GOVERNMENT LIABILITY
(TEXAS TORT CLAIMS ACT)

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CHAPTER 13

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ATTORNEY - Weinstein, Sommerman, Bagelman, Link & Moore, L.L.P. (Dallas, Texas)
Responsibilities: Plaintiffs' personal injury practice.
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ATTORNEY - Law Offices of Windle Turley, P.C. (Dallas, Texas)
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1985 - 1992

ASSISTANT ATTORNEY GENERAL - Office of the Attorney General, Claims Section (Austin, Texas)
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1984 - 1985

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1983 - 1984

ASSISTANT DISTRICT ATTORNEY - District Attorney's Office (Austin, Texas)
Responsibilities: Prosecuted felony criminal cases, including plea-bargaining, jury trials, trials before the court and other hearings and appellate arguments.
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1981 - 1982

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Association of Trial Lawyers of America
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Dallas Bar Association "Trial By Jury" presentations (1988, 1989)

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Dallas Bar Association "Mini-Skills" Course (1990) - Instructor

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GOVERNMENT LIABILITY

Edward H. Moore

I. THE ACT

Section 101.021 of the Texas Tort Claims Act sets forth the grounds for imposing liability upon a governmental unit:

> A governmental unit in the state is liable for:
>
> (1) Property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) The property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> (B) The employee would be personally liable to the claimant according to Texas law; and
>
> (2) Personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1986). Consequently, except as specifically waived by the Act, a governmental unit is immune from tort liability under the doctrine of sovereign immunity. If the Act does not apply, the government is immune unless some other constitutional or statutory authority applies. Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976).

There is a $100,000.00/$300,000.00 limit for local units of government, but the limit for municipalities and state units of government is $250,000.00/$500,000.00, Tex. Civ. Prac. & Rem. Code Ann. § 101.023 (Vernon Supp. 1991).

II. OVERVIEW OF THE TEXAS TORT CLAIMS ACT

The Texas Tort Claims Act (TTCA) has been amended twice since its original enactment:

(1) The original enactment of the Act in 1969. Tex. Rev. Civ. Stat. Ann. art. 6252-19 (1969) (now repealed). See Appendix A.
(2) Recodification in the Texas Civil Practices and Remedies Code (TCPRC). Tex. Civ. Prac. & Rem. Code Ann. § 101.001-101.109 (Vernon 1986). See Appendix B. (Intended as a simplified restatement of the old law without substantive change but requiring judicial interpretation in at least one instance to avoid a new limitation on the duty owed.) See Bryant v. Metro. Transit Auth., 722 S.W.2d 738, 740 (Tex. App.--Houston [14th Dist.] 1986, no writ) (Mandates all revisions to be without substantive change).
(3) The amendments to § 101.023 and § 101.0215 as a part of "tort reform" and dealing with municipal liability. See Appendix C.

III. THE DUTY OWED

Liability of the state, municipality or local governmental unit arises from acts or omissions by its officers or employees within the scope of their employment. Liability cannot arise from acts by agents or employees of independent contractors whom the governmental unit has no legal right to control. See Tex. Civ. Prac. & Rem. Code Ann. § 101.001 (Vernon 1986). If a private person, similarly situated, would not be liable for the alleged act or omission, this rule of law will be applied to the governmental unit as well. City of Denton v. Page, 701 S.W.2d 832, 835 (Tex. 1986) (where no danger created, no ownership or control of premises, there is no act for which private person would be liable).

The original Act provided that it was to be "liberally" construed to effectuate its purposes. Tex. Rev. Civ. Stat. Ann. Art. 6052-19 § 13 (1969). See Appendix A. Robinson v. Cent. Texas MHMR Ctr., 780 S.W.2d 169, 170 (Tex. 1989) (liberally construed); Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) (liberally construed); Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976) (liberally construed); Mount Pleasant I.S.D. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989) (explicit waiver required).

IV. GOVERNMENTAL LIABILITY FOR ACTS: EMPLOYEES V. INDEPENDENT CONTRACTORS

The Act defines "employee" as:

> a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

Tex. Civ. Prac. & Rem. Code Ann. § 101.001(1) (Vernon 1997). Careful consideration must be given to both

pleading and proving (early on in the litigation) that an employee committed the offending conduct.

In Harris v. Galveston County, 799 S.W.2d 766 (Tex. App.--Houston [14th Dist.] 1990, writ denied), the plaintiff initially alleged only "negligent monitoring of physicians" against the county. After special exceptions were sustained for failure to state a cause of action against the physician defendant, the plaintiff failed to amend and allege negligence on the part of an employee of the county. As the Court of Appeals viewed the physician to be an independent contractor, the granting of summary judgment after the failure to allege that the physician was an employee was upheld.

In Mitchell v. Shepperd Memorial Hospital, 797 S.W.2d 144 (Tex. App.--Austin 1990, writ denied), Clara Mitchell brought suit against the county hospital alleging negligent care by an emergency room physician and radiologist. The trial court entered summary judgment in favor of the hospital. The court of appeals held that the statute making a governmental unit liable for "personal injury and death so caused by a condition or use of tangible personal or real property" requires a wrongful act or omission or negligence of an employee acting within the scope of employment. Mitchell sought care in the emergency room in 1982 for a severe hip injury. Mitchell did not request any physician by name, and was treated by an emergency room physician and a radiologist, and the hospital billed her directly for services.

Mitchell brought suit against the hospital alleging that the treating physicians, as agents or employees of the hospital, were negligent in their care. The hospital denied liability on any alleged negligent acts on the part of doctors and moved for summary judgment. The summary judgment evidence established that the hospital was owned and operated by the Burnet County Hospital Authority, as a general authority established pursuant to state law. At the hearing on the hospital's motion, the trial court found that the hospital was a "governmental unit" and that the treating physicians were not "employees" of the hospital as those terms are defined in the Tort Claims Act. The trial court ruled that because the hospital did not waive sovereign immunity except with regard to the acts or omissions of employees, it was not liable for the treating physicians in this case. (Emphasis added). Plaintiff argued that the doctrine of ostensible agency applied inasmuch as the Tort Claims Act clearly provides that the hospital is liable to her "if the hospital would, were it a private person, be liable to her according to Texas law." Similarly, Mitchell contended that even if the treating physicians were not employees under the Act, that the doctrine of ostensible or apparent agency should extend to the treating physicians as independent contractors of the hospital. The court implied that ostensible agency was not available due to the Act's definition of employee. The court concluded the hospital established its sovereign immunity as a matter of law and affirmed the trial court's summary judgment. See Murk v. Scheele, 120 S.W.3d 865 (Tex. 2003) (holding "(1) medical student, who was paid by county health district, was not hospital's 'employee,' . . . , but (2) necessity for neurosurgeon's professional judgment did not vitiate hospital's right to control details of his practice, such that neurosurgeon did not qualify as hospital's 'employee,' under Tort Claims Act").

In Harris County v. Dillard, the Texas Supreme Court held that a volunteer reserve deputy who was not being paid at the time he was involved in an off-duty accident could not subject the county to liability. Harris County v. Dillard, 883 S.W.2d 166 (Tex. 1994). The court relied upon the definition of employee set out in §101.021(1) of the Act, which defines an employee as "a person, including an officer or agent, who is in the paid service of a governmental unit." Tex. Civ. Prac. & Rem. Code Ann. §101.001(1). Additionally, an employee may serve two masters at the same time and, thus, give rise to liability under the Tort Claims Act. White v. Liberty Eylau Sch. Dist., 880 S.W.2d 156 (Tex. App.--Texarkana 1994, writ den'd). A school bus driver hired by a non-defendant school district was found to be acting within the scope of his employment for a neighboring school district which had the authority to recommend the hiring and firing of bus drivers and other sufficient control over the drivers to satisfy the court that he was an employee at the time of the incident. See Bishop v. Texas A&M Univ., 35 S.W.3d 605 (Tex. 2000) (holding "professors who acted as faculty advisors to drama club were university employees at that time, for purposes of Tort Claims Act");but cf. Texas A&M Univ. v. Bishop, 156 S.W.3d 580 (Tex. 2005) (holding that a director of a drama club play was an independent contractor under the Tort Claims Act).

A law firm that collects taxes for a municipality may also be able to cloak itself in the limited waiver of sovereign immunity provided by the Act. To do so, however, the firm would have to show that it is acting as an agent of the municipality and not as an independent contractor. Gonzalez v. Heard, 923 S.W.2d 764, 766 (Tex. App.--Corpus Christi 1996, writ denied).

V. LIABILITY FOR "OPERATION OR USE" OF MOTOR-DRIVEN VEHICLES OR MOTOR-DRIVEN EQUIPMENT

A. What Constitutes a Motor-Driven Vehicle or Motor-Driven Equipment?

Although the TTCA does not define a motor-driven vehicle, other Texas statutes define a "motor vehicle" as any self-propelled mechanical device, in, upon or by which a person may be transported on a public highway

and which is designed for highway use. See Tex. Rev. Civ. Stat. Ann. Art. 6701d-11 § 1, cited in Brookshire v. Houston Indep. Sch. Dist., 508 S.W.2d 675, 677 (Tex. App.--Houston [14th Dist.] 1974, no writ) (a forklift is not a motor-driven vehicle but is motor-driven equipment); see also Slaughter v. Abilene State Sch., 561 S.W.2d 789, 792 (Tex. 1977) (motor vehicle means "all classes of self-propelled vehicles not operating on stationary rails or tracks" and includes a tractor).

Similarly, "motor-driven equipment" is also not defined in the Act except to exclude liability in two instances:

(1) Medical equipment, such as iron lungs, used in hospitals;
(2) Flood gate or water release equipment used by river authorities.

The flood gate and water release equipment exception was held to preclude liability in a case alleging damage to real property. Bennett v. Tarrant County Water Control & Improvement Dist. No. 1, 894 S.W.2d 441 (Tex. App.--Fort Worth 1995, no writ); see also Texas Nat. Res. Conservation Comm'n v. White, 46 S.W.3d 864 (Tex. 2001) (holding "stationary electric motor-driven pump was 'motor driven' equipment").

The Fort Worth Court of Appeals concluded that a sailboat is not a "motor vehicle" under the Act. Ozolins v. North Lake Cmty. Coll., a Div. of Dallas County Cmty. Coll. Dist., 805 S.W.2d 614 (Tex. App.--Fort Worth 1991, no writ). A wrongful death action was brought against the community college arising out of the death of a student who fell from a sailboat used in the college's sailing course. The trial court entered summary judgment in favor of the college. The court of appeals held that a sailboat is not a "motor vehicle" for purposes of the exception to the community college's immunity from liability under the Tort Claims Act for operation or use of a motor vehicle, even though the sailboat contained a motor. See Tex. Rev. Prac. & Rem. Code Ann. § 101.051 (Vernon 1986).

Electric motors which pressurize water lines are also not actionable "motor-driven equipment" under the Act. Schaefer v. City of San Antonio, 838 S.W.2d 688, 693 (Tex. App.--San Antonio 1992, no writ). In Schaefer, the court of appeals held that electric motors which pressurize water lines and forced water out of a break in a water main were not the kind of motor-driven equipment contemplated under § 101.021(1) of the Act.

B. What Constitutes "Operation or Use" of Motor-Driven Vehicles or Equipment?

1. The Jackson Definition for "Operation or Use"

Since neither "operation" nor "use" is defined in the Act, one court adopted the common and ordinary meaning of the words holding that "operation" means "the practical application of principles or processes of operating a motor vehicle", and "use" means "the act or practice of employing a motor vehicle." Jackson v. City of Corpus Christi, 484 S.W.2d 806, 809 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.) (citing Webster's Dictionary and Satterfield v. Satterfield, 448 S.W.2d 456, 459 (Tex. 1969)).

The Texas Supreme Court subsequently modified the Jackson definition, adopting the following definitions:

(1) "Operation" refers to "a doing or performing of a practical work"; and
(2) "Use" means "to put or bring into action or service; to employ for or apply to a given purpose."

Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989).

The Supreme Court has apparently grafted a new requirement on this portion of the statute. In LeLeaux v. Hamshire-Fannett Independent School District, 835 S.W.2d 49 (Tex. 1992), the requirement that an employee use or operate a motor vehicle or motor-driven vehicle was discussed. (Emphasis added.) Monica LeLeaux was a student taking part in a band trip sponsored by the Hamshire-Fannett Independent School District. Ms. LeLeaux stood up quickly while entering the doorway of her school bus' open emergency exit, striking her head on top of the open doorway. The bus was parked, not running, and the bus driver was not present at the time of the accident.

Joyce LeLeaux, Monica's mother, acting as next friend, then brought an action against the school district and the driver of the bus seeking damages for personal injuries under the Tort Claims Act. The trial court granted the school district's motion for summary judgment. The Texas Supreme Court affirmed and held that "[w]hile the statute does not specify whose operation or use is necessary--the employee's, the person who suffers injury, or some third party--we think the more plausible reading is that the required operation or use is that of the employee."

2. "Operation or Use" May Include the Failure to Use or Misfeasance.

Applying the "operation or use" of motor vehicles to a misfeasance/non-use theory, one court held that the failure of a school bus driver to activate flashers on a bus before stopping and discharging children raised a fact issued as to liability of a school district for the ensuing child/vehicle collision. Hitchcock v. Garvin, 738 S.W.2d 34, 35 (Tex. App.--Dallas 1987, no writ) (holding these

facts constitute an "act or omission arising from" the operation or use of a motor-driven vehicle). The recent holding in Robinson that "use" of tangible property also includes "non-uses" may be applicable to motor vehicles. Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989) (citing, Beggs v. Texas Dep't of Mental Health & Mental Retardation, 496 S.W.2d 252, 254 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.); see also Robinson v. Cent. Texas MHMR, 780 S.W.2d 169, 171 (Tex. 1989) ("use of tangible property" under TTCA includes "non uses" such as failure to provide a life preserver). However, all of these cases are called into question by virtue of the Supreme Court's ruling in Kassen v. Hatley. In Hatley, the Court found that the non-use of available drugs during emergency medical treatment was not an actionable use of tangible personal property under the Act. Kassen v. Hatley, 887 S.W.2d 4, 14 (Tex. 1994); see also Texas Nat. Res. Conservation Comm'n v. White, 46 S.W.3d 864 (Tex. 2001) (holding that "damages resulting from removal of pump did not result from 'operation or use' of pump").

3. Whether School Districts Owe a Lesser Duty for Their "Operation or Use" of Motor Vehicles.

School districts [and junior college districts] receive special treatment under the Tort Claims Act. Their liability under the Act is limited "as to motor vehicles." See Tex. Civ. Prac. & Rem. Code Ann. § 101.051 (Vernon 1986). This provision exempts school districts from liability for the condition or use of tangible property or premise defects. See Greenhill & Murto, Governmental Immunity, Texas L. Rev. 462, 468 (1971) (probably the most significant concessions in the original Act were achieved by school districts). Thus, not only do school districts have limited liability as to defects on their premises, to the extent any theory of use of tangible property could otherwise be combined to establish liability associated with the use of motor vehicles, a school district's duty is lessened in its use of motor vehicles, as well. Moreover, school districts do not have any duty regarding the "operation or use" of motor-driven equipment or motor-driven vehicles that are not motor vehicles. Compare Tex. Civ. Prac. & Rem. Code Ann. § 101.501 (Vernon 1986) (formerly art. 6252-19 § 19A) with Tex. Rev. Civ. Prac. & Rem. Code Ann. § 101.021(1)(A) (Vernon 1986) (formerly art. 6252-19 § 3).

The Texas Supreme Court has interpreted the § 101.501 language "except as to motor vehicles" to create liability of school districts for "damages caused by negligence . . . in circumstances relating to the use, maintenance or operation of motor vehicles." Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617, 619 (Tex. 1987).

One case decided prior to Hopkins interpreted the language "except as to motor vehicles" as meaning "that a person must be injured by a motor vehicle in order to recover from a school district." Bryant v. Metro. Transit Auth., 722 S.W.2d 738, 741 (Tex. App.--Houston [14th Dist.] 1986, no writ) (dicta in distinguishing the holding in Estate of Garza v. McAllen Indep. Sch. Dist., 613 S.W.2d 526, 528 (Tex. Civ. App.--Beaumont 1981, writ ref'd n.r.e.). Another court, in holding that an assault on a school bus did not arise from operation or use of the school bus, reasoned that the Legislature, with its special treatment of school districts, did not "intend to expose [them] to unlimited liability for stabbings on school buses while denying such claims for stabbings on school grounds." Estate of Garza v. McAllen Indep. Sch. Dist., 613 S.W.2d 526, 528 (Tex. Civ. App.--Beaumont 1981, writ ref'd n.r.e.) (the dissent strongly contended that this holding erroneously limited "operation or use" to incidents involving driving or collisions).

In Heyer v. North East Independent School District, 730 S.W.2d 130, 132 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.), a student waiting to board a school bus was struck by another student who lost control of his own car in the school parking lot while power-braking (pushing on the brake and accelerating simultaneously). A summary judgment for the school district was upheld in the face of allegations of improper control and supervision of the parking lot, the students and the traffic. The court reasoned that this did not constitute negligence arising from the "use or operation" of a motor vehicle where the car was not owned or operated by the district or its agent.

VI. LIABILITY FOR "CONDITION OR USE" OF TANGIBLE PROPERTY, REAL OR PERSONAL.

A. The Statutory Language.

The Act waives immunity and subjects the governmental unit (other than school districts and junior colleges) to liability for personal injury and death (but not property damages) proximately "caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1986) (formerly art. 6252-19 §3) (the pertinent original language read, "caused from some condition or some use of tangible property, real or personal, under circumstances where such unit of government, if a private person, would be liable").

B. What is the Meaning of "Condition or Use" of Tangible Property?

1. The Definitions for "Condition or Use" of Tangible Property.

If "some condition" of property, real or personal, is the basis of liability, the "condition" must render the property "defective or inadequate" and this "condition" must contribute to the claimant's injuries. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983). Where "use" of property is relied upon, the claimant need only establish that the use of property was "wrongful" and that this "wrongful use" contributed to his/her injuries. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983).

2. An Error in Judgment must Involve a "Condition or Use" of Property.

The Texas Supreme Court held that a cause of action for "use of tangible property" was stated against the hospital district for allegedly "misusing the electro cardiographic equipment by improperly reading and interpreting" the graphs and charts by an emergency room physician who, despite findings on the graph of a classic pattern of myocardial infarction, sent Salcedo home where he died that day from a "heart attack". Liability resulted where an error in judgment was combined with wrongful use of property. The death was held to be "caused by the negligence of the hospital's employees in the use of tangible property," although the property alone was not defective. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983).

When the claimant alleged only an error in judgment by the Texas Department of Mental Health & Mental Retardation in transferring an extremely violent and dangerous person to a nursing home, the court concluded that this allegation did not reasonably involve negligent use of tangible property although the transferee had doused a private nursing home co-patient with lighter fluid and ignited her. Stated another way, MHMR's alleged negligence was held not to have a close enough factual nexus to the use of property. Beggs v. Texas Dep't of Mental Health & Mental Retardation, 496 S.W.2d 252 (Tex. Civ. App.--San Antonio 1973, writ ref'd); see also Texas A&M Univ. v. Bishop, 156 S.W.3d 580 (Tex. 2005) (holding that "faculty advisors' alleged failure to properly supervise the props that the director chose [for a drama club play] does not constitute a use of tangible personal property"); San Antonio State Hosp. v. Cowan, 128 S.W.3d 244 (Tex. 2004) (holding "that merely providing someone with personal property that is not itself inherently unsafe is not 'use' of the property"); Texas Dep't of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002) (holding "a speed limit sign that accurately reflected the legal speed limit for area did not amount to a 'condition' of the sign"); Texas Dep't of Criminal Justice v. Miller, 51 S.W.3d 583 (Tex. 2001) (holding "plaintiff's complaint only alleged negligence and not 'use' of tangible property that 'caused' injury," where failure to adequately evaluate plaintiff's medical condition resulted in a misdiagnosis).

The combination of an error in judgment in connection with the use of tangible property resulted in liability for the University of Texas when a volunteer track and field official was struck in the face by a shotput as a result of the alleged failure of UT officials "to supervise the use of real and personal property (the shotput and the use by athletes of the shots themselves)." Smith v. Univ. of Texas, 664 S.W.2d 180, 184, 187-188 (Tex. App.--Austin 1984, writ ref'd n.r.e.).

3. Practice Pointer: Pleading must Allege a "Condition or Use" of Property That Caused Injury.

The allegation of use of property absent an allegation that the use of property caused injuries will not state a cause of action for "use of tangible property." Russell v. Dep't of Human Res., 746 S.W.2d 510, 513 (Tex. App.--Texarkana 1980, writ denied). Thus, where parents and grandparents alleged that they were wrongfully accused and investigated for child abuse, pleadings which only imply the use of computers, telephones and report forms were insufficient to state a claim.

In a case involving the loss by a lab technician of plaintiff's eye following surgery, plaintiff alleged both a defective condition of property and negligent use of property. Plaintiff alleged negligent acts or omissions in failing to have a screen over the sink drain, failing to have a cover over the container in which the eye was deposited, and in allowing the gauze cover over the container to come off. Mokry v. UT Health Science Ctr., 529 S.W.2d 802, 804 (Tex. Civ. App.--Dallas 1975, writ ref'd n.r.e.).

A cause of action arising from a "condition" of property is stated where it is alleged that a drama student's injury was caused by the use of inappropriate property in requiring him to act out a scene where he must fall with a glass in his hand. Christilles v. Southwest Texas State Univ., 639 S.W.2d 38, 41 (Tex. App.--Austin 1982, writ ref'd n.r.e.).

C. Failure to Provide (or Non-use of) Property.

The Texas Supreme Court has held that the non-use of available medication during emergency medical treatment is not actionable. Kassen v. Hatley, 887 S.W.2d 4,14 (Tex. 1994). The medication had been confiscated from the plaintiff and was not returned to her to allegedly control her mental illness before she was released; she was killed when she ran out in front of a truck. This case states further that the supreme court has never held that non-use of property can create a waiver

of sovereign immunity. Accord Bossley v. Dallas County Mental Health & Mental Retardation, 934 S.W.2d 689, 694 (Tex. App --Dallas 1995, writ dism'd). Kassen's holding with the non-use of available medication is, arguably, inconsistent with prior supreme court holdings that were not specifically overruled in Kassen. For example, in Robinson v. Central Texas MHMR, the failure to provide a life preserver to a known epileptic which resulted in death was found to be a "use" under the Act. Robinson v. Cent. Texas MHMR, 780 S.W.2d 169, 170 (Tex. 1989). And, in Lowe v. Texas Tech University, the plaintiff's allegations of the furnishing of defective football protective equipment, **as well as** the failure to furnish readily available protective items was found to be actionable as a "use" of tangible property. Lowe v. Texas Tech Univ., 540 S.W.2d 297 (Tex. 1976).

This issue was recently revisited in Kerrville State Hospital v. Clark. Kerrville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1996). Kerrville actually limited the holdings in Lowe and Robinson to allow "claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and the lack of this integral component led to the plaintiff's injuries." The court gave as an example the provision of a hospital bed without bed rails. If the lack of bed rails led to injury, it would constitute actionable "use" under the Act. See McGuire v. Overton Mem'l Hosp., 514 S.W.2d 79 (Tex. Civ. App.--Tyler 1974, writ ref'd n.r.e.) 518 S.W.2d 528 (Tex. 1975) (per curiam) (failure to provide bed rails constituted actionable "use"). Accordingly, despite the holding in Kassen, Kerrville makes it clear that the non-use of available safety equipment is actionable.

The court in Kerrville went on to hold that the use of oral anti-psychotic medication to treat a mental patient who was released, failed to properly medicate himself and took the life of another was not an actionable "use". The plaintiffs complained in Kerrville that this was an injectionable drug that would have kept the patient medication-compliant and safe for release. The court found that this was actually a "non-use" complaint that did not support a claim under the Act. This portion of the Kerrville opinion is in conflict with the definition of the "use" contained in the Mount Pleasant case. Mount Pleasant Indep. Sch. Dist.. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989) ("use" means to put or bring into action or service or to employ for or apply to a given purpose). The majority closes its opinion by reasoning that the failure to prescribe a certain form of drug is not actionable "use" under the Act. Similarly, the use of a jail cell to confine a prisoner allegedly in need of immediate medical care could not result in liability because of her death in the jail. City of Orange v. Jackson, 927 S.W.2d 784 (Tex. App.--Beaumont 1996, no writ).

D. What Constitutes Tangible Personal Property?

Information from a patient's medical records that was recorded or should have been recorded does not constitute tangible personal property under the Act. Univ. of Texas Med. Branch at Galveston v. York, 808 S.W.2d 106 (Tex. App.--Houston [1st Dist.] 1991), rev'd on other grounds, 871 S.W.2d 175 (Tex. 1994); accord Bellnoa v. City of Austin, 894 S.W.2d 821, 827 (Tex. App.--Austin, 1995, n.w.h.) (change in speed limit does not involve tangible property even though the decision is reduced to paper); Washington v. City of Houston , 874 S.W.2d 791 (Tex. App.--Texarkana 1994, no writ) (use or misuse of personnel files was not actionable tangible property). The court in York acknowledged that the paper that comprised the medical records was tangible property; however, information contained in the records is intangible and will not support a recovery. York, 871 S.W.2d at 179. The plaintiff's allegations included failing to record pertinent observations and failing to act on pertinent information recorded in the plaintiff's medical records. The court held that no liability could exist based on the plaintiff's allegations.

The court distinguished the Salcedo case. In Salcedo, the plaintiffs alleged a failure to treat properly based on an incorrect reading of an electrocardiogram printout. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983). The Supreme Court in York somehow managed to distinguish negligence based on information contained in the electrocardiogram graph because the electrocardiogram was tangible personal property and was to be used by reading the graphical printout. York, 871 S.W.2d at 178. The court held that there is no waiver of immunity for "negligence involving the use, misuse, or non-use of information in a patient's medical record." York, 871 S.W.2d at 179. If there are graphical readouts such as fetal heart monitor strips or EKG or ECG printouts, Plaintiffs should take care to demonstrate that the information underlying the alleged negligence, while contained in the Plaintiff's medical records, is a product of tangible personal property, to-wit: medical diagnostic tools or devices. But see Thornhill v. Ronnie's I-45 Truck Stop, Inc., 944 S.W.2d 780 (Tex. App.–Beaumont 1997, writ dism'd) (holding "information contained in the State Fire Marshall's inspection records and memoranda do not constitute tangible personal property")

Failure to provide oxygen has been held actionable as a use of tangible property. Rodriguez v. Holmes, 556 S.W.2d 125, 126 (Tex. Civ. App.--San Antonio 1977, no writ). Also, a state prison's alleged use of computer, keyboard and telephone to order an erroneous telegram to advise claimants that their incarcerated relative had died in prison was a misuse of tangible personal property. Texas Dep't of Corr. v. Winters, 765 S.W.2d 531, 532 (Tex. App.--Beaumont 1989, writ denied). The use of a

police booking room and the placement of a stool in the room which caused injury to an untreated epileptic constitutes "use" for purposes of the Tort Claims Act. Vela v. City of McCowan, 894 S.W.2d 836 (Tex. App.--Corpus Christi 1995, no writ).

VII. LIABILITY FOR PREMISE DEFECTS AND SPECIAL DEFECTS

A. In General.

The statute provides the following with regard to premises and special defects:

> (a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.
> (b) The limitation of duty in this section does not apply to the duty to warrant a special defect such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals or warning devices as is required by Section 101.060.

Tex. Civ. Prac. & Rem. Code Ann. § 101.022 (Vernon 1986).

A governmental unit may be liable for personal injury or death caused by a condition of personal or real property amounting to a premises defect if "the governmental unit would, were it a private person, be liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code Ann. § 101.021(2) (Vernon 1986). E.g., City of Denton v. Page, 701 S.W.2d 831 (Tex. 1986); Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427 (Tex. App.--Fort Worth 1989, writ ref'd n.r.e.). Ownership, occupation or control of premises, creation of a premises defect or an agreement to make safe a known dangerous condition of real property will give rise to a premises duty. City of Denton v. Page, 701 S.W.2d at 834-835 (City had no duty to discover and remove gasoline from storage building on lot behind rental house despite three separate attempts by arsonists to burn the storage building and its contents where the City had extinguished each prior fire and investigated and found that kerosene had been used to set the fires); Marshbank v. Austin Bridge Co., 669 S.W.2d 129, 133 (Tex. App. 1984--Corpus Christi 1984, writ ref'd n.r.e.); see also Texas Dep't of Transp. v. Bederka, 36 S.W.3d 266 (Tex. App.–Beaumont 2001, no pet.) (examining "whether sovereign immunity is waived . . . for failing to place additional or different traffic control devices at an intersection").

B. Premises Defects--Duty Owed.

1. The Duty Owed.

The general duty owed by a governmental unit under the Tort Claims Act is the duty owed to a licensee. State v. Tennison, 509 S.W.2d 560 (Tex. 1974); Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a) (Vernon 1986). The general duty requires that the licensor not injure the licensee by willful, wanton or gross negligence. An exception to that general rule is that "when the licensor has knowledge of a dangerous condition, and the licensee does not, a duty is owed on the part of the licensor to either warn the licensee or to make the condition reasonably safe." Lower Neches Valley Auth. v. Murphy, 536 S.W.2d 561, 562-563 (Tex. 1976); Tennison, 509 S.W.2d at 561; Smith v. State, 716 S.W.2d 177 (Tex. App.--El Paso 1986, writ ref'd n.r.e.) A governmental unit may liable for premises defects under a joint enterprise theory. Texas Dep't of Transp. v. Able, 35 S.W.3d 608 (Tex. 2000).

A plaintiff must prove the following to prevail in an ordinary premises defect case:

> (1) the condition on the premises created unreasonable risk of harm to the claimant;
> (2) the owner/occupier actually knew of the condition;
> (3) the claimant did not actually know of the condition;
> (4) the owner/occupier failed to warn of a condition or make the condition reasonably safe; and
> (5) the owner/occupier's failure was a proximate cause of the injury to the claimant.

State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992).

2. Premises Defect Defined.

One court has defined a "premise defect" by using the common and ordinary meanings of the words "premises" and "defect". Billstrom v. Mem'l Med. Ctr., 598 S.W.2d 642, 646 (Tex. Civ. App.--Corpus Christi 1980, no writ) (allegations that a defective security screen and an unlocked window failed to restrain an escaping mental patient were held to constitute premises defect allegations). "Premises" was defined as "a building or part of a building with its grounds or other appurtenances" and "[l]ands and tenements; an estate, including land and buildings thereon." Id. at 646. "Defect" was defined as a "shortcoming, imperfection" or "want of something necessary for completeness." Id. The court found that the conditions were defects in an appurtenance to a room and not a defect in personalty.

Elevators are integral parts of buildings. As such, a plaintiff injured while attempting to enter an elevator was

held to have alleged a "premises defect" case, requiring the submission of a premises defect issue in the court's charge. Univ. of Texas Med. Branch v. Davidson, 882 S.W.2d 83, 86 (Tex. App.--Houston [14th Dist.] 1994).

3. Requirement That Plaintiff Be Aware of Defect.

At least two courts have held that the plaintiff's knowledge of a dangerous condition should not be considered a part of the general duty owed to a licensee. In Rowland v. City of Corpus Christi, the court held that the duty owed to a licensee was to "not injure him willfully, wantonly or through gross negligence, and to warn or make safe dangerous conditions of which it had actual knowledge." Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933-934 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.) (emphasis added). Sutton v. State Highway Department held that "[t]he question of the deceased's knowledge of the premises' condition relates to an issue of contributory negligence." Sutton v. State Highway Dep't, 549 S.W.2d 59, 61-62 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.) (dismissal for want of jurisdiction was reversed as plaintiff's knowledge of premises condition related to contributory negligence and did not have to be negated in her pleadings); State v. McBride, 601 S.W.2d 552, 557 (Tex. Civ. App.--Waco 1980, writ ref'd n.r.e.); see also County of Cameron v. Brown, 80 S.W.3d 549 (Tex. 2002) (holding "survivors' failure to allege that they did not actually know of the alleged dangerous condition constituted failure to state premises defect claim under the Act, although the jurisdictional defect was not incurable").

4. Requirement That Government Be Aware of Defect.

A governmental unit's actual knowledge apparently need not be actual in every instance. What appears to be constructive notice satisfied the actual notice requirement in one licensee case. City of Austin v. Cooksey, 561 S.W.2d 874, 882-883 (Tex. Civ. App.--Eastland 1978), rev'd on other grounds, 570 S.W.2d 386 (actual knowledge finding upheld where City owned and sighted a light pole which fell and caused injury; the City mapped and specified underground utilities and culverts requiring excavation in and around the area of the pole although it apparently did not have actual knowledge of the unstable soil around the pole); see also City of Dallas v. Donovan, 768 S.W.2d 905 (Tex. App.--Dallas 1989, no writ) (actual notice for purposes of § 101.060(a)(3) found where witnesses testified that sign had been down for a number of days and municipal employees testified that they would have reported any missing signs); State Dep't of Highways & Pub. Transp. v. Gonzalez, 82 S.W.3d 322 (Tex. 2002) (holding "absent evidence that Department of Transportation has actual notice that stop signs at intersection were vandalized before fatal accident occurred, State could not be held liable").

C. Payment Exception to Licensee Duty.

Payment for the use of the premises raises the duty to that owed an invitee. The duty then owed is to "keep the premises in a reasonably safe condition and to inspect the premises to discover any latent defects and to make safe any defect or give adequate warning." Marshbank v. Austin Bridge Co., 669 S.W.2d 129, 132-133 (Tex. App.--Corpus Christi 1984, writ ref'd n.r.e.) (invitee duty not applicable as employer, not employee, paid for use of premises); Rawlings v. Angelo State Univ., 648 S.W.2d 430, 433 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (university student's payment of tuition and fees was payment for use of the campus where her injury occurred); see Tex. Civ. Prac. & Rem. Code Ann. § 101.022(a) (Vernon 1986); cf. Trevathan v. State, 740 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1987, writ denied) (invitee duty was not owed to paying customers of park because of an attack on female in shower with broken lock and poor lighting, as the actions of the assailant caused injury exclusive of any condition of the property; this, the court found, was an act or omission arising out of the failure to provide, or the method of providing, police or fire protection under § 101.055).

D. Special Defect Exception to Licensee Duty.

1. The Statutory Provision.

Section 101.022 of the Tort Claims Act provides as follows:

> The limitation of duty in this section [to that owed a licensee] does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.

Tex. Civ. Prac. & Rem. Code Ann. § 101.022(b) (Vernon 1986). This provision creates an invitee duty for premises defects that can be categorized as "special defects."

In a special defect case, a claimant must obtain favorable fact findings on the following elements:

(1) the condition on the premises created unreasonable risk of harm to the claimant;
(2) the owner/occupier knew, or reasonably should have known, of the condition;
(3) the owner/occupier failed to warn of the condition or make the condition reasonably safe; and
(4) the owner/occupier's failure to warn was a proximate cause of injury to the invitee.

Payne, 838 S.W.2d 235 at 237.

2. Special Defect Defined.

The legislature has not defined "special defect." Under the Ejusdem Generis Rule, the Texas Supreme Court has held that special defects are of the same class as the excavations and roadway obstructions mentioned in Section 101.022(b). Harris County v. Eaton, 573 S.W.2d 177 (Tex. 1978). Eaton also held that the two examples mentioned in the Act are not exclusive and do not exhaust the class of special defects. Id. at 179.

The supreme court has followed Eaton and held that "[t]he exception for special defects applies only to defects that resemble excavations or obstructions on highways, roads or streets." State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992). The court held further that special defects are those which pose an "unexpected and unusual danger to ordinary users of roadways. Payne, 838 S.W.2d at 238; accord State Dep't of Highways & Pub. Transp. v. Kitchen, 867 S.W.2d 784 (1993). In Payne, the court considered whether a culvert ending with a twelve-foot vertical drop twenty-two feet away from the roadway was a special defect. Although a hunter crossing the highway on foot going toward a deer blind fell off and injured himself, the court held the culvert did not constitute a "special defect".

Two cases prior to Payne had explicitly defined the term "special defect." In Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427 (Tex. App.--Fort Worth 1989, writ denied), the court defined a special defect as "some defect which is out of the ordinary course of events rather than a long-standing, routine, or permanent defect." The court noted that the term was not defined in the Civil Practice and Remedies Code and mentioned a dictionary definition of the word "special." The court rationalized that it was sound public policy to require governmental units to give additional warnings about unusual or unexpected dangers. Id. at 434. The Crossland definition was followed in Villarreal v. State, 810 S.W.2d 419, 422 (Tex. App.--Dallas 1991, writ denied).

3. Factors to Be Considered Regarding Special Defects.

Eaton holds that the size of the dangerous condition is one characteristic that should be considered. Harris County v. Eaton, 573 S.W.2d 177, 179 (Tex. 1978) (an oval-shaped pothole varying from six to ten inches in depth and extending over 90% of the width of the highway that was four feet across at one point and nine feet across at another point was a special defect). Eaton also holds that a special defect need not be "specially created" by a governmental unit. Id.; contra Sutton v. State Highway Dep't, 549 S.W.2d 59 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.) (a severe depression in the roadway that had sunk below the surface of an abutting concrete bridge was held not to be a special defect as it was not specially created but rather a routine maintenance defect).

Other factors considered in the special defect analysis include proximity to a roadway and whether the condition was readily apparent. See Payne v. City of Galveston seems to suggest that a lack of proximity to a roadway will preclude a finding of a special defect. Payne v. City of Galveston, 772 S.W.2d 473 (Tex. App.--Houston [14th Dist.] 1989, writ denied) (considering the fact that the Galveston Seawall was separated from a roadway by 20 feet of unobstructed sidewalk in holding that the Seawall was not a special defect). The supreme court opinion in State Department of Highways and Public Transportation v. Payne indicates that conditions on or near a roadway may be special defects if they pose a threat to ordinary users. Nothing in the opinion indicates that the duty would not extend to pedestrians so long as they are ordinary users of the road or street. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238 n.3 (Tex. 1992); accord Blankenship v. Galveston County, 775 S.W.2d 439 at 442 (Tex. App.--Galveston 1989, no writ) (a lack of proximity to a roadway was apparently not considered in finding that the danger posed to a pedestrian by algae growth on the Galveston Seawall stairs was not a special defect).

State Department of Highways and Public Transportation v. Payne expressly disapproves of two cases where conditions wholly unconnected to roadways had been found to constitute special defects. In the first case, Harris County v. Dowlearn, an unattached wall panel in the Harris County Courthouse which fell and injured the plaintiff was held to be a special defect. Harris County v. Dowlearn, 489 S.W.2d 140, 147 (Tex. Civ. App.--Houston [14th Dist.] 1972, writ ref'd n.r.e.). In the second case, a light pole that fell and injured a man on a job site was found to be a special defect. City of Austin v. Cooksey, 561 S.W.2d 874, 880 (Tex. Civ. App.--Eastland 1978) rev'd on other grounds, 570 S.W.2d 386. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238 (Tex. 1992).

The court in Payne v. City of Galveston also relies on the readily apparent nature of the large drop-off of the Galveston Seawall as a factor in deciding that it was not a special defect. Payne v. City of Galveston, 772 S.W.2d at 477. The fact that a condition was not open and obvious was also mentioned in Dowlearn. Dowlearn, 489 S.W.2d 140, 147 (Tex. App.--Houston 1972, writ ref'd n.r.e.); but see Parker v. Highland Park, Inc., 565 S.W.2d 512 at 521 (Tex. 1978) ("[P]laintiff's knowledge ... even if the facts display the danger open and obviously... should not affect the defendant's duty.").

4. Special Defect Is a Question of Law.

The determination of whether a premises defect rises to the level of a "special defect" is a matter of law to be determined by the court. State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 238 (Tex. 1992); accord State Dep't of Highways & Pub. Transp. v. Kitchen, 867 S.W.2d 784 (1993); Blankenship v. Galveston County, 775 S.W.2d 439 at 442 (Tex. App.-- Galveston 1989, no writ) (special defect is a question of law); contra Park v. Troy Dodson Constr. Co., 761 S.W.2d 98, 100 (Tex. App.-- Beaumont 1988, writ denied) (existence of fact issue regarding the size of a pothole precluded summary judgment); City of San Antonio v. Schneider, 787 S.W.2d 459, 468 (Tex. App.-- San Antonio 1990, writ denied).

5. Other Examples of What Are and Are Not Special Defects.

Other examples of special defects include the following:

(1) a poorly-lit street that suddenly ended four feet away from a six-foot ditch; City of Houston v. Jean, 517 S.W.2d 596, 599 (Tex. Civ. App.-- Houston [1st Dist.] 1974, writ ref'd n.r.e.);
(2) two feet of standing water on a state highway; Miranda v. State, 591 S.W.2d 568, 570 (Tex. Civ. App.--El Paso 1979, no writ);
(3) a slick, muddy condition on a road under construction; State v. McBride, 601 S.W.2d 552, 558 (Tex. Civ. App.--Waco 1980, writ ref'd n.r.e.);
(4) an arroyo parallel to a dirt road; Chappell v. Dwyer, 611 S.W.2d 158, 161 (Tex. Civ. App.-- El Paso 1981, no writ); and
(5) a 10-12 inch shoulder drop-off that extended for 65 feet along a road; Morse v. City of Beaumont, 905 S.W.2d 470 (Tex. App. - Beaumont 1995, writ denied).

One court has suggested that falling trees or stalled cars on a roadway could amount to special defects. State Dep't of Highways & Pub. Transp. v. Carson, 599 S.W.2d 852, 855 (Tex. Civ. App.--El Paso 1980, writ ref'd n.r.e.) (citing 31 Baylor L. Rev. 517, 525 (1979)).

The following conditions were found not to constitute special defects:

(1) old striping on a highway near a detour that had become invisible; Carson, 599 S.W.2d at 855 (the court appeared to find that this did not fall into the class of an excavation or roadway obstruction);
(2) the Galveston Seawall; Payne v. City of Galveston, 772 S.W.2d 473 at 477;
(3) algae on stairs descending from the top of the Galveston Seawall to the rocks below; Blankenship, 775 S.W.2d 439 at 442 (Tex. App.-- Galveston 1989, no writ);
(4) an unlit bridge with minimal clearance for boaters on a lake; Crossland, 781 S.W.2d 427 at 433-434;
(5) a large depression on a highway; Sutton, 549 S.W.2d 59 at 61;
(6) a legally parked car on a narrow roadway; Palmer v. City of Benbrook, 607 S.W.2d 295, 300 (Tex. Civ. App.--Fort Worth 1980, writ ref'd n.r.e.);
(7) obstruction of a stop sign 22 feet away from the roadway; Johnson v. Texas Dep't of Transp., 905 S.W.2d 394 (Tex. App. - Austin 1995, no writ);
(8) a partially cracked and crumbling sidewalk step; City of Grapevine v. Roberts, 946 S.W.2d 841 (Tex. 1997) (the court did not find the condition to resemble an excavation or obstruction and did not find that it posed a risk of harm to ordinary users of the adjoining road);
(9) an icy bridge when there is precipitation accompanied by near-freezing temperatures, State Dep't of Highways & Pub. Transp. v. Kitchen, 867 S.W.2d 784, 786 (1993) (the court did not consider the icy bridge to be unexpected nor unusual); and
(10) tall grass and weeds covering the median at a crossover area of a four-lane, divided highway; Sipes v. Texas Dep't of Transp., 949 S.W.2d 516 (Tex. App.--Texarkana 1997, writ denied).

E. Recreational Use Exception to Licensee Duty.

The recreational use statute provides for limited liability of an owner/occupier of land, including a governmental unit (overruling City of Dallas v. Mitchell, 870 S.W.2d 21 (Tex. 1994) (holding that governmental units do not enjoy the reduced liability afforded private landowners under the statute). If an owner or occupier of land gives permission to another or invites another to enter the premises for recreational purposes, the owner or occupier owes no greater duty of care to that person than that owed to a trespasser. Recreational activities include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, and waterskiing or other water sports. Hockey, in-line hockey, skating, in-line skating, roller-skating, skateboarding, and roller-blading are also considered recreational activities, but only if they take place on government owned, managed, or operated premises. Tex. Civ. Prac. & Rem. Code Ann. § 75.002.

Except for a governmental unit, the recreational use statute does not apply to: landowners/occupiers who charge a fee for entry or use of the premises, landowners/occupiers who deliberately, willfully, or maliciously cause injury to a person or property, or situations where the doctrine of attractive nuisance applies. Owners who receive minimal income for such charges or who have significant insurance coverage may still avail themselves of the lowered duty. Tex. Civ. Prac. & Rem. Code Ann. § 75.003.

In Texas Department of Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004), a visitor and her husband sued the park after she sustained injuries from a tree limb falling on her head. Plaintiffs were camping and picnicking as paying guests at a state park. The Supreme Court reversed the trial court, holding that the defendant did not act with gross negligence; and therefore, did not waive immunity under the Texas Tort Claims Act. The recreational use statute controls over the Texas Tort Claims Act to the extent it limits the duty owed. The court held that the plaintiff did not present evidence that the defendant both had actual knowledge that the tree branch might fall and consciously chose not to take steps to minimize the danger.

In Howard v. East Texas Baptist University, 122 S.W.3d 407 (Tex. App.–Texarkana 2003, no pet.), the plaintiff sued the university for injuries she sustained when the diving board at the school's swimming pool "double bounced" forcing her to attempt to correct herself in mid-air and hurt her back. The Court of Appeals held that the recreational use statute applied to limit the university's liability because it only collected entry fees for use of its facilities in an amount less than the total ad valorem taxes for the previous calendar year. The court held that the proper measure for calculating ad valorem taxes is those taxes imposed on the owner's entire premises, not just the swimming pool. Since the evidence did not establish the university acted with gross negligence, it was not liable for plaintiff's injuries.

In Texas Department of Parks & Wildlife v. Shumake, 131 S.W.3d 66 (Tex. App.–Austin 2003, pet. granted), the parents of a child who drowned while swimming in a man-made culvert sued the defendant under a wrongful death cause of action asserting that the Texas Tort Claims Act waives the defendant's sovereign immunity, the recreational use statute is inapplicable because defendant charged a fee for use of the premises, and in the alternative, the defendant breached the duty owed under the recreational use statute. The trial court held that "a governmental unit does not lose the benefit of the recreational use statute when it charges a fee for entrance;" however, it held the recreational use statute was unconstitutional because it treated governmental units differently from private landowners. The appellate court rejected the contention that the statute is unconstitutional as applied in this case, holding that unlike private landowners, government units do not lose the benefit of the statute when they change fees; however, the court affirmed the denial of the defendant's plea to jurisdiction because the plaintiffs alleged sufficient facts to potentially prove gross negligence. The court in City of Fort Worth v. Crockett, 142 S.W.3d 550 (Tex. App.–Fort Worth 2004, pet. denied), declined to follow the Shumake opinion, stating that it is in direct contravention to the proposition that landowners do not assure that their premises are safe for recreational users and the common law rule that landowners owe no duty of care to trespassers. In Crockett, the court held that the defendant had no duty to warn recreational users of or make safe an artificial condition on its premises.

In City of Bellmead v. Torres, 89 S.W.3d 611 (Tex. 2002), the Supreme Court reversed the appellate court and affirmed the trial court's grant of summary judgment to the defendant. The case involved a female who was injured when the swing she was sitting on broke while she was taking a break from a softball game and who then sued the city, the landowner, for the premises defect. The city claimed that the recreational use statute applied and summary judgment should be granted because the plaintiff did not allege willful, wanton, or grossly negligent action on the part of the city. Because the defect did not occur in the course of playing softball, the recreational activity in question was sitting on the swing; therefore, the issue was whether sitting on a swing was considered "recreation" for purposes of the statute. The court answered in the affirmative and held that because the plaintiff did not plead any willful, wanton, or grossly negligent conduct, judgment must be rendered for the defendant.

VIII. LIABILITY FOR GOVERNMENTAL AND PROPRIETARY FUNCTIONS OF MUNICIPALITIES

A. Distinction Between Governmental and Proprietary.

Before the passage of the "Tort Reform" Law in 1987, municipal functions were categorized as either governmental or proprietary. Proprietary functions have been defined as ones "intended primarily for the advantage and benefit of persons within the corporate limits of the municipality rather than for use by the general public." City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex. 1987); Gates v. City of Dallas, 704 S.W.2d 737, 739 (Tex. 1986). Prior to the 1986 changes in the law, proprietary functions included, among others:

(1) maintenance of streets; Turvey v. City of Houston, 602 S.W.2d 517, 518 (Tex. 1980);
(2) operation of a cemetery; City of Gladewater v. Pike, 727 S.W.2d 514 (Tex. 1987);

(3) operation of a storm sewer system; Williams v. City of Dallas, 636 S.W.2d 222 (Tex. App.--El Paso 1982, no writ);
(4) the construction, operation, and maintenance of parks and recreational facilities; City of Houston v. George, 479 S.W.2d 257 (Tex. 1972); and
(5) vehicle maintenance; City of Houston v. Shilling, 240 S.W.2d 1010 (1951).

All other functions were governmental before "tort reform." Activities "carried on by a city, pursuant to state requirement, in discharge of the state's obligation for the health, safety or general welfare of the public generally or which are voluntarily assumed by the city for the benefit of the public generally rather than for its own citizens" are governmental. Sarmiento v. City of Corpus Christi, 465 S.W.2d 813, 816 (Tex. Civ. App.--Corpus Christi 1971, no writ). Governmental functions before tort reform included, among others:

(1) traffic regulation; Villarreal v. City of San Antonio, 657 S.W.2d 175 (Tex. App.--San Antonio 1983, no writ);
(2) emergency ambulance service; Green v. City of Dallas, 665 S.W.2d 567 (T ex. App.--El Paso 1984, no writ);
(3) fire protection; Genzer v. City of Mission, 666 S.W.2d 116 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.);
(4) providing health and medical services; City of Houston v. Arney, 680 S.W.2d 867 (Tex. App.--Houston [1st Dist.] 1984, no writ), overruled by Univ. of Texas Med. Branch at Galveston v. York., 871 S.W.2d 175, 179 n.7 (Tex. 1994);
(5) operation of a police department; Cronen v. Nix, 611 S.W.2d 651 (Tex. Civ. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.); and
(6) hiring and firing of city employees; City of Dallas v. Moreau, 718 S.W.2d 776 (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.).

B. Non-Applicability of the Tort Claims Act to Proprietary Municipal Functions.

1. Proprietary Functions Are Exclusive to Municipalities.

Only cities are capable of performing proprietary functions; all other units of government perform governmental functions exclusively. Turvey v. City of Houston, 602 S.W.2d 517 (Tex. 1980) (counties may not perform proprietary functions); Bragg v. City of Dallas, 605 S.W.2d 669 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.) (airports perform governmental activities exclusively). The supreme court has refused to extend the proprietary/governmental analysis to governmental entities other than municipalities. Guillory v. Port of Houston Auth., 845 S.W.2d 812 (Tex. 1993). The plaintiff sought to avoid the damage limitations of the Act by characterizing the actions of the port authority as proprietary. The supreme court held that all of the functions of the port authority were governmental; thus, the Act's damage limitations applied.

2. Statutory Classification of Governmental and Proprietary Functions.

The scope of proprietary functions has been drastically limited by the current Tort Claims Act. Governmental functions now include, but are not limited to, the following:

(1) police and fire protection and control;
(2) health and sanitation services;
(3) street construction and design;
(4) bridge construction and street maintenance;
(5) cemeteries and cemetery care;
(6) garbage and solid waste removal, collection and disposal;
(7) establishment and maintenance of jails;
(8) hospitals;
(9) sanitary and storm sewers;
(10) airports;
(11) water works;
(12) repair garages;
(13) parks and zoos;
(14) museums;
(15) libraries and library maintenance;
(16) civic, convention centers, or coliseums;
(17) community, neighborhood, or senior citizen centers;
(18) operation of emergency ambulance service;
(19) dams and reservoirs;
(20) warning signals;
(21) regulation of traffic;
(22) transportation system;
(23) recreational facilities, including, but not limited to, swimming pools, beaches, and marinas;
(24) vehicle and motor driven equipment maintenance;
(25) parking facilities;
(26) tax collection;
(27) firework display;
(28) building codes and inspection;
(29) zoning, planning, and plat approval;
(30) engineering functions;
(31) maintenance of traffic signals, signs, and hazards;
(32) water and sewer service; and
(33) animal control.

Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a) (Vernon Supp. 1991). The list now includes virtually all of the preexisting proprietary functions. The Act currently includes activities, and is therefore not applicable to the following proprietary activities:

(1) the operation and maintenance of a public utility;
(2) amusements owned and operated by the municipality; and
(3) any activity that is abnormally dangerous or hazardous.

Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(b) (Vernon Supp. 1991). Governmental activities that are specifically enumerated in this statute will never be proprietary despite any overlap in the two categories. Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(c) (Vernon Supp. 1991)

Activities not specifically labeled "governmental" in the Act may constitute proprietary functions. Houston v. Southwest Concrete Constr., Inc., 835 S.W.2d 728, 731 (Tex. App.-- Houston [14th Dist.] 1992, writ denied). This is a matter to be decided by the court and is to be strictly construed against municipalities. In this case, a judgment for tortious interference with contract, negligence, breach of contract, breach of covenant of good faith and fair dealing, and retaliation and harassment was affirmed where the City of Houston chose to implement the Federal Rehabilitation Loan Program. The court found that this was akin to prior cases where administerial acts performed by local governments which could have been done by private contractors were found to be proprietary functions.

IX. EXCLUSIONS AND EXEMPTIONS

A. Infrequently Used Exemptions.

There are a number of exemptions in the Act that are rarely utilized. Liability is precluded for:

(1) acts or omissions of the legislature or member of the legislature acting in his official capacity or for the legislative functions of a governmental unit; Tex. Civ. Prac. & Rem. Code Ann. § 101.052 (Vernon 1986);
(2) an act or omission of a court or any member of a court acting in his official capacity or a judicial function of a governmental unit; Tex. Civ. Prac. & Rem. Code Ann. § 101.053(a) (Vernon Supp. 1991);
(3) an act or omission of an employee executing a lawful order of any court; Tex. Civ. Prac. & Rem. Code Ann. § 101.053(b) (Vernon 1986);
(4) acts or omissions which constitute implementation of policy decisions on how to collect or assess taxes; Driskill v. State, 787 S.W.2d 369 (Tex. 1990) (driving from one collection site to another is not conduct directly related to the assessment or collection of taxes and does not exempt a governmental unit from liability); see Harris County v. Dowlearn, 489 S.W.2d 140, 146-147 (Tex. Civ. App.-- Houston [14th Dist.] 1972, writ ref'd n.r.e.) (an injury to the plaintiff while on her way to pay taxes did not exempt the county from liability); Tex. Civ. Prac. & Rem. Code Ann. § 101.055(1) (Vernon 1986);
(5) activities of the state military forces on active duty; Tex. Civ. Prac. & Rem. Code Ann. § 101.054 (Vernon 1986);
(6) claims arising out of "civil disobedience, riot, insurrection, or rebellion"; City of Amarillo v. Langley, 651 S.W.2d 906, 918 (Tex. App.-- Amarillo 1983, no writ) ("Two motorcycle riding traffic scofflaws do not qualify as a matter of law as a commotion of a large number of persons acting unlawfully in concert to warrant exemption for civil disobedience."); Forbus v. City of Denton, 595 S.W.2d 621, 622 (Tex. Civ. App.--Fort Worth 1980, writ ref'd n.r.e.) (a single individual arrested for suspicion of lunacy who set fire to his mattress did not constitute civil disobedience); Tex. Civ. Prac. & Rem. Code Ann. § 101.057 (1) (Vernon 1986).
(7) an attractive nuisance; Tex. Civ. Prac. & Rem. Code Ann. § 101.059 (Vernon 1986);
(8) any act or omission that occurred before January 1, 1970 [the effective date of the first enactment of the Tort Claims Act]; Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427 (Tex. App.--Fort Worth 1989, writ ref'd n.r.e.); Tex. Civ. Prac. & Rem. Code Ann. § 101.061 (Vernon 1986); and
(9) providing 911 service or responding to a 911 emergency call unless the action violates applicable statutes or ordinances; Tex. Civ. Prac. & Rem. Code Ann. § 101.062 (Vernon Supp. 1991).

B. Partial Exemption for School Districts and Junior College Districts.

1. Liability for Use of Motor Vehicles.

Actions may not be maintained against school districts or junior college districts unless they involve motor vehicles. Tex. Civ. Prac. & Rem. Ann. § 101.051 (Vernon 1986). This provision has been construed very narrowly in favor of school districts and junior college districts for injuries arising from circumstances other

than collisions or improper driving. LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49 (Tex. 1992) (child who bumped her head and fell while entering the emergency exit of a parked school bus that was not running did not state a cause of action.) Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208 (Tex. 1989) (allowing child to exit bus at stop 40 yards north of her normal bus stop was not actionable when child delayed crossing the road until the bus was approximately one-quarter of a mile away and there was no jury issue inquiring as to whether the child's death arose out of the "operation or use of a motor-driven vehicle"); Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617 (Tex. 1987) (seizures suffered by child on a bus and alleged improper treatment after an injury at school were not injuries arising out of the use or operation of school bus); Estate of Garza v. McAllen Indep. Sch. Dist., 613 S.W.2d 526, 528 (Tex. Civ. App.--Beaumont 1981, writ ref'd n.r.e.) (an alleged failure to control and discipline students that resulted in a stabbing death did not arise out of the use or operation of a motor vehicle); Heyer v. North East Indep. Sch. Dist., 730 S.W.2d 130 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.) (loss of control of fellow student's vehicle on school grounds did not arise from the operation or use of a motor vehicle as the vehicle was not owned or operated by the school district); Naranjo v. Southwest Indep. Sch. Dist., 777 S.W.2d 190 (Tex. Civ.--San Antonio 1989, writ denied) (an injury suffered by a student working on an automobile carburetor in a shop class did not arise out of the operation or use of a motor vehicle).

2. Liability of School Employees for Excessive Discipline.

The only additional grounds for liability in this area arises from the Education Code. Professional employees and student teachers who "use excessive force in the discipline of students or [engage in] negligence resulting in bodily injury to students" are individually liable for those actions. Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617, 618 (Tex. 1987); Tex. Educ. Code Ann. § 22.051(1)-(6) (Vernon 2003).

C. Emergency Exemption.

The Act provides that governmental units are not liable for acts arising from:

> ...the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is taken with [sic] conscious indifference or reckless disregard for the safety of others....

Tex. Civ. Prac. & Rem. Code Ann. § 101.055 (Vernon Supp. 1991); see also City of San Antonio v. Schneider, 787 S.W.2d 459 (Tex. App.--San Antonio 1990, writ denied).

The Texas Supreme Court has held that a plaintiff must show recklessness to support liability against the driver of an emergency vehicle. City of Amarillo v. Martin, 971 S.W.2d 426 (Tex. 1998). Martin involved a fire truck driving with lights and sirens on. As discussed below, prior case law allowed liability where state and local ordinances regarding emergency operations were violated. The court in Martin appeared to ignore prior cases to require that all fact situations involving the operation of emergency vehicles will require a showing of recklessness for the plaintiff to prevail. Moreover, the court defined recklessness to require a showing that the driver knew or should have known posed a high degree of risk or serious injury. City of Amarillo v. Martin, 971 S.W.2d at 429. Operating emergency vehicles in violation of ordinances would arguably give rise to the requisite showing of recklessness; clearly, however, the court has raised the standard where there is no showing of a violation of applicable laws. (It should be noted that the court has also resolved the apparent typographical error in the law as drafted indicating that a governmental unit would not be liable for actions taken with conscious indifference or reckless disregard if there were no applicable laws or ordinances. The court noted that this interpretation of the law was absurd and, despite the language contained in the statute, a more reasonable meaning would be given, i.e., liability attaches if there are no applicable laws or ordinances where the actions are taken with conscious indifference or reckless disregard.) Violations of state and local ordinances applicable to emergency operation of government vehicles, such as the failure to use lights and sirens, will preclude the application of this exemption. Langley v. City of Amarillo, 579 S.W.2d 351, 353 (Tex. Civ. App.--Amarillo 1979, writ ref'd n.r.e.) (failure to use siren precluded exemption from liability); Terrell v. State, 574 S.W.2d 616, 618 (Tex. Civ. App.--Austin 1978), aff'd, 588 S.W.2d 784. The failure to drive with due regard to the safety of the public while using emergency lights and sirens may violate state law regarding emergency vehicle operation and preclude the applicability of this exemption. Chambers v. City of Lancaster, 843 S.W.2d 143, 150 (Tex. App.--Dallas 1992), aff'd, 883 S.W.2d 650 (a fact question existed regarding a pursuit with speeds near 100 mph thereby precluding summary judgment based on the emergency exemption); Guzman v. City of San Antonio, 766 S.W.2d 858, 860 (Tex. App.-

-San Antonio 1989, writ denied); see also Travis v. City of Mesquite, 830 S.W.2d 94 (Tex. 1992). Bookman v. Bolt, 881 S.W.2d 771 (Tex. App.--Dallas 1994, no writ).

The court in Fernandez v. City of El Paso acknowledged the exception to the waiver of sovereign immunity contained in § 101.055. The court held that if no statutory violations can be shown, that the police and fire protection exemption contained in § 101.055 will apply. Fernandez v. City of El Paso, 876 S.W.2d 370, 376 (Tex. App.--El Paso 1993, no writ).

D. Police and Fire Protection Exemption.

1. In General.

The Act precludes liability arising from "the failure to provide or the method of providing police or fire protection." Tex. Civ. Prac. & Rem. Code Ann. § 101.055 (Vernon Supp. 1991). This provision precludes "judicial review of the policy decisions that governments must make in deciding how much, if any, police or fire protection to provide for a community." State v. Terrell, 588 S.W.2d 784, 787 (Tex. 1979). Terrell indicated that decisions such as providing only three fire trucks per community or using minimal police to control a riot or crime in a particular area are the types of decisions for which liability is precluded. Terrell, 588 S.W.2d 784 at 788. A failure to provide adequate security has been held to be a method of providing police protection. Trevathan v. State, 740 S.W.2d 500 (Tex. App.--Houston [1st Dist.] 1987, writ denied). A failure to institute adequate procedures for fire prevention has been held to be a claim arising out of the method of providing fire protection. City of Denton v. Page, 683 S.W.2d 180 (Tex. App.--Fort Worth 1985), rev'd on other grounds, 701 S.W.2d 831. This provision of the Act is not a "general exclusion for any act or omission that occurs while an officer is providing police or fire protection." Negligence in the formulation of policy gives rise to immunity; if an employee or officer acts negligently in carrying out that policy, liability may exist. Terrell, 588 S.W.2d at 787-788.

2. Negligence in Implementation of or Incidental to Policies Regarding Police or Fire Protection.

Negligence in the implementation of policy or incident to policy is actionable. City of Waco v. Hester, 805 S.W.2d 807, 813 (Tex. App.--Waco 1990, n.w.h.) (failure to properly supervise and segregate a potentially violent homosexual inmate was a claim rising out of the negligent implementation of a policy of police protection and/or negligent acts or omissions related to the policy); Jefferson County v. Sterk, 830 S.W.2d 260, 262 (Tex. App.-- Beaumont 1992, writ denied); Forbus v. City of Denton, 595 S.W.2d 621, 623 (Tex. Civ. App.--Fort Worth 1980, writ ref'd n.r.e.). Acts or omissions incidental to the formulation of policy regarding the method of police protection to provide may very well subject a governmental unit to liability. For instance, a particular method of providing meals for inmates, including proper maintenance of kitchen equipment, was held to be incidental to policy decisions regarding the provision of police protection. Norton v. Brazos County, 640 S.W.2d 690 (Tex. App.--Houston [14th Dist.] 1982, no writ) (the failure to properly guard and maintain a bacon slicing machine was found to be incidental to the policy decision regarding the provision of police protection). The failure to properly treat an incarcerated epileptic has also been held to be incidental to any policy decision regarding the provision of police protection. Jenkins v. State, 570 S.W.2d 175 (Tex. Civ. App.--Houston [14th Dist.] 1978, no writ); accord Cuddy v. Texas Dep't of Corrs., 578 S.W.2d 522, 524 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.), rev'd on other grounds, Univ. of Texas Med. Branch at Galveston v. York, 871 S.W.2d 175, 179 n.7 (Tex. 1994).

3. Compliance with Policy of Police or Fire Protection.

In two cases, compliance with departmental policy has precluded liability. In Poncar v. City of Mission, the municipality's failure to fully extinguish a fire that was in accordance with city policy supported immunity arguably based on this provision. Poncar v. City of Mission, 797 S.W.2d 236 (Tex. App.--Corpus Christi 1990, no writ). A similar result was reached in Robinson v. City of San Antonio. In Robinson, City of San Antonio policies provided that violation of protective orders was a basis for arrests for offenses committed in an officer's presence or view. In this case an ex-husband kidnapped his daughter while police were being called in the hope they would enforce a protective order. Police officers arrived after the kidnapping and were shown the protective order, advised that the child had been taken without permission, that the ex-husband was violent, and that he might hurt the child. The officers indicated that they could do nothing and left. The plaintiff located her ex-husband by calling around and, as she spoke with him on the phone, friends called the police again. The ex-husband killed the child and committed suicide before the police arrived. The court held that compliance with the policy provided a basis for immunity without an analysis of whether the policy or its implementation constituted negligence. Robinson v. City of San Antonio, 727 S.W.2d 40 (Tex. App.--San Antonio 1987, writ ref'd n.r.e.).

E. Discretionary Exemption.

1. In General.

"The discretionary acts" exemption is a commonly-utilized provision of the Act. § 101.056 of the Act prevents liability for claims based on:

(1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or
(2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or non-performance of an act if the law leaves the performance or non-performance of the act to the discretion of the governmental unit.

Tex. Civ. Prac. & Rem. Code Ann. § 101.056 (Vernon 1986).

The court's analysis of this provision has generally paralleled the analysis of the police and fire protection exemption. The purpose of both provisions is to "avoid a judicial review that would "question the wisdom of a government's exercise of its discretion in making policy decisions." City of Brownsville v. Alvarado, 897 S.W.2d 750 (Tex. 1995); State v. Terrell, 588 S.W.2d 784, 787 (Tex. 1979). Where an act is clearly mandated by law, the discretionary exemption is not available. For example, the State Department of Highways and Public Transportation is required by Article 6674q-4 to maintain state highways; this exemption will not preclude liability for the state's negligent maintenance of the highway system. Hamric v. Kansas City S. Ry. Co., 718 S.W.2d 916, 919 (Tex. App.--Beaumont 1986, writ ref'd n.r.e.); Sutton v. State Highway Dep't, 549 S.W.2d 59, 62 (Tex. Civ. App.--Waco 1977, writ ref'd n.r.e.); Texas Dep't of Transp. v. Ramirez, 74 S.W.3d 864 (Tex. 2002) (holding that "median's slope and lack of safety features, such as barriers or guardrails, reflect discretionary decisions for which the [Department of Transportation] retains immunity under the Act's discretionary function exception").

2. Standard of Care for Discretionary Acts Undertaken by a Governmental Unit.

The exemption does not apply in every instance simply because no law requires that an act be performed or simply because the performance is left to the governmental unit's discretion by law. Once a government has decided to perform a discretionary act, the act must be performed in a non-negligent manner. Norton v. Brazos County, 640 S.W.2d 690, 693 (Tex. App.--Houston [14th Dist.] 1982). "In other words, when a governmental unit does choose to perform an act which it is not required to perform, and does that act negligently, [Section 101.056] seemingly does not apply and the unit is subject to liability." Christilles v. Southwest Texas State Univ., 639 S.W.2d 38, 41 fn. 2 (Tex. App.--Austin 1982, writ ref'd n.r.e.); contra, Burnett v. Texas Highway Dep't, 694 S.W.2d 210, 212 (Tex. Civ. App.--Eastland 1985, writ ref'd n.r.e.) (where the record apparently indicated that a decision had been made to change or upgrade a guardrail, the court held that the decision to change the barrier was discretionary and that the state was exempt from liability).

3. Actions Incidental to or That Implement Policy.

Acts or omissions that are merely incidental to the formulation of policy or that implement policy thereby exempt governmental units from liability. Christilles, 639 S.W.2d 38 at 42-43; Norton, 640 S.W.2d 690 at 692-693; Trinity River Auth. v. Williams, 659 S.W.2d 714, 723 (Tex. App.--Beaumont 1983), rev'd on other grounds, 689 S.W.2d 883 (the failure to warn of a dangerous back current was made at the operational level and was not exempt as a discretionary act).

No "clear-cut test" exists to determine the applicability of § 101.056. Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 787 S.W.2d 427 (Tex. App.--Fort Worth 1989, writ ref'd n.r.e.). The court in Christilles suggests that decisions that are not in the nature of those made by the legislature, the governor or other executive officials should not be exempt as discretionary. Christilles, 639 S.W.2d 38 at 43. Also, decisions involving professional or occupational discretion should not be exempt under this provision. Christilles, 639 S.W.2d 38 at 43. In Crossland, professional and/or occupational decisions regarding the design of a bridge and the failure to provide any lighting for boaters were held to be discretionary decisions that exempted the state from liability. Crossland, 787 S.W.2d 427 at 433. Crossland is the only case holding that the design of roads and bridges is discretionary and thus, exempt, that also indicates that the court analyzed the policymaking/ implementation analysis described in the cases cited hereinabove. Maxwell v. Texas Department of Transportation follows Christilles and holds that actions involving occupational or professional discretion are devoid of policy implications. Maxwell, nonetheless, distinguishes the engineering decisions of highway designers and categorizes the entire design process as discretionary. Maxwell v. Texas Dep't of Transp., 880 S.W.2d 461, 464 (Tex. App.--Austin 1994, no writ).

4. Cases Where Discretionary Exemption Was Applicable.

A number of other cases have held that the design of roads and bridges are discretionary and that govern mental units will not be liable for such decisions. City of El Paso v. Ayoub, 787 S.W.2d 553 (Tex. App.--El Paso 1990, writ denied) (the design, placement, and upgrading of guardrails is discretionary). Shives v. State, 743 S.W.2d 714 (Tex. App.--El Paso 1987, writ denied) (the failure to install a traffic light and speed limit signs was discretionary and exempted the state from liability). In Stanford v. State Department of Highways & Public

Transportation, the failure to add guardrails to an overpass was held to be discretionary and the state was exempted from liability. Stanford v. State Dep't of Highways & Pub. Transp., 635 S.W.2d 581, 582 (Tex. App.--Dallas 1982, writ ref'd n.r.e.); accord Brazoria County v. Radke, 566 S.W.2d 326, 330 (Tex. Civ. App.--Beaumont 1978, writ ref'd n.r.e.) (noting the apparent lack of a legal requirement for training deputy sheriffs, the court found that training and supervision of deputy sheriffs was exempt under the discretionary provision).

F. Traffic and Road Control Devices Exclusion.

1. In General.

An additional set of specific exemptions applies to traffic or road signs, signals and warning devices. Section 101.060 of the Act provides that liability is precluded for claims arising out of:

(a)(1) the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is a result of discretionary action of the governmental unit;

(2) the absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice; or

(3) the removal or destruction of a traffic or road sign, signal, or warning device by a third person unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice.

(b) The signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with the use of the roadway.

(c) This section does not apply to the duty to warn of special defects such as excavations or roadway obstructions.

Tex. Civ. Prac. & Rem. Code Ann. § 101.060 (Vernon 1986).

There are no cases that have defined the term "discretionary" as used in § 101.060 referring to the failure to initially install traffic control devices. The cases that have defined the term (as used in § 101.056 of the Act) have held that the term was utilized to protect and shield policymaking decisions of municipalities and not decisions incidental thereto or the operational or implementation decisions involved in carrying out those policies. State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979); Norton v. Brazos County, 640 S.W.2d 690, 693(Tex. App.--Houston [14th Dist.] 1982, no writ). Bookman v. Bolt appears to equate the meaning of the term "discretionary" in § 101.060 with the meaning given the term in cases such as State v. Terrell. Bookman v. Bolt, 881 S.W.2d 771, 776 (Tex. App.--Dallas 1994, no writ). In addition, two cases have suggested impliedly that the term as used in both provisions should be interpreted in similar fashion. State Dep't of Pub. Highways & Pub. Transp. v. King, 795 S.W.2d 888 (Tex. App.--Beaumont, 1990, writ denied per curiam, 808 S.W.2d 465 (1991); Shives v. State, 743 S.W.2d 714, 716 (Tex. App.-- El Paso 1987, writ denied).

The failure to replace a stop sign with a traffic light has been held to be discretionary for purposes of § 101.060(a)(1). Id. at 714. The Texas Supreme Court refused to approve or disapprove a court of appeals holding that mandatory language in the Texas Manual or Uniform Traffic Control Devices precluded the application of the discretionary traffic control device exemption. State Dep't of Highways & Pub. Transp. v. King, 795 S.W.2d 888 (Tex. App.--Beaumont 1990), writ denied per curiam, 808 S.W.2d 465 (1991); Villarreal v. State, 810 S.W.2d 419, 420-421 (Tex. App.--Dallas 1991, writ denied); cf. City of Denton v. Mathes, 528 S.W.2d 625, 633 (Tex. Civ. App.--Fort Worth 1975, writ ref'd n.r.e.) (the court found that the negligent condition of a signal light was not in conformity with the Uniform Manual on Traffic Control Devices; liability was upheld). Whether the failure to initially install a traffic control device is discretionary can be a jury issue. Villarreal v. City of San Antonio, 657 S.W.2d 175, 177 (Tex. App.--San Antonio 1983, no writ); see also State Dep't of Highways & Pub. Transp. v. King, 795 S.W.2d 888, 895-896 (Tex. App.--Beaumont 1990), writ denied per curiam, 808 S.W.2d 465 (1991).

The "condition" of traffic control devices also includes visual obstructions to those devices. Lorig v. City of Mission, 629 S.W.2d 699, 701 (Tex. 1982). Obstruction of a stop sign by trees was a "condition" of a "traffic or road sign." Kenneally v. Thurn, 653 S.W.2d 69 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.). This provision refers to intentional or inadvertent conditions or malfunctions. Sparkman v. Maxwell, 519 S.W.2d 852 (Tex. 1975).

In Garza v. State, school zone signs setting lower speed limits were not placed after the recent construction of a junior high school. The preexisting signs, creating a 45 mile per hour speed limit, were not changed. The court found that summary judgment was improper under § 101.060(a)(2) because the 45 mile per hour speed limit near the newly constructed school zone was a condition that should have been addressed by the State. Garza v. State, 878 S.W.2d 671 (Tex. App.--Corpus Christi 1994,

no writ). In Miller v. City of Fort Worth, the Court seemed willing to affirm a judgment based on evidence that a governmental agency had notice of the dangerous of an intersection without a stop sign and failed to correct the condition within a reasonable time after receiving such notice. Miller v. City of Fort Worth, 893 S.W.2d 27 (Tex. App.--Fort Worth 1994, no writ). The Court did not find such evidence in the record and, as such, reversed and rendered.

2. Notice Required.

Notice of the specific malfunction in existence on the date of an accident was not required where the state had "knowledge that the traffic signal light in question was old, in need of replacement, frequently malfunctioned, and in general was in a defective condition." State v. Norris, 550 S.W.2d 386, 391 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.). It now seems that constructive notice can satisfy the actual notice provision contained in § 101.060(a)(3). Actual notice was found where witnesses testified that a sign had been missing for a number of days and municipal employees testified that they would have reported any missing signs. City of Dallas v. Donovan, 768 S.W.2d 905 (Tex. App.--Dallas 1989, no writ). Where bushes had blocked a stop sign for as long as one witness could remember and where police officers routinely drove past the intersection, a fact question was raised as to notice of a condition under § 101.060(2). Kenneally v. Thurn, 653 S.W.2d 69 at 72.

Apparently, just over three hours, eight days and for "as long as she could remember" have all been held to be reasonable periods of time for governments to respond after notice for purposes of § 101.060(2). Sparkman v. Maxwell, 519 S.W.2d 852, 856, 858 (Tex. 1975) (traffic engineer and police officers observed and noted potential hazard of traffic light over an eight-day period prior to the accident); City of Houston v. Stoddard, 675 S.W.2d 280, 282-283 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.) (a complaint the night before supposedly was successfully repaired; complaints were received approximately two and three hours before the accident); Kenneally v. Thurn, 653 S.W.2d 69, 72 (Tex. App.--San Antonio 1983, writ ref'd n.r.e.) (witness testified stop sign had been obstructed for as long as she could remember).

G. Intentional Tort Exclusion.

The act precludes liability for allegations "arising out of assault and battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by a school authority." Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2) (Vernon 1986). But, negligence, separate and apart from an intentional tort, that is a proximate cause of injury may subject a governmental unit to liability. Delaney v. Univ. of Houston, 835 S.W.2d 56, 58-59 (Tex. 1992) (this provision does not bar recovery for a rape resulting from allegedly negligent maintenance of an exterior door); Young v. City of Dimmitt, 787 S.W.2d 50 (Tex. 1990) (per curiam) (claims of negligent entrustment in hiring were not precluded because the accident that injured the plaintiff was caused by the suicide of a police officer). City of Waco v. Hester, 805 S.W.2d 807 (Tex. App.--Waco 1991, writ denied) (rape of an inmate was not exempted from liability where other actions of a municipality proximately caused injuries.); contra Townsend v. Mem'l Med. Ctr., 529 S.W.2d 264, 266-267 (Tex. Civ. App.--Corpus Christi 1975, writ ref'd n.r.e.) (the intentional tort provision precluded liability for a rape despite allegations of hospital negligence that were arguably proximate causes of the assault). Accordingly, an assault on a police officer did not preclude liability where the police officer negligently struck the plaintiff with his vehicle after the assault took place. Guzman v. City of San Antonio, 766 S.W.2d 858, 860-861 (Tex. App.--San Antonio 1989, writ denied).

Recovery for improper hospitalization of a mental patient who was either not mentally ill or only mildly mentally ill for over thirty-five years was not precluded because it could be characterized as a false imprisonment claim. Texas Dep't of Mental Health & Mental Retardation v. Petty, 848 S.W.2d 680 (Tex. 1992). False imprisonment was not pled and there was no jury finding in that regard. Thus, the fact that it may have constituted an exempt intentional tort, false imprisonment, did not preclude a recovery based on negligence.

H. Prior Settlement or Judgments Preclude Employee Liability.

Section 101.106(c) Texas Civil Practices and Remedies provides as follows:

> A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of a governmental unit whose act or omission gave rise the claim.

A judgment in a case involving the governmental agency and its employees for the same acts of negligence will preclude any recovery against the individual employees. Thomas v. Oldham, 895 S.W.2d 352 (Tex. 1995). This becomes a significant consideration for practitioners along with the authority issues of individual immunity to keep in mind when there are individual employees and governmental agencies named as defendants in the same suit. Moreover, "a dismissal on a plea to the jurisdiction, in an action against a governmental unit, is a 'judgment,'

for purposes of the derivative immunity provision of the Texas Tort Claims Act." Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). In addition, a judgment against an employee of a government will now bar a judgment or recovery from the governmental unit. Tex. Civ. Prac. & Rem. Code Ann. § 101.106(d). The previous language barring an action against the employee because of a judgment or settlement against the governmental unit has been repealed. Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f).

X. DAMAGES

A. Types of Actual Damages Recoverable.

Damages for personal injury, death, and property damage can be recovered if the negligence involves a motor vehicle or motor-driven equipment. Only damages for personal injury and death can be recovered for negligence arising out of the use or condition of tangible property. Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (Vernon 1986).

B. Limitations on Damages.

Actual damages are limited under the Tort Claims Act. Municipalities and the State can never be liable for more than $250,000 per person and $500,000 for each single occurrence for personal injury and $100,000 for each single occurrence for property damage. Tex. Civ. Prac. & Rem. Code Ann. § 101.023(a) (Vernon 1986), § 101.023(c) (Vernon Supp. 1991) (prior to September 1, 1987 municipalities were liable for $100,000 per person and $300,000 per incident for personal injury and $100,000 per incident for property damage). All other governmental units are liable for $100,000 per person and $300,000 per occurrence for personal injury and $100,000 per occurrence for property damage. Tex. Civ. Prac. & Rem. Code Ann. § 101.023(b) (Vernon Supp. 1991).

C. The "For Each Person" Limitations.

The term "for each person" used in the statute refers to each person injured; therefore, all wrongful death beneficiaries will be limited to the appropriate "for each person" amount. Harris County Hosp. Dist. v. Estrada, 872 S.W.2d 759 (Tex. App.--Houston [1st Dist.] 1993); City of Austin v. Cooksey, 570 S.W.2d 386, 387-388 (Tex. 1978); see also Madisonville Indep. Sch. Dist. v. Kyle, 658 S.W.2d 149, 150 (Tex. 1983). For example, in Harris County v. White, 823 S.W.2d 385 (Tex. App.--Texarkana 1992, no writ), a deceased prisoner, not the surviving spouse and children, was the only person injured within the meaning of Texas Tort Claims Act in a wrongful death action against Harris County.

Spouses' claims for loss of companionship and consortium, mental anguish and loss of household services are derivative of the injuries sustained by the injured spouse. Rosenzweig v. Dallas Area Rapid Transit, 841 S.W.2d 897, 898 (Tex. App.-- Dallas 1992, writ denied). Such injuries do not constitute an additional bodily injury to give rise to a new $100,000 per person recovery. Contra City of Denton v. Page, 683 S.W.2d 180, 205-206 (Tex. App.--Fort Worth 1985), rev'd on other grounds, 701 S.W.2d 831 (a spouse's damages for mental anguish, loss of consortium and loss of services were separate and independent causes of action and, therefore, the spouse was not limited to the "for each person" limitation even if the other spouse was awarded a maximum "for each person" amount). However, one who recovers under a "bystander" theory is entitled to recover up to the "for each person" limitation for his or her own damages, notwithstanding any other recovery of other statutory beneficiaries. City of Austin v. Davis, 693 S.W.2d 31, 34 (Tex. App.--1985, writ ref'd n.r.e.).

D. Miscellaneous.

The statute's damage limitation does not apply to proprietary functions. City of Houston v. Bush, 566 S.W.2d 33, 34-35 (Tex. Civ. App.--Beaumont 1978, writ ref'd n.r.e.). The statutory limitations cannot be waived even if they are not pled. Whipple v. Deltscheff, 731 S.W.2d 700, 705 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.); City of Houston v. Arney, 680 S.W.2d 867, 874-875 (Tex. App.--Houston [1st Dist.] 1984, no writ), rev'd on other grounds, University of Texas Med. Branch at Galveston v. York., 871 S.W.2d 175, 179 n.7 (Tex. 1994). Any award of damages to multiple claimants in excess of the applicable limitation should be apportioned according to the proportionate share of each claimant to the total amount awarded to all claimants. City of Austin v. Cooksey, 570 S.W.2d 386 at 388; Madisonville Indep. Sch. Dist. v. Kyle, 658 S.W.2d 149 at 150.

Punitive damages cannot be recovered for governmental functions. Tex. Civ. Prac. & Rem. Code Ann. § 101.024 (Vernon 1986). Punitive damages may be recovered against municipalities performing proprietary functions if it is "pleaded and proved that the acts giving rise to the claim were committed with such malice or evil intent, or such gross negligence as to be equivalent to such intent." City of Gladewater v. Pike, 727 S.W.2d 514, 523 (Tex. 1987) (citing Peace v. City of Center, 372 F.2d 649 (5th Cir. 1967)).

The Tort Claims Act has, by its specific terms, always precluded discovery of insurance that would cover judgments against a governmental unit. Tex. Civ. Prac. & Rem. Code Ann §§ 101.027A, 101.104.

The discovery of insurance coverage for individual employees, however, has long been allowed. See City of Bedford v. Schattman, 776 S.W.2d 812, 814 (Tex. App.–Fort Worth 1989, orig. proceeding). The holding

in Schattman has been called into question, if not completely overruled by In re Sabine Valley Center, 986 S.W.2d 612 (Tex. 1999). Apparently, this case now prohibits discovery of insurance for actions against a government and its employees for which the government could be liable under the Act. Other language in the case seems to extend the discovery limitation to only insurance that is actually **purchased** for an individual by the governmental agency. As such, arguably, insurance purchased for an individual governmental employee by the employee, an employee union, or anyone other than the governmental agency may still be discoverable.

E. Damage Limitations Do Not Apply to Individuals.

The damage limitations do not apply to individual employees. See Madisonville Indep. Sch. Dist. v. Kyle, 658 S.W.2d (school bus driver was held to be jointly and severally liable for the entire amount of the judgment in excess of $100,000 limitation placed on the school district); Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001, 101.021. The Act by its plain language does not apply to liability against employees in their individual capacity. However, a judgment or a settlement against or with a governmental unit will bar any recovery against an individual employee. Tex. Civ. Prac. & Rem. Code Ann. § 101.106 (Vernon 1986).

F. Calculation of Judgments.

Comparative negligence percentage reductions must be made on the total amount awarded by the jury before the application of any statutory limitation. State Dep't of Highways & Pub. Transp. v. Cotner, 826 S.W.2d 692 (Tex. App.-- Waco 1992) rev'd on other grounds 845 S.W.2d 818; Univ. of Texas at El Paso v. Nava, 701 S.W.2d 71 (Tex. App.--El Paso 1985, no writ). Similarly, settlement credits are to be offset from the total judgment before applying the appropriate "for each person" damage limitation. Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76 (Tex. 1997); City of Houston v. Aber, 770 S.W.2d 89, 90 (Tex. App.-- Houston [14th Dist.] 1989, no writ). It has been held, however, that the actual amount of damages against multiple governmental defendants must be determined before adjudicating joint and several liability. This is true even if the joint and several liability of the defendants, if they were private entities, would each exceed the "for each person" limitations. Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427, 438-439 (Tex. App.-- Fort Worth 1989, writ ref'd n.r.e.).

Prejudgment interest may be recovered, but it may not be recovered in excess of the "for each person" limitation. Weller v. State, 682 S.W.2d 234 (Tex. 1984); State Dep't of Highways & Pub. Transp. v. Bacon, 754 S.W.2d 279, 282 (Tex. App.-- Texarkana 1988, writ denied). Post-judgment interest in excess of the statutory limitation has been allowed. Thus, governmental units should not have greater leeway to postpone payment than any private entity. Univ. of Texas Med. Branch at Galveston v. York, 808 S.W.2d 106 (Tex. App.-- Houston [14th Dist.] 1991), rev'd on other grounds, 871 S.W.2d 175 (Tex. 1994).

XI. NOTICE REQUIREMENTS

A. The Statutory Provisions.

Claimants must timely satisfy the notice provisions of the Act in addition to the statute of limitations. Section 101.101 of the Act provides as follows:

> (a) A governmental unit is entitled to receive notice of the claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:
> (1) the damage of injury claim;
> (2) the time and place of the incident; and
> (3) the incident
> (b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.
> (c) The notice requirements provided or ratified and approved by subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.

Tex. Civ. Prac. & Rem. Code Ann. § 101.101 (Vernon 1986).

B. In General.

The notice provision is designed to allow a governmental unit to "investigate while facts are fresh and conditions remain substantially the same... to guard against unfounded claims, settle claims and prepare for trial." City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981); Artco-Bell Corp. v. City of Temple, 616 S.W.2d 190 (Tex. 1981). City charter provisions with lawful periods for notice are ratified and approved. City of Houston v. Torres, 621 S.W.2d 588 at 590. One case has held that the Act's notice provision is exclusive and overrides any conflicting municipal ordinances or charter provisions. City of Denton v. Mathes, 528 S.W.2d 625, 632 (Tex. Civ. App.-- Fort Worth 1975, writ ref'd n.r.e.). [Practice Point: The better practice may be to comply with the statutory notice provision and any municipal ordinance or charter notice provisions.] The notice provision in the Act clearly overrides any non-municipal notice provisions. Harris County v. Dowlearn, 489 S.W.2d 140, 146 (Tex. Civ. App.--Houston [14th Dist.]

1972, writ ref'd n.r.e.) (a statute requiring presentation of a claim to a commissioners' court is not applicable to a case brought under the Act).

In cases against the State of Texas and its agencies, notice should be given to the Secretary of State and/or the agency head. Notice should be given to the County Judge and/or the Commissioners' Court for cases involving counties. Notice to municipalities should be served upon City Secretaries. Notice to all other types of governmental units should be served on the head of the units.

The filing of a petition may satisfy the notice provision of the act. Cavazos v. City of Mission, 797 S.W.2d 268, 271 (Tex. App.--Corpus Christi 1990, no writ). A governmental unit may be estopped from raising a failure of notice claim if the actions of governmental officials misled the claimant or otherwise caused the claimant to fail to comply with applicable notice provisions. City of Houston v. Black, 571 S.W.2d 496 (Tex. 1978); Roberts v. Haltom City, 543 S.W.2d 75, 80 (Tex. 1976). Failure to comply with notice provisions must be raised in a verified pleading. City of Houston v. Riggins, 568 S.W.2d 188, 194-195 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.). A recent decision holds that notice is an element of the Plaintiff's claim under the Texas Tort Claims Act. Texas Tech Univ. Health Ctr. v. Apodaca, 876 S.W.2d 402, 411 (Tex. App.--El Paso 1994, no writ). As such, notice should be pled and proven.

C. Actual Notice.

Actual notice will excuse compliance with the formal notice provisions. Actual notice has been defined as that knowledge which a governmental unit would have had if the claimant had complied with the formal notice provisions. Collier v. City of Texas, 598 S.W.2d 356 (Tex. Civ. App.--Houston [14th Dist.] 1980, no writ); City of Texarkana v. Nard, 575 S.W.2d 648 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); Texas Dep't of Criminal Justice v. Simons, 140 S.W.3d 338 (Tex. 2004) (holding that "actual notice under the Tort Claims Act required governmental unit have knowledge of information it was entitled to be given under the Act's notice provision and a subjective awareness that its fault produced or contributed to claimed injury"). The Supreme Court has recently increased the burden of proof for actual notice. Knowledge of the death or injury, the government's alleged fault causing harm, and the identification of the parties must be shown. Cathey v. Booth, 900 S.W.2d 339 (Tex. 1995). Hospitals often have actual knowledge of medical malpractice committed within their confines. Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271, 274 (Tex. App.--Fort Worth 1986, writ ref'd n.r.e.). However, in Reynosa v. Bexar County Hospital District, a finding of actual notice was precluded despite evidence of a conference on cesarean deliveries at which the plaintiff's case was discussed; review of the case by the hospital chief of obstetrics; a reporting of the case to the clinical nursing director for labor and delivery; the plaintiff's mother advising an attending that she blamed the hospital; the fact a separate file was found containing a key fetal heart tone monitoring strip; and a report written by a nurse that was involved. The court held there was no showing of actual notice because no one at the Bexar County Hospital District concluded that the hospital was responsible in some way for the minor plaintiff's injuries. This case seems to go well beyond Cathey in its holding. Interestingly enough, the case suggests that hospital records plus something more can raise a fact question on notice. The case holds that expert testimony linking the injuries to negligence that the hospital records show were, more likely than not, the cause of the plaintiff's injuries will suffice for actual notice. Reynosa v. Bexar County Hosp. Dist., 943 S.W.2d 74 (Tex. App. — San Antonio 1997, no writ); see also Dinh v. Harris County Hosp. Dist., 896 S.W.2d 248, 253 (Tex. App. — Houston [1st Dist.] 1995, writ dism.'d w.o.j.) (hospital records made it clear that an order was ignored for more than twenty-four hours and the minor plaintiff's treating physician linked the error to the injuries; fact question as to actual notice existed.)

Actual notice must be received by an agent or employee who has a duty to investigate the facts and report them to a person of sufficient authority. In McDonald v. State, notice given to an unidentified woman about a dangerous condition when all employees were charged with reporting dangerous conditions was insufficient because there was no evidence that the unidentified woman had any duty to investigate the facts of the accident. McDonald v. State, 936 S.W.2d 734 (Tex. App.--Waco 1997, no writ). A similar result was reached in Cantu v. Harris County. Cantu v. Harris County, 931 S.W.2d 39 (Tex. App.–Houston [1st Dist.] 1996, no writ). In Cantu, the only evidence provided was that some unknown third parties who lived near an accident told two witnesses that they had notified "the county" on several occasions of a downed stop sign. The court held that this was insufficient to raise a fact question on the issue of actual notice. See Univ. of Texas Southwestern Med. Ctr. at Dallas v. Loutzenhiser, 140 S.W.3d 351 (Tex. 2004) (holding "(1) Tort Claims Act's six-month notice period for giving notice to medical center began when son was born; (2) telephone call from father to someone at medical center was no a 'notice of claim,' for purposes of Tort Claims Act; [(3)] mother's failure to give medical center notice of claim . . . did not deprive the court of subject matter jurisdiction . . . ; [and] [(4)] medical center did not waive its

contention that lack of notice barred claim by raising notice issue seven weeks before trial").

Investigation of accidents by a governmental unit alleged to be negligent are also likely to give rise to actual notice. Woomer v. City of Galveston, 765 S.W.2d 836, 839 (Tex. App.--Houston [1st Dist.] 1988, writ denied) (the governmental units involved investigated a drowning and created a written report; the failure to forward the report to any other department of the governmental units did not preclude actual notice); Rosales v. Brazoria County, 764 S.W.2d 342, 344-345 (Tex. App.--Texarkana 1989, no writ) (deputy sheriff's investigation and subsequent report was actual notice regardless of whether report was sent to the County Commissioners' Court); City of Texarkana v. Nard, 575 S.W.2d 648, 653 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.).

Cases against a municipality arising out of their proprietary functions cannot be brought under the Act and actual notice will not excuse compliance with a city charter. City of Houston v. Turvey, 593 S.W.2d 766 (Tex. Civ. App.--Houston [1st Dist.] 1979), aff'd, 602 S.W.2d 517; City of Houston v. Deshotel, 585 S.W.2d 846, 849 (Tex.Civ.App.-- Houston [1st Dist.] 1979, no writ). Finally, the existence of actual notice is a fact issue for the jury. Alvarado v. City of Lubbock, 685 S.W.2d 646 (Tex. 1985); Lorig v. City of Mission, 629 S.W.2d 699 (Tex. 1982).

D. Unlawful City Charter Provisions.

Many city charters are unconstitutional or otherwise unlawful. Municipal charter provisions requiring thirty, sixty, and ninety-day notice periods have been held to be unconstitutional. Borne v. City of Garland, 718 S.W.2d 22, 24 (Tex. App.--Dallas, writ ref'd n.r.e.) (thirty-day notice period provision was unconstitutional.); Fitts v. City of Beaumont, 688 S.W.2d 182, 185 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.) (sixty-day provision found to be unconstitutional); City of San Antonio v. Schautteet, 706 S.W.2d 103 (Tex. 1986) (ninety-day period held unconstitutional). Fitts suggested that six months was a reasonable and constitutional time period. Borne does suggest that a shorter time period may be constitutional in conjunction with an actual notice provision in the charter. Borne, 718 S.W.2d 22 at 24. Charter provisions requiring twenty-four hour prior notice of defects have also been held unconstitutional. Hanks v. City of Port Arthur, 48 S.W.2d 944 (Tex. 1932). Charter provisions requiring verification have also been found to be unlawful. Artco-Bell Corp. v. City of Temple, 616 S.W.2d 190, 193-194 (Tex. 1981) (verification was an unreasonable limitation on the city's liability and is contrary to the limitation of authority placed upon home rule cities); City of Houston v. Wormley, 623 S.W.2d 692, 694 (Tex. Civ. App.--Houston [1st Dist.] 1981, writ ref'd n.r.e.).

E. Disability.

Physical or mental incapacity excuses the running of the notice provision of municipalities. Hatcher v. City of Galveston, 775 S.W.2d 37, 38-39 (Tex. App.-- Houston [1st Dist.] 1989, no writ); City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981). Compliance with the notice provision will also be excused during the time that one is under the disability of minority. McCrary v. City of Odessa, 482 S.W.2d 151 (Tex. 1972); City of Denton v. Mathes, 528 S.W.2d 625, 635 (Tex.Civ.App.-- Fort Worth 1975, writ ref'd n.r.e.); but cf. Martinez v. Val Verde County Hosp. Dist., 140 S.W.3d 370 (Tex. 2004) (holding that "six month period prescribed by Texas Tort Claims Act for giving notice of claim against governmental unit was not tolled by a patient's minority").

Compliance within six months after the attainment of majority is not required of one who is excused from compliance because of minority. City of Denton v. Mathes, 528 S.W.2d 625, 635 (Tex.Civ.App.-- Fort Worth 1975, writ ref'd n.r.e.); City of Lubbock v. Onley, 506 S.W.2d 208 (Tex. 1973). Once a disability resulting from physical or mental incapacity is removed, the notice provision must be satisfied. Rath v. State, 788 S.W.2d 48, 51 (Tex. App.--Corpus Christi 1990, writ denied); see McCrary v. City of Odessa, 482 S.W.2d at 154.

The discovery rule does not extend to notice provisions under the Act. Sanford v. Texas A&M Univ., 680 S.W.2d 650, 651-652 (Tex. App.--Beaumont 1984, writ ref'd n.r.e.); Univ. of Texas Med. Branch at Galveston v. Greenhouse, 889 S.W.2d 427, 431-432 (Tex. App.--Houston [1st Dist.], 1994, no writ.). Apparently, notice provisions under the Tort Claims Act applicable to governmental bodies other than municipalities may not be tolled by mental or physical disability. Dinh v. Harris County Hosp. Dist., 896 S.W.2d 248 (Tex. App.--Houston [1st Dist.] 1994, no writ); Greenhouse, 889 S.W.2d at 431-432.

XII. INDIVIDUAL IMMUNITY

A. In General.

The Tort Claims Act does not create immunity for individual employees or officials. "To the extent an employee has individual immunity from a tort claim for damages, it is not affected by" the Act. Tex. Civ. Prac. & Rem. Code Ann. § 101.026 (Vernon 1986); see also Gonzales v. Avalos, 866 S.W.2d 346 (Tex. App.--El Paso 1993, writ dism'd w.o.j.).

Gonzales analyzed the distinction between the immunities available for an employee of a government sued in his individual and official capacities. An employee sued in his or her individual capacity is

protected from personal liability by the defense of individual immunity. (Individual immunity, somewhat confusingly, is referred to interchangeably throughout the case law as "good faith," "individual," "official" and/or "quasi-judicial" immunity.) An employee sued in his or her official capacity is not subject to personal liability and any judgment would have to be paid by the respective governmental agency. The only defense available is that of the government, i.e. sovereign immunity. If there is a waiver of sovereign immunity, there is no immunity for the individual sued in his or her official capacity. Gonzalez v. Avalos, 866 S.W.2d 346.

Some employees are absolutely immune to liability. Judges and legislators are absolutely immune. Spencer v. City of Seagoville, 700 S.W.2d 953, 957-958 (Tex. App.--Dallas 1985, no writ); Canfield v. Gresham, 82 Tex. 10, 17 S.W. 390, 392-393 (1891). Prosecutors also enjoy absolute immunity while performing typical prosecutorial functions such as initiating criminal charges and presenting the prosecution's case. Oden v. Reader, 935 S.W.2d 470 (Tex. App.--Tyler 1996, no writ) (activities not directly related to the prosecution of cases did not give rise to absolute immunity but were subject to the claim of qualified or official immunity).

B. Quasi-Judicial and Ministerial Acts.

Other public officials and employees are immune when they are engaged in quasi-judicial activities. Quasi-judicial activities are discretionary in character, requiring personal deliberation, decision, and judgment. Austin v. Hale, 711 S.W.2d 64 (Tex. App.--Waco 1986, writ ref'd n.r.e.); Baker v. Storey, 621 S.W.2d 639 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.). In addition, when a state employee gathers facts and then acts on those facts, such actions are treated as "quasi-judicial" acts. Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224 (Tex. App.-- Waco 1986, writ ref'd n.r.e.); Austin v. Hale, 733 S.W.2d at 66; Augustine by Augustine v. Nusom, 671 S.W.2d 112, 115 (Tex. App.-- Houston [14th Dist.] 1984, writ ref'd n.r.e.). In contrast, there is no individual immunity for ministerial acts. Baker v. Storey, S.W.2d 639, 645 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.). Under Texas law, quasi-judicial officials are entitled to individual immunity when they exercise their judgment and discretion in good faith. Campbell v. Jones, 264 S.W.2d 425, 427 (1954). An exception exists if a quasi-judicial official acts "willfully or maliciously." Id.

The holding in the City of Lancaster v. Chambers case makes no mention of a quasi-judicial ministerial distinction. It broadly holds that all government employees are entitled to official immunity from suit if they are performing discretionary acts in good faith within the scope of their authority. City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994). It should be noted, however, that the performance of discretionary acts has always been roughly equated with quasi-judicial activities as discussed above. See e.g., Washington v. City of Houston, 874 S.W.2d 791 (Tex. App.--Texarkana 1994, no writ) (quasi-judicial duties are those that involve discretion rather than those that are ministerial. This court notes the governmental/ occupational test in the Hatley and Armendarez cases cited below).

"Quasi-judicial" immunity has been applied to child welfare workers for the decision to allow an allegedly abused child to remain in a home. Austin v. Hale, 711 S.W.2d 64 (Tex. App.--Waco 1986, no writ). A Department of Human Resources employee who allegedly failed to close an unlicensed day care facility was also protected by "quasi-judicial" immunity. Augustine by Augustine v. Nusom, 671 S.W.2d 112 (Tex. App.--Houston [14th Dist.] 1984, writ ref'd n.r.e.). Immunity has also been granted to a sheriff and police chief for their decision to arrest and incarcerate a person. Anderson v. Higdon, 695 S.W.2d 320, 324 (Tex. App.--Waco 1985, writ ref'd n.r.e.).

The actions of a court clerk or governmental clerk have been characterized as ministerial. Benge v. Foster, 47 S.W.2d 862, 864 (Tex. Civ. App.--Amarillo 1932, writ ref'd). The duties of jailers and sheriffs in receiving and caring for prisoners have been held to be ministerial. Browning v. Graves, 152 S.W.2d 515, 519 (Tex. Civ. App.--Fort Worth 1941, writ ref'd). The actions of the director of a mental institution regarding custody and disposition of a patient's personal belongings have been held to be ministerial. Worsham v. Votgsberger, 129 S.W. 157, 159 (Tex. Civ. App. 1910, no writ).

The actions of a pound keeper regarding animals have also been held to be ministerial. Hargrove v. City of Rotan, 553 S.W.2d 246, 248 (Tex. Civ. App.--Eastland 1977, no writ); City of Garland v. White, 368 S.W.2d 12, 16 (Tex. Civ. App.--Eastland 1963, writ ref'd n.r.e.). Normal operation of a motor vehicle absent an emergency situation is also ministerial. Woods v. Moody, 933 S.W.2d 306 (Tex. App.--Houston [14th Dist.] 1996, no writ).

The supreme court in Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417 (Tex. 2004), applied the doctrine of official immunity to members of a municipal board of adjustment. In Ballantyne, the court determined that the board (1) acted within its scope of authority; (2) performed a discretionary function; and (3) acted with good faith in the revoking the plaintiff's building permit; accordingly, the board of adjustment established an official immunity defense as a matter of law. Id. at 428.

It is also worth noting that, in examining the good faith of the board of adjustment, the court only considered objective evidence of good faith. Id.

C. Law Enforcement Immunities.

The Eastland Court of Appeals has held that the manner in which a police officer operates his vehicle in the performance of his duties, "does not involve matters within his discretion as an officer, or any judicial act within official jurisdiction." Eubanks v. Wood, 304 S.W.2d 567, 570 (Tex. Civ. App.--Eastland 1957, writ ref'd n.r.e.); accord Baker v. Storey, 621 S.W.2d at 645. The immunity available to police officers engaged in high-speed chases appears to have been resolved recently in City of Lancaster v. Chambers. City of Lancaster v. Chambers, 883 S.W.2d 650 (Tex. 1994). The law now seems to be that all government employees are entitled to official immunity from suit arising from:

(1) the performance of their discretionary duties,
(2) in good faith,
(3) as long as they are acting within the scope of their authority.

The court in Chambers squarely held that a police officer's actions in engaging in a high-speed chase are discretionary actions. (It should be noted that this case makes no mention of quasi-judicial positions).

The court also defined a test for the "good faith" element of official immunity. The court held that an officer is acting in good faith in a chase if:

> a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect that way to clear risk of harm to the public in continuing pursuit.

In addition, a police officer acts within his or her scope of authority if he or she is discharging the duties generally assigned.

Subsequent to its landmark decision in Chambers, the Texas Supreme Court has expounded on doctrine of official immunity regarding law enforcement. In Wadewitz v. Montgomery, 951 S.W.2d 464 (Tex. 1997), the court elaborated on the "good faith" test defined in Chambers, stating:

> The "need" aspect of the test refers to the urgency of the police intervention. In the context of an emergency response, need is determined by factors such as seriousness of the crime or accident to which the officer responds, whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect, and what alternative courses of action, if any, are available to achieve a comparable result. The "risk" aspect of good faith, on the other hand, refers to the countervailing public safety concerns: the nature and severity of harm that the officer's actions could cause (including injuries to bystanders as well as the possibility that an accident would prevent the officer from reaching the scene of the emergency), the likelihood that any harm would be clear to a reasonably prudent officer.

Id. at 467. In addition, the court in Wadewitz held that the "good faith" test applied to an officer's high-speed emergency response. Id. Subsequently, in University of Houston v. Clark, 38 S.W.3d 578 (Tex. 2000), the court further refined the requirements of "good faith" for official immunity. In Clark, a suspect, fleeing police by car, collided with another vehicle, injuring a third-party. The court held that "to establish good faith in a police pursuit case, an officer must conclusively prove that a reasonably prudent officer in the same or similar circumstances could agree that the need to immediately apprehend the suspect outweighed the risk of harm to the public in continuing the pursuit, taking into account all the Wadewitz factors." Id. at 583.

However, in Telthorster v. Tennell, 92 S.W.3d 457 (Tex. 2002), the court declined to further extend the Chambers/Wadewitz test to cover injuries sustained by a suspect during arrest "because the public-safety concerns underlying [the risk/needs] assessment are not implicated." In Telthorster a suspect was injured when the arresting officer's gun accidently discharged. The suspect sued for damages and the officer moved for summary judgment based on the doctrine of official immunity. Because the need/risks assessment was not required, the officer only needed to show "that he acted in good faith for purposes of invoking official immunity protection." Id. at 465. Similarly, a recent decision by the court of appeals held that the need/risks balancing test of Chambers does not apply to "a police officer's decision to use force to protect himself from an immediate threat." Piedra v. City of Dallas, 2004 WL 550792, at *2 (Tex. App.–Dallas, March 22, 2004, no pet.) ("Application of the need/risk analysis presupposes an officer's ability to first consciously assess the needs and risks at issue before choosing whether or not to intervene. However, an officer faced with an immediate threat is not making a discretionary decision . . . rather, he is responding to outside forces.").

The inherent difficulty in utilizing the quasi-judicial/ministerial distinction was noted in Baker v. Storey:

> The distinction between "quasi-judicial" and "ministerial" duties is not only a fine spun distinction; it is for practical

> purposes, unworkable. It is said that "quasi-judicial" acts are "discretionary" in character, requiring personal deliberation, decision, and judgment, while "ministerial" acts require only obedience to orders, or the performance of a duty as to which the actor is left no choice of his own. "It seems almost impossible to draw any clear and definite line, since the distinction, if it exists, can be at most one of degree. 'It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.'"

Baker v. Storey, 621 S.W.2d 639, 645 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.), citing, W. Prosser, The Law of Torts, § 132 at p. 990. This is borne out by the current state of case law on this question.

One case holds that police officers are entitled to immunity whenever they are in the course and scope of their authority, acting in good faith and performing discretionary functions. Bozeman v. Trevino, 804 S.W.2d 341 (Tex. App.--San Antonio 1991, no writ) (this holding was based on the Dent case and arose out of an alleged beating and choking of a criminal suspect). Decisions regarding the location of a traffic stop, how long the vehicle occupants should have been detained, whether the occupants should have been allowed out of the vehicle, and when a warning light should have been used were held to be discretionary, judgmental decisions for which the officers were protected by official immunity. Carpenter v. Barner, 797 S.W.2d 99 (Tex. App.--Waco 1990, writ denied). This case seems to expand the immunity to acts and activities beyond the scope of the traditional quasi-judicial/ministerial analysis and the cases interpreting same. In Wyse v. Department of Public Safety, the traditional analysis was considered. The court found that an assistant district attorney and a county sheriff were officers whose duties are related to the judicial process and that they were performing quasi-judicial acts in terminating Department of Public Safety Employees after an investigation into charges of illegal activities. Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224, 227 (Tex. App.--Waco 1986, writ ref'd n.r.e.); accord Anderson v. Higdon, 695 S.W.2d 320 (Tex. App.--Waco 1985, writ ref'd n.r.e.) (defendants were officers whose duties are related to the judicial process and their actions were quasi-judicial; the case involved allegations of improper treatment of a schizophrenic inmate in the jail).

At least two appellate courts have added an additional factor for consideration in a law enforcement officer's claim of alleged official immunity. In State v. McGeorge, the court held that evidence seeking to defeat an officer's claim of qualified immunity must factually support the conclusion that no reasonable person in the officer's position could have believed that the officer's actions were justified. State v. McGeorge, 925 S.W.2d 105, 109 (Tex. App.--Houston [14th Dist.]1996, no writ). An affidavit which apparently satisfied the McGeorge requirement was found to raise a fact issue in City of San Antonio v. Bynum. See City of San Antonio v. Bynum, 937 S.W.2d 596 (Tex. App.--San Antonio 1996, no writ). While both cases reference the elevated standard of proof for non-movant attempting to defeat a claim of official immunity, the additional requirement described in the two cases above, that the facts must reasonably lead to a conclusion that no reasonable officer could believe the complained of activities were justified, is not present in the Chambers case.

Clark v. University of Houston notes that Chambers only requires that the plaintiff show that no reasonable person in the defendant's situation could have thought that the facts justified the defendant's acts. Clark v. University of Houston, No. 14-96-00005-CV, 1997 Tex. App. LEXIS 393 (Tex. App.--Houston [14th Dist.] 1997, history); see also Chambers v. City of Lancaster, 883 S.W.2d 650, 657-658 (Tex. 1994). Clark holds that an expert's affidavit must demonstrate an objective opinion based upon the facts that satisfies the Chambers standard. Once the court satisfied itself that the expert's affidavit met these requirements, a fact issue was presented.

McGeorge was the only case to overturn the denial of summary judgment. The court there seemed to base its holding simply on the fact that there were conflicting opinions about whether or not a reasonable officer could have believed that the actions were justified. Clark and McGeorge created a split in the Houston 14th District Court of Appeals on this issue. Clark makes it clear that the elevated standard of proof required by Chambers does not change the standard for review of qualified immunity summary judgments. The language in Kassen v. Hatley is instructive:

> The following standard shall guide a trial court in considering a summary judgment motion:
>
> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to a non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Kassen v. Hatley, 887 S.W.2d 4, 8 n.2 (Tex. 1994) (citing Nixon v. Mr. Property Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985)).

D. Medical Professional Immunities.

A surgeon's malpractice has been held not to rise to "quasi-judicial" status. Baker v. Storey, 621 S.W.2d 639, 645 (Tex. Civ. App.--San Antonio 1981, writ ref'd n.r.e.). The actions of physicians and nurses that parallel those of private practitioners do not rise to the level of "quasi-judicial" activities. Armendarez v. Tarrant County Hosp. Dist., 781 S.W.2d 301 (Tex. App.--Fort Worth 1989, writ denied). Kassen v. Hatley, like Chambers, seems to subsume the quasi-judicial/ministerial analysis into the discretionary function prong of the Chambers good faith standard. The supreme court holds that government-employed medical personal will be liable if they exercise medical discretion. Liability may be precluded if the claims arise out of the exercise of governmental discretion. Kassen v. Hatley, 887 S.W.2d 4, 11-12 (Tex. 1994); accord Bossley v. Dallas County Mental Health & Mental Retardation, 934 S.W.2d 689, 694 (Tex. App.--Dallas 1995, writ dism'd).

In Carrola v. Guillen, general descriptions of the overlapping duties of firefighters and paramedics were insufficient to support summary judgment based on qualified immunity when there was no specific evidence that the firefighting (governmental) duties were actually part of the complained-of actions in the case. As such, summary judgment based upon qualified immunity was improper. Carrola v. Guillen, 935 S.W.2d 949, 953 (Tex. App.--San Antonio 1996, no writ).

Another pre-Kassen case upheld the denial of summary judgment based on qualified immunity for paramedics. In City of Irving v. Pak, the court found no summary judgment proof that distinguished the decisions or duties of the paramedics from those that would be made in private practice. City of Irving v. Pak, 885 S.W.2d 189, 193 (Tex. App.--Dallas 1994, dism'd w.o.j.).

In Gross v. Innes, the court held that the Kassen governmental/medical analysis applied to paramedics. Gross v. Innes, 930 S.W.2d 237, 240 (Tex. App.-Dallas 1996, writ dism'd w.o.j.). Apparently, the Texas Supreme Court will decide the viability of this particular holding in the near future.

It seems likely that a nurse's claim of official immunity should also be subjected to the governmental/medical analysis contained in Kassen. See Wheeler v. Yettie Kersting Mem'l Hosp., 866 S.W.2d 42, 28 (Tex. App.--Houston [1st Dist.] 1993, no writ) (this is a pre-Kassen case decided based on Armendarez which acknowledged the distinction between uniquely governmental duties and medical duties).

Qualified immunity for medical examiners has also been upheld. Putthoff v. Ancrum, 934 S.W. 2d 164 (Tex. App.--Fort Worth 1996, writ denied). Statutory requirements for death determinations was found to satisfy the Kassen standard for governmental discretion.

E. Other Government Employee Immunities.

The Chambers good faith immunity standard has been applied to activities other than police chases. Summary judgment was inappropriate where a police officer failed to show that reasonable prudent officers could have believed that firing at a fleeing suspect was justified under the circumstances. City of Dallas v. Half Price Books, Records, Magazines, Inc., 883 S.W.2d 374, 377 (Tex. App.--Dallas 1994, no writ). The Chambers standard has been applied, somewhat awkwardly, the claim of individual immunity of the City of Laredo's traffic engineer. The defendant failed to show that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." Murillo v. Garza, 881 S.W. 2d 199 (Tex. App.--San Antonio 1994, no writ). As such, summary judgment was improper. See Murillo v. Garza, 904 S.W.2d 688(Tex. App.--San Antonio 1995, no writ) (the first appeal of this case similarly applied the Chambers standard to the City's traffic engineer). Summary judgment is inappropriate where there is no showing that the defendant's actions were within the scope of their authority as required by Chambers. For example, in Aldridge v. DeLosSantos, members of the faculty senate failed to make the proper showing and a denial of summary judgment was upheld. Aldridge v. DeLosSantos, 878 S.W.2d 288, 297 (Tex. App.--Corpus Christi 1934, no writ).

F. Interlocutory Appeal.

Section 51.014 of the Civil Practice & Remedies Code provides as follows:

> A person may appeal from an interlocutory order of a district court, county court at law, or county court that:
>
> > ...(5) denies a motion for summary judgment that is based on assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.

Tex. Civ. Prac. & Rem. Code § 51.014 (Vernon 1997). Thus, any denial of summary judgment based on individual immunity can serve as the basis for an interlocutory appeal.

Governmental agencies may also avail themselves of the provisions of Section 51.014. City of Houston v. Kilburn, 849 S.W.2d 810 (Tex. 1993). The Texas Supreme Court reasoned that governments and governmental subdivisions were "persons" for purposes of Section 51.014. The court examined Section 101.021(1) of the Act and reasoned that an employee's immunity could preserve the sovereign immunity of the governmental entity since that section requires proof of an employee's negligence. As such, the court found that interlocutory appeals were appropriate where individual employees claimed immunity and where liability was alleged under § 101.021(1) of the Act. Accord Huddleston v. Maurry, 841 S.W.2d 24, 30 (Tex. App.-- Dallas 1992, writ dism'd w.o.j.).

A government's claim of sovereign immunity should not be the subject of an interlocutory appeal pursuant to Section 51.014(5). City of Houston v. Killburn, 849 S.W.2d 810 (Tex. 1993); City of Irving v. Pak, 885 S.W.2d 189, 191 (Tex. App.--Dallas 1994, dism'd w.o.j.). The prudent claimant's practitioner will be sure to reply to any point of error regarding sovereign immunity where there has been no final disposition based upon same at the trial court level.

Putthoff v. Ancrum, however, holds that the government's immunity based on a lack of required notice immunizes its employees from liability. Putthoff v. Ancrum, 934 S.W.2d 164, 166 (Tex. App.--Fort Worth 1996, writ denied). The court apparently deemed that a plaintiff's failure to adequately give notice should preclude individual immunity, citing Thomas v. Oldham, 895 S.W.2d 352 (Tex. 1995). In spite of its holding in Killburn, the Texas Supreme Court seemed comfortable with the results. Similarly, the denial of a motion for summary judgment based on sovereign immunity was apparently allowed in City of Orange v. Jackson. City of Orange v. Jackson, 927 S.W. 2d 784, 787 (Tex. App.-- Beaumont 1996, no writ).

The supreme court has recently allowed an interlocutory appeal for an individual that was not specifically based on a claim of immunity. Newman v. Obersteller, 960 S.W.2d 621 (Tex. 1997). The court in Newman allowed the interlocutory appeal and held that Section 101.106 of the Tort Claims Act which bars judgment against an individual after judgment against a governmental unit arising out of the same transaction was actually an immunity statute. As such, the interlocutory appeal was proper.

G. Sovereign Immunity Based on Individual Immunity.

Individual immunity can prevent governmental liability based upon the employee's negligence. DeWitt v. Harris County, 904 S.W.2d 650 (Tex. 1995). The court upheld the government's immunity even though the plaintiff's claim was made under section 101.021(2) of the Act (under this section involving use or condition of property, the term employee is not used). This case involved alleged misuse of a flashlight. There was no allegation that a condition of property caused the injuries. Sovereign immunity based on individual immunity for § 101.021(1) claims had already been approved by the Supreme Court in Kilburn. 849 S.W. 2d 810 at 812 (Tex. 1993). This is true even if the individual employee is not sued. City of Beverly Hills v. Guevara, 904 S.W. 2d 655 (Tex. 1995).

A city's claim of sovereign immunity based on an employee's individual immunity must be urged by the employee and/or the city in the city's motion for summary judgment. City of Mission v. Ramirez, 865 S.W.2d 579, 582 (Tex. App.--Corpus Christi 1993). If the employees are claiming individual immunity on some other ground, there is no basis for an interlocutory appeal. Ramirez, 865 S.W.2d at 582.

A governmental unit's immunity cannot be based on a claim made under Section 101.021(2) of the Texas Tort Claims Act absent evidence that each employee involved was entitled to immunity. Fort Bend County v. Heikkila, 921 S.W.2d 395 (Tex. App.--Houston [1st Dist.] 1996, no writ). A similar result was reached in Texas Youth Commission v. Givens, 925 S.W.2d 760 (Tex. App.--Austin 1996, no writ). Section 101.021(2) of the Act requires proof of damages caused by a condition or use of property if the governmental unit would, if it were a private person, be liable to the claimant under Texas law. It does not hinge on the negligence of an employee as in section 101.021(1) of the Act. As such, at a minimum, a practical difficulty arises in a government seeking to avail itself of immunity based on immunity of employees. Either special exception is required to pinpoint any identifiable employees to allow proof of official immunity or the government must present proof of official immunity with regard to any employee who may have been involved. Otherwise, the government's claim of sovereign immunity based on a claim of employee official immunity is improper.

XIII. WAIVER OF IMMUNITY FOR WRONGFUL DISCHARGE IN WORKER'S COMPENSATION CASES

The Texas Supreme Court has recently decided the issue of whether worker's compensation wrongful discharge cases may be maintained against municipalities. City of LaPorte v. Barfield, 898 S.W.2d 288 (Tex. 1995). The Court took a long tortuous path through the history of worker's compensation wrongful discharge legislation and codification to arrive at its result. The court limited recovery to two remedies: reinstatement and back pay. The court also decided that

the Tort Claims Act limitations apply. Therefore, damages recoverable are limited by the limits of the Tort Claims Act and punitive damages are not permitted. Id..

XIV. PLEA TO THE JURISDICTION

The Texas Tort Claims Act confers subject-matter jurisdiction over claims that fall within the limited waiver of sovereign immunity. As a result, claims falling outside the scope of the Texas Tort Claims Act are challenged by a plea to the jurisdiction and subject to dismissal. Texas Dep't of Transp. v. Jones, 8 S.W.3d 636 (Tex. 1999); Texas Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004). In Miranda, the Texas Supreme Court held that, in ruling on a plea to the jurisdiction, a trial court may consider extrinsic evidence if the plea challenges jurisdictional facts alleged in the petition. Miranda, 133 S.W.3d at 227. Justice Jefferson filed a dissenting opinion "because [this new standard] permits a defendant, on painfully short notice and before evidence has been developed, to force plaintiff to either present evidence on the ultimate issue in the lawsuit, or lose the right to a jury trial on the merits." Miranda, 133 S.W.3d at 235. Moreover, a party filing a plea to the jurisdiction is not required to follow the same notice requirements as similar motions that consider extrinsic evidence and there is no provision in the rules for "an adverse party's right to present opposing evidence." Miranda, 133 S.W.3d at 236. Instead of applying a standard similar to a Rule 166(c) motion for summary judgment, Justice Jefferson "would examine the pleadings to determine whether the [plaintiff] alleged facts sufficient to invoke the trial court's jurisdiction," thereby avoiding the need to reach the merits of the plaintiff's claim. Miranda, 133 S.W.3d at 236; Tex. R. Civ. P. 21; 166(c).

APPENDIX A

ARTICLE 11. CLAIMS AGAINST EMPLOYEES OR VOLUNTEERS OF A GOVERNMENTAL UNIT

SECTION 11.01. Sections 108.002(a) and (b), Civil Practice and Remedies Code, are amended to read as follows:

(a) Except in an action arising under the constitution or laws of the United States, a public servant is not personally liable for damages in excess of $100,000 arising from personal injury, death, or deprivation of a right, privilege, or immunity if:

(1) the damages are the result of an act or omission by the public servant in the course and scope of the public servant's office, employment, or contractual performance for or service on behalf of a state agency, institution, department, or local government; and

(2) for the amount not in excess of $100,000, the public servant is covered:

(A) by the state's obligation to indemnify under Chapter 104;

(B) by a local government's authorization to indemnify under Chapter 102;

(C) by liability or errors and omissions insurance; or

(D) by liability or errors and omissions coverage under an interlocal agreement.

(b) Except in an action arising under the constitution or laws of the United States, a public servant is not liable for damages in excess of $100,000 for property damage if:

(1) the damages are the result of an act or omission by the public servant in the course and scope of the public servant's office, employment, or contractual performance for or service on behalf of a state agency, institution, department, or local government; and

(2) for the amount not in excess of $100,000, the public servant is covered:

(A) by the state's obligation to indemnify under Chapter 104;

(B) by a local government's authorization to indemnify under Chapter 102;

(C) by liability or errors and omissions insurance; or

(D) by liability or errors and omissions coverage under an interlocal agreement.

SECTION 11.02. Chapter 261, Health and Safety Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. LIABILITY OF NONPROFIT MANAGEMENT CONTRACTOR

Sec. 261.051. DEFINITION. In this subchapter, "municipal hospital management contractor" means a nonprofit corporation, partnership, or sole proprietorship that manages or operates a hospital or provides services under a contract with a municipality.

Sec. 261.052. LIABILITY OF A MUNICIPAL HOSPITAL MANAGEMENT CONTRACTOR. A municipal hospital management contractor in its management or operation of a hospital under a contract with a municipality is considered a governmental unit for purposes of Chapters 101, 102, and 108, Civil Practice and Remedies Code, and any employee of the contractor is, while performing services under the contract for the benefit of the hospital, an employee of the municipality for the purposes of Chapters 101, 102, and 108, Civil Practice and Remedies Code.

SECTION 11.03. Section 285.071, Health and Safety Code, is amended to read as follows:

Sec. 285.071. DEFINITION. In this chapter, "hospital district management contractor" means a nonprofit corporation, partnership, or sole proprietorship that manages or operates a hospital or provides services under contract with a hospital district that was created by general or special law.

SECTION 11.04. Section 285.072, Health and Safety Code, is amended to read as follows:

Sec. 285.072. LIABILITY OF A HOSPITAL DISTRICT MANAGEMENT CONTRACTOR. A hospitaldistrict management contractor in its management or operation of a hospital under a contract with a hospital district is considered a governmental unit for purposes of Chapters 101, 102, and 108, Civil Practice and Remedies Code, and any employee of the contractor is, while performing services under the contract for the benefit of the hospital, an employee of the hospital district for the purposes of Chapters 101, 102, and 108, Civil Practice and Remedies Code.

SECTION 11.05. Section 101.106, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 101.106. ELECTION OF REMEDIES. (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

SECTION 11.06. Section 108.001, Civil Practice and Remedies Code, is amended by adding Subdivision (3) to read as follows:

(3) "Public servant" includes a licensed physician who provides emergency or post emergency stabilization services to patients in a hospital owned or operated by a unit of local government.

SECTION 11.07. Section 108.002(c), Civil Practice and Remedies Code, is repealed.