

GOVERNMENTAL IMMUNITY ACT SYNOPSIS
U.C.A. §63G-7-101 et seq.

- Sovereign immunity is a legal doctrine that has origins in ancient monarchies. Basically says that the “sovereign” (king, head of state, governor) could not be sued or prosecuted criminally for any act.
- U.S. Constitution and U.S. Laws have adopted forms of sovereign immunity with the federal government being immune from suit unless it waives its immunity (e.g. Federal Tort Claims Act) and the states being immune from suit in federal court (11th Amendment--unless abrogated by the federal government) and in state court unless their immunity is waived by them.
- Prior to 1966, under the doctrine of sovereign immunity, the “State” (Utah, its agencies and other governmental entities) could not be sued for damages incurred as a result of any act considered to be a “governmental function.” Governmental functions (as opposed to “proprietary functions”) were generally those activities traditionally found to be within the exclusive province of government, such as construction of roads, education, law enforcement, etc.
- The Governmental Immunity Act (“GIA”) (U.C.A. §63G-7-101 et seq.), was passed into law in 1966 in an attempt to balance the interests of individuals incurring damages as a result of governmental activities in receiving compensation, with the state’s interest in preserving the solvency of the state, its agencies and other political/governmental subdivisions.
- **EXAMPLE:** No immunity in federal court for a federal civil rights violation:
Gage County, Nebraska. 6 people sued the county in federal court for civil rights violations for wrongful conviction in a 1985 homicide case. Jury awarded \$28MM. County of 22,000 people now must come up with \$1,300 for every man, women and child in the county:
Raise taxes to maximum allowable rate (businesses/citizens would leave)
Convince the State Legislature to pay all or some of the judgment
Declare bankruptcy (never done by a Nebraska county)

- The current GIA **retains immunity** for suits for injuries arising from the exercise of governmental functions (U.C.A. §63G-7-201(1)).
- At the same time, the GIA **waives immunity** for a variety of activities, including **negligence of governmental employees** (U.C.A. §63G-7-301).
- Finally, the act provides **exceptions to the waivers of immunity** for activities such as control of flood waters, natural conditions on land, incarceration, etc. (U.C.A. §63G-7-201(2)-(4)).
- Individual and aggregate (per occurrence) **caps on damages** awarded against governmental entities are established by the GIA (U.C.A. §63G-7-604). These caps on damages are automatically adjusted every two years to comport with changes in the consumer price index. (Current caps are \$745,200 per person, \$2,552,000 per occurrence and \$295,000 for property damage).
- The GIA requires that a claimant file a **Notice of Claim** within one year of the incident giving rise to the claim. The governmental entity has 60 days to accept or reject the claim, which is deemed rejected if no response is provided within 60 days. A claimant then has one year to file suit against the governmental entity (U.C.A. §63G-7-401).
- The GIA requires a plaintiff to file a \$300 **undertaking** with any complaint against a governmental entity.

Analysis of a GIA claim:

1) Was the entity in question a “governmental entity”? (U.C.A. §63G-7-102(3)).

Includes: county, city, town, school district, community reinvestment agency, special improvement or taxing district, local district, special service district, an entity created by an interlocal agreement, or “other governmental subdivision or public corporation” also the state of Utah, including each office, department, division, agency, authority, commission, board, institution, hospital, college, university, Children’s Justice Center, “or other instrumentality of the state.” (Does not include contractors).

2) **Is the activity in question a “governmental function”?**

Standiford v. Salt Lake City Corp., 605 P.2d 1230 (Utah 1980). Test for “governmental function”: **“whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity.”** (operation of a golf course was not a “governmental function”).

Condemarin v. Univ. of Utah Hosp., 775 P.2d 348 (Utah 1989). Court held GIA immunity did not apply to malpractice claim against University Hospital because the Hospital was not exercising a “governmental function.”

After *Condemarin* the legislature amended the GIA to say that anything the government does is a “governmental function.”

Laney v. Fairview City, 57 P.3d 1007 (Utah 2002). Court held that GIA’s definition of “governmental function” to include “any act of a governmental entity” violated the open courts provision of the Utah Constitution. (Heirs of person electrocuted by the city’s power lines could bring suit because operation of a power system was not a “governmental function”).

Takes us back to the *Standiford test*:

Operating a sledding hill? (no)

Transporting students to an out-of-state debate tournament (yes)

Regulating boxing matches (yes)

Collecting and disposing of sewage? (no)

Running an electric coop (no)

Operating a public transit system (yes)
Running a hospital (no)

FACTORS: “the extent to which the activity is funded by the State, competes in the marketplace with private entities, generates annual profits, and would be ‘qualitatively different’ if engaged in by a private entity.”

3) Has immunity for the activity been waived? (U.C.A. §63G-7-301) Eg:

- Contractual obligations.
- Obtain possession of or quiet title to real or personal property.
- Damage or destruction of property.
- The most typical waiver is for “injury proximately caused by a **negligent act or omission of an employee** committed within the scope of employment.” (U.C.A. §63G-7-301(2)(i)).

4) Do any exceptions to waiver of immunity apply? (U.C.A. §63G-7-201). (Must be the **proximate cause** of the injury—*Barneck*).

- control epidemic or infectious disease
- investigate/control bioterrorism
- respond to a national, state or local emergency
- coordinate healthcare services
- latent dangerous or defective conditions of roads, sidewalks, etc.
- latent dangerous or defective conditions of buildings, dams, etc.
- negligent acts of employees resulting from:
 - discretionary function
 - assault, battery, false arrest, false imprisonment, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contractual rights, infliction of mental anguish, violation of civil rights

- issuance/revocation of a permit, license, certificate, etc.
- failure to make an adequate inspection
- malicious prosecution of an administrative or judicial proceeding
- negligent or intentional misrepresentation
- riot, mob unlawful assembly, civil disturbance
- collection/assessment of taxes
- activities of the Utah National Guard
- incarceration
- natural condition on public land
- abandoned mines
- activities of the School and Institutional Trust Lands
- activities of the Div. of Forestry, Fire and State Lands
- operation or existence of a pedestrian trail, ditch, canal, stream, etc.
- cloud seeding
- management of flood waters, earthquakes or natural disasters
- operation of a flood or storm system
- operation of an emergency vehicle
- functions of the Bd. of Water Resources
- unauthorized access to government records/data/information
- activities of wildlife involving the use of a road

5) Are there other considerations: Did the governmental entity owe a duty to the Plaintiff? “**Public Duty Doctrine**”—a duty to the public in general is not sufficient to create liability. There must be a “**special relationship**”.

- In recent years the Utah Supreme Court has strictly construed the exceptions to waivers of immunity contained in the GIA, has altered the standard under which these exceptions apply, and has expanded the duties owed by governmental entities.

The following cases show how the Utah Supreme Court has changed the landscape of Governmental Immunity, by either narrowing the

application of the retention of immunity provision, expanding duties owed or strictly construing exceptions to waivers of immunity:

Grappendorf v. Pleasant Grove (2007 UT 84).

In 2002 the Grappendorf family (including Daniel-12) attended a softball game at P.G. park. Gust of wind came up and blew a mobile pitching mound free from its tether to a fence. The mound hit Dillon, who died of severe head injury. Parents sued, claimed City employees were negligent in how they tethered the mound to the fence. District Court granted Summary Judgment inf favor of the city. Parents appealed.

ISSUE: Governmental entity? Yes.

Governmental function? Yes. Operation of a park.

Waiver of immunity? Yes.

Exception to waiver? The City argued gust of wind was a “natural condition on land.”

HELD: atmospheric conditions are not the “conditions on land” for purposes of immunity. Not “topographical.” City was liable.

Whitney v. Div. of Juvenile Justice (2012 UT 12).

Dillon Whitney-16 charged with several crimes. Declared a “juvenile delinquent” Spent several weeks in a detention center in Salt Lake County, then, after a hearing, placed in a proctor home for troubled teens.

Lived in a downstairs basement (family upstairs) w/ a roommate.

Allowed to leave as he wanted with limitations.

Went to Thanksgiving dinner with father. To return by 9:00 p.m.

Instead went to friend’s apartment.

Sometime during the night fell down the stairs to the apartment-unconscious.

Next day “Friend”, believing Dillon was dead, put him in the stairwell

Someone else found him and called ambulance. Died in route to hospital.

Parents sued, claimed Div. of Juv. Justice was negligent in failing to supervise.

ISSUE: Governmental entity? Yes. Division of Juvenile Justice = state entity under the GIA.

Governmental Function? Yes. Criminal detention of juveniles.

Immunity waived? Yes. Negligent supervision of detained juvenile.

Exception to waiver of immunity? Division argued it was immune under the “Incarceration Exception” since Dillon was “incarcerated at the time.

HELD: “Incarceration” means spatially restricted or physically confined. Since Dillon free to leave (with restrictions) not “incarcerated.”

Thayer v. Washington County School District (2012 UT 31)

Tucker Thayer-15 was a student at Desert Hills H.S.

Stage tech. for musical *Oklahoma*

Instead of a fake gun, School officials (Principal, Teacher, Police Officer) allowed use of a parent’s pistol with blanks.

Tucker was playing with the gun during rehearsal in the sound booth. Fired it near his head. Died.

Parents sued in Federal Court for negligent supervision and civil rights violations.

ISSUE: Governmental entity? Yes. School District.

Governmental function? Yes. School activities.

Waiver of immunity? Yes. Negligent supervision by school employees.

Exception to waiver of immunity? School district argued “Issuance of License, Certificate or Approval”? (To have the gun be on campus for the play).

HELD: 1) Gov’t entity must have “formal authority” (statute/rule) to issue the permit/license/certificate/permission) NO

2) Can’t “authorize” self/employees to be negligent (allow gun to be used on campus).

Francis v. State Division of Wildlife Resources (2013 UT 65).

DWR made aware that a bear had gone to a campsite in Am. Fork Canyon and raided coolers and attacked the campers. Scared off by pistol.

DWR went the next day and tracked the bear. Unable to find/kill it. Gave up at 5:00

Before leaving, checked the campsite—empty, no food. Planned to return the next day.

That night, Francis family w/ Sam-10 went to the campsite, cooked food, went to bed.

During the night the bear returned and pulled Sam from his tent and killed him.

Parents sued claiming DWR employees were negligent in allowing the bear to attack/kill Sam

ISSUE: 1) Governmental Entity? Yes. State Division of Wildlife Resources.
2) Governmental Function? Yes. Management of state wildlife.
3) Waiver of immunity? Negligence in duties.
4) Exception to waiver of immunity? Division argued bear was a “natural condition on land.”
5) Other considerations (“Public duty Doctrine”) Division argued duty was to the public as a whole, no “special relationship.”

HELD: By attempting to find/kill the bear the State (DWR) created a “Duty” to Sam because this created a “Special Relationship” to a distinct group (Campers)
Bear (“Wildlife”) was not a “Natural Condition on Land.” (Not “Topographical” –citing *Grappendorf* wind case)
Division was liable.

Glaittli v. State of Utah (2014 UT 30).

Glaittli owned a 25 ft. boat that he kept at a slip at Jordanelle Reservoir. Dock was attached to cables that could be adjusted depending on wind/water level. A big storm came up Large waves. Glaittli went to the Marina to check on boat. Attempted to hold the boat by the bow to keep it from smashing the dock. Boat crashed down on him, shattering his arm/shoulder. Sued claiming DWR negligent in management of the dock and in not building a breakwater.

District Court granted SJ—Waves were a “Natural Condition on Land” so exception to waiver of immunity for negligence applied.

Issue: 1) Governmental Entity? Yes. Division of Parks and Recreation
2) Governmental Function? Yes. Operation of State park.
3) Waiver of immunity? Yes. Negligence in the operation of the park.
4) Exception to waiver of immunity? Division argued the waves were a “Natural Condition on Land” they were “topographical”

HELD: Supreme Court (bending over backwards) held that waves could be a natural condition on land BUT since the Reservoir was man-made, not a “Natural Condition” Justice Lee states in concurrence that “natural

condition extends only to conditions that have not been changed by any act of a human being.”

Cope v. Utah Valley University (2014 UT 53)

Ms. Cope (Adult) was a member of the UVU Ballroom Dance Team
She and her partner were practicing a routine for a performance
Required Cope’s partner to lift her above his head while twisting her body.
Tried several times and couldn’t complete the lift
Coach told them to try again (without spotters)
Cope was dropped, injuring her head on partner’s knee.
Cope sued claiming the Coach was negligent in requiring the lift/no spotters.
District Court granted SJ because NO DUTY owed to Cope—No “Special Relationship”
Public Duty Doctrine—duty to all is duty to none.
Court of Appeals Reversed, Supreme Court granted cert.

Issue: 1) Governmental entity? Yes. UVU = state institution of higher education.
2) Governmental function? Yes. Higher education.
3) Waiver of immunity? Yes. Negligence of teacher.
4) Exception to waiver of immunity? None argued.
5) Other considerations?: Public duty doctrine

HELD: Public Duty Doctrine didn’t apply to “affirmative acts” of negligence.
Only to omissions. (Overruled prior cases). There was a “Special Relationship” (Duty owed) due to Coach/Student relationship.

Barneck v. UDOT (2015 UT 50).

Incident occurred near Altamont (Duchesne County) 2-lane highway.
Earlier in the day, in the mountains to the North of Altamont there had been a
torrential rainstorm.
Water came down the gulley next to the highway and backed up in a wash next to
it. Washed debris onto road.
UDOT employees cleared the debris and attempted to use a bucket loader to clear
the culvert under the road to let water go through. Couldn’t get to it.
Decided to leave at 5:00 and come back the next day to try after the water receded.
That night the water washed away a large chunk of the road.
11:00 two cars-opposite directions- drove into the chasm.
Justine Barneck (15) killed, Father hurt, Another girl severely injured.

Plaintiffs sued claiming UDOT employees were negligent in failing to clear the culvert.

District Court granted SJ to UDOT

Issue: 1) Governmental entity? Yes. UDOT.

2) Governmental function? Yes. Maintenance of State roads.

3) Waiver of immunity?: Yes. Negligent maintenance.

4) Exception to waiver?: UDOT argued exception for “Operation of a Storm System” and “Management of Flood Waters”

HELD:

Reversed

One culvert isn't a “Storm SYSTEM”

Water wasn't “Flood Water” because contained in gully.

Another interesting case:

- *Utah Transit Auth. V. Greyhound Bus Lines, Inc.*, 2015 UT 53. The Court holds that contracts requiring a party to purchase insurance are not strictly construed. Here Greyhound failed to purchase insurance that covered UTA as an additional insured and for UTA's own negligence. The Court held that this omission required Greyhound to step up and “insure” UTA itself.

Things the GIA does **not** do:

-No application to federal claims for civil rights violations, Title IX and other federal causes of action.

-No application to claims that arise outside the State of Utah.

-Does not preclude a suit against a state employee personally if the employee engages in **fraud or willful misconduct**, is driving under the influence of drugs and/or alcohol, or who intentionally or knowingly manufactures evidence or gives false testimony under oath. (U.C.A. §63G-7-202(3)).

-Does not apply to breach of contract claims. (U.C.A. §63G-7-301(1)(a)).

-Does not apply to governmental “taking” claims.

2019 Legislative changes:

5 bills dealing with the GIA, 2 passed:

HB 391 (Rep. Ivory)

Waives immunity for sexual battery/sexual abuse committed by a paid employee who is criminally charged against a **K-12** LEA (school district, charter school, Schools for the Deaf and Blind) unless, at the time of the sexual abuse, the school had:

- an “appropriate behavior policy” in place (“not less stringent than a model policy created by the State Board of Education”)
- had provided sexual abuse training to the offending employee
- had required the employee to sign a document acknowledging understanding of the school’s behavior policies.

For the state’s **higher education** institutions, waives immunity for sexual battery/sexual abuse committed by a “special trust” employee against a “subordinate student” unless:

- the student was 18 years old and consented to the conduct, OR at the time of the sexual misconduct, the institution was subject to a policy governing behavior prepared by the Board of Regents
- before the behavior occurred the institution had taken steps to implement and enforce the policy.

HB 311 (Rep. McKell)

- 1) Waives immunity of an elementary, secondary or charter school from claims of sexual battery committed by an employee against a student unless, prior to the sexual battery, the school had done a background check to determine if the employee was a registered sex offender.

- 2) Waives a governmental entity's ability to challenge a Notice of Claim that is delivered to the wrong person/office, if the NOC is also delivered to the entity's attorney OR unless the governmental entity gives notice of the defect w/i 60 days of receipt.
- 3) Requires a governmental entity (or its insurer) to acknowledge receipt of a NOC w/I 60 days, and, if appropriate, indicate that the NOC has been sent to the wrong entity.
- 4) Gives a claimant 2 years (instead of 1) from DOL to file an action (but must still wait 60 days from filing of a NOC).
- 5) Gives a claimant 20 days after filing suit to file a \$300 undertaking. If the claimant fails to do so, the court may order an amount and time for an undertaking to be filed. The governmental entity waives the defense of failure to file an undertaking unless it asserts the defense in its responsive pleading.
- 6) Increases the aggregate caps from \$2,552,000 to \$3,000,000. Current: \$745,200/~~\$2,552,000~~/\$295,000. (Still recalculated every other year.)
- 7) Creates a "Special Master" process for claims submitted to the Board of Examiners that exceed the tort caps. The special master can hold a hearing/collect information, if necessary. Makes a written recommendation to the BOE. Legislature may appropriate funds from the General Fund Reserve Account to pay the claim amount in excess of the tort caps.