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Statutes


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MEDICAL MALPRACTICE
LITIGATION UNDER THE TEXAS
TORT CLAIMS ACT

I. INTRODUCTION

Welcome once again to the strange world of litigating medical malpractice cases under the Texas Tort Claims Act. Irrelevant facts still may determine the outcome of your case and you must constantly be on your guard to avoid the many pitfalls which await the unsuspecting plaintiff’s attorney or the ill prepared defense counsel. Do not trust your instincts! Do not rely on common sense! You must throw them out the window and rely on your knowledge of the twists and turns of case law interpreting one of Texas’ strangest statutes.

Instead of concentrating solely on negligence, you have to pay close attention to these types of questions:

1. What is tangible personal property?
2. What is a use or misuse of tangible personal property?
3. Why isn’t a nonuse of tangible personal property actionable?
4. Why is a non-use of tangible personal property actionable if it involves a safety device?
5. What if the Plaintiff cannot give notice within 6 months of the incident because no-one knows a cause of action might exist?

I hope these materials and our discussions of these topics are useful to you. We will try to explain why the Texas Tort Claims Act does not allow a plaintiff to sue a hospital if a nurse negligently fails to record important information in a patient’s medical chart, but does allow a plaintiff to sue a hospital if a hospital employee misinterprets an electrocardiogram. Or why you cannot sue a hospital for failing to give prescribed medication but you can sue if they fail to raise the rails on a hospital bed. Just be sure you check your instincts at the door.

II. HISTORY OF SOVEREIGN IMMUNITY AT COMMON LAW

At common law, governmental entities enjoyed complete sovereign immunity. State v. Snyder, 18 S.W. 106, 109 (Tex. 1886). Sovereign immunity contains two components: (1) A state is immune from being sued without consent even if there is no dispute regarding the state’s liability; and (2) a state has immunity from liability even when the state has consented to being sued. See Dillard v. Austin Independent School District, 806 S.W.2d 589, 592 (Tex. 1991, writ denied). Therefore, in order to bring a suit at common law against the State of Texas, a plaintiff had to prove the state had waived both immunity from suit and immunity from liability. City of Houston v. Arney, 680 S.W.2d 867 (Tex. App.-Houston [1st Dist.] 1984, no writ).

At common law sovereign immunity extended to include agencies, commissions, boards, departments and state universities. Davis v. City of San Antonio, 540 S.W.2d 297 (Tex. 1976). Sovereign immunity is applied to governmental units such as mental health centers, Castillo v. Tropical Texas Center for Mental Health and Mental Retardation, 962 S.W.2d 622 (Tex. App.-Corpus Christi 1997, no writ); water system board of trustees, Zacharie v. City of San Antonio By and Through San Antonio Water System Board of Trustees, 952 S.W.2d 56 (Tex. App.-Austin 1997, no writ); county hospital districts, Brown v. Montgomery County Hospital District, 905 S.W.2d 481 (Tex. App.-Beaumont 1995, no writ); hospital authorities, Huckabay v. Irving Hospital Authority, 879 S.W.2d 64 (Tex. App.-Dallas 1993, writ dism’d by agr.); and water control districts and counties, Bennett v. Brown Water Improvement District No. 1, 272 S.W.2d 498 (Tex. 1954).

III. STATUTORY WAIVER OF IMMUNITY

The Texas Tort Claims Act was enacted by the Texas legislature in 1969 and allowed governmental entities (hospital districts and hospital authorities) to be sued for acts occurring after January 1, 1970.

The TTCA waived immunity from both suit and liability for certain tort claims brought against governmental entities. The TTCA permits suits against governmental entities only to the extent liability is imposed on an individual by state law and only upon the occurrence of particular fact patterns. State Department of Highways and Public Transportation v. Dopyera, 834 S.W.2d 50 (Tex. 1992).

Without the TTCA, hospital districts and authorities could not be sued. The Texas Supreme Court has held that only the Legislature of the State of Texas may waive immunity from suit. University of Texas Medical Branch of Galveston v. York, 871 S.W.2d 175 (Tex. 1994).

It is important to note that the TTCA does not create a cause of action; it merely waives sovereign immunity as a bar to suit that would otherwise exist. Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997).

The burden is on the plaintiff to show that waiver of sovereign immunity has been met under the TTCA or some other legislative material. Turvey, 602 S.W.2d at 519.

However, defendants must remember that sovereign immunity is an affirmative defense which may be waived if not properly raised by the pleadings. See Davis v. City of San Antonio, 752 S.W.2d 518, 519 (Tex. 1988).

A. Provisions of the TTCA

The provisions of the TTCA are broken down into three categories: (1) entities that are covered by the
Medical Malpractice Litigation Under the Texas Tort Claims Act

IV. GOVERNMENTAL ENTITIES

Section 101.001(3) defines “governmental unit” as follows:

(3) “Governmental unit” means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;

(C) an emergency service organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

Although “governmental unit” is a broad definition, it does not allow for suits to be brought against departments or subdivisions of city or county governments. County of Brazoria v. Radtke, 566 S.W.2d 326, 328 and 329 (Tex. Civ. App.-Beaumont 1978, writ ref’d n.r.e.).

As noted in the common law section, the following have also been held to be governmental entities by case law: hospital districts, hospital authorities, and mental health centers (owned by appropriate governmental units).

V. LIABILITY ESTABLISHED UNDER THE TTCA

Governmental liability is established by § 101.021 of the Texas Civil Practice and Remedies Code. It holds as follows:

§ 101.021. Governmental Liability

A governmental unit in the state 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.

Section 101.021 is broken down into four major sections: (1) the operation or use of a motor driven vehicle or motor driven equipment; (2) the personal injury or death caused by a condition or use of tangible personal property; (3) premises liability claims (general liability); and (4) special defects. Medical malpractice claims are filed under category #2.

A. Liability for the Condition or Use of Tangible Personal Property

For a plaintiff to establish liability against a governmental unit for medical malpractice, the plaintiff must show that personal injury or death was caused by a “condition or use of tangible personal” property. Tex. Civ. Prac. & Rem. Code 101.021(2). The Plaintiff must also show that the misuse was by the entity’s employee. See. Dumas v. Muenster Hospital District, 859 S.W.2d 648 (Tex. App. – Fort Worth [2nd Dist.] (1993).

There are three issues to address here: (1) What constitutes tangible personal property?, and (2) What is a use/misuse of tangible personal property? (3) Is the person who allegedly misused the property an “employee”?

1. What is tangible personal property?

The Texas Supreme Court recently defined tangible personal property as “something that has a corporeal, concrete and palpable existence.” York, 871 S.W.2d at 178. Before filing a case against a tort claims entity you must decide if the property you contend was misused meets the York definition.

a. Records

Records and documents of all nature have been held not to constitute tangible personal property, including: medical records of all types, police reports, and permits. The Texas Supreme Court further
solidified Texas law along these lines in the York decision. Prior to York there were several cases holding governmental entities liable based on medical records and other documents concerning the misuse of various machinery. York dealt with a plaintiff who reported with a red and swollen hip and significant change in demeanor. Id. at 176. The lower courts held the treating physician had misused the information in the medical records in failing to diagnose a broken hip. The supreme court rejected this circular reasoning and held, “[i]nformation is intangible; the fact that information is recorded in writing does not render the information tangible property.” Id. at 179.

In 1995 the Texas Supreme Court applied the York decision in a case involving a district clerk releasing a plaintiff’s indictment for theft. The Waco Court of Appeals held sovereign immunity was waived as to Dallas County because the indictment was tangible personal property. Dallas County v. Harper, 913 S.W.2d 207 (Tex. 1995). The Texas Supreme Court reversed the Waco Court of Appeals and rendered judgment for Dallas County by reiterating the indictment was a written statement of a grand jury and was not tangible personal property for purposes of waiving sovereign immunity under the TTCA. Id at 207-208.

Use or misuse of information contained in records simply does not suffice as tangible personal property for purposes of waiving immunity under the TTCA. This is an important defense in medical malpractice cases because it eliminates claims of negligence for failing to document, improper charting, failing to convey information to a physician, etc.

b. Other property

Court have held that the following types of items are tangible personal property:

- **Bedrails** – Overton Memorial Hospital v. McGuire, 518 S.W.2d 528 (Tex. 1975)
- **Bolts** – City of Baytown v. Townsend, 548 S.W.2d 935 (Tex. App. – Houston [14th Dist.] 1977 ref’d n.r.e.).

c. Who owns the property?

There is no requirement that the governmental entity own the property to be liable under the statute. Sem v. State, 821 S.W.2d 411 (Tex. App. – Fort Worth 1991).

2. **What is the difference between a misuse and a nonuse?**

Once you determine that a case involves the “tangible personal property,” you must next decide if the property was used or misused. “Use” is defined as “put or bring into action or service.” See Kassen v. Hartley, 887 S.W.2d 4, 14 (Tex. 1994). A “nonuse” of property is not actionable, but this was not always the case. Up until 1995 plaintiffs had a basis for contending that non-use of tangible personal property could waive immunity pursuant to the TTCA. Two supreme court cases found waiver and subsequent liability where non-use allegations were at issue. In Robinson v. Central Texas MHMR Center, the Texas Supreme Court held the failure to provide a life preserver was a condition or use of personal property when MHMR employees took the plaintiff’s son swimming. Robinson v. Central Texas MHMR Center, 780 S.W.2d 169, 171 (Tex. 1989). In 1976 the Texas Supreme Court held Texas Tech liable when it failed to provide a football player with protective equipment. The supreme court held this was misuse of tangible personal property. Lowe v. Texas Tech University, 540 S.W.2d 297, 300 (Tex. 1976).

Subsequent to the Robinson and Lowe opinions, the supreme court held the non-use of medication was not actionable under the TTCA. Kassen v. Hartley, 887 S.W.2d 4, 14 (Tex. 1994). The supreme court specifically held in Kassen:

> **We have never held** that a non-use of property can support a claim under the Texas Tort Claims Act. Section 101.021, which requires the property’s condition or use to cause the injury, does not support this interpretation. See LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992) (stating that “use” means “to put or bring into action or service; to employ for or apply to a given purpose”) (quoting Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989)). We conclude that the non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity. Kassen v. Hartley, 887 S.W.2d 4, 14 (Tex. 1994). (emphasis added). It is interesting the supreme court would make this bold statement in light of its holdings in Robinson and Lowe. Of course, the makeup of the court had dramatically changed in Kassen.

The Texas Supreme Court further refined the Robinson and Lowe opinions in Kerrville State Hospital v. Clark, 923 S.W.2d 582 (Tex. 1996); however, it stops short of completely shutting down an argument for non-use of property. The supreme court stated in Clark:

> [Robinson and Lowe], represent perhaps the outer bounds of what we have defined as use of tangible personal property. We did not intend, in deciding these cases, to allow both use and non-use of property to result in waiver of immunity under the Act. Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly
intended. The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff’s injuries. For example, if a hospital provided a patient with a bed lacking bed rails and the lack of this protective equipment led to the patient’s injury, the Act’s waiver provisions would be implicated.

Id. at 585. Therefore, non-use is a viable action in the limited situation of failing to provide safety equipment.

3. Is the Use/Misuse by an Employee?
The use or misuse must be by an employee. See Dumas v. Muenster Hospital District, 859 S.W.2d 648 (Tex. App. – Fort Worth [2 nd Dist.] (1993). An employee is defined as “a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.” See Section 101.001 (1). Physicians that have privileges at a hospital but claim to be independent contractors are not employees. See Dumas at 651. One difficult case to defend from a non-use standpoint involves failure to read or interpret fetal heart monitor strips or electrocardiogram results. In Salcedo v. El Paso Hospital District, 659 S.W.2d at 30, (Tex 1983), the Supreme Court held that failure to accurately interpret these tests (seemingly a non-use) was a mis-use because the test was a safety issue for the patient. If you are defending one of these cases, it is extremely important to note that the doctor in the Salcedo case was an employee of the Hospital District. Defendants should always argue that a physician’s misinterpretation on one of these tests is not actionable under the TTCA because the physician is not an employee. Salcedo has been criticized by many courts but never overturned.

VI. LIMITATIONS AND EXCLUSIONS FOUND IN THE TTCA
A. Exemplary Damages
Exemplary damages are not allowed against a tort claim entity pursuant to § 101.024, which states as follows:

This chapter does not authorize exemplary damages.

The TTCA’s prohibition against exemplary damages does not apply to proprietary activities of cities. Turvey, 602 S.W.2d at 519. The TTCA allows a plaintiff to recover unlimited damages against a city for proprietary functions. Id. at 519.

B. Discoverability of Insurance Policies
Insurance policies of governmental entities are not discoverable pursuant to § 101.104 of the Texas Civil Practice and Remedies Code. Historically, if a governmental employee was sued individually, the courts held the insurance policy, of the governmental unit providing insurance to the employee as an additional insured, discoverable. City of Bedford v. Schattman, 776 S.W.2d 812 (Tex. App.-Fort Worth 1989, no writ). The Texas Supreme Court recently disapproved to the Schattman opinion and held the governmental unit’s insurance policy is not discoverable even when the individual employee is named in the suit. In Re Sabine Valley Center, 986 S.W.2d 612 (Tex. 1999).

C. Notice Provisions
1. Written or Actual Notice
The notice provisions of the TTCA are significant and in many cases totally preclude an action surviving against a governmental entity. The notice provision of the TTCA is found in § 101.101 which states as follows:

(a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:

(1) the damage or injury claimed;
(2) the time and place of the incident; and
(3) the incident.

(b) A city’s charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.

(c) The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant’s property has been damaged.

As stated in § 101.101, a governmental unit must receive formal written notice of a claim within six months of the date of the incident. If the plaintiff or claimant fails to provide this notice, each will contend the formal written notice is not required because the governmental unit had actual notice that the claim occurred pursuant to subsection (c) of 101.101.

The seminal case in this area is Cathey v. Boothe, 900 S.W.2d 339 (Tex. 1995). As stated by the Texas Supreme Court:
The purpose of the notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. See City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981). The interpretation of section 101.101(c) urged by the Booths would eviscerate the purpose of the statute, as it would impute actual notice to a hospital from the knowledge that a patient received treatment at its facility or died after receiving treatment. For a hospital, such an interpretation would be the equivalent of having no notice requirement at all because the hospital would be required to investigate the standard of care provided to each and every patient that received treatment.

We hold that actual notice to a governmental unit requires notice of (1) a death, injury, or property damage; (2) the governmental unit’s alleged fault producing or contributing to the death, injury, or property damage; (3) the identity of the parties involved. Id. at 341.

If the governmental unit does not have knowledge of all of these factors, suit will be precluded. Streemman v. University of Texas Health Science Center at San Antonio, 952 S.W.2d 53 (Tex. App.-San Antonio 1997, writ denied).

However, Texas courts have also held that governmental entities can be provided actual notice through the knowledge of their agents and employees. City of Texarkana v. Nard, 575 S.W.2d 648, 651-652 (Tex. Civ. App.-Tyler 1978, writ ref’d n.r.e.). Although actual notice can be imputed in this manner, the agent or employee possessed of actual notice must have a duty to investigate the facts and report them to a person of sufficient authority. McDonald v. State, 936 S.W.2d 734 (Tex. App.-Waco 1997, no writ). If the agent or employee does not have a duty with the governmental entity to investigate the facts and report them to a person with sufficient authority, actual notice will not be imputed. Id. at 738.

Additionally, Texas courts have held that a patient’s medical records can actually give a hospital notice of a claim that satisfies the TTCA notice requirement. See, Gaskin v. Titus County Hospital District, 978 S.W.2d 178 (Tex. App. – Texarkana 1998). Plaintiffs often successfully argue that medical records raise a fact issue about notice and preclude summary judgment.

2. The Discovery Rule does not apply to Section 101.101

The discovery rule does not apply to the six month notice provision of the TTCA. Putt Hoff v. Ancrum, 934 S.W.2d 164 (Tex. App.-Fort Worth 1996, writ denied); Sanford v. Texas A&M University, 680 S.W.2d 650 (Tex. App.-Beaumont 1984, writ ref’d n.r.e.). In The University of Texas Medical Branch of Galveston v. Greenhouse, 889 S.W.2d 427 (Tex. App. - Houston, 1994) the court held that the plaintiff failed to comply with the notice provision in a case where the hospital negligently left a surgical need inside her. Neither the hospital nor the plaintiff knew the needle was negligently left inside Plaintiff until eleven months after the surgery. The Court still directed the plaintiff’s case be dismissed. Similarly, the six month notice requirement is not tolled by mental incapacity of the claimant. Dinh v. Harris County Hospital District, 896 S.W.2d 248 (Tex. App.-Houston [1st Dist.] 1995, writ dism’d w.o.j.).

However, case law has excused minors from complying with the notice provisions of § 101.101. Alvarado v. City of Lubbock, 685 S.W.2d 646 (Tex. 1985); City of Denton v. Mathis, 528 S.W.2d 625 (Tex. Civ. App.-Fort Worth 1975, writ ref’d n.r.e.).

3. Are employees entitled to notice?

One Texas case has held that when a governmental entity maintains its immunity due to the plaintiff’s failure to provide notice pursuant to this section 101.101, individual employees are also immunized from any further liability based on the lack of notice. See Putt Hoff v. Ancrum, 934 S.W.2d 164 (Tex. App.-Fort Worth 1996, writ denied).

4. Notice defense must be pled

The lack of notice on the part of the plaintiff may need to be specifically pled as opposed to a general allegation of the plaintiff’s failure to comply with the immunity provisions of the TTCA. The Tyler Court of Appeals has held that the Texas Department of Criminal Justice-Institutional Division’s failure to specifically plead lack of notice waived that affirmative defense. McBride v. Texas Department of Criminal Justice-Institutional Division, 964 S.W.2d 18 (Tex. App.-Tyler 1997, no writ).

5. City Charters

It should be noted pursuant to the express provisions of § 101.101 that city charters can limit or shorten the time period for notice pursuant to its charter. The Torres case held that such shortening of the time periods must be reasonable. City of Houston v. Torres, 621 S.W.2d 588, 590-591 (Tex. 1981).

D. Limitation on Damages

Governmental units enjoy a significant limitation on damages which is found in § 101.023 of the Tex. Civ. Prac. & Rem. Code. It states as follows:
(a) Liability of the state government under this chapter is limited to money damages in a maximum amount of $250,000.00 for each person and $500,000.00 for each single occurrence for bodily injury or death and $100,000.00 for each single occurrence for injury to or destruction of property.

(b) Except as provided in subchapter (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000.00 for each person and $300,000.00 for each single occurrence for bodily injury or death and $100,000.00 for each single occurrence for injury to or destruction of property.

(c) Liability of a municipality under this chapter is limited to money damages in a maximum amount of $250,000.00 for each person and $500,000.00 for each single occurrence for bodily injury or death and $100,000.00 for each single occurrence for injury to or destruction of property.

(d) Except as provided by Section 78.001, liability of an emergency service organization under this chapter is limited to money damages in a maximum amount of $100,000.00 for each person and $300,000.00 for each single occurrence for bodily injury or death and $100,000.00 for each single occurrence for injury to or destruction of property.

Generally, the cap for the State of Texas and municipalities is $250,000.00. Liability for other units of local government, i.e. counties, hospital districts, hospital authorities and water districts is $100,000.00. Additionally, the liability of an emergency service organization is $100,000.00. Section 101.023 Tex. Civ. Prac. & Rem. Code.

The constitutionality of these damage caps have been attacked numerous times by plaintiffs; however, the Texas courts have uniformly upheld the damage limitations. Their reasoning has been that at common law plaintiffs did not have a cause of action against these various governmental entities because each enjoyed sovereign immunity. Sovereign immunity was waived in limited circumstances by the Texas Legislature; therefore, the Texas Legislature had the power to decide the extent of the waiver of sovereign immunity. City of Austin v. Cooksey, 570 S.W.2d 386 (Tex. 1978).

Special interest groups aggressively lobbied the Texas Legislature to raise these caps in 2001 but were unsuccessful. A similar campaign is expected in the next legislative session.

E. Civil Disobedience and Intentional Torts

In §§101.057, the TTCA excludes certain intentional torts’ activities from waiver of sovereign immunity.

Section 101.057 also excludes civil liability for the intentional torts of governmental employees. Delaney v. University of Houston, 835 S.W.2d 56, 59 (Tex. 1992). However, where the governmental unit’s negligence creates an atmosphere where an intentional tort can be committed by a third party actor (not governmental unit’s employee) immunity is not protected under this section, and the governmental unit can be liable. Id.

VII. MUNICIPALITIES

Section 101.0215 of the Texas Civil Practice and Remedies Code distinguishes between proprietary and governmental functions of municipalities. Similar to our discussion concerning sovereign immunity at common law at the beginning of this paper, municipalities are the only entity that the distinction between proprietary and governmental functions applies. Jezek v. City of Midland, 605 S.W.2d 544 (Tex. 1980).

Section 101.0215 states as follows:

(a) A municipality is liable under this chapter for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given it by the state as part of the state’s sovereignty, to be exercised by the municipality in the interest of the general public, including but not limited to:

(1) police and fire protection and control;
(2) health and sanitation services;
(3) street construction and design;
(4) bridge construction and maintenance and street maintenance;
(5) cemeteries and cemetery care;
(6) garbage and solid waste removal, collection, and disposal;
(7) establishment and maintenance of jails;
(8) hospitals;
(9) sanitary and storm sewers;
(10) airports;
(11) waterparks;
(12) repair garages;
(13) parks and zoos;
(14) museums;
(15) libraries and library maintenance;
(16) civic, convention centers, or coliseums;
(17) community, neighborhood, or senior citizen centers;
(18) operation of emergency ambulance service;
(9) dams and reservoirs;
(20) warning signals;
(21) regulation of traffic;
(22) transportation systems;
(23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;
(24) vehicle and motor driven equipment maintenance;
(25) parking facilities;
(26) tax collection;
(27) firework displays;
(28) building codes and inspection;
(29) zoning, planning, and plat approval;
(30) engineering functions;
(31) maintenance of traffic signals, signs, and hazards;
(32) water and sewer service;
(33) animal control; and
(34) community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code.

(b) This chapter does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to:

(1) the operation and maintenance of a public utility;
(2) amusements owned and operated by the municipality; and
(3) any activity that is abnormally dangerous or ultra hazardous.

(c) The proprietary functions of a municipality do not include those governmental activities listed under Subsection (a).

The laundry list under subsection (a) lists those governmental functions for which a municipality may be liable pursuant to the other provisions of the TTCA. Section 101.0215 is not an independent waiver of governmental immunity; therefore, a plaintiff must still establish applicability of the TTCA under some other section before invoking § 101.0215. Bellinoa v. City of Austin, 894 S.W.2d 821, 826 (Tex. App.-Austin 1995, no writ).

Subsection (b) of § 101.0215 establishes proprietary functions of the municipality. The TTCA does not apply to these proprietary functions, and the municipality enjoys no immunity from suit or liability. Therefore, there is no limitation on the amount of damages a plaintiff can recover from a municipality engaging in these proprietary functions listed in subsection (b). Pontarelli Trust v. City of McAllen, 465 S.W.2d 804, 807-808 (Tex. Civ. App.-Corpus Christi 1971, no writ).

If there is a conflict between subsections (a) and (b) in determining whether an activity is proprietary or governmental, the conflict will be resolved in favor of the activity being governmental. General Electric Company v. City of Abilene, 795 S.W.2d 311, 312-313 (Tex. App.-Eastland 1990, no writ).

VIII. CLAIMS AGAINST EMPLOYEES OF GOVERNMENTAL ENTITIES

Generally, employees of governmental entities are not afforded the defenses and protections under the Texas Tort Claims Act. See City of Bedford at 813. Many plaintiff’s attorneys are now suing employees individually instead of suing the entity. This strategy negates all of these defenses and the case becomes a basic negligence case for medical malpractice. It also puts the insurer in a difficult position because of the entity’s insurance policy usually mirrors the statutory cap but the individuals exposure is unlimited. Plaintiff is not entitled to know the insurance limit so a Stower’s demand is difficult.

IX. INNOVATIVE ATTEMPTS TO AVOID THE TORT CLAIMS ACT’S RESTRICTIONS

Due to the severe restrictions placed on Plaintiffs under the Texas Tort Claims Act, some attorneys are attempting to get around the Act by creating new causes of action. The following are just some of the different strategies employed by attorneys recently to try and create causes of action against Tort Claims facilities for medical malpractice actions which are not subject to the TTCA restrictions.

A. EMTALA Claims

Some medical malpractice cases add a cause of action under the Emergency Medical Treatment and Active Labor Act (EMTALA) in order to try and avoid restrictions under the TTCA. See 42 U.S.C. § 1395(d)(d). EMTALA was enacted by Congress to address a growing concern that Hospital’s were either “dumping” patients who could not pay or transferring patients to another hospital before their emergency conditions were stabilized. EMTALA was not intended to duplicate or preempt state law protections that already exist, but was intended to create a new cause of action.
not available under state law for failure to treat. See, Summers v. Baptist Medical Ctr. Arkadelphia, 91 F. 3d 1132, 1137 (8th Cir. 1996). Thus, an EMTALA cause of action is a new and independent action outside the scope of the Texas Tort Claims Act.

EMTALA requires that a hospital provide an appropriate medical screening examination and then stabilize any medical condition (or transfer the patient) if the hospital determines that an emergency medical condition exists. See, 42 U.S.C. § 1395 (d)(d)(a)(b). This creates two separate ways for a Claimant to establish a cause of action under EMTALA. First, a cause of action may be established if the hospital’s screening examination was not appropriate. See, Casey v. Amarillo Hosp. Dist., 947 S.W. 2d 301 (Tex. App. – Amarillo 1997). Second, the claimant has a cause of action if the hospital has determined that an emergency medical condition existed but failed to either stabilize that condition or transfer the patient to another hospital. Id.

At first glance, it appears that Plaintiffs may avoid the Tort Claims Act for emergency room cases by simply pursuing their case under EMTALA. However, the Casey court points out that an EMTALA violation is vastly different from medical negligence. The appropriateness of the medical screening is not to be judged against a negligence standard. Id. Instead, the hospital must only show that each patient in the emergency room is treated pursuant to uniform screening procedures. EMTALA was not created to ensure that each emergency room patient received a correct diagnosis, but rather to ensure that each is accorded that same level of treatment regularly provided to patients in similar medical circumstances. Gatewood v. Washington Health Care Corp., 933 F. 2d 1037 (D.C. Cir. 1991).

Additionally, a claimant may show an EMTALA violation by proving that the hospital failed to either stabilize an emergency medical condition or transfer the patient to another medical facility. However, to prove this allegation, the Claimant must show that the emergency medical condition “was within the actual knowledge of the doctors on duty.” See, Cleland v. Bronson Health Care Group, Inc., 917 F. 2d 266 (6th Cir. 1990). Therefore, the hospital’s actions are to be viewed in terms of the actual diagnosis, not in terms of what the diagnosis should have been. See, Casey at 304.

Accordingly, even though governmental entities may be sued for violations of EMTALA, the standard is not one of medical negligence. The standard only requires hospitals to give a uniform screening and either stabilize or transfer patients that the hospital has judged to have an emergency medical condition.

B. Action for Violation of Texas Health & Safety Code § 321

One of the more recent strategies being used to avoid restrictions in the Texas Tort Claims Act is to file suit under Section 321.003 of the Texas Health & Safety Code. That section states that “a treatment facility or mental health facility that violates a provision of (this section) is liable to a person receiving care or treatment in or from the facility who is harmed as a result of the violation and may sue for damages. Section 321.002 sets forth a patient’s “bill of rights” which allegedly establishes the standard of care for patients at mental health facilities.

Some Texas courts have held that this section reflects the legislature’s clear and unambiguous waiver of both immunity from liability and immunity from suit. See, Central Counties Ctr. for Mental Health and Mental Retardation v. Rodriguez, 45 S.W. 3rd 707 (Tex. App – Austin 2001), writ granted.

Other Texas courts have held that Section 321 does not waive sovereign immunity and that no cause of action may be pursued under that section. See, Texas Dept. of Mental Health and Mental Retardation v. Lee, 38 S.W. 3rd 862 (Tex. App. – Fort Worth 2001), writ granted. The Lee court holds that sovereign immunity is not waived because Section 321 defines who may be sued as “any person.” The Lee court reasoned that any definition of “person” which includes political subdivisions gives no clear indication of legislative intent to waive immunity. Id; See also, Duhart v. State, 610 S.W. 2d 740 (Tex. 1980).

Both the Lee case and the Rodriguez case are pending before the Texas Supreme Court but no decision has been rendered as of this writing.

The most important point of contention between tort claims hospitals and plaintiffs at this point is the definition of “mental health facility” and “treatment facility.” Plaintiffs that are trying to stretch this statute to extend to non-mental health facility hospitals insist that such is permissible because the definition of “treatment facility” in Section 464.001 includes “a public or private hospital.” The issue before the Supreme Court does not involve whether non-mental health facilities are included in this statute but that issue is sure to be addressed in the near future.


There have recently been an increase in the number of medical malpractice cases that are filed as civil rights violations under 42 U.S.C. § 1983. This most often occurs in death cases and involves plaintiffs claiming that a patient’s civil right of “life” has been violated by the governmental entity.

This is a difficult case for plaintiffs to prove and there are presently few federal decisions which address this specific issue. In general, plaintiffs contend that the employees of the governmental hospital are “state actors” and acted with deliberate indifference with regards to plaintiff’s constitutional right. Plaintiff must show that the hospital employees’ conduct actually violated a clearly established constitutional right of which a reasonable person would have known. Rowe v.
If plaintiff can show facts establishing the violation and a clearly established constitutional right of which a reasonable person would have known, the hospital is still entitled to immunity if the employee’s conduct was objectively reasonable. See, Jones v. Collins, 132 F.3rd 1048 (5th Cir. 1998). Those elements include a showing that the Hospital employees conduct was more than just negligent, but actually to the level of “deliberate indifference.” Id. These elements are difficult to satisfy but are often times the only way for a plaintiff to try and avoid the restrictions contained in the Texas Tort Claims Act.

X. CONCLUSION

The TTCA is a significant roadblock in the vast majority of cases brought against governmental entities. You must pay close attention to the twists and turns of case law interpreting this statute or your client will ultimately pay (or not pay) the price.