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A Paying Patient in a County Hospital May Not Maintain a Cause of Action in Tort in the Event of Injuries Sustained as the Result of the Negligence of Hospital Employees.

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or national origin. This amendment is self-operative."[33] Section 3 of the present constitution provides:

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.[34]

The Supreme Court of Texas in discussing the equal rights guaranteed by Art. I, § 3, of the Texas Constitution said:

> In spite of this, the State can adjust its legislative differences . . . . Our Constitution does not forbid legislative classification of subjects and persons for the purpose of regulatory legislation, but it does require that the classification be not arbitrary or unreasonable.[35]

Passing the proposed amendment would render all legislation based wholly and arbitrarily on sex unconstitutional.[36] Any law which has as its basis a differential based on facts other than sex would be valid, but the amendment is necessary to insure that sex alone is not a reasonable ground for legislative purposes.[37]

Robert S. Flaniken

GOVERNMENT IMMUNITY—HOSPITALS—A "PAYING PATIENT" IN A COUNTY HOSPITAL MAY NOT MAINTAIN A CAUSE OF ACTION IN TORT IN THE EVENT OF INJURIES SUSTAINED AS THE RESULT OF THE NEGLIGENCE OF HOSPITAL EMPLOYEES. *Ritch v. Tarrant County Hospital District,* 476 S.W.2d 950 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e.,* 480 S.W.2d 622 (Tex. Sup. 1972).

Tom L. Ritch, while under the influence of medications administered by the hospital staff, fell from his bed in the intensive care unit of a county hospital and sustained injuries which subsequently resulted in death. The plaintiffs, Ritch's surviving spouse and children, brought action for damages under the Texas Wrongful Death Act,[1] alleging negligence of the hospital's staff and employees. The lower court rendered summary judgment in favor of the defendant, Tarrant County

33 Proposed Amendment: TEX. CONST. art. I § 3a (Supp. 1972). Proposed by S.J.R. No. 16, Acts 1971, 62nd Legislature, 4129, for submission to the people in Nov., 1972.
34 TEX. CONST. art. I, § 3.
35 Friedman v. American Surety Co., 137 Tex. 149, 160, 151 S.W.2d 570, 576 (1941).
36 Tobolowsky, *For Equal Rights Amendment,* 26 TEX. B.J. 1004 (1963).
37 *Id. Contra,* Amsler, *Against Equal Rights Amendment,* 26 TEX. B.J. 1005 (1963).

1 TEX. REV. CIV. STAT. ANN. art. 4671 (1952).

Hospital District, and plaintiffs appealed. Held—*Affirmed.* The present status of governmental immunity in Texas inhibits recovery even in those instances in which the claimant is a "paying patient," in spite of the fact that the hospital functioned and operated in a purely proprietary capacity with reference to the injured claimant.[2]

The immunity of the sovereign to liability is a judge-made doctrine of law which bars recovery for tortious conduct of the agents, employees, or officers of the state. The first instance of its application was in *Russell v. Men of Devon.*[3] The rule of *Men of Devon* was adopted first in this country in *Mower v. Inhabitants of Leicester*[4] in 1812. Chief Justice Marshall, without citation of authority, found the rule to be controlling in federal courts in 1821.[5] This doctrine gradually became the general rule of law in the United States.

In spite of this common origin, the doctrine of sovereign immunity has followed divergent patterns in the various state jurisdictions. This differentiation is particularly visible in the application of the rule to the county, as a governmental unit, in its functional capacity. Some jurisdictions hold that the county is a governmental entity which functions only in a governmental capacity.[6] The trend of the law, however, is to recognize the fact that counties do operate in a proprietary manner in some instances, and, as such, they should be held liable just as a private individual or corporation.[7] A third approach to county liability for tortious conduct recognizes the proprietary nature of certain functions of the county, but withholds liability in the absence of specific statutory law which enables such recovery.[8]

The question of liability of a county hospital for the negligence of its employees which results in injury or death to a patient remains an issue of governmental immunity in most jurisdictions.[9] A few states

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2 Ritch v. Tarrant County Hosp. Dist., 476 S.W.2d 950 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e.*, 480 S.W.2d 622 (Tex. Sup. 1972).

3 100 Eng. Rep. 359 (K.B. 1788).

4 9 Mass. 247 (1812).

5 Cohens v. Virginia, 19 U.S. (6 Wheat.) 262, 5 L. Ed. 257 (1821). *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 971 (4th ed. 1971).

6 *E.g.*, Hartness v. Allegheny County, 37 A.2d 18 (Pa. 1944); McMahon v. Baroness Erlanger Hosp., 306 S.W.2d 41 (Tenn. Ct. App. 1957); Shaffer v. Monongalia Gen. Hosp., 62 S.E.2d 795 (W. Va. 1950).

7 *E.g.*, Hernandez v. County of Yuma, 369 P.2d 271 (Ariz. 1962); Henderson v. Twin Falls County, 50 P.2d 597 (Idaho 1935); Wittmer v. Letts, 80 N.W.2d 561 (Iowa 1957); Jacoby v. Chouteau County, 112 P.2d 1068 (Mont. 1941); Granite Oil Securities, Inc. v. Douglas County, 219 P.2d 191 (Nev. 1950); Rhodes v. City of Ashville, 52 S.E.2d 371 (N.C. 1949); Carlson v. Marinette County, 59 N.W.2d 486 (Wis. 1953). *See generally* Annot., 16 A.L.R.2d 1080 (1951).

8 *E.g.*, Laney v. Jefferson County, 32 So. 2d 542 (Ala. 1947); Schaffer v. Board of Trustees, 168 N.E.2d 547 (Ohio 1960); Lund v. Salt Lake County, 200 P. 510 (Utah 1921). *Contra*, Krause v. State, 274 N.E.2d 321 (Ohio Ct. App. 1971).

9 *E.g.*, Laney v. Jefferson County, 32 So. 2d 542 (Ala. 1947); McMahon v. Baroness Erlanger Hosp., 306 S.W.2d 41 (Tenn. Ct. App. 1957); Shaffer v. Monongalia Gen. Hosp., 62 S.E.2d 795 (W. Va. 1950). *See generally* Annot., 16 A.L.R.2d 1083 (1951).

recognize a special status for the "paying patient" in a county hospital and hold the county liable for negligence when it acts in such a proprietary capacity.[10]

Governmental immunity in Texas is a rule of law established by the judiciary;[11] the state may not be sued without its consent.[12] Furthermore, even in those instances of legislative consent to suit, the state has been held to be immune from liability for the torts of its agents or employees.[13] The courts of Texas have long recognized the governmental versus proprietary dichotomy of functions for municipal corporations,[14] and have held a city liable for the negligence of its employees when engaged in a proprietary function. The county, on the other hand, is a governmental agency, a subagent of the state, and as such only performs governmental functions; therefore, liability for the tortious conduct of employees is barred by the operation of sovereign immunity in the same manner that such rule protects the state.[15]

The court's decision in the instant case was rendered in strict compliance with precedent. In affirming summary judgment for defendant hospital district, Chief Justice Massey reasoned:

> Although plaintiff's decedent was a "paying patient," i.e., one with whom the defendant had contracted, upon compensation, for his hospital care as of the time of his alleged negligently inflicted injuries, resulting in death, we are of the opinion that the present state of the doctrine of governmental immunity in Texas inhibits any recovery.[16]
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> . . . .
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> Under current law, its [the county hospital] governmental immunity is referable thereto and exists in consequence despite the fact

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[10] *E.g.*, Hernandez v. County of Yuma, 369 P.2d 271 (Ariz. 1962); Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911 (Fla. 1952); Henderson v. Twin Falls County, 50 P.2d 597 (Idaho 1935); Wittmer v. Letts, 80 N.W.2d 561 (Iowa 1957). *See generally* Annot., 16 A.L.R. 2d 1083 (1951).

[11] The rule was first applied in Hosner v. DeYoung, 1 Tex. 764 (1847).

[12] *Id.*

[13] Texas Hwy. Dep't v. Weber, 147 Tex. 628, 219 S.W.2d 70 (1949); State v. Hale, 136 Tex. 29, 146 S.W.2d 731 (1941). *See generally* Comment, *The Governmental Immunity Doctrine in Texas—An Analysis and Some Proposed Changes*, 23 Sw. L.J. 341 (1969); Comment, *Governmental Immunity from Suit and Liability in Texas*, 27 TEXAS L. REV. 337 (1964).

[14] City of Galveston v. Posnainsky, 62 Tex. 118, 131 (1884).

[15] Hodge v. Lower Colo. River Authority, 163 S.W.2d 855, 856 (Tex. Civ. App.—Austin 1942, writ dism'd by agr.).

[16] Ritch v. Tarrant County Hosp. Dist., 476 S.W.2d 950, 951 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e.*, 480 S.W.2d 622 (Tex. Sup. 1972).

> The Tarrant County Hospital District was created under provisions of Article 4494n, V.A.T.S., and Article 9, Sec. 4, of the Constitution of the State of Texas. . . . It was created as, and is, a lawfully constituted county-wide Hospital District in Tarrant County, and owns and operates a public hospital system for the purpose of furnishing medical aid and hospital care to indigent and needy persons residing in the Hospital District. Obvious therefore is the character of the corporation and the purposes for which it was created. *Id.* at 952.

> that, as applied to the plaintiff's decedent, it *functioned and operated in a purely proprietary capacity.*[17]

These conclusions were based primarily on a prior decision of the same court in *Arseneau v. Tarrant County Hospital District,*[18] which clearly established the application of governmental immunity to the district's ordinary operation of its hospital. However, the court also relied on *Hodge v. Lower Colorado River Authority*[19] which was interpreted as indicating that "general governmental immunity from liability (except for municipalities) is referable not only to the character of the function performed, but also to the character of the corporation itself, and the purposes for which it was created."[20] An analysis of *Hodge* does not reveal this distinction to be applicable to counties, but is specifically related to municipal corporations.[21] Furthermore, *the counties do not function in a proprietary capacity* in Texas as they are

> . . . *political subdivisions of the state operating solely and exclusively as a governmental agency in a governmental capacity and are, therefore, immune from tort liability.* . . . [c]ounties are exercising a governmental function when they furnish, operate and maintain hospitals for the benefit of the public and not for the purpose of profit or revenue.[22]

The dictates of precedent restrained the court's conclusion, but did not inhibit Justice Massey in the expression of his distaste for the end result:

> Were the author of this opinion free to do so, he would hold substantially as did the Supreme Court of Florida in Suwannee County Hospital Corp. v. Golden,[23] and say that, ". . . as to those who are paying patients . . . the hospital is operated in a proprietary capacity, and they may not be divested of constitutional rights by the attempted statutory immunization. As to persons of that classification, the hospital is the same as if it were privately maintained, its duty to the patient is the same, and it should be equally responsible for its torts."[24]

This minority view,[25] advocated by Justice Massey, accedes to the

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17 *Id.* at 952 (emphasis added).
18 408 S.W.2d 802 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.).
19 163 S.W.2d 855 (Tex. Civ. App.—Austin 1942, writ dism'd by agr.).
20 Ritch v. Tarrant County Hosp. Dist., 476 S.W.2d 950, 952 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e.*, 480 S.W.2d 622 (Tex. Sup. 1972).
21 Hodge v. Lower Colo. River Authority, 163 S.W.2d 855, 856 (Tex. Civ. App.—Austin 1942, writ dism'd by agr.).
22 Rodriquez v. Medical Arts Hosp., 437 F.2d 1203, 1204 (5th Cir. 1971) (emphasis added).
23 56 So. 2d 911 (Fla. 1952).
24 Ritch v. Tarrant County Hosp. Dist., 476 S.W.2d 950, 951 (Tex. Civ. App.—Fort Worth), *writ ref'd n.r.e.*, 480 S.W.2d 622 (Tex. Sup. 1972).
25 Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911 (Fla. 1952); *accord*, Hernandez

logical conclusion that it is the character of the function which is the real test of whether or not governmental immunity to tort should be applied in any given set of circumstances. Thus, "it is not a tort for government to govern,"[26] but "an enterprise is not governmental in character simply because the government enters it or the Legislature declares it so."[27] "Whether it be governmental or proprietary depends on the nature of the business and the determination of the courts."[28]

The operation of the county hospital is essentially a charitable enterprise in Texas.[29] However, "paying patients" are admitted, and the enabling statutes provide for partial payment for services rendered; hospital charges are based on the patient's ability to pay, but not exceeding *per capita* costs of operation and maintenance.[30] The granting of total immunity for negligence, even if the county hospital were absolutely "charitable" in its activities, would appear to be in direct conflict with the court's abolishment of charitable immunity in *Howle v. Camp Amon Carter*.[31] Justice Greenhill's criticism of the "charitable" status of hospitals which charged their patients for the requisite health care would seem to apply with equal vigor to the county hospital.[32] Yet the exercise of governmental immunity bars recovery for negligently inflicted injuries for which private as well as charitable hospitals are held liable—even when the claimant is a "paying patient."

Governmental immunity as a doctrine of law has been adequately criticized for decades,[33] and both the judiciary and the legislatures of the various states have been effective in ameliorating the harshness of

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v. County of Yuma, 369 P.2d 271 (Ariz. 1962); Henderson v. Twin Falls County, 50 P.2d 597 (Idaho 1935); Wittmer v. Letts, 80 N.W.2d 561 (Iowa 1957). *See generally* Annot., 16 A.L.R.2d 1083 (1951).

[26] Dalehite v. United States, 346 U.S. 15, 57, 73 S. Ct. 956, 979, 97 L. Ed. 1427, 1452 (1953) (Jackson, J., dissenting).

[27] Suwannee County Hosp. Corp. v. Golden, 56 So. 2d 911, 913 (Fla. 1952).

[28] *Id.* at 913.

[29] In 1966, 92 per cent of all patients accepted by Tarrant County Hosp. Dist. were indigents. The hospital district "owns and operates a public hospital system for the purpose of furnishing medical aid and hospital care to indigent and needy persons residing in the hospital district." Arseneau v. Tarrant County Hosp. Dist., 408 S.W.2d 802, 803 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.).

[30] TEX. REV. CIV. STAT. ANN. art. 4494n, § 14 (1960).

[31] 470 S.W.2d 629 (Tex. Sup. 1971).

[32] "It is difficult, for example, to consider a person who pays $20 to $50 per day for a hospital room to be the object of charity and entitled to no protection from negligent acts of the hospital. Many forceful and persuasive opinions have been written to the effect that the entire doctrine is outmoded or should be modified. . . ." Watkins v. Southcrest Baptist Church, 399 S.W.2d 530, 535 (Tex. Sup. 1966) (Greenhill, J., concurring). *See also* Villarreal v. Santa Rosa Medical Center, 443 S.W.2d 622 (Tex. Civ. App.—San Antonio 1969, no writ), in which the court refused to apply the doctrine of charitable immunity to a paying patient in a hospital operated by a charitable organization.

[33] An early contributor who is frequently cited is Professor Edwin Borchard of the Yale Law School. *See* Borchard, *Governmental Liability in Torts*, 34 YALE L.J. 1, 129, 229 (1924), *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 757, 1039 (1927), *Governmental Responsibility in Tort*, 28 COLUM. L. REV. 734 (1928), *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934).

its application.[34] Texas has made significant strides in this general direction by passing a tort claims act;[35] yet the general rule of governmental immunity remains a fact.[36]

The *Ritch* decision is incongruous with modern principles of equity. To bar recovery for the negligent acts of hospital employees, especially when the claimant is a "paying patient," is to deny the reasoning which supported the abolishment of charitable immunity in Texas.[37] Furthermore, the denial of claims like that of Mrs. Ritch and her children seems to violate those ideals which fostered a tort claims act for this state.[38] Ultimately, and most importantly, the *Ritch* decision defies the basic responsibility of providing a remedy for every wrong. When the issues of *Ritch* are again confronted in this state, our courts would do well to consider the remarks of Justice Struckmeyer of the Supreme Court of Arizona:

> Reason suggests that a patient who pays for professional services ought to be entitled to the same protection and the same redress for wrongs as if the negligence had occurred in a privately owned and operated hospital. . . . If the government is to enter into business ordinarily reserved to the field of private enterprise, it should be held to the same responsibilities and liabilities.[39]

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[34] *See* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919.

[35] TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970). The plaintiffs in *Ritch* did not raise the question of the applicability of the Texas Tort Claims Act. The Supreme Court of Texas, in a per curiam opinion, 480 S.W.2d 622 (Tex. Sup. 1972), stated that as the question of the Texas Tort Claims Act was not before the court, they approved the lower court's judgment, "without deciding whether or not the Tort Claims Act would remove the bar of governmental immunity in the particular fact situation."

[36] TEX. REV. CIV. STAT. ANN. art. 6252-19 § 3 (1970), provides a statutory waiver of sovereign immunity for personal injuries or death caused by "the operation or use of a motor-driven vehicle and motor-driven equipment . . . or death or personal injuries so caused from some condition or use of tangible property, real or personal. . . ." If the statute is interpreted literally, no cause of action accrues for the negligent acts of agents or employees of government hospitals. Furthermore, the waiver of immunity for injuries proximately caused by the operation or use of "motor-driven equipment," may not be construed so as to include medical equipment. *Id.* § 18(a).

[37] *See* Watkins v. Southcrest Baptist Church, 399 S.W.2d 530, 535 (Tex. Sup. 1966) (Greenhill, J., concurring).

[38] *See* Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, By Whom?*, 31 TEX. B.J. 1036 (1968).

[39] Hernandez v. County of Yuma, 369 P.2d 271, 272 (Ariz. 1962).