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# It's Time to Call 911 for Government Immunity

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## IT'S TIME TO CALL 911 FOR GOVERNMENT IMMUNITY

In our modern society we are trained, almost from birth, that we should telephone 911[1] to summon help in the event of a medical emergency.[2] Generally, when one calls 911, prompt help arrives quickly, and professional assistance is rendered, resulting in countless saved lives.[3] Unfortunately, the 911 system occasionally fails with disastrous and fatal consequences for the person relying on the service. In these instances, the injured parties or their representatives often institute personal injury or wrongful death suits against the governmental entity responsible for the operation of the 911 system. In most of these cases, the governmental entity argues some form of governmental or sovereign immunity as a defense.[4] Courts often accept this defense, leaving a surviving individual or family to bear tremendous financial burdens and emotional pain, without any form of compensation.

This note addresses the use of governmental immunity as

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1. For the purposes of this note, 911 will refer to the three-digit telephone number systems in place in most populated regions of the United States in which emergency assistance is available simply by dialing the three-digit number.

2. It is estimated that 99% of adult Americans living in an area serviced by a 911 system know to dial 911 in the event of an emergency; even children as young as three years old can be trained to dial 911. David Foster, *'Help Officer, My Souffle is Falling Non-Emergencies Clog 911 Lines*, L.A. TIMES, Mar. 15, 1992, at A1. The 911 system is so well known that there is even a television show, *Rescue 911* (CBS television series, weekly broadcasts) documenting and re-creating its exploits. *Id.*

3. The number of 911 calls nationwide is estimated to be in the tens of millions. In 1991, New York City alone received 8.3 million calls, which is an increase from 6.5 million calls per year in the early 1970's; the record number of calls was 42,787 on July 4, 1991, in New York City. Donatella Lorch, *New York Streamlines an Essential Link: 911*, N.Y. TIMES, Sept. 23, 1990, § 1, at 39.

4. In this note, the terms governmental immunity and sovereign immunity will be used interchangeably. Originally, sovereign immunity was only applicable to the head of state, while governmental immunity applied to acts of the state. *See* CHESTER J. ANTIEAU & MILO MECHAM, TORT LIABILITY OF GOVERNMENT OFFICERS AND EMPLOYEES 7 (1990).

applied to negligent operations of 911 emergency medical services. Part I of this note reviews 911 services and their anticipated uses, and describes some of the areas in which a system failure can occur due to negligence. This section also discusses sovereign immunity, its applicability to negligent 911 situations, and the various constitutional issues involved, such as the duty to protect or to rescue. Part II surveys case law involving negligent conduct on the part of government emergency medical systems and analyzes why the use of governmental immunity is flawed. Section III proposes standards of liability for negligent 911 systems. This note argues that governmental immunity, as a defense to negligent operations of 911 emergency medical services, is out-moded given our society's expansive concepts of tort liability

## I. OVERVIEW

### A. 911 Services Generally

The first 911-type emergency number system was implemented in Great Britain in 1937,[5] but such systems did not come into use in the United States until the 1960's.[6] In the United States, congressional and executive initiative served as the impetus for systems that focused on increasing and promoting public safety.[7] Today, 911 systems are in use across the United States, serving 75% of the population and covering 25% of the nation's land surface.[8] The primary reason for implementing 911 was the anticipated reduction in the time it would take for an individual to call an ambulance, request emergency medical assistance, and receive help.[9]

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5. Bertram A. Maas, Comment, *"911" Emergency Assistance Call Systems: Should Local Governments be Liable for Negligent Failure to Respond?*, 8 GEO. MASON U. L. REV. 103, 103 n.1 (1985) (discussing history of 911 systems).

6. The 911 systems were pioneered by AT&T. The first 911 system in the United States came into operation in Haleyville, Alabama, in the late 1960's. Foster, *supra* note 2, at A1.

7. *See* JAMES E. GEORGE, LAW AND EMERGENCY CARE 51-52 (1980). Part of the mandate for the increased training and use of ambulances and the emergency medical technicians (EMTs) was the passage of federal and state highway safety acts. *Id.* at 51. The President's Commission on Law Enforcement led to the national implementation of 911 type systems. Maas, *supra* note 5, at 103 n.1.

8. Foster, *supra* note 2, at A1.

9. If a caller is too injured, or is otherwise unable to identify himself or herself, it is time-consuming to determine the identity of the caller on the old seven-digit emergency lines or on 911 systems that cannot display via computers the telephone number and address of the caller's telephone. Mike Comerford, *Enhanced 911 System to Start Six Months Late*, CHI. TRIB., Mar. 7, 1990, at 1 (may take fifteen minutes to identify callers);

Public response to the 911 systems was positive since it eliminated reliance on private mortuary-ambulance services.[10]

All emergency calls to a 911 system are routed through a central receiving center, where a dispatcher receives the call, discusses the emergency with the caller, and decides the appropriate response action.[11] At this point in the system, many errors resulting in injury or death are made.[12] A dispatcher may decide that the call is not an emergency, when in fact, the caller is in a life-threatening situation;[13] or the dispatcher may give medical advice over the telephone, when in fact he or she has no professional medical training.[14] In other cases, a dispatcher may fail to

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*see also* Reed Abelson, *Rescuing 911*, FORBES, Mar. 2, 1992, at 103 (may take up to 45 minutes to identify callers in Boulder, Colorado without improved 911 systems). With improved 911 systems, called "enhanced 911," or "E911," identification of the caller's telephone number and address takes place in less than one minute. Albert J. Parisi, *Towns Wary of Joining '911' Emergency System*, N.Y. TIMES, Mar. 15, 1992, § 12NJ (N.J. Weekly), at 1 (only 15 seconds to identify caller with E911); Lorch, *supra* note 3, at 39 (only 30 seconds for system to identify caller).

10. *See* GEORGE, *supra* note 7, at 51. In many communities, the private company that operated ambulances also operated mortuary hearses, often in the same vehicle. This fact created an inherent conflict of interest, since the company was paid for its services whether the injured passenger survived or died. *See id.*

11. *See, e.g.*, Maas, *supra* note 5, at 104 (describing the process of call receipt, evaluation, and response).

12. *See* cases discussed *infra* Part II.

13. *See, e.g.*, Wanzer v. District of Columbia, 580 A.2d 127, 128-29 (D.C. 1990) (man with no history of headaches who called to complain of severe headache was told by the dispatcher to take aspirin; two days later, the man died from a stroke); St. George v. City of Deerfield Beach, 568 So. 2d 931, 932 (Fla. Dist. Ct. App. 1990) (city admitted that a dispatcher who did not dispatch paramedics mishandled calls from a woman who said that her ex-husband was bleeding seriously, and who later died from gastrointestinal hemorrhaging); *Plea Bargain Arranged in '911' Killing*, S.F. CHRON., Jan. 23, 1992, at A18 (boy being beaten to death in Fresno, California called 911 and requested help; dispatcher failed to send assistance, despite the fact that sounds of a fight were clearly audible to the dispatcher).

14. *See, e.g.*, Archie v. City of Racine, 627 F. Supp. 766, 767-68 (E.D. Wis. 1986), *aff'd*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989) (dispatcher with no medical training diagnosed breathing problems described by a woman in two telephone calls covering an eight hour period, and told her to breathe into a paper bag; the woman died from respiratory failure). It is estimated that over 75% of all 911 dispatchers have no formal medical training. John D. Cramer, *Training Program for Emergency Dispatchers Helps Make 911 a Lifeline; Response: Workers Who Are Trained to Give Medical Instructions Are Helping Make the Most of the Crucial Minutes Between a Call for Help and its Arrival*, L.A. TIMES, Oct. 31, 1990, at B3. This situation has created some paradoxical results. Fear of liability has led some 911 systems to forbid the dispensing of medical advice over the telephone. Parisi, *supra* note 9, at 1. In California, a small child fell into a five-gallon bucket of water and started to drown, and when the mother called 911 for help, the dispatcher refused to give life saving instructions over the telephone. By the time paramedics arrived, it was too late to save the child. Bill Billiter,

promptly send an ambulance to the caller,[15] or may fail to provide Emergency Medical Technicians (EMTs) with the correct address from which the emergency call was made.[16] Other instances of human error may occur when the EMTs actually arrive at the victim's location and incorrectly diagnose, treat, or transport the victim.[17]

### B. Constitutional Analysis

Plaintiffs often use the statutory obligation of some governmental entities to operate a 911 system[18] to argue that the government has a constitutional duty to rescue the individual in a negligence-free manner. Proponents of this theory argue that failure to properly rescue an individual in peril constitutes deprivation of life or liberty, violating the Fourteenth Amendment.[19] This argument was specifically rejected in *DeShaney v. Winnebago County Department of Social Services*.[20] While this case did not involve a

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*Senate Approves Bill Giving Immunity to 911 Dispatchers*, L.A. TIMES, Jan. 18, 1992, at A27. This particular case raised such furor that the California Legislature was persuaded to amend the California code which now grants qualified immunity to dispatchers and allows them to dispense medical advice over the telephone. CAL. HEALTH & SAFETY CODE § 1799.107 (West 1992).

15. *See, e.g.*, Hines v. District of Columbia, 580 A.2d 133, 135 (D.C. 1990) (dispatcher sent only a basic life-support ambulance to man's assistance when an advanced life-support unit was needed; the first paramedics who arrived had to make two calls themselves and wait 13 minutes before an advanced unit was dispatched and arrived); Barth v. Board of Educ., 490 N.E.2d 77, 80 (Ill. App. Ct. 1986) (school officials called 911 to aid an eleven-year-old boy who received a head injury on the playground; the dispatcher waited until receiving a third call before dispatching an ambulance, even though the ambulance was parked directly across the street from the school. The boy was paralyzed because the 50 minute delay exacerbated a blood clot on his brain). *See also* Trezzi v. City of Detroit, 328 N.W.2d 70, 71 (Mich. Ct. App. 1982), *aff'd*, 363 N.W.2d 641 (Mich. 1984) (911 dispatcher considered a call requesting police assistance a low priority and waited 90 minutes before arranging for police vehicles to be dispatched; the plaintiff's decedents died as a result of injuries received in an assault).

16. *See, e.g.*, De Long v. County of Erie, 457 N.E.2d 717, 719 (N.Y. 1983) (dispatcher erroneously sent emergency assistance to the wrong address in response to a call from a woman who heard her house being burglarized; by the time the correct address was determined, the caller had been killed).

17. *See, e.g.*, Gianechini v. City of New Orleans, 410 So. 2d 292, 294-95 (La. Ct. App. 1982) (paramedics allegedly worsened condition of a man they were transporting to a hospital when they administered the wrong type of resuscitation treatment; the man suffered brain damage due to lack of oxygen).

18. *See, e.g., infra* note 53 and accompanying text.

19. *See e.g.*, Archie v. City of Racine, 627 F. Supp. 766 (E.D. Wis. 1986), *aff'd*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065 (1989) (holding that failure to dispatch an ambulance did not violate the Due Process Clause).

20. 489 U.S. 189 (1989).

911 system, its holding is applicable to 911 systems. In *DeShaney*, a child suffered considerable abuse at the hands of his father. The Wisconsin Department of Social Services was well aware of the boy's plight and had documented in considerable detail the boy's numerous visits to hospital emergency rooms and his injuries.[21] Despite this knowledge, the state took no action to protect the child. Ultimately, the father injured the boy so seriously that he was rendered permanently retarded.[22] The boy's representatives sued the state under 42 U.S.C. § 1983,[23] alleging that the state deprived the boy of his "liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause."[24] The Court rejected this argument, finding that the Due Process Clause did not require a state to protect its citizens from the actions of private actors, but that the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law.'"[25] Most significantly, *DeShaney* held that the Fourteenth Amendment did not impose a duty on the government to provide aid or protective services.[26] The plaintiffs in *DeShaney* argued that, since the state was specifically aware of the boy's predicament, a special relationship existed between the boy and the state; therefore, the boy's reliance on the state for protection created an affirmative duty for the state to protect him.[27] In unequivocal

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21. *Id.* at 192-93. The Winnebago County Department of Social Services caseworker "dutifully" recorded reports of the boy's visits to the hospital in her file, "along with her continuing suspicions that someone in the DeShaney household was physically abusing" the boy. *Id.* at 193.

22. *Id.* The boy suffered severe brain damage as a result of "traumatic injuries to the head inflicted over a long period of time." *Id.* His brain damage is so severe that he is permanently and "profoundly retarded" and confined to an institution. *Id.*

23. This section is titled "Civil action for deprivation of rights," and states that any person who "under color of any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subjected, any citizen to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured " 42 U.S.C § 1983 (1988). *See generally* ROBERT H. FREILICH & RICHARD G. CARLISLE, SECTION 1983 SWORD AND SHIELD (1983) (discussing and analyzing the history of § 1983 claims in general).

24. *Deshaney*, 489 U.S. at 189.

25. *Id.* at 195.

26. *Id.* at 196-97 ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." (citation omitted)).

27. *Id.* at 197 (Plaintiffs argued that, since the state knew of the boy's predicament and had "specifically proclaimed, by word and by deed, its intention to protect him

terms, the Court rejected the "affirmative duty" argument.[28] The Court ruled that the Constitution does not impose a duty on government entities to protect an individual.[29] Thus, by implication, suits against 911 systems cannot be predicated on the Due Process Clause, or brought under 42 U.S.C. § 1983; rather, a plaintiff must maintain a suit based on the state tort laws in force.[30]

The dissent sharply criticized the seemingly harsh ramifications of the majority decision in *DeShaney*.[31] Justice Brennan stated that the decision gave constitutional protection to state inaction and seemed opposed to the effort to protect citizens.[32] Of particular relevance to 911 systems, Justice Brennan stated that "'the State's knowledge of [an] individual's predicament [and] its expressions of intent to help him' can amount to a 'limitation of his freedom to act on his own behalf' or to obtain help from others."[33] The *DeShaney* dissent puts considerable emphasis on the availability of protective services, and the extent to which the individuals affected in *DeShaney* had attempted to avail themselves of these services for protection.[34] Under the circumstances, the state had induced the plaintiffs to rely upon its services. If the plaintiffs felt that their reliance was unfounded, perhaps they would have sought other sources of protection.[35] Similarly, citizens are under the im-

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against that danger," an affirmative duty was created.).

28. *Id.* at 198. *DeShaney* was cited in Wanzer v. District of Columbia, 580 A.2d 127, 133 (D.C. 1990), to support a finding that no special duty was created between a 911 caller and the District of Columbia's 911 system. *See also infra* Part II.

29. *Deshaney*, 489 U.S. at 195.

30. *See id.* at 201-03. The Court stated that if special duties are created under state tort law, states may be subject to suit since: "A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not 'all common-law duties owed by government actors were constitutionalized by the Fourteenth Amendment.'" *Id.* at 202 (citing Daniels v. Williams, 474 U.S. 327, 335 (1986) (alteration in original)).

31. *Id.* at 203-13.

32. *See id.* at 204 (Brennan, J., dissenting).

33. *Id.* at 207 (quoting the majority's opinion, *DeShaney*, 489 U.S. at 200). *Cf.* Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Alternatives After* DeShaney v. Winnebago County Department of Social Services, 75 CORNELL L. REV. 1393, 1414-25 (1990) (arguing that post-*DeShaney* recovery may be available to women who argue liberty deprivation, property entitlements to police protection, denial of equal protection, and violation of state tort laws).

34. *See Deshaney*, 489 U.S. at 208 ("Wisconsin has established a child-welfare system specifically designed to help children like [the boy injured] In this way, Wisconsin law invites—indeed, directs—citizens to depend on local departments of social services to protect children from abuse").

35. *See id.* at 208-09 ("The specific facts [of the case] before us bear out this view of

pression that, when faced with a medical emergency, they can ensure a prompt, effective, and professional response simply by calling 911.[36] While *DeShaney* states that an individual has no reason to expect constitutionally guaranteed protection, the plaintiffs' reliance is enough to establish a common-law duty, thereby imposing a special duty on the 911 system to rescue the individual. Once a special duty is created, anything improper, negligent, or tortious should create liability that cannot be circumvented by governmental immunity

### C. Governmental Immunity as Applied to 911 Cases

The doctrine of sovereign immunity originates from English common law, and was originally granted to the King.[37] The rationale of the doctrine was that immunity of corporate entities was necessary in order to avoid their financial demise.[38] In feudal times, the sovereign likely feared the adverse effect that uninhibited tort liability applied against governmental or municipal entities would have on the ability of the crown to collect taxes and other feudal incidents and services.[39]

Beginning in 1812, the majority of courts in the United States recognized the applicability of sovereign immunity to municipalities.[40] While governmental immunity is still widely recognized, it

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Wisconsin's system of protecting children. Each time someone voiced a suspicion that [the boy] was being abused, that information was relayed to the Department for investigation and possible action.").

36. *See supra* notes 2-3 and accompanying text.

37. *See* ANTIEAU, *supra* note 4, at 7.

38. *See* Maas, *supra* note 5, at 105 (citing Note, *Municipal Tort Immunity in Virginia*, 68 VA. L. REV. 639, 640 (1982) (discussing the historical rationale for applying sovereign immunity)).

39. *See, e.g.*, A. JAMES CASNER & W. BARTON LEACH, CASES AND TEXT ON PROPERTY 189-94 (3d ed. 1984) (discussing feudal property arrangements and systems for tax and rents collection).

40. The historical adoption of sovereign immunity has received some harsh criticism. In Dickinson Pub. Sch. Dist. v. Sanstead, 425 N.W.2d 906, 911 (N.D. 1988) (holding that an action against a statute authorizing the state to make per-pupil foundation aid was barred by sovereign immunity), Justice Meschke stated in a concurrence that: "Sovereign immunity, a hallmark of totalitarianism, is contrary to our constitutions." Justice Meschke further stated that, as "our forefathers fought a Revolution to repudiate an unresponsive sovereign, it is antithetical to our heritage to immunize any government from accountability for its actions." *Id.* (citing Pruett v. City of Rosedale, 421 So. 2d 1046, 1048 (Miss. 1982)). Justice Meschke concluded that: "Sovereign immunity is a judicial fiat of mysterious origin." *Id.* at 911 n.4 (citing Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924) ("How [sovereign immunity] came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution.")).

has been significantly eroded.[41] Expanding notions of tort liability, combined with a greater liberalization of social policies,[42] led American courts to recognize that unmitigated governmental immunity yielded unfair results for plaintiffs.[43] Gradually, analysis of whether to apply immunity focused on the extent and scope of the activity that had caused the tort.[44]

The torts that resulted from governmental functions undertaken for the benefit of the entire state remained protected by governmental immunity because, without immunity, government could not make the sort of policy decisions that "good government requires."[45] The functions that were undertaken for the benefit of a local entity or which benefitted a minority of the state's population were not protected.[46]

Holding government officials liable for activities affecting the entire state would force those officials to endure the burdens of trial, which "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their [official] duties."[47] Doubtless, courts were under the impression that enough political constraints and the principles of federalism would diminish irresponsible or negligent actions resulting from acts of the sovereign government.[48]

Government policy at a local level, or affecting individuals, was regarded as having a greater potential for harm, because it was not subject to the same constraints as official acts of sovereign

41. State tort acts serve to waive absolute government immunity and allow plaintiffs to sue for torts. *See, e.g.*, CAL. GOV'T CODE §§ 810-996 (Claims and Actions Against Public Entities and Public Employees) (West 1990 & Supp. 1993) (allowing tort suits against government entities in specifically enumerated types of cases).

42. One area of tort law that has experienced significant expansion and liberalization is recovery for emotional distress. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (allowing recovery for mental distress resulting from directly observing a related third person in peril or suffering harm). *But cf.* Spade v. Lynn & Boston R.R., 47 N.E. 88, 89 (Mass. 1897) (denying plaintiff's recovery for emotional distress, since this would open the door for unjust claims).

43. *See* Maas, *supra* note 5, at 105 (citing Bailey v. Mayor of New York, 3 Hill 531, 539-40 (N.Y. 1842)).

44. *See infra* notes 45-48 and accompanying text.

45. ANTIEAU, *supra* note 4, at 9.

46. *See* Maas, *supra* note 5, at 105-06 (discussing the history of the discretionary versus ministerial analysis).

47. ANTIEAU, *supra* note 4, at 9 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

48. *See* ANTIEAU, *supra* note 4, at 10.

entities.[49] Thus, in recent years, states have relaxed absolute immunity for governmental entities as a defense for torts committed at municipal levels; these changes have resulted in legislation that "modif[ies] or qualif[ies] immunity "[50]

Today, state legislatures have taken various steps to apply or to limit governmental immunity Most states apply limited governmental immunity,[51] or hold that immunity is not available in situations where it has been specifically waived.[52]

Many states have specifically addressed government liability for emergency medical services. Some of these states have imposed a statutory duty on municipalities to provide 911 services.[53] Some states specifically state that 911 systems may enjoy governmental immunity,[54] although the majority of states hold that immunity does not automatically protect all facets of 911 system operations.[55] Some jurisdictions impose a mandate on governmental entities to purchase liability insurance coverage for their tortious

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49. *See id.* at 15-16 (discussing executive or administrative immunity).

50. *See id.* at 16-17.

51. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 1033 (5th ed. 1984) (governments are immune except where they have specifically consented to suits).

52. *See id.*

53. *See, e.g.*, LA. REV. STAT. ANN. § 33:4791.1(A)(1) (West 1988) ("The provision of consistently high quality emergency medical care, and any and all aspects attendant to ambulance operation is essential to the health, safety, and welfare of the state and its people.").

54. *See, e.g.*, N.J. STAT. ANN. § 26:2K-38 (West 1987) ("No mobile intensive care paramedic, first aid, ambulance or rescue squad members or officers, is [*sic*] liable for any civil damages as the result of an act or the omission of an act committed while rendering advanced life support services in good faith ").

55. *See, e.g.*, CAL CIVIL CODE § 1714.2 (West 1985) (government immunity not granted "to any person whose conduct in rendering emergency care constitutes gross negligence."); CONN. GEN. STAT. ANN. § 52-557b(A) (West 1991) (immunity from liability for emergency medical assistance "does not apply to acts or omissions constituting gross, wilful or wanton negligence."); DEL. CODE ANN. tit. 10, § 4012 (1991) ("A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death "); D.C. CODE ANN. § 2-1344(a) (1988) ("Any person who in good faith renders emergency medical care shall not be liable in civil damages for any act or omission, not constituting gross negligence "); IDAHO CODE § 5-331 (1990) (immunity extends to ambulance attendants "unless it can be shown that the person administering first aid or emergency medical attention is guilty of gross negligence "); ILL. ANN. STAT. ch. 85, para. 5-106 (Smith-Hurd 1987) ("Except for willful or wanton conduct, neither a local public entity, nor a public employee is liable for an injury caused when responding to an emergency call "); MICH. COMP. LAWS ANN. § 333.20965(1) (West 1992) ("Unless an [EMTs] act or omission is the result of gross negligence or willful misconduct," EMTs are immune from liability).

liability;[56] in these jurisdictions, the extent to which a municipal entity may be held liable is limited to the extent of the insurance coverage.[57]

Many courts, in determining whether or not to impose liability on 911 systems, focus on the duties assumed by the system. A considerable amount of the courts' analyses focus on whether the tortious act arose as a result of a discretionary or ministerial activity

Discretionary functions are those which involve high-level planning decisions, such as the actual implementation of a 911 system and the various policy issues governing the system's implementation.[58] Ministerial functions are the decisions concerning the actual operation of the system, and include the actions and decisions made by the 911 dispatchers and EMTs in the fulfillment of their duties.[59] This note argues that the alleged errors in most cases involve ministerial functions.[60]

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56. *See, e.g.*, MISS. CODE ANN. § 41-55-5 (Law. Co-op. Supp. 1992) ("The governing authority shall have further power and authority to obtain insurance against casualty ").

57. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 258, § 2 (West 1988 & Supp. 1992) (imposing a statutory limitation of $100,000 on plaintiffs' recovery in tort suits against governmental entities). It has been held that a government entity purchasing insurance coverage for $2 million does not waive the $100,000 limitation on liability recovery. Ayala v. Boston Hous. Auth., 536 N.E.2d 1082, 1091 (Mass. 1989). Furthermore, it has been stated that this recovery cap is designed to protect public funds from excessive liability and does not deny equal protection of the law. Hallett v. Wrentham, 499 N.E.2d 1189, 1194 (Mass. 1986).

58. A discretionary function is an act "which requires exercise in judgment and choice and involves what is just and proper under the circumstances." BLACK'S LAW DICTIONARY 467 (6th ed. 1990). One court stated that discretionary acts are "characterized by a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." Irwin v. Town of Ware, 467 N.E.2d 1292, 1298 (Mass. 1984) (discussing discretion involved in police officers' decision concerning detention of drunk drivers).

59. *See* Douglas L. Bates, Note, *911: The Call That No One Answered*, 10 NOVA L.J. 1319, 1325-26 (1986) ("[O]perational level decisions, such as dispatching [are] not cloaked with immunity."). The test for determining if an act is discretionary or ministerial has been stated as:

> (1) Does the challenged act necessarily involve a basic governmental program? (2) Is the act or decision essential to the accomplishment of that program as opposed to one which would change the course of the program? (3) Does the act or decision require the exercise of a basic policy evaluation, expertise or judgment? (4) Does the governmental agency have the constitutional or statutory authority to make this decision?

*Id.* at 1335 (quoting Evangelical United Bretheren Church v. State, 407 P.2d 440, 445 (Wash. 1965)).

60. *See infra* Part II.

In deciding whether or not to apply immunity to ministerial acts, many jurisdictions attempt to distinguish whether operating and offering 911 services is a "public duty" or a "special duty."[61] If a jurisdiction decides that the 911 system is for the benefit of the general public as a whole, the courts generally allow immunity as a defense.[62] Other jurisdictions find that a "special relationship" is created when an emergency call is placed, because only an individual, the caller, is involved, rather than a large segment of the population.[63] Once a court decides that a special relationship has been created, a "special duty" is incurred by the 911 system, and the system must perform its functions in a prompt, efficient, and non-negligent manner.[64] The jurisdictions disagree about exactly what elements are needed to create a special relationship. One court listed the requisite elements for the creation of a special relationship as:

> (1) Whether the victim was in legal custody at the time of the incident, or had been in legal custody prior to the incident (2) Whether the State has expressly stated its desire to provide affirmative protection to a particular class or specific individuals (3) Whether the State knew of the [victim's] plight [65]

Other jurisdictions require that:

> (1) the municipality must be uniquely aware of the particular danger or risk to which the plaintiff is exposed, (2) there must be allegation of specific acts or omissions on the part of the municipality, (3) the specific acts or omissions must be either affirmative or wilful in nature, and (4) the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality [66]

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61. *See infra* notes 87-95 and accompanying text.

62. *See infra* notes 88-95 and accompanying text.

63. *See, e.g., infra* note 115 and accompanying text.

64. *Id.*

65. Jensen v. Conrad, 747 F.2d 185, 194-95 n.11 (4th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985) (holding that state agencies may have a constitutional duty to protect children subject to their investigation), *quoted in* Amy G. Markowitz, *The Constitutional Duty to Complete a Rescue: An Examination of* Archie v. City of Racine, 23 COLUM. J.L. & SOC. PROBS. 487, 507 (1990).

66. Barth v. Board of Educ., 490 N.E.2d 77, 84-85 (Ill. App. Ct. 1986) (citing Marvin v. Chicago Transit Auth., 446 N.E.2d 1183, 1186-87 (Ill. App. Ct. 1983) (holding that

Another factor discussed in some jurisdictions is the degree of reliance that the 911 system induced.[67] This factor may be stated as a "but for" test. For example, "but for" the dispatcher's admonition that an ambulance is on its way, the victim would have sought out other forms of assistance.[68]

## II. CASES AND ANALYSIS

### A. Cases Involving 911 Mishaps

Three cases concerning alleged misconduct of 911 paramedic services were heard by the District of Columbia Court of Appeals on the same day: *Wanzer v. District of Columbia*,[69] *Hines v. District of Columbia*,[70] and *Johnson v. District of Columbia*.[71] These three cases contain fact patterns typical of most 911 cases.

The *Wanzer* case involved a victim who called 911 and complained of a headache. Despite the victim's statement to the dispatcher that he had a terrible headache and had never experienced headaches in his life, the dispatcher asked if the victim had taken aspirin.[72] When the victim replied that he had not, the dispatcher asked "Then you need an ambulance and you haven't tried to take an aspirin?"[73] Finally, the dispatcher asked "Don't you think that you should take [aspirin,] wouldn't that be logical?"[74] No ambulance was dispatched after the first call. Nine hours later, the victim again called 911 and complained of the same symptoms. After this second call, an ambulance was dispatched and the victim was taken to the hospital, where he was diagnosed as having suffered a stroke. Two days later, the victim died.[75]

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police do not owe a duty to specific individuals, as their duty is to protect the public in general)).

67. *See, e.g.*, Johnson v. District of Columbia, 580 A.2d 140, 142 (D.C. 1990) (discussing Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981) (en banc)) (finding that the reliance of individuals on the District's 911 system does not create any duty on the part of the system). *See also supra* notes 116-23 and accompanying text.

68. *Cf.* Florence v. Goldberg, 375 N.E.2d 763 (N.Y. 1978) (holding that the voluntary assumption of school crossing-guard duties by the police department had induced reliance on the part of plaintiffs. Thus, "but for" the service assumed, the plaintiffs would have taken other precautions concerning their child's use of the crosswalk).

69. 580 A.2d 127 (D.C. 1990).

70. 590 A.2d 133 (D.C. 1990).

71. 580 A.2d 140 (D.C. 1990).

72. *Wanzer*, 580 A.2d at 128.

73. *Id.*

74. *Id.*

75. *Id.*

In *Hines*, the victim lost consciousness, and a call was made to 911. Although an advanced life support unit could have been dispatched, only a basic life support ambulance was sent.[76] Upon arrival, the EMTs realized that the advanced unit was needed, and the EMTs themselves called for the advanced unit. Despite the alleged confirmation by the dispatcher to the EMT that the advanced unit would be dispatched immediately, after ten minutes that unit still had not arrived.[77] Ultimately, the advanced unit was not dispatched until after the EMTs made three phone calls to the 911 dispatcher.[78] The advanced unit transported the victim to the hospital where she died two hours later.

In *Johnson*, the victim's friend telephoned the 911 number when the victim complained of "feeling weak."[79] After about fifteen minutes, the victim collapsed of a heart attack, at which point a second call was made. When no ambulance came, a third call was made, and an ambulance finally arrived, after over thirty minutes had elapsed from the time of the first call.[80] When the firefighters of the Emergency Ambulance Division ("EAD") arrived, they had no advanced life support equipment other than an oxygen mask and a mouth-to-mouth resuscitation device.[81] Upon arrival, the firefighters "casually and slowly" walked into the house.[82] When the firefighters went to examine the victim, "one firefighter lifted the victim's eyelid with the rubber antenna of his radio rather than touch [the victim]."[83] The firefighters then asked to have the victim moved to the living room, where they then waited for a trauma unit to arrive to take the victim to the hospital.[84] When the trauma unit brought the victim to the hospital, she died. At the hospital, a doctor stated that the victim could have been saved if "[they] had gotten to her a few minutes sooner."[85]

These three cases all challenged the District of Columbia 911 system's "adequacy and timeliness."[86] In each case, the Court of

76. *Hines*, 580 A.2d at 135.
77. *Id.*
78. *Id.*
79. *Johnson*, 580 A.2d at 141.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Hines*, 580 A.2d at 137.

Appeals held that the 911 system was not liable. The court applied nearly all the sovereign immunity doctrines and their related arguments. Interestingly, the court did not look to any statutory authority in reaching its decisions, but instead relied solely on earlier judicial precedents to make its determinations.[87]

The primary defense against imposing liability in these three cases was that because no special relationship existed, the District of Columbia owed no special duty to the victim. In *Wanzer*, for example, the trial court dismissed the case because it was not established "as a matter of law that the District owed a special duty [to the victim.]"[88] The Court of Appeals, in affirming this dismissal, relied upon a series of cases from other states that equated ambulance services with police and fire protection services.[89]

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87. One of the primary cases cited by the court in support of its decisions in *Wanzer*, *Hines*, and *Johnson* is Warren v. District of Columbia, 444 A.2d 1 (D.C. 1981), *cited in Wanzer*, 580 A.2d at 129, 131-32; *Hines*, 580 A.2d at 136-37; *Johnson*, 580 A.2d at 142. *Warren* involved women who telephoned 911 to report sounds of a burglary in their apartment building, and were told by the dispatcher that help was on the way. However, the dispatcher's relay to the police did not contain the message that a crime was in progress, so when the police arrived at the callers' residence and received no answer after knocking on the door, they left; meanwhile, the women had seen the police car, and thought it was safe to emerge from hiding. When the women came out, they alerted the intruders to their presence, and the intruders held the women captive for fourteen hours, during which time they were repeatedly and violently raped. *Hines*, 580 A.2d at 137 (describing the facts of *Warren*). The court in *Warren* dismissed the case for failure to state a claim, finding that no "special relationship out of which a duty to specific persons ar[ose]" existed. *Warren*, 444 A.2d at 4; *see also Hines*, 580 A.2d at 137 (quoting *Warren*). A second case relied upon by the District of Columbia in deciding *Wanzer*, *Hines*, and *Johnson* is Morgan v. District of Columbia, 468 A.2d 1306 (D.C. 1983), *cited in Wanzer*, 580 A.2d at 129, 131-33; *Hines*, 580 A.2d at 136-39; *Johnson*, 580 A.2d at 142-43. In *Morgan*, a policeman's wife reported to the police department that her husband had threatened her with a gun, but the department took no preventive or protective action. Several months later, the husband shot the wife, their son, and another police officer. *Hines*, 580 A.2d at 138 n.6 (describing the facts of *Morgan*). The Court of Appeals ruled that no special relationship existed between plaintiff and the police. *Morgan*, 468 A.2d at 1319. In reaching its decision, the *Morgan* court applied the test for determining the creation of a special duty, stating: "[A]n exception to the public duty doctrine arises from the combination of (1) a specific undertaking by a government agent to provide help or protection to a specific individual or group and (2) that individual's resulting particularized and justifiable reliance." *Hines*, 580 A.2d at 138.

88. *Wanzer*, 580 A.2d at 129 (citing *Morgan* and *Warren*, among other previously decided cases, for support).

89. *Id.* at 130 ("It is generally held that '[t]he institution of [a publicly operated] emergency service is a service kindred to the police or fire service. This type of service is incident to the police power of the state: *i.e.*, to protect the health, safety, and general welfare of its citizens.'" (alterations in original) (quoting Ayala v. City of Corpus Christi, 507 S.W.2d 324, 328 (Tex. Ct. App. 1978)). *See also* Edwards v. City of Portsmouth, 375 S.E.2d 747, 749 (Va. 1989) (In affirming a lower court's motion to

Once the court equated these three services, it stated that the 911 system was implemented to summon efficiently and effectively any one of these three services, and that all of the services were interconnected and vital to the health and safety of the community as a whole.[90] The court's language seems to suggest a public duty doctrine under which the government is immune from liability because these services "safeguard the life and health of the citizenry."[91]

In *Hines*, the court specified that the public duty doctrine precluded liability, because "the mere fact that an individual has emerged from the general public and become an object of the special attention of public employees does not create a relationship which imposes a special legal duty."[92] Similarly, in *Johnson*, the court found that no special relationship was created, despite the 911 dispatchers' assurances that help would be dispatched immediately.[93] In reaching its decision, the *Johnson* court implicitly readopted the requirements for establishing a special relationship, which they first articulated in *Morgan v. District of Columbia*,[94] requiring: "1) a specific undertaking to protect a particular individual, and 2) justifiable reliance by the plaintiff."[95] The *Johnson* court reasoned that, since the 911 system is created to protect everyone, rather than any particular person, and since the service is offered *en masse*, rather than to a specific group, the *Morgan* requirements for a special relationship are not met, and thus, no

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dismiss the case against 911 services on the grounds that the city was protected by the sovereign immunity doctrine, the court stated that "the City could not have established the emergency ambulance services here in dispute were it not exercising its police powers."). The court in *Edwards* also drew an analogy to Asbury v. Norfolk, 147 S.E. 223 (Va. 1929), in which garbage collection was found to be a governmental function because it concerned public health. *Edwards*, 375 S.E.2d at 749-50. The court reasoned that "if collecting garbage is a governmental function, then providing ambulance services must be, because it is difficult to imagine anything more directly tied to the health, safety, and welfare of the citizens." *Id. But see* St. George v. City of Deerfield Beach, 568 So. 2d 931, 932 (Fla. Dist. Ct. App. 1990) (stating that "the function of municipal paramedics falls [under] provision of professional, educational and general services for the health and welfare of citizens, comparable to those performed also by private persons — and is therefore not protected by sovereign immunity.").

90. *Wanzer*, 580 A.2d at 130.

91. *Id.*

92. *Hines*, 580 A.2d at 136.

93. *Johnson*, 580 A.2d at 140 (citing *Hines*, 580 A.2d at 136-37).

94. 468 A.2d 1306 (D.C. 1983) (en banc).

95. *Morgan*, 468 A.2d at 1314; *see also Johnson*, 580 A.2d at 142-43 (quoting *Morgan* and stating that "in order for a special relationship to arise [between emergency personnel and a plaintiff] there must be 'justifiable reliance by the plaintiff.'").

special relationship arises.

Other arguments presented by the plaintiffs in these three cases concerned the fees charged by the system and the failure to follow agency protocols. The plaintiffs raised the fee issue in *Wanzer*,[96] in trying to circumvent the District of Columbia's argument that because ambulance service was analogous to police and fire service, the public duty doctrine should be invoked to shield such services from special duty claims. The plaintiffs countered that the ambulance service was distinguishable from the other protective services in that, unlike the other services, it charged a fee.[97] In rejecting this argument, the court engaged in a lengthy analysis of the fiscal policies of the District of Columbia's emergency services. The court found that when the emergency services were implemented, the thirty-five dollar fee was expected to "generate only enough revenue to cover about twenty-five percent of the total cost of maintaining the [Emergency Medical Service while]; the remaining seventy-five percent of the cost was to be subsidized from the general fund."[98] In addition, the court noted that failure to pay the user fee does not result in denial of services. Based upon these distinctions, the court held that "operation of the EMS is an exercise of the District[ of Columbia]'s police power to further the general health and welfare, user fees notwithstanding."[99]

The plaintiffs in *Wanzer* also raised a protocol argument, alleging that the dispatchers had "depart[ed] from accepted EMS protocols and procedures"[100] by not sending an ambulance within a specified period of time. The court quickly rejected this argument, finding that "[a]gency protocols and procedures, like agency manuals, do not have the force or effect of a statute or an administrative regulation."[101] Thus, the court stated that such rules only serve as guidelines for the operation of legislatively mandated services.[102]

The court in these cases applied nearly every sovereign immunity doctrine available to absolve the District of Columbia's 911 system from liability What is unique about these decisions is that instead of relying upon any statutory authority granting sovereign

96. Wanzer v. District of Columbia, 580 A.2d 127 (D.C. 1990).
97. *Id.* at 131.
98. *Id.*
99. *Id.*
100. *Id.* at 129.
101. *Id.* at 133.
102. *Id.*

immunity, the court based its decisions upon previous judicial opinions that established a broad application of sovereign immunity to virtually any mishap committed by the police, fire, or ambulance services of the District of Columbia.[103] Undoubtedly, other jurisdictions will look to this court for precedent in deciding similar cases, so the ramifications of these three decisions is certain to be widespread.

### B. Analysis

In deciding 911 cases courts pay a great deal of attention to whether the person or entity committing the allegedly wrongful act is engaged in a governmental or discretionary function, as opposed to a ministerial or proprietary function.[104] Many of the courts' decisions focus on the actual nature of the specific act, rather than the context in which the act was committed. Discretionary acts are those acts "'characterized by a high degree of discretion and judgment in weighing alternatives and making choices with respect to public policy and planning.'"[105] Courts define many acts which require a decision to be made by a particular officer, paramedic, or dispatcher as being "discretionary", since they are based upon that individual's personal judgment.[106] This reasoning, however, amounts to nothing more than a semantic manipulation of the terms "discretionary" and "ministerial."

Historically, discretionary functions were those functions having

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103. *See supra* note 87 and accompanying text.

104. *See infra* note 106 and accompanying text; *see also* Maas, *supra* note 4, at 105 (discussing the history of the discretionary versus ministerial analysis).

105. Irwin v. Town of Ware, 467 N.E.2d 1292, 1298 (Mass. 1984) (quoting Whitney v. Worchester, 366 N.E.2d 1210, 1216 (Mass. 1977)).

106. *See, e.g.*, Sullivan v. City of Sacramento, 190 Cal. App. 3d 1070, 1074, 1081 (1987) (stating that a 911 dispatcher's decision to return a call to a caller in distress and berate her over the telephone while the caller's rapist stood by, was a "discretionary decision invoking the 'personal deliberation, decision, and judgment' of the dispatcher and as such was cloaked with discretionary immunity " (citation omitted)); Abraham v. Jackson, 473 N.W.2d 699, 701-02 (Mich. Ct. App. 1991) (stating that, in a medical malpractice suit against EMTs, a suit was barred since the EMTs were making medical assessments which "involved significant medical judgment rather than minor decision making[, and d]efendants therefore were engaged in discretionary activity and were entitled to immunity "); Trezzi v. City of Detroit, 328 N.W.2d 70, 72 (Mich. Ct. App. 1982) (implying that 911 dispatcher's actions were discretionary because they involved unique decisionmaking dilemmas, and holding that such actions should be immune from liability); R.C. v. Southwestern Bell Tel. Co., 759 S.W.2d 617, 620 (Mo. Ct. App. 1988) (stating that decisions not to implement back-up equipment on the 911 phone system so that voices could be amplified and addresses could be located quickly were "discretionary" and entitled to immunity).

a uniquely governmental function, or those functions that only the government was in a unique position to offer.[107] The ministerial or proprietary functions were those functions required to implement or carry out the governmental duties.[108] Examples of activity still uniquely governmental in nature are military and diplomatic activities, and to a lesser extent, police and fire protection services.[109] However, even police services are now less purely governmental than they were historically, given the large numbers of private security and patrol services available; ambulance services are even less purely governmental, as large numbers of private ambulance and patient transport companies are in operation.[110]

The real focus in 911 cases should be on the nature of the allegedly wrongful act. If a dispatcher fails to dispatch an ambulance immediately, dispatches the wrong type of unit or equipment, sends the unit to the wrong address, or if the paramedics fail to care for the patient promptly, it stretches the notion of discretionary function to say that their specific act is governmental and so immune from liability Arguably, but for the governmental decision to provide 911 services, callers would never be in situations where they would rely on 911, and no government employee would be in a position where their acts would affect the public.[111] Thus, it seems that any act performed by personnel of a 911 system is ministerial. While certain acts may require decisions which call for the 911 personnel to utilize their professional judgment, the choice

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107. *See supra* notes 58-60 and accompanying text.

108. *See R.C.*, 759 S.W.2d at 620 (defining a ministerial duty as one "of a clerical nature which a public officer is required to perform in obedience to the mandates of legal authority without regard to his own judgment of opinion").

109. *See* ANTIEU, *supra* note 4, at 42 (noting that some courts have held that executive officials of the highest level will be entitled to absolute immunity because of the discretionary nature of the decisions they make); *see also* CHARLES S. RHYME ET AL., TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS 194 (1976) (stating that "courts are more than willing to tip the balance between protection from liability for the police officer and protection for the injured plaintiff in favor of the plaintiff" in police brutality cases, suggesting the lesser extent to which police services are considered uniquely governmental or discretionary).

110. *See* CHARLES P. NEMETH, PRIVATE SECURITY AND THE LAW 13 (1989) (noting the steady growth of private security since World War II); Blair Kamin, *Private Security's Peace of Mind Comes at a Price*, CHI. TRIB., Aug. 4, 1991, at C1 (stating that Americans spend more than double on private security in 1990 than they did in 1980). *See also* Stephen L. Myers, *Volunteer Ambulance Corps Fill the Gaps*, N.Y. TIMES, Mar. 21, 1992, §1 at 27 (describing how many volunteer ambulance corporations are being formed by private groups in order to supplement the regular, overburdened 911 systems).

111. *Cf. supra* note 68 and accompanying text.

of options and decisions they may make are limited and usually pre-determined, as governed by a myriad of statutes, regulations, and guidelines.[112]

One possible explanation for court decisions that all actions of 911 systems are discretionary and governmental, and thus, shielded from liability by sovereign immunity, may be the concept of separation of powers. While this doctrine is not stated by the courts, it is possible that the judiciary is reluctant to impose liability on systems that are essentially created by legislative bodies and operated as entities of the executive branch. The decision to operate 911 systems demonstrates a governmental commitment to enhance and ensure the public welfare and safety Operation of the systems requires significant commitments of governmental resources in terms of finances, equipment, and manpower.[113] While increased availability of advanced life support ambulances and a corresponding increase in the number of highly trained personnel could prevent many 911 mishaps, such escalations would require more resources than most governmental entities can afford to allocate. Imposing liability would require the courts to criticize the legislatures for failing to take the measures necessary to increase the reliability of the 911 systems. Such actions would also require the courts to make policy or decisions that are not within the realm of proper judicial activity

The separation of powers argument, however, fails to justify liability preclusion for all 911 systems. Once the system is implemented, it must adhere to certain standards. Imposing liability would force legislatures to confront the flaws in the 911 systems and mandate adherence to certain acceptable standards. The legislatures are uniquely capable of implementing changes and practices that would minimize or mitigate the potential for 911 mishaps. Once the government has made the decision to deploy a system, it is obligated to operate the system in a non-negligent fashion.

Virtually every court applying sovereign immunity and holding 911 systems immune from liability reason that no "special relationship" has been created by the mere act of calling 911, and

112. *See, e.g., supra* notes 106-09 and accompanying text.

113. The Los Angeles 911 system cost $50 million when first implemented in 1984, and was "obsolete and overloaded almost from the beginning." Jane Fritsch, *Hanging Up On an Outdated "911"*, L.A. TIMES, Aug. 5, 1990, at A3. A new system for Los Angeles will cost in excess of $235 million. *Id.* In New York City, the 911 system required a "facelift" costing $22 million to ensure its continued viability. Lorch, *supra* note 3, at 39.

thus, the system is under no "special duty" to provide exemplary, error-free service to the caller.[114] Courts analogize ambulance services to police and fire protection services, and state that since these services are designed to protect the public in general, rather than specific individuals, no higher standard of care is owed to callers seeking 911 assistance.

However, proponents of holding 911 systems liable argue that a call to a 911 system does create a special relationship. First, the dispatcher answering the call for help is immediately put on notice that an emergency situation exists. And, second, the dispatcher is in a unique position to assist the caller. Some courts have used these factors in finding that a call to 911 does in fact create a special relationship.[115]

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114. *See* Lindsay v. City of Dayton, No. 11302, 1989 WL 109289, at *4 (Ohio Ct. App. Sept. 18, 1989), holding that:

> [A] telephone conversation between a member of the general public and a police department, wherein the caller requests help and the police operator says he will send help, *is insufficient as a matter of law to establish a special relationship . . . This is because a mere telephone call for assistance does not sufficiently remove the caller from the class of the general population. Regardless of the police dispatcher's response, it does not represent a commitment of particular police resources to that individual.*

(emphasis added). *See also* Sullivan v. City of Sacramento, 190 Cal. App. 3d 1070, 1076 (1987), in which the court stated:

> A person does not, by becoming a police officer [or "911" dispatcher], insulate himself from any of the basic duties which everyone owes to other people, *but neither does he assume any greater obligation to others individually. The only additional duty undertaken . . . is the duty owed to the public at large.*"

(alteration and emphasis added) (citing Warren v. District of Columbia, 444 A.2d 1, 8 (D.C. 1981)); R.C. v. Southwestern Bell Tel. Co., 759 S.W.2d 617, 620 (Mo. Ct. App. 1988) ("The general rule is that there exists no duty to protect a party against intentional criminal conduct of unknown third persons . . . [except] . . . where special relationships or special circumstances exist.") (citations omitted)).

115. *See* DeLong v. County of Erie, 455 N.Y.S.2d 887, 892 (App. Div. 1982), where the court stated that:

> It is not the establishment of the emergency call system to serve [the area], standing alone which creates the duty. It is the holding out of the 911 number as the one to be called by someone in need of assistance, [decedent]'s placing of the call in reliance on that holding out, and [decedent's] further reliance on the response to her plea for immediate help: "Okay, right away." This is not a mere failure to furnish police protection owed to the public generally but a case where the municipality has assumed a duty to a particular person which it must perform in a nonnegligent manner, [although without the] voluntary assumption of that duty, none would have otherwise existed.

(last alternation in original) (citing Florence v. Goldberg, 375 N.E.2d 763 (N.Y. 1978)); *see also* St. George v. City of Deerfield Beach, 568 So. 2d 931, 932-33 (Fla. Dist. Ct. App. 1990) (finding that a special relationship was created when a woman twice called 911 for her profusely bleeding husband); Barth v. Board of Educ., 490 N.E.2d 77, 84 (Ill.

The most important factor that courts often summarily dismiss is that of reliance. The omnipresent appeal to the public to call 911 when they are in need of emergency medical assistance is evident in many forms: virtually all emergency vehicles carry signs advertising the 911 service, telephone directories direct callers to dial 911 for emergency assistance,[116] children are taught in schools to call 911,[117] and many communities have signs posted on streets that advise passers-by that they are entering a "911 community." For all practical purposes, most Americans automatically think to call 911 when in a medical crisis; this behavior is difficult to characterize as anything other than "reliance."[118]

The *Restatement (Second) of Torts* states that liability is imposed when an individual's reliance on another's undertaking of protective services increases the risks to the relying individual or causes harm.[119] Applying the *Restatement*, callers to 911 are un-

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App. Ct. 1986) (rejecting city's claim that 911 emergency system was a police protection service and further stating that "sovereign immunity does not apply when the police have assumed a special relationship to a person that elevates her status to something more than a member of the public") (citation omitted)).

116. *See, e.g.*, OHIO BELL, CLEVELAND YELLOW PAGES 1 (1991) ("For Fire, Police, Sheriff, Emergency Medical Service, Ohio State Highway Patrol dial: 9-1-1 In an emergency you are encouraged to dial 9-1-1 so your call will be received by the proper emergency service as quickly as possible.").

117. *See* Frances G. Taylor, *Repetition Key to Teaching Kids About Crisis; Teaching Kids How to Get Help*, HARTFORD COURANT, Jan. 14, 1992, at D7 (describing how area schools start teaching children as young as three or four years old how to dial 911 and handle emergency situations); *see also* EMERGENCY MEDICAL ASSOCIATES, EMERGENCY MEDICAL SERVICES COLORING BOOK FOR CHILDREN (Owego Township, N.Y. pubs. 1985) (coloring book for children, extolling the virtues of EMS services and admonishing children to call for assistance when facing a crisis).

118. People know that 911 works so well in fact, that they call it instead of calling regular police telephone numbers when faced with a non-emergency situation, because they know help will arrive faster. Jack Sullivan, *Police Seek to Cut Nonessential Calls to 911 Phone Line*, BOSTON GLOBE, Dec. 30, 1991, at 13 ("callers call [911] and say an emergency exists to get police to respond quickly"). People have come to rely on 911 so much since its debut 24 years ago that it has "become a nearly universal signal of distress." Foster, *supra* note 2, at A10. People rely on 911 so much, that they will call it for almost anything. *See, e.g.*, Cramer *supra* note 14, at B3 (man called 911 because he had swallowed a mouse on a $20 bet and wanted to know what he should do); Foster, *supra* note 2, at A10 (people called 911 to get the weather forecast, report broken toilets, and find out their senator's name; a six-year-old boy called to say his brother had stolen his toy, and dozens of midwesterners call to report sighting the northern lights); Fritsch, *supra* note 113, at A3 (caller called 911 to find out how to get a hunting license); Lorch *supra* note 3, at 39 (man called to voice his suspicions that his in-laws wanted to poison him); Christine Winter, *This 911 Not Just For Emergencies*, CHI. TRIB., Feb. 7, 1992, at N.W. 1 (people call 911 to complain about barking dogs).

119. The RESTATEMENT (SECOND) OF TORTS § 323 (1965) states that:

One who undertakes, gratuitously or for consideration, to render services to

der the impression that 911 is their best hope for rescue, and any deviation from these expected high standards will result in harm. It is entirely foreseeable that, if the system fails to dispatch timely and adequate paramedic services, further injury or even death will result.

Further, government employees should not be immune from the same standards of duty and care applied to private individuals.[120] The fortuity of the 911 employee being employed by the state rather than by a private ambulance company should not bar recovery, especially in light of our ever-expanding notions of tort liability.[121] In short, the establishment of 911 services creates an atmosphere of reliance, which is understandable and justifiable, and should be protected.

Advocates of sovereign immunity argue that special relationships can only be created between the government and special classes of people. In the 911 context, no special class is possible because potentially anyone can call 911.[122] This argument seems to focus on when the relationship was created, rather than on the relationship itself. While everyone within the municipality may have access, the system is designed to aid only those in need of immediate assistance. Although identification of members of this class before they call is virtually impossible, one can define the class itself as those persons calling 911. While this may appear to be an *ex post facto* determination, it is not an outrageous concept. The 911 system was created to address narrowly defined and identifiable exigencies, which created a certain class of potential users. The services offered by the city operate within pre-determined geographic parameters and provide medical attention and life-supporting transportation to a hospital. Relatively simple statistical studies will reveal the frequency and type of calls, so the system is

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another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) *the harm is suffered because of the other's reliance upon the undertaking.*

(emphasis added).

120. *See* Wanzer v. District of Columbia, 580 A.2d 127, 131 (D.C. 1990) (addressing plaintiff's argument that, since the District's ambulance service charges fees, they should be "subject to the same tort liability as privately owned ambulance companies").

121. *See supra* notes 42-43 and accompanying text.

122. *See, e.g., supra* note 115 and accompanying text.

better prepared to handle the needs of the class it has set out to protect. Thus, that specific, individual members cannot be identified prior to calling 911 does not necessarily mean that a particular class of persons cannot be identified.

A 911 system induces reliance and creates the perception that calling 911 is significantly safer and more preferable than seeking other, potentially unknown sources of assistance.[123] Courts should find relationships between the government and callers because this reliance, combined with the government's awareness of the caller's predicament and its ability to assist the caller, are sufficient to impose a special duty on the 911 systems.

Courts have given little attention to the protocols or procedures governing 911 systems, instead focusing on the other sovereign immunity issues. Protocols and procedures are the comprehensive guidelines that 911 systems follow in their day-to-day operations. When a call is placed to 911, dispatchers ask a series of questions, all designed to assess and evaluate the type and degree of emergency Based on the answers or information received, dispatchers can determine which type of response the situation most warrants.

In the District of Columbia, calls are ranked on a scale of one through four, in order of emergency status.[124] In *Wanzer v. District of Columbia*, after the victim complained of headaches, with no history of such symptoms, the dispatcher ranked the call as "'priority 4'[, which] is the lowest priority"[125] The more dire the circumstances, the higher the priority ranking the call receives. This ranking allows the dispatchers to allocate system resources more efficiently

Courts have ignored the importance of protocols and procedures, and dismiss them for not having the authoritative value of statutes or administrative regulations.[126] Courts could use protocols and procedural guidelines as establishing standards of care to defeat sovereign immunity If a 911 system has violated or misapplied its own internal operating guidelines, a plaintiff can present a stronger case for imposing liability on a 911 system.

The most important purpose protocols and procedures may serve in imposing liability is in demonstrating that use of such

123. *See supra* notes 116-18 and accompanying text.

124. *See* Wanzer v. District of Columbia, 580 A.2d 127, 129 n.1 (D.C. 1990).

125. *Id.*

126. *See, e.g., id.* at 133 ("Agency protocols and procedures do not have the force or effect of a statute or an administrative regulation.").

guidelines makes the acts of 911 system personnel purely ministerial in nature and not discretionary Courts often categorize decisions made by the government employees as discretionary, yet if personnel make their decisions based on certain finite options, then their decisions are actually ministerial.[127] Ministerial decisions are not subject to sovereign immunity and, therefore, those persons making decisions based on comprehensive protocols and guidelines should not be totally immune from liability

Courts have also paid little attention to the issue of fees charged by 911 systems in determining whether sovereign immunity applies. Plaintiffs in 911 cases usually raise the fee issue in order to distinguish ambulance services from police and fire protection services.[128] The fees charged vary in amount, from thirty-five dollars[129] to upwards of several hundred dollars.[130]

In these fee-for-service arrangements, the 911 system has arguably entered into a quasi-contractual relationship with the caller. In addition, when callers dial 911 knowing that the 911 system may charge a fee for the services, they may have an even greater sense of reliance on the system. This heightened reliance should lead to a finding of a special duty, and thus should prevent application of sovereign immunity

While the calculation of damages in breach of contract cases is

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127. *Cf.* Richard v. Department of Health, 572 So. 2d 692, 694 (La. Ct. App. 1990) (dispatcher disciplined for not following allegedly established protocols in her handling of calls); DeLong v. County of Erie, 455 N.Y.S.2d 887, 890-91 (App. Div. 1982) (discussing the problems with dispatcher's handling of 911 call and noting that he followed procedure, suggesting a ministerial, rather than discretionary, mistake).

128. Most arguments raised by plaintiffs concerning fees fail to convince courts that government immunity should be pierced. *See, e.g., Wanzer*, 580 A.2d at 131 ("[W]e hold that operation of the [Emergency Medical Services] is an exercise of the District's police power to further the general health and welfare, *user fees notwithstanding.*") (emphasis added); Johnson v. District of Columbia, 580 A.2d 140, 141 (D.C. 1990) ("The public duty doctrine applies to conduct of the District's Emergency Ambulance Division in the same way that it applies to conduct of the police and fire departments, *notwithstanding the fact that the District may charge a user fee for ambulance service*" (emphasis added) (citing *Wanzer*, 580 A.2d at 129-31)); Edwards v. City of Portsmouth, 375 S.E.2d 747, 750 (Va. 1989) (finding that the "governmental aspect of the undertaking is controlling" with regard to ambulance service, and thus liability does not extend even though a fee may be charged).

129. *See Wanzer*, 580 A.2d at 131 (noting the $35 fee for emergency ambulance service instituted in 1976 to partially defray the costs of running the system).

130. Telephone Interview with Billing Agent, Ambulance Billing Unit, Los Angeles Fire Department (January 7, 1992) (an average bill for responding to a non-urgent care emergency, such as an automobile accident, where first-aid and transport to a hospital are the main services performed, is $250).

markedly different from those in tort cases, creating a contractual relationship may open 911 systems to the sort of liability allowed in medical malpractice cases where the doctor-patient relationship originates in the formation of a contractual relationship. Similar to a patient who seeks out the services of a doctor, a caller to 911 expects that the system will fulfill its mission in a non-negligent manner. Those running the 911 system can foresee that some act or omission, misfeasance or malfeasance will result in harm to the caller or victim.

An examination of analogous situations in cases involving police detention of drunk drivers[131] and hospital admission standards will further illustrate how courts have dealt with the discretionary versus ministerial function and the public duty versus special duty doctrine.

In recognition of the fact that over twenty-two thousand drivers are killed every year in traffic fatalities involving drunk drivers,[132] federal and state governments have taken drastic steps to limit this behavior.[133] In cases where officers stop, but fail to arrest, a drunk driver and an accident results, many jurisdictions have imposed liability on the governmental entity, the police department, and the officers.[134] Those jurisdictions finding that the officers' knowledge of the driver's state of intoxication creates a special duty have generally rejected extension of governmental immunity in these cases.[135] Often, the decision to circumvent governmental immunity turns on whether the police officer's actions of stopping, then allowing the drunk driver to drive away, are discretionary or

131. *See generally* Kelly M. Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873 (1992).

132. *Id.* at 873 n.1 (citing NATIONAL CTR. FOR STATISTICS AND ANALYSIS, U.S. DEP'T OF TRANS., DRUNK DRIVING FACTS 1 (July 1991)).

133. *See id.* at 873 ("In response to the seriousness of the drunk driving problem, many groups, including the insurance industry, citizen groups such as Mothers Against Drunk Driving (MADD), and both federal and state governments, have taken severe measures to limit the extent of drunk driving and its inevitable consequences." (citations omitted)).

134. *See id.* at 874-75 n.17 (citing Ransom v. City of Garden City, 743 P.2d 70 (Idaho 1987); Fudge v. City of Kansas City, 720 P.2d 1093 (Kan. 1986); Irwin v. Town of Ware, 467 N.E.2d 1292 (Mass. 1984); Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986); Bailey v. Town of Forks, 737 P.2d 1257 (Wash. 1987) (en banc), *modified* 753 P.2d 523 (Wash. 1988) (holding police liable for failure to detain a drunk driver who subsequently caused an automobile accident)).

135. *See* Tullier, *supra* note 131 at 891-92 (discussing *Irwin*, 467 N.E.2d at 1303-04, which held that, since it is foreseeable that a drunk driver may injure someone, and since the legislature has expressed an intent to remove drunk drivers from the road, there is a special relationship created between the police and the injured third party).

ministerial.[136] Characterization as discretionary artificially extends the traditional protection of sovereign immunity for discretionary acts to those actions carried out in the field by government employees.[137] As a result, a number of jurisdictions have found that police officers have a special, mandatory duty to detain drunk drivers.[138] Those jurisdictions finding that immunity is not an appropriate defense explain that government liability for the negligent actions of its officers serves the purposes of adequately compensating victims of tortious acts and deterring similar future tortious conduct.[139]

The issue of unlimited access to hospital emergency rooms has also undergone a significant transformation in recent times.[140] Under the common law, emergency rooms were usually free to deny access to an individual.[141] The common law view was most likely premised on the established tort law principle that a person is not obligated to rescue a person in peril.[142] This harsh policy has been partially rejected by the liberal expansions of modern tort law.[143] In almost every jurisdiction, "courts have [held] hos-

136. *See id.* at 880 n.41 (stating that every state uses the discretionary versus ministerial distinction, and grants immunity to government officials for their policy or discretionary actions) (citing RESTATEMENT (SECOND) OF TORTS § 895(B) (1965)).

137. Scholars have been critical of the attempts at distinguishing between discretionary and ministerial function, arguing that the terms are too vague and flexible. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963) ("The dichotomy between 'ministerial' and 'discretionary' it [sic] at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result. One may also believe that it has become a convenient device for extending the area of nonliability without making the reasons explicit."), *quoted in* Tullier, *supra* note 131, at 882 n.54.

138. *See, e.g., supra* notes 134-37 and accompanying text.

139. *See* KEETON ET AL., *supra* note 51, at 25 ("The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the court become known, and defendants realize they may be held liable, there is of course a strong incentive to prevent the occurrence of harm"), *quoted in* Tullier, *supra* note 131, at 876 n.26.

140. *See* Kenneth R. Wing & John R. Campbell, *The Emergency Room Admission: How Far Does the "Open Door" Go?*, 63 U. DET. L. REV. 119, 142 (1985) (noting that the traditional common law rule giving hospitals an absolute right to choose their patients has been abandoned by many modern courts).

141. *See id.* at 125 n.42 ("We begin with the shocking proposition that present law in most American jurisdictions is said to permit a hospital to keep its doors closed to the person seeking emergency medical aid") (citation omitted)).

142. *See, e.g.*, Buch v. Amory Mfg. Co., 44 A. 809, 810 (N.H. 1897) (stating in dictum that a person has no general duty to protect another from harm).

143. *Cf.* Farwell v. Keaton, 240 N.W.2d 217, 222 (Mich. 1976) (holding that a special relationship exists between companions on a social venture and finding that, when one

pitals or emergency room physicians liable for negligently refusing or providing emergency treatment."[144] In a leading case, *Wilmington General Hospital v. Manlove*,[145] a hospital was liable for the death of an infant when the decedent was denied admission to the emergency room; the court reasoned that liability was appropriate "if the patient has relied upon a well-established custom of the hospital to render aid "[146] In another case, *Stanturf v. Sipes*,[147] a hospital was held liable for exacerbated injuries suffered by a man to whom the hospital had denied access because of his inability to pay The court reasoned that "members of the public had reason to rely on the [hospital for treatment]."[148] Most cases that result in holding hospitals liable premise their holding on the notion that, "once [a hospital] undertakes to render medical aid, [it] is required to do so non-negligently "[149]

Thus, as courts are beginning to extend liability to police for failure to detain drunk drivers, and as hospitals are under an increasing duty to admit injured patients, it seems reasonable for courts to hold 911 emergency medical systems liable for their negligent conduct.

## III. PROPOSAL

Legislatures or courts should abrogate unmitigated immunity and create only limited liability for municipalities maintaining all systems. A scheme of total immunity ignores all tort law goals of compensating victims for their loss or injury Too often, states allow 911 systems to escape liability by considering them as part of the general police power of the state. However, while general police powers are designed to promote the general health and welfare of the community, 911 emergency medical services are depended upon for specific purposes: prompt medical attention and

companion knows of the other's peril, an affirmative duty to assist that person arises), *rev'g* 215 N.W.2d 753 (Mich. Ct. App. 1974).

144. Wing & Campbell, *supra* note 140, at 126 (citations omitted).

145. 174 A.2d 135 (Del. 1961), *aff'g* 169 A.2d 18 (Del. Super. Ct. 1961), *cited in* GEORGE, *supra* note 7, at 20-22.

146. *Manlove*, 174 A.2d at 140, *quoted in* GEORGE, *supra* note 7, at 21.

147. 447 S.W.2d 558 (Miss. 1969), *cited in* DAVID G. WARREN, PROBLEMS IN HOSPITAL LAW 88-89 (1978).

148. *Stanturf*, 447 S.W.2d at 562, *quoted in* WARREN, *supra* note 147, at 89.

149. Fjerstad v. Knutson, 271 N.W.2d 8, 11-12 (S.D. 1978) (reversing jury verdict in favor of defendant hospital on grounds that the hospital had violated its own standards for treatment and remanding for a new trial), *overruled by* 380 N.W.2d 659 (S.D. 1986).

transportation to a hospital. In contrast, police and fire services offer a wide array of services. Many of the emergency situations police and fire departments respond to involve third party actors, unrelated to the caller, as in the case of crime or fire. This distinction is important, as many 911 cases have been decided on the grounds that emergency medical services are so similar to police and fire services that they deserve the same immunity [150]

A person calls the 911 system only when they are too ill or injured to assist themselves, or when they need immediate medical attention; these callers are under the impression that 911 can assist them immediately In cases where the system fails to assist them properly, total immunity from liability simply by virtue of government — as opposed to private — status should not allow the responsible parties to escape liability

Once absolute or total immunity is abrogated, certain elements of sovereign immunity defenses must be minimized. Too often, courts will find the acts of the system's personnel giving rise to the lawsuit are "discretionary," when such a finding turns on the semantics of defining the government employee's actions. Certain acts do require decisions based on the dispatcher's or EMT's judgment or experience, but it is irresponsible to uniformly categorize these as not involving any ministerial functions.[151] Dispatchers should be held to a negligence standard, and EMTs should be held to a true gross negligence standard.

Dispatchers are faced with considerably less decisionmaking pressure than are the EMTs. Dispatchers answer the calls and establish a link with the caller, asking questions to determine the caller's identity and the nature of the crisis. The response that the dispatcher considers appropriate depends on the answers received. In many cities, the options a dispatcher has to exercise are predetermined by protocols or procedural guidelines.[152] In jurisdictions with established protocols, dispatchers' responses are virtually mandatory In these situations, dispatchers should be held to a general negligence standard for failing to properly apply the protocols.

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150. *See, e.g.*, Wanzer v. District of Columbia, 580 A.2d 127, 131 (D.C. 1990) (the court concluded that "the District's public ambulance service is equivalent to its police and fire protection, so that the special duty analysis set forth in such cases must be applied to the case at bar as well."). *But see supra* note 89 and accompanying text.

151. *See supra* notes 59-60 and accompanying text.

152. *See Wanzer*, 580 A.2d at 129 n.1 ("The Fire Department has developed 'general procedures' to aid dispatchers in prioritizing requests for ambulance service.").

More difficult to assess are the jurisdictions where the dispatchers work without protocols. Many times, dispatchers are not sufficiently trained in medicine to be able to adequately assess the crisis faced by the caller. This situation places dispatchers in a dilemma. Their personal judgment may urge them to dispatch an ambulance, yet they are aware that many 911 calls do not warrant a full emergency ambulance response. Their reluctance may be heightened by the fear that a real medical emergency may present itself and find the municipality with no available ambulance; thus, ambulances cannot be dispatched to every caller complaining of a headache, which often leads to tragic consequences.[153] Some dispatcher union representatives, recognizing that the dispatchers and their government employers may be exposed to a greater number of lawsuits in such situations where no protocols exist, have begun lobbying for definitive protocol guidelines[154] so that the public can be served more efficiently[155] and they can be shielded from liability

This note urges that all governmental entities providing 911 services enact such protocols as quickly as possible. The abrogation of total sovereign immunity, combined with the adoption of definitive protocols, will arguably make 911 systems less vulnerable to lawsuits, since jurisdictions will be able to ensure that dispatchers follow an ordered set of procedures. If dispatchers are given a set of well-constructed guidelines, which take into account virtually every medical emergency the system could be faced with, and the appropriate response is predetermined, then dispatchers and municipalities will be better able to assist or advise callers, and the entire operation may be streamlined so that a greater number of mishaps can be eliminated. Additionally, dispatchers will be more effective if their decisions are not clouded by liability concerns. The development of guidelines will eliminate many of the judgment decisions dispatchers have to make, and if the protocols are followed, the municipality will be shielded from liability, since the

153. *See, e.g., id.* at 129-31 (describing a situation where the victim died after complaining of headaches, which were actually indications of fatal stroke).

154. California has enacted CAL. HEALTH & SAFETY CODE § 1799.107 (West 1992), which grants qualified immunity to dispatchers dispensing medical advice and information over the telephones.

155. Los Angeles has enacted protocols to help screen out non-emergency calls, and is now telling callers with non life-threatening problems to call their doctor or the local hospital. Laurie Becklund, *New 911 Rules Screen Minor Ills*, L.A. TIMES, Jan. 11, 1992, at B3.

development of the protocols will be unquestionably discretionary or governmental in nature, and thus, still shielded from liability under the discretionary/ministerial analysis.

Further, immunity statutes should not be used to shield EMTs completely from liability The actual administering of medical care to callers in which EMTs engage requires a greater degree of independent decisionmaking than the dispatchers' tasks, although their decisions are to a large extent determined by the exigency of the medical emergency they confront. Given this, the EMTs should be held to a gross negligence standard of care. Courts often incorrectly equate gross negligence with wilful or wanton behavior,[156] thereby immunizing conduct that should be sanctioned. Yet, willful or wanton behavior is even more egregious than gross negligence.[157] In many cases, courts hold that the actions of the EMTs will be considered tortious only when their conduct is wilful or wanton, which in application practically requires the EMT to directly and intentionally harm the victim.[158] If EMTs are held liable for conduct which is outrageous, or is otherwise grossly negligent, lawsuits will turn on factual issues which the jury system is well equipped to handle. It is important to note here that many of the 911 cases are dismissed on the defendant municipalities' summary judgment motions, or for failure to state a claim on grounds of general sovereign immunity; the actual factual matters of the negligent conduct of the system personnel rarely get through a full trial.[159] EMTs will be able to defend their actions in liability

156. *See, e.g.*, Tatum v. Gigliotti, 565 A.2d 354, 358 (Md. Ct. Spec. App. 1989) (equating gross negligence with wilful or wanton conduct (citing Four v. Juvenile Serv., 552 A.2d 947, 956 (1989), *aff'd*, 583 A.2d 1062 (Md. 1991)).

157. Gross negligence is defined as watchfulness and circumspection that "falls short of being such reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong." BLACK'S, *supra* note 58, at 1033.

158. *See, e.g.*, Johnson v. District of Columbia, 580 A.2d 140, 141-42 (D.C. 1990) (court stated that an EMT who examined the victim by raising her eyelids with the rubber antenna of his radio rather than touch her was not liable since his actions, while perhaps failing to conform to applicable standards of care, did not constitute an affirmative act that actually worsened the victim's condition); Gianechini v. City of New Orleans, 410 So. 2d 292, 300 (La. Ct. App. 1982) (EMT not held liable, since improper CPR administered to the victim was not proven to be the actual "cause-in-fact of the victim's brain damage"), *appeal dismissed*, 459 U.S. 802 (1982).

159. *See, e.g.*, Wanzer v. District of Columbia, 580 A.2d 127, 133 (D.C. 1990) (affirming trial court's dismissal of case for failure to state a cause of action); Hines v. District of Columbia, 580 A.2d 133, 140 (D.C. 1990) (affirming trial court's summary judgment in favor of defendant District, as general sovereign immunity doctrines shielded District from liability).

suits successfully if they administer proper aid and conform to applicable standards of emergency medical care.

The doctrine of shielding municipalities by refusing to find that a special relationship between the municipality and the 911 caller has been created should be abandoned. It seems a legal fiction to determine that there can be no binding relationship between a municipality and a 911 caller simply because that person cannot be pre-determined as a 911 user. The municipality is immediately aware of the caller's identity and the crisis the caller faces. Further, a 911 call meets several of the critical factors of the above-stated[160] test for a special relationship: the municipality is aware of the caller's identity and peril, the municipality is in a position to assist the caller, and the caller is under the impression that the municipality is the best, if not the only, means of providing help. In situations where someone other than the victim is the caller, liability should not be denied just because some third party has placed the call;[161] rather, liability should be imputed through a third party, so long as the caller is in the immediate vicinity or zone of the person in distress.

Abolition of blanket sovereign immunity statutes and the extension of liability to 911 systems will result in redress and compensation to victims for their injuries. Holding dispatchers to a general negligence standard for such acts as failing to adhere to or follow protocols would have allowed recovery in many 911 cases.[162] Holding EMTs to a true gross negligence standard would have allowed recovery in cases where the EMT's acts are callous, indifferent, or demonstrate a lack of dedicated commitment to quickly aiding a victim.[163] It is unlikely that jurisdictions will ever reduce the negligence standard for EMTs to anything below gross negli-

160. *See supra* notes 63-66 and accompanying text.

161. *See, e.g.*, Runnions v. City of New York, N.Y. LAW JOURNAL, June 10, 1991, at 32 (N.Y. Sup. Ct. 1991) (plaintiffs suing city for negligence in assisting them after assault by gang in subway denied recovery because an identified woman, also attacked by the gang, had made the call to 911; no special relationship existed between city and plaintiffs).

162. *See, e.g., Wanzer*, 580 A.2d at 128-29 (dispatchers instructed caller, who eventually died from two strokes, to take aspirin for a headache, rather than sending ambulance as required by established procedures); *Hines*, 580 A.2d at 140 (finding city dispatcher shielded from liability for negligent failure to send the proper EMT unit to the aid of a victim who eventually died).

163. *Cf. Johnson*, 580 A.2d at 141 (firefighters "casually and slowly" approached the victim, examined her with the antenna of their radio, and asked relatives to "move [the victim] to the living room").

gence, given the difficult decisions concerning medical care that EMTs must make and the general inexactitudes of medical science.[164]

Several policy concerns must be taken into consideration in applying any standards to 911 services. The primary concern raised by extending or expanding liability to cover all facets of 911 emergency medical services is that municipalities may be dissuaded from offering the services, or that individuals may be deterred from working for the systems, for fear of liability exposure. But adoption of the proposed standards could minimize these concerns. If dispatchers follow the protocols properly, then any inquiry about liability would have to go to the protocols themselves, and since the establishment of the protocols would be governmental or discretionary, liability would not attach. Municipalities are encouraged to purchase liability insurance to cover their 911 emergency medical services, and jurisdictions are encouraged to pass statutes limiting the amount of recovery in these cases.[165]

The demand for 911 services in many cities exceeds the capabilities of the systems to respond to all calls. In many cities, private and volunteer ambulance services are available, and may be utilized in several ways.[166] If a 911 system is experiencing a temporary shortage of ambulances, dispatchers should notify callers that delays in dispatching ambulances or substantial time-lapses in arrival may take place before a municipal ambulance arrives. This puts callers on notice that they should seek alternative medical care/transport options. Municipal 911 entities could try to integrate the private ambulances into the network, perhaps even serving as a clearing-house or call-forwarding service for putting 911 callers in touch with these private companies. If municipalities feel that this is too risky, their own liability could be mitigated by requiring private participants to be insured, and the municipality could ensure that their actions are limited to making referrals only, with no

164. *See* Gianechini v. City of New Orleans, 410 So. 2d 292, 300 (La. Ct. App. 1982) (EMT's failure to administer a particular treatment or the negligent administration of another type of treatment not able to be proven as a cause contributing to death of victim), *appeal dismissed*, 459 So. 2d 802 (La. 1982).

165. *See supra* notes 56-57 and accompanying text. *But cf.* John C. McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505, 536 n.146 (1987) (recognizing that some constitutional limits against these recovery cap schemes have been raised, since similar cases against private enterprises will not be subject to limits).

166. *See, e.g.*, Myers, *supra* note 110, §1 at 27.

guarantee or warrant as to the quality or speed of the private ambulance. Since private ambulance services are regulated by the state, and all EMTs are certified by the state, legislatures could extend some of the limited immunity statutes covering 911 operations to include private organizations. Reasonable statutes, insurance safeguards, and other precautions will ensure that municipalities do not suffer great financial losses due to 911 mishaps.

The imposition of liability may also have a desired effect of upgrading the quality of the system. Municipalities concerned with mitigating liability may exercise greater care in the hiring, training, certification, implementation, and continuous re-training of all 911 system personnel, and the guidelines and protocols established will be well constructed by experienced experts in emergency medical care.

## IV CONCLUSION

The overall goal of 911 systems is to provide prompt and efficient medical attention to persons in need. For the most part, 911 systems meet this goal. Unfortunately, human error can sometimes create or exacerbate tragic situations. In these cases, victims should not be denied compensation simply because unlimited sovereign immunity doctrines shield municipalities from liability, nor should general sovereign immunity be used to protect negligent dispatchers or grossly negligent EMTs. Rational standards of care, enforced by rigorous judicial and legislative scrutiny, and well constructed guidelines for decisionmaking and operation of the systems, will combine with the diligence that exposure to liability creates, to ensure that 911 systems operate the way they are intended — to save lives.

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