

SOVEREIGN IMMUNITY, THE TEXAS TORT CLAIMS ACT

AND OTHER UNANSWERABLE QUESTIONS

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AFTER LAW SCHOOL, YOU BECOME A FONT OF FREE ADVICE

Friends, family and even strangers have no
hesitance about asking questions such as:

This is tax deductible, RIGHT?!?!?

Were are not going to have to pay for that?

Can you represent Me for Free?

What do you mean I can't sue the
government?!?!?!?

A year in the life of a Tort Claims litigator!!!



I HAVE THIS GREAT SUIT AGAINST THE GOVERNMENT, SEE ANY PROBLEMS?

If you're suing a governmental entity, you MUST have a waiver of Sovereign Immunity. What does that mean?

Sovereign Immunity bars suits against governmental entities for money damages.

Can't sue without a waiver of immunity from suit.

KEY TO THE COURTHOUSE, JURISDICTIONAL

Can't recover without a waiver of immunity from liability.

Can't be waived!!!



I AM SUING A CITY, A WATER DISTRICT AND EDC, DO THEY ALL HAVE SOVEREIGN IMMUNITY?

Immunity protects all governmental entities and those fulfilling governmental functions

- ▶ “Nature, purpose and powers” of an entity determine if it enjoys immunity
- ▶ *Ben Bolt/LTTS*—the Quack/AFLAC Test
 - ▶ Purpose,
 - ▶ Authority, and
 - ▶ Limitations



I AM SUING A CITY, A WATER DISTRICT AND EDC, DO THEY ALL HAVE SOVEREIGN IMMUNITY?

Exception is a governmental entity performing a proprietary function

- ▶ Applies only to cities
- ▶ AND What Constitutes a Proprietary Functions are Limited

OH AND--Sovereign Immunity also applies to suits against persons in their official capacity



WAIT, WE FOUGHT THE REVOLUTION TO GET RID OF THIS CRAP!

Sovereign Immunity was created by the Judiciary.

Purpose of Sovereign Immunity:

- Sovereign Immunity protects diversion of limited resources (tax dollars) from their intended purpose.
- Stops second guessing of policy decisions.

And BY THE WAY to make things more, the form of Sovereign Immunity that applies to local governments is called Governmental Immunity.

Why a different name? Got no clue!



A COUPLE WEEKS LATER A FOLLOW UP CALL: I THINK THE CITY CHARTER AND BYLAWS WAIVE THIS IMMUNITY STUFF

a. Legislature can waive

- Supremes say the Legislature is in the best position to make such a decision

b. Can Legislature allow others to waive?

- No; *IT-Davy*
- More recently, Supremes side-stepped this issue
UTEP v. Herrera; Tooke v. Mexia

c. Can courts find waiver by estoppel?

- *Hearts Bluff Game Ranch (citing State v. Biggers)*
- Government cannot reap benefit of unjust behavior



WHAT DOES THE LEGISLATURE HAVE TO DO WITH THIS?

- The Legislature's role is to determine when to waive immunity (allocate limited resources, i.e., tax dollars)
- Any waiver of immunity, but it must do so in a clear and unequivocal manner



BUT YOU SAID THE COURTS CREATED SOVEREIGN IMMUNITY?

- Courts determine the scope of protection afforded
 - What suits are barred by immunity--equity claims vs. suits for money damages
 - *City of Dallas v. Parker*
 - What entities enjoy immunity
 - *LTTS*



“I REPRESENT THE CITY OF WEST MULVANIA, I CAN SUE BRISTOL COUNTY FOR DESTROYING OUR BRIDGE!?”

A governmental plaintiff suing another governmental entity must establish that immunity is not applicable or has been waived by statute

- *Tex. Dept. Trans. v. City of Sunset Valley* (Tex. 2004)
- This is even true when the State sues a local governmental entity: *City of Galveston*
- *Nueces County v. San Patricio County*—heavy presumption of immunity



“THE LEG JUST PASSED A BILL AND THE CITY TOOK ACTION TO ENFORCE IT. IT IS UNCONSTITUTIONAL, CAN I SUE?”

Sovereign Immunity does not apply to suits seeking equitable relief. *City of El Paso v. Heinrich* (Tex. 2009)

- You can sue for a declaration that a statute, ordinance, etc., is unconstitutional.
- Also, can bring an *Ultra Vires* claims against Governmental Official acting without legal authority.
- “Illegal or unauthorized actions are not acts of the State.”
So you sue the official in their official capacity.
- Can’t avoid immunity by claiming a suit for money damages is seeking only declaratory relief



HMMM, CITY OF EL PASO V. HEINRICH, TELL ME MORE!

Heinrich sued for injunction based on reduction in her pension payments

- Heinrich's suit did not challenge a discretionary decision, but alleged they violated the statute and their bylaws
- Heinrich sought an injunction prohibiting the Board from continuing its illegal actions. Could received money damages from the date of the injunction hearing.
- You cannot avoid immunity by calling a suit for money damages an ultra vires claim or a suit for money damages.

You sound like you know a lot about this, can you represent my client for free or a very reduced rate?



HEY, I AM ABOUT TO SUE UNDER THE PESTICIDE APPLICATION STATUTE; THAT WAIVES IMMUNITY, RIGHT?

- A. To waive immunity, a statute must do so in a clear and unambiguous manner.
- B. “Rarely” will courts find a statute waives immunity when the “magic words” are absent. *Southwestern Bell v. Harris Co. Toll Road Authority* (Tex. 2009)



THE STATUTE DOES NOT SAY IT WAIVES IMMUNITY, DOES THAT MATTER?

1. Courts resolve ambiguities by retaining immunity.
2. Statute the waive immunity typically set a limit on liability.
3. A statute that requires joinder in suit where immunity would otherwise attach waives immunity. (Ex. DJA)
4. Would the statutory provision serve ANY purpose absent a waiver?

*Oncor Electric; Harris Co. Toll Road Authority;
Montgomery County Hosp. Dist.*



BUT THIS STATUTE SAYS THEY “SHALL” DO THIS!

Southwestern Bell/Montgomery County

-If there is any other purpose for the language at issue, then there is no waiver of immunity from suit.

-If there is any plausible reading of the statute other than waiver, the statute does not waive immunity.



WAIT, THIS IS NOT FAIR

- Life is not fair
- Immunity protects tax payers from “boneheaded decisions” of government officials/employees—however “improvident, harsh, [or] unjust” the result may be. *Brown and Grey Engineering* (Tex. 2015)(quoting Bacon v. Tex. Historical Comm’n (Tex.App.–Austin 2013))



HEY I FOUND THE TCA, THAT MEANS I CAN SUE, RIGHT? NOT SO MUCH!

Torts Claims Act is a LIMITED WAIVER OF IMMUNITY!

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



“WHAT DO YOU MEAN LIMITED? IT SAYS CONDITION OF USE OR REAL OR PERSONAL PROPERTY!”

Section 101.021 waives Immunity for:

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



**AN EMPLOYEE WAS THERE AND HE COULD HAVE SET THE BED
RAILS SO SHE DID NOT FALL!
WHAT MORE DO I NEED TO PROVE!?!?!**

Condition or Use Liability

- "Condition" and "Use" are separate bases of liability
- The Supreme Court has asked for clarification, but the Legislature has not amended the TCA
- Whether a "condition" or "use" is a question of law
- It's either a "Condition" or a "Use" case, but not both

"Condition" of Personal Property Liability

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



PERSONAL PROPERTY LIABILITY

Condition:

- “Condition” liability is based on “either an intentional or an inadvertent state of being.” *Sparkman v. Maxwell* (Tex. 1975).
- 911 System that was always hanging up on caller. *Sanchez*, (Dallas CA 2015)
- Allegation that two pit bulls escaped through defective fence and attacked two children were sufficient to allege a “condition” of property claim. *Michael v. Travis Cnty. Hous. Auth.*, Austin CA 1999.



PERSONAL PROPERTY LIABILITY

“THEY DID NOTHING TO PREVENT THE INJURY FROM HAPPENING. THAT IS NEGLIGENCE!”

“Use” of Personal Property Liability

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

The Supremes Court’s old decisions regarding liability for non-use are no longer good law



PERSONAL PROPERTY LIABILITY

“USING THE WRONG DRUG HAS TO BE THE USE OF PERSONAL PROPERTY.”

Use of Personal Property Liability

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



PERSONAL PROPERTY LIABILITY

“THEY HAVE TO BE LIABLE! THE INFORMATION WAS RIGHT THERE. ALL THEY HAD TO DO WAS READ IT!”

“Use” of Property Liability

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



PERSONAL PROPERTY LIABILITY

“I KNOW I HAVE A PROBLEM WITH PROXIMATE CAUSE, BUT THAT GOES TO THE JURY!”

Injuries Must Be Proximately Caused

- Plaintiff must prove cause in-fact and foreseeability
- Property must do more than furnish the condition that makes the injury possible. *Bossley*
 - Door left open that allowed patient escape. *Bossley*
 - Exposed wires on telephone in holding cell. *Posey*
 - 911 responder’s mistake was too attenuated from cause of death—drug overdose. *Sanchez*



REAL PROPERTY LIABILITY

“PREMISES CASES ARE TOUGH, BUT ALL THEY DID WAS PUT UP A SIGN ‘GUARDRAIL DAMAGE AHEAD’”

Ordinary Premises Defect/Licensee-Licensors Standard

This requires proof of:

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



REAL PROPERTY LIABILITY

“THE POTHOLE COVERED ABOUT 90% OF THE ROAD!” DO WE HAVE A CHANCE? YOU DO!!!

Special Defect-Invitee Standard of Care

- Defect on roadway comparable to an “excavation or obstruction”
- Courts consider:
 - Size of condition
 - Creates an unexpected and unusual danger
 - For ordinary users of the roadway
 - Deer hunter case
 - Ice on bridge case
 - Safety arm laying off roadway case



REAL PROPERTY LIABILITY—SPECIAL DEFECT

Special Defect-Invitee Standard of Care

- Special Defects are the exception
 - Most defects are ordinary premises defects
- Governmental entity can be liable for failing to act within a reasonable time of having constructive knowledge of condition
 - Plaintiff's knowledge is not a bar to recovery
 - Duty may be discharged by warning of condition



MOTOR DRIVEN EQUIPMENT LIABILITY

“THE COP RAN THE RED LIGHT AND HIT MY CLIENT!”

1. Must establish that:

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



MOTOR DRIVEN EQUIPMENT LIABILITY

2. Defeating Official Immunity

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



MOTOR DRIVEN EQUIPMENT LIABILITY

3. Good Faith Test—objective legal reasonableness—would any officer do it?
 - “Protects all but the plainly incompetent” or a knowing violation of law
4. In officer involved accident cases, officer must prove:
 - He acted as he thought best
 - CONSIDERED the Risk to the Public of Acting
 - CONSIDERED Other Alternatives



“OK I CAN GET PAST ALL THAT!” WAIT... THERE ARE EVEN MORE HURDLES--EXCLUSIONS FROM LIABILITY

A. TCA Expressly Excludes Certain Activities from Liability

B. Actions before Jan. 1, 1970

- Buildings that pre-date the TCA

C. Discretionary Act

- Construction of roads

D. Intentional Torts are Excluded

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



ELECTION OF REMEDIES

“FORGET IT, I WILL SUE THE EMPLOYEE!”

Section 101.106

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



A. SECTIONS 101.106(A)(B) TCA

- A. Suing governmental unit is an *irrevocable election* barring claims against employees regarding same subject matter.
- B. Suing employee is an *irrevocable election* barring claims against governmental entity regarding same subject matter.

Don't Tell Anyone: That is NOT What It Really Means!!!



B. SECTION 101.106(C)(D) TCA

- C. Settlement bars suit against employee regarding the same subject matter
- D. Judgment against an employee bars suit against the governmental unit
 - Ruling on a plea to the jurisdiction is a judgment



C. SECTION 101.106(E) TCA

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



D. SECTION 101.106(F) TCA

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



D. SECTION 101.106(F) TCA

- If Employees Files Motion, Look at substance of allegations:
 - If the substance of the claims are based on work in the course of duties, then it is a claim in the official capacity. *Alexander v. Walker*
 - Scope of employment is objective not subjective. *Laverie v. Wetherbe*
- Could have been brought under the TCA:
 - Employee is dismissed regardless of whether there is waiver of entity's immunity under the TCA. *Franka*
- Statute of limitation:
 - Statute of limitation is tolled if entity is named in a timely fashion. *Bailey*



D. SECTION 101.106(F) TCA

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

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

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



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