Technical Report Documentation Page

1. Report No. 1704 TX -97/0-1704-5R	2. Government Accession No.	3. Recipient's Catalog No.
4. Title and Subtitle Analysis of Risk Management and Tort Liability for Roadway Lighting Design		5. Report Date December 1997
		6. Performing Organization Code TECH
7. Author(s) Charles A. Joplin, and Douglas D. Gransberg,		8. Performing Organization Report No. Interim Research Report 0-1704-5R
9. Performing Organization Name and Address Texas Tech University Department of Engineering Technology Box 43107 Lubbock, Texas 79409-3107		10. Work Unit No. (TRAIS)
		11. Contract or Grant No. Project 0-1704
12. Sponsoring Agency Name and Address Texas Department of Transportation Research and Technology P. O. Box 5080 Austin, TX 78763-5080		13. Type of Report and Period Cover Interim Research September 1996 - December 1997
		14. Sponsoring Agency Code

15. Supplementary Notes
Study conducted in cooperation with the U.S. Department of Transportation, Federal Highway Administration.
Research Project Title: "Evaluation of Roadway Lighting Systems Designed by STV Methods"

16. Abstract
The purpose of this phase of the STV study was to identify the State of Texas' exposure to liability due to roadway lighting design. This report covers an exhaustive search of case law, regulation, and policy with respect to a public entity's responsibility for the design and construction of public facilities. It finds that the doctrine of sovereign immunity generally protects the State against claims of faulty design. However, this protection has not been tested for roadway lighting in court. The report recommends that any wording adopted in roadway lighting design policy reinforce the design engineer's option to select the best design method for the project at hand. It also recommends that roadway lighting design documentation be called "guidelines" rather than "standards" to reduce the possibility of future law suits alleging the failure to follow a published "standard" in roadway lighting design.

17. Key Words Roadway Lighting, STV, Optical Metric, Safety, Pavement Reflectance, Luminance, Illuminance, Tort, Liability, Risk Management	18. Distribution Statement No restrictions. This document is available to the public through the National Technical Information Service, Springfield, Virginia 22161		
19. Security Classif. (of this report) Unclassified	20. Security Classif. (of this page) Unclassified	21. No. of Pages 37	22. Price

Form DOT F 1700.7 (8-72)

ANALYSIS OF RISK MANAGEMENT AND TORT LIABILITY FOR ROADWAY LIGHTING

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December 1997

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ANALYSIS OF RISK MANAGEMENT AND TORT LIABILITY FOR ROADWAY LIGHTING DESIGN

"...it seems to be that at this time we need education in the obvious more than investigation of the obscure."

Oliver Wendell Holmes

"He that will not apply new remedies must expect new evils, for time is the greatest innovator."

Francis Bacon

By nature, we humans are apprehensive of any proposed change in our lives. Change must be justified. We are skeptical of whether the resulting differences will be effective and will be achieved at a cost, which is reasonable. The cost can be in dollars or it can be in alteration of time requirements or convenience or it can be in the increase in the element of risk (potential tort liability) inherent in the converted project, or a combination of all of these.

Engineers tend to focus on the technical impact of new technologies and design methodologies without regard to their relationship to the legal aspects of the environment in which the systems designed by engineers are placed. As roadway lighting is inherently a safety device and since public health and safety constitute an important issue in much of the litigation found in this country, it is extremely important to evaluate the legal ramifications of a change in the design methodology of roadway lighting.

Some engineers will argue that their responsibility ends at the technical design decision. However, this is a shortsighted view if the manner in which the technical decisions are made alters the current balance between risk and responsibility in a given technical area and opens the door for litigation. Thus, it is extremely important that before a new design methodology is promulgated as a new standard that its potential for changing the legal environment be carefully evaluated.

This report is part of a project related to the writing of the standard practice for roadway lighting. It is a broad view of the legal environment into which the new design methodology would be introduced. Preparation for this report has been a search of case law, news articles, periodicals, and professional writings regarding the risk factors which evolve from the design, construction and maintenance of highway lighting and of highway traffic control and warning systems, and the law that pertains to these subjects.

During the past decade highway lighting systems have been designed under "illuminance" or "luminance" standards, as discussed in RP-8- (Proposed), American National Standard Practice for Lighting, July 7, 1997, pp.3 and 4. For definitions of "luminance" and "illuminance", see appendix C.

This research examines the extent to which liability has been established from highway lighting causes. This study must cover any monetary damages paid in accident cases in which lighting has been held to be the causation factor. Information developed should be helpful in predicting whether a change in lighting standards would increase or decrease *future* tort liability of the state and whether the results merit the cost of the change.

The good news is that this writer found that, in the Great State of Texas, the presence or absence of highway lighting historically has been of limited causation in lawsuits, that is, highway lighting has not been blamed as the cause of accidents to any great extent. In order to examine the WHY? of this statement, we will review tort liability in general, and more specifically, the necessary elements of negligence claims, the process of asserting such claims and what defenses are available to the state.

The other news is that, to evaluate future liability we will consider the types of claims asserted currently in highway safety cases. Future liability claims attributable to highway lighting could take their form from today's complaints brought blaming alleged defects in signage, signals, warning devices, as well as design, construction and maintenance of the highway.

The results of this review will offer suggestions regarding **RISK MANAGEMENT AND TORT LIABILITY** in the adoption of lighting design standards or guidelines.

Risk Management

"Risk" has been defined in a court decision as "risk means hazard, danger, peril, exposure to loss, injury, disadvantage or destruction, and comprises all elements of danger." Knox Jewelry Co.v. Cincinnati Insurance Company, 203 S.W. 2d 739, 740.

"Risk Management" does not mean the organizing and operating the various fortuitous happenings described in this definition, but rather, identifying the elements of risk inherent or foreseeable in an endeavor, and making plans for dealing with such happenings should they occur.

Risks may be divided into two types: business risks and risk of a nature which could be insurable. Business risks involve the success or failure of the particular business undertaking. The fortune of the business depends on various factors such as management ability, market performance, product desirability, and timing. The risk of profit or loss is fundamental to "business risk."

"Insurable risks" do not hinge on management ability and success; rather they turn on fortuitous losses, i.e. what we often call "accidents' or "acts of God." Insurable risks involve statistical loss probability, hence are basically different from business risks. It follows that commercial general liability insurance covers only "insurable risks" and does not cover "business risks". Insurable risks arise without any contractual relationship between an injured party and the party allegedly causing the injury, and are generally referred to as "Tort Liability.

Tort Liability

Black's Law Dictionary defines **"Tort"** as, "A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." "There must always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties."
"Three elements of every tort action are: (1) Existence of a legal duty from defendant to plaintiff, (2) breach of that duty, and (3) damage as proximate result. *Joseph v. Hustad Corp,* 454 P.2d 916." This report will review the current law on the tort liability of a governmental unit in the State of Texas. Also, analysis will be made of possible changes in the extent of liability should new and different standards of lighting evaluation be adopted by the State of Texas.

Potential Liability of the State for Tort Claims

In the United States, whether on the national or on the state level, the governmental entity, the State, is usually responsible for the design, building, and maintenance of the highways, including the lighting system. Any complaint or claim alleged which involves the highway or the lighting system, has to be brought in a lawsuit against the State.

For one seeking to bring a lawsuit against the State, the general rule is that, except to the extent that the state *consents* to be sued, **it is immune from liability and lawsuit under the doctrine of *Sovereign Immunity.*** To be noted is that this is the general rule, and as such, is subject to exceptions.

Consent often takes the form of general legislation, wherein sovereign immunity is **waived** to described limits in the statute. These enactments are termed "Tort Claims Acts" both on the state and federal levels. Consent can also come in special legislation responding to a petition to a state legislature on an individual complaint (See p. 4). Another form of consent, enforced on the state, can come in a court judgment in favor of a claimant successfully broadening the legislative waiver of immunity. While most states have now consented to at least a measure of liability for torts, there remain basic **policy or discretionary decisions in which the State retains sovereign immunity from suit and from liability**. (See page 10)

Sovereign Immunity

In the Beginning, plus a few years, was the State. And the State was run by the King, or the Queen, depending on who had or hadn't disposed of the other lately. And the subjects or citizens did the bidding of the king or queen, "the sovereign". And those who did not do the bidding of the sovereign generally led short and unhappy lives. Those who sought to lodge complaints or claims against the sovereign led even shorter and more unhappy lives. The kings or queens in charge liked this idea to the extent to which they considered themselves ruling by "divine right of kings" and that "the king could do no wrong". This philosophy became known as "sovereign immunity" meaning immunity from liability, and later, from lawsuit. See discussion of the two

principles, "Suit and Liability" in Missouri Pac. R.R. v. Brownsville Navigation District, 453 S.W.2d 812 (Tex.1970).

As time went by, it became apparent that, although oppressive in its inception, the "sovereign immunity" idea had practical merit. The immunity traditionally was quite broad and defended the State even in cases that undoubtedly involved happenings or conduct which would, except for the immunity, create liability on the part of the state. The doctrine has enabled governmental units to operate and to provide necessary public services to their citizens such as police and fire protection, garbage collection, streets, libraries, transportation, and schools, free from the inordinate pressure created by the threat of litigation and exposure to liability.

The doctrine of sovereign immunity has been accepted by the courts of the United States since the early days of the republic. Cohens v. Virginia, 19 U.S. 264 (1 Wheat). The law of the United States has ever since been that, except to the extent the government consents to suit, it is immune. The sovereign immunity doctrine adopted by the Supreme Court of the State of Texas in Hosner v. DeYoung, 1 Tex. 764 (1847) holds that private citizens must get permission from the legislature before filing suit against the state in *breach of contract* cases. In 1997 this principle was re-affirmed by the Texas Supreme Court in Federal Sign v. Texas Southern University, 951 S.W.2d 401 (Tex. 1997). In that recent case Texas Southern University was held to be immune from suit brought by Federal Sign Company on alleged *breach of contract* when the sign company constructed a stadium sign pursuant to a contract with the university. The decision has produced consternation and criticism on the part of contractors and counsel who have continuing commercial contact with the State. Texas Lawyer, Vol., 13, p. 1, 14-17, June 30, 1997. It is clear that on this point the Supreme Court is going to leave this particular question of Sovereign Immunity in **breach of contract** cases to the legislature for any relief to complainants.

Contracts and Torts

Observing the strong doctrine of "legislative permission required in order to sue the state" on *breach of contract* matters, we are alerted to the question of whether the two areas of civil law, contract and tort, might be treated differently under the "*sovereign immunity doctrine.*"

As far back in history as our law is written, there have been cases and comment on the law of contracts. It has only been since the latter part of the nineteenth century that "Torts" began to achieve recognition as a distinct branch of the law. There has developed a body of law which is directed toward the compensation of individuals for losses which they have suffered within the scope of their legally recognized interests, where the law considers that compensation is required.

Basically, a **contract** requires that there be a "meeting of the minds" of the parties , i.e. an agreement, which creates an obligation to do or not to do a particular thing. Essentials of a contract are: competent parties, subject matter, a mutuality of obligation, and "consideration" to be exchanged. "Consideration" can be money or property or service, or even the promise to NOT DO something, i.e. to refrain or forebear.
"Tort Liability" on page 2 gave brief mention of the elements of a cause of action founded in

Tort generally. More specifically, we need to review the elements of the tort cause of action termed "negligence."

Negligence is simply one kind of tortious conduct. (See Prosser, Appendix C) The traditional formula for the elements necessary to such a cause of action may be stated briefly as follows:

1. A **duty**, or obligation, recognized by the law, requiring the person to conform to a certain
   standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a **breach** of the duty.
3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause, or "**proximate cause**"
4. Actual loss or **damage** resulting to the interests of another. Proof of damage is an essential part of the plaintiff's case.

An important distinction between contract and tort is that, in a contract dispute, the parties are determined and identified when those persons enter into an agreement. On the other hand, tort duties are owed to all persons generally or perhaps toward general classes of persons such as owners of a particular model of automobile.

In a tort claim, the defendant might be sued by any stranger who considers himself wronged by the failure of the defendant to perform some perceived duty or by the alleged negligent act of the defendant which resulted in injury to plaintiff's person or property. For example, Wal-Mart has a duty to all persons to maintain floors in a condition which is safe and not conducive to "slip and fall" accidents. Similarly, McDonalds has a duty to serve coffee that will not burn customers when spilled. Questions which apply to highway lighting as provided by the state are, "where, and how much lighting is the state obligated to provide, or, does the state have such obligation at all, and who is to say how it is designed and what happens when the lamps burn out?"

The treatment of **contracts** between private parties and the State is contrasted with the treatment of **tort claims** asserted by private parties against the state. The State retains its sovereign immunity in **contract** cases. In 1969 Texas passed the **Tort Claims Act** providing for waiver of tort immunity in some limited class of cases and establishing monetary limits of the liability of governmental units. There have been many lawsuits since the passage of the Tort Claims Act, wherein plaintiffs have sought to persuade the courts that the subject matter of their perceived wrong exists within the intended subject matter of the legislative waiver.

[Writer's note - Hereinafter, the Tort Claims Act will sometime be referred to as, "The Act" or "TCA, §____"; The Civil Practices and Remedies Code will be referred to as "The Code", or "§ ___." A copy of the Tort Claims Act is attached hereto as Appendix D.

Tort Claims Act - Limited Waiver of Liability by The State

Since the 1900s the development of our Tort law system has been rapid. We live in a litigious society. Even small children can be heard taunting their playmates with, "I'll' sue you!" While the people demand "tort reform" as they see their insurance premiums continuing to rise, these citizens also seek to make their government susceptible to liability for tort claims where their personal interest is involved.

> "The reasons of policy given in support of any particular immunity are apt to be grounded in values and perceptions of the times, and with the change in values and perception, the immunity itself is likely to undergo change as well."
>
> Prosser p.1032

The 1920's author, F. Scott Fitzgerald said, "Show me a hero and I'll write you a tragedy." Similarly we could say, "Show me a new invention, a car airbag, a moving sidewalk, a new miracle drug to grow hair, and I'll draft you a complaint for damages!"

Over thirty states have now abrogated sovereign immunity in a general way. Texas is among a smaller group which has waived tort immunity in some limited class of cases by the passage in 1969 of the **"Tort Claims Act"** §101.001 et seq, Chapter 10, Civil Practice and Remedies Code (Vernon 1969), Attached hereto as Exhibit D. **In order to sue a governmental entity in tort in Texas, there must be a waiver of the immunity which exists in the common law.** Sovereign immunity for governmental units provides waiver but only to the extent that liability is created by the Act. Excellent articles on this subject, entitled **"Overview of the Texas Tort Claims Act"** have been provided by David J. LaBrec and Kevin E. Oliver of the Dallas law firm of Strasburger & Price, L.L.P. in the State Bar of Texas Professional Development Program Seminars on *"Suing and Defending Governmental Entities and Officials"* at each program since 1981, updating the material at each periodic offering of program.

Although the Act provides for limited waiver of liability, it also establishes limitations when monetary damages are assessed against each level of governmental unit. Texas Civil Practice and Remedies Code, § 101.0215 - § 101.023(c). For example, for State Government, §101.0215 provides that liability under the Act is limited to money damages in the maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury and death, and $100,000 for each single occurrence for injury to or destruction of property. Specific limits are also set for "municipality" and "other units of local government".
§ 101.023 (b) and (c), but these levels of government are not within the scope of this review.

Under §101.024 the Act does not allow for recovery of exemplary damages, but see City of Gladewater v. Pike, 727 S.W. 2d 514 (Tex.1987) which establishes tests by which a municipality can be held liable for exemplary, or punitive damages.

Authority Over the Public Roads in The State Of Texas,

The constitutional provision that the legislature shall provide for laying out and working public roads means that the state through its legislature has control and authority over all public roads of the state and that the legislature may, in its discretion, delegate such power to such agencies as it sees fit. V.A.T.S.Ann. St.Const.art.16, §24. Texas Highway Commission v. El Paso Building and Construction Trades Council, 234 S.W.2d 857 (Texas 1950); Sinclair Pipe Line Company. Archer County, Texas, 245 F.2d 79, (5th Cir. 1957).

Risk Management of Highway Lighting as Affected by The Doctrine of Sovereign Immunity and The Tort Claims Act

The essential governmental function of providing highways and the related lighting, warning and control devices, informational signage, and means of traffic direction and control, make **waiver of sovereign immunity of this function highly unlikely**. Davis v. Lubbock County, 486 S.W.2d 109 (Tex.App.-Amarillo 1972, no writ). Although the Legislature has opened the door for a partial waiver of governmental immunity by the enactment of this article, immunity is still the rule where this Act does not apply. Hopper v. Midland County, 500 S.W.2d 552 (Tex.App.-El Paso 1973, ref'd n.r.e.) Under the Tort Claims Act, waiver of sovereign immunity must be clear and unambiguous. Bellnoa v. City of Austin, 894 S.W.2d 821 (Tex.App.-Austin 1995). State's liability for premise defect based upon condition of roadway requires finding that state actually knew of dangerous condition. TCA § 101.022, State Department of Highways and Public Transportation, v. Kitchen, 867 S.W. 2d 784 (Texas 1993).

The Judicial Record of Tort Liability Cases Brought Against The State of Texas

Claims brought against the State of Texas based on the design, building, and maintenance of lighting systems on streets and highways appear to be few in the law reports such as "Southwestern Reporter." This is not because such cases are not filed, but the cases published in these "law books" are those which have been decided in a lower court and have then been appealed. Thus, results in a case which have had the scrutiny of a judge followed by review of a court of appeals, have been established by the judicial system as precedent and are qualified to be reported. Cases which are not appealed from the lower court, or cases which are filed and later settled, are not made a part of our judicial record or precedent, hence we do not read about these claims other than perhaps briefly in the newspapers.

State County and District Court records establish that over ninety percent of cases filed with our court clerks are settled or dismissed before trial. It is clear that most disputes are never tried, much less appealed to qualify for being reported, according to the Association of Attorney-Mediators, Advanced Training Seminar, Houston, October 4, 1997.

Among the cases found in the law books, we find many efforts to expand the waiver of sovereign immunity for alleged defects in design, building, and maintenance of the highway system, but no

cases blaming lighting as a proximate cause of injury. Court decisions build a history of claims based on highway design, building, and maintenance, and these decisions establish precedent for guidance of the courts. We will consider these precedents, under the assumption that future efforts to establish liability from highway lighting might be similar to current treatment of claims based on design, building, and maintenance. By analogy, we hope to thus evaluate our potential liability exposure related to the highway lighting system.

Duty Owed: Premise Defect And Special Defect, §101.022

Section 101.022 of the Act is important due to it being the section wherein claimants often make effort to qualify their claim for waiver of immunity by broadening the definitions in the section. See Appendix D for text of the Act.

Among decisions where application of §101.022 was in issue:

"Whether condition is special defect for purposes of state's liability respecting defect on roadway is question of law." V.T.C.A. Civil Practices and Remedies Code §§101.022, 101.022(b) State Dept. of Highways and Public Safety v. Kitchens, supra.

"Both ordinary premise defects and special defects can, and many times do, constitute dangerous conditions; however legal distinction between two lies in duty owed by State to person or property injured or damaged as result of defect; if causative factor of claim is **premises defect, State owes same duty private land owner owes licensee,** while if defect is **"special defect," state owes same duty to warn that private landowner owes invitee.** V.T.C.A.Civil Practice and Remedies Code §101.022(a,b), Morse v. State of Texas, 905 S.W.2d 470 (Tex App.--Beaumont 1995).

This case goes further to explain, "Where defect is determined to be premise defect, duty upon owner is not to injure licensee by willful, wanton, or grossly negligent conduct; furthermore, owner must use ordinary care to warn licensee of, or to make reasonably safe, dangerous condition of which owner is aware and licensee is not. Restatement (Second) of Torts § 342."

The Supreme Court of Texas held that "Icy bridge was premise defect, for purposes of state's liability respecting accident on bridge resulting in motorist's death and injury to passenger; when there is precipitation accompanied by near-freezing temperature, icy bridge is neither unexpected nor unusual, but, rather entirely predictable and something motorists can and should anticipate when weather is conducive to such condition. V.T.C.A. Civ.Prac. & Rem Code §§ 101.022, 101.022(b) See Kitchen, 867 S.W.2d 784 supra.

In another case, the Supreme Court held, "Condition may be "special defect" only if it is excavation, obstruction, or some other condition which presents unexpected and unusual danger to ordinary users of roadway. State of Texas v.Burris 877 S.W.2d 298 (Texas 1994).

Discretionary Acts Exemption

The "discretionary acts" exemption is a commonly utilized provision of the Act. §101.056 prevents liability 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 non-performance of an act if the law leaves the performance or non-performance of the act to the discretion of the governmental unit. Code § 101.056.

The purpose of both provisions is to "avoid a judicial review that would question the wisdom of a government's exercise of its discretion in making policy decisions."

The question of whether an act is discretionary is one of law. City of Ft. Worth v. Adams, 888 S.W. 2d 607 (Tex.App.-Ft. Worth 1994). Tort Claims Act exempts from waiver of sovereign immunity claims arising from discretionary acts and omissions. Code §101.060. Bellnoa v. City of Austin, 894 S.W.2d 821 (Tex App-Austin 1995). This holding began, "City is immune from liability for governmental functions in absence of statute waiving sovereign immunity." Then, in consideration of the "statute waiving sovereign immunity, which is the Texas Tort Claims Act (TCA), the Court found that "Whether governmental act is discretionary, and thus within exception to waiver of immunity under Tort Claims Act, is question of law. Code §§101.056,101.060.

"Decision by Department of Highways and Public Transportation not to replace highway bridge and guardrails was discretionary function excluded from Tort Claims Act's waiver of governmental immunity." Code §101.056, Barron v. Texas Department of Transportation, 880 S.W.2d
300,(Tex.App.--Waco 1994, no writ)

Potential Liability in the Design of Public Roads

A governmental entity's discretion in the design of roads and bridges, which includes the installation of safety features such as guardrails and barricades, is protected from liability by section 101.056(2) of the Tort Claims Act. Maxwell v. Texas Department of Transportation, 880 S.W.2d 461 (Tex.App-Austin 1994) This case went on to state, "It is not proper for a court to second-guess the agency's decision that some other type of marker or safety device would have been more appropriate than the amber reflector at issue, or that the culvert was placed too close to the highway. To do so would displace the authority of the agency responsible for making such decisions," citing City of El Paso v. Ayoub, 787 S.W.2d 553 (Tex.App.- El Paso 1990, writ denied).

A Red Flag for Highway Design: Will Highway Design Always Be Exempt As Discretionary Implementation of Policy?

Acts or omissions that are incidental to the formation of policy or that implement policy thereby exempt governmental units from liability. Cristilles v. Southwest Texas State University, 639 S.W.2d 38, (Tex.App.--Austin 1982, writ ref'd n.r.e.) However, However, Cristilles goes on to quote, "The discretionary function exemption is limited to the exercise of governmental discretion and does not apply to the exercise of nongovernmental discretion such as professional or occupational discretion." This comes from K.Davis, *Administrative Law Treatise §25.08 at 403-4 (Supp.1982)* **The opinion further suggests that decisions involving professional or occupational discretion should not be exempt under this provision.** For discussion of "governmental discretion" distinguished from occupational or professional discretion, see Eakle v. Texas Dep't. of Human Services, 815 S.W. 2d 869, 874 (Tex.App.-- Austin 1991).

In a rather high-profile case, the Court of Appeals in Fort Worth wrote that "we know of no "clear-cut test" for determining when a claim is precluded by this statute. (§ 101.056) Tarrant County Water Control and Improvement District No. 1 v. Crossland, 787 S.W.2d 427 (Tex.App.--Fort Worth 1989, writ ref'd n.r.e.) . The holding also indicates that the court analyzed the policy-making/implementation analysis described in Christilles and other cases citing "Comment, The "Policy Decision" Exemption of the Texas Tort Claims Act: State v. Terrell, 32 BAYLOR L.REV.403, 410 (1980).

Maxwell v. Texas Department of Transportation, supra, follows Christilles and holds that actions involving occupational or professional discretion are devoid of policy implications. **Maxwell, nonetheless, distinguishes the engineering decisions of highway designers and categorizes the entire design process as discretionary.** To the aid and comfort of those who design highways, it is stated, "A "professional" such as an engineer, may use his or her skills in designing adequate safety features for a highway without subjecting the process to judicial review as an occupational or professional class of agency action. Thus, even though the Department may have used engineering expertise and discretion in the planning and design of the culvert, the action remains in the informed discretion of the agency and exempt from liability under section 101.056(2)."

Citing Maxwell, (supra), the same Court of Appeals in Austin wrote in Johnson v. Texas Department of Transportation, 905 S.W.2d 394 (Tex.App.-- Austin, 1995), "In Maxwell we held *inter alia* that under the scheme established by the Act it was inappropriate for a court to second-guess the Department's choice or placement of safety devices. In confirming the Department's authority to make these decisions, we distinguished the use of Department personnel's engineering skills to effectively **implement** its policy decisions from actions involving "occupational or professional discretion" that may expose a governmental entity to liability."

The designers of highways should look seriously at the line of cases of Cristilles, Tarrant County, Eakle, Maxwell, and Johnson due to the fact that none of these is a Supreme Court case, that is, the highest court in the State of Texas has not ruled on the questions presented in the line

of cases. Also, lack of agreement of the various Courts of Appeals is not unusual. There have been not infrequent instances of a Court changing its stance on a subject after the membership and philosophy of the court has changed after an election. At the moment, immunity of highway design is the law in Texas.

It would follow, by analogy, that highway lighting could be subject to the same conditions of immunity, particularly when one considers the high degree of discretion necessary in highway lighting design. The infinite number of variables, from the various types of road surface, surface age and condition of repair, the many types of light source (luminaries) and their suppliers, the existence of casual (additional) lighting, etc. go together to create an art to be practice by the experienced professional. In considering the complexity here, the layman might ponder how, with the popularity of higher riding sport utility vehicles and pickup trucks, the change in height of the average vehicle might change the tolerances to which a standard would be applied.

Acts Mandated By Law, Other Cases Where Exemption Does Not Apply

Where an act is clearly mandated by law, the discretionary exemption is not available. For example, the Texas Department of Transportation is required by Article 6674q-4 V.A.T.S.(Vernons 1997) to maintain state highways. The discretionary exemption will not preclude liability for the state's negligent maintenance of the highway system. Hamric v. Kansas City Southern Railway Company, 718 S.W.2d 916, 919 (Tex.App.--Beaumont 1986, writ ref'd n.r.e).

In Johnson v. Texas Department of Transportation, (supra). it was unsuccessfully argued that Texas Department of Transportation violated its own design rules by placing a stop sign outside the guideline set forth in the Manual on Uniform Traffic Control Devices for Streets and Highways. The manual is expressly incorporated as a part of the Texas Administrative Code. ("TAC") See 43 TAC § 24.1 (1994). The court sustained the Department's contention that roadway design is a discretionary act, and that the question is a matter of law for the court to decide.

The exemption does not apply in every instance because no law requires that an act be performed or because the performance is left to the governmental unit's discretion by law. Once a government has decided to perform a discretionary act, the act must be performed in a non-negligent manner. Norton v. Brazos County, 640 S.W.2d 690, 693 (Tex.App.--Houston [14th Dist] 1982)

Proportionate Responsibility of Claimants in Texas

At one time in the state of Texas, in a damage suit a plaintiff was **barred from recovery** if the defendant could prove that the plaintiff was partially responsible for his own injuries. This was called the "Contributory Negligence Rule"

In an effort to make the parties share more of the tort liability responsibility, the legislature began in 1973 to enact changes whereby a "Comparative Negligence" rule was created. There was still different treatment provided for product liability cases and those involving negligence. Effective September 1, 1995 a "Proportionate Responsibility" rule was enacted to cover all cases, §33.001 Tex.Civ.Prac.& Rem.Code. (Vernons 1996)

The rule states simply that a claimant may not recover damages if his percentage of responsibility is greater than fifty per-cent.(50%) Further, § 33.003 provides that the trier of fact (the jury, or in a non-jury case, the judge) shall determine the percentage of responsibility of each person's causing or contributing to the harm for which recovery of damages is sought. This means, generally, that should a claimant be considered thirty per-cent (30 %) responsible for the injury, any damages awarded to him would be reduced by that thirty per-cent.

Statute Of Limitations

In any litigation, a defendant has a right to expect that any litigation begun against him must be brought within a reasonable time. This assures timely review of accident scenes, reasonable memory and availability of witnesses, and the ordinary process of life without fear of old and forgotten claims being raised. Such reasonable time is defined by statute, termed "Statute of Limitations." Generally, such law states that no suit shall be maintained on certain causes of action unless brought within a specified period of time after the right accrued.

In the State of Texas a two-year limitations period is described in § 16.003, Tex Civ Prac & Rem Code (Vernon 1996) for cases of the type which would involve damage alleged to be due to highway lighting causes.

Standards, Guidelines and Procedures

The preceding discussions and findings disclose the defenses available to the State in lawsuits and the success or lack thereof of those defenses. "The king should not be required to defend himself in his own court under laws which he has established." was a logical basis of the original doctrine of sovereign immunity. In Texas, the Tort Claims Act waives immunity within defined limits. Claims are brought by aggrieved parties seeking to broaden the waiver.

A governmental unit could possibly create a waiver of immunity through adoption of rules regulating its operation using mandatory, rather than directory language. In the adoption of standards or rules for a governmental unit, it is necessary to be well acquainted with the significance of the terminology and wording used. For a well-done treatment of definitions and their significance we'll look to a publication published by possible adversary, the Expert Witness.

In today's litigation process, all parties rely to a considerable degree on "Expert Witnesses." Knowing that the State will be faced with expert witnesses testifying on behalf of the party who

is adverse to the state, it seems prudent to look at the basis on which that specialist might fashion his approach.

The text in this section is taken from the December, 1995, ***EXPERT WITNESS NEWSLETTER***, which was located on the Internet from the Home Page of Institute of Transportation Engineers (ITE). The material is very well written, and the definitions state clearly the purpose to which Expert Witnesses can put the various levels of "Standards, Guidelines, and Procedures." In the newsletter it states that, "the Expert Witness Council and ITE Coordinating Council are about to complete their first year in existence under the new ITE Council format."

With the usual disclaimers regarding "opinions expressed are those of the authors and are neither endorsed by the Institute of Transportation Engineers nor are they necessarily reflective of the policy or policies of the institute." (any omitted sentences are indicated by ".....".)

Standards, Guideline and Procedures

Standards, guidelines and procedures have different levels of importance and acceptance in the engineering profession. Accordingly, they should have different levels of weight in supporting an engineering opinion. Unfortunately, the differences are seldom explained to the court when one is testifying. The purpose of this paper is to clarify the terminology, establish some appropriate reference for use and promote correct usage by members of the Expert Witness Council If and when the terminology is acceptable, it would be incorporated in the Expert Witness Council Information Notebook for reference by EWC members.

Standards

A standard is described as a prescribed set of rules, conditions or requirements concerned with the definition of terms, classification of components; delineation of procedure; specification of dimensions, materials, performance, design or operations; description of fit and measurement of size; or measurement of quality and quantity in describing material, products, systems, service or practices. More importantly, a Standard must be developed under restrictive procedures to governmental requirements. It is required that Standards be widely considered, provide for public input, ensure no trade bias, be developed from a sound defensible basis and that all input be provided due consideration. The Standard-making organizations such as ASTM, FHWA and ITE do not take the development of standards lightly since they can be a party to litigation because of Standard provisions. The following items have been developed and are approved as Standard:

*The Manual of Uniform Traffic Control Devices for Streets and Highways
*Equipment and Material Standards of the Institute of Transportation Engineers

Only a portion of the Manual of Uniform Traffic Control Devices (MUTCD) is structured as a Standard through the use of a "shall" statement indicating mandatory compliance with those of MUTCD provisions. If an engineering decision is made to use a traffic control device,, then the device design and the application must conform to the MUTCD "shall" requirements.

Recommended Practice

Recommended Practice is a procedure, methodology or means of analyzing, decision making and application of engineering. It is the recognized national use, consistent with public interest and providing a fair, adequate and consensus approach to engineering practice. A Recommended Practice would be comparable to the Standard of Care for engineering practice. Standard of Care is commonly defined as that level of skill and competence ordinarily and contemporaneously demonstrated by a professional of the same disciple practicing in the same locale and faced with the same or similar facts and

circumstances.....The information in the Recommended Practice may be presented as recommendations or guidelines for consideration. There is no mandate that the recommended practice be followed explicitly but it represents good engineering practices at the time. Deviations from the recommended practices are acceptable but the basis for deviation should be documented and defensible in court. It is very similar to the "should" requirements of the MUTCD that represents advisable usage. It is recommended but is not mandatory.

Guidelines

Guidelines are general controls or information covering a range of values or options for guidance of the professional in determining appropriate requirements for a specific application. They represent some of the best available information on a particular subject and are valuable in attaining good design and in promoting uniformity. However, guidelines are neither mandatory Standard nor preferred Recommended Practice. They are for guidance only and optional relative to application to a specific situation. Examples of guidelines are the AASHTO Policy on Geometric Design Greenbook, An informational Guide for Roadway Lighting and the AASHTO Roadside Design Guide. The "may" requirements of the MUTCD are similar to guidelines. They provide permissible options for consideration in the application of traffic control devices but neither mandate nor recommends that application.

Policies and Procedures

Governmental agencies adopt policies and procedures to express the desires of the organization, provide a convenient employee reference for specific courses of action and establish uniform approaches to agency activities. While the policies and procedures may require specific engineering analyses and reports, the absence of those documents does not signify a failure by the agency. Non-compliance with policies and procedures, while an individual error to meet organizational requirements, is not necessarily "negligence per se" by the agency. The situation must be considered on the basis of what existed at the time, "State of the Art" or normal engineering practice, and the requirements of a reasonable and prudent road user.

Reports and Studies

Engineering reports and research studies are solely informational reports on a specific subject. They may represent either an individual, group or organization approach to solving an engineering problem. They are usually one of the initial efforts in identifying a problem and may provide a suggested solution to the problem. Standard-making organizations such as AASHTO, FHWA and ITE are aware of these studies and consider their contribution to professional knowledge in the subject area when considering the promulgation of new Standards, Recommended Practices or Guidelines. However, while informational reports and research studies provide useful data, they have no standing for mandatory or recommended application until the report criteria are formally considered in the standard's approval process. The informational reports presented in AASHTO, ITE, or TRB publications would fit within this classification.

Specific Concerns Regarding Adoption of New Standards

As acknowledged above, in "Standards" provided by the Expert Witness Council, standard-making organizations do not take the development of standards lightly. The research that goes into the establishment of the scientific side is proven, tested, and proven again, is subjected to scrutiny of peers and the comparative research and testing of other scientists. Only after painstaking development would a "standard" be adopted.

This legal review indicates that the manner in which the written description of the standard is expressed, and the language which is adopted, is vital to the proper use of the results of the research. If the intent of the change in standards of lighting is to improve visibility and highway safety, care must be taken to assure that the change does invoke the Law of Unintended Consequences. Consideration must be given to the extent of displacement of the legal status equilibrium and whether the anticipated improvement of lighting qualities merits the possible alteration of legal status.

Imperative instructions, voiced by scientists dedicated to the validity of their findings, unless described in terms which will allow flexibility in application, might provide a means by which discretion would be restricted or eliminated. Liability exposure could be created which would be totally unanticipated and not at all consistent with the intent of the research team.

For a short example purpose, comparison was made of some of the language in the American National Standard Practice for Roadway Lighting, ANSI/IES RP-8, 1983, the proposed ANSI/IES RP-8-1990 and the RP-8-(Proposed) American National Standard Practice for Roadway Lighting, Draft Date 7 July, 1997,

"1. Introduction" in the 1983 Standard, states that "The Standard Practice deals entirely with lighting and does not give advice on construction practice. **It is neither intended nor does it establish a legal standard for roadway lighting systems."** (emphasis, this writer) "Its purpose is to provide recommended practices for designing new roadway lighting systems....."

In the 1990 "Proposed", the sentence emphasized above in the 1983 standard, is changed to, **"This is a technical standard which can be adopted by regulatory agencies."** (Emphasis, again this writer) In the 1997 Proposed, the emphasized sentence is the same as in 1990.

Both publications state that "This is a technical standard which can be adopted (1997 "as a *standard*") by (1997 "local") regulatory agencies. Its purpose is to provide *recommended practices* for designing new roadway lighting systems"

Both the 1990 and the 1997 close the introductory paragraph with "Once a decision has been made to provide lighting, this publication provides the basis for designing an acceptable system.".

Referring to the Expert Witness Newsletter terms, we see that "Standard", "Recommended Procedure" and others are considered by the Expert Witness Council as "words of art" which have a specific legal significance. In a lawsuit alleging failure to follow this "standard" in a jurisdiction which adopted the 1997 RP-8, one should expect to see the legal definition and the alleged mandatory "basis for designing an acceptable system" given considerable weight and emphasis by a plaintiff seeking damages from the adopting jurisdiction.

Conclusions

Although this analysis is very general and "the calm water of generality is fraught with the rocks of exceptions," the following conclusions can be drawn from this analysis.

1. The doctrine of SOVEREIGN IMMUNITY is generally available to the State to protect from civil liability associated with roadway lighting design.

2. With regard to the tort liability consequences inherent to the roadway lighting design process, wording which protects the design judgment process should be used to minimize the potential future impact on the anticipated type of change.

At what might be considered an extreme "abundance of caution," wording in the "purpose" of a proposed standard might be suggested as, "In the legal context, for purposes of determining an actionable standard of care, this document is not meant to be interpreted as a policy. Rather, the purpose of this publication is to set out guidelines that Texas Department of Transportation employees or agents may consider in implementing their engineering judgment and discretion."

3. To provided the maximum protection from future liability, any new design methodology should be promulgated as an alternative to existing design methodologies.

4. Wording should be used which clearly delineates the design engineer's responsibility to select an appropriate design methodology based on the engineer's own best judgment to fit the specific project requirements rather than trying to make one design method cover all possibilities.

Recommendations

The Following Recommendations Are Made:

1. If research clearly demonstrates that an alternative design methodology, for example, the STV design methodology, can provide for a safe and effective roadway lighting design, it should be included in RP-8 as an alternative to the current illuminance and luminance design methods.

2. The wording of RP-8 should avoid describing any of the alternative design methodologies as a "standard."

3. The IES should retain wording in the new RP-8 which carries the same technical intent as the wording in RP-8-1983 which describes the alternative design methodologies as "recommended practices" rather than the proposed "technical standard."

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Barron v. Texas Department of Transportation, 880 S.W.2d 300,(Tex.App.--Waco 1994, no writ)
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Cohens v. Virginia, 19 U.S. 264 (1 Wheat).
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Davis v. Lubbock County, 486 S.W.2d 109 (Tex.App.-Amarillo 1972, no writ).
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Johnson v. Texas Department of Transportation, 905 S.W.2d 394 (Tex.App.-- Austin, 1995),
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Morse v. State of Texas, 905 S.W.2d 470 (Tex App.--Beaumont 1995).
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Sinclair Pipe Line Company. Archer County, Texas, 245 F.2d 79, (5th Cir. 1957).
State Department of Highways and Public Transportation, v. Kitchen, 867 S.W. 2d 784 (Texas 1993).
State of Texas v.Burris 877 S.W.2d 298 (Texas 1994).
Tarrant County Water Control and Improvement District No. 1 v. Crossland, 787 S.W.2d 427 (Tex.App.--Fort Worth 1989, writ ref'd n.r.e.) .
Texas Highway Commission v. El Paso Building and Construction Trades Council, 234 S.W.2d 857 (Texas 1950);

TABLE OF SOURCES

American National Standard Practice for Roadway Lighting, ANSI/IES RP-8, 1983, the proposed ANSI/IES RP-8-1990 and the RP-8-(Proposed) American National Standard Practice for Roadway Lighting, Draft Date 7 July, 1997,
EXPERT WITNESS NEWSLETTER, which was located on the Internet from the Home Page of Institute of Transportation Engineers (ITE).

Manual on Uniform Traffic Control Devices for Streets and Highways. The manual is expressly incorporated as a part of the Texas Administrative Code. ("TAC") See 43 TAC § 24.1 (1994).

"Overview of the Texas Tort Claims Act" articles have been provided by David J. LaBrec and Kevin E. Oliver of the Dallas law firm of Strasburger & Price, L.L.P. in the State Bar of Texas Professional Development Program Seminars on *"Suing and Defending Governmental Entities and Officials"* at each program since 1981, updating the material at each periodic offering of program.

"Premises Liability Under the Tort Claims Act", Michael Shaunessy, Attorney with Bickerstaff, Heath & Smiley, L.L.P., Austin, Texas
presented at the seminar "Suing and Defending Governmental Entities, 1994, Corpus Christi, Texas, as part of the Professional Development Program, State Bar of Texas.

PROSSER AND KEETON HORNBOOK ON TORTS, Fifth Edition, Student Edition, West Publishing Company, St.. Paul, Minn. 1993.

Restatement of (Second) Torts, §342

Texas Lawyer, Vol.13, No. 16, June 30, 1997, pp.1,19; Vol 13, No. 20, July 28, 1997, pp. 1,15.

The Causes, Ecology and Prevention of Traffic Accidents, H. J. Roberts, M.D., Charles C. Thomas, Publisher, Springfield, Ill. 1967.

Article: "*Visibility Problems in Night Driving: The role of Subjective Brightness and Contrast*" W. D. Wright, D.Sc., Applied Optics Section, Imperial College of Science and Technology, London, which appeared in The Prevention of Highway Injury, The proceedings of a Symposium held April 19-21, 1967 sponsored by the University of Michigan Medical School and Highway Safety Research Institute, Ann Arbor, 1967.

For interesting contrast with private ownership of roads, Mexico, see "Airports go private, but roads back to state," *Our World,* a supplement to USA TODAY, produced by United World Inc.: Grand Central Station, P. O. Box 5173, New York, N.Y. 10163.

Definitions:

LUMINANCE and ILLUMINANCE: The eye sees luminance, not illuminance. The visual system perceives the light leaving an object (luminance), not the light arriving at the object (illuminance). Source: "Architectural Lighting", in Magill's Survey of Science: Applied Science, Salem Press, Pasadena CA, 1993

LUMINANCE, L: The quotient of the luminous flux at an element of the surface surrounding the point, and propagated in directions defined by an elementary cone containing the given direction, by the product of the solid angle of the cone and area of the orthogonal projection of the element of the surface on a plane perpendicular to the given direction. The luminous flux may be leaving, passing through, and/or arriving at the surface.

ILLUMINANCE, E: the density of the luminous flux incident on a surface; it is the quotient of the luminous flux by the area of the surface when the latter is uniformly illuminated.
Source: American National Standard Practice for Roadway Lighting, ANSI/IES RP-8, (Proposed) American National Standard Practice for Roadway Lighting, Draft Date 7 July, 1997.

Texas Civil Practices and Remedies Code

(The information contained in Appendix D is copied from the original source.)

Texas Civil Practice and Remedies Code

1996 Edition
[Supersedes 1994 Edition]

WITH TABLES
AND INDEX

As Amended through the 1995 Regular Session of the 74th Legislature

WEST PUBLISHING CO.
ST. PAUL, MINNESOTA

TITLE 5. GOVERNMENTAL LIABILITY

CHAPTER 101. TORT CLAIMS

SUBCHAPTER A. GENERAL PROVISIONS

SUBCHAPTER B. TORT LIABILITY OF GOVERNMENTAL UNITS

SUBCHAPTER C. EXCLUSIONS AND EXCEPTIONS

SUBCHAPTER D. PROCEDURES

SUBCHAPTER A. GENERAL PROVISIONS

§ 101.001. Definitions

In this chapter:

(1) "Employee" means 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.

(2) "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) a volunteer fire department; 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.

(3) "Motor-driven equipment" does not include:

(A) equipment used in connection with the operation of floodgates or water release equipment by river authorities created under the laws of this state; or

(B) medical equipment, such as iron lungs, located in hospitals.

(4) "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

(5) "State government" means an agency, board, commission, department, or office, other than a district or authority created under Article XVI, Section 59, of the Texas Constitution, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

(6) "Volunteer fire department" means a fire department that is:

(A) operated by its members; and

(B) exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 (26 U.S.C. Section 501(a)) by being listed as an

exempt organization in Section 501(c)(3) of that code (26 U.S.C. Section 501(c)(3)).

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., ch. 693, § 1, eff. June 19, 1987; Acts 1991, 72nd Leg., ch. 476, § 1, eff. Aug. 26, 1991; Acts 1995, 74th Leg., ch. 827, § 1, eff. Aug. 28, 1995.

Section 2 of the 1987 amendatory act provides:

"This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued in effect for this purpose."

For applicability provisions of the 1991 amendatory act, see note following § 101.063.

Section 3 of the 1995 amendatory act provides:

"This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued in effect for that purpose."

§ 101.002. Short Title

This chapter may be cited as the Texas Tort Claims Act.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.003. Remedies Additional

The remedies authorized by this chapter are in addition to any other legal remedies.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

[Sections 101.004 to 101.020 reserved for expansion]

SUBCHAPTER B. TORT LIABILITY OF GOVERNMENTAL UNITS

§ 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.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.0215. Liability of a Municipality

(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) waterworks;

(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;

(19) 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; and

(33) animal control.

(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 ultrahazardous.

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

Added by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.02, eff. Sept. 2, 1987.

Subsection (b) of § 4.04 of the 1987 Act provides:

"If a provision of Section 3.02 of this Act is held invalid or its application to any person or circumstance is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. If a provision of Section 3.03 of this Act is held invalid or its application to any person or circumstance is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. If a provision of Section 3.13 of this Act is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. All other sections of this Act are severable as provided in Subsection (a) of this section."

For provisions of the 1987 Act relating to the effective date, findings and purpose, severability, declaratory judgment and accelerated appeals, see notes under § 9.001.

§ 101.022. Duty Owed: Premise and Special Defects

(a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.

(b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by Section 101.060.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.023. Limitation on Amount of Liability

(a) Liability of the state government under this chapter 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.

(b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily injury or death and $100,000 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 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.

(d) Except as provided by Section 78.001, liability of a volunteer fire department under this chapter is limited to money damages in a maximum amount of $100,000 for each person and $300,000 for each single occurrence for bodily

injury or death and $100,000 for each single occurrence for injury to or destruction of property.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.03, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 827, § 2, eff. Aug. 28, 1995.

Subsection (b) of § 4.04 of the 1987 amendatory act provides:

"If a provision of Section 3.02 of this Act is held invalid or its application to any person or circumstance is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. If a provision of Section 3.03 of this Act is held invalid or its application to any person or circumstance is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. If a provision of Section 3.13 of this Act is held invalid, Sections 3.02, 3.03, and 3.13 of this Act are void and have no effect. All other sections of this Act are severable as provided in Subsection (a) of this section."

For provisions of the 1987 amendatory act relating to the effective date, findings and purpose, declaratory judgment and accelerated appeals, see notes under § 9.001.

Section 3 of the 1995 amendatory act provides:

"This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued in effect for that purpose."

§ 101.024. Exemplary Damages

This chapter does not authorize exemplary damages.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.025. Waiver of Governmental Immunity; Permission to Sue

(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.026. Individual's Immunity Preserved

To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.027. Liability Insurance

(a) Each governmental unit may purchase insurance policies protecting the unit and the unit's employees against claims under this chapter.

(b) The policies may relinquish to the insurer the right to investigate, defend, compromise, and settle any claim under this chapter to which the insurance coverage extends.

(c) This state or a political subdivision of the state may not require an employee to purchase liability insurance as a condition of employment if the state or the political subdivision is insured by a liability insurance policy.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.028. Workers' Compensation Insurance

A governmental unit that has workers' compensation insurance or that accepts the workers' compensation laws of this state is entitled to the privileges and immunities granted by the workers' compensation laws of this state to private individuals and corporations.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.029. Liability for Certain Conduct of State Prison Inmates

(a) The Department of Criminal Justice is liable for property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an inmate or state jail defendant housed in a facility operated by the department if:

(1) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment;

(2) the inmate or defendant would be personally liable to the claimant according to Texas law; and

(3) the act, omission, or negligence was committed by the inmate or defendant acting in the course and scope of a task or activity that:

(A) the inmate or defendant performed at the request of an employee of the department; and

(B) the inmate or defendant performed under the control or supervision of the department.

(b) This section does not apply to property damage, personal injury, or death sustained by an inmate or state jail defendant.

Added by Acts 1995, 74th Leg., ch. 321, § 1.108, eff. Sept. 1, 1995.

Historical and Statutory Notes

Section 1.115 of the 1995 Act provides:

"The change in law made by this article to Chapter 101, Civil Practice and Remedies Code, applies only to a cause of action that accrues on or after the effective date of this article. An action that accrued before the effective date of this article is governed by the law applicable to the action as it existed immediately before the effective date of this article, and that law is continued in effect for that purpose."

[Sections 101.030 to 101.050 reserved for expansion]

SUBCHAPTER C. EXCLUSIONS AND EXCEPTIONS

§ 101.051. School and Junior College Districts Partially Excluded

Except as to motor vehicles, this chapter does not apply to a school district or to a junior college district.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.052. Legislative

This chapter does not apply to a claim based on an act or omission of the legislature or a member of the legislature acting in his official capacity or to the legislative functions of a governmental unit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.053. Judicial

(a) This chapter does not apply to a claim based on an act or omission of a court of this state or any member of a court of this state acting in his official capacity or to a judicial function of a governmental unit. "Official capacity" means all duties of office and includes administrative decisions or actions.

(b) This chapter does not apply to a claim based on an act or omission of an employee in the execution of a lawful order of any court.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.04, eff. Sept. 2, 1987.

For provisions of the 1987 amendatory act relating to the effective date, findings and purpose, severability, declaratory judgment and accelerated appeals, see notes under § 9.001.

§ 101.054. State Military Personnel

This chapter does not apply to a claim arising from the activities of the state military forces when on active duty under the lawful orders of competent authority.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.055. Certain Governmental Functions

This chapter does not apply to a claim arising:

(1) in connection with the assessment or collection of taxes by a governmental unit;

(2) from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others; or

(3) from the failure to provide or the method of providing police or fire protection.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.05, eff. Sept. 2, 1987; Acts 1995, 74th Leg., ch. 139, § 1, eff. Sept. 1, 1995.

For provisions of the 1987 amendatory act relating to the effective date, findings and purpose, severability, declaratory judgment and accelerated appeals, see notes under § 9.001.

Section 7(b) of the 1995 amendatory act provides:

"The change in law made by this Act applies to a cause of action accruing on or after the effective date of this Act."

§ 101.056. Discretionary Powers

This chapter does not apply to a claim 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.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.057. Civil Disobedience and Certain Intentional Torts

This chapter does not apply to a claim:

(1) based on an injury or death connected with any act or omission arising out of civil disobedience, riot, insurrection, or rebellion; or

(2) arising out of assault, battery, false imprisonment, or any other intentional tort, including a tort involving disciplinary action by school authorities.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.058. Landowner's Liability

Text of section as added by Acts 1995, 74th Leg., ch. 520, § 4

To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under this chapter, Chapter 75 controls.

Added by Acts 1995, 74th Leg., ch. 520, § 4, eff. Aug. 28, 1995.

For text of section as added by Acts 1995, 74th Leg., ch. 738, § 2, see § 101.058, post

Section 5 of Acts 1995, 74th Leg., ch. 520 provides:

"This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrues before the effective date of this Act is governed by the law applicable to the action immediately before the effective date of this Act, and that law is continued in effect for that purpose."

§ 101.058. Negligence of Off-Duty Law Enforcement Officers

Text of section as added by Acts 1995, 74th Leg., ch. 738, § 2

This chapter does not apply to the wrongful act or omission or the negligence of an officer commissioned by the Department of Public Safety if the officer was not on active duty at the time the act, omission, or negligence occurred. This section applies without regard to whether the officer was wearing a uniform purchased under Section 411.0078, Government Code, at the time the act, omission, or negligence occurred.

Added by Acts 1995, 74th Leg., ch. 738, § 2, eff. Sept. 1, 1995.

For text of section as added by Acts 1995, 74th Leg., ch. 520, § 4, see § 101.058, ante

Section 3 of Acts 1995, 74th Leg., ch. 738 provides:

"Section 101.058, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."

§ 101.059. Attractive Nuisances

This chapter does not apply to a claim based on the theory of attractive nuisance.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.060. Traffic and Road Control Devices

(a) This chapter does not apply to a claim arising from:

(1) the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is a result of discretionary action of the governmental unit;

(2) the absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice; or

(3) the removal or destruction of a traffic or road sign, signal, or warning device by a third person unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice.

(b) The signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with the use of the roadway.

(c) This section does not apply to the duty to warn of special defects such as excavations or roadway obstructions.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.061. Tort Committed Before January 1, 1970

This chapter does not apply to a claim based on an act or omission that occurred before January 1, 1970.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.062. 9-1-1 Emergency Service

(a) In this section, "9-1-1 service" and "public agency" have the meanings assigned those terms by Section 771.001, Health and Safety Code.

(b) This chapter applies to a claim against a public agency that arises from an action of an employee of the public agency or a volunteer under direction of the public agency and that involves providing 9-1-1 service or responding to a

9-1-1 emergency call only if the action violates a statute or ordinance applicable to the action.

Added by Acts 1987, 70th Leg., ch. 236, § 2, eff. Aug. 31, 1987. Amended by Acts 1991, 72nd Leg., ch. 14, § 284(3), eff. Sept. 1, 1991.

Application of 1987 amendatory act, see note under Vernon's Ann.Civ.St. art. 1432f.

§ 101.063. Members of Public Health District

A governmental unit that is a member of a public health district is not liable under this chapter for any conduct of the district's personnel or for any condition or use of the district's property.

Added by Acts 1991, 72nd Leg., ch. 476, § 2, eff. Aug. 26, 1991.

Section 4 of the 1991 Act provides:

"This Act applies only to a cause of action that accrues on or after the effective date of this Act. An action that accrued before the effective date of this Act is governed by the law in effect at the time the action accrued, and that law is continued in effect for this purpose."

§ 101.064. Land Acquired Under Foreclosure of Lien

(a) This section applies only to a municipality with a population of 1.5 million or more that acquires land at a sale following the foreclosure of a lien held by the municipality.

(b) This chapter does not apply to a claim that:

(1) arises after the date the land was acquired and before the date the land is sold, conveyed, or exchanged by the municipality; and

(2) arises from:

(A) the condition of the land;

(B) a premises defect on the land; or

(C) an action committed by any person, other than an agent or employee of the municipality, on the land.

(c) In this section, the term "land" includes any building or improvement located on land acquired by a municipality.

Added by Acts 1995, 74th Leg., ch. 139, § 5, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 442, § 1, eff. Sept. 1, 1995.

Acts 1995, 74th Leg., ch. 139, § 6 and Acts 1995, 74th Leg., ch. 442, § 2 provide:

"The change in law made by this Act by the addition of Section 101.064, Civil Practice and Remedies Code, applies only to a claim brought against a municipality that is filed with a court on or after the effective date of this Act. A claim filed with a court before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose."

[Sections 101.065 to 101.100 reserved for expansion]

SUBCHAPTER D. PROCEDURES

§ 101.101. Notice

(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.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.102. Commencement of Suit

(a) A suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises.

(b) The pleadings of the suit must name as defendant the governmental unit against which liability is to be established.

(c) In a suit against the state, citation must be served on the secretary of state. In other suits, citation must be served as in other civil cases unless no method of service is provided by law, in which case service may be on the administrative head of the governmental unit being sued. If the administrative head of the governmental unit is not available, the court in which the suit is pending may authorize service in any manner that affords the governmental unit a fair opportunity to answer and defend the suit.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.06, eff. Sept. 2, 1987.

For provisions of the 1987 amendatory act relating to the effective date, findings and purpose, severability, declaratory judgment and accelerated appeals, see notes under § 9.001.

§ 101.103. Legal Representation

(a) The attorney general shall defend each action brought under this chapter against a governmental unit that has authority and jurisdiction coextensive with the geographical limits of this state. The attorney general may be fully assisted by counsel provided by an insurance carrier.

(b) A governmental unit having an area of jurisdiction smaller than the entire state shall employ its own counsel according to the organic act under which the unit operates, unless the governmental unit has relinquished to an insurance carrier the right to defend against the claim.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.104. Evidence of Insurance Coverage

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under this chapter.

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.105. Settlement

(a) A cause of action under this chapter may be settled and compromised by the governmental unit if, in a case involving the state the governor determines, or if, in other cases the governing body of the governmental unit determines, that the compromise is in the best interests of the governmental unit.

(b) Approval is not required if the governmental unit has acquired insurance under this chapter.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.106. Employees Not Liable After Settlement or Judgment

A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.107. Payment and Collection of Judgment

(a) A judgment in a suit under this chapter may be enforced only in the same manner and to the same extent as other judgments against the governmental unit are enforceable as provided by law, unless the governmental unit has liability or indemnity insurance protection, in which case the holder of the judgment may collect the judgment, to the extent of the insurer's liability, as provided in the insurance or indemnity contract or policy or as otherwise provided by law.

(b) A judgment or a portion of a judgment that is not payable by an insurer need not be paid by a governmental unit until the first fiscal year following the fiscal year in which the judgment becomes final.

(c) If in a fiscal year the aggregate amount of judgments under this chapter against a governmental unit that become final, excluding the amount payable by an insurer, exceeds one percent of the unit's budgeted tax funds for the fiscal year, excluding general obligation debt service requirements, the governmental unit may pay the judgments in equal annual installments for a period of not more than five years. If payments are extended under this subsection, the governmental unit shall pay interest on the unpaid balance at the rate provided by law.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.108. Ad Valorem Taxes for Payment of Judgment

(a) A governmental unit not fully covered by liability insurance may levy an ad valorem tax for the payment of any final judgment under this chapter.

(b) If necessary to pay the amount of a judgment, the ad valorem tax rate may exceed any legal tax rate limit applicable to the governmental unit except a limit imposed by the constitution.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

§ 101.109. Payment of Claims Against Certain Universities

A claim under this chapter against a state-supported senior college or university is payable only by a direct legislative appropriation made to satisfy claims unless insurance has been acquired as provided by this chapter. If insurance has been acquired, the claimant is entitled to payment to the extent of the coverage as in other cases.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

CHAPTER 102. TORT CLAIMS PAYMENTS BY LOCAL GOVERNMENTS

Section
102.001. Definitions.
102.002. Payment of Certain Tort Claims.
102.003. Maximum Payments.
102.004. Defense Counsel.
102.005. Security for Court Costs not Required.
102.006. Other Laws not Affected.

§ 102.001. Definitions

In this chapter:

(1) "Employee" includes an officer, volunteer, or employee, a former officer, volunteer, or employee, and the estate of an officer, volunteer, or employee or former officer, volunteer, or employee of a local government.

(2) "Local government" means a county, city, town, special purpose district, and any other political subdivision of the state.

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985. Amended by Acts 1987, 70th Leg., 1st C.S., ch. 2, § 3.07, eff. Sept. 2, 1987.

For provisions of the 1987 amendatory act relating to the effective date, findings and purpose, severability, declaratory judgment and accelerated appeals, see notes under § 9.001.

§ 102.002. Payment of Certain Tort Claims

(a) A local government may pay actual damages awarded against an employee of the local government if the damages:

(1) result from an act or omission of the employee in the course and scope of his employment for the local government; and