ORAL ARGUMENT – 02-12-03
02-0348
SAN ANTONIO STATE HOSPITAL V. KIMBERLY COWAN

ABBOTT: Plaintiff sued San Antonio State Hospital under the tort claims act. In doing so, the plaintiffs had to establish three things in order to survive San Antonio State's Hospital plea to the jurisdiction. One, that an employee of San Antonio State Hospital used tangible personal property that proximately caused Mr. Cowan's death. In their pleadings they have shown none of these three things.

The first thing that must have been shown is that it was actually an employee of San Antonio State Hospital that caused the death. Here they have not shown that it was an employee. Going back to the court's analysis in the court's formulation, looking at the language of the statute: a governmental unit is liable for personal injury and death so caused by a condition or use of tangible personal property. The court has interpreted the so caused provision in the subsection to mean when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of their employment or office. This court and lower courts have said that liability attaches under subsection 2 for respondeat superior when an employee or officer is negligent. The natural corollary is that only use of property by an employee can trigger a waiver of immunity. In this case we had no use of property by an employee of the San Antonio State Hospital. It was Mr. Cowan's use of the suspenders and of the piece from the walker that actually caused his death.

PHILLIPS: _______________ from the athlete's use of a knee brace in Lowe or the student's use of swimming paraphernalia without an inner tube in Robinson?

ABBOTT: In both Lowe and Robinson this court has on several occasions constrained those cases to the category of cases lacking an integral safety component. And this is not one of those cases where property was provided by a state actor that lacked an integral safety component. In this case, of course, all the hospital did was to log in the suspenders and return to Mr. Cowan his own property.

PHILLIPS: So if the whole corpus of the property is unsafe, then it's not a violation of the tort claims act is it? But if there's one part of the property that's unsafe or is lacking - it's lacking some characteristic that would make an otherwise unsafe corpus of property safe, then there's tort claims liability, and if that's right where does that come from the language?

ABBOTT: First of all, let me explain that there's a couple of meaningful differences between the concept you're talking about, and what we're dealing with in this case. In this case, unlike say the life preserver, or unlike the knee brace is not as if there was a safety component missing from the suspenders. For another, there is no factual allegation that there was a safety component missing from the suspenders. The condition of the suspenders and whether or not they had or did not have an integral safety component is not an issue in this case.

PHILLIPS: I will concede that.

ABBOTT: All we did was gave back to Mr. Cowan his own suspenders.

PHILLIPS: But I'm trying to tie this into the language of the statute. How does this factual distinction that you are drawing relate back to anything the legislature has told us?

ABBOTT: What the legislature has told us is that first of all liability is to be limited. Secondly, what the legislature has done is to create a special situation that has three requirements in order for liability to be waived. First, it must be a state actor. Second, it must be the putting to use of tangible personal property. Third, that use of that personal property must be the proximate cause of the person's injury or death. We don't have any of those three here.

O'NEILL: What if the property itself is inherently dangerous. What would your argument be? What if the hospital employee had been given a gun?

ABBOTT: It obviously would seem to pose a very interesting situation if the hospital gave a gun to a person who was a patient at a mental facility. But what you do is you go back to the core language of what the statute provides, keeping in mind this isn't a general negligence situation...

O'NEILL: But under your argument, even providing a gun to a suicidal patient at a hospital would not qualify for immunity because the employee didn't shoot the patient.

ABBOTT: That's exactly correct. And I think that is the outcome when you apply the statutory language to the facts. It may seem rather harsh, and the fact that courts in the State of Texas have said that application of the tort claims act does on occasion lead to harsh results, but we need to remember that we have sovereign immunity here. Sovereign immunity is waived only to the extent the legislature has waived it. You have to look at the precise language of the statute to determine the scope of the waiver. And there are three things that must be established by the plaintiff in order to achieve that waiver. The mental state by either the governmental unit, or by the person who is injured does not come into play.

Going back to some decisions issued by this court, a mental state or mental condition is not tangible personal property. It would information. It would be knowledge. If we knew that the person had suicidal tendencies, that would be information and knowledge on our part. Information and knowledge on our part, as this court has made clear, is not the use of tangible personal property. Waiver is limited only to those situations where a state actor actually puts to use tangible personal property. In this case, we simply don't have none.

O'NEILL: It seems to me it's sort of like a distinction without a difference. Because if the knee brace or the swimsuit without the life preserver, you can call it equipment that lacks an integral safety component, or you can call it inherently dangerous. They seem to be the same thing. So if suspenders are inherently dangerous to a suicidal patient, I don't see where you draw the line in

terms of intentional use.

ABBOTT: First of all, let's go back and draw a very key distinction between what you're talking about and the facts that we have in this case. What you're talking about would be the hospital providing a gun to a person who is suicidal. We didn't have that here. We don't have for one providing a gun, but more importantly, we don't have the other fundamental prerequisite. And that is, the hospital wasn't providing something to Mr. Cowan for Mr. Cowan to use. All the hospital did was to return Mr. Cowan's suspenders to him.

O'NEILL: But if it had been the hospital's walker, what difference does that make?

ABBOTT: There's no evidence that it was the hospital's walker.

O'NEILL: How would this apply in other situations, would you say if it's his own walker there's no liability, but if the hospital supplies it there's liability?

ABBOTT: No. I would say even if the hospital supplied a walker to Mr. Cowan it would not be the hospital's putting to use of property that proximately caused Mr. Cowan's injury.

PHILLIPS: Then Lowe is wrong.

ABBOTT: First of all, I think this court has gone out of its way to endeavor to try to limit Lowe and Robinson and the other cases, which the court seems to try to subcategorize as cases involving property that lacks an integral safety component. This is not one of those cases. The court has time after time after time tried to limit and subcategorize those cases. This doesn't fall within those. There is no allegation of lacking an integral safety component. The reason is, it wasn't us providing property. Going to Robinson which is the life preserver case. The state affirmatively took upon itself to get involved and to provide a life preserver to that person. Here we weren't providing our own state property. We were merely returning Mr. Cowan's property. The same thing applies in Lowe where the state affirmatively got involved to supply a knee brace to Mr. Lowe. Here again we don't have the situation. We were merely returning the property to Mr. Cowan.

Let me give you an example that may help put this in some context. As we sit here today there are tens of thousands, maybe hundreds of thousands of people incarcerated in the State of Texas. And what we have is, as we speak, the state is providing tangible personal property to all those people who are incarcerated who have a mental state which could not be categorized as the reasonable person in the state of Texas. There are violent people. These are sometime suicidal people. Nevertheless we provide them tangible property in the sense of utensils to eat with, beds to sleep on, things with which they can bash in shanks or whatever to injury other people. Are we going to have a situation where every time an inmate in the State of Texas uses some property from the prison to stab somebody else, is that a use of tangible personal property by the State of Texas? Of course not. The original use that is made of the property by the state in that situation and by the hospital in this situation if it could be categorized as a use is a benign use. In that situation is the

state providing utensils so inmates can eat with. In this situation it's a matter of simply returning suspenders to Mr. Cowan. That is a benign use. It was Mr. Cowan...

O'NEILL: But doesn't that get into the ultimate liability question? You still have to once you establish the tangible property, you still have to establish that it's under a circumstance that somebody would be liable if it wasn't the government. So that would come under it seems to me just the general liability section once the tangible personal property is used.

ABBOTT: I'm not following you.

O'NEILL: There are two pieces to it. There's the use of tangible personal property, and in order to hold the state liable then, that you've got to prove the liability, that there was negligence. That just goes to the underlying cause of action. It seems like what you're arguing goes to the underlying cause of action. Whether there would ultimately be liability benign use or non-benign use would be negligent, not negligent.

ABBOTT: Actually I'm trying to make a little bit different point. And that is, it's important in interpreting and applying the statute to look at the use to which the item is put and who is putting that item to use. In this situation it was the hospital, that was merely returning Mr. Cowan's suspenders to him. A hospital was not putting to use.

HECHT: But before you do that. You wouldn't think it was different if the hospital had given him the suspenders and walker, or do you?

ABBOTT: I would not think it would be different if the hospital gave Mr. Cowan - he checked in without anything, and the hospital provided a walker and suspenders to Mr. Cowan, the result should still be the same. There is no waiver of immunity because the use to which the items were put were to provide, let's say, ambulatory assistance to Mr. Walker.

HECHT: You don't think it makes any difference whether the hospital gave him property back or gave him property in the first instance?

ABBOTT: I would agree with that. I do think our case is slightly more compelling being that we merely returned property to him. Because let's look at this on a bigger stage. Is the state or all of governmental units going to be liable every time they merely return someone's property to them? How many times are people arrested every single day where their property is originally confiscated, and then they are bailed out or whatever and they are returned their property and go about their merry way. Did they commit suicide or harm somebody else as a result of that? Are we going to have an onslaught of ___________ claims asserting?

PHILLIPS: Do you have any judicial opinion or any scholarly work that suggests that a useful limit on use of property would be that the state actor must be using the property?

ABBOTT: Oh sure. I would interpret what this court wrote in the DeWitt v. Harris County, where the court relied upon Lowe, Suacedo and York and said, "So caused means when proximately caused by the negligence or wrongful act or admission of any officer or employee acting within the scope of his employment or office."

PHILLIPS: I know that in all these cases a state actor has touched the property. In Lowe, some assistant coach had the knee brace; in Robinson, a worker at the home had the swimsuit. But has anyone suggested that at the time the injury is caused it must be because of use of property that the state actor is using, and that Lowe and Robinson are wrong?

ABBOTT: I would say the converse is true. And that is, I haven't seen any case where the converse is true where some third person is using the property.

WAINWRIGHT: The requirement that a government employee used this property - let's look at the language of the tort claims act and see if you can point us to where that comes from the language of the statute. 101.021(1) specifically refers to the negligence of an employee. Subsection (2) which is at issue, subsection (1) is not at issue, does not make any reference to an employee. How can we get to where you are from the language of the statute?

ABBOTT: It comes from two things. One is this court's many interpretations of the two words "so caused." If you look back again at subsection (2) it says, _____ injury and death "so caused". In DeWitt v. Harris County, the court spoke specifically about what that meant. And said that it meant caused by the negligence or wrongful act of an employee acting within the scope of their employment. Secondly on a couple of different occasions in both DeWitt v. Harris County and in TNRCC v. White, the court said that subsection (1) and (2) are to be interpreted similarly.

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RESPONDENT

MILLER: We are here again before the court on this issue of property. Use of property under the Tort Claims Act. The way I see what we have here on the tort claims act is three issues. One is the issue of whether the property actually had a relationship with the injury? And that's the issue that's been coming up in Bosley and in Miller. Two, whether the employee used the property? And three, whether the employee's use of that property was a proximate cause of the injuries?

We're clearly dealing with proximate cause as the main issues of liability. But on the plea to the jurisdiction issue what we're looking at at the beginning is whether the property itself had a relationship with his injury. And then also whether the employee was using the property. Those are the things we look at on the plea to the jurisdiction.

As a preliminary issue, whether the court has subject matter jurisdiction we look at those issues.

In Bosley, the court even though it went on a proximate cause determination, it really seemed to be troubled by the fact that in that case the property that was being brought into question, which was the door and the lock on the door, they did not physically cause the injury. And then the court used a proximate cause analysis, that was a summary judgment case not a plea to the jurisdiction, and found that there was essentially no cause in fact between the property itself and the injury, and, therefore, there was no claim under the tort claims act.

J. Abbott wrote a dissent in that opinion saying, let's be careful. We need to be looking at proximate cause in this issue. It's unusual to find that you actually are reversing on a summary judgment or rendering on a summary judgment based on proximate cause. And I think that case was similarly to ______, which the court relied on, or Albritton, whichever the court relied on, in that it was very attenuated, so it was a question of whether you had any cause in fact between the use of that property and the injury that was caused in that case.

WAINWRIGHT: Isn't it easy to reconcile the dissent by Mr. Abbott in the former life with the disposition now? In Bosley at issue was a summary judgment. In this case at issue is a plea to the jurisdiction. So the parties are limited to the facts that were pled. In the summary judgment obviously we had to look at evidence, and in the dissent the argument was there was a fact question. So isn't it easy to reconcile that case with the position here?

MILLER: I would think so, but when this court looked in Miller it looked at a plea to the jurisdiction instead of looking at the same issues in Miller on the factual determinations and issues that were brought in outside the record. And even though that was a plea to the jurisdiction review, it actually then started looking, which I think was an improper look use, it started looking to issues of whether they proved that that - in that case in Miller it was the use of a drug that masked the meningitis. And the court said looking at whether that use had been proved by the plaintiff as a proximate cause and not whether it was just alleged. And so I would agree with you. Yes. It should be very distinguishable. But for some reason the court in Miller decided, well we're going to use a proximate cause analysis. We're going to make sure you prove something as a summary judgment standard even on a plea to the jurisdiction.

When you go back and you look at all the cases, I think that one of the main concerns the court has had, and I think rightfully so is, in Miller, Lowe, Robinson, Clark, all those cases the property itself didn't physically cause any harm. And so the court was always having to struggle determining can we just use the plain proximate cause here, just a one time proximate cause issue and resolve that. And if you look at it just on the basic proximate cause issue it's almost always going to raise a fact issue, which means you can't decide it on a plea to the jurisdiction. It's always going to go to the end until you have a jury determination, and, therefore, the government is going to be sued more than this court wanted it to and more than the legislature likely wanted it to, because if we have to use just one proximate cause analysis for the whole thing, then it may not be the legislative intent. Although I don't see how we could ever figure legislative intent from this statute.

O'NEILL: Let me propose a rule that said, we're going to require affirmative employee use

except for property that lacks an integral safety component. Would that comport with our jurisprudence thus far?

MILLER: I think that that would be consistent with what the court has said thus far.

O'NEILL: If that's the case, then what happens here because we don't have property that lacks an integral safety component. I guess what I'm asking is, would Mr. Abbott's position be square with our law if that's the way we interpret it to read?

MILLER: I don't believe so because I think that there's no question that there was a use of property in this case. What Mr. Abbott is saying is that the employee of the state used the property for one purpose, and it was then - he doesn't believe it's foreseeable. And because there was this third party in-between, he thinks that there is new and independent cause or something of that nature. And as you said earlier that goes to the ultimate proximate cause issue of the case...

ENOCH: Walking you through this. From your perspective, do you think that the tort claims act waives sovereign immunity in this case because the state employee actually touched Mr. Cowan's property?

MILLER: No. I would say that the state used the property. They provided it to him.

ENOCH: When you say provided to him. He checks in this facility in a suicide watch. All the doctors in the world say, you should have taken the suspenders away from him. They were open and obvious. You should have taken them away from him. You would say that the tort claims act in those circumstances is not waived because the employee did not touch the suspenders?

MILLER: Let me use an example which I think may answer it. When we walk in the door here, you go through a metal detector. If I had a gun in my bag they looked at it. They found the gun. They saw it. They put it back in and sent me through. They had control of it. They had custody of it. They gave it back to me. In the circumstances we are, that would cause a foreseeable risk. If he did not find, if there was something there, if he didn't see it, he didn't have any control over it.

ENOCH: My argument is that he does see it. My argument is he doesn't touch it. He does see it. He doesn't touch it. And your evidence is well he should have touched it. He should have taken it. Is that the distinction you seek here?

MILLER: I don't think it has to be a distinction in our case. I think that it creates an interesting issue most especially in an involuntary commitment that we have. Because he was being committed to the state for suicide watch, and part of what that is for is so they do take custody and control of not only his body but everything he has to make sure he doesn't have anything that he could use to hurt himself.

ENOCH: So you would argue that the state provided the suspenders even if the employee had

not touched the suspenders?

MILLER: I think in this particular circumstance that would have happened even in this case. Even if they had just seen them and provided them to him, I think it would be essentially implicit in the relationship that they had with him because he was involuntarily committed. I don't think we have to get to that point...

PHILLIPS: Anytime a prisoner injured another prisoner with some property that the state had provided or allowed the prisoner to use, there would be tort claims waiver.

MILLER: If they provided the property, then, yes. If there was a causal relationship between the property, and that's what you're saying, then, yes, there would be a waiver. Now there may not be any liability because it may not have been foreseeable, but there would be a wavier of the tort claims act in that situation. I believe what the tort claims act, the struggle is, what is the extra thing that the tort claims act means by saying use of property? And I think that what it means is the property itself has to be the instrumentality of the harm itself. Property has to be the instrument of harm. And that's where the struggle has come up in so many of these cases, but we don't have that issue in this case because the instrument of harm was the property that we're talking about.

HECHT: So if the hospital had not touched the walker or the suspenders you could win your case?

MILLER: Again, because of the unusual circumstances that we have with an involuntary commitment and because of what they have in this case, I'm not sure that that would be true. But I don't think that we have to get to that point in this case because we're here on a plea to the jurisdiction in which we have alleged that they did have custody and control of the property and they put it to a use...

HECHT: You want us to say that that's required and that means something. But your position would be - you wouldn't take that position if the orderly had not checked-in, or logged-in the walker and the suspenders, or would you?

MILLER: I haven't particularly thought about it that much. I think it creates a much more difficult question of whether they actually used the property. In this case, we've alleged that they did use it. We alleged that they did control it. And I believe the facts will prove that they did take custody and control of it, and then gave it to him. And I do think that the state does this on a regular basis where they do take control of it.

ENOCH: But your point is that the tangible property that gets used doesn't have to be owned by the state. In Robinson and in Lowe it was the state's property that got used in this integral part. But your point for the tort claims act to be waived under these facts that you allege, it doesn't have to be the state's property that gets used. It could be any property that gets used so long as the state had some responsibility for it. In this case, I'm checking someone into the hospital. It's a suicide

watch. It's an involuntary commitment. I see the suspenders. I see the walker. I don't touch them. So long as you have evidence that said a reasonable person under those circumstances, a reasonable hospital under those circumstances should have taken control of the property, you would get there under the tort claims act because there was a state action that should have been required that they didn't do, and that permitted the tangible property to remain in the possession...

MILLER: I'm not saying that I would agree with that. What I'm saying is, they had to have had custody and control. They did have custody and control. So the distinction being if you went into, for instance, University Hospital, which is just a normal hospital that's run by the state, and somebody brings their own property in, they don't have control over that. What I'm saying is that the distinction between the hypothetical you gave is that they did have custody and control over it and whether that's implicit because of the involuntary commitment and what the state did in putting them in there, and the very specific circumstances of this case, then that's what I'm talking about is a legal distinction of they have custody and control because of the circumstance. So if they never had custody and control of it and it's not the state's property, then I don't think the tort claims act would apply, because I do think that it has to be a relationship or the employee using the property.

OWEN: Suppose he had come in on crutches and they didn't take his crutches away from him. They put him in a room. He shredded his own shirt and he used part of the crutch as much as he used the piece of the walker, would you still be making the same argument?

MILLER: We would be making the same argument. I think of course foreseeability would be a more difficult issue, but I do think we would make the same argument under the plea to the jurisdiction of use of property. And if they used that property and that property was the instrumentality of harm, and that's what caused the injury, and it was used by an employee, he could put it into some use, and when we go back to the statute, the statute as a ___________ before it was codified as it is now talked about some use, not a use for its own inherent purpose.

JEFFERSON: How do you interpret the phrase "so caused?" Do you see that requiring some employee use of the property itself?

MILLER: I think that it does, because I think that you have to have the state action at some point. And I would tend to agree with the court where it said before that based on the way the statute read before it was clearer that it didn't. When it was talking about "so caused" it was talking about the cause being used by an employee. But again, the previous statute also said, so caused by some condition or some use. And I don't think that what the statute was talking about then and what it means now is that it has to be use of any specific type of property for any specific type of purpose as long as there is property involved. But I do think that so caused, the causal relationship at that point refers back to the employee.

And I do think there's proximate cause of the employee, and there has to be. But the proximate cause of the employee is not going to be an issue for this plea to the jurisdiction, because we've alleged it as a proximate cause in the plea to the jurisdiction at this point because there was

no evidence put on. And I don't know if it really should be the proper issue for any evidence anyway under Bland. That is not one of the issues that's being brought up really of proximate cause, the foreseeability of whether they should have foreseen this or not. The issue is really at this point is whether the property was the cause of the harm. Which there is no question in this case as opposed to Lowe where it's actually the property didn't cause the harm. It was the other football player.

O'NEILL: I think you answered my question earlier that the General's position, the way he put it is, you've either got to have property that lacks an integral safety component, which we don't have here, or you have to have employee use of the property. And I believe he said that is not inconsistent with our jurisprudence. Why shouldn't we adopt that rule if in fact the tort claims waiver was intended to be limited? My understanding of the rule he's proposing is either you have to have affirmative employee use of the property, which we don't have here.

MILLER: I disagree with that. I agree that you have to have employee use. What I'm saying is the employee has to put it to a use, and once the employee puts it to a use - the employee doesn't have to sit there and strangle somebody with it. It doesn't have to be a direct and immediate causation. It has to be proximate cause. The employee's use is proximate cause. The tort claims act says so caused. It means the injury is so caused by the employee through a use of property.

OWEN: What if he had brought in sleeping pills or some sort of drug that could kill him if he had taken too much, and an employee simply failed to find them on his person. And he went in and took the pills. He's using tangible personal property. Is that use within the tort claims act?

MILLER: If they had custody and control over it, then that is the issue for the tort claims act, is whether the employee had custody and control and then used the property for some purpose. I don't know that you would say that the employee used that at any point, because I don't know if the employee got it. He said they never saw it. They had no idea. I don't know if you could say that the employee used it when they had no idea about it. If you do have some legal issue of you are deemed to have had custody of everything, you are deemed to have put it to the use if they used it because you had custody of him, then, yes. I think that creates a different situation. Again I think that would be difficult on proximate cause when you did get to the ultimate case.

SCHNEIDER: Where are you saying the use occurred here? Are you saying it occurred at the time that this personal property was used, the strangulation? Or are you saying it was used at the time the state, and I'll assume your interpretation of the facts, the state had possession and control over it and issued it or returned it to him. When are you saying the use occurred here?

MILLER: The use occurred when the state provided it to him.

SCHNEIDER: If you say that then, you are not saying that the use occurred when the injured person used them to wrap it around his neck, or whatever he did to kill himself?

MILLER: No. That is not the event that the jury would be asked a question about.

SCHNEIDER: I just want to clarify that. It's not the victim's use here. It's the state's use you are saying?

MILLER: Yes. And the state will likely raise that as a intervening cause. And they can get it. That's not an affirmative defense, but it is a defense and they can raise that at the time of trial.

JEFFERSON: Just looking at the statute, and if we can forget the whole history of Lowe and Robinson, Miller, etc., would you say that there are two reasonable constructions of this statute? One, that says it must be the employee of the hospital or the state that used the property; another that says, no it could be the victim of the property, as in this case, having been provided property?

MILLER: I don't think that the statute is as clear as it could or should be. I think that's what the court has asked the legislature on numerous occasions to go back and clarify it.

JEFFERSON: Nothing in the statute compels either reversal or affirmance? We just have to make a choice.

MILLER: I would say yes, although, I think you can use some types of statutory construction. Again, this is a difficult situation because of the history and because I think that courts started using legislative history very early on because it's such a large topic of government at the time. And that, I think, the court has gotten very far into the legislative history. Personally, I don't think the statute is clear. But I have trouble with that, because I would hate to say well the statute isn't clear, and, therefore, because it's not a clear waiver of a liability that the legislature didn't intend to waive any liability. I wouldn't go that far, because I don't think that's the intent of the legislature. I think they did intend to waive liability, but they intended to waive it when you can prove that the property itself was an instrumentality of harm. And then you have the other issues on the proximate causation.

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REBUTTAL

ABBOTT: As this court has noted merely alleging that property was involved is simply not enough. If only involvement were required, the waiver of immunity would be virtually unlimited since _____________ do not somehow involve the use of tangible personal property.

O'NEILL: If this were not a government entity, if this were a private hospital, would there be liability here?

ABBOTT: There could very well, and that's the important issue to keep in mind. And that is, that there are many instances where there's just pure negligence. For example, absence of medical judgment can lead to liability on the part of a private person. But when it comes to a governmental entity, the only way in which a governmental entity could be held liable is under the strict...

O'NEILL: But if it's a private entity, if it's not a governmental entity what would the negligence

claim look like here? The causative thing would be the property. You would say that they negligently provided inherently dangerous property. And why does that property distinction in the private context not get us there here when subsection (2) of the statute talks about liability if it would attach in a non-governmental unit context?

ABBOTT: First of all, when I was addressing the question, I was talking about globally a private person can be held liable under situations which a governmental unit cannot. Under the facts of this case where you have merely a situation of somebody returning property to somebody else, I'm not sure you would get there under general negligence principles. But the point is general negligence principles don't apply here. What applies here are the three prerequisites set out by the tort claims act. It has to be an employee putting to use tangible personal property that causes the death. Here we don't have a situation where property was put to use.

OWEN: As you well know we've struggled with this statute many, many times. What if at a state concession stand over in the capitol or a park or somewhere else the state sold tangible personal property - a soft drink, a hotdog, a lighter without a child proof thing that was a defective product, and a person who is not a state employee purchased it and was injured in the use of it. Would the tort claims act apply to that or not?

ABBOTT: I happen to believe it would not, because the use to which the item was put it wasn't that use that caused the problem. This statute is not intended to encompass situations such as inherently dangerous products, which kind of goes back to a question that you asked earlier on. The statute doesn't address it. The statute only concerns the actual put into use of tangible personal property.

Let's refer back to Lowe. That was a situation where the girl hurt her head on a bus. And as the court made clear, even though it involved the tangible property of the bus being involved, that wasn't sufficient to trigger the use of property provision. Because it was merely the situs where the injury occurred. Here it wasn't the returning of the suspenders.

OWEN: We've got the same language: use of real property. And that's typically real property that's defective, and someone is injured. That's the situs. And you can recover under the tort claims act for use of real property. How do you square that?

ABBOTT: It's the use to which the property is put and whether or not that use causes the injury to the third party. Here we have merely a benign use that did not cause Mr. Cowan's injury. If the court determines that merely returning property to somebody else, or let's say the hospital affirmatively decided to give the suspenders to Mr. Cowan, is a use of tangible personal property, then the scope of a tort claims act has suddenly got immensely bigger. You can consider the present situation. You can consider the multitude of situations where the state government provides tangible property to people who work for the state government who then may in turn use that property to either commit suicide or harm somebody else. It wasn't the providing - the original providing of tangible personal property to the governmental employee or to the third person that cause the injury.

It was that third person then taking that property and using it for a different purpose that caused the injury.

HECHT: Does the AG share the view that this use or condition of personal property is so opaque that after 30 years judicial efforts to construe it are at best metaphysical and at worse nonsense?

ABBOTT: Yes.

HECHT: Then having called upon the legislature to clarify this to no avail, does the AG think that that would be a good thing for them to devote their efforts?

ABBOTT: Yes.