

# 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'ls 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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