

The seal of the City of Houston, Texas, is a circular emblem. It features a central five-pointed star above a shield. The shield contains a ship and a plow. The words "CITY OF HOUSTON" are written in a circular path around the top, and "TEXAS" is written at the bottom. The seal is rendered in a light, semi-transparent blue and yellow color.

# **Recent Developments in Immunity**

**Texas Police Chiefs Association**

**March 30, 2021**

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# Overview



# Overview

- **Qualified Immunity**
- **Official Immunity**
- **Government Immunity (TTCA issues)**
- **Tim Cole Act**
- **Legislation to Watch**



# Qualified Immunity



# History

- **1967 *Pierson v. Ray***
  - **Police and judge were defendants**
  - **§ 1983 did not abolish absolute immunity for judges**
  - **Defense of good faith and probable cause under Miss. common law available to officers in §1983 case**
- **1982 *Harlow v. Fitzgerald***
  - **immunity available to the senior aides of POTUS**
  - **“functional” approach to immunity**
  - **Discretionary functions shielded insofar as their conduct does not violate clearly established law a reasonable person should have known**



# Recent Supreme Court Cases

## Taylor v. Riojas—November 2020

- “clearly established”
- No reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time



# Recent Fifth Circuit Cases

## **Brown v. Tarrant County—January 2021**

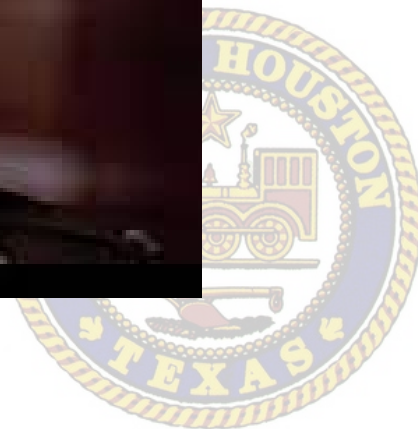
- **3-week lapse in sex offender treatment during confinement**
- **Not clearly established**
- **Circuit split on whether there is a due process right to treatment**



# Recent Fifth Circuit Cases

## ***Cunningham v. Castloo*— December 2020**

- **F5 “dishonorable”**
- **Asking to “speak to”  
sheriff not a request for  
name-clearing hearing  
such that due process  
attached**

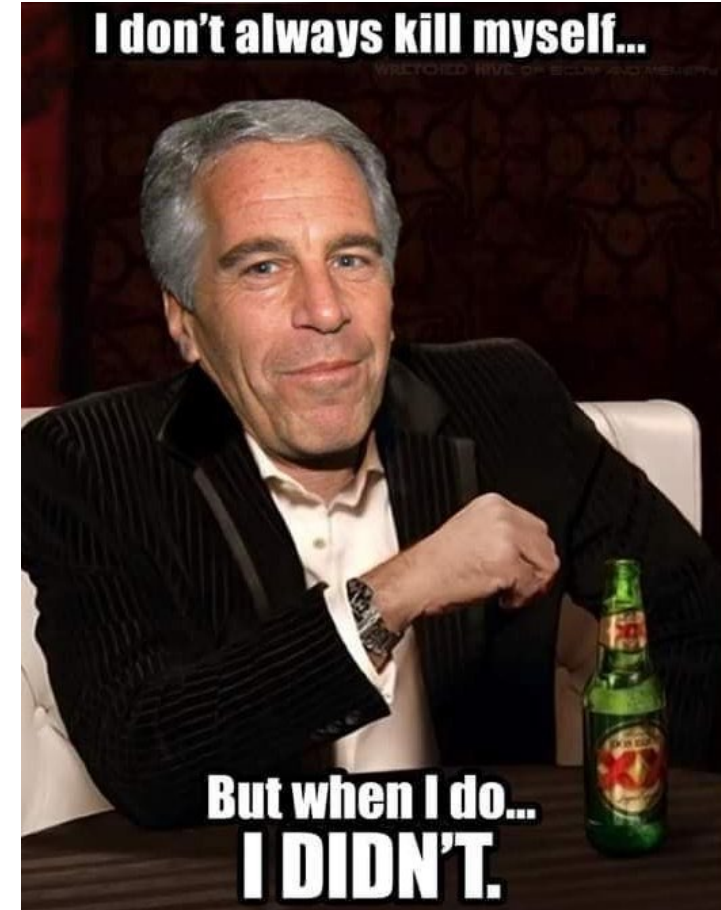




# Recent Fifth Circuit Cases

## *Bonilla v. Orange County*—December 2020

- **Protection from known suicidal tendencies is clearly established right**
- **Adequate suicide screening is not**



# Recent Fifth Circuit Cases



# Recent Fifth Circuit Cases

## *Joseph v. Bartlett*—November 2020

- **Excessive force—26 blunt-force injuries**
- **“measured and ascending”**
- **Active vs. passive resistance**
- **Explanation of mechanics of qualified immunity**
- **Bystander liability**



# Official Immunity



# History/Origins

***Campbell v. Jones*—Tex. 1954**

***Baker v. Story*—San Antonio 1982**

- **Same goals as qualified immunity**

***City of Lancaster v. Chambers*—Tex. 1994**

- **Functional approach**
- **A reasonably prudent officer, under the same or similar circumstances, could have believed that the need to \_\_\_\_\_ outweighed a clear risk of harm to the public in \_\_\_\_\_.**



# History/Origins

## ***Wadewitz v. Montgomery—Tex. 1997***

- **Expanded need/risk analysis in pursuit & other emergencies**
  - **Need: urgency/seriousness of the crime or accident to which the officer responds; available alternative courses of action, if any**
  - **Risk: countervailing safety concerns**

## ***Telthorster v. Tennell—Tex. 2002***

- **Expanded need/risk analysis not required in arrest case**



# Qualified vs. Official Immunity

## Qualified Immunity

- **“Invoked” answer or 12(b) motion**
- **Burden on plaintiff to prove it does not apply**
- **Multiple interlocutory appeals**
- **Does not necessarily shield gov’t**

## Official Immunity

- **Pled in answer**
- **Initial burden on Defendant**
- **One interlocutory appeal**
- **Official immunity of employee shields gov’t**



# Recent Official Immunity Cases

***Univ. of the Incarnate Word v. Redus—Tex. 2020***

- **Campus police have official immunity**
- **Private universities do not have governmental immunity**

***City of Dallas v. Rodriguez—Dallas 2020***

- **Officer's testimony established good faith**





# Recent Official Immunity Cases

## *Rivera v. City of Houston*—Houston 1<sup>st</sup> 2020

- **Expert testimony not needed to defeat MSJ on official immunity**
- **Court inferred lack of good faith solely from the fact that the officer entered the intersection without knowing what color her light was**



# Governmental Immunity



# History & Purpose

- **The King can do no wrong**
- **Conserve treasury**
- **Ensure separation of powers**
- **Construed to PRESERVE immunity**
- **Burden on plaintiff**



# TTCA Motor vehicle waiver

**A governmental unit in this 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;**



# TTCA Election of Remedies

**(a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.**

**(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.**

**(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.**





# Scope of Employment

## ***City of Houston v. Mejia***—Houston 14<sup>th</sup> 2020

Tex. Civ. Prac. & Rem. § 101.021(1)	Tex. Civ. Prac. & Rem. § 101.106(f)
<p>A governmental unit in the state is liable for:</p> <p>(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee <b><i>acting within his scope of employment</i></b> if:</p> <p>(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment</p>	<p>If a suit is filed against an employee of a governmental unit based on conduct <b><i>within the general scope of that employee's employment</i></b> and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only.</p>



# **TTCA Election of Remedies & Scope of Employment**

***Ledesma v. City of Houston*—Houston 1<sup>st</sup> 2020**

- **When appellate issue is immunity, any new argument can be raised for the first time on appeal**
- **101.106(e) = judicial admission of scope of employment**



# Emergency Exception

**This chapter does not apply to a claim arising:**

**(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;**





# Recent Emergency Exception Cases

## *City of Dallas v. Rodriguez*—Dallas 2020

- **The mere fact an accident occurred is insufficient to raise a fact issue on recklessness**

## *Rivera v. City of Houston*—Houston 1<sup>st</sup> 2020

- **Officer did not “slow as necessary” for safe operation even though it was unrefuted that she did slow and look for cross traffic**



# Recent Emergency Exception Cases

## *Gomez v. City of Houston*—Houston 14<sup>th</sup> 2019

- **Fact issue on reckless disregard can be inferred from three facts**
  - **The officer did not drive BELOW the speed limit**
  - **Did not use lights and siren**
  - **Looked down to police radio before entering intersection**



# 911 Exception

**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.**



# Riot Exception

***TDCJ v. Rangel—Tex.*  
2020**

- **7 or more persons**
- **Immediate danger**



# **TTCA Real/Personal Property Waiver**

**A governmental unit in the state is liable for:**

**(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**



# TTCA Real/Personal Property Waiver

## *TDCJ v. Rangel—Tex. 2020*

- **Where a governmental unit authorizes or orders an employee to use tangible personal property for a specific purpose, that governmental unit has “used” the tangible personal property for purposes of the Act's waiver.**



# **TTCA Real/Personal Property Waiver**

## ***Lopez v. City of El Paso*—El Paso December 2020**

- **Forcefully pulled at and yanked Mr. Lopez from the vehicle**
- **Mr. Lopez was then flung forward by his aggressors, the two officers**
- **Officer E. Féria struck at Mr. Lopez's head multiple times, nonstop with his baton**
- **Substantively not negligence but intentional torts**



# TTCA Real/Personal Property Waiver

*White v. City of Houston*—March 2021

- **Condition=state of being**
- **Use=put into action**
- **Lacked integral safety component**
- **Transporting a firehose to a location where it is to be employed to extinguish a fire is as much a part of its intended and ordinary use as extinguishing a fire**





# **TTCA real/personal property waiver**

***City of San Antonio v. Smith—San Antonio 2020***

- **Stolen ambulance**
- **Motor vehicle waiver does not apply**
- **Real/personal property waiver does not apply**
  - **Anti-theft devices were not completely lacking**



# Tim Cole Act



# History & Purpose

- **Alter common-law default for sovereign immunity**
  - Immunity from suit
  - Immunity from liability
- **Article III, Section 51**
  - No legislative grants of public monies to individuals
- **Constitutional Amendment 1955**
  - Authorized legislature to make compensation scheme



# History & Purpose

- **1965 legislature passed wrongful imprisonment compensation statute**
  - **not guilty**
- **2001 amended**
  - **actual innocence**
- **2007, 2009, and 2011 Amendments**



# Tim Cole Act

- **A person who receives compensation under this chapter may not bring any action involving the same subject matter, including an action involving the person's arrest, conviction, or length of confinement, against any governmental unit or an employee of any governmental unit.**
  - **Tex. Civ. Prac. & Rem. Code Ann. § 103.153(b)**



# Tim Cole Act

- **This provision plainly prohibits those who receive compensation from the State from then suing local government entities or employees. Thus, it grants local government entities a conditional immunity.**
- **Until receipt occurs, the plain language of the statute does not allow other government entities to use Chapter 103 as a defense**

***State v. Oakley*, 227 S.W.3d 58, 63 (Tex. 2007)**



# Tim Cole Act

## Tim Cole Election 103.153

- **Person who receives compensation**
- **May not bring any action**
- **Involving the same subject matter...**
- **Against any governmental unit or employee**

## TTCA Election 1985

- **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.**



# Tim Cole Act

## Tim Cole Election 103.153

- **Person who receives compensation**
- **May not bring any action**
- **Involving the same subject matter...**
- **Against any governmental unit or employee**

## TTCA Election current

- **Filing of suit/settlement of claim**
- **Constitutes an irrevocable election**
- **Immediately and forever bars**
- **Suit against or recovery by plaintiff from government/employee**





# Tim Cole Act

- ***In re Alfred Brown—Tex.***  
**2020**
  - **Mandamus to Comptroller to pay Tim Cole Compensation**
  - **Filed suit in 2017**
  - **State compensation 2020**
  - **?????**



# Current Legislation to watch



# H.B.614

- **Right of action against person or public entity**
- **For deprivation of right privilege or immunity in Tex. Constitution.**
- **No statutory immunity or liability cap**
- **No qualified immunity**
- **Fees to prevailing plaintiff**
- **Fees to prevailing defendant only if frivolous**
- **Public entity shall indemnify employee**
- **No indemnity if employee has criminal conviction**



# H.B.3602

- **Right of action against peace officer**
- **Otherwise same as H.B.614**
- **Requires all peace officers to pass an exam on implicit bias**
- **Blacklists peace officers who were terminated or resigned for use of unjustified deadly force**
- **No collective bargaining agreement without input from community**
- **Requires: de-escalate; warn; proportionate force**



# **S.B.1224**

- **Right of action against peace officer**
- **Otherwise like H.B.614**
- **Requires officers to intervene if another officer**
  - **violates law or department policy**
  - **puts any person at risk of bodily injury unless immediately necessary to avoid imminent harm to police or others**
- **Requires aid immediately to anyone who needs medical attention b/c of use of force**
- **Texas Southern to write policy for citations for misdemeanors, de-escalation & proportionate response**
- **Progressive disciplinary matrix**



# H.B.88

- **Right of action against peace officer**
- **Otherwise very similar to S.B.1224**
- **Model policy on use of force**
- **No techniques that impede breathing or circulation by applying pressure to throat or neck or blocking mouth or nose**

