The Georgia Tort Claims Act: A License for Negligence in Child Deprivation Cases?

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INTRODUCTION

In what has been described as "one of the most horrific cases of child abuse ever seen in Fulton County," five-year-old Terrell Peterson died from repeated physical abuse. This tragedy occurred even after the plight of Terrell and his siblings had been reported to the Department of Family and Children Services (DFCS or "Department") on eight separate occasions, with no less than twenty-one different caseworkers mishandling his file over a two-year period. Sadly, this is not an isolated incident. Of 513 files on Georgia children who died between 1996 and 1998, forty-six percent of the deaths occurred while DFCS had an open file on either the child or the child's family. Equally disturbing is the fact that DFCS violated either state policies or procedures in nearly a third of the

2. See Hansen, supra note 1, at A1.
3. See Hansen, supra note 1, at A1; Timothy Roche, The Crisis of Foster Care, TIME, Nov. 13, 2000, at 76. Some states report caseworker turnover rates as high as 70%. See Roche, supra, at 81. Atlanta attorney Don Keenan brought both federal and state claims against the Department of Human Resources on behalf of Terrell Peterson’s estate and his mother. See Ron Martz, Judge Rules State Not Liable in Death of Terrell Peterson, ATLANTA J. CONST., Aug. 23, 2001, at F1. The judge dismissed the federal claim, ruling that the state is not responsible for a child who is not in the custody of DFCS, even when DFCS is aware of the child’s situation. Id. The state claim is still pending. See id. A section 1983 analysis is outside the scope of this Note; for a discussion of section 1983 cases, see Eric P. Gifford, Comment, 42 U.S.C. § 1983 and Social Worker Immunity: A Cause of Action Denied, 26 Tex. Tech L. Rev. 1013 (1995).

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cases. Further, this is not just a local problem, but also a national one with "[t]ens of thousands of other children" being seriously harmed after a child protection agency became involved in the situation. Some areas have reported that as many as twenty-five to forty-five percent of children who die of alleged child abuse and neglect were previously reported to the appropriate child welfare agency.

Cases like these raise questions of great importance: What is the appropriate level of culpability for DFCS in the alleged negligent handling of a child deprivation case? Should the Department be held civilly liable, or should it be protected by governmental immunity? The Georgia Tort Claims Act (GTCA) waives the state’s sovereign immunity for torts that state officials and employees commit within the scope of their employment. However, the GTCA provides an

5. See id. In Terrell’s case, after receiving a report of physical abuse, the caseworker did not retrieve the police report, did not interview Terrell, did not talk to the doctor, did not request medical records, and did not talk to his teachers to verify if he fell often at school (which was his foster grandmother’s explanation for his injuries). See Jane O. Hansen, Did 5-Year-Old Terrell Have to Die? Georgia’s Child Protection System Failed Him—And Then Covered Up the Truth, ATLANTA J. CONST., Oct. 17, 1999, at A1. Further, the caseworkers did not make all the foster home visits the policy manual mandates, did not appear in court as required, and “lied in reports that supervisors signed but did not read.” Roche, supra note 3, at 76.

6. Douglas J. Besharov, Protecting Children from Abuse: Should It Be a Legal Duty? 11 U. DAYTON L. REV. 509, 510 (1986). In 1993 an estimated 2,815,600 children in the United States were reported as being abused or neglected. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, EXECUTIVE SUMMARY, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (Sept. 1996). This is a 98% increase from 1986. See id. Of these children, Child Protective Services investigated less than one-half of the cases. See id. In Georgia, there were 69,949 reports of child abuse or neglect reported in 1999, with 26,888 of the reports substantiated. See DEPARTMENT OF HUMAN RESOURCE OFFICE OF COMMUNICATION, GA. DEPARTMENT OF HUMAN RESOURCES, FACT SHEET (Aug. 2000).


8. See generally Besharov, supra note 6; Susan Lynn Abbott, Note, Liability of the State and Its Employees for the Negligent Investigation of Child Abuse Reports, 10 ALASKA L. REV. 401 (1993); Laura Humber Martin, Comment, Caseworker Liability for the Negligent Handling of Child Abuse Reports, 60 U. CIN. L. REV. 191 (1991); Ryan, supra note 7.


11. O.C.G.A. § 50-21-23(a) provides that "[t]he 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 . . . ."
exception to this waiver for the discretionary acts of state employees, resulting in complete immunity for these actions. The exception is applicable even if the discretion is abused, resulting in immunity for the negligent performance of discretionary acts.

The purpose of this Note is to explore both the Georgia courts' application of the GTCA in suits against DFCS for the alleged negligent handling of child deprivation cases and the proper immunity that should be afforded DFCS in such circumstances. Part I reviews the history of the GTCA. Part II outlines the state's statutory duty to protect its children. Part III evaluates the seemingly contradictory application of the discretionary function exception among the Georgia courts. Part IV explores how other jurisdictions, both federal and state, interpret the discretionary function exception. Finally, Part V analyzes the policy implications of applying either a broad or a narrow definition of discretionary function under the GTCA in cases involving the negligent mishandling of child deprivation cases.

I. THE GEORGIA TORT CLAIMS ACT

A. Basis for the Georgia Tort Claims Act

The Georgia Tort Claims Act (GTCA) is patterned after the Federal Tort Claims Act (FTCA). The basis for the FTCA, the doctrine of sovereign immunity, originated in the common law. The doctrine is based on the common law maxim that "the King can do no wrong," thus relieving the government from liability for the

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12. See O.C.G.A. § 50-21-24(2) (providing immunity for the state in "[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").

13. See id.


negligence of a government agent or official. Historically, the injured’s only recourse was the use of a private congressional claim bill, which was a petition for a legislative enactment allowing compensation for the harm the government caused.

In 1946, due to a marked increase in the number of people injured by the government and the cumbersome nature of the claim bills, Congress waived governmental immunity and passed the FTCA. The FTCA allows citizens to sue the government in tort for the negligent acts of its employees and officials. However, the FTCA is subject to a discretionary function exception, allowing the government to retain sovereign immunity when a government employee or official makes a decision based on his discretion. Unfortunately, the statute does not define “discretionary,” nor does the legislative history lend much guidance to its meaning. Thus, the federal courts are left to interpret the definition of “discretionary” as well as the breadth of the discretionary function exception.

19. See Krent, supra note 15, at 876; Goldman, supra note 15, at 838. An actionable negligence claim requires that: (1) the defendant owed the plaintiff a duty of due care; (2) the defendant breached that duty; and (3) the breach proximately caused the plaintiff’s damages. See CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS, ch. IV, § 1, at 44 (2d ed. 1980).
20. 28 U.S.C. § 2680(a) (2000) provides that the government is not liable for:
   [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.
22. See Krent, supra note 15, at 876-77.
23. Id.
B. History of the GTCA

Until 1974, the State of Georgia was cloaked in the protective blanket of sovereign immunity.\(^{24}\) However, in that year, the Georgia Constitution was amended to authorize the General Assembly to establish a court of claims to try cases against the state.\(^ {25}\) Nonetheless, the amendment specifically reserved the state's sovereign immunity.\(^ {26}\) In 1990, the legislature drafted an amendment to the Georgia Constitution, explicitly retaining the state's sovereign immunity absent a waiver by the General Assembly in the form of a state tort claims act.\(^ {27}\)

In 1992, the General Assembly enacted the GTCA.\(^ {28}\) The statute expressly waives the state's sovereign immunity for the torts of state employees acting within the scope of their employment "in the same manner as a private individual or entity would be liable under like circumstances."\(^ {29}\) The exclusive remedy under the GTCA is an action against the agency, not against the employee who commits the tort.\(^ {30}\) However, the waiver is limited by several potentially broad-reaching

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26. See id.
27. The amendment now appears at GA. CONST. art. I, § II, ¶ IX(e) and provides:
   Except as 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 General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.
30. Id. § 50-21-25(a) (providing that "[t]his 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."). Further, the Act broadly defines state officers and employees as "elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity . . . ." Id. § 50-21-22(7) (1998).
exceptions. One such exception is for the performance of a "discretionary function or duty" by a state employee.\footnote{See id. § 50-21-24 (1998).}

In construing the meaning of the discretionary function exception, the courts first looked to the plain meaning of the statute.\footnote{See id. § 50-21-24(2) (1998).} The statute defines "discretionary function or duty" as that "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."\footnote{See, e.g., Brantley v. Dep't of Human Res., 523 S.E.2d 571, 574 (Ga. 1999).} In order to ascertain the scope of this broad definition, the courts found it necessary to review the legislative history in search of the General Assembly's intent in providing for the discretionary function exception.\footnote{O.C.G.A. § 50-21-22(2) (1998).}

In the second section of the GTCA, the General Assembly acknowledged that "inherently unfair and inequitable results" will occur if sovereign immunity is strictly applied.\footnote{See Brantley, 523 S.E.2d at 574; Edwards v. Dep't of Children & Youth Servs., 525 S.E.2d 83, 84 (Ga. 2000).} The General Assembly noted that unlike a private business that can limit its liability by choosing which services to provide, the state must provide a broad range of services and functions.\footnote{O.C.G.A. § 50-21-21(a) (1998); see also Edwards, 525 S.E.2d at 84.} Consequently, the General Assembly concluded that the state should not be required to provide every feasible service available, and "the state's exposure to tort liability must be limited."\footnote{See Edwards, 525 S.E.2d at 84.}

The legislative history provides little insight into the General Assembly's actual intent in creating the discretionary function exception.\footnote{Id.} Because of the apparent conflict between the GTCA's broad ban against the state's unrestrained tort liability and the narrow definition of discretionary function, the courts must interpret the...

\footnote{See id. § 50-21-24 (1998).}
\footnote{See id. § 50-21-24(2) (1998).}
\footnote{See, e.g., Brantley v. Dep't of Human Res., 523 S.E.2d 571, 574 (Ga. 1999).}
\footnote{O.C.G.A. § 50-21-22(2) (1998).}
\footnote{See Brantley, 523 S.E.2d at 574; Edwards v. Dep't of Children & Youth Servs., 525 S.E.2d 83, 84 (Ga. 2000).}
\footnote{O.C.G.A. § 50-21-21(a) (1998); see also Edwards, 525 S.E.2d at 84.}
\footnote{See Edwards, 525 S.E.2d at 84.}
\footnote{Id.}
\footnote{Id.}
ambiguous legislative history and determine how to apply the exception. Thus, judicial interpretation of the breadth of this exception will either expand or limit the state's tort liability in executing its statutory duty to protect Georgia's children.

II. GEORGIA'S DUTY TO PROTECT ITS CHILDREN

In the landmark case of *DeShaney v. Winnebago County*, the United States Supreme Court held that when a state voluntarily decides to protect abused and neglected children, state tort law may create a duty to adequately protect the child. The state may then be held negligent for failing to satisfy that duty. As a result, child welfare agencies are obligated to investigate allegations of child abuse and neglect, intervene if needed, and protect children from maltreatment. In Georgia, the Department of Human Resources is responsible for providing services to protect the welfare and safety of the state's children through its own programs and those of DFCS and Child Protective Services (CPS).

A. Georgia's Child Protection Law

In order to have a cognizable claim of negligence, a duty must exist. Georgia code section 49-5-8 ("Code") outlines the state's

40. *Id.* at 84-85.
42. 489 U.S. 189 (1989).
43. *See id.* at 201-02. *DeShaney* involved the issue of whether the county had deprived a severely abused child of his liberty without due process for failing to intervene and protect him. *See id.* at 189. The suit was brought under 42 U.S.C. § 1983. *See id.* A section 1983 analysis is outside the scope of this Note. *See Gifford, supra* note 3.
44. *See DeShaney*, 489 U.S. at 201-02.
46. *See O.C.G.A.* § 49-5-8(a) (2000). DFCS is the county agency, and CPS is a branch of DFCS. *See id.; John E.B. Myers, Legal Issues in Child Abuse and Neglect Practice* 68 (2d ed. 1998).
47. *See Morris & Morris, supra* note 19, ch. IV, § 1, at 44. A breach of duty occurs when the defendant's "conduct is not as careful as a reasonably prudent person's conduct would be in like circumstances..." *See id.*
statutory duty to protect the welfare and safety of its children. The Code’s purpose “is to promote, safeguard, and protect the well-being and general welfare of children and youth of this state.” Georgia law requires that DFCS follow procedures and affirmatively act to carry out this mandate. The statute requires the Department to investigate all suspected cases of child abuse and neglect. However, the Code does not provide any specific guidelines for DFCS to follow in the course of its investigations. The procedures that DFCS must follow


49. The Code provides that “[p]rotective services . . . will investigate complaints of deprivation, abuse, or abandonment of children . . . and, on the basis of the findings of such investigation, offer social services . . . or bring the situation to the attention of a law enforcement agency, an appropriate court, or another community agency.” O.C.G.A. § 49-5-8 (a)(2)(B) (2000). For a discussion of a state’s public duty doctrine and the need for a “special relationship” beyond what is provided by a general welfare statute to create the legal duty needed for a cognizable negligence claim, see R. Perry Sentell, Jr., Georgia’s Public Duty Doctrine: The Supreme Court Held Hostage, 51 MERCER L. REV. 73 (1999). However, neither the Georgia Court of Appeals nor the Georgia Supreme Court has questioned the existence of a duty as created by the state’s child welfare statutes in child deprivation cases where the state has retained custody of the child. See Edwards v. Dep’t of Children & Youth Servs., 512 S.E.2d 339, 340 (Ga. Ct. App. 1999), rev’d, 525 S.E.2d 83 (Ga. 2000); Brantley v. Dep’t of Human Res., 509 S.E.2d 645 (Ga. Ct. App. 1998), rev’d, 523 S.E.2d 571 (Ga. 1999). However, it might be an issue if the government “fails adequately to provide a protective public service.” Sentell, supra, at 100.


51. See Taylor v. Ledbetter, 818 F.2d 791, 799-800 (11th Cir. 1987) (“What the child is entitled to is the state’s protection from harm. She is entitled to be protected in the manner provided by statute.”).

52. O.C.G.A. § 19-7-5(e) (2000) requires that:

[i]f a report of child abuse is made to the child welfare agency or independently discovered by the agency, and the agency has reasonable cause to believe such report is true or the report contains any allegation or evidence of child abuse, then the agency shall immediately notify the appropriate police authority or district attorney.

53. See id. However, Georgia Rules and Regulations require that “[t]he Agency shall have a written manual of operating policies and procedures regarding its services. The policies and procedures shall include . . . [p]rocedures for supervising foster home placements . . . [and][a]gency practices shall conform to the written policies.” GA. COMP. R. & REGS. 290-9-2-05 (1), (b)3, (7) (2000).
after receiving a report of alleged child deprivation are set out in the Child Protective Services Social Services Manual.\textsuperscript{54}

1. Child Protective Services Procedure

CPS has a legal duty to protect children who are victims of abuse and neglect.\textsuperscript{55} Once CPS receives a report of suspected abuse, the intake worker is responsible for gathering all relevant information necessary to assess the child’s situation.\textsuperscript{56} The intake worker assigns a response time to any report that may need further investigation.\textsuperscript{57} The response time, determined by the urgency of the situation, may be anywhere from an immediate response up to five days.\textsuperscript{58}

Deciding whether a report warrants field investigation involves the use of a decisional tree titled the “Child Abuse/Neglect Intake Screening Tree” (“Tree”).\textsuperscript{59} In using the Tree, intake workers gather the information to certain pertinent questions that require a yes or no response.\textsuperscript{60} Each yes or no response dictates which branch of the tree the caseworker will proceed down in the information-gathering process.\textsuperscript{61} Some situations allow the report to be “screened-out,” which means that no field investigation will follow the intake report;

\textsuperscript{54} See generally GEORGIA DEPARTMENT OF HUMAN RESOURCES, CHILD PROTECTIVE SERVICES SOCIAL SERVICES MANUAL (Oct. 1999) [hereinafter SERVICES MANUAL].

\textsuperscript{55} See id. ch. 2100, § 1, at 1. For a brief history of the role of CPS in the United States, see MYERS, supra note 46, at 41-42.

\textsuperscript{56} See SERVICES MANUAL, supra note 54, ch. 2100, § III, at 56.

\textsuperscript{57} See id.

\textsuperscript{58} See id. Examples of reports that always require an immediate to 24-hour response include the following: (1) maltreatment of a child under the age of three; (2) serious multiple bruises/welts; (3) bizarre punishments; (4) sexual abuse; (5) reports where a child lives in the same household where an alleged maltreated child has died; and (6) maltreatment of a child in custody. See id. ch. 2100, § III, at 68-69.

\textsuperscript{59} See id. ch. 2100, § III, at 79 app. A.

\textsuperscript{60} See id. Some examples of the questions asked include the following: (1) “Is the victim less than 18 years old?” (2) “Is the alleged perpetrator a caretaker to the child?” (3) “Does the referral fit other screen-out criteria such as poverty and custody issues?” (4) “Is ‘physical abuse’ involved?” (5) “Is ‘neglect’ involved?” (6) “Is ‘emotional abuse’ involved?” See id.

\textsuperscript{61} See id.
however, the caseworker may refer the case to another appropriate agency. If the caseworker deems that an investigation is necessary, the investigator must complete it within thirty days of the initial intake report. At the end of that period, the investigator determines whether the allegation of abuse or neglect is either substantiated or unsubstantiated. Through face-to-face contact with the parents, the investigator gathers information and looks at various factors to determine if abuse or neglect is occurring. These factors include the following: (1) how the parent behaves with the child, i.e., is any violence observed; (2) how the parent describes the child, i.e., does the parent describe the child in negative ways; (3) whether the parent has caused serious harm to the child; (4) whether the parent’s explanation for the alleged abuse or neglect of the child is consistent; (5) whether the parent has seriously maltreated any other child previously; and (6) whether the child appears fearful of the parent. The investigation also requires that the investigator contact at least two collateral sources. Collateral sources may include medical personnel, teachers, and counselors.

Unsubstantiated reports are not necessarily false reports, because failure to substantiate is usually due to a caseworker’s inability to gather all of the pertinent information. If substantiated, CPS determines if the child can be adequately protected while remaining in the home, or if foster placement is appropriate.

62. See id.
63. See id. ch. 2100, § III, at 71.
64. See id. ch. 2100, § IV, at 127.
65. See id. ch. 2100, § IV, at 127-28. A substantiated report must be "supported by a preponderance of the evidence." Id.
66. See id. ch. 2100, § IV, at 119.
67. Id.
68. Id. ch. 2100, § IV, at 124.
69. Id.
70. See WIEHE, supra note 48, at 24.
71. See SERVICES MANUAL, supra note 54, ch. 2100, § II, at 35-36. Foster care is only appropriate when "it has been established that it is necessary for the physical and/or emotional well-being of the child." GA. COMP. R. & REGS. 290-9-2.07(1) (2000).
the child outside the home, CPS must take legal action that requires Juvenile Court intervention.\textsuperscript{72}

The caseworker is required to have, at a minimum, monthly face-to-face contact with all children placed in a foster home.\textsuperscript{73} If a report of suspected abuse or neglect is made regarding the foster parents, CPS must investigate the matter immediately.\textsuperscript{74} Within forty-eight hours of completing the investigation, the caseworker must decide whether to remove the child from the foster home.\textsuperscript{75} Unfortunately, instead of protecting children, DFCS' action or inaction often places them at greater risk.\textsuperscript{76}

III. GEORGIA COURTS' INTERPRETATION OF THE DISCRETIONARY FUNCTION EXCEPTION IN CHILD DEPRIVATION CASES

The Georgia Court of Appeals has generally construed the discretionary function exception broadly.\textsuperscript{77} However, in cases

\textsuperscript{72} See Services Manual, supra note 54, ch. 2100, § II, at 37. Authority to remove the child from the home can be achieved through one or more of the following: Juvenile Court order transferring temporary custody to [DFCS] . . . ; Juvenile Court order terminating parental rights; [v]oluntary agreement to place a child in foster care; [v]oluntary relinquishment of parental rights; Superior Court order; or [r]equest for short-term emergency care, as a result of an emergency or illness of the person having physical and legal custody . . . "

\textit{Id.} ch. 2100, § II, at 39.

\textsuperscript{73} See id. ch. 2100, § V, at 147. The Department is also required to have a case plan for the child and his foster family that is reevaluated at least once every six months. See Ga. Comp. R. & Regs. 290-9-2-.07(1) (2000).

\textsuperscript{74} See Services Manual, supra note 54, ch. 2100, § VI, at 14.

\textsuperscript{75} See id.

\textsuperscript{76} See Michele Miller, Note, Revisiting Poor Joshua: State-Created Danger Theory in the Foster Care Context, 11 Hastings Women's L.J. 243 (2000). The Seventh Circuit has noted that:

If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

\textit{Id.} at 245 (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).

\textsuperscript{77} See Bruton v. Dep't of Human Res., 509 S.E.2d 363, 367 (Ga. Ct. App. 1998) (holding that the Department’s decision to place an Alzheimer patient in a personal care home was a discretionary function); N.W. Ga. Reg'l Hosp. v. Wilkins, 469 S.E.2d 786, 789 (Ga. Ct. App. 1996) (holding that the Department’s decision that a mentally handicapped man was a suitable resident for a personal care home was discretionary in nature); Christensen v. State, 464 S.E.2d 14, 17 (Ga. Ct. App. 1995) (holding that the parole board's decisions regarding the release of a prisoner were discretionary in
regarding the alleged negligent handling of child deprivation, the Georgia Supreme Court has overruled the appeals court, providing for a narrower definition of the exception.78

A. Jackson v. Department of Human Resources

In February 1998, the Georgia Court of Appeals reviewed the issue of Department liability in the alleged negligent mishandling of a child deprivation case under the GTCA.79 In Jackson, a father of three children alleged that the Department was negligent in placing his children with relatives whose home was unqualified to be a foster care placement.80 The children suffered physical and emotional abuse while in the home.81 The Department defended on the ground that decisions regarding a foster child’s placement are discretionary and thus protected by sovereign immunity.82

The court relied on a discretionary versus ministerial analysis in reaching its holding.83 The court stated that a discretionary act is one that “calls for the exercise of personal deliberation and judgment, entailing ‘examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed.’”84 Conversely, “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.'”85 The court found that foster home placement requires the caseworker not only to consider the best interest of the child, but also to weigh all available alternatives, taking into account “a multitude of social and economic

80. Id. at 58-59.
81. Id. at 59.
82. Id.
83. Id.
84. Id. (quoting Joyce v. Van Arsdale, 395 S.E.2d 275, 276 (1990)).
The court held that placement decisions are discretionary since they require the "exercise of discretion and personal judgment."  

**B. Brantley v. Department of Human Resources**

In November 1998, the court of appeals reviewed its second case regarding the Department's liability under the GTCA concerning the alleged mishandling of a child in foster care. In *Brantley*, a two-year-old's foster parents left the child unsupervised in their backyard pool where she slipped out of a float and drowned. The court analogized a foster parent's function to that of a school official responsible for the monitoring, supervising, and controlling of students, finding that the foster parents' supervisory duties fell within the discretionary function exception of the GTCA.

The plaintiffs, relying on *Department of Transportation v. Brown*, argued that supervising a child is not a discretionary function. In *Brown*, the Georgia Supreme Court held that the discretionary function exception only applies to "basic governmental policy decisions" and not to "any decision affected by 'social, political, or economic factors.'" The court found that road planning and designing are not policy decisions and, thus, not subject to the discretionary function exception. Here, however, the appeals court

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86. *Id.*

87. *Id.*


89. See *id.* at 646. O.C.G.A. § 50-21-22(7) (2000) provides that "[a]n employee shall also include foster parents . . . ."

90. See *Brantley*, 509 S.E.2d at 646 ("'We have . . . consistently held that the task of school officials to monitor, supervise, and control students is a discretionary action protected by the doctrine of official immunity.'") (quoting *Payne v. Twiggs County School Dist.*, 501 S.E.2d 550 (Ga. Ct. App. 1998)).

91. See *Dep't of Transp. v. Brown*, 471 S.E.2d 849 (Ga. 1996). See also *Sentell*, *supra* note 49, at 101 (arguing that *Brown* may have been erroneously decided because the public duty doctrine was not applied in the same manner as in *City of Rome v. Jordan*, 426 S.E.2d 861 (Ga. 1993)).


93. *Id.* The court further noted that the use of such a standard "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." *Id.*
distinguished child supervision from road planning and designing, reasoning that discretionary functions are those requiring personal deliberation and judgment.\(^{94}\) Consequently, the court held that foster child supervision falls within the discretionary function exception.\(^{95}\)

The Georgia Supreme Court granted certiorari and unanimously reversed the lower court’s decision, holding that a foster parent’s negligent supervision does not fall within the discretionary function exception of the GTCA.\(^{96}\) Unlike the court of appeals, the court found that Brown was analogous to the instant case.\(^{97}\) The court stated that designing roads requires at least as much discretion as supervising a child and further, that such a comparison was not an appropriate basis for distinguishing the cases.\(^{98}\)

Additionally, the court noted that the court of appeals consistently failed to consider the statutory definition of “discretionary function.”\(^{99}\) The GTCA definition requires the exercise of discretion or judgment, which itself requires a “policy judgment in choosing among alternate courses of action based upon a consideration of social, political or economic factors.”\(^{100}\) The court held that leaving an unsupervised child in a pool is not routine childcare and “[i]f such a decision were considered a discretionary function, the ‘exception [would] swallow the waiver.’”\(^{101}\)

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94. See Brantley, 509 S.E.2d at 647.
95. See id.
97. See id. at 573.
98. See id.
100. Brantley, 523 S.E.2d at 574 (quoting O.C.G.A. § 50-21-22(2)); see Edwards v. Dep’t of Children & Youth Servs., 525 S.E.2d 83, 85 (Ga. 2000) (stating that there is no need to review pre-GTCA cases); Dep’t of Transp. v. Brown, 471 S.E.2d 849, 851 (Ga. 1996) (stating that it is not necessary to consider discretionary versus ministerial decisions of prior case law).
101. Brantley, 523 S.E.2d at 575 (quoting Brown, 471 S.E.2d at 851) (second alteration in original).
C. Edwards v. Department of Children & Youth Services

In 1999, the court of appeals was presented with yet another case brought under the GTCA for the negligent mishandling of a child in the state’s custody. In Edwards, the parents of a child placed in a youth detention center (YDC) sued under the GTCA for the wrongful death of their fifteen-year-old daughter ("Edwards"), alleging that the YDC negligently failed to provide her with reasonable medical care. After Edwards complained of a headache, the YDC nurse diagnosed her as having a sinus problem and prescribed over-the-counter medication. The following morning and evening, Edwards again complained of headache pain to the house parent, who also gave her over-the-counter medication. A security guard who checked on Edwards that evening testified that Edwards could not stand on her own. The staff continued to monitor Edwards every five to ten minutes. During one such check, the staff realized that Edwards was not breathing and called the nurse. The nurse arrived approximately ten minutes later, instructed that someone phone 911 and began cardiopulmonary resuscitation. By the time the emergency team arrived, Edwards had died from a subdural hematoma.

The parents claimed that the YDC had an absolute, nondiscretionary duty to provide medical care for their daughter, and that the YDC negligently delayed calling 911. The court of appeals affirmed the lower court’s decision that the YDC had a duty to provide medical care but found that the YDC fulfilled that duty by...

103. Id.
104. Id. at 341.
105. Id.
106. Id.
107. Id.
109. Id. at 342.
110. Id. at 342 n.2.
111. Id.
treat ing and monitoring Edwards. The court held that selecting the type and amount of medical care administered to an incarcerated juvenile are decisions left to the employees’ discretion. Further, sovereign immunity is not waived under the GTCA even when such discretion is abused.

On appeal, a unanimous Georgia Supreme Court reversed, finding that the court of appeals had “improperly expanded the meaning of ‘discretionary function.’” The court again relied on Brown, where it had rejected reviewing the case law before the GTCA’s enactment, because the statute itself defines “discretionary function.” The court found the GTCA’s language clearly requires that the discretionary function exception apply only to decisions that are “policy judgment[s]” related to choices among “alternative actions based on social, political, and economic factors.” Further, the court was persuaded by the reasoning of other state courts that a decision regarding the proper medical care to provide to incarcerated juveniles is not a “basic governmental policy decision.” The court held that the YDC’s decisions regarding Edwards’ treatment “do not involve policy judgments based on social, political or even economic factors.” Thus, the YDC was not immune from liability under the GTCA.

112. Id. at 343.
113. Id.
114. Id.
117. Edwards, 525 S.E.2d at 85.
118. Id.; see also id. at 85 n.17 (citing Magee v. United States, 121 F.3d 1 (1st Cir. 1997)) (finding that specific medical treatment decisions fall outside the discretionary function exception); Rise v. United States, 630 F.2d 1068, 1072 (5th Cir. 1980) (finding that failure to provide proper medical care cannot be considered the exercise of a discretionary function); Jackson v. Kelly, 557 F.2d 735, 739 (10th Cir. 1977) (finding that the discretionary function exception does not absolve government from liability for negligent medical care).
119. Edwards, 525 S.E.2d at 85-86.
120. See id. at 86.
IV. OTHER JURISDICTIONS’ APPLICATION OF THE DISCRETIONARY FUNCTION EXCEPTION

The Georgia Court of Appeals has interpreted only three cases regarding the GTCA’s discretionary function exception in instances of alleged mishandling of a child deprivation case. The Georgia Supreme Court reversed two of the three cases; therefore, it is appropriate to look to other jurisdictions for guidance on the exception’s appropriate application. Supreme Court cases interpreting the exception will be examined first, since the GTCA is patterned after the FTCA and the definition of “discretionary function” under the GTCA parallels “discretionary function” under the FTCA and its developing case law. Next, a review of other state courts’ interpretations of “discretionary function” as applied to the handling of child deprivation cases will be examined.

A. The United States Supreme Court’s Interpretation of the FTCA Discretionary Function Exception

Though the Supreme Court has not reviewed the FTCA’s discretionary function exception in the context of a child deprivation case, the Court has proclaimed that “[t]he prevention of . . . [the]
abuse of children constitutes a government objective of surpassing importance." The 1953 case of Dalehite v. United States was the first case in which the United States Supreme Court interpreted the FTCA's discretionary function exception. The Court used the exception to bar mass tort liability in Texas, when an explosion of fertilizer grade ammonium nitrate (FGAN) injured and killed hundreds of people. The plaintiffs sued under the FTCA, alleging government negligence in the manufacture and transport of the highly combustible FGAN, which was being produced for export to war-torn Europe.

The Court found that the discretionary function exception immunized the government from liability because discretion was involved in both formulating and implementing the plan to export the fertilizer. The Court defined "discretion" as "more than the initiation of programs and activities"; it is "[w]here there is room for policy judgment and decision." Further, the Court developed the "planning rather than operational" decision-making distinction that subsequent courts applied.

Two years later, in Indian Towing Co. v. United States, the Court used Dalehite's "planning" versus "operational" dichotomy when a towing company sued the United States for negligence after a
tugboat hit shore because the Coast Guard improperly maintained a lighthouse. The Court found that the Coast Guard’s decision to maintain the lighthouse was a “planning” decision; thus, it was discretionary and protected under the discretionary function exception. However, the actual maintenance of the lighthouse was “operational,” requiring no discretion and opening the government up to liability.

For the next thirty years, the lower courts used this dichotomy to insulate the government from liability whenever an activity was deemed to be “planning” as opposed to “operational.” However, in 1984, the Court reexamined the discretionary function exception in United States v. S.A. Empresa De Viacao Aerea Rio Grandense (“Varig Airlines”), which involved an airline fire that resulted in 124 deaths. The Federal Aviation Administration (FAA) was sued under the FTCA for the negligent performance of a safety inspection on a commercial aircraft. The plaintiff alleged that if the inspection had been properly performed, the fire hazard would have been detected in time to prevent the accident.

The Court formulated a new test that focused on “the nature of the conduct, rather than the status of the actor” and whether the acts in question are the type that Congress intended to exempt from liability. The Court stated that the purpose of the discretionary function exception is “to prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic,

134. Id. at 64.
135. Id. at 69.
136. Id.
139. Id. at 800.
140. Id. at 801.
141. Id.
142. Id. at 813.
143. Id.
and political policy through the medium of an action in tort.” The Court held that if regulating an activity requires a judgment regarding social, economic, or political policy, then the discretionary function exception applies. Though this standard is far from clear, it is a departure from the earlier planning versus operational analysis. Four years later, the Court in Berkovitz v. United States sought to clarify the standard.

In Berkovitz, an infant contracted polio after he received an oral polio vaccine. His parents sued under the FTCA, alleging negligence because the National Institute of Health’s Division of Biologic Standards (DBS), which had approved the vaccine, neglected to obtain certain information from the manufacturer before issuing a vaccine license, as the regulatory scheme required. The Court found that because the DBS failed to follow a “mandatory directive,” the discretionary function exception did not apply. The Court noted that whether the discretionary function exception applies depends upon a two-part analysis. First, only conduct that involves judgment is discretionary. Conduct based on a statute or regulation proscribing a specific course of action is not discretionary because there is no exercise of judgment in such instances. Second, if the conduct does involve judgment, the issue becomes whether the conduct is the type that Congress meant to protect by the discretionary function exception. Public policy considerations

144. Id. at 814.
145. Id. at 820.
146. See Zillman, supra note 126, at 370; Goldman, supra note 15, at 844. See generally Hackman, supra note 137, at 418.
148. See id.
149. Id. at 533.
150. Id. at 533, 540.
151. Id. at 544.
152. Id. at 536-37; Zillman, supra note 126, at 370.
153. See Berkovitz, 486 U.S. at 545.
154. See id. at 544-45.
155. See id. at 545.
should be the basis of this inquiry.¹⁵⁶ Thus, the Berkovitz test reaches broadly, allowing the exception for matters grounded in social, economic, or political policy.¹⁵⁷

*United States v. Gaubert,*¹⁵⁸ decided in 1991, is the Court’s most recent and definitive review of the discretionary function exception.¹⁵⁹ In *Gaubert,* a shareholder of an insolvent savings and loan association alleged that the government negligently interfered with the unstable Federal Savings and Loan Associations (FSLAs) of the 1980s.¹⁶⁰ Specifically, the plaintiff alleged that the Federal Home Loan Bank Board (FHLBB), which had statutory authority to regulate the FSLAs, was negligent in the supervision of the day-to-day business decisions of the FSLAs.¹⁶¹ The Court applied the two-part Berkovitz test: (1) does the act involve the use of judgment? (2) is the judgment the kind that the discretionary function exception is intended to protect?¹⁶² The first issue examined was whether the FHLBB’s activities were discretionary or whether they were controlled by a statute, regulation, or policy.¹⁶³ The Court found that the FHLBB had broad, non-mandatory statutory authority to supervise the FSLAs, leaving most decisions up to the judgment of the FHLBB.¹⁶⁴ Because the acts involved the use of judgment, the Court moved to the second prong of the test and found that the FHLBB’s decisions were “within the purview of the policies behind the statutes.”¹⁶⁵ Thus, the discretionary function exception applied because it involved policy judgments of the type Congress meant to protect.¹⁶⁶

¹⁵⁶. See id.
¹⁵⁷. See generally id.
¹⁵⁹. See Zillman, supra note 126, at 371; Hackman, supra note 137, at 424.
¹⁶⁰. See Gaubert, 499 U.S. at 320.
¹⁶¹. Id. at 318.
¹⁶². See Gaubert, 449 U.S. at 322-23; Zillman, supra note 126, at 371.
¹⁶³. Gaubert, 499 U.S. at 328.
¹⁶⁴. Id. at 329.
¹⁶⁵. Id. at 332-33.
¹⁶⁶. See id. at 334; Zillman, supra note 126, at 372.
Justice Scalia, concurring, opined that requiring a "policy judgment" before the discretionary function will apply is overly broad and the lower courts would have difficulty with its application. Justice Scalia stated that more emphasis should be placed upon the decision-maker's status within the organization, because the level of the decision-maker is indicative of whether policy considerations are at issue. Justice Scalia asserted that more of an operational versus planning dichotomy, pursuant to Dalehite and Indian Towing, should be applied to establish clearer guidelines.

B. State Courts' Interpretation of Discretionary Function in Negligence Cases for the Mishandling of Child Deprivation Cases

In G. v. State Department of Social and Rehabilitation Services, an adoptive mother sued the Department under the Kansas Tort Claims Act, alleging that the decision not to remove her adopted son from his previous foster home was negligent and caused him emotional and psychological damage. While in the foster home, the county received a report that another child in the home sexually abused him. The Department claimed immunity under the discretionary function exception of the Kansas Tort Claims Act. The court held that the decision to remove a child from foster care is discretionary as it requires deliberation and the weighing of risks, and

167. See Gabert, 499 U.S. at 335 (Scalia, J., concurring).
168. See id. at 336; Hackman, supra note 137, at 425.
169. See Gabert, 499 U.S. at 336 (Scalia, J., concurring).
171. Id. at 980.
172. Id. at 982-83.
173. Id. at 983. The discretionary function exception within the Kansas Tort Claims Act states in part that "a governmental entity or an employee acting within the scope of the employee's employment" will not be liable for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved." Id. at 985 (citing KAN. STAT. ANN. § 75-6104).
thus it is not a decision that should be susceptible to judicial review.\(^{174}\)

In *Scott v. County of Los Angeles*,\(^ {175}\) the County of Los Angeles ("County") was sued for the negligent supervision of a child placed in foster care.\(^ {176}\) The County defended on the grounds that it was immune from liability under the discretionary function exception to the California Tort Claims Act.\(^ {177}\) State regulations mandated that the Department of Social Services (DSS) make monthly visits to all homes where foster children were placed.\(^ {178}\) Despite receiving numerous reports that the child was being abused, DSS did not comply with the monthly visitation mandate.\(^ {179}\) Subsequently, the child was permanently disabled and disfigured when his foster grandmother immersed him in scalding water, severely burning his legs.\(^ {180}\) The court found that DSS not following the mandatory visitation schedule was not an omission resulting from discretion, but rather, a failure to fulfill a ministerial duty.\(^ {181}\) Caseworkers do not have the choice to violate the regulations outlined in the DSS policy manual.\(^ {182}\) The court noted that "[i]f those standards are deemed discretionary, the effect can only be to decrease, not increase, the

\(^{174}\) See id. at 988; Beebe v. Fraktman, 921 P.2d 216, 218 (Kan. Ct. App. 1996) (holding that the decision to open a file for suspected child abuse is a discretionary function).

\(^{175}\) 32 Cal. Rptr. 2d 643 (Cal. Ct. App. 1994).

\(^{176}\) See id. at 645-47. After being abandoned by her mother, the juvenile court placed the child with her grandmother with the placement to be supervised by DSS. *Id.*

\(^{177}\) *Id.* at 649. Section 820.2 of the California Government Code provides that "a public employee is not liable for any injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion is abused." *Id.* at 647 n.5.

\(^{178}\) See id. at 646 n.2.

\(^{179}\) *Id.* at 649.

\(^{180}\) *Id.* at 648.

\(^{181}\) See id. at 651; see also Alicia T. v. County of Los Angeles, 222 Cal. App. 3d 869 (Cal. Ct. App. 1990) (holding that the decision to begin dependency proceedings is discretionary); Newton v. County of Napa, 266 Cal. Rptr. 682, 687 (Cal. Ct. App. 1990) (holding that the initial decision to conduct a child abuse investigation is discretionary, but subsequent actions in performance of the investigation may be ministerial).

protection afforded to children."\textsuperscript{183} Consequently, the County was liable for negligence.\textsuperscript{184}

In \textit{Williams v. Horton},\textsuperscript{185} a suit was brought when the negligent placement of a child in a foster home resulted in the child’s death.\textsuperscript{186} The defendants claimed immunity under the Michigan Tort Claims Act.\textsuperscript{187} The court held that finding a placement for a foster care child requires “significant decision-making” that involves weighing numerous factors and alternatives.\textsuperscript{188} Thus, the placement constituted a discretionary function, not a ministerial one, and the placement action was immunized from liability, despite the placement being negligent.\textsuperscript{189}

In \textit{Boland v. State of New York},\textsuperscript{190} a father alleged that the state was liable for his son’s death and his daughter’s injuries suffered at the hands of their stepmother that occurred while the father was out of the country.\textsuperscript{191} Neighbors reported their concerns to a state child abuse hotline, but because of a routing error, the correct county did not receive the report in a timely manner.\textsuperscript{192} By the time the caseworker visited the residence, the children had already been injured and hospitalized.\textsuperscript{193} The New York Supreme Court held that the child abuse hotline was acting in a ministerial capacity in the call intake.\textsuperscript{194} Thus, the state was not protected by governmental immunity.\textsuperscript{195}

\textsuperscript{183} \textit{Id.} at 652.
\textsuperscript{184} \textit{See id.}
\textsuperscript{186} \textit{Id.} at 19.
\textsuperscript{187} \textit{See id.}
\textsuperscript{188} \textit{Michigan Compiled Laws section 691.1407 provides that the “officials, employees, and agents are immune from tort liability only when they are . . . performing discretionary, as opposed to ministerial acts.” Id.}
\textsuperscript{189} \textit{Id.} at 20.
\textsuperscript{190} \textit{See id.} at 21.
\textsuperscript{192} \textit{Id.} at 501-02.
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.} at 505.
\textsuperscript{195} \textit{See id.} at 506.
In *Department of Health & Rehabilitative Services v. Yamuni*, an adoptive mother sued the Department of Health ("Department"), alleging both negligent investigation of repeated abuse reports regarding her adopted son while he was in the care of his natural mother and failure to seek protective custody of him. The court held that these duties were operational acts because they did not involve policymaking. Further, the court noted that to allow immunity for the Department "would turn [the state’s child protective statute] on its head by protecting the legal protector . . . from the protected class." Therefore, the Department was liable for the incompetent investigation.

In *Rich v. Erie County Department of Human Resources*, the Department removed a child from the home where his mother’s boyfriend was abusing him. The boyfriend killed the child after the Department returned him to the home. The Administrator of the child’s estate sued the Department for negligence. The Ohio Court of Appeals noted that the state’s child abuse statutes mandate conflicting procedures. For instance, although an abused child must be removed from the home, the Department must also strive for reunification. Because of the wide range of the statute’s mandates, the Department has broad discretion in carrying out its duties. Further, the court acknowledged that the decision to return a child to a home where he has previously been abused is "always fraught with peril since [the Department] attempt[s] to predict human

196. 529 So. 2d 258 (Fla. 1988).
197. Id. at 259.
198. Id. at 259-61.
199. Id. at 262.
200. See id.
202. Id. at 280.
203. Id.
204. Id.
205. Id. at 282.
206. See id.
207. See id.
behavior."\textsuperscript{208} Consequently, the court found the Department’s decision to return the child to his mother to be one of discretion, thus affording the Department governmental immunity.\textsuperscript{209}

V. POLICY CONSIDERATIONS

As illustrated, when faced with the decision of whether to hold a state liable for the negligent handling of a child deprivation case or to extend the state immunity, courts employ a number of different tests, which result in a multitude of outcomes.\textsuperscript{210} In particular, courts struggle to decide whether a particular action or inaction is discretionary in nature.\textsuperscript{211} Consequently, proper application of the discretionary function exception in cases involving the alleged mishandling of child abuse cases demands an inquiry into the policies underlying the exception.\textsuperscript{212}

A. Policies Supporting a Broad Application of the Discretionary Function Exception

A broad application of the discretionary function exception to the GTCA in cases of alleged negligent handling of child deprivation cases implicates important policy rationales. These include separation of governmental powers, hampering government decision-making, and depletion of government funds.

\textsuperscript{208} Id.; see also Todd v. State, 699 So. 2d 35, 42 (La. 1997) (holding that the decision to remove a child from his home is one in which the caseworker has latitude and is, therefore, discretionary in nature); White v. White, 479 So. 2d 588, 589 (La. Ct. App. 1985) (holding that the decision whether to investigate a report of child neglect when the state does not have custody of the child is discretionary in nature).

\textsuperscript{209} See Rich, 665 N.E.2d at 282.

\textsuperscript{210} See supra Parts I, II.

\textsuperscript{211} See supra Part I.

\textsuperscript{212} See generally Krent, supra note 15, at 884-907; Abbott, supra note 8, at 423-27; Goldman, supra note 15, at 852-59; Martin, supra note 8, at 212-18.
1. Separation of Powers

A major argument for a broad application of the discretionary function exception is that it preserves the separation of powers between the branches of the government.\(^{213}\) This argument is based on the premise that the judiciary should not be allowed to second-guess the wisdom of a governmental agency (here, DFCS) that supposedly has more expertise and more experience in setting policies in its particular area.\(^{214}\) However, DFCS and its caseworkers arguably are not making policy decisions; the legislature has already done that by passing child protection statutes.\(^{215}\) DFCS and its caseworkers are simply carrying out the mandate of the child protection statutes.\(^{216}\) Thus, judicial review of DFCS' non-policymaking activities may not be problematic because it is appropriate for the judiciary to review operational decisions.\(^{217}\) Rather than reviewing a coordinate branch's policy choice, the court would be reviewing a standard negligence claim and holding the state liable for breaching a duty that it imposed upon itself—the protection of the state's children.\(^{218}\) Moreover, because the state's interest in protecting the safety and welfare of its children is of paramount importance, it is imperative that DFCS' actions are not shielded from the judiciary's scrutiny.\(^{219}\)

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213. See Krent, supra note 15, at 872; Goldman, supra note 15, at 852; Martin, supra note 8, at 216.
214. See Edwards v. Dep't of Children & Youth Servs., 525 S.E.2d 83, 85 (Ga. 2000) ("The purpose of the exception under the federal act is to prevent the courts from substituting their own judgment for the policy decisions of the executive and legislative branches of government."); Maleski, supra note 24, at 448; Goldman, supra note 15, at 853.
215. See Martin, supra note 8, at 213.
216. See id.
217. See Brantley v. Dep't of Human Res., 523 S.E.2d 571, 575 (Ga. 1999) (finding that a non-discretionary act is "not the type of governmental decision that should be protected from review by the judiciary"); Martin, supra note 8, at 208 (citing Stevenson v. State Dep't of Transp., 619 P.2d 247, 251-52 (Or. 1980)).
218. See generally Martin, supra note 8, at 208.
219. See generally Brantley, 523 S.E.2d at 575.
2. Hampering Government Decision-Making

Another typical argument for a broad application of the discretionary function exception is that caseworkers must be free to exercise their judgment without a constant fear of liability. Proponents of that argument believe that without freedom from liability, caseworkers will become too cautious in their decision-making. Alternatively, the caseworker may engage in "defensive" social work. Operating in the shadow of a constant threat of liability, the caseworker may become too intrusive in the family relationship without proper justification. Such over-intervention harms the child and violates parental rights. The GTCA seemingly resolves both of these concerns because the caseworker may not be held individually liable when working within the scope of his employment. The potential for over-intervention is further curbed by the fact that a parent may in some cases sue the state for violating their parental rights if the child is removed unnecessarily.

Further, holding the state liable for the negligent mishandling of child deprivation cases should not hinder the effective functioning of DFCS because Title 49 places a mandatory, statutory duty on the state to investigate reports of suspected child abuse and neglect. DFCS cannot choose not to investigate reports of alleged child abuse. Realistically then, holding DFCS legally accountable would not harm its effective decision-making but rather enhance it by deterring negligence.

220. See generally Goldman, supra note 15, at 853-54.
221. See generally id.
222. See Besharov, supra note 6, at 547.
223. See id. at 547-48.
224. See Abbott, supra note 8, at 424-25.
226. See Abbott, supra note 8, at 425.
228. See O.C.G.A. § 49-5-8(a)(2)(B); accord Abbott, supra note 8, at 424.
229. See generally Abbott, supra note 8, at 424-25.
3. Depletion of Government Funds

Another argument against broadly imposing liability upon DFCS is that such a policy would rapidly deplete government funds. The Code limits the state's liability to $1 million per person, per occurrence, with a $3 million aggregate liability per occurrence, regardless of the number of defendants. The Code further provides that judgments can only be collected from the state's tort claims fund or applicable insurance policies. If the funds become depleted, the state's liability under the GTCA ceases for the fiscal year. In such a case, the only way the plaintiff may recover a judgment is if the General Assembly appropriates additional funds for that purpose. Further, concerns regarding the state's financial ability to fulfill its statutory duties implicate budgetary decisions, which is the province of the legislature.

B. Policies Supporting a Narrow Application of the Discretionary Function Exception

A narrow application of the discretionary function exception to the GTCA in cases of the alleged negligent handling of child deprivation cases would further the policies of promoting deterrence and providing remedies.

230. See Bershov, supra note 6, at 546-47; Abbott, supra note 8, at 425.
232. See id.; Maleski, supra note 24, at 440.
235. See id.
236. See Martin, supra note 8, at 211 n.122 ("Under common notions of governmental responsibility, ... when a state has undertaken by statute the duty to protect abused children, it offends moral justness to suggest that the state could avoid the consequences of failing to execute that duty on the basis of inadequate government funds.")
1. Deterrence

Imposing liability against DFCS will likely aid in the deterrence of the negligent mishandling of child abuse cases.237 Child welfare agencies tend to be underfunded and understaffed.238 The lack of sufficient financial resources seriously harms the very children who are under the supposedly watchful eye of the agency.239 Many times, overburdened caseworkers have no choice but to perform abbreviated investigations, ignore time limits, and inadequately supervise ongoing cases.240 Some judges consider an agency’s limited resources when determining if the agency was negligent in the performance of its duties.241 However, many judges consider lack of funding to be an inappropriate consideration.242 Judge Posner has declared, “understaffing is not a defense to a violation of administrative law.”243

Imposing liability would give the state greater incentive to allocate increased resources to DFCS to provide better hiring, training, and supervision of its caseworkers.244 Like any private business, forcing the state (or federal) government to internalize negligence costs creates incentives for the state to act more safely.245 As a result, the state would become “more creative and energetic about finding new solutions to the problem.”246

238. See generally Abbott, supra note 8, at 426; Goldman, supra note 15, at 856-57. But see generally Krent, supra note 15, at 885-87.
239. See Besharov, supra note 6, at 546.
240. See id. at 531, 546.
242. See id.
243. Id. (quoting Judge Posner in Salamed v. INS, 70 F.3d 447, 452 (7th Cir. 1995)).
244. See Abbott, supra note 8, at 426; Martin, supra note 8, at 211.
245. See Krent, supra note 15, at 872. “If the theory of tort law is in part to compel private entities to become more efficient in light of potential tort liability, then there is no apparent reason why potential liability should not similarly force the government to be more prudent in its operations.” Id.; see also Goldman, supra note 15, at 856.
246. Martin, supra note 8, at 218.
2. Availability of a Remedy

A narrow application of the discretionary function exception supports the traditional tort theory that a negligent actor should compensate the innocent victim. President Lincoln once stated, "[i]t is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals." Child abuse victims are quite likely the most helpless victims in society. If the state avoids liability pursuant to a broad interpretation of the discretionary function exception, innocent victims are forced to shoulder the consequences of DFCS' negligence. These children need redress to, inter alia, pay for the future medical and psychological treatment they will likely require after enduring such maltreatment.

The United States Supreme Court recognizes the unfairness of denying relief to an innocent victim on the grounds of governmental immunity. Hence, it is preferable to spread the cost of DFCS' liability over all taxpayers who enjoy the benefits of the government's services. Providing the victim a remedy is fair because an exception to governmental immunity can become a "license to harm."

CONCLUSION

Courts struggle with the question of what level of immunity to afford the state when a child abuse case has been handled.

249. See Martin, supra note 8, at 210.
250. See Goldman, supra note 15, at 857.
251. See Miller, supra note 76, at 254-55.
253. See Abbott, supra note 8, at 426; see also Schuck, supra note 248, at 23.
negligently. \textsuperscript{255} In Georgia, courts have approached the issue in various ways. \textsuperscript{256} A broad application of the discretionary function exception essentially reinstates sovereign immunity.

When DFCS violates its own policy and procedure manual, there is no discretionary function to protect. \textsuperscript{257} To permit the discretionary function exception in such cases would result in the exception swallowing the rule. \textsuperscript{258} Instead of being protected by the state, DFCS' negligence further victimizes the children. \textsuperscript{259} DFCS will not be held liable when it merely makes a "reasonable" mistake, but only when it acts negligently. \textsuperscript{260} It is imperative that children, society's most helpless victims, be compensated for the harm they suffer. \textsuperscript{261} If under funding results in negligence, the state must be encouraged to allocate more resources to DFCS in order to prevent such harm. \textsuperscript{262}

Ultimately, the lives of innocent children like Terrell Peterson are at stake. Courts must protect these children rather than allow the GTCA to become a license for the negligent handling of child deprivation cases. To that end, courts should narrowly define the discretionary function exception to the GTCA and hold the state responsible when its child protection agencies act negligently. When children fall through "the crater" \textsuperscript{263} at DFCS, the very agency appointed and funded by Georgia taxpayers to protect them, the state must be held accountable.

\textit{Mauricia Allen} \textsuperscript{264}

\textsuperscript{255} See supra discussion Parts I, II.
\textsuperscript{256} See supra discussion Part I.
\textsuperscript{257} See supra discussion Parts I, II.
\textsuperscript{258} See supra notes 93, 101 and accompanying text.
\textsuperscript{259} See generally Miller, supra note 76.
\textsuperscript{260} See MORRIS \& MORRIS, supra note 19.
\textsuperscript{261} See supra Part V.B.
\textsuperscript{262} See supra Part V.A.
\textsuperscript{263} Hansen, supra note 5, at A1 (quoting Don Keenan, an Atlanta lawyer suing the state on behalf of Terrell Peterson's estate, who declared that the treatment of Terrell is not "about falling through the cracks, this is about falling through the crater").
\textsuperscript{264} The author wishes to express her sincere gratitude to fellow law student, Lynne Voelker, for her invaluable technical and substantive suggestions.