St. Mary's Law Journal

Volume 5 | Number 1 Article 11

3-1-1973

The Texas Legislature Expressly Waived Sovereign Immunity in Suits against the State of Texas under the Texas Tort Claims Act in Federal as Well as in State Courts.

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Recommended Citation

Jeffrey C. Anderson, *The Texas Legislature Expressly Waived Sovereign Immunity in Suits against the State of Texas under the Texas Tort Claims Act in Federal as Well as in State Courts.*, 5 ST. MARY'S L.J. (1973).
Available at: https://commons.stmarytx.edu/thestmaryslawjournal/vol5/iss1/11

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In *Haley v. Troy*,[41] a district court, in holding that judicial immunity does not extend to cases where equitable relief is sought, recognized the vacuum of controlling case law in the area.[42] However, the court speculated that the Supreme Court would soon be faced with a similar case and would rule in a manner favorable to its decision in *Haley*. The court in so speculating stated:

> Although the Supreme Court has not spoken directly in a case where equitable relief against a judicial officer was the object, it has in at least one case issued a temporary restraining order against a state court judge, and on final hearing reversed a district court's refusal to grant a permanent injunction.[43]

It is highly probable that *Little v. Berbling* may be the case in which the Supreme Court speaks directly in this area of law, and determines that the doctrine of judicial immunity does not extend into those situations where equitable relief is sought.

Adrian Gregory Acevedo

SOVEREIGN IMMUNITY—TEXAS TORT CLAIMS ACT—FEDERAL COURTS —THE TEXAS LEGISLATURE EXPRESSLY WAIVED SOVEREIGN IMMUNITY IN SUITS AGAINST THE STATE OF TEXAS UNDER THE TEXAS TORT CLAIMS ACT IN FEDERAL AS WELL AS IN STATE COURTS. *Flores v. Norton & Ramsey Lines, Inc.*, 352 F. Supp. 150 (W.D. Tex. 1972).

The plaintiff was proceeding north in his tractor-trailer truck on Interstate 35 near New Braunfels, Texas when he was directed to stop for a vehicle weight and license check by a patrolman of the Texas Department of Public Safety. As the plaintiff descended from the cab of his truck, defendant's truck, also traveling in a northerly direction, struck the rear of the plaintiff's vehicle. The driver of the defendant's truck was killed, the plaintiff injured, and both vehicles severely damaged. The plaintiff filed suit in federal district court against the defendant, Norton & Ramsey Lines. The defendant, in turn, filed a third party complaint against the Texas Department of Public Safety under Section 3 of the Texas Tort Claims Act[1] for in-

Rockefeller, 323 F. Supp. 478 (S.D.N.Y. 1971); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970); Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969); Ginsburg v. Stern, 125 F. Supp. 596, 602 (W.D. Pa. 1954).

41. 338 F. Supp. 794 (D. Mass. 1972).

42. *Id.* at 800-01.

43. *Id.* at 800. The case referred to in the statement in which the Supreme Court issued a temporary restraining order was Hadnott v. Amos, 394 U.S. 358, 89 S. Ct. 1101, 22 L. Ed. 2d 336 (1969).

1. TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970).

demnity or contribution in the event he was found negligent in the primary suit.

The Department of Public Safety, represented by the attorney general, filed a motion to dismiss. The attorney general contended that the State's waiver of sovereign immunity in Section 4 of the Texas Tort Claims Act did not apply to suits brought in federal courts, and that the negligent acts of a highway patrolman, even if determined to be the proximate cause of the plaintiff's injuries, did not create state liability under section 3 of the Act. Held: *Motion denied.* Under provisions of Sections 3 and 4 of the Texas Tort Claims Act, the State waived its right of sovereign immunity in federal as well as state courts, and may be held liable for the negligent act of a highway patrolman committed within the scope of his employment.

It has long been recognized that total sovereign immunity from tort claims is an unnecessarily harsh and arbitrary doctrine that must be modified.[2] Judicial assaults upon the doctrine have failed to provide a substantial degree of relief for a number of reasons,[3] the principal one being the lack of consistency among jurisdictions.[4] Legislative action has proven to be a much more effective means of relieving the inequities of sovereign immunity without discarding the doctrine altogether.[5] Legislative enactments have also had their problems,[6] one of the most fundamental being the jurisdictional

2. Greenhill & Murto, *Governmental Immunity,* 49 TEXAS L. REV. 462, 472 (1971).

3. See Note, *Limitations on the Doctrine of Governmental Immunity from Suit,* 41 COLUM. L. REV. 1236 (1941), for a general survey of various judicial limitations.

4. Meska v. City of Dallas, 429 S.W.2d 223 (Tex. Civ. App.—Dallas 1968, writ ref'd) (the court refused to waive governmental immunity); *accord,* Clarke v. Ruidoso-Hondo Valley Hosp., 380 P.2d 168 (N.M. 1963). *But see* Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962) (Supreme Court of Wisconsin announced guidelines that in essence abolished governmental immunity); Molitor v. Kaneland Community Unit Dist. No. 302, 163 N.E.2d 89 (Ill. 1959) (Illinois Supreme Court abrogated governmental immunity for school districts on a broad scale). In Parish v. Pitts, 429 S.W.2d 45 (Ark. 1968), the Arkansas Supreme Court abolished municipal governmental immunity only to have it revived by the legislature during their next session. ARK. STAT. ANN. § 12-2901 (Supp. 1971).

5. At least 12 states have adopted tort claims statutes waiving sovereign immunity to some degree within the last 10 years: ALAS. STAT. § 09.65.070 (Supp. 1972); CAL. GOV'T CODE §§ 810-996.6 (Deering Supp. 1972); CONN. GEN. STAT. REV. § 7-465 (1972); ILL. REV. STAT. ch. 85, §§ 8-101 to -103 (Supp. 1972); IOWA CODE ANN. § 613.A1-.A11 (Supp. 1973); MICH. STAT. ANN. § 3.996 (101-115) (1962); MINN. STAT. ANN. § 466.02 (1963); NEV. REV. STAT. §§ 41.031-.038 (1965); TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970); UTAH CODE ANN. §§ 63-30-1 to -34 (1968); WASH. REV. CODE ANN. §§ 4.92.090, 4.96.010 (Supp. 1972); WIS. STAT. ANN. § 895.43 (1966).

6. The Texas Legislature statutorily removed the requirement of sovereign consent to negligence suits brought against the state. TEX. REV. CIV. STAT. ANN. art. 962 (1963) (municipalities); TEX. REV. CIV. STAT. ANN. art. 1573 (1962) (counties). However, the Texas courts held that such action did not apply the doctrine of respondeat superior to governmental enterprises. City of Tyler v. Ingram, 139 Tex.

scope of the state's liability. There is no question that a state may elect to waive sovereign immunity and limit the waiver to designated tribunals created exclusively for that purpose,[7] or that it may waive sovereign immunity in the state's own courts while specifically retaining it in federal jurisdictions.[8] It is also recognized that the waiver of sovereign immunity does not automatically authorize suits against the state in federal courts.[9] The problems primarily arise when the legislatures fail to provide their newly created "waivers" with specific jurisdictional limits, and the courts are called upon to "second guess" the legislatures' intentions.

Traditionally, the Supreme Court has limited the scope of statutory consent holding that statutes waiving sovereign immunity must be strictly construed.[10] Justice Douglas appropriately summarized this approach when he said, "The conclusion that there has been a waiver of [sovereign] immunity will not be lightly inferred."[11] Today, the predominance of judicial authority follows the Douglas maxim and holds that unless there is a specific provision to the contrary, the language of a waiver statute is construed to exclude all actions in federal courts.[12] In *Title Guaranty & Surety Co. v.*

600, 605, 164 S.W.2d 516, 519 (1942); *see* Matkins v. State, 123 S.W.2d 953 (Tex. Civ. App.—Beaumont 1939, writ dism'd jdgmt cor.).

7. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

8. Smith v. Reeves, 178 U.S. 436, 445, 20 S. Ct. 919, 922, 44 L. Ed. 1140, 1145 (1900); Southern Bridge Co. v. Department of Hwys., 319 F. Supp. 948, 950 (E.D. La. 1970).

9. Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54, 64 S. Ct. 873, 877, 88 L. Ed. 1121, 1126 (1944); Murray v. Wilson Distilling Co., 213 U.S. 151, 168, 29 S. Ct. 458, 463, 53 L. Ed. 742, 750 (1909); Chandler v. Dix, 194 U.S. 590, 591, 24 S. Ct. 766, 766, 48 L. Ed. 1129, 1131 (1904); Smith v. Reeves, 178 U.S. 436, 445, 20 S. Ct. 919, 922, 44 L. Ed. 1140, 1145 (1900).

10. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579, 66 S. Ct. 745, 748, 90 L. Ed. 862, 867 (1946) (state statute providing for action in "any court of competent jurisdiction" held no consent to federal suit); Ford Motor Co. v. Department of Treas., 323 U.S. 459, 468, 65 S. Ct. 347, 352, 89 L. Ed. 389, 396 (1944) (Indiana statute authorizing suit in "the circuit or superior court of the county in which the taxpayer resides or is located" held no consent to federal suit); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54, 64 S. Ct. 873, 876, 88 L. Ed. 1121, 1126 (1944) (state statute authorizing recovery of taxes in "the court having jurisdiction thereof" held no consent to federal suit); Oliver Am. Trading Co. v. Government of the United States of Mexico, 5 F.2d 659, 662 (2d Cir. 1924) (the court affirmed the state's right to retract its waiver of sovereign immunity after a suit has been filed in a federal court). *But see* Reagan v. Farmer's Loan & Trust Co., 154 U.S. 362, 392, 14 S. Ct. 1047, 1052, 38 L. Ed. 1014, 1021 (1894) (court held that even though the language of a statute called for suits to be filed "in a court of competent jurisdiction in Travis County, Texas," this did not preclude suits from being brought in the federal district court in Travis County).

11. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 276, 79 S. Ct. 785, 787, 3 L. Ed. 2d 804, 807 (1959); *see* Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938).

12. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579, 66 S. Ct. 745, 748, 90 L. Ed. 862, 867 (1946); Ford Motor Co. v. Department of Treas., 323 U.S. 459, 468, 65 S. Ct. 347, 352, 89 L. Ed. 389, 396 (1944); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 54, 64 S. Ct. 873, 876, 88 L. Ed. 1121, 1126 (1944); Murray v.

Guernsey,[13] the plaintiff brought a bill of equity in federal court against Guernsey and the State of Washington as codefendants, seeking the balance due on a construction contract. The state attorney general *voluntarily* entered the suit and filed an answer. The court determined that the statutory provision authorizing suits against the state filed "in the Superior Court of Thurston County"[14] was construed to be a consent to be sued only in a state court. The court went on to say that the attorney general's voluntary entry had no effect upon the jurisdictional question since "immunity of the state . . . can only be waived by the Legislature, and [the state] is in no manner bound or estopped by the acts of its officers."[15] Today, a majority of courts still favor strict construction of waiver statutes; however, there appears to be a significant movement away from that position.[16]

Recent cases indicate that the Supreme Court is departing from its own strict construction doctrine and is softening its position concerning the interpretation of waiver statutes.[17] In *Petty v. Tennessee-Missouri Bridge Commission*,[18] the Supreme Court held that where a bistate corporation's compact authorized it to sue and be sued, this waiver of tort immunity was applicable in both state and *federal* courts.[19] Even more recently, the Court held that a statute stating that the jurisdiction of federal courts "shall be concurrent with that of the courts of several States,"[20] was not intended to limit federal jurisdiction, but merely to provide an alternate forum in state courts.[21] Although the Supreme Court's departure from the doctrine of strict construction has been slight, it appears to have had a pronounced effect on the lower

Wilson Distilling Co., 213 U.S. 151, 171, 29 S. Ct. 458, 464, 53 L. Ed. 742, 751 (1909); Chandler v. Dix, 194 U.S. 590, 591, 24 S. Ct. 766, 766, 48 L. Ed. 1129, 1131 (1904); Smith v. Reeves, 178 U.S. 436, 448, 20 S. Ct. 919, 924, 44 L. Ed. 1140, 1146 (1900).

13. 205 F. 94 (W.D. Wash. 1913). *See also* Annot., 88 L. Ed. 1132, 1134 (1943).

14. WASH. REV. CODE ANN. § 4.92.010 (Supp. 1972).

15. Title Guar. & Sur. Co. v. Guernsey, 205 F. 94, 95 (W.D. Wash. 1913). The two primary methods of waiving sovereign immunity are: (1) Consenting to be sued by express provision in a statute; and (2) waiver of immunity to suit by voluntary appearance. Annot., 88 L. Ed. 1132 (1943).

16. *See* Parden v. Terminal Ry., 377 U.S. 184, 197-98, 84 S. Ct. 1207, 1216, 12 L. Ed. 2d 233, 243 (1964); Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir. 1961); Zeidner v. Wulforst, 197 F. Supp. 23, 26 (E.D.N.Y. 1961); McCorkle v. City of Los Angeles, 74 Cal. Rptr. 389, 395 (1969). *See generally* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462 (1971); Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUS. L. REV. 1 (1967).

17. *See* Parden v. Terminal Ry., 377 U.S. 184, 197-98, 84 S. CT. 1207, 1216, 12 L. Ed. 2d 233, 243 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 280, 79 S. Ct. 785, 789, 3 L. Ed. 2d 804, 809 (1959). *See generally* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462 (1971); Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUS. L. REV. 1 (1967).

18. 359 U.S. 275, 79 S. Ct. 785, 3 L. Ed. 2d 804 (1959).

19. *Id.* at 281-82, 79 S. Ct. at 789, 3 L. Ed. 2d at 809-10 (emphasis added).

20. Federal Employee's Liability Act, 45 U.S.C. § 56 (1970).

21. Parden v. Terminal Ry., 377 U.S. 184, 190, 84 S. Ct. 1207, 1212, 12 L. Ed. 2d 233, 239 (1964).

courts. Within the last decade there has been a significant increase in the number of both state and federal courts construing ambiguous statutory waivers of sovereign immunity liberally in favor of injured claimants.[22] This general trend has progressed to a point where some state supreme courts have abrogated governmental immunity for torts altogether.[23] Justice Frankfurter perhaps summarized the motivation behind those courts adopting the liberal approach to the doctrine of sovereign immunity in *Great Northern Insurance Co. v. Read*,[24] when he stated:

> Whether . . . [governmental] immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State.[25]

Most state legislation aimed at limiting governmental immunity has been judicially prompted.[26] Texas, however, was one of two states[27] which acted to liberalize the doctrine of sovereign immunity of its own volition.[28] In 1969, after having rejected several similar bills, the Texas Legislature passed the Texas Tort Claims Act.[29] The purposes behind the Act's creation was to provide relief for injured persons by applying the doctrine of respondeat superior to governmental enterprises just as it applies to private enterprise under common law.[30] The Act expressly waived sovereign immunity for all

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22. Zeidner v. Wulforst, 197 F. Supp. 23, 26 (E.D.N.Y. 1961). The court ruled that "where immunity from suit in federal courts is granted but immunity from suit in the State courts is completely waived, the limitation upon the waiver is ineffective." *See* Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir. 1961); Kelso v. City of Tacoma, 390 P.2d 2, 5 (Wash. 1964).

23. Spencer v. General Hosp., 425 F.2d 479, 489 (D.C. Cir. 1969); Scheele v. City of Anchorage, 385 P.2d 582, 584 (Alas. 1963); Parish v. Pitts, 429 S.W.2d 45, 53 (Ark. 1968); Willis v. Department of Conservation & Economic Dev., 264 A.2d 34, 37 (N.J. 1970); Holytz v. City of Milwaukee, 115 N.W.2d 618, 623 (Wis. 1962).

24. 322 U.S. 47, 64 S. Ct. 873, 88 L. Ed. 1121 (1944).

25. *Id.* at 59, 64 S. Ct. at 879, 88 L. Ed. at 1126 (dissenting opinion) (citations omitted).

26. Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 467 (1971).

27. Utah was the only other state to place statutory limits on governmental immunity without prior judicial prompting. *Id.* at 467.

28. *Id.* at 467. Justice Greenhill noted that the legislature was possibly influenced by the dicta in a charitable immunity case, in which the court reflected a willingness to review governmental immunity. Watkins v. Southcrest Baptist Church, 399 S.W.2d 539 (Tex. Sup. 1966).

29. TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970). Fearing the original bill was "too broad and all encompassing in scope as to impose upon the taxpayers of the State of Texas an onerous burden," Governor Smith vetoed it. Message from Governor Smith, TEX. H.R.J. 1621, *quoted in* Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 467 (1971).

30. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (1970). There is a general reservation of immunity at the planning and policy making levels of government and also in the area of legislative and judicial action. A pure doctrine of respondeat superior cannot be applied to governmental functions that require immunity from judicial evaluation. *See* Keeton, *Summary Statement—Texas Tort Claims Act*, attached

governmental units and granted injured claimants the right to sue to the extent of the waiver.[31] To better effect its purposes and define the scope of its jurisdiction, the legislature provided that the Act "shall be liberally construed . . . ."[32] This provision fell on deaf ears. In *Weaver v. Hirsty*,[33] a plaintiff filed suit in federal district court for injuries arising out of an automobile accident, and the defendant impleaded the Texas Highway Commission. The defendant alleged that the commission, through its employees, negligently surfaced the highway where the accident occurred and that this was the proximate cause of the collision. The defendant sought to implead the commission for indemnity and contribution in the event she was found negligent in the main cause. The State argued that the Texas Tort Claims Act did not waive its sovereign immunity in federal courts under the eleventh amendment. The court dismissed the third party complaint on the grounds that the venue provision in section 5 required suits to be initiated in the county where the cause of action occurred,[34] and this necessarily limited suits to the state courts. In those counties which seat both state and federal courts, section 7 precludes suits in the federal jurisdiction by requiring all actions to be governed by the Texas Rules of Civil Procedure.[35] Together, these sections contemplated waiver of sovereign immunity in state courts only.[36] As the case of first impression, the court in *Weaver* applied the traditional strict construction doctrine to the newly created Texas Tort Claims Act.[37]

Less than 2 weeks after the *Weaver* decision, the court in *Flores v. Norton & Ramsey Lines, Inc.*,[38] was faced with the same preliminary jurisdictional issue that faced the *Weaver* court: To what degree has the Texas Tort Claims Act waived sovereign immunity? In accurately interpretating the

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as exhibit "C" to SENATE INTERIM COMM., 62d Legislature of Texas, REPORT TO THE SENATE ON THE TEXAS TORT CLAIMS ACT A-15, A-16 (1971).

31. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 4 (1970). "To the extent of such liability created by section 3, immunity of the sovereign to suit, as heretofore recognized and practiced in the State of Texas with reference to units of government, is hereby expressly waived and abolished, and permission is hereby granted by the Legislature to all claimants to bring suit against the State of Texas, or any and all other units of government covered by this Act, for all claims arising hereunder."

32. *Id.* § 13.

33. No. 5513 (E.D. Tex., Nov. 22, 1972) (not yet reported).

34. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 5 (1970). "All cases arising under the provisions of this Act shall be instituted in the county in which the cause of action . . . arises."

35. *Id.* § 7. "The laws and statutes of the State of Texas and the Rules of Civil Procedure . . . insofar as applicable . . . shall apply to and govern all actions brought under the provision of this Act."

36. Weaver v. Hirsty, No. 5513, at 3 (E.D. Tex., Nov. 22, 1972).

37. The court made no mention of section 13 which states: "This Act shall be liberally construed to achieve the purposes hereof." TEX. REV. CIV. STAT. ANN. art. 6252-19, § 13 (1970).

38. 352 F. Supp. 150 (W.D. Tex. 1972).

scope of the Act, the *Flores* court applied a generally recognized test for the existence of eleventh amendment immunity: (1) Has the state consented to be sued in federal courts, and if so, (2) is there a cause of action against the state?[39]

Although unable to distinguish the case from *Weaver* on the facts, the court declined to apply the doctrine of strict construction to the issue of whether the Texas Tort Claims Act waived sovereign immunity in federal courts.[40] The court declared that the language of section 4[41] of the Act expressly grants permission *to all claimants* to sue the state, and that had the legislature specifically intended to retain sovereign immunity in all cases filed in federal courts, it would have stated so in sections 4 or 14, where other numerous exceptions to the liability are set out.[42] The court next criticized the conclusion of the *Weaver* court that the venue provision in section 5 limited suits to state courts only, since state statutes prescribing venue have not generally been held to preclude suits in federal courts.[43] The court also held that the reference to the Texas Rules of Civil Procedure in section 7 was only "*insofar as applicable*,"[44] and not intended to restrict the scope of the Act to exclude federal jurisdictions. Obviously the Texas rules were not applicable in federal courts.[45] Acordingly, the court concluded that the waiver of sovereign immunity in suits against the State under the Texas Tort Claims Act was effective in both federal and state courts, and subsequently the court had jurisdiction over the case.[46]

Having determined that the State had statutorily consented to be sued in a federal jurisdiction, the second issue facing the court was whether there existed a cause of action against the State. Do the actions of the highway patrolman, if proven to be the proximate cause of the plaintiff's injury, create liability to the State under the Texas Tort Claims Act?[47] Absent precedent, the State's allegations rested on the interpretation of section 3 of the Act

39. Aero-Gen. Corp. v. Askew, 453 F.2d 819, 828 (5th Cir. 1971); *see* Ford Motor Co. v. Department of Treas., 323 U.S. 459, 462, 65 S. Ct. 347, 349, 89 L. Ed. 389, 393 (1944).

40. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 153 (W.D. Tex. 1972).

41. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 4 (1970). "To the extent of such liability created by section 3 . . . is hereby expressly waived . . . and permission is hereby granted . . . to bring suit against the State of Texas . . . ."

42. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 153 (W.D. Tex. 1972) (court's emphasis).

43. *Id.; see* Ellis v. Associated Indus. Ins. Corp., 24 F.2d 809, 810 (5th Cir.), *cert. denied,* 278 U.S. 649 (1928); TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (1967).

44. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 7 (1970) (court's emphasis); *see* Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 153 (W.D. Tex. 1972).

45. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 153 (W.D. Tex. 1972).

46. *Id.* at 154.

47. *Id.* at 154.

as referring to premises defects only.[48] With this interpretation, and the exclusions in section 18(b),[49] the State contended it owed the plaintiff only the duty a private person owes a licensee on private property, that is, not to injure him willfully, wantonly, or through gross negligence.[50] Thus the State would only be liable if the officer was personally liable.[51] The court first attacked the logic behind the State's argument by assuming it to be correct and then attempting to reconcile the assumption with the second sentence in section 18(b) which states, "the limitation of duty contained in this subsection shall not apply to . . . obstructions on *highways, roads, or streets* . . . ."[52] The court found the State's interpretation was clearly erroneous and declared that the legislature did not intend to apply the limited licensee rationale to the use of state highways.[53] The court, however, was not satisfied with the State's primary assumption that the language of section 3 was concerned with premises defects only and rebutted this argument by quoting from Justice Greenhill: "The result [of the passage of the Act] is essentially waiver [of sovereign immunity] in three general areas: use of publicly owned automobiles, premises defects, *and* injuries arising out of conditions or use of property."[54] The court further stated that since public roadways are "subject to the use" of highway patrolmen, it is not unreasonable to conclude that tangible property of the State was being "used" by a proper custodian,[55] and thus it is irrelevant whether the patrolman was independently liable in the main cause or not.[56] The court found that there was suf-

48. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (1970). "Each unit . . . shall be liable . . . for personal injuries . . . caused from some condition or . . . use of tangible property, real or personal, under circumstances where such unit of government, if a private person would be liable to the claimant. . . ."

49. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 18(b) (1970). "As to premises defects, the unit of government shall owe to any claimant only the duty owed by private persons to a licensee on private property . . . . [This limitation] shall not apply to the duty to warn of . . . obstructions on highways, roads, or streets . . . ."

50. Hernandez v. Heldenfels, 374 S.W.2d 196, 198 (Tex. Sup. 1964).

51. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 155 (W.D. Tex. 1972); *see* TEX. REV. CIV. STAT. ANN. art. 6252-19, § 3 (1970).

52. TEX. REV. CIV. STAT. ANN. art. 6252-19, § 18(b) (1970) (emphasis added). *See also* SENATE INTERIM COMM., 62d Legislature of Texas, REPORT TO THE SENATE ON THE TEXAS TORT CLAIMS ACT 3 (1971). "Premises problems have been of only slight concern to date, in view of the express provision [of section 18(b)] added after the gubernatorial veto classifying all persons using governmental premises as 'licensees' *except as to roadway defects and obstructions.*" [Emphasis added.]

53. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 155 (W.D. Tex. 1972).

54. Greenhill & Murto, *Governmental Immunity*, 49 TEXAS L. REV. 462, 468 (1971) (emphasis added).

55. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 155 (W.D. Tex. 1972).

56. Even where the liability of the state is directly contingent upon the individual liability of an employee, the California Supreme Court held the City of Los Angeles liable under the California Tort Claims Act as a result of the negligence of one of its patrolmen who, while investigating an accident, asked the plaintiff to step into the

ficient cause to join the State as a third party and hold it vicariously liable for the negligence of its employees should any be proven.[57]

The court summed up its position by citing section 13 of the Act: "[T]his Act shall be liberally construed to achieve the purposes hereof."[58] In recognizing that section 13 was the key to proper interpretation, the court refused to confine itself to the arbitrary jurisdictional restrictions advocated by the *Weaver* court; or to sustain a motion to dismiss based on the State's clearly erroneous interpretations. Applying section 13 to the general issue of whether the waiver of sovereign immunity in state courts is also a waiver in federal jurisdictions, the *Flores* decision is the only logical interpretation. The limits of recovery are specific; theoretically the plaintiff's cause of action is neither advanced nor prejudiced by bringing suit in a federal court. It is also difficult to imagine that holding a state vicariously liable for the negligence of its highway patrolmen was not within the legislature's intentions when they drafted the Act.

The Texas Tort Claims Act is still in the embryo of its development; its future as viable relief from the harsh inequities of total sovereign immunity depends upon proper judicial interpretation. The judiciary can severely disable the Act by arbitrarily restricting its scope. Justification for such conduct arises from neither reason nor tradition. The *Weaver* interpretation of the Act was clearly not in keeping with the times. It failed to reflect either the legislature's intentions or the current judicial trend. The *Flores* construction allowing suit in federal court was sound, particularly since the State was joined by the defendant for purposes of contribution and indemnity. Piecemeal litigation in both state and federal courts was avoided. The *Flores* decision also represents the current progressive trend toward removing the protective shield of sovereign immunity from those governmental functions which do not require it. Finally, the court's decision reflects the Texas Legislature's intention that the Act should be construed in the most liberal manner consistent with the purposes behind its creation. If the Texas Tort Claims Act's very existence rests upon proper judicial interpretation, the *Flores* decision represents an early prognosis of a long and effective life.

Jeffrey C. Anderson

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street to identify skid marks. In so doing, the plaintiff was hit by a passing car. McCorkle v. City of Los Angeles, 74 Cal. Rptr. 389, 396 (1969); *see* CAL. GOV'T CODE § 820.2 (Deering 1966).

57. Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 156 (W.D. Tex. 1972). Unfortunately, *Flores* was settled out of court on December 18, 1972, before the trial on the merits.

58. *Id.* The court interpreted section 13 to mean that any ambiguity should be construed liberally in favor of the claimant, and strictly against the state.