Campbell Law Review

Volume 12
Issue 3 *Summer 1990*

Article 6

April 1990

Tort Law - The Public Duty Doctrine: Should It Apply in the Face of Legislative Abrogation of Sovereign Immunity? - Coleman v. Cooper

David S. Bowers

NOTE

TORT LAW — THE PUBLIC DUTY DOCTRINE: SHOULD IT APPLY IN THE FACE OF LEGISLATIVE ABROGATION OF SOVEREIGN IMMUNITY? — *COLEMAN V. COOPER*

INTRODUCTION

The idea that the king can do no wrong no longer commands support in the courts of this country. Nearly every state has abolished or severely limited the doctrine of sovereign immunity.[1] In North Carolina, the legislature has limited governmental immunity by enacting two statutes.[2] These statutes provide that immunity is

---

1. Comment, *Local Government Sovereign Immunity: The Need For Reform*, 18 WAKE FOREST L. REV. 43, 46 (1982) [hereinafter Comment, *Local Government Sovereign Immunity*].

2. N.C. GEN. STAT. § 160A-485 states:

Waiver of immunity through insurance purchase.

(a) Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance.

. . . .

(c) Any plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, governmental immunity shall be no defense.

N.C. GEN. STAT. § 160A-485 (1985).

N.C. GEN. STAT. § 153A-435 states:

Liability Insurance; damage suits against a county involving governmental functions.

(a) A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment.

Purchase of insurance pursuant to this subsection waives the county's governmental immunity, to the extent of insurance coverage, for

waived when a county or city purchases liability insurance.[3] The Tort Claims Act limits governmental immunity as well by authorizing suits against the State and its agencies.[4] However, in spite of these recent limits on governmental immunity, the North Carolina Court of Appeals, in Coleman v. Cooper,[5] recently expanded governmental immunity by applying the public duty doctrine.[6] The public duty doctrine prevents an action against a governmental entity from being maintained when the action concerns a breach of a duty owed to the general public.[7] The doctrine holds that for the

---

any act or omission occurring in the exercise of a governmental function.

(b) If a county has waived its governmental immunity pursuant to subsection (a) of this section, any person, or if he dies, his personal representative, sustaining damages as a result of an act or omission of the county or any of its officers, agents, or employees, occurring in the exercise of a governmental function, may sue the county for recovery of damages. To the extent of the coverage of insurance purchased pursuant to subsection (a) of this section governmental immunity may not be a defense to the action.

N.C. GEN. STAT. § 153A-435 (1985).

3. *Id.*

4. The North Carolina Tort Claims Act, Chapter 143 of the North Carolina General Statutes provides in § 143-291 for the North Carolina Industrial Commission to preside over tort claims against the state and its agencies. § 143-291 states:

The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. GEN. STAT. § 143-291 (1987).

The effect of the Act is to waive the sovereign immunity of the state when injury is caused by the negligence of a state employee, giving the injured party the same right to sue as any other litigant. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

5. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988), *discr. rev. den.*, 322 N.C. 834, 371 S.E.2d 275 (1988).

6. *Id.*

7. E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 53.04b, at 165 (3rd ed. 1984 & Supp. 1988) [hereinafter MCQUILLIN]. McQuillin writes that the elimination of sovereign immunity places the government tortfeasor on the same level as any other, it does not create any new liability. *Id.* He goes on to state however, that

[T]he tort liability of a public official is not in all circumstances identical with that of a private individual. The public duty rule is a rule which provides that in order for an injured person to recover against a municipality he must show the breach of a duty owed to him as an individual

breach of a public duty no action lies on behalf of any individual.[8]

Coleman involved an action brought against a municipality for negligence in failing to provide police protection.[9] In applying the public duty doctrine, the court held that the city owed only a public duty to provide police protection, and that failure to provide such protection does not give rise to a cause of action on behalf of any particular individual.[10] The court applied the doctrine despite the fact that the City of Raleigh, a defendant in the case, had purchased liability insurance.[11] The court treated the doctrine as if it had applicability outside the context of governmental immunity through the basic premise of tort law that there is no liability unless the law imposes a duty.[12] The court stated that as the duty to provide police protection is a duty to the general public, no liability exists for any specific individual.[13]

This Note analyzes the *Coleman* case. The Note suggests that

---

and not merely the breach of an obligation owing to the general public. *Id.*

8. *Id.* McQuillin states that just as it is necessary that the plaintiff show that the private corporation has breached a duty owing to him in order to sustain his cause of action, he must show the breach of a duty owed to him by the municipal corporation. However, he goes on to state that unless there is a "special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals, *no liability may be imposed* upon a municipality for failure to enforce a statute or regulation or to provide protection or services to a particular individual or class of individuals." *Id.* (emphasis added) (citing cases).

9. *Coleman*, 89 N.C. App. 188, 366 S.E.2d 2 (1988).

10. *Id.* at 193, 366 S.E.2d at 6.

11. *Id.* at 191, 366 S.E.2d at 5.

12. *Id.* at 192, 366 S.E.2d at 5. The court stated:

> A more difficult question is presented by the lower court's order granting summary judgment for the City of Raleigh. Ordinarily, a municipality providing police services is engaged in a governmental function for which there is no liability (citation omitted). By purchasing liability insurance, municipalities in this State waive the defense of governmental immunity to the extent of insurance coverage. G.S. 160A-485. A waiver of governmental immunity, however, does not create a cause of action where none previously existed (citations omitted).
>
> In tort, it is axiomatic that there is no liability unless the law imposes a duty (citation omitted).

Id.

The court goes on to state that when furnishing police protection a municipality acts for the benefit of the public at large and not for any specific individual. Therefore, the breach of such a public duty cannot give rise to a cause of action for an individual. *Id.*

13. *Id.*, 366 S.E.2d at 6.

the court incorrectly applied the public duty doctrine where the defense of governmental immunity had been waived. First, the Note traces the background of the public duty doctrine. Second, the Note discusses the facts and holding of the *Coleman* case. Next, the note focuses on cases from other jurisdictions that have analyzed the public duty doctrine and its relation to governmental immunity. Finally, the Note addresses the issue of whether there is a real distinction between governmental immunity and the public duty doctrine.

BACKGROUND

A frequently quoted statement of the public duty doctrine is found in Cooley's treatise on the law of torts. Cooley writes:

> In order that a public officer shall be liable to an individual in tort, it is necessary that the officer shall have violated some legal duty owing by him to such individual, as a result of which violation the individual has suffered damage. For the mere failure of an officer to perform a public duty owing by him to the public at large, as for example, the duty of a legislator to act honestly, or of an executive officer to enforce the laws, no action lies by an individual.[14]

The public duty doctrine may have its origin in the early United States Supreme Court case of *South v. Maryland*.[15] In *South* the plaintiff sued the sheriff alleging the sheriff negligently failed to protect him from a mob.[16] The Court held that no cause of action existed for a breach of the sheriff's duties as conservator of the peace.[17] Concerning such duty the Court stated, "[i]t is a public duty, for neglect of which he is amenable to the public, and punishable by indictment only."[18]

Twenty American jurisdictions currently recognize the public duty doctrine.[19] However, Prosser writes that the foundations of

---

14. COOLEY, A TREATISE ON THE LAW OF TORTS, § 60, at 144 (rev. student's ed. 1930).

15. 59 U.S. (18 How.) 396 (1855).

16. *Id.* at 399.

17. *Id.* at 403.

18. *Id.*

19. *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, 1197-1200 (1985 & Supp. 1989) [hereinafter Annotation]. (Alabama, California, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Ne-

the doctrine have been eroded in part by a number of decisions that have rejected, discounted or narrowed its scope.[20] In fact, ten jurisdictions that formerly recognized the public duty doctrine have flatly rejected it.[21]

The doctrine is routinely applied by the courts in cases where a duty to provide police protection is alleged.[22] However, the doctrine has also been applied where a city provides services such as inspections mandated by building and fire codes.[23] The courts con-

---

vada, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Washington). North Carolina should be added to the list provided by the annotation.

20. PROSSER, THE LAW OF TORTS, § 131, at 1049 (5th ed. 1984).

21. *See*, Annotation, *supra* note 19, at 1203-05. Alaska, Adams v. State, 555 P.2d 235 (Alaska 1976) (action against the state by persons injured in a motel fire); Arizona, Ryan v. State, 134 Ariz. 308, 656 P.2d 697 (1982) (action against state by person injured by escapee from state institution); Colorado, Leake v. Cain, 720 P.2d 152 (Colo. 1986) (action by parents of teenagers killed by drunk driver who police failed to take into custody); Florida, Commercial Carrier v. Indian River County, 371 So. 2d (Fla. 1979) (action against county for failure to maintain stop sign at intersection); Iowa, Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979) (action against city for negligent safety inspection of building that burned, killing decedents); Nebraska, Maple v. Omaha, 222 Neb. 293, 384 N.W.2d 254 (1986) (action against municipality for negligence of its employees); New Mexico, Schear v. Bd. of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (1984) (action against sheriff's department for failure to respond to a rape); Louisiana, Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980) (court found special duty, but stated that mere fact that duty is public does not require finding of no liability); Oregon, Brennan v. Eugene, 285 Or. 401, 591 P.2d 719 (1979) (court held that public duty rule precluded by statute establishing governmental liability); Wisconsin, Coffey v. Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) (failure of building inspector to detect defective standpipes); *See also*, Hopkins v. State, 237 Kan. 601, 702 P.2d 311 (1985) (court held that it was improper to grant summary judgment on ground that duty of law enforcement to preserve peace was a public duty where it was not determined whether officers acted needlessly, maliciously, or wantonly).

22. *See generally* Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821 (1981) [hereinafter Note, *Police Liability*]; Note, *Government Liability and the Public Duty Doctrine*, 32 VILL. L. REV. 505 (1987) [hereinafter Note, *Government Liability*].

23. MCQUILLIN, *supra* note 7, § 53.04b, at 166 (citing cases); Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 548 (1983) [hereinafter Comment, *Municipal Tort Liability*]. The author notes two specific exceptions that apply when the claim is based on erroneous issuance of building permits: (1) where the claimant establishes a "clear intent" in the statute to benefit a particular class of individuals, and (2) where the claimant can establish a "special relationship" with the municipality. *Id.* at 549. However, the author states that "[b]ecause courts have construed the exceptions to the public duty doctrine very narrowly, the doctrine has

sider these services performed for the benefit of the public in general and not for the benefit of any particular individual.[24]

The major exception to the public duty doctrine is the special relationship or special duty exception.[25] One scholar describes the exception:

> Where a municipality assumes a duty to a particular person or class of persons, it must perform that duty in a nonnegligent manner notwithstanding that if it had not assumed that duty none would have otherwise existed. Once the duty is assumed, a special duty or special relationship comes into existence, and an individual or class of individuals who detrimentally rely upon the authorities' assumption of the duty, may recover damages proximately caused by the authorities' failure to carry out the duty in a nonnegligent manner.[26]

An often cited example of the special duty exception is the case of *Schuster v. City of New York*.[27] In *Schuster* the plaintiff brought an action to recover for wrongful death against the city for its negligence in failing to provide protection for the decedent, Schuster.[28] Schuster supplied information to the New York City Police concerning the whereabouts of Willie Sutton, a nationally known criminal.[29] Schuster requested that the police provide him with protection after receiving threats.[30] The police refused.[31] Schuster was subsequently shot to death.[32] The court held that the city owed Schuster a special duty to use reasonable care to protect him from harm.[33] The court stated that this duty arose once Schuster collaborated with the police in the arrest of Sutton, and when it was apparent that he was in danger due to such collaboration.[34]

---

become a very successful municipal defense to tort liability." *Id.* at 552.

24. McQUILLIN, *supra* note 7, § 53.04b, at 166.

25. *Id.*, § 53.04c, at 171-72; Note, *Police Liability*, *supra* note 22, at 824.

26. McQUILLIN, *supra* note 7, § 53.04c, at 171-72.

27. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265, (1958).

28. 5 N.Y.2d at ____, 154 N.E.2d at 536, 180 N.Y.S.2d at ____.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at ____, 154 N.E.2d at 537, 180 N.Y.S.2d at ____.

34. *Id.*; *See*, Note, *Police Liability*, *supra* note 22. The author notes that since the *Schuster* decision courts have expanded the special relationship exception to police nonliability. The author lists five fact patterns defining the limits of this expansion. The author states that in the first two police liability is usually

ANALYSIS

A. *Facts and Holding of the Coleman Decision*

In *Coleman*, an employee of the Wake County Department of Social Services (Cooper) received information that a father had sexually abused two of his minor daughters.[35] The girls told Cooper about specific instances of sexual abuse.[36] The plaintiff, the girls' mother, confirmed the story.[37] Plaintiff told Cooper that she feared what Coleman might do if he found out about the investigation.[38] Cooper assured plaintiff of police protection.[39]

Officer Phillips of the Raleigh Police interviewed the girls.[40] The girls told Officer Phillips of the abuse and that they were not afraid of Coleman.[41] Officer Phillips subsequently interviewed

---

found, while in the last three it is not: (1) Where the plaintiff is harmed as a consequence of his giving aid to police, e.g., as an informant; (2) Where the police have promised protection to a specific individual; (3) Where police are aware of danger to a specific individual, but do not put the individual into jeopardy through affirmative action and do not promise protection; (4) Where police are aware of a source of danger to the public, but cannot foresee a specific victim; (5) Where police are aware of a general threat, e.g., a crime wave. The author states that the fact patterns can be placed on an "intimacy spectrum." The more intimate the individual's relationship with the police, the more likely courts are liable to find a special duty. *Id.* at 825-28. The author states that "[t]his judicial response is disappointing, for it neither serves justice nor advances policy to make the duty of protection hinge primarily on the degree of intimacy between the police and the victim." *Id.* at 828; *But cf.*, Comment, *Washington's Special Relationship Exception To The Public Duty Doctrine*, 64 WASH. L. REV. 401 (1989) [hereinafter Comment, *Special Relationship*]. The author notes that in Washington courts have restricted the special relationship test. The author states that the special relationship test enunciated in J&B Dev. Co. v. King County, 100 Wash. 2d 299, 669 P.2d 468 (1983), found the special relationship as long as there was direct contact between the government and the individual, coupled with implied assurances through issuance of a building permit that the individual had complied with building codes. *Id.* at 405-06. The new rule set down by later decisions is that there must be express, as opposed to implied, assurances from the governmental entity. *Id.* at 406.

35. 89 N.C. App. 188, 189, 366 S.E.2d 2, 4 (1988), *discr. rev. den.*, 322 N.C. 834, 371 S.E.2d 275 (1988).

36. 89 N.C. App. at 189, 366 S.E.2d at 4.

37. *Id.* at 190, 366 S.E.2d at 4.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

Coleman as well.[42]

Officer Phillips testified before a Wake County Grand Jury on April 1, 1985 concerning the sexual abuse of the minor girls.[43] That same day the Grand Jury issued an indictment against Coleman.[44] The next day Officer Phillips had orders of arrest prepared for Coleman.[45] The police department prepared the orders of arrest on April 2.[46] However, Officer Phillips did not pick them up that day because he was involved in another investigation.[47] Before Coleman was arrested on April 3, 1985, he went to the plaintiff's home and murdered the two girls.[48]

Plaintiff brought a wrongful death action alleging negligence on the part of Cooper, Wake County, the City of Raleigh and the Raleigh Police Department.[49] The suit alleged that the defendants failed to take steps to ensure the safety of plaintiffs' daughters.[50] No one disputed the fact that the Raleigh Police had no policy of providing police protection to potential witnesses in a criminal case.[51] However, the court stated that both the City of Raleigh and Wake County had purchased liability insurance and thus waived governmental immunity.[52]

The court of appeals affirmed the trial court's grant of summary judgment in favor of the City of Raleigh.[53] The court of appeals then reversed the grant of summary judgment for Cooper and Wake County.[54] The court stated that although the city pur-

---

42. *Id.* Officer Phillips observed that Coleman was a calm, well-dressed individual. Coleman's entire criminal record consisted of a speeding conviction. *Id.*

43. *Id.*

44. *Id.* Officer Phillips contacted the Wake County District Attorney's office at 5:00 p.m. on April 1, and was informed that true bills of indictment had been issued against Coleman. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* Officer Phillips phoned Coleman's attorney and informed him of the grand jury's action. Coleman's attorney said he would ask Coleman to turn himself in the next day. *Id.*

48. *Id.* at 191, 366 S.E.2d at 4.

49. *Id.* at 189, 366 S.E.2d at 3. The court granted summary judgment in favor of the Raleigh Police Department stating that absent a statute authorizing such a suit, the police department could not be sued since it is not a person in being, but only a component part of the city. *Id.* at 192, 366 S.E.2d at 5.

50. *Id.* at 189, 366 S.E.2d at 3.

51. *Id.* at 191, 366 S.E.2d at 4.

52. *Id.* at 192, 366 S.E.2d at 5.

53. *Id.*

54. *Id.*

chased liability insurance and thus had waived any defense of governmental immunity, such a waiver could not create a cause of action where none previously existed.[55] The court held that the city owed no duty to provide police protection to plaintiff's daughters.[56] The court stated:

> In furnishing police protection, a municipality ordinarily acts for the benefit of the public at large and not for a specific individual. (citations omitted) As the duty is to the general public rather than to a specific individual, no liability exists for the failure to furnish police protection.[57]

The court went on to discuss the special relationship exception.[58] The exception applies when a special relationship exists between the injured party and the police.[59] However, the court held that no special relationship existed.[60] The interview was the only connection between Officer Phillips and the girls.[61]

The court noted a second exception to the public duty doctrine.[62] This exception is applied where the police create a special duty by promising protection.[63] Regarding this exception, the court stated that the Raleigh Police had promised no such protection.[64] The court stated that although Officer Phillips was aware of prior acts of violence by Coleman,[65] the girls told Officer Phillips that they were not afraid of Coleman.[66] The court closed the door on unlimited liability by finding that the girls were merely potential witnesses.[67]

As for defendants Cooper and Wake County, the court stated that N.C.G.S. § 7A-544 creates a duty on the part of the Wake County Department of Social Services.[68] This duty calls for the

---

55. *Id.*
56. *Id.* at 193, 366 S.E.2d at 6.
57. *Id.*
58. *Id.* at 193-94, 366 S.E.2d at 6.
59. *Id.*
60. *Id.* at 194-95, 366 S.E.2d at 7.
61. *Id.*
62. *Id.* at 194, 366 S.E.2d at 6.
63. *Id.*
64. *Id.*, 366 S.E.2d at 7.
65. *Id.*
66. *Id.*
67. *Id.* at 195, 366 S.E.2d at 7. The court stated, "If liability were to be imposed on the city in this instance, law enforcement in this State would be required to protect almost every potential witness to avoid liability." *Id.*
68. *Id.* at 196-97, 366 S.E.2d at 7-8.

protection of minors whom the Department determines to be victims of abuse.[69] The court stated that a breach of this duty gives rise to an action for negligence.[70]

B. Cases That Have Recently Reconsidered the Public Duty Doctrine

Was the court of appeals correct in applying the public duty doctrine? Several jurisdictions have refused to recognize the doctrine in the face of legislative abrogation or limitation of sovereign immunity.[71] These courts have concluded that the doctrine is nothing more than a continuation of sovereign immunity.[72]

One such jurisdiction is Alaska.[73] The Supreme Court of

---

69. *Id.* The court stated that a standard of conduct may be determined by reference to a statute which imposes a specific duty for the purpose of protecting others. The court stated that a violation of such a statutorily provided duty would be negligence *per se*, (citing, Lutz Industries, v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955)). *Id.* at 195, 366 S.E.2d at 7. The court also cited the Restatement (Second) of Torts, § 286 in support of this view. The particular section quoted provides:

> When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted
>
> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively in whole or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Id. at 196, 366 S.E.2d at 7.

The court stated that the General Assembly had enacted N.C. GEN. STAT. § 7A-544 as the standard of conduct to be exercised by the Department of Social Services for the protection of abused juveniles. The court stated that the plaintiff's minor daughters were within the class the statute was intended to protect, and that the harm Coleman inflicted upon them was the specific type of harm the statute was intended to prevent. *Id.* at 197, 366 S.E.2d at 8.

70. *Id.* at 197, 366 S.E.2d at 8. The court held that it was a question of fact for the jury whether the plaintiff was contributorily negligent in breaching her common law duty to protect her children. *Id.* at 198-99, 366 S.E.2d at 8-9.

71. E. MCQUILLIN, *supra* note 7, § 53.04b, at 166.

72. *Id.*

73. Adams v. State, 555 P.2d 235 (Alaska 1976) (superceded by statute on other grounds, Wilson v. Anchorage, 669 P.2d (Alaska 1983)).

Alaska, in *Adams v. State*,[74] delivered a harsh criticism of the public duty doctrine often cited by other courts that have rejected it.[75] The plaintiffs, as injured victims and personal representatives of deceased victims of a hotel fire, filed suit against the state.[76]

The state Fire Marshall inspected the hotel several months prior to the fire and detected various hazards.[77] The marshall promised the hotel manager that he would outline the steps needed to correct the hazardous conditions in a letter.[78] However, the marshall failed to send the letter.[79] The state took no action to alleviate the fire hazards.[80]

The trial court granted summary judgment for the State.[81] The Alaskan Supreme Court reversed,[82] holding that the state had assumed a common law duty by its affirmative conduct in inspecting the Hotel.[83] The court also held that the duty was owed to the occupants of the hotel injured in the fire, not just to the general public.[84] In rejecting the public duty doctrine the court stated:

> Second, we consider that the "duty to all, duty to no-one" doctrine is in reality a form of sovereign immunity, which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. An 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. Why 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. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.[85]

The court stated that the legislature, through the statute authorizing tort claims against the state, had adopted a policy of risk-

74. *Id.*
75. *Id.*
76. *Id.* at 236.
77. *Id.* at 238.
78. *Id.*
79. *Id.* at 239.
80. *Id.*
81. *Id.* at 236.
82. *Id.* at 244.
83. *Id.* at 240.
84. *Id.* at 241.
85. *Id.* at 241-42.

spreading in which society, rather than the individual, should bear the cost of the state's negligence.[86]

The Colorado Supreme Court rejected the public duty doctrine in the case of *Leake v. Cain*.[87] The case involved an action by the parents of six teenagers who were killed when struck by a car driven by eighteen year old Ralph Crowe.[88] Crowe attended a party that the police broke up when neighbors complained.[89] Crowe drank an excessive amount of alcohol at the party.[90] The police handcuffed and detained him after he became disruptive.[91] However, they released Crowe to the care of his younger brother.[92] Crowe's brother later allowed Crowe to drive to the location where the party had resumed.[93] It was there that Crowe struck and killed the six teenagers.[94]

The trial court granted summary judgment for the police on the basis of the public duty doctrine.[95] The court of appeals reversed for other reasons, failing to discuss the lower court's application of the public duty doctrine.[96] The supreme court did discuss the doctrine to clear up conflicting decisions in the court of appeals.[97]

The court discussed many of the problems associated with the doctrine.[98] The court cited as a major problem its harsh effect on would-be plaintiffs, who possibly could recover if not for the public status of the tortfeasor.[99] The court found the doctrine in apparent contravention to statutes abrogating sovereign immunity because it makes the status of the defendant a crucial factor in determining liability.[100] The court pointed out that the arguments in support of the doctrine are the same as that used to support sovereign immu-

---

86. *Id.* at 244.
87. 720 P.2d 152 (Colo. 1986).
88. *Id.* at 153-54.
89. *Id.*
90. *Id.* at 153. Crowe's blood alcohol level was .20 at the time of the accident. *Id.* at 154.
91. *Id.* at 154.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 154-55.
97. *Id.* at 157.
98. *Id.*
99. *Id.* at 159.
100. *Id.*

nity.[101] The court stated that if this policy basis has been rejected by statutes abrogating sovereign immunity, it should also be rejected as a policy basis in support of the public duty doctrine.[102] The court thought this was especially true if the doctrine is seen as a function of sovereign immunity, rather than an independent concept of negligence.[103]

The court came to the conclusion that at least in effect the public duty doctrine is virtually the same as that of sovereign immunity.[104] In rejecting the doctrine the court stated:

> In our view, the problems associated with the public duty rule far outweigh the benefits of the rule, which are more properly realized by other means. The fear of excessive governmental liability is largely baseless in view of the fact that a plaintiff seeking damages for tortious conduct against a public entity 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. (citation omitted). Another hurdle the plaintiff must surmount in order 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 rule.[105]

The court stated that the Colorado legislature had abrogated the doctrine of sovereign immunity.[106] Nothing in the statutes dealing with governmental immunity indicated that the legislature intended to introduce a concept so closely related to sovereign immunity.[107]

The New Mexico Supreme Court rejected the public duty doctrine in *Schear v. Board of County Commissioners*.[108] The case involved an action brought by a woman who had suffered a brutal

---

101. *Id.* The court noted the two arguments most often made; that imposing tort liability would result in financial ruin for government, and judicial interference in government operations. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 160. The court stated, "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.*

105. *Id.*

106. *Id.*

107. *Id.*

108. 101 N.M. 671, 687 P.2d 728 (1984).

rape.[109] The woman alleged that the sheriff's department negligently failed to respond to a crime in progress.[110] The court of appeals, relying on *Doe v. Hendricks*,[111] affirmed the trial court's dismissal of the woman's action.[112] The supreme court reversed.[113] The court stated that the public duty doctrine relied on in *Doe* was simply too closely linked with the concept of sovereign immunity to have been included within the traditional tort concepts of duty.[114] The court further held "[a]lthough many jurisdictions had relied on the [public duty-special duty] distinction (citations omitted), the development in the law has been to abolish it in those jurisdictions where the matter has been more recently considered or reconsidered."[115]

Both the Arizona and Florida Supreme Courts have reconsidered the public duty doctrine.[116] Both states rejected earlier decisions that applied it.[117] Courts of other jurisdictions had frequently cited these rejected decisions in support of the doctrine. In *Ryan v. State*[118] the Arizona Supreme Court overruled *Massengil v. Yuma County*.[119] The court stated that it would no longer seek to deter-

109. *Id.* at ____, 687 P.2d at 729.

110. *Id.*

111. 92 N.M. 499, 590 P.2d 647 (1979) (*Doe* was a case brought by a young boy who was dragged into an abandoned house and sexually molested. He was unsuccessful in his suit against the police for not promptly responding to calls for help from those who had witnessed the attack due to the view of the New Mexico Court of Appeals that the duty of the police is only a public duty.)

112. 101 N.M. at ____, 687 P.2d at 729.

113. *Id.*

114. *Id.* at ____, 687 P.2d at 730. The court noted that the legislature provided for an exception to the rule of sovereign immunity by passing the Tort Claims Act. *Id.*

115. *Id.* at ____, 687 P.2d at 731.

116. Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979).

117. *Id.*

118. 134 Ariz. 308, 656 P.2d 597 (1982) (Plaintiff sued the state of Arizona, Director of the Arizona Department of Corrections and Director of the Arizona Youth Center for injuries he received when an inmate at the Arizona Youth Center escaped from custody and shot him with a sawed-off shotgun while robbing a convenience store.)

119. 104 Ariz. 518, 456 P.2d 376 (1969) (This action was brought against the Sheriff of Yuma County for negligence of his deputy who made no attempt to stop a man he witnessed pull out of the parking lot of a tavern. The deputy followed the man and observed him driving recklessly but did not pull him over. The driver of the car was involved in an accident that resulted in the death of five persons, leaving a sixth totally disabled.)

mine if a duty is general or specific.[120] The court held "We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery."[121]

The Florida Supreme Court in *Commercial Carrier v. Indian River County*[122] rejected the public duty doctrine that had been adopted in *Modlin v. City of Miami Beach*.[123] The court held that the doctrine did not survive legislative enactment of a statute authorizing suits against the state, its agencies and subdivisions.[124] The court stated, "[r]egardless, it is clear that the *Modlin* doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity."[125]

C. *Rationale of the Coleman Decision*

Although the court in *Coleman* applied the public duty doctrine as if it had some viability outside of the context of governmental immunity, the effect of the doctrine is to give a public defendant a preferred status.[126] The policy rationale relied on by the court in granting the City of Raleigh such a preferred status is that set forth by the court of appeals of New York in *Riss v. City of New York*.[127] The court in *Coleman* quoted *Riss*, stating:

---

120. *Id.* at ____, 456 P.2d at 599.

121. *Id.*

122. 371 So. 2d 1010 (Fla. 1979) (Defendant in an automobile collision case filed a third-party complaint against Indian River County alleging negligence in the County's failure to maintain a stop sign at the intersection where the collision occurred.).

123. 201 So. 2d 70 (Fla. 1967) (court held that city was not liable for building inspector's negligence in failing to inspect store mezzanine which fell and killed a patron).

124. 371 So. 2d at 1015.

125. *Id.*

126. *See generally* Note, *Government Liability*, *supra* note 22. The author states, "Generally, absent a 'special relationship' between the injured plaintiff and the government, the public duty doctrine effectively provides a common law immunity for the negligent acts of government officials." *Id.* at 506. The author also states, "[C]ourts applying the public duty doctrine effectively restrict government's duty to individuals. Government is thereby favored over private parties in defending against negligence actions." *Id.* at 519-20.

127. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968) (This was an

> The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits.[128]

However, is this rationale not the same justification usually asserted in support of sovereign immunity? That is, to impose liability on public entities will result in financial disaster for those entities, and in addition, permit judicial interference with legislative and executive decision-making.[129]

The argument that abolishing the public duty doctrine will bankrupt government fails to recognize that many actions have been maintained and won against government entities where legislative limitations on sovereign immunity have allowed such actions. As Judge Keating stated in his dissenting opinion in *Riss*,

> No municipality has gone bankrupt because it had to respond in damages when a policeman causes injury through carelessly driving a police car or in the thousands of other situations where by judicial fiat or legislative enactment, the state and its subdivisions have been held liable for the tortious conduct of their employees.[130]

North Carolina courts have repeatedly held the state, counties and cities liable under the statutes authorizing suits against those entities.[131] Furthermore, the ability of the tortfeasor to pay a damage

---

action by a young woman who was brutally attacked by a rejected suitor. She alleged that the city was negligent in failing to provide protection after she had requested it, and had informed the police of threats her attacker had made.)

128. 89 N.C. App. 188, 193, 366 S.E.2d 2, 6 (1988) (quoting Riss, 240 N.E.2d at 860-61).

129. *See* Comment, *Local Government Sovereign Immunity*, *supra* note 1, at 53-54. The author cites as two of the major policy considerations underlying sovereign immunity, financial considerations and separation of powers. *Id.*; *See also* Note, *Police Liability*, *supra* note 22, at 832-33. Although the author states that "[m]ost courts mask policy considerations with a conclusory application of the no-duty rule", the two most frequently used policy arguments noted are "[j]udicial reluctance to interfere with executive discretion" and "[j]udicial fear of the financial impact of expanded police liability." *Id.*

130. 22 N.Y.2d at ____, 240 N.E.2d at 863, 293 N.Y.S.2d at ____, (J. Keating, dissenting).

131. *See, e.g.*, Geiger v. Guilford College Community Volunteer Fireman's

award is not a proper inquiry in determining if liability should be imposed in the first instance.[132]

Where laws have been enacted that limit or abolish governmental immunity, basic principals of tort law such as proximate cause, foreseeability and contributory negligence should serve as limits to liability.[133] Instead, the public duty doctrine denies liabil-

---

Ass'n, 668 F. Supp. 492 (M.D.N.C. 1987) (nonprofit fire company employed by county held liable for negligence in rescue attempt to the extent of insurance coverage.); White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967) (City found liable for negligent operation of chemical fogging machine.); McNeil v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987) (County ABC Board may be held liable for an assault committed by its officer to the extent of liability insurance.); Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980) (City may be held liable for negligent operation of a sewer system if liability has been waived through purchase of liability insurance.); Bullman v. North Carolina State Highway Comm'n, 18 N.C. App. 94, 195 S.E.2d 803 (1973) (State Highway Commission held liable for negligence of employee in operating truck at excessive speed.); Cogburn v. North Carolina State Highway Comm'n, 14 N.C. App. 544, 188 S.E.2d 553 (1972) (State Highway Commission found liable for employee's negligent operation of a dump truck.); Stroud v. North Carolina Memorial Hosp., 15 N.C. App. 592, 190 S.E.2d 392 (1972) (State Hospital found liable for employee's negligence in spilling salad dressing causing plaintiff to slip and fall.).

132. *See* Note, *Government Liability*, *supra* note 22, at 536.

133. As Judge Keating stated in his dissenting opinion in *Riss*, "The argument is also made as if there were no such legal principles as fault, proximate cause or foreseeability, all of which operate to keep liability within reasonable bounds." 22 N.Y.2d at ____, 240 N.E.2d at 863, 293 N.Y.S.2d at ____, (J. Keating, dissenting). He further states, "To deny liability on ordinary principals of tort law offers a far better approach to the question of municipal tort liability than the fiction that there is no duty running to the general public." 22 N.Y.2d at ____, 240 N.E.2d at 866-67, 293 N.Y.S.2d at ____. *See also* Note, *Government Liability*, *supra* note 22, at 530. The author states, "[E]ven if the public duty doctrine is abrogated, police officers are sufficiently protected from meritless suits by . . . conventional tort analysis. . . ." *Id.*; *But See* Comment, *Municipal Tort Liability*, *supra* note 23, at 554-60. The author states that the minority position, which substitutes a conventional tort foreseeability analysis for the public duty rule is faulty in two respects: (1) it wrongfully expands municipal tort liability beyond that imposed on private tortfeasors, and (2) such expansion in government tort liability based on the minority position is poor public policy. *Id.* at 554. The author's position is that the minority view expands government liability by providing an individual with a cause of action for the breach of a public duty. *Id.* at 555. However, that is begging the question since the minority view is that any duty owed to the public is owed to individual members of the public. Yet, the minority view would limit liability through a traditional tort analysis rather than a conclusory finding of no duty. The author cites as the two policy justifications for the minority position; to deter government officials from approaching their duties frivolously, and to place the risk of erroneous permit issuance on the government.

ity altogether if the government-defendant was engaged in a "public duty," one for the benefit of the public. This sounds much like the principal of sovereign immunity. Namely, that a governmental entity can only be held liable if engaged in a "proprietary", as opposed to a "governmental" function.[134] However, the statutes en-

---

Id. at 558. The author disagrees that imposing liability on the government will provide an incentive for government to do its job correctly, because government may not be able to afford to do its job correctly. *Id.* at 559. However, the elimination of governmental immmunity extends liability to public as well as private defendants. It is no excuse for government to say it can act negligently because it is too expensive to act otherwise. The authors' view is that the burden of erroneous permit issuance should fall on the developer, not government. *Id.* at 560. However, liability should fall on the entity whose negligence caused the injury. The minority position seeks to impose liability on the negligent party regardless of that partys' public or private status. *Id.* at 559-60.

134. *See generally* Comment, *Local Government Sovereign Immunity*, *supra* note 1, at 44. The author states:

> Municipal corporations exercise their powers in dual modes, either governmental or proprietary. In the governmental mode, municipalities function as extensions of the state by performing activities authorized by the state for the public benefit. Acts in this mode are protected by sovereign immunity because they are carried out on behalf of the state. In the proprietary, or corporate mode, municipalities operate as corporations. . . . In this corporate mode, municipalities are legal individuals required to use ordinary care and are subject to tort actions, just as is any private corporation or individual.

Id.

In Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976) the court states:

> The "public duty" - "special duty" distinction espoused in cases cited by the *City of Milwaukee* and *Legrand* set up just the type of artificial distinction between "proprietary" and "governmental" functions which this court sought to dispose of in *Holytz*, *supra*. Any duty owed to the public generally is a duty owed to individual members of the public.

Id. at ____, 247 N.W.2d at 139.

See also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 25.06, at 457-59 (1958). K. Davis writes about a California case where the plaintiffs were denied a cause of action against the city for negligence in failing to maintain city fire fighting equipment. The court sustained the defendant's demurer despite the fact that a statute specifically provided for liability. Quoting the court's statement in support of its ruling Davis writes:

> The court held that a demurer was properly sustained because: "Upon analysis, it clearly appears that the gravamen of plaintiff's complaint is the failure of a governmental function. Such failure involves a denial of a benefit owing to the community as a whole, but does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress. . . ." *Id.* at 458 (quoting, Stang v. City of Mill Valley, 38

acted in North Carolina that allow cities and counties to waive immunity through purchase of liability insurance preclude the government as tortfeasor from relying on any distinction between governmental-proprietary functions as a limit to liability.[135] Instead these statutes limit liability by maintaining that immunity is waived only to the extent of the insurance purchased.[136] Likewise, the Tort Claims Act limits liability by providing that the plaintiff cannot be awarded in excess of $100,000.[137]

Cal.2d 486, 489, 240 P.2d 980, 982 (1952).)
K. Davis further states, "[S]urely when a court construes away such an unequivocal statutory provision, the judicial responsibility for governmental irresponsibility is very grave indeed." *Id.* at 459.

135. The statute providing that any city may waive its liability through purchase of insurance provides "[a]ny plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, *governmental immunity shall be no defense.*" N.C. GEN. STAT. § 160A-485(c) (1985) (emphasis added). Likewise, the statute providing for counties to waive immunity by purchasing insurance provides, "To the extent of the coverage of insurance purchased pursuant to subsection (a) of this section, *governmental immunity may not be a defense to the action.*" N.C. GEN. STAT. § 153A-435 (1985) (emphasis added).

See also Comment, *Municipal Tort Liability and the Public Duty Rule: A Matter of Statutory Analysis*, 6 W. MIT. L. REV. 391, 405-08 (1980). The author notes that in adopting the public duty rule in Cracraft v. St. Louis Park, 279 N.W.2d 801 (1979), the court relied on an earlier decision which was premised on the distinction between governmental and proprietary functions. *Id.* at 405. Criticizing the *Cracraft* rationale the author states that this distinction was specifically abolished by the Minnesota legislature when it enacted the Minnesota Municipal Tort Liability Act. *Id.* at 408. The author states that "[i]n abolishing sovereign immunity, the Legislature necessarily abolished the governmental-proprietary distinction because a municipality performing a governmental function is thereby acting in its sovereign capacity and able to assert sovereign immunity. Similarly, a municipality performing a proprietary function is not acting in its sovereign capacity and is not able to assert sovereign immunity." *Id.*, n. 123. It goes without saying that N.C. GEN. STAT. §§ 160A-485 & 153A-435 abolished any distinction between governmental and proprietary functions where the city or county has waived immunity through the purchase of liability insurance.

136. *See* Comment, *Local Government Sovereign Immunity, supra* note 1, at 55. The author states:

> The insurance thus purchased establishes definite limits of liability of the governmental entity and thus brings predictability to the area of tort damage awards. By acquiring predictability, local governments can eliminate the risks of serious fiscal impairment to the governmental unit occasioned by the lack of limits on tort damage awards.

Id.

137. The North Carolina Tort Claims Act provides "[I]n no event shall the

For a case where liability was limited by principals of tort law rather than the public duty doctrine consider *Cook v. Burk County*.[138] The plaintiff alleged the county negligently failed to keep the sidewalk clear of pigeon droppings.[139] The county had waived immunity through purchase of liability insurance.[140] The court held that the county had not failed to use reasonable care stating that "[r]easonable care does not require it to maintain a constant patrol of walkways outside its buildings in order to keep them free from bird droppings and windblown trash."[141] According to *Coleman* the court could have ruled that keeping the sidewalk clear of pigeon droppings is a public duty, the breach of which does not give rise to an action for any individual.

The City of Raleigh would have likely escaped liability if such traditional tort principals had been applied. A jury could have easily found that the harm suffered by plaintiff's daughters was not a foreseeable risk arising as a consequence of Officer Phillips' conduct.[142] Yet the impact of the decision, absolving the city of liabil-

---

amount of damages awarded exceed the sum of one hundred thousand dollars ($100,000) cumulatively to all claimants on account of injury and damage to any one person." N.C. GEN. STAT. § 143-291 (1987).

138. 272 N.C. 94, 157 S.E.2d 611 (1967).

139. *Id.* at 95, 157 S.E.2d at 612.

140. *Id.* at 96, 157 S.E.2d at 613.

141. *Id.* at 97, 157 S.E.2d at 613-14.

142. *See, e.g.*, Comment, *Special Relationship*, *supra* note 34, at 411-17. The author notes that a physically injured homeowner may be precluded from recovering from the governmental entity that issued the permit to the builder, the party responsible for the building code violation, because under traditional tort duty analysis, the builder "is in the best position to foresee and avoid possible injury resulting from noncompliance." *Id.* at 411. The author states that using traditional tort analysis, rather than a special relationship exception to the public duty doctrine, "allows full compliance with Washington statutes abrogating governmental immunity by applying the same tort analysis to both private and governmental defendants. *Id.*

Another example noted by the author where traditional tort principals would work a better result than the special relationship test enunciated by Washington's courts is Campbell v. City of Bellevue, 85 Wash. 2d 1, 530 P.2d 234 (1975). In this case the plaintiff phoned the city electrical inspector about a hot current running through a creek on his property. The inspector found faulty wiring but failed to shut off the electricity. Plaintiff's wife was subsequently electrocuted when attempting to pull her son out of the creek. *Id.* at 412. The author states that the plaintiff could not recover under the new special relationship test which requires direct contact, express assurances and justifiable reliance. *Id.* However, the plaintiff could recover under a traditional tort analysis because duty would result if plaintiff could show that the injury was foreseeable and proximately caused by

ity because it is a public rather than a private tortfeasor, will prevent many plaintiffs with meritorious claims from ever having their day in court. The court applied the doctrine, which the New Mexico Supreme Court in *Schear* accurately described as a "ghost of sovereign immunity,"[143] when the clear intent of the legislature, as expressed in N.C.G.S. § 160A-485, was that governmental immunity shall be no defense.[144]

The court of appeals in *Coleman*, offered another argument in support of the public duty doctrine.[145] The court asserted that to impose liability on public entities for negligence in providing public services would result in excessive interference with legislative and executive decision-making.[146] Yet courts have indirectly reviewed such decisions in the many actions brought pursuant to the Tort Claims Act, or where recovery has been allowed because the defendant city or county has purchased liability insurance.[147] The policy as expressed by the legislature in enacting those statutes is that, when they apply, the state, municipality or county is to be treated like a private litigant.[148]

---

the defendant. *Id.* at 413. The author states that the result precluding recovery lacks "substantive justification." *Id.*

Finally, the author states, A traditional tort duty analysis is a better analytical tool for determining government duty, because under a traditional tort duty analysis the primary focus is on whether the government *should* owe a duty. *Id.* at 416-17.

143. 101 N.M. 671, 687 P.2d 728, 734 (1984).

144. N.C. GEN. STAT. § 160A-485(c) provides, Any plaintiff may maintain a tort claim against a city insured under this section in any court of competent jurisdiction. As to any such claim, to the extent that the city is insured against such claim pursuant to this section, *governmental immunity shall be no defense.*"(emphasis added).

145. 89 N.C. App. 188, 193, 366 S.E.2d 2, 6 (1988) (quoting *Riss*, 240 N.E.2d at 860-61).

146. *Id.*

147. *See supra* note 131 for cases in which the state, counties and cities have been held liable.

148. *See* Guthrie v. State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983), where the court stated:

> Traditionally the State has maintained its sovereign immunity in tort actions. (citation omitted) However, the Tort Claims Act, as provided in North Carolina General Statute 143-291 *et. seq.*, waived the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not contributorily negligent, *giving the injured party the same right to sue as any other litigant* (emphasis added).

Id. at 535, 299 S.E.2d at 625.

Conceding that government is not infallible, and that mistakes are going to be made, who should bear the cost of those mistakes? Longstanding policy consideratons underlying sovereign immunity effectively maintained that the injured individual would bear the risk.[149] However, these longstanding policy considerations have come under attack in recent years.[150] Today very few jurisdictions apply sovereign immunity in the form in which it was adopted.[151] Because the public duty doctrine is nothing more than sovereign immunity in sheep's clothing,[152] it should not be utilized to shift

---

Likewise, both counties, pursuant to N.C. GEN. STAT. § 153A-435, and cities, pursuant to N.C. GEN. STAT. § 160A-485, waive any defense of immunity through the purchase of liability insurance, thus giving the injured party the same right to sue as any other litigant.

149. *See* McQUILLIN, *supra* note 7, § 53.02, at 134. McQuillin notes that although for many years courts continued to adhere to the doctrine of immunity out of "shear weight of judicial authority," the major criticism directed against the doctrine by "eminent jurists" and "distinguished legal scholars" was "that it places on the individual damaged an inequitable burden which should be borne by the community at large. . . ." *Id.*

150. *See* Comment, *Local Government Sovereign Immunity*, *supra* note 1, at 54. The author states:

> The arguments historically advanced for retention of the sovereign immunity doctrine have been eclipsed by modern developments that restrict its applicability. Prominently included among these developments are the expansion of local government activities, with a concomitant increase in the risk of harm to citizens, and the availability of liability insurance to cover those risks. Additionally, the courts have recognized it is unjust to preclude recovery by a party injured by a local government and that the general public, rather than the injured party, should pay for the risks arising from governmental activities.

Id.

151. *See generally*, McQUILLIN, *supra* note 7, § 53.02, at 132-37. McQuillin provides a good history of the decline of the doctrine of sovereign immunity in the states.

152. *See* Note, *Government Liability*, *supra* note 22, at 513. The author states that "[a]lthough the main difference between sovereign immunity and the public duty doctrine is only theoretical, strict application of the public duty doctrine resurrects complete sovereign immunity as to public officers." *Id.*, *See also* Note, *Sorichetti v. City of New York Tells the Police that Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333, 335-39 (1985) [hereinafter Note, *Sorichetti*]. The author, commenting on the history of sovereign immunity, notes that "[t]he essence of the rule is the notion that 'because we [the police] owe a duty to everybody, we owe it to nobody.'" *Id.* at 366 (citing Riss v. City of New York, 22 N.Y.2d 579, 585, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 901 (1968) (Keating, J., dissenting)). The author states that although immunity for municipalities in New York was abrogated in 1945 when the

the burden of irresponsible government action onto the innocent victim.[153] As Judge Keating stated in *Riss*, the 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."[154]

---

court held that the city's immunity was an extension of the state's, and thus abrogated by the Court of Claims Act, "[f]earing possible financial disaster for the cities and a flood of litigation, the courts preserved the concept of immunity as applied to police departments, but under the guise of the 'public duty' doctrine." *Id.* at 339.

153. *See* Note, *Government Liability*, *supra* note 22, at 537-38. The author states:

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

Id. at 537. *See also* Note, *Sorichetti*, *supra* note 152, at 338. The author, referring to a statement by the United States Supreme court on risk-spreading, states:

> [B]ecause the public receives the benefit of government, the public should bear the loss caused by the negligence of government employees. The unfortunate individuals upon whom the injuries fall should not alone bear the societal cost of police mistakes; the government defendants who generally possess superior loss-bearing capacity should bear the societal cost.

Id. (citing, Owen v. City of Independence, 445 U.S. 622, 655 (1980)). *See also* Note, *Police Liability*, *supra* note 22, at 834. The author states, The burden to minimize losses from crime should fall on the police rather than the victims because the police are in a better position to prevent crime." *Id.* The author states that this is especially true where the police are aware of a particular danger, but foresee no particular victim. *Id.* The author cites as an example the case of a drunken driver who the police are aware of, but fail to arrest. The author states that there is little that others on the road can do to protect themselves from the driver's recklessness. *Id.* For an example of the problem see, Shore v. Town of Stonington, 187 Conn. 147, 444 A.2d 1379 (1982) (Police stopped drunken driver, but failed to arrest. Driver subsequently involved in collision with plaintiff's decedent. Court denied cause of action for wrongful death stating that police owed no special duty to plaintiff's decedent).

154. 22 N.Y.2d 579, 580, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968). (Keating, J. dissenting). Judge Keating further states, "Despite almost universal condemnation by legal scholars, the rule survives, finding its continuing strength, not in its power to persuade, but in its ability to arouse unwarranted judicial fears of the consequences of overturning it." *Id.*

CONCLUSION

The Court of Appeals in *Coleman* may have intended to limit application of the public duty doctrine only to situations where a duty to provide police protection is alleged. However, now that the doctrine has found its way into the case law of this state it will no doubt be applied in situations involving other types of public services.[155] The police should be liable if sovereign immunity has been waived when the police fail to carry out a duty owed to citizens when it is foreseeable that a failure to carry out the duty may result in injury to a specific individual. A preferred status should not be extended to the public officer. This preferred status would leave the injured party without recourse.[156]

---

155. Since the *Coleman* decision, the North Carolina Court of Appeals has denied two more causes of action based on a conclusory application of the public duty doctrine. In Martin v. Mondie, 94 N.C. App. 750, 381 S.E.2d 481 (1989) the court upheld summary judgment of the trial court against the plaintiff who brought action against the Town alleging that the police department's negligence in failing to execute three arrest warrants was proximate cause of his injuries. The plaintiff was injured when the subject of the arrest warrants, while driving intoxicated, collided head-on with plaintiff. In Lynch v. N.C. Dept. of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989) the court of appeals affirmed the trial court's dismissal of a claim for wrongful death against law enforcement officers alleging that their recklessness in attempting to apprehend fleeing criminals while the criminals had in their custody the plaintiff's children was proximate cause of the deaths of those children.

156. Lynch v. N. C. Dept. of Justice, 93 N.C. App. 57, 376 S.E.2d 247 (1989). *Lynch* provides a clear picture of the injustice of the public duty doctrine. This case involved the tragic deaths of the plaintiff's two small children. At the time of their deaths the children were in the custody of two murder suspects. *Id.* at 58, 376 S.E.2d at 248. The defendant law enforcement agents staked out the premises where the suspects were hiding. *Id.* The defendants, upon observing the suspects leave with the children in an automobile, pursued the suspects. *Id.* at 58-59, 376 S.E.2d at 248. During the chase, the suspects fired at the defendants with a submachine gun. *Id.* at 59, 276 S.E.2d at 248. Later during the pursuit the suspects gave the children lethal doses of cyanide, and shot them in the head. *Id.* The suspects then detonated a bomb, killing themselves. *Id.*

The plaintiff alleged in his cause of action that the defendants were negligent and reckless in undertaking to arrest the suspects while the children were in their custody. *Id.* at 58, 376 S.E.2d at 248. The court held that the cause of action could not be maintained because the defendants owed no legal duty to the children, and there was no special relationship between the defendants and the children. *Id.* at 60, 376 S.E.2d at 249. The court stated that plaintiff's argument that defendants should have waited until the children were elsewhere to attempt the arrest is inconsistent with the police duty to protect the public from dangerous criminals. *Id.* at 60-61, 346 S.E.2d at 249.

This Note addresses the true nature of the public duty doctrine. Although the public duty doctrine has gathered support over the years, the recent trend views the doctrine as a function of sovereign immunity. The policy of sovereign immunity is outweighed by the need to compensate citizens injured by public defendants. The public duty doctrine must yield to this need as well.

David S. Bowers