

PERSONAL INJURY ACTIONS:
STATE AND COUNTY DEFENDANTS

I. THE GEORGIA TORT CLAIMS ACT

II.

Introduction

The Tort Claims Act was passed in the 1992 Session of the General Assembly. The Act provides a remedy for certain claims accruing after July 1, 1992. O.C.G.A. § 50-21-27(c).

Additionally, the entire Act -- including the caps it imposes on damages -- was made retroactive to cover accrued claims that occurred anytime after January 1, 1991. O.C.G.A. § 50-21-27(a).

The Tort Claims Act purports to abrogate the right of injured victims to bring actions against responsible state employees for their negligence or their violation of ministerial duties. The Act also limited a plaintiff's right to an action against the State Department by whom the negligent state employee is employed, and to the extent that an action is provided for under the provisions of the Act. Under the law which existed prior to the passage of the 1991 constitutional amendment and the Tort Claims Act, a plaintiff could sue both the negligent state employees and the department by whom they were employed. See Martin v. Georgia Department of Public Safety, 257 Ga. 300, 357 S.E. 2d 569 (1987). The Tort Claims Act provides:

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. O.C.G.A. § 50-21-25(a) (emphasis added).

A. **The Georgia Tort Claims Act Provides A Limited Waiver of Sovereign Immunity And Prescribes Certain Torts for Which the State Is Not Liable**

B. An understanding of the language of the Act is a must for lawyers who seek to represent injured victims under the Act. The Act contains a limited waiver of sovereign immunity and sets forth certain types of torts or losses for which the State and its departments are not liable.

C. O.C.G.A. § 50-21-23 is entitled "Limited waiver of sovereign immunity," and it provides:

(a) The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.

(b) The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Georgia. The state does not waive any immunity with respect to actions brought in the courts of the United States.

O.C.G.A. § 50-21-24 contains a list of losses for which the state is not liable and this list is entitled "Exceptions to State Liability." This provision of the Act provides that the state shall have no liability for losses resulting from 12 separate categories of occurrences. Among the exceptions to state liability are losses resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights. See O.C.G.A. § 50-21-24(7).

Several cases have interpreted the state's exception to liability for losses resulting from assault and battery. In Department of Human Resources v. Hutchinson, 217 Ga. App. 70, 456 S.E.2d 642 (1995), the Court of Appeals held that the state is not liable for claims where the underlying loss arises from assault and battery. Likewise, in the recent case of Sherin v. Department of Human Resources, 229 Ga. App. 621, 494 S.E. 2d 518 (1997), the Court of Appeals held ". . . plaintiffs' claims are precluded by Department of Human Resources v.

Hutchinson, 217 Ga. App. 70, 456 S.E.2d 642 (1995), because they arise from an assault and battery . . . and immunity for this act has not been waived."

In Christensen, et al. v. State of Georgia, et al., 219 Ga. App. 10 (1995) the Court of Appeals construed the state's exceptions to liability under Sections 50-21-24 (7) and (2) of the Georgia Tort Claims Act. The Court of Appeals stated:

O.C.G.A. § 50-21-24(7) provides: "The state shall have no liability for losses resulting from . . . [a]ssault [or] battery" Plaintiffs argue that the assault and battery exception applies only where a state employee commits the assault or battery. But we rejected this construction of O.C.G.A. § 50-21-24 (7) in Ga. Dept. of Human Resources v. Hutchinson, 217 Ga. App. 70 (456 S.E.2d 642 (1995), where a victim of a shooting by a juvenile who had been placed in the victim's home by the state, attempted to hold DHR responsible for her injuries. Hutchinson made plain that this immunity provision does not require that the state employee be the person committing the assault or battery. *Id.* at 71-73 (1). Likewise, O.C.G.A. § 50-21-24 (2) provides: "The state shall have no liability for losses resulting from . . . [t]he exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused." Even assuming that GMHI had wrongfully denied Zachary emergency medical or psychiatric treatment as plaintiffs allege, such conduct would be insulated by this section of Georgia Tort Claims Act. A hospital employee's decision in connection with admission or discharge of a patient is a discretionary act cloaked with immunity. See, Roberts v. Grigsby, 177 Ga. App. 377, 379 (2) (339 S.E.2d 633) (1985). Christensen, 219 Ga. App. at 13.

See also Miller v. Department of Public Safety, 221 Ga. App. 280, 281 (1996), holding that "[P]ursuant to the 1991 amendment, the General Assembly enacted the Georgia Tort Claims Act . . . providing for a limited waiver of sovereign immunity accorded to the State and its departments and agencies." "Under the provisions of the Tort Claims Act, the waiver of sovereign immunity accorded DPS as a department or agency of the State does not extend to 'losses resulting from . . . [a]ssault [or] battery.' O.C.G.A. § 59-21-24(7)." *Id.*

Following these interpretations of the "assault and battery" exception to the waiver of immunity, appellate courts have made the following decisions:

- (1) A motion to dismiss is proper in the case alleging that a child's rape was the result of a failure to protect her while she was at a state school, Georgia Military College v. Santa Morena, 237 Ga. App. 58, 514 S.E. 2d 82 (1999);

- (2) There is no recovery for negligence by state hospital employees that results in a death directly caused by the assault and battery on the decedent, Georgia Department of Resources v. Coley, 247 Ga. App. 392, 544 S.E. 2d 165 (2000); and
- (3) Where the immediate act that causes the injury is an assault or battery, there is still no remedy under the Act where a legal cause of the injury was the negligent performance of a ministerial duty by a state officer or employee. Youngblood v. Gwinnett Rockdale Newton Community Service Board, 273 Ga. 715, 545 S.E. 2d 875 (2001).

The specific provisions of O.C.G.A. § 50-21-24 excluding the state's liability for certain torts must be examined in detail. Some of the exceptions to state liability include losses resulting from an act or omission by a state officer or employee exercising due care in the carrying out a statute, regulation or rule [O.C.G.A. § 50-21-24(1)]; the performance or failure to perform a discretionary function or duty by a state officer or employee whether or not the discretion involved is abused [O.C.G.A. § 50-21-24(2)]; losses resulting from inspection powers or functions [O.C.G.A. § 50-21-24(8)]; and losses resulting from licensing powers or functions [O.C.G.A. § 50-21-24(9)].

Early in the application of the Tort Claims Act, the state argued in a series of cases that the “discretionary function” was a nearly absolute defense to tort cases under the Act. O.C.G.A. § 50-21-24(2) provides an exception for losses resulting from “the exercise or performance of or the failure to exercise or perform a discretionary function or duty . . . , whether or not the discretion involved is abused.” In a couple of decisions, the Court of Appeals equated the “discretionary function” exception under the Tort Claims Act with the historic discretionary/ministerial duty distinction applying to government officials, and then added an “abuse” requirement. Interpreting the Tort Claims Act in that fashion would have greatly limited its effectiveness as a remedy for a negligent action by a state. This issue is laid to rest by the Supreme Court in DOT v. Brown, 267 Ga. 6, 471 S.E. 2d 849 (1996).

In Brown, the Supreme Court drew a line between the old discretionary function/ministerial duty decisions. The Court held:
In determining the scope of the discretionary function exception, we need not consider previous cases involving discretionary versus ministerial decisions because the legislature included in this statute the definition of discretionary function or duty: "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." O.C.G.A. §§ 50-21-22 (2). The key to this issue is the difference between design and operational decisions and policy decisions. We note with approval the decisions from other jurisdictions, cited by the Court of Appeals, holding that the discretionary function exception is limited to basic governmental policy decisions. The Court of Appeals was correct in noting that the decision to build the road involved here was a policy decision. Where and whether to install traffic lights were design decisions. When to open the intersection, and whether to open it without traffic lights are operational decisions, and the decision to use stop signs only for the cross-road was a design decision.

The scope of the discretionary function exception urged by DOT, which would include any decision affected by "social, political, or economic factors," is so broad as to make the exception swallow the waiver. Whether to buy copier paper from a particular vendor, and in which colors, are decisions that might be affected by all three factors, but they are not policy decisions. The Court of Appeals was correct in rejecting DOT's argument that the discretionary function exception applies to this case.

Two of the statutory exemptions from liability were addressed by the Court of Appeals in DOT v. Cox, 246 Ga. App. 221, 540 S.E. 2d 218 (2000). The road design and permitting/licensing exemptions were at issue there. O.C.G.A. §§ 50-21-24(9), -24(10). The latter of these subsections provides that there should be no liability for any loss that results from:
The plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such 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.

This provision has been construed to not only exempt the DOT from liability for initial design deficiencies, but it also exempts the DOT from liability "for its failure to upgrade a highway to meet current design standards" where those standards have improved or become more stringent in the intervening years. Daniels v. DOT, 222 Ga. App. 237, 474 S.E. 2d 26 (1996) (physical precedent only). In the Cox case, the plaintiffs were injured when they were

struck by a driver who failed to yield while turning left into a commercial driveway. Plaintiffs argued that the configuration of the four-lane, divided highway, at the commercial driveway contributed to the accident, and that it was generally negligent. The year by which the design standards would be interpreted became an issue in Cox. The plaintiffs argued that 1992 (rather than the original construction year of 1969) would be the governing year for assessing the standards. Because, in 1992, the road was resurfaced and a DOT district engineer proposed making improvements to the roadway median opening in 1992. The court held that neither event was sufficient to trigger an application of later, more stringent standards. Since there was no evidence that the design of the roadway failed to meet 1969 engineering standards, the year of original construction, summary judgment was warranted for defendant.

A related issue addressed possible DOT liability on account of failure to have a traffic signal at the driveway. The claim there was that the DOT failed to properly or timely issue a permit to the City of Newnan to install a traffic signal at the driveway. Whether negligent or not, apparently, these allegations were insufficient to state a claim because of the permitting/licensing exemption. O.C.G.A. § 50-21-24(9) excludes liability for any loss resulting from:
Licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of, or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization.

Other recent decisions construing the various exemptions in the Tort Claims Act include the following:

- (1) A decision by foster parents¹ to leave a 2-year-old child who was under their care unattended in the swimming pool could be challenged as negligent. The Supreme Court held that such a decision by the foster parents was not of a character that would bring it within the “discretionary function” exception to the Tort Claims Act. Brantley v. DHR, 271 Ga. 679 , 523 S.E. 2d 571 (1999), reversing Brantley v. DHR, 235 Ga. App. 863, 509 S.E. 2d 645 (1998).

¹ Note that “foster parents” are specifically defined by the statute to constitute “employees” of the state who are subject to the Tort Claims Act, and whose negligence allows for recovery under the Act. O.C.G.A. § 50-21-22(7).

(2) A 15-year-old incarcerated at the Macon Youth Development Center died from a subdural hematoma. Her parents brought an action under the Tort Claims Act against the Georgia Department of Children & Youth Services, alleging that the YDC employees were negligent in failing to provide proper medical care to Edwards. In another decision that would essentially render the idea of “tort claim recovery” annulity, the Court of Appeals held that – while the State had a duty to provide youth in their custody medical care and treatment – the “details” of that care were discretionary and subject to immunity. Edwards v. Georgia Department of Children & Youth Services, 236 Ga. App. 696, 512 S.E. 2d 339 (1999). Cert was granted and that opinion was unanimously reversed in Edwards v. Georgia Department of Children & Youth Services, 271 Ga. 890, 525 S.E. 2d 83 (2000). It would seem that what are essentially medical malpractice cases certainly should be subject to tort claims, notwithstanding the fact that the physicians and others must exercise some assessment and “judgment” in performing their tasks. There are nevertheless standards of care that apply. (3) Hiring, firing and disciplinary decisions regarding employees and officers generally requires the exercise of professional deliberation and will be deemed a discretionary function under the Act. Harper v. City of Eastpoint, 237 Ga. App. 375, 515 S.E. 2d 623 (1999) (dictim).

(4) An action was brought in Hilson v. Department of Public Safety, 236 Ga. App. 638, 512 S.E. 2d 910 (1999), arising out of a collision with a state trooper who was allegedly operating his vehicle negligently while chasing a speeding traffic offender. The Court of Appeals held that such claims were exempted from possible coverage under the Tort Claims Act, regardless of negligence, because they constituted a “method for providing law enforcement” and, as such, were well within the subsection (6) exception. That provision of the Act excludes liability for losses resulting from “civil disturbance, riot, insurrection, or rebellion or the failure to provide, or the method of providing, law enforcement, police, or fire protection.” This exception was principally intended to apply

to cases where officers failed to protect citizens from third party criminal acts. The case takes the provision a lot further than intended.

(5) The decisions of a parole officer are discretionary acts that did not give rise to liability under the Tort Claims Act. Rowe v. State Board of Pardons & Parole, 240 Ga. App. 163, 523 S.E. 2d 40 (1999).

(6) There is no liability under the Act for alleged libel or slander. Howard v. Burch, 210 Ga. App. 515, 436 S.E. 2d 573 (1993).

(7) The DOT can be liable in a highway design case where expert testimony is provided that the DOT failed to comply substantially with engineering standards applicable at the time an intersection was planned and designed. Such testimony complies with the exception in subparagraph (10). Lennen v. DOT, 239 Ga. App. 729, 521 S.E. 2d 885 (1999).

(8) Howard v. Miller, 222 Ga. App. 868, 476 S.E. 2d 636 (1996) involved a claim by a doctor for damages arising out of the suspension of his license to practice medicine. Plaintiff tried to claim that the Tort Claims Act did not govern his action. The Court of Appeals disagreed. Because of the specific immunity given by the Act to state employees as individuals for liability arising from the performance or non-performance of their official duties or functions, the plaintiff's only remedy was to sue the state agency, if there was any remedy. The Court of Appeals said no such remedy could arise under the Act, however, because of the exception for losses resulting from "licensing powers or functions, including . . . the issuance, denial, suspension or revocation of [a license or] similar authorization." O.C.G.A. § 50-21-24(9).

(9) Magueur v. DOT, 248 Ga. App. 575, 547 S.E. 2d 304 (2001), addresses the "inspection" exemption of O.C.G.A. § 50-21-24(8), which includes losses resulting from "inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation,

code, or ordinance, or contains a hazzard to health or safety.” The plaintiff was injured when she lost control of her car in a 90-degree curve on a roadway. The road was owned, built and maintained by the county. Claim against the DOT arose from the allegation that the DOT had a contract with the county to provide funds for the road’s construction, and in connection with that contract, the DOT reviewed and improved the construction plans, and inspected the site upon completion before releasing funds. In an opinion by Judge Ruffin, the court extended the “inspection power or function” exemption to cover the circumstances. The court acknowledged that the statutory language that seemed aimed at the “inspection of physical property to determine whether it complies with accepted safety standards,” is different than what occurred here, the court nevertheless held that it would apply the same exemption to the “inspection of construction plans to determine whether the property, once constructed, will comply with such standards.” 248 Ga. App. at 577.

(10) A claim that the Department of Human Resources was negligent in conducting or failing to conduct adequate inspections of a personal care home, resulting in injury, fell within the statutory exception concerning inspections. Bruton v. DHR, 235 Ga. App. 291, 509 S.E. 2d 363 (1998).

B. What Entities or Persons Are Covered by the Tort Claims Act

Construction and interpretation of the State Tort Claims Act by the courts is still relatively new. However, there have been several important decisions over the past several years dealing with entities or persons covered under the Act, the caps on damages provisions, and the notice of claim requirements.

O.C.G.A. § 50-21-22 contains certain definitions that are very important to an interpretation and construction of the act. Subparagraph (5) of this definitional section defines "state" as ". . . the State of Georgia and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities and institutions, but does not include counties, municipalities, school districts, other units of local government, hospital authorities, or housing

and other local authorities." The following decisions answer some important questions regarding the entities covered by the Act:

(1) Hospital authorities and certain other authorities are expressly excluded from coverage under the Georgia Tort Claims Act; however, the Georgia Ports Authority is a state agency covered under the Act. Miller v. Georgia Ports Authority, 217 Ga. App. 876, 877 (1995);

(2) "The Georgia Tort Claims Act, O.C.G.A. § 50-21-22 to 50-21-37 was . . . enacted to waive the sovereign immunity of the state for the torts of its officers and employees but expressly excludes counties from the ambit of this waiver." Gilbert v. Richardson, 264 Ga. 744, 747 (1994);

(3) Under O.C.G.A. § 50-21-22(7) a corporation cannot be a "state officer or employee," and the Georgia Higher Education Assistance Corporation is not one of the covered state government entities referred to in O.C.G.A. § 50-21-22(5). Garrett v. Georgia Higher Education Assistance Corporation, 217 Ga. App. 415 (1995).

Subparagraph (7) of O.C.G.A. § 50-21-22 provides that "'state officer or employee' means officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state" This section provides that the term "state officer or employee" includes persons who are members of a board, commission committee task force or other similar body established to perform specific tasks including advisory functions, with or without compensation, for the state or state governmental entity, or natural persons who is a volunteer participating as a volunteer, with or without compensation, in a structured volunteer program organized, controlled and directed by a state governmental entity for the purposes of carrying out the functions of the state entity.

Subpart paragraph (7) states that "an employee shall also include foster parents and foster children. This subparagraph provides that the term "[state officer or employee]" shall not include a corporation whether for profit or not for profit, or any private firm, business proprietorship, company, trust, partnership, association, or other such private entity. The term "state officer or employee" thus only includes natural persons.

In Keenan v. Plouffe, 260 Ga. 791 (1997), the Supreme Court decided that a state employed physician alleged to have negligently performed surgery on a private patient is not immune from suit under the State Tort Claims Act. Construing the provisions of O.C.G.A. § 50-21-25, the Supreme Court stated this ". . . section provides that a state employee is immune from suit for torts committed 'while acting within the scope of his or her official duties or employment.' . . . Thus, the decisive question in this case is whether Dr. Plouffe was acting within the scope of his official state duties while treating [the patient]." The Court concluded that Dr. Plouffe was not acting in the course of his official duties as a state employee in his treatment of the patient and was therefore not entitled to sovereign immunity.

Keenan v. Plouffe arose from a situation where the physician, Plouffe, performed a laser laparoscopy/hysterectomy on a patient at the Medical College of Georgia. At the time of the surgery, Plouffe was a member of the faculty of the Medical College. The patient suffered significant and permanent brain damage as a result of the surgery. The suit was brought against Dr. Plouffe and the manufacturer of a laser device known as an Argon Beam Coagulator. The suit alleged, among other things, that Dr. Plouffe was not certified to use this particular type of laser and that he had used it in a negligent manner during the surgery thereby injuring the plaintiff.

Dr. Plouffe moved for summary judgment asserting that he was acting as a state employee at the time of the surgery and that he was immune from suit under O.C.G.A. § 50-21-25. The trial court agreed with Dr. Plouffe, finding that he was teaching a resident doctor at the time of the patient's surgery and ruled that he was entitled to immunity. In reversing, the Supreme Court ruled:

. . . Although it could be argued that Dr. Plouffe was in the broadest sense acting within the scope of his employment because he had an obligation as a professor of the Medical College to treat patients, he had distinct obligations to [the patient] that were independent of his official state duties, and the duties he is alleged to have violated in this case relate solely to those independent obligations. Here, [the patient] was a private-pay patient who employed Dr. Plouffe as her medical doctor. She was billed directly for his services by the PPG [the Physicians Practice Group which exists as a cooperative organization under the policies of the Medical College of Georgia and the Board of Regents], and Dr. Plouffe stated that the diagnosis and treatment of [the patient], including the use of the Argon Beam Coagulator during the surgery, were left to his sole medical discretion, and were not controlled by the government. Therefore, significantly, the duties alleged to have been violated in this case relate strictly to the medical care provided [the patient] and do not call into play what might be termed 'governmental considerations,' such as the allocations of state resources for various types of medical care. 267 Ga. at 793.

The Supreme Court concluded that based upon the nature of the doctor's relationship with his patient in this case, as well as the fact that the allegations of negligence related solely to the doctor's independent medical judgment in treating the patient, that he was not acting within the scope of his official state duties in treating the patient. The Court construed the legislative intent of the Act bolstered the conclusion that the General Assembly did not intend for the language of § 50-21-25 ". . . to provide immunity to physicians under circumstances like those existing in this case." 267 Ga. at 795.

"Protecting doctors against the exercise of their medical discretion (as opposed to the exercise of governmental discretion) in treating a private patient does not further the purposes of official immunity." 267 Ga. at 796. "Further, liability insurance is readily available for medical doctors who treat private-pay patients. . . . because the purpose of official immunity is not furthered by construing the phrase 'official duties' to encompass the exercise of medical discretion with regard to private-pay patients, we decline to construe that phrase to provide protection in this case." *Id.* However, after making these important observations about the scope of sovereign immunity, the Court in footnote 17 indicated that it was not considering or ruling upon whether immunity is appropriate for state employed physicians who are required to treat particular patients:

Because this case involves the exercise of a medical discretion on a private-pay patient that was not controlled by the government employer or by statute, we do not consider whether immunity is appropriate for state-employed physicians who are required to treat particular patients, or who are alleged to have violated governmental, as opposed to medical, responsibilities, or whose medical discretion is controlled or impacted by governmental standards or constraints. 267 at 796, footnote 17.

The Supreme Court has also held that the 1991 amendment to the State Constitution and the 1992 enactment of the Tort Claims Act did not negate the long-standing principle of law that sovereign immunity does not protect or shield state departments or employees from injunctive relief. In IBM Corp. v. Evans, 265 Ga. 215 (1995), Justice Fletcher writing for the majority wrote:

This Court has long recognized an exception to sovereign immunity where a party seeks injunctive relief against the State or a public official acting outside the scope of lawful authority. . . . 'If the actions of [public corporations, boards or commissions] are illegal or contrary to law, the Courts will intervene in order to prevent [an action] illegal or contrary to the law.' . . . To avoid the harsh results sovereign immunity would impose, the Court has often employed the legal fiction that such a suit is not a suit against the state, but against an errant official, even though the purpose of the suit is to control state action through state employees.

Other relevant cases dealing with these issues are as follows:

(1) Unified governments are like counties, and hence such claims are barred by traditional sovereign immunity and do not fall within the ambit of the waiver to suit enacted by the Tort Claims Act. Swan v. Johnson, 219 Ga. App. 450, 465 S.E. 2d 684 (1995).

(2) In an action under the Act for injuries by a state prisoner sustained or working on a highway under the supervision of a county employee where the prisoner is held in the county jail under contract with the Department of Corrections, potential liability of the Department of the Tort Claims Act will turn on whether the employee was an agent of the DOC or an independent contractor. Williams v. Georgia DOC, 224 Ga. App. 571, 481 S.E. 2d 272 (1997).

(3) The state may be liable as a joint tort feisor under the Georgia Tort Claims act. DOT v. Brown, 218 Ga. App. 178, 460 S.E. 2d 812 (1995), affirmed, 267 Ga. 6, 471 S.E. 2d 849 (1996).

(4) A health department that acts solely as a county agency takes on the same immunity at the county itself, and its immunity is not waived by the Tort Claims Act. Fielder v. Rice Construction Company, 239 Ga. App. 362, 522 S.E. 2d 13 (1999).

(5) Armstrong State College v. McGlynn, 234 Ga. App. 181, 505 S.E. 2d 853 (1998) involves a case where a plaintiff was injured while participating in a ROTC repelling course at Armstrong State College. The instructor was an active duty non-commissioned officer in the United States Army assigned to the college for the purpose of instructing ROTC courses. It was alleged that the instructor was an agent of the college and that he and the college were jointly and severally liable for the plaintiff's damages. The Court of Appeals looked at the college's right to control the time, manner and method of the Army's performance of the courses. Because an insufficient level of control existed, the Court concluded that the instructor was an independent contractor, rather than employee or agent of the college, so that the Tort Claims Act did not apply.

C. **Prior to Filing Suit, You Must Timely File A Notice of Claim; the Notice of Claim Must Be Given in Writing Within 12 Months of the Date of Loss**

O.C.G.A. § 50-21-26 sets forth the requirements regarding the Notice of Claim which must be served upon the State as a prerequisite to bringing an action under the Tort Claims Act. O.C.G.A. § 50-21-26(a)(1) provides that anyone having a tort claim against the State pursuant to the Act must give notice of the claim in writing within 12 months of the date the loss was discovered or should have been discovered. O.C.G.A. § 50-21-26(a)(2) provides that the notice of a claim must be given in writing and ". . . shall be mailed by certified mail, or statutory overnight delivery, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services." This section also requires that in addition to serving the notice upon the Risk Management Division of the Department of Administrative Services, a copy shall be delivered personally to or mailed

(certified or “statutory overnight”) to the State Government entity whose acts or omissions or whose employee's acts or omissions are asserted as the basis of the claim. This provision also gives each state government entity the power and right to designate an office or officer within that entity to whom the Notice of Claim is to be delivered or mailed.

The Notice of Claim provisions of the Act are very important. A failure to strictly comply with the Notice of Claim provisions can be fatal. The Act specifically sets forth what is required to be included in the Notice of Claim. The items or matters that must be set forth in the Notice of Claim are set forth in O.C.G.A. § 50-21-26(a)(5). This provision provides:

A Notice of Claim under this code section shall state, to the extent of the claimant's knowledge and belief and as may be practical under the circumstances, the following:

- (A) the name of the state government entity, the acts or omissions of which are asserted as the basis of the claims;
- (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.

In serving Notices of Claims under the Tort Claims Act, it is the practice in our office to serve the Notice both by certified mail/return receipt requested and in person. We serve both the Risk Management Division of the Department of Administrative Services and the State Department whose acts or omissions gave rise to the claim, separately, by certified mail/return receipt requested and by hand delivery. O.C.G.A. § 50-21-26(a)(2) provides that when the Notice is delivered personally, a receipt must be obtained from the Risk Management Division of the Department of Administrative Services. When we serve the Risk Management Division of the Department of Administrative Services and State Departments personally with our Notices of Claim in the past, the persons to whom we have delivered these Notices often refuses to sign the receipt acknowledging delivery. Therefore, after we serve the Notices personally, we write a

separate letter confirming that the Notice of Claim was delivered at a certain time, on a certain date and naming the person to whom it was delivered, and that we provided a receipt acknowledging delivery which this person refused to sign. If the Notices are timely served both personally and by certified mail/return receipt requested to both the Department of Administrative Services and to each state governmental entity involved, then the plaintiff will have sufficient proof that the Notice was timely served.

In cases where there are separate claims by the estate for pain and suffering and a claim by the next of kin for wrongful death arising out of the same occurrence, I generally file separate claims, one on behalf of the estate for the pain and suffering and other claims belonging to the estate, and another Notice for the wrongful death claim. This is appropriate because in these cases the cap on damages of \$1 million set forth in O.C.G.A. § 50-21-29(b) should apply separately to the personal representative's wrongful death claim and the administratrix's claims arising from the occurrence. The Supreme Court in the case of Georgia Department of Human Resources v. Phillips, 268 Ga. 316 (1997) agreed and held that the personal representative and administratrix are "two distinct legal persons" and that the maximum amount of damages that could be assessed against the Department of Human Resources is \$2 million. In that case, the Court stated:

Notably, two separate notices of claim were filed in this case, each asking for damages in the amount of \$1 million. Because suit in this case was filed on behalf of two distinct legal persons, the pretrial order supports a damages award of \$2 million 268 Ga. at 320, footnote 18.

C. **Other Requirements of the Act with Respect to Commencement of A Lawsuit and the Filing of the Complaint**

1. O.C.G.A. § 50-21-26(b) mandates that the lawsuit or civil action may not filed or commenced following the presentation of the Notice of Claim until either the Department of Administrative Services has denied the claim or more than 90 days have expired after presenting and serving the Notice of Claim without action by the Department of Administrative Services.

2. The complaint filed must include and have attached thereto a copy of the Notice of Claim presented to the Department of Administrative Services along with the certified mail receipt or receipt showing personal delivery as exhibits thereto. See O.C.G.A. § 50-21-26(a)(4).

3. In order to perfect service of process in any lawsuit brought under the Act, the plaintiff must both: "(1) cause process to be served upon the chief executive officer of the state governmental entity involved at his or her usual office address; and (2) cause process to be served upon the director of the Risk Management Division of the Department of Administrative Services at his or her usual office address." O.C.G.A. § 50-21-35. It is also required under this section that a copy of the lawsuit showing the date of filing be mailed to the attorney general at his/her usual office address by certified mail/return receipt requested and attached to the lawsuit must be a certificate signed by counsel that this requirement has been complied with.

E. Constitutional Considerations Under The Georgia Tort Claims Act

There are several constitutional questions under the Tort Claims Act that have not yet been addressed. Overall, the Act has been held constitutional. That is, the Act generally was passed as a legitimate exercise of the power bestowed upon the General Assembly by the 1991 constitutional amendment. In addition, that amendment has been upheld as valid, notwithstanding the substantial controversy surrounding the deceitful ballot language that was used to trick the voters into ratifying the amendment. Donaldson v. Department of Transportation, 262 Ga. 49 (1992); Burton v. Georgia, 953 Fed. 2d 1266 (11th Cir. 1992).

Other constitutional issues remain. First is the question of whether the cap and the immunity provisions can be applied retroactively to those claims that accrued prior to adoption of the act. A fundamental tenet of Georgia law is that substantive rights may not be abridged retroactively. Ga. Const. Art. I, Sec. I, Par. X. This issue was presented to the Georgia Supreme Court in the case of D.H.R. v. Phillips, supra, but the court declined to reach the question, holding instead that the issue had not been timely raised procedurally in that case. As time moves on, of course, the issue of retroactivity has become less and less important, and it may never be decided. For causes of action arising after the effective date of the act - which are

nearly all of the cases now in the courts - the constitutionality of the GTCA's retroactivity provision will not be at issue.²

Regardless of retroactivity, there is the broader constitutional question that was not resolved in Riddle v. Ashe, 269 Ga. 65 (1998). While holding in that case that the Act was constitutional because it afforded remedies against state agencies where remedies were abrogated (by immunity) against individual employees, the Court did not reach the much more substantial constitutional question of whether the immunity granted employees is constitutional where *no remedy is provided by the GTCA*.

This constitutional issue starts with the language of the "tort claims amendment" itself. The 1991 constitutional amendment provides, in part:

Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions....Ga. Const. Art. I, Sec. II, Par. IX.

The importance of this amendment is that it provides an affirmative right of action and remedy against officers and employees of the state who are negligent, *except insofar as a tort claims act is passed*. Given the affirmative establishment of this right of action, can a tort claims act immunize employees for their misconduct *where that misconduct does not have a corresponding remedy under the Tort Claims Act*? If the General Assembly could do that, why couldn't it pass a tort claims act that created a very narrow category of remedies (i.e., waivers of sovereign immunity), give blanket immunization to officers and employees of the state for all their conduct? That would not make sense, and it would not seem to be consistent with the constitutional provision. But where should this line be drawn, if it is not drawn to require that

² This view should be tempered by the fact that the GTCA contains broad tolling provisions so that actions may be filed, under proper circumstances, years after the original negligence.

employees be subject to suit *wherever* there is no corresponding remedy under the Tort Claims Act?

The same question comes up with regard to the caps under the Act. In cases where damages exceed the per-claim cap, the remedy provided by the Act is different than the rights affirmatively established by the constitutional provision. Can the caps be constitutionally applied in those circumstances? These constitutional issues were not raised in the recent case of Ridley v. Johns, *supra*. While that case came to the dubious conclusion that actions against state employees predicated upon actual malice or actual intent to injure were precluded by the interaction of the 1991 sovereign immunity amendment and the Tort Claims Act, it did not address these broader issues. They were not raised. Ridley does indicate a willingness, however, to obliterate causes of action that previously existed.

F. Other Cases Under the Tort Claims Act

The Tort Claims Act was applied in a contorted way to achieve a very bad result in the recent case of Ridley v. Johns, 274 Ga. 241, 552 S.E. 2d 853 (September 17, 2001). The plaintiff in that case sued a state employee who was their supervisor for slander, libel, intentional infliction of emotional distress, and invasion of privacy. A loss of consortium claim was also filed arising out of the same acts by plaintiff's husband. Because the torts were intentional and involved allegations of actual malice, no recovery for such claims, if proved at trial, could be had against the appropriate state department under the Tort Claims Act. O.C.G.A. § 50-21-24(7) [providing the general exemption for "assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights].

Notwithstanding the fact that the Tort Claims Act provided no remedy, however, the Supreme Court in Ridley relied upon the Act's exemption principal to also exempt the individual employee-defendant from liability. The Court of Appeals had held that malice or intent to injure could strip a state officer or employee of the immunity otherwise provided by the Tort Claims Act for torts committed within the scope of his or her official duties or employment. The Supreme Court disagreed, holding:

The statute is plain in its language as to the scope of its coverage and the extent of the immunity granted thereby: “this article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee or commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefore.” . . . since there is no exemption in the statute or acts motivated by malice or an intent to injure, the presence of such motivation has no effect on the immunity granted by the statute. 274 Ga. at _____ (emphasis added).

Other pertinent cases include:

(1) Dept. of Transportation v. Evans, 269 Ga. 400 (1998) - This case addressed the issue of venue under the GTCA. Here the plaintiff was injured in a car accident in Columbia County and was then transported to the hospital in Richmond County where she died. The GTCA specifies that venue is proper in the county wherein the loss occurred. O.C.G.A. § 50-21-28. The court held that venue was proper in the place where the death occurred. The focus of venue is the situs of the loss and "loss" is defined in the Act as "personal injury or death." O.C.G.A. § 50-21-22(3).

(2) Dept. of Transportation v. Cannady, 230 Ga. App. 585 (1998) - Plaintiff was injured when hit by car which hydroplaned on wet roadway and brought suit against DOT alleging negligent maintenance. Plaintiff sought to introduce evidence of subsequent remedial measures that the DOT took with respect to pavement of the road. General rule is that such subsequent remedial measures are not admissible, however, the court enumerated several exceptions: to prove some fact of the case; show knowledge of the defect; to rebut a contention that it was impossible for the accident to occur in the manner alleged; or to show feasibility of repair. Admission of such evidence is within the discretion of the trial court judge. Appeals Court affirmed trial court's decision to allow such evidence here.

Court also addressed the issue of the \$1 million cap. Held that the trial court erred in failing to conform the judgment to O.C.G.A. § 50-21-23. Maximum recovery of \$1 million for each occurrence; jury verdict of \$2.75 million reduced accordingly. No constitutional challenge was made to cap. Court also addressed the issue of how a

settlement with a previous defendant should be handled with respect to information given to the jury.

(3) Riddle v. Ashe, 269 Ga. 65 (1998) - Superior Court struck down the immunity provisions of the Georgia Tort Claims Act as unconstitutional. The Supreme Court reversed, holding that the general assembly - in providing for employee immunities - had acted within its constitutional authority under the 1991 amendment. The Court reasoned that the GTCA does not give "blanket immunity" for suit, but rather immunizes the officials while waiving immunity with regard to the state departments themselves. "Accordingly, the GTCA provides limited, rather than blanket, immunity from suit." Id. at 67.

Importantly, the Court does not address the constitutional issue of whether the immunity provision is constitutional where a remedy is not provided for the official's conduct. That is particularly true where there otherwise would have been a remedy for that official's conduct under prior law; under the affirmative grant of rights to the citizens under the 1991 amendment to the constitution; or pursuant to Georgia case and statutory law that existed prior to enactment of the GTCA. In those situations, there would be no corresponding in waiver of sovereign immunity, you would have what the court describes as "blanket immunity."

The opinion also notes that there is no immunity for the acts of an officer employee that "are not within the scope of his or her official duties or employment." Id. at 66. That is what the code itself provides under the GTCA.

(4) Norris v. Dept. of Transportation, 268 Ga. 192 (1997) - Court addressed the issue of whether an ante litem notice of claim under GTCA requires actual receipt of a writing by appropriate state agent or whether this notice requirement is satisfied by proper mailing. Court held that mailing is sufficient.

(5) Campbell v. Dept of Corrections, 268 Ga. 408 (1997) - Plaintiff filed suit in Fulton County and argued that Fulton County was proper pursuant to Art. VI, Sec. II,

Par. VI (Ga. Const. 1983) (residence of Defendant). Defendant then moved to transfer pursuant to GTCA venue provision (where loss occurred). Court held that O.C.G.A. § 50-21-28 controlled because it provided for exclusive venue for a GTCA suit against DOC.

(6) Wellborn v. Dekalb County School District, 227 Ga. App. 377 (1997) - Plaintiff's son had sexual relationship with his sign language interpreter. Since the son, who was of majority, was not a party to this appeal, dismissal of son's claims and dismissal of school board from this action were not properly before the court. Court also held that mother's claim for emotional distress was not proper because such claims are only allowed where there is some physical injury to the claimant (negligent infliction of emotional distress) and intentional infliction of emotional distress can only be brought where the intentional act was directed at the plaintiff. Also, GTCA provides for limited waiver of sovereign immunity for torts of state officers and employees, but it excludes school districts from the waiver.

(7) McGee v. State of Georgia, et al, 227 Ga. App. 107 (1997) - Ante litem notice of the GTCA is not unconstitutional and must be strictly followed. Court considered the issue of whether substantial compliance with the ante litem provisions is sufficient. Held that substantial compliance is not sufficient and that the provisions must be specifically followed. Court also briefly considered the issues of whether defendant McGee was an employee of the state and whether he was acting within the scope of his official duties. Court found that he was an agent and was acting within the scope of his employment, and thus the trial court did not err in granting summary judgment in favor of Avant individually and dismissing him from the action.

(8) Howard v. State of Georgia, 226 Ga. App. 543 (1997) - Court addressed issue of notice of claim requirement of GTCA. Held that these requirements must be strictly followed. Plaintiff, in this case did not adequately give such notice. However, court held that if the appellant is a minor, GTCA tolls with respect to the ante litem notice

until appellant reaches majority. Statute of limitation will not run against a minor represented in litigation by a next friend. Thus appellant's cause of action was not barred.

(9) Sherin v. Dept of Human Resources, et al, 229 Ga. App. 621 (1997) - Plaintiffs were foster parents who adopted a child with the assistance of defendants. However, they were not told of the child's history of sexual misbehavior. Some of plaintiffs' other children were sexually assaulted by the newly adopted child and plaintiffs brought the instant action against DHR and against the employee who placed the child with plaintiffs without adequately informing them of the child's history. Court held that the DHR employee who was responsible for such placement was entitled to qualified immunity due to the fact that her actions were within the scope of her discretionary authority. With respect to the GTCA issues, the court held that sovereign immunity is not an affirmative defense and that the party seeking to benefit from the waiver of sovereign immunity bears the burden of proof.

II. THE LIABILITY OF COUNTY OFFICIALS FOR TORTS

A. INTRODUCTION

The law in Georgia has long been that – absent of specific waiver – the state, its subdivisions, counties, and similar governmental entities are immune from general tort liability. While these entities might be liable *as entities* for a variety of damage claims, their general tort liability – absent a specific statutory waiver³ – is limited. In these regards, the law became no more favorable to injured persons after the sovereign immunity amendment to the Georgia Constitution was ratified in 1990. Prior to the 1990 amendment, sovereign immunity shielded the state from tort liability in the absence of insurance, and that immunity applied to “political subdivisions of the state,” including the State Board of Regents, counties, school boards, other agencies or authorities in charge of public schools, and the like. Hennessy v. Webb, 245 Ga. 329 (1980)⁴; Perry v. Regents of University System, 147 Ga. App. 42 (1972). Clark v. State of Georgia, 240 Ga. 188, 240 S.E. 2d 5 (1977); Ga. Const., Art. I, § 2, ¶ 9(e). In the several years just before enactment of the 1990 amendment, there were some interesting developments that began to open the door for tort liability against state employees – and even those agencies and department that employed them – where there was insurance, including self-insurance provided by the DOAS. Martin v. Georgia Department of Public Safety, 257 Ga. 300, 357 S.E. 2d 569 (1987); Price v. Department of Transportation, 257 Ga. 535, 361 S.E. 2d 146 (1987).

The 1990 amendment did not abrogate the existing immunity. It provides: Except as is specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the

³ For example, governmental entities as such may be liable for actions *ex contractu*, for takings, and for excessive regulations that constitute takings, whether permanent or even temporary. Some of these causes of actions are grounded in constitutional and due process principles.

⁴ “Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him, he is sometimes called a quasi-judicial officer, and when so acting he is usually given immunity from liability . . . these discretionary acts lie midway between judicial and ministerial ones . . . and the question depends on the character of the act.” Hennessy v. Webb, 245 Ga. at 330-31.

General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

Ga. Constitution, Art 1, Sec. 2, Para. 9(e).

This amendment has been construed to not only restate the sovereign immunity of counties, but to eliminate the possibility that the purchase of insurance by a county – for either itself or its employees – could constitute a waiver of immunity for torts generally to the extent of the insurance in place. Gilbert v. Richardson, 264 Ga. 744, 452 S.E. 2d 476 (1994). The statutory exceptions to county sovereign immunity to tort liability are few and narrow. One that arises commonly is that for claims arising from the use of a motor vehicle. O.C.G.A. § 33-24-51(b). To the extent that a county has purchased insurance to cover claims arising from motor vehicle use, the county’s sovereign immunity for tort liability is waived. The waiver effected by that statute is limited, and no other is provided for a general tort waiver. See Woodard v. Lions County, 265 Ga. 404 (1995).

B. Official Capacity v. Individual Capacity Liability and Immunity

While the cases are not entirely clear on how they use the concepts, a suit against an individual county employee or official in his “official capacity” is essentially an action against the official’s office. Judgment against such a person in their “official capacity” is recoverable against the office itself, to the extent that that office has funds or assets to satisfy a judgment. Suits against employees or officials in their “individual capacity” seek damages that are directly recoverable from the individual, and not from the governmental employers. Gilbert v. Richardson, 264 Ga. 744, 452 S.E. 2d 476 (1990). While there are a lot of differences between state law concepts of immunity and the federal law of immunity – particularly as it has developed under 42 U.S.C. § 1983, which authorizes civil rights against for constitutional deprivations – the “official capacity” “individual capacity” distinction is pretty much the same under Georgia law as it is under federal law. See Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304 (1989).

Because actions against county employees and officials brought “in their official capacities” seeks a judgment against county assets, claims against such officials in their “official

capacity” are subject to the same sovereign immunity defenses as are actions directly against the county. That is not the case in actions brought against officials in their individual capacities, although the grounds for which actions may be successfully asserted are significantly narrower than what would be applicable in private tort actions.

C. Discretionary Acts v. Ministerial Acts

Both before and after the sovereign immunity amendment became effective in 1991, Georgia law has recognized actions against county employees acting in their *individual capacity* for torts, subject to certain immunities. Those immunities are more limited than the all-encompassing blanket of sovereign immunity.

The immunity that individual county defendants may avail themselves of has been given various names. Most often, it is called “official immunity” or “governmental immunity” as opposed to “sovereign immunity” which runs to the governmental entity itself. This same immunity is sometimes referred to as “discretionary act immunity.”

Generally official immunity may shield governmental officers from liability, but not if they acted with actual malice or with intent to cause injury. Todd v. Kelly, 244 Ga. App. 404, 535 S.E. 2d 540 (2000). Also, an officer or county official can be held liable for the negligent performance of ministerial acts. A ministerial act is distinguished from a discretionary act of the official. The number of cases addressing what constitutes a ministerial act, which arises from a ministerial duty, and a discretionary one, is tremendous. The earliest ones go back to the early days of Georgia law. These cases are not always entirely consistent; they turn very much on the particular facts of the case.

There are some general formulations of ministerial and discretionary acts, though even those emphasize the importance of looking at the facts. A discretionary act is often said to be one that calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasonable conclusions, and acting upon them in a way not specifically directed. See, e.g., Todd v. Kelly, *supra*. That formulation, however, could arguably apply to the most simple-minded, mechanical act imaginable. It must, and has been, tempered

with practicality. In the same vein, ministerial acts have been defined to be acts that are “simple, absolute, and definite, arising under conditions admitted or proved to exist in requiring merely the execution of a specific duty.” Phillips v. Walls, 242 Ga. App. 309, 311 (2000).

The law respecting individual actions against county officials seems to be unchanged by the 1991 sovereign immunity amendment (aside from the question of immunity waivers through purchase of insurance). “The 1991 amendment to the Georgia Constitution provides that such officials may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in their performance of their official functions.” Phillips v. Walls, 242 Ga. App. 309, 311 (2000). “The decision of whether acts of a public official are ministerial or discretionary is determined by the facts of the particular case.” The decision of whether acts of a public official are ministerial or discretionary is determined by the facts of the particular case. Id. Nelson v. Spalding County, 249 Ga. 344, 336 (2)(a), 290 S.E. 2d 915 (1982). Moreover, “A ministerial act is commonly one that is simple, absolute and definite arising under conditions admitted or proved to exist and requiring merely the execution of a specific duty.” Id.; Stone v. Taylor, 233 Ga. App. 886, 888 (2), 506 S.E. 2d 161 (1998).

D. How Discretionary and Ministerial Acts Have Been Viewed by the Courts.

Notwithstanding the oft-cited proposition that ministerial acts are only those that are “simple, absolute and definite,” the law plainly recognizes a broader range of conduct and circumstances as creating ministerial duties than the narrowest mechanical application of the general principle might allow. Some examples of cases are as follows:

1. Public duties, “the public duty doctrine,” wrongful arrest and deputy sheriffs.

In the area of warrant service by sheriffs, the deputy sheriffs are vested with the authority to arrest and imprison citizens in the State of Georgia. Georgia has a long-standing history of protecting personal freedom and individual liberty and, as a result, there are protections and safeguards established to protect citizens. The right of the people to be secure in their homes,

houses, papers and effects includes the right to privacy which is guaranteed by the Constitution and the laws of the state. See Walker v. Whitle, 83 Ga. App. 445, 448 (1951). The warrant requirement in Georgia law regarding executions of warrants is fundamental to that protection. Ga. Const. Art. 1, § 1, ¶ 13.

To determine whether the action of a deputy sheriff violates principles of law which imposes an execution of a specific duty one must examine the actual duties.

(1) Law enforcement officers must act with due diligence and in good faith to be certain that the correct person is served. See Massey Stores, Inc. v. Reeves, 111 Ga. App. 227, 229 (1965); and

(2) A deputy sheriff must examine the warrant to insure the fact that the correct person has been identified. See Blocker v. Clark, 126 Ga. 484, 488 (1906).

The violation of either of the above stated duties constitutes a violation of ministerial duties under Georgia law. This, coupled with the fact that a county sheriff's department generally has specific procedures directing the performance of acts with respect to the execution of warrants, would strengthen the plaintiff's assertion that a ministerial duty had been violated.

The Georgia courts have held that when there is an established policy in place directing a governmental employee to perform, or refrain from performing an act, the failure to carry out the procedure is ministerial. For example, in Phillips v. Walls, *supra*, plaintiffs brought suit against county employees alleging that they failed to inspect a particular intersection and failed to monitor the accident history of the intersection contrary to established conventions, both of which caused injuries to their minor children. Phillips, 242 Ga. App. at 309-310.

In analyzing the issue of official immunity, the Court of Appeals first addressed whether the act of inspecting the intersection and monitoring the accident history was a ministerial or discretionary act. While there was no law specifically directing the county employees to inspect the particular intersection at issue, or review and monitor the accident history, the court nevertheless held that the acts were ministerial in nature. The court held that “[w]hile the act of

establishing a policy in the first place is discretionary, the acts of following established policies of inspecting and monitoring are ministerial tasks. [cits.] Both of the actions to which plaintiffs attributed damages here are ministerial in nature being failures to carry out procedures that were already established.” Id. at 311-312.

It is important to note that an act may be ministerial despite the fact that it requires some prior care. Moreover, there is no requirement that the act should literally “be robotic in nature.” Howard v. City of Columbus, 239 Ga. App. 329 (1999). (Sheriffs’ training, supervision and enforcement of policies, practices and procedures are ministerial); Washington v. Department of Human Resources, 214 Ga. App. 319 (2000) (County employees decision to bathe patient in water which was too hot, causing injuries, was ministerial).

When action is brought against county officials, individually, pursuant to Georgia Constitution, Art. 1, § 2, ¶ 9(c), a defendant may attempt to vitiate the affect of this constitutional provision through application of the “public duty doctrine.” The public duty doctrine limits the liability of government and public officials for non-enforcement of their police power. The public duty doctrine began in 1855 in the case of South v. Maryland, 59 U.S. 396 (1855), where a plaintiff sued the local sheriff for refusing to arrest and detain third parties whom the sheriff knew had threatened the plaintiff. The Court held that the sheriff’s arrest powers were a public duty, the neglect for which the sheriff was subject to the public generally through elections or indictment, but not through private civil action.

Most Georgia cases which apply the public duty doctrine deal with non-enforcement of the state’s police power. For example, in City of Rome v. Jordan, 263 Ga. 26, 426 SE.2d 861 (1993), the court granted certiorari “to determine the duty of police officers of the city to respond to emergency requests for help” and to determine if a municipality may be held liable for the failure of its duty to provide police protection to individual citizens. While much of Jordan is inapplicable because it involved a Section 1983 claim, it is informative. The Court concluded that the imposition of liability on a city based on the general duty to protect all citizens from

third parties, would improperly expand the city's duty and potential liability beyond that which is imposed on private parties under traditional tort analysis.

The Georgia Court of Appeals has extended the rationale in City of Rome v. Jordan beyond police protection cases. The appellate court reversed a judgment against the City of Lawrenceville for negligent building inspection in City of Lawrenceville v. Macko, 211 Ga. at 312 (1993). The owners of a house had sued the city for damages arising out of a deficient drainage system which the city building inspectors had accepted. The Court of Appeals, citing Jordan, relied upon the “public duty” doctrine in this context to bar the action against the city holding:

[L]iability does not attach where the duty owed by the governmental unit runs to the public in general, and not to any particular member of the public except where there is a special relationship between the government unit and the individual giving rise to the particular duty owed to that individual. As a result liability attaches to the municipality only where a special relationship existed between the municipality and the injured individual which sets the individual apart from members of the general public. 211 Ga. App. at 315.

When the court applied the facts to the public duty doctrine it noted that it was undisputed that the city did not make specific assurances to the owner of the house prior to the purchase of the home. The court held that the owners “did not establish that a duty of care was owed to them by the city based upon a special relationship, [therefore] the trial court erred in failing to grant the city's motion for a directed verdict”. Id. at 316.

In Hamilton v. Cannon, 267 Ga. 655, 482 SE.2d 370 (1997), the Supreme Court held that the public duty doctrine had no application outside the area of police protection. In Hamilton, after children were playing in the water in a swimming pool, a child went to the bottom of the pool and stayed there until another child pulled him out to perform CPR. A deputy arrived on the scene and forced the child to stop giving the victim child CPR. As no first aide was rendered, the victim child later died. The Court held that the public duty doctrine was not applicable pursuant to the City of Rome decision because it did not involve police protection in the context of criminal activity.

The latest Georgia Supreme Court decision to attempt to clarify the public duty doctrine is Rowe v. Coffey, 270 Ga. 715, 515 SE.2d 375 (1999). Unfortunately, the Supreme Court did not offer any significant explanation regarding the applicability of the public duty doctrine in cases outside the context of police protection. In Rowe, the county and other defendants were sued for negligence due to the failure on behalf of a deputy sheriff to protect the plaintiffs from a deteriorated section of a road which led to a series of wrecks and ultimately to a death.

The Rowe court held that the “police protective services” inherent in the public duty doctrine includes a particular deputy's decision not to erect a barricade. However, the court did not hold the deputy liable as it found that a “special relationship did not exist between himself and the injured parties.” Id. Unfortunately, the court said that it would not set up parameters of what exactly amounted to police protection, however, the court would apply such protection to the facts of the case in Rowe.

The concurrence by Justices Fletcher and Sears advocated [dissenters in Hamilton v. Cannon, supra) revision of the public duty doctrine as follows:
[L]iability of a governmental unit and its agents for failure to provide police services to an individual does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public, but liability does attach when (a) one with the duty to provide police services is present at the scene of a crime or emergency with the knowledge of the danger and resources to aid an injured or imperilled party, yet fails to act; *or* (b) apply the City of Rome v. Jordan test which requires the special relationship.

One of the more thorough discussions of ministerial duties was made in Miree v. United States, 490 F.Supp. 768 (N.D. Ga. 1980). In Miree an airport manager was required pursuant to his job description to correct a hazard caused by birds congregating around the Peachtree-Dekalb Airport. The manager had taken some actions to mitigate the bird hazard, however his efforts were insufficient and a fatal crash ultimately killed seven persons on board an aircraft, with serious injury to a bystander. Initially, the plaintiffs brought suit against, inter alia, the United States and Dekalb county accusing both entities of negligence in the operation of the airport. The plaintiffs further contended that Dekalb county was liable to them for maintenance of a

nuisance, or bird hazard, and for the breach of the provisions of airport safety which Dekalb county was required to follow.

The plaintiffs alleged that the airport manager, Manget, a Dekalb county official, had a duty to maintain and supervise ground operations as well as to insure the safety of airport patrons. The plaintiffs further contended that Manget breached this duty by failing to remedy the hazard in light of the fact that he knew that there had been recent bird strikes in the area. Accordingly, the plaintiff filed suit for Manget's negligence to warn other airmen of the bird hazard, negligent behavior in the face of the continuing risk of tragic consequences, etc.

Manget's assertion that his negligence, if proven, was committed in the exercise of his discretionary authority, which would allow him to assert his governmental immunity from liability. The plaintiffs responded that Manget had prior orders from the FAA to fix the hazard and he had no choice but to eliminate "or at least mitigate the danger." Moreover, the plaintiffs rightly asserted "that even assuming that this act demanded an act of discretion, Manget could still be held liable for wilful and wanton misconduct and that their claim clearly alleged this theory of liability." Id.

The court then summarized its final view of Georgia law regarding the liability of a public official:

Georgia courts have steadfastly refused to grant a public official the same blanket immunity extended the state to avoid allowing public officials to escape all legal responsibility for their actions, but at the same time to prevent the specter of tort liability from inhibiting all governmental decision making. The courts have drawn a rather fine distinction between discretionary and ministerial acts. A clear line is difficult to draw because it is essentially a question of degree. A discretionary act is generally characterized as one which is the result of personal discretion or judgment. A ministerial act on the other hand, requires merely the execution of the specific duty arising from fixed or designated facts. A public official is protected from liability in the performance of his discretionary duties whereas ministerial acts are committed at the officials own risk." Miree v. United States, 490 F.Supp 768, 773.

To determine the definition of the action taken by Manget, the court then focused on Manget's contention that his discretionary authority is "self-evident" based on his review of his job requirements. "In Georgia the distinction between a ministerial and discretionary act and,

therefore, the scope of the immunity granted a public official in any given situation, turns upon the specific character of the complained of act not the mere general nature of the job". Id. Citing Partain v. Maddox, 131 Ga. App. 783, 206 SE.2d 618. The court then concluded "the single overriding factor is whether the specific act from which liability allegedly arises is discretionary or ministerial". Id.

Accordingly, the court found that the determinative act was Manget's failure to not only get rid of the bird hazard, but also to warn the departing pilots of the hazard, if Manget admitted that part of his job description was to insure ground safety. Indeed, he had testified that on 172 separate occasions he went to the runway, armed with a shotgun, to shoot at birds. The court asserted that there was nothing in the list of Manget's official actions that suggested that his acts were discretionary. In denying Manget's motion for summary judgment, the court stated: "[O]nce the bird problem and the need to correct it were acknowledged by the official responsible for the maintenance and operation of the airport, the time for exercising personal judgment had passed."

In assessing a situation and weighing alternative courses of action, an official is called upon to exercise his own judgment in prescribing the approach to be taken. If he should select one course of action over another, or simply decide to defer further action until he has more of an opportunity to review the circumstances, the official may be faulted for any deliberative errors. The official may be held personally liable for the consequences of his decision. Implicit in the conclusion that an act was discretionary is the notion that the official was free to perform or disregard the act . . . when . . . he acts under the compulsion of orders from his superiors or of his own evaluation of an exigent need for immediate action, his discretion, however broad it might be normally, has no reason or room to operate. Arguably, the selection of an appropriate method of solving the problem from a number of alternatives requires personal judgment and deliberation, but not necessarily so, and defendant offers nothing here to distinguish these circumstances from those present in earlier decisions in which a public official's freedom to choose the appropriate method to complete a designated duty was held to be insufficiently discretionary to shield the official from liability when the work under his supervision was performed negligently. "*The fact that Manget could choose his means does not transform his specific duty to eliminate and acknowledge hazard into a discretionary act.*"

2. Liability in Highway Cases.

There are many cases in Georgia law involving torts arising from injuries and deaths on the highway. Frequently, county employees with some responsibility for highway maintenance, highway design, signalization, and the like have been defendants in these cases. There is a higher archy of facts presented in these cases, varying from more general and discretionary types of decision-making by county officials, to the more mechanical and less judgmental. The more the facts tend towards the latter category, the more likely there will be liability. But it is not necessary, as noted above, that the responsibility of the defendant be truly mechanical or “robotic.”

The decision whether to erect a traffic signal is generally a discretionary one. Donaldson v. DOT, 236 Ga. App. 411, 511 S.E. 2d 210 (1999). Once the decision has been made to erect a traffic signal, however, the execution of that decision has been held to fall within the ministerial duty excepting, and those cases go back a long time.

“Should the city decide when a street should be opened, closed or repaired, or when a sewer should be built, it is clearly exercising legislative or judicial functions, but when it engages in the work of opening, closing, or repairing a street, or building a sewer, and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature.” City Council of Augusta v. Owens, 111 Ga. 464, 36 S.E. 830 (1900); Mathis v. Nelson, 79 Ga.App. 639, 54 S.E.2d 710 (1949) (emphasis added).

“A ministerial act is commonly one that is simple, absolute, and definite, arising under conditions admitted or proved to exist, and requiring merely the execution of a specific duty. A discretionary act, however, calls for the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.” Phillips v. Walls, 242 Ga. App. 309, 529 S.E.2d 626 (2000). Implicit in the conclusion that an act is discretionary is the notion that the employee is free to perform or disregard the act. Miree v. United States, 490 F.Supp. 768 (1980).

Requiring ministerial acts to be specific and definite led to cases that have held that they must derive from an established policy or procedure adopted by a county to discharge its official

functions. Woodward v. Laurens County, 265 Ga. 404, 456 S.E.2d 581 (1995). The act of establishing a policy or procedure is discretionary, but the acts of employees in carrying out or performing the policy or procedure is ministerial in nature. Phillips v. Walls, 242 Ga. App. 309, 529 S.E.2d 626 (2000).

Cases indicate that the policy or procedure need not be in writing and may simply be custom or even common sense. For example, a county road supervisor was told at 6 a.m. that a tree had fallen across a highway. He decided not to take immediate action to warn of or remove the hazard but waited two hours until a road crew could be dispatched. During the delay, a wreck occurred causing injuries. The court said that the supervisor had the discretion to choose the manner in which the task was to be performed but this did not change the ministerial nature of the task; the two-hour delay raised an issue of negligence. The court held it was a jury question whether the supervisor negligently performed his ministerial duty to more quickly remove or warn of the hazard. Lincoln County v. Edmond, 231 Ga. App. 871, 501 S.E.2d 38 (1998). In Edmond, there was no discussion whether the county had a policy that required employees to take some kind of immediate action to mitigate a road hazard.

Related issues were addressed in the badly fractured decision in Rowe v. Coffey, 270 Ga. 715, 515 S.E. 2d 375 (1999), reversing Coffey v. Brooks County, 231 Ga. App. 886, 500 S.E. 2d 341 (1998). In that case, a deputy sheriff observed a county road during a torrential rain storm, and decided that a barricade was not called for because of the threat of washout. However, a subsequent washout in the road led to a series of wrecks and a death. An action was brought against several deputy sheriffs, the sheriff, and various road supervisors. The opinion announcing the judgment of the Supreme Court was joined in by only one other justice; it held that the public duty doctrine encompassed the activities of the deputy sheriff in inspecting the road during the rainstorm. He was therefore entitled to summary judgment. Justice Sears concurred, writing that a police officer/deputy sheriff may be liable for acts of misfeasance and nonfeasance when there is a “special relationship” between the parties, and she sets out three elements that go to the creation of that relationship. “Thus, in the context of an automobile

accident, the arrival of a deputy sheriff at the emergency scene would fulfill the first requirement; the presence there of an individual known by the deputy to need assistance in order to avoid injury would fulfill the second; and any act of simple negligence committed by the deputy on which the injured person relies will satisfy the third requirement.” 270 Ga. at 722. Broadly stated, this view could excuse police officers from liability under the public duty doctrine where they are engaged in “general policing” activities, as opposed to dealing with specific individuals. Justice Thompson joined in Justice Sears dissent.

Justice Carley dissented and would have gone further. He would abolish the public duty doctrine completely, or at least restrict it to the narrowest circumstances. “The incorporation of the public duty doctrine into Georgia’s tort jurisprudence has resulted in a limitation on liability which is in addition to that provided by constitutional governmental immunity.” 270 Ga. at 723.

In short, while the public duty doctrine is not dead in Georgia, it is under assault and has been narrowed from the broad scope attributed to it by some government defendants in the past.

Other highway cases involve allegations of negligent inspections, or failures to inspect, beyond the public duty issues raised in Rowe. In Kordares v. Gwinnett County, 220 Ga.App. 848, 470 S.E.2d 479 (1996), since there was no procedure or instruction which the defendants failed to follow, the acts upon which liability were premised were deemed discretionary.

Where a county policy or procedure creates a ministerial duty without establishing a time frame to perform the duty, a jury question is created as to whether there was an inordinate delay in performance. For example, in a recent case a motorist was killed in a wreck when she lost control of her vehicle on a curve. A witness testified she had called the county road supervisor before the wreck complaining that the highway was too fast and needed speed bumps or guard rails where the fatality occurred. The county had a policy of following up on citizen complaints regarding issues of road safety. The supervisor denied getting such a complaint and argued that, even if he did, there was no requirement that it be investigated within any particular time frame. The court held that the county policy created a ministerial duty requiring the road supervisor to follow up on such citizen complaints. “[A] jury must decide whether Tatum properly followed

department policy for investigating [the] complaint, including whether six months was a reasonable response time. In short, the jury must decide whether he negligently breached his ministerial duty to investigate.” Wanless v. Tatum, 244 Ga.App. 882, 536 S.E.2d 308 (2000).

In Nelson v. Spalding County, 249 Ga. 334, 290 S.E.2d 915 (1982), it was alleged that a county employee was negligent in his “failure to act within a reasonable time” to replace a missing stop sign before a motorist was killed at an intersection. The court held that the act of replacing and repairing signs is ministerial rather than discretionary in nature. Once the employee is notified that a sign is missing his duty is to replace it, the court said. This duty does not involve the exercise of discretion on his part. The performance of this duty is, therefore, ministerial, it was held. Although it could not be shown that the employee had actual notice of a downed sign there was evidence the sign had been missing for several days. Thus, the court held the alleged delay raised a jury issue due to a conflict in the factual testimony.

3. Other Recent Cases

(1) Ross v. Taylor County, 231 Ga. App. 473, 498 S.E. 2d 803 (1998). Plaintiffs were injured when their car overturned in a ditch on a county road. The road was built by the county pursuant to a public road contract with the DOT; the original plans for the road were altered by the county and a portion of the road was left unpaved. Plaintiffs argued that a provision in the contract requiring the county to build the road “in strict and in entire conformity” with the specifications made the road construction process, in its entirety, a purely ministerial functions. The Court of Appeals disagreed. “[T]o change the plans and not build a portion of the road; to end the paving at a certain location and in a certain manner; and to use (and not use) certain warning signs and traffic signals indicating the end of the paved road . . . are the very essence of discretionary acts.” 231 Ga. App. at 474. It is interesting that the court writes comparing discretionary acts under the Tort Claims Act with traditional ones, and states in that regard that, because the Tort Claims Act does not apply [the case being against a county and its employees]: “we therefore need not apply the **restrictive definition** of discretionary acts supplied by the Georgia Tort Claims Act. . . .” (Emphasis added.)

(2) Bixler v. Merritt, 244 Ga. App. 82, 534 S.E. 2d 837 (2000). The plaintiffs sued Dekalb County EMT's, alleging that they failed to perform ministerial duties, etc. in failing to her to the hospital after responding to her 911 call. The court did not reach the official immunity issue, holding that immunity was appropriate under O.C.G.A. § 31-11-8 which applies to any person "who is licensed to furnish ambulance service and who in good faith renders emergency care. . . ."

(3) Brock v. Sumter County School Board, 246 Ga. App. 815, 542 S.E. 2d 547 (2000). A child waiting for a school bus darted out into the road and was stuck and killed by a truck. The plaintiffs alleged negligence by the School Board's transportation director for not performing a morning check route of the bus route, which was not required by any policy. Official immunity held to apply; ministerial duties did not include the supervising, controlling, and monitoring of student safety under the circumstances.

(4) Carter v. Glenn, 249 Ga. App. 414, 548 S.E. 2d 110 (2001). Plaintiff alleged that a former city police officer raped her, and that the city mayor and police chief violated ministerial duties concerning the employment and retention of the alleged malcreant. The Court of Appeals disagreed, holding that official immunity applied as the actions of the defendants were discretionary. "While the act of establishing a policy in the first place is discretionary, the acts of following established policies of inspecting and monitoring are ministerial tasks. [Citations omitted] . . . [plaintiff] alleges that [defendants] negligently hired and retained Wade," and that their failure to perform adequate background checks were ministerial functions. "The operation of a police department, including the degree of training and supervision to be provided its officers, is a discretionary governmental function of the municipality as opposed to ministerial, proprietary, or administratively routine functions." 249 Ga. App. at 417.

(5) City of Atlanta v. Heard, _____ Ga. App. _____ (2001 Ga. App. Lexis 1232 (October 26, 2001)). An auto dealer sued city officials for defamation, conversion, false arrest and malicious prosecution after detectives entered the dealership to conduct an inspection under applicable statute. During the inspection, the detectives found an apparently stolen vehicle

and other stolen car parts, and arrested Heard (the car dealer) for theft. The court found no allegation or evidence of a ministerial duty being negligently performed, which could have created municipal liability. See O.C.G.A. § 36-33-1(b). Here, the detectives' decision to not scrutinize certain evidence and to arrest Heard, whether flawed or not, were discretionary. [A caveat: it appears that plaintiff made no serious effort to develop evidence, or even allege, the essential elements of the tort.]

(6) Caldwell v. Griffin Spalding County Board of Education, 232 Ga. App. 892 (1998). In this case, the plaintiff was attacked and beaten by other football team players as part of some sort of "routine" hazing that got out of control. Plaintiff alleged that the school personnel who supervised the football program knew that hazing had occurred, and their failure to stop it was the proximate cause of this injury. They were alleged to be negligent in their failure to stop the hazing. The Court of Appeals held that defendants they were 0immune from liability in this situation. "Supervision of student safety is a discretionary function," citing prior decisions. Plaintiffs argument that that rule should not apply because of the specific statute that prohibited hazings was rejected. Hazing is criminalized. The Court of Appeals reasoned that the individual defendants were not guilty of the crime prohibited because they did not have the requisite mens rea, were not aiders and abettors, and did not know that this specific incident was occurring.

(7) Parrish v. Akins, 233 Ga. App. 442 (1998). Inmates who were working at a county courthouse escaped and attacked the plaintiff. The Court held that they were immune because the supervision of inmates was a discretionary function in this instance, giving defendants official immunity.

(8) Department of Corrections v. Lamaine, 233 Ga. App. 271 (1998) (en banc, 6-1). This case is unusual in that it construes the constitutional amendment because the claim itself arose before the amendment passed, but was filed after ratification of the amendment. The Tort Claims Act did not apply because it was retroactive only to claims arising on or after January 1, 1991.

Construing the constitutional amendment, the Court held that employees are subject to suit, under the amendment, where: (1) there was a negligent performance of ministerial duties; or (2) there was actual malice by the employee/officer or an intent by him/her to cause injury.

Further, the Court held that "malice," to avoid immunity, cannot be implied from mere "recklessness." There must be a showing of "express" malice and/or "malice in fact."

(9) Lincoln County v. Edmond, 231 Ga. App. 871 (1998). A motorist was injured by a falling tree on the road here. The Court held that the county road superintendent could be sued for a negligent violation of his ministerial duty under these facts; the claim presented a jury question. The Court reasoned that the superintendent had the duty to remove the tree. He had "discretion" in deciding how to remove the tree, but he had to do it. In this case, it was a jury question whether the two hour delay in acting was negligence.

(10) Joyce v. Van Arsdale, 196 Ga. App. 95, 97, 395 S.E. 2d 275 (1990). The county Board of Commissioners instructed its employees to close certain bridges after the Georgia DOT mandated that federal highway funds would no longer go to the county unless those bridges were closed or repaired. A county constructed a barricade of bridge timbers and posted "bridge closed" signs along the highway. Plaintiff was injured when she drove her automobile across the bridge and hit the barricade he had erected. The Court of Appeals held that the employees tasks were ministerial.

Should the [county] decide when a street should be opened, closed, or repaired, or when a sewer should be built, it is clearly exercising legislative or judicial functions, but when it engages in the work of opening, closing, or repairing a street, or building a sewer, and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature.' [Cit.] It follows that the actual progress of such work by a [county] is of a ministerial character, and that the duties of a road supervisor in carrying out the physical details of the work are likewise ministerial in nature. Likewise, the supervision and control by the road supervisor of a subordinate who is actually running the road machine are of the same character. 196 Ga. App. at 97.