Sovereign Immunity for Nuisance and Takings Claims in Texas after City of Dallas v. Jennings

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HUNDREDS of scholarly articles and thousands of cases[1] have examined the law of nuisance since William Prosser concluded in 1942 that "virtually nothing of any consequence has been written on the subject . . . ."[2] Sixty-two years and a mountain of legal writing later, the law of nuisance remains "a sort of legal garbage can."[3] The law of takings has not received as much scholarly attention as the law of nuisance, but nevertheless the law of nuisance remains an "impenetrable jungle."[4] The intersection of nuisance and takings law—in the form of claims against governmental entities—has been the subject of numerous judicial decisions but few scholarly articles. With isolated exceptions, these judicial decisions have done little to clarify the corpus of "misleading and inaccurate"[5] writings on these subjects, particularly as they relate to the element of intent necessary to each claim.

On June 25, 2004, the Texas Supreme Court delivered its opinion in *City of Dallas v. Jennings*,[6] clarifying the level of intent required to maintain a constitutional takings claim in Texas and announcing new law concerning the viability of nuisance claims against governmental entities. The *Jennings* decision, however, expands the scope of governmental im-

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1. Even by 1906, the issue of nuisance was termed "a much litigated and vexatious one . . . ." JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES iii (1906).

2. William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942). Professor Prosser's statement is puzzling, as there were at the time he wrote it at least two substantial works on the law of nuisance. *See generally* H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS (2d ed. 1883); JOYCE & JOYCE, *supra* note 1.

3. Prosser, *supra* note 2, at 410.

4. Page Keeton, *Torts*, 26 Sw. L.J. 3, 14 (1972).

5. *Id.*

6. City of Dallas v. Jennings, 142 S.W.3d 310, 314 (Tex. 2004).

munity for nuisance claims beyond advisable limits and leaves unanswered critical questions concerning both nuisance and takings claims.

This article reviews the elements of nuisance and takings claims, explores the history and purposes of sovereign immunity, evaluates the *Jennings* decision and its effect on nuisance and takings claims, and proposes a resolution to what is unquestionably one of the most convoluted and confusing areas of Texas tort law.

I. THE ELEMENTS OF NUISANCE AND TAKINGS CLAIMS

A. COMMON-LAW NUISANCE

Nuisance, as it has developed in the common law of England and the United States, is an invasion of or interference with another's interest. If the interest invaded or interfered with belongs to the community, then the nuisance is a public nuisance.[7] If, on the other hand, the interest or interference concerns an individual's private use and enjoyment of land, then the nuisance is a private nuisance.[8] Private nuisance is distinguished from trespass in that "it does not depend upon a physical invasion of the land, or interference with the plaintiff's exclusive possession, but merely disturbs . . . [the] use of it."[9] This article is concerned with private nuisance claims against governmental entities.

The elements of private nuisance are (1) a substantial interference with another's interest in the private use and enjoyment of land (2) that is the proximate result of either (a) intentional and unreasonable, (b) negligent, or (c) abnormally dangerous conduct.[10] Thus, minor inconveniences and annoyances, as well as unforeseeable consequences of otherwise lawful activity, fall outside the sphere of nuisance law. The former are excluded by the requirement of substantial interference and the latter by the requirement of proximate cause.[11]

The substantial interference and proximate cause requirements are, relatively speaking, the cause of little confusion in nuisance law. It is the conduct requirement that has generated much of the confusion surrounding nuisance claims. Prior to the twentieth century, nuisance liability was predicated upon the harm caused to the plaintiff rather than the nature of the defendant's conduct.[12] This approach, exemplified by cases like *Fletcher v. Rylands*,[13] fixed liability for nuisance involving abnormally

7. "A public nuisance is an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

8. *Id.* § 822.

9. Prosser, *supra* note 2, at 414.

10. RESTATEMENT (SECOND) OF TORTS § 822 (1979); *see also* Jamail v. Stoneledge Condo. Owners Ass'n, 970 S.W.2d 673, 676 (Tex. App.—Austin 1998, no pet.).

11. Neither requirement is expressly set forth in the Restatement. The foreseeability/proximate-cause limitation may be inferred from the use of the phrase "legal cause" in section 822, and the substantiality restriction is established by case law. *See* RESTATEMENT (SECOND) OF TORTS § 822 (1979); Prosser, *supra* note 2, at 415-16 nn.122-28.

12. RESTATEMENT (SECOND) OF TORTS § 822 cmt. b (1979).

13. Fletcher v. Rylands, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868).

dangerous conditions on the harm caused to the plaintiff without reference to the defendant's conduct. As courts began moving away from this approach, which was essentially a strict liability standard, they focused on the reasonableness of the defendant's conduct. This focus on the defendant's conduct led to parsing of the level of scienter and, necessarily, the degree of fault of the defendant. The law of nuisance devolved from strict liability predicated on the substantiality of harm inflicted upon the plaintiff to a thicket of case-by-case analyses of the reasonableness of defendants' activities.

The intentional-conduct prong of the second element of nuisance claims is perhaps most problematic for courts[14] in that it leaves open the central question in most nuisance claims: What level of intent is required? Is intent *to cause harm to the plaintiff* necessary, or is intent *to conduct the activity* sufficient? The Restatement (Second) of Torts attempts to address this problem by defining "intentional" to include "acts for the purpose of causing [the invasion]" as well as acts leading to consequences "substantially certain" to result from the intended conduct.[15] This definition, however, is no more satisfactory than the intent element itself because it lacks any sort of standard. The comments to the definition shed little light:

> It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing the invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct.[16]

The difficulty arises in attempting to determine the difference between realizing that conduct involves a serious risk or likelihood of causing the invasion and knowing the invasion is substantially certain to result. Despite this lack of precision, courts generally have held that intent to do the act that causes harm is insufficient to impose liability for nuisance.[17] On the other hand, intent to harm is a sufficient though not necessary element of an intentional nuisance claim. Finally, intentional action coupled with a substantial certainty that the conduct will cause the harm generally is sufficient to result in liability.[18]

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14. *See, e.g.*, Wright v. Masonite Corp., 368 F.2d 661 (4th Cir. 1966); Hall v. Phillips, 436 N.W.2d 139 (Neb. 1989); Snow v. City of Columbia, 409 S.E.2d 797 (S.C. Ct. App. 1991); Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826 (Tex. App.—Waco 1993, writ denied); Vogel v. Grant-Lafayette Elec. Coop., 548 N.W.2d 829 (Wis. 1996).

15. RESTATEMENT (SECOND) OF TORTS § 825 (1979).

16. *Id.* § 825 cmt. c.

17. *See, e.g.*, *Wright*, 368 F.2d at 661 (following the RESTATEMENT (SECOND) OF TORTS in a diversity case applying North Carolina law).

18. *See, e.g.*, *Hall*, 436 N.W.2d at 145-46; *Vogel*, 548 N.W.2d at 836; Jost v. Dairyland Power Coop., 172 N.W.2d 647, 652 (Wis. 1969).

B. TAKINGS

A taking is an intentional governmental action for a public purpose resulting in damage to private property without prior consent from or adequate compensation to the landowner.[19] Negligent governmental conduct that results in the destruction of a landowner's property is not a taking.[20] Takings claims are based on state[21] and federal[22] constitutional provisions prohibiting governmental entities from taking, damaging, appropriating, injuring, or destroying private property for public use without adequate compensation.

Throughout most of the nineteenth century courts construed takings clauses as limitations on legislative action rather than as sources of remedies for aggrieved landowners.[23] Only after state constitutions were amended in the 1870s and thereafter to encompass injuring, damaging, or destroying property did courts begin to interpret takings clauses to provide a damages remedy to landowners who had suffered a loss at the hands of the government.[24]

What remained relatively constant throughout this upheaval in takings law was the understanding that only intentional conduct could support a takings claim. Unlike the intent element in nuisance law requiring intent to harm the plaintiff or substantial certainty that harm will occur,[25] intent for takings purposes often meant only the intent to perform the act or acts that resulted in damage to the plaintiff's property.[26] This apparent difference in the intent requirements for nuisance and takings law was the root of significant confusion.

II. A BRIEF HISTORY OF SOVEREIGN IMMUNITY

Sovereign immunity, today represented in American law by the broader doctrine of governmental immunity, is firmly entrenched in the landscape of American law. Yet despite its deep roots, the very notion of sovereign immunity has come under scathing, at times even vitriolic, criti-

19. Takings are often equated with inverse condemnations, both being grounded on constitutional guarantees of just compensation. *See, e.g.*, Tarrant Reg'l Water Dist. v. Gragg, 43 S.W.3d 609, 614 (Tex. App.—Waco 2001), *aff'd*, No. 01-0362, 2004 WL 1439646, at *12 (June 25, 2004).

20. *See, e.g.*, City of Tyler v. Likes, 962 S.W.2d 489, 505 (Tex. 1997).

21. TEX. CONST. art. I, § 17; *see also* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth Century State Just Compensation Law*, 52 VAND. L. REV. 57, 119-20, nn.270-71 (1999).

22. U.S. CONST. amend. V.

23. Brauneis, *supra* note 21, at 60.

24. *Id.* at 115.

25. *See supra* notes 18-19 and accompanying text.

26. *See, e.g.*, State v. Hale, 146 S.W.2d 731, 736 (Tex. 1941).

cism from commentators[27] and courts.[28] The doctrine has been deemed fit only for "discussion by students of mythology."[29] The result is that sovereign immunity causes "confusion not only among the various jurisdictions, but almost always within each jurisdiction."[30]

A. English Origins

It is commonly asserted in scholarly literature and judicial opinions that the roots of sovereign immunity lie in William Blackstone's oft-quoted phrase, "The king can do no wrong."[31] In fact, medieval law, both in England and continental Europe, contemplated liability on the part of sovereign governments for their wrongs.[32]

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27. *See, e.g.*, Leslie L. Anderson, *Claims Against States*, 7 VAND. L. REV. 234 (1954) (arguing that all governments should waive immunity in tort); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 494 (1953) (characterizing sovereign immunity as "confus[ing], conflicting . . . unsound and undesirable"); Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924) (criticizing theoretical foundations of sovereign immunity).

28. *See* Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1043-44 (1994) (reporting Supreme Court Justice Wilson's statement that sovereign immunity is "philosophically antithetical to any form of government, pragmatically antithetical to a democracy, and clearly not contemplated by the words of the Constitution"); *see also* Langford v. United States, 101 U.S. 341, 343 (1879) ("We do not understand that either in reference to the government of the United States, or of the several states, or of any of their officers, the English maxim has an existence in this country."); Stone v. Ariz. Highway Comm'n, 381 P.2d 107, 110 (Ariz. 1963) ("This doctrine of the English common law seems to have been windblown across the Atlantic as were the pilgrims on the Mayflower and landed as if by chance on Plymouth Rock . . . ."). Some states have attempted to abrogate the doctrine entirely. *See, e.g.*, N.Y. CT. CL. ACT § 8 (McKinney 1989) (waiving common-law doctrine of governmental immunity); WASH. REV. CODE ANN. § 4.92.090 (West 1988) (legislatively removing governmental immunity); Colo. Racing Comm'n v. Brush Racing Ass'n, 316 P.2d 582 (Colo. 1957) (eliminating governmental immunity); Smith v. Idaho, 473 P.2d 937 (Idaho 1970) (abrogating common-law doctrine of governmental immunity); Rice v. Clark County, 382 P.2d 605 (Nev. 1963) (removing immunity for counties and their officials); Holytz v. City of Milwaukee, 115 N.W.2d 618 (Wis. 1962) (abrogating governmental tort immunity).

29. *Colo. Racing Comm'n*, 316 P.2d at 585.

30. Ayala v. Philadelphia Bd. of Pub. Educ., 305 A.2d 877, 884 (Pa. 1973).

31. *See, e.g.*, Janell M. Byrd, *Rejecting Absolute Immunity for Federal Officials*, 71 CAL. L. REV. 1707, 1709 (1983); Susan L. Smith, *Governmental Immunity Issues: Can the King Do No Wrong?*, NAT. RESOURCES & ENV'T, Summer 1991, at 16-17; Mary S. Hack, Note, *Sovereign Immunity and Public Entities in Missouri: Clarifying the Status of Hybrid Entities*, 58 MO. L. REV. 743, 746 (1993). In its entirety, Blackstone states: "Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong." 1 WILLIAM BLACKSTONE, COMMENTARIES *238. As the Supreme Court has explained, "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." Nevada v. Hall, 440 U.S. 410, 414 (1979); *but see* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (arguing that sovereign immunity is not based on an English concept but rather on the practical basis "that there can be no legal right as against the authority that makes the law on which the right depends").

32. *See* Edwin M. Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 17 (1926). The issues related to sovereign immunity, most notably the capacity of kings to be called to account in court, have been the subject of debate and discussion for a much longer period. The Jewish Talmud even contains a discussion as to whether a king may be judged. *See* 48 TALMUD BAVLI: THE SCHOTTENSTEIN EDITION, *Sanhedrin* 19a (1994).

By the time Henry III concluded his reign as King of England in 1272, it was clear (at least in theory) that the Crown was immune to suit.[33] The English based this immunity on what they perceived to be a necessary relationship between sovereignty and immunity; in the English view, permitting any court to exercise jurisdiction over the King without his consent would imply a superiority of power.[34] At the same time, the Crown was regarded as the ultimate source of justice in England and therefore was required both by law and conscience to provide remedies to aggrieved subjects.[35] To that end, Edward I (1272-1307)[36] introduced procedures for bringing claims against the Crown, possibly modeled on his observations of the papal court.[37] The result was that, while the monarch could not personally be subjected to the processes of the common law courts, the British government was not insulated from liability for failure to meet its legally imposed obligations.

B. Sovereign Immunity in America

Sovereign immunity in the United States is "one of the mysteries of legal evolution."[38] While Americans were reluctant to adopt most aspects of English political theory during the Constitution's formative period,[39] sovereign immunity nevertheless was accepted as an established

33. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-3 (1963).

34. "Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *234-35. The king was immune, in short, because "no lord could be sued in his own court." W.S. Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. REV. 141, 142 (1922); *see also* Jaffe, *supra* note 33, at 4.

35. CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5 (1972).

36. Though popular culture and modern cinema appear to remember him primarily as a ruthless warrior, Edward I is known to historians primarily for his advances in administrative efficiency and legal reform. In fact, his work with respect to the English common law earned him the nickname "English Justinian." 6 ENCYCLOPEDIA BRITANNICA *Edward I of England* 434 (1981).

37. *See* Borchard, *supra* note 27, at 23. The most common form of relief was the Petition of Right, which permitted a subject to petition the Crown seeking redress for its wrong. The procedures instituted under Edward I provided for factual investigation and trial and for determination based upon legal standards. MELVYN R. DURCHSLAG, STATE SOVEREIGN IMMUNITY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 4 (2002). Sovereign immunity under these procedures was "largely a legal conception, which determined the forms of procedure in some cases but did not seriously impair the subject's right to recovery in accordance with the substantive law." JACOBS, *supra* note 35, at 6.

38. Stefan Schnopp, Note, Garrett v. Sandusky*: Justice Pfeifer's Fight for Full & Fair Legal Redress: Does Sovereign Immunity Violate Ohio's "Open Court" Provision?*, 27 U. TOL. L. REV. 729, 732 (1996) (citing Edwin M. Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 4 (1926)); *see also* Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 459 (Cal. 1961).

39. "[E]ven though at a very early date in American history we overthrew the reign of the English King, the doctrine somehow became entrenched in our judicial code." Stone v. Ariz. Highway Comm'n, 381 P.2d 107, 109 (Ariz. 1963). This curious development led one court to term sovereign immunity the illegitimate offspring of English law. *See* Spencer v. Gen. Hosp., 425 F.2d 479, 484 (D.C. Cir. 1969).

doctrine when the Constitution was drafted and ratified.[40]

During the ratification process, few issues were as divisive as the extent of national power. Opponents of the Constitution pointed out that Article III extended federal judicial jurisdiction to suits "between a State and Citizens of another State."[41] This provision, the Anti-Federalists noted, appeared to permit suits against states upon their war debts. The financial condition of several states at the time was tenuous,[42] and permitting such suits to proceed in federal court was viewed by advocates of states' rights as intolerable.[43]

The Constitution's proponents were adamant that states would remain immune from suit. Alexander Hamilton argued that sovereignty necessarily entailed immunity to suit.[44] According to Hamilton, such immunity was preexisting in the states and unaffected by the Constitution.[45] Other proponents echoed these assurances.[46] The state ratification conventions made clear their belief that the Constitution preserved the sovereign im-

40. *See* Chisolm v. Georgia, 2 U.S. 419, 434-35 (1793) (Iredell, J., dissenting) ("I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed."); *see also* David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5-9 (1972) (examining the doctrine of sovereign immunity in colonies).

41. U.S. CONST. art. III, § 2, cl. 1.

42. Because their funds were limited, the states were forced to incur significant debt to purchase provisions necessary to the war effort against England. When the war ended, the states were left to deal with their many creditors. The states owed approximately $210 million by the end of the Revolutionary War. James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1283-85 (1988).

43. "Unquestionably the doctrine of sovereign immunity was a matter of importance in the early days of independence. Many of the States were heavily indebted as a result of the Revolutionary War. They were vitally interested in the question whether the creation of a new federal sovereign, with courts of its own, would automatically subject them, like lower English lords, to suits in the courts of the 'higher' sovereign." Nevada v. Hall, 440 U.S. 410, 418 (1979) (footnote omitted).

44. "Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation." THE FEDERALIST NO. 81, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

45. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.* (emphasis in original).

46. At the Virginia ratifying convention, James Madison posited that "[i]ts jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court." Madison summarized that "[i]t appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should conde-

munity of the states.[47]

Despite these assurances, the Supreme Court soon created a constitutional crisis by ruling to the contrary. In *Chisolm v. Georgia*,[48] the Supreme Court held that Article III of the Constitution, granting federal judicial power to controversies between States and citizens of other states, allowed a citizen of another state to sue Georgia in federal court without its consent. Although each of the Justices concurring in the judgment wrote a separate opinion, the common thread among them was the belief that the case fell within the literal text of Article III.[49]

"The decision fell upon the country with a profound shock."[50] The states were outraged.[51] The Eleventh Amendment was introduced and adopted in direct and rapid response to *Chisolm*[52] to codify the federal

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scend to be a party, this court may take cognizance of it." James Madison, Journal, *in* 3 DEBATES ON THE FEDERAL CONSTITUTION 533 (Jonathan Elliot 2d ed., 1854).

John Marshall was even more forceful in his remarks:

> With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.

Id. at 555 (emphasis in original).

47. The Rhode Island Convention stated that "[i]t is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." *Amendments and Ratification of the Constitution by the Convention of the State of Rhode Island and Providence Plantations*, *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 334, 336 (Jonathan Elliot 2d ed., 1959) (1790). New York made a similar statement and made clear that ratification was based in part on this assumption. *Ratification by the State of New York*,, *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra* at 327, 329.

48. Chisolm v. Georgia, 2 U.S. 419 (1793).

49. Chief Justice Jay and Justice Wilson also based their opinions on the belief that sovereign immunity was inconsistent with the principle of popular sovereignty established by the Constitution. *See Chisolm*, 2 U.S. at 454-58 (Wilson, J., concurring); *id.* at 470-72 (Jay, C.J., concurring).

50. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev'd 1932); *see also* Note, *The Sovereign Immunity of the States: The Doctrine and Some of Its Recent Developments*, 40 MINN. L. REV. 234, 236 (1956).

51. *Chisolm* created "a shock of surprise throughout the country." Hans v. Louisiana, 134 U.S. 1, 11 (1890). Georgia's House of Representatives passed a bill establishing that anyone attempting to execute process in the *Chisolm* decision would be "guilty of [a] felony and shall suffer death, without benefit of clergy, by being hanged." DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 196 (1997).

52. An amendment was introduced in the House of Representatives the day after *Chisolm* was decided. WARREN, *supra* note 50, at 99-101. The Eleventh Amendment was proposed in its present form on January 2, 1794. CURRIE, *supra* note 51, at 196 n.181. The House and Senate each discussed and endorsed the amendment in one day. "It is plain that just about everybody in Congress agreed the Supreme Court had misread the Constitution." *Id.* at 196. Ratification by the required three-fourths of the states was secured on February 7, 1795, and the Eleventh Amendment was declared part of the Constitution on January 8, 1798. 2 TOM PENDERGAST ET AL., CONSTITUTIONAL AMENDMENTS: FROM FREEDOM OF SPEECH TO FLAG BURNING 219 (2001). The delay between ratification and

notion of sovereign immunity: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[53]

In 1821, the Supreme Court interpreted the Eleventh Amendment such that an individual could no longer sue a state in federal court, firmly establishing governmental immunity in American law.[54] Thereafter, governments were able to evade liability in most cases simply by asserting the defense of governmental immunity. In 1946, however, Congress passed the Federal Tort Claims Act (FTCA),[55] waiving governmental immunity for the federal government in certain limited instances. The FTCA marked the death knell for the notion that governmental immunity operates as a complete bar to relief.

Two centuries after its ratification, the Eleventh Amendment remains a legal mystery. "The United States Supreme Court decisions interpreting the amendment have fluctuated widely and have compounded legal fiction upon legal fiction."[56] The only thing certain about the Eleventh Amendment is the lack of certainty concerning its meaning. The questions raised by Eleventh Amendment jurisprudence are not abstract. At issue are fundamental notions of state and federal authority and sovereignty. The Eleventh Amendment is now the figurative battleground for many of the disputes underlying the real battles of the Civil War.[57]

C. Sovereign Immunity in Texas

The Texas Supreme Court adopted the doctrine of sovereign immunity in 1847, holding that "a state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent."[58] In the early part of the twentieth century, Texas courts took the initial step toward limiting immunity by distinguishing between governmental and proprietary functions.[59] Governmental functions, those performed in furtherance of general law to benefit the public, continued to fall under the protection of immunity.[60] Proprietary functions, those un-

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adoption resulted from certain states failing to inform Congress of the ratification of the amendment until late in 1797. *Id.* at 226.

53. U.S. Const. amend. XI.

54. Cohens v. Virginia, 19 U.S. 264 (1821).

55. Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. § 1346(b) (2001)); *see* Jordan v. United States, 170 F.2d 211, 213 (5th Cir. 1948) (discussing adoption of FTCA).

56. William P. Marshall, *Foreword* to Melvyn R. Durchslag, State Sovereign Immunity: A Reference Guide to the United States Constitution, at xiii (2002).

57. "Apparently, the sovereignty issue remains unsettled, even today. Of course, the stakes today are much smaller. Secession is no longer an issue. But within a narrower compass, the debate goes on." Daniel Farber, Lincoln's Constitution 28 (2003).

58. Hosner v. DeYoung, 1 Tex. 764, 769 (1847).

59. *See* City of Amarillo v. Ware, 40 S.W.2d 57, 60 (Tex. 1931).

60. *See* City of Houston v. Shilling, 240 S.W.2d 1010, 1011 (Tex. 1951).

dertaken for the benefit of persons within city limits, were unprotected.[61] Not surprisingly, courts had significant difficulty distinguishing between the two concepts, resulting in a fairly arbitrary system of recovery[62] that was the subject of intense scholarly criticism.[63]

In 1969, the Texas Legislature reacted to mounting criticism by adopting the Texas Tort Claims Act (the "Act"), waiving immunity in limited instances.[64] In 1985, the Texas Tort Claims Act was codified with minor modifications and is now part of the Texas Civil Practice and Remedies Code.[65] Although the Texas Act is based in large measure upon the Federal Tort Claims Act, it is substantially narrower in its waiver of immunity. Under the Act, a governmental unit in Texas is liable for

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment if:
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> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
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> (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 government unit would, were it a private person, be liable to the claimant according to Texas law.[66]

As one Texas court has summarized the Act:

> In order for immunity to be waived under the TTCA, the claim must arise under one of the three specific areas of liability for which immunity is waived, and the claim must not fall under one of the exceptions from waiver. The three specific areas of liability for which immunity has been waived are: (1) injury caused by an employee's use of a motor-driven vehicle; (2) injury caused by a condition or use

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61. *Id.* at 1011-12; *see also* Lawrence v. City of Wichita Falls, 906 S.W.2d 113, 116 (Tex. App.—Fort Worth 1995, no writ).

62. *Compare* Gotcher v. City of Farmersville, 151 S.W.2d 565 (Tex. 1941) (holding operation and maintenance of sewage system to be governmental function), *with* Dilley v. City of Houston, 222 S.W.2d 992 (Tex. 1949) (holding operation and maintenance of sanitary sewage system to be proprietary function); *compare* Imperial Prod. Corp. v. City of Sweetwater, 210 F.2d 917 (5th Cir. 1954) (holding maintenance of a municipal airport to be governmental function), *with* City of Orange v. Lacoste, Inc., 210 F.2d 939 (5th Cir. 1954) (holding operation of port to be proprietary function).

63. *See, e.g.*, Joe R. Greenhill, *Should Governmental Immunity for Torts Be Re-examined, and, If So, by Whom?*, 31 TEX. BAR J. 1036, 1066-72 (1968); Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 462-63 (1971); James L. Hartsfield, Jr., *Governmental Immunity from Suit and Liability in Texas*, 27 TEX. L. REV. 337, 347-48 (1949).

64. *See generally* Tort Claims Act, 61st Leg., R.S., 1969 TEX. GEN. LAWS 874, *repealed by* Texas Tort Claims Act, 1985 TEX. GEN. LAWS 3242, 3322 (codified as amended as TEX. CIV. PRAC. & REM. CODE ANN. § 101.001-.109 (Vernon 2004)). The original Act was drafted in part by Professor Keeton and sponsored by Representative DeWitt Hale of Corpus Christi. W. James Kronzer, Jr., *The New Texas Tort Claim Act—some offhand reflections*, TRIAL LAW. FORUM, Nov.-Dec. 1969, at 11, 12.

65. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001-.109 (Vernon 2004).

66. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2004).

of tangible personal or real property; and (3) claims arising from premise defects.[67]

III. THE *JENNINGS* DECISION AND ITS EFFECTS

The application of sovereign immunity to nuisance and takings law in Texas was for many years the source of significant confusion. Texas courts traditionally applied sovereign immunity to bar some, but certainly not all, nuisance claims (though the demarcation line was less than clear). With respect to takings claims, the Texas Supreme Court found a waiver of sovereign immunity in the Takings Clause of the Texas Constitution.[68] In either case, immunity could be overcome only for claims based solely on non-negligent acts.[69] The presence of negligence by the government in either case resulted in immunity. This rule was based upon the assumption that damages arising from unintended, accidental, and negligent acts do not benefit the public.[70] Under Texas law, sovereign immunity traditionally barred negligence-based nuisance and takings claims but not non-negligence-based claims. Less clear was whether nuisance claims arising out of abnormally dangerous conduct were barred.[71]

Prior to *Jennings*, Texas courts addressed abnormally dangerous conduct under the rubric of intentional nuisance and sometimes imposed liability on that basis.[72] Thus, for example, cases involving the flooding of

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67. Medrano v. City of Pearsall, 989 S.W.2d 141, 144 (Tex. App.—San Antonio 1999, no pet.) (citations omitted). Of course, a private litigant does not need legislative permission to sue for a state official's violation of law. A state official's illegal or unauthorized actions are not state actions. Dir. of Dep't of Agric. & Env't v. Printing Indus. Ass'n, 600 S.W.2d 264, 265 (Tex. 1980). Consequently, an action to determine or protect a person's rights against a state official who has acted illegally or without statutory authority is not subject to sovereign immunity. *See* Cobb v. Harrington, 190 S.W.2d 709, 712 (Tex. 1945).

68. *See* City of Tyler v. Likes, 962 S.W.2d 489, 503-04 (Tex. 1997); *see also* TEX. CONST. art. I, § 17.

69. *See* Likes, 962 S.W.2d at 503-04; *see also* Tex. Highway Dep't v. Weber, 219 S.W.2d 70, 71 (Tex. 1949).

70. *See* Weber, 219 S.W.2d at 71.

71. Section 521 of the Restatement (Second) of Torts purports to exculpate public actors for such conduct where it is carried out in pursuance of a public duty: "The rules as to strict liability for abnormally dangerous activities do not apply if the activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier." RESTATEMENT (SECOND) OF TORTS § 521 (1977). The comments to this section of the Restatement do not discuss or even refer to the effect of constitutional takings clauses on nuisance claims based on abnormally dangerous activities.

72. *See* City of San Antonio v. Pollock, No. 04-03-00403-CV, 2004 WL 1835770 (Tex. App.—San Antonio May 12, 2004) (addressing benzene leaking from a landfill). In his nuisance-law article, commenting on *Turner v. Big Lake Oil Co.*, 96 S.W.2d 221 (Tex. 1936), Prosser concluded that Texas courts accepted and applied the doctrine of strict liability for abnormally dangerous activities "under the name of nuisance without fault." Prosser, *supra* note 2, at 426. The Fifth Circuit, however, interpreted Texas precedents, including *Turner*, as having "clearly rejected strict liability for abnormally dangerous activities." Doddy v. Oxy USA, Inc., 101 F.3d 448, 462 (5th Cir. 1996). Keeton, commenting on *Turner*, reconciled the equation of abnormally dangerous activities with intentional nuisances as follows:

> When the defendant engages in an activity that annoys and discomforts others in the vicinity of that activity, he is often held liable for the consequential harm thereby inflicted, even though the activity is socially desirable

land as the result of the release of water from a public dam typically gave rise to takings claims based on the intentional acts of the governmental actors.[73] Intent in these cases was inferred from the recurring nature of the damage, and courts had little difficulty finding that the governmental actors knew, or at least were substantially certain, that the conduct at issue would cause damage to the plaintiff's property. It was against this unsettled backdrop that the *Jennings* case arose.

A. THE *JENNINGS* DECISION

In 1993, employees of the City of Dallas dislodged a clogged sewer main. The dislodged material caused another backup that flooded raw sewage into the home of James and Charlotte Jennings. The couple sued the City for nuisance and unconstitutional taking. They did not argue that the City was negligent in its operation of the sewer system but rather claimed that flooding damage is inherent in the operation of any municipal sewer system. The City sought and obtained summary judgment on the basis of immunity.[74] The Dallas Court of Appeals reversed the summary judgment,[75] and the City appealed to the Texas Supreme Court.

The critical issue with respect to the takings claim in *Jennings* was the level of intent necessary to maintain a constitutional takings claim in Texas. The parties in *Jennings* agreed that only an intentional act could give rise to a taking but disagreed as to the type of intent required to sustain such a claim. The Jenningses argued that only intent to perform the act causing damage is necessary. Because the City unquestionably intended to unclog the sewer line and this action resulted in the taking, the City—in the view of the Jenningses—was liable under the Takings Clause. The City, on the other hand, contended that specific intent to damage the plaintiff's property was required to support a takings claim. The City did not intend to damage the Jennings' home and therefore argued it was not liable under the Takings Clause.[76]

The Texas Supreme Court rejected both positions. The court decided that the position advanced by the Jenningses was incorrect for two rea-

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> and even though utmost care is exercised. But the situation is virtually always one in which he knew that the necessary effect of his activity was to interfere with the use and enjoyment by another of his property. The interference was not accidental in *Turner*; it was intentional. . . . Not even the government is allowed to take or damage property intentionally, without paying for it. . . .

Keeton, *supra* note 4, at 14.

73. *See, e.g.*, Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 106 (Tex. 1961); Golden Harvest Co. v. City of Dallas, 942 S.W.2d 682, 689-90 (Tex. App.—Tyler 1997, writ denied); Ansley v. Tarrant County Water Control & Improvement Dist. Number 1, 498 S.W.2d 469, 475 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

74. The Jenningses sought partial summary judgment themselves, claiming the raw sewage in their home constituted a nuisance per se under provisions of Texas law defining public health nuisances. Jennings v. City of Dallas, 142 S.W.3d 310, 312 (Tex. 2004).

75. The Court of Appeals also rendered partial summary judgment in favor of the Jennings on the nuisance per se claim. *Id.*

76. *Id.* at 313.

sons. First, the imposition of liability when only the act giving rise to damage was intentional would subject the government to a higher degree of liability than private persons engaged in identical acts. Second, such a standard would violate the predicate that the taking be for public use. In the court's view, when damage is merely the accidental result of governmental action, there is no public benefit and the property cannot be termed "taken or damaged *for public use*."[77]

At the same time, the court also rejected the City's argument that the government must intend to cause the damage. The court instead adopted the rule suggested by the Restatement, holding that "if the government knows that specific damage is substantially certain to result from its conduct, then takings liability may arise even when the government did not particularly desire the property to be damaged."[78] The court summarized its ruling on the takings claim as follows:

> We therefore hold that when a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under Article I, Section 17 if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action—that is, that the damage is "necessarily an incident to, or necessarily a consequential result of" the government's action.[79]

The City argued throughout the case that the nuisance claim was a pleading subterfuge designed to evade the City's immunity from negligence claims. The City urged that the claims at issue were actually based on allegations of negligence in connection with discretionary functions and therefore fell within the scope of immunity preserved by the Texas Tort Claims Act.[80] The Jenningses responded by pointing out that they had not alleged any claim of negligence, that there was no evidence of any negligence by the City, and that there was complete agreement by the parties as to the absence of any negligence. Both parties took for granted that the City did not possess any immunity for a nuisance claim. The court of appeals agreed, holding that the City was not entitled to immunity on the nuisance claim because it was properly asserted without any allegation of negligence.[81]

The Texas Supreme Court did not address the nuisance/negligence issue considered so important by the parties and the court of appeals. Instead, the court held that all nuisance claims against governmental entities in Texas are barred by immunity absent either an express waiver in the Texas Tort Claims Act or a taking under the Texas Constitution.[82]

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77. *Id.* (emphasis in original).
78. *Id.*
79. *Id.* at 314 (quoting Tex. Highway Dep't. v. Weber, 219 S.W.2d 70, 71 (Tex. 1949)).
80. Jennings v. City of Dallas, 138 S.W.3d 366, 371 (Tex. App.—Dallas 2001), *rev'd*, 142 S.W.3d 310 (2004).
81. *Id.*
82. *Jennings*, 142 S.W.3d at 315-16.

Because the Jenningses could not point to any waiver in the Act and because the takings claim had been adjudged deficient, the City possessed immunity for the nuisance claim.[83]

B. Effects of the *Jennings* Decision

Jennings represents a dramatic departure from existing governmental immunity law in Texas, expanding that immunity well beyond its previous limits. In resolving the takings claim, the court made clear that there are only two situations in which the intent requirement may be satisfied, and both require proof of actual knowledge by the government: (1) when the government *knows* that a specific act is causing identifiable harm and (2) when the government *knows* that the specific property damage sued for is substantially certain to result from an authorized government action.[84] Even that high standard, however, was not enough—the court went on to make clear its view that damage is "substantially certain" only where it is "'necessarily an incident to, or necessarily a consequential result of' the government's action."[85]

The result is that Texas citizens may no longer assert claims under the Takings Clause absent proof of actual knowledge by the government that damage already was occurring or was necessarily going to occur as the result of an authorized act. In many cases, this standard will be insurmountable as a result of proof issues. As a practical matter, if the damage is not recurring, how is a plaintiff to prove actual knowledge of its certainty? This question is particularly troubling from a public policy perspective. *Jennings* will almost certainly provide governmental entities with a strong incentive not to undertake extensive environmental impact and similar studies prior to beginning significant public works projects. After all, those very studies could well become the only means by which a citizen might maintain future litigation against the government for damages resulting from the project. Since there is no taking absent actual knowledge, the government could avoid liability simply by choosing not to investigate the consequences of its actions in advance. In essence, *Jennings* creates a rule by which the government's intentional ignorance immunizes it from liability under the Takings Clause.

The court's definition of "substantial certainty" insulates the government beyond advisable limits. Substantial certainty, as defined in *Jennings*, means something more than its ordinary definition. At least with respect to takings claims, *substantial* certainty actually means *absolute* certainty—it means that the damage is "necessarily" the consequence of the government's action. In other words, *Jennings* appears to suggest that the government's eighty- or ninety-percent certainty that damage will result is insufficient as a matter of law to impose liability because the damage would not in that event *necessarily* be incident to the authorized act.

83. *Id.*
84. *Id.* at 314.
85. *Id.*

So long as the government can establish its good-faith belief that there was some reasonable probability that damage to the plaintiff would not result from its act, it can evade liability under *Jennings* even where it believed the damage was highly likely to take place.

In resolving the nuisance claim, the court took pains to create the impression that its ruling did not represent a departure from prior nuisance cases against governmental entities. In truth, however, *Jennings* represents a radical departure from—and overruling of—at least some of those cases. Prior to *Jennings*, at least some Texas appellate courts believed that the government was not immune to claims for non-negligent nuisance.[86] *Jennings* implicitly overrules these prior appellate decisions permitting nuisance claims without an express waiver of immunity or valid claim under the Takings Clause. Additionally, it is difficult to reconcile *Jennings* with the Texas Supreme Court's earlier decision in *City of Tyler v. Likes*.[87] In *Likes*, the court rejected the plaintiff's takings claim[88] but nevertheless proceeded to address the accompanying nuisance claim on the merits: "Nor may Likes recover property damages on a theory of non-negligent nuisance. The City produced summary judgment evidence that it did not intentionally do anything to increase the amount of water in the watershed in which Likes's home was located."[89] The situation in *Likes* mirrors that in *Jennings*—the court was confronted with a non-negligent nuisance claim for which it could find no express waiver of immunity or valid takings claim. In *Likes*, the court nevertheless addressed the merits of the nuisance claim, giving no indication that rejection of the takings claim necessitated overruling the nuisance claim. In stark contrast, the *Jennings* court simply announced that rejection of the takings claim mandated rejection of the nuisance claim. When juxtaposed with the court's efforts to reconcile its holdings in prior cases to the contrary, *Jennings* represents a new rule in Texas with respect to non-negligent nuisance claims against governmental entities.

The net result of *Jennings* is that governmental entities are completely insulated from nuisance claims, whether or not they are based in negligence, unless (1) the claim is for property damage, personal injury, or death arising from the operation or use of a motor-driven vehicle or motor-driven equipment and the employee would be personally liable to the claimant according to Texas law; (2) the claim is for personal injury or death caused by a condition or use of tangible, personal, or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law; or (3) the claim also constitutes a valid

86. *See, e.g.*, Shade v. City of Dallas, 819 S.W.2d 578 (Tex. App.—Dallas 1991, no writ). The *Shade* court reversed summary judgment rendered on a nuisance claim arising from a sewage backup because there existed "a question of fact about whether the problem was caused by the City's negligence or whether the condition is inherent in the operation of the sewer system itself." *Id.* at 582; *see also* Bible Baptist Church v. City of Cleburne, 848 S.W.2d 826 (Tex. App.—Waco 1993, writ denied).

87. City of Tyler v. Likes, 962 S.W.2d 489 (Tex. 1997).

88. *Id.* at 504.

89. *Id.*

claim under the Takings Clause, meaning that there is proof that the government knew that a specific act was causing identifiable harm or knew that the specific property damage sued for was necessarily incident to or the consequential result of an authorized government action.[90]

The current regime governing nuisance claims against governmental entities in Texas is counterintuitive at best, downright absurd at worst. When the government undertakes large-scale projects for public benefit—the classic example being the operation and maintenance of sewer systems as in *Jennings*—and those projects result in damage to private property, it will be the individual property owners who will most often bear the financial burden of repairing the damage. The government, which caused the damage, and citizenry, for whose benefit the damage was caused, will be able to rely on immunity to avoid liability. When projects are undertaken for the public benefit and subsequent damage to private property occurs, the citizenry should absorb the cost of repairing those damages. Individuals should not be forced to shoulder the entire burden of repair when it can and should be spread among the community.[91]

Moreover, the government remains immune to suit even where private property is damaged by the foreseeable consequences of a negligently performed governmental activity. Fault on the part of the governmental actor does not affect immunity. This rule is based on the legal fiction that a negligently performed act cannot be of benefit to the public.[92] Again, this rule forces individual property owners to absorb costs that are more properly shared by the entire community. Society as a whole should share the risk of loss for injuries caused by the negligence of government employees performing authorized services for the community.[93] "Assuming negligence or fault on the part of the government or its employees, the public is better able to bear the risk of loss than the individual person

90. Actual knowledge may be inferred in some circumstances, most notably where there is a recurrence of the damage. "In the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur." Tarrant Reg'l Water Dist. v. Gragg, No. 01-0362, 2004 WL 1439646 (Tex. June 25, 2004) (not released).

91. *See* City of Austin v. Teague, 570 S.W.2d 389, 394 (Tex. 1978) (The City of Austin "singled out plaintiffs to bear all the costs for the community benefit without distributing any cost among the members of the community.").

92. "The recurrence requirement assures that the government is not held liable for taking property when a project's adverse impacts, and by implication its benefits to the public, are too temporal or speculative to warrant compensation." *Gragg*, 2004 WL 1439646, at *7. The critical error in this assumption is to overlook that a particular government action that does not appear to confer public benefit may be part of a larger government operation that exists solely to confer public benefit. That was precisely the situation in *Jennings*, where the action of unclogging the sewer line was part of the inherent overall operation of the public sewer system.

93. This is in fact the very heart of the Takings Clause, which is based upon the premise that the government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Steele v. City of Houston, 603 S.W.2d 786, 789 (Tex. 1980) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960); YMCA v. United States, 395 U.S. 85, 89 (1969)).

or family."[94]

IV. A PROPOSAL TO MODIFY THE *JENNINGS* RULE

The Texas Supreme Court's decision in *Jennings* has the effect of expanding the scope of governmental immunity well beyond just and advisable limits. The court is, however, unlikely to revisit the decision and find a common-law waiver of immunity for nuisance claims. Since the enactment of the Texas Tort Claims Act, the court has repeatedly held that the waiver of governmental immunity is the sole province of the Texas Legislature.[95] Consequently, any change in the rules governing immunity for nuisance claims will have to be made through legislative action.

The Texas Legislature should amend the Texas Tort Claims Act to provide an express waiver of immunity for nuisance claims, whether or not they are based in negligence. Such a waiver need not be complex—the problem would be solved by amending Section 101.021 of the Texas Civil Practice and Remedies Code[96] to add a provision making a governmental unit liable for

> a substantial interference with another's interest in the private use and enjoyment of land which is the proximate result of either intentional and unreasonable, negligent, or abnormally dangerous conduct if the government unit would, were it a private person, be liable to the claimant according to Texas law.

Additionally, Section 341.012 of the Texas Health and Safety Code[97]

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94. Greenhill, *supra* note 63, at 1072.

95. *See, e.g.*, Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401 (Tex. 1997); Guillory v. Port of Houston Auth., 845 S.W.2d 812, 813 (Tex. 1993); Mount Pleasant Indep. Sch. Dist. v. Lindburg, 766 S.W.2d 208, 211 (Tex. 1989) (holding that "[o]nly when the legislature has clearly and explicitly waived the state's sovereign immunity may a cause of action accrue") (quoting Duhart v. State, 610 S.W.2d 740, 742 (Tex. 1980)); Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 298 (Tex. 1976); *see also* Greenhill, *supra* note 63, at 1070.

96. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2004).

97. TEX. HEALTH & SAFETY CODE ANN. § 341.012 (Vernon 2004). This could be accomplished simply by stating that "a government unit is liable for damages proximately caused to a private property owner by the governmental unit's creation of a public health nuisance." Section 341.011 provides that each of the following is a public health nuisance:

> (1) a condition or place that is a breeding place for flies and that is in a populous area;
> (2) spoiled or diseased meats intended for human consumption;
> (3) a restaurant, food market, bakery, other place of business, or vehicle in which food is prepared, packed, stored, transported, sold, or served to the public that is not constantly maintained in a sanitary condition;
> (4) a place, condition, or building controlled or operated by a state or local government agency that is not maintained in a sanitary condition;
> (5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons;
> (6) a vehicle or container that is used to transport garbage, human excreta, or other organic material and that is defective and allows leakage or spilling of contents;
> (7) a collection of water in which mosquitoes are breeding in the limits of a municipality;

should be amended to include an express waiver of immunity for public health nuisances created by governmental entities.

These revisions to Texas law would maintain the general immunity enjoyed by governmental actors in Texas, while properly apportioning the risk and cost of government-created nuisances. It would also, after more than a century of confusion, remove the law of nuisance—at least in Texas—from the legal garbage can and elevate it to its proper status as an essential tool in the tort scheme.

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(8) a condition that may be proven to injuriously affect the public health and that may directly or indirectly result from the operations of a bone boiling or fat rendering plant, tallow or soap works, or other similar establishment;
(9) a place or condition harboring rats in a populous area;
(10) the presence of ectoparasites, including bedbugs, lice, and mites, suspected to be disease carriers in a place in which sleeping accommodations are offered to the public;
(11) the maintenance of an open surface privy or an overflowing septic tank so that the contents may be accessible to flies; and
(12) an object, place, or condition that is a possible and probable medium of disease transmission to or between humans.

TEX. HEALTH & SAFETY CODE ANN. § 341.011 (Vernon 2004).

Casenote


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