



1987

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Recommended Citation

John C. McMillan Jr., *Government Liability and the Public Duty Doctrine*, 32 Vill. L. Rev. 505 (1987).
Available at: <https://digitalcommons.law.villanova.edu/vlr/vol32/iss2/5>

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1987]

GOVERNMENT LIABILITY AND THE PUBLIC DUTY DOCTRINE

I. INTRODUCTION

Two children lay dead in Commerce City, Colorado, victims of a drunken teenage driver.¹ Just prior to the accident, the teenager had been in police custody.² Although the police were aware that the teenage driver was intoxicated, they released him into the custody of his brother.³ The victims' parents thereafter brought a wrongful death action against the Commerce City Police Department.⁴ It is precisely situations such as this to which the public duty doctrine is applicable.⁵

1. *Leake v. Cain*, 720 P.2d 152, 153-54 (Colo. 1986) (wrongful death action brought on behalf of pedestrians struck by automobile driven by intoxicated person whom police officers had released in custody of younger brother). For a discussion of *Leake*, see *infra* notes 99-112 and accompanying text.

2. *Leake v. Cain*, 720 P.2d 152, 154 (Colo. 1986). The Commerce City police officers were dispatched to break up a teenage party after a neighbor complained. *Id.* While ordering the teenagers to disperse, 18 year old Ralph Crowe became disruptive and was handcuffed and detained by the officers. *Id.*

3. *Id.* After Ralph Crowe's detention, the police officers were approached by Ralph's 17 year old brother Eddie Crowe. *Id.* Eddie Crowe requested that Ralph be released to him and told the officers that he would drive his brother home. *Id.* After noting that Eddie appeared sober and possessed a valid driver's license the officers agreed to permit Ralph Crowe to leave the party with his brother. *Id.*

4. *Id.* The representatives (respondents) of the two children struck and killed by Ralph Crowe brought the action against Ralph Crowe, his father James Crowe, the five Commerce City police officers who responded to the party, and Commerce City (petitioners). *Id.* James Crowe was subsequently dismissed from the action by stipulation of both parties and Ralph Crowe was not a party to the Colorado Supreme Court appeal. *Id.* at n.5.

Respondents alleged that the police officers had reason to believe Ralph Crowe was intoxicated at the time of his detention and were thus negligent in failing to take him into custody. *Id.* at 154. Respondents further alleged police negligence in the release of Ralph Crowe to his younger brother, since it was foreseeable that Ralph Crowe would drive intoxicated and that injury to the public was therefore a foreseeable consequence. *Id.*

After a hearing, the trial court granted petitioners' motion for summary judgment. *Id.* at 153. The court of appeals reversed and remanded the case for trial. *Id.* (citing *Cain v. Leake*, 695 P.2d 798 (Colo. Ct. App. 1984)). In 1986 the Supreme Court of Colorado granted *certiorari*, and reversed and remanded the case to the court of appeals with directions to reinstate the trial court's order granting summary judgment. *Id.*

5. See *id.* at 155-56; see also *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982) (summary judgment granted on basis of public duty doctrine in action against town for police officer's failure to arrest drunken driver); *Fryman v. JMK/Skewer, Inc.*, 137 Ill. App. 3d 611, 484 N.E.2d 909 (1985) (county found not liable to patrons of restaurant serving contaminated food inspected by county health department where duty to warn was public duty); *Cox v. Department of Natural Resources*, 699 S.W.2d 443 (Mo. Ct. App. 1985) (public duty of state agency to maintain safe swimming area held not actionable by

The public duty doctrine is utilized in situations where an individual attempts to hold a governmental entity liable for breach of a duty⁶ owed to the general public.⁷ Generally, absent a "special relationship"⁸ between the injured plaintiff and the government, the public duty doctrine effectively provides a common law immunity for the negligent acts of government officials.⁹

private plaintiff); *O'Connor v. City of New York*, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983) (public duty doctrine denied liability for negligent natural gas line inspection); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I. 1985) (police officers not liable for injuries suffered in accident later in evening after "sobered" driver was allowed to drive car away).

6. A "duty" is defined as a "question of whether the defendant is under any obligation for the benefit of the particular plaintiff . . . to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS*, § 53 at 356 (5th ed. 1984) [hereinafter cited as *W. KEETON*]; see also *Cummins v. Firestone Tire & Rubber Co.*, 344 Pa. Super. 9, 495 A.2d 963 (1985) (requisite element of cause of action in negligence is duty on part of defendant to conform to certain standard of conduct with respect to plaintiff).

7. See Annotation, *Modern Status of Rule Excusing Governmental Unit From Tort Liability on Theory That Only General, Not Particular, Duty was Owed Under Circumstances*, 38 A.L.R. 4th 1194, 1196 (1965). The public duty doctrine provides that "a governmental entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general, as in the case of police or fire protection." *Id.*; see also 65 C.J.S. *Negligence* § 4(8) (1966 & Supp. 1986) ("individual has no right of action for failure to perform a duty owed to the public as such"); Note, *State Tort Liability for Negligent Fire Inspection*, 13 COLUM. J.L. & SOC. PROBS., 303, 322-23 & nn. 94-95 (1977) [hereinafter cited as Note, *State Tort Liability for Negligent Fire Inspection*] ("Government officials, and more recently their employers, have long been held liable for their tortious conduct *only if* the duty of due care breached was one owed to a particular individual, and not one owed to the public in general." (emphasis in original)); Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 823-24 (1981) [hereinafter cited as Note, *Police Liability*] (discussing origins of public duty doctrine); Note, *A Unified Approach to State and Municipal Tort Liability in Washington*, 59 WASH. L. REV. 533, 537 & n.32 (1984) [hereinafter cited as Note, *A Unified Approach to Tort Liability*] ("The public duty doctrine provides that ordinarily the duties of government agents arising from governmental activities are owed to the public in general and not to any specific individual.").

8. See Note, *Police Liability*, *supra* note 7, at 824. In the context of the public duty doctrine, a "special relationship" is recognized by the courts:

[W]hen a citizen becomes singled out from the general population and a special duty is owed him by the governmental entity. Such a duty is established by a special relationship between the government and the citizen and the breach of that duty may result in liability for the damages suffered by the citizen.

Annotation, *supra* note 7, at 1196.

For a discussion of the "special relationship" exception to the public duty doctrine, see *infra* notes 38-60 and accompanying text.

9. See Note, *A Unified Approach*, *supra* note 7, at 537; see also *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (where police answered call and arrived outside scene of robbery and repeated gang rape, such response created no special relationship or liability to victims for failing to ascertain attacks were not continuing). See generally Annotation, *Liability of Municipality or Other Governmental*

While the public duty doctrine persists as the majority rule in the United States today,¹⁰ the doctrine has come under increasing criticism in recent years for its harsh effect upon victims who would otherwise be

Unit for Failure to Provide Police Protection, 46 A.L.R. 3d 1084, 1088 & n.3 (1973) (“[C]ourts generally have adopted the rule that there can be no liability on the part of a municipality for its failure to provide police protection . . . unless some ‘special relationship’ is shown.”).

The emphasis of this Note is upon alleged acts of police nonfeasance. “Nonfeasance” is generally defined as “passive inaction or a failure to take steps to protect . . . from harm.” W. KEETON, *supra* note 6, § 56, at 373 & n.3. In contrast, police acts of “misfeasance” or “active misconduct working positive injury to others” are not considered herein. *Id.* The rationale behind this distinction according to PROSSER & KEETON ON THE LAW OF TORTS is that by misfeasance “the defendant has created a new risk of harm to the plaintiff, while by ‘nonfeasance’ he has at least made the situation no worse, and has merely failed to benefit him by interfering in his affairs.” *Id.* at 373 & n.4.

10. *Williams v. State*, 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137 (1983) (highway patrol officer had no duty to investigate accident and preserve evidence for civil litigation under public duty doctrine); *Sestito v. Groton*, 178 Conn. 520, 423 A.2d 165 (1979) (plaintiff must prove that police officer owed duty to plaintiff’s decedent and not public in general where officer witness failed to stop public disturbance until after decedent was shot); *Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977) (public duty doctrine applied in action against department of corrections for failing to comply with regulation requiring disclosure of parolee’s prior sex-related convictions), *modified*, 580 F.2d 647 (D.C. Cir. 1978) (en banc); *Nelson v. Freeman*, 537 F. Supp. 602 (W.D. Mo. 1982) (under state law child abuse statute created only duty to public and could not support individual’s cause of action); *Namauu v. Honolulu*, 62 Haw. 358, 614 P.2d 943 (1980) (police department’s duty to apprehend escaped mental patient not actionable by individuals under public duty doctrine); *Huey v. Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1968) (municipality not liable for failing to protect racial minority under public duty doctrine); *Simpson’s Food Fair, Inc. v. Evansville*, 149 Ind. App. 387, 272 N.E.2d 871 (1971) (police force not liable under public duty doctrine for failing to halt wave of criminal activity); *Hendrix v. Topeka*, 231 Kan. 113, 643 P.2d 129 (1982) (police officer not liable for death of former state mental patient under public duty doctrine); *Frankfort Variety, Inc. v. Frankfort*, 522 S.W.2d 653 (Ky. 1977) (fire department held not liable for negligent fire fighting under public duty doctrine); *Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) (public duty doctrine did not bar plaintiff’s action and thus town held liable for negligent failure of its police officers to remove from highway intoxicated automobile driver who subsequently caused injury to other travelers); *Foshee v. Detroit*, 76 Mich. App. 377, 256 N.W.2d 601 (1977) (city not liable under public duty doctrine for failing to secure vacant house wherein plaintiff’s decedent was found dead by strangulation); *Hage v. Stade*, 304 N.W.2d 283 (Minn. 1981) (duty of fire inspection held to be a public duty and not actionable by individuals); *Frye v. Clark County*, 97 Nev. 632, 637 P.2d 1215 (1981) (duty of county to fight fires was public duty and not actionable); *O’Connor v. New York*, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983) (municipality held not liable for negligent inspection of natural gas line subsequently causing explosion); *Shelton v. Industrial Comm’n*, 51 Ohio App. 2d 125, 367 N.E.2d 51 (1976) (state not liable for negligent boiler inspection under public duty doctrine); *Melendez v. Philadelphia*, 320 Pa. Super. 59, 466 A.2d 1060 (1983) (city not liable for failing to protect youth shot by neighbor during period of racial unrest under public duty doctrine); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I. 1985) (drunk driving laws impose upon police officers general duty to public and not individual drivers); *J & B Dev. Co. v. King*

entitled to a cause of action absent the public status of their alleged tortfeasors.¹¹ Hostility toward the public duty doctrine is evidenced by the abrogation of the doctrine by courts in several jurisdictions in favor of a traditional negligence analysis.¹²

This Note will provide an overview of the public duty doctrine. Specifically, it will examine the "special relationship" limitation of the public duty doctrine and the methods by which courts have come to abolish the doctrine.¹³ Furthermore, this Note will examine the caselaw and commentary regarding the public duty doctrine's continued viabil-

County, 100 Wash. 2d 299, 669 P.2d 468 (1983) (public duty doctrine applied to issuance of builders permit by county).

11. *Leake v. Cain*, 720 P.2d 152, 158 (Colo. 1986) (citations omitted); *see generally* I.A. C. ANTIEAU, MUNICIPAL CORPORATION LAW § 11.74 & n.3 (1986) ("good courts are increasingly repudiating [the public duty doctrine] used to continue tort irresponsibility of local governments"); Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7 (critiquing public duty doctrine application to negligent fire inspection cases); Note, *Court of Claims Act*, 58 ST. JOHN'S L. REV. 199 (1983) [hereinafter cited as Note, *Court of Claims Act*] (criticizing New York application of public duty doctrine).

12. *Adams v. State*, 555 P.2d 235, 243 (Alaska 1976) (abolishing public duty doctrine and finding case "governed by the usual tort principles"); *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982) (abolishing public duty doctrine and holding state to same tort liability as "ordinary citizens"); *Leake v. Cain*, 720 P.2d 152 (Colo. 1986) (public duty doctrine held no longer applicable in Colorado and duty of public entity in negligence action is to be determined in same manner as private party); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) (holding governmental negligence to be determined by non-public entity standards since public duty doctrine did not survive legislative abolishment of sovereign immunity); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (abolishing public duty doctrine and holding the state to same negligence standard as private litigants); *Schear v. Board of County Comm'rs*, 101 N.M. 671, 687 P.2d 728 (1984) (statutory abolishment of public duty doctrine with sovereign immunity subjects public entities to "traditional tort concepts of duty"); *Brennen v. City of Eugene*, 285 Or. 401, 591 P.2d 719 (1979) (abolishing public duty doctrine and holding city liable for employee torts "just as any private employer"); *Coffey v. Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (same); *DeWald v. State*, 719 P.2d 643 (Wyo. 1986) (abolishing public duty doctrine and holding traditional negligence principles as proper standard for grant of summary judgment).

To constitute a "traditional" negligence cause of action the plaintiff must allege (1) the existence of a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) which actually and proximately caused (4) damage to the plaintiff. *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986) (quoting W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 164-65 (5th ed. 1984)); *see also* *Brennen v. City of Eugene*, 285 Or. 401, 591 P.2d 719, 722 (1979) (listing requirements of cause of action in negligence); *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132, 135 (1976) (same).

13. The primary emphasis of this Note is upon the state courts' application of the public duty doctrine to law enforcement officers' negligent provision of police protection. However, the public duty doctrine applies to the acts of governmental entities in general. Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 537 & n.32. Therefore, this Note utilizes cases dealing with other governmental duties, such as inspection, or fire protection, to give the reader a thor-

ity. Finally, this Note will conclude that courts should abandon the public duty doctrine because an innocent victim of police negligence should be fairly compensated for his or her injury and law enforcement itself would ultimately benefit.

II. BACKGROUND

A. *The Public Duty Doctrine and Its Subsequent Limitation Through the "Special Relationship Exception"*

Often referred to as the "duty to all, duty to no one" doctrine,¹⁴ the public duty doctrine provides that since government owes a duty to the public in general, it does not owe a duty to any individual citizen.¹⁵ The origins of the public duty doctrine may be traced to the United States Supreme Court's decision in *South v. Maryland*.¹⁶ In determining whether a county sheriff who refused to arrest the plaintiff's kidnappers could be held liable for his nonfeasance, the *South* Court held "[i]t is an undisputed principle of the common law, that for a breach of a public duty . . . [the sheriff] is amenable to the public, and punishable by indictment only."¹⁷ Thus, the Court found no cause of action arising from a breach of duty to provide police protection to an individual.¹⁸

ough and genuine overview of the present trends in application of the public duty doctrine.

14. See, e.g., *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1015 (Fla. 1979).

15. See *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986); *Commercial Carrier Corp. v. Indian River County* 371 So. 2d 1010, 1015 (Fla. 1979).

16. 59 U.S. (18 How.) 396 (1855). In *South*, the plaintiff alleged that he was kidnapped and held for four days and released only when he secured the ransom money demanded by his kidnappers. *Id.* at 398-99. The plaintiff further asserted that the local sheriff knew he had been unlawfully restrained yet did nothing to obtain his release or arrest the kidnappers. *Id.* at 399. The plaintiff sued the sheriff for refusing to enforce the laws of the state and for failing to protect the plaintiff. *Id.* The circuit court awarded the plaintiff a substantial judgment. *Id.* at 401. On appeal, the United States Supreme Court reversed finding the sheriff's duty to keep the peace a "public duty." *Id.* at 403.

17. *South*, 59 U.S. (18 How.) at 402-03. After articulating the public duty doctrine, the Court noted its reasoning was well founded in the common law:

The history of the law for centuries proves this to be the case [N]o instance can be found where a civil action has been sustained against [a sheriff] for his default or misbehavior as conservator of the peace by those who have suffered injury . . . through the violence of mobs, riots, or insurrections.

In the case of *Entick v. Carrington* . . . Lord Camden remarks: "No man ever heard of an action against a conservator of the peace, as such."

Id. at 403 (citation omitted).

18. *Id.* The *South* court specifically noted that the plaintiff had failed to allege any "special individual right, privilege, or franchise" that he was deprived of by the sheriff's actions. *Id.* The public duty doctrine as established in *South*

Prior to the development of the public duty doctrine, sovereign immunity¹⁹ shielded many municipalities from tort liability for the majority

was subsequently adopted by most state courts. *Leake v. Cain*, 720 P.2d 152, 155 n.6 (Colo. 1986). The leading tort law treatise of the era articulated the doctrine stating:

The rule of official responsibility, then appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution.

T. COLLEY, A TREATISE ON THE LAW OF TORTS 379 (1879).

The author thereafter provided an illustration of the doctrine's application to a case of negligent police protection:

The [public duty doctrine] does not depend at all on the grade of the office, but exclusively upon the nature of the duty. This may be shown by taking as an illustration the case of the policeman; one of the lowest grade of public officers. His duty is to serve criminal warrants; to arrest persons who commit offenses in his view, to bring nightwalkers to account Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep upon his beat, and while thus off duty a robbery is committed or a house burned down, either of which might have been prevented had he been vigilant,—who shall bring him to account for this neglect of duty? Not the individual who has suffered from the crime, certainly, for the officer was . . . not hired by him, paid by him, or controlled by him; and consequently owed him no legal duty. The duty imposed upon the officer was a duty to the public—to the State, of which the individual sufferer was only a fractional part, and incapable as such of enforcing obligations which were not individual but general. If a policeman fails to guard the premises of a citizen with due vigilance, the neglect is a breach of duty of exactly the same sort as when, finding the same citizen indulging in riotous conduct, he fails to arrest him; and if the citizen could sue him for the one neglect, he could sue also for the other.

Id. at 381 (footnote omitted), *quoted in Leake*, 720 P.2d at 155 n.6.

The public duty doctrine was repeated in subsequent editions of the treatise without criticism. *See* T. COLLEY, A TREATISE ON THE LAW OF TORTS 446 (2d ed. 1888); 2 T. COLLEY, A TREATISE ON THE LAW OF TORTS 756-57 (3d ed. 1906); 2 T. COLLEY, A TREATISE ON THE LAW OF TORTS 385-86 (4th ed. 1932); *see also* W. KEETON, *supra* note 6, § 131, at 1049 & nn.78-80 ("Thus . . . a failure to provide police protection, like the failure to provide fire protection, is usually immune . . . on the ground that the duty to protect is owed to the public at large and not to any particular person who might be injured.").

19. The general rule of sovereign immunity is "based on the idea that the king could do no wrong, the immunity of the modern state is much like that of the federal government." W. KEETON, *supra* note 6, § 131, at 1043. This immunity acts as a complete defense to the tort liability of the state and its agencies. *See id.*

The sovereign immunity doctrine was inherited from English jurisprudence and extended to insulate both municipal corporations and state governments from suit. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970-71, 977-87 (4th ed. 1971); Mathes & Jones, *Toward a "Scope of Official Duty" Immunity for Police Officers in Damage Actions*, 53 GEO. L.J. 889, 890-94 (1965) (authors argue for both practical and policy considerations for change in area of police civil tort liability); *see also* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3-4 (1963) (author examines history of sovereign immunity

of police activities because such activities were considered "governmental" functions.²⁰ The rationale for incorporating the sovereign immunity doctrine into American common law, however, has been described as "one of the mysteries of legal evolution."²¹

Although there is a trend toward abrogating the sovereign immunity doctrine either by direct judicial action,²² or legislation,²³ a major-

doctrine as applied to suits against administrative officers in England and United States).

20. Note, *Police Liability*, *supra* note 7, at 823; *see also* W. PROSSER, *supra* note 19, § 131, at 979. In his treatise, Professor Prosser distinguishes "governmental" functions, which were historically immune from liability, from "proprietary" functions under which the government "may be liable." *Id.* at 978-79 (footnotes omitted). A "proprietary" function is defined as when "the city performs a service which might as well be provided by a private corporation, and particularly when it collects revenue from it." *Id.* at 980. The rationale for liability attaching under such circumstances is that municipalities operating in the "proprietary" role are "capable of much the same acts as private corporations . . . having the same special and local interests and relations, *not shared* by the state at large." *Id.* at 977 (emphasis added). Therefore municipalities should be subject to the same liability as their private counterparts. *Id.*

In contrast, the municipalities are not liable when engaging in a "governmental" function including "the torts of police officers, even where they commit unjustifiable assault and battery . . . or are grossly negligent." *Id.* at 979. "Governmental" functions are typified as those that "can be performed adequately only by the government." *Id.* The primary rationales proffered in support of immunity for such functions are: (1) "fear of an infinity of actions," (2) the fact "that the government derives no profit from the exercise of governmental functions, which are solely for the public benefit," and (3) the concern that "cities cannot carry on their governments if money raised by taxation is diverted to making good the torts of employees." *Id.* at 978; *see also* E. MCQUILLAN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 53.79-.80, at 439-51 (3d rev. ed. 1984) (citing cases).

21. Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 307 (quoting Borchard, *Government Liability in Tort* (pts. 1-3), 34 *YALE L.J.* 1, 4 (1924-25)). Justice Douglas, for example, discussing the application of sovereign immunity in the United States, merely stated that "it has been the theory of law, since the beginning, that the King could do no wrong." Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 307 (citing W. DOUGLAS, *AN ALMANAC OF LIBERTY* 204 (1954)). Application of the sovereign immunity doctrine has been utilized, for example, to immunize three municipal defendants from liability for alleged negligence of their police officers engaged in a high speed chase. *See Oberkramer v. City of Ellisville*, 650 S.W.2d 286, 296 (Miss. Ct. App. 1983). In *Oberkramer*, the defendants were several police officers and their three municipal employers. *Id.* at 289. The plaintiffs were the widow and minor children of a police officer killed by a vehicle attempting to elude police in a high speed chase. *Id.* The plaintiffs charged the municipalities under the doctrine of *respondeat superior* for the alleged "failure to request and failure to receive" instructions regarding continuing the pursuit and for failure to have a pursuit policy, thereby creating an "unreasonable risk of harm to the public." *Id.* The court held that the defendants were engaged in a governmental function and were thus immune from suit, unless immunity was expressly waived by statute. *Id.* at 296. The court further concluded the alleged failure to request and receive instructions or have a pursuit policy did not fall within the statutory waiver of sovereign immunity. *Id.* at 297.

22. *See, e.g.*, *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969)

ity of jurisdictions still rely on the public duty doctrine as enunciated in *South*²⁴ to shield public officers and their municipal employers from liability for negligent nonfeasance.²⁵ For example, in *Shore v. Town of Stonington*,²⁶ the plaintiff brought an action for the wrongful death of his decedent pursuant to a statute permitting tort actions against a municipality.²⁷ Shore's decedent was killed by a drunken driver who had been stopped, but not arrested, by a town police officer approximately one hour before the accident.²⁸ Applying the public duty doctrine, the Supreme Court of Connecticut denied the plaintiff's cause of action, stating that "the special duty required to maintain the action cannot be established by the mere fact that someone with whom the official had prior contact subsequently injured the plaintiff or the plaintiff's dece-

(sovereign immunity held no longer applicable in tort action against county for failure to arrest law-violating drivers); *Muskopf v. Corning Hosp. Dist.*, 11 Cal. Rptr. 89, 359 P.2d 457, 55 Cal. 2d 211 (1961) (sovereign immunity doctrine discarded as "mistaken and unjust"); *Evans v. Board of County Comm'rs of El Paso County*, 174 Colo. 97, 482 P.2d 968 (1971) (doctrines of sovereign and governmental immunity overruled as defenses to tort claims); *Willis v. Department of Conservation and Economic Dev.*, 55 N.J. 534, 264 A.2d 34 (1970) (state held not immune from suit arising out of traumatic amputation of child's arm while feeding bear in state recreational facility); see also W. KEETON, *supra* note 6, § 131, at 1052 & n.1 (discussing abolition of sovereign immunity doctrine).

23. See, e.g., LA. CONST. art. 12, § 10; ALASKA STAT. §§ 9.50.250-.300 (1983); FLA. STAT. ANN. § 768.14 (1986); IDAHO CODE §§ 6-901 to 928 (1979); N.J. STAT. ANN. § 59:2-6 (West Supp. 1982); OR. REV. STAT. §§ 30.260-.300 (1983); R.I. GEN. LAWS §§ 9-31-1 to 7 (1985); VT. STAT. ANN. tit. 12, §§ 5601-5605 (1973); WASH. REV. CODE ANN. §§ 4.92.010-.200 (1973 & Supp. 1987).

Statutes abolishing sovereign immunity in these jurisdictions typically provide:

"[E]very governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function, where the governmental entity if a private person or entity would be liable for money damages under the laws of the [S]tate."

Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 320-21 (footnotes omitted); see also W. KEETON, *supra* note 6, § 131, at 1052 n.2 (discussing abrogation of sovereign immunity by statute).

24. For a discussion of *South* see *supra* notes 16-18 and accompanying text.

25. For a discussion of jurisdictions applying the public duty doctrine see *supra* note 10 and accompanying text.

26. 187 Conn. 147, 444 A.2d 1379 (1982).

27. *Id.* at 148, 444 A.2d at 1380 n.1.

28. *Id.* at 150, 444 A.2d at 1381. In *Shore*, a town police officer had observed a vehicle traveling at a high rate of speed and repeatedly crossing the center line. *Id.* The officer, who subsequently spoke to the driver after following him into a parking lot, did not arrest the driver but merely cautioned him to "slow down and . . . let his girlfriend drive" if he wanted to retain his license. *Id.* At trial, the court found evidence that the driver was then under the influence of drugs or intoxicants. *Id.* Approximately one hour later the released driver struck another vehicle killing plaintiff's decedent. *Id.* at 151, 444 A.2d at 1381.

dent.”²⁹ Therefore, the *Shore* court held that the police “owed no specific duty to plaintiff’s decedent to enforce the motor vehicle laws of the state.”³⁰

Although the main difference between sovereign immunity and the public duty doctrine is only theoretical,³¹ strict application of the public duty doctrine resurrects complete sovereign immunity as to public officers.³² Those jurisdictions which embrace the public duty doctrine, however, rely on several policy considerations to support their decision.³³ The principal rationales espoused by the courts are fear that abolition of the public duty doctrine will unduly interfere with governmental operation and subject government to an overwhelming

29. *See id.* at 156, 444 A.2d at 1381-83. The court held that the public duty doctrine was applicable to the case because:

[I]f the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public and not an individual injury, and must be redressed, if at all in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it or to perform it properly, is an individual wrong, and may support an individual action for damages.

Id. at 152, 444 A.2d at 381-82 (citing *Leger v. Kelley*, 142 Conn. 585, 589-90, 116 A.2d 429, 432 (1955)).

The *Shore* court held the law required “a showing of imminent harm to an identifiable victim” to precipitate a public duty becoming an actionable special duty. *See id.* at 152, 444 A.2d at 1382. The court discerned no such showing in *Shore* and affirmed the lower court’s grant of summary judgment in favor of the town. *Id.* at 157, 444 A.2d at 1383-84.

30. *Id.* at 150, 444 A.2d at 1380. The *Shore* court concluded that its decision was justified under the following policy rationale:

The adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society. . . . We do not think that the public interest is served by allowing a jury of laymen with benefit of 20/20 hindsight to second-guess the exercise of a policeman’s discretionary professional duty. Such discretion is no discretion at all.

Id. at 157, 444 A.2d at 1384.

31. Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 537 (“The public duty doctrine would reinstate complete sovereign immunity, because the distinction between no duty and immunity is only a theoretical difference.”); *see also* Note, *Court of Claims Act*, *supra* note 11, at 200-01 (stating particularly in tort law remnants of sovereign immunity “have been ‘judicially resurrected’ by requiring litigants who sue [a] city to establish that a duty is owed specifically to them, rather than . . . the public at large.”).

32. *See, e.g.*, *Leake v. Cain*, 720 P.2d 158, 160 (Colo. 1986). In *Leake*, the Colorado Supreme Court remarked that “whether or not the public duty rule is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant.” *Id.*

33. *Shore*, 187 Conn. at 152, 444 A.2d at 1382. The *Shore* court noted the distinction between “public and private duty is an expression of the many policy considerations which lead the law to determine whether interests of a particular type are entitled to protection against conduct by officials.” *Id.*

financial burden.³⁴

The public duty doctrine, however, is not an absolute bar to recovery.³⁵ Even where the rule prevails, significant exceptions have narrowed its scope of application.³⁶ One such exception to the doctrine allows a cause of action for negligent police protection.³⁷ This exception is limited to those situations in which the plaintiff can demonstrate a "special duty or relationship" between the victim and police.³⁸

Generally, a special duty or relationship exists where the government singles out a particular party from the general public and affords that person special treatment.³⁹ For example, in *Schuster v. City of New*

34. See, e.g., *Massengill v. Yuma County*, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969) ("The extent of potential liability to which [abrogating the public duty] doctrine could lead is staggering."); *Kean v. Chicago*, 98 Ill. App. 2d 460, 463, 240 N.E.2d 321, 322 (1968) (public duty doctrine required to protect city government from "an all but impossible burden"); *Stranger v. New York Elec. & Gas Corp.*, 25 A.D.2d 169, 172, 268 N.Y.S.2d 214, 217 (1966) (holding abrogation of public duty doctrine would "unduly and indeed indefinitely" extend governmental liability); see also *Ryan v. State*, 134 Ariz. 308, 309, 656 P.2d 597, 598 (1982) ("We are . . . told that [if the public duty doctrine is abolished] not only will the public treasury suffer but government will come to a standstill because its agents will be afraid to act."); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986) (noting financial impact on government and interference with governmental operations in defense of public duty doctrine); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 291, 669 P.2d 451, 461 (1983) (Utter, J., concurring) (citing additional cases rationalizing the public duty doctrine on basis of preventing "excessive governmental liability" and "hindrance of the governing process").

35. See Note, *Police Liability*, *supra* note 7, at 824 ("The [public duty] doctrine is not an absolute barrier to recovery, for courts universally recognize a duty when a 'special relationship' exists between plaintiff and the police.").

36. *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986).

37. See, e.g., Annotation, *supra* note 7, at 1196.

The courts have recognized . . . that there are instances when a citizen becomes singled out from the general population and a *special duty is owed him by the governmental entity*. Such a duty is established by a special relationship between the government and the citizen and the breach of that duty may result in liability for the damages suffered by the citizen.

Id. (emphasis added); see E. McQUILLAN, *supra* note 20 at § 53.51 (citing cases); see also *Peck v. United States*, 470 F. Supp. 1003 (S.D.N.Y. 1979) (duty to warn only imposed by federal legislation, federal assumption of duty, or special relationship between government and victim); *Bruttomeso v. Las Vegas Metropolitan Police Dep't*, 95 Nev. 151, 591 P.2d 254 (1979) (no liability for failure to supply police protection absent special duty or relationship owed particular individual); *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (municipality held liable for breach of assumed special relationship to provide substitute school crossing guard); *Chapman v. Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753 (1981) (special relationship generally exists only when individual is exposed to special danger and authorities undertake responsibility to provide adequate protection); see generally Annotation, *supra* note 7, at 1197-203 (citing and discussing "special relationship" cases).

38. For a discussion of the special duty or relationship exception to the public duty doctrine, see *infra* notes 39-47 and accompanying text.

39. *J & B Dev. Co., v. King County*, 100 Wash. 2d 299, 305, 669 P.2d 468,

York,⁴⁰ the New York Court of Appeals applied the public duty doctrine,⁴¹ but denied the city's motion to dismiss the action for failing to provide adequate protection to a young man murdered as a consequence of aiding them in the arrest of a notorious fugitive.⁴² The court reasoned that the police owed a "special duty to use reasonable care for the protection of persons who [aided] in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."⁴³

Although the public duty doctrine's special duty exception can be difficult to invoke,⁴⁴ a special duty has been found to arise in three situa-

471-72 (1983); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 285, 669 P.2d 451, 457-58 (1983).

The public duty doctrine cannot be used to avoid liability where a "special relationship" exists between the public entity and the plaintiff. *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986) (citing *Campbell v. Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975); *accord Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970) (government owed special duty to protect Internal Revenue Service undercover agent threatened and injured for testifying on behalf of government); *Morgan v. County of Yuba*, 230 Cal. App. 2d 938, 41 Cal. Rptr. 508 (1964) (county liable for breaching special relationship created by sheriff and deputies who promised warning to decedent upon release of arrested person); *Gardner v. Chicago Ridge*, 71 Ill. App. 2d 157, 219 N.E.2d 147 (1966) (police owed special duty to protect plaintiff called to scene of arrest to make an identification), *later appeal*, 128 Ill. App. 2d 157, 262 N.E.2d 829 (1970), *cert. denied*, 403 U.S. 919 (1971).

40. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). In *Schuster* plaintiff alleged his intestate supplied information to the police leading to the arrest of a dangerous fugitive. *Id.* at 79, 154 N.E.2d at 536, 180 N.Y.S.2d at 268. Schuster immediately thereafter received death threats and immediately informed the police. *Id.* However, no protection was afforded Schuster and he was shot to death three weeks later outside his home. *Id.*

41. *Id.* at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269-70.

42. *Id.* at 80, 154 N.E.2d at 536, 180 N.Y.S.2d at 268-69.

43. *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. The basis of the majority opinion was simple reciprocity. *See id.* at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 270; *see also Note, Police Liability, supra* note 7, at 824. Since citizens have a duty to aid in law enforcement, the court held the government in turn owed a duty of protection when such aid places citizens in danger. 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.

In his concurring opinion, Judge McNally suggested an alternative source of a special policy duty. *Id.* at 87, 154 N.E.2d at 541, 180 N.Y.S.2d at 275 (McNally, J., concurring). Since the police had provided temporary protection to Schuster, Judge McNally argued that the government had voluntarily assumed a duty it could not renounce as long as Schuster remained in danger. *Id.* (McNally, J., concurring). The judge based his conclusion on an established rule of tort law that "'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully if he acts at all.'" *Id.* (quoting *Glanzer v. Shepard*, 233 N.Y. 236, 239, 135 N.E. 275, 276 (1922)). Judge McNally's argument that the duty was voluntarily assumed by the police is thus distinguishable from the majority's theory of reciprocity holding that a citizen's aid to police triggers a mandatory duty of protection.

44. *See, e.g., Biloan's Elec. Serv., Inc. v. Wilmington*, 401 A.2d 636 (Del. Super. Ct. 1979), *aff'd*, 417 A.2d 371 (municipality not liable for fire damage to plaintiff's business during riot absent showing of special relationship between

tions. The first situation is where a statute or ordinance indicates a *clear* legislative intent to protect a specific and identifiable class of persons of which plaintiff is a member.⁴⁵ The second situation is where the plaintiff relied on *express* or *implied assurances* made by a governmental agent or entity with whom the injured party had *direct contact*.⁴⁶ The third situa-

municipality and plaintiff); *Melendez v. Philadelphia*, 320 Pa. Super. 59, 466 A.2d 1060 (1983) (plaintiff shot by neighbor failed to establish special relationship owed by police despite alleged assurances of protection due to racial tensions); *Chapman v. Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753 (1981) (complaint that decedent died from attack and robbery on platform of railroad station was properly dismissed in absence of facts showing special relationship between decedent and city).

The public duty doctrine is consistent with the general tort principle that a plaintiff's recovery is contingent on the demonstration of a duty owed him or her. *See Note, A Unified Approach to Tort Liability, supra* note 7, at 539. The doctrine, however, is inconsistent with traditional tort analysis by requiring a "special relationship" prior to formation of a duty upon which plaintiff can sue. *Id.* Traditionally, where a person should foresee his or her act, or failure to act, to involve an unreasonable risk of harm, there is a duty to avoid such harm through reasonable care. *See, e.g., Griesenbeck v. Walker*, 199 N.J. Super. 132, 488 A.2d 1038, *cert. denied*, 101 N.J. 264, 501 A.2d 932 (1985) (negligence action brought against social host for alleged negligent acts of intoxicated guests); *Commonwealth of Pennsylvania Dept. of Transp. v. Phillips*, 87 Pa. Commw. 504, 488 A.2d 77 (1985) (motorist's widow and children brought wrongful death and survival action against Department of Transportation and others for fatal injury sustained by motorist in collision caused by ice patch on highway); *see also RESTATEMENT (SECOND) OF TORTS* § 321 (1965). However, there is no duty to prevent a third person from harming another, absent a special relationship between the actor and the wrongdoer or between the actor and the victim. *Id.* at § 315.

In contrast, under the public duty doctrine, a duty arises from the relationship between the government agent and an individual or class of persons. *See Note, A Unified Approach to Tort Liability, supra* note 7, at 539. Thus, the special relationship requirement serves the function of limiting the number of individuals to whom the government owes a duty. *Id.* The government is thereby favored over private parties in negligence actions. *Id.* Because the special relationship requirement imposes on victims the financial burden of damages caused by a municipality's negligence, it has been subjected to extensive criticism. *Note, Court of Claims Act, supra* note 11, at 205 n.93 (citing *Hopkins, Municipal Tort Liability in Iowa*, 31 *DRAKE L. REV.* 855, 861 (1981-1982) ("[b]etter the taxpayer bear the financial burden of injury than the guiltless injured party").

45. *See, e.g., Irwin v. Town of Ware*, 392 Mass. 745, 467 N.E.2d 1292 (1984) (statute created duty on part of police officer to arrest intoxicated driver for the benefit of motoring public); *Campbell v. City of Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975) (city ordinance found to create special duty for city electrical inspector to disconnect hazardous electrical system).

46. *See Morgan v. County of Yuba*, 230 Cal. App. 938, 41 Cal. Rptr. 508 (Cal. Dist. Ct. App. 1964); *Bloom v. City of New York*, 78 Misc. 2d 1077, 357 N.Y.S.2d 979 (N.Y. Sup. Ct. 1974). When such assurances are present, the courts generally hold that law enforcement officers have a duty to provide the promised protection to the citizen. *See, e.g., Morgan*, 230 Cal. App. at 944, 41 Cal. Rptr. at 513 (sheriff who promised to warn plaintiff of impending release of dangerous prisoner obliged to do so); *Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977) (special duty to victim found where parole officer had duty to disclose parolee's full record of sex offenses to employer under Department of Corrections policy), *modified on other grounds*, 580 F.2d 647 (D.C. Cir. 1978) (en

tion is where the plaintiff is harmed as a result of aiding or abetting the police, often as an informer or witness.⁴⁷

Many jurisdictions which adhere to the public duty doctrine, however, do not allow the special duty exception to nullify the rule.⁴⁸ For example, in *Campbell v. City of Bellevue*,⁴⁹ the Washington Supreme Court went to great lengths to apply the special relationship exception, without expressly abandoning the public duty doctrine.⁵⁰ In *Campbell*, a city electrical inspector, informed of a short circuit electrifying a creek bed, failed to disconnect the power running to the circuit as required by city ordinance.⁵¹ Instead, the inspector merely placed a warning message

banc); *Silverman v. City of Fort Wayne*, 171 Ind. App. 415, 357 N.E.2d 285 (1976) (police promise to protect plaintiff's property against riot damage found to create special duty of protection); *Bloom*, 78 Misc. 2d at 1078, 357 N.Y.S.2d at 981 (assurances of police protection from riot damage created a special duty to plaintiffs); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P.2d 451 (1983) (special relationship based on assurances via telephone between plaintiffs and dispatchers that police were en route). *But see* *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (police dispatcher's promise of assistance to rape victim's repeated pleas for help failed to create special relationship exception to public duty doctrine).

The rationale applied most frequently by judges finding a duty to provide police protection where the plaintiff relied on assurances of such protection, is that they are merely compelling police to perform a ministerial act in fulfilling their voluntarily assumed obligations. *See, e.g.*, *Morgan v. County of Yuba*, 230 Cal. App. 938, 942-43, 41 Cal. Rptr. 508, 511 (1964) (construing discretionary nature of sheriff's decision to promise protection with ministerial nature to fulfill such.).

47. *See Swanner v. United States*, 309 F. Supp. 1183 (M.D. Ala. 1970) (government has special duty to protect informant when reasonable cause to believe he is endangered due to aiding federal agents); *Gardner v. Chicago Ridge*, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966) (police owed duty of protection to victim attacked during suspect identification), *cert. denied*, 403 U.S. 919 (1971); *Estate of Tanasijevich v. City of Hammond*, 178 Ind. App. 669, 383 N.E.2d 1081 (1978) (government has duty to protect property against credible threats of vandalism after caretaker aids police investigating past criminal acts); *Christy v. City of Baton Rouge*, 282 So. 2d 724 (La. Ct. App. 1973) (police owe duty to protect assault victim attacked while aiding police in arrest), *application denied*, 284 So. 2d 776 (La. 1973).

48. *See* Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 540. The Washington Supreme Court, for example, has "effectively eviscerated" the public duty doctrine through expansive application of the special relationship rule, thereby effectively allowing tort suits against the government where such would be permitted under common law principles of negligence. *Id.* at 540 & n.45. However, the court continues to apply the public duty doctrine because it allows the court to retreat from conventional tort principles while relieving the government of liability through failure to find a special relationship. *Id.*

49. 85 Wash. 2d 1, 530 P.2d 234 (1975).

50. Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 333 & n.151.

51. *Campbell*, 85 Wash. 2d at 13, 530 P.2d at 241. In *Campbell*, the plaintiff and his family lived adjacent to a creek passing through the property of a neighbor, George Schafer, who had placed electric lights in and around the stream. *Id.* at 3, 530 P.2d at 235. The plaintiff subsequently became aware of a dangerous electric current in the water and phoned the city electrical inspector. *Id.*

on the electric system owner's door.⁵² The inspector took no further action and five months later plaintiff's decedent fell in the creek and was electrocuted.⁵³ The Washington Supreme Court held the city liable on the basis that the ordinance had created a mandatory duty for the inspector to disconnect power to the circuit.⁵⁴ However, the court explicitly recognized the general validity of the public duty doctrine.⁵⁵

In addition, courts adhering to the doctrine generally find three categories in which the degree of intimacy between police and plaintiff is too attenuated and therefore seldom ascribe liability to the government for alleged nonfeasance in these situations.⁵⁶ In one category, courts are reluctant to impute liability where police are aware of a narrowly defined and readily identifiable source of danger to the public, but cannot reasonably foresee a specific victim.⁵⁷ In a second category, courts

52. *Id.* Finding the wiring extensively deteriorated and no one home, the inspector affixed a prominent red tag on the lighting system owner's door warning that the wiring constituted a "threat to life . . . [and] will have to be corrected immediately or the service will be disconnected." *Id.* at 3-4, 530 P.2d at 236. Apart from a telephone call to the lighting system owner's residence the next morning, no further action was taken. *Id.* at 4, 530 P.2d at 236.

53. *Id.* Five months later, the plaintiff's 6 year old son fell into the creek and received a paralyzing shock. *Id.* His mother rushed to his rescue. *Id.* Although the son survived, his mother did not. *Id.* Plaintiff claimed the inspector's negligence in the inspection and inattention to remedying the situation proximately caused his wife's death and his son's injuries. *Id.* at 5, 530 P.2d at 236.

54. *Id.* at 9, 530 P.2d at 238-39. The City of Bellevue vigorously contended that the enforcement of its electrical safety regulations were public duties, the breach of which were only enforceable, if at all, by the city, and created no duty to any individual. *Id.* The court, however, allowed the plaintiff to recover, even though it refused to overrule the public duty doctrine, by holding that the requisite "special relationship" had been formed between the parties, thereby justifying an exception to the general rule of non-liability. *Id.* at 10, 530 P.2d at 239.

55. *See id.* at 9, 530 P.2d at 239. The Washington Supreme Court stated it "had no particular quarrel at this time" with the public duty doctrine. *Id.* The Washington Supreme Court has to date continued to maintain the doctrine's viability. *See, e.g.,* J & B Dev. Co. v. King County, 100 Wash. 2d 299, 669 P.2d 468 (1983) (public duty doctrine applied in case of negligent issuance of building permit); Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983) (public duty doctrine applied in complaint of negligent failure of police to respond to emergency calls in timely fashion).

56. For a discussion of courts' reluctance to impart liability for police nonfeasance, see *supra* notes 25-34 and accompanying text.

57. *See, e.g.,* Everton v. Willard, 468 So. 2d 936 (Fla. 1985) (police owed no duty of protection to victim of intoxicated driver cited for traffic offense but not arrested prior to accident) Wuethrich v. Delia, 155 N.J. Super. 324, 382 A.2d 929 (N.J. Super. Ct. App. Div.) (per curiam) (police not liable for death of assault victim regardless of failure to investigate prior complaints of assailant's dangerous conduct), *cert. denied*, 77 N.J. 486, 391 A.2d 500 (1978); Evers v. Westerberg, 38 A.D.2d 751, 329 N.Y.S.2d 615 (1972) (police owed no duty of protection to victim of drunken driver not arrested by police at earlier accident), *aff'd mem.*, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973); Melendez v. Philadelphia, 320 Pa. Super. 59, 466 A.2d 1060 (1983) (plaintiff shot by neighbor failed to establish special relationship with police despite alleged assurances of protec-

refuse to impose liability where police are aware of a danger to a specific individual, but have not jeopardized the plaintiff through affirmative acts or promised protection.⁵⁸ Finally, courts are hesitant to impute liability where police are aware of a more generalized threat such as a "wave of criminal activity," but fail to provide adequate protection.⁵⁹

Thus, courts applying the public duty doctrine effectively restrict government's duty to individuals.⁶⁰ Government is thereby favored

tion due to racial tensions); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I. 1985) (police officer's attempt to force apparent intoxicated driver to remain in parking lot until sober failed to create "special relationship" with passenger injured in subsequent accident).

In *Melendez*, for example, a boy who was shot in the eye by a neighbor during a racial confrontation brought an action against the City of Philadelphia. *Melendez*, 320 Pa. Super. at 61, 466 A.2d at 1061. Plaintiffs asserted the minor's injuries were caused by the nonfeasance of the city's police department and human relations commission, who allegedly failed to adequately protect the neighborhood after having been apprised of racial problems in the community. *Id.* at 61-62, 466 A.2d at 1061. The Superior Court of Pennsylvania affirmed a grant of summary judgment for the city applying the public duty doctrine. *Id.* at 64, 466 A.2d at 1065. The court noted that under Pennsylvania law the only way for plaintiff to overcome the public duty doctrine was if a "special relationship" was demonstrated between himself and the police. *Id.* at 64-65, 466 A.2d at 1063. Addressing that issue, the court held that "[n]othing occurred which would have focused the police department's attention on the minor appellant or his assailant so as to create a special duty. The mere happening of an event . . . does not predicate liability." *Id.* at 67, 466 A.2d at 1064.

58. *See, e.g.*, *Peck v. United States*, 470 F. Supp. 1003 (S.D.N.Y. 1979) (knowledge of planned attack on plaintiffs did not create a duty of protection by FBI); *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6, 120 Cal. Rptr. 5 (1975) (no duty of protection owed by police to murder victim who informed police of imminent danger and requested help); *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (Ct. App. 1979) (no duty for police to respond promptly to witness' call to assist assaulted child); *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (police owed no duty of protection to plaintiff threatened by rejected suitor).

59. *Compare* *Keane v. City of Chicago*, 98 Ill. App. 2d 460, 240 N.E.2d 321 (1968) (police knowledge of violence in schools created no duty to protect teacher assaulted on school grounds); *Simpson's Food Fair, Inc. v. City of Evansville*, 149 Ind. App. 387, 272 N.E.2d 871 (1971) (police owed no duty to protect corporate plaintiff's business by halting crime wave); *and* *Bruttomesso v. Las Vegas Metropolitan Police Dep't*, 95 Nev. 151, 591 P.2d 254 (1979) (police had no duty to provide security for outdoor film festival at which plaintiff was stabbed) *with* *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (municipality held liable for breach of special relationship to provide protection to each school child using crosswalks that police agreed to supervise). *Cf.* *Eisman v. Port Auth. Trans. Hudson Corp.*, 96 Misc. 2d 678, 409 N.Y.S.2d 578 (N.Y. Sup. Ct. 1978) (installation of television monitors by rapid transit system for security purposes may have created duty of protection to passengers).

60. *See, e.g.*, *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (no duty to rape victim repeatedly promised assistance by police dispatcher under public duty doctrine); *Riss v. New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (under public duty doctrine police had no duty to provide protection to victim of violent assault who repeatedly requested protection from jilted suitor); *Melendez v. Philadelphia*, 320 Pa. Super. 59, 466 A.2d 1060 (1983)

over private parties in defending against negligence actions.⁶¹ However, this restrictive approach has been increasingly criticized by courts and legal scholars for placing the burden of municipal negligence entirely upon the victim.⁶²

B. *The Minority View: Abrogation of the Public Duty Doctrine*

In contrast to the jurisdictions which adhere to the public duty doctrine, there is a small but growing minority of jurisdictions that have explicitly rejected the public duty doctrine.⁶³ The landmark case of *Adams v. State*⁶⁴ stands as the earliest decision in which a court rejected the

(police owed no duty of protection to plaintiff despite assurances to neighborhood of protection due to racial tensions); see also Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 539 ("The special relationship requirement [of the public duty doctrine] restricts the number of individuals to whom the government owes a duty.").

61. Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 539.

62. Note, *Court of Claims Act*, *supra* note 11, at 205 & n.93. The public duty doctrine has been extensively criticized by commentators and by judges dissenting from, and concurring with, opinions upholding the doctrine. See, e.g., *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 290, 669 P.2d 451, 460 (1983) (Utter, J., concurring) ("I would . . . reject this 'public duty' doctrine embraced by the majority inasmuch as I believe respondents' duty toward appellants rests upon the traditional tort principles of policy and foreseeability rather than the existence of an ill-defined special relationship and reliance upon explicit assurances."); *Hage v. State*, 304 N.W.2d 283, 288 (Minn. 1981) (Scott, J., dissenting) (arguing majority's upholding of public duty doctrine constituted refusal to accept abolition of sovereign immunity); *Riss v. City of New York*, 22 N.Y.2d 579, 580, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968) (Keating, J., dissenting) (stating public duty doctrine "is premised upon a legal rule which long ago should have been abandoned, having lost any justification it might once have had."); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 136, 204 N.E.2d 635, 637, 265 N.Y.S.2d 595, 598 (1965) (Desmond, C.J., dissenting) ("[a]ny court created tort-immunity rule should be forthrightly abandoned when its injustice and its unreality are so evident as to produce exceptions, interpretations and inconsistencies galore"); 1A C. ANTIEU, *supra* note 11, at § 11.74 & n.1 (1986) ("[c]ourts have too often created a rule of social irresponsibility by ruling that cities and counties, which have tested, chosen, trained and sanctioned police personnel, are not liable for their torts within the scope of employment, employing the fiction that their duty was not to the persons killed or injured by police activity, but only to the general public."); see generally Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7 (critiquing public duty doctrine's application to fire inspections cases); Note, *Police Liability*, *supra* note 7 (criticizing public duty doctrine and suggesting alternative methods of determining police liability); Note, *Court of Claims Act*, *supra* note 11 (criticizing New York application of public duty doctrine); Note, *A Unified Approach to Tort Liability*, *supra* note 7 (critiquing Washington's application of public duty doctrine).

63. For a list of jurisdictions rejecting the public duty doctrine, see *supra* note 23 and accompanying text. For a discussion of those jurisdictions and commentators which have criticized the public duty doctrine, see *supra* notes 11 & 22 and accompanying text.

64. 555 P.2d 235 (Alaska 1976) (*superseded by* ALASKA STAT. § 09.65.070 (1977) as stated in *Wilson v. Anchorage*, 669 P.2d 569 (Alaska 1983)).

public duty doctrine.⁶⁵ In *Adams*, plaintiffs alleged that state fire officials inspected a hotel and thereafter negligently failed to take action upon a number of known fire hazards.⁶⁶ Relying upon the public duty doctrine in its defense,⁶⁷ the State of Alaska argued that any duty owed was to the public generally and thus was not actionable by the plaintiffs as individuals.⁶⁸

The Supreme Court of Alaska rejected the state's argument on two grounds.⁶⁹ First, the court found that the duty owed was "not one owed to the general public . . . [but was] a limited one, and its beneficiaries a limited class."⁷⁰ Second, specifically addressing the efficacy of the public duty doctrine, the court stated that it considered the public duty doctrine to be "in reality a form of sovereign immunity."⁷¹ Since sovereign immunity was abrogated by statute in Alaska, the *Adams* court stated that application of the public duty doctrine would reinstitute immunity against the clear mandate of the legislature.⁷²

Similarly, one month later, the Supreme Court of Wisconsin abrogated the public duty doctrine in *Coffey v. Milwaukee*.⁷³ The plaintiffs in *Coffey* alleged that the city had negligently inspected certain defective standpipes which were incapable of providing sufficient water to extinguish a conflagration in plaintiffs' building.⁷⁴ The city asserted in its

65. See *Leake v. Cain*, 720 P.2d 152, 158 (Colo. 1986).

66. 555 P.2d at 239. In *Adams*, the state had "undertaken to inspect the Gold Rush Hotel for fire safety." *Id.* at 238. The inspectors found several hazardous conditions and promised the manager a letter detailing the violations so that they could be corrected. *Id.* However, the letter detailing the violations was never sent and "little further action appears to have been taken by the state." *Id.* at 239. Some eight months later, the hotel caught fire killing five people and injuring many. *Id.* at 236, 238.

67. *Id.* at 241.

68. *Id.* In *Adams*, the court noted: "The state . . . raises an argument based upon its special public status. Its theory, and one traditionally recognized, is that an entity such as the state, which owes a duty to the public generally, does not owe an actionable duty to any individual." *Id.*

69. *Id.* Before rejecting the argument, however, the *Adams* court recognized that the theory was well respected in other states. *Id.* at n.16.

70. *Id.*

71. *Id.* The court characterized the public duty doctrine as "the duty to all, duty to no one doctrine." *Id.*

72. *Id.* The *Adams* court explained that:

[a]n application of the public duty doctrine here would result in finding no duty owed the plaintiffs or their decedents by the state, because, although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed.

Id. at 241-42 (footnote omitted). The court further inquired into the policy behind the public duty doctrine asking, "[w]hy should the establishment of duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant." *Id.* at 242.

73. 74 Wis. 2d 526, 247 N.W.2d 132 (1976).

74. *Id.* at 530, 247 N.W.2d at 134-35. Plaintiff Coffey asserted in his complaint that the city had breached a duty to him by negligently inspecting the fire

defense that the public duty doctrine relieved it of liability.⁷⁵

The *Coffey* court rejected the city's defense holding that the "public duty-special duty" distinction set up the same type of artificial distinction between "proprietary" and "governmental" functions⁷⁶ which had been discarded when the court abrogated the doctrine of sovereign immunity.⁷⁷ Rejecting the public duty doctrine, the court found it appropriate to determine the city's liability by employing a traditional negligence analysis.⁷⁸

The trend in this area has continued toward governmental liabil-

sprinkler standpipes in his building. *Id.* at 531, 247 N.W.2d at 135. The court noted that the municipal immunity defense had been abolished from tort law in Wisconsin, and thereafter addressed the city's assertion of the public duty doctrine in its defense. *Id.* at 535-36, 247 N.W.2d at 137.

75. *Id.* at 535, 247 N.W.2d at 137. Plaintiff Coffey's complaint asserted that the City of Milwaukee had been obliged to inspect at periodic intervals the standpipes in his building for safety purposes pursuant to state statute. *See id.* at 533-34, 247 N.W.2d at 135-36 (relying on Wis. STAT. § 101.14 (1973) (fire inspections and prevention)). The city contended that "the duties imposed on the building inspector by the applicable statutes with respect to fire safety inspections [were] clearly duties owed to the public in general and not to the specific plaintiff in this case." *Id.* at 535, 247 N.W.2d at 137. Therefore, the city argued, "there can be no liability on the part of a municipality for the breach of such a 'public duty.'" *Id.*

76. For a discussion of the "proprietary" and "governmental" functions of municipal governments, see *supra* note 20 and accompanying text.

77. *Coffey*, 74 Wis. 2d at 540, 247 N.W.2d at 139 (citing *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962) (Wisconsin Supreme Court abrogation of sovereign immunity)). The *Coffey* court granted plaintiffs a cause of action against the city for negligent inspection stating that "[a]ny duty owed to the public generally is a duty owed to individual members of the public. . . . Under the circumstances of this case, there is no distinction to be drawn between a 'public duty' and 'special duty.'" *Id.*

78. *Coffey*, 74 Wis. 2d at 540, 247 N.W.2d at 139. The *Coffey* court held the elements necessary to maintain a cause of action for negligence were "(1) [a] duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." *Id.* at 531, 247 N.W.2d at 135 (citations omitted).

The court further held that a governmental entity could incur a duty to exercise reasonable care once its building inspector undertook to inspect the building. *Id.* at 540 & n.2, 247 N.W.2d at 139 & n.2. The court based its decision upon the RESTATEMENT (SECOND) OF TORTS which states:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 324A (1965) ("Liability to Third Person for Negligent Performance of Undertaking")).

ity.⁷⁹ In 1979, three more states rejected the public duty doctrine.⁸⁰ In *Commercial Carrier Corp. v. Indian River County*,⁸¹ plaintiffs maintained a wrongful death action against a Florida county for failing to maintain a stop sign and pavement markings.⁸² The Supreme Court of Oregon in *Brennen v. City of Eugene*,⁸³ addressed the issue of "whether a municipality can be held liable in damages when its employee issues a taxicab license to an applicant who does not possess the minimum liability insurance required by city ordinance."⁸⁴ In *Wilson v. Nepstad*,⁸⁵ plaintiffs asserted that the City of Des Moines, Iowa had negligently breached statutory duties relating to building and fire-safety inspection.⁸⁶

In each case, the governmental entities asserted the public duty doctrine in their defense.⁸⁷ Similarly, all three jurisdictions rejected the public duty doctrine.⁸⁸ As in *Adams and Coffey*, the courts reasoned that

79. *Wilson v. Nepstad*, 282 N.W.2d 664, 667 (Iowa 1979) (trend is toward liability for failure to provide general policy or fire protection).

80. *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979) (plaintiff alleged county was liable in wrongful death action because county failed to maintain stop sign and pavement markings); *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979) (plaintiffs alleged city negligently breached building and fire inspection duties); *Brennen v. City of Eugene*, 285 Or. 401, 591 P.2d 719 (1979) (plaintiff alleged city negligent in issuing taxicab license to underinsured company).

81. 371 So. 2d 1010 (Fla. 1979).

82. *Id.* at 1013. In *Commercial Carrier*, petitioners, a trucking company and its insurance carrier, sought indemnity and contribution for the negligent failure of the county to maintain a stop sign and pavement markings at an intersection. *Id.* The plaintiffs alleged this failure resulted in a collision between petitioner's tractor-trailer truck and decedent's automobile. *Id.*

83. 285 Or. 401, 591 P.2d 719 (1979).

84. *Id.* at 403, 591 P.2d at 721. In *Brennen*, plaintiff alleged that the city was negligent in issuing a taxicab license to an underinsured company precluding him from collecting the full amount of damages awarded to him for injuries sustained in a collision. *Id.* at 404, 591 P.2d at 721-22. The Oregon Supreme Court found a municipal ordinance created a duty on the part of the city's licensing agent to use reasonable care in performing his function and to avoid creating a foreseeable risk of harm to others. *Id.* at 411, 591 P.2d at 725. Therefore, the city's licensing agent had a duty to ensure that the applicant for a taxicab license possessed the minimum of liability insurance required by law before issuing a license. *Id.*

85. 282 N.W.2d 664 (Iowa 1979).

86. *Id.* at 666. In *Wilson*, plaintiffs alleged that statutes and ordinances relating to building codes, occupancy permits, and fire regulations required the city to perform inspections and compel compliance. *Id.* Plaintiffs further asserted that the city breached these duties when the city negligently inspected the premises of an apartment building and issued a certificate warranting it safe for human habitation. *Id.* Five months after the inspection, a fire destroyed the building, killing several individuals who were residents or guests in the building. *Id.*

87. *Commercial Carrier*, 371 So. 2d at 1013; *Brennen*, 285 Or. at 408, 591 P.2d at 723-24; *Wilson*, 282 N.W.2d at 666.

88. See *Commercial Carrier*, 371 So. 2d at 1015; *Brennen*, 285 Or. at 411, 591 P.2d at 725; *Wilson*, 282 N.W.2d at 668-69. It should be noted, however, that the *Commercial Carrier*, *Wilson* and *Brennen* decisions abrogating the public duty doc-

the public duty doctrine reimposed sovereign immunity contravening the intent of their respective state legislatures.⁸⁹

trine are distinguishable from cases in which nonfeasance is alleged. *See Brennen*, 285 Or. at 409, 591 P.2d at 724. Police nonfeasance cases deal with a failure of public officers to act at all, which "involve considerations quite different from [those in cases such as *Commercial Carrier*, *Wilson* and *Brennen*] where an act is alleged to have been performed and performed negligently." *Id.* Where an act is alleged to have been performed negligently, as a general rule, the *Brennen* court held that "one is held to a higher standard of care when he affirmatively acts than when he fails to act." *Id.*

Thus, the question arises whether these jurisdictions would similarly dispose of the public duty doctrine defense to governmental culpability in the police nonfeasance context. One such state court confronted with this issue has completely abrogated the public duty doctrine in both contexts. *See City of Kotzebue v. McLean*, 702 P.2d 1309, 1311 (Alaska 1985) (relying on abrogation of public duty doctrine in *Adams v. State*).

In *City of Kotzebue*, the court found the city liable for breaching a duty to protect a stabbing victim after the perpetrator called the police prior to the attack, identified himself, disclosed his location, and informed police he was going to kill a friend. 702 P.2d at 1310. The court found that the police purposely delayed responding to the call. *Id.* The court refused to recognize the public duty doctrine as a defense stating it had rejected the doctrine in the negligent public inspection case of *Adams v. State*, and declined to resurrect it. *Id.* at 1311.

For a further discussion of the *Adams* case, see *supra* notes 66-72 and accompanying text. For a further discussion of the distinction in the application of the public duty doctrine in cases of police nonfeasance as opposed to police negligence, see *supra* note 9.

89. *See Commercial Carrier*, 371 So. 2d at 1015; *Brennen*, 285 Or. at 409-10, 591 P.2d at 724; *Wilson*, 282 N.W.2d at 668-69. The Supreme Court of New Mexico discarded the public duty doctrine for similar reasons in *Schear v. Board of County Commissioners*, 101 N.M. 671, 687 P.2d 728 (1984). The plaintiff in *Shear* was brutally tortured and raped due to the alleged failure of the sheriff's agents to respond to a call for assistance. *Id.* at 672, 687 P.2d at 729. The court of appeals upheld the trial court's application of the public duty doctrine, dismissing *Shear's* complaint for failure to state a claim upon which relief could be granted. *Id.* at 672, 687 P.2d at 729. The Supreme Court of New Mexico granted *certiorari* and reversed the court of appeal's decision. *Id.* The court held that the legislative abrogation of the doctrine of sovereign immunity had likewise abolished the public duty doctrine in that jurisdiction. *See id.* at 673-74, 687 P.2d at 730-32.

The *Shear* court noted it had abolished sovereign immunity in an earlier case. *Id.* at 674-75, 687 P.2d at 731 (citing *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975)). The court further observed, however, that while the legislature had enacted a statute reestablishing sovereign immunity as to certain governmental employees, it had not "exclude[d] peace officers from liability while performing 'any public duty.'" 101 N.M. at 674, 687 P.2d at 731 (construing N.M. STAT. ANN. §§ 41-4-2,-12 (1977)). Therefore, the court concluded that the legislature had intended police agencies to be subject to the same standard of liability as citizens. *See* 101 N.M. at 677, 687 P.2d at 734.

Thereafter, relying on the same rationale, Wyoming abrogated the doctrine in *DeWald v. State*, 719 P.2d 643 (Wyo. 1986). In *DeWald*, the decedent's estate brought an action against the state for his death caused by a drunk driving suspect being pursued by police. *Id.* at 645. The driver ignored repeated attempts by highway patrol officers to stop him through use of their red lights and sirens, and a high speed pursuit ensued. *Id.* The pursuit ended when the drunken

In *Ryan v. State*,⁹⁰ Arizona overruled its prior case law and joined the trend of states abrogating the public duty doctrine.⁹¹ In *Ryan*, plaintiff brought an action for the negligent state supervision of an escaped inmate who robbed and shot the plaintiff.⁹² The basis for the court's decision was that the public duty doctrine was merely a replacement for the previously rejected doctrine of sovereign immunity in a "bright new word-package."⁹³

The *Ryan* court also addressed the government's contentions that discarding the public duty doctrine would cause the public treasury to become insolvent, or that "the government would come to a standstill because its agents will be afraid to act."⁹⁴ Upon examination, the court promptly rejected such arguments.⁹⁵ Purchasing insurance, the court stated, would adequately protect against the spectre of governmental insolvency from adverse negligence judgments.⁹⁶ The court further noted that police officers had continued performing their duties long

driver struck a vehicle stopped at a red light, killing plaintiff's decedent instantaneously. *Id.*

Following the reasoning of the aforementioned cases, the court found that the legislature's abolition of sovereign immunity made the public duty doctrine no longer viable in Wyoming. *Id.* at 653. In *DeWald*, the court abolished the public duty doctrine stating it "was in essence a form of sovereign immunity and viable when sovereign immunity was the rule. The legislature has abolished sovereign immunity in this area. The public duty [doctrine], if it ever was recognized in Wyoming, is no longer viable." *Id.*

90. 134 Ariz. 308, 656 P.2d 597 (1982).

91. *Id.* at 310, 656 P.2d at 599. In rejecting the public duty doctrine in *Ryan*, the Arizona Supreme Court expressly overruled one of the most frequently cited cases supporting the public duty doctrine, *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969).

92. *Ryan*, 134 Ariz. at 308, 656 P.2d at 597. In *Ryan*, a seventeen-year-old inmate with a long history of criminal behavior and three previous escapes absconded from the Arizona Youth Center, allegedly by reason of grossly negligent supervision. *Id.* The youth subsequently engaged in the robbery of a convenience market and shot the plaintiff point-blank with a sawed-off shotgun. *Id.*

93. *Id.* at 309, 656 P.2d at 598.

94. *Id.*

95. *Id.* at 309, 656 P.2d at 598. The *Ryan* court noted that appellee's predictions of public treasury insolvency and governmental fear to act in the face of liability had arisen before in regard to the abrogation of sovereign immunity. *Id.* The court found appellee's contentions meritless in view of the fact that "Arizona [had] survived" insolvency and that "law enforcement officers continued to perform their duties long after sovereign immunity's demise." *Id.* at 309, 656 P.2d at 598-99. The court further found that in addition to purchasing liability insurance, the preservation of statutory immunity for state officers' discretionary acts "done 'in good faith without wanton disregard of [their] statutory duties'" provided continued protection against the "horribles pictured by appellee." *Id.* at 310, 656 P.2d at 599.

96. *Id.* at 310, 656 P.2d at 599. The court stated that the legislature had clearly contemplated that the state would be liable for the negligent acts of its agents. *Id.* Therefore, the court "assumed" the legislature would already have purchased liability insurance, shielding the state from serious financial loss. *Id.*

since a 1947 decision affirming a judgment against a state police officer for negligence.⁹⁷ Therefore, the concern that liability would frighten individuals to act in their official capacities was held to be unfounded in reality.⁹⁸

In *Leake v. Cain*,⁹⁹ Colorado became the most recent state to abrogate the public duty doctrine. In *Leake*, two minor brothers attended a large outdoor teenage party in Commerce City, Colorado.¹⁰⁰ The eldest, Ralph Crowe, drank a substantial quantity of alcohol over the course of the evening.¹⁰¹ When he became disruptive, Ralph Crowe was handcuffed and taken into custody by Commerce City police officers attempting to disperse the teenagers.¹⁰² The police, however, later released Ralph Crowe to the custody of his younger brother.¹⁰³ Later that evening, Ralph Crowe struck several individuals with his car, killing two.¹⁰⁴ Respondents thereafter filed a wrongful death suit against the five Commerce City police officers responding to the party, and Commerce City (petitioners).¹⁰⁵

97. *Id.* at 309, 656 P.2d at 599 (citing *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947) (affirming judgment against highway patrol officer for negligently striking plaintiff's vehicle while responding to a call)). The *Ryan* court further noted that a state statute provided substantial protection to state officers, agents, and employees from personal liability for discretionary acts done in "good faith without wanton disregard of [their] statutory duties." *Id.* at 310, 656 P.2d at 599 (citing ARIZ. REV. STAT. ANN. § 41-621(G) (1985)).

98. *See Ryan*, 134 Ariz. at 309, 656 P.2d at 599.

99. 720 P.2d 152 (Colo. 1986).

100. *Id.* at 153. The size of the party was estimated at "between thirty and sixty youths." *Id.* at 153 n.1. Both brothers were minors when these events transpired. *See id.* at 153-54. Ralph Crowe was eighteen years of age at the time of the accident. *Id.* at 153. His brother Eddie Crowe was seventeen years of age. *Id.* at 154.

101. *Id.* at 153 & n.2. The facts of *Leake* indicate Ralph Crowe consumed eight cups of beer and three cups of alcoholic punch. *Id.* at 153. Each cup held approximately four to five ounces of liquid. *Id.* at 153 n.2.

102. *Id.* at 154. The Commerce City police officers were dispatched to disperse the party in response to a neighbor's complaint. *Id.* at 153-54.

103. *Id.* at 154. Eddie Crowe requested that his brother be released to him. *Id.* He promised the officers he would drive Ralph home. *Id.* After observing that Eddie Crowe appeared sober and had a valid driver's license, the officers agreed to permit Ralph Crowe to leave the party with his brother. *Id.*

However, rather than proceeding home, the brothers intended on returning to the relocated party. *See id.* After stopping to purchase some cookies at a convenience store, Ralph Crowe assumed control of the vehicle. *Id.*

104. *Id.* Ralph Crowe's blood alcohol content was .20 grams per one hundred milliliters of blood, "well in excess of the legal presumption of intoxication in Colorado." *Id.* A person is presumed legally intoxicated under Colorado law if his blood alcohol content is "0.10 or more grams of alcohol per one hundred milliliters of blood." *Id.* at 154 n.3 (citing 17 COLO. REV. STAT. § 42-4-1202(1)(a) (1984)).

105. 720 P.2d at 154. Respondents' complaint alleged that the officers: (1) had reason to believe that Ralph Crowe was intoxicated at the time he was detained and were therefore negligent in failing to take him into custody; (2) were negligent in releasing Ralph Crowe to his younger brother; (3) should

Presented with the issue of whether the Commerce City Police Department could invoke the public duty doctrine defense,¹⁰⁶ the court chose to join the trend of jurisdictions abrogating the public duty doctrine and applied traditional tort analysis to the case.¹⁰⁷ The *Leake* court criticized the public duty doctrine for its "harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of their tortfeasor."¹⁰⁸ The court further found that application of the public duty doctrine would be inappropriate where the doctrine of sovereign immunity had been abrogated by case law or by the legislature.¹⁰⁹

have foreseen that Ralph Crowe would drive an automobile in an intoxicated condition, and that injury to the public was a foreseeable consequence of their failure to arrest Ralph Crowe. *Id.*

106. 720 P.2d at 155. After a hearing, the trial court, applying the public duty doctrine, granted petitioners' motion for summary judgment. *Id.* The petitioners contended that "the duty of the officers to enforce the law was a public duty, and that the officers' negligence, if any, was not actionable because they did not owe a special duty to the respondents' decedents." *Id.* at 154. Therefore, the trial court concluded that the Commerce City police officers' exercise of discretion in releasing Ralph Crowe had not created a special duty to respondents' decedents. *Id.*

However, the court of appeals reversed, holding that "(1) the decision . . . to release Ralph Crowe was not a discretionary act and (2) denying immunity would not unduly interfere with the governmental function." *Id.* at 154-55. The court of appeals "inexplicably" did not address whether the trial court appropriately relied upon the public duty doctrine. *Id.* at 157 n.7. Thereafter, the Commerce City petitioners were granted *certiorari* by the Supreme Court of Colorado, who reversed and remanded to the court of appeals with directions to reinstate the trial court's order granting summary judgment. *Id.* at 153.

107. *Id.* at 159-60 (citations omitted). For a complete list of jurisdictions rejecting the public duty doctrine, see *supra* note 12.

108. 720 P.2d at 159 (citing *Adams*, 555 P.2d at 235; *Commercial Carrier*, 371 So. 2d at 1010).

In *Adams*, the Supreme Court of Alaska criticized the public duty doctrine because it would "result in finding no duty" because of the public status of the tortfeasor, even though "they were foreseeable victims and a private defendant would have owed such a duty." *Adams*, 555 P.2d at 241-42.

Similarly, in *Commercial Carrier*, the Florida Supreme Court criticized the harsh effects of the public duty doctrine stating:

[W]e believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state . . . where the duty breached is said to be owed to the public at large but not to any particular person. . . . By less kind commentators, [the public duty doctrine] has been characterized as a theory which results in a duty to none where there is a duty to all.

Commercial Carrier, 371 So. 2d at 1015.

109. *Leake*, 720 P.2d at 159-60 (citations omitted). The *Leake* court's reasoning in this regard is similar to that of other courts. For a discussion of other decisions which have held that the public duty doctrine is not appropriate where the doctrine of sovereign immunity has been abrogated, see *supra* notes 22-23 and accompanying text. The rationale behind these decisions is that the concept of sovereign immunity and the public duty doctrine are so closely related that continued application of the public duty doctrine after sovereign immunity's elimination would be contrary to the policy behind the abolition of sovereign

The *Leake* court rejected the argument that the government would be severely interfered with or suffer an incapacitating financial impact if the public duty doctrine was abolished.¹¹⁰ After noting that these same policy rationales had been found meritless when used to justify sovereign immunity, the court reasoned they should likewise be rejected as justifications for the public duty doctrine.¹¹¹ Finally, the *Leake* court concluded that “the most persuasive reason for the abandonment of the public duty doctrine was that it created needless confusion” in the law and resulted in uneven and inadequate results.¹¹²

immunity. *See, e.g., Leake*, 720 P.2d at 160 (effect of public duty doctrine is identical to that of sovereign immunity).

110. *Leake*, 720 P.2d at 159. The court stated that these rationales were asserted to justify sovereign immunity. *Id.*

111. *Id.* at 159 (citing *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P.2d 451 (1983) (Utter, J., concurring)).

112. *Id.* (citing *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982); *J & B Dev. Co., v. King County*, 100 Wash. 2d 229, 669 P.2d 468, 474 (1983) (Utter, J., concurring)); *see also* Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 341 (“[T]he public duty doctrine . . . is riddled with numerous and unpredictable exceptions [which] serve only to thwart the equitable purposes underlying the abrogation of sovereign immunity.”); Note, *Court of Claims Act*, *supra* note 11, at 209 (cases applying public duty doctrine in New York “have frustrated this area of the law and have rendered prospective liability unpredictable”).

The *Leake* court noted that the burdens of establishing a duty using “conventional tort principles, such as foreseeability” and proof of proximate cause provided sufficient protection against excessive governmental liability. *Leake*, 720 P.2d at 160. Accordingly, the court rejected the public duty doctrine and determined the case utilizing conventional tort principles. *Id.* The court then turned to an analysis of whether the Commerce City police officers owed a duty to respondents’ decedents. *Id.* The court held a duty to avoid harm exists when “a person should reasonably foresee that his act, or failure to act, will involve an unreasonable risk of harm.” *Id.* (citations omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 321 (1965). The court noted, however, that absent a special relation between the actor and the victim there is no duty to prevent a third person from harming another. 720 P.2d at 160 (citing RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

The court found that although the officers had a duty to prevent Ralph Crowe from harming others while he was in police custody, the officers had discharged their duty by restraining Crowe until he calmed down. 720 P.2d at 161 (citing RESTATEMENT (SECOND) OF TORTS § 319 (1965) (duty of those in charge of person with dangerous propensities)). Thus, the *Leake* court concluded that the officers’ duty “began and ended at the party” and therefore was not owed to respondents’ decedents. 720 P.2d at 161.

Additionally, the Colorado Supreme Court addressed the issue of qualified immunity. *Id.* at 163. Despite the abrogation of absolute sovereign immunity, the court noted that “[a] public official performing discretionary acts within the scope of his office enjoys qualified immunity. He is protected against civil liability if his conduct is not willful, malicious or intended to cause harm.” *Id.* (citations omitted). The *Leake* court concluded that the Commerce City police officers were protected against liability by official immunity because the decision to take Ralph Crowe into custody was a discretionary function protected by official immunity. 720 P.2d at 164.

III. ANALYSIS

It is submitted that the drastic social and economic changes that have taken place since the public duty doctrine's birth in the nineteenth century warrant that it follow the doctrine of sovereign immunity into the "dustheap of history."¹¹³ Many jurisdictions abrogated the doctrine of sovereign immunity because of the degree of injustice it caused.¹¹⁴ Yet despite their acknowledgment of the inherent problems of sovereign immunity, and subsequent abandonment of the doctrine, many jurisdictions continue to impose the functional equivalent of sovereign immunity by recognition and application of the public duty doctrine.¹¹⁵ Although the public duty doctrine differs from sovereign immunity theoretically, the doctrine continues to place the burden of the injury entirely upon the innocent victim.¹¹⁶

As previously noted, proponents of the public duty doctrine cite two principle justifications in defense of the doctrine's continued viability.

113. See *Massengill v. Yuma County*, 104 Ariz. 518, 521, 456 P.2d 376, 379 (1969) (en banc) ("[T]his Court in the most unquestionable terms relegated that archaic doctrine [of sovereign immunity] to the dustheap of history.").

114. See *Evans v. Board of County Comm'rs*, 174 Colo. 97, 482 P.2d 968 (1971) (prospectively overruling doctrine of sovereign immunity as defense to tort claims against counties, school districts, and state).

In 1960, the New Jersey Supreme Court stated:

It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, "the King can do no wrong," should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it can be borne without hardship upon any individual, and where it justly belongs.

McAndrew v. Mulachuk, 33 N.J. 172, 191, 162 A.2d 820, 830-31 (1960) (action by minor and parents against municipality and reserve police officer for negligent shooting in course of officer's duty) (quoting *Barker v. City of Santa Fe*, 47 N.M. 85, 136 P.2d 480, 482 (1943)).

115. See, e.g., *Ryan*, 134 Ariz. at 309, 656 P.2d at 598 (public duty doctrine is merely sovereign immunity "in a bright new word-package"); *Leake*, 720 P.2d at 160 ("[W]hether or not the public duty [doctrine] is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity.").

116. See, e.g., Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 341 ("[T]he [public duty] doctrine remains a court's most potent weapon in conserving public funds by imposing the cost of government negligence upon a few hapless individuals."); Note, *Police Liability*, *supra* note 7, at 834 ("These mistakes [of police negligence] should not be borne solely by the unfortunate few upon whom the injuries fortuitously fall."); Note, *Court of Claims Act*, *supra* note 7, at 201 & n.68 ("The limitation on municipal liability imposed by [the public duty doctrine] has the unfortunate side effect of leaving innocent victims without redress."); Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 541 ("If government agents are negligent, the innocent victims of their negligence should not have to bear the cost.").

ity.¹¹⁷ The first justification is that abrogation of the public duty doctrine will unduly interfere with governmental operations.¹¹⁸ Courts relying on this justification have feared that expanding liability would deter individuals from serving as public officers,¹¹⁹ and that those serving in public office would avoid undertaking activities which might expose them to liability.¹²⁰

It is submitted, however, that imposing liability on police merely provides an incentive for law enforcement officers to perform their pre-existing job responsibilities adequately.¹²¹ Additionally, it is submitted that even if the public duty doctrine is abrogated, police officers are sufficiently protected from meritless suits by the conventional tort analysis which would supplant the public duty doctrine.¹²²

117. For a discussion of policy justifications for courts' application of the public duty doctrine, see *supra* note 18 & *infra* notes 118-120.

118. See, e.g., *Adams*, 555 P.2d at 242 (stating concern of public duty doctrine is that "tort suits must not hinder the state in its process of governing"); *Leake*, 720 P.2d at 159 (stating interference with governmental operations is asserted in defense of public duty doctrine by its proponents); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 291, 669 P.2d 451, 461 (1983) (Utter, J., concurring) (rationale defending public duty doctrine is "need to prevent hindrance of the governing process").

119. See *Miller v. Ouray Elec. Light & Power Co.*, 18 Colo. App. 131, 139, 70 P. 447, 449 (1902) (citation omitted) ("[N]o sane man would assume the position [of county commissioner] with such a liability attached.'").

120. See, e.g., *Ryan*, 134 Ariz. at 309, 656 P.2d at 598 ("[w]e are . . . told . . . government will come to a standstill because its agents will be afraid to act"); *Stigler v. City of Chicago*, 48 Ill. App. 2d 20, 268 N.E.2d 26 (1971) (expressing concern of court that expanding liability would deter municipalities from enacting ordinances designed to protect the general public); *Dufrene v. Guarino*, 343 So. 2d 1097 (La. Ct. App.), *writ denied*, 343 So. 2d 1068 (1977) (liability for damages due to failure to enforce regulations might compel government to repeal regulations depriving public of their benefits); *Dinsky v. Town of Framington*, 386 Mass. 801, 438 N.E.2d 51 (1982) (abrogation of public duty doctrine would cause city tremendous exposure to liability and dissuade municipalities from enacting regulations designed for public's protection and welfare); see also *Stone & Rinker, Jr., Governmental Liability for Negligent Inspections*, 57 TUL. L. REV. 328, 330-31 & n.15 (1982) (stating fear that municipalities will be deterred from undertaking inspection is a concern offered in support of public duty doctrine); Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 341; Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 541.

121. See Note, *Police Liability*, *supra* note 7, at 833 & n.54.

122. See, e.g., *City of Kotzebue v. McLean*, 702 P.2d 1309, 1313 (Alaska 1985) (protection of state from becoming insurer of all private activity and preserving ability to govern is better protected by traditional tort concept of duty); *Leake*, 720 P.2d at 160 (benefits of public duty doctrine are more properly realized by applying traditional negligence law); *Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1979) (following abrogation of public duty doctrine "there is no liability for the acts of an officer or employee unless there is negligence"); see also Note, *Police Liability*, *supra* note 7, at 834-35 & n.65 ("[u]nder any negligence scheme, plaintiffs would still be required to establish breach of duty and causation"); Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 542 (stating that common law principle of foreseeability would work well in place of public duty doctrine).

In conventional tort analysis the plaintiff must still demonstrate a duty owed, a breach of that duty, and establish causation.¹²³ The extent of a duty owed by police to an individual is a question for the court to decide under policy considerations.¹²⁴ The general rule of negligence is that where a person should reasonably foresee that his or her act, or failure to act, involves an unreasonable risk of harm to another, there is a duty to avoid such harm.¹²⁵ In cases of police nonfeasance, however, there is "no duty to prevent a third person from harming another, absent a special relationship between the actor and the victim."¹²⁶ It is submitted that the "special relationship" standard of traditional negli-

123. *Ryan*, 134 Ariz. at 310, 656 P.2d at 599; *Schear*, 101 N.M. at 676, 687 P.2d at 733; *Cummins v. Firestone Tire & Rubber Co.*, 344 Pa. Super. 9, 495 A.2d 963 (1985); see also W. KEETON, *supra* note 6, § 30, at 164-65.

In *Leake*, the court stated:

The fear of excessive governmental liability is largely baseless in view of the fact that a plaintiff . . . must establish the existence of a duty using conventional tort principles, such as foreseeability, in the same manner as if the defendant were a private entity. . . . Another hurdle the plaintiff must surmount . . . to recover is proof of proximate cause. The traditional burdens of proof tied to tort law adequately limit governmental liability without resort to the artificial distinctions engendered by the public duty [doctrine].

720 P.2d at 160 (citing *City of Kotzebue v. McLean*, 702 P.2d 1309 (Alaska 1985)).

Similarly, the *Schear* court noted that "[s]trict liability for failure to adequately perform a duty is not imposed by this opinion." *Schear*, 101 N.M. at 676, 686 P.2d at 733. "Liability will not attach until *all* the elements of negligence have been proved, including duty, breach of duty, and proximate cause." *Id.* (emphasis added).

124. *Brennen*, 285 Or. at 406, 591 P.2d at 722. The *Brennen* court observed that duty was "simply 'an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" *Id.* (citation omitted); see also W. KEETON, *supra* note 6, § 53, at 356-57. "A duty," the authors state,

is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk. What the defendant must do, or not do, is a question of the standard of conduct required to satisfy the duty.

Id.

125. *Adams*, 555 P.2d at 240 n.10 (citing *Transamerica Title Ins. Co. v. Ramsey*, 507 P.2d 492 (Alaska 1973); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928)); *Leake*, 720 P.2d at 160 (citing *Metropolitan Gas Repair Serv. Inc. v. Kulick*, 621 P.2d 313 (Colo. 1981); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971)); *Griesenbeck v. Walker*, 199 N.J. Super. 132, 488 A.2d 1038, *cert. denied*, 101 N.J. 264, 501 A.2d 932 (1985); *Commonwealth of Pa. Dep't of Transp. v. Phillips*, 87 Pa. Commw. 504, 488 A.2d 77 (1985); *RESTATEMENT (SECOND) OF TORTS* § 281 (1977).

126. See, e.g., *Leake*, 720 P.2d at 160 (citing *RESTATEMENT (SECOND) OF TORTS* § 315 (1965)).

For a discussion of "special relationships" between police and individuals in the context of the public duty doctrine, see *supra* notes 8 & 38-60 and accompanying text.

gence law provides adequate protection for police officers by making liability a question of whether police *assumed* a duty to the plaintiff,¹²⁷ rather than solely upon their status as public officers.¹²⁸ Further, even if the plaintiff can establish a duty, since interaction between the police and crime victims is commonly highly attenuated, plaintiffs would have a difficult burden substantiating that police nonfeasance was the proximate cause of their alleged damages.¹²⁹

It is further submitted that many legislatures have not shared the concern that individuals will be deterred from seeking public office or undertaking governmental activities. In those jurisdictions where sovereign immunity has been abolished,¹³⁰ the legislatures have manifested their intent to have public entities treated like private individuals with regard to tort claims.¹³¹ Furthermore, individuals such as doctors, lawyers, and entities such as partnerships and corporations, have long been

127. See *Melendez v. Philadelphia*, 320 Pa. Super. 59, 65, 466 A.2d 1060, 1064 (1983). The Superior Court of Pennsylvania, for example, stated that in order to demonstrate a "special relationship" between the plaintiff and police, a plaintiff must demonstrate that police were: "1) aware of the *individual's* particular situation or unique status, 2) had knowledge of the potential for the particular harm which the *individual* suffered, and 3) voluntarily assumed, in light of that knowledge, to protect the *individual* from the precise harm which was occasioned." *Id.* (emphasis in original).

128. For a discussion of criticism of the public duty doctrine for its emphasis on the public status of the tortfeasor in denying a cause of action, see *supra* note 12 and accompanying text.

129. See *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379 (1982). In *Shore*, the complaint alleged that a township police officer had negligently released a drunken driver, who subsequently struck and killed plaintiff's decedent later that day. *Id.* at 1380. Addressing the issue of causation the court held that the special duty required to maintain an action could not be established merely by the fact that someone with whom the official had prior contact subsequently injured the plaintiff or plaintiff's decedent. *Id.* at 1383. Therefore, the court dismissed the action under the public duty doctrine due to the absence of proof of a special relationship owed to the plaintiff's decedent. See *id.* at 1383-84; see also *Evers v. Westerberg*, 38 A.D. 2d 751, 329 N.Y.S.2d 615 (1972) (reversing jury verdict against police for failing to arrest drunken driver who subsequently caused accident citing insufficient evidence of causation as principle grounds), *aff'd mem.*, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973); Note, *Police Liability*, *supra* note 7, at 835-36 & nn.66-70 ("cases litigated to date suggest that causation in particular would constitute a major hurdle").

130. For a discussion of jurisdictions abrogating the doctrine of sovereign immunity, see *supra* notes 22-23 and accompanying text.

131. See *Leake*, 720 P.2d at 159. A foremost policy consideration of courts abrogating the public duty doctrine is the legislature's intent to have the state treated as a private individual for purposes of determining liability. See, e.g., *Adams*, 555 P.2d at 241-42; *Ryan*, 134 Ariz. at 310, 656 P.2d at 599; *Leake*, 720 P.2d at 160; *Commercial Carrier*, 371 So. 2d at 1015; *Wilson*, 282 N.W.2d at 671; *Brennen*, 285 Or. at 411, 591 P.2d at 725; see also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.06, at 458-59 (1958) ("Surely when a court construes away such an unequivocal statutory provision [abrogating sovereign immunity], the judicial responsibility for governmental responsibility is very grave indeed."). For further discussion of state statutes' effects upon abrogation of the public duty doctrine, see *supra* notes 22-23, and accompanying text.

held liable for the tortious conduct of their employees under the doctrine of *respondeat superior*.¹³² Yet medical, business and law schools have not become extinct, nor ceased to find willing applicants due to a fear of liability. Instead, it is submitted that emphasis should be, and is, correctly placed on *avoiding* liability by hiring employees more carefully, training public officers more thoroughly, and investigating possible criminal activity more completely.¹³³

Furthermore, the concern that public entities will be unable to function absent immunity has not proven to be historically accurate where imposition of liability has been allowed for other governmental activities.¹³⁴ For example, as the *Adams* court noted, Alaska has not stopped designing or maintaining highways even though the court allowed suits against the state for negligent design or maintenance of highways.¹³⁵

The second and most basic rationale for the public duty doctrine's application is simply preservation of municipal funds.¹³⁶ While some

132. See, e.g., *In re Mifflin Chem. Corp.*, 123 F.2d 311 (3d Cir.), cert. denied, 315 U.S. 815 (1941) (under Pennsylvania law responsibility of employer for acts of agent is imposed under general rule of *respondeat superior*); *Poutre v. Saunders*, 19 Wash. 2d 561, 143 P.2d 554 (1943) (holding *respondeat superior* is common law duty of every person to conduct affairs so as not to injure another, whether or not in managing such affairs he or she employs servants or agents); see generally W. KEETON, *supra* note 6, § 70, at 501-03 (discussing master's liability for servant's torts).

133. See THE TRAFFIC INSTITUTE, *CIVIL LIABILITY AND THE POLICE* 56 (1982).

The authors of the treatise state:

Once access to the legal system . . . is obtained, the officer or administrator is usually put to the burden of defending his conduct or practices. If the police personnel involved have performed their duties and responsibilities in accordance with the legal precepts which are applicable to a given situation, the probability of success within the legal system is practically assured.

. . . .

The key to success in avoiding civil liability is training, guidance and discipline. These are the responsibilities of the police administrator and obligations on the part of the subordinates.

Id.

134. See, e.g., *Ryan*, 134 Ariz. at 309, 656 P.2d at 598. Addressing defendant's contention that the abrogation of the public duty doctrine would make government "come to a standstill" due to fear of liability, the *Ryan* court posited that the same dire predictions were made before the court rejected the sovereign immunity doctrine, yet Arizona survived. *Id.* The court further noted that subsequent to sovereign immunity's demise "law enforcement officers continue to perform their duties." *Id.*

135. *Adams*, 555 P.2d at 243-44. The court stated that the state did not terminate highway design and maintenance despite the "greater risk of liability in that area." *Id.* at 244.

136. See, e.g., *Massengill v. Yuma County*, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969) (en banc) ("The extent of potential liability to which [abrogation of the public duty doctrine] could lead is staggering."); see also *Stone & Rinker*, *supra* note 120 at 328, 330 & n.14 (1982) ("The threat of fiscal disaster [is an] additional concern[] offered to justify governmental immunity [under the public duty doctrine]"); Note, *State Tort Liability for Negligent Fire Inspection*, *supra*

courts have openly confessed their fear of burdensome liability as a rationale for denying recovery,¹³⁷ a majority of courts that apply the public duty doctrine cloak their fear of excessive liability by consistently applying the public duty doctrine, and merely concluding no duty was owed the plaintiffs.¹³⁸

It is submitted, however, that this concern is unfounded and sophistic upon analysis. Thus far, no state government or municipality has become insolvent due to an adverse common law tort judgment.¹³⁹ To the contrary, an economic analysis suggests public social welfare and governmental efficiency can be maximized by the encouragement of governmental amenability to tort actions.¹⁴⁰ Moreover, why should the

note 7, at 344-49 (discussing the "myth of the crippling judgment" against governmental entities).

137. See, e.g., *Dufrene v. Guarino*, 343 So. 2d 1097, 1100 (La. Ct. App. 1977) ("[t]he agencies rightfully point to the immeasurable and inevitably enormous impact on the public if all agencies are held liable"), *cert. denied*, 343 So. 2d 1069 (1977); *Riss v. City of New York*, 22 N.Y.2d 579, 582, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 898 (1968) ("Before such extension of [financial] responsibilities should be dictated by the indirect imposition of tort liabilities, there should be a legislative determination that that should be the scope of public responsibility.") (citations omitted).

138. See *Stone & Rinker*, *supra* note 120, at 328, 341 & n.54 (1982) ("The public duty doctrine has often been used by courts primarily to disguise the actual reason for refusing to grant relief against the government—the fear of excessive liability . . ."). Courts applying the public duty doctrine typically do not include policy rationales in their decisions, but simply deny recovery on the basis that no duty was owed the individual. See *id.* at 322; *cf. Williams v. State*, 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137 (1983) (highway patrol officer had no duty to investigate accident and preserve evidence for civil litigation under public duty doctrine); *Sestito v. Groton*, 178 Conn. 520, 423 A.2d 165 (1979) (inquiry limited as to whether police officer who witnessed but failed to stop public disturbance had created special duty to plaintiff's decedent); *Namauu v. Honolulu*, 62 Haw. 358, 614 P.2d 943 (1980) (police department had no duty to individuals to apprehend escaped mental patient); *Huey v. Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1968) (police had no duty to protect individual members of racial minority where not informed of danger); *Hendrix v. Topeka*, 231 Kan. 113, 643 P.2d 129 (1982) (police officer assumed no duty to individual removed from mental hospital); *Frankfort Variety, Inc. v. Frankfort*, 552 S.W.2d 653 (Ky. 1977) (city had no duty to individuals for fire loss under public duty doctrine); *Hage v. Stade*, 304 N.W.2d 283 (1981) (state had no knowledge of dangerous conditions that would create duty to individual plaintiffs); *Melendez v. Philadelphia*, 320 Pa. Super. 59, 466 A.2d 1060 (1983) (court found no evidence that police had assumed duty of protection to shooting victim during racial incident).

For a discussion of the special relationship exception to the public duty doctrine, see *supra* notes 37-60 and accompanying text.

139. Letter from Sean F. Mooney, Senior Vice President, Insurance Information Institute to John McMillan (Feb. 26, 1987). According to the most recent information available to the Insurance Information Institute "no city has actually gone bankrupt" due to adverse tort liability judgment. *Id.* However, the Institute cautions that municipalities have faced situations where the initial judgments were higher than the available financial resources. *Id.*

140. Note, *Police Liability*, *supra* note 7, at 835. It has been suggested that the economic and social benefits created by the recognition of police liability provide a "cogent argument" for discarding the public duty doctrine. *Id.*; see also

government be treated any differently with regard to liability than an ordinary citizen?¹⁴¹ If a governmental entity is so crippled by adverse judgments that it borders on insolvency then, as a private individual or entity, it is submitted that the government should either modify institutional practices,¹⁴² or replace those in positions of authority with individuals who can perform satisfactorily.¹⁴³ The overwhelming number of police agencies that perform their duties non-negligently demonstrate that reasonable police protection is not an unrealistic expectation.¹⁴⁴

The government can further protect its resources by carrying liability insurance,¹⁴⁵ or by imposing reasonable statutory limits on the size

Note, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977) (presenting extensive economic model suggesting governmental efficiency is maximized by amenability to tort actions).

141. See *Adams*, 555 P.2d at 242; *Wilson*, 282 N.W.2d at 668. Since a private individual's ability to pay a judgment is considered irrelevant for purposes of determining liability, a government's ability to pay should likewise have no bearing. See *Stone & Rinker*, *supra* note 120, at 541 & n.56 (the ability of government to pay should have no bearing on tort liability).

142. See *Jaffe, Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 213-18 (1963) (discussing modification of institutional practices to reduce incidence of actionable police negligence); Note, *Police Liability*, *supra* note 7, at 823 (discussing evidence that institutional reforms effect significant improvements in crime prevention).

143. See THE TRAFFIC INSTITUTE, CIVIL LIABILITY AND THE POLICE 30 (1982). The first responsibility of an effective police administrator is ensuring that the hiring process is adequate to screen out applicants who are not qualified to perform as police officers. *Id.* The administrator is further obliged "to ensure that all employees who are subsequently determined to be incompetent or otherwise unfit as officers are removed or brought in line with department policy." *Id.*

144. See Americans for Effective Law Enforcement, *Lawsuits Against Police Skyrocket*, Issue 7 (1980). For example, a study conducted by Americans for Effective Law Enforcement predicted a total of 26,000 lawsuits (of all types) against police in 1980. *Id.* In 1979, the closest year to the study for which statistics were available, there were some 580,269 police officers employed in the United States at the state and local levels. Bureau of the Census, *U.S. Dep't of Commerce, Statistical Abstract of the United States* 183 (1981). Using simple arithmetic, this works out to only some 2.3 lawsuits per thousand police officers. The number of lawsuits against police officers today may be even lower since "the number of cases filed—including tort, contract, real property rights and small claims cases—declined 4 percent between 1981 and 1984." N. Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J. 48,49 (July 1, 1986).

145. See, e.g., *Ryan*, 134 Ariz. at 310, 656 P.2d at 599 ("insurance should be obtained by the state to protect it from financial loss in [cases where the state is held liable for negligent acts of its agents]"); *Brennen*, 285 Or. at 408, 591 P.2d at 723 ("[M]unicipalities can further protect themselves by obtaining liability insurance . . ."); *Hunter v. North Mason High School*, 85 Wash. 2d 810, 817, 539 P.2d 845, 849-50 (1975) (governmental entities too small to self insure usually will purchase insurance like any private individual or corporation); see also Note, *Police Liability*, *supra* note 7, at 844 ("with the availability of insurance the costs [of governmental liability] may not be greatly burdensome"); Note, *A Unified Approach to Tort Liability*, *supra* note 7, at 541 (government is able to protect its resources by carrying liability insurance). *But cf.* N. Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J. 48 (July 1, 1986) (discussing municipalities' concerns over rising costs of liability insurance).

of damage awards.¹⁴⁶ Although the current "insurance panic" raises some concern about the ability of municipalities to obtain insurance,¹⁴⁷ it is submitted that neither tort systems allowing suit against municipalities, nor the municipalities themselves are culpable for the difficulty in obtaining reasonably priced liability insurance.¹⁴⁸

Regardless, it is submitted that the ability of the government to pay a damage judgment should have no bearing on the judicial determination of liability.¹⁴⁹ As the New Hampshire Supreme Court stated, the "inadmissible plea of poverty"¹⁵⁰ is not a proper subject for judicial

For a further discussion of municipal concerns about liability insurance, see *infra* note 147, and accompanying text.

146. See, e.g., FLA. STAT. § 768.28(5) (1986) (limiting individual tort claims against state to \$100,000); IND. CODE ANN. § 34-4-16.5-4 (West 1983) (aggregate tort damages against state limited to \$300,000 per individual); OKLA. STAT. ANN. tit. 51 § 154 (West Supp. 1987) (\$1,000,000 limitation on any number of tort claims against state arising out of single occurrence); OR. REV. STAT. § 30.270(1)(a) (limiting tort claims against state to \$500,000 limit); 42 PA. CONS. STAT. ANN. § 8553(b) (1982) (limiting amount recoverable from municipality in tort claim to \$500,000).

It should be noted, however, that these statutes have been attacked on federal and state constitutional grounds. Compare *Smith v. City of Philadelphia*, 512 Pa. 129, 516 A.2d 306 (1986) (Pennsylvania Supreme Court upheld damage limitation provided in Pennsylvania's Political Subdivisions Torts Claims Act restricting tort recovery to \$500,000 aggregate damages arising from single occurrence) with *Pfost v. State*, 713 P.2d 495 (Mont. 1985) (statute limiting tort damages against state ruled unconstitutional as invasion by legislature on fundamental right under state constitution to sue governmental entities for full legal redress).

147. See, e.g., N. Blodgett, *Premium Hikes Stun Municipalities*, A.B.A. J. 48 (July 1, 1986). The author states several reasons for the increased cost of municipal tort liability insurance. *Id.* First, suits based on the Federal Civil Rights Act, originally limited to cases of police brutality, have been drastically expanded against cities. *Id.* Second, municipalities are frequently targeted as the "deep pocket" in even extremely tenuous tort claims under the doctrine of joint and several liability. *Id.* at 49. Third, the "rate wars" between insurance companies trying to offer lower premium rates than their competitors ended following "record insolvencies" of insurance companies in 1984. *Id.* at 50. Expanded concepts of liability and greater difficulty for insurance companies in obtaining reinsurance are listed as further causes of the greater expense of insurance for municipalities. *Id.* at 50-51; see also *Pennsylvania Law Journal-Reporter*, Mar. 24, 1986, 1, 3 (discussing municipalities' concern about rising insurance costs.).

148. See also *Pennsylvania Law Journal-Reporter*, Mar. 24, 1986, 1,3 (quoting Pennsylvania Local Government Commission Report, Nov. 1986). The Pennsylvania Local Government Commission recently concluded that neither the tort system allowing suit against municipalities, nor the municipalities in the state could be blamed for the problem of obtaining reasonably priced liability insurance. *Id.*

149. For a discussion of why government's ability to pay a damage judgment should not be considered in a judicial determination of liability, see *infra* notes 154-155 and accompanying text.

150. *Piechuk v. Maguziak*, 82 N.H. 429, 135 A. 534 (1926); accord *King v. Starr*, 43 Wash. 2d 115, 260 P.2d 351 (1953) (issue of whether defendant carries liability insurance is immaterial for consideration by jury); see also Note, *State Tort Liability for Negligent Fire Inspection*, *supra* note 7, at 345 (discussing "plea of pov-

consideration for it distorts and belies the supposedly impartial determination of factual and legal liability.¹⁵¹

It is further submitted that equitable loss spreading further mandates the abrogation of the public duty doctrine.¹⁵² It is suggested that once the requirements of traditional negligence analysis are satisfied, the municipality and police department should bear the burden of damages as opposed to the innocent victim,¹⁵³ because even a small municipality normally has financial resources far beyond those of a private citizen.¹⁵⁴

Although the costs of governmental liability will be borne by the public, it is submitted this is not unreasonable. Such cost spreading is no more unreasonable than an increase in the price of a product to allow a private company to spread a loss.¹⁵⁵ Moreover, as the United States Supreme Court has stated, since the public enjoys the benefits of government's activities, the public is ultimately responsible for its costs.¹⁵⁶

erty"); Note, *Defendant Rebutts Inference of Insurance*, 5 STAN. L. REV. 143 (1952) (same).

151. See C. McCORMICK, EVIDENCE § 201 (3d ed. 1984) (jury should decide case "according to the facts and substantive law, rather than upon sympathy and ability to pay"); cf. FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully."). The Advisory Committee Notes to Rule 411 of the Federal Rules of Evidence conclude that knowledge of the presence or absence of insurance "would induce juries to decide on improper grounds." *Id.* at Advisory Committee Notes.

152. See *Owen v. City of Independence*, 445 U.S. 622, 657 (1980) ("No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.").

153. See *id.* at 657 (stating that innocent individual harmed by the abuse of government is more properly compensated by damages chargeable to population as whole); see also *Riss v. City of New York*, 22 N.Y.2d 579, 589, 240 N.E.2d 860, 865, 293 N.Y.S.2d 897, 905 (1968) (Keating, J., dissenting) (stating true costs of inadequate or incompetent police protection are hidden by charging expenditures to victims of catastrophic loss rather than amongst the community that had power to prevent crime through its agent municipality); see generally W. KEETON, *supra* note 6, § 85, at 608-09 (discussing fault principles of tort law in American legal system).

154. See Note, *Police Liability*, *supra* note 7, at 834 (costs of governmental negligence should not be borne solely by fortuitous victims since governmental defendants generally possess superior loss-bearing capacity).

155. See, e.g., *McAndrew v. Mularchuk*, 33 N.J. 172, 162 A.2d 820 (1960). In *McAndrew*, the Supreme Court of New Jersey stated that "the public's willingness to assume the normally incidental costs of carrying out its enterprises through municipal corporations is no less than its insistence that private corporations bear the costs of their business activities." *Id.* at 192-93, 163 A.2d at 831 (citing *Green, Freedom of Litigation* (III), 38 ILL. L. REV. 355, 378 (1944)).

156. *Owen v. City of Independence*, 445 U.S. 622, 655 (1980). In *Owen*, the police chief of the City of Independence brought an action against the city claiming his rights had been violated by his dismissal without notice or due process. *Id.* at 630. The court of appeals found the petitioner's rights had been violated under the Federal Civil Rights Act, but upheld the district court's dismissal find-

Furthermore, public indignation usually accompanies a tax increase of any kind. It is submitted that the public fury accompanying a *preventable* tax increase, necessitated by adverse police nonfeasance judgments, would provide a powerful incentive for an agency to reform its practices adequately.¹⁵⁷

It should be emphasized, however, that abrogation of the public duty doctrine is not intended to be a malicious attack on law enforcement. Police officers are human beings faced with a difficult job, and to expect *perfection* is unrealistic and unfair. In light of this, most jurisdictions that have discarded the public duty doctrine continue to reserve a qualified immunity for discretionary acts done in good faith without wanton disregard of the officer's statutory duties.¹⁵⁸ Therefore, upon abrogation of the public duty doctrine, officers in jurisdictions which have reserved qualified immunity for discretionary acts of public officials are required to do no more than to perform a preexisting or assumed duty.

Moreover, even if a jurisdiction has not enacted a statutory qualified immunity for discretionary acts of public officials, there is still no valid reason to cling to the antiquated public duty doctrine. Although the fear that abolition of the public duty doctrine will require a municipality to incur greater costs and will interfere with the discretion of police¹⁵⁹ is

ing the respondents were entitled to qualified immunity from liability based on the good faith of the officials. *Id.* at 634. The Supreme Court of the United States reversed, holding that a municipality has no immunity under the Federal Civil Rights Act. *Id.* at 638 (construing 28 U.S.C. § 1983).

157. For a discussion of how and why the municipalities should modify their practices, see *supra* notes 145-47 and accompanying text.

158. See, e.g., *Ryan*, 134 Ariz. at 310, 656 P.2d at 599 (construing ARIZ. REV. STAT. ANN. § 41-621(G) (1985)); *Leake*, 720 P.2d at 163 (citing *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo. 1985) (applying common law qualified immunity)); *Wilson v. Nepstad*, 282 N.W.2d 664, 669 (Iowa 1979) (construing IOWA CODE ANN. § 613 A.4(3) (1986)); *DeWald v. State*, 719 P.2d 643, 647 (Wyo. 1986) (quoting *Blake v. Rupe*, 651 P.2d 1096, 1109 (Wyo. 1982) (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (applying common law qualified immunity))); see also RESTATEMENT (SECOND) OF TORTS § 895D(3) (1979). The treatise states:

A public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission if

- (a) he is immune because engaged in the exercise of a discretionary function,
- (b) he is privileged and does not exceed or abuse the privilege, or
- (c) his conduct was not tortious because he was not negligent in the performance of his responsibility.

Id.

159. See *Shore*, 187 Conn. at 162-63, 444 A.2d at 1384. The *Shore* court emphasized that allowing a jury to second-guess an officer's exercise of discretion would result in "no discretion at all." *Id.* For a discussion of *Shore*, see *supra* notes 26-30 and accompanying text. See also Note, *Police Liability*, *supra* note 7, at 836 (broadening of police liability must also account for need of police discretion). It is submitted that the concern over limiting police discretion is evi-

not without merit, it is submitted that a heightened standard of culpability could be imposed judicially.

Specifically, it is suggested that a heightened standard of liability similar to that of the "business judgment rule"¹⁶⁰ should be applied in order to allow jurisdictions, which are fearful of applying traditional negligence analysis, to abrogate the outdated public duty doctrine.¹⁶¹ Under such a standard, liability would not be imposed upon police officers for simple errors of judgment.¹⁶² Rather, the court would review the circumstances of the case and the "good faith, independence and thoroughness" of the officer's decision.¹⁶³ It is submitted that such a standard would represent an appropriate compromise between the public duty doctrine and traditional negligence analysis.¹⁶⁴

denced by the majority of courts which apply the public duty doctrine. For a complete listing of these jurisdictions, see *supra* note 10.

160. For a discussion of the business judgment rule, see *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983). Practically, under the business judgment rule, liability will not be imposed upon corporate directors merely for the exercise of bad business judgment as to economic conditions, consumer tastes, or production line efficiency. *Id.*

161. It is submitted that applying either a limited standard of review or a higher standard of culpability is not a novel approach to cases involving defendants who have greater expertise in an area and who are charged with making decisions. See, e.g., *Berry v. Bean*, 796 F.2d 713 (4th Cir. 1986) (court deferred to military officer's decision to exclude civilians who had been found in possession of controlled substances from military base); *Currie v. United States*, 644 F. Supp. 1074 (M.D.N.C. 1986) (applying standard analogous to business judgment rule to psychotherapist's decision not to involuntarily commit patient to mental institution). For a discussion of *Currie*, see *infra* note 164.

162. See *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1498 (1983). The problem with imposing this standard is that under the business judgment rule liability is rarely imposed upon a corporate officer or director merely for exercising poor judgment. *Id.* (citations omitted). Thus, it is submitted that the same effect could result if that standard is applied to the exercise of police discretion. This standard, however, could be justified because, as in the corporate setting, "after-the-fact-litigation is a most imperfect device to evaluate" the decisions of policy officers. *Cf. id.* at 886. Moreover, even under the business judgment rule standard, liability may be found. *Id.* (citations and examples omitted).

163. *Cf. id.* 880, 888. It is submitted that such a standard would not unduly interfere with police discretion forcing police to act in an overly cautious manner. *Cf. id.* at 886 (the business judgment rule will not create incentives for overly cautious corporate decisions).

164. See *Currie v. United States*, 644 F. Supp. 1074 (M.D.N.C. 1986). In *Currie*, plaintiff brought an action against the government for the failure of a psychotherapist at a veterans' hospital to involuntarily commit a mental patient. *Id.* at 1077. The court noted that it found the choices of either declining to impose a duty upon the defendant or imposing a duty based upon traditional negligence principles unsatisfactory. *Id.* at 1083. Therefore, the court adopted a standard analogous to the business judgment rule, characterizing such a standard as an appropriate compromise. *Id.* at 1083-85.

IV. CONCLUSION

In the twentieth century, the courts and legislatures of the United States have expressed and adopted a more humanitarian view of government's tort responsibility to the public.¹⁶⁵ No longer is government's liability to be inviolably determined solely upon the public status of the tortfeasor. Slowly, but inexorably, the courts of this nation are following the conclusion of the *Adams* court that the public duty doctrine is a relic of a bygone era and has outlived its legitimate usefulness, if indeed it ever served one.¹⁶⁶

Therefore, it is submitted that the recent trend toward abrogating the public duty doctrine enhances justice, equity, and the relationship between police and public in several ways. The public duty doctrine will no longer serve as an impenetrable facade automatically barring suits against the police for negligence, regardless of the egregious nature of the nonfeasance. It is submitted that by abrogating the public duty doctrine a clear message will be sent to law enforcement agencies, that lackadaisical responses to pleas for protection will no longer be tolerated. Agencies suffering large damage judgments must modify their practices to limit exposure to liability as an ordinary citizen or company would.¹⁶⁷ By modifying their practices where necessary, police will increase public confidence in law enforcement agencies. It is submitted, in conclusion, that the efficacy of the public duty doctrine today mirrors that of sovereign immunity at the forefront of its fall from grace, and that in the ensuing years it too will follow into the "dustheap of history."

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165. For a discussion of courts' more humanitarian view of government's tort obligation to the public through the abrogation of sovereign immunity, see *supra* notes 21-23 and accompanying text.

166. For a discussion of jurisdictions abrogating the public duty doctrine, see *supra* notes 11-12 and accompanying text. For a discussion of the *Adams* case, see *supra* notes 66-72 and accompanying text.

167. See Note, *Police Liability*, *supra* note 7, at 835. For a discussion of modifying governmental practices, which will limit exposure to liability, see *supra* notes 40-44 and accompanying text.