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## Tort Claims Act - Liability of Law Enforcement Officers While in the Line of Duty: *Wilson v. Grant County*

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TORT CLAIMS ACT—Liability of Law Enforcement  
Officers While in the Line of Duty:  
*Wilson v. Grant County*

I. INTRODUCTION

The issue in *Wilson v. Grant County*<sup>1</sup> was whether section 41-4-12<sup>2</sup> of the New Mexico Tort Claims Act<sup>3</sup> [hereinafter “Tort Claims Act” or “Act”] is the only provision that waives sovereign immunity for law enforcement officers, or whether law enforcement officers are subject to other waiver provisions of the Act as well.<sup>4</sup> The New Mexico Court of Appeals held in *Wilson* that law enforcement officers are also subject to liability under section 41-4-5 of the Act, which waives immunity for damages caused by the negligence of public employees in the operation or maintenance of a motor vehicle, watercraft, or aircraft.<sup>5</sup>

The court’s decision in *Wilson* is critical to New Mexico tort law because it construes the legislative exceptions to sovereign immunity in favor of those who have brought claims against the government. The analysis employed and the decision reached in the *Wilson* case illustrate that the court not only ignored the purpose, design, and language of the Tort Claims Act when construing its terms, but also relied on different policy considerations than those stated by the legislature when it enacted the Act. While the legislature carved out specific provisions granting immunity in the Act, *Wilson* narrowed the scope of government immunity, thereby defeating the legislative purposes of the Act.

This Note will discuss the history of sovereign immunity, analyze how the holding in *Wilson* contravenes the Tort Claims Act, propose more logical interpretations of how the legislature intended sections 41-4-5 and 41-4-12 to be construed, and explore some of the consequences of the court’s decision.

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1. 117 N.M. 105, 869 P.2d 293 (Ct. App.), *cert. denied*, 117 N.M. 215, 870 P.2d 753 (1994).

2. N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989). This section reads as follows:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

3. N.M. STAT. ANN. §§ 41-4-1 to -27 (Repl. Pamp. 1989).

4. N.M. STAT. ANN. §§ 41-4-5 to -12 (Repl. Pamp. 1989).

5. *Wilson*, 117 N.M. at 107, 869 P.2d at 295; N.M. STAT. ANN. § 41-4-5 (Repl. Pamp. 1989).

This section of the statute provides that:

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any motor vehicle, aircraft or watercraft.

## II. STATEMENT OF THE CASE

On November 25, 1989, Deputy Carl Henderson of the Grant County Sheriff's Department responded to a call for back-up assistance while on duty.<sup>6</sup> Henderson had his emergency lights and siren on when his vehicle collided with Dorothy Wilson's vehicle. Wilson filed suit against Deputy Henderson, Grant County, and the Grant County Sheriff's Department under both section 41-4-5 and section 41-4-12 of the Tort Claims Act on November 8, 1991. Plaintiff alleged that Henderson was negligent in exceeding the posted speed limit, and in failing to maintain his lane, properly inspect and maintain his brakes, and follow proper procedures in responding to a call for assistance.

On March 26, 1993, Defendants moved for summary judgment on the basis that the Tort Claims Act did not waive immunity for the actions upon which Dorothy Wilson based her claim. The District Court of Grant County granted summary judgment, ruling that immunity had not been waived for the incident leading to Plaintiff's cause of action. The court held that the only section of the Act that applies to law enforcement officers is section 41-4-12, which specifically mentions law enforcement officers. Because Plaintiff based her complaint on Henderson's alleged negligent operation of a motor vehicle under section 41-4-5 of the Act, Plaintiff's claim failed.

Ms. Wilson appealed. The court of appeals reversed the trial court, holding that section 41-4-5 applies to all public employees, including law enforcement officers.<sup>7</sup>

## III. HISTORICAL BACKGROUND

Sovereign immunity exempts all levels of government from lawsuits against the government and its entities.<sup>8</sup> Historically, sovereign immunity was based on the notion that the divine ruler "can do no wrong."<sup>9</sup> Before the sixteenth century, sovereign immunity was a purely personal right of the kings of England: "In the feudal structure the lord of the manor was not subject to suit in his own courts. The King, the highest feudal lord, enjoyed the same protection. No court was above him."<sup>10</sup>

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6. The facts in this opinion are set out in *Wilson*, 117 N.M. at 106, 869 P.2d at 294.

7. The appellate court expressed no opinion as to whether Deputy Henderson had indeed been acting negligently when the accident occurred. *Wilson*, 117 N.M. at 108, 869 P.2d at 296.

8. See generally Edwin M. Borchard, *Governmental Responsibility in Tort VI*, 36 YALE L.J. 1 (1926); Kenneth C. Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751 (1956); BLACK'S LAW DICTIONARY 1396 (6th ed. 1990) (defining sovereign immunity as "[a] judicial doctrine which precludes bringing suit against the government without its consent.").

9. *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975), modified, 88 N.M. 593, 544 P.2d 1158 (1976) (abolishing sovereign immunity as an affirmative defense by the state, or any of its political subdivisions, in tort actions). Scholars believe that the concept of sovereign immunity existed and perhaps originated during the time of Roman law. The doctrine of sovereign immunity became an integral part of the majority of governments in Europe. See George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953).

10. Verne Lawyer, *Birth and Death of Government of Immunity*, 15 CLEV.-MAR. L. REV. 529, 529 (1966). The Court of Exchequer did, however, have jurisdiction to provide equitable relief against the King. *Id.*

Thus, sovereign immunity became deeply embedded in the British common law.<sup>11</sup> Sovereign immunity was transplanted to the American colonies along with the English common law.<sup>12</sup> American judges embraced the doctrine in the early days of the government.<sup>13</sup> As modern states evolved in America, the idea of sovereign immunity continued due to the ideology that allowing a suit against a ruling government was inconsistent with the concept of a supreme executive power.<sup>14</sup>

#### A. *New Mexico Case Law*

New Mexico courts recognized common law sovereign immunity from the beginning of statehood.<sup>15</sup> In 1921, the New Mexico Supreme Court stated that “[i]t is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission.”<sup>16</sup> In 1975, however, the New Mexico Supreme Court followed the lead of the federal government<sup>17</sup> and a number of other states<sup>18</sup> and abolished common law sovereign immunity as a defense for all tort actions against New Mexico governmental entities.<sup>19</sup> The *Hicks* court reasoned that requiring an individual who suffers an injury due to a government tort to carry the entire burden of the injury was unjust.<sup>20</sup> The court in *Hicks* found that:

It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, “the king can do no wrong,” should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from

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11. *Id.* at 530.

12. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (held that the United States cannot be sued without its permission).

13. *Id.* at 303 (“It is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent.”).

14. Lawyer, *supra* note 10, at 530; see generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 131-32 (5 ed. 1984).

15. Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do “Little” Wrong*, 21 N.M. LAW REV. 441 (1991).

16. *New Mexico ex rel. Evans v. Field*, 27 N.M. 384, 385, 201 P. 1059, 1060 (1921); see also *Arnold v. State*, 48 N.M. 596, 599, 154 P.2d 257, 260 (1944) (statutes authorizing suits against the state are to be strictly construed).

17. See Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671, 2672, 2674, 2675, 2676, 2677, 2678, 2679, 2680 (1982).

18. Twenty-four states had already abolished sovereign immunity, subject to several exceptions. These states include Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Washington, D.C. *Hicks v. State*, 88 N.M. 588, 593, 544 P.2d 1153, 1158 (1975).

19. *Id.* at 592, 544 P.2d at 1157.

20. *Id.* at 591, 544 P.2d at 1156. Victims of tortious conduct should be entitled to recover compensatory damages whether or not the person who committed the tort is a public employee. The *Hicks* opinion is not without support: “Such a recovery would serve both private and public interests. The victim would be compensated and official misconduct would be deterred. Further, imposition of liability would satisfy the ideal of providing equal justice for persons similarly situated.” Ruth Kovnat, *Constitutional Torts and the New Mexico Torts Claims Act*, 13 N.M. LAW REV. 1, 1 (1983).

the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.<sup>21</sup>

The court further noted that "[t]here are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity . . . thus, we take this opportunity to rid the State of this legal anachronism."<sup>22</sup>

### B. *New Mexico Statutory Law*

In 1976, the New Mexico legislature responded to the supreme court's abrogation of sovereign immunity in *Hicks* by enacting the Tort Claims Act.<sup>23</sup> The Act reinstated sovereign immunity for government entities and public employees acting within the scope of their duties.<sup>24</sup> The legislature stated that "the area within which the government has the power to act for the public good is almost without limit . . ." and, therefore, sovereign immunity should be revived in some circumstances.<sup>25</sup>

It is evident that the legislature was concerned with more than just the unfair and inequitable results an individual might receive at the hands of the government. The legislators were also concerned with the exposure of the public treasuries to the risk of paying damages which benefit only the individual, rather than the public at large.<sup>26</sup> It is crucial that the

21. *Hicks*, 88 N.M. at 591, 544 P.2d at 1156 (quoting *Barker v. City of Santa Fe*, 47 N.M. 85, 88, 136 P.2d 480, 483 (1943)).

22. *Id.* at 590, 544 P.2d at 1155.

23. N.M. STAT. ANN. §§ 41-4-1 to -29 (Repl. Pamp. 1989); see also *Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 177, 793 P.2d 855, 859 (1990) ("We believe that the purpose of [the Tort Claims Act] was to reinstate the sovereign immunity which had been abolished by *Hicks v. State*, subject to certain exceptions.").

24. N.M. STAT. ANN. § 41-4-4(A) (Repl. Pamp. 1989) reads in part as follows:

A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978.

25. N.M. STAT. ANN. § 41-4-2(A) (Repl. Pamp. 1989). The legislative declaration of purpose contained in this section states:

The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act and in accordance with the principles established in that act.

*Id.*

26. The *Hicks* court argues that by placing the financial burden upon the state, it can distribute its losses throughout the populace, and is thus more just and equitable than forcing the individual to bear the burden alone. *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975). This point was detailed by the Pennsylvania Supreme Court in *Smith v. City of Philadelphia*, 516 A.2d 306, 311 (1986) ("The governmental interest, preservation of the public treasury as against the possibility of unusually large recoveries in tort cases, is, self-evidently, an important governmental interest.").

government be capable of providing and maintaining essential services to the public, such as police, fire fighters, waste water treatment and street maintenance.<sup>27</sup> Other than these essential services, there are several "nonessential" governmental services that many citizens rely on to survive. Such services include assistance to the elderly, public transportation, medical care for the indigent, welfare programs of various kinds and educational institutions.<sup>28</sup> It is fundamental for the legislature to protect the governmental process by allocating the State's limited resources for the performance of those services important to the health, safety, and welfare of the public.<sup>29</sup>

Consequently, the Tort Claims Act intends to balance the needs of victims of tortious conduct with those of the government.<sup>30</sup> In order to resolve the competing equities of the government and the individual, the legislature established eight classes of governmental activities in the Act that are not immune from liability.<sup>31</sup> Thus, in order for an individual to recover from the government for tortious conduct within the scope of its duties, the plaintiff's cause of action must fit into one of the eight exceptions of the Act.<sup>32</sup>

#### IV. THE RATIONALE AND ANALYSIS OF THE *WILSON* COURT'S DECISION: A CRITIQUE

*Wilson* expanded the scope of the exceptions to sovereign immunity designated in the Tort Claims Act when it held that law enforcement officers are liable to private citizens under both section 41-4-5 and section 41-4-12 of the Act.<sup>33</sup> Officers are now subject to a lengthy list of potential liabilities which may interfere with their duties regarding law enforcement,

27. *Trujillo v. City of Albuquerque*, 110 N.M. 621, 630, 798 P.2d 571, 580 (1990) ("[T]he damage cap . . . is substantially related to the goal of protecting governmental funds for . . . services (other than payment to victims of governmental torts).").

28. *Id.*

29. This point was made explicitly by the Minnesota court in *Lienhard v. State*, 431 N.W.2d 861, 867 (Minn. 1988) (en banc).

30. *Id.*

31. N.M. STAT. ANN. §§ 41-4-5 to -12 (Repl. Pamp. 1989). The legislature waived immunity for bodily injury, wrongful death or property damage caused by negligence of public employees while acting within the scope of their duties in the:

(1) "operation or maintenance of any motor vehicle, aircraft, or watercraft," § 41-4-5; (2) "operation or maintenance of any building, public park, machinery, equipment or furnishings," § 41-4-6; (3) "operation of airports," § 41-4-7(A); (4) "operation of public utilities and services such as gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation," § 41-4-8(A); (5) "operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities," § 41-4-9; (6) provision of "health care services," § 41-4-10; (7) "construction, and . . . maintenance of . . . any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area," § 41-4-11(A); and (8) activities of "law enforcement officers," § 41-4-12.

32. *Methola v. County of Eddy*, 95 N.M. 329, 334, 622 P.2d 234, 239 (1980) ("The right to sue and any recovery under the New Mexico Tort Claims Act is limited to the rights, procedures, limitations and conditions prescribed in that Act.").

33. *Wilson v. Grant County*, 117 N.M. 105, 108, 869 P.2d 293, 296 (Ct. App.), *cert. denied*, 117 N.M. 215, 870 P.2d 753 (1994).

such as claims against them for personal injury, property damage resulting from assault, defamation of character, and for the negligent operation of any motor vehicle while acting within the scope of their duties.<sup>34</sup>

*A. Viewing the New Mexico Tort Claims Act as a Whole Makes Section 41-4-12 the Only Waiver Provision Applicable to Law Enforcement Officers*

The *Wilson* court attempted to justify its mitigation of the Act's purpose with rules of statutory construction. The court stated, "we must interpret the statute as a whole to achieve a harmonious result"<sup>35</sup> and concluded that section 41-4-5 applies to all public employees, including law enforcement officers.<sup>36</sup> Such an interpretation, the court reasoned, avoids the unreasonable consequence that would result from holding that section 41-4-5 does not apply to law enforcement officers.<sup>37</sup> The court supported its holding by citing to a court of appeals decision that held a statute should be construed under the presumption that the legislature acted reasonably in enacting it.<sup>38</sup>

Although the court attempted to interpret the statute as a whole, they failed to do so as evidenced by their misconstrued decision. The court held that section 41-4-12 does not contain any language indicating that it is the only section that applies to law enforcement officers.<sup>39</sup> But courts must read the Act as a whole.<sup>40</sup> Both provisions at issue in this case were enacted in 1976. However, if any waiver provision other than section 41-4-12 were applicable to law enforcement officers, the legislature would have so stated.<sup>41</sup>

The Court of Appeals should not have read language into the Act which was not there. Rather, the court should have effectuated legislative intent and held that immunity had not been waived.

34. Law enforcement officers are also liable for claims against them for bodily injury and wrongful death; property damage resulting from battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico while acting within the scope of their duties, N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989), and the negligent maintenance of any motor vehicle, aircraft or watercraft while acting within the scope of their duties, N.M. STAT. ANN. § 41-4-5 (Repl. Pamp. 1989).

35. *Wilson*, 117 N.M. at 106, 869 P.2d at 294 (citing *Roberts v. Southwest Community Health Servs.*, 114 N.M. 248, 251, 837 P.2d 442, 445 (1992)).

36. *Id.* at 108, 869 P.2d at 296.

37. *Id.* at 106, 869 P.2d at 294. The example the court sets forth as an unreasonable consequence is one where "a jailer transporting a prisoner to a hearing in a public vehicle would be immune from suit if the jailer negligently caused an accident." *Id.*

38. *Id.* (citing *New Mexico ex rel. Rodriguez v. American Legion Post No. 99*, 106 N.M. 784, 786-87, 750 P.2d 1110, 1112-13 (Ct. App.), *cert. denied*, 106 N.M. 588, 746 P.2d 1120 (1987) and 107 N.M. 16, 751 P.2d 700 (1988)).

39. *Id.* at 107, 869 P.2d at 295.

40. *New Mexico ex rel. Kline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988).

41. The legislature might have added language similar to: "in addition to the waiver of immunity set forth in section 41-4-5 of this Article" in the introductory language of section 41-4-12. This language would allow the reader to apply both section 41-4-5 and section 41-4-12 to law enforcement officers. The legislature did not insert such language.

*B. Section 41-4-12 is the Specific Statute and is Therefore Controlling*

Another rule of statutory construction the court examined, but dismissed, is the rule of specificity. The court noted that because both sections of the Act are specific in their own way and do not apply to the same subject, one section does not limit or restrict the scope of the other.<sup>42</sup> The court stated that:

Section 41-4-5 applies to the activities of operating or maintaining a motor vehicle, watercraft or aircraft, by any public employee; Section 41-4-12 applies to specific activities, such as assault and battery, by law enforcement officers. Although Section 41-4-12 is more limited in scope than Section 41-4-5 because it applies to only one class of public employees, that does not make it more specific for purpose of statutory construction.<sup>43</sup>

Therefore, the court found the general/specific analysis inapplicable to this case.<sup>44</sup>

Both statutory sections, however, are not specific. Section 41-4-5 addresses two particular activities: operation and maintenance of motor (water and air) vehicles.<sup>45</sup> Section 41-4-12 addresses a specific category of public employees: law enforcement officers.<sup>46</sup> Nevertheless, section 41-4-12 also addresses specific activities of this specific group of public employees.<sup>47</sup> Thus, the distinction the court makes between specific activities and specific employees being addressed by each section is not a true distinction.<sup>48</sup> Because section 41-4-12 is specific with respect to both the employees and the activities it governs, it should control sovereign immunity with regard to law enforcement officers.

Furthermore, a well-established principle of statutory construction recognizes that when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute is considered an exception to the general statute and applies.<sup>49</sup> Section 41-4-5 applies to "public employees" which, by defi-

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42. *Wilson*, 117 N.M. at 107, 869 P.2d at 295.

43. *Id.*

44. *Id.* The court supports this argument by citing to a case which held that when two statutes deal with the same subject matter, the more specific statute will be considered an exception to the general statute and will apply. *Production Credit Ass'n v. Williamson*, 107 N.M. 212, 213, 755 P.2d 56, 57 (1988) (holding that section 39-5-1 specifically related to foreclosure sales, and Rule 1-005 did not, and therefore section 39-5-1 governed).

45. N.M. STAT. ANN. § 41-4-5 (Repl. Pamp. 1989). *See also supra* note 5.

46. N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989). *See also supra* note 2.

47. *Id.* The activities section 41-4-12 addresses are those amounting to assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation or violation of certain rights and privileges. *See also supra* note 2.

48. *Wilson*, 117 N.M. at 107, 869 P.2d at 295.

49. *Production Credit Ass'n v. Williamson*, 107 N.M. 212, 213, 755 P.2d 56, 57 (1988); *see also City of Alamogordo v. Walker Motor Co.*, 94 N.M. 690, 616 P.2d 403 (1980); *New Mexico Bureau of Revenue v. Western Elec. Co.*, 89 N.M. 468, 469, 553 P.2d 1275, 1276 (1976) ("Conflicts between general and specific statutes are resolved by giving effect to the specific statute."); *State v. Spahr*, 64 N.M. 395, 328 P.2d 1093 (1958).

dition, includes law enforcement officers. Section 41-4-12 applies specifically to law enforcement officers, a subcategory of public employees. Each section, therefore, deals with the same subject, public employees. Because section 41-4-12 is more specific than section 41-4-5 with respect to law enforcement officers, it governs. In accord with the foregoing principle, section 41-4-12 must be considered an exception to section 41-4-5 (and any other section waiving the immunity of public employees generally).

### C. *The Plain Language of the Statute*

The *Wilson* court also refers to the plain language rule of statutory construction.<sup>50</sup> The court states that nothing in section 41-4-12 indicates that it is the only section of the Act that applies to law enforcement officers.<sup>51</sup> The court notes that:

Section 41-4-5 applies to public employees generally, and law enforcement officers are public employees. Section 41-4-12 sets out specific acts of such officers that will result in liability, but it does not state that those are the only acts for which immunity will be waived.<sup>52</sup>

The court concluded that adding a restriction applying only section 41-4-12 to law enforcement officers would be contrary to the legislature's intent.<sup>53</sup>

Due to the nature of an officer's duties, however, an officer will encounter more situations for potential lawsuits than most, if not all, public employees. Law enforcement officers should have protection from unlimited liability for performing duties that often place them in situations involving interaction or even physical confrontations with citizens. The language of section 41-4-12 evidences clear legislative understanding of the situation officers encounter.<sup>54</sup> The torts listed in section 41-4-12 are generally intentional and egregious in nature.<sup>55</sup> If the legislature had wanted law enforcement officers to be liable for all negligent acts, they would have added to the list already included in the waiver provision.

An officer's patrol unit is in many ways an extension of the officer in the performance of his duties. The units are used to responding to emergency calls, patrol the community, transport evidence and suspects, investigate crimes, prepare paperwork, conduct stakeouts, etc. The trial court's application of section 41-4-12 implicitly recognizes this wide-

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50. *Wilson*, 117 N.M. at 107, 869 P.2d at 295.

51. *Id.*

52. *Id.*

53. *Id.* As recognized by the *Wilson* decision, "[t]he chief aim of statutory construction is to give effect to the intent of the legislature." *Id.* (citing *Roth v. Thompson*, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992)).

54. N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989). See also *supra* note 2.

55. *Id.*

ranging use of patrol units.<sup>56</sup> The trial court's interpretation would not provide blanket immunity for any operation of a motor vehicle by a law enforcement officer. Law enforcement officers would be liable for operating their vehicles in a manner that caused an assault, battery or other violation of rights or privileges.<sup>57</sup> At the same time, the trial court's interpretation would provide immunity for a law enforcement officer's simple negligence in operating his vehicle in the performance of his duties.

#### *D. The Legislative Intent in Establishing the Tort Claims Act*

In order to correctly decide an issue of statutory construction, it is imperative that the court focus on the "legislative intent" behind the statute.<sup>58</sup> The courts must "divine" the legislature's intent in enacting the Act.<sup>59</sup> The *Wilson* court stated, "[w]e agree that one purpose of the [Tort Claims] Act is to limit governmental liability to losses resulting from certain specified actions. Operating a motor vehicle, however, is one of the specified activities for which immunity is waived."<sup>60</sup> The court's interpretation is an inaccurate reflection of the legislative intent to limit the areas in which law enforcement officers could be liable.

Utilizing the well-accepted rules of statutory construction, it is apparent that a more logical interpretation of what the legislature intended section 41-4-12 to mean should have been reached. The Tort Claims Act is a balance of the needs and rights of victims and government.<sup>61</sup> While victims should be compensated for their injuries, the government must discharge its responsibilities to the public.

Interpreting the Act to waive liability for law enforcement officers pursuant to section 41-4-12 fosters the purpose of the Act and is consistent with the history of sovereign immunity. If a law enforcement officer causes an injury or tort, the victim will receive compensation only in certain circumstances.<sup>62</sup> However, law enforcement officers will be able to freely discharge their important responsibilities of protecting the public without fear of lawsuit, except where the officers overstep the bounds of appropriate law enforcement with egregious conduct listed in section 41-4-12.

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56. *Wilson*, 117 N.M. at 108, 869 P.2d at 296 (holding that as a matter of law immunity had not been waived because the only section of the Act which applies to law enforcement officers is section 41-4-12, which specifically mentions law enforcement officers).

57. *Id.* The trial court held that law enforcement officers are liable for the actions listed in section 41-4-12 of the Act.

58. *Roth v. Thompson*, 113 N.M. 331, 332, 825 P.2d 1241, 1242 (1992) (chief aim of statutory construction is to give effect of legislature's intent).

59. *New Mexico ex rel. Kline v. Blackhurst*, 106 N.M. 732, 734, 749 P.2d 1111, 1113 (1988) (in construing a statute, reviewing court's central concern is to determine and give effect to the intent of the legislature by looking primarily at language used and considering the history and background of the statute).

60. *Wilson*, 117 N.M. at 107, 869 P.2d at 295.

61. See N.M. STAT. ANN. § 41-4-2(A) (Repl. Pamp. 1989).

62. Those circumstances are listed in N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989). See also *supra* note 2.

The court further stated that "the legislature limited the waiver of immunity from Section 41-4-12 activities to more egregious behavior such as assault and battery."<sup>63</sup> Section 41-1-12 waives immunity for assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation or deprivation of state or federal rights caused by law enforcement officers.<sup>64</sup> These torts are intentional and egregious in nature. These torts are also within the continuum of activities in which law enforcement officers typically must engage. There is a clear message within section 41-4-12: law enforcement officers will encounter difficult and dangerous situations and they will be given some latitude because of this.<sup>65</sup> However, law enforcement officers will not be allowed to cross certain lines with impunity.

Immunity has been waived for officers' negligence which causes infliction of one of the predicate torts specified in section 41-4-12.<sup>66</sup> Immunity has also been waived for negligent inaction by law enforcement officers which allowed a third-party to inflict one of the predicate torts.<sup>67</sup> Nevertheless, immunity has not been waived for negligence standing alone in the performance of a law enforcement officer's duties.<sup>68</sup> Interpreting section 41-4-5 as a waiver applicable to law enforcement officers does just that and thus runs counter to the purposes for which the Act was enacted.

In the instant case, Deputy Carl Henderson was operating his patrol unit in the performance of his law enforcement duties.<sup>69</sup> He was responding for a call for police back-up and had the unit's emergency equipment on. He is not alleged to have committed any intentional act nor is he alleged to have allowed a third-person to have committed such a tort on Ms. Wilson. Therefore, he was not liable under section 41-4-12. Instead, he was in the process of offering emergency assistance to a citizen of Grant County. Unfortunately, his patrol unit collided with Ms. Wilson's

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63. *Wilson*, 117 N.M. at 107-08, 869 P.2d at 295-96.

64. N.M. STAT. ANN. § 41-4-12 (Repl. Pamp. 1989).

65. *Id.*

66. *Id.*

67. *See, e.g.*, *Cross v. City of Clovis*, 107 N.M. 251, 755 P.2d 589 (1988) (bringing suit against the city under the Tort Claims Act arising from death of bystander who was fatally struck by stolen automobile after it crashed through police roadblock); *Schear v. Board of County Comm'rs*, 101 N.M. 671, 687 P.2d 728 (1984) (bringing a complaint against board of county commissioners and sheriff, alleging that sheriff's agents did not respond to call reporting crime in progress and requesting assistance, and that complainant suffered rape and torture as result of such inaction); *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980) (bringing suit against county, county commissioners, sheriff and his deputies for injury to jail inmates by other inmates); *see also* *Bober v. New Mexico State Fair*, 111 N.M. 644, 653-54, 808 P.2d 614, 623-24 (1991) (motorist who was injured in collision with vehicle as it exited state fairgrounds parking area onto abutting highway sued state fair, state fair commission, and state police).

68. Other states have also abided by this contention. The Indiana Supreme Court found that the trial court correctly rendered summary judgment for the city of Indianapolis based on a governmental immunity statute in an action arising out of an accident in which plaintiff motorist's car was rear-ended by a police officer going to a crime scene, since the acts of the lieutenant were enforcing the law within the scope of the statute. *Bevis v. Indianapolis*, 365 N.E.2d 772 (Ind. Ct. App. 1991).

69. *Wilson*, 117 N.M. at 106, 869 P.2d at 294.

vehicle during the process. It is contrary to the legislature's mandate under the immediate circumstances that the immunity of Deputy Henderson, Grant County or its Sheriff's Department be waived by section 41-4-5.

## V. IMPLICATIONS

The *Wilson* decision has several implications that will affect New Mexico tort law. By restricting the parameters of sovereign immunity for law enforcement officers, *Wilson* created new avenues for individuals to bring lawsuits against the government. Such a decision will generate litigation. With the increased number of lawsuits and probable monetary judgments against law enforcement officers, there may be a need for the government to increase its insurance coverage. An increase in governmental insurance premiums will affect every New Mexico taxpayer. Also, and more importantly, litigation will deplete the government treasury, making it difficult for the government to fulfill many of its essential services to the citizens of New Mexico.

In addition to the burdensome and costly amount of litigation the *Wilson* decision will generate, it will also result in some unreasonable situations by making an artificial distinction among law enforcement officers. For example, it is difficult, if not unreasonable, to believe that the legislature intended to make a distinction between a law enforcement officer in a motor vehicle (aircraft or watercraft) and a law enforcement officer who is not in a motor vehicle. Under the court's interpretation, an officer in a motor vehicle will be held liable for negligence, while an officer on a bicycle or on horseback would not be held liable for equivalent negligence.<sup>70</sup>

The court attempts to answer this dilemma by arguing that the legislature created this distinction and it has been created for all public employees.<sup>71</sup> What the court fails to address, however, is that only police officers regularly use a bicycle or horse as a transportation means to carry out their duties. Other public employees usually do not travel on horses in the regular course of their duties. This fact supports the argument that the legislature did not intend to have section 41-4-5 apply to law enforcement officers, as the *Wilson* decision mandates.

The *Wilson* decision also creates a tension between the judicial and executive powers on the issue of tort liability. The state judiciary, both in *Wilson* and in the history of sovereign immunity, has alleviated the effects of government immunity as it is imposed under the New Mexico Tort Claims Act, thereby defeating the legislative purposes which underlie the Act's structure and design. The New Mexico Supreme Court held that the doctrine of sovereign immunity is one of common law, judicially created.<sup>72</sup> The *Hicks* decision held that the judiciary, and not the leg-

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70. *Id.* at 108, 869 P.2d at 296.

71. *Id.*

72. *Hicks v. State*, 88 N.M. 588, 589, 544 P.2d 1153, 1154 (1975).

islature, is the proper forum to decide the fate of sovereign immunity. "[The] doctrine of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary."<sup>73</sup>

In this instance, however, it appears that the court system has overstepped the boundaries set forth in the New Mexico constitution.<sup>74</sup> The *Wilson* court invades the legislature's province of deciding under Article IV, Section 1, of our Constitution how available resources should be allocated and what importance should be assigned to the programs that the government's elected representatives choose to fund.<sup>75</sup>

## VI. CONCLUSION

Law enforcement officers are more likely than other public employees (other than perhaps health care professionals who are also specifically addressed in the Tort Claims Act) to require protection from lawsuit. This is not because law enforcement officers are more likely than other public employees to commit torts, but rather because law enforcement officers are more likely to encounter situations in which emotion, danger, activity, and other circumstances are increased. Officers are more vulnerable to a later attack on the propriety of their behavior because of the nature of the situations and individuals they frequently encounter. The legislature chose to specifically address law enforcement officers' immunity and waive it only in specific intentional torts. The New Mexico Court of Appeals' holding that law enforcement officers are also liable for negligence in the operation or maintenance of their patrol vehicles is contrary to the legislature's scheme of immunity. The court of appeals manipulated the language of the Tort Claims Act in order to reach a policy based decision. Now, New Mexico's law enforcement officers are exposed to almost unlimited tort liability which will inevitably affect their ability to enter dangerous criminal situations, and eventually will hurt the public treasury, thus negatively affecting each and every citizen of New Mexico.

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73. *Id.* at 589-90, 544 P.2d at 1152-53. *Hicks* listed a few cases (Clark v. Ruidoso-Hondo Valley Hospital, 72 N.M. 9, 380 P.2d 168 (1963); Elliot v. Lea County, 58 NM 147, 267 P.2d 131 (1954)) holding that the legislature and not the judiciary is the proper forum to decide the fate of sovereign immunity. The *Hicks* court expressly overruled these cases. In Chief Justice Oman's concurring decision, however, he stated:

I have always been of the opinion that if the doctrine [of sovereign immunity] were to be abolished by action of this Court it should be done prospectively only, in order to give the Legislature a fair opportunity to take whatever action it should deem advisable before the abolishment of the long accepted immunity.

*Id.* at 595, 544 P.2d at 1160.

74. See generally N.M. CONST. art. VI.

75. N.M. CONST. art. IV, § 1 ("The legislative power shall be vested in a senate and a house of representatives . . .").