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A Unified Approach to State and Municipal Tort Liability in Washington

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A UNIFIED APPROACH TO STATE AND MUNICIPAL TORT LIABILITY IN WASHINGTON

By 1967, the Washington legislature had abolished sovereign immunity as a defense against tort liability for the state and its subdivisions.[1] The statutes abolishing sovereign immunity provide that the state and municipalities shall be liable for their tortious conduct to the same extent as private persons or corporations.[2] However, despite the explicit statutory language, the Washington Supreme Court has erected two barriers to governmental tort liability. The first is the "discretionary governmental acts" exception, which reinstates complete governmental immunity for policy-making acts.[3] The second is the public duty doctrine, which prevents recovery unless the plaintiff can show a special relationship with the government.[4]

The discretionary governmental acts and public duty exemptions are different in theory but related in application.[5] Immunity for discretionary governmental acts is based solely on governmental decisionmaking with no consideration given to the merits of the decision or the effect of the decision on the injured party.[6] The public duty doctrine, on the other hand, examines the implementation of government decisions and how they affect specific individuals or groups.[7] The public duty doctrine focuses on the duty relationship between the government and injured parties to determine tort liability. This Comment examines and analyzes the two judicially created limitations on governmental tort liability in Washington. It concludes that the discretionary governmental acts immunity is a proper limitation on governmental tort liability, but that the public duty doctrine should be abandoned.

I. DISCRETIONARY GOVERNMENTAL ACTS

Shortly after the Washington legislature abolished the state government's defense of sovereign immunity,[8] the Washington Supreme Court

1. *See* WASH. REV. CODE § 4.92.090 (1983) (abolishing sovereign immunity for the state government); *id.* § 4.96.010 (abolishing sovereign immunity for state subdivisions and municipalities).
2. *Id.* § 4.96.010; *see also id.* § 4.92.090.
3. *See, e.g.*, Evangelical United Brethren Church v. State, 67 Wn. 2d 246, 407 P.2d 440 (1965).
4. *See, e.g.*, Chambers-Castanes v. King County, 100 Wn. 2d 275, 669 P.2d 451 (1983).
5. *See id.;* Mason v. Bitton, 85 Wn. 2d 321, 534 P.2d 1360 (1975); Campbell v. City of Bellevue, 85 Wn. 2d 1, 530 P.2d 234 (1975); King v. City of Seattle, 84 Wn. 2d 239, 525 P.2d 228 (1974).
6. *See infra* text accompanying notes 18–26.
7. *See infra* text accompanying notes 32–40.
8. *See* Act of Mar. 16, 1961, ch. 136, § 1, 1961 Wash. Laws 1680, 1680.

created an exception to state tort liability.[9] This exception covered high level policy-making acts called "discretionary governmental acts."[10] Many other states and the federal government also recognize discretionary governmental acts as a judicial or statutory exception to state tort liability.[11]

The major rationale for governmental immunity for discretionary acts stems from the structure of our government. Each of the three co-equal branches of government performs different political functions. The judiciary does not and should not oversee the other branches in their performance of basic political activities.[12] A second rationale is that it should not be a tort for the government to govern, even ineptly.[13] The government should be able to make basic policy decisions without the threat of sovereign tort liability.[14]

The discretionary acts exception should apply to policy-making acts, not policy-implementing acts. This distinction is very difficult to make,[15] and courts have split over which actions are discretionary and which are merely operational.[16] As a result, some activities have been classified as discretionary governmental acts in some jurisdictions and as operational acts in others.[17]

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9. Evangelical United Brethren Church v. State, 67 Wn. 2d 246, 407 P.2d 440 (1965).

10. Chambers-Castanes v. King County, 100 Wn. 2d 275, 281, 669 P.2d 451, 456 (1983); Bender v. City of Seattle, 99 Wn. 2d 582, 588, 664 P.2d 492, 497 (1983); King v. City of Seattle, 84 Wn. 2d 239, 243–44, 525 P.2d 228, 231 (1974); *Evangelical*, 67 Wn. 2d at 252–55, 407 P.2d at 444–45 (discussion of rationale for statutory exceptions for "discretionary" or "governmental" acts).

11. 28 U.S.C. § 2674 (1983) (federal tort liability); *Evangelical*, 67 Wn. 2d at 253, 407 P.2d at 444 (tort liability in other states); *see, e.g.*, Adams v. State, 555 P.2d 235, 243 (Alaska 1976); Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010, 1020 (Fla. 1979); *see also* RESTATEMENT (SECOND) OF TORTS §§ 895B–895C (1979) (follows this pattern by holding municipalities liable for their torts except for legislative or judicial functions, or administrative functions involving the determination of fundamental governmental policy); C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 32.2, at 1044 (1980).

12. *See* Bender v. City of Seattle, 99 Wn. 2d 582, 588, 664 P.2d 492, 497 (1983) (discussion of the court's attitude and policy toward reviewing policy acts of the other branches of government); King v. City of Seattle, 84 Wn. 2d 239, 246, 525 P.2d 228, 233 (1974); Evangelical United Brethren Church v. State, 67 Wn. 2d 246, 253, 407 P.2d 440, 444 (1965).

13. Dalehite v. United States, 346 U.S. 15, 57, 60 (1953) (Jackson, J., dissenting).

14. *Evangelical*, 67 Wn. 2d at 254, 407 P.2d at 444.

15. *See id.* at 253, 407 P.2d at 444 ("[i]t is a gross understatement to say . . . that marking a definitive dividing line [between governmental and operational acts,] with any degree of clarity or certainty, is fraught with some legal as well as factual difficulty"); 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.22a, at 178 (1977); C. RHYNE, *supra* note 11, § 32.2, at 1042–43.

16. C. RHYNE, *supra* note 11, § 32.2, at 1043 ("A comparative study of the cases in the states discloses an irreconcilable conflict and a wide divergence in the decisions as to what activities are governmental and what are private. Functions held to be governmental in some jurisdictions are held to be proprietary in others."); *compare, e.g.*, Trezzi v. City of Detroit, 120 Mich. App. 506, 328 N.W.2d 70 (1982), *with* DeLong v. Erie County, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982).

17. C. RHYNE, *supra* note 11, §§ 32.11, .13, .15, .17 (building inspections, issuance of building

Many jurisdictions have defined discretionary governmental acts very broadly, thereby imposing sovereign immunity on a large number of tort claims otherwise valid under common law principles.[18] Washington, on the other hand, has been able to protect government interests while disallowing as few valid tort claims as possible. The Washington courts employ a two-part test to define discretionary governmental immunity. First, the courts determine whether the decision was made at a truly executive level.[19] Second, the courts determine whether discretion was actually used in making the decision.[20]

In *Evangelical United Brethren Church v. State*,[21] the supreme court established a four-factor analysis to determine whether a governmental decision was made at an executive level. First, the challenged act must involve a basic governmental policy or program. Second, the questioned act must be essential to the realization or accomplishment of that policy or program. Third, the act must require the exercise of basic policy evaluation on the part of the governmental agency involved. Finally, the governmental agency involved must possess the requisite authority and a duty to do the challenged act.[22] Thus, the key determination is whether the decision was made at a level high enough within the government so as to create public policy, and not whether the government agent exercised judgment or discretion when rendering a decision.[23]

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permits, operation of airports and hospitals, maintenance of city parks and recreational facilities, and police activities, for example); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 979–82 (4th ed. 1971) (various results of applying governmental versus operational distinction in different jurisdictions).

18. *See, e.g.*, Trezzi v. City of Detroit, 120 Mich. App. 506, 328 N.W.2d 70, 72 (1982) (holding operation of emergency 911 dispatch system immune from suit as a governmental function); Freeman v. City of Norfolk, 221 Va. 57, 266 S.E.2d 885, 886 (1980) (holding city immune from tort liability for its failure to warn adequately of a sharp curve in a road).

19. Chambers-Castanes v. King County, 100 Wn. 2d 275, 281–82, 669 P.2d 451, 456 (1983); Bender v. City of Seattle, 99 Wn. 2d 582, 588, 664 P.2d 492, 497 (1983).

20. King v. City of Seattle, 84 Wn. 2d 239, 245–46, 525 P.2d 228, 232 (1974).

21. 67 Wn. 2d 246, 407 P.2d 440 (1965). In *Evangelical*, the plaintiff's church was burned by an escaped juvenile offender. State negligence was alleged for establishing the particular type of juvenile program and for assigning the particular juvenile to that program. On the first claim, the supreme court held that the decision to create the juvenile program with low security was a high level policy decision made by the state agency in charge of corrections and was immune from tort liability. *Id.* at 257–58, 407 P.2d at 446–47. However, the placement and supervision decisions were operational decisions implementing the previous policy decision by the agency. These decisions did not "involve decisions which are essential to the realization or attainment of the basic policies and objectives of the delinquent youth program." *Id.* at 259, 407 P.2d at 447. The state was therefore liable in tort for the decisions and for the failure to notify the police of the escape in a timely manner.

22. *Id.* at 255, 407 P.2d at 445.

23. Under this test, the governor's decision to establish an emergency zone around Mount St. Helens before the eruption was an immune policy-making act, Cougar Business Owners Ass'n v. State, 97 Wn. 2d 466, 472, 647 P.2d 481, 484, *cert. denied*, 103 S. Ct. 301 (1982), but the local prosecutor's decision to prosecute an individual accused of larceny was not, Bender v. City of Seat-

The supreme court established the second part of the test for discretionary governmental immunity in *King v. City of Seattle*.[24] The court held that the state must show that the basic policy decision in fact involved a conscious balancing of risks and advantages.[25] Thus, the actions of an employee who normally engages in discretionary activity are subject to tort liability if, in a given case, the employee does not actually exercise discretion.[26]

Thus, legislative or executive acts creating laws or public programs or allocating public resources should be immune from tort liability.[27] Administrative rulemaking and adjudication should also be immune, as should all judicial decisions.[28] These activities involve high level governmental decisions that create public policy.[29] Lower level decisions that implement public policy, however, should not be immune from tort liability.[30] In its corporate capacity, the government interacts with the public on the same level as a private corporation or person providing goods or services to its customers at a cost. Liability for negligent acts should be part of the cost of providing those services. Therefore, the government

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tle, 99 Wn. 2d 582, 590, 664 P.2d 492, 498 (1983). The decision to build a freeway, its location, and the number of lanes was a discretionary policy-making act, yet the particular design of a bridge and the lighting on the approach to the bridge were not high level decisions and were subject to tort liability, Stewart v. State, 92 Wn. 2d 285, 294, 597 P.2d 101, 106–07 (1979). Further, decisions not to dispatch an officer to an emergency call, Chambers-Castanes v. King County, 100 Wn. 2d 275, 282–83, 669 P.2d 451, 456–57 (1983); to pursue a reckless driver in a high speed chase, Mason v. Bitton, 85 Wn. 2d 321, 328, 534 P.2d 1360, 1365 (1975); and to release a mental patient from a state hospital, Peterson v. State, 100 Wn. 2d 421, 434–35, 671 P.2d 230, 237 (1983); were made by low level government agents and did not create public policy. They were therefore not immune from tort liability.

24. 84 Wn. 2d 239, 525 P.2d 228 (1974). In *King*, the plaintiffs alleged that the city intentionally and wrongfully refused to issue them street use and building permits. *Id.* at 240, 525 P.2d at 230. The city claimed immunity because the acts were an "erroneous exercise of discretion." *Id.* The court held there was no immunity. To qualify for immunity the government must prove that "a policy decision, consciously balancing risks and advantages, took place." *Id.* at 246, 525 P.2d at 233. Since the city acted arbitrarily and capriciously, its decision was not immune. The *King* test, while focusing on how the governmental decision was made, also reinforced the *Evangelical* requirement that the decision be a high level policy decision by mandating proof that discretion was exercised.

25. *Id.* at 246, 525 P.2d at 233.

26. *Id.*

27. Stewart v. State, 92 Wn. 2d 285, 294, 597 P.2d 101, 106 (1979).

28. *See* 18 E. MCQUILLIN, *supra* note 15, § 53.04a, at 122; RESTATEMENT (SECOND) OF TORTS §§ 895B–895C (1979).

29. Because discretionary policy-making acts are immune, courts need not impose liability based on the merits of the policy.

30. Nevertheless, courts should not blindly grant immunity for all governmental policy-making acts even though they are discretionary. The state constitution sets the minimum standard for all governmental acts, and courts should permit damage recoveries for unconstitutional policy-making acts. *See, e.g.*, WASH CONST art. I, § 4 (freedom of speech); *id.* art. I, § 7 (right of privacy); *id.* art. I, § 11 (religious freedom).

should not be liable for a decision to undertake a given policy, but should be liable if its agents act negligently in implementing that policy.[31]

II. PUBLIC DUTY DOCTRINE

The public duty doctrine provides that ordinarily the duties of government agents arising from government activities are owed to the public in general and not to any specific individual.[32] Strictly applied, the public duty doctrine would reinstate complete sovereign immunity, because the distinction between no duty and immunity is only a theoretical difference. However, most jurisdictions following the public duty doctrine recognize an exception to the doctrine where the plaintiff can show special circumstances creating a special relationship or duty.[33] In general, a special relationship or special duty is created when the government singles out a party from the general public and affords him or her special treatment.[34] Washington follows both the public duty doctrine and the special relationship exception to it.[35]

A. The Special Duty/Special Relationship Requirement for Governmental Tort Liability

With the narrow application of immunity for discretionary governmental acts in Washington, the main hurdle in bringing a tort suit against the government is the public duty doctrine. This requires showing a special duty of care owed by the government to an injured party. A plaintiff can show the requisite special duty in three ways. First, a duty exists if a statute or ordinance indicates a clear legislative intent to protect a specified and identifiable class of persons, and if the plaintiff is a member of the protected class.[36] Second, a duty exists if the plaintiff relied on ex-

31. *See infra* Part II; *see also* Bender v. City of Seattle, 99 Wn. 2d 582, 590, 664 P.2d 492, 498 (1983) ("Accountability through tort liability in areas outside the narrow exception noted above [for discretionary governmental immunity] may be the only way of assuring a certain standard of performance from governmental entities.").

32. *Cf.* J & B Dev. Co. v. King County, 100 Wn. 2d 299, 303, 669 P.2d 468, 471 (1983) (rule applied to municipal corporations); 2 T. COOLEY, A TREATISE ON THE LAW OF TORTS § 300 (4th ed. 1932).

33. *See* C. RHYNE, *supra* note 11, § 32.9 (most jurisdictions following the public duty doctrine recognize an exception to its "no duty" assumption where the plaintiff can show a special relationship or duty).

34. *J & B Dev. Co.*, 100 Wn. 2d at 305, 669 P.2d at 472; Chambers-Castanes v. King County, 100 Wn. 2d 275, 285, 669 P.2d 451, 457–58 (1983).

35. *See J & B Dev. Co.*, 100 Wn. 2d at 305, 669 P.2d at 472; *Chambers-Castanes*, 100 Wn. 2d at 285, 669 P.2d at 457.

36. Baerlein v. State, 92 Wn. 2d 229, 231–32, 595 P.2d 930, 932 (1979); Halvorson v. Dahl, 89

press or implied assurances made by a governmental agent with whom the plaintiff had direct contact.[37] Third, a duty exists if a government agent is

Wn. 2d 673, 676, 574 P.2d 1190, 1192–93 (1978); Mason v. Bitton, 85 Wn. 2d 321, 325–26, 534 P.2d 1360, 1363 (1975).

In *Mason*, the Washington Supreme Court first recognized an exception to the public duty doctrine where a statute identified a group of persons to be protected from a government agent's actions. 85 Wn. 2d at 327, 534 P.2d at 1364. In *Mason*, the state was held liable for a death resulting from a high speed police chase. *Id.* at 329, 534 P.2d at 1365. A state statute authorized emergency vehicles to exceed the speed limit, but only so long as life and property were not endangered. *See* WASH REV CODE § 46.61.035(2)(c) (1983). The statute further provided that the driver bears "the duty to drive with due regard for the safety of all persons," and that the driver would remain liable for "the consequences of his reckless disregard for the safety of others." *Id.* § 46.61.035(4). The supreme court held that this narrow language created a statutory duty to protect "all persons" by proscribing conduct by government agents, and that it would support governmental liability. *Mason*, 85 Wn. 2d at 327, 534 P.2d at 1364.

For a discussion of *Halvorson*, see *infra* text accompanying notes 77–80.

Baerlein is the only case involving a statute where the Washington Supreme Court did not find a statutory duty running to the plaintiff. The legislature clearly did not intend to protect investors from actions of securities division agents because the statute disclaimed the duty on which the plaintiffs based their claim. *See infra* text accompanying notes 63–65.

37. *See* J & B Dev. Co. v. King County, 100 Wn. 2d 299, 306–07, 669 P.2d 468, 473 (1983); Chambers-Castanes v. King County, 100 Wn. 2d 275, 286, 669 P.2d 451, 458 (1983); Baerlein v. State, 92 Wn. 2d 229, 234–35, 595 P.2d 930, 933 (1979); Rogers v. City of Toppenish, 23 Wn. App. 554, 557–58, 596 P.2d 1096, 1097–98 (1979).

In *J & B Dev. Co.*, the plaintiff builders were issued a building permit upon approval of their building plans by a county agent who failed to notice that the lot required an additional setback of 18 feet. A subsequent inspection by the county after construction had begun also failed to detect the setback violation. Several neighbors complained about the violation and the county revoked the permit. The Washington Supreme Court held the county liable for the negligence of its employees in erroneously issuing the building permit. The court held that a builder should be able to rely on the county to give accurate information when issuing permits. 100 Wn. 2d at 306, 669 P.2d at 472. A special relationship between the county and the builder arose from direct contact between the permit issuer and the builder, and from the builder's reliance on the inspector's action in issuing the permit as an implicit assurance of its validity. *Id.* at 306–07, 669 P.2d at 473.

Rogers involved an almost identical problem of misinformation about the zoning of a parcel of land. The Washington Court of Appeals found governmental liability based on the same analysis used in *J & B Dev. Co. Rogers*, 23 Wn. App. at 559, 596 P.2d at 1098–99.

In *Chambers-Castanes*, the plaintiffs were assaulted on a public street, and the assailants remained in the general area for some time after the crime. One plaintiff, and several witnesses, called the police numerous times requesting police help in apprehending the criminals. The plaintiff's calls were met with express assurances from police dispatchers that help was on the way and would arrive any minute. In fact, more than one hour and 20 minutes elapsed before a police officer was dispatched to the scene. Plaintiffs sued for emotional distress resulting from the negligent failure of the police to respond to an emergency call in a timely manner. As in *J & B Dev. Co.*, the Washington Supreme Court found a special relationship based on direct contact via telephone between the plaintiffs and the dispatchers, and reliance based on assurances by the dispatchers that help was on the way. *Chambers-Castanes*, 100 Wn. 2d at 279, 287, 669 P.2d at 455, 458–59.

In *Baerlein*, the Washington Supreme Court addressed the duty issue in dicta. The court stated that no reliance occurred because the government agents gave no assurances to the plaintiff of the validity of securities statements. The court based its holding on a statute regulating securities sales disclaiming all liability for truth or accuracy of securities statements. 92 Wn. 2d at 232–33, 595 P.2d at 932. The supreme court in *J & B Dev. Co.* cited *Baerlein* as an example of the absence of direct contact leading to a finding of no special relationship. *J & B Dev. Co.*, 100 Wn. 2d at 307, 669 P.2d at 473.

under a statutory obligation to abate a specific known and dangerous condition but fails to do so.[38]

The public duty doctrine is consistent with the general tort principle that the plaintiff can recover only by showing that the tortfeasor owed him or her a duty.[39] The doctrine is inconsistent with traditional tort analysis, however, in that the duty arises only from a special relationship. Traditional tort law imposes a duty upon everyone to use reasonable care when his or her actions create a foreseeable risk of harm to some person or class of persons.[40] Under the public duty doctrine, in contrast, duty arises from the relationship between the government agent and an individual or class of persons.

The special relationship requirement restricts the number of individuals to whom the government owes a duty. Thus, the government is favored over private parties in defending negligence actions. For example, suppose a city fire inspector, pursuant to a statutory inspection program, discovers fire code violations in a building but does nothing to force an abatement of the fire hazard.[41] A fire results from this hazard, destroying the building and an adjacent structure owned by the plaintiff. Plaintiff sues, alleging negligence from the inspector's failure to force compliance with the fire code. Under existing cases, the city would probably not be liable to the plaintiff in this situation unless the fire code or inspection statutes created a protected class[42] or otherwise clearly imposed liability,[43] or unless direct contact between the plaintiff and the inspector created reliance.[44] However, under these same circumstances, a private party obligated to inspect buildings for fire hazards would probably be liable to the adjacent landowner. The risk of harm from the negligent fire inspection foreseeably flowed to the neighboring structure.

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38. Campbell v. City of Bellevue, 85 Wn. 2d 1, 13, 530 P.2d 234, 241 (1975). In *Campbell*, a city electrical inspector, informed of a short circuit electrifying a creek bed, failed to disconnect the power to the circuit as required by city ordinance. Instead, the inspector merely turned off the power at the circuit breaker. The circuit breaker was subsequently switched back on and plaintiff's decedent was electrocuted. The Washington Supreme Court found that the ordinance created a mandatory duty for the inspector to disconnect power to the circuit. The inspector's knowledge of the code violation created a duty to protect persons "within the ambit of the danger involved, a category into which the plaintiff and his neighbors readily fall." *Id.* at 13, 530 P.2d at 241. Thus, the inspector's failure to comply with the code rendered the city liable. *Id.*

39. *See generally* W. PROSSER, *supra* note 17, § 53 (discussion of duty issue).

40. *See* Berg v. General Motors Corp., 87 Wn. 2d 584, 592, 555 P.2d 818, 822 (1976); *see also* Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99, 100 (1928) ("[t]he risk reasonably to be perceived defines the duty to be obeyed").

41. The factual setting is a variation of the facts in Halvorson v. Dahl, 89 Wn. 2d 673, 574 P.2d 1190 (1978), with the difference being in the plaintiff's relationship with the building owner.

42. *See id.* at 675–76, 574 P.2d at 1192.

43. *See* Chambers-Castanes v. King County, 100 Wn. 2d 275, 284, 669 P.2d 451, 457 (1983).

44. *See id.* at 286, 669 P.2d at 458.

B. The Current Impact of the Public Duty Doctrine

The Washington Supreme Court has effectively eviscerated the public duty doctrine by permitting tort actions based on the special relationship rule when actions would be permitted under common law principles.[45] Even in the absence of a statutory duty, courts have usually found a special relationship between the government agent and the plaintiff to create tort liability. The only Washington Supreme Court case not finding a duty involved a court interpretation that a statute was never intended to impose liability on the government.[46]

Justice Utter of the Washington Supreme Court, an ardent critic of the public duty doctrine, suggests that the approach used in Washington may never differ significantly from traditional tort analysis.[47] However, any prediction about the future of the public duty doctrine is mere conjecture. The few Washington Supreme Court decisions dealing with the public duty doctrine present such compelling factual situations for findings of governmental liability, and are so narrowly confined to the specific factual situation in each case,[48] that they do not provide a solid basis for determining the boundaries of the public duty doctrine. The doctrine further confuses traditional tort analysis of duty, an already cloudy area of the law.

By using the public duty doctrine instead of traditional tort law, the court is not bound by the historic development of tort principles. Thus, the retention of the public duty doctrine allows the court the opportunity to retreat from conventional tort principles and to relieve the government of liability through failure to find a special duty.

Moreover, an analysis that limits government liability by limiting governmental duty is contrary to the apparent legislative intent behind the enactment of the sovereign liability statutes.[49] According to the language of the statutes, the state and its subdivisions should be liable in tort "to the same extent as if they were a private person or corporation,"[50] with discretionary governmental immunity being the only recognized excep-

45. *See, e.g.*, J & B Dev. Co. v. King County, 100 Wn. 2d 299, 306–07, 669 P.2d 468, 473 (1983) (reliance); *Chambers-Castanes*, 100 Wn. 2d at 286–87, 669 P.2d at 458 (reliance); Campbell v. City of Bellevue, 85 Wn. 2d 1, 12–13, 530 P.2d 234, 241 (1975) (statutory duty); Rogers v. City of Toppenish, 23 Wn. App. 554, 557–58, 596 P.2d 1096, 1098 (1979) (reliance).

46. Baerlein v. State, 92 Wn. 2d 229, 233, 595 P.2d 930, 932 (1979).

47. *J & B Dev. Co.*, 100 Wn. 2d at 312, 669 P.2d at 476 (Utter, J., concurring in result).

48. *See generally J & B Dev. Co.*, 100 Wn. 2d 299, 669 P.2d 468; *Chambers-Castanes*, 100 Wn. 2d 275, 669 P.2d 451; *Halvorson*, 89 Wn. 2d 673, 574 P.2d 1190; *Campbell*, 85 Wn. 2d 1, 530 P.2d 234.

49. *See generally* WASH. REV CODE §§ 4.92.090, 4.96.010 (1983).

50. *Id.* § 4.96.010.

tion to this statutory directive.[51] When the government implements public policy through the production of public services or public projects, it acts like a private corporation. According to the legislature, the government should therefore bear the same tort liability as a private corporation.[52]

C. *Public Duty Doctrine Lacks Justification*

The government does not deserve special treatment on the duty issue. The duty of reasonable care should be the same whether the actor is an individual, a corporation, or a government agent. The extent of the injury does not change simply because the government, rather than a private party, acts negligently. Furthermore, the purpose of imposing liability for negligence is to make the negligent wrongdoer compensate the injured party. If government agents are negligent, the innocent victims of their negligence should not have to bear the cost.

Proponents of the public duty doctrine cite three main justifications for it. All three are unpersuasive. First, proponents assert, the public duty doctrine is used to preserve the public treasury and spare innocent taxpayers the cost of a government agent's negligence.[53] The fear of numerous lawsuits is unfounded, however, and no municipality has been unduly burdened by an adverse tort judgment.[54] Furthermore, the government is able to protect its resources by carrying liability insurance or by imposing limits on damage awards against the government.[55] The ability to pay should have no bearing on tort liability.[56] The Washington legislature has declared that the government should be treated just like a private individual.[57] Since a private defendant's ability to pay is not considered when determining private tort liability, the government's ability to pay should also not be considered when determining its tort liability.[58]

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51. *See supra* Part I (discussion of discretionary governmental immunity).

52. *See* WASH. REV. CODE §§ 4.92.090, 4.96.010 (1983).

53. *See* Stone & Rinker, *Governmental Liability for Negligent Inspections*, 57 TUL. L. REV. 328, 330–31 (1982); Comment, *State Tort Liability for Negligent Fire Inspection*, 13 COLUM. J.L. & SOC. PROBS. 303, 344–46 (1977).

54. Comment, *supra* note 53, at 346.

55. Hunter v. North Mason High School, 85 Wn. 2d 810, 817, 539 P.2d 845, 849–50 (1975) (liability insurance); Brennan v. City of Eugene, 285 Or. 401, 591 P.2d 719, 723 (1976) (statutory limit on damages).

Statutory limits on damages are an unsatisfactory way to handle the problem because injured parties, while not precluded from compensation for their injuries, are arbitrarily prevented from receiving just compensation for the damage suffered.

56. Proximate cause is as effective a limitation on government tort liability as it is on the liability of a private party. *See generally* W. PROSSER, *supra* note 17, § 42.

57. *See* WASH. REV. CODE §§ 4.92.090, 4.96.010 (1983).

58. Comment, *supra* note 53, at 345.

The second argument for the public duty doctrine is that unlimited liability would inhibit the government from undertaking public programs carrying a high risk of tort liability.[59] If this were true, the argument would serve as support for unlimited state liability—not a reasoned criticism of it. The government should consider whether the benefits of the government program outweigh its total costs, including the cost of potential tort liability. If the cost of tort liability is not taken into account, then the government may undertake programs in which the actual cost to the public outweighs the benefits derived. Therefore, the inhibiting effect of tort liability may ensure that public resources are not wasted on inefficient programs.

The third rationale for the public duty doctrine is that, when combined with the special relationship rule, it determines whether a duty is actually owed to an individual claimant rather than to the public at large.[60] Any necessary focusing, however, can be accomplished by the common law principle of foreseeability. The public duty doctrine merely creates another barrier for individual claimants to overcome and thereby lessens governmental liablity for its negligent acts.

The justifications behind the public duty doctrine are not compelling. The common law principle of foreseeability would work well in its place. By upholding the public duty doctrine and special relationship requirement, the Washington Supreme Court apparently wants to control the expansion of sovereign liability and maintain special treatment for the government. That is exactly what the legislature tried to abolish when it passed the sovereign liability statutes.

III. SYSTEMATIC APPLICATION OF GOVERNMENTAL TORT LIABILITY ANALYSIS

Although the public duty doctrine has little merit, the Washington Supreme Court will probably not abandon it in the near future.[61] Instead, the court will undoubtedly continue to dismember the doctrine by exception.[62] Hypothetical situations which differ slightly from cases already decided suggest a framework for a systematic and well-reasoned application of the governmental tort liability analysis. The framework consists of first determining whether the discretionary acts immunity relieves the

59. Stone & Rinker, *supra* note 53, at 330–31; Comment, *supra* note 53, at 341.

60. J & B Dev. Co. v. King County, 100 Wn. 2d 299, 304, 669 P.2d 468, 472 (1983).

61. The Washington Supreme Court strongly supported the public duty doctrine in two recent cases, Chambers-Castanes v. King County, 100 Wn. 2d 275, 669 P.2d 451 (1983), and J & B Dev. Co. v. King County, 100 Wn. 2d 299, 669 P.2d 468 (1983), with only one justice voicing opposition to the doctrine.

62. *Chambers-Castanes*, 100 Wn. 2d at 293, 669 P.2d at 462 (Utter, J., concurring in result).

government of liability. If the government is not immune, then foreseeability would determine liability. Finally, considering the supreme court's attachment to the public duty doctrine, it will also be applied to the following hypothetical situations.

1. Baerlein v. State

In *Baerlein v. State,*[63] the plaintiff alleged that the state securities division owed a duty to investors to protect them from false and misleading registration statements and securities sales and that the state had violated this duty by failing to enforce its securities regulations and statutes.[64] The Washington Supreme Court found no government liability because of a statutory disclaimer.[65]

However, even in the absence of a statutory disclaimer, the court should have found no liability. The discretionary governmental acts immunity should relieve the state of liability under these facts. In developing a securities regulation program, the legislature created a securities division staff of only two agents to process the 2000 permits issued by the division in the year in question.[66] The legislature could not have intended that a staff of two would investigate every registration statement or license application for fraud or misstatements. Therefore, the decision not to investigate registration statements was the result of a discretionary governmental act involving policy-making action by a high level body, the legislature, and would be immune from tort liability.

If the decision not to investigate the registration statement was made by the securities division staff, and was not the result of legislative construction of the securities regulation program, then discretionary governmental immunity would not apply. The court should then apply a foreseeability test to determine governmental liability. Assuming adequate staff to investigate and no statute disclaiming liability, the court would have to decide whether the agents had a duty to investigate registration statements. If the agents should have investigated, then under a foreseeability analysis the duty to investigate would run to investors purchasing in reliance on the registration statement. The government would be liable for damages resulting from its failure to investigate the fraudulent registration statement. This would not be true, however, under the public duty doctrine unless the securities regulation statutes named investors as a class to be

63. 92 Wn. 2d 229, 595 P.2d 930 (1979).
64. *Id.* at 230, 595 P.2d at 931.
65. *Id.* at 233, 595 P.2d at 932–33.
66. *Id.* at 233, 595 P.2d at 933.

protected from fraudulent or misleading registration statements[67] or the investor had personal contact with the securities division staff and relied on their actions.[68]

Whether the state should be liable under the hypothetical facts is a debatable question. A foreseeability approach would analyze legislative intent, government agents' responsibilities, and reasonable public expectations, and determine liability according to the interrelationships of these three factors. The public duty doctrine, on the other hand, would automatically bar governmental liability unless one of the three narrow special relationship tests was met.[69] Under a foreseeability approach, plaintiff's case would probably be determined by the trier of fact after full litigation. Under the public duty doctrine, however, plaintiff's case would almost surely be dismissed on a summary judgment motion, as was the result in *Baerlein*.[70] The important problem raised in the hypothetical should be resolved on the merits through trial, not summarily dismissed because of the narrow public duty test.

2. Chambers-Castanes v. King County

In *Chambers-Castanes v. King County*,[71] a crime victim's repeated calls for police help were met with assurances from police dispatchers that help was on the way.[72] In fact, however, an officer was not sent for over an hour. The supreme court held that the plaintiff had a cause of action for emotional distress resulting from the negligent failure to respond to the emergency calls in a timely manner.[73]

If the victim had called the emergency dispatcher requesting help, and the dispatcher had merely taken the address of the victim and made no assurances that help would be sent, the question of liability would be more difficult. Discretionary governmental immunity would not apply because the decision to dispatch an officer was made by a low level employee.[74] But under a foreseeability analysis a duty should be found despite the absence of verbal assurances. The failure to dispatch help in response to an emergency call would create a foreseeable risk of harm to

67. Halvorson v. Dahl, 89 Wn. 2d 673, 676, 574 P.2d 1190, 1192–93 (1978) (statute creating a protected class).

68. *See J & B Dev. Co.*, 100 Wn. 2d at 306, 669 P.2d at 472–74 (personal contact and reliance).

69. *See supra* text accompanying notes 36–38.

70. Baerlein v. State, 92 Wn. 2d 229, 230, 595 P.2d 930, 931 (1979).

71. 100 Wn. 2d 275, 669 P.2d 451 (1983).

72. *Id.* at 279–80, 669 P.2d at 454–55.

73. The Washington Supreme Court reversed a superior court dismissal of plaintiff's action for negligent infliction of emotional distress. *Id.* at 287, 669 P.2d at 459–60.

74. *Id.* at 282, 669 P.2d at 453.

the party asking for help. The party might forgo other avenues of assistance in reliance on traditional police response to distress calls.[75] A reasonable person would assume, and should be able to assume, that upon receipt of an emergency call the governmental body designated to dispatch help would promptly do so. In the absence of a statement to the contrary, reasonable reliance should arise from the operator's silence.

Under the public duty doctrine the same result should occur. A special duty would arise because the victim had direct contact with the government dispatcher and relied on the dispatcher to do her job. However, the public duty doctrine adds only confusion to the analysis because the traditional foreseeability approach leads to the same result. Use of one mode of analysis for both private and government tortfeasors is more consistent with the legislative intent underlying the sovereign liability statutes.[76]

Alternatively, suppose that the dispatcher told the victim that no officer would be sent because all of the officers were occupied at the time. Applying the discretionary governmental immunity analysis, the court should find the city or county not liable. The lack of sufficient manpower results from a lack of funding for the police department, not from negligent action by a government agent. Budget allocations resulting in a given level of police services are discretionary, policy-making activities by a legislative body and thereby immune from tort liability.

3. Halvorson v. Dahl

A more difficult problem is presented in *Halvorson v. Dahl*,[77] where the estate of a hotel resident contended that city inspectors had known of fire code violations in the hotel for six years prior to the fire and yet did nothing to force the building owner to comply with the code.[78] The Washington Supreme Court found that the Seattle Housing Code named building occupants as a protected class and that the plaintiff's claim therefore met the special duty requirement.[79]

The *Halvorson* court specifically declined to determine whether the city would be liable if the fire inspectors had failed to discover an existing fire hazard during their inspection and a person was injured as a result of a

75. *See* Delong v. Erie County, 89 A.D.2d 376, 455 N.Y.S.2d 887, 892 (N.Y. App. Div. 1982); Warren v. District of Columbia, 444 A.2d 1, 12 (D.C. 1981) (Kelly, J., concurring in part and dissenting in part).

76. *See generally* WASH. REV. CODE §§ 4.92.090, 4.96.010 (1983).

77. 89 Wn. 2d 673, 574 P.2d 1190 (1978).

78. *Id.* at 675–76, 574 P.2d at 1192. As in *Chambers-Castanes*, the Washington Supreme Court reversed the superior court's dismissal of plaintiff's action. The superior court held that the city owed no duty to the plaintiff. *Halvorson*, 89 Wn. 2d at 674, 574 P.2d at 1191.

79. 89 Wn. 2d at 676, 574 P.2d at 1192–93.

fire from that hazard.[80] Analyzing liability under these facts, discretionary governmental immunity would not apply because fire inspectors are lower level governmental employees, like the dispatcher in *Chambers-Castanes,* who do not make basic policy decisions.[81] Under a foreseeability analysis, however, the government would probably be liable if the hazard was reasonably discoverable. Duty would arise from the inspector's statutory obligation to inspect and the foreseeable risk of harm running to building occupants from the failure to discover fire hazards. The same result should occur under the public duty doctrine because a statute, the housing code, indicates a clear legislative intent to protect a class of persons—building occupants.[82] Again, as in the *Chambers-Castanes* hypothetical,[83] the foreseeability approach and the public duty doctrine lead to the same result. The public duty doctrine should be abandoned and foreseeablity should apply to all tortfeasors—public as well as private.

IV. CONCLUSION

The discretionary governmental acts immunity is a reasonable exception to statutory sovereign immunity. Judicial restraint and political prudence suggest that courts should not pass judgment on actual policy decisions of the legislature or executive. The supreme court strongly upheld this proposition by requiring proof that the decision emanated from a high level of government and that it was the product of an exercise of discretion. By narrowing the scope of the immunity to this extent, the supreme court effectively balanced its desire to uphold liberal sovereign liability with its reluctance to pass judgment on the merits of true policy-making acts.

The public duty doctrine, on the other hand, has no logical support for its limitation on sovereign tort liability. In theory, the public duty doc-

80. *Cf. id.* at 678, 574 P.2d at 1193 ("we find it unnecessary to consider whether neglect falling short of actual and long-standing knowledge of noncompliance would support a claim for relief").

The Minnesota Supreme Court, faced with this question in Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979), found no duty and no liability under these facts. The key to the *Cracraft* holding, however, was that the Minnesota court did not find a protected class in the city fire code even though the code specifically identified "occupants" as needing protection. *Id.* at 805 n.4. Therefore, the duty owed was only to the general public and not actionable. The *Halvorson* court reached the opposite result on the "protected class" issue by finding that building occupants were specifically identified in the code as a class intended to be protected. *See Halvorson,* 89 Wn. 2d at 676–77, 574 P.2d at 1192–93; *see also* Adams v. State, 555 P.2d 235 (Alaska 1976).

81. *See* Chambers-Castanes v. King County, 100 Wn. 2d 275, 282, 669 P.2d 451, 456 (1983).

82. *See Halvorson,* 89 Wn.2d at 676–77, 574 P.2d at 1192–93. Furthermore, this approach creates the incentive for fire inspectors to conduct reasonably thorough and careful inspections. By contrast, waiving liability for negligent failure to discover fire hazards gives inspectors no incentive to find code violations since the government would not be liable for overlooking them.

83. *See supra* text accompanying notes 74–76.

trine limits governmental duty. The Washington legislature specifically intended to abolish special treatment of the government by requiring that government be treated the same as a private party in tort actions. In application, the public duty doctrine so far has not barred governmental liability and may not in the future. Thus, no substantive reason exists for retaining the doctrine. Under the present public duty analysis, sovereign tort liability in Washington is a cloudy and confused area. Instead of continually dismantling the doctrine by exception, as the court has done in the past, the public duty doctrine should be abolished outright.

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