. Acts 1945, c. 73, §§ 6, 7, 11, TENN. CODE ANN. §§ 1034.31, 1034.32, 1034.36 (Williams Supp. 1950).

83. *E.g.*, Roberts v. Dep't of Highways, 12 Min. Bk. 84 (Nov. 22, 1949), 12 *id.* 98 (Dec. 15, 1949), 12 *id.* 100 (Jan. 10, 1950). The present practice is to pay the ordinary fees provided for witnesses in attendance at court or other proceedings under compulsion of a subpoena. See TENN. CODE ANN. §§ 9799-9801 (Williams 1934).

84. *E.g.*, Stafford v. Dep't of Highways, 8 Min. Bk. 171 (Apr. 9, 1946), 8 *id.* 217 (Oct. 10, 1946), 8 *id.* 220 (Dec. 16, 1946).

85. This category includes all claims under TENN. CODE ANN. §§ 1034.27-1034.29, 1034.34 (Williams Supp. 1950).

86. TENN. CODE ANN. § 1034.30 (Williams Supp. 1950).

87. This last figure overlaps somewhat with the first two, since the first two contain all items in their categories, whether heard by the Board originally or considered by it under legislative reference.

A. *Claims by Employees and Their Dependents*

"Said board of claims is hereby authorized to pay and compensate employees of any department . . ., who shall receive injury in the line of duty . . ., whether such injury shall be accidental or otherwise, or the dependents of such employee in case of death arising out of such injury. . . ."[88] Under substantially similar provisions, members of the State and National Guard are entitled to file claims for compensation.[89]

The great majority of employees' claims before the Board are allowed; medical expenses are paid, and compensation for loss of time from work is awarded. A general discussion of this phase of the Board's jurisdiction here is not warranted, but a few interesting points deserve mention. As an administrative body, the Board may retain jurisdiction of a case and make periodic awards to an injured employee, closing the case only when satisfied that full compensation has been rendered.[90] When a claim is first filed, the Board may order the employee to obtain a medical examination and report, at no cost to the claimant;[91] or it may even authorize the employee in advance to submit to a surgical operation, guaranteeing the payment of all expenses.[92]

In general, except as to medical and hospital expenses, the Board is limited to the maximum awards allowable under the Tennessee Workmen's Compensation Law in granting claims by employees.[93] In two cases, however, it apparently has approved more than that amount, although somewhat reluctantly, where the claims were referred to it by the Legislature in miscellaneous appropriations.[94] The Board has denied claims where it has de-

88. TENN. CODE ANN. § 1034.27 (Williams Supp. 1950).

89. *Id.* §§ 1034.28, 1034.34 (Williams Supp. 1950).

90. In the case of Smith v. Dep't of Highways, 10 Min. Bk. 4 (Aug. 12, 1947), 10 *id.* 202 (July 12, 1949), fourteen separate awards were made to the employee; and the Board ultimately authorized payment of the costs of an operation to lessen disability.

91. *E.g.,* Caldwell v. Dep't of Highways, 8 Min. Bk. 189 (June 4, 1946) (ordered to obtain physical); 8 *id.* 193 (July 2, 1946) (award granted).

92. *E.g.,* Adams v. Dep't of Highways, 10 Min. Bk. 181 (May 18, 1949).

93. Section 2 of the Act of 1945 provided, in part: "[A]ny award or settlement made by the board of claims hereunder shall in no event exceed the amount which would be allowable under the provisions of the Workmen's Compensation Law of this State." TENN. CODE ANN. § 1034.27 (Williams Supp. 1950). In enacting an official supplement to the Code of 1932, the 1951 General Assembly added: "[T]he provisions of the Workmen's Compensation Law limiting medical and hospital benefits shall not be binding on the board of claims in cases where, in the sound discretion of the board, the nature of the injury and the ends of justice require payment of additional monies for medical and hospital expenses of injured state employees over and above the maximum amounts fixed by said Workmen's Compensation Law." TENN. CODE SUPP. § 1034.2 (1950).

94. Cocke v. Tennessee, 10 Min. Bk. 185 (June 7, 1949) (claim by member of Guard under Tenn. Pub. Acts 1949, c. 287, § 5, item 8; portion of claim based upon loss of civilian earnings denied), 12 *id.* 2 (Aug. 4, 1949) (heard on exceptions; continued for additional briefs on claimant's right to award for loss of civilian earnings after previous allowance of maximum Workmen's Compensation benefits), 12 *id.* 46 (Sept. 2, 1949), 12 *id.* 85 (Nov. 22, 1949) (award for loss of civilian earnings granted); Hamby v. Dep't of Safety, 8 Min. Bk. 260 (May 6, 1947), 8 *id.* 269 (June 11, 1947), 10 *id.* 190 (July 12, 1949), 12 *id.* 2 (Aug. 4, 1949).

termined that there was actually no "injury,"[95] that the injury did not occur in the line of duty,[96] or that the injury occurred in a fight with a fellow-employee.[97] Where the employee, in the course of his employment, is injured by the wrongful act of a third person, the Board withholds its decision on a claim for compensation, pending the outcome of an action against the wrongdoer for damages.[98] On the other hand, if it appears that the third person is of doubtful financial responsibility,[99] or that the employee is destitute and in need of immediate relief,[100] the Board may grant a partial or complete award upon the employee's executing an agreement subrogating the state to his rights against the wrongdoer and assigning to the state any funds which he may subsequently recover from the wrongdoer.[101]

B. *Tort Claims*

Section 5 of the Act of 1945[102] is the statutory basis of the Board's jurisdiction over claims for

> "personal injuries or property damages caused by negligence in the construction and/or maintenance of state highways or other state buildings and properties and/or by negligence of state officials and employees of all departments or divisions in the operation of state-owned motor vehicles or other state-owned equipment while in the line of duty."

The section also imposes two significant limitations upon the power of the Board to grant awards in claims for tort. First, an award is to be made only where the facts found by the Board "establish such a case of liability on the part of a department or agency of the state Government as would entitle the claimant to a judgment in an action at law, if the state were amenable to such."[103] Second, only those claims are to be paid which arise out

95. *E.g.*, Quillin v. Dep't of Highways, 8 Min. Bk. 171 (Apr. 9, 1946) ("catch" in claimant's back held to be an arthritic condition, not an injury).

96. *E.g.*, King v. Dep't of Highways, 10 Min. Bk. 150 (Mar. 16, 1949), 10 *id.* 164 (May 17, 1949).

97. *E.g.*, Lee v. Dep't of Highways, 12 Min. Bk. 190 (July 25, 1950); Annis v. Dep't of Institutions, 12 Min. Bk. 44 (Sept. 2, 1949); *cf.* Wright v. Dep't of Highways, 12 Min. Bk. 50 (Sept. 2, 1949) (award granted where injury resulted from attack by fellow-employee); Polk v. Dep't of Highways, 12 Min. Bk. 10 (Aug. 9, 1949) (award granted where injury resulted from practical joke of fellow-employee).

98. *E.g.*, Dabbs v. Dep't of Highways, 12 Min. Bk. 62 (Nov. 9, 1949).

99. *E.g.*, Crippen v. Dep't of Institutions, 13 Min. Bk. 42 (Oct. 10, 1950); Wade v. Dep't of Highways, 8 Min. Bk. 248 (April 8, 1947).

100. *E.g.*, Sanker v. Dep't of Highways, 12 Min. Bk. 113 (Feb. 21, 1950).

101. See Sanker v. Dep't of Highways, 13 Min. Bk. 88 (Feb. 12, 1951) (final settlement with employee, deducting from the award the $1,000 recovered by the employee from the third person).

102. TENN. CODE ANN. § 1034.30 (Williams Supp. 1950).

103. Compare the language of the Federal Tort Claims Act, 28 U.S.C.A. § 2674 (1950): "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." The latter part of this section imposes a restriction upon the claims cognizable under the Federal Act which apparently is not present under the wording of the Tennessee Act. *See* Feres v. United States, 340 U.S. 135, 141, 71 Sup. Ct. 153 (1950).

of the performance of functions of state agencies and employees "imposed upon them by law where in such performance said departments have exclusive control of the personnel and equipment involved."[104]

By far the greatest number of claims handled by the Board under section 5 grow out of automobile accidents; even in a collision with the car of the Governor, himself, the private citizen is entitled to show that he was in the right and that he should be compensated for his damages.[105] Because relatively little expense is incurred in filing a claim, the Board hears numerous "bent fender" cases in which damages of less than $50 are claimed.[106] Not all claims under this provision involve collisions, however; for example, the Board has granted relief to motorists whose windshields were broken by gravel falling from the bed of a state truck and being hurled backward by the rear wheels;[107] and a city has been redressed for damages to its streets from heavy military equipment of the National Guard.[108]

The cases arising out of negligence in the construction and maintenance of highways fall into two classes: (1) those in which the injury is produced directly or consequently by affirmative acts of negligence; and (2) those in which the injury is caused by a negligent omission to act, a failure to repair and maintain the highways properly. Where the highway employees cause actual, physical injury to a person's land, such as the cutting of trees,[109]

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104. There is rarely any occasion for question as to whether the damage complained of was caused by an "official or employee in the line of duty." But in Stacks v. Tennessee National Guard, 13 Min. Bk. 13 (Aug. 15, 1950), 13 *id.* 41 (Oct. 10, 1950), where the claimant sought an award for automobile damage and wrongful death, the report made to the Board by the Adjutant General showed the driver of the state car to have been a civilian employee of the Federal Government. Without reaching a decision on the point, the Board ordered the case held in abeyance pending the outcome of the claimant's suit against the Federal Government; but hearing the case upon exceptions and argument, the Board found that the driver was a state employee acting in the line of duty, and rendered an award of more than $13,000.

105. *E.g.*, Freshour v. Governor's Office, 12 Min. Bk. 165 (June 8, 1950).

106. During the period from July, 1945, to February, 1951, the damages awarded by the Board in cases under its Section 5 jurisdiction fall into the following ranges: $50 and under, 146 awards; $50-100, 95 awards; $100-500, 128 awards; $500-1,000, 26 awards; $1,000-5,000, 29 awards; over $5,000, 12 awards.

Ordinarily, the question of the amount of damages to be awarded involves nothing more than a mere determination of fact. *E.g.*, White Motor Express v. Dep't of Highways, 10 Min. Bk. 128 (Nov. 9, 1948) (decision deferred on claim for auto damage, to determine propriety of repair bill), 10 *id.* 142 (Dec. 14, 1948) (repair bill found proper and award granted). Occasionally, a claim may present technical questions of law as to the proper measure of damages. *E.g.*, Beake v. Dep't of Institutions, 10 Min. Bk. 81 (June 1, 1948), 10 *id.* 164 (May 17, 1949), 12 *id.* 16 (Aug. 9, 1949) ($5,000 awarded for physical injuries and mental suffering); Chandler v. Dep't of Highways, 8 Min. Bk. 248 (Apr. 8, 1947) (damages awarded for repairs and for loss of use of taxi); Cook v. Dep't of Highways, 8 Min. Bk. 214 (Oct. 10, 1946) (claim for damage to car allowed, for loss of fees from lack of car denied).

107. Inman v. Dep't of Highways, 12 Min. Bk. 166 (June 8, 1950); Pugh v. Dep't of Highways, 10 Min. Bk. 175 (May 18, 1949).

108. City of Huntingdon v. Tennessee National Guard, 10 Min. Bk. 200 (July 12, 1949).

109. *E.g.*, Krantz v. Dep't of Highways, 12 Min. Bk. 188 (July 25, 1950).

the severing of water pipes,[110] or the destruction of trees and crops by fires started in cleaning off the rights-of-way,[111] the claimant has little difficulty in proving his claim. Of a similar nature are the frequent claims based upon the blasting operations conducted in highway construction. The awards are normally small in the cases where flying rocks strike the "barn roof,"[112] but the state pays heavily when the shock from the blast causes the walls of a nearby well to cave in.[113] The Board has also made awards for the flooding of land and crops, where the faulty construction of highways prevented proper drainage,[114] and for damage suffered by landowners from changes in the grade of an existing highway.[115] Various other cases have been held to come within the "highway construction and maintenance" jurisdiction of the Board, including claims for damages to clothing sprayed with asphalt,[116] for injury to a child who was struck by an iron bar dropped by a state employee,[117] and for damage to an automobile from dirt and rocks dumped upon it by a mechanical shovel.[118]

Some of the most interesting and difficult cases tried by the Board have involved automobile accidents caused by "conditions" on state highways, either created or left uncorrected by highway construction and maintenance crews. Where maintenance men had left dirt and mud piled upon the road, causing an automobile to skid off the road, the claimant was allowed complete recovery in each of two decisions of the Board.[119] The negligent failure to keep the highways in repair has resulted in state liability in several cases: in *Wright v. Dep't of Highways*[120] damages were allowed to a claimant whose accident was caused by holes in the road; in *Mitchell v. Dep't of Highways*[121] an award was granted for damages to a truck which

110. *E.g.*, Lexington Water Co. v. Dep't of Highways, 13 Min. Bk. 37 (Oct. 10, 1950); Pemberton v. Dep't of Highways, 10 Min. Bk. 111 (Sept. 14, 1948), 10 *id.* 115 (Oct. 12, 1948).

111. *E.g.*, Powell v. Dep't of Highways, 12 Min. Bk. 105 (Jan. 10, 1950); Terry v. Dep't of Highways, 12 Min. Bk. 103 (Jan. 10, 1950); Shands v. Dep't of Highways, 8 Min. Bk. 232 (Dec. 16, 1946).

112. *E.g.*, Harris v. Dep't of Highways, 13 Min. Bk. 40 (Oct. 10, 1950); Hickerson v. Dep't of Highways, 12 Min. Bk. 54 (Sept. 23, 1949).

113. *E.g.*, Hood v. Dep't of Highways, 12 Min. Bk. 7 (Aug. 9, 1949); Vaughan v. Dep't of Highways, 10 Min. Bk. 161 (Mar. 16, 1949), 10 *id.* 174 (May 18, 1949).

114. *E.g.*, Whitehead v. Dep't of Highways, 12 Min. Bk. 103 (Jan. 10, 1950), 12 *id.* 136 (Apr. 11, 1950); Gray v. Dep't of Highways, 12 Min. Bk. 103 (Jan. 10, 1950), 12 *id.* 127 (Mar. 14, 1950).

115. *E.g.*, Wilhite v. Dep't of Highways, 10 Min. Bk. 186 (June 7, 1949); *cf.* Nixon v. Dep't of Highways, 10 Min. Bk. 150 (Mar. 16, 1949), 12 *id.* 62 (Nov. 9, 1949), 13 *id.* 69 (Dec. 20, 1950) (landowner's damage caused by changes in plan of construction after acquisition of right-of-way).

116. Caruthers v. Dep't of Highways, 12 Min. Bk. 126 (Mar. 14, 1950).

117. Corn v. Dep't of Highways, 12 Min. Bk. 164 (June 8, 1950).

118. Latimer v. Dep't of Highways, 10 Min. Bk. 171 (May 18, 1949).

119. Broyles v. Dep't of Highways, 10 Min. Bk. 179 (May 18, 1949); Carmack v. Dep't of Highways, 10 Min. Bk. 170 (May 18, 1949).

120. 12 Min. Bk. 112 (Feb. 21, 1950).

121. 10 Min. Bk. 178 (May 18, 1949).

hit a hole in a bridge and was thrown into the stream below; and in *Roberts v. Dep't of Highways*[122] more than $17,000 damages were awarded for property damage and wrongful deaths caused by the collapse of a bridge.

The recent case of *Locke v. Dep't of Highways*[123] is strong testimony to the fact that claims can be presented to the Board which involve large sums, complicated facts, and difficult legal problems. In that case a young medical student was driving at night on a road upon which the Highway Department was engaged in spreading new, crushed limestone. The automobile, upon reaching a curve, left the road and plowed headlong into a large mound of crushed limestone which had been piled in a field beside the road. The driver was killed; his wife and sister, asleep in the automobile at the time of the accident, were badly injured. Thus, there being no other witnesses, the only person who really knew what had happened had died in the accident. The case was tried upon the theory that the pile of crushed rock in the field appeared at night to be a continuation of the road straight up over a hill, and that the highway employees were negligent in leaving it so placed. The entire case hinged solely upon circumstantial evidence; but after hearing argument upon exceptions to its original denial, the Board awarded damages in the amount of $23,021.25, the largest sum that it has ever awarded in a case under its original jurisdiction.[124]

Jurisdiction of the Board over claims for injuries from negligence in the construction and maintenance of state "buildings and properties" opens the door to a wide variety, although not so great a number, of claims. Under that portion of section 5 recovery has been had, for example: where the explosion of an asphalt tank caused death to a person and damage to a filling station, grocery store, and stock of goods;[125] where seepage from a state-owned lake damaged a farm;[126] and even where an electrically-charged wire, under the control of the Conservation Department, electrocuted a pig.[127]

Although section 5 would limit awards to those claims which "establish such a case of liability . . . as would entitle the claimant to a judgment in an action at law," the actual decisions of the Board sometimes suggest a compromise on that point and a "settlement" with the claimant. In a claim for damages suffered by a child when struck by a state vehicle, for example,

122. 12 Min. Bk. 84 (Nov. 22, 1949), 12 *id.* 98 (Dec. 15, 1949), 12 *id.* 100 (Jan. 10, 1950).

123. 12 Min. Bk. 143 (Apr. 13, 1950), 13 *id.* 44 (Nov. 14, 1950).

124. Note that there is no limit set by the Act of 1945 upon the amount which can be awarded by the Board in section 5 cases. Compare the provisions of the Kentucky statute setting up a board of claims, which limit the awards of that board to $5,000. KY. REV. STAT. ANN. § 44.070(2) (Baldwin Cum. Supp. 1951).

125. Frazier v. Dep't of Highways, 10 Min. Bk. 138 (Dec. 14, 1948).

126. Lawson v. Tennessee, 8 Min. Bk. 149 (Nov. 8, 1945).

127. Dunn v. Dep't of Conservation, 13 Min. Bk. 39 (Oct. 10, 1950).

the Board found from the evidence that the child ran into the side of the automobile and held that there was no apparent liability; nevertheless, it ordered the payment of a small bill for medical services rendered to the child.[128] A further indication of the Board's liberality is its inclination to apply a rule of comparative negligence which would not be available in an "action at law" in the Tennessee courts.[129] In a claim for automobile damage in *Runions v. Dep't of Highways*,[130] the Board allowed one-half of the repair bill as a "reasonable settlement." And in *Roberts v. Dep't of Highways*[131] the Board used the following language:

> "[I]t is the opinion of the Board that there is liability on the part of the State Highway Department to the petitioner for the wrongful death of his intestates, but that the amount of his recovery should be reduced because of the contributory negligence of the said intestates in the operation of the truck involved in the collapse of the bridge. . . ."[132]

Similarly, in *Williams v. Dep't of Highways*[133] the Board awarded $2,500 for a wrongful death, "reduced to this amount in mitigation of the damages that otherwise would be paid, because of the contributory negligence of the deceased." Although purporting to apply the Tennessee rule that remote contributory negligence will not bar recovery but may be considered in mitigation of damages, these decisions seem to go somewhat beyond the holdings of the Tennessee cases in point.[134]

In another class of cases, also, the Board has adopted the practice of giving awards where there is actually no "liability" of the state. These are claims by state employees for reimbursement of funds paid by them to third persons who have suffered damages from acts of the employees. Thus, where a state employee has been involved in an automobile collision and has paid for the damages to the other party's vehicle,[135] or has expended funds in securing the injured party's admission to a hospital,[136] the Board has granted the employee's claim for reimbursement. In one such case the

128. McClanahan v. Dep't of Highways, 10 Min. Bk. 133 (Dec. 14, 1948).

129. The Tennessee rule appears to hold a plaintiff completely barred when his own contributory negligence is a "proximate" cause of the injury, but not when it is a mere "remote" cause. When merely a remote cause, the plaintiff's contributory negligence may be considered in mitigation of damages. See McDermott, *Remote Contributory Negligence*, 2 TENN. L. REV. 109 (1924).

130. 8 Min. Bk. 134 (Aug. 7, 1945), 8 *id.* 183 (June 4, 1946).

131. 12 Min. Bk. 84 (Nov. 22, 1949), 12 *id.* 98 (Dec. 15, 1949), 12 *id.* 100 (Jan. 10, 1950).

132. Even after the reduction, the Board awarded more than $16,000 for the deaths of claimant's intestates.

133. 12 Min. Bk. 111 (Feb. 21, 1950), 12 *id.* 128 (Mar. 14, 1950).

134. *But see* Schwam v. Dep't of Highways, 12 Min. Bk. 64 (Nov. 9, 1949), 12 *id.* 97 (Dec. 15, 1949), 12 *id.* 101 (Jan. 10, 1950) (contributory negligence held to bar two of the claimants, but not imputed to three passengers in the automobile).

135. *E.g.*, Jett v. Dep't of Highways, 10 Min. Bk. 52 (Feb. 3, 1948); Booth v. Dep't of Education, 10 Min. Bk. 48 (Jan. 13, 1948).

136. Crawley v. Dep't of Agriculture, 13 Min. Bk. 88 (Feb. 12, 1951) (employee reimbursed and injured party awarded damages).

Board suggested that it would make an award only when the employee had been at fault and damages would have been awarded to the third person had he filed a claim.[137] An earlier case, however, apparently placed no such limitation upon the employee's right to recover; for in that case, while the employee was reimbursed for paying the medical expenses of the injured person, the claim of the third person for the damages to his automobile was denied.[138] Ordinarily, of course, when the employee commits a tort in the scope of his employment, it is he, not the employer, who is primarily liable for the damages; and it is the employer who is entitled to reimbursement from the employee, not *vice versa,* upon paying the claim. Furthermore, if the employee has not been guilty of negligence, he is merely a volunteer in paying for the damages suffered by the other party. On the other hand, the grounds of policy behind the Board's decisions in these cases seem obvious—the employee should be encouraged to effect a settlement with the other party; and he should be saved from undue expense in the performance of his duties, the state being far better able to bear the loss than the ordinary state employee.[139]

In hearing tort claims against the state the Board has made no distinction between residents and nonresidents of Tennessee as to their right to claim under the Act.[140] As a practical matter, however, the out-of-state claimant is at somewhat of a disadvantage if his claim is denied on the original hearing; for he may find it very difficult to appear before the Board at the hearing on exceptions, and hardly worthwhile if the claim is small.[141] The question of the right of a subrogee to file a claim, which has caused considerable difficulty under the Federal Tort Claims Act, was early resolved in favor of the subrogee by the Tennessee Board under the Act of 1945.[142] Where a third person is damaged by the negligence of a state employee,

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137. Owen v. Dep't of Highways, 13 Min. Bk. 48 (Nov. 14, 1950) (employee repaid, "it appearing to the Board that this is a case in which the Board of Claims would have made an award to [the third person] had a petition been filed by him before the Board for the damages complained of, said collision being the fault of [the state employee]").

138. W. M. McClanahan & Sons v. Dep't of Highways, 10 Min. Bk. 15 (Oct. 10, 1947), 10 *id.* 64 (Mar. 1, 1948).

139. The Federal Tort Claims Act provides that a judgment against the Federal Government for negligence of an employee will bar an action against the employee. 28 U.S.C.A. § 2676 (1950).

140. *E.g.,* Pugh v. Dep't of Highways, 13 Min. Bk. 99 (Mar. 20, 1951) (claim by Kentuckian allowed on original hearing).

141. *E.g.,* Kipp v. Dep't of Highways, 12 Min. Bk. 152 (May 9, 1950), 12 *id.* 170 (June 13, 1950) (claim by resident of California, denied on original hearing; heard again upon exceptions, without appearance of counsel or witnesses, and again denied).

142. The question was similarly resolved under the Federal Tort Claims Act in United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 70 Sup. Ct. 207, 94 L. Ed. 171, 12 A.L.R.2d 444 (1949). See Tooze, *Uncle Sam—A Tort-Feasor,* 29 ORE. L. REV. 245, 249 (1950); Yankwich, *Problems under the Federal Tort Claims Act,* 9 F.R.D. 143, 152 (1950); Note, 98 U. OF PA. L. REV. 884, 894 (1950).

therefore, and his damages are paid by his insurance company, the insurer is subrogated to his rights to file a claim against the state.[143]

The Rules of the Board require a claimant to show the basis of the Board's jurisdiction in his original petition, "preceding the statement of facts"; and if he fails to bring his case within the provisions of the Act of 1945, the Board will not take cognizance of the claim.[144] In three cases which have been heard, it does not readily appear upon what basis the Board took jurisdiction, or whether it actually considered that it had jurisdiction, since all three claims were denied. One involved a claim for damages for the death of the wife and daughter of the superintendent of a state training school, who were killed by an inmate of the institution;[145] another involved a claim for damages for the burning of a house by runaway boys from the Tennessee Industrial School;[146] and in the third a state employee asserted a right to additional compensation for services performed.[147]

Five claims have been dismissed by the Board expressly upon the ground that it lacked jurisdiction: (1) a claim by the representative of an inmate of a state hospital for the insane, killed through the alleged negligence of an employee;[148] (2) a claim for damages to land from coal dust deposited by a creek flowing from the coal washer at the Brushy Mountain Penitentiary;[149] (3) a claim for damages for an allegedly wrongful confiscation of a truck, trailer and some lumber by the Finance and Taxation Department;[150] (4) a claim by a contractor, alleging that it was entitled to funds in addition to the contract price for construction done for the Highway Department;[151] and (5) a claim by a landowner for additional compensation, where a right-of-way agreement had conveyed more property to the Highway Department than contemplated by the landowner.[152] The last two cases indicate that a claimant might accomplish his objective even by presenting a claim beyond the scope of the Board's jurisdiction, for in each case the Board "advised" the Highway Department that the claimant had a meritorious case and recommended voluntary payment out of Department funds.

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143. *E.g.*, Hall v. Dep't of Highways, 12 Min. Bk. 142 (Apr. 13, 1950).
144. Rule 2.
145. Scott v. Dep't of Institutions, 8 Min. Bk. 149 (Nov. 8, 1945).
146. Pace v. Tennessee, 8 Min. Bk. 149 (Nov. 8, 1945), 8 *id.* 152 (Jan. 8, 1946).
147. Blankenship v. Tennessee, 10 Min. Bk. 166 (May 18, 1949), 12 *id.* 3 (Aug. 4, 1949), 12 *id.* 45 (Sept. 2, 1949) (services held to be included in the duties for which the employee had been paid a salary).
148. Thompson v. Dep't of Institutions, 10 Min. Bk. 111 (Sept. 14, 1948), 10 *id.* 130 (Nov. 9, 1948).
149. Brasel v. Dep't of Institutions, 10 Min. Bk. 58 (Feb. 3, 1948), 10 *id.* 130 (Nov. 9, 1948).
150. Burleson v. Dep't of Finance & Taxation, 13 Min. Bk. 11 (Aug. 15, 1950).
151. L. & M. Construction Co. v. Dep't of Highways, 10 Min. Bk. 192 (July 12, 1949), 12 *id.* 61 (Sept. 23, 1949).
152. Henderson v. Dep't of Highways, 12 Min. Bk. 5 (Aug. 9, 1949), 12 *id.* 46 (Sept. 2, 1949).

The discussion thus far has been devoted to showing the general nature of the claims which are handled by the Board under the Act of 1945.[153] A person whose claim cannot be fitted into the language of the Act may obtain a similar hearing before the Board by means of a legislative miscellaneous appropriation; this phase of the Board's activity is the next to be discussed.

153. The following citations will serve to illustrate suits against counties and municipal corporations in Tennessee upon facts similar to those which form the basis of claims presented to the State Board of Claims under Section 5. On these general problems, see Note, 21 TENN. L. REV. 306, 307 (1950); 3 VAND. L. REV. 835 (1950).

County's immunity from liability for negligence in maintenance of roads. Weakley County v. Carney, 14 Tenn. App. 688 (W.S. 1932) (damage to property from fire started by county employees); Buckholtz v. Hamilton County, 180 Tenn. 263, 174 S.W.2d 455 (1943) (ditch across road); Tyler v. Obion County, 171 Tenn. 550, 106 S.W.2d 548 (1937) (gravel left piled in road); Scott v. Knox County, 166 Tenn. 585, 64 S.W.2d 185 (1933), 12 TENN. L. REV. 297 (1934) (automobile ran through an unprotected place where a bridge had been removed); Unicoi County v. Barnett, 181 Tenn. 565, 182 S.W.2d 865 (1944) (plaintiff's land flooded by faulty construction of highway); Fryar v. Hamilton County, 160 Tenn. 216, 22 S.W.2d 353 (1929), 8 TENN. L. REV. 199 (1930) (plaintiff's land flooded by county's failure to keep ditches open); Carothers v. Shelby County, 148 Tenn. 185, 253 S.W. 708 (1922) (collapse of bridge).

Liability of municipal corporations in maintenance of streets. Oliver v. Nashville, 106 Tenn. 273, 61 S.W. 89 (1901) (general discussion of city's liability to users of streets); Gray v. Mayor of Knoxville, 85 Tenn. 99, 1 S.W. 622 (1886) (damage to adjoining property, knocking down fences and causing overflow of surface water); Mayor of Knoxville v. Bell, 80 Tenn. 157 (1883) (injury from pile of bricks in street); *cf.* Nashville v. Brown, 25 Tenn. App. 340, 157 S.W.2d 612 (M.S. 1941), 17 TENN. L. REV. 498 (1942) (injury to motorist caused by dish culvert); *see* Williams v. Taxing District, 84 Tenn. 531, 535 (1886) (cities and counties compared in this respect). For pertinent statutes, see TENN. CODE ANN. § 3404 (Williams 1934) (cities made liable to property-owners for damages caused by change in grade of streets); TENN. CODE ANN. § 8596 (Williams 1934) (requiring notice within ninety days, to mayor or manager, of "injuries received by person or property on account of the negligent condition of any street, alley, sidewalk, or highway").

County's immunity from liability on theory of respondeat superior. Johnson v. Hamilton County, 156 Tenn. 298, 1 S.W.2d 528 (1927); McAndrews v. Hamilton County, 105 Tenn. 399, 58 S.W. 483 (1900). Recovery allowed where county carries liability insurance. Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936); Marion County v. Cantrell, 166 Tenn. 358, 61 S.W.2d 477 (1932); Taylor v. Cobble, 28 Tenn. App. 167, 187 S.W.2d 648 (E.S. 1945).

Municipal corporations and respondeat superior—the proprietary and governmental function distinction. Boyd v. Knoxville, 171 Tenn. 401, 104 S.W.2d 419 (1937) (negligent driver of city vehicle held engaged in governmental function); Connelly v. Nashville, 100 Tenn. 262, 46 S.W. 565 (1897); Jackson v. City of Paris, 228 S.W.2d 1015 (Tenn. App. W.S. 1949); Nashville v. Fox, 6 Tenn. App. 653 (M.S. 1928).

Disappearance of the nuisance doctrine as applied to connties. Buckholtz v. Hamilton County, 180 Tenn. 263, 174 S.W.2d 455 (1943), *overruling* Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919); Odil v. Maury County, 175 Tenn. 550, 136 S.W.2d 500 (1940); Note, 20 TENN. L. REV. 619 (1949).

Liability of municipal corporations for nuisance. Knoxville v. Lively, 141 Tenn. 22, 206 S.W. 180 (1918); *see* Boyd v. Knoxville, 171 Tenn. 401, 403, 104 S.W.2d 419, 420 (1937).

For material on the steps which have been taken by other states to allow administrative and court determination of claims against cities and counties, see Fuller & Casner, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437 (1941); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability,* 9 LAW & CONTEMP. PROB. 214 (1942). For proposed statutes on tort liability of political subdivisions of the state, see Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort,* 9 LAW & CONTEMP. PROB. 282, 296 (1942). It has been suggested that the states might create a single board or court to administer all claims against the state and its political subdivisions, with the state perhaps assuming some of the liability of the small towns to obtain their acquiescence in the plan. *Id.* at 284.

C. *Miscellaneous Claims under Legislative Reference*

Earlier portions of this Note have demonstrated how the miscellaneous appropriation has been employed to get claims before the Board against which the one-year statute of limitations has run, or which have previously been disallowed by the Board. A third important use of such an appropriation is to obtain the Board's consideration of claims over which it has no original jurisdiction under the Act of 1945. The ordinary item included in the Legislature's miscellaneous appropriation bill is made subject to the Board's investigation of facts and determination of questions of law, and its consequent approval of the claim.[154] Such a claim, when it reaches the Board, is on a substantial par with the claims heard under the authority of the Act of 1945;[155] for the Board may deny the claim on the merits, or it may allow less than the amount named in the specific appropriation.[156]

Many of the claims referred to the Board relate to the refund of taxes to the claimant. The Board has approved, among others: (1) a refund of inheritance taxes, where recent court decisions had disclosed that there had been an overpayment by the taxpayer, and where the one year had passed during which the claimant might otherwise have obtained the refund;[157] (2) the refund of a penalty for nonpayment of income taxes over a four-year period, upon the claimant's proving that he had been a prisoner-of-war during that time;[158] (3) the refund of the price of a beer license sold to a partnership, where it was shown that the prospective business had never been opened, because of the death of one partner;[159] and (4) the refund of unemployment compensation taxes collected from schools, churches, and similar organizations, where the act under which they were collected[160] was later amended so as to make such organizations and their employees beyond its coverage, without voluntary submission.[161] However, where the Legis-

154. See, *e.g.*, Tenn. Pub. Acts 1949, c. 287, § 1 (in part): "All appropriations hereinafter made, except those for Legislative expenses, for the use of departments, definite grants, or specific public uses and purposes, shall not be paid until the Board of Claims has investigated the facts and determined the questions of law authorizing the payment and approved the same in writing. . . ."

155. For the ordinary cases tried by the Board under its original jurisdiction, each General Assembly appropriates an amount sufficient to pay the awards and expenses of the Board during the subsequent biennium. *E.g.*, Tenn. Pub. Acts 1949, c. 287, § 4, item 16.

156. *E.g.*, Tenn. Pub. Acts 1947, c. 237, § 2, item 26, appropriated an amount "not to exceed" $2,500; the Board actually allowed less than $1,000. Spencer v. Dep't of Institutions, 10 Min. Bk. 28 (Nov. 12, 1947).

157. Karsch v. Dep't of Finance & Taxation, 8 Min. Bk. 252 (Apr. 8, 1947) (under Tenn. Pub. Acts 1947, c. 237, § 2, item 23).

158. Smith v. Dep't of Finance & Taxation, 8 Min. Bk. 259 (May 6, 1947) (under Tenn. Pub. Acts 1947, c. 237, § 2, item 24).

159. McGlasson v. Tennessee, 10 Min. Bk. 186 (June 7, 1949) (under Tenn. Pub. Acts 1949, c. 287, § 10).

160. Tenn. Pub. Acts 1947, c. 29.

161. Tenn. Pub. Acts 1949, c. 20. The Miscellaneous Appropriation Bill of 1949 (Tenn. Pub. Acts 1949, c. 287, § 4, item 27) was the source of some 55 claims presented to the Board for such refunds. *E.g.*, Mid-State Baptist Hospital, Inc. v. Dep't of Employment Security, 12 Min. Bk. 18 (Sept. 2, 1949).

lature has made an appropriation for the refund of taxes, to be paid to the claimant without regard to his noncompliance with the provisions of Tennessee law as to paying taxes under protest and bringing suit for their recovery,[162] the Board has refused to approve the refund, holding the appropriation unconstitutional as class legislation.[163]

Contract claims likewise have found their way to the Board through the instrumentality of the miscellaneous appropriation, most frequently for goods furnished to the state[164] or services performed for the state.[165] Similarly, the Board has heard claims for additional compensation under a construction contract with the Highway Department because of conditions not foreseen by the parties,[166] and for damages for an alleged failure of the Highway Department to furnish a contractor with proper blueprints for the construction of a bridge.[167] Appropriations for land taken by the state, where no legal remedy for compensation remains open to the landowner, have also been subjected to the scrutiny of the Board.[168]

Injuries to prisoners and inmates of state institutions have given rise to several appropriations. Where a prisoner was injured "in the line of his duties" required by the prison authorities,[169] or through the negligence of a prison employee,[170] the Board has approved the appropriation. It has also approved an award for the death of an inmate of the Central State Hospital,

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162. TENN. CODE ANN. §§ 1790-94 (Williams 1934).

163. *E.g.*, Natural Gas Service Co. v. Dep't of Finance & Taxation, 10 Min. Bk. 51 (Jan. 13, 1948), 10 *id.* 57 (Feb. 3, 1948), 10 *id.* 131 (Nov. 9, 1948) (under Tenn. Pub. Acts 1947, c. 237, § 2, items 84, 87). See also Jones v. Tennessee, 10 Min. Bk. 166 (May 18, 1949) (under Tenn. Pub. Acts 1949, c. 287, § 5, item 6).

164. *E.g.*, Drewry v. Dep't of Highways, 10 Min. Bk. 9 (Aug. 12, 1947), 10 *id.* 40 (Dec. 2, 1947), 12 *id.* 83 (Nov. 22, 1949) (claim for value of lumber allegedly furnished for construction of bridge, heard and denied under Tenn. Pub. Acts 1947, c. 237, § 2, item 78, and Tenn. Pub. Acts 1949, c. 287, § 12); Ingle Bros. v. Dep't of Institutions, 8 Min. Bk. 126 (July 10, 1945) (claim for price of goods allegedly sold to Commission for the Blind, heard and denied under Tenn. Pub. Acts 1945, c. 177, § 2, item 62).

165. *E.g.*, Booten v. Dep't of Finance & Taxation, 10 Min. Bk. 129 (Nov. 9, 1948) (claim for commission for collecting taxes, heard and allowed under Tenn. Pub. Acts 1945, c. 177, § 2, item 23, and Tenn. Pub. Acts 1947, c. 237, § 2, item 69); Walker v. Dep't of Insurance & Banking, 10 Min. Bk. 27 (Nov. 12, 1947) (claim by widow for salary earned in 1944 by deceased husband, heard and allowed under Tenn. Pub. Acts 1947, c. 237, § 2, item 76).

166. Foster & Creighton Co. v. Tennessee, 13 Min. Bk. 41 (Oct. 10, 1950) (heard and denied under Tenn. Pub. Acts 1949, c. 287, § 5, item 38).

167. Foster & Creighton Co. v. Dep't of Highways, 8 Min. Bk. 126 (July 10, 1945), 8 *id.* 142 (Nov. 8, 1945) (heard and denied under Tenn. Pub. Acts 1945, c. 177, § 2, item 37).

168. Coffee County v. Tennessee, 12 Min. Bk. 152 (May 9, 1950), 13 *id.* 14 (Aug. 15, 1950) (claim for compensation for county school property taken into Camp Forrest, heard and allowed under Tenn. Pub. Acts 1949, c. 287, § 5, item 42); Chumbley v. Tennessee, 12 Min. Bk. 130 (Apr. 11, 1950), 12 *id.* 152 (May 9, 1950) (claim for land allegedly taken into Camp Forrest, heard and denied under Tenn. Pub. Acts 1949, c. 287, § 5, item 45).

169. *E.g.*, Guy v. Dep't of Institutions, 10 Min. Bk. 177 (May 18, 1949) (under Tenn. Pub. Acts 1949, c. 287, § 5, item 39).

170. Brown v. Dep't of Institutions, 10 Min. Bk. 29 (Nov. 12, 1947) (under Tenn. Pub. Acts 1947, c. 237, § 2, items 33, 86).

caused by injuries sustained through the negligence of an attendant.[171] And in one case, a claimant was awarded $5,000 for a wrongful conviction and incarceration.[172] There is obviously no limit to the variety of claims which could be referred to the Board by the Legislature, but the foregoing discussion indicates the types of claims which recur most often.

V. EVALUATION

Thirty years ago the primary question was, "Should the State submit to liability?" Today the question has become, "To what extent should the State assume liability, and how should governmental responsibility best be administered?"[173] In most of the states it is constitutionally possible for the legislature to authorize suits against the state. In about half of these the legislatures have provided for some form of such suits; and others have frequently authorized suit in individual cases, where the state constitution does not prohibit special legislation.[174] Some of the statutes provide for suits only in specified classes of cases,[175] *e.g.*, on particular types of contracts or on contracts generally; while others expressly provide for both contract and tort actions. And some of the statutes, although apparently worded so as to permit a wide variety of claims, have been construed to exclude tort claims.[176]

> "In New York, the broadest of all, jurisdiction extends to all cases arising from the management of canals, defects in highways, the appropriation by the State of private lands, the elimination of grade crossings, erroneous payment of taxes, contracts with the State, and torts of State officers and employees. It is noteworthy that this broad liability has not cost New York an excessive amount."[177]

As to the proper agency to hear and determine the validity of claims against the state, the commentators generally have favored the courts,

171. Thompson v. Dep't of Institutions, 10 Min. Bk. 180 (May 18, 1949) (under Tenn. Pub. Acts 1949, c. 287, § 5. item 5). On immunity of Tennessee counties and municipalities from liability in similar cases, see Howard v. Chattanooga, 170 Tenn. 663, 98 S.W.2d 510 (1936) (city held immune from liability for injuries to prisoner through negligence of employee); Johnson v. Hamilton, County, 156 Tenn. 298, 1 S.W.2d 528 (1927) (county held immune from liability for employee's negligence in caring for patient in county hospital).

172. Hill v. Dep't of Institutions, 10 Min. Bk. 169 (May 18, 1949) (under Tenn. Pub. Acts 1949, c. 287, § 5, item 52).

173. "[T]he crucial problem now is to frame the substantive law and the procedural requirements in such a way as to do justice to the individual and protect the community against imposition." Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 LAW & CONTEMP. PROB. 282, 284 (1942).

174. Borchard, *Tort Claims against Government: Municipal, State and Federal Liability*, 33 A.B.A.J. 221, 225 (1947); Shumate, *Tort Claims against State Governments*, 9 LAW & CONTEMP. PROB. 242, 253 (1942).

175. See Notes, 27 TEXAS L. REV. 337 (1949), 23 IND. L.J. 468, 469 (1948).

176. Note, *Limitations on the Doctrine of Governmental Immunity from Suit*, 41 COL. L. REV. 1236, 1245 (1941).

177. Borchard, *Tort Claims against Government: Municipal, State and Federal Liability*, 33 A.B.A.J. 221, 225 (1947). For a discussion of the workings and interpretation of the New York statute, see MacDonald, *The Administration of a Tort Liability Law in New York*, 9 LAW & CONTEMP. PROB. 262 (1942).

although they have recognized that acceptance of this idea by the states is likely to be slow.[178] They have pressed the arguments that judges are better qualified to handle the problems than are officials chosen primarily for their executive ability; that the executive officials, being burdened with other duties, must either sacrifice thoroughness or leave investigation to persons likely to be subjected to political pressure; and that uniformity of decisions can be best achieved through the judiciary.[179] It has been suggested further that, in the interest of obtaining correct decisions and speedy relief, the creation of a special court to hear such claims is preferable to giving jurisdiction to existing state courts.[180] As a part of the plans for court determination of claims, however, the various administrative departments or an official representing the state are ordinarily empowered to make settlements with claimants. Under the Federal Tort Claims Act, for example, there is a provision for administrative adjustment of claims up to $1,000, and for the compromise of claims by the Attorney General with the approval of the court.[181]

As a practical matter, most of the states have been unwilling to go beyond the setting up of administrative bodies to decide the merits of asserted liability of the state, the agencies usually being composed of several of the state's executive officers.[182] Some of these boards, as in Tennessee, have advance appropriations from the legislature to cover the awards to be made; such boards are, therefore, relatively independent.[183] Others are merely advisory bodies, the claims allowed being assembled in bill form and presented to the legislature for a vote.[184] The recommendations of these boards are

178. Borchard, *Tort Claims against Government: Municipal, State and Federal Liability,* 33 A.B.A.J. 221, 225 (1947); Shumate, *Tort Claims against State Governments,* 9 LAW & CONTEMP. PROB. 242, 257 (1942); Note, 44 HARV. L. REV. 432, 434 (1931). For models of state statutes setting up a court of claims and providing for state liability, see Borchard, *Proposed State and Local Statutes Imposing Public Liability in Tort,* 9 LAW & CONTEMP. PROB. 282, 293 (1942); Note, 9 OHIO ST. L.J. 491 (1948). For a comparison of administrative and judicial settlement of tort liabilities of municipalities, see Fuller & Casner, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437, 447, 453 (1941).

179. Oberst, *The Board of Claims Act of 1950,* 39 KY. L.J. 35, 41 (1950); Note, 44 HARV. L. REV. 432 (1931).

180. Note, *Administrative Phases of State Responsibility,* 44 HARV. L. REV. 432, 435 (1931). For a discussion of the problems of venue, jury trial, and joinder of parties which can arise where claims are heard by the courts, see *id.* at 436-47.

181. 28 U.S.C.A. §§ 2672, 2677 (1950).

182. *E.g.,* ALA. CODE ANN. tit. 55, § 333 (Cum. Supp. 1947) (director of finance, treasurer, secretary of state, state auditor); *cf.* KY. REV. STAT. ANN. § 44.070(1) (Baldwin Cum. Supp. 1951) (attorney general, commissioner of finance, judge or commissioner of Court of Appeals appointed by Chief Justice).

183. *E.g.,* ALA. CODE ANN. *tit.* § 343 (1940) (appropriation limited to $50,000); Tenn. Pub. Acts 1945, c. 73, § 11, TENN. CODE ANN. § 1034.36 (Williams Supp. 1950) (unlimited appropriation).

184. *E.g.,* Walsh, *The Ohio Sundry Claims Board,* 9 OHIO ST. L.J. 437 (1948); Note, *Limitations on the Doctrine of Governmental Immunity from Suit,* 41 COL. L. REV. 1236, 1244 (1941). "Such statutes are almost equivalent to no statute at all, because they do not define any class of action in which the state might be liable to suit. Hence, in effect, they preserve the doctrine of immunity intact."

usually accepted, however, and they make a substantial contribution in providing a uniform method of hearing claims and in lessening the political considerations usually connected with purely legislative settlement.[185] A few state legislatures, while providing for none of these methods for deciding tort claims, have authorized the purchase of liability insurance to cover the operation of motor vehicles by state employees, thus offering some measure of protection to private citizens.[186] Beyond this point, the states provide relief only through petition to the legislature for a direct appropriation, a practice which still persists in many areas despite its obvious shortcomings—the infrequency of legislative sessions, the inadequate facilities of the legislature to make investigations, and the politics which enter into the presentation and treatment of claims.[187]

The results produced by the Tennessee Board of Claims under the Act of 1945 are, on the whole, gratifying. The history of the Board, from its inception in 1931, suggests that the Legislature has felt its way cautiously in the relatively unexplored area of permitting claims against the state; each extension of the Board's powers has been followed by a waiting period for a view of the results. A substantial tradition had been built up by the Board by the time of the 1945 legislation, and its subsequent record probably gives an accurate indication of what may be expected of it under its present organization and mode of procedure. It provides a simple, speedy, and inexpensive method of hearing numerous small claims, and has not shown itself incapable of coping with the large and more difficult claims. There are persons, of course, whose fear of administrative bodies and

185. "[N]ine States have adopted an administrative settlement by a Claims Commission. Such a commission is likely to act more judicially than a legislative committee. While its findings are as a rule advisory only and a dissatisfied claimant can present his claim to the legislature or a Court, [its] finding is usually upheld. The cost of administration is trifling.

"The administrative board . . . may play an important part in the administration of tort claims. It could unify the practice throughout the State, make small administrative settlements so as to relieve the Courts, institute uniform investigating methods, adopt uniform rules . . ., and in other ways effectively regularize the practice and administration of tort liability." Borchard, *Tort Claims against Government: Municipal, State and Federal Liability*, 33 A.B.A.J. 221, 225 (1947). See also Shumate, *Tort Claims against State Governments*, 9 LAW & CONTEMP. PROB. 242, 251 (1942).

186. See *e.g.*, Note, 23 IND. L.J. 468, 469 (1948). The Indiana statute, enacted in 1941, requires a provision in the policy that the insurer will not raise governmental immunity as a defense. This, of course, does not operate as a waiver of the state's immunity. It is generally conceded that the state has no authority to purchase liability insurance without such a statute.

In Tennessee it has been held that a statute authorizing counties to employ drivers for school buses, and to require such drivers to make bonds for faithful performance, also authorizes the counties to purchase liability insurance to cover negligence of the drivers. Rogers v. Butler, 170 Tenn. 125, 92 S.W.2d 414 (1936).

187. Shumate, *Tort Claims against State Governments*, 9 LAW & CONTEMP. PROB. 242, 249 (1942); Note, 44 HARV. L. REV. 432, 435 n. 23 (1931). "It is important to escape so far as possible the delay and the unsavory political flavor so conspicuous in the handling of petitions to the legislature. . . . That body's function is to grant relief only in those exceptional cases where moral and legal obligations diverge."

whose devotion to the courts grow proportionately stronger as the amount of money involved increases; and it is entirely conceivable that Tennessee law-makers in the future will find it advisable at least to provide a method of review by the courts over the decisions of the Board.[188]

At present, the permanent files maintained in the offices of the Board are comprised of the Minute Books, which contain brief entries of the Board's orders in all cases, and the complete "record" of all claims which have been denied by the Board. Where a claim is allowed, the Board must forward the record in the case, together with a request for the issuance of a voucher payable to the claimant, to the office of the Director of Accounts; and the record thereafter goes to the State Archives. It would seem that the Board has now reached the point in its development where precedent could be of some value in the determination of a particular claim, especially in view of its fluctuating membership. For this reason, the Board might well consider keeping more readily available a file of copies of the records of all claims in tort under section 5 of the Act, both for its own reference and for the benefit of claimants and their counsel, since the minute entries are too brief to be very helpful in this regard.

The practice of legislative reference of claims to the Board seems to have provided an effective method of judging their merit, beyond anything which the ordinary machinery of the Legislature could produce. There would appear to be ample justification for such practice with regard to matters barred by the statute of limitations or outside the Board's jurisdiction. But the Legislature fails to give due deference to the Board's decisions when it sends back for retrial those claims which already have received full consideration by the Board.[189]

Some thought should be given to a possible expansion of the jurisdiction of the Board. The provision for claims growing out of negligence in the construction or maintenance of state highways, buildings and other properties, and in the operation of state automobiles and equipment, is somewhat more restrictive than the provisions of many states. The statement of the Board's jurisdiction might be made in a general provision for claims arising out of negligence of the state, any of its departments or agencies, or any of its officials or employees while acting within the scope of their employ-

188. See KY. REV. STAT. ANN. § 44.140 (Baldwin Cum. Supp. 1951), providing for appeal to the circuit court "from all awards or judgments of the Board where the amount in controversy, exclusive of interest and costs, is over $50.00."

189. "It is likewise highly important that the decision be by a tribunal in which the state legislative body has confidence. . . . If the claim is rejected, neither political considerations nor distaste for the rule of law controlling the case should carry weight with the legislature except under the most extraordinary circumstances." Note, *Administrative Phases of State Responsibility,* 44 HARV. L. REV. 432, 435 (1931).

ment;[190] and it might be made to include enumerated types of claims, such as claims for injuries to inmates of state institutions, claims based upon specified types of contracts, and the like, many of which are now referred to the Board by the Legislature.[191] The state needs also to give attention to the administration of claims against its counties and municipalities; the suggestion has been offered that the jurisdiction of the state Board be extended "to permit it to decide claims for every type of injury caused individuals by any officer of the state or subdivision of the state."[192] There is much to be said for such a plan; but if it is ever adopted, the Board of Claims will have to be composed of full-time members, and not of executive officials whose primary duties are elsewhere.

A growing docket of claims and a continuing pressure to bring about greater assumption of responsibility by the state may ultimately necessitate material alterations in the structure of the Board. Although future experiments may bring improvements, the Tennessee Board of Claims already has demonstrated real progress in providing a fair hearing to the citizen who asserts that he has a just claim against the state.

GEORGE H. CATE, JR.

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190. This is substantially the statement of the jurisdiction of the Kentucky Board of Claims. See KY. REV. STAT. ANN. § 44.070(1) (Baldwin Cum. Supp. 1951).

191. The Alabama Board of Adjustment, for example, has jurisdiction over claims for damages to person or property for injury caused by the state or any of its agencies, claims for personal injury or death of state employees and prisoners in state penitentiaries, claims for injuries caused by officers in attempting to recapture escaped convicts, claims arising out of contracts, and claims for overpayments to state agencies. The Alabama statute enumerates several exceptions to the Board's jurisdiction, and provides that it shall not hear claims which are cognizable in the courts. ALA. CODE ANN. tit. 55, § 334 (1940).

192. Note, *Tort Liability of Public Officers in Tennessee,* 21 TENN. L. REV. 306, 314-15 (1950). Professor Borchard, also, has suggested the administration of tort claims against the state and its political subdivisions through a single court or administrative body, with the state perhaps assuming a share of the liability of the small towns. *Proposed State and Local Statutes Imposing Public Liability in Tort,* 9 LAW & CONTEMP. PROB. 282, 284 (1942).