ARTICLES

The Value of Government Tort Liability: Washington State's Journey from Immunity to Accountability

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I. INTRODUCTION

When the Washington legislature waived sovereign immunity of state and local governmental entities, it provided that those entities shall be liable for their "tortious conduct to the same extent as if [they] were a private person or corporation."[1] In so doing, the legislature aligned Washington with a nationwide trend to limit or eliminate the antiquated notion that the sovereign can do no wrong, instead favoring responsible, accountable government.[2] This movement was triggered in part by the passage in 1946 of the Federal Tort Claims Act, which waived the sovereign immunity of the United States.[3] Overall, the movement reflected the

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1. WASH. REV. CODE § 4.92.090 (2004) (waiving sovereign immunity of state government); *see also id.* § 4.96.010 (waiving sovereign immunity of local governmental entities).

2. *See* Charles F. Abbott, Jr., Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312, 314–16 (1961); 5 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 29.1 (2d ed. 1986).

3. 28 U.S.C. §§ 1346(b)(1), 2671–2680 (2000); *see also* Fowler, *supra* note 2, § 29.12 (describing this act as "the most widely important piece of legislation affecting governmental immunity").

notion that "greater efficiency and justice would be attained by accompanying power with responsibility."[4]

In a recent article, Washington's Attorney General Rob McKenna and Senior Assistant Attorney General Michael Tardif argued that Washington's abolition of sovereign immunity should be re-examined because it has resulted in unacceptable government tort liability and escalating litigation costs.[5] That article also criticized court interpretations of government tort liability and the consequences of that liability.[6] In response to a perceived crisis, Tardif and McKenna urged the legislature to replace the current broad waiver with a scheme that precisely sets forth when the government is liable in tort.[7]

This Article takes a contrary view, commending both the legislature's choice to broadly waive sovereign immunity and judicial decisions defining the impact of this waiver. In doing so, this Article traces the development of government tort liability in Washington both before and after the state expressly abandoned sovereign immunity in 1961. Moreover, this Article demonstrates that the waiver of immunity did not create excessive governmental liability. Rather, the waiver has been implemented in a way that not only respects the prerogative of the state and local entities to govern, but also provides for greater government accountability and individualized justice for Washington citizens.

Part I of this Article traces Washington's history with the common law doctrine of government immunity from tort liability. It also identifies other distinct common law immunities protecting executive, legislative, and judicial functions—immunities that lay dormant during the reign of sovereign immunity. Part II discusses the legislature's broad waiver of sovereign immunity in 1961 and the legislature's subsequent reaffirmation of the waiver. It also notes isolated instances in which the legislature has partially restored immunity or otherwise limited tort liability. Part III addresses the development of case law interpreting the scope of government tort liability in light of the legislative waiver of sovereign immunity and examines the impact of the remaining related common law immunities for executive, legislative, and judicial functions. Part III also examines the role of the "public duty doctrine," which has evolved as a con-

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4. Edwin M. Borchard, *Government Liability in Tort [Part II]*, 34 YALE L.J. 129, 134 (1924); *see also* Kilbourn v. City of Seattle, 43 Wash. 2d 373, 375–76, 261 P.2d 407, 408 (1953) (referencing growing demand for legislation regarding government accountability in tort); Mayle v. Penn. Dep't of Highways, 388 A.2d 709 (Pa.1978) (discussing history of sovereign immunity and policy reasons for abrogation of doctrine).

5. *See* Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Government Liability*, 29 SEATTLE U. L. REV. 1, 50–52 (2005).

6. *Id.* at 18, 46–47.

7. *Id.* at 50–52.

ceptual framework for assessing whether a predicate duty supports government tort liability in any given circumstance. Finally, Part IV exalts the continuing value of holding government accountable for its tortious conduct, treating such accountability as a legitimate means to encourage responsible government and achieve individual justice. Part IV also urges that any marked retreat from the broad waiver of sovereign immunity is unnecessary and unjustified, whether viewed from a fiscal or ideological standpoint.

II. A BRIEF HISTORY OF GOVERNMENT IMMUNITY IN WASHINGTON

A. Sovereign Immunity

From the formation of the United States, both the federal government and the several states adopted the notion of sovereign immunity that had prevailed in England since ancient times.[8] Historically, sovereign immunity was a common law doctrine imposed by the courts as a matter of policy.[9] This doctrine was well-settled when Washington became a state and so remained well into the twentieth century.[10] The framers of the Washington constitution implicitly acknowledged default application of the doctrine in art. II, § 26: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." Thus, since statehood, it has been understood that the legislature is constitutionally empowered to alter the common law doctrine of sovereign immunity.[11]

Early in the reign of sovereign immunity, the Washington Supreme Court required clear evidence that the legislature intended to waive sovereign immunity. For example, on two separate occasions at the beginning of the twentieth century, the court held that the legislature's mere authorization of a right to "begin an action" against the state was not a sufficient declaration that the state would be responsible for the tortious acts of its agents and employees.[12] The court required the legislature to

8. *See* RESTATEMENT (SECOND) OF TORTS ch. 45A, introductory cmt. at 393–94; *Id.* at § 895B cmt. a (1979).

9. *Id.* ch 45A, introductory cmt. at 392–93.

10. *See* Billings v. State, 27 Wash. 288, 291, 67 P. 583, 584 (1902) (recognizing the state as immune unless liability provided for by statute, as required by WASH. CONST. art. II, § 26); Kelso v. City of Tacoma, 63 Wash. 2d 913, 915, 390 P.2d 2, 4 (1964) (same); *see also* CODE OF 1881, § 1 (common law controls when not inconsistent with statute or constitution); Sayward v. Carlson, 1 Wash. 29, 40–41, 23 P. 830, 833 (1890).

11. *See Billings*, 27 Wash. at 290–91, 67 P. at 584 (liability of state determined by statute under WASH. CONST. art. II, § 26); Coulter v. State, 93 Wash. 2d 205, 207, 609 P.2d 261, 262 (1980) (same).

12. *See Billings*, 27 Wash. at 292–93, 67 P. at 584–85 (holding state statute, BAL. CODE § 5608, authorizing actions against the state, did not constitute a waiver of immunity); Riddoch v.

use unmistakable statutory language in order to demonstrate the legislature's consent to respondeat superior liability.[13]

While Washington common law regarding the sovereign immunity of the *state* was plain and all-encompassing, the same was not true with respect to the sovereign immunity of local governmental entities.[14] In Washington, as elsewhere, entitlement to immunity often turned on the particular nature of the entity. Geographical subdivisions of the state, such as counties and school districts, were deemed to partake fully in the state's immunity. However, municipal corporations, such as cities and towns, were treated differently because of their independent corporate status.[15] Functions performed by cities and towns were not immune if those functions were considered "proprietary" in nature.[16]

When local governmental entities were found to be immune from liability for tortious acts or omissions, they were not deemed immune in their own right. Instead, their immunity was said to derive from that of the state.[17] As a result, cities and towns were imbued with immunity when they were performing "governmental functions" similar to those performed by the state, unless that immunity had been waived by statute; however, if a function was "proprietary" or "corporate" in nature, that function was subject to tort liability.[18]

Prior to the waiver of sovereign immunity, courts developed a test to distinguish a governmental function from a proprietary function or, put another way, to decide whether an entity was "acting in a governmental capacity."[19] The test centered on whether the particular act was done for the benefit of all, rather than for the advantage of the governmental entity itself.[20] In other words, the overarching question was

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State, 68 Wash. 329, 332–40, 123 P. 450, 452–55 (1912) (same, regarding statutory authorization for actions against state under REM. & BAL. CODE § 886).

13. *See Billings*, 27 Wash. at 293, 67 P. at 585; *Riddoch*, 68 Wash. at 332, 123 P. at 451.

14. *See* Abbott, *supra* note 2, at 316.

15. *See generally* RESTATEMENT (SECOND) OF TORTS § 895C, cmts. (1979); *see also* Kilbourn v. City of Seattle, 43 Wash. 2d 373, 375–79, 261 P.2d 407, 408–10 (1953) (recognizing the dichotomy in Washington law with respect to availability of immunity to certain entities, with immunity deemed abrogated by statute as to counties and school districts, but not as to municipal corporations such as cities and towns).

16. *See Kilbourn*, 43 Wash. 2d at 377, 261 P.2d at 409.

17. *Riddoch*, 68 Wash. at 334, 123 P. at 452; Kelso v. City of Tacoma, 63 Wash. 2d 913, 916–17, 390 P.2d 2, 5 (1964).

18. *See* Hagerman v. City of Seattle, 189 Wash. 694, 698–99, 66 P.2d 1152, 1154–55 (1937); *see also* Abbott, *supra* note 2, at 313, 315–16.

19. *Hagerman*, 189 Wash. at 697, 66 P.2d at 1154.

20. Abbott, *supra* note 2, at 317; Simpson v. Whatcom, 33 Wash. 393, 395–96, 74 P. 577, 578 (1903).

whether the particular activity was undertaken for the common good.[21] Under this standard, a city or town performing a proprietary function was liable for its tortious acts to the same extent as a private corporation. While this criteria appears to be simple and straightforward, it proved to be difficult to apply. As in other jurisdictions, Washington's early case law revealed inconsistencies in the application of the governmental-proprietary dichotomy.[22]

The common law distinction between governmental and proprietary functions became obsolete once the Washington legislature waived sovereign immunity for state and local governmental entities. Nevertheless, this historical distinction has some lingering relevance because of the language later used by the legislature to describe the breadth of the waiver of sovereign immunity.[23]

B. Other Common Law Immunities

During the era of sovereign immunity in Washington and elsewhere other less-encompassing common law immunities also existed, although they did not receive the full attention of the courts until after the veil of sovereign immunity was lifted. These immunities corresponded to certain core functions performed by the legislative, judicial, and executive branches of government.[24] While legislative and judicial immunity each bear the name of the branch affected, the immunity for the executive branch is often referred to as "discretionary immunity."[25] Understandably, there was no need to widely discuss legislative, judicial, and discretionary immunities while sovereign immunity reigned because sovereign

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21. *Hagerman*, 189 Wash. at 699, 66 P.2d at 1154-55. In *Hagerman*, the court described the nature of a municipal corporation's governmental, as opposed to proprietary, function:

> It is quite apparent that there are certain kinds of public service that only the government can adequately perform. First among these are the administration of justice, the maintenance of peace by the enforcement of the law, the protections of persons and property against the ravages of fire, and the preservation of the public health against sickness and disease. It is in these fields that the principle of immunity from torts has its widest application and place.

189 Wash. at 699, 66 P.2d at 1154–55. This distinction was not applied to the state. *See Riddoch*, 68 Wash. at 334–35, 123 P. at 452; *see generally* Harper et al., *supra* note 2 § 29.4, at 615.

22. For example, street repair was considered proprietary, but operation of a health department truck on the streets by a city employee was not. *Hagerman*, 189 Wash. at 701–04, 66 P.2d at 1155–56 (collecting cases); *see generally* Fowler, *supra* note 2 § 29.6, at 620 ("[t]he American rules governing the tort liability of municipal corporations make a curious patchwork of immunity and responsibility").

23. *See infra* Part II.

24. *See generally* RESTATEMENT (SECOND) OF TORTS § 895B, cmt. c (1979); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (1965) (discussed *infra* Part III); Bender v. City of Seattle, 99 Wash. 2d 582, 588–89, 664 P.2d 492, 497–98 (1983).

25. *Bender*, 99 Wash. 2d at 588–89, 664 P.2d at 497–98.

immunity was all-encompassing: a claim of sovereign immunity necessarily subsumed conduct giving rise to each of the narrower immunities.

Legislative immunity provides that a legislature and its members cannot be held responsible in tort for merely passing a statute that causes injury to a person.[26] Similarly, judicial officers (and quasi-judicial officers) are not subject to tort liability for fulfilling their adjudicative functions.[27] In turn, discretionary immunity insulates members of the executive branch from tort liability with regard to the implementation of laws.[28] Generally conceived, discretionary immunity is confined to conduct at the *policy-making* level, as opposed to the ministerial level. The American Law Institute noted the following:

> [W]ithin the scope of the executive branch are many agencies, officers and employees that are merely administrative. The State does not retain immunity for all of the acts or omissions that they perform. *It is only when the conduct involves the determination of fundamental governmental policy and is essential to the realization of that policy, and when it requires "the exercise of basic policy evaluation, judgment and expertise" that the immunity should have application.* Evangelical United Brethren Church of Adna v. State, (1965) 67 Wash. 2d 246, 255, 407 P.2d 440, 445. The purpose of the immunity is "to ensure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government . . . [if] such a policy decision, consciously balancing risks and advantages, took place." Johnson v. State, 447 P.2d 352, 361 (Cal.1968).[29]

As discussed below, when the Washington legislature waived sovereign immunity, the policy-based discretionary immunity doctrine became a major focus of attention for the courts in determining when wrongful governmental conduct could be deemed tortious.[30]

III. THE WASHINGTON LEGISLATURE'S STEADFAST ADHERENCE TO A BROAD WAIVER OF SOVEREIGN IMMUNITY

Midway through the twentieth century, the doctrine of sovereign immunity was under serious attack. Its feudal origins were questioned, as was its stated rationale—that the doctrine was necessary to avoid undermining governmental interests and depleting public resources.[31] Courts

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26. RESTATEMENT (SECOND) OF TORTS § 895B, cmt. c (1979).
27. *Id.*
28. *Id.*
29. *Id.* at cmt. d. (emphasis added).
30. *See infra* Part III.
31. *See* Fowler, *supra* note 2 §§ 29.1–4, at 596–620.

and commentators recognized sound policy reasons for extending the deterrent, compensatory, and loss distribution functions of tort law to the state and local governmental entities.[32] In 1953, the Washington Supreme Court noted that case law and legal commentary reflected a "growing demand" for legislation imposing government accountability in tort.[33]

In 1961, the Washington legislature exercised its power under art. II, § 26 of the state constitution and categorically directed the manner in which suits may be brought against the state: "The state of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."[34]

Revised Code of Washington (RCW) 4.92.090 was immediately perceived as abolishing the state's sovereign immunity.[35] However, because the judiciary had not previously viewed consent to maintaining a suit or action as being equivalent to a waiver of sovereign immunity, there were some lingering questions whether this statutory language truly achieved this result.[36] But all misgivings about the legislature's intent were soon put to rest by the 1963 amendment to the same statute: "The state of Washington, whether acting in its governmental or proprietary capacity, *shall be liable for damages* arising out of its tortious conduct to the same extent as if it were a private person or corporation."[37]

In two cases decided shortly after these legislative pronouncements, the state supreme court interpreted RCW 4.92.090 as abolishing the doctrine of sovereign immunity in Washington, including any derivative immunity previously available to certain local governmental entities.[38]

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32. Fowler, *supra* note 2 § 29.3 at 603–04.

33. *See* Kilbourn v. Seattle, 43 Wash. 2d 373, 376, 261 P.2d 407, 408 (1953).

34. Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)). This enactment did not include a statement of legislative intent. Further, neither the House of Representatives nor the Washington Senate Journals reveal any legislative history bearing on the underlying motivation for providing for government tort liability in Washington. The legislature's archives do not contain any bill reports that might explain precisely what motivated the legislature to waive sovereign immunity.

35. *See* Abbott, *supra* note 2, at 318, 323.

36. Abbott, *supra* note 2, at 318–22; *see also* Billings v. State, 27 Wash. 288, 291–92, 67 P. 583, 584 (1902); Riddoch v. State, 68 Wash. 329, 340, 123 P. 450, 454–55 (1912).

37. Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)) (emphasis added).

38. *See* Kelso v. Tacoma, 63 Wash. 2d 913, 916–19, 390 P.2d 2, 5–6 (1964) (holding 1961 act waived derivative sovereign immunity of local governmental entities); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 252, 407 P.2d 440, 443 (1965) (holding, based upon 1961 enactment, that "the legislature intended to abolish on a broad basis the doctrine of sovereign tort immunity in this state"); *Evangelical*, 67 Wash. 2d at 262, 407 P.2d at 449 (Finley, J., dissenting) (noting that the "1963 amendment was apparently enacted in the light of widespread judicial unwillingness to sound the final death knell for the archaic concept of sovereign immunity").

Recognition that the waiver applied to local government entities made particular sense: their immunity necessarily flowed from the immunity of the state itself.[39] Therefore, if the state's immunity was waived, then so was theirs. In 1967, the legislature codified the extent of the waiver of sovereign immunity *vis-à-vis* local governmental entities:

> All political subdivisions, municipal corporations, and quasi municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents, or employees to the same extent as if they were a private person or corporation . . . .[40]

The Washington legislature's waiver of sovereign immunity is one of the broadest in the country.[41] However, the waiver is not without limitations. Rather, the waiver contains some procedural limitations, including provisions in the 1963 act requiring notice of claims, restricting execution on judgments, and providing for a specific fund from which payment of claims and judgments must be made.[42] More importantly, the 1961 and 1963 waiver provisions require that claims against the state must arise out of "tortious conduct to the same extent as if it were a private person or corporation."[43] The legislature did not define this clause, leaving it to the courts to determine its meaning. In particular, because "tortious" is a common law concept, the courts would determine whether the less-encompassing common law immunities for legislative, judicial, and discretionary acts still remained and whether those immunities could be raised by governmental entities to defeat tort liability.[44]

In the years since the Washington legislature waived sovereign immunity, it has, on occasion, partially restored immunity for certain

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39. *Riddoch*, 68 Wash. at 334–35, 123 P. at 452–53.

40. Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

41. *See* Tardif & McKenna, *supra* note 5, at 2; *see also* Abbott, *supra* note 2, at 316; *Evangelical*, 67 Wash. 2d at 252, 407 P.2d at 443.

42. *See* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753–54 (codified as WASH. REV. CODE §§ 4.92.100–.110 (2004)) (requiring notice of claim against state and establishing procedure for filing claims); *Id.* at 754–55 (codified as WASH. REV. CODE § 4.92.040 (2004)) (prohibiting execution of any judgment against state and providing for method of paying judgments from state treasury); *Id.* at 754 (codified as WASH. REV. CODE § 4.92.130 (2004)) (providing for funding source for payment of judgments).

43. Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)); Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)). Similar language is found in the 1967 enactment regarding waiver as to local governmental entities. *See* Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

44. *See* Abbott, *supra* note 2, at 323-24.

types of conduct when it found sufficient justification.[45] However, the legislature has not retreated whatsoever from the notion of a broad waiver of sovereign immunity. In fact, the opposite is true. Perhaps the most comprehensive legislation after 1967 bearing upon government liability was enacted merely to refine the state risk management program by enhancing preventative measures for the stated purpose of diminishing civil liability exposure.[46] In undertaking this measure, the legislature clearly recognized the weight of additional civil liability on the state as a result of the waiver. Even so, the legislature did not re-examine the wisdom of the waiver, instead choosing to address the problem by improving risk management strategies:

> *In recent years the [S]tate of Washington has experienced significant increases in public liability claims.* It is the intent of the Legislature to reduce tort claim costs by restructuring Washington State's risk management program to place more accountability on state agencies, to establish an actuarially sound funding mechanism for paying legitimate claims, when they occur, and to establish an effective safety and loss control program. [47]

This 1989 legislation suggests a legislature resolute in its commitment to government accountability. Since then, the legislature has steadfastly adhered to its broad waiver of sovereign immunity and has continued to focus on preventative measures designed to minimize the state's tort liability exposure and related costs.[48] As will be seen in the next section, during this same period, the Washington courts have faithfully honored the legislature's intent in waiving sovereign immunity, while also clarifying the application of remaining common law immunities that necessarily limit government tort liability.

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45. *See, e.g.*, WASH. REV. CODE § 46.44.020 (2004) (relieving state and other governmental entities of liability by reason of any damage or injury due to the existence of a structure over a public highway where vertical clearance is 14 feet or more); *Id.* § 9.94A.843 (providing conditional immunity to state for release of information regarding sex offenders); *Id.* § 35.21.415 (providing qualified immunity for officials and employees of cities and towns relating to responsibilities for electrical utilities, but not for cities and towns); *Id.* § 4.24.210 (providing qualified immunity to private and public landowners making their property available for recreational activities).

46. Act of May 13, 1989, ch. 419, 1989 Wash. Sess. Laws 2270 (codified as amended at WASH. REV. CODE § 4.92 (2004)).

47. *See id.* (emphasis added)

48. *See generally* Act of April 3, 2002, 2002 Wash. Sess. Laws 1693 (codified as amended at WASH. REV. CODE § 4.92 (2004)) (amending risk management statutes).

IV. JUDICIAL INTERPRETATION OF GOVERNMENT TORT LIABILITY IN WASHINGTON FOLLOWING THE WAIVER OF SOVEREIGN IMMUNITY

A central theme in Tardif and McKenna's call for Washington to re-examine its waiver of sovereign immunity is the assertion that judicial interpretation of the waiver expanded the scope of government tort liability beyond both the language of the statutory waiver and the Washington Supreme Court's decision in *Evangelical United Bretheren Church of Adna v. State*.[49] However, this assertion cannot withstand scrutiny. Since *Evangelical*, Washington courts have consistently interpreted the waiver of sovereign immunity as imposing liability for only "tortious conduct;" but the courts have also consistently recognized that other distinct common law immunities and judicial doctrines still protect essential acts of governing and shield governmental entities from unlimited civil liability.[50]

This Part surveys key Washington case law regarding government liability, beginning with an examination of *Evangelical* and how Tardif and McKenna misread that decision. It then explains how later cases have adhered to and clarified *Evangelical's* analysis, emphasizing that the common law immunities at issue in *Evangelical*—judicial, legislative, and discretionary immunity—are rooted in separation of powers principles. Finally, this Part identifies the development of the public duty doctrine as a related judicial construct for distinguishing tortious from non-tortious conduct.

A. The Evangelical Decision

Evangelical was the first major decision to interpret the scope of government liability following the waiver of sovereign immunity. In *Evangelical*, the Washington Supreme Court considered the scope of tortious conduct for which the State was not immune under RCW 4.92.090.[51] According to the court,

> the legislative, judicial, and purely executive processes of government, including as well the essential quasi-legislative and quasi-judicial or discretionary acts and decisions within the framework of such processes, cannot and should not, from the standpoint of public policy and the maintenance of the integrity of our system of gov-

49. 67 Wash. 2d 246, 407 P.2d 440 (1965); *see* Tardif & McKenna, *supra* note 5, at 6–7, 15–31.

50. *See supra* Part III.

51. *Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444.

> ernment, be characterized as tortious however unwise, unpopular, mistaken, or neglectful a particular decision or act might be.[52]

The plaintiffs in *Evangelical* asserted four principal claims of liability against the state arising out of a fire set by a youth who had escaped from a state juvenile facility for children with behavior problems.[53] The plaintiffs alleged the state was negligent in 1) maintaining an "open program" at the facility, which allowed youths a substantial degree of freedom; 2) placing the boy in question in the open program; 3) assigning the boy to a boiler room work detail, given his proclivity for setting fires; and 4) failing to timely notify local law enforcement following the boy's escape.[54] The state countered that none of its actions could be regarded as tortious conduct subject to the waiver of sovereign immunity because they involved the exercise of administrative judgment and discretion.[55]

In addressing the plaintiffs' claims, the court recognized the need "to determine where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins."[56] The court thus drew a distinction between tortious conduct, which is subject to civil liability since the waiver of sovereign immunity, and immunized conduct, which the court described as "discretionary," a term associated with purely executive processes that are comparable to the protected processes of the judicial and legislative branches.[57] Having drawn this distinction, the court considered various tests for separating discretionary from tortious conduct, including distinguishing between "planning" and "operational" decisions as under the Federal Tort Claims Act.[58] The point of such distinction is captured in U.S. Supreme Court Justice Jackson's observation in *Dalehite v. United States* that "it is not a tort for government to govern."[59]

The Washington Supreme Court ultimately adopted its own test based upon a series of questions intended to help distinguish "truly discretionary acts" from potentially tortious conduct:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental *policy, program, or objective*? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that *policy, program, or objective*

52. *Id.* (citations omitted).
53. *Id.* at 252, 407 P.2d at 443.
54. *Id.*
55. *Id.*
56. *Id.* at 253, 407 P.2d at 444.
57. *Id.* at 253, 258, 407 P.2d at 444, 446–47.
58. *Id.* at 253-54, 407 P.2d at 444.
59. 346 U.S. 15, 57 (1953) (Jackson, J., dissenting); *see Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444.

> as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of *basic policy evaluation, judgment, and expertise* on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[60]

In view of these questions, the court assessed the plaintiffs' four separate allegations of tort liability and concluded that, as to the first two allegations, the state could not be held liable for the agency decision to create the open program at the juvenile facility or for the review board's decision to place the particular youth in that program.[61] These policy-based decisions were "not unlike those called for in the legislative and judicial processes of government," about which "widely divergent opinions can and do exist."[62] Furthermore, the decisions involved the balancing of competing policy objectives "between therapy and security."[63] In particular, the review board's placement decision was viewed as analogous to the decision of a parole board to release an inmate from a mental hospital, a decision that the court had previously recognized as quasi-judicial in character.[64] It appears it was this liability theory the court had in mind when it concluded that the plaintiffs' first two contentions involved acts that were "purely discretionary, if not in fact quasi-judicial in nature."[65]

In contrast, the court held that the state could be subject to tort liability on the plaintiffs' second two claims—for the managerial decision to assign the youth to the boiler room detail and for any failure to timely notify law enforcement of his escape.[66] While these acts did involve some degree of discretion in implementing the program in question, they were not "essential to the realization or attainment of the basic *policies and objectives* of the delinquent youth program of the state."[67] Rather, the acts involved merely ministerial processes incidental to the day-to-day operation of the facility.[68]

Tardif and McKenna, however, read *Evangelical* as interpreting the waiver of sovereign immunity to exclude liability for all "governmental

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60. *Evangelical*, 67 Wash. 2d at 255, 407 P.2d at 445 (emphasis added).
61. *Id.* at 258, 407 P.2d at 446–47.
62. *Id.* at 258, 407 P.2d at 447.
63. *Id.*
64. *Id.* (citing Emery v. Littlejohn, 83 Wash. 334, 145 P. 423 (1915)).
65. *Id.* at 259, 407 P.2d at 447.
66. *Id.*
67. *Id.* (emphasis added)
68. *Id.*

functions."[69] They state, "*Evangelical* was a seminal case because it interpreted the private liability limitation in the waiver as excluding governmental functions from liability. *Evangelical* was significant because it immunized not only policymaking, but also operational steps taken by officials to implement policy."[70]

This interpretation misapprehends the Court's holding. First, *Evangelical* did not purport to interpret the scope of the waiver of sovereign immunity at all. The court gave every indication of accepting the all-encompassing language of the 1961 act as to tortious conduct, whether in a "governmental or proprietary capacity."[71] Instead, the court focused on the common law limits on tortious conduct *vis-á-vis* governmental entities when it stated, "it is not a tort for government to govern."[72] Thus, the court recognized that the legislative, judicial, and certain executive processes of government cannot be tortious. These common law immunities for judicial or quasi-judicial acts, legislative or quasi-legislative acts, and purely executive or discretionary acts were well-established prior to the waiver of sovereign immunity, but they only gained relevance after the state lost its more-encompassing sovereign immunity.[73]

Second, Tardif and McKenna misread *Evangelical* as suggesting that operational or managerial acts taken by officials to *implement* policy are subject to common law discretionary immunity.[74] In this regard, they criticize the *Evangelical* opinion for containing an "internal inconsistency," insofar as the court finds no liability for the review board decision placing the youth in the open program, but finds potential liability for the facility's assignment of the youth to the boiler room detail.[75] When Tardif and McKenna describe this aspect of the decision as an inconsistency, they appear to misunderstand why the former decision involved basic policymaking, but the latter did not.

The initial placement of the youth in the open program involved a discretionary, quasi-judicial decision, made by an initial review board that had to balance the statutory policy goals of community safety and rehabilitation of the youth.[76] The legislature granted the responsible agency the discretion to establish and maintain programs to carry out the

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69. Tardif & McKenna, *supra* note 5, at 11.

70. *Id.*

71. *See Evangelical*, 67 Wash. 2d at 252, 407 P.2d at 443.

72. *Id.* at 253, 407 P.2d at 444 (quoting Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting)).

73. *See id.*

74. Tardif & McKenna, *supra* note 5, at 11, 15–16, 43–44, 50–51.

75. *Id.* at 11.

76. *Evangelical*, 67 Wash. 2d at 257–58, 407 P.2d at 446–47.

statutory policy objectives.[77] Within this framework, the decision that placement of a particular youth in the open program would best balance the twin policy aims of security and rehabilitation involved a basic policy judgment, akin to the quasi-judicial decision a parole board makes in deciding whether to grant parole to a particular person.[78]

In contrast, the decision to assign the youth to work the boiler room detail was merely a managerial decision implementing established policy in the day-to-day assignment of youths to work details.[79] As such, this decision *was* capable of being measured against established procedures and standards of care and *was* subject to generally applicable tort law analysis, including the foreseeability of harm.[80] Properly understood, there is no internal inconsistency in the court's decision in *Evangelical.*

Tardif & McKenna find an inconsistency because they erroneously read the decision to interpret the waiver of sovereign immunity "as excluding governmental functions from liability,"[81] especially "the operational steps taken by officials to implement policy."[82] In fact, the *Evangelical* court drew no distinction between governmental and nongovernmental functions. Rather, the court drew a distinction between high-level policymaking and low-level operational acts to implement policy. It is true that all of these functions are "governmental" in some sense. But in finding potential tort liability for day-to-day management decisions, including assignment of the youth to the boiler room detail, the court recognized that there was no immunity for "operational," "ministerial," or "housekeeping" functions.[83] Discretionary immunity is thus confined to those "decisions which are essential to the realization or attainment of the basic *policies and objectives* of the delinquent youth program of the state."[84] In sum, the court appreciated the difference between the essential government formulation of "basic policies and objectives" and the merely operational "internal management" decisions made by government officials.[85]

The Washington Supreme Court's decision in *Evangelical* was pivotal because it established the framework for understanding the interplay between the legislature's broad waiver of sovereign immunity and the

77. *See id.* at 257, 407 P.2d at 446.

78. *Id.* at 258, 407 P.2d at 447; *see also* Taggart v. State, 118 Wash. 2d 195, 205–07, 822 P.2d 243, 248 (1992) (noting quasi-judicial immunity of parole boards).

79. *Evangelical*, 67 Wash. 2d at 259–60, 407 P.2d at 447–48.

80. *Id.* at 260, 407 P.2d at 447–48.

81. Tardif & McKenna, *supra* note 5, at 11.

82. *Id.*

83. *Evangelical*, 67 Wash. 2d at 259, 407 P.2d at 447.

84. *Id.*

85. *Id.*

pre-existing common law immunities for basic judicial, legislative, and executive functions. As discussed below, cases since *Evangelical* have not departed from this framework, but rather have clarified the line between high-level policymaking and merely managerial acts, making clear that the policymaking/operational distinction is rooted in separation of powers principles.

B. Refinement of the Evangelical Decision

As *Evangelical* foreshadowed, courts were presented with a variety of new tort claims for government conduct following the waiver of sovereign immunity. Consequently, judicial decisions continued to revisit and refine the scope of government liability. Tardif and McKenna suggest that later key cases departed from *Evangelical*'s initial interpretation of the waiver of sovereign immunity and expanded government liability beyond "traditional" liabilities.[86] However, this argument misapprehends the holding in *Evangelical*, as previously discussed.[87] In fact, the key cases that Tardif and McKenna criticize are not only consistent with *Evangelical*, but they have also helped to clarify the sometimes fine line between high-level policymaking and low-level operational decisions.

A series of cases beginning with *King v. City of Seattle* in 1974 were instrumental in furthering the analysis in *Evangelical*.[88] These cases underscore that the *Evangelical* court's reasoning is founded upon the doctrine of separation of powers. For example, in *King*, the court noted that "immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on *policy decisions* in the province of coordinate branches of government."[89] This statement is consistent with the generally understood "main idea" behind discretionary immunity; namely, that "certain governmental activities are legislative or executive in nature[, and] any judicial control of those activities, in tort suits or otherwise, would disrupt the balanced separation of powers of

86. Tardif & McKenna, *supra* note 5, at 15-16.

87. *See supra* Part III.A.

88. *See* King v. City of Seattle, 84 Wash. 2d 239, 246–47, 525 P.2d 228, 232–33 (1974) (holding city not immune from liability for arbitrary and capricious decision not to issue permits); *see also* Mason v. Bitton, 85 Wash. 2d 321, 328–29, 534 P.2d 1360, 1365 (1975) (finding no immunity for discretion exercised "in the field" by police officers engaged in high-speed chase); Bender v. City of Seattle, 99 Wash. 2d 582, 589–90, 664 P.2d 492, 498–90 (1983) (rejecting claim of discretionary immunity for decisions made during criminal investigation, which, albeit "discretionary," were not "basic policy decisions"); *compare* Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 476, 647 P.2d 481, 486 (1982) (recognizing discretionary immunity for governor's decision regarding scope and duration of restricted "red zone" designation following eruption of Mt. St. Helens), *cert. denied*, 459 U.S. 971 (1982).

89. *King*, 84 Wash. 2d at 246, 525 P.2d at 233.

the three branches of government."[90] Both before and since the waiver of sovereign immunity, tort litigation has been unable to scrutinize the basic activities of governing, including executive, legislative, and judicial functions. The legislature's broad waiver of sovereign immunity did not alter this fact.[91]

Separation of powers principles led to the four questions posed by the court in *Evangelical*.[92] These questions distinguish between high-level policy decisions and low-level implementation-of-policy decisions made by executive branch officials. The point of inquiry is not simply whether government officials exercised some discretion in the performance of their duties, but whether such discretion embodied basic policy decision-making. Applying the *Evangelical* framework, the court in *Mason v. Bitton* noted the following:

> To now hold that this type of discretion, exercised by police officers in the field, cannot result in liability under RCW 46.61.035 [emergency vehicle statute], due to an exception provided for basic policy discretion, would require this court to close its eyes to the clear intent and purpose of the legislature when it abolished sovereign immunity under RCW 4.92.090. If this type of conduct were immune from liability, the exception would surely engulf the rule, if not totally destroy it.[93]

Emphasizing the separation of powers concerns that guided the decision in *Evangelical*, cases such as *Mason* have helped refine the discretionary immunity doctrine in a way that respects the legislature's waiver of sovereign immunity. These cases emphasize that imposing liability for merely managerial, operational, or ministerial functions does not implicate separation of powers concerns because these activities do not involve policymaking by a coordinate branch of government. Rather, such managerial acts involve merely the *implementation* of policy and may therefore be measured according to ordinary tort principles, including established standards of care. Just as the court in *Evangelical* was able to assess a basic managerial decision (assigning the youth to the boiler room detail) according to the standard of a reasonable supervisor, later courts have recognized tort liability when governmental decisions were

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90. W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS § 131, at 1039 (5th ed. 1984).

91. *See* RESTATEMENT (SECOND) OF TORTS § 895B, cmts. c–d (1979) (recognizing it is not a tort for a court to wrongly decide a case or for the legislature to pass a bad law); *see also* Abbott, *supra* note 2, at 323–24; ("it would be unthinkable, for example, to hold the state liable for the wrong decision of a judge or legislator"); *see generally*, KEETON ET AL., *supra* note 90, § 131.

92. 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1966); *see also* RESTATEMENT (SECOND) OF TORTS § 895B, cmt. d (1979) (citing *Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444).

93. 85 Wash. 2d at 328–29, 534 P.2d at 1365 (1975).

subject to definable standards of care.[94] For example, later courts have held that government activity such as roadway design, maintenance, and signage is readily subject to ordinary negligence theories.[95] Even before the waiver of sovereign immunity, courts recognized that liability in this area was amenable to traditional negligence analysis.[96]

In contrast, courts cannot assess basic policy decisions against tort standards of "reasonableness." For example, a local business association sued Washington Governor Dixie Lee Ray based on her declaration of a state of emergency during the eruption of Mt. St. Helens in 1980.[97] One cannot imagine that a court hearing such a case would allow an "expert" governor from a neighboring state to testify how a reasonable governor would respond to a volcanic eruption in order to establish whether Governor Ray acted negligently on that occasion. On the contrary, so long as authorized by statute or constitutional provision, basic policy decisions of this sort are appropriately regarded as immune from judicial second-guessing through the medium of a tort duty analysis.[98] Similarly, political judgments are by nature open to dispute, and judicial review of such decisions might improperly "operate to make the judiciary the final and supreme arbiter in government, not only on a constitutional level, but on all matters on which judgment might differ."[99] For this reason, *Evangelical* and subsequent cases have carefully defined the distinction between policymaking and operational decisions.

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94. *See, e.g.*, Miotke v. Spokane, 101 Wash. 2d 307, 336–47, 678 P.2d 803, 819–20 (1984) (decision to build sewage bypass was not basic policy decision where measured against technical, engineering, and scientific judgment); Haberman v. Wash. Pub. Power Supply Sys., 109 Wash. 2d 107, 158, 744 P.2d 1032, 1055 (1987) (distinguishing between arguably immune decision to undertake nuclear power project versus technical means by which decision was implemented, subject to scrutiny under ordinary tort principles).

95. *See* Stewart v. State, 92 Wash. 2d 285, 294, 597 P.2d 101, 106–07 (1979) (holding that, while decision to build freeway involved basic policy decision, choices as to design and lighting were not protected by discretionary immunity); Riley v. Burlington Northern, 27 Wash. App. 11, 18 n.4, 615 P.2d 516, 519 n.4 (rejecting discretionary immunity for decision regarding roadway signing at railroad crossing), *review denied*, 94 Wash. 2d 1021, 615 P.2d 516 (1980); Ruff v. County of King, 125 Wash. 2d 697, 704–05, 887 P.2d 886, 889–90 (1995) (noting common law duty to exercise ordinary care in maintaining safe roadways). In appropriate circumstances, negligence may be established by reference to the standards set forth in the Manual of Uniform Traffic Control Devices (MUTCD). *See* Ottis Holwegner Trucking v. Moser, 72 Wash. App. 114, 122, 863 P.2d 609, 614 (1993) (noting that the"[f]ailure to comply with uniform state traffic control standards can be evidence of negligence"); *cf.* Kitt v. Yakima County, 93 Wash. 2d 670, 676–76, 611 P.2d 1234, 1237 (1980) (holding that violation of mandatory MUTCD provision constitutes negligence per se).

96. *See* Hewitt v. City of Seattle, 62 Wash. 377, 378–79, 113 P. 1084, 1085–86 (1911).

97. *See* Cougar Bus. Owners Ass'n v. State, 97 Wash. 2d 466, 647 P.2d 481 (1982), *cert. denied*, 459 U.S. 971 (1982).

98. *Id.* at 471–73, 647 P.2d at 484–85 (holding governor's actions protected by discretionary immunity; applying four part test of *Evangelical*).

99. KEETON ET AL., *supra* note 90 § 131, at 1039.

Rather than recognizing the separation of powers principles that undergird the analysis in *Evangelical*, Tardif and McKenna view the decision as interpreting discretionary immunity to embrace "governmental functions," including "operational steps."[100] As will be seen, this interpretation of discretionary immunity erroneously reflects the former "governmental-proprietary" dichotomy that was expressly discarded by the legislature when it waived sovereign immunity.

C. Discretionary Immunity Does Not Embrace All "Governmental Functions"

As discussed above, courts have recognized that governmental functions are subject to tort liability when they do not involve high-level policymaking. This view is consistent with the legislative waiver of sovereign immunity for both governmental and proprietary acts, and it is true regardless of whether the activity in question is one that *only* the government performs, such as licensing drivers or designing and maintaining public roads.[101] Tardif and McKenna's suggestion that such activities were not intended to be subject to the waiver of sovereign immunity because they involve basic governmental functions does not accord with the language of the waiver statutes.[102] Both RCW 4.92.090 and 4.96.010 waive sovereign immunity of the state and local governmental entities whether acting in a "governmental or proprietary capacity."[103] Tardif and McKenna discuss the pre-waiver distinction between governmental and propriety functions of municipal corporations[104] and argue that the discretionary immunity analysis in *Evangelical* essentially carries forward this distinction.[105]

As noted, however, the distinction between governmental and proprietary functions arose prior to the waiver of sovereign immunity as a way to identify those activities of certain municipal corporations in which the municipality partook in the state's sovereignty, ergo in the state's immunity.[106] Courts attempted to draw the line between functions

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100. Tardif & McKenna, *supra* note 5, at 11.

101. *See, e.g.*, LaPlante v. State, 85 Wash. 2d 154, 531 P.2d 299 (1975) (involving negligent licensing of taxi driver); Stewart v. State, 92 Wash. 2d 285, 597 P.2d 101 (1979) (involving negligent roadway design).

102. *See* Tardif & McKenna, *supra* note 5, at 11, 17, 42, 50–51.

103. *See* Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)); Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

104. *See* Tardif & McKenna, *supra* note 5, at 5–7.

105. *See id.* at 10–12, 50–51.

106. Hagerman v. City of Seattle, 189 Wash. 694, 698–99, 66 P.2d 1152, 1154–55 (1937); Riddoch v. State, 68 Wash. 329, 334, 123 P. 450, 452 (1912); *see also* Kelso v. Tacoma, 63 Wash. 2d 913, 916–17, 390 P.2d 2, 5 (1964); Abbott, *supra* note 2, at 313, 315–16. *See supra* Part I.A.

a municipality performed as a subdivision of the state, which were immune by virtue of state sovereignty, versus those proprietary functions the municipality performed on behalf of itself, which were subject to tort liability.[107] Pre-waiver cases drew no distinction between high-level, basic policy decisions and merely operational decisions of the governmental entity.[108] Nor was the analysis necessarily concerned with whether the function involved an activity analogous to that performed by a private corporation.[109] The pre-waiver cases make clear that proprietary functions for which a political subdivision could be held liable in tort often involved matters of substantial discretion as well as activities for which no private counterpart was apparent.[110] Immunity for governmental functions, on the other hand, extended only as far as the state's sovereign immunity and went by the wayside with the waiver of sovereign immunity in 1961.[111]

Thus, by the time the court decided *Evangelical*, it did so in the context of the legislature's categorical waiver of the state's sovereign immunity, which rendered obsolete the former governmental-proprietary distinction.[112] Tardif and McKenna's unsupported assertion that *Evangelical* interpreted the waiver "as excluding governmental functions from liability,"[113] is a misreading of the court's opinion. As explained previously,[114] the *Evangelical* court was concerned with interpreting the term "tortious conduct" in RCW 4.92.090, and it held that essential acts of governing embodied in basic policy decisions cannot be deemed tortious.[115] This holding reflected separation of powers concerns that necessarily limit tort liability, notwithstanding the otherwise categorical waiver of sovereign immunity.[116] Indeed, it would have been anomalous for the court to hearken back to the former governmental-propriety distinction, given its recognition that RCW 4.92.090 waived immunity for governmental functions.[117]

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107. *See Kelso*, 63 Wash. 2d at 916–17, 390 P.2d at 5.

108. *See id.*

109. *See Hagerman*, 189 Wash. at 701–02, 66 P.2d at 1155–56.

110. *See, e.g.*, McLeod v. Grant County Sch. Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953) (holding school district liable for negligence resulting in rape of student); Berglund v. Spokane County, 4 Wash. 2d 309, 103 P.2d 355 (1940) (recognizing tort liability for negligent road maintenance, including failure to install sidewalk).

111. *See Kelso*, 63 Wash. 2d at 916–17, 390 P.2d at 5.

112. *See* Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 252–53, 407 P.2d 440, 443–44 (1965).

113. Tardif & McKenna, *supra* note 5, at 11.

114. *See supra* Part III.A.

115. *Evangelical*, 67 Wash. 2d at 253–54, 407 P.2d at 444.

116. *Id.* at 253–55, 407 P.2d at 444–45.

117. *Id.* at 252, 407 P.2d at 443.

Moreover, in waiving sovereign immunity, the legislature consented to imposition of liability against state and local governmental entities for tortious conduct "to the same extent as if [they] were a private person or corporation."[118] This language forecloses any reliance on the "governmental" nature of a particular activity as a basis for retaining sovereign immunity. In this regard, it is appropriate when assessing liability to draw analogies between the governmental defendant's conduct and comparable conduct performed in the private sector.[119] For example, the duty of a law enforcement officer may be analogized to that of a private security officer under similar circumstances.[120] Notably, the statutory language, "as if,"[121] suggests that liability may be imposed even in areas in which no prior analogous liability has been found in the private sector, so long as a private entity would be subject to liability if the same theory were asserted against it in the first instance. A more restrictive analysis might have been required if the statutes imposed liability only for conduct "performed by" or even "to the same extent as" private defendants, rather than "as if . . . a private person or corporation."[122]

Tardif and McKenna make the related assertion that the legislature intended to impose liability only for "ordinary torts," such as negligent driving or medical malpractice, which may be committed by public and private actors alike.[123] However, this assertion is out of keeping with Washington case law and is unsupported by the language actually used by the legislature. As the courts have properly recognized, the waiver mandates that the sovereign mantle be disregarded so that governmental entities are subject to the same tort duty analysis as if sovereign immunity never existed.

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118. WASH. REV. CODE §§ 4.92.090, 4.96.010 (2004). Although the majority opinion in *Evangelical* only commented on the original 1961 enactment, the 1963 statute, which remains in force to this day, has the same pivotal language. *Compare* Act of March 16, 1961, ch. 136, 1961 Wash. Sess. Laws 1680 (codified as WASH. REV. CODE § 4.92.090 (2004)), *with* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753 (codified as amended at WASH. REV. CODE § 4.92.090 (2004)). The same language also appears in the 1967 enactment confirming the waiver of sovereign immunity as to local governmental entities. Act of March 21, 1967, ch. 164, 1967 Wash. Sess. Laws 792 (codified as WASH. REV. CODE § 4.96.010 (2004)).

119. *See Evangelical*, 67 Wash. 2d at 253, 407 P.2d at 444 (noting that tortious conduct "must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation"); *see also* J & B Dev. Co. Inc. v. King County, 100 Wash. 2d 299, 310–11, 669 P.2d 468, 475 (1983) (Utter, J., concurring) (noting analysis involves analogizing to private sector duties), *overruled on other grounds*; Taylor v. Stevens County, 111 Wash. 2d 159, 759 P.2d 447 (1988).

120. *J & B Dev.*, 100 Wash. 2d at 311, 669 P.2d at 475 (Utter, J., concurring) (noting this analogy and use of similar analysis in other states); *see also* Adams v. State, 555 P.2d 235, 240–41 (Alaska 1976) (recognizing liability of public fire inspector as analogous to duty of private insurance inspector).

121. WASH. REV. CODE § 4.92.090 (2004).

122. *Id.*

123. *See* Tardif & McKenna, *supra* note 5, at 7, 17–18.

This interpretation of the waiver is supported by the fact that governmental defendants may not assert a defense to tort liability based on limited financial resources.[124] While the legislature was evidently concerned with the potential economic consequences of waiving sovereign immunity, it addressed this concern through risk management programs and by limiting the methods by which a tort victim may collect a judgment against the state or its subdivisions.[125] In *Bodin v. Stanwood*, a majority of the supreme court, comprised of the concurring and dissenting justices, properly rejected a municipality's argument that limited economic resources may provide a defense against claims of negligence.[126] Though dicta in an earlier decision suggested that a governmental defendant might have a defense based on funding limitations or budget allocations,[127] the holding in *Bodin* makes clear this is not the case. While a governmental entity, just as a private person or corporation, may offer certain cost evidence as bearing upon the exercise of reasonable care, there is no generally available "poverty defense."[128]

Following *Evangelical*, judicial interpretation of the scope of government tort liability has respected the legislature's directive that state and local governmental entities shall be liable for their tortious conduct, both governmental and proprietary, to the same extent as if they were a private person or corporation. At the same time, Washington courts have honored the common law doctrines providing for judicial, legislative, and discretionary immunity, consistent with the separation of powers principle underlying these doctrines.

Against this backdrop, the courts have also struggled to identify the sources of government tort duties, an inquiry that only became relevant with the waiver of sovereign immunity. Most notably, the "public duty doctrine" has emerged as an analytical framework for assessing the scope of tort liability in particular contexts.

D. The Public Duty Doctrine

The public duty doctrine did not fully surface until after the waiver of sovereign immunity (though it is inaccurate to suggest that the doc-

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124. *See id.* at 23 n.151.

125. *See* Act of March 25, 1963, ch. 159, 1963 Wash. Sess. Laws 753-54 (codified as WASH. REV. CODE §§ 4.92.100–.110 (2004)) (requiring notice of claim against state and establishing procedure for filing claims).

126. 130 Wash. 2d 726, 742–43, 927 P.2d 240, 250–51 (1996) (Alexander, J., concurring & Johnson, J., dissenting) (majority rejecting so-called poverty defense).

127. *See* McCluskey v. Handorff-Sherman, 125 Wash. 2d 1, 8–9, 882 P.2d 157, 161 (1994); *see also* Tardif & McKenna, *supra* note 5, at 23 n.151.

128. *See Bodin*, 130 Wash. 2d at 742, 927 P.2d at 250 (Alexander, J., concurring); *id.* at 743, 927 P.2d at 250–51 (Johnson, J., dissenting).

trine arose out of dissatisfaction with the broad scope of the waiver).[129] Washington borrowed the public duty doctrine from a series of New York cases involving government tort liability.[130] The basic rule expressed in the New York cases is that obligations imposed by statute or municipal ordinance do not, in and of themselves, support tort liability.[131] In Washington, this rather unremarkable principle reflects traditional tort duty analysis insofar as a statutory obligation is not generally regarded as imposing tort liability unless courts recognize that the statute creates a direct or implied cause of action.[132] This duty analysis only surfaces when a statute, administrative code, or ordinance is asserted as the source of the defendant's duty to the plaintiff—and significantly, this duty analysis is equally applicable to both public and private defendants.[133]

Since first recognizing the public duty doctrine, the Washington Supreme Court has described the doctrine and its exceptions as "focusing tools" for determining whether a duty is owed "to a nebulous public or whether that duty has focused on the claimant."[134] In some instances, the court has applied basic tort principles to carve out broad exceptions to the doctrine's rule of non-liability.[135] At the same time, the court has also imposed liability, without reference to the public duty doctrine, for a

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129. *See* Tardif & McKenna, *supra* note 5, at 48.

130. *See* Campbell v. Bellevue, 85 Wash. 2d 1, 9 n.5, 530 P.2d 234, 238–39 n.5 (1975).

131. *See, e.g.*, Motyka v. Amsterdam, 204 N.E.2d 635, 636–37 (N.Y. 1965) (holding there is no general liability to the public for failure to supply adequate police or fire protection); *see also* Kelly Mahon Tullier, Note, *Governmental Liability for Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 887 (1992) (noting origins of public duty doctrine).

132. *See Campbell*, 85 Wash. 2d at 8–10, 530 P.2d at 238–39; *see also* Bennett v. Hardy, 113 Wash. 2d 912, 784 P.2d 1258 (1990) (recognizing implied cause of action for discrimination under WASH. REV. CODE § 49.44.090 (2004), based on analysis of RESTATEMENT (SECOND) OF TORTS § 874A (1979)). In addition to a direct or implied statutory cause of action, the court has recognized that a statute, ordinance, or the like may provide evidence of the standard of care for a common law action. *See, e.g.*, Hansen v. Friend, 118 Wash. 2d 476, 480–82, 824 P.2d 483, 485–86 (1992) (recognizing statutory standard of care under four-part test of RESTATEMENT (SECOND) OF TORTS § 286 (1965)).

133. *See Campbell*, 85 Wash. 2d at 9–10, 530 P.2d. at 238–39. Application of this analysis to private sector tort liability is evident in the New York cases discussed in *Campbell*. As explained in *Motyka*, the landmark "public duty doctrine" case in New York involved a *private* defendant providing services to the city under a contract and the terms of an enabling statute. *See Motyka*, 204 N.E.2d at 636-37 (citing H.R. Moch Co. Inc. v. Rensselaer Water Co., 159 N.E. 896 (N.Y.1928)).

134. J & B Dev. Co. Inc. v. King County, 100 Wash. 2d 299, 304–05, 669 P.2d 468, 472 (1983); *see also* Bailey v. Forks, 108 Wash. 2d 262, 265–68, 737 P.2d 1257, 1259–60 (1987) (outlining public duty doctrine and exceptions).

135. Four exceptions to the doctrine have thus far been identified: "legislative intent," "special relationship," "failure to enforce," and "rescue doctrine." *See Bailey*, 108 Wash. 2d at 268, 737 P.2d at 1260; *see also* Taggart v. State, 118 Wash. 2d 195, 218, 822 P.2d 243, 254 (1992) (noting, "[t]he question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff"); *accord* Bishop v. Miche, 137 Wash. 2d 518, 530, 973 P.2d 465, 471 (1999).

governmental entity's breach of a common law duty not based on a statutory obligation.[136]

Over the years, both judges and commentators have expressed concern that the public duty doctrine operates as a judicial restoration of sovereign immunity in defiance of the legislature's waiver.[137] Recently, in response to such criticism and calls to abandon the public duty doctrine, the Washington Supreme Court clarified the doctrine's limited purpose and scope.[138] In *Osborn v. Mason County*, the court stated,

> Because a public entity is liable in tort "to the same extent as if it were a private person or corporation," former RCW 4.92.090 (1963) *and* former 4.96.010 (1967) (municipality), the public duty doctrine does not—cannot—provide immunity from liability. Rather it is a "focusing tool" we use to determine whether a public entity owed a duty to a "nebulous public" or a particular individual. The public duty doctrine simply reminds us that a public entity—like any other defendant—is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State has a duty to the plaintiff." In other words, the public duty doctrine helps us distinguish proper legal duties from mere hortatory "duties."[139]

This reasoning confirms that the public duty doctrine is not a substitute for sovereign immunity, but is merely a part of traditional tort analysis when an asserted duty is based on a statute, regulation, ordi-

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136. *See* Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983) (holding action may lie for State's negligent release of mentally disturbed patient); *see also Taggart*, 118 Wash. 2d at 218 n.4, 822 P.2d at 254–55 n.4 (1992) (noting that *Petersen* was later described as effectively creating exception to public duty doctrine).

137. *See* Chambers-Castanes v. King County, 100 Wash. 2d 275, 290–95, 669 P.2d 451, 460–63 (1983) (Utter, J., concurring) (urging that the doctrine detracts from traditional tort analysis); Babcock v. Mason County Fire Dist. No. 6, 144 Wash. 2d 774, 795–802, 30 P.3d 1261, 1272–76 (2001) (Chambers, J., concurring) (criticizing doctrine); Beal v. City of Seattle, 134 Wash. 2d 769, 794, 954 P.2d 237, 249 (1998) (Talmadge, J., dissenting) (same); *see also* Mark McLean Meyers, Comment, *A Unified Approach to State and Municipal Tort Liability in Washington*, 59 WASH. L. REV. 533 (1984); Shelly K. Speir, Comment, *The Public Duty Doctrine and Municipal Liability for Negligent Administration of Zoning Codes*, 20 SEATTLE U. L. REV. 803 (1997). In response to criticism, numerous jurisdictions have abandoned the public duty doctrine, while only two that have addressed the issue have chosen to retain it. *See* Aaron R. Baker, Comment, *Untangling the Public Duty Doctrine*, 10 ROGER WILLIAMS U. L. REV. 731, 747 nn.111–12 (2005) (collecting cases).

138. *See* Cummins v. Lewis County, 156 Wash. 2d 844, 133 P.3d 458 (2006); Osborn v. Mason County, 157 Wash. 2d 18, 134 P.3d 197 (2006). The *Cummins* court did not address whether the public duty doctrine should be abandoned, concluding the issue had not properly been preserved by the plaintiff.

139. 157 Wash. 2d at 27–28, 134 P.3d at 202 (citations omitted).

nance, or the like.[140] Similarly, the doctrine's "exceptions" help define those instances in which a defendant's actions toward a particular person or class of persons may give rise to a duty in tort.[141] With this clarification in *Osborn*, the Washington Supreme Court has properly defined the tort duties of governmental entities in accord with prior case law, which has consistently imposed government liability except in narrow circumstances involving essential acts of governing.[142] Thus, *Osborn* has brought stability to the law.

Ultimately, the past four decades have seen positive growth in the understanding of the scope of government tort liability following the legislature's mandate. During this time, the law has not drifted away from the intent of the waiver statutes and the decision in *Evangelical*. Rather, as the law has developed, it has accomplished the goal of holding the state and local governments accountable for their tortious conduct to the same extent as if they were private actors. At the same time, the law has maintained its respect for the rights of state and local governments to govern. Though the incremental refinements that naturally occur in the development of case law have produced some ebb and flow in the scope of government tort liability in particular areas, the Washington Supreme Court has consistently held to the principles first announced in *Evangelical*. As will be discussed in the next section, this system of holding governmental entities liable in tort to the same extent as if they were private entities has tremendous value and should be exalted.

V. THE VALUE OF GOVERNMENT ACCOUNTABILITY FOR TORTIOUS CONDUCT

Because Tardif and McKenna tend to focus on the immediate costs of imposing tort liability on governmental entities,[143] their analysis downplays the value of tort liability. However, the social benefits of imposing tort liability must be appreciated. As Justice Utter observed in *King v. Seattle*, "[t]he most promising way to correct the abuses, if the community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit."[144]

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140. *See id.*

141. *Id.*

142. Osborn and aligned amicus curiae, Washington State Trial Lawyers Association Foundation, requested that the *Osborn* court abrogate the public duty doctrine because it was redundant with traditional duty analysis, but the court refused to do so. 157 Wash. 2d at 27, 134 P.3d at 202. While this result likely would have gone farther in eliminating skirmishes as to the impact of the doctrine, *Osborn* is sufficiently clear in identifying its limited purpose as a focusing tool, so as to avoid further misunderstanding of the doctrine. *See id.* at 32, 134 P.3d at 205.

143. Tardif & McKenna, *supra* note 5, at 13–14, 31–32, 41–42, 44–45.

144. 84 Wash. 2d 239, 244, 525 P.2d 228, 232 (1974)

The immediate costs of imposing tort liability on governmental entities include direct litigation expenses and the payment of damages. However, just as in the private sector, the immediate costs are outweighed by the societal value of encouraging responsible conduct in two ways: through holding governmental entities accountable for tortious acts and through providing compensation to injured citizens.[145]

It has long been recognized that tort liability is a powerful tool for encouraging responsible conduct.[146] Indeed, a primary purpose of tort law is to provide for civil enforcement of social norms.[147] Private lawsuits often accomplish results that government action cannot achieve through criminal sanctions, regulatory enforcement, or other means.[148] Both public and private actors alter their behavior in response to tort liability, and any suggestion that tort liability is not an impetus for change in the context of governmental conduct rests on the doubtful premise that the government is uniquely unable to reform.[149]

Tardif and McKenna argue that governmental entities are unlike private entities because government is a sole-source provider of services that affect large numbers of people, and its resources are fixed by limited budgets, staff, and statutory mandates.[150] Governmental entities have repeatedly raised this type of argument, but the Washington Supreme Court has repeatedly rejected it, instead recognizing not only that governments are fully capable of conforming to standards of reasonable conduct, but also that the waiver of sovereign immunity does not equate to

145. Tardif and McKenna also note the general expansion of tort law since 1961, arguing it has had an adverse impact on government tort liability. *See* Tardif & McKenna, *supra* note 5, at 6–7, 33–35, 52. They suggest the legislature could not have contemplated this development at the time it waived sovereign immunity. *Id.* at 7. It is beyond the scope of this article to examine and defend either the advances in tort law that have occurred over the past forty-odd years or the impact of such advances on government liability. It is enough to note that Washington's legislature is deemed to be familiar with Washington case law, including developments in tort law, and the legislature has not sounded a retreat from its broad waiver of sovereign immunity. Moreover, in making governmental entities liable in tort "as if . . . a private person or corporation," the legislature clearly stated its purpose to eliminate the distinction between governmental and private defendants, not to establish the substance of tort law as applied to the state and local governments. *See* WASH. REV. CODE §§ 4.92.090, 4.96.010 (2004).

146. KEETON ET AL., *supra* note 90, § 4 at 25–26.

147. *Id.*

148. For example, it was a California jury verdict against Ford Motor Company that ultimately resulted in Ford's issuing a voluntary recall of its Pinto automobile, a step that Ford had not taken in the face of earlier regulatory action by the National Highway Transportation Safety Agency. *See* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1018–19 (1991).

149. Tardif & McKenna, *supra* note 5, at 46–47.

150. *Id.* at 47.

absolute liability on the government.[151] On the contrary, plaintiffs seeking imposition of liability against a governmental defendant must still establish duty, breach, proximate cause, and damages, just as if they were suing a private defendant.[152] Further, a governmental entity may defend itself against claims of liability by showing that it acted reasonably according to common notions of feasibility and practicality.[153]

Moreover, circumstances involving sole-source providers, fixed resources, or statutory mandates are not unique to governmental entities; many private entities may also be sole providers of services that affect millions of citizens, operating with fixed budgets and subject to federal and state statutes and regulations. Even so, Washington has long understood the value of holding such entities accountable for their negligence despite their claims that exercising reasonable care would be too expensive or bad for business.[154]

Additionally, the value of tort liability does not lie solely in encouraging responsible conduct; tort liability also provides necessary compensation to injured victims. This compensatory function is arguably the greatest value that tort law provides. Indeed, the civil justice system is uniquely suited to address the individual needs of those injured by acts of negligence.[155] But Tardif and McKenna appear to discount the civil justice system's ability to accomplish this goal. They unduly criticize this most-revered institution for the redress of wrongs—including its central feature, the jury system—when they suggest that verdicts against governmental defendants are "excessive,"[156] "punitive,"[157] and "inflated by

151. *See* Taggart v. State, 118 Wash. 2d 195, 216, 822 P.2d 243, 253 (1992); Hertog v. City of Seattle, 138 Wash. 2d 265, 279–80 n.4, 979 P.2d 400, 408–09 n.4 (1999); Tyner v. Dep't Soc. & Health Servs., 141 Wash. 2d 68, 87–88 n.8, 1 P.3d 1148, 1158–59 n.8 (2000).

152. *See, e.g.*, *Taggart*, 118 Wash. 2d at 218–19, 822 P.2d at 254–55 (recognizing government liability based on traditional tort analysis, involving foreseeability of harm and pertinent policy considerations).

153. *See, e.g.*, Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 260–61, 407 P.2d 440, 447–48 (1965); *Tyner*, 141 Wash. 2d at 87–88, 1 P.3d at 1158–59; *see also* McCluskey v. Handorff-Sherman, 125 Wash. 2d 1, 19–23, 882 P.2d 157, 166–68 (1994) (Brachtenbach, J., concurring) (noting that cost evidence may be admissible to defend based on the feasibility or practicality of corrective measures); Bodin v. City of Stanwood, 130 Wash. 2d 726, 745–46, 927 P.2d 240, 250–51 (1996) (Johnson, J., dissenting) (noting that the cases that have allowed cost evidence have been concerned with practicalities, not financial strategy).

154. *See Bodin*, 130 Wash. 2d at 744–45, 927 P.2d at 250 (Johnson, J., dissenting) (noting judicial rejection of poverty defense whether raised by government or private person or corporation).

155. KEETON ET AL., *supra* note 90 § 4, at 20; *see also* Hunter v. North Mason High Sch., 85 Wash. 2d 810, 814, 539 P.2d 845, 848 (1975) (noting "the right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to have a decent life").

156. Tardif & McKenna, *supra* note 5, at 52.

157. *Id.* at 49.

emotion and outrage."[158] A jury of citizens, no less than a legislature of citizens, acts as the social conscience of the community and is well suited to weigh the value of imposing tort liability, both in terms of compensation and deterrence. In any event, procedural safeguards in court rules and statutes—including post-verdict motions for remittitur or new trial as well as the right of appeal—alleviate the risk that excessive or improper jury verdicts will stand.[159] These institutional checks protect the integrity of the jury system.

Finally, there is some irony in Tardif and McKenna's suggestion that the perceived problems with government tort liability should be solved by legislative action that "replac[es] Washington's waiver with statutes that precisely define the extent of liability for state and local government functions."[160] Having criticized the judiciary's efforts at distinguishing between truly "discretionary" acts and tortious conduct, Tardif and McKenna conclude that the legislature will have no difficulty with this same task: "The history of the waiver in Washington and in other states provides the legislature with ample information to determine 'where in the area of governmental processes, orthodox tort liability stops and the act of governing begins.'"[161] However, Tardif and McKenna rely too much on the legislature's ability to precisely define the boundaries of tort liability without further judicial refinement—it is a rare statute that does not encounter some legitimate dispute over its proper scope and interpretation.

More importantly, there is no reason for the legislature to retrace its steps. The legislature fashioned a broad waiver of sovereign immunity that subjects governmental entities to tort liability *as if* they were private sector defendants. The Washington Supreme Court has properly recognized and effectuated this intent, and the legislature has not sought to retreat from its commitment to the broad waiver. In this matter, the lawmaking and interpretive functions of these two branches of government have worked as they should. All that remains is for the executive branch of the state to fully accept this framework of government tort liability and focus on implementing the legislature's risk management and loss prevention programs.

At this juncture, there is no need to ask the legislature to retrace its steps; patience should be the order of the day. While centuries of deci-

158. *Id.* at 51; *see also id.* at 31–32.

159. *See generally* WASH. R. CIV. P. 59 (new trial or amendment of judgment); WASH. R. CIV. P. 60 (relief from judgment); WASH. REV. CODE § 4.76.030 (2004) (remittitur or additur); WASH. R. APP. P. Title 2 (designating trial court decisions subject to appeal or other appellate review).

160. Tardif & McKenna, *supra* note 5, at 50.

161. *Id.* (quoting Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 253, 407 P.2d 440, 444 (1965)).

sion-making continue to give substance to the institution of tort law, Washington has only a few decades' experience with extending tort principles to governmental entities. This experience demonstrates that the broad waiver of sovereign immunity has served a valuable function in encouraging responsible government through greater accountability and in providing justice for injured citizens.

VI. CONCLUSION

The waiver of sovereign immunity in Washington has marked a tremendous step forward in social policy; it has enhanced both responsible government and individualized justice. As the law evolves, the value of recognizing government tort liability should continue to outweigh its costs.

The Washington legislature should not retreat from the broad waiver of sovereign immunity for state and local governmental entities. The broad waiver furthers respect for this state's system of government by imposing accountability for tortious conduct of government agents and employees. It also provides individualized justice through recovery of compensatory damages for Washington citizens who have been victimized by wrongful conduct of their state or local government. The continued viability of the broad wavier has been enhanced by appropriate funding and staffing measures, advances in risk management strategies, and, when justified by particular circumstances, selective restoration of immunity.

As the waiver of sovereign immunity has been put into effect, tort liability has been imposed on governmental entities. This process has been aided by the thoughtful and painstaking application of the common law by the Washington courts. The courts have extended traditional tort analysis into the governmental context and have recognized common law legislative, judicial, and discretionary (executive) immunities as limitations on government liability. In so doing, the courts have ensured that the specter of tort liability does not interfere with true acts of governance by state and local entities.

The over forty years of evolution and refinement of the law regarding government tort liability should not be abandoned at the very point in time when it seems that the controlling principles have been identified, and the law has begun to stabilize. The time and energy that would be involved in starting over would be better spent in further refining and supporting the system now in place.

The current system is an enlightened one, exalting the values of government accountability as well as individualized justice. Accomplishing both of these goals is understandably a difficult task—one that must

be achieved over time. In the last forty-odd years, the legislature and the courts have made necessary adjustments and calibrations. While this process is by nature ongoing, a stable and largely predictable system of government accountability has emerged. Washington citizens should be proud of this system because it assures that Washington remains "among the forerunners of those states abolishing the almost universally condemned doctrine of sovereign immunity."[162]

162. Abbott, *supra* note 2, at 327.