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WHITHER THE TEXAS TORT CLAIMS ACT: WHAT REMAINS AFTER OFFICIAL IMMUNITY?

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I. INTRODUCTION

The Texas Tort Claims Act[1] ("the Act" or "TTCA") allows the state to be held liable for narrow categories of tortious acts.[2] Absent the Act, the state would enjoy sovereign immunity from suit,[3]

1. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.009 (Vernon 1997 & Supp. 2001).

2. *See id.* § 101.021 (listing the acts in which a state governmental unit may be held liable for property damage, personal injury, and death).

3. The doctrine of sovereign immunity is derived "from the ancient belief that 'the King can do no wrong.'" Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 417 (Tex. 1997) (Enoch, J., dissenting) (citing Glen A. Majure et al., *The Governmental Immunity Doctrine in Texas—An Analysis and Some Proposed Changes*, 23 SW. L.J. 341, 341 (1969), *and* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963)). The *Federal Sign* court recognized, but rejected, that the modern justification for applying the doctrine is that suits against a government entity would deplete the treasury of funds essential in operating a government. *Id.* However, Professor Louis L. Jaffe questioned whether sovereign immunity in England ever existed. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963). In his law review article, Professor Jaffee asserted that: the king, as the source of equity and justice, "could not refuse to redress wrongs when petitioned to do so by his subjects." *Id.* at 3 (quoting 9 Holdsworth, A History of English Law 8 (3d ed. 1944)). Jaffe further states that the idea that the "'King can do no wrong' originally meant precisely the contrary to what it later came to mean .... 'that the king must not, was not allowed, not entitled, to do wrong ....'" *Id.* at 4 (quoting LUDWIK EHRLICH, No. XII, Proceedings Against the Crown (1216-1377), at 42, *in* 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 42 (Vinogradoff ed. 1921)).

shielding it absolutely from tort liability.[4] The byzantine structure of the Act has given rise to some unusual arguments over whether the State is liable under various fact scenarios.[5] Frequently, the argument centers on whether the alleged tortious conduct amounts to a condition or use of tangible personal property.[6] However, recently, a different portion of the statute has been contorted into such a broad exception to state liability that it has, effectively, repealed the Act itself.

In general, the Act creates two categories of liability.[7] First, the state is liable for damages caused by the negligence of a state employee arising "from the operation or use of a motor-driven vehicle or motor-driven equipment."[8] Second, the state is liable for damages "caused by a condition or use of tangible personal or real property."[9] Both categories of liability indicate that the govern-

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4. *See Fed. Sign*, 951 S.W.2d at 405 (stating that the Texas Supreme Court has continually recognized that "sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State"); Griffin v. Hawn, 341 S.W.2d 151, 152 (Tex. 1960) (discussing the rule that an individual who brings suit against the state must have the legislature's consent); Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (holding that claims against the state are barred without the state's consent).

5. *See, e.g.*, Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 178 (Tex. 1994) (determining whether failure to note information in the plaintiff's medical records is misuse of tangible property, which the court defined as "something that has a corporeal, concrete, and palpable existence"). Ultimately, the court held that "information," whether or not it is recorded, is not tangible property for purposes of the Act. *Id.* at 179; Mokry v. Univ. of Tex. Health Sci. Ctr. At Dallas, 529 S.W.2d 802, 805 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) (holding that the plaintiff's claim against the hospital for its employee's loss of patient's eyeball after surgical removal was valid under the Act).

6. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983); *see York*, 871 S.W.2d at 178-79 (asserting that the failure to record information is not "misuse of tangible personal property"); Robinson v. Cent. Tex. MHMR Ctr., 780 S.W.2d 169, 171 (Tex. 1989) (holding that a state mental health center that provided its patients swimming attire, which did not include a life preserver, was a use or condition of tangible personal property giving rise to TTCA liability); Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 300 (Tex. 1976) (finding that a state university's furnishing of a football uniform without knee pads was a use or condition of tangible personal property).

7. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)-(2) (Vernon 1997). There are also provisions that further narrow the scope of the government's liability and clarify specific circumstances where liability attaches. *See id.* § 101.022 (Vernon 1997) (specifying that liability attaches for premise defects and "special defects," which may be obstructions or excavations on highways); *id.* § 101.023 (Vernon Supp. 2001) (providing a cap for damages recoverable under the Act); *id.* § 101.024 (Vernon 1997) (precluding recovery of exemplary damages).

8. *Id.* § 101.021(1).

9. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1997).

ment is only liable to the extent that a "private person" would be held liable.[10] The "private person" language has given rise to an unusual application of the common law doctrine of qualified immunity in TTCA jurisprudence. Specifically, if the individual is "immune" from suit, then the governmental unit is also shielded from liability.[11]

The Texas Supreme Court embraced the doctrine of individual qualified immunity, or official immunity, against TTCA tort liability in the 1994 decision: *City of Lancaster v. Chambers*.[12] The following year, the supreme court extended the immunity from the individual to include the governmental entity.[13] Since 1994, the Texas Supreme Court has so broadly stated the test of official immunity for a public employee that there are few circumstances in which the employee, and consequently the state, is held liable. This surprising barrier to liability is a result of the supreme court's expansive definition of a discretionary act, which is the key element to qualified immunity. Thus, any action requiring discretion and performed in good faith within the course and scope of a government actor's employment immunizes the employee, and thus the state, from liability for his negligent acts.[14]

Regrettably, the court has confused the personal defense of official immunity with the statutory exception from liability for the dis-

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10. *See id.* § 101.021(1)(B) (stating that, with regard to motor-vehicle injuries, the governmental unit is only responsible if the employee operating the equipment would be individually liable under Texas law); *id.* § 101.021(2) (expressing that in claims arising from the condition or use of property, liability of the governmental unit only attaches in instances where a private person is also liable under Texas law). The Act also provides statutory legislative and judicial immunity. *Id.* §§ 101.052-.053. In addition, the Act does not apply to state military personnel and other particular governmental functions, such as employees responding to an emergency call. *Id.* §§ 101.054-.055.

11. *See* DeWitt v. Harris County, 904 S.W.2d 650, 651, 654 (Tex. 1995) (holding that a county is barred from respondeat superior liability for its employee's negligent acts when official immunity protects the employee).

12. 883 S.W.2d 650 (Tex. 1994); *see also* Baker v. Story, 621 S.W.2d 639, 643-44 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (discussing whether public servants should be given official immunity).

13. *See DeWitt*, 904 S.W.2d at 654 (construing the Act as basing the state's liability upon whether its employee is personally liable).

14. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (recognizing the doctrine of official immunity as an affirmative defense to TTCA liability). The court stated that "[g]overnment employees are entitled to official immunity from suits arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *Id.*

cretionary acts of government.[15] Similar provisions are found in both the Texas Tort Claims Act and the Federal Tort Claims Act.[16] The discretionary function of government exception states simply that when the government is formulating or executing policy, no liability can attach to the government's performance of these proper acts.[17] This exclusion from liability for acts of governmental discretion in making or executing policy is well founded in public policy. Persons making policy decisions should not fear personal liability and lawsuits for decisions made in their official capacity. However, most commentators on the federal law have recognized that if the discretionary function doctrine is not limited to general policy creation and execution, then the exception will swallow the waiver of immunity that is the principal purpose of the Federal Tort Claims Act.[18]

The purpose of the state act is to make Texas governmental units "liable for tort claims for personal injury" and "[to] abolish[ ] certain immunities of the sovereign to suit, and grant[ ] permission for

15. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997).

16. *See generally id.*; 28 U.S.C. § 2680(a) (1994).

17. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997).

18. *See* Rosebush v. United States, 119 F.3d 438, 444 (6th Cir. 1997) (Merritt, J., dissenting) (contending "that the discretionary function exception has swallowed, digested and excreted the liability-creating sections of the Federal Tort Claims Act"); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 41 (1983) (noting that the discretionary function exception is quite broad); Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 875, 880 (1991) (contending that the discretionary function exception "should apply to protect government functions either when the federal government official's action stems from a deliberate agency policy or, more rarely, when the official's action cannot be subject to meaningful judicial review"); Osborne M. Reynolds, Jr., *The Discretionary Function Exception of the Federal Tort Claims Act: Time for Reconsideration*, 42 OKLA. L. REV. 459, 461 (1989) (discussing that whether the discretionary exception should apply may turn on whether the government engaged in making policy); Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 366, 384 (1995) (stating that courts have generally sided with the government entity if it asserts policy discretion); Amy M. Hackman, Note & Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411, 444-45 (1997) (criticizing courts for applying the discretionary function exception "too often and with varying results"); *see also* James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 (2000) (noting that the discretionary function exception takes away governmental tort liability imposed under the Federal Tort Claims Act).

such suit."[19] In addition, the Act is to be liberally construed.[20] However, with the present construction of the Act, the state's liability is limited more narrowly than the legislature envisioned. Thus, the expansive view of official immunity in Texas, coupled with the prerequisite of the employee's exposure to personal liability to establish the state's liability, makes the Act a hollow shell.

This Article shows that by importing the doctrine of qualified immunity into the Act and construing it broadly, the Texas Supreme Court has effectively repealed the Act. Part II presents a brief history of the Act, paying special attention to its immunities provisions. Furthermore, Part III traces the origins and uses of the official immunity doctrine, specifically its emergence in TTCA jurisprudence. Part IV demonstrates that by incorporating the doctrine in such an expansive way it has all but eliminated TTCA liability. Finally, Part V concludes that if the *City of Lancaster v. Chambers* and *DeWitt v. Harris County* were applied to the original TTCA cases, the state would not have been liable.

II. History and Structure of the Texas Tort Claims Act

A. *History of the Act*

Sovereign immunity is a judicially created doctrine first mentioned in 1834 by the United States Supreme Court in *United States v. Clarke*.[21] The doctrine of sovereign immunity holds, simply, that

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19. Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, pmbl., 1969 Tex. Gen. Laws 874, *repealed by* Act of Sept. 1, 1985, 69th Leg.; R.S. ch. 959, § 9(1), 1985 Tex. Gen Laws 3242, 3322 (codified as amended as Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-.109 (Vernon 1997 & Supp. 2001)).

20. *Id.* § 13 (codified as amended as Tex. Civ. Prac. & Rem. Code Ann. § 101.109 revisor's note (Vernon 1997); *see Robinson*, 780 S.W.2d at 170 (affirming that waiver of immunity is to be liberally construed to effectuate the purposes of the Act); Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 32 (Tex. 1983) (noting the legislature mandated that the original Act be liberally construed).

21. *See* 33 U.S. 436, 443-44, 38 Pet. 366 (1834) (stating that "[a]s the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it"). In 1868, the Court declared in another case:

> It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and con-

the sovereign cannot be sued without its consent.[22] After years of criticism by scholars, the United States waived immunity from suit for the tortious acts of its employees with the 1946 Federal Tort Claims Act.[23] Various states waived immunity either by judicial decision, reasoning that because the judiciary has created immunity as a legal doctrine it could reconsider it in light of modern legal theory and circumstances, or, more commonly, by statute.[24]

The Texas Supreme Court adopted the doctrine of sovereign immunity in 1847, with *Hosner v. DeYoung*.[25] However, in 1969, after intense criticism from scholars and judges, the Texas Legislature adopted the Texas Tort Claims Act, which provided a limited waiver of immunity for the acts of its officers and employees.[26]

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sequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.

The Siren, 74 U.S. (7 Wall.) 152, 153-54 (1868).

22. The U. S. Constitution states that "judicial Power shall extend to all Cases, in Law and Equity, . . . between a State and Citizens of another State . . . ." U.S. CONST. art. II, § 2. In *Chisholm v. Georgia*, however, the Supreme Court held that consent of the state to be sued is not required under the Constitution and that federal courts have jurisdiction over the state. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793). In response to *Chisholm*, Congress passed the Eleventh Amendment in 1798. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) (indicating that the *Chisholm* decision created shock waves throughout the country, which resulted in the quick passage of the Eleventh Amendment); *see* U.S. CONST. amend. XI (stating "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"). After the Eleventh Amendment was passed, the Supreme Court held in *Cohens v. Virginia* that the amendment bars actions by citizens against individual states thereby establishing governmental immunity. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 412 (1821). Later, the *Hans* decision completed the establishment of the doctrine of sovereign immunity by opining that the state cannot be sued by a citizen of any state absent the state's consent. *Hans*, 134 U.S. at 10.

23. Federal Tort Claims Act of 1946, Pub. L. No. 601, 60 Stat. 842 (codified as amended at 28 U.S.C. § 1346 (1993 & Supp. 2001), § 2674 (1994)); *see* Renna Rhodes, Comment, *Principles of Governmental Immunity in Texas: The Texas Government Waives Sovereign Immunity When It Contracts—Or Does It?*, 27 ST. MARY'S L.J. 679, 708-14 (1996).

24. *Hans*, 134 U.S. at 11.

25. *See* Hosner v. DeYoung, 1 Tex. 764, 769 (1847) (holding that a state cannot be sued without its consent).

26. *See generally* Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 874, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242,

The scope of the waiver was carefully limited to include vehicular accidents and injuries caused by a condition or use of government owned real or personal property.[27] The statute provided a monetary limitation on liability, as well as exceptions including, but not limited to, official immunity for members of the legislature and the judiciary, police and fire personnel in emergency situations, traffic control devices, and intentional torts.[28] The Act further provided that it was to be "liberally construed."[29] Negligence was established as the standard of liability, and the standard of care was based on whether a private person would be liable.[30]

The original Act had a tortuous history and a difficult passage. The state's waiver of sovereign immunity from torts was first introduced in the Texas Legislature in 1953 by Representative DeWitt Hale of Corpus Christi.[31] Dean Page Keeton of the University of Texas School of Law assisted Representative Hale in drafting the bill.[32] The news media touted the new bill "as a necessary step to eliminate" the "monster" of the state's immunity from tort liability.[33] However, legislative interest in its passage was limited and not until 1967, when Representative Hale enlisted the support of Representative Temple Dickson and Senator Oscar Mauzy, did the

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3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2001)).

27. *Id.* § 3 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021-.024 (Vernon 1997)).

28. *See id.* ("limiting liability to $100,000 per person and $300,000 for any single occurrence for bodily injury or death"); § 14(2)-(3) (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.052-.053 (Vernon 1997)) (granting immunity for legislators and judicial officials); § 14(8) (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon 1997)) (allowing immunity for an officer responding to an emergency); § 14(10) (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (Vernon 1997)) (awarding official immunity to the state for an employees' intentional torts); Act of Jan. 1, 1970, § 14(12) (extending immunity "to [a]ny claim arising from the absence, condition, or malfunction of any traffic or road sign, signal, or warning device . . .") (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (Vernon 1997)).

29. *See id.* § 13 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.109 revisor's note (Vernon 1997)) (calling for the liberal construction of its provisions to achieve the purposes of the Act).

30. *Id.* § 3 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997)).

31. TEX. SENATE INTERIM COMM., 61st Leg., Report on Study of Governmental Immunity, R.S. (1969).

32. W. James Kronzer, Jr., *The New Texas Tort Claims Act - Some Offhand Reflections*, TRIAL LAW. F., Nov.-Dec. 1969, at 11, 12.

33. *Id.*

bill pass the House;[34] the bill subsequently died in the Senate.[35] After the bill died, study committees appointed by both legislative bodies held hearings and issued favorable reports, clearly indicating to opponents that some waiver of immunity was imminent.[36]

In 1969, with House Bill 117, Representative Temple Dickson and Senator Oscar Mauzy again introduced a bill waiving sovereign state immunity for its tortious acts.[37] House Bill 117 was referred to the House Judiciary Committee, chaired by Representative Hale, and was reported favorably to the House, with certain modifications.[38] One committee's modifications removed the limitation that individual "immunity cannot immunize the government."[39] The bill passed the House and the Senate, and was sent to Governor Preston Smith, who vetoed it.[40] In his message accompanying the veto, the governor recognized that the time had come to reconsider the doctrine of absolute governmental immunity, but identified the proposed Act as "so broad and all-encompassing in scope" that it imposed an onerous burden upon the state taxpayers.[41] Governor Smith further expressed concern about the state's potential liability arising from the public functions and services it performs for the benefit of its citizens that private businesses are not

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34. *Id.*

35. *See id.* (identifying that the bill died in the senate committee by only one vote).

36. *Id.*

37. Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV 462, 467 (1971).

38. *See id.* (discussing the history of House Bill 117).

39. JUDICIARY COMM., BILL ANALYSIS, Tex. H.B. 117, 61st Leg., R.S. (1969). H.B. 117 as referred to committee originally stated:

> Notwithstanding any provision hereof, the individual immunity of public officers, agents or employees of government from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized, *however, that the individual immunity of such persons shall not operate so as to immunize the unit of government from claims based on whole or in part upon the acts or omissions of such public officers, agents or employees for which liability is expressly provided in this Act.*"

Id. § 15 (emphasis added). One of the few committee amendments deleted the above italicized text, removing only "the limitation that immunity cannot immunize the government." *Id.*

40. Veto Message of Gov. Preston Smith, Tex. H.B. 117, H.J OF TEX., 61st Leg., R.S. (1969); *see also* Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV 462, 467 (1971) (stating that after both houses held hearings, the bill passed again).

41. Veto Message of Gov. Preston Smith, Tex. H.B. 117, H.J. OF TEX., 61st Leg., R.S. (1969).

allowed to perform, such as "police and fire protection, road and highway construction and maintenance, and administrative functions which necessitate maintaining buildings for public records and other public service activities."[42] He noted the very nature of these governmental functions require that it maintain buildings and vast tracts of property.[43] Accordingly, Governor Smith stated his specific objections, vetoed the bill, but made specific recommendations.[44]

After the veto, the House promptly passed House Bill 456, known as the Texas Tort Claims Act, making the modifications the governor suggested and noting in the caption that the bill "provid[es] for continued individual immunity."[45] The new bill provided that the government unit's duty owed to persons on realty would be the same as that owed by private owners or occupiers to licensees.[46] The bill generally conformed to the governor's objections to H.B. 117 by abolishing the applicability of the attractive

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42. *Id.*

43. *Id.*

44. *See id.* (recommending that the legislature enact a more limited bill). Governor Smith first recommended that the waiver of immunity should be limited to claims arising out of the "operation of motor vehicles and equipment[,]" but if the legislature wished to include injuries arising from "the condition or use of governmental property" he recommended the following changes should be incorporated:

1. Exempt from the application of the Act liability arising from the absence or malfunction of any traffic or road sign, signal or other warning device.
2. Limit the duty of the governmental subdivision to persons on government property to that duty owed to a licensee by the owner of private property.
3. Abolish the doctrine of attractive nuisance as applied against governmental units in all cases. Bill 117 only abolishes the doctrine in rural areas, in limited cases.
4. Leave the law on employee liability for torts as it now is, with a provision, if desirable, that the State or political subdivision may not require any employee to purchase liability insurance as a condition of his employment where the political subdivision is insured by a policy of liability insurance.

Id.

45. Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, pmbl., 1969 Tex. Gen. Laws 874, *repealed* by Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2001)); *see also* Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV 462, 468 (1971) (discussing the passage of the Texas Tort Claims Act).

46. Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, § 3, 1969 Tex. Gen. Laws 874, 875, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997)).

nuisance doctrine to governmental realty.[47] This later version was passed by the Senate and signed into law by the governor.[48]

B. *Structure of the Act*

The fundamental statement of governmental liability is set forth in section three of the original act:

> Sec. 3. Each unit of government in the state shall be liable for money damages for personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor-driven vehicle and motor-driven equipment, other than motor-driven equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state, *under circumstances where such officer or employee would be personally liable to the claimant in accordance with the law of this state*, or death or personal injuries so 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 to the claimant in accordance with the law of this state.* Such liability is subject to the exceptions contained herein, and it shall not extend to punitive or exemplary damages.[49]

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47. *Id.* § 14(11) (codified as amended as TEX. CIV. PRAC. & CODE ANN. § 101.059 (Vernon 1997)); *see also* Veto Message of Gov. Preston Smith, Tex. H.B. 117, H.J. OF TEX., 61st Leg., R.S. (1969) (recommending the elimination of the doctrine of attractive nuisance to governmental property).

48. *See generally* Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 874, *repealed* by Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1997 & Supp. 2001)).

49. *Id.* § 3 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021-.024 (Vernon 1997)) (emphasis added); *see also* 28 U.S.C. § 2674 (1993) (specifying that the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances"). The federal courts have interpreted the "private individual under like circumstances" standard differently than the Texas courts have treated the TTCA's "personally liable" and "private person" language. Arguments have been made, and rejected, that the FTCA's "private individual under like circumstances" language means that the United States government is not liable if the tortious conduct occurs while a governmental employee is performing some act that a private person would not perform. 28 U.S.C. § 1346(b) (1993); *see also* Indian Towing Co., Inc. v. United States, 350 U.S. 61, 67-68 (1955) (holding that the Coast Guard could be liable under the FTCA for failing to use due care in maintaining a light in a lighthouse, even though maintaining a lighthouse is not something that a private person would do). The Court reasoned that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby

The Act further provided that it was to be "liberally construed" to achieve its purposes.[50] It specifically exempted from coverage any claim based on an act or omission of the legislature or a member acting in his official capacity, the judiciary or any officer acting on the lawful orders of a court, discretionary acts of a unit of government, emergency calls, and intentional torts, among others.[51] Section 15 of the Act provided, "[n]otwithstanding any provision hereof, the individual immunity of public officers, agents or employees of government from tort claims for damages is hereby preserved to the extent and degree that such persons presently are immunized."[52]

C. *The Modern Act*

The Texas Tort Claims Act was codified in 1985 with little change and is found in Chapter 101 of the Texas Civil Practices and

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induces reliance must perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65. Thus, the court reasoned that while the Coast Guard had no obligation to undertake the lighthouse service, once it undertook the operation of a light on a particular island and induced reliance on the light, it thereby had a duty to keep the light in working order. *Id.* at 69. The *Indian Towing* Court refused to hold that under the Federal Tort Claims Act they would be liable, as a government entity would be liable, if it were a "municipal corporation" and not a private individual because that would "push the courts into the 'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. Rather, the Court pointed out that "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* at 67.

Similarly, in *United States v. Muniz*, the Court held that state law immunities should not be imported into FTCA jurisprudence. United States v. Muniz, 374 U.S. 150, 164-65 (1963). On the contrary, the question of "[w]hether a discretionary function is involved is a matter to be decided under [the FTCA], rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions." *Id.* at 164. The Court stated, "[j]ust as we refused to import the 'casuistries of municipal liability for torts' in Indian Towing, so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity." *Id.* at 164. While *Muniz* was decided in the context of an FTCA suit brought by a prison inmate, other federal courts have followed suit by holding that state law immunities do not apply to FTCA cases in other contexts.

50. Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, § 13, 1969 Tex. Gen. Laws 874, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S. ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.109 revisor's note (Vernon 1997)).

51. *Id.* § 14 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.052-.053, 101.055 (Vernon 1997)).

52. *Id.* § 15 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.026 (Vernon 1997)).

Remedies Code.[53] Although the Act is generally based on the Federal Tort Claims Act,[54] it has a much narrower scope. Specifically under the Act, a governmental unit in Texas 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.[55]

Thus, a governmental entity waives sovereign immunity and may be liable for damages caused by a governmental employee's negligence in operating a vehicle or motor-driven equipment or for damages caused by a "condition or use of tangible personal or real property."[56] In each instance, the statute provides that the government entity may be liable only if a private individual would be liable.[57]

III. THE DOCTRINE OF OFFICIAL IMMUNITY EMERGES ON THE TEXAS TORT CLAIMS ACT LANDSCAPE

A. *Origins and Operation of the Official Immunity Doctrine*

The origin of immunity for public officers is found in the doctrine of sovereign immunity, which originally extended to protect the king's servants who carried out his orders.[58] As the sovereign could not be held accountable in his courts, neither could his servants, who were the extensions of the crown and doing his will. However, with the development of the parliamentary system in England, came the concept that ministers were personally liable for

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53. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.009 (Vernon 1997 & Supp. 2001).

54. 28 U.S.C. §§ 1346, 2674 (1993 & Supp. 2001).

55. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997).

56. *Id.*

57. *Id.*

58. RESTATEMENT (SECOND) OF TORTS § 895D cmt. a (1979).

their illegal acts.[59] The common law rules on tort liability immunity that finally emerged were a compromise between these two systems.[60]

The Restatement (Second) of Torts ("Restatement") provides the general rule that a public officer is not shielded from tort liability except as otherwise provided by law.[61] This rule is consistent with the burden on the officer to plead and prove as an affirmative defense that he is immune from suit.[62] The Restatement further states that absolute immunity is recognized for a public officer, who acts within the scope of his authority, "for an act or omission involving the exercise of a judicial or legislative function."[63] In addition, any public officer has qualified immunity from tort liability for an administrative act if "(a) he is immune because [he] engaged in the exercise of a discretionary function, (b) he is privileged and does not exceed or abuse the privilege, or (c) his conduct was not tortious because he was not negligent in the performance of his responsibility."[64]

In general, immunities attach to public officers for torts committed when the officers perform their official functions.[65] The reason for this immunity is that officers are charged only with the duty of making decisions, either in law or fact, and acting in accordance with their determinations.[66] Those decisions, which are a function and requirement of the office, must be made regardless of the correctness. For example, judges have always been accorded complete and absolute immunity for judicial acts performed within their jurisdiction, no matter if the decision was reached through corruption or malice.[67]

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59. *Id.*

60. *Id.*

61. *Id.* § 895D.

62. City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994).

63. RESTATEMENT (SECOND) OF TORTS § 895D(2) (1979).

64. *Id.* § 895D(3).

65. PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1056 (W. Page Keeton et al. eds., 5th ed., 1984).

66. *Id.* (discussing the importance of an officer to make decisions without the threat of an unjust suit).

67. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871) (stating it is well settled in jurisprudence that judges who exercise their official functions are exempt from civil liability); *see also* TEX. CIV. PRAC. & CODE ANN. § 101.053 (Vernon 1997).

Legislators similarly enjoy absolute immunity.[68] They are charged with making laws and are the public's representatives to determine policy, and its concrete applications, through the legislative process. While acting in that capacity, legislators, like judges, should not be deterred by the fear of vexatious suits and personal liability. Anyone who occupies a position that requires making policy decisions and exercising judgment in office should not be stifled in making those decisions by fear of personal liability. The absolute immunity accorded legislators is also shared with city councils and other decision-makers at lower levels of government, such as school district officials.[69]

B. City of Lancaster *Imports the Official Immunity Doctrine into TTCA Jurisprudence*

The Texas Supreme Court first addressed the issue of official immunity in relation to the Texas Tort Claims Act with *City of Lancaster v. Chambers*.[70] In *City of Lancaster*, the plaintiffs sued the city and several police officers, claiming negligence and a federal § 1983 claim for injury to their son.[71] The plaintiffs' son was injured during a high-speed police chase, which occurred when he ran a red light on his motorcycle.[72] The chase ended when the motorcycle crashed after attempting to exit the interstate.[73]

The defendant cities and officers claimed among other defenses that they were immune from suit.[74] The Texas Supreme Court stated that the purpose of official immunity "is to protect public officers from civil liability for conduct that would otherwise be actionable."[75] Accordingly, the court asserted that it may find immunity whenever a suit arises from the good faith performance of a public officer's discretionary duties, which are performed within

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68. *See* Supreme Ct. of Virginia v. Consumers Union, Inc., 446 U.S. 719, 734 (1980) (opining that the Virginia Supreme Court judges were immune from suit); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.052 (Vernon 1997).

69. *See* Lopez v. Trevino, 2 S.W.3d 472, 473-74 (Tex. App.—San Antonio 1999, pet. dism'd w.o.j.) (holding that school officials are entitled to legislative immunity if they can prove the act was "functionally legislative").

70. 883 S.W.2d 650 (Tex. 1994).

71. *City of Lancaster*, 883 S.W.2d at 652.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 653-54.

the scope of his authority.[76] The court distinguished discretionary acts from ministerial ones, which the court defined as acts "[w]here the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment . . . ."[77]

After a lengthy review of other jurisdictional views regarding discretionary acts in relation to police pursuit cases, the court held that a police officer engaged in a high-speed chase is acting in a discretionary manner.[78] The court further adopted a test to determine whether a police officer acts in good faith when engaged in a pursuit.[79] The court remanded the issue to the trial court to apply the new test to the facts of the case.[80]

The standard for distinguishing ministerial from discretionary acts came from *Rains v. Simpson*.[81] In that case, "former justices of the peace," as *ex officio* members of the county court, were sued for wrongfully and maliciously rejecting an official bond for the sheriff.[82] The defendants had the discretion to approve or reject a bond for the sheriff, who was acting as the tax collector.[83] The court distinguished between ministerial and discretionary duties, in that for ministerial duties, the law "prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment."[84] The court held that where judgment is required, the duty is discretionary and the government actor is immune from liability.[85]

Justice Bonner, writing for the court, stated that "from the time of the Yearbooks, it was a settled principle and the very foundation of all well-ordered jurisprudence that every judge . . . had the right

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76. *City of Lancaster*, 883 S.W.2d at 653.

77. *See id.* at 654 (quoting Rains v. Simpson, 50 Tex. 495, 501 (1878), *and* Comm'r v. Smith, 5 Tex. 471, 479 (1849)).

78. *Id.* at 655.

79. *See id.* at 656 (holding that "an officer acts in good faith in a pursuit case if: a reasonably prudent officer, under the same or similar circumstances could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit").

80. *Id.* at 657.

81. 50 Tex. 495 (1878).

82. Rains v. Simpson, 50 Tex. 495, 497 (1878).

83. *Id.* at 501.

84. *Id.* (quoting Comm'r v. Smith, 5 Tex. 471, 479 (1849)).

85. *Id.*

to decide according to his own free and unembarrassed convictions, uninfluenced by any apprehension of private prosecution."[86] Thus, the court held that the county court's action in not approving the bonds was a judicial act as given by the legislature, and immunity from liability flowed to the officials.[87]

The *Rains* decision represents the traditional view of judicial or legislative immunity as absolute. This immunity is conferred upon judges and other decision-makers in government. Because legislators, administrators, and policymakers are given the obligation to set policy and to carry it out, they are not held accountable in damages for decisions made in the course of their office. Any other rule of liability would result in an ineffective government.

Texas courts have used various terms and criteria to address the immunities of officials who are not judges. For example, in *Sanders State Bank v. Hawkins*,[88] the State Insurance and Banking Commissioner, fearing insolvency, ordered the closing of the Sanders State Bank.[89] The bank in turn sued the commissioner, W. E. Hawkins, individually for damages.[90] The court analyzed the case assuming Hawkins was a "quasi-judicial"[91] official and applied the rule that an official is not personally liable if he is acting within the legitimate authority of his office.[92] The court looked to the discretion the legislature gave the commissioner in concluding he was similar to a judicial officer.[93] After applying the test of whether the commissioner acted within his legislatively granted authority when he closed the bank, the court concluded that the defendant-commissioner was immune from liability.[94]

The present test in Texas for official immunity has three criteria: that the act be discretionary, within the scope of the actor's author-

86. *Rains*, 50 Tex. at 498.

87. *Id.* at 502.

88. 142 S.W. 84 (Tex. Civ. App.—Texarkana 1911, no writ).

89. Sanders State Bank v. Hawkins, 142 S.W. 84, 85 (Tex. Civ. App.—Texarkana 1911, no writ).

90. *Id.* at 85-86.

91. *See id.* at 86 (stating that because the defendant was not wholly a judge but had judge-like qualities, he was "quasi-judicial").

92. *See id.* (recognizing the potential immunity of the defendant, but stating that the court can properly determine if the defendant abused his powers by acting in excess of his authority).

93. *Id.* at 87-88.

94. *Sanders State Bank*, 142 S.W. at 87, 89.

ity, and done in good faith.[95] The failure of any one of the required elements precludes the affirmative defense of official immunity.[96] The result is that only one who is performing purely ministerial or clerical duties may be held liable.[97] In addition, one who is obeying the orders of a superior or following the mandates of the law may also be held liable.[98] However, one who has a choice of alternatives and injures another is not liable regardless of his negligence as long as the deed is done in "good faith."[99]

IV. INCORPORATING OFFICIAL IMMUNITY INTO THE TEXAS TORT CLAIMS ACT TO PRECLUDE THE STATE'S LIABILITY FOR ITS AGENT'S TORTS

A. *The Standard of Care Under the Act*

The Act creates no new standard of care peculiar to the state, but makes reference to the general law of negligence by incorporating the duty of ordinary care.[100] In general, the Act requires that liability of the State be determined under the same standard of care that is applied to a private individual.[101] The only instance where the Act explicitly varies from this rule is when the claim is based upon a premises defect.[102] If the claim is based upon a defect on the premises, the state has the duty of care that a private property owner owes a licensee.[103] Although the Act contains a

95. City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (citing Baker v. Story, 621 S.W.2d 639, 644 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.), *and* Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224, 227 (Tex. App.—Waco 1986, writ ref'd n.r.e.)).

96. *Id.*

97. *See id.* at 653-54 (stating that a government employee's discretionary acts are entitled to official immunity; however, ministerial acts, "which require obedience to orders or the performance of a duty to which the actor has no choice[,]" are not).

98. *See id.* at 654 (clarifying that ministerial acts are those acts prescribed by law or done in obedience to orders and therefore are not entitled to official immunity).

99. *See id.* at 656 (explaining that good faith requires an officer to act as "a reasonably prudent officer, under the same or similar circumstances, [who] could have believed that the need to immediately apprehend the suspect outweighted a clear risk of harm to the public in continuing the pursuit").

100. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon 1997) (stating that the duty of care required is that which "a private person owes to a licensee").

101. *Id.* § 101.021.

102. *Id.* § 101.022(a).

103. *See* Mellon Mortgage Co. v. Holder, 5 S.W.3d 654, 660 (Tex. 1999) (Enoch, J., concurring) (determining the standard of care an owner or occupier of land owes to another by the status of the visitor). In Texas, a landowner owes invitees the duty to maintain the premises in a reasonably safe condition. *Id.* (citing Carlisle v. J. Weingarten, Inc., 134

number of exclusions from liability that do not apply to private citizens, the clear sense of the Act is that the same rules of law used to determine the liability of private defendants are applied to determine the state's liability.[104] The Act limits the state's waiver of sovereign immunity by limiting liability to injuries caused by vehicles, motor-driven equipment, defective realty, or tangible property.[105]

During the first twenty-five years of the Act, Texas courts struggled in determining whether the negligence asserted by a claimant arose from a covered activity or if one of the express exclusions applied. Often the issue turned on whether the activity involved the "use" of tangible personal property. For instance, the Texas Supreme Court identified the failure of a municipal hospital to furnish a bed with bed rails to the plaintiff as a condition or use of tangible property, thus establishing potential liability under the Act.[106] Similarly, the court also held that the Act covered the failure of Texas Tech University to furnish a student athlete proper protective equipment to wear during football games.[107]

During that twenty-five year period after passage of the Act, the supreme court did not address the issue of whether a state actor was personally immune from suit in any cases involving the Act, although the liability of the state was frequently based on the employee's negligence. For example, in *State v. Terrell*,[108] the supreme court held that the Act waived state sovereign immunity when a highway patrolman, pulling onto the highway to pursue a speeding driver, failed to activate his emergency lights or siren and collided with the plaintiff.[109] At issue was whether the actions of the patrol-

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Tex. 220, 152 S.W.2d 1073, 1074 (1941)). Toward trespassers, a landowner merely owes the duty not to cause injury intentionally, willfully, or by gross negligence. *Id.* (citing State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996)). The landowner owes the highest duty toward licensees, namely, the "duty to warn of or to make safe hidden dangers known to the landowner." *Id.* (citing Tex.-La. Power Co. v. Webster, 127 Tex. 126, 91 S.W.2d 302, 306 (1936)).

104. *See id.* § 101.055(2) (protecting emergency actions by police and fire personnel from liability); *id.* § 101.055(3) (precluding liability for methods of fire and police protection employed); *id.* § 101.056 (excluding governmental discretionary acts from liability).

105. *Id.* § 101.021.

106. Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528, 529 (Tex. 1975) (per curiam).

107. Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 300 (Tex. 1976).

108. 588 S.W.2d 784 (Tex. 1979).

109. State v. Terrell, 588 S.W.2d 784, 788 (Tex. 1979).

man were a "method" of providing police protection as defined by the Act.[110] The state argued that the section excluding "methods" of police or fire protection was applicable to any claim arising from a policeman's actions while providing police protection.[111]

On behalf of a unanimous supreme court in *Terrell*, Chief Justice Greenhill stated:

> Since a governmental unit is liable only if its employees or officers are acting within the scope of their employment, this construction of the statute would exempt virtually all activities of police and firemen from the Texas Tort Claims Act. We do not believe the Legislature intended to create such a broad exclusion.[112]

The court further stated that the broad exclusion went to policy decisions, to prevent a court from second guessing the government on the type, degree, or amount of police protection given the community.[113] This exclusion from liability is similar to the exclusion given for discretionary acts of the government. The court further recognized that the government retains immunity if an employee's negligence "lies in the formulating of policy—i.e., the determining of the *method* of police protection to provide[;]" however, it does not retain immunity from liability under the Act if an "employee acts negligently in carrying out that policy."[114] Nowhere was there any suggestion that if the individual tortfeasor could not be held

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110. *Id.* at 786-87 (deciding whether the state is liable for personal injuries resulting from a highway patrol officer's negligent operation of a vehicle while apprehending the plaintiff); *see also* Act of Jan. 1, 1970, 61st Leg., R.S., ch. 292, § 14, 1969 Tex. Gen. Laws 874, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon 1997)).

111. *Terrell*, 588 S.W.2d at 786.

112. *Id.* (citation omitted).

113. *Id.* at 787.

114. *Id.* at 788. It is especially meaningful that the author of the *Terrell* opinion was Chief Justice Greenhill. Justice Greenhill was familiar with the debates accompanying the adoption of the Texas Tort Claims Act and was truly "present at the creation." Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. B.J., 1036, 1070-72 (1968). The Senate Interim Committee even cited the law review article in its official report. TEX. SENATE INTERIM COMM., 61st Leg., Report on Study of Governmental Immunity, R.S. (1969). Shortly after the passage of the Act, Greenhill wrote an article with Thomas V. Murto outlining the Act for the Texas Law Review. *See generally* Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV. 462 (1971).

individually liable because of his status, liability could not also attach to the state based on those actions.

In 1994, the supreme court addressed for the first time the relationship between the official immunity of individual defendants and the derivative liability of their government employer under the Act.[115] In *Kassen v. Hatley*[116] the court considered whether a nurse and doctor employed by a state hospital who were sued individually for malpractice were protected by the defense of official immunity.[117] The court focused on governmental versus medical discretion, contrasting governmental discretion, for which immunity would exist, with medical discretion, for which it would not.[118] The court held that the medical professionals failed to establish their defense of official immunity as a matter of law.[119]

In its discussion of official immunity, the court asserted that official immunity protects government officials from personal liability, as long as the discretionary duties are performed in good faith and within the scope of authority.[120] The court contrasted official immunity with sovereign immunity, stating that: "[i]f a plaintiff has a right of action against the government due to the state's waiver of sovereign immunity, this right is not affected by whether a governmental employee has official immunity."[121] Six of the eight justices

115. *See* Kassen v. Hatley, 887 S.W.2d 4, 9 (Tex. 1994) (deciding whether the doctrine of official immunity covers the acts of state-employed medical personnel).

116. 887 S.W.2d 4 (Tex. 1994)

117. *Kassen*, 887 S.W.2d at 6.

118. *See id.* at 11-12 (holding that a state-employed doctor or nurse has immunity arising out of acts that exercise government discretion, but is not immune if the act arises from medical discretion). The opinion pointed out that official immunity extends to executive officials and to lower level personnel who exercise governmental discretion. *Id.* at 12 n.8. The court cited section 895D of the Restatement (Second) of Torts, and listed seven factors that a court should consider in determining if a government employee's acts involve governmental discretion. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 895D cmt. f (1979)).

119. *See id.* at 13 (ruling against the defense's motion for summary judgment as a matter of law because the defense failed to properly support the motion, and there were issues of material fact).

120. *Kassen*, 887 S.W.2d at 8.

121. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.008, 108.002, 108.003, *and* Washington v. City of Houston, 874 S.W.2d 791, 796 (Tex. App.—Texarkana 1994, no writ)).

agreed with the portion of the opinion containing this statement;[122] however, that rule of law was short lived.

B. DeWitt *Expands Qualified Immunity for the Individual into Immunity for the Entity*

On June 22, 1995, the Texas Supreme Court decided two cases that applied the doctrine of official immunity to preclude the state's liability. In *DeWitt v. Harris County*,[123] the court stated the issue of whether a state entity is subject to respondeat superior liability under the Act for an employee's alleged negligent acts, when the employee is protected by official immunity.[124] The court held that the county does not waive its sovereign immunity when the county employee possesses official immunity and is thereby not personally liable.[125] However, the court failed to address or explain its previous *Kassen* opinion where the court clearly expressed that a plaintiff's right to sue the state is not affected by whether a government employee has official immunity.[126]

In *DeWitt*, a two vehicle collision occurred at night on a highway, leaving one vehicle on the highway, stalled.[127] An off-duty Harris County deputy constable on the scene loaned his flashlight to a civilian to direct traffic around that car.[128] A motorcycle carrying Brenda and Richard Hopkins, Jr., crashed into the stalled car, killing both.[129] As a result, the decedents' daughter brought a wrongful death action against the deputy constable and Harris County, alleging several acts of negligence by the officer.[130] Her claim against the county was based solely on respondeat superior liability for the negligent acts of the officer.[131] Although the jury found the motorcycle's driver and the officer each fifty percent (50%) negli-

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122. *See id.* at 15 (Gammage, J., dissenting) (arguing that an employee may not claim official immunity if their discretionary decision was "non-governmental").

123. 904 S.W.2d 650 (Tex. 1995).

124. DeWitt v. Harris County, 904 S.W.2d 650, 651 (Tex. 1995).

125. *Id.* at 654.

126. *Compare Dewitt*, 904 S.W.2d at 654 (limiting a plaintiff's ability to sue a governmental entity for a negligent employee who has official immunity), *with Kassen*, 887 S.W.2d at 8 (allowing a plaintiff to sue regardless of the employee's official immunity).

127. *Dewitt*, 904 S.W.2d at 651.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

gent, the trial court granted judgment against the county, but not against the officer, concluding that the officer was entitled to official immunity.[132] The court of appeals reversed the trial court's judgment and held that public policy dictates that the county should not be liable when its employees and officers have official immunity.[133] The supreme court affirmed the decision of the court of appeals.[134]

The supreme court stated as an established rule of law that if a state employee is shielded from liability by official immunity under the Act, the state retains its sovereign immunity.[135] Two supreme court cases were cited for this proposition, *K.D.F. v. Rex*[136] and *City of Houston v. Kilburn.*[137] However, neither decision is directly on point and both cases could have been decided on other grounds. Thus, the language relied upon by the court in *DeWitt* could be considered *dicta* and disregarded.

K.D.F. v. Rex was a mandamus action involving a Kansas governmental entity-the Kansas Public Employees' Retirement System-and two affiliates-the investment advisor for the system and a partnership holding the system's securities.[138] The Kansas entities were sued in Texas for not releasing a security interest in an oil and gas property acquired by the plaintiff.[139] The Kansas defendants contended the Texas court did not have personal jurisdiction over them.[140] All three asserted that under principles of interstate comity, Texas was obliged to recognize the sovereign immunity of the

132. *Dewitt*, 904 S.W.2d at 651.

133. Harris County v. DeWitt, 880 S.W.2d 99, 104, 107 (Tex. App.—Houston [14th Dist.] 1994), *aff'd*, 904 S.W.2d 650 (Tex. 1995); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1997) (providing a waiver of sovereign immunity for personal injury or death arising from the use of tangible personal property if the entity would be liable under Texas law if it were a private individual).

134. *Dewitt*, 904 S.W.2d at 651.

135. *See id.* at 653 (relying on TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(B), which provides a waiver of sovereign immunity for injuries caused by vehicles if the employee would be personally liable under Texas law).

136. 878 S.W.2d 589 (Tex. 1994).

137. 849 S.W.2d 810 (Tex. 1993).

138. K.D.F. v. Rex, 878 S.W.2d 589, 590-91 (Tex. 1994).

139. *Id.* at 591.

140. *Id.*

State of Kansas and should decline to exercise jurisdiction.[141] The court rejected the plaintiff's assertion.[142]

The court held that the retirement system in *K.D.F.* was entitled to sovereign immunity protection and analyzed the status of the affiliates.[143] Approaching the problem from several aspects, the court found "further guidance" in the similar ways the Texas and Kansas Tort Claims Acts both applied to state employees who were sued as individuals.[144] It concluded that Kansas and Texas have identical views on official immunity, outlining the criteria in *City of Lancaster v. Chambers.*[145] After citing *City of Lancaster*, the court concluded that, in Texas, the state is "vicariously liable for the acts of its employees only to the extent its employees are not entitled to official immunity," without citing authority.[146] The court concluded that the Kansas and Texas Tort Claims Act waived state immunity in identical manners, stating:

> Thus, in either state, indirect liability on the part of the state will arise from the performance of ministerial functions by a state employee under the control or direction of the state, and not from (1) discretionary acts of the employee, (2) acts of independent contractors, or (3) intentional, grossly negligent, fraudulent, or malicious conduct by the employee.[147]

The court's only analysis of the Texas Tort Claims Act was a citation to the statute itself, and no authority was given for the proposition that, under the Act, the state is only liable to the extent that an employee would be liable.[148]

In *City of Houston v. Kilburn*,[149] the city appealed the denial of its plea of sovereign immunity from suit.[150] The supreme court held that the statute only allowed interlocutory appeals in which

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141. *Id.*

142. *Id.* at 594.

143. *K.D.F.*, 878 S.W.2d at 596.

144. *See id.* (noting that all immunity is waived in Kansas except for express exceptions where Texas has a selective waiver of immunity).

145. *Id.* at 597; *see also* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (listing the three requirements for an employee to qualify for official immunity).

146. *K.D.F.*, 878 S.W.2d at 597.

147. *Id.*

148. *Id.*

149. 849 S.W.2d 810 (Tex. 1993).

150. City of Houston v. Kilburn, 849 S.W.2d 810, 811 (Tex. 1993).

the basis was the official immunity of the individual actor.[151] The court held that although the city's immunity from suit would continue if its employee had qualified immunity, the city could not maintain the interlocutory appeal because the employee had not asserted his immunity.[152] The court cited two court of appeals decisions for the new proposition that the immunity of the individual employee also immunizes the entity because there is no waiver of sovereign immunity under the Act.[153] However, *Kilburn* contains no analysis of legislative history, no review of the pre-code language, nor any mention of the statutory imperative that the act be "liberally construed."[154] Further, the opinion indicated it contained no new proposition of law, but rather, decided the case on well established rules and interpretations.[155]

Ironically, the holding in *Kilburn* was overruled by a case decided the same day as *DeWitt v. Harris County.* In *City of Beverly Hills v. Guevara*,[156] the Texas Supreme Court held that the defendant city could appeal from a denial of its motion for summary judgment, based on the individual immunity of a police officer,

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151. *See id.* at 812 (holding a sovereign immunity claim may be based on an individual's qualified immunity claim to fall within Section 51.014(5) of the Texas Civil Practice and Remedies Code); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Supp. 2001) (providing that an individual may appeal a court's interlocutory order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state").

152. *City of Houston*, 849 S.W.2d at 812.

153. *Id.* (citing Carpenter v. Barner, 797 S.W.2d 99, 102 (Tex. App.—Waco 1990, writ denied), *and* Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224, 227-28 (Tex. App.—Waco 1986, writ ref'd n.r.e)).

154. *See id.* at 811-12. Explicit language that the act be liberally construed was omitted when the Tort Claims Act was codified in chapter 101 of the Texas Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 101.109 revisor's note (Vernon 1997). The revisor's note reasons that: "the Code Construction Act . . . provides that the objects sought to be attained in a statute are among the factors to be considered in construing the statute." *Id.* (citations omitted). The revisor's note further states that "V.A.C.S. Article 10, Subdivision 8, provides that statutes in derogation of the common law are to be liberally construed 'to effect their objects and to promote justice.'" *Id.*

155. *See City of Houston*, 849 S.W.2d at 812 (reasoning that Section 51.014(5) of the Texas Civil Practice and Remedies Code provides that a party may appeal a denial of summary judgment if the party asserts qualified immunity). The court explained that under the Act, a governmental entity may be liable for its employees' torts if the employee would be individually liable under Texas law. *Id.* The court further stated that, if the employee was protected under the doctrine of qualified immunity, then the governmental entity may retain sovereign immunity. *Id.* at 812.

156. 904 S.W.2d 655 (Tex. 1995).

even though the officer had not asserted that affirmative defense and was not a party to the action.[157] The holding of *Kilburn*, that the officer had to assert his immunity for his employer to maintain an interlocutory appeal of a denial of summary judgment, did not survive more than two years.[158]

The two court of appeals cases cited by the *Kilburn* court as authority for the proposition that official immunity of the individual resulted in sovereign immunity for the entity were thin reeds upon which to base such a momentous turn in TTCA jurisprudence.[159] In the first case cited in *Kilburn*, *Carpenter v. Barner*,[160] a constable stopped a motorist on an interstate for a defective taillight.[161] While the driver was attempting to repair the light's fuse under the dash of his car parked on the shoulder of the highway, both cars were struck by another vehicle, severely injuring the stopped motorist.[162] Both the constable and the county were sued.[163] The county, as a unit of state government, was entitled to the defense of sovereign immunity unless it had been waived by the Act.[164] The trial court found both the county and the constable liable.[165]

Upon appeal, after defining official immunity and stating its salutory purposes, the court of appeals distinguished between discretionary and ministerial functions of officials.[166] Stating the well established test that ministerial duties are those prescribed by law and leave nothing to the discretion of the state's employee, the court found the officer's actions were purely discretionary.[167] Therefore, the court held that Carpenter was entitled to official im-

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157. City of Beverly Hills v. Guevara, 904 S.W.2d 655, 656 (Tex. 1995).

158. *Id.*

159. Carpenter v. Barner, 797 S.W.2d 99, 102 (Tex. App.—Waco 1990, writ denied); Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224, 227-28 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

160. 797 S.W.2d 99 (Tex. App.—Waco 1990, writ denied).

161. *Carpenter*, 797 S.W.2d at 101.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Carpenter*, 797 S.W.2d at 101.

167. *Id.* at 102. The court described Carpenter's decisions that night as follows:

> Whether to stop the Dodge on the paved shoulder of the highway or on the access road, how long the occupants of the vehicle should be detained, whether the occupants should be allowed out of the vehicle, where the vehicles should be positioned on the paved shoulder and in relation to each other, what warning lights or devices

munity and reversed the judgment against him and the county without discussing the interaction between the individual's personal immunity and the state's waiver of sovereign immunity pursuant to the Act.[168] The court merely concluded without discussion that because the constable was shielded by official immunity, the county was not liable under the Act.[169]

In *Wyse v. Department of Public Safety*,[170] the second case cited in *Kilburn*, two former city police officers sued investigating officers, the city, two Texas Rangers, the county sheriff, the District Attorney, and the Department of Public Safety (the agency over the Rangers) after being discharged from their jobs with the City of Hillsboro, Texas.[171] The City fired the plaintiffs after the defendants conducted an investigation that uncovered wrongdoing by the officers.[172] A take nothing summary judgment was granted in favor the defendants.[173]

The court of appeals held that all defendants were entitled to immunity defenses under the circumstances.[174] The Department of Public Safety ("DPS"), a state agency immune from suit unless the Act grants a waiver, plead sovereign immunity.[175] The court held that the allegations against the DPS were outside the waiver of immunity of the Act.[176] Moreover, the court emphasized that the "DPS's liability . . . [was] necessarily predicated on some act on the part of Rangers Mitchell and/or Ray for which they would be liable

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should be displayed during the stop and detainment—these were decisions within Carpenter's sole discretion and judgment as a matter of law.

Id.

168. *Id.*

169. *Id.* at 101-02.

170. 733 S.W.2d 224 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

171. Wyse v. Dep't of Pub. Safety, 733 S.W.2d 224, 224 (Tex. App.—Waco 1986, writ ref'd n.r.e).

172. *Id.* at 225.

173. *Id.* at 226.

174. *See id.* at 227 (holding that the District Attorney and the Sheriff were performing "quasi-judicial" functions and were thus entitled to "quasi-judicial" immunity, while the officers were entitled to official immunity). The distinction made was that the District Attorney and Sheriff were being sued for their duties as officers of a court, and were entitled to a version of immunity traditionally held by courts and judges. *Id.* The various police officers held the immunity associated with the exercise of discretion, within the scope of their office, and made in good faith. *Wyse*, 733 S.W.2d at 227.

175. *Id.* at 225.

176. *Id.* at 228.

to the plaintiffs."[177] Therefore, because both Mitchell and Ray were found not liable to the plaintiffs, the DPS was likewise not liable to the plaintiffs.[178]

The supreme court's conclusion in *DeWitt* rests on very weak precedents and is not compelled by the language or history of the Act. The wording of the Act is most naturally interpreted to mean that the same standards of care will be applied to the State as are applied to individuals without regard to the status of the person. If the legislature's intent was to make the state responsible for injuries caused by certain negligent acts of its employees, the *DeWitt* opinion clearly thwarts that purpose.

The Act expressly excludes from its coverage the actions of legislators and judges performed within the scope of their offices.[179] If the court's view of the statutory language in *DeWitt* is correct, those exclusions become surplus. The general rule is that the legislature acts purposefully; *i.e.*, including matters in a statute for a reason.[180] Reading the Act to require real liability of an individual as a predicate to the state's waiver of immunity contradicts that precept. If a *DeWitt*-type exclusion was intended, a clear directive should have appeared in the legislative history or contemporary commentary. The exclusion from liability under the Act of all discretionary acts performed in good faith by employees of the state swallows the waiver of the state's sovereign immunity and largely renders the Act useless.

C. *Since* DeWitt

DeWitt v. Harris County held that the official immunity of the individual prevented recovery against his employing unit of government.[181] It further held that both sections of the Act did not waive the state's immunity from suit unless the actions were predicated on the liability of the individual employee.[182] Since *DeWitt*,

177. *Id.*

178. *Id.*

179. TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.052-.053 (Vernon 1997).

180. *See* TEX. GOV'T CODE ANN. § 311.021 (Vernon 1998) (stating that it is presumed that in enacting a statute, the legislature intended that "the entire statute is intended to be effective").

181. Dewitt v. Harris County, 904 S.W.2d 650, 654 (Tex. 1995).

182. *See id.* at 654 (noting that a state entity's liability is based on the liability of the employee).

the Texas Supreme Court has applied *DeWitt* and found official immunity, and no waiver of sovereign immunity, in few cases.[183]

The courts of appeal have combined *City of Lancaster* and *DeWitt* to defeat claims against units of government on numerous occasions. Police activities were involved in some.[184] Other types of public employees have also been granted official immunity based on their performance of "discretionary acts."[185]

On occasion, courts have found a state actor's actions ministerial, rather than discretionary, and imposed liability on that basis. For example, in *City of El Paso v. W.E.B. Investments*,[186] a city employee's non-discretionary implementation of a demolition order was a basis for avoiding official immunity and resulting sovereign immunity of a city.[187] In that case, the government employee, a street operations supervisor, followed the demolition orders received from his supervisor.[188] The court held the defendant's duty was to follow the orders, not formulate them, and "[w]ithout a directive, he does nothing."[189] The defendant conceded that "he noticed a discrepancy in the demolition dates on the order; [but] nevertheless demolished the building without checking the discrepancy[,]" contrary to city policy.[190] The court concluded that the state may waive immunity for the defendant employee's actions,[191] an analysis other courts have followed.[192]

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183. *See* Wadewitz v. Montgomery, 951 S.W.2d 464, 467 (Tex. 1997) (concluding that the trial court's denial of summary judgment is correct when the city bases its sovereign immunity defense upon the employee's official immunity defense).

184. *See, e.g.*, Cameron County v. Carrillo, 7 S.W.3d 706, 708 (Tex. App.—Corpus Christi 1999, no pet.) (alleging that the collision was caused when a deputy sheriff removed a tire from the highway); City of Coppell v. Waltman, 997 S.W.2d 633, 635 (Tex. App.—Dallas 1998, pet. denied) (noting suit against officers and city for a jail suicide).

185. *See* Heikkila v. Harris County, 973 S.W.2d 333, 337 (Tex. App.—Tyler 1998, pet. denied) (discussing the County Medical Examiner, who was sued for misidentifying and releasing remains to wrong persons, was performing a discretionary act as a matter of law and was thus subject to official immunity).

186. 950 S.W.2d 166 (Tex. App.—El Paso 1997, writ denied).

187. *See* City of El Paso v. W.E.B. Invs., 950 S.W.2d 166, 171 (Tex. App.—El Paso 1997, writ denied) (illustrating that a state employee's execution of a non-discretionary function may waive the state's immunity).

188. *Id.* at 170.

189. *Id.* at 170-71.

190. *Id.*

191. *City of El Paso*, 950 S.W.2d at 171.

192. *See* State v. Terrell, 588 S.W.2d 784, 787-88 (Tex. 1979) (concluding that a highway patrolman's driving decisions outside the scope of policy directives are not covered by

Similarly, in *Victory v. Faradineh*,[193] an on-duty sheriff's deputy involved in a vehicular collision was determined to have been acting in a ministerial capacity while driving to a photography laboratory on official business.[194] The court said "that unlike a high speed chase, a traffic stop, or an accident investigation, operating a car in a non-emergency situation is a ministerial function."[195] It followed two other courts of appeal in holding that a non-emergency operation of a car is a ministerial function, thereby precluding the officer's official immunity.[196] According to those courts, "the discretion used . . . in determining which route to take and how to operate [the] car" is not the kind of discretion that is required for the officer to be immunized.[197] The *Victory* opinion is difficult to justify given the express language of *City of Lancaster* enunciating the mundane decisions the officer driving had to make.

The Texas Supreme Court cases that have found official immunity for the tortious acts of government employees, for the most part, have involved the actions of law enforcement officers.[198] However, no special rule has developed specifically tailored to law enforcement; rather, the court has said explicitly that the discretionary/ministerial dichotomy applies to **all** state employees in determining whether they are immune from liability for their tortious

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immunity); City of Waco v. Hester, 805 S.W.2d 807, 812-13 (Tex. App.—Waco 1990, writ denied) (holding that failing to follow city policy requiring segregation of certain inmates waived immunity because the acts constituted negligent implementation of policy rather than formulation).

193. 993 S.W.2d 778 (Tex. App.—Dallas 1999, no pet.).

194. Victory v. Faradineh, 993 S.W.2d 778, 780 (Tex. App.—Dallas 1999, no pet.).

195. *Id.*

196. *Id.* (following City of Wichita Falls v. Norman, 963 S.W.2d 211, 216-17 (Tex. App.—Fort Worth 1998, pet. dism'd w.o.j.), *and* Woods v. Moody, 933 S.W.2d 306, 308 (Tex. App.—Houston [14th Dist.] 1996, no writ)).

197. *Id.*

198. *See* Univ. of Houston v. Clark, 38 S.W.3d 578, 579-80 (Tex. 2000) (involving a university police officer pursuing an individual who later collided with plaintiff, and in the companion case-Ener-a deputy constable collided with another vehicle while pursuing a speeder); Wadewitz v. Montgomery, 951 S.W.2d 464, 465 (Tex. 1997) (examining a city police officer's collision with plaintiff while responding to a burglary); DeWitt v. Harris County, 904 S.W.2d 650, 651 (Tex. 1995) (involving a deputy constable at the scene of a highway wreck); City of Lancaster v. Chambers, 883 S.W.2d 650, 652 (Tex. 1994) (discussing city police officers' actions during a high speed chase of a motorcycle on which plaintiff was a passenger).

conduct.[199] The court stated in *City of Lancaster* that "[g]overnment employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority."[200] The *DeWitt* court cited that proposition emphasizing that "[o]fficial immunity inures to **all governmental employees** who perform discretionary functions in good faith and within their authority."[201]

The inclusion of all state employees as potential recipients of personal immunity presents the most serious challenge to the viability of the Act. This is because the first element of official immunity, that the act be discretionary, is too easily proven. Discretionary acts are contrasted with ministerial ones, which are required by law and precisely defined as duties performed so "as to leave nothing to the exercise of discretion or judgment . . . ."[202] Such a restrictive definition of ministerial acts necessarily pushes most acts into the discretionary category.

In *City of Lancaster*, the court enumerated the decisions the police officers made that led to the court's conclusion that the officers were engaged in a discretionary act, thus satisfying the first element of official immunity.[203] The officer must first decide whether to undertake pursuit; if pursuit is undertaken, a number of other decisions must be made: which route to take and at what speed, whether additional officers should be called to provide back-up, and how closely the fleeing vehicle should be pursued.[204] There can be no disagreement that once all actions are divided into two categories, with those that are ministerial restricted to only those that the law defines with such precision that no judgment is required, driving the car involves the exercise of discretion and satisfies the first element of immunity.

The most accurate portrayal of immunity for law enforcement officers is analogous to the personal immunity enjoyed by

199. *See generally DeWitt*, 904 S.W.2d at 652 (holding that the official immunity doctrine may apply to all governmental employees).

200. *City of Lancaster*, 883 S.W.2d at 653.

201. *DeWitt*, 904 S.W.2d at 652 (emphasis added).

202. *City of Lancaster*, 883 S.W.2d at 654.

203. *Id.* at 655.

204. *Id.*

judges.[205] Those who work in the justice system, such as lawyers, district attorneys, and process servers, are given immunity from personal liability for actions they take in the courtroom or incident to presenting a case.[206] This type of immunity is usually called "quasi-judicial" immunity because it is associated with that of judges who determine, in the course of their office, who should be jailed or who should not.[207] For example, a lawyer has immunity, or privilege, for allegations in pleadings, words said in open court, or demand letters prior to the institution of suit.[208] Similarly, prosecutors have traditionally been protected, as have police, in filing complaints, making arrests, and pursuing the legitimate ends of law enforcement.[209]

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205. Absolute immunity for judges has been incorporated in our law since at least 1872. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871) (opining that a judicial officer is allowed to act on his convictions without concern of any personal consequences). This immunity is absolute and applies "even when the judge is accused of acting maliciously or corruptly." Pierson v. Ray, 397 U.S. 547, 554 (1967) (explaining that judicial immunity benefits the public, "whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear" that parties may accuse a judge with malice or corruption)). *Id.*

206. *See* Hawkins v. Walvoord, 25 S.W.3d 882, 891 (Tex. App.—El Paso 2000, pet. denied) (holding that judicial immunity extends to court administrator). The court extended the judicial immunity doctrine, stating:

> When judges delegate their authority or appoint persons to perform services for the court, their judicial immunity may follow that delegation or appointment. In Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as a prosecutor performing typical prosecutorial functions, court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees. The key consideration in determining whether an officer is entitled to judicial immunity is whether the officer's conduct is a normal function of the delegating or appointing judge. Whether an act is judicial in nature is determined by the act's character, not by the character of the agent performing it.

Id.

207. *See* Sanders State Bank v. Hawkins, 142 S.W. 84, 86 (Tex. Civ. App.—Texarkana 1911, no writ)(defining the term "quasi-judicial").

208. *See* Crain v. Smith, 22 S.W.3d 58, 60-63 (Tex. App.—Corpus Christi 2000, no pet.) (adopting the Restatement (Second) rule); *see also* RESTATEMENT (SECOND) OF TORTS § 586 & cmt. a (1977) (stating that an attorney has an absolute privilege to "publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding").

209. *See* Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976) (adopting the rule of absolute immunity for prosecutors).

V. ANALYSIS: IF *CITY OF LANCASTER/DEWITT* WERE APPLIED TO ORIGINAL TEXAS TORT CLAIMS ACT CASES THERE WOULD NOT HAVE BEEN LIABILITY

A. *Applying* City of Lancaster/Dewitt *to Prior Texas Tort Claims Act Cases*

The dangerous potential of a sweeping application of the official immunity doctrine into TTCA jurisprudence is best illustrated by applying the modern analysis to pre-*City of Lancaster* cases. This exercise shows that liability could virtually always be defeated by the doctrine. For example, in *Lowe v. Texas Tech University*, a student football player brought an action against Texas Tech University alleging that the university furnished him defective equipment.[210] The question presented to the Texas Supreme Court at that time was whether Lowe stated a cause of action under the Act.[211] Lowe alleged that he suffered disabling injuries to his knee while playing football for the university, due to failure of the university coaching staff, management, and trainers to furnish proper equipment, failure to permit Lowe to wear proper equipment that was available, furnishing defective equipment, and refusal to permit Lowe to wear the proper equipment, supporting devices, and braces.[212]

The supreme court's opinion focused on whether the allegations stated a cause of action for "condition or use of tangible property" under the Act.[213] However, the outcome may have been different if the court had instead focused on the issue of immunity. For example, if the coaching staff, trainer, and managers pled official immunity as an affirmative defense to liability, they would be shielded from liability.[214] Specifically, they could be subject to official immunity if they showed that they were performing discretionary duties within the scope of their authority and done in good

210. Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 298 (Tex. 1996).

211. *See id.* at 298-99 (stating that the problem is whether the allegations state a case that falls within the statutory waiver of immunity).

212. *Id.* at 298.

213. *Id.* at 299.

214. *See* City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (stating that official immunity is an affirmative defense to TTCA liability, and the defendant has the burden to establish all elements of the official immunity defense).

faith when they determined which equipment Lowe should wear.[215] Since a discretionary act is one that involves personal deliberation, decision, and judgment,[216] the decision regarding which type of equipment to prescribe to one's football players is almost inherently "discretionary." Certainly, the defendants in *Lowe* were acting in good faith and certainly within the scope of their authority.[217] Thus, under *City of Lancaster*, the university employees would be protected from liability by the doctrine of official immunity. Similarly, under *DeWitt*, the governmental unit, or the university, would likewise be shielded by the employee's official immunity.[218]

Therefore, the court has done what the legislature failed to do. Under the modern judicial interpretation of the TTCA, liability would not have attached in instances where it would have previously. This scenario can be played out with virtually every pre-*City of Lancaster/DeWitt* case fact pattern where TTCA liability is predicated either on motor-vehicle operation or use of tangible personal property.

Another example is seen in *Black v. Nueces County Rural Fire Prevention District No. 2.*[219] In *Black*, a volunteer fireman brought suit against the fire protection district and the city after he was struck and injured by a fire truck as it backed into position at the scene of a fire.[220] The question before the court was whether the

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215. *See id.* (explaining the manner in which government employees are entitled to official immunity).

216. *Id.* at 654.

217. Although there is no evidence they were acting in good faith, it can fairly be presumed from the facts of the case.

218. DeWitt v. Harris County, 904 S.W.2d 650, 654 (Tex. 1995). Arguably, the university could not be liable for those acts complained of because of the "discretionary powers" exception codified in the Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (Vernon 1997). Under that provision, the governmental unit may retain its sovereign immunity 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 nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

Id. Thus, the decision made at the management or university-level regarding the type of equipment to provide to the football team would be statutorily immune from liability.

219. 695 S.W.2d 562 (Tex. 1985).

220. Black v. Nueces County Rural Fire Prevention Dist. No. 2, 695 S.W.2d 562, 563 (Tex. 1985).

exception for emergency operations applied to bar liability under the Act.[221]

At that time, a statutory exception was in effect for claims "arising out of the action of an officer, agent or employee of the government while responding to emergency calls or reacting to emergency situations when such action is in compliance with the laws and ordinances applicable to emergency action."[222] Finding that no laws or ordinances existed pertaining to the emergency situation wherein Black was injured, the Court held that the district and the city were liable for their employees' negligence.[223]

Once again, a modern interpretation would extend immunity to the city and district by virtue of the officer's immunity who injured Black with the truck.[224] The governmental units could claim immunity by showing that the driver was performing a discretionary act when he was driving the truck, that he was acting in good faith when driving, and that he was acting within the scope of his authority at the time.[225] Again, the result would be no liability for the government.

Further, in *Salcedo v. El Paso Hospital District*,[226] the supreme court held that a government physician's misreading of an electrocardiogram could impose TTCA liability because it amounted to a use of tangible property.[227] Applying the modern analysis of the Act, however, a court could reach the conclusion that the doctor's reading of the electrocardiogram was performance of a discretionary act, done in good faith, and clearly within the scope of his duties. Therefore, under the Act, official immunity could preclude liability for the government doctor.

Ultimately, the supreme court's wholesale adoption of the official immunity doctrine has dealt a staggering blow to the Act. One can hardly fathom a situation where sovereign immunity is waived

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221. *Id.*

222. *Id.*

223. *Id.*

224. *See* City of Beverly Hills v. Guevara, 904 S.W.2d 655, 656 (Tex. 1995) (reiterating that official immunity of a city's employees and agents may also extend to the city).

225. City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994) (emphasizing that official immunity extends to government employees when performing "(1) their discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority").

226. 659 S.W.2d 30 (Tex. 1983).

227. Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983).

and official immunity does not attach.[228] In fact, the expansive adoption of the doctrine has changed the focus in post-*City of Lancaster* cases.[229] Because an action will rarely be found "ministerial" rather than discretionary, where liability is thereby essentially abolished, courts have focused on whether the proof of "good faith" is adequate.[230]

B. *The Good Faith Requirement*

Although the good faith test is an alternative avenue to precluding official immunity, the law puts an incredibly high burden on a plaintiff attempting to controvert an officer's verification that he exercised good faith. To survive summary judgment, the controverting proof must show that "no reasonable person in the [officer's] position could have thought the facts were such that they justified [the officer's] acts."[231] This is recognized as an "elevated standard of proof for the nonmovant seeking to defeat a claim of

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228. *But see* Bishop v. Tex. A & M Univ., 35 S.W.3d 605, 606 (Tex. 2000) (holding that that the state university was vicariously liable for the acts of its drama club faculty advisors in connection with an accidental stabbing of a student during a drama club production). The supreme court rejected the trial court's conclusion that the faculty advisors were independent contractors and not university employees and held that the faculty advisors were employees for purposes of the Act. *Id.* The issue of official immunity was not mentioned in the Court's per curiam opinion, and thus, it is unclear whether it was plead. *Id.* at 606-07. However, had the advisors been considered employees an application of the *City of Lancaster* test for official immunity would likely have resulted in a finding that the faculty advisors and by extension the university were immune from liability.

229. *See, e.g.*, Alamo Workforce Dev., Inc. v. Vann, 21 S.W.3d 428, 431, 435 (Tex. App.—San Antonio 2000, no pet.) (granting summary judgment on official immunity grounds to an agency supervisor for defamation and tortious interference with employment); Ramos v. Tex. Dep't of Pub. Safety, 35 S.W.3d 723, 726-31 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (holding that an officer established entitlement to official immunity on a motion for summary judgment in a suit filed against the officer administering a driver's test where the test-taker hit two people with the vehicle); Rivas v. City of Houston, 17 S.W.3d 23, 29 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (upholding the trial court's grant of judgment not withstanding the verdict because the evidence did not support the jury's finding of lack of good faith, rather, it conclusively established the existence of good faith); Cameron County v. Carrillo, 7 S.W.3d 706, 711 (Tex. App.—Corpus Christi 1999, no pet.) (holding that officer conclusively established that his action of removing a tractor tire from the roadway was performed in good faith); City of Coppell v. Waltman, 997 S.W.2d 633, 640 (Tex. App.—Dallas 1998, pet. denied) (finding that the officers established good faith performance of discretionary acts where inmate committed suicide while in jail cell).

230. *See* Kassen v. Hatley, 887 S.W.2d 4, 9 (Tex. 1994) (explaining that even ministerial duties involve some discretion).

231. *City of Lancaster*, 883 S.W.2d at 657.

official immunity in response to a motion for summary judgment."[232] Nevertheless, surprisingly, and perhaps in reaction to the expansive adoption of the immunity defense, courts often find the defendant's evidence insufficient to establish the good faith prong of the official immunity test.[233]

Two supreme court cases dealing with the good faith requirement of official immunity have been appeals from orders granting or denying summary judgments based on official immunity of law enforcement officers.[234] As official immunity is an affirmative defense,[235] the officer and governmental entity may move for summary judgment based on the officer's immunity.[236] Generally, the

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232. *Id.* at 656.

233. *See, e.g.*, Bridges v. Robinson, 20 S.W.3d 104, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (determining an officer's affidavit failed to establish good faith); City of San Juan v. Gonzalez, 22 S.W.3d 69, 74 (Tex. App.—Corpus Christi 2000, no pet.) (concluding that an officer's affidavit failed to establish good faith sufficiently to entitle the officer to summary judgment on official immunity); Clement v. City of Plano, 26 S.W.3d 544, 552 (Tex. App.—Dallas 2000, no pet.) (finding an officer was not entitled to summary judgment on an immunity defense because the affidavit regarding good faith contained legal conclusions rather than facts); Hayes v. Patrick, 45 S.W.3d 110, 118 (Tex. App.—Fort Worth 2000, no pet.) (asserting that an officer did not establish the good faith element of immunity defense because the plaintiff offered "some" controverting evidence); Ener v. Thomas, 20 S.W.3d 712, 715-16 (Tex. App.—Houston [14th Dist.] 1999), aff'd, *38 S.W.3d 578 (Tex. 2000)* (holding that summary judgment evidence was insufficient to establish good faith); City of Robstown v. Ramirez, 17 S.W.3d 268, 275 (Tex. App.—Corpus Christi 2000, pet. dism'd w.o.j.) (opining that a fact issue existed on the element of good faith); City of San Augustine v. Parrish, 10 S.W.3d 734, 742 (Tex. App.—Tyler 1999, pet. dism'd w.o.j.) (concluding a fact issue existed on the question of good faith); Univ. of Tex. Med. Branch at Galveston v. Hohman, 6 S.W.3d 767, 780 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.) (stating a fact issue remained on the issue of good faith); Ho v. Univ. of Tex. at Arlington, 984 S.W.2d 672, 691 (Tex. App.—Amarillo 1998, pet. denied) (emphasizing that professors at the state university failed to establish prima facie showing of good faith).

234. *See* Univ. of Houston v. Clark, 38 S.W.3d 578, 588 (Tex. 2000) (upholding the trial court's opinion that the police officer's involved in a pursuit case proved good faith as a basis for summary judgment). In a case that was consolidated with the *University of Houston*, the court held that a deputy constable, the defendant, was not entitled to "summary judgment based on official immunity" because the defendant failed to establish that he acted in good faith when colliding after pursuing a speeding car. *Id.* at 580, 588; *see also* Wadewitz v. Montgomery, 951 S.W.2d 464, 469 (reversing the trial court's denial of an officer's motion for summary judgment based on official immunity).

235. *City of Lancaster*, 883 S.W.2d at 653.

236. *See generally Univ. of Houston*, 38 S.W.3d at 580 (considering the appeal of the trial court granting the defendant's motion for summary judgment based on the officers official immunity); *Wadewitz*, 951 S.W.2d at 165 (deciding on the trial court's denial of defendant officer's motion for summary judgment).

officer and government entity may use affidavits or other documentary evidence to support the motion for summary judgment.[237] In the two aforementioned cases, the main issues were whether the officer had established his good faith as a matter of law, or whether the plaintiff had put the question in issue, thus, requiring resolution by a fact-finder.[238] The court determined the officer's "good faith" by applying a standard of objective legal reasonableness, without regard to the officer's subjective state of mind.[239] Furthermore, in a pursuit case the court states its good faith standard is "if a reasonably prudent officer under the same or similar circumstances could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing, rather than terminating, the pursuit."[240]

In *Wadewitz v. Montgomery*,[241] the supreme court examined the good faith test in the context of a police officer responding to a dispatcher's call.[242] Dispatched to aid another officer, Officer Wadewitz proceeded "on an emergency basis" with siren, lights, and air horn.[243] The officer collided with Montgomery's car while making a blind left turn in a crowded intersection.[244] He submitted his affidavit setting out his thoughts and conclusions, the circumstances of the dispatcher's call, a description of the incident as "something in the nature of a purse snatching[,]" the belief that another unit dispatched would reach the scene first, his consideration of routes, and his decision to go on an emergency basis to help protect another officer.[245] An expert opined in his affidavit that a

237. *See Univ. of Houston*, 38 S.W.3d at 585 (allowing the officers' affidavits to establish good faith, and thus official immunity); *Wadewitz*, 951 S.W.2d at 465 (deciding the defendants affidavits and expert testimony did not provide conclusive evidence of his good faith).

238. *See Univ. of Houston*, 38 S.W.3d at 581 (opining that a police officer must prove the good faith standard to obtain summary judgment in a pursuit case); *Wadewitz*, 951 S.W.2d at 466 (stating the issue as whether the officer established good faith based on his summary judgment evidence).

239. *See City of Lancaster*, 883 S.W.2d at 656 (adopting the test that emerged from federal law for claims of qualified immunity in § 1983 cases).

240. *Id.*

241. 951 S.W.2d 464 (Tex. 1997).

242. *See Wadewitz*, 951 S.W.2d at 465 (referring to the officer's response to a theft in progress where he crossed three lanes of traffic and collided with the plaintiff).

243. *Id.*

244. *Id.*

245. *Id.* at 466.

reasonably prudent officer would have reached the same decision as Officer Wadewitz to proceed on an emergency basis.[246]

The court held the officer did not establish good faith as a matter of law because he did not substantiate how he evaluated both the need to undertake his course of action and the risks associated with it.[247] The consideration of "need" is important to determine the seriousness of the crime, whether the officer's immediate presence was necessary, and whether alternative courses of action were available.[248] The court recommended that, in assessing the "risks," the officer should consider public safety concerns, the nature and potential severity of harm his actions could cause, the likelihood of any harm occurring, and whether a reasonable prudent officer would clearly see a risk of harm.[249] The court found that the officer's and the expert's summary judgment evidence did not adequately substantiate their conclusions regarding the existence of good faith and affirmed the denial of summary judgment for Officer Wadewitz.[250]

In *Wadewitz*, the officer's critical decision was to make a left turn at a busy intersection when he could not see if all the oncoming lanes were clear or if traffic was stopped.[251] However, the court failed to address whether the officer must detail his rationale for making that turn, contrasting the necessity with the potential harm. To hold that the officer can do no wrong after the first decision is made after proper analysis, whether driving at a high speed is an emergency, and requiring no update as circumstances change, is a license for recklessness.

Recently, the court held in *University of Houston v. Clark*[252] that the factors used in determining good faith in pursuit cases are used in emergency response cases as well.[253] Specifically, the court stated that the officer must detail his "need/risk" analysis to justify

246. *Id.*

247. *Wadewitz*, 951 S.W.2d at 467.

248. *Id.*

249. *Id.*

250. *Id.*

251. *See id.* at 465 (stating that a truck was stopped in the middle of the westbound lane, which blocked the officer's view when making his turn).

252. 38 S.W.3d 578 (Tex. 2000).

253. Univ. of Houston v. Clark, 38 S.W.3d 578, 582-83 (Tex. 2000).

his conclusion that his actions were reasonable and in good faith.[254] Although the test for good faith has been established in pursuit and emergency response cases, questions remain about the reliability of the evidence.

A motion for summary judgment is the vehicle most often used to test the defense of official immunity. The supreme court has explicitly opined that an officer must consider various factors to reach a good faith conclusion before acting in the challenged fashion.[255] The validity of the defendant officer's conclusion that he acted in good faith can only be determined in light of considering both the risks and the anticipated benefits of his actions. The inherent nature of affidavits is biased towards the individual who creates them. In affidavits accompanying the motion for summary judgment, the defendant officer elaborates on his mental processes, and an expert on police procedures reviews that reasoning and opines that the officer's conclusion was reasonable given the factors he weighed at the time.

In addition, the officer's affidavit is usually prepared well after the event and the filing of the lawsuit when the officer has legal counsel and will have discussed the matter beforehand with representatives of the governmental unit, whether legal advisors, claims adjusters, or risk managers. Without doubt the officer will be advised of the requirements of the official immunity defense, particularly how his actions are judged to have been made in good faith or not. As illustrated above, because it is a self-serving affidavit created well after the event dealing solely with mental processes, it is easily fabricated.

Even if the officer does not intend to falsely state his thought processes and reasoning immediately before the event, his description may be false nonetheless. The favorable legal advice he receives informs him what his mental processes should be to meet the test of good faith to secure his official immunity defense. The power of suggestion and his repeated recreation of the events in his mind may falsify his memory so that he truly believes he consid-

254. *See id.* at 583 (using a test of whether a reasonably prudent officer under similar circumstances would agree that the need for immediate apprehension outweighed the potential harm to the public if the pursuit was continued).

255. *See City of Lancaster*, 883 S.W.2d at 656 (establishing the test of good faith that is applied in police pursuit cases).

ered many relevant factors, when in truth he had not. It can be foreseen that the only time affidavits will not adequately state what factors the officer balanced in reaching his conclusion to justify his action are in those situations where the officer is unable to testify about his reasoning because of death or incapacity.

VI. CONCLUSION

It has long been recognized that fundamental fairness requires that governments are liable for the torts of their employees, just as are other employers. The federal government, as well as most states, has abolished, or at the least limited, its immunity from suit in tort and resulting liability. A limited waiver of liability was finally enacted in Texas in 1969, after over 15 years of legislative debate and one gubernatorial veto. Many exceptions were written into the Act, allowing for immunity for judicial and legislative actions, and for discretionary acts of government. Although affording only a very limited waiver of sovereign immunity from suits in tort, the Act occasionally allowed some recovery by the injured for the negligent acts of state employees.

However, in 1994 and 1995, with the adoption of official immunity for all employees of government, the expansive definition of a "discretionary act," and the direct linking of the state's liability with the employee's potential liability, the Texas Supreme Court greatly restricted the state's waiver of immunity. It can be foreseen that the ordinary operation of an automobile by a state employee can become a discretionary act which entitles that person to official immunity, with resulting immunity for the state.

The irony is that the doctrine of sovereign immunity was a judicially crafted bar to suits against the state or its entities. The courts in Texas repeatedly refused to modify the doctrine, but called on the legislature to do so. The legislature did so, although belatedly and in a limited fashion, only to have the courts hold twenty-five years later that the waiver of sovereign immunity by the state from suit will not apply because of the newly found official immunity protecting each state employee. Unless the definition or application of the doctrine of official immunity to the Texas Tort Claims Act is modified judicially or legislatively, sovereign immunity of the government for its torts in Texas will once again reign supreme.