



“The Emperor Has No Clothes”

The Evolving Law of Governmental Immunity in Texas

Texas City Attorneys Association
Sandy Hellums-Gomez | June 25, 2026



The Kingdom’s Agenda

- I. Origins of the Doctrine: The Crown’s Protection
- II. Contract Immunity: Cracks in the Castle Wall
- III. Ultra Vires: The Knight Who Acted Alone
- IV. Legislative Developments





PART I

Origins of the Doctrine: The King Can Do No Wrong

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Where the Doctrine Was Born

- ◆ English common law held that the sovereign, as the source of all law, could not be subject to it
- ◆ The Crown's own courts could not be used against the Crown itself
- ◆ Transplanted to American jurisprudence after independence: despite rejecting the monarchy, the new republic kept the doctrine
- ◆ *Chisholm v. Georgia* (1793) Federal courts could hear claims against state governments
- ◆ Eleventh Amendment (1795) protected states from jurisdiction in federal court

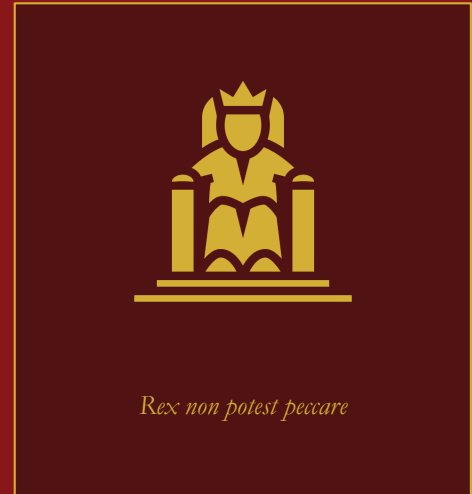


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Types of Immunity

- ◆ Immunity from Suit
- ◆ Immunity from Liability
- ◆ Areas of Immunity
 - ◆ Contract
 - ◆ Tort
 - ◆ Constitutional Tort



Purpose of Immunity

- ◆ Protecting public resources,
- ◆ Preserving separation of powers,
- ◆ Shielding governmental discretion.

The Doctrine Arrives in Texas

Common Law Era

Immunity adopted as the default rule in Texas courts.

Key Distinction

Immunity from suit (jurisdictional, not waivable by conduct) vs. immunity from liability (a merits defense).

Critical Rule

Only the Legislature can waive immunity from suit — and it must do so in clear and unambiguous language.

Tooke v. City of Mexia (Tex. 2006)

The Supreme Court enforces strict construction; ambiguous waivers are construed in favor of the sovereign.

If the Legislature did not say it clearly, there is no waiver.



PART II

Contract Immunity

Cracks in the Castle Wall

Absolute Immunity from *Suit-Federal Sign v. TSU* 951 SW.2d 401 (Tex. 1997)

This Court has long recognized that sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State.

The State retains immunity from suit, without legislative consent, even if the State's liability is not disputed.

Immunity in Contract: Statutory Limitation

- ◆ Historically, municipalities enjoyed broad immunity from contract claims; vendors and counterparties had no recourse
- ◆ Policy tension: cities must contract to function, and contractors need certainty of enforcement
- ◆ The Legislature responded with Tex. Loc. Gov't Code Ch. 271 (2005)
- ◆ Requirements for waiver under Ch. 271:
 - Written contract, properly authorized by the governing body, subject matter within statutory scope
- ◆ What Ch. 271 does NOT waive:
 - Consequential damages (§ 271.153); all types of government contracts; attorney's fees in all circumstances

Types of Contracts: Origins

“[A] municipality’s proprietary functions are those conducted in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government,‘ while its governmental functions are in the performance of purely governmental matters solely for the public benefit.”

Tooke v. City of Mexia, 197 S.W.3d 325, 332 (Tex. 2006)

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City of League City v. Jimmy Changas 619 S.W.3d 819 (Tex. 2023)

- ◆ City enters an economic development agreement with a restaurant/commercial entity under Tex. Loc. Gov't Code Ch. 380
- ◆ City fails to perform its obligations; then asserts sovereign immunity as a defense to the breach of contract claim
- ◆ The central question: Is economic development a governmental function (shielded) or a proprietary function (exposed)?
- ◆ The court's analysis:
 - Economic development incentive agreements bear the hallmarks of proprietary commercial activity
 - When a city acts like a private commercial actor to attract business, it may be treated like one
 - The proprietary characterization strips the city of its immunity defense

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Governmental vs. Proprietary Functions

Governmental Functions	Proprietary Functions
Unique to government	Could be performed by private actors for profit
Immunity generally preserved	Immunity generally not available
Police, fire, courts, taxation	Utilities, commercial operations, some economic activity
Tex. Civ. Prac. & Rem. Code § 101.0215 (partial list)	Determined by courts — highly fact-specific

This distinction is the most litigated line in Texas municipal liability law.

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After Jimmy Changas: Practical Impact

Risks

- ◆ Ch. 380 and economic development agreements carry real breach exposure
- ◆ Cities cannot assume immunity shields commercial-style commitments
- ◆ The proprietary characterization can be argued by any sophisticated counterparty
- ◆ Economic development staff and councils may not appreciate this legal risk

Recommended Actions

- ◆ Audit all pending and future Ch. 380 agreements
- ◆ Include express recitals as to governmental purpose (useful, not dispositive)
- ◆ Add dispute resolution, limitation of liability, and cure provisions
- ◆ Brief elected officials on litigation exposure before approval
- ◆ Coordinate with finance and economic development departments

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PART III

Qualified Immunity & Ultra Vires

When the King's Knight Rides Alone

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Qualified Immunity: The Federal Shield

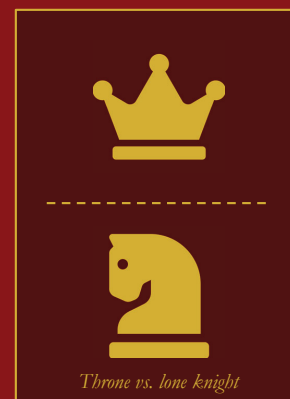
- ◆ 42 U.S.C. § 1983 civil rights claims against officials acting under color of state law
- ◆ The shield: officials are immune from personal liability unless they violated a clearly established right a reasonable person would have known
- ◆ Developed through *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny
- ◆ Two-prong analysis:
 - (1) Did the official violate a constitutional or statutory right?
 - (2) Was that right clearly established at the time of the conduct?
- ◆ QI protects individual officers, not the municipality itself



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Ultra Vires: Acting Beyond the King's Authority

- ◆ As QI creates barriers at the federal level, plaintiffs increasingly turn to ultra vires claims under Texas state law
- ◆ Core theory: an official who acts without legal authority is not acting for the government and cannot invoke governmental immunity
- ◆ Foundational case — *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009):
 - Texas Supreme Court formally recognized ultra vires suits as an exception to immunity
 - Suit must be against the official in their official capacity, not the entity directly
 - Relief is prospective only — injunctive/declaratory, no retrospective damages against the entity
 - Plaintiff must allege the officer acted without authority or failed a purely ministerial duty



Even kings cannot protect knights who ride without orders.

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Ultra Vires: What It Is and What It Is Not

What Qualifies

- ◆ Acting entirely without statutory or constitutional authority
- ◆ Failing to perform a ministerial duty with no discretion involved
- ◆ Executing a contract without proper governing body approval
- ◆ Enforcing a rule or ordinance that does not legally exist
- ◆ Acting after authority has expired or was never granted

What Does Not Qualify

- ◆ Exercising discretion incorrectly, even badly
- ◆ Making a wrong legal judgment within the scope of authority
- ◆ Policy disagreements framed as legal violations
- ◆ Attempts to obtain retrospective monetary damages
- ◆ Claims directed at the governmental entity rather than the official

The knight must have ridden with no authority at all. Riding with bad authority is not enough.

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When the Knight Rides Alone: Potential Scenarios



Procurement or contracting decisions made without proper council authorization



Land use and zoning decisions alleged to violate state enabling statutes



Enforcement actions taken without a statutory basis



Officials executing agreements after their term has ended



Actions taken in excess of specifically delegated authority



Code enforcement or permitting actions contrary to express statutory limits

Train your officials. Document authority. Every act by a city employee is a potential ultra vires claim.

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PART IV

Legislative Limitations

The Legislature Rewrites the Royal Decree

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Immunity Under Siege

- ◆ Renewed national debate following high-profile use-of-force incidents beginning in 2020
- ◆ States modifying or abolishing QI:
 - Colorado (2020) Enhance Law Enforcement Integrity Act abolishes QI and good-faith defense; creates state claim
 - New Mexico (2021) New Mexico Civil Rights Act allows individuals to sue up to \$2 million and abolishes qualified immunity defense
- ◆ Federal: George Floyd Justice in Policing Act passed the House but stalled in the Senate
- ◆ Texas has not abolished QI; proposals introduced but not enacted



The City of Dallas: A Targeted Waiver

- ◆ City Charter Amendment (Nov. 2024)
 - ◆ Grants standing to sue to enforce city charter, ordinances, state law
 - ◆ Allows declaratory and injunctive relief, costs and attorney's fees
 - ◆ Waives governmental immunity from suit and liability
- ◆ Is this another ultra vires or waiver of governmental immunity?
- ◆ Challenges to homeless encampments, police staffing
- ◆ City noted legal costs and administrative demands will divert critical resources
- ◆ Whether the Dallas provision sets a precedent for other municipalities to seek targeted waivers
- ◆ State legislation allowing or denying such actions (codifying immunity failed in last session)

Targeted legislative waivers are a growing tool — and a growing risk — for Texas cities.

Defending the Realm: Practical Guidance

On Contracts

- ◆ Audit Ch. 380 and economic development agreements for proprietary risk
- ◆ Require and document proper governing body authorization
- ◆ Draft limitation of liability and dispute resolution provisions
- ◆ Brief councils on contract exposure before approval

On Ultra Vires

- ◆ Train officials on scope of authority and documentation
- ◆ Establish internal legal authority review before major actions
- ◆ Maintain indemnification policies for officials individually named
- ◆ Counsel officials separately when conflicts of interest arise

On Legislation

- ◆ Monitor the Legislature each session; immunity law shifts fast
- ◆ Review use-of-force and high-risk policies proactively
- ◆ Engage TML and peer city attorneys on developing case law
- ◆ Prepare contingency protocols for a post-QI environment

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The Royal Decree: Five Takeaways

- I. Immunity is not absolute it erodes through legislation, judicial interpretation, and creative plaintiff theories.
- II. The proprietary/governmental line is the most dangerous frontier, especially in economic development.
- III. Ultra vires claims are rising officials who act without authority face personal exposure regardless of the city's immunity.
- IV. Qualified immunity is under siege prepare now, not after the doctrine falls.
- V. No waiver should ever be assumed. Clear, unambiguous legislative language is required. When in doubt, there is no waiver.

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“The King Can Do No Wrong.”

Thank You

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