

of property so that the plaintiff's claim for damages is within the Act's waiver of sovereign immunity.² The plaintiff asserts that her husband died because the prison clinic gave him pain medication that masked his symptoms, thereby preventing proper diagnosis and treatment. The Court concludes that the plaintiff's complaint, in essence, is not about a misuse of pain medication, which did not worsen her husband's illness or hurt him in any way, but about the misdiagnosis of that illness, for which the Legislature has not waived sovereign immunity. I agree that the use of property alleged by the plaintiff is not sufficiently central to her claim to bring it within the statutory waiver, and that allowing claims like hers would greatly increase the government's liability, contrary to the undoubted purpose of the Tort Claims Act.³ Accordingly, I concur in the Court's opinion.

What troubles me gravely is that sixteen decisions from this Court — on the average, one every other year since the Act passed — and hundreds more from the courts of appeals have done so little to infuse the Act's use-of-property standard with meaning that the task now appears hopeless. The Tort

² "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.

³ See *Bossley*, 968 S.W.2d at 341-42.

Claims Act does not define “use”, and nothing in the history of its passage provides a clue as to the standard’s intended meaning.⁴ The standard appears to have been inserted in the statute simply to narrow its waiver of immunity enough that Governor Smith would not veto it.⁵ No other explanation has ever been advanced. No other jurisdiction employs such a standard for waiving sovereign immunity, so we cannot borrow from others’ experience. For want of any legislative guidance, we have given the word “use” its ordinary meaning⁶ and consequently held that for property to be used in causing injury it must actually be involved⁷ and not merely serve as the situs of injury⁸ or furnish the condition that makes injury possible.⁹ The inadequacy of these basic notions in providing any real guidance for applying the use-of-property standard is apparent in our decisions. We have held that failing to provide a hospital patient a bed with rails¹⁰ or a football player a properly protective uniform¹¹ or an epileptic swimmer with a life preserver¹² is a use of property within the statutory waiver of immunity, but failing to give a patient an injectionable

⁴ *Lowe*, 540 S.W.2d at 301-302 (Greenhill, C.J., concurring); *Bossley*, 968 S.W.2d at 341-42.

⁵ *Bossley*, 968 S.W.2d at 342.

⁶ *Mount Pleasant*, 766 S.W.2d at 211.

⁷ *Bossley*, 968 S.W.2d at 343.

⁸ *LeLeaux*, 835 S.W.2d at 52.

⁹ *Bossley*, 968 S.W.2d at 343.

¹⁰ *Overton*, 518 S.W.2d at 529.

¹¹ *Lowe*, 540 S.W.2d at 300.

¹² *Robinson*, 780 S.W.2d at 171.

drug¹³ or to install a pump to dissipate gas fumes¹⁴ is but a non-use of property and outside the waiver. We have held that misreading an electrocardiogram is a use of property,¹⁵ but misreading medical records is not.¹⁶

Frustrated by our inability to find, or even invent from scratch, any cogent explanation for applying the use-of-property standard, we have repeatedly beseeched the Legislature for guidance. In *Lowe v. Texas Tech University*, Chief Justice Greenhill, who had earlier argued in favor of some statutory waiver of sovereign immunity,¹⁷ wrote separately “to encourage the Legislature to take another look at the Tort Claims Act, and to express more clearly its intent as to when it directs that governmental immunity is waived.”¹⁸ Seven years later we complained in *Salcedo v. El Paso Hospital District* that despite calls for clarification from Chief Justice Greenhill in *Lowe* and from the venerable Dean Keeton in a report to the Texas Senate — stating that the use-of-property standard is “productive of undesirable litigation over its meaning” — none had been forthcoming.¹⁹ Six more years passed, and in *Robinson v. Central Texas MHMR Center*, we wrote: “We once again call on the legislature to clarify, as soon as possible, the extent

¹³ *Kerrville*, 923 S.W.2d at 584.

¹⁴ *White*, ___ S.W.3d at ___.

¹⁵ *Salcedo*, 659 S.W.2d at 33.

¹⁶ *Kassen*, 887 S.W.2d at 14; *cf. Petty*, 848 S.W.2d at 684 (plurality opinion).

¹⁷ Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. BAR J. 1036, 1072 (1968).

¹⁸ 540 S.W.2d at 301 (Greenhill, C.J., concurring).

¹⁹ 659 S.W.2d at 32.

to which it intended to waive governmental immunity.’²⁰ In *Texas Department of Mental Health & Mental Retardation v. Petty*, a plurality of the Court reaffirmed its decision in *Salcedo*, stating: “It has now been sixteen years and nine regular legislative sessions since our decision in *Lowe* and nine years since *Salcedo*, and despite amendment and recodification of the Act, and yet another legislative session after *Robinson*, the Legislature has not even attempted to alter our prior holdings.’²¹ Yet our decisions since *Petty* have been so plainly irreconcilable with *Salcedo*²² that we have finally limited the holding in that case to its facts,²³ and still the Legislature has not responded. Use, non-use — whatever.

After thirty-two years and hundreds of cases, I am now convinced that it is simply impossible for the courts to meaningfully construe and consistently apply the use-of-property standard in the Tort Claims Act. The principal reason, I think, is that no discernible relationship exists between the use or non-use of property and governmental tort liability or non-liability. Setting aside the difficulty in determining “use”, and taking only clear cases: *why* should the government be liable for administering medication that injures a patient but be immune from liability for withholding medication that could have helped the patient? Or *why* should the government be liable for not confining a patient to his bed but be immune from liability for not confining him to the hospital? The point of such examples is not that liability or non-liability in particular circumstances is good or bad policy, an issue the judiciary should not decide; rather, the point is that the

²⁰ 780 S.W.2d at 170.

²¹ 848 S.W.2d at 683-84 (plurality opinion).

²² *Kassen*, 887 S.W.2d at 14; *York*, 871 S.W.2d at 178-79.

²³ *Bossley*, 968 S.W.2d at 342.

Legislature, which must decide such policy matters, has not provided the judiciary a usable answer. If the Legislature, in response to our several requests for help, had ever provided any indication of what it intended by limiting its waiver of immunity to injuries and death arising from a use of property, the courts would certainly be constrained to carry out that intent. But the Legislature has met every request with silence.

That silence cannot be ascribed to the absence of workable solutions to the immunity question. The Federal Tort Claims Act has exceptions to liability that are capable of being understood and applied.²⁴ Moreover, its procedures for administrative adjustment of tort claims²⁵ provide a non-judicial forum for seeking relief. The federal scheme has not inundated its courts with tort cases against the government; in fiscal years 1996 and 1997, only 365 tort cases against the United States were terminated by trial.²⁶ Regardless of whether the federal approach would be appropriate in Texas, the federal experience at least shows that a more workable system is possible.

The most this Court has been able to make of the use-of-property standard is that property must have been directly involved in an actionable injury or death, and that the Legislature intended only a partial waiver of immunity. In our “long and arduous history” of construing the statute,²⁷ we have not succeeded

²⁴ 28 U.S.C. § 2680.

²⁵ 28 U.S.C. § 2672.

²⁶ MARIKA F. X. LITRAS & CAROL J. DEFANCES, FEDERAL TORT TRIALS AND VERDICTS, 1996-97 2 (U. S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics) (February 1999; revised May 3, 1999) (NCJ 172855) (available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm>).

²⁷ *Kerrville*, 923 S.W.2d at 584; *York*, 871 S.W.2d at 177.

in extracting anything more. Having thoroughly explored every possible basis for the standard and found none that is workable, having patiently searched for some pattern to emerge from three decades of attempts to apply the standard in various circumstances, and having repeatedly requested guidance from the Legislature to absolutely no avail, the courts cannot, in my view, continue to apply a legislative standard that cannot be understood sufficiently to reach reasoned, consistent decisions. A classification that is unreasonable, arbitrary, or capricious is not within the Legislature's authority to make.²⁸ Neither, I would add, is a classification that cannot be understood and consistently applied.

To disregard the statutory waiver for personal injury and death claims arising from a use of property would significantly raise the immunity bar, contrary to the legislative intent that at least some claims be allowed. In modern times, governmental immunity from tort claims has been severely criticized.²⁹ A creature of the common law,³⁰ immunity has been limited or abolished in every jurisdiction in this country, either by statute or by judicial decision.³¹ The common-law rule of immunity in Texas was the judiciary's

²⁸ *Wood v. Wood*, 320 S.W.2d 807, 809 (Tex. 1959).

²⁹ See Joe R. Greenhill & Thomas V. Murto, III, *Governmental Immunity*, 49 TEX. L. REV. 462, 472 (1971); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L. J. 1, 2-3 (1924); R.T. Kimbrough, Annotation, *Role of Municipal Immunity from Liability for Acts in Performance of Governmental Functions as Applicable in Case of Personal Injury or Death as Result of a Nuisance*, 75 A.L.R. 1196 (1931). See also, e.g., *Pruett v. City of Rosedale*, 421 So.2d 1046 (Miss.1982) (abolishing sovereign immunity with certain exceptions); *Bulman v. Hulstrand Construction Co.*, 521 N.W.2d 632, 638-39 (N.D. 1994) (abolishing sovereign immunity from tort liability) .

³⁰ *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998); *Heigel v. Wichita County*, 19 S.W.562 (Tex. 1892); cf. *Taylor v. Hall*, 9 S.W. 148, 149 (Tex. 1888). See Glen A. Majure et. al, *The Governmental Immunity Doctrine in Texas--An Analysis and Some Proposed Changes*, 23 SW. L.J. 341, 341 (1969).

³¹ *Clouse v. State*, 16 P.3d 757, 760 [¶ 14] (Ariz. 2001) ("Although most states have waived their sovereign immunity, either through judicial abrogation or legislative waiver, all fifty states have enacted some form of 'Tort Claims Act' to define, and sometimes to re-establish, the parameters of governmental liability. See 57 AM. JUR.2D *Municipal, County, and State Tort Liability* § 129 (1988).")

to recognize,³² and it is ours to disregard.³³ An abolition of immunity is more likely, I think, to prompt the enactment of a reasoned system for determining the government's fair responsibility for its torts than a reinstatement of the absolute bar that existed before the Act.

The Court has often said that it should defer to the Legislature for any waiver of governmental immunity. I have joined in that view and continue to endorse it, but defer does not mean abdicate. I no longer see any way to obtain a legislative determination and preserve reasoned decision-making by the courts without abolishing the government's common-law tort immunity, leaving it to the Legislature to decide whether and how to fill the void.

Nathan L. Hecht
Justice

Opinion delivered: June 21, 2001

³² *Hosner v. DeYoung*, 1 Tex. 764, 769 (1847) (recognizing doctrine, without citation of authority); *Bd. of Land Comm'rs v. Walling*, Dall. 524 (Tex. 1843) (recognizing doctrine, without citation of authority).

³³ See also Joe R. Greenhill, *Should Governmental Immunity for Torts be Re-Examined, and, If So, by Whom?* 31 TEX. B.J. 1036, 1065-70 (1968)(discussing other states case law, and arguing practical reasons for legislative, rather than judicial, abolishment); CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT §§ 1.7-1.8 (John L. Craig et al., eds., 2d. Ed. 1992).