SOVEREIGN IMMUNITY: A STUDY OF HIGHER EDUCATION CASES

Nichole A. Mancone

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APPROVED:

Marc Cutright, Major Professor
Kathleen Whitson, Committee Member
Wendy Watson, Committee Member
Mark Wardell, Dean of the Toulouse Graduate School

This study explored the legal parameters of sovereign immunity and its waivers for employees of public institutions of higher education in the state of Texas. This empirical study examined the decisions of the Texas Judiciary concerning public university litigation in the area of sovereign immunity, with a review of major state court decisions. Legal research methodology was used in this study. The data for this study included case study review of six cases decided by the Texas judiciary. Information about each of the cases and the important legal inferences from the cases was discussed. A review of the history of sovereign immunity and the current status of the application of the Texas Tort Claims Act was also included.

Based on the review of the relevant case law and scholarly commentary, the study findings suggest that a) Texas courts recognize and apply the doctrine of sovereign immunity, unless the application of the doctrine is restricted by the Texas Tort Claims Act; b) the Texas Tort Claims Act establishes limited waivers to sovereign immunity applicable only under specified circumstances and subjects; c) Texas courts were consistent in applying the circumstances by which an institution or its actors waived sovereign immunity. Practice recommendations are included for education professionals at Texas state institutions of higher education.
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CHAPTER 1
OVERVIEW OF THE STUDY

Problem Statement

The overall purpose of this research is to explore the dimensions of sovereign immunity as a legal doctrine whereby the sovereign or state is considered immune from civil suits or criminal prosecution due to its incapability to commit an offence or other legal misconduct. A special emphasis is placed upon the application of the doctrine of sovereign immunity to higher education cases in Texas.

New institutions of higher education continue to be established in Texas, adding to the numbers of students, faculty, and staff. This also increases the number of businesses that institutions work with; the number of people who visit college campuses; and the overall number of decisions made on a daily basis at an institution. When these new institutions are state institutions, those faculty and staff are added to numbers of governmental employees. The United States continues to be a litigious society. Understanding sovereign immunity and the waivers of sovereign immunity as outlined in the Texas Tort Claims Act (TTCA), is important for those who work at institutions of higher education in Texas. What kinds of protections do they have? What might be a likely outcome if they were party to a lawsuit due to something that happened while they were working? What should they be keeping in mind about the application of sovereign immunity as they go about their workday?
The present study is conducted in the form of exploratory research. The positives and negatives of the doctrine of sovereign immunity in terms of Texas higher education are approached. The current study presents a comprehensive analysis of the favorabilities, inconsistencies, limitations, and drawbacks of the doctrine of sovereign immunity in the framework of contemporary higher education in Texas. This study will provide a thorough review and analysis of Texas higher education cases in order to ascertain the manifestations of sovereign immunity and to comprehend how the judiciary in Texas interprets waivers and exceptions under the TTCA.

The Texas Tort Claims Act (TTCA) is the codification of waivers of sovereign immunity in Texas. Initially passed in 1969, and revised several times in intervening years, the TTCA states that a “governmental unit in the state is liable for property damage, personal injury, or death proximately caused by the wrongful act or omission or the negligence of an employee acting within the scope of employment; or as the result of the operation of a motor vehicle.” (§ 101.021, 1985) The TTCA carves out exceptions to the common law rule of sovereign immunity. The courts then look at exceptions to these exceptions.

Given this, the main thesis of this study follows: The legal prescriptions of the Texas Tort Claims Act are not all-embracing and, thus the practical application of sovereign immunity principles, waivers of sovereign immunity, and exceptions to waivers of sovereign immunity is dependent on the judicial interpretation. This thesis statement brings into light some theoretical and practical problems.

The first major problem is that the doctrine of sovereign immunity is applicable through a set of specific principles which are not always clear or unanimously followed.
The second major problem is that waivers of sovereign immunity and exceptions to sovereign immunity are regulated in one statutory act – the Texas Tort Claims Act – which is incapable to address all practical challenges.

The third major problem is whether the Texas courts are capable of correctly providing judicial interpretation of sovereign immunity and restrictions on sovereign immunity, taking into consideration that only one statutory act adopts limited restrictions on sovereign immunity in the State of Texas.

Research Aim

The main focus of this research is to provide a thorough review and analysis of Texas higher education cases in order to understand the manifestations of sovereign immunity and to comprehend how the judiciary in Texas interprets waivers and exceptions to waivers of sovereign immunity under the Texas Tort Claims Act. The end goal being a well reasoned recommendation for employees of state institutions regarding decisions made in the course of their work at state institutions of higher education.

Definition of Terms

The following legal terms are used throughout this work. All definitions are from Black’s Law Dictionary, 2011 edition:

a) Sovereign immunity – “a government’s immunity from being sued in its own courts without its consent” (p. 365).
b) **Damages** – “money claimed by, or ordered to be paid to, a person as compensation for loss or injury” (p. 195).

c) **Declaratory judgment** – “a federal or state law permitting parties to bring an action to determine their legal rights and positions regarding a controversy not yet ripe for adjudication” (p. 207).

d) **Summary Judgment** – “a judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law; the court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law” (p. 730).

e) **Certiorari** – “an extraordinary writ issued by an appellate court, at its discretion directing a lower court to deliver the record in the case for review; the US Supreme Court uses certiorari to review most of the cases that it decides to hear” (p. 104).

f) **En banc** – “with all the judges present and participating; in full court” (p. 266).

g) **Injunction** – “a court order commanding or preventing an action; to get an injunction the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted” (p. 383).

h) **Subject Matter Jurisdiction** – “jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things” (p. 422).
Research Questions

The current study aims at providing comprehensive answers to two research questions. The primary question of research must be expressed as follows: \textit{To what extent is the doctrine of sovereign immunity recognized and applied in Texas higher education cases?} The secondary question of research then follows: \textit{To what extent are the TTCA’s waivers to sovereign immunity recognized and applied in Texas higher education cases?}

The present research focuses on several important issues stemming from the doctrine of sovereign immunity. They are: 1) the legal nature and specifics of the doctrine of sovereign immunity; 2) the legal nature and specifics of the TTCA’s waivers of sovereign immunity as viewed in Texas higher education cases; 3) the legal nature and specifics of the exceptions to TTCA’s waivers of sovereign immunity as viewed in Texas higher education cases.

Research Objectives

In addition to research questions, the present study rests on a set of research objectives. Research objectives are generally understood as the targets entailing logical consistency and coherence of scientific steps. The main significance of research objectives lies in their capability to guide the search for valid answers to research questions. In the framework of this dissertation the following objectives of research are used:

1 - To critically analyze the legal dimensions of the doctrine of sovereign immunity as a scientific phenomenon (Literature Review).
2 - To compare and contrast the views and positions of academics on the viability and constitutional legitimacy of sovereign immunity as a legal doctrine (Literature Review).

3 - To review the case law underlying the doctrine of sovereign immunity (Literature Review).

4 - To examine the judicial reasoning on the specifics and extent to which the doctrine of sovereign immunity can be applied (Case Study and Findings).

5 - To ascertain the reasoning of legislators on the specifics and extent to which the doctrine of sovereign immunity can be applied (Case Study and Findings).

6 - To verify the judicial reasoning on the specifics and extent to which the TTCA’s waivers of sovereign immunity are recognized and applied in terms of Texas higher education cases (Case Study and Findings).

7 - To examine the judicial reasoning on the specifics and extent to which exceptions to the TTCA’s waivers of sovereign immunity are recognized and applied in terms of Texas higher education cases (Case Study and Findings).

Limitations of Research

The current research proposes to undertake a qualitative analysis of legal documents. On the other hand, the review of qualitative data will heavily rely on documented and published works, some of which are subject to research biases. The major limitation is that the present study is restricted to qualitative exploratory research. Neither experimental designs nor quantitative research methods were applied in the framework of this research. Also, the scope of this research is limited to the State of...
Texas, its public institutions of higher education, and cases heard in the Texas judicial system.
CHAPTER II
REVIEW OF LITERATURE

Introduction

This literature review explores the major themes within the research questions: sovereign immunity, waivers to sovereign immunity, and exceptions to waivers of sovereign immunity. The writings are addressed in a thematic order.

Apart from the method of review, classification, comparative analysis and synthesis are widely used. It is important to look through the literature which is dedicated to research in the field of sovereign immunity. A wide range of authors focus on different internal and external issues which can influence the applicability of sovereign immunity in the State of Texas. A comparative analysis in connection with other methods of research is used to help in achieving the objectives efficiently. The review aims at assisting in finding, systemizing, and outlining main problems, notions, key ideas, and principal themes identified in literature by previous researchers. The supreme purpose of this review emanates from the fact that various determinants influence and will influence the recognition and application of sovereign immunity in the United States and the State of Texas in particular.

Sovereign Immunity

The legal definition of sovereign immunity

According to the Black’s Law Dictionary (2011), the term “sovereign immunity” should be understood as the immunity of government from being sued in its own courts
without its consent (p. 365). The dictionary highlights several general facets of sovereign immunity as a legal doctrine. First and foremost, it stresses on the prerogative right of a government to protect itself from being liable for any conduct in its own courts and without its consent. Secondly, it implies that sovereign immunity as the protection of a government from legal suits may be waived only upon the government’s consent.

A more detailed explanation of sovereign immunity as a legal concept can be found in the publication by Anthony and McMahon (2000). According to the authors, the doctrine of sovereign immunity “provides governmental entities and their employees with protection against suits for tort liability” (p. 10). The general rule is that sovereign immunity exists for tort and statutory cases unless the statute specifically waives sovereign immunity in its implementation. Nonetheless, the authors clarify the circle of those who may enjoy the benefits of the doctrine by stating that not only governmental agencies as legal entities, but also employees of governmental organizations, are entitled to sovereign immunity.

According to the World Bank, there are two forms of sovereign immunity: jurisdiction and execution. As far as the first form is concerned, the World Bank maintains that “a state’s immunity to jurisdiction originates from the belief that it is inappropriate for one state’s courts to call another state under its jurisdiction. This interpretation of sovereign immunity as a legal concept is rooted in international law and provides that a sovereign state cannot be sued by the national courts of another sovereign state” (World Bank, n.d.).
Historical development of the legal doctrine of sovereign immunity in the common law context

According to Toleikyte (n.d.), sovereign immunity is an institution which originates from public international law (p. 346). Before analyzing the historical perspective of sovereign immunity, it is possible to agree with Toleikyte (n.d.) that the doctrine of foreign state immunity has evolved over the last centuries, and thus is not the same doctrine as it once was.

Similar to Toleikyte’s finding, Pugh (1953) writes that the doctrine of sovereign immunity has substantially changed with the flow of time. According to Pugh, “legal historians have struck at the very bases of this unwanted and unjust concept, and legislatures have gradually relinquished the state’s claim to irresponsibility” (p. 476).

Pugh (1953) argues that the history of sovereign immunity is connected with uncertainty and obscurity as every discussion starts with what the basis of the doctrine of sovereign immunity is. The author claims that historians look for the doctrine’s origin in early England. However, their opinions differ as to the precise origins of the concept.

Phelan (2011) argues that the long-standing doctrine of sovereign immunity has emerged from the theory of absolute sovereignty, which is “based on the structure of the feudal system on the one hand, and on the fiction that the King could do no wrong on the other” (p. 748).

Despite the obscurity and uncertainty around the historical development of the doctrine of sovereign immunity, there is historical evidence that the petition of right to immunity was adopted during the reign of Edward I, whereas prior to the reign of Edward I, the king could be subject to suit in his own courts.
Nevertheless, some experts on early England proffer that even prior to the reign of Edward I, the king was immune from suit and prosecution in his own courts. Also, the author concedes that the king's immunity from suit and prosecution was personal to himself and emerged from the practical specifics and needs of the feudal system, “rather than from any conception that the king is superior to the law” (Pugh, 1953, p. 478).

This finding is important, because it reveals the true justification underlying the emergence and development of the doctrine of sovereign immunity. This position is rejected in terms of the theory of the divine right of kings. According to this theory, the monarch was always treated as above the law, because the monarch was the law-giver appointed by God, “and therefore could not be subjected to the indignity of suit by his subjects” (Pugh, 1953, p. 478). According to Pugh - Bodin, Machiavelli, and Hobbes were among the fathers of the theory of the king’s divine rights.

Thus, following Pugh’s reasoning, it is possible to infer that the system of social (feudal) relationships in early England, rather than the desire of a monarch to usurp the state power, affected the emergence of sovereign immunity as a legal doctrine. To continue, Pugh (1953) posits that the exact historical point when the personal immunity of the king metamorphosed into the present-day sovereign immunity of the Crown is unknown (p. 478). However, there is a historical assumption that this shift was accomplished during the emergence of modern nation states.

Some scholars are prone to believe that the maxim ‘the king can do no wrong’ means simply that the king had no privilege to do wrong, and, “besides the attribute of sovereignty, the law also ascribes to the king in his political capacity absolute
perfection. The king can do no wrong…” (Bochard, 1926). Moreover, the author continues that the king’s attribution of absolute perfection implies that the king is not only capable of doing wrong, but also of thinking wrong.

“Despite the humbleness of the doctrine of sovereign immunity in its origins, it is considered by scholars lethal in its final implications” (Pugh, 1953, p. 479). According to Pugh (1953), the historical development of the doctrine of sovereign immunity has led to increasing relief through the development of legal procedures for suits against the Crown. The petition of right may represent the most notorious of such procedures. According to Pugh (1953), this procedure dates back to the period of the reign of Edward I. However, this petition had no applicability in the domain of torts and the stakes involving the implications of sovereign immunity are no longer as lethal as they once were.

With the expansion of governmental functions, the courts in England allowed suits against the governmental employee or official who had in fact committed the wrongdoing (Pugh, 1953, p. 480). However, in the twentieth century, the picture with sovereign immunity in England completely changed with the adoption of the Crown Proceedings Act of 1947, according to which an individual has been entitled to trigger civil proceedings against the Crown, “and this is true in tort as well as contract” (Pugh, 1953, p. 480). Today, sovereign immunity is recognized as a principle of jurisprudence in all civilized countries.
Forms of sovereign immunity

The concept of sovereign immunity is multi-faceted, and thus it is sometimes difficult to determine its scope and extent. Taking into consideration the complex nature of this phenomenon, the scholars are prone to differentiate between two basic forms of sovereign immunity: a) the immunity from jurisdiction; and b) the immunity from execution, also known as immunity from enforcement (Reinisch, 2006). According to Reinisch (2006), immunity from enforcement measures is different from jurisdictional immunity.

Like Reinisch (2006), Wiesinger (2006) writes that the distinction between jurisdictional immunity and immunity from enforcement measures is made in the practice of courts of justice. Wiesinger (2006) defines jurisdictional immunity as a “restriction on the forum state to exercise its jurisdiction over a foreign state, whereas state immunity from enforcement measures is a limitation of the forum state to impose measures of constraint on a foreign state” (p. 3).

There is a wide array of scholars who expound on the nature of jurisdictional immunity, including Fox (2002), Lauterpacht (1951), Sinclair (1980), Trooboff (1986), and others. According to Fox (2002), one crucial piece of jurisdictional immunity is that, while sovereign states possess the full and absolute jurisdiction over their territories, in some circumstances, the forum state may waive its jurisdiction over a foreign state with the purpose of encouraging advantageous interstate relations. To that end, comity is used as a means of moderating the extension of territorial jurisdiction. Pingel-Lenuzzi
(1997) adds that jurisdictional immunity as an intrinsic entitlement of a state can be waived, for instance in French courts, only if the waiver is express.

The aforementioned arguments highlight the restrictive rather than absolute nature of sovereign immunity. In this sense, Reinisch (2006) writes that during the twentieth century many countries of Europe transitioned from the idea of an absolute jurisdictional immunity to the notion of a restrictive jurisdictional immunity (p. 804). The restrictive nature of jurisdictional immunity implies that sovereign states are only granted immunity with regard to their official (governmental) acts, but not with regard to their private (commercial) conduct (Malanczuk, 1997; Wiesinger, 2006).

As far as the second form of sovereign immunity is concerned, Reinisch (2006) writes that, in contrast to the restrictive nature of jurisdictional immunity, immunity from enforcement measures is absolute. Wiesinger (2006, p. 3) and Schreuer (1988, p. 126) also add that states are more reluctant to keep their immunity from enforcement measures within certain specified limits because enforcement measures are more extreme influences on state sovereignty as compared to the mere assumption of jurisdiction.

This notwithstanding, the absolute character of immunity from enforcement measures is put into question in terms of academic debates. In addition to scholars, a number of domestic courts have postulated that immunity from enforcement measures is also no longer absolute (Reinisch, 2006, p. 804). This means that the elaboration of precise delimitations between permissible and impermissible enforcement measures has already started taking place.
Exceptions to sovereign immunity under international law and national legal systems

The preceding has made it clear that neither the principle of sovereign immunity, nor the right of sovereign immunity, as some scholars explain, can be regarded as an absolute category. This means that sovereign immunity has exceptions. In his comprehensive research on sovereign immunity, Finke (2011) brings into light several exceptions to sovereign immunity, such as the private-public distinction, the tort exception, the hierarchy of norms argument, and the comity approach (p. 857). For the purposes of this research, the focus will be on the tort exception as the regulative nature of the Texas Tort Claims Act and Texas Higher Education cases are explored.

The tort exception, coupled with the private-public distinction, has been regarded as a significant rule-exception concept which assists the progress of establishing the jurisdiction of the forum state in circumstances of violations of fundamental human rights (Finke, 2011, p. 861). National laws of some countries do not prescribe the tort exception to sovereign immunity. Moreover, on the national level, sovereign immunity may be prescribed as a “shield for governmental entities and their employees against claims for tort liability” (Anthony, & McMahon, 2000, p. 10). Anthony and McMahon (2000) make it clear that governmental agencies and universities are generally exempt from the majority of tort suits.

Nevertheless, Anthony and McMahon (2000) recognize the tort exception to sovereign immunity in some cases. According to the authors, the most noticeable exceptions to the doctrine of sovereign immunity are acts “outside the scope of employment, grossly negligent conduct, intentional torts, or acts characterized as bad faith” (Anthony and McMahon, 2000, p. 13).
From this statement, it is possible to deduce that tort liability constitutes a partial exception to sovereign immunity. That is, some tortious conduct from the side of a state may be recognized as an exception to sovereign immunity, whereas other tortious acts of a state do not preclude the state from having recourse to sovereign immunity.

Analyzing the applicability of the doctrine of sovereign immunity to tort claims in Texas, Shaunessy (2001) points out that both the State of Texas and all of its political subdivisions have complete sovereign immunity, including immunity from both liability and suit. This means that neither the State of Texas nor any of its agencies may be sued for the torts of its agents until the adoption of a constitutional or statutory provision which will waive immunity from suit and liability.

The exception to sovereign (implied) waivers constitutes another exception to sovereign immunity. In the framework of international law, states are allowed to waive its immunity and consent to the jurisdiction of a foreign state, to the same extent as the state may consent to the jurisdiction of an international court (Finke, 2011, p. 864).

Brownlie (1987) provides that a foreign state may not invoke immunity from measures of constraint or jurisdiction if the explicit consent to the exercise of the relevant type of jurisdiction has been given either by international agreement, or in a written contract, or by a declaration concerning the particular case, or by a voluntary submission to jurisdiction. Also, it is important to note that the consent to jurisdiction does not mean consent to measures of constraint (Brownlie, 1987). In other words, one may invoke immunity from one and waive immunity from the other.

The arguments against the applicability and practicability of sovereign immunity are based on the inconsistency of state practices and the appeal to territorial
sovereignty of the forum state which dictates the prevalence over any claim of sovereignty to which foreign state may have recourse to (Lauterpacht, 1951).

As far as the exception of inconsistent state practices is concerned, it needs to be pointed out that the US Supreme Court has provided a controversial reinterpretation of one of the oldest judicial rulings on sovereign immunity via the judgment in *Schooner Exchange v. McFadden* (1812).

Nowadays there is no agreement among scholars on their understanding of the case. Some scholars are inclined to believe that the case was interpreted by the US Supreme Court as a source of the absolute theory of sovereign immunity (Bankas, 2005; Damrosch, 2004). Other experts are disposed to think that the US Supreme Court acknowledged the assumption that sovereign immunity is granted as a matter of courtesy, rather than a matter of law (Caplan, 2003). Alternatively, Appelbaum (2007) expresses confidence that the legal wording of the case of *Schooner Exchange v. McFadden* (1812) can be interpreted either way.

Historical development of the legal doctrine of sovereign immunity in the United States

The main specifics of the historical development of the doctrine of sovereign immunity in the American context lies in the fact that this characteristic of sovereign immunity was brought to America by the British. For some period of time, the United States rested on the English vision of sovereign immunity.

The English doctrine of sovereign immunity was doomed to failure in terms of the US democratic governance. Pugh (1953) makes it clear that, since the Declaration of Independence, the cornerstone of American political vision has been responsible
government, and thus the doctrine of sovereign immunity was predestined to change with the American Revolution. A similar position is offered by Phelan (2011). According to the author, the American colonists “manifestly denied the fiction of the king’s infallibility when they declared their independence from the Crown” (p. 749).

Discussing the origins of the doctrine of sovereign immunity, as well as its applicability in the American context, the US Supreme Court in *Nevada v. Hall* (1979) refers to the text of the Declaration of Independence: “whenever any form of government becomes destructive of these ends, it is the right of the People to alter or to abolish it, and to institute new government …and such is now the necessity which constrains them to alter their former systems of government” (paras. 414-415).

Furthermore, the Court continues quoting the Declaration of Independence by emphasizing: “the history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states” (*Nevada v. Hall*, 1979, paras. 414-415).

Having the purpose of prevention in the mind, the US Supreme Court reconfigured the English doctrine of sovereign immunity into the doctrine of governmental immunity. Instead of merely copying this doctrine from English law, the courts revised it due to the fear that the federal government would somehow deviate and inflict injuries and usurpations similar to those by the United Kingdom in the period of the Revolutionary War.

Nevertheless, the doctrine was not rejected completely, but was subject to alteration in accordance with the requirements of the US Constitution. Thus, the court in
Chisholm v. Georgia (1793) sought to change the parameters of the doctrine of sovereign immunity.

In this case, the United States Supreme Court permitted a North Carolina resident to sue the state of Georgia with regard to the property seized during the American Revolution. The court held that the citizen of one state is entitled to sue another state in assumpsit (Pugh, 1953). According to Black’s Law Dictionary, the term assumpsit means “an express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another” (2011, p.53). Here, the court made a specific decision to allow that while states have individual governments, they are part of one nation. This is where the US began to deviate from the UK in its revision of sovereign immunity.

Analyzing the US Supreme Court’s jurisprudence on sovereign immunity, Young (2000) arrives at the conclusion that such jurisprudence is often contradictory, obscure and difficult to comprehend (p. 7). Possibly, the lack of firm legal footing inside the US Supreme Court with regard to sovereign immunity is the main reason why the states are continuously winning more federalism cases at the Supreme Court (Young, 2000, p. 1).

As a response to the US Supreme Court’s ruling in Chisholm v. Georgia (1793), the US states ratified the Eleventh Amendment to the American Constitution two years afterwards. The main idea of the Amendment is to provide the US states with sovereign immunity against lawsuits by citizens of other states, and even other nations. According to Young (2000), the key prerequisite to the ratification of the Eleventh Amendment was the fact that the Court allowed jurisdiction over a suit filed by a private person who aimed at collecting a debt against the state Georgia.
However, at that period of time, the states were already indebted on loans stemming from the Revolutionary War, and that is why the Court’s decision in *Chisolm* ignited the general opposition of states (Young, 2000).

The Eleventh Amendment to the US Constitution states:

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 (The Constitution of the United States, The Eleventh Amendment, 1795).

Analyzing the provisions of the amendment, it is possible to infer that one principal objective of the amendment is to provide the capabilities of the judicial power in making restrictions on the states’ right to sovereign immunity. Another fundamental objective of the Amendment is to prevent citizens of one state of the United States from suing against other states in order to guarantee the principle of states’ sovereignty.

In *Hans v. Louisiana*, the Court ruled that a state has immunity from suit on a contract clause claim – “a federal question claim, arising under the Federal Constitution” – which is brought by an individual from another state (Young, 2000, p. 8). In this, Young (2000) is disposed to think that the expansion of sovereign immunity to cases which concern federal cases threatens to cut short the enforceability of federal rights against state governments. Also, Young states that the case of Hans and its immediate result spurred three groups of cases conceived to mitigate the threat (Young, 2000).

Thus, according to the author, starting with the landmark holding in *Ex parte Young*, the Court makes it certain that “the sovereign immunity of a state shall not bar a suit against a state officer who is alleged to be acting in opposition to federal law” (*United States v. Lee*, 1882).
Some might argue that the suit against a state officer is not equal to the suit against the state. Nevertheless, Young (2000) maintains that the suits against state officers involve interests of states, either directly or indirectly, and thus the state may interfere and protect its interests by having recourse to the doctrine of sovereign immunity in common law.

Durchslag (2002) analyzes the Eleventh Amendment to the US Constitution “as an evolutionary material from diversity of jurisdiction to sovereign immunity” (p. 47). According to the scholar, the main benefit of the Eleventh Amendment lies in the fact that it is unambiguous. The author characterizes the Eleventh Amendment as a “bar to federal judicial power only if the state is a formal party” (Durchslag, 2002, p. 51). That is, the Eleventh Amendment restricts federal jurisdiction only in cases in which federal jurisdiction rests on the nature of the parties.

Second, the scholar provides that there is a dilemma in the application of the Eleventh Amendment. Thus, on the one hand, “the more restrictive scope of sovereign immunity in the federal courts is to preserve the principle of supremacy of federal law, via the use of a federal forum” (Durchslag, 2002, p. 51). On the other hand there is a strong policy interest in preserving a state’s sovereign interest in its taxing power and the funds derived therefrom.

The case law articulates that “the Eleventh Amendment should not be recognized as a constitutional grant of state sovereign immunity in state courts” (Durchslag, 2002, p. 52). Analyzing the case law, Durchslag (2002) arrives at the conclusion that the Eleventh Amendment does not isolate the state’s treasury from all other claims.
However, such position was reviewed by the Marshall Court in *Governor of Georgia v. Madrazo* (1828).

In the framework of the Marshall Court in *Governor of Georgia v. Madrazo* (1828), the court states that “if the chief magistrate of a state is sued, not by his name, but by the character of office, and the claim filed upon his is completely in his official character, it is possible to consider the state a party on the record” (Durchslag, 2002, p. 52).

Taking into consideration the space for state intervention, later cases focused more on the limitation of the officer remedy, and, at the same time, clarified that “only prospective relief may be had against state officials sued in their official capacity” (Young, 2000, p. 10; *Edelman v. Fordan*, 1974). Additionally, the Court’s holding in *Hart v. Wechsler* states that, although private individuals are entitled to sue state officers for damages in their personal capacity, a plaintiff is restricted from reaching the state through such a suit.

Phelan (2011) also comments on the nature of sovereign immunity under the Eleventh Amendment to the US Constitution. According to the scholar, “although the Eleventh Amendment only bars actions by noncitizens against a state, the case law establishes that the Amendment may justify a suit brought by a citizen against his own State” (Phelan, 2011, p. 758; *Hans v. Louisiana*, 1890).

Referring to the wording of the Eleventh Amendment, the Supreme Court in its recurrent decisions has adopted, as “a fundamental rule of jurisprudence, the principle that a State may not be sued in federal court without its consent” (Phelan, 2011, p. 759). Thus, in *Alden v. Maine* (1999), the Supreme Court notes that the principle of sovereign
immunity has had effect in respect of state governments as early as the ratification of the Constitution.

The text of the Eleventh Amendment has been regarded as being consistent with principles of federalism. In this sense, Phelan (2011) comments that the Supreme Court makes it certain that “neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court” (Alden v. Maine, 1999). This means that the Eleventh Amendment manifests itself as some sort of a guarantee which is rooted in the principles of federalism and protects a State from being sued in federal courts without its unequivocal consent. In addition to this, Phelan (2011) acknowledges that “a State’s waiver of sovereign immunity in its own courts should not be considered a waiver of the Eleventh Amendment immunity in the federal courts” (p. 760).

The issue of the Eleventh Amendment immunity is also examined in the publication by Shaunessy (2001). In his comments, the scholar differentiates between the common law sovereign immunity and the Eleventh Amendment immunity as the two forms of immunity with different scopes.

According to the author, the two forms of sovereign immunity are different even though they rest on the concept that “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent” (Florida Prepared Postsecondary Education Expense Bd v. College Sav. Bank, 1999). This notwithstanding, cities and counties do not enjoy Eleventh Amendment immunity (Hess v. Port Auth. Trans-Hudson Corp, 1994).
Elaborating further on the historical dimensions of sovereign immunity in the United States, it is appropriate to note that in 1946, Congress adopted the Tort Claims Act, which permitted agents of the federal government to be sued for tortious acts in federal courts. Thus, under the provisions of the Federal Tort Claims Act, “the United States is considered liable, in the same manner, and to the same extent as a private individual under like conditions, but [is not] liable for interest prior to judgment for punitive damages” (Federal Tort Claims Act, 1946, §2674). Also, it is important to note that federal courts have jurisdiction over such tort claims against the United States; however, the courts apply the law of the State where the alleged act or omission took place (Federal Tort Claims Act, 1946, s 1346).

According to Shaunessy (2001) the adoption of the Texas Tort Claims Act is a crucial event for the statutory regulation of sovereign immunity in the context of the State of Texas. The author provides that the TTCA has established a restricted waiver of sovereign immunity for specific torts: via the TTCA, “the legislature waived immunity from both suit and liability for the claims authorized therein” (Shaunessy, 2001, p. 104). According to the author, the Texas Supreme Court has specified that the Texas Tort Claims Act is a limited waiver of sovereign immunity.

Shaunessy (2001) comments that the Texas Supreme Court in *Dallas County Mental Health & Mental Retardation v. Bossley* (1998) recognizes the obscurity of the Act and difficulties in its application as a result of many compromises. Moreover, the Court also concedes that the waiver of immunity under the Texas Tort Claims Act has never been purported to be complete. Analyzing Shaunessy’s comments on the Texas
Tort Claims Act, it is possible to deduce that the author acknowledges the ambivalent nature of the Act.

Thus, on the one hand, the Act is characterized by Shaunessy (2001) as a tool of obscure and incomplete waiver of sovereign immunity, whereas, on the other hand, the scholar notes that the TTCA is a precise law, because it provides detailed definitions of those conditions, “in which sovereign immunity has been waived so that the sovereign, therefore can be held liable in tort” (Shaunessy, 2001, p. 105).

Returning back to the historical dimensions of sovereign immunity in the United States, it needs to be noted that the Federal Tort Claims Act was enacted in 1946 as a response to the 1945 B-25 Empire State Building crash (Richman, 2008). For the first time, the federal legislation provided American citizens with the right to sue the federal government.

Despite the fact that the plane’s crash was not the direct cause of the bill, which had been pending for more than twenty years, “the adopted Act was made retroactive to 1945, so that to supply victims of that crash with the possibility of seeking recovery” (State Insurance Fund v. United States, 1953).

Notwithstanding the full-scaled implementation of the Federal Tort Claims Act which granted the right for private individuals to sue the federal government for a wide array of tortious acts such as acts of negligence and personal injury claims, states in the US still sought protection under sovereign immunity until recent times. That has changed with the adoption of the Tort Claims Act of 1992 in Georgia. This Act took away sovereign immunity for its agencies, with the exception of certain circumstances.
Following Georgia’s example, other states, such as Texas, started enacting similar Tort Claims Acts. Before analyzing the Texas Tort Claim Act, it is vital to gain insight into the historical dimensions of the sovereign immunity jurisprudence in Texas.

Texas Cases and the Texas Tort Claims Act

The Texas Tort Claims Act is a conglomeration of statutes which aim at determining when a governmental agency may be liable for tortious acts under Texas State law (Edgar & Sales, 2013). Prior to the adoption of the Act, there was no possibility for private persons to recover damages from state or local governmental entities for injuries originating from the actions of a government official or employee in the performance of a governmental function. Hence, it follows that the Texas Tort Claims Act regulates the relations which pertain to the recovery of damages from the tortious conduct of state or local governmental officials who inflict the damages through the performance of a governmental function.

The Texas Tort Claims Act was incorporated into the Texas Civil Practice and Remedies Code under Chapter 101 “Tort Claims”. According to Edgar and Sales (2013), the Texas Tort Claims Act as a part of the Texas Civil Practice and Remedies Code deals with the problem of liability of governmental entities by delineating the entities and individuals who can be liable. Moreover, the Act regulates the exclusions and exemptions to sovereign immunity of governmental entities. To verify the nature of the above problems, it is essential to analyze the TTCA section by section.

The Act starts with Section 101.001. In this section, operational terms are explained. Section 101.001 (3) of the TTCA defines what activities and entities are
covered by the legal provisions of the Act. Referring to this Section, it is possible to infer that the TTCA applies only to governmental units. In the context of Section 101.001 (3) of the TTCA, a governmental unit is construed as (1) the State of Texas and all its agencies; (2) administrative parts of the State, such as counties, cities, school districts, water improvement districts, junior college districts, water control districts, etc.; (3) an emergency service organization; and (4) any other agency, institution, entity, or organ of government which derives its legal status either from the Constitution of Texas or from the state laws which were passed under this Constitution (Texas Tort Claims Act, 1969).

As far as Section 101.001 (3) of the TTCA is concerned, Shaunessy (2001) argues that the provisions of the Texas Tort Claims Act both applies and extends to all the administrative parts and organizations which are created under the state constitution and state laws (p. 121). The author’s statement is substantiated with a large spectrum of the judicial decisions.

For instance, the court in *Dillard v. Austin Independent School District* (1991) makes it clear that the TTCA does not differentiate between those types of municipalities which can be covered by municipal liability, and those types of municipalities which cannot be covered by municipal liability (para. 10). In this connection, it is possible to make inference that all municipalities can be covered by municipal liability.

Similarly, the court in *Tarrant County v. Dobins* (1996) regulates that any political subdivision of the state “is not liable for the acts or conduct of its officers or employees unless its immunity is waived by the Texas Tort Claims Act.” This means that the court acknowledges that the TTCA covers all subdivisions of the State of Texas.
To continue, the Texas case law enumerates a wide range of governmental entities which are covered by the provisions of the TTCA. For instance, *Wheeler v. Yettie Kersting Memorial Hospital* (1993) regulates that the Texas Tort Claims Act covers county hospital districts and county owned hospitals.

On the other hand, the court in *Huckabay v. Irving Hosp. Authority* (1993) establishes that city owned hospitals are also covered by the provisions of the TTCA. Furthermore, the Texas Tort Claims Act covers independent school districts and junior college districts as well (*Brown v. Houston Indep. Sch. Dist*, 1991).

Analyzing the TTCA further, Section 101.001 (2) of the Act explains the meaning of such actors as employees, agents, and independent contractors. For the purpose of the TTCA, a governmental unit can be deemed liable for the acts of its officers, agents, and employees. The term ‘employee’ is defined as any individual who is an officer or agent of a governmental entity and is in the paid service of this entity.

Section 101.021 of the TTCA regulates issues concerning governmental liability. In the context of this Section of the TTCA, a governmental unit is unprotected by the principles of sovereign immunity and must be deemed liable for property damage, personal injury, and death only if the wrongful omission or act or the negligent behavior of the governmental unit’s employee took place within the scope of employment (*Texas Tort Claims Act, 1969, Section 101.021 (1)).

Moreover, the TTCA establishes additional requirements for the liability of a governmental unit under Section 101.021 of the TTCA. They are: a) the infliction of the property damage, personal injury, or death by means of ‘a motor-driven vehicle or motor-driven equipment’; and b) ‘the employee would be personally liable to the
claimant according to Texas law’ (Texas Tort Claims Act, 1969, Section 101.021). The Texas case law construes the TTCA’s provisions regarding the liability of a governmental entity for the acts or omissions of its employees.

Thus, the lower court in Bishop v. Texas A&M University (2000) prescribes that, in order for a governmental entity to be held liable for the acts or omissions of its employees, it is essential that the employees are in paid service of a government unit. In this case, the facts show that the University cannot be liable under the Texas Tort Claims Act, because “the Wonios were independent contractors and Drs. Curley and Lesko, although in the paid service of the university for their academic positions, were volunteers for purposes of their faculty-advisor role” (Bishop v. Texas A&M University, 2000). Hence, it follows that the volunteers are not covered by the term “employee” for the purposes of liability under the Texas Tort Claims Act.

To continue, Section 101.001 (5) of the TTCA defines the term “scope of employment”. According to this Section, the concept of the scope of employment needs to be understood as a unit of the obligations 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” (Texas Tort Claims Act, 1969, Section 101.001 (5)). Referring to this Section of the Texas Tort Claims Act, Shaunessy (2001) construes that a governmental entity can be held liable only for those tortious acts of its employees which are committed strictly within the scope of their employment.

The scope of employment establishes the restrictions on the governmental unit’s liability for the conduct of its employees. The practical application of this rule is clearly demonstrated in Hein v. Harris County (1977). In the framework of this case, the court
regulates that any declination from an employee’s assigned work will preclude liability under the Texas Tort Claims Act.

Analyzing the TTCA further, it is important to note that Section 101.003 of the Act explains the nature of exceptions to the doctrine of sovereign immunity. According to this Section, the remedies created and granted by the TTCA are used in addition to any other remedies or forms of redress a party may use against a governmental entity. This rule is acknowledged by the court in *Burgess v. City of Houston* (1983). The court in *Burgess v. City of Houston* (1983) affirms that the TTCA preserves a claimant’s common law right to seek unlimited damages for the negligence of a municipality when performing a proprietary function.

Not opposed to *Burgess v. City of Houston* (1983), the court in *Kerrville HRH, Inc. v. City of Kerrville* (1990) holds that an individual is not precluded by the Texas Tort Claims Act from filing the claims against a city under the Deceptive Practices Act. Section 101.021 of the TTCA directly regulates the correlation between an employee’s immunity from liability and the plaintiff’s ability to bring suit against governmental units.

The first subsection prescribes that a governmental entity can be sued for personal injury, property damages, or death resulting from the use or operation of a motor-car or motor-driven equipment. Also, this part of Section 101.021 of the TTCA articulates that an individual may file suit originating from the operation of a motor-driven vehicle or motor-driven equipment only if the employee driving the equipment would be personally liable to the claimant under Texas law. This means that the prescription of an employee’s personal liability under Texas law is a key prerequisite to the governmental entity’s liability under the Texas Tort Claims Act.
In this light, the Texas Supreme Court clarifies that the Texas law precludes suits against the employee using the motor-driven vehicle or motor-driven equipment according to the principles of official immunity, whereas the Texas Tort Claims Act bars suits against the governmental employer according to the principles of sovereign immunity (*DeWitt v. Harris County*, 1995).

Apart from governmental liability (Section 101.021), Subchapter B of the Act also addresses such issues as liability of a municipality arising from its governmental functions (Section 101.0215), limitation on amount of liability (Section 101.023), the non-authorization of exemplary damages (Section 101.024), waiver of governmental immunity (Section 101.025), individual's immunity from a tort claim for damages (Section 101.026), liability insurance (Section 101.027), workers’ compensation insurance (Section 101.028), and liability for certain conduct of state prisons (Section 101.029).

Subchapter C, deals with exclusions and exceptions to sovereign immunity. In the framework of Subchapter C of the Act, it is possible to discern an array of exclusions and exceptions to sovereign immunity under the Texas Tort Claims Act. They include: a) school and junior college districts (Section 101.051); b) legislature (Section 101.052); c) judicial branch (Section 101.053); d) state military personnel (Section 101.054); e) specific governmental functions (Section 101.055); f) discretionary powers (Section 101.056); g) certain intentional torts and civil disobedience (Section 101.057); h) landowner’s liability (Section 101.058); i) attractive nuisances (Section 101.059); j) traffic and road control devices (Section 101.060); k) tort committed before January, 1970 (Section 101.061); l) 9-1-1 emergency services (Section 101.062); m) members of
public health district (Section 101.063); n) land acquired under foreclosure of lien (Section 101.064); o) negligence of off-duty law enforcement officers (Section 101.065); p) computer date failure (Section 101.066), and r) graffiti removal (Section 101.067).

There is no need to explore the nature of each of the enumerated exceptions and exclusions to sovereign immunity. However, some of these exclusions and exceptions must be explained. As far as school and junior college districts are concerned, Section 101.051 of the TTCA prescribes that, with the exception of motor vehicles, the legal provisions of the Act applies neither to a school district nor to a junior college district. This means that school and junior college districts are partially excluded from the regulative framework of the TTCA.

Section 101.057 of the TTCA establishes the exclusion for civil disobedience and specific intentional torts. According to this Section, governmental units are precluded from being held liable for measures taken as a reaction to wide-ranging civil disobedience. According to Shaunessy (2001), the main rationale behind the legal provisions of Section 101.057 of the Act is to exclude the claims which are connected with riots and other forms of civil disobedience in order to bar liability for injuries originating from the efforts of law-enforcement agencies to control riots (p. 197).

The court in State v. Terrell (1979) holds that Section 101.057 of the Act is purposed to bar liability for governmental decisions on how to deal with the instances of riot and whether to control the riot at all. Moreover, the judicial reasoning in Forbus v. City of Denton (1980) is that measures taken as a reaction to a fire started in a prison by a single inmate should not be recognized as measures in response to civil
disobedience, and thus the consequent infliction of injuries could be considered the basis for suit.

Aside from civil disobedience, Section 101.057 of the TTCA covers certain intentional torts. However, the waiver from sovereign immunity for intentional torts has ignited a considerable debate and related litigation (Shaunessy, 2001, p. 197). As a climax of this debate, the Texas Supreme Court in Delaney v. University of Houston (1992) substantially confined the scope of the exclusion to sovereign immunity under Section 101.057 (2) of the Act by rejecting the reasoning of the Delaney court.

The latter held that the institution of higher education “could not be held liable for the plaintiff’s rape by an intruder in her dormitory room because the claim was for an intentional tort”, which precludes liability of an institution of higher education under Section 101.057 of the Texas Tort Claims Act (Shaunessy, 2001, p. 197).

Nevertheless, the Texas Supreme Court in Delaney v. University of Houston (1992) restricted the scope of Section 101.057 (2) of the Texas Tort Claims Act by concluding that the broad application of this section means ignoring “a distinction which the law recognizes when negligent and intentional acts both contribute to the occasion of injury” (Delaney v. University of Houston, 1992, para. 60).

Subchapter D, “Procedures”, addresses all procedural issues concerning the practical implementation of exclusions and exceptions to sovereign immunity, including such issues as notice (Section 101.101), commencement of suit (Section 101.102), legal representation (Section 101.103), evidence of insurance coverage (Section 101.104), settlement (Section 101.105), election of remedies (Section 101.106), payment and collection of judgment (Section 101.107), ad valorem taxes for payment of
In his commentary, Shaunessy (2001) sheds light on the restrictive provisions of the Texas Tort Claims Act. The author argues that, despite the fact that the TTCA establishes a limited waiver of sovereign immunity, the common law principles of sovereign immunity are still applied for the purpose of determining the extent to which a governmental entity is liable.

Exploring the dimensions of the doctrine of sovereign immunity in the State of Texas, the scholar comes to the conclusion that the Texas Tort Claims Act imposes the liability on governmental entities under the conditions of use of personal and real property and common law standards of liability. This means that “the extent of liability under the Texas Tort Claims Act is predetermined not only by the nature of sovereign immunity with its exceptions, but also by the common law premises of liability” (p. 91).

The first source giving rise to sovereign immunity in Texas is the US Constitution. To be more precise, the Eleventh Amendment to the US Constitution prescribes sovereign immunity for all States of the USA. The second source of sovereign immunity in the State of Texas may be represented by the federal law which shields governmental officials from liability. In addition to this, the US Supreme Court’s case law constitutes the third source of sovereign immunity, because it both interprets the rules of the Eleventh Amendment immunity and adjusts the common law principles of sovereign immunity to the American legal reality.

The fourth source of sovereign immunity in terms of the State of Texas may be considered as the Texas statutory law. The Texas Tort Claims Act is an example of this.
The fifth source of sovereign immunity in the context of the State of Texas originates from the case law of the Texas Supreme Court. The judicial review of various specificities and principles of the doctrine of sovereign immunity is very important for the application of both the Texas Tort Claims Act, and other statutory instruments.

It should be noted that the case law regulating sovereign immunity in Texas is intertwined with the case law regulating sovereign immunity at the federal level. Thus, in Texas, similar to other states, the doctrine of sovereign immunity is rooted in the common law doctrine that a sovereign cannot commit a legal wrong, thus should be immune from civil suit (Phelan, 2011; *Humane Society of the US v. Clinton*, 2001).

Shaunessy (2001) recognizes two underlying principles of sovereign immunity in the State of Texas: a) immunity from suit; and b) immunity from liability (p. 93). As far as the first principle is concerned, Shaunessy (2001) explains that, under the common law, the State of Texas is shielded by sovereign immunity without legislative consent, even if the liability of the State is not disputed. The second principle provides that the State of Texas is entitled to have recourse to immunity from liability in cases when the legislative body has prescribed consent to the suit.

Scrutinizing the discrepancy between the statutory principles of sovereign immunity and common law principles of sovereign immunity, Shaunessy (2001) writes that the common law grants full sovereign immunity to governmental entities. Thus, under the prescriptions of the common law, sovereign immunity safeguards the State of Texas, its officials and its agencies from suits for damages. Also, the common law does not prescribe the possibility of consent to sue the State of Texas. As a matter of fact, the Texas Supreme Court explicates the difference between the two principles of
sovereign immunity. According to the Court’s ruling, “immunity from suit precludes any suit against the State of Texas unless the State expressly gives its consent to the suit” (Shaunessy, 2001).

It follows that the State’s right to sovereign immunity will be curtailed only if the State provides its manifest consent to the suit. Moreover, the mere acknowledgement by the State of its liability is not sufficient for the derogation of sovereign immunity, because the rule of consent precludes a remedy under the Texas law as long as the legislature gives the consent to suit. A legislative waiver of sovereign immunity does not necessarily guarantee a right to redress.

In addition to this, Shaunessy (2001) comments that the main rationale of immunity from liability lies in the protection of the State of Texas from possible judgments even under the conditions when the legislature has expressly consented to the suit. Therefore “it is up to the State of Texas to decide whether to acknowledge its liability to the suit or not. Also, if the legislature recognizes the suit against the State as lawful, it is incumbent on the State of Texas to decide in every single case on whether to affirm its liability or not” (Shaunessy, 2001, p. 93).

Shaunessy’s reasoning helps to make inference that the State’s express consent to suit is the crucial prerequisite to the exception to sovereign immunity, whereas the State’s express acknowledgement of its liability is not crucial for the exception to sovereign immunity, because it requires the subsequent legislative consent to provide a remedy to the plaintiff but is not necessary to bring the state into court. The state’s express acknowledgement of liability is crucial to the waiver of one type of immunity. Given this, the author posits “that it is incumbent on any individual who files suit for
monetary damages against the State to substantiate that the State has waived both
immunity from suit and immunity from liability” (Shaunessy, 2001, p. 93).

It is important to note that the adoption of the TTCA has substantially changed
the liability of cities. Before the enactment of the Texas Tort Claims Act, there was no
liability of cities for the negligent conducts of their employees and agents with regard to
the performance of governmental functions. This means that the pre-TTCA common law
precluded cities from being sued for the negligent acts of its agents and employees
originating from their public activities.

Nevertheless, the pre-TTCA common law made cities liable for unlimited
damages when the negligence was rooted in proprietary functions – to wit, functions
that a municipality may undertake in the interest of its residents. To that end,
Shaunessy (2001) comments that the test of distinguishing proprietary functions from
governmental functions was established in City of Galveston v Posnainsky (1884).
Thus, Shaunessy (2001) infers that the proprietary function exception to the doctrine of
sovereign immunity had application only towards municipalities.

However, this practice was changed later on. The Texas Supreme Court
extended the proprietary function exception beyond the context of municipalities. Texas
Highway Commission v. Texas Association of Steel Importers (1963) is considered a
landmark case which shows how various state-related practices, such as the
construction of highways, may be regarded as proprietary activities (1963) which lead to
the subjugation of the State of Texas to suit and liability. Nevertheless, subsequent
judicial decisions restricted the proprietary function exception to cities in lieu of the
The courts have since consistently held that the state enjoys immunity, even when engaged in proprietary actions.

Despite the provision of definite circumstances under which sovereign immunity can be waived, the scope of the Act’s waiver of immunity is considered poorly prescribed and thus requires further interpretation. The San Antonio Court of Appeals points out that the scope of the TTCA’s waiver of sovereign immunity should be understood as follows: “there are three specific domains of liability for which sovereign immunity under the TTCA can be waived” (Shaunessy, 2001, p. 105).

In order for immunity to be waived under this Act, one of the three specific areas of liability must give rise to the claim. These three specific areas of liability are: 1) injuries inflicted as a result of driving a vehicle; 2) injury inflicted by a condition or use of tangible personal or real property; and 3) claims resting on premise defects (Medrano v. City of Pearsall, 1999).

Apart from the TTCA, the waiver of sovereign immunity is also prescribed by other legal acts. In the Kerrville State Hospital case, the court analyzed whether it was possible to impose liability on state entities for contraventions of the Anti-Retaliation Law.

In other words, it was incumbent on the court to verify whether the State Applications Act (SAA) waived sovereign immunity of state agencies for the claim arising from the Anti-Retaliation Law (Kerrville State Hospital, 1995). In the ultimate analysis, the court concluded that the State Application Act (SAA) does intend to waive sovereign immunity for claims under the Anti-Retaliation Law. The State Applications Act provides that state agencies provide workers compensation benefits for its workers.

Commenting on the judicial decision in *Kerrville State Hospital* (1995), Shaunessy (2001) highlights the urgency for a court of justice to “look beyond the express language of the statute in question to ascertain whether the Texas Legislature had clear intention to waive sovereign immunity” (p. 107). In other words, the certainty of whether a legal statute waives immunity requires from both parties to be prepared to offer to the trial court all available evidence, such as “legislative history, other legislative materials, transcripts of committee or floor debate, and so on” (Shaunessy, 2001, p. 107).

Notwithstanding the feudal roots, the US Supreme Court delineated the doctrine of sovereign immunity as a court-made rule which “rests on considerations of policy given sanction by [the] Court” (Phelan, 2011, p. 750). However, the case law of the United States on sovereign immunity was considered inconsistent, uncertain, and ambivalent until the adoption of the Federal Tort Claims Act in 1946.

As the discussion suggests, the Federal Tort Claims Act has become both the first federal statute which allows private individuals to sue federal government and the first underlying legislation which creates the basis for subsequent unification and consolidation of the judicial position with regard to the nature and applicability of the doctrine of sovereign immunity at the federal and state levels.

In the state of Texas, the doctrine of sovereign immunity includes two principles: “immunity from liability and immunity from suit” (Phelan, 2011, p. 729). The principle of
the immunity from suit as established by the Texas Supreme Court provides that “immunity from suit prohibits suits against the State unless the State expressly consented to the suit…the principle of immunity from liability provides protection from liability for discretionary actions taken in good faith within the scope of the officer’s or employee’s authority.” (Wichita Falls State Hospital v. Taylor, 2003).

Phelan (2011) acknowledges that the State of Texas may have recourse to sovereign immunity from suit in a plea to jurisdiction “which is a dilatory plea that not only seeks dismissal of a case for lack of subject-matter jurisdiction but also defeat[s] a cause of action without regard to whether the claims asserted have merit” (p. 730).

To continue, Phelan (2011) asserts that the Supreme Court of Texas recently made several decisions in cases concerning governmental agencies which reflect the court’s predisposition to insulate governmental officers and have resorted to the firm application of the doctrine of sovereign immunity.

Phelan (2011) argues that, at present times, the Texas Supreme Court is prone to a rigid and extensive application of sovereign immunity principles. It seems that the courts in Texas do not acknowledge the need of protecting the public from indecent conducts of governmental officials. In the author’s opinion, the current practice of the Texas Supreme Court revolves around the extensive application of sovereign immunity principles, whereas the Court is expected to protect the Texas population by making governmental officials accountable and liable for their malpractice.

In Harris County Hospital District v. Tomball Regional Hospital (2009), the Texas Supreme Court affirms that the sovereign immunity doctrine has evolved in Texas since the mid-nineteenth century “and presumably thought this was a reason to continue to
sustain it” (Phelan, 2011, p. 727). It is possible to agree with Phelan (2011) that the court in *Harris County Hospital District v. Tomball Regional Hospital* (2009) could have ruled that the doctrine of sovereign immunity was an obsolete legal doctrine which contradicts the current need for moral responsibility on the part of governmental agencies and their officers as well as a need to vindicate the rights of victims from harmful governmental acts. *City of El Paso v. Heinrich* (2009) is another case regulating sovereign immunity in Texas. In this case, the Supreme Court of Texas holds that the aim of sovereign immunity is to safeguard the State of Texas from lawsuits for pecuniary damages. However, the Court also affirms that “an action to determine or protect a private party’s rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars” (*City of El Paso v. Heinrich*, 2009).

Hence, it follows that the Texas Supreme Court in this case aims at differentiating between a state official’s acts without prior legal or statutory authority and a state official’s acts with prior legal or statutory authority. In the framework of this case, the Texas Supreme Court implies that a state official loses his or her benefit of being shielded by sovereign immunity when acting without legal or statutory authority.

Also, the Court notes that state (governmental) immunity generally bars suits for retroactive financial relief. Nevertheless, governmental immunity does not prevent prospective remedies in the framework of official-capacity suits against those governmental officers who contravene “statutory or constitutional provisions” (*City of El Paso v. Heinrich*, 2009).
To that end, the Court further details that while the decision in the *Heinrich* case regulates “a claim for prospective declaratory and injunctive relief against governmental actors in their official capacity but acting *ultra vires*, or beyond the power of, is not barred by immunity even if the requested relief compels the governmental entity to make monetary payments”, the precepts of sovereign immunity still “bars suits against governmental entities for retrospective monetary relief” (Phelan, 2011, p.732).

It should be noted that the Texas Supreme Court does not prohibit private individuals to sue state officials if statutory or constitutional provisions grant those individuals an entitlement to payment. In this light, it is possible to deduce that “those suits which require state officials to comply with the prescriptions of law are not barred by sovereign immunity, simply because those suits compel the state to deliver those payments” (Phelan, 2011, p. 733).

On the other hand, the analysis of the above cases helps us to infer that the suit against a state official in Texas can be barred by the principles of sovereign immunity unless the suit is covered by the *ultra vires* exception, according to which “the suit must not revolve around a state official’s misconduct, but must allege, and consequently prove, that the official in question either performed the alleged act without legal authority or failed to conduct a purely ministerial act” (*City of El Paso v. Henrich*, 2009, para. 371).

That is, under the above case law, the possibility of sovereign immunity as a shield against lawsuits is dependent not on the nature of consequences, but rather on the nature of the act which is conducted by a state official. For the applicability of sovereign immunity, it is important to ascertain whether a state official’s act was
performed outside the state official’s legal/statutory authority, or conforms to such authority.

On the one hand, the *Heinrich* decision prevents state officials from shielding their acts with the principles of sovereign immunity if these acts are conducted without proper legal or statutory authority. On the other hand, by acknowledging the *ultra vires* exception to sovereign immunity, the Court remains silent on whether the victims from state officers’ unauthorized acts are entitled to remedy, which may invoke state immunity.

Given this, the case law on sovereign immunity demonstrates an intrinsic contradiction. On one side, the case law empowers private individuals to seek redress in the *ultra vires* suits against state officials, and on the other, the same case law limits the possibility of such redress by barring the recovery of damages from the state treasure in a private suit. In practice, this situation means a clear differentiation between various types of claims. That is, the federal case law on sovereign immunity allows claims for prospective injunctive relief, while barring the claims for retroactive relief. The State of Texas mirrors this distinction.

The distinction between the two types of claims is rooted in the Eleventh Amendment to the US Constitution and explained in the jurisprudence of the US Supreme Court. Thus, in *Pennhurst State School & Hospital v. Halderman* (1984), the US Supreme Court states that federal courts are empowered to award an injunction which regulates a state officer’s future deeds, such as impermissible lawsuits seeking monetary redress for past actions.
The above referenced cases of sovereign immunity in the context of the State of Texas provide general knowledge of how the doctrine of sovereign immunity is interpreted and utilized in the practice of the Texas Supreme Court and other courts within the State. The above cases create the basis for subsequent research of sovereign immunity in the context of Texas.
CHAPTER III
RESEARCH METHOD

Methodology

Black letter legal research method

This legal research approach is a methodology which is based on the concept of ‘black letter law’. To be more precise, it originates from the US common law case Jackson ex dem Bradford v Huntington. In the framework of this case, the method of black letter law approach rests on a fundamental legal principle that the substantial elements of a particular field of law are undisputed and free of doubt. This method addresses only those provisions of statutory law and case law which are: 1) substantial in terms of a specific domain of law; 2) undisputed (there is no disagreement among judges or other lawyers in respect of the meaning of these prescriptions); 3) free of doubt (it is impossible to understand these provisions in a different or discrepant way).

Thus, the black letter law method is reinforced by the method of doctrinal study.

Doctrinal study

The doctrinal format of research implies that the academic procedures focus exclusively on the questions of law on particular issues (Varga, 2008). In terms of this research, doctrinal study is directed at a number of specific legal issues in question: a) the legal nature of sovereign immunity as a common law doctrine; b) the legal peculiarities of waivers of sovereign immunity under the Texas Tort Claims Act; c) the position of legal theorists (commentators of law) on sovereign doctrine; d) the legal
specificities and dimensions of exceptions to waivers of sovereign immunity under the Texas Tort Claims Act.

The doctrinal study is employed as purely legal research directed at specific statements of law and complex analysis of legal reasoning. Doctrinal study is utilized through a series of sequential steps, such as: 1) search and retrieval of the pertinent legal sources (the TTCA and Texas Higher education case law); 2) critical analysis, interpretation, and collation of the relevant provisions and prescriptions of the legal sources and legal reasoning; 3) inferences from the doctrinal analysis of the legal sources.

Comparative analysis

The method of analysis is a mental process of separating relatively complex phenomena into smaller parts in order to gain clearer and more vivid comprehension of them (Ritchey, 1996). The method of comparison reinforces analysis by way of disclosing and quantifying the relationships between two or more variables through collation, observation, and confrontation.

The method of analysis is employed through a series of mutual steps: 1) data preparation; 2) data description; and 3) making inferences from the data (Trochim, 2006). After the collected data is analyzed, it is compared. The appropriateness of comparison to the context of this study is justified with the following arguments. First, it is vital to investigate several Texas higher education cases in order to ascertain the extent to which the doctrine of sovereign immunity, waivers of sovereign immunity, and exceptions to waivers of sovereign immunity are applied by the Texas judiciary. Second,
it is essential to verify the legal effectiveness of the Texas Tort Claims Act as the only available legal instrument which waives sovereign immunity in the State of Texas under specific circumstances.

Review

Review is a secondary data collection method which is applied in the framework of this research. The practical operation of review as a methodological design is reflected in the Chapter II, Literature Review. Review is an independent method of theoretical study which seeks to provide a familiarization with the existing academic publications in a specific domain of knowledge (Marczyk et al., 2010). The pertinence of review as a scientific method lies in the capabilities of the method to provide both methodological and theoretical contributions to the topic at issue. Also, it is expected that the method of review will prepare, orient, adjust, verify and reinforce the findings of subsequent primary data collection methods, such as black letter law research, doctrinal study, and comparative analysis. As a critical overhaul of pertinent publications, the method of review is conducted in a thematic manner.

Critique

The method of critique means an extension of, and complement to, the method of review. The core of the critique is to clarify the academic findings on the extent to which the state could be involved in arbitration or litigation by questioning the findings of previous authors. As a research method, critique means a systematic and progressive exploration of the researchers’ reasoning, arguments, opinions, and drawbacks.
The method of critique focuses on the critical strengths and weaknesses of previous authors in their research on sovereign immunity. Thus, the method of critique was used in reviewing past publications by placing a special emphasis upon their original constituents and correlations of the issues in question.

Case study

Case study is another method which is employed in the framework of this study. The method of case study is a flexible, qualitative research design which rests on empirical investigations of one or several cases. Hence, the concept of case is the core of case study as a scientific method. According to Yin (2011), the term ‘case’ should be understood as a specific individual, occurrence, country, material object, event, organization, etc. In the framework of this study, the notion of case is associated with a particular Texas higher education case. The main objective of case study as an empirical enquiry of legal cases is to obtain a better comprehension of sovereign immunity, waivers of sovereign immunity and exceptions to waivers of sovereign immunity, and consequently provide reliable answers to the formulated research questions by making pertinent inferences from the cases.

The application of case study is going to be made through a series of sequential steps: 1) search and retrieval of relevant cases; 2) analysis of the cases’ salient features; 3) fixation of results; 4) inferences from the results.
CHAPTER IV
CASE STUDIES AND FINDINGS

Case Studies

The principal purpose of this chapter is to review, analyze, discuss, and evaluate noteworthy Texas higher education cases in order to ascertain how the doctrine of sovereign immunity is interpreted and applied in terms of Texas higher education. The study of each case is made through a series of sequential steps (1) brief analysis of the facts; (2) brief analysis of the holding; (3) doctrinal study of the arguments concerning sovereign immunity and the TTCA; and (4) important inferences from the case.

As a result of preliminary analysis, a certain number of Texas Higher Education Cases were identified for the review. It was deemed relevant to examine the following Texas higher education cases which directly invoke the doctrine of sovereign immunity:

  
  • This case was selected because it was one of the few that found for the student, with the court rejecting the sovereign immunity claim made by the institution. It was also one of the first suits brought against an institution under the TTCA.

• *The University of Texas Health Science Center at San Antonio v. Linda M. Bruen* (2002).
  
  • This case was selected because not only did the appellee file claim under the TTCA, she also filed claim under the Americans with Disabilities Act, both of which were dismissed by the court.

• This case was selected because it was reviewed by the Texas Supreme Court. Also, it introduces the concept of third parties and how the TTCA is applied.

• **Steven Biermeret v. The University of Texas System** (2007).
  - This case was selected because it is illustrative of the court ruling that in order to waive immunity, the institution had to have constructive or actual knowledge that an injury could have happened.

• **The University of Texas v. Hermelinda Amezquita** (2009).
  - This case was selected because it provides insight to the court’s application of one of the exceptions to waiving sovereign immunity – namely when the injury is caused due to the discretion allowed in the design of a structure.

• **The University of Texas M. D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, Individually and as Next Friends of Preston Baker** (2012).
  - This case was selected because it is one of the few cases where the court does not side with the institution, citing that a waiver of immunity was sufficiently alleged based on the facts of the case.


Brief analysis of the facts.
James Byrnes, Appellant, v. University of Houston et. al., Appellees; heard in the Court of Civil Appeals of Texas, Fourteenth District, Houston, on appeal from 151st District Court of Harris County.

According to this case, James Byrnes, the appellant student, wished the court’s judgment to be reviewed. The appellant alleged that the disputed judgment “dismissed his action for declaratory judgment and recovery of wrongfully paid tuition against appellees, university and registrar” (James Byrnes v. University of Houston et al., 1974). In other words, the appellant asserted that the appellees had redundantly charged him at non-resident rates, without taking into consideration that he was a resident of Texas.

On the other hand, appellees university and registrar “entered a plea to the jurisdiction, and in abatement, alleging that appellant was part of a federal class action on the same issues, and claiming sovereign immunity” (James Byrnes v. University of Houston et al., 1974). The trial court dismissed the case by granting the appellees’ plea to jurisdiction.

The court of appeals confirmed the dismissal of appellant’s claim for declarative judgment but reversed and remanded the appellant’s basis for recovery of tuition fees. The court declined appellee’s defense of sovereign immunity, because of the fact that the appellee registrar was acting outside the scope of his legal authority, and if the redundant tuition was illegally obtained, “it would amount to a taking of private property” (James Byrnes v. University of Houston et al., 1974).
The court’s holding.

The court of appeals in this case affirmed the trial court’s judgment in part, and reversed and remanded that judgment in part. Thus, the cause of action for the return of money paid as tuition was reversed and remanded, whereas “the exercise of the trial court’s discretion in dismissing the payer for declaratory relief was affirmed” (*James Byrnes v. University of Houston et al.*, 1974).

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.

The above description of the main facts makes certain that *James Byrnes v. University of Houston* (1974) directly concerns the doctrine of sovereign immunity. The doctrine of sovereign immunity is used by the defendants as a shield against the plaintiff’s suit for a declaratory judgment and for the recovery of money paid. The defendant’s main justification for having recourse to the precept of sovereign immunity lies in the allegation that the plaintiff was a party to a case in the federal court on the same issue (*James Byrnes v. University of Houston et al.*, 1974).

Despite the fact that the trial court bases its judgment on the defendants’ allegations, the court of appeals verifies that the plaintiff’s suit is not an action against the State of Texas. Thus, the court of appeals makes it clear in its reasoning that the plaintiff’s suit is directed against Registrar Lucchesi, who is in charge of categorizing students as nonresident and resident. Moreover, the court of appeals ascertains that the registrar acted beyond his legal authority, and thus the University of Houston could not be permitted to enjoy the governmental immunity from the suit (*James Byrnes v. University of Houston et al.*, 1974).
Important inferences from the case.

The first inference from this case is that a higher education establishment may shield itself with sovereign immunity from being held liable for conduct of its employee only if the employee acts according to his or her legal authority. The failure of the employee to act within the scope of his or her legal authority gives rise to the exclusion of the doctrine of sovereign immunity.

The second inference from the case is that a suit for the recovery of money paid is not precluded by the doctrine of sovereign immunity if the money to be recovered “amounts to the taking of private property without due process and would therefore offend Article 1, sec. 19 of the Texas Constitution, as well as the Fourteenth Amendment of the United States Constitution” (James Byrnes v. University of Houston et al., 1974).

The University of Texas Health Science Center at San Antonio v. Linda M. Bruen (2002)

Brief analysis of the facts.

The University of Texas Health Science Center at San Antonio, Appellant v. Linda M. Bruen, Appellee; heard in the Court of Appeals of Texas, Fourth District, San Antonio, on appeal from the 37th Judicial District Court, Bexar County, Texas.

In this case, the appellee nurse took part in a seminar at the Center, slipped and fell off the edge of a ramp. The Center alleged that the court of first instance had no jurisdiction over the nurse’s action, because the Center’s sovereign immunity was not waived under the provisions of the Texas Tort Claims Act. Thus, the trial court dismissed the Center’s plea to jurisdiction. As a result, the Center appealed.
In the court of appeals, it was established that the Center’s sovereign immunity was not waived for claims concerning alleged defects in the design of the ramp, because such decisions were discretionary. Moreover, the court of appeals held that the nurse was not entitled to base her claim on alleged breaches of the Americans with Disabilities Act, because she was not disabled (*The University of Texas Health Science Center at San Antonio v. Linda M. Bruen*, 2002).

Additionally, the court of appeals verified that the failure to utilize a rope barrier on the ramp edge as well as the failure to properly implement the Center’s policy concerning the use of a rope under those conditions did not in fact waive the Center’s sovereign immunity, “because it involved the non-use of personal property” (*The University of Texas Health Science Center at San Antonio v. Linda M. Bruen*, 2002). The court of appeals held that the Center was immune from suit and granted the plea to jurisdiction.

The court's holding.
The court of appeals reversed the trial court’s judgment and dismissed the case.

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.

This case involves the issues of sovereign immunity and waivers of sovereign immunity under the Texas Tort Claims Act. According to the factual and procedural background of the case, the University of Texas Health Science Center at San Antonio (hereinafter referred to as the Center) brought two pleas to jurisdiction based on the doctrine of sovereign immunity.
The first plea was dismissed in part, whereas the second plea was rejected completely. To be more specific, the trial court denied the Center's pleas with regard to the plaintiff's allegations that the Center: (1) “failed to have the rope in place that was normally used to warn and protect others from the ramp’s edge; and (2) the ramp and entrance failed to comply with the Americans with Disabilities Act” (*The University of Texas Health Science Center at San Antonio v. Linda M. Bruen*, 2002).

In view of the above, it needs to be explained that the plaintiff's allegations revolve around the statutory requirements for safety of ramps under the Americans with Disabilities Act. Bruen's claims concern the dangerous condition of the ramp from which the plaintiff fell. On the other hand, the Center's counterarguments rest on the doctrine of sovereign immunity under Section 101.056 of the Texas Tort Claims Act.

According to Section 101.056 of the Texas Tort Claims Act, waivers to sovereign immunity do not apply to a claim which is based on a governmental unit's failure to conduct an act which is not required for this unit by law to perform, or a claim based on the decision of a governmental entity 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” (*The University of Texas Health Science Center at San Antonio v. Linda M. Bruen*, 2002).

In its findings, the court revealed that sovereign immunity is not waived under the TTCA for those claims which are based on discretionary acts and omissions (Texas Tort Claims Act, 1969, Section 101.056). In this sense, the court explains that the discretionary function exception to the waiver of sovereign immunity is conceived to
prevent judicial review of governmental policy decisions (State v. Terrell, 1979). Also, the court argues that this is a question of law - whether a government act is discretionary and within the exception to the waiver of immunity under the TTCA.

The court in this case reiterates that Texas courts have ruled that design decisions are discretionary and therefore no waiver to sovereign immunity is possible (Ramos v. Texas Department of Public Safety, 2000). On these grounds the court points out that sovereign immunity is not waived under the TTCA.

Notwithstanding the court’s reasoning, Bruen keeps maintaining that the Center had a legal obligation under the provisions of the Americans with Disabilities Act to perform structural alterations and improvements to the facility at issue after the facility was erected. According to Bruen, it was incumbent on the defendant to make the following structural changes: installation of curbs, edge protectors, railings, walls, and projection surfaces, which were expected to prevent injuries similar to those the plaintiff suffered.

The main argument of Bruen in favor of the waiver to sovereign immunity is that failure to make structural improvements and changes to the facility at issue should be qualified as negligence by itself and thus affording grounds for legal action under the Texas Tort Claims Act, taking no heed to whether the plaintiff is covered by the provisions of the Americans with Disabilities Act (The University of Texas Health Science Center at San Antonio v. Linda M. Bruen, 2002).

In the Center’s opinion, the Americans with Disabilities Act has no application to this case, and does not prescribe a waiver to state immunity, because the TTCA is the
only available statutory mechanism, under which sovereign immunity can be waived in
the State of Texas. The court agrees with the Center’s arguments.

Discussing the plaintiff’s arguments, the court holds that Title II of the Americans
with Disabilities Act can be applied only to public entities. Furthermore, this part of the
Americans with Disabilities Act regulates that no “qualified individual with a disability
shall, by reason of such disability, be excluded from participation in or be denied the
benefits of the services program, or activities of a public entity, or be subjected to
discrimination by any such entity” (Americans with Disabilities Act, 1990).

To that end, the court in the present case comes to a conclusion that to establish
a contravention of Title II of the Americans with Disabilities Act, it is incumbent on the
plaintiffs to demonstrate that they are qualified persons within the Act’s scope.
Secondly, the court explains that the application of the Americans with Disabilities Act
requires establishing whether plaintiffs are being disallowed from taking part in, or being
refused to have benefits of, programs, services, or activities for which the public entity is
obliged (The University of Texas Health Science Center at San Antonio v. Linda M.
Bruen, 2002). The court in the current case acknowledges that the aforesaid exclusion,
denial of advantages, or disparate treatment must be connected with a plaintiff’s
disability in order to have the Americans with Disabilities Act actionable.

Another counterargument of the Center is that Bruen’s statement concerning “its
failure to use a theater rope alleges a non-use of property”, is not actionable under the
TTCA” (The University of Texas Health Science Center at San Antonio v. Linda M.
Bruen, 2002). In other words, a non-use of personal property is not regulated by the
Texas Tort Claims Act as a waiver of sovereign immunity. The court underpins the
aforementioned conclusion with the following arguments. First and foremost, the Center is a branch of the University of Texas system and as such the Center is a state entity which is protected from liability and suit by sovereign immunity (University of Texas Health Sci. Ctr. at San Antonio v. Mata & Bordini, 1999).

The Texas case law prescribes that the legislature may waive its sovereign immunity only through clear and unambiguous language (City of LaPorte v. Barfield, 1995). In addition to the Texas case law, the Texas Tort Claims Act prescribes that the State waives its sovereign immunity for “personal injury and death so caused by a condition or use of tangible personal property or real property if the governmental unit would were it a private person, be liable to the claimant…” (Texas Tort Claims Act, 1969, Section 101.021 (2)).

From the aforementioned provision of the Texas Tort Claims Act, it is possible to infer that only active behavior of a governmental unit creates prerequisites to a waiver of its sovereign immunity. In other words, sovereign immunity cannot be waived for a claim originating from the non-use of personal property, but rather from a use of such property (Kerrville State Hospital v. Clark, 1996).

Taking into consideration the above findings, the appellate court in Bruen’s case arrives at the conclusion that the plaintiff’s allegations that her injuries were inflicted by the center’s failure to utilize the theater rope resemble those “non-use” allegations which were denied by the Texas Supreme Court under other circumstance, such as the failure to use injectable medication (Kerrville State Hospital v. Clark, 1996), and the failure to provide medication (Kassen v. Hatley, 1994).
Apart from the above allegations, Bruen’s claim emphasizes the tortious implementation of procedure and policy. The appellate court in Bruen’s case takes into consideration the plaintiff’s allegations for the negligent implementation of policy and procedure, but also notes that Bruen still fails to state a claim for which governmental immunity is barred under the Texas Tort Claims Act. The court refers Bruen to Section 101.056 of the Texas Tort Claims Act.

Analyzing the wording of this section of the TTCA, it is possible to deduce that no waiver of sovereign immunity is contained in its statutory norms. In other words, the appellate court in Bruen’s case holds that Section 101.056 of the TTCA cannot be considered the legal base for a waiver of sovereign immunity, because it establishes an exception to any waiver of sovereign immunity where the claim deals with the formulation of policy (City of Orange v. Jackson, 1996).

The legal wording of Section 101.056 of the Texas Tort Claims Act makes it clear that a governmental unit’s enjoyment of sovereign immunity is not waived by the tortious implementation of procedure and policy if the injury or death at issue did not originate from the use or condition of tangible personal property or from the use or operation of a motor car. On these grounds, the appellate court in Bruen’s case considers the plaintiff incapable to substantiate a waiver of sovereign immunity under Section 101.021 of the TTCA, whereas her reference to negligent implementation is deemed useless by the court.

The appellate court in Bruen’s case ends with the conclusion that the plaintiff failed to substantiate a waiver of sovereign immunity and thus the trial court made a mistake in rejecting the Center’s pleas to jurisdiction. It is important to note that while
the court dismissed Bruen’s claim of ADA non-compliance because she is not disabled, there are circumstances where sovereign immunity does not apply. The ADA is one of these circumstances, if the person claiming the wrong is disabled. The other circumstance where immunity does not apply is fire code.

Important inferences from the case.

Having analyzed the case, it is possible to make several important inferences with regard to the judicial interpretation of the doctrine of sovereign immunity and waivers to sovereign immunity under the TTCA. The first inference is that other than the TTCA, statutory acts have application to the cases concerning issues of sovereign immunity and waivers to sovereign immunity only if their provisions have direct effects on plaintiffs. This means that it is impossible to substantiate the claim to a waiver of sovereign immunity with the provisions of a statutory act if that statutory act is not applicable to the plaintiff.

The second inference is that Section 101.056 of the Texas Tort Claims Act does not prescribe a waiver of sovereign immunity, but establishes an exception to all waivers of sovereign immunity under the TTCA. In other words, the discretionary function is an exception but not a waiver of sovereign immunity under the TTCA. Hence, it follows that it is useless to allege a waiver of sovereign immunity by reference to Section 101.056 of the TTCA.

The third inference is that design decisions are considered discretionary and thus present no waiver to sovereign immunity. The fourth inference is that “non-use” of tangible personal or real property is not actionable under the Texas Tort Claims Act.
This means that only a use or condition of tangible personal or real property gives rise to a waiver of sovereign immunity under the provisions of the Texas Tort Claims Act.

Texas A & M University v. Paul A. Bishop (2005)

Brief analysis of the facts.

Texas A&M University, Petitioner, v. Paul A. Bishop, Respondent; heard in the Supreme Court of Texas, on petition for review from the Court of Appeals of Texas, Fourteenth District, Houston, Texas.

A student actor was stabbed by another actor during the performance of a play. As a result of this incident, the injured student filed the suit “for the negligent actions of the drama club’s faculty advisors and the play’s director in deciding to use a real knife and in failing to provide an adequate stab pad” (Texas A & M University v. Paul A. Bishop, 2005).

The appellate court affirmed the trial court’s judgment in the favor of the student. However, the state university made petition for review. In addition to this, it needs to be noted that the Texas Supreme Court had once sent back the case to the appellate court. However, on remand the appellate court decided that the faculty sponsors’ actions constituted a “use of tangible personal property according to the provisions of the Texas Tort Claims Act, for which the university was liable” (Texas A & M University v. Paul A. Bishop, 2005).

During the procedure of review, the state university asserted that, in accordance with Section 201.021 (2) of the Texas Tort Claims Act, there could be no application of the waiver for a use of tangible personal property, because both the prop assistant and
director were not the university’s employees, and thus the state university could not be liable for the conduct of individuals who were not its employees. Moreover, the state university alleged that the faculty sponsors’ actions did not constitute a “use” of tangible personal property within the TTCA’s scope.

The court’s holding.
The Texas Supreme Court reversed the judgment of the appellate court and dismissed the suit.

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.
In the final analysis, the Texas Supreme Court found it necessary to disagree with the reasoning of the appellate court’s judges and dismissed the suit. The Texas Supreme Court agreed with the defendants that the alleged failure of the faculty advisors to correctly oversee the props that the director chose for the performance could not be understood as a use of tangible personal property within the TTCA’s purview, because the state university’s immunity from suit was not waived under the TTCA, and thus the trial court did not have subject-matter jurisdiction (Texas A & M University v. Paul A. Bishop, 2005).

Analyzing the issues concerning sovereign immunity, the Texas Supreme Court arrives at the conclusion that the question of employment is a crucial determinant of whether a waiver of sovereign immunity can be applied. In this case, the Texas Supreme Court holds that Bishop filed the suit under a theory of respondeat superior for

According to the Black’s Law Dictionary (2011), the term “respondeat superior” denotes the doctrine of tort law “holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency” (p. 653).

Bishop claims that the Wonios was negligent in permitting actors to use a real knife and in failing to secure an adequate stab pad. The claimant alleged that the faculty advisors committed the tortious acts by failing to enforce the university’s safety policy forbidding the use of lethal weapons on campus (*Texas A & M University v. Paul A. Bishop*, 2005).

The Texas Supreme Court refers to *University of Tex. Med. Branch at Galveston v. York* (1994), according to which the doctrine of sovereign immunity shields state universities from liability for their employees’ negligence unless a waiver of sovereign immunity is prescribed by the legislature (*Texas A & M University v. Paul A. Bishop*, 2005).

In the current case, Bishop presents two grounds for the state university’s liability under the TTCA. First, the plaintiff alleges that Wonios’ conduct is grounds for the state university’s liability, because Wonios directed the play which was performed with the use of real knives. Second, Bishop also contends that Curley and Lesko’s acts and omissions constitute other grounds for the state university’s liability, because they were the drama club’s faculty advisors.
The state university presents three counterarguments to Bishop’s allegations of the two grounds for the defendant’s liability. First, the university appeals that the TTCA’s waiver for a use of tangible personal property does not apply in this case, because Wonios was not a university employee for whose acts and omissions the university could be held liable. Second, the actions of the university’s faculty sponsors did not constitute the waiver of a use of property within the TTCA’s scope. Third, the common law doctrine of sovereign immunity keeps on shielding the state university from liability for the conduct of its faculty advisors.

In light of the plaintiff’s allegations of the two arguments for the state university’s liability and the defendant’s three counterarguments against the plaintiff’s allegations, the Texas Supreme Court began by analyzing the case with the issue of the use of tangible personal property as a waiver of sovereign immunity under the Texas Tort Claims Act. According to the Texas Supreme Court, Section 101.021 (2) waives sovereign immunity for the use of personal property only when the governmental entity is itself the user. This means that a governmental unit does not “use” personal property simply by permitting other actors to use it and nothing more (Texas A & M University v. Paul A. Bishop, 2005).

As far as this case is concerned, the Texas Supreme Court acknowledges that the drama club faculty advisors did not themselves bring or put the knife into action or service. Nor did they themselves employ the knife for or apply it to a given purpose. This means that the drama club faculty advisors did not “use” the knife within the TTCA’s scope.
The facts in the case show that the faculty advisors permitted Wonios to provide the knife by failing to correctly oversee its production. The Texas Supreme Court continues that the faculty advisors’ misconduct constitutes negligent supervision (Texas A & M University v. Paul A. Bishop, 2005). Nevertheless, the fact of negligent supervision does not preclude sovereign immunity, because the failure to prevent any accidental occurrence which involves tangible personal property is not covered within the TTCA’s purview.

In his arguments, Bishop appeals to those cases in which a use of tangible personal property was established through the lack of an integral safety component. The Texas Supreme Court has held that the lack of an integral safety component meant a use of tangible personal property and thus, created a waiver under Section 101.021 (2) of the Texas Tort Claims Act.

However, in Bishop’s case the Texas Supreme Court disregards the plaintiff’s argument of the lack of an integral safety component. It reasons that the lack of an integral safety component may waive sovereign immunity under the Texas Tort Claims Act only if an integral safety component is completely lacking, rather than merely inappropriate (Texas A & M University v. Paul A. Bishop, 2005, Part III).

In the framework of Bishop’s case, the Texas Supreme Court verifies that the knife was intrinsically unsafe without an appropriate stab pad, and this fact does not mean that an integral safety component was absent for purposes of the TTCA’s waiver of sovereign immunity. Following the reasoning of the Texas Supreme Court, it needs to be explained that stab pad should not be considered an integral component of a knife.
because the stab pad is not an intrinsic or essential part of the knife which makes the knife appropriate for its intended purpose.

As the discussion suggests, the issue of employment is another critical issue in question which determines the applicability of the TTCA’s waiver of sovereign immunity in Bishop’s case. In all applications and sense, the Texas Tort Claims Act defines the term “employee” as an individual who receives payment for his service on a governmental entity, but also provides that this concept “does not include an independent contractor … or a person who performs tasks the details of which the governmental unit does not have the legal right to control” (Texas Tort Claims Act, 1969, Section 101.001 (2)).

In addition to the statutory definition of the term “employee”, the Texas Supreme Court in Bishop’s case puts forth several factors which may help to determine whether or not a worker is an independent contractor. These factors may be specified as follows: “a) the independent nature of the contractor’s business; b) the contractor’s duty to supply essential equipment, provision, instruments, and material to get the job done; c) the contractor’s right to take control over the course of his work, with the exception of the final outcomes; and d) the payment method, either by time or by the job” (Texas A & M University v. Paul A. Bishop, 2005).

In alleging the employee status, Bishop provides evidence that the state university via its employees, the faculty sponsors, had authority to employ and dismiss the directors, as well as to review and approve the script of the performance. Bishop also alleges that the university, through the faculty sponsors, could also monitor what
props were used in the performance by way of putting into force the university’s safety policies (Texas A & M University v. Paul A. Bishop, 2005).

In addition to this, Bishop makes attempts to prove the fact of the faculty sponsors’ employment by relying on Wonios’ testimony that the state university had the right of the final decision concerning the faculty sponsors’ conduct and that the university was entitled to interfere with the faculty sponsors’ decisions and work with a demand making them to comply or withdraw (Texas A & M University v. Paul A. Bishop, 2005).

Additionally, Bishop substantiates his allegations with evidence that the state university made payments to Wonios through the distribution of university funds, and also supplied Wonios with the electricity and facility for the production. The Texas Supreme Court notes that, by reference to the aforementioned evidence, the plaintiff seeks to prove that Wonios is an employee of the state university.

This notwithstanding, the Texas Supreme Court considers Bishop’s position wrong. In denying Bishop’s allegations with regard to Wonios’ employment, the Texas Supreme Court acknowledges that Bishop’s case is very similar to Anchor Casualty Company v. Hartsfield (1965). In the framework of the latter, the Texas Supreme Court decided that a worker who conducted work requiring special skill, provided his personal instruments, arrived and acted at his own will, received payment for his job, and being on the employer’s tax rolls was recognized as an independent contractor as a matter of law (Anchor Casualty Company v. Hartsfield, 1965, para. 471).

In like manner, in Bishop’s case, Wonios applied his special skill, by way of accomplishing a specialized task – directing a performance. Also, it is regulated by the
Texas Supreme Court that Wonios supplied his own props, had no signed contract, and was not included on the university’s tax rolls. The Texas Supreme Court also points out that Wonios’ job was compensated, while the faculty sponsors enjoyed the minimal level of control and interference with regard to their working relationships (Texas A & M University v. Paul A. Bishop, 2005). On these grounds, the Texas Supreme Court affirms the appellate court’s holding that there is no evidence proving that Wonios was an employee, but there is evidence that Wonios was involved in the activities of the state university as an independent contractor.

Important inferences from the case.

Despite the case’s complexity, it is possible to make several inferences with regard to the application of sovereign immunity principles and the TTCA waivers of sovereign immunity to this case and similar cases. The first inference ensuing from the Texas Supreme Court’s reasoning is that the state university’s immunity from suit may be waived only if subject-matter jurisdiction over the plaintiff’s cause of action is established.

The second inference is that a state entity is liable for the acts and omissions of its employees only if it is proved by the plaintiff that the actual actors are covered by the statutory and judicial interpretation of the term “employee”. The Texas Supreme Court differentiates between the worker of a state university who is covered by the legal definition of an “employee”, and the state university worker who is recognized as an independent contractor.

Additionally, it is possible to deduce that the distinction between employees and independent contractors is both substantial for the qualification of whether the state
unit’s immunity is barred under the TTCA, and difficult because the statutory rules on the separation of employees from independent contractors are very scarce and incomprehensive. To that end, it is incumbent on the judiciary to discern employees from independent contractors, or vice versa, discretely in every single case.

The third inference is that a use of tangible personal or real property as a waiver of sovereign immunity under the Texas Tort Claims Act may be actualized only if the plaintiff proves that the “use” took place by a state unit’s employee within the scope of its employment. Moreover, the Texas Supreme Court holds that a use of tangible personal property inadequately must not be interpreted as the property lacking an integral safety component.

Steven Biermeret v. The University of Texas System (2007)

Brief analysis of the facts.

Steven Biermeret, Appellant v. The University of Texas System, Appellee; heard in the Court of Appeals of Texas, Second District, Fort Worth, Texas, on appeal from the 342nd District Court of Tarrant County.

In this case, the appellant questions a holding of the trial court which granted the appellee state university’s plea to jurisdiction. In his action, the claimant alleges that the state university committed a negligent use of tangible personal property and also incurred premises liability (Biermeret v. The University of Texas System, 2007). The claimant substantiates the aforesaid claims with Sections 101.021 (2) and 101.022 of the Texas Tort Claims Act.
The claimant bases his allegations on the fact that he slipped and fell in the shower area at a swimming premises owned by the state university. Given this, the trial court stated that neither the facts pleaded by the claimant nor the jurisdictional evidence presented to the court of first instance did not give rise to the trial court’s subject matter jurisdiction with regard to Biermeret’s claim of negligent use of tangible personal property.

By rejecting the claimant’s arguments, the trial court took into consideration the following circumstance. First, there was no evidence proving that the floor mats on which the claimant slipped and fell were defective. Second, there was no evidence in the case demonstrating that the university’s employees tortiously used the floor mats in the shower facility of the university. The main argument of the university in the trial court was that the university did not misuse the floor mats in the way required by case law for the implementation of the waiver of sovereign immunity.

The court’s holding.

The court of appeals affirmed the trial court’s holding.

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.

In this case, the claimant alleges that the defendant committed tortious acts under Sections 101.021 (2) and 101.022 of the Texas Tort Claims Act. Section 101.021 (2) of the TTCA regulates that the governmental entity’s infliction of personal injury or death under the condition or by a use of tangible personal or real property creates a waiver of sovereign immunity. On the other hand, Section 101.022 of the Texas Tort
Claims Act prescribes that a premise defect also creates a waiver of sovereign immunity.

The importance of this case in terms of this study lies in the fact that the court conducts a circumstantial analysis of the doctrine of sovereign immunity. In its revelations, the court highlights that, as the general rule, governmental units are precluded from being sued unless the statutory law provides an express consent to the suit (*Biermeret v. The University of Texas System*, 2007).

Also, the court of appeals acknowledges the fact that the legislature expressed its consent and granted plaintiffs with a restricted waiver of immunity under the Texas Tort Claims Act. In the court’s opinion, the TTCA allows suing governmental units only in specific narrowly-defined circumstances.

To be more precise, the court of appeals recognizes the following circumstances whereby the TTCA permits suits against state entities for personal injuries: (1) the practical use of publicly owned motor cars; (2) a use or condition of tangible personal or real property; and (3) a premises defect, or the condition of real property (*Biermeret v. The University of Texas System*).

Moreover, the appellate court reasons that if a premise defect constitutes the circumstance of real property as the waiver of sovereign immunity, “the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property” (*Texas Tort Claim Act*, 1969, Section 101.022 (a)).

If the claimant makes payment for the use of the governmental unit’s facilities, the restriction of duty under section 101.022 does not take place and the governmental entity owes the claimant the duty owed to an invitee. According to the court of appeals,
the duty to an invitee stipulates that the facility’s owner must use ordinary care to diminish or remove an unjustified hazard of harm created by a premises condition of which “the owner is or reasonably should be aware” (Biermeret v. The University of Texas System, 2007).

The court of appeals holds that it was incumbent on Biermeret to allege and put forth evidence substantiating his contention that he suffered an injury which was proximately inflicted by a use or condition of tangible personal property. The court of appeals interprets the term “tangible personal property” as something which has a concrete, corporeal, and palpable existence. In this sense, it was incumbent on the claimant to introduce jurisdictional evidence that the defendants utilized personal property and that the use of such property proximately inflicted injuries on him (Biermeret v. The University of Texas System, 2007).

The appellate court asserts that Biermeret has provided the court with no jurisdictional evidence indicating that the floor mats were defective or that the claimant slipped and fell as a result of a defect in the floor mat. Similarly, the court of appeals finds no evidence which may demonstrate that the university’s employees used the floor mats in the shower zone with negligence. Following the court’s reasoning, it is possible to deduce that the premises defect as a waiver of sovereign immunity may be proved in several ways.

First, an injured party may provide evidence sufficient to demonstrate that the defect in the state entity’s property existed at the moment when injury was inflicted. Second, an injured party may substantiate that the state unit’s personnel negligently used the state unit’s property.
After taking into consideration all appropriate evidence provided by the parties to the dispute, the court of appeals arrives at the conclusion that the evidence did not establish a jurisdictional fact as to whether the university used tangible personal property (Biermeret v. The University of Texas System, 2007).

As far as the Biermeret’s premises liability claim is concerned, the claimant alleges that the condition of the university’s premises imposed an unreasonable hazard of injury. Thus, the unreasonable dangerous condition is substantiated with the arguments that the flooring in the shower area as well as the flooring in the surrounding area was dangerously slippery and imposed an unreasonable risky condition.

Moreover, Biermeret stresses on the fact that the defendant either was aware or should have been aware of that dangerous condition, “because defendant was made aware of the condition through prior incidents and complaints prior to Mr. Biermeret’s injury” (Biermeret v. The University of Texas System, 2007).

The aforementioned allegations are substantiated with existing emails sent to the university’s employees concerning at least one other incident of a slip and fall in the women’s shower zone of the university’s swimming facility. The court of appeals writes that the Texas Tort Claims Act requires Biemeret to allege and substantiate that a premises defect emerged from a condition inherent to real property and that the state university would, were it a private person, be liable to Biemeret under the Texas law.

Given this, the court of appeals verifies that the university, if it were a private entity, would not be liable to Biermeret under the recent holding of the Texas Supreme Court. In Brookshire Grocery, the Texas Supreme Court ruled that, because the plaintiff did not present evidence that the grocery store had actual or constructive knowledge
“that the particular ice cube that the plaintiff slipped on was on the floor, the plaintiff had failed to prove the grocery store’s actual or constructive knowledge of the unreasonably dangerous condition” (Brookshire Grocery v. Mary Francis Taylor, 2006).

The appellate court in Biermeret v. The University of Texas System (2007) refers to the case of Brookshire Grocery, particularly because the jurisdictional facts in the two cases are highly similar. Hence, following the reasoning of the Texas Supreme Court in Brookshire Grocery, it is possible to infer that, in Biermeret v. The University of Texas System (2007), it was incumbent on Biermeret to prove that the university possessed actual or constructive knowledge the specific mat that Biermeret slipped on was slippery and damp, and that the university possessed actual or constructive knowledge of the unreasonably dangerous condition.

Important inferences from the case.

From this case, it is possible to make several inferences. The first inference is that the Texas Tort Claims Act prescribes only general rules on premises liability claims and negligent use of tangible personal property claims, without establishing the detailed conditions upon which such claims supersede a governmental unit’s sovereign immunity. The second, the court of appeals made it clear that sovereign immunity is intrinsic to all governmental units and requires no additional affirmation by the judiciary, but may be waived only if the legislature expressly consents to the suit.

The third inference is that the TTCA’s waivers and exceptions to sovereign immunity are limited rather than absolute. This means that the TTCA permits suits to be filed against governmental entities in three specific narrowly-defined circumstances: a)
the use of publicly owned motor cars; b) a condition or use of tangible personal or real property; and c) a premises defect, or the condition of real property. The fourth inference is that liability for premises defects is connected with a use or condition of tangible personal or real property.

The fifth inference is that if the injured party paid for the use of the premises, the limitation of duty under section 101.022 does not apply and the state unit owed the claimant the duty owed to an invitee, that is the duty of ordinary care to diminish or remove an unreasonable risk “created by a premises condition of which the owner is or reasonably should be aware” (Biermeret v. The University of Texas System, 2007).

The sixth inference is that the waiver of sovereign immunity in such cases will be established only if the claimant claims that the usage of the property proximately caused the injury, whereas mere involvement of the property is insufficient. The seventh inference is that it is always incumbent on the injured party to prove that the state unit was aware or should have possessed actual or constructive knowledge of the unreasonably dangerous condition, such as the water on which Biermeret slipped was actually on the floor in the shower area at the exact moment of time.

The University of Texas v. Hermelinda Amezquita (2009)

Brief analysis of the facts.

The University of Texas, Appellant v. Hermelinda Amezquita, Appellee; heard in the Court of Appeals of Texas, Third District, Austin, Texas, on appeal from the District Court of Travis County, 201st Judicial District.
Appellant university challenged a judgment from the trial court which dismissed its plea to jurisdiction in an action brought by appellee under Sections 101.001-101.109 of the Texas Tort Claims Act (*The University of Texas v. Hermelinda Amezquita*, 2009).

The case’s facts are as follows. The appellee slipped on a metal plate on a walkway close to the university’s baseball stadium, because the plate was slippery after a rainfall. Consequently, the injured party claimed that the plate was a premises defect for which the university’s sovereign immunity had been waived under the TTCA. The defendant’s plea to jurisdiction was dismissed. The defendant appealed.

The court’s holding.

The court of appeals reversed the trial court’s decision and rendered a judgment granting the university’s plea to jurisdiction and denying the suit for absence of jurisdiction.

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.

According to the case, in reversing the trial court’s decision, the court of appeals holds that an engineer’s affidavit made it clear that the metal plate which was alleged by the plaintiff as a premises defect was a component of the original design of the baseball stadium which belonged to the university (*The University of Texas v. Hermelinda Amezquita*, 2009).

In addition to this, the court of appeals notes that the construction and incorporation of the metal plate into the stadium sidewalk was made in accordance with
the architectural plans and original design. This assertion of the court of appeals also rests on the engineer’s affidavit.

Another finding of the court of appeals lies in the fact that the injured party, the appellee, provided the court with no evidence sufficient to refute the engineer’s affidavit. Following the reasoning of the court of appeals, it is possible to infer that an engineer’s affidavit must be considered relevant evidence to settle the issues of jurisdiction. Thus, when deciding on the case, the court of appeals reviewed the dismissal of a plea to the jurisdiction de novo (The University of Texas v. Hermelinda Amezquita, 2009).

In justifying its decision, the court of appeals contends that it is always incumbent on the plaintiff to carry the burden of proving facts which would establish the trial court’s jurisdiction. Also, the court implies that the decision on jurisdiction issues must be made on the basis of facts which are found or which are undisputed.

Also, in deciding whether the doctrine of sovereign immunity may be enjoyed by the appellant or not, the court of appeals refers to Section 101.056 of the Texas Tort Claims Act, according to which sovereign immunity remains in the hands of the State if the law attributes the performance or nonperformance of the act to the discretion of the state unit (The University of Texas v. Hermelinda Amezquita, 2009).

This implies that if the act is discretionary, it does not waive sovereign immunity. In this context, the court of appeals comes to the conclusion that the design of any public work, including but not limiting to the construction of a roadway, is a discretionary function which is based on a wide range of policy decisions, and thus state units responsible “may not be sued for such decisions” (The University of Texas v. Hermelinda Amezquita, 2009).
Another justification for the university’s immunity is that construction plans designed by state engineers need to be treated as paradigmatic discretionary decisions immune from suit. This means that the preference for one engineering design over another is inherent to the performance of discretion. Moreover, the court of appeals affirms that the aforesaid rule is applicable to all public works, and not only engineering plans.

In addition to this, the court of appeals provides that its conclusion might differ if the plaintiff had alleged the defect was not of the presence of the metal plate, but of its installation, “for the Act waives immunity for negligent implementation of discretionary decisions” (The University of Texas v. Hermelinda Amezquita, 2009).

However, there is no record in the case showing that Amezquita asks for consideration of the issue of defective construction, positioning, or maintenance of the metal plate. In the appellate court’s opinion, the major shortcoming of the injury party’s suit lies in the plaintiff’s main argument that the “defect” at issue is merely the university’s decision to use a metal plate which is potentially slippery.

All things considered, the court of appeals arrives at the conclusion that there is sufficient jurisdictional evidence proving that the university’s incorporation of a metal plate into a sidewalk was a discretionary decision, and thus the university preserves sovereign immunity under the Texas Tort Claims Act.

Important inferences from the case.

From this case, it is possible to derive a number of essential inferences. The first inference is that discretionary decisions of state units are not covered by the provisions
of the Texas Tort Claims Act, and thus cannot give rise to a waiver of sovereign immunity. The second inference is that a premises defect as a waiver to sovereign immunity stems from the construction, maintenance, or positioning of an object, but not in the engineering design or architectural development of the object in conformity with a discretionary decision of a state unit.

The TTCA prescribes that there are no exceptions or exemptions to sovereign immunity, where a claim rests on the failure of a state entity to exercise an act which this entity is not required by law to exercise; “or 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” (Texas Tort Claims Act, 1969, Section 101.056).

This means that the absence of law regulating the design of the metal plate (a removable drainage trench cover) as a component of the university’s baseball stadium retains the university’s sovereign immunity from suit concerning this metal plate’s design under Section 101.056 of the Texas Tort Claims Act.

The University of Texas M. D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, Individually and as Next Friends of Preston Baker (2012)

Brief analysis of the facts.

The University of Texas M.D. Anderson Cancer Center and the University of Texas System, Appellants V Preston Baker & Jennifer Baker, Individually and as Next
Friends of Preston Baker, Jr., Jessica Baker, Cayla Baker, and Caleb Baker; heard in the Court of Appeals of Texas, Fourteenth District, Houston, Texas, on appeal from the 333rd District Court, Harris County, Texas.

In the framework of this case, the appellants, a state university medical center and the university system, filed an interlocutory appeal from an order of the 333rd District Court, Harris County (Texas), which dismissed their plea to the jurisdiction “in a tort suit filed by appellee parents alleging personal injuries to appellee children” (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012). The main facts of the case are as follows. The plaintiff complained that a medical center’s machine, allegedly absent “integral safety components to protect against lead exposure”, had polluted a machinist’s clothing “and that his children had sustained personal injuries as a result of their exposure to lead dust on his clothing when he went home” (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012).

The trial court decided that governmental immunity of the medical center was waived under Section 101.021 (2) of the Texas Tort Claims Act. According to Section 101.021 (2) of the Texas Tort Claims Act, a state entity is liable for the death or personal injury inflicted “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” (Texas Tort Claims Act, 1969, Section 101.021 (2)).

The trial court established that the plaintiff both provided sufficient description of the use of tangible personal property, which was the milling machine, and successfully
substantiated that the use of the milling machine was an intrinsically hazardous circumstance, in view of the fact that this machine lacked integral safety components. The trial court highlighted that the causation in the case was adequately established. Thus, the trial court relied on the facts demonstrating that the plaintiff’s children were exposed to the lead dust, and that the lead dust could be traced directly and immediately back to the use of the milling machine. On these grounds, the trial court considered the allegations of duty and breach sufficient.

The court’s holding.

The appellate court affirmed the trial court’s decision dismissing the plea to the jurisdiction and “remanded for further proceedings” (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012).

Doctrinal study of the arguments concerning sovereign immunity and the TTCA.

Preston Baker, Jennifer Baker, and their four children, base their claims on the provisions of the TTCA in order to make the defendants liable for the injuries inflicted on the children. The University of Texas System and the Proton Therapy Center-Houston Ltd., L.L.P. contend that sovereign immunity has not been waived under the TTCA, and thus they cannot be held liable.
The appellate court verifies that the Bakers’ arguments are sufficient to establish a waiver of sovereign immunity. The Bakers allege that the defendants used motor-driven equipment, a milling machine. The Bakers also allege a condition of tangible personal property which leads to a waiver of immunity because of the absence of integral safety components on the milling machine.

The court of appeals considers both of these allegations independently sufficient to state a waiver of sovereign immunity (*The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker*, 2012). As the matter of fact, these two allegations rest on the provisions of the TTCA which waive sovereign immunity under a condition or use of tangible personal or real property (Section 101.021 (2)), or use of publicly owned motor-driven vehicle or motor-driven equipment (Section 101.021 (1)).

As far as the first allegation is concerned, the court of appeals prescribes that, for sovereign immunity to be waived, it is incumbent on the plaintiff to prove that an injury was inflicted by the use or condition of tangible personal property. In this sense, the Texas Supreme Court defines the term “use” as “to put or bring into action or service; to employ for or apply to a given purpose” (*San Antonio State Hospital v. Cowan*, 2004).

In establishing the use or condition of tangible personal property, the court of appeals in *The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker* (2012) examined conditions which do not establish the use of tangible personal property.

Thus, the court of appeals argues that a mere provision, furnishing, or permission of the access to tangible property does not actually mean a “use” in light of the TTCA.
That is, sovereign immunity cannot be waived when the unit of government merely permits someone else to make use of the property and nothing more (Dallas County v. Posey, 2009).

In the framework of The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker (2012), the court of appeals ascertains that when a governmental entity provides an individual with the access to tangible personal property, this does not mean the use of such property.

Also, the court of appeals notes that the mere failure to use tangible property must be considered a waiver to sovereign immunity. For instance, in Kerrville State Hospital v. Clark (1996) and Dallas County v. Posey (2009), it is established that a governmental entity’s failure to substitute a corded telephone, which was subsequently used for the committal of suicide, did not constituted a use of tangible personal property. Similarly, in, the failure of faculty advisors to diligently supervise the students and director in a play, who used a real knife in lieu of a fake one – did not constitute a use of tangible personal property (Texas A&M University v. Bishop, 2005).

In the framework of The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker (2012), attempting to refute the Bakers’ allegations, the University of Texas M.D. Anderson Cancer Center and the University of Texas System stick to the arguments of “various failures… regarding the non-use of property” and that “the real substance of the Bakers’ allegations focus on a non-use of property”, for which no waiver of sovereign immunity is prescribed under the provisions of the Texas Tort Claims Act.
The appellants argue that the Bakers’ are responsible for the injuries inflicted due to a wide spectrum of failures, such as the failure to supply themselves with safety equipment, including protective clothing, failure to stick to the OSHA regulations, as well as the failure to take precautions and avert the take-home exposures.

Nevertheless, the appellate court reasons that the appellants’ rebuttals are irrelevant, because the current legal case is not comparable to cases in which the plaintiffs substantiated their claims for liability on the grounds of “non-use” of tangible personal property.

The court of appeals in this case verifies that the “various failures”, like in many other negligent cases, are rooted in the appellants’ breaches of a legal duty of care relating to the measures that they might have taken to avert the injury allegedly resulting from the appellants’ affirmative conduct (*The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker*, 2012).

Thus, according to Section 3 of the Restatement (Third) of Torts (2010), negligence often stems from the failure to take reasonable preventive measures… such a failure can be delineated as an omission. In confirmation to this statement, the Black’s Law Dictionary (2011) defines negligence as “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm…” (p. 508).

From the aforesaid statement, the court of appeals makes the inference that the allegation of “various failures” does not indicate the “non-use” character of this case over which the trial court would be devoid of jurisdiction.
Despite the difficulties in determining whether the claim rests on the use or condition of tangible property, the court of appeals still comes to a conclusion that the milling machine as a tangible property was applied or employed to a given purpose – to make bronze apertures, and thus the Bakers’ claims provided sufficient descriptions of a use of tangible personal property.

The court of appeals reasons that the liability of a governmental entity may also be established if the entity provides property having an intrinsically dangerous condition which poses a risk “when the property is put to its intended and ordinary use” (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012). Furthermore, the court of appeals points out that the liability under this theory is infrequent and restricted to the conditions when an integral safety component is absent.

The court of appeals acknowledges that the Bakers’ allegations put the milling machine squarely within existing case authority and, thus, substantiates a waiver of sovereign immunity through the condition of tangible personal property. The court of appeals also affirms that the Bakers’ correctly identify a hazardous condition of the milling machine which completely lacks integral safety components (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012). Moreover, the court of appeals verifies that the appellants as governmental entities did not merely furnish, provide, or permit access to the milling machine, but also employed people to use a machine which, in the course of its intended and ordinary operation, resulted in a hazard in the form of lead dust.
After acknowledging the truth of the Bakers’ allegations concerning a use or condition of tangible property, the court of appeals turns to the problem of causation. Thus, according to Section 101.02 (2) of the Texas Tort Claims Act, in order for sovereign immunity to be waived, personal injury or death must be proximately inflicted by the condition or use of tangible property. In other words, it is essential to establish the direct and immediate nexus between the use of the tangible property and the injury inflicted as a result of such use.

To ascertain whether sovereign immunity has been barred under the provisions of the TTCA, the court of appeals in *The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker* (2012) uses the traditional concepts of proximate cause, such as “cause-in-fact and foreseeability”. This concept of proximate cause articulates that the allegedly negligent omission or act must be treated as a significant cause of injuries, and that, without the negligent act or omission no harm would have been inflicted (*Columbia Medic. Ctr. of Las Colinas Inc. v. Hogue*, 2008).

Also, according to the principles of case-in-fact, it is essential to establish that the negligent act or omission has been the direct and immediate cause for the inflicted injuries. The court of appeals in the Bakers’ case highlights that a defendant’s negligence is not a substantial factor if the negligence only furnishes a circumstance under which the injuries are possible, and nothing more.

In the Bakers’ case, the appellants assert the lack of cause-in-fact, because: (a) the milling machine only furnished the condition under which the alleged injury became possible; (b) the lead dust merely gave rise to a circumstance which subsequently
inflicted injury on the Baker children; (c) from the geographical, temporal, and causal perspectives, there is a very attenuated and distant relationship between the creation of the lead dust in the PTC, and infliction of injury on children in the Baker home; (d) the source of the lead does not create consequences in the form of injuries.

As far as the concept of foreseeability is concerned, the court finds that foreseeability takes place if the actor, as an individual of ordinary mind, should have anticipated hazards his tortious act creates for other individuals (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012).

Importantly, the court in this case ascertains that a defendant’s conduct is not always a proximate cause of the plaintiff’s injuries. The lack of a proximate cause may be experienced particularly when a third party’s act interrupts or replaces the defendant’s negligence.

This means that the causal nexus in such cases may have a place only if the defendant’s tortious act or omission is not associated with any other superseding cause, but should have been anticipated at the time of the defendant’s negligence. From this statement, it is possible to infer that if a superseding cause interrupts the relationship between the defendant’s act or omission and the plaintiff’s injuries as a concurrent cause, then the defendant may substantiate the recourse to sovereign immunity.

In the framework of the discussed case, the defendants’ contend that Preston Baker should be considered the intervening cause which interrupted the relationship between the lead dust and the harmful infliction of injuries on his children. In other words, the defendants argue that Preston Baker allegedly carried the lead dust to his
home and thus superseded the “concurrent” cause. In addition to this, the defendants claim that the lead dust is not intrinsically dangerous without a supplementary deliberate action, such as the transfer of the dust to the children which resulted in the inhalation or ingestion of such dust (The University of Texas M.D. Anderson Cancer Center and the University of Texas System v. Preston Baker & Jennifer Baker, 2012).

Important inferences from the case.

Having analyzed many issues of this case in detail, it is possible to make several inferences concerning the judicial interpretation of sovereign immunity and the Texas Tort Claims Act. The first inference is that in order to prove a waiver to sovereign immunity under the TTCA, it is essential for the plaintiff to prove a cause of action. The court utilizes two concepts for the establishment of the cause of action in such cases: a) cause-in-fact; and b) foreseeability.

The second inference is that the issues of sovereign immunity may be raised in different courts several times. In other words, the defendants' failure to include the issue justifying the resort to governmental immunity as the ground in their plea to the jurisdiction does not preclude the defendants from raising the same issues in the court of appeal. The court rules that if a governmental unit refers to the theory of sovereign immunity for the first time on appeal, and the plaintiffs do not adequately allege jurisdictional facts, the case needs to be remanded for further procedures.

The third inference is that it is incumbent on a plaintiff to establish the defendant’s waiver to sovereign immunity as a matter of law. Otherwise, the defendant may resort to sovereign immunity without proving the relevance of such right.
SUMMARY, FINDINGS, & CONCLUSIONS

Summary

The conducted research shed light on the legal dimensions of sovereign immunity as a legal doctrine whereby the sovereign or state is considered immune from civil suits or criminal prosecution due to its incapability to commit an offence or other legal misconduct. The pros and cons of the doctrine of sovereign immunity in terms of Texas higher education were approached.

Findings

Findings from literature review

The doctrine of sovereign immunity provides governmental entities and their employees with protection against suits for tort liability. The circle of those who may enjoy the benefits of the doctrine are not only governmental agencies as legal entities, but also employees of governmental organizations.

There are two forms of sovereign immunity: jurisdiction and execution. Finke (2011) defines sovereign immunity as a legal doctrine which implies a specific rule of customary international law. Additionally, Finke (2011) understands sovereign immunity as a legally binding principle. This means that the state is incapable to set the scope and limits of sovereign immunity within their legal orders as long as they are bound by other principles of international law (Finke, 2011, p. 853).
Sovereign immunity should be viewed as a principle of customary international law, not statutory international law or treaty international law. The idealists are prone to deny sovereign immunity in light of international crimes and fundamental human rights, whereas the realists focus on the essential necessity of sticking to the precepts of sovereign immunity in order to maintain friendly and peaceful relations among sovereign states.

Some experts conceptualize sovereign immunity as a general rule which can be realized as long as sovereign states have not accepted any limitations (Fox, 2008). From the contrasting point of view, sovereign immunity is viewed as a concept which is devoid of its legal binding effect under customary international law. It is possible to notice that the disparity between theoretical and actual meanings of sovereign immunity is affected by the lack of detailed interpretations on how sovereign immunity must be evaluated and granted in every single case.

The idea that sovereign immunity is a specific rule is rejected by some authors because the current law does not provide a precise extent to which sovereign immunity is applied to individual cases. The definition of sovereign immunity as a legally binding principle is more beneficial in the context of both international law and federal law, because in contrast to a specific rule, the principle of sovereign immunity supplies states with the entitlement to determine the scope of sovereign immunity within their legal orders by taking into consideration the restrictions imposed by international law.

The concept of sovereign immunity is multi-faceted, and thus it is sometimes difficult to determine its scope and extent. Taking into consideration the complex nature of this phenomenon, the scholars are prone to differentiate between two basic forms of
sovereign immunity: a) the immunity from jurisdiction; and b) the immunity from execution, also known as immunity from enforcement (Reinisch, 2006). The main distinction between jurisdictional immunity and immunity from enforcement measures is made in the practice of courts of justice.

Courts in every state recognize the immunity of a foreign sovereign. This limitation is rooted in the period of personal sovereignty when the domestic sovereign (government and state) was above the law. All this highlights the restrictive rather than absolute nature of sovereign immunity. The restrictive nature of jurisdictional immunity implies that sovereign states are only granted immunity with regard to their official (governmental) acts, but not with regard to their private (commercial) conduct (Malanczuk, 1997; Wiesinger, 2006).

In contrast to the restrictive nature of jurisdictional immunity, immunity from enforcement measures is absolute. The absolute character of immunity from enforcement measures is put into question in terms of the academic debates. In addition to scholars, a number of domestic courts have postulated that immunity from enforcement measures is also no longer absolute (Reinisch, 2006, p. 804).

Sovereign immunity can shield states from the jurisdiction of other states only under specific circumstances. These specific circumstances were discerned in the customary international law and explicated by means of the restrictive theory of sovereign immunity. States are capable to conduct two types of conduct: 1) acts *jure imperii*; and 2) acts *jure gestionis*. The former means official conduct, whereas the latter implies private conduct. The operation of sovereign immunity is restricted to official (public) conduct of the state.
The rule of the restrictive state immunity contradicts the doctrine of absolute immunity \textit{ratione personae}. According to this doctrine, the principle of absolute immunity extends even to cases concerning the allegations of international crimes to all serving state officials and diplomats. In contrast to it, the doctrine of restrictive sovereign immunity is reduced to the official acts of states only. “The rule of restrictive sovereign immunity restricts the immunity to cases in which the state has realized its official capacity as a sovereign political entity” (Allen, 1933, p. 301).

The tort exception, coupled with the private-public distinction, has also been regarded as a significant rule-exception concept “which assists the progress of establishing the jurisdiction of the forum state in circumstances of massive violations of fundamental human rights” (Finke, 2011, p. 861). Tort liability constitutes a partial exception to sovereign immunity. That is, some tortious conduct from the side of a state may be recognized as an exception to sovereign immunity, whereas other tortious acts of a state do not preclude the state from having recourse to sovereign immunity.

A foreign state may not invoke immunity from measures of constraint or jurisdiction if the explicit consent to the exercise of the relevant type of jurisdiction has been given either by international agreement, or in a written contract, or by a declaration concerning the particular case, or by a voluntary submission to jurisdiction. Also, it is important to note that the consent to jurisdiction does not mean consent to measures of constraint (Brownlie, 1987).

The arguments against the applicability and practicability of sovereign immunity are based on the inconsistency of state practices and the appeal to territorial sovereignty of the forum state which dictates the prevalence over any claim of
sovereignty to which foreign state may have recourse to (Lauterpacht, 1951).

Nowadays, there is no agreement among scholars on their understanding of the case. Some experts are disposed to think that the US Supreme Court acknowledged the assumption that sovereign immunity is granted as a matter of courtesy, rather than a matter of law (Caplan, 2003). Alternatively, Appelbaum (2007) expresses confidence that the legal wording of the case of *The Schooner Exchange v. McFadden* (1812) can be interpreted either way.

Sovereign immunity is an institution which originates from public international law. To that end, the historical evolution of the concept of sovereign immunity in the world needs to be explored largely through the prism of public international law. The doctrine of sovereign immunity has substantially changed with the flow of time.

The long-standing doctrine of sovereign immunity has emerged from the theory of absolute sovereignty, which is based on the structure of the feudal system on the one hand, and on the fiction that the King could do no wrong. There is a historical assumption, or, in other words a hypothesis that this shift was accomplished during the emergence of the nation states. This shift implied that “what was once accepted as the mere personal immunity of an individual was associated with the concept of sovereignty in the final analysis” (Pugh, 1953, p. 478).

With the expansion of governmental functions, the courts in England “allowed suits against the governmental employee or official who had in fact committed the wrongdoing” (Pugh, 1953, p. 480). Sovereign immunity dates back to the time of feudalism in Europe. The roots of the doctrine are in the fiction that ‘the King can do no
wrong.’ Nowadays, sovereign immunity is recognized as a principle of jurisprudence in all civilized countries.

Some scholars argue that the suit against a state officer does not equal to the suit against the state. Taking into consideration the existence of the legal space for state intervention, later cases focused more on the limitation of the officer remedy, and, at the same time, clarified that “only prospective relief may be had against state officials sued in their official capacity” (Young, 2000, p. 10; Edelman v. Fordan, 1974). Under the provisions of the Federal Tort Claims Act, the United States is considered liable, in the same manner, and to the same extent as a private individual under like conditions, “but [is not] liable for interest prior to judgment for punitive damages” (Federal Tort Claims Act, 1946, s 2674).

The Federal Tort Claims Act was enacted in 1946 as a response to the 1945 B-25 Empire State Building crash (Richmann, 2008). For the first time, federal legislation provided American citizens with the right to sue the federal government. Notwithstanding the full-scaled operation of the Federal Tort Claims Act which granted the right for private individuals to sue the federal government for a wide array of torturous acts such as acts of negligence, personal injury claims, etc., states still sought protection under the prescriptions of sovereign immunity until recent times.

The case law regulating sovereign immunity in Texas is intertwined with the case law regulating sovereign immunity at the federal level. In Texas, similar to other states, the doctrine of sovereign immunity is rooted in the common law doctrine that a sovereign cannot commit a legal wrong, thus should be immune from civil suit (Phelan, 2011; Humane Society of the US v. Clinton, 2001). Notwithstanding the feudal roots,
the US Supreme Court delineated the doctrine of sovereign immunity as a court-made rule which “rests on considerations of policy given sanction by [the] Court” (Phelan, 2011, p. 750). However, the case law of the United States on sovereign immunity was associated with inconsistency, uncertainty and ambivalence, until the adoption of the Federal Tort Claims Act in 1946.

In the State of Texas, the doctrine of sovereign immunity encircles two principles: immunity from liability and immunity from suit (Phelan, 2011, p. 729). The principle of immunity from suit as established by the Texas Supreme Court provides that “immunity from suit prohibits suits against the State unless the State expressly consented to the suit” (Wichita Falls State Hospital v. Taylor, 2003). The State of Texas may have recourse to sovereign immunity from suit in a plea to jurisdiction “which is a dilatory plea that not only seeks dismissal of a case for lack of subject-matter jurisdiction but also defeat[s] a cause of action without regard to whether the claims asserted have merit” (p. 730).

There are two underlying principles of sovereign immunity in the State of Texas: a) immunity from suit; and b) immunity from liability. As far as the first principle is concerned, the State of Texas is shielded by sovereign immunity without legislative consent, even if the liability of the State is not disputed. The second principle provides that the State of Texas is entitled to have recourse to immunity from liability in cases when the legislative body has prescribed consent to the suit. The State’s right to sovereign immunity will be curtailed only if the State provides its manifest consent to the suit. Moreover, the mere acknowledgement by the State of its liability is not sufficient for the derogation of sovereign immunity, because the rule of consent precludes a remedy
under the Texas law as long as the legislature gives the consent to suit. This means that the affirmation of its liability is insufficient for the suit against the State without the legislative consent to such a suit.

The main rationale of immunity from liability lies in the protection of the State of Texas from possible judgments even under the conditions when the legislature has expressly consented to the suit. Hence, it is up to the State of Texas to decide whether to acknowledge its liability to the suit or not. Also, if the legislature recognizes the suit against the State as lawful, it is incumbent on the State of Texas to decide in every single case on whether to affirm its liability or not (Shaunessy, 2001, p. 93).

Both the State of Texas and all of its political subdivisions have complete sovereign immunity, including immunity from both liability and suit. This means that neither the State of Texas nor any of its agencies may be sued for the torts of its agents until the adoption of a constitutional or statutory provision which will waive immunity from suit and liability. The experts recognize another form of sovereign immunity which is applicable in the context of the State of Texas – the Eleventh Amendment immunity. For instance, Durchslag (2002) analyzes the Eleventh Amendment to the US Constitution as an “evolutionary material from diversity of jurisdiction to sovereign immunity” (Durchslag, 2002, p. 47). According to the scholar, the main benefit of the Eleventh Amendment lies in the fact that it is unambiguous. The author characterizes the Eleventh Amendment as a bar to federal judicial power only if the state is a formal party (Durchslag, 2002, p. 51). That is, the Eleventh Amendment restricts federal jurisdiction only in cases in which federal jurisdiction rests on the nature of the parties.
A State’s waiver of sovereign immunity in its own courts should not be considered a waiver of the Eleventh Amendment immunity in the federal courts. The two forms of sovereign immunity are different even though they rest on the concept that “it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent” (Florida Prepared Postsecondary Education Expense Bd v. College Sav. Bank, 1999). Immunity of cities depends on whether the alleged action stemmed from the area of governmental functions or the area of a proprietary activity.

The TTCA has established a restricted waiver of sovereign immunity for specific torts: via the TTCA, “the legislature waived immunity from both suit and liability for the claims authorized therein” (Shaunessy, 2001, p. 104). Despite the provision of definite circumstances under which sovereign immunity can be waived, the scope of the Act’s waiver of immunity is considered poorly prescribed and thus requires further interpretation.

Findings from the TTCA and case study

The Texas Tort Claims Act is a conglomeration of statutes which aim at determining when a governmental agency may be liable for tortious acts under Texas State law (Edgar & Sales, 2013). Prior to the adoption of the Act, there was no possibility for private persons to recover damages from state or local governmental entities for injuries originating from the actions of a government official or employee in the performance of a governmental function.

A higher education establishment may shield itself with sovereign immunity from being held liable for conduct of its employee only if the employee acts according to his
or her legal authority. The failure of the employee to act within the scope of his or her legal authority gives rise to the exclusion to the doctrine of sovereign immunity. A suit for the recovery of money paid is not precluded by the doctrine of sovereign immunity if the money to be recovered “amounts to the taking of private property without due process and would therefore offend Article 1, sec. 19 of the Texas Constitution, as well as the Fourteenth Amendment of the United States Constitution” (James Byrnes v. University of Houston et al., 1974).

In order for a state entity to be held liable for the instance of negligence leading to injury due to the premises liability defect, it is crucial for the plaintiff to prove that the defendant possessed sufficient knowledge about the fact that a particular condition created by the defendant posed an unreasonable risk of harm. The Texas Tort Claims Act (TTCA) restricts the governmental obligation owed to a plaintiff to the duty that a private person owes to a licensee on private property, “unless the claimant pays for the use of the premises” (The University of Texas Pan American v. Tony Aguilar and Kay Marie Aguilar, 2007).

The only exception to this rule of dangerous condition lies in the actual knowledge by a licensor of a dangerous condition, about which the licensee is not warned or the condition is not made reasonable safe. In other words, the Texas Supreme Court highlights the plaintiff’s obligation to prove the existence of the state’s actual knowledge of a dangerous condition. According to the Texas Supreme Court the actual knowledge may be proved only through the provision of circumstantial evidence, whereas constructive knowledge of the danger is insufficient for such substantiation. The
inference is that discretionary decisions of state units are not covered by the provisions of the Texas Tort Claims Act, and thus can give rise to a waiver to sovereign immunity.

A premises defect as a waiver to sovereign immunity stems from the construction, maintenance, or positioning of an object, but not in the engineering design or architectural development of the object in conformity with a discretionary decision of a state unit. The TTCA prescribes that there is no exception or exemption to sovereign immunity where a claim rests on the failure of a state entity to exercise an act which this entity is not required by law to exercise; “or 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” (Texas Tort Claims Act, 1969, Section 101.056). This means that the absence of law regulating the design of a structure retains the university’s sovereign immunity from suit concerning the design under Section 101.056 of the Texas Tort Claims Act.

In order to prove a waiver to sovereign immunity under the TTCA, it is essential for the plaintiff to prove a cause of action. The court utilizes two concepts for the establishment of the cause of action in such cases: a) cause-in-fact; and b) foreseeability. The issues of sovereign immunity may be raised in different courts several times. In other words, the defendants’ failure to include the issue justifying the resort to governmental immunity as the ground in their plea to the jurisdiction does not preclude the defendants from raising the same issues in the court of appeals.

If a governmental unit refers to the theory of sovereign immunity for the first time on appeal, and the plaintiffs do not adequately allege jurisdictional facts, the case needs
to be remanded for further proceedings. It is incumbent on a plaintiff to establish the defendant’s waiver to sovereign immunity as a matter of law. Otherwise, the defendant may resort to sovereign immunity without proving the relevance of such right. The Texas Tort Claims Act prescribes only general rules on premises liability claims and negligent use of tangible personal property claims, without establishing the detailed conditions upon which such claims supersede a governmental unit’s sovereign immunity.

If the injured party paid for the use of the premises, the limitation of duty under section 101.022 does not apply and the state unit owed the claimant the duty owed to an invitee, that is the duty of ordinary care to diminish or remove an unreasonable risk “created by a premises condition of which the owner is or reasonably should be aware” (Biermeret v. The University of Texas System, 2007). The waiver of sovereign immunity in such cases will be established only if the claimant claims that the usage of the property proximately caused the injury, whereas mere involvement of the property is insufficient. The finding is that it is always incumbent on the injured party to prove that the state unit was aware or should have possessed actual or constructive knowledge of the unreasonably dangerous condition.

The state university’s immunity from suit may be waived only if subject-matter jurisdiction over the plaintiff’s cause of action is established. A state entity is liable for the acts and omissions of its employees only if it is proved by the plaintiff that the actual actors are covered by the statutory and judicial interpretation of the term “employee”. In this, the Texas Supreme Court differentiates between the worker of a state university
who is covered by the legal definition of an “employee”, and the state university worker who is recognized as an independent contractor.

The distinction between employees and independent contractors is both substantial for the qualification of whether the state unit’s immunity is barred under the TTCA, and difficult, because the statutory rules on the separation of employees from independent contractors are very scarce and incomprehensive. To that end, it is incumbent on the judiciary to discern employees from independent contractors, or vice versa, discretely in every single case.

A use of tangible personal or real property as a waiver of sovereign immunity under the Texas Tort Claims Act may be actualized only if the plaintiff proves that the “use” took place by a state unit’s employee within the scope of their employment. Moreover, the Texas Supreme Court holds that a use of tangible personal property inadequately must not be interpreted as the property lacking an integral safety component.

The TTCA statutory acts have application to the cases concerning issues of sovereign immunity and waivers to sovereign immunity only if their provisions have direct effects on plaintiffs. This means that it is impossible to substantiate the claim to a waiver of sovereign immunity with the provisions of a statutory act if that statutory act is not applicable to the plaintiff.

Section 101.056 of the Texas Tort Claims Act does not prescribe a waiver of sovereign immunity, but establishes an exception to all waivers of sovereign immunity under the TTCA. In other words, the discretionary function is an exception but not a waiver of sovereign immunity under the TTCA. Hence, it follows that it is useless to
allege a waiver of sovereign immunity by reference to Section 101.056 of the TTCA. The design decisions are considered discretionary and, thus, present no waiver to sovereign immunity. The “non-use” of tangible personal or real property is not actionable under the Texas Tort Claims Act. This means that only a use or condition of tangible personal or real property gives rise to a waiver of sovereign immunity under the provisions of the Texas Tort Claims Act.

Conclusions

The conducted research helped to achieve all research objectives: 1. The views and positions of academics on the viability and constitutional legitimacy of sovereign immunity as a legal doctrine were investigated; 2. The case law underlying the doctrine of sovereign immunity was reviewed; 3. The judicial reasoning on the specificities and extent to which the doctrine of sovereign immunity can be applied was examined; 4. The reasoning of legislators on the specificities and extent to which the doctrine of sovereign immunity can be applied was analyzed in detail; 5. The judicial reasoning on the specificities and extent to which the TTCA’s waivers of sovereign immunity are recognized and applied in terms of Texas higher education cases was scrutinized; 6. The judicial reasoning on the specificities and extent to which exceptions to the TTCA’s waivers of sovereign immunity are recognized and applied in terms of Texas higher education cases was investigated.

After everything has been given due consideration, it is possible to generalize that the conducted study provided answers to the research questions. The primary question of research, to what extent is the doctrine of sovereign immunity recognized
and applied in Texas higher education cases, was answered as comprehensively as possible. It was ascertained that the Texas courts recognize and apply the doctrine of sovereign immunity as an absolute and inviolable right of all governmental units, unless the application of the doctrine is restricted by the Texas Tort Claims Act.

Also, the secondary question of research, to what extent are the TTCA’s waivers to sovereign immunity recognized and applied in Texas higher education cases, was answered completely. As a result of the study, it was determined that the TTCA establishes limited waivers to sovereign immunity which are applicable only under specified circumstances and to specified subjects, such as employees of a university.

As part of the research for this case, 54 individual cases brought before Texas courts were reviewed. The cases encompassed the time period from January 1, 1974 through December 31, 2013. These cases were all suits brought against institutions of higher education and staff at institutions of higher education. In these cases, the institutions and the staff all put forward claims of sovereign immunity. Of those 54 cases, only 9 were found to be not in favor of the institution or its actors. The individual suing the institution and claiming waivers of sovereign immunity on behalf of the institution were successful in their suits only 9 times.

The Texas courts were consistent in applying the circumstances by which an institution or its actors waive sovereign immunity as well as those instances where there is no waiver of sovereign immunity. There are several implications in these numbers. First, so long as employees act in the scope of their stated positions, they should not be overly concerned about being sued for decisions made in the course of their duties. What they should remain aware of is that discretionary decisions involving motor
vehicles or motorized equipment fall into a different category and employees should be aware when they operate either of those that should something happen, they may be liable. Next, institutions and their actors should not overly concern themselves with discretionary decisions of design. While all due consideration should be made for structures to be secure and well-constructed, the state does give certain latitude for discretion in design. Where institutions need to be aware is in the maintenance and upkeep of such structures as those are separate from design issues and negligence in this area can result in a waiver of sovereign immunity.

Other areas where institutions and their actors can take care is in whether or not they have actual or constructive knowledge of a problem. If there is a known issue, it would be wise to find a remedy. Having knowledge that there are potential tort issues and not doing something to rectify the situation can result in a waiver of sovereign immunity. If the injured party can prove that the institution should have known that an act would be tortious, the court will find that the waiver of sovereign immunity applies.

Areas for future research would be to see how federal cases involving the Eleventh Amendment and the federal Tort Claims Act are decided in reference to institutions of higher education. How do federal courts treat sovereign immunity in the cases they decide?

As faculty and staff of institutions of higher education can be highly mobile in their career paths, it would be prudent to conduct a similar review of sovereign immunity statutes in the other states to see if such statutes exist as well as how they are applied, particularly in the state of Louisiana where the system of law was created based on
Napoleonic Code, rather than British Law. Is the idea of governmental immunity at all different?

Another area for future research would be to investigate if the Texas legislature has responded or plans to respond to how the Texas Tort Claims Act is applied. The TTCA was enacted to aid individuals in their ability to recover damages from governmental units shielded by governmental immunity. As the cases have shown, it is unlikely that an individual will be successful in their suit against an institution of higher education.
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