

December 2016



TEXAS TORT CLAIMS ACT

OR
“THE GAME OF
THRONES”



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Michael Shaunessy

I. SOVEREIGN IMMUNITY IS THE STARTING POINT

- Purpose of Sovereign Immunity:
 - Sovereign immunity ... “protects the public ... from ‘boneheaded’ acts.” *Brown & Grey*
 - Sovereign Immunity protects diversion of limited resources (tax dollars) from intended purpose.
 - As applied to local governmental entities Sovereign Immunity is called Governmental Immunity



I. SOVEREIGN IMMUNITY IS THE STARTING POINT

- To get past Sovereign Immunity a plaintiff must plead and prove:
 - A waiver of Immunity from Suit
 - The key to the courthouse
 - Establishes jurisdiction
 - Cannot be waived
 - A waiver of Immunity from Liability
 - The key to governmental treasury
 - Can be waived if not raised



I. SOVEREIGN IMMUNITY IS THE STARTING POINT

- The TCA is a limited waiver of sovereign immunity and strictly construed.
 - Unless the TCA contains a clear and unambiguous waiver of immunity, the Act is construed in favor of finding no waiver.
 - If Plaintiff cannot prove elements of claim then suit is barred by immunity from suit.



II. TORT CLAIMS UNDER TCA

A. Section 101.021 Waives Immunity for:

1. Injuries from Personal Property arising from:
 - A. Condition or Use of
 - B. Tangible Personal Property
 - C. For Proximately Caused Injuries
2. Injuries from Condition of Real Property
 - A. With different standards of care for Ordinary Defects and Special Defects
3. Operation of Motor Driven Equipment or Automobiles.



B. PERSONAL PROPERTY LIABILITY

1. Condition or Use Liability

- "Condition" and "Use" are separate basis of liability;
- The Supreme Court has asked for clarification, but the Legislature has not amended the TCA.

2. "Condition" of Personal Property Liability:

- This is not a form of vicarious liability for the acts of employees/agent.



B. PERSONAL PROPERTY LIABILITY

3. Condition:

- "Condition" liability is based on "either an intentional or an inadvertent state of being." *Sparkman v. Maxwell*, (Tex. 1975).
- Allegations that two pit bulls escaped through defective fence and attacked two children were sufficient to allege a "condition" of property claim. *Michael v. Travis Cnty. Hous. Auth.*, Austin CA 1999.



B. PERSONAL PROPERTY LIABILITY

4. “Use” of Personal Property Liability

- “Use” is liability predicated on vicarious acts of employees/agents;
- “Use” means “to put or bring into action or service; to employ for or apply to a given [and INTENDED] purpose.” *Tex. Dep’t of Crim. Justice v. Miller*, 51 S.W.3d 583, 588 (Tex.2001).
- Non-use of property is not actionable.

Robinson and *Lowe* are no longer good law.



B. PERSONAL PROPERTY LIABILITY

5. Use of Personal Property Liability

- Property must be “used” for intended purpose.
- Property must be “used” by a governmental employee or agent.
 - Assisted Suicide; *Rusk State Hosp.*
 - Sexual Assault; *TDCJ. v Campos*
 - 911 Call; *Dallas v. Sanchez*



B. PERSONAL PROPERTY LIABILITY

6. “Use” of Property Liability

- The Personal Property must be “Tangible”
- Reducing information to writings on paper does not make the information “tangible personal property.”
 - Accordingly, the failure to read medical records or misinterpretation of test results are not actionable. *University of Tex. Med. Branch v. York*
 - Release of indictment is not actionable. *Dallas County v. Harper*, (Tex. 1995)



B. PERSONAL PROPERTY LIABILITY

7. Injuries Must Be Proximately Caused

- Plaintiff must prove cause in-fact and foreseeability
- Property must do more than furnish the condition that makes the injury possible. *Bossley*
 - Door left open that allowed patient escape, *Bossley*,
 - Cell with telephone cord, *Posey*,



C. REAL PROPERTY LIABILITY

1. Ordinary Premises Defect/Licensee-Licensors Standard

This requires proof of:

- Existence of a Dangerous Condition
- Knowledge
 - Must prove entity had ACTUAL knowledge of the condition, and
 - Plaintiff DID NOT have actual or constructive knowledge of the condition.
- Governmental entity failed to warn of OR make the defect safe.



C. REAL PROPERTY LIABILITY

2. Special Defect-Invitee Standard of Care

- TCA likens special defects to “excavations or obstructions”
- Courts consider:
 - Size of condition
 - Creates an unexpected and unusual danger
 - For ordinary users of the roadway
- Deer hunter case
- Ice on bridge case
- Safety arm laying off roadway case



C. REAL PROPERTY LIABILITY

3. Special Defect-Invitee Standard of Care

- Special Defects are the exception

Most defects are ordinary premises defects

- Governmental entity can be liable for failing to act within a reasonable time of having constructive knowledge of condition
 - Plaintiff's knowledge is not a bar to recovery
 - Duty can be discharged by warning of condition



D. LIABILITY FOR MOTOR DRIVEN EQUIPMENT

1. Must establish that:

- Damages arise from operation of operation of a motor-driven vehicle or motor-driven equipment; and
- The employee would be liable at common law.
 - This means that the claim would not be barred by official immunity.



D. LIABILITY FOR MOTOR DRIVEN EQUIPMENT

2. Defeating Official Immunity

- More than proving negligence
- Official Immunity bars claims where
 - Employee carrying out Discretionary Activity
 - Employee acted in good faith
 - BUT Defendant has the burden of proof to establish Official Immunity



D. LIABILITY FOR MOTOR DRIVEN EQUIPMENT

3. Good Faith Test—objective legal reasonableness—would any officer do it?
 - “Protects all but the plainly incompetent” or knowing violation of law
4. In Officer involved accident cases, Officer must prove she considered:
 - Need to act as he things best;
 - Risk to the Public of acting
 - Other alternatives



III. EXCLUSIONS FROM LIABILITY

A. TCA Expressly Excludes Certain Activities from Liability.

B. Actions before Jan. 1, 1970

- Buildings that pre-date the TCA

C. Discretionary Act

- Construction of roads

D. Intentional Torts are Excluded

- Assisted Suicide; *Rusk State Hosp.*
- Sexual Assaults; *TDCJ. v Campos*
- Excessive Force; *Gordon*
- *But cannot allow third parties commit intentional torts.*
Delaney v. UH



IV. ELECTION OF REMEDIES

A. Section 101.106

- Purpose to ease “burden on governmental units and their employees in defending duplicative claims, by favor[ing] the expedient dismissal of ... employees when suit should have been brought against the government.”
Cannon
- Forces Plaintiff to make an election of whether to sue individuals or entities.
- Settlement and judgment will bar claims against other potential parties.



B. SECTIONS 101.106(A)(B) TCA

- (a) Suing governmental unit is an *irrevocable election* barring claims against employees regarding same subject matter.
- (b) Suing employee is an *irrevocable election* barring claims against governmental entity regarding same subject matter.



C. SECTION 101.106(C)(D) TCA

- (c) Settlement bars suit against employee regarding the same subject matter
- (d) Judgment against an employee bars suit against the governmental unit
 - Ruling on a plea to the jurisdiction is a judgment



D. SECTION 101.106(E) TCA

- (e) If the plaintiff sues both the entity and its employees, the suit is against only the entity.
- Employees will be immediately dismissed on motion of the governmental entity.



E. SECTION 101.106(F) TCA

- When a suit is brought against an employee for actions within course and scope of employment, and could have been brought under the TCA, the employee can file a motion to substitute the entity.
- If the employee files the motion to substitute, the plaintiff can either:
 - Agree to the motion and join the entity; or
 - Contest that the employee is liable in his individual capacity. *Texas Adjunct Gen'l's Office*



E. SECTION 101.106(F) TCA

- Statute of Limitations:
 - Statute of limitation is tolled if entity is named in a timely fashion. *Bailey*
- Look at Substance of allegations:
 - If the substance of the claims are based on work in the course of duties, then it is a claim in the official capacity. *Alexander v. Walker*
- Could have been brought under the TCA:
 - Employee is dismissed regardless of whether there is waiver of entity's immunity under the TCA. *Franka*



E. SECTION 101.106(F) TCA

- Dismissal for want of jurisdiction may be a judgment under sub-section (d)

Thus, a plaintiff bringing suit puts other claims/suits at risk

- Courts have refused to allow a plaintiff to dismiss once a plea/motions to dismiss are filed



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Presented By:

Michael Shaunessy

McGinnis Lochridge, LLP

600 Congress Avenue, Suite 2100

Austin, Texas 78701

(512) 495-6000

mshaunessy@mcginnislaw.com

www.mcginnislaw.com

