

A Practitioner's View of the Georgia Tort Claims Act

by Charles M. Richards and Susan J. Levy

In the 1992 Legislative Session, the Georgia General Assembly passed the Georgia Tort Claims Act (the "Act"), codified at O.C.G.A. §§ 50-21-20 through 50-21-36. The Act is still quite new, having first become effective on July 1, 1992. Only a few decisions of the appellate courts have considered the Act.¹ Therefore, this Article is intended simply as a practical review of the important features of this Act from a practitioner's viewpoint, rather than as a scholarly treatise.

I. Legislative Purpose

The Georgia Tort Claims Act includes a very specific statement of legislative purpose, found in O.C.G.A. § 50-21-21. When issues arise concerning the proper construction and operation of the Georgia Tort Claims Act, this statement of legislative purpose will be a significant reference.

In O.C.G.A. § 50-21-21(a), the General Assembly specifically recognizes that the traditional doctrine of sovereign immunity is harsh and frequently unfair. However, the General Assembly also recognizes that, because of the scope of its responsibilities, State government would face potentially massive financial exposure if subjected to unlimited tort liability. In balancing these competing interests, the General Assembly has decided upon a *limited* waiver of sovereign immunity.² This statement of legislative intent requires that the Act be strictly construed. Any future expansion of State liability under the Georgia Tort Claims Act arguably must derive from amendments enacted by the General Assembly, rather than from judicial interpretation.

One of the purposes of the Act, as stated in O.C.G.A. § 50-21-21(b), is to insulate State officers and employees from lawsuits arising from performance of their jobs. This statement of legislative purpose is effectuated in O.C.G.A. § 50-21-25(a), which provides that: "This article constitutes the exclusive remedy for any tort committed by a State officer or employee. A

State officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor." Under the Act, the exclusive remedy for a tort committed by a State employee is an action against the agency, and not against the employee personally.

II. Causes of Action to Which the Georgia Tort Claims Act Applies

The Georgia Tort Claims Act waives the state's defense of sovereign immunity for causes of action sounding in tort. O.C.G.A. § 50-21-23(a) provides that the State shall be liable for "the torts" of its employees "in the same manner as a private individual or entity would be liable under like circumstances; . . ." What may be less apparent to most practitioners is the fact that this is a *limitation* on the potential scope of the government's liability. The Act does not create any new torts, nor does it purport to impose liability upon the government simply because a governmental policy or decision might have some harmful impact. The State is potentially liable only for conduct which fits within existing legal definitions of the term "tort." In general, the State will not be liable for conduct or activities that are uniquely governmental. As the conduct or activities of State employees comes to more closely resemble conduct or activities commonly pursued by individuals or corporations in the private sector, and where there are readily identifiable and closely analogous standards of care in the private sector governing such conduct or activities, there is a greater likelihood that the State will be found to be subject to tort liability under the Act.

III. Exceptions to Liability

Under the Georgia Tort Claims Act, the State is not liable for every act or omission which might fall within the definition of a "tort." As a broad generalization, *most* conduct which would

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fall within traditional concepts of negligent torts will support recovery under the Act. In addition, some intentional torts, such as fraud and deceit, will be actionable under the Act if the conduct occurred within the scope of the employee's official duties or employment.

Because the Act provides only a limited waiver of the State's immunity from tort liability, it is critical to understand the areas delineated by the Act for which the State will have no liability. These exceptions to liability are set forth specifically and in considerable

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detail in O.C.G.A. § 50-21-24. A number of the exceptions relate to areas of government action not traditionally included within any definition of tortious conduct. However, some of the exceptions require special attention.

"Discretionary function or duty" exception: O.C.G.A. § 50-21-24(2) provides that the State is not subject to suit arising out of the performance or non-performance of a "discretionary function or duty." The term "discretionary function or duty" is defined in O.C.G.A. § 50-21-22(2) as: "... a function or duty requiring a State officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political or economic factors." This is a more narrow definition than the definition traditionally given in Georgia cases dealing with "official immunity." Consequently, under the Act, a cause of action will not be defeated solely because the particular function or duty at issue required the exercise of judgment by the

responsible State officer.

The new Georgia Tort Claims Act was modeled, in part, after the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671, *et seq.* The federal discretionary function exception is codified at 28 U.S.C. § 2680(a). Thus, cases construing the "discretionary function or duty" exception under the FTCA will be persuasive authority in construing this exception

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Dalehite v. United States,³ *United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*,⁴ and their progeny, define the discretionary function exception to the FTCA. The United States Supreme Court stated in *Dalehite* that the discretionary function exception "... includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."⁵

After reviewing the legislative history of the FTCA, the U.S. Supreme Court in *Varig Airlines* refined the exception, noting that:

Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took steps to protect the Government from liability that would seriously handicap effi-

cient government operations.⁶

The "discretionary function or duty" exception to liability under the Georgia Tort Claims Act, like the same exception under the FTCA, is grounded in the constitutional doctrine of separation of powers. This provision reflects the desire of the General Assembly to protect and foster the policy decision-making process. These principles, along with analogous federal authority, will assist the practitioner in deciding whether questioned conduct falls within the "discretionary function or duty" exception under the Georgia Tort Claims Act.

"Inspection powers or functions" exception: Under O.C.G.A. § 50-21-24(8), the State is not subject to suit arising from claims that it did not perform an inspection of private property properly. However, this exception does not apply to inspections performed by the State of its own property. If the State negligently inspects its own property, and someone is injured as a result, an action under the Georgia Tort Claims Act is cognizable.

"Licensing powers or functions" exception: O.C.G.A. § 51-21-24(9) addresses a recent phenomenon whereby a number of plaintiffs have sued State employees and agencies to recover for injuries caused by the negligence of a person or entity licensed by the State. This provision makes it clear that the State is not liable for "negligent licensing." That is, the State is not the insurer of those to whom it issues licenses.

"Plan or design of public works" exception: Every bridge or highway could be designed in many different ways. O.C.G.A. § 51-21-24(10) precludes suit from being brought against the State for the choice and preparation of a plan or design, provided the plan or design is prepared "in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design."

Because plans or designs are almost always prepared by professionals, in cases involving improper design, the Act should be read *in pari materia* with O.C.G.A. § 9-11-9.1. That statute requires that the affidavit of an expert competent to testify be attached to the complaint.

This section also explicitly states that the adequacy of a plan or design is to be determined according to the accepted standards "in effect at the time

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of preparation of the plan or design." Thus, the State is not subject to tort actions based upon claims that the State had a duty to update a pre-existing facility to current design or construction standards.

Consistent with other provisions of the Georgia Tort Claims Act, this exception is a limited one. Tort actions arising from improper construction or improper maintenance are not precluded by this exception.

"Georgia National Guard" exception: It must be noted that the exception set forth in O.C.G.A. § 50-21-24(12) does not apply to "vehicular accidents." If a National Guard vehicle is involved in a collision on a street or highway, an action is cognizable under the Georgia Tort Claims Act.

O.C.G.A. § 50-21-24 contains no relaxation of the protection of State officers and employees. For conduct which falls within one of the exceptions, neither the State nor any State official is subject to tort liability in State courts.

IV. Naming the Proper Defendant

Under the Georgia Tort Claims Act, the exclusive remedy for a tort committed by a State employee within the scope of his or her official duties or employment is an action against the agency, and thus, the agency is the proper party to be named as the defendant. Under O.C.G.A. § 50-21-25(b), if the plaintiff attempts to name a State employee as a defendant, the agency must be substituted as the party defendant.

The provision solves a significant problem for plaintiffs under the former statutory scheme. In the past, when actions against the State were controlled by the so-called "insurance waiver" of sovereign immunity, a plaintiff in a tort action was required to identify an individual State employee as the defendant. This was, in many instances, a difficult requirement for tort plaintiffs to meet, in view of the difficulty of associating particular State employees with the governmental action which gave rise to the plaintiffs' claims. The procedure was likewise undesirable from the standpoint of State employees, who found themselves in the role of "lightning rods" for tort litigation arising out of government actions. The Georgia Tort Claims Act simplifies matters considerably in this regard, and should be an improve-

ment both for plaintiffs and for State employees.

Only State agencies are subject to actions brought under the Georgia Tort Claims Act. The statutory definition of the term "the State" specifically excludes counties, municipalities, school districts, local hospital authorities, and similar entities. Tort actions against such entities are governed by other constitutional and statutory provisions.

V. Limitations

The Georgia Tort Claims Act is retroactive, so that it affords a remedy for persons whose tort claims accrued on or after January 1, 1991. Under the Act, there are two different statutes of limitation:

- A. *For tort claims accruing between January 1, 1991 and June 30, 1992:* Ante-litem notice must be given on or before June 30, 1993, and the action must be commenced on or before June 30, 1994.
- B. *For tort claims accruing on or after July 1, 1992:* Ante-litem notice must be given within 12 months after the loss was or should have been discovered, and the action must be commenced within two years after the loss was or should have been discovered.

O.C.G.A. §§ 50-21-27(d) and (e) provide important aids to the State and to plaintiffs. From the State's standpoint, statutes of ultimate repose and abrogation found elsewhere in the Code will apply to actions under the Act. From the plaintiff's standpoint, limitations-tolling statutes found elsewhere in the Code will also toll the period of limitations under the Act.

VI. Requirement of Ante-Litem Notice

Under O.C.G.A. § 50-21-26(a), no tort action can be filed against the State without first giving the required written ante-litem notice. This is an absolute jurisdictional requirement. O.C.G.A. § 50-21-26(a)(3). In contrast to other ante-litem notice provisions, the Georgia Tort Claims Act contains specific requirements with respect to the contents of the notice of claim, as well as providing to whom the notice of claim must be submitted.

Under O.C.G.A. § 50-21-26(a)(5), the following information must be included in a written notice of claim submitted under the Tort Claims Act:

- (A) The name of the State government entity, the acts or omissions of which are asserted as the basis of the claim;
- (B) The time of the transaction or occurrence out of which the loss arose;
- (C) The place of the transaction or occurrence;
- (D) The nature of the loss suffered;
- (E) The amount of the loss claimed; and
- (F) The acts or omissions which caused the loss.

The language of the statute suggests that substantial compliance with this Code Section will satisfy jurisdictional prerequisites. However, the practitioner who is interested in settling a claim in the pre-litigation stage would be well advised to provide more than minimally-sufficient information.

Providing detailed information in two particular areas will greatly enhance the plaintiff's chances of reaching a settlement with the State. The first is in describing "the amount of

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the loss claimed." Contrary to what seems to be a widely held belief, the State will not simply hand over \$1 million to each tort claimant. In order for the State's Risk Management Unit to properly evaluate a claim, it must first have sufficient information to fully understand the severity of the injury, and the extent of the direct economic damages caused by the injury, such as medical bills and loss of wages. The claimant's lawyer will render her or his client good service by providing as much information as possible, including photographs, x-rays, physician's reports, medical bills, life-care plans, "day in the life" videos and copies of W-2 forms to fully document the claimant's injury and loss.

Second, in order to begin forming a valid estimate of the monetary value of a tort claim, one must be able to realistically evaluate the asserted basis of liability. Thus, to maximize the chances of reaching a favorable settlement in the pre-litigation stage, the claimant's lawyer should provide the Risk Management Division with a full, detailed explanation, along with as much supporting information as possible.

To safeguard the claim, the claimant's lawyer must ensure that the notice of claim is *received* by all required agencies *before* the expiration of the statutory period for giving ante-litem notice.

As a practical matter, the earlier a notice of claim is submitted, the greater the likelihood of a settlement being reached. Although it seems obvious, many lawyers fail to recognize that it is always easier to investigate, evaluate

and settle a claim when all the facts are fresh, and witnesses with fresh recollections are readily available.

VII. To Whom the Notice of Claim Must Be Submitted

Under O.C.G.A. § 50-21-26(a)(2), the notice of claim must be submitted *both* to: (a) the Risk Management Division of the Georgia Department of Administrative Services; and (b) the State agency or agencies against whom the claim is asserted.

"O.C.G.A. § 50-21-24 contains no relaxation of the protection of State officers and employees. For conduct which falls within one of the exceptions, neither the State nor any State official is subject to tort liability in State courts."

VIII. How the Notice of Claim Must Be Submitted

Under O.C.G.A. § 50-21-26(a)(2), the notice of claim must be delivered in person, or mailed by certified mail, return receipt requested, to the Risk Management Division of the Georgia Department of Administrative Services. The address is as follows:

Georgia Department of
Administrative Services
Risk Management Division
200 Piedmont Avenue
Suite 1508, West Tower
Atlanta, GA 30334-5525
Attention: Director of
Risk Management

A copy of the notice of claim must also be delivered in person or mailed by first-class mail to the State agency or agencies against which the claim is asserted.

IX. Time Period for Investigating Claims

The Act contemplates efforts to settle claims against the State before the parties have to resort to litigation. Under O.C.G.A. § 50-21-26(b), a tort lawsuit cannot be filed against the State until either the State denies the claim or more than 90 days have elapsed after the presentation of the notice of claim.

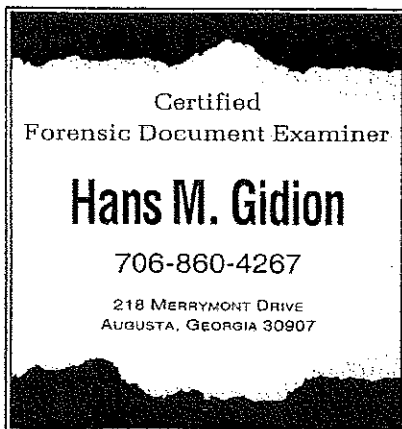
This does not mean that the claimant's lawyer will have to file a lawsuit on the 91st day after presenting the notice of claim. The Risk Management Division is attempting to handle a large number of claims. The large volume of this work means that most claims, including meritorious claims, simply cannot be completely investigated and evaluated within 90 days. However, the Risk Management Division does not lose interest in settling a claim just because 90 days have elapsed. Until a decision is made to deny a claim, the Risk Management Division will continue to investigate the claim, and to attempt to resolve it.

The telephone number of the Risk Management Division is (404) 656-3237. If a claimant's lawyer has any question about the status of a particular claim, he or she should contact the Risk Management Division. In many instances, the claimant's lawyer will find that the claim is still being investigated, and that the State is still interested in trying to settle the claim without the necessity of litigation.

X. Venue of Actions Under the Georgia Tort Claims Act

Under O.C.G.A. § 50-21-28, venue of actions under the Georgia Tort Claims Act lies in the county where the loss occurred. This Code section contains two qualifications. The second is the easier to decipher. Where the loss occurs in another state, venue lies in the county of residence of the State employee whose negligence caused the loss.

The first qualification is somewhat less clear on its face. The Act provides that: "... in any case in which an officer or employee of the State may be included as a defendant in his individual capacity, the action may be brought in the county of residence of such officer or employee." This qualification was added in a House Judiciary Committee hearing, in response to the concern that it may sometimes be hard for a



plaintiff to determine whether a State employee was or was not "acting within the scope of their [his or her] official duties or employment" when he or she committed a tort. Where a plaintiff cannot answer this fundamental question, this provision allows filing one lawsuit advancing alternate claims against either the State or the employee. Ordinarily, the question will be answered either because the State agency determines that the employee was acting within the scope of his or her employment, or because the court decides the question as a matter of law. If the State employee is found to have been acting within the scope of his or her official duties or employment, then the complaint must be dismissed as to the individual, and the case must be transferred to the venue appropriate for an action against the State. If, on the other hand, the State employee is found to have been acting outside the scope of his or her official

duties or employment, then the action must be dismissed as to the State.

XI. Requirements as to Service of Process

Under O.C.G.A. § 50-21-35, a plaintiff is required to cause process to be served upon *both*: (a) the chief executive officer of each defendant agency; and (b) the director of the Risk Management Division of the Department of Administrative Services. Both are to be served at their usual office addresses. The time for the State to file an answer does not begin to run until all these parties have been served.

This section also requires that the plaintiff mail a copy of the complaint, *by certified mail*, to the Attorney General. The complaint must contain a certificate showing that this requirement has been met. It would be impossible for a plaintiff's lawyer to comply with the literal requirements of the statute, inasmuch as a stamped

copy of the complaint could not possibly be mailed to the Attorney General before the lawsuit is filed. In view of the impossibility of literal compliance, substantial compliance with this requirement should be sufficient. It is suggested that plaintiffs' lawyers should send a copy of the complaint to the Attorney General prior to filing, with some notation as to when the complaint will be filed.

XII. Limits on State Liability

Under O.C.G.A. § 50-21-29(b), the State's liability is limited to \$1 million per person, and \$3 million per occurrence, regardless of the number of defendants. There is a further limitation imposed on a plaintiff's potential recovery. Under O.C.G.A. §§ 50-21-33(h) and 50-21-34(a) and (b), claims and judgments can only be collected out of the State Tort Claims Fund, or from

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any other insurance policies that may be applicable.⁸ Once these sources have been depleted, the State's liability under the Georgia Tort Claims Act ends for that fiscal year.

However, even if a judgment proves uncollectible because the sources of payment are depleted, the judgment is not void: The injured plaintiff still can collect on the judgment if the General Assembly subsequently appropriates funds to pay the judgment. Given the fact that the General Assembly has so strongly supported the concept of the Georgia Tort Claims Act, there is some likelihood that a high priority would be given to the replenishment of the Tort Claims Trust Fund if it were to be depleted.

XIII. Types of Damages Recoverable

Under O.C.G.A. § 50-21-30, the State is not subject to claims for exemplary or punitive damages. Also, the State is not liable for pre-judgment interest. Under O.C.G.A. § 50-21-31, judgments against the State bear post-judgment interest at the rate of 7% per annum.

XIV. No Waiver of Immunity in Federal Court

O.C.G.A. § 50-21-23(b) provides that the State's immunity is waived only in State courts. There is no consent to be sued in federal courts. In other words the State's Eleventh Amendment immunity is not waived.

XV. Immunity of State Employees from Lawsuit or Liability

Pursuant to O.C.G.A. § 50-21-25, State employees are afforded complete protection against personal liability arising out of performance of their jobs. The sole and exclusive remedy for torts committed by State employees is an action against the appropriate agency under the Georgia Tort Claims Act. In this regard, the Georgia Tort Claims Act is closely analogous to, and operates in basically the same fashion as, the Federal Tort Claims Act.

XVI. Repeal of Conflicting Laws

Section III of the Act specifies that: "All laws and parts of laws in conflict with this Act are repealed." Although this is standard boilerplate language, it

has practical significance in this case. In O.C.G.A. § 50-21-21(a), the General Assembly specifically states that: "... the state shall only be liable in tort actions within the limitations of this article..." Other statutes which may previously have allowed tort actions against the State were, therefore, repealed by the enactment of the Georgia Tort Claims Act. Since January 1, 1991, tort actions against the State can be maintained only if and to the extent that they are allowed under the Georgia Tort Claims Act.

XVII. Conclusion

In recent years, a strong consensus has developed that persons injured by the negligent torts of government employees should have some available avenue to seek redress for their injuries. At the same time, political and economic forces require that public treasures be protected from open-ended exposure to tort liability. Additionally, there is a strong need for capable and conscientious persons to enter and remain in public service without facing the burden of potential litigation being brought against them personally.

Through the enactment of the Georgia Tort Claims Act, the General Assembly has made a conscientious effort to balance all these competing interests. Although the remedies provided are as yet largely untested, there is good reason to hope that the citizens of this State will be well-served by this important legislation.

Footnotes

1. See *Googe v. Florida Int'l Indemnity Co.*, 262 Ga. 546, 422 S.E.2d 552 (1992); *Curtis v. Board of Regents*, 262 Ga. 226, 416 S.E.2d 510 (1992); *Datz v. Brinson*, ___ Ga. App. ___, 430 SE2d 823 (April 5, 1993), and *Collfer v. Whitworth*, 205 Ga. App. 758, 423 S.E.2d 440 (1992).
2. *Googe* at 550, n.9.
3. 346 U.S. 15 (1953).
4. 467 U.S. 797 (1984).
5. *Dalebite v. United States*, 346 U.S. 15, 35-36 (1953).
6. *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984).
7. See, e.g., Art. IX, Sec. III, Par. IX of the 1983 Georgia Constitution (authorizing the General Assembly to waive the sovereign immunity of counties and municipalities); O.C.G.A. § 36-33-1 through 6 (dealing with waivers of the sovereign immunity of municipalities).
8. O.C.G.A. § 50-21-33 authorizes the Department of Administrative Services to provide for payment of judgments either by self-insurance, or by obtaining outside insurance, or by a combination of both. This should make no significant difference for claimants under the Act.
9. 1992 Ga. Laws 1875.

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