

## **What is the Texas Tort Claims Act?**

The Texas Tort Claims Act (“The Act”) is a set of statutes that determine when a governmental entity may be liable for tortious conduct under state law. Prior to the adoption of the Act, individuals could not recover damages from state or local governmental units for injuries resulting from the actions of a government employee or officer in the performance of a governmental function.

Granting governmental units sovereign immunity serves several purposes. It protects governmental time and resources from diminishment from private litigation and encourages forthright action by public officials. It also protects the government from fraudulent or frivolous suits that otherwise may arise because of the perceived “deep pockets” of government entities.

In 1969, the Texas Legislature enacted the Texas Tort Claims Act. The Act waived sovereign immunity for a governmental entity that was engaged in a governmental function.

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.

Tex. Civ. Prac. & Rem. Code § 101.021.

## **What are the liability limits for governmental units under the Act?**

Liability of a municipality under the Act is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

## **What type of actions are not covered by the Act?**

The Act does not limit the liability of a city for damages that result from the city's performance of proprietary functions. Even prior to the passage of the Act, a city could be held liable for the negligent performance of proprietary functions. Proprietary functions are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality. Tex. Civ. Prac. & Rem. Code § 101.0215 (b).

Section 101.0215 of the Act specifically lists three activities that are considered proprietary and 36 activities that are considered governmental functions. The proprietary functions listed in the statute include the operation and maintenance of a public utility; the operation of amusements that are owned and operated by the municipality; and any activity that is abnormally dangerous or "ultra-hazardous". Tex. Civ. Prac. & Rem. Code § 101.0215 (b). It is important to note that the list of 36 governmental functions is exclusive, while the list of proprietary functions is not. This means that, for the purposes of the Act, only these 36 specifically enumerated activities are considered governmental functions. Conversely, even though the statute lists three activities as "proprietary functions", the reality is that, for the purposes of the Act, any activity that the city engages in that is not listed as a governmental function is considered proprietary in nature. If a proprietary function is involved and liability is established, there is no limit to the amount of damages that may be awarded.

## **I'm still not clear on the difference between "governmental" functions and "proprietary" functions.**

Governmental functions are those functions that are imposed on a city by law and are given to the city by the state, as part of the state's sovereignty, to be exercised by the city in the interest of the general public. Governmental functions involve providing for the health, safety, and welfare of the general public. Examples of governmental functions include police and fire protection, health and sanitation services, parks and zoos, zoning and animal control. Tex. Civ. Prac. & Rem. Code, §101.0215(a).

Proprietary functions are those functions that a city may perform in its discretion, and the functions are performed to serve the interests of the inhabitants of the city. Examples of proprietary functions include operation and maintenance of a public utility or amusements owned and operated by a city. Tex. Civ. Prac. & Rem. Code, §101.0215(b). Under state law, the distinction between governmental and proprietary functions is significant because the city's liability for governmental functions exists only to the extent that it has been waived under the Act. However, for proprietary functions, the city is liable to the same extent as a private entity or individual.

### **Does the Act provide immunity for individual public officials?**

No. The Act does not provide immunity for individual public officials. The Act addresses immunity only for the governmental entity itself. There are other legal doctrines that come into play with regard to official immunity. Texas courts have adopted a doctrine of limited official immunity. In certain cases, it absolves a public officer or employee from personal liability for acts within the scope of the officer's or employee's governmental authority.

Texas case law provides either absolute immunity or qualified immunity to a public servant depending on the type of authority retained by that individual. For example, judges are generally entitled to the defense of absolute or complete immunity in the exercise of judicial functions. Turner v. Pruitt, 342 S.W.2d 422 (Tex. 1961).

The majority of Texas public servants, however, may only assert a defense of qualified immunity from liability. Qualified immunity provides protection from liability for discretionary actions taken in good faith within the scope of the officer's or employee's authority. Determination of whether an action was taken in good faith is a fact issue and a discretionary action involves the exercise of discretion or judgment.

There is no qualified immunity for ministerial (i.e. mandatory) actions for which the public servant has no choice. Worsham v. Votgsberger, 129 S.W. 157 (Civ.App. 1919, no writ). For example, the duties of jailers and sheriffs in receiving and caring for prisoners are usually held to be ministerial, as are those of animal pound directors. The line between a discretionary duty and a ministerial one is difficult to draw and competent legal advice should be sought when liability is at issue.

### **To what extent are cities liable for the actions of volunteers?**

The Texas Tort Claims Act waives sovereign immunity for certain actions of governmental employees. Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (1) (Vernon 2001). The Act defines an employee as "a person, including an officer or agent, who is in the paid service of a governmental unit." Id. § 101.001(1). In Harris County v. Dillard, the Texas Supreme Court concluded that an unpaid "volunteer" is not an "employee" for whose acts the governmental unit can be held liable. 883 S.W.2d 166, 167 (Tex. 1994).

### **Are cities liable for injuries sustained by volunteers?**

To the extent authorized by the Act, cities may be liable to persons, including volunteers, for property damage, personal injury, and death proximately caused by the wrongful act, omission or negligence of a city employee, or the condition

or use of personal or real property. Tex. Civ. Prac. & Rem. Code Ann. §101.021 (Vernon 2001). Consequently, cities may want to limit their liability for negligence by obtaining workers' compensation coverage for their volunteers. Cities can opt to cover volunteer fire fighters, police officers, emergency medical personnel, and "other volunteers" who are named under the cities' workers compensations coverage. Tex. Lab. Code Ann. §504.012 (Vernon 2001). With limited exceptions, the recovery of workers' compensation benefits is the exclusive remedy for the death or work-related injuries of covered individuals. Id. § 408.001.

Also, many liability policies have a standard exclusion provision denying coverage for claims arising from injuries to volunteers if the city has purchased workers' compensation coverage for employees but not for volunteers. Thus, cities should consider obtaining workers' compensation coverage for volunteers. For more details, please contact the TML Intergovernmental Risk Pool.