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Road to Recovery: Why Rhode Island Drivers Should Be Made Whole from Potholes

Jordan Z. Sasa, Esq.*

INTRODUCTION

This Article will delve into a longstanding and all-too-familiar issue in Rhode Island: potholes and state and local governments' failure to repair them. Although this topic sounds banal, it raises interesting questions about governmental immunity and balancing the twin aims of tort law with other policy considerations. Roads, much like schools and emergency services, are vital components of the public sector. Well-maintained roads facilitate commerce, ensure safe travel, raise nearby property values, and generate tax revenue.¹ Unfortunately, road conditions are declining nationwide,

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1. See *Determining Fault When Unsafe Road Conditions Cause Accidents*, NAT'L L. REV. (Dec. 7, 2020), <https://www.natlawreview.com/article/determining-fault-when-unsafe-road-conditions-cause-accidents> [<https://perma.cc/G7SP-UCS2>]; *Small Businesses Still Optimistic, but Poor Infrastructure is a Road Block*, U.S. CHAMBER OF COM. (Mar. 6, 2019), <https://www.uschamber.com/small-business/small-businesses-still-optimistic-poor-infrastructure-road-block> [<https://perma.cc/TNY3-3ZDU>]; Adam Bonislawski, *To Boost Your Home's Value, Live Near a Highway*, WALL ST. J. (Nov. 27, 2018, 12:33 PM), <https://www.wsj.com/articles/to-boost-your-homes-value-live-near-a-highway-1543340018>.

and Rhode Island is one of the country's worst offenders. Over eighty percent of the state's roads are in poor or fair condition.² Consequently, Rhode Island drivers incur \$620 million per year in repairs and operating costs.³ This should not be shocking to Rhode Islanders—the roads here have been decrepit for quite some time.

The General Assembly has charged the Rhode Island Department of Transportation (RIDOT) and local equivalents with the duty to keep roads in good repair.⁴ It is undisputable, however, that they have not lived up to their end of the social contract.⁵ While the state offers some relief for pothole-related damage, three major issues permeate the current scheme: compensation is far too little, only vehicle damage is reimbursed, and claimants are subject to an absurdly short limitations period.⁶

State law shields the state and municipalities from additional liability under the public duty doctrine.⁷ The Rhode Island Supreme Court most recently examined the public duty doctrine in *Georges v. State*, where the plaintiff struck an eighteen-inch-wide pothole resulting in serious vehicle damage and personal injuries.⁸ When Georges sued for negligence in an attempt to receive just compensation, the Court held that the state was immune from any

2. See AM. SOC'Y OF CIV. ENG'RS, REPORT CARD FOR RHODE ISLAND'S INFRASTRUCTURE 7–9 (June 24, 2020); *Key Facts about Rhode Island's Surface Transportation System*, THE ROAD INFO. PROGRAM (Jan. 26, 2022), https://trip-net.org/wp-content/uploads/2020/04/TRIP_Fact_Sheet_RI.pdf [https://perma.cc/UK2H-Q5LA]. See generally Hope Yen, 'Strong Risk of Failure': Most Aspects of US Infrastructure Get a 'D' in Report Card, WNEP (Mar. 3, 2021, 1:37 AM), <https://www.wnep.com/article/news/nation-world/american-infrastructure-roads-grade/507-017383f2-5de6-4527-ad54-33fd14c66890> [https://perma.cc/4DMR-A3Z7].

3. AM. SOC'Y OF CIV. ENG'RS, *supra* note 2, at 8.

4. R.I. GEN. LAWS §§ 24-5-1(a), 37-5-2(a) (2022).

5. See Gabrielle Caracciolo, *Department of Transportation to Use Federal Funds to Fix Rhode Island's Pothole Problem*, WJAR (Feb. 9, 2022), <https://turnto10.com/news/local/department-of-transportation-to-use-federal-funds-to-fix-rhode-islands-pothole-problem>. [https://perma.cc/CX4D-6YV8]; Joseph P. Nadeau, *State of the State*, PAWTUCKET TIMES (Feb. 3, 2016), <https://www.pressreader.com/usa/pawtucket-times/20160203/28147927544> 8818.

6. See R.I. GEN. LAWS §§ 24-5-13, 24-8-35 (2022).

7. See, e.g., *Georges v. State*, 249 A.3d 1261, 1266–67 (R.I. 2021).

8. *Id.* at 1263.

additional liability because road maintenance is a protected governmental function.⁹

The thrust of this Article is that Rhode Island's legal obligation regarding road maintenance—or lack thereof—is dangerous, unjust, and a misappropriation of governmental immunity. Potholes cause significant vehicle damage and devastating personal injuries. They are difficult for drivers to identify while driving, putting drivers in peril at any practicable speed. Drivers have little choice other than to put themselves and others in harm's way. When a driver does strike a pothole, she is not adequately or fully compensated, if at all. Instead, state courts have continuously called upon the state's public duty doctrine—originally intended to encourage governmental action without fear of litigation¹⁰—to justify and reward government inaction.

Justice requires that injured drivers receive greater compensation, but such a change would raise many fundamental legal, economic, and political questions. If Rhode Island permitted drivers to seek further compensation, would additional litigation excessively strain the state's judicial resources? Would the increased cost of claims detract from other parts of state and local budgets? Because governments are “playing with house money,” is there even a legitimate incentive for them to make policy changes? These questions will be discussed throughout this article, but not all definitively answered, as some are best left for the political process.

Part I will discuss the public duty doctrine in Rhode Island, its origins, and its exceptions that have developed from caselaw. Part II will examine Rhode Island's application of the public duty doctrine in recent cases involving road maintenance. Part III will identify inconsistencies in Rhode Island's application of the public duty doctrine and make two arguments for governmental liability in *Georges*. Part IV will consider policy rationales for changing the treatment of pothole damage claims in favor of a more driver-friendly approach. Part V will raise certain considerations that may complicate a sweeping policy change. Finally, the conclusion will call for reevaluating the public duty doctrine in Rhode Island or, in the alternative, increasing current compensation under Rhode Island General Laws §§ 24-5-13 and 24-8-35.

9. *Id.* at 1266–67.

10. *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989).

I. A BRIEF HISTORY OF THE PUBLIC DUTY DOCTRINE IN RHODE ISLAND

The public duty doctrine immunizes government entities from the negligent performance of discretionary activities.¹¹ It is premised on fundamental tort concepts. In private negligence cases, a plaintiff must show that the defendant owed a duty of care; without a duty, there cannot be a breach of duty.¹² The public duty doctrine applies the same principle to governments. Because a duty owed to the public at-large is a duty to no one, plaintiffs must show that the government owed a duty to them individually to prevail.¹³

The public duty doctrine has been well established in Rhode Island since it first appeared in the 1980 case, *Ryan v. State*.¹⁴ Before the public duty doctrine, however, Rhode Island subscribed to sovereign immunity, which is based on the English common law maxim that “the King can do no wrong.”¹⁵ Sovereign immunity dictates that the state could not be sued without the state’s manifested consent to suit.¹⁶ The same immunity insulated municipalities in limited circumstances;¹⁷ municipalities were immunized for the

11. David S. Kresin, *Protecting the Protectors: The Public Duty Doctrine*, 67 J. KAN. BAR. ASS’N 22, 22 (1998).

12. *Gagnon v. State*, 570 A.2d 656, 658 (R.I. 1990).

13. See Aaron R. Baker, *Untangling the Public Duty Doctrine*, 10 ROGER WILLIAMS U. L. REV. 733, 737 (2005); see also VICTOR E. SCHWARTZ ET AL., PROSSER, WADE, AND SCHWARTZ’S TORTS: CASES AND MATERIALS 688 n.1 (13th ed. 2015).

14. Baker, *supra* note 13, at 736. See generally *Ryan v. State*, 420 A.2d 841 (R.I. 1980).

15. SCHWARTZ ET AL., *supra* note 13, at 681 n.1.

16. *Id.*; see *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”).

17. Baker, *supra* note 13, at 733. Municipal immunity’s limited nature is explained thusly:

Municipal corporations, such as cities, school districts, and the like have a rather curious dual character. On one hand, they are subdivisions of the state, acting as local governments. On the other, they are corporate bodies, capable of much the same acts and having much the same special interests and relations as private corporations The principal exception was for activities that were deemed “proprietary” or “private” as contrasted with governmental functions. Courts imposed liability when the city or town engaged in activity that normally was carried out by the private sector . . . and reserved the immunity

performance of “governmental functions,” activities in which the municipality held “no particular interest, and from which it derived no special benefit or advantage in its corporate capacity,”¹⁸ but were liable for negligently performing “proprietary functions,” activities from which a municipality derived a corporate benefit or return.¹⁹ Under this framework, plaintiffs’ chances of success depended on context and the label that a court placed on a particular activity, leading “at worst to innumerable injustices and at best to a plethora of legislative and judicial exemptions.”²⁰ Due to the doctrine’s inconsistencies, the Rhode Island Supreme Court abrogated municipal immunity in *Becker v. Beaudoin*.²¹

The Rhode Island Supreme Court next addressed state sovereign immunity in *Calhoun v. City of Providence*.²² Between *Becker* and *Calhoun*, the Rhode Island General Assembly enacted Rhode Island General Laws § 9-31-1, which ostensibly opened the state and municipalities to tort liability.²³ However, the *Calhoun* Court was skeptical that the legislature intended to “impose liability upon the state for any and all acts or omissions of its employees and officers,” and determined that some functions must remain exempt because of societal interests and public policy considerations.²⁴ *Calhoun* preserved state immunity only when the negligent actor enjoyed a personal immunity.²⁵ The holding can be described as a discretionary-ministerial distinction—the Court excused the state for injustices arising from “the exercise of individual judgment,” but

for traditional governmental functions like administering elections, providing a judicial system, exercising police powers, etc.

SCHWARTZ ET AL., *supra* note 13, at 682 n.4.

18. *Kelly v. Cook*, 41 A. 571, 572 (R.I. 1888); *see Wixon v. City of Newport*, 13 R.I. 454, 458–49 (R.I. 1881).

19. *See Karczmarczyk v. Quinn*, 200 A.2d 461, 464–65 (R.I. 1964).

20. *Calhoun v. City of Providence*, 390 A.2d 350, 354 (R.I. 1978); *see Becker v. Beaudoin*, 261 A.2d 896, 900 (R.I. 1970) (“However, we were fully cognizant at the time we wrote that opinion that had, in the same circumstances, the line been laid by the fire department to extinguish a fire in the debris at the bridge construction site, the plaintiff would have been barred from acting by the doctrine of governmental immunity.”).

21. *Becker*, 261 A.2d at 901–02; *see Baker*, *supra* note 13, at 734.

22. *See Calhoun*, 390 A.2d at 352–53; *Baker*, *supra* note 13, at 734–36.

23. R.I. GEN. LAWS § 9-31-1(a) (2022).

24. *Calhoun*, 390 A.2d at 353, 356–57.

25. *See Baker*, *supra* note 13, at 736–37.

held it liable for the negligent execution of a “specific duty arising from fixed and designated facts.”²⁶

The Rhode Island Supreme Court formally introduced the public duty doctrine in *Ryan v. State*.²⁷ In *Ryan*, two plaintiffs were injured in a motor vehicle accident with a driver who, considering his numerous violations, was wrongfully granted a driver’s license.²⁸ Because the registrar did not have a personal immunity, the state should have been found liable.²⁹ However, the *Ryan* Court departed entirely from *Calhoun*, holding that there is no government liability “unless there is a breach of a duty owed to the plaintiff.”³⁰ The plaintiffs could not make a case for breach because the statutes allegedly violated by the registrar merely established duties owed to the public.³¹

Ryan represented a sharp turn from *Becker* and *Calhoun*. The Rhode Island Supreme Court did not mention its prior decisions, relying instead on cases from other jurisdictions.³² No longer was the nature of the duty at issue, but rather to whom the duty was owed. Even if a state actor was not personally immune, plaintiffs were now required to show they were “specifically within the knowledge of the state so that injury to plaintiffs could have been and should have been foreseen.”³³ Naturally, this situation occurs in rare circumstances, generally when a plaintiff has personal interactions with state agents that put them within the agents’

26. Lauren Villa, *Public Service, Private Entity: Should the Nature of the Service or Entity be Controlling on Issues of Sovereign Immunity?*, 78 ST. JOHN’S L. REV. 1257, 1260 n.18 (2004) (quoting *Kari v. City of Maplewood*, 582 N.W.2d 921, 923 (Minn. 1998)). *But see Calhoun*, 390 A.3d at 356 n.5 (“use of the phrase ‘discretionary acts’ is merely a reference to the generally established requirements for personal governmental immunity protection.”). *See generally* SCHWARTZ ET AL., *supra* note 13, at 689 n.3.

27. *See generally* *Ryan v. State*, 420 A.2d 841, 842 (R.I. 1980).

28. *Id.* at 842. The plaintiffs claimed that the registrar negligently provided a driver’s license to the defendant and failed to “investigate his character, habits, and driving ability before reinstating his license after three suspension orders.” *Id.*

29. *Baker*, *supra* note 13, at 736–37.

30. *Ryan*, 420 A.2d at 843.

31. *Id.*

32. *See id.*

33. *Longtin v. D’Ambra Constr. Co.*, 588 A.2d 1044, 1047 (R.I. 1991).

contemplation.³⁴ An unknown plaintiff was left without remedy, even if injury was foreseeable.³⁵ Moreover, the Court later applied the new *Ryan* analysis to both state and municipal negligence.³⁶

Over time, however, Rhode Island carved out two true exceptions to the public duty doctrine,³⁷ which imposed liability despite the absence of a special duty. Those exceptions are the proprietary function exception and the egregious conduct exception.

A. *The Proprietary Function Exception*

The proprietary function exception attributes liability for the negligent performance of activities that are performed or closely replicated by private persons.³⁸ The exception arose in two sister cases. In *Catone v. Medberry*, the plaintiff died in a motor vehicle accident with a state-owned garbage truck that was driving slowly in the high-speed lane of a highway.³⁹ The plaintiff in *O'Brien v. State* tripped on a latent horseshoe stake embedded in the ground at a public park.⁴⁰ In both cases, the Rhode Island Supreme Court reexamined the public duty doctrine to find a common thread between its prior applications. The Court found that the state should be immunized only when it engages in discretionary activities “inherently incapable of being performed by private individuals.”⁴¹ However, when engaged in “the identical function that a private person might perform or which a private person might well parallel . . .,” the state owes a duty of reasonable care just as a private person would owe.⁴² In these cases, the Court found no reason to

34. See *id.* at 1046 (quoting *Knudsen v. Hall*, 490 A.2d 976, 978 (R.I. 1985)).

35. See *Ryan*, 420 A.2d at 842–43 (finding that, based on the driver’s suspensions and violations, the registrar could have reasonably foreseen that reinstating that driver’s license without an investigation under § 31-11-10 increased the risk of a motor vehicle accident, but holding that the statute did not create a duty owed to the individual plaintiff).

36. See generally *Polaski v. O’Reilly*, 559 A.2d 646 (R.I. 1989).

37. Special duties are often called an exception to the public duty doctrine, but this writer hesitates to follow suit. Special duties are the inverse to the public duty doctrine, not an exception. *But see Baker*, *supra* note 13, at 737.

38. See *Catone v. Medberry*, 555 A.2d 328, 334 (R.I. 1989).

39. *Id.* at 330.

40. *O’Brien v. State*, 555 A.2d 334, 335 (R.I. 1989).

41. *Catone*, 555 A.2d at 333; accord *O’Brien*, 555 A.2d at 336–37.

42. *O’Brien*, 555 A.2d at 337; see *Catone*, 555 A.2d at 334.

absolve the state from its duty of care as a motor vehicle operator or landowner.⁴³

A private person does not need to perform the *exact same* task as the state for this exception to apply, just the relevant or operative portion.⁴⁴ For instance, the Rhode Island Department of Corrections receives, stores, and distributes food as part of the Emergency Food Assistance Program (TEFAP), a task that can only be performed by the Department.⁴⁵ In October of 2004, the DOC distributed six cases of raisins to low-income persons.⁴⁶ The plaintiff received a box of raisins and, after consuming them, discovered insect larvae and excrement at the bottom of the box.⁴⁷ The state argued that the public duty doctrine applied since “the distribution of food that occurred in this matter is much more complex’ than is the distribution of food undertaken on a regular basis by private parties”⁴⁸ The Rhode Island Supreme Court disagreed, holding:

While it is true that administration of a federally funded program could, potentially, be considered a governmental function, the actual government function at issue in this case—namely, the storage and distribution of food—is an activity that business entities and private persons can and do perform regularly. The plaintiff does not argue that his alleged injuries arose out of the discretionary decisions of government agents in administering the TEFAP program; instead, his allegations concern the relatively commonplace task of storing and distributing foodstuffs. For this reason, the public duty doctrine cannot properly be invoked to shield defendant from liability in the instant case.⁴⁹

More recently, in *Roach v. State*, the state was held liable for the plaintiff’s injuries sustained while working as a contract nurse

43. *Catone*, 555 A.2d at 333–34; *O’Brien*, 555 A.2d at 338.

44. See *Roach v. State*, 157 A.3d 1042, 1051–52 (R.I. 2017); *Adams v. R.I. Dep’t of Corrections*, 973 A.2d 542, 546 (R.I. 2009); Alastair C. Deans, 2009 *Survey of Rhode Island Law*, 15 ROGER WILLIAMS U. L. REV. 356, 359–60 (2010).

45. *Adams*, 973 A.2d at 544.

46. *Id.* The DOC received the raisins in March 2004 and stored them in a temperature-controlled distribution center in Cranston until they were distributed in October of 2004. *Id.*

47. *Id.*

48. *Id.* at 545.

49. *Id.* at 546 (emphasis added).

at a state-operated veterans' home.⁵⁰ The state argued that the public duty doctrine applied because the veterans' home was a creature of statute and under the auspices of the Rhode Island Director of Human Services, and no private person could perform that same function.⁵¹ Relying on *Adams*, the Court determined that an individual could perform the same activities at issue here, since the "pertinent government function [was] resident-patient care," not broad-sense administration.⁵²

B. *The Egregious Conduct Exception*

The egregious conduct exception attributes liability for the grossly negligent performance of (or failure to perform) discretionary activities that are otherwise protected by the public duty doctrine.⁵³ The standard for "egregious conduct" is essentially the same as a private action alleging gross negligence. The plaintiff must show that the state (1) "created circumstances that forced a reasonably prudent person into a position of extreme peril," (2) had actual or constructive knowledge of the peril, and (3) did not remediate the peril within a reasonable time.⁵⁴

The egregious conduct exception first appeared in *Verity v. Danti*, where the plaintiff was forced to step off the sidewalk to avoid a tree that "took up the entire width of the sidewalk area."⁵⁵ As she walked on the roadway, a vehicle struck and seriously injured the plaintiff.⁵⁶ The state admitted it was aware of the tree and that it had not taken any action to make the sidewalk safer for pedestrians.⁵⁷ Despite such knowledge, however, the state continued to deem that the sidewalk was in satisfactory condition.⁵⁸ Although the state failed to perform a discretionary activity—which

50. See *Roach v. State*, 157 A.3d 1042, 1052 (R.I. 2017). The plaintiff alleged that she was injured after she slipped and fell on a wet bathroom floor. *Id.* at 1046.

51. *Id.* at 1051–52.

52. *Id.* at 1052.

53. See *Baker*, *supra* note 13, at 742–43.

54. *Id.* (quoting *Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992)).

55. *Verity v. Danti*, 585 A.2d 65, 65–66 (R.I. 1991). The plaintiff could not walk on the other side of the tree because the path was blocked by a stone wall abutting the tree. *Id.*

56. *Id.* at 66.

57. *Id.* at 67.

58. *Id.*

would normally be immunized—the *Verity* Court held that “when the state has knowledge that it has created a circumstance that forces an individual into a position of peril and subsequently chooses not to remedy the situation, the public duty doctrine does not shield the state from liability.”⁵⁹

Later cases expanded the class of risks that may put a person in a “position of extreme peril” by including conditions that give rise to slip-and-falls and government interference with property rights.⁶⁰ Whereas *Verity* contemplated risks of grave bodily injury, today’s “egregious conduct” demands little more than a showing of ordinary negligence, at least on paper.⁶¹

Not only have the courts expanded the definition of “extreme peril,” they have also been lax with respect to satisfactory notice. A government entity may be notified via actual or constructive notice.⁶² A plaintiff can show actual notice by proving that the government knew of the defective condition prior to the injury.⁶³ More commonly, plaintiffs allege constructive notice, which “is chargeable only where the hazard has existed for a sufficient length of time to allow the vigilant owner the opportunity to discover and remedy the situation.”⁶⁴ The Rhode Island Supreme Court has remained pro-plaintiff when considering factual disputes over whether the government had constructive notice, often overruling dispositive motions when little or no evidence demonstrates the government should have been aware of a defective condition.

In *Haley v. Town of Lincoln*, the plaintiffs struck an oncoming vehicle after swerving to avoid two unlit sawhorses that a road maintenance crew placed in the road.⁶⁵ The trial court dismissed the plaintiffs’ claim under the public duty doctrine, but the Rhode Island Supreme Court reversed.⁶⁶ Based on the plaintiffs’

59. *Id.*

60. *See Baker, supra* note 13, at 744–46.

61. *Id.* at 745.

62. *Haley v. Town of Lincoln*, 611 A.2d 845, 849 (R.I. 1992).

63. 2 LOUIS A. LEHR, JR., PREMISES LIABILITY § 36:6 (3d ed. 2012); *see* Joseph R. Long, *Notice in Equity*, 34 HARV. L. REV. 137, 160 (1920) (“Constructive notice is notice imputed by law, and is wholly independent of knowledge; indeed there can be true constructive notice only in the absence of knowledge, with knowledge the party would have actual notice.”).

64. 2 LEHR, *supra* note 63.

65. *Haley*, 611 A.2d at 847.

66. *Id.* at 850–51.

complaint, the Court surmised that the plaintiffs had a viable argument under the egregious conduct exception, believing it was possible that the “defendants were in fact cognizant of the potential for disaster resulting from the placement of the sawhorses” and “failed to alleviate any danger to motorists caused by the sawhorses within a reasonable time.”⁶⁷ Thus, the Rhode Island Supreme Court ruled that government was potentially liable despite not receiving any concrete, prior notice.⁶⁸

More recently, the Rhode Island Superior Court declined to dismiss a negligence claim against the state even though no evidence of notice existed on the record.⁶⁹ The plaintiff in *Quattrini v. Olsen* fell into a pothole on a state-owned road while attending the Gaspee Days Arts and Crafts Festival.⁷⁰ Although the plaintiff could not show that the state had any prior knowledge or complaints about the pothole in question, the *Quattrini* Court determined that the state may have been constructively notified if the “defective condition, although not actually known by the city, *could have been known* by the exercise of ordinary diligence and care on its part.”⁷¹ The Court concluded by stating that the egregious conduct exception is a fact-intensive inquiry on which reasonable minds could differ, and that the plaintiff’s allegations overcame the state’s dispositive motion.⁷²

Under both the proprietary function and egregious conduct exceptions, plaintiffs’ chances of prevailing against the government improved. Even if they were unknown to the government at the time of the incident, plaintiffs could recover if they showed that the relevant activity was common between public and private actors, or that the government engaged in (what essentially amounts to) willful or wanton misconduct. Unfortunately, the Rhode Island Judiciary applies these exceptions inconsistently with respect to roads and road safety, as the next part will show.

67. *Id.*

68. *Id.* at 850.

69. *Quattrini v. Olsen*, No. KC-2016-0004, 2019 WL 1493810, at *7, *9 (R.I. Super. Ct. Mar. 29, 2019).

70. *Id.* at *1.

71. *Id.* at *7 (quoting 19 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 54:183 (3d ed. 2018 update)) (emphasis added).

72. *Id.* (citing *Tedesco v. Connors*, 871 A.2d 920, 925–26 (R.I. 2005)).

II. RHODE ISLAND'S APPLICATION OF THE PUBLIC DUTY DOCTRINE TO INFRASTRUCTURE

Rhode Island and its municipalities have largely avoided liability when plaintiffs are injured by unsafe road conditions. While some instances of immunity are proper, such as when the government exercises its judgment, there are more improper uses, such as when the government fails to repair or maintain its property. This section will attempt to delineate these two situations and show that a blanket legal approach as to both fact patterns is inappropriate.

A. *Immunity for Discretionary Decisions*

Decisions to place or open a road, install traffic devices, and the like are exercises in discretion, as they are calculi “contingent upon limited resources, a determination of traffic volume, and a consideration of engineering standards.”⁷³ There is no question that governments should not face liability for a cost-benefit analysis that balances risks of injury with other practical considerations.

For instance, in *Catri v. Hopkins*, the plaintiff died in a vehicle accident at the intersection of Tuckertown Road and Route 110 in South Kingstown.⁷⁴ The intersection only had two stop signs for one of the roads at the intersection, despite several requests to place an additional pair on the other road.⁷⁵ The Rhode Island Supreme Court immunized the state, holding that placing traffic control signals is a discretionary activity protected by the public duty doctrine.⁷⁶ While the Court noted that the state was “sluggish” in responding to requests for additional signage, it stated that it could not “invent liability from the slowest of actions.”⁷⁷

Likewise, in *DeFusco v. Todesca Forte, Inc.*, the plaintiff drove off the side of an exit ramp in South Kingstown that was under construction.⁷⁸ The state opened the exit ramp for traffic without painting lines on the road or activating lights that were already installed.⁷⁹ The *DeFusco* Court held that since the exit ramp was not

73. *Catri v. Hopkins*, 609 A.2d 966, 968 (R.I. 1992).

74. *Id.* at 967.

75. *See id.*

76. *Id.* at 968.

77. *Id.* at 969.

78. *DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 364 (R.I. 1996).

79. *Id.*

fully completed, the state could not be held liable for failure to repair; opening the ramp without activating the lights was a discretionary decision.⁸⁰

Once a discretionary decision is made, though, Rhode Island continues to immunize the government for failure to repair or keep its property in working order. Generally, once an agency implements a policy decision and installs new public property, it is liable for failure to maintain that property.⁸¹ Rhode Island, however, views road maintenance as a discretionary function incapable of being performed by private individuals.⁸² Thus, only the egregious conduct exception has given rise to potential liability.⁸³ The next subsection will examine prominent cases and make the argument for liability under both the proprietary function and egregious conduct exceptions.

B. *Immunity for Negligent Maintenance*

Knudsen v. Hall set the stage for excusing governmental negligence in maintaining a safe driving environment.⁸⁴ The parties were involved in a motor vehicle accident at the intersection of Route 14 and Route 102 and contended at trial that the state's poor maintenance caused the accident.⁸⁵ The parties introduced evidence that the intersection was missing a stop sign that was previously placed there and was missing a stop line and center line markings that would have indicated an intersection.⁸⁶ In addition, the state failed to cut back the brush alongside the road as it usually did, which obstructed the parties' vision when approaching the intersection.⁸⁷ The jury returned a verdict allocating 32.5% fault to the state, but the trial judge granted the state's motion for judgment *non obstante veredicto*.⁸⁸

80. *Id.* at 365–66.

81. *See generally* SCHWARTZ ET AL., *supra* note 13, at 689 n.3 (citing *Hensley v. Jackson County*, 227 S.W.3d 491 (Mo. 2007)) (“For example, the government may be liable if one of its agents . . . negligently fails to maintain government premises, or negligently fails to maintain public roads.”).

82. *DeFusco*, 683 A.2d at 365.

83. *See, e.g.*, *Tedesco v. Connors*, 871 A.2d 920, 929–30 (R.I. 2005).

84. *See Knudsen v. Hall*, 490 A.2d 976 (R.I. 1985).

85. *Id.* at 976–97.

86. *Id.* at 977.

87. *Id.*

88. *Id.*

At the time, neither the proprietary function exception nor the egregious conduct exception existed in Rhode Island.⁸⁹ Thus, the only way for the plaintiffs to prevail was to show a special duty owed by the state. The *Knudsen* Court determined that Rhode Island General Laws § 24-8-14, which required the state to keep roads in good repair, was a duty owed to the public at large, and thus the state was immunized.⁹⁰

Later, armed with public duty doctrine exceptions, the Rhode Island Supreme Court faced two near-identical cases in *Polaski v. O'Reilly* and *Toegemann v. City of Providence* but declined to extend relief in either. In *Polaski*, the plaintiff was injured in a motor vehicle accident at the intersection of Longmeadow Avenue and Hope Avenue in Warwick.⁹¹ At trial, the plaintiff alleged that the state negligently maintained the intersection because it allowed one of the stop signs to be “mutilated beyond recognition and to become obstructed from view by trees, brush, and bushes.”⁹² In *Toegemann*, the plaintiff struck another vehicle at the intersection of Adelaide Avenue and Melrose Street in Providence.⁹³ The plaintiff alleged that the City of Providence negligently maintained and designed the intersection, causing the accident.⁹⁴

The plaintiffs’ claims in both *Toegemann* and *Polaski*, centered on Rhode Island General Laws § 31-13-3, which governs municipal placement of traffic control signage.⁹⁵ The Rhode Island Supreme Court held that placing traffic signage is an activity protected by the public duty doctrine because the statute gives municipalities discretion to place signs on local roads.⁹⁶ Moreover, the *Polaski* and

89. Compare *id.* at 976, with *Catone v. Medberry*, 555 A.2d 328 (R.I. 1989), and *O'Brien v. State*, 555 A.2d 334 (R.I. 1989), and *Verity v. Danti*, 585 A.2d 65 (R.I. 1991) (demonstrating the outcome before such exceptions came into play.).

90. *Knudsen*, 490 A.2d at 978–79.

91. *Polaski v. O'Reilly*, 559 A.2d 646, 646 (R.I. 1989).

92. *Id.* at 647.

93. *Toegemann v. City of Providence*, 21 A.3d 384, 385–86 (R.I. 2011).

94. *Id.* The plaintiff alleged that “the posted speed limit was ‘too fast for the area,’ that the intersection was unsafe because it had only two stop signs, that the speed limit signs were hidden by vegetative growth, and that trees blocked the view of the ‘Road Narrows’ signs.” *Id.* at 386.

95. See *Polaski*, 559 A.2d at 647; *Toegemann*, 21 A.3d at 387; R.I. GEN. LAWS § 31-13-3 (2022).

96. *Polaski*, 559 A.2d at 647; *Toegemann*, 21 A.3d at 387.

Toegemann courts found that no exceptions to the public duty doctrine applied, so the cities were immunized for their failures to repair or remediate the defective conditions.⁹⁷

As the next section explains, *Polaski*, *Toegemann*, and, more recently, *Georges v. State* raise a pertinent question: should maintenance be treated as a discretionary activity? Placing roads and other traffic control devices is surely the product of a cost-benefit analysis. However, after conducting that analysis and making the discretionary decision to install a traffic instrument, should the government be held to account when the instrument falls into disrepair and causes injury to the public? The next part will argue that road maintenance is not discretionary, and even if it is, failure to maintain roads falls under public duty doctrine exceptions.

III. THE CASE FOR LIABILITY FROM POTHOLE DAMAGE AND INJURIES

A. *Is Road Maintenance a Discretionary Activity?*

In both *Polaski* and *Toegemann*, the Rhode Island Supreme Court conflated placement with replacement.⁹⁸ Deciding whether a street or intersection warrants a stop sign is surely discretionary—the government must evaluate the risks inherent at a particular location, weigh the benefits and disadvantages of signage, and determine that the traffic control would offer a net benefit. However, in both cases, signage was already placed, meaning that the towns had already exercised their discretion under § 31-13-3 and deemed the signage necessary for safe travel.⁹⁹ As a matter of policy and logic, courts should not consider the discretionary nature of placing a traffic sign once a town has placed the sign and it has fallen into disrepair. If the town had discretionarily determined that a sign was no longer needed, it stands to reason that the town would have removed it. As such, in *Polaski* and *Toegemann*, the Rhode Island Supreme Court should have found that it was incumbent on the towns to maintain the signs after placing them and should have held the towns liable for their failure to do so.

97. *Polaski*, 559 A.2d at 647–48; *Toegemann*, 21 A.3d at 388. It is worth mentioning that the court decided *Polaski* in 1989, before it established the egregious conduct exception in *Verity v. Danti*, 585 A.2d 65, 67 (R.I. 1991).

98. See *Polaski*, 559 A.2d at 647; *Toegemann*, 21 A.3d at 387.

99. See *Polaski*, 559 A.2d at 647; *Toegemann*, 21 A.3d at 386.

The Rhode Island Supreme Court reached this exact conclusion in a case involving traffic lights. In *Bierman v. Shookster*, the parties were involved in an accident at the intersection of Friendship Street and Dyer Street in Providence.¹⁰⁰ At that intersection, there were two traffic lights controlling traffic on Dyer Street, both of which were unusable; one was broken, and the other was blocked by an illegally parked truck.¹⁰¹ The parties sued the City of Providence for negligent maintenance of the intersection, but the claim was dismissed on public duty doctrine grounds.¹⁰² On appeal, the Rhode Island Supreme Court reversed, holding that:

By placing an automatic signal light at an intersection, the municipality governs the behavior of drivers and pedestrians who utilize those areas. Therefore, drivers and pedestrians who come in contact with controlled intersections rely on the operation of the automatic lights both for their safety and in order to remain within the law By placing the traffic controls at Dyer and Friendship Streets, the city caused people approaching the intersection to rely on the signals. By failing to correct the malfunction, of which it should have been aware, the city jeopardized the safety of those utilizing the intersection in reliance on the traffic lights.¹⁰³

Bierman was distinguished from *Polaski* on the grounds that traffic signal maintenance was at issue in *Bierman*, while *Polaski* was a case about placement.¹⁰⁴ As discussed above, maintenance was at issue in both cases since the municipality in *Polaski* had already made the discretionary decision to place the signage and thus took on the burden of maintaining it. Granted, egregious conduct was not an exception to the public duty doctrine when *Polaski* was decided, but it was for *Toegmann*, which has a strikingly similar fact pattern. Drivers rely on signage just as they rely on traffic lights. They both are designed to ensure a safe and orderly procession of traffic. Drivers rely on others to abide traffic control devices, since failure to adhere to either increases the risk of an accident, or

100. *Bierman v. Shookster*, 590 A.2d 402, 403 (R.I. 1991).

101. *Id.*

102. *Id.*

103. *Id.* at 404.

104. *Id.* at 403.

at the very least a traffic violation and fine.¹⁰⁵ Consequently, a driver finds himself in the same or similar peril approaching an intersection with a missing stop sign as approaching one with broken traffic lights.¹⁰⁶ In theory, a driver's misplaced reliance on any roadway component that is in a defective condition, including the pavement, can put the driver in peril.

B. The Case for Liability in Georges under Public Duty Doctrine Exceptions

A closer inspection of the *Georges* decision reveals arguments for liability under both the proprietary function and egregious conduct exceptions to the public duty doctrine. In *Georges*, the plaintiff struck an eighteen-inch-wide pothole on West Shore Road in Warwick.¹⁰⁷ The impact caused one of the vehicle's wheels to dislodge which caused personal injuries and forced the plaintiff out of work for six weeks.¹⁰⁸ The plaintiff sued to recover for his personal injuries, arguing that the state maintained the road "in 'such a negligent and careless manner, so as to allow a pothole to exist in said roadway.'"¹⁰⁹ At the trial court level, the state argued that the public duty doctrine insulated them from liability and prevailed on a motion for summary judgment.¹¹⁰

On appeal, the Rhode Island Supreme Court only made a finding as to the proprietary function exception.¹¹¹ The plaintiff argued that "the [S]tate acts as a private landowner when it repairs potholes on public roadways (or fails to do so), because private individuals maintain private roadways."¹¹² However, the Court rejected this argument, reasoning that private actors are not duty-bound to

105. See *About Intersection Safety*, FED. HIGHWAY ADMIN., <https://safety.fhwa.dot.gov/intersection/about/> [<https://perma.cc/VKM5-8Y9Q>] (May 18, 2022); R.I. GEN. LAWS § 31-41.1-4 (2022).

106. Compare *Bierman*, 590 A.2d at 404, with *Polaski v. O'Reilly*, 559 A.2d 646, 646–47 (R.I. 1989), and *Toegemann v. City of Providence*, 21 A.3d 384, 385–86 (R.I. 2011).

107. *Georges v. State*, 249 A.3d 1261, 1263 (R.I. 2021).

108. *Id.*

109. *Id.* (quoting First Amended Complaint at 3, *Georges v. State*, No. KC-2014-355 (R.I. Super. Ct. May 13, 2014)).

110. *Id.* at 1263–64.

111. *Id.* at 1265.

112. *Id.* at 1266.

repair public roads.¹¹³ While the Court did not squarely address the egregious conduct exception, it implied that the state's failure to repair the pothole was not egregious.¹¹⁴

1. *Liability under the Proprietary Function Exception*

The *Georges* Court's finding that the proprietary function exception did not apply was dismissive of its prior holdings and frankly, legally disjunctive. Consider the Court's description of the pertinent activity: repairing *public* roads.¹¹⁵ Even a cursory glance at prior caselaw shows that the *Georges* Court manufactured an attenuation whole cloth to forcibly separate public and private road repair even though they are functionally identical.

Adams v. Department of Corrections and *Roach v. State* completely dispel the notion that a plaintiff's claims are barred because the alleged negligent activity is funded by public dollars, managed by public employees, or is a more complicated version of a privately undertaken task.¹¹⁶ In *Adams*, the state argued that its activity was incapable of being performed by private individuals because of TEFAP's complex food distribution scheme, which distinguished the state's activity from more commonplace "distribution of food undertaken on a regular basis by private parties such as supermarkets, convenience stores, and food banks."¹¹⁷ In *Roach*, the state similarly argued that operating and maintaining the state's veterans' home was incapable of being performed by private citizens because the home was statutorily created and under state officials'

113. *Id.*

114. *See id.* at 1266–67.

115. *See id.* at 1266.

116. *See Adams v. R.I. Dep't of Corr.*, 973 A.2d 542, 546 (R.I. 2009); *Roach v. State*, 157 A.3d 1042, 1051–52 (R.I. 2017).

117. *Adams*, 973 A.2d at 545. The trial justice also stated in her opinion that:

The food here was purchased by the federal government and distributed, along with federal funds, through the Defendant to the local church where Plaintiff received it. This distribution of federal funds and food is a discretionary matter performed by a government agency. Private individuals or corporations are not permitted to perform this activity. Consequently, the Defendant's actions in this case, while on the surface are seemingly of the type that can be performed by private individuals, clearly are not such here.

Id. (quoting *Adams v. Rhode Island Department of Corrections*, No. PC 06-2130, 2007 WL 3236721, at *8 (R.I. Super. Ct. Oct. 11, 2007)).

management.¹¹⁸ The Rhode Island Supreme Court dispensed with both arguments, reasoning that courts should examine the actual underlying activity and determine “whether a private person or corporation could carry it out.”¹¹⁹ In both cases, the core activities—food distribution and patient care—were undertakings that private persons regularly performed.¹²⁰

Additionally, the *Georges* Court’s arbitrary distinction between public and private roads overlooks the holding in *O’Brien v. State*, which made no such public-private separation. The plaintiff in *O’Brien* was injured in a public park, but the Court did not ponder whether private citizens are responsible for maintaining public land.¹²¹ In fact, *O’Brien* actively dissuades the insertion of attenuating qualifiers because its holding states that the proprietary function exception applies to any activity that private individuals could perform identically or in a parallel capacity.¹²²

So, what is a more accurate underlying activity? One could hearken back to *O’Brien* and argue that the underlying function in *Georges* is the identification and remediation of defects on one’s premises. After all, what are roads and other rights-of-way if not land improvements?¹²³ However, this view is likely too simplistic. Not all land is used for vehicular traffic. Moreover, Rhode Island’s Recreational Use Statute makes comparing public roads to public parks impracticable for liability purposes because the statute specifically imposes a different liability regime for the latter.¹²⁴ For

118. *Roach*, 157 A.3d at 1051.

119. *Id.*

120. *Id.*; *Adams*, 973 A.2d at 546.

121. *O’Brien v. State*, 555 A.2d 334, 335 (R.I. 1989).

122. *See id.* at 337.

123. *Cf.* Jacob C. Schipaanboord, *America’s Troubled Roads*, 26 J. LAND RES. & ENV’T L. 153, 153 (2005) (“The ability to control roads on public lands is at the core of the debate surrounding public land use. . . . Building roads is essential to any use of public lands, because every oil rig, every mine, every acre of potential timber to be harvested must start with a road.”).

124. *See* R.I. GEN. LAWS § 32-6-3 (2022). *See generally* Smiler v. Napolitano, 911 A.2d 1035, 1038–39 (R.I. 2006) (“To encourage landowners to open their property to the public for recreational use, Rhode Island’s Recreational Use Statute limits landowners’ liability for personal injuries sustained by the users of such properties. The Recreational Use Statute modifies the common law to change the legal duty that owners owe to users of recreational property. This change from the common law treats users of public and private recreational properties as trespassers, thus reducing the duty of care owed to recreational

purposes of this Article, simply removing the “public” qualifier from “public roads” will suffice.

If the underlying activity is maintaining roads and other rights-of-way, then the proprietary function exception should apply because private actors regularly engage in that activity. Owners of private roads, rights-of-way, and easements are duty-bound to maintain them. Local ordinances demand owners to remove overgrowth and resurface the pavement “to maintain a safe and uniform driving surface.”¹²⁵ More than likely, a private individual will hire a company for resurfacing, some of which resurface state roads and highways as well.¹²⁶ The same asphalt is used on private and public roads for both initial surfacing and repairs.¹²⁷ While private individuals may not be charged with a duty to repair public roads, they do the same maintenance on private ones. Even without that duty, some individuals maintain public roads anyway.¹²⁸

users.”) (citing *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1060 (R.I.1994)).

125. *E.g.*, CRANSTON, R.I., CODE OF ORDINANCES § 17.104.020(G) (2022), https://library.municode.com/ri/cranston/codes/code_of_ordinances?nodeId=CO_TIT17_ZO_CH17.104RPREPLDI_17.104.020DEST [<https://perma.cc/PKP9-5R5R>]; *see* R.I. GEN. LAWS § 34-9.1-2(a) (2022).

126. *See Award Report for Bid CB21000371*, R.I. DEP’T OF TRANSP., <https://www.dot.ri.gov/ridotbidding/> (search in RI DOT “Bid Board” search bar for “resurfacing”; then follow “I-95 SB High Speed Lane Resurfacing (ARD)” hyperlink; then choose “View Award Report”) (last visited Oct. 23, 2022); *Paving*, D’AMBRA CONSTR. CO., <https://www.d-ambra.com/paving/> (last visited Oct. 23, 2022).

127. Tim Carter, *Asphalt Sealers for Driveways vs. Roadways*, CHICAGO TRIB. (Oct. 25, 2002, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2002-10-25-0210250134-story.html> [<https://perma.cc/JTG2-93SA>]. *Compare How to Repair Potholes in Asphalt Driveway*, HOME DEPOT, <https://www.homedepot.ca/en/home/ideas-how-to/home-repair-and-maintenance/how-to-repair-potholes-in-asphalt-driveway.html> (last visited Oct. 23, 2022), and *The Best Method for Pothole Repair: Cold Patch or Hot Mix Asphalt?*, RALEIGH PAVING (Jan. 12, 2021), <https://www.raleighpaving.com/resources/blog/the-best-method-for-pothole-repair-cold-patch-or-hot-mix-asphalt/> [<https://perma.cc/CQ9B-MB5D>], *with Potholes*, R.I. DEP’T OF TRANSP., <https://www.dot.ri.gov/about/potholes.php> [<https://perma.cc/K92W-MC9H>] (last visited Oct. 23, 2022).

128. *See, e.g.*, Malia Wollan, *How to Fill a Pothole*, N.Y. TIMES (Sept. 28, 2021), <https://www.nytimes.com/2021/09/28/magazine/how-to-fill-a-pothole.html>.

2. *Liability under the Egregious Conduct Exception*

Although the *Georges* Court did not discuss this exception at length,¹²⁹ the state's failure to repair potholes could also amount to egregious conduct. Unfortunately, the Rhode Island Supreme Court did not discuss what circumstances would lead to a finding of egregious conduct with respect to potholes. As discussed earlier, the elements of this exception have softened considerably; plaintiffs can find themselves in a position of "extreme peril" without risk of grave bodily harm, and lack of notice is no longer a bar to recovery.¹³⁰ Here, however, potholes put drivers in great peril, and the state could have been constructively notified.

In *Bierman v. Shookster*, the Rhode Island Supreme Court found that drivers rely on traffic signals to proceed safely through intersections, and that since the lights at Friendship and Dyer Streets were inoperable, drivers who relied on those traffic controls were placed in harm's way.¹³¹ Drivers similarly rely on a smooth driving surface to proceed safely on a road or highway. Unlike traffic signals, a defective road surface place drivers in jeopardy whether they proceed with caution or not. At an intersection, a driver can come to a stop (as is customary at intersections), examine the surrounding area, and advance slowly to avoid colliding with another vehicle. But potholes on a road are different because drivers cannot identify potholes well in advance and may not have enough time to safely avoid them. If a driver does not spot a pothole in time, their only options are to strike the pothole, swerve out of its path, or stomp on the brakes, all of which carry risks of harm.¹³² No matter what action drivers may take, they are at risk.

On the issue of notice, *Haley*, and particularly *Quattrini*, stand for the proposition that lack of actual notice does not bar a plaintiff's

129. See *Georges v. State*, 249 A.3d 1261, 1265 (R.I. 2021).

130. See *supra* Part I.B. At the very least, a plaintiff can survive a dispositive motion without a showing of actual notice. See *Haley v. Town of Lincoln*, 611 A.2d 845, 850 (R.I. 1992); *Quattrini v. Olsen*, No. KC-2016-0004, 2019 WL 1493810, at *7 (R.I. Super. Ct. Mar. 29, 2019).

131. *Bierman v. Shookster*, 590 A.2d 402, 404 (R.I. 1991).

132. See, e.g., *Georges*, 249 A.3d at 1263; *Allstate Ins. Co. v. Fischer*, No. 20-12241, 2021 WL 5040164, at *4 n.2 (E.D. Mich. Oct. 28, 2021); *Tex. Dep't of Transp. v. Canales*, No. 04-19-00121-CV, 2020 WL 86219, at *1 (Tex. App. Jan. 8, 2020); *Miller v. State*, No. 13AP-849, 2014 WL 4245913, at *1 (Ohio Ct. App. Aug. 28, 2014); *Minhas v. Oakland Cnty. Rd. Comm'n*, No. 278477, 2008 WL 2744624, at *1 (Mich. Ct. App. July 15, 2008).

claims. In *Quattrini*, the Rhode Island Department of Transportation (RIDOT) did not receive any complaints of potholes at the incident site before or after the plaintiff's injury.¹³³ Despite the plaintiff's lack of evidence to the contrary, the *Quattrini* court determined that RIDOT could have been constructively notified because the Department could have discovered the pothole through the exercise of reasonable diligence and care.¹³⁴

The area where the *Georges* incident took place is not isolated or rural by any stretch of the imagination. It is a stone's throw away from two schools (Warwick Veterans' Memorial High School and Bishop Hendricken High School) and Oakland Beach, and runs alongside T.F. Green Airport.¹³⁵ The prospect that every driver on West Shore Road somehow failed to notice an eighteen-inch-wide pothole on West Shore Road is next to impossible. Moreover, RIDOT has a branch headquarters in Warwick, just a short drive from West Shore Road and Judith Avenue where the incident in *Georges* occurred.¹³⁶ It is entirely possible that someone from the Department passed that pothole on the way to or from a worksite, from the office, from home, or from lunch. The issue of notice is a mixed question of law and fact,¹³⁷ and the *Georges* court spent no time entertaining the possibility that RIDOT was aware, or should have been aware, of a pothole minutes from its own building. While

133. *Quattrini*, 2019 WL 1493810, at *7.

134. *Id.* (quoting 19 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 54:183 (3d ed. 2018 update)) (“Constructive notice—notice which the law imputes from the circumstances of the case and is based on the theory that negligent ignorance is no less a breach of duty than willful neglect—may be sufficient.”).

135. *See City of Warwick, Rhode Island: Web GIS Maps and Online Property Information*, MAIN ST. GIS, <https://www.mainstreetmaps.com/ri/warwick/public.asp> [<https://perma.cc/4AUQ-EYA>] (last visited Apr. 1, 2022).

136. Directions from RIDOT Division of Highway and Bridge Maintenance Headquarters to Intersection of West Shore Road and Judith Avenue, GOOGLE MAPS, <https://www.google.com/maps/dir/State+of+Rhode+Island+DOT+Division+of+Highway+%26+Bridge+Maintenance+Headquarters+State+of+Rhode+Island+DOT+Division+of+Highway+%26+Bridge+Maintenance+Headquarters,+360+Lincoln+Ave,+Warwick,+RI+02888/W+Shore+Rd+%26+Judith+Ave,+Warwick,+RI+02889/@41.722957,-71.4407652,14z/data=!3m1!4b1!4m13!4m12!1m5!1m1!1s0x89e44e8da7e9d799:0x826d78b93b7dbf8f!2m2!1d-71.4391803!2d41.7449404!1m5!1m1!1s0x89e44d9326c6601f:0xd036e686e4e0fb7f!2m2!1d-71.3975418!2d41.700883> [<https://perma.cc/KS57-Q7QX>] (last visited Apr. 1, 2022).

137. *Tedesco v. Connors*, 871 A.2d 920, 926 (R.I. 2005).

it is possible that no RIDOT employee was aware of the pothole, a factual question of such magnitude should have overcome the state's dispositive motion.¹³⁸

Notwithstanding the Rhode Island Supreme Court's legal inconsistencies, the public duty doctrine ought to be curtailed as a matter of public policy. The next two parts will address policy justifications in favor of changing the current pothole compensation scheme, as well as complicating factors that will likely be discussed should policy change be earnestly considered.

IV. POLICY JUSTIFICATIONS FOR ADDITIONAL POTHOLE LIABILITY

After examining caselaw and the statutory scheme under which drivers are compensated for pothole-related claims, one ought to reach the following conclusion: the current system is insufficient, and the public duty doctrine has been wrongfully used to shield governmental neglect. This section will discuss policy reasons why there should be sweeping policy change, namely to restore the public duty doctrine to its originally intended, safety net status, to increase governmental accountability, and to further the twin aims of the tort system.

A. *The Current Compensation Scheme is Unjust and Inadequate*

As mentioned in the introduction, Rhode Island's compensation scheme for pothole-related claims is unjust and inadequate. It suffers from three significant flaws: (1) the scheme awards wildly insufficient compensation; (2) the scheme imposes a draconian short limitation to file a claim; and (3) the scheme does not compensate personal injuries, only vehicle damage.¹³⁹ This subsection will address the injustices and consequences of such shortcomings.

1. *The Current Scheme Awards Insufficient Compensation*

State and local governmental entities enjoy a highly restricted exposure for pothole-related claims; both are only liable up to \$300 per claim.¹⁴⁰ This amount is wholly inadequate to cover drivers' expenses to repair their vehicles. The \$300 figure has remained the same since 1979, when the General Assembly first offered pothole

138. See *Yankee v. LeBlanc*, 819 A.2d 1277, 1280–81 (R.I. 2003).

139. See R.I. GEN. LAWS §§ 24-5-13, 24-8-35 (2022).

140. *Id.*

damage compensation.¹⁴¹ Recent economic developments have rendered this compensation even more deficient. The cost to produce tires has nearly tripled from 1979 to 2022.¹⁴² The consumer price index (CPI) for motor vehicle parts and equipment has nearly doubled since 1992 when the metric was first measured.¹⁴³ Consumers' purchasing power in 2022 is less than twenty-five percent of what it was in 1979.¹⁴⁴ Not only have tires gotten more expensive, but the price of tire installation, tire rotation, and wheel alignment, which are all part and parcel of necessary repairs after striking a pothole.¹⁴⁵ Drivers may incur additional costs, such as repairs to bodywork or suspension systems.¹⁴⁶ Any costs in excess of the \$300 awarded under a pothole damage claim must be paid out-of-pocket or billed to the driver's insurance carrier, which raises premiums. Adjusted for inflation, the state should pay over \$1,300 to fairly compensate drivers today.¹⁴⁷

141. 1979 R.I. Pub. Laws 38–39.

142. See *Federal Reserve Economic Data: Producer Price Index by Commodity: Rubber and Plastic Products: Tires*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/WPU071201> [<https://perma.cc/CCK6-9EGP>] (last visited Aug. 31, 2022).

143. See *Federal Reserve Economic Data: Consumer Price Index for All Urban Consumers: Motor Vehicle Parts and Equipment in U.S. City Average*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/CUSR0000SETC> [<https://perma.cc/4JJ6-JE9W>] (last visited Aug. 31, 2022).

144. See *Federal Reserve Economic Data: Consumer Price Index for All Urban Consumers: Purchasing Power of the Consumer Dollar in U.S. City Average*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/CUUR0000SA0R> [<https://perma.cc/C2ME-ZFWQ>] (last visited Aug. 31, 2022).

145. See Sean Tucker, *Americans Seeking Fewer, More Expensive Car Repairs*, KELLEY BLUE BOOK (Mar. 23, 2022, 8:01 AM), <https://www.kbb.com/car-news/americans-seeking-fewer-more-expensive-car-repairs/> [<https://perma.cc/SM3K-UJ6Z>]; Robert Ferris, *Why People Are Paying More for Tires*, CNBC (Mar. 12, 2021, 12:35 PM), <https://www.cnbc.com/2021/03/12/why-people-are-paying-more-for-tires.html> [<https://perma.cc/KX3A-2NKQ>]; Peter Cummings, *City Pothole Costs Me \$2,612*, THE PROVIDENCE J. (June 13, 2015, 6:19 PM), <https://www.providencejournal.com/story/opinion/2015/06/13/city-pothole-costs-me-2/34288849007/> [<https://perma.cc/Z2AK-P4W2>].

146. See Rod O'Connor, *How Potholes Can Damage Your Car*, GEICO, <https://www.geico.com/living/driving/auto/auto-care/pothole-damage/> [<https://perma.cc/FU49-TVNR>] (last visited Oct. 13, 2022); *5 Car Parts Potholes Can Damage*, I & I TIRES, <https://www.ianditires.com/5-car-parts-potholes-can-damage/> [<https://perma.cc/AN32-C733>] (last visited Oct. 13, 2022).

147. This writer used the CPI Inflation Calculator supplied by the U.S. Bureau of Labor Statistics to find the approximate, inflation-adjusted value. See

2. *The Current Scheme Imposes a Draconian Short Limitation to File a Claim*

In Rhode Island, drivers only have seven days to file a claim with the state or a local government after they strike a pothole.¹⁴⁸ The limitation is severely constricting compared to Rhode Island's statute of limitations on other personal injury or property damage claims.¹⁴⁹ Drivers even have three years to sue local governments for infrastructure-related injuries that do not involve potholes and can notify the municipality within sixty days of the injury occurring.¹⁵⁰

Why are pothole claims alone subject to such a short claim window? Perhaps it is because pothole damage is so prevalent in the state that making claims more accessible would drastically increase "settlement" expenses. In other words, state and local governments rely on the planned obsolescence of the compensation statutes¹⁵¹ to protect their budgets, secure in the near certainty that unwitting, injured drivers will not avail themselves of the meager remedy available within the short statute of limitation.¹⁵² Many drivers are unaware of the seven-day limit to file a pothole claim, or that they can file a claim at all.¹⁵³ A driver who strikes a pothole might spend the week afterwards finding a mechanic, obtaining estimates, contacting insurance carriers, arranging for alternative transportation, treating physical injuries, and tackling other urgent matters. By the time a driver has addressed more vital concerns, it is likely too late to file a claim for compensation. Denying compensation based on such a short deadline is manifestly unjust and unreasonable; drivers should have a great deal more time to request relief.

generally CPI Inflation Calculator, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/69WG-QCWG] (last visited Oct. 13, 2022).

148. R.I. GEN. LAWS §§ 24-5-13(b), 24-8-35 (2022).

149. *See, e.g.*, §§ 9-1-13(a), 9-1-14 to 9-1-14.4.

150. § 45-15-9 (2022).

151. *See generally* §§ 24-5-13(b), 24-8-35 (2022) (defining a seven-day statute of limitation and a \$300 limit on recovery).

152. *Cf.* Cummings, *supra* note 145.

153. *See id.*

3. *The Current Scheme Does Not Compensate for Personal Injuries*

State and local governments are only liable to pay for vehicle repair costs, but property damage is far from the only type of injury that potholes cause. Potholes can cause drivers to lose control of their vehicles and suffer from terrible personal injuries or even death.¹⁵⁴ Medical treatment has become outrageously expensive, forcing drivers to incur massive out of pocket expenses or be hit with higher insurance premiums.¹⁵⁵ Not only are personally injured drivers left to pay for their own medical treatment, but they may also lose wages from being out of work, like the plaintiff in *Georges*.¹⁵⁶ In a worst case scenario, the government would likely not be under any obligation to compensate families in wrongful death actions, although this has not been visited specifically with potholes and road defects. Personal injuries are a more costly and devastating expense to injured drivers, and a better scheme should offer some relief to that effect.

B. *The Public Duty Doctrine Has Been Misappropriated with Respect to Potholes*

The public duty doctrine was designed to insulate the state from the threat of litigation in the performance of its duties.¹⁵⁷ Without adequate protection, the state “would be unable to function if liability was imposed each time an individual was deleteriously affected”¹⁵⁸ However, the public duty doctrine was never intended to shield governments for inaction, quite the opposite; the Rhode Island Supreme Court intended the limited immunity to

154. See e.g., *Miller v. State*, No. 13AP–849, 2014 WL 4245913, at *1 (Ohio Ct. App. Aug. 28, 2014) (pothole related truck accident resulted in death of passing motorist).

155. See *Federal Reserve Economic Data: Personal Consumption Expenditures: Net Health Insurance: Medical Care and Hospitalization*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/DMINRC1A027NBEA> [<https://perma.cc/92FQ-8CCA>] (last visited Apr. 14, 2022); see also *Federal Reserve Economic Data: Producer Price Index by Commodity: Insurance and Annuities: Health and Medical Insurance*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/WPS411103> [<https://perma.cc/7Y8A-WBTR>] (last visited Oct. 13, 2022).

156. *Georges v. State*, 249 A.3d 1261, 1263 (R.I. 2021).

157. *Catone v. Medberry*, 555 A.2d 328, 333 (R.I. 1989).

158. *Id.*

encourage governments to fulfill their duties and obligations without fear of being sued for potential resultant injuries.¹⁵⁹

The State of Rhode Island, RIDOT, local municipalities, and every resident knows that the roads have been riddled with potholes and other defects for decades.¹⁶⁰ Despite that knowledge, the state has consistently failed to properly address the problem through routine underfunding and reliance on bond issues.¹⁶¹ Even now, six years after implementing the RhodeWorks program¹⁶², seventeen roads alone account for 13,000 potholes that have yet to be filled.¹⁶³ The notion that road maintenance is a discretionary activity protected by the public duty doctrine is a folly and sets a dangerous incentive for the state and municipalities to simply disregard deteriorating road conditions and claim ignorance when someone is inevitably injured.

C. Increased Deterrence and Compensation Will Further the Twin Aims of the Tort System

The twin aims of the tort system are to “deter wrongful conduct” and “to restore injured parties to their original condition . . . by compensating them for their injury”¹⁶⁴ A more just system of public compensation, set forth in Part III.A above, would further these policy objectives. The public duty doctrine was intended to encourage government action and provide a safety net when negligent action yielded injury. However, if these protections are not used as intended, the specter of litigation should similarly push state and local governments to improve road conditions. Deterrence is often used in the context of private parties; the risk of financial loss is what motivates people and companies to take prophylactic steps to reduce the risk of injury, premises upkeep and quality control, just to name two examples. Governmental sensitivity to increased liability, however, is not so apparent.

159. *See id.*

160. *See* Caracciolo, *supra* note 5; *see also* Nadeau, *supra* note 5.

161. AM. SOC’Y OF CIV. ENG’RS, *supra* note 2, at 8–9.

162. Ruled unconstitutional in *Am. Trucking Ass’ns v. Alviti*, No. CV 18-378, 2022 WL 4364195 (D.R.I. Sept. 21, 2022).

163. Caracciolo, *supra* note 5. *See generally* R.I. S. FISCAL OFF., ISSUE BRIEF: RHODEWORKS, 2016-S-2246 (2016), <https://www.rilegislature.gov/sfiscal/Other%20Documents/RhodeWorks%202016.pdf> [<https://perma.cc/SE8N-5GRV>].

164. SCHWARTZ ET AL., *supra* note 13, at 1.

As for compensation, it is right and just to restore injured drivers to their *a priori* condition. In private actions, plaintiffs are routinely compensated fully when they are injured by defects on private property, or when they are the victim of defective or toxic products. In contrast, Rhode Island's pothole compensation system is inadequate in multiple respects. Drivers are not compensated adequately. They are only entitled to part of their potential expenses and only if they file a claim within a week of the injury. Additionally, drivers have little other choice but to use the roads that the state and municipalities provide. The drivers' sole untaken safer alternative is to simply not drive at all. The Rhode Island Public Transit Authority (RIPTA) is not equipped to handle a large influx of new customers, and is currently in the thralls of internal disputes, safety concerns, and administrative scandals.¹⁶⁵ Until public transport or other means of travel are cheaper, safer, and more available, Rhode Islanders will keep driving and continue to incur damages and sustain injuries. In the interim, the state and local governments should compensate citizens fully so that their personal finances are maintained for necessary, productive uses.

V. OTHER POLICY CONSIDERATIONS

In addition to the policy justifications outlined above, there are other prominent legal, political, and economic considerations that must be discussed and weighed. This Article does not purport to answer these questions, but rather raise them and allow readers and policymakers to determine whether potential tradeoffs and intangible benefits are worth making a policy change.

165. See Alexandra Leslie & Sarah Doiron, *'I was in fear for my life': RIPTA Driver Recounts Subduing Passenger with Weapon*, WPRI (Apr. 7, 2022, 6:40 PM), <https://www.wpri.com/news/local-news/blackstone-valley/i-was-in-fear-for-my-life-ripta-driver-who-stopped-man-with-weapon-shares-story/> [<https://perma.cc/5ZYX-EM5U>]; Edward Fitzpatrick, *Attorney General Subpoenas RIPTA, UnitedHealthcare over Data Breach*, BOSTON GLOBE (Feb. 2, 2022, 5:06 PM), <https://www.bostonglobe.com/2022/02/02/metro/attorney-general-subpoenas-ripta-unitedhealthcare-over-data-breach/> [<https://perma.cc/MZT4-E8GX>]; Joseph Richard, *RIPTA Workers Vote 'No Confidence' in Management*, ABC 6 (Jan. 6, 2022, 7:34 PM), <https://www.abc6.com/ripta-workers-vote-no-confidence-in-management/> [<https://perma.cc/MT95-D5D3>]; *Proposed RIPTA Service Improvements for Fall 2021*, R.I. PUB. TRANSIT AUTH., https://www.ripta.com/projects/fall2021/?utm_source=rss&utm_medium=rss&utm_campaign=fall2021 [<https://perma.cc/R33B-HD6Q>] (last visited Apr. 14, 2022).

A. *Questions on Duty*

RIDOT and local departments of public works owe a duty to maintain their respective roads and keep them in good repair.¹⁶⁶ However, they only act on that duty insofar as they are directly notified. The proposals laid out in this Article demand preventative measures in addition to responsive actions, which would require state and local agencies to monitor road conditions from time to time. The principal question with respect to these agencies' duties is whether a duty to *maintain* includes a duty to *monitor*.

The answer, from a statutory construction perspective, is hazy. RIDOT is charged with the duty to “maintain and construct highways.”¹⁶⁷ As for local governments, Rhode Island provides that “[a]ll highways, causeways, and bridges . . . lying and being within the bounds of any town, *shall be kept in repair and amended, from time to time*, so that the highways, causeways, and bridges may be safe and convenient for travelers.”¹⁶⁸ Courts may interpret these statutes to require governments to repair roads as needed—that is, when they are notified of dangerous conditions. Though, the question remains: how could governments maintain roads or keep them in good repair without periodically inspecting them? If they wait until a road disintegrates to gravel before repaving it, have they *maintained* it, or simply *repaired* it? Maintenance is the act of keeping something in its present state or condition,¹⁶⁹ which undoubtedly requires periodic inspections to ensure that the same state or condition is present. Car owners, for example, perform maintenance at regular intervals; they do not change their oil only after their engine starts smoking.

Private landowners are already obligated to inspect their property for defects and ensure that the premises is in a reasonably safe condition.¹⁷⁰ An owner must inspect the devices and apparatuses on her premises.¹⁷¹ The purpose an inspection is to “discover

166. R.I. GEN. LAWS §§ 24-5-1(a), 37-5-2(a) (2022).

167. § 37-5-2(a).

168. § 24-5-1(a) (emphasis added).

169. *Maintain*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/maintain> [<https://perma.cc/Y5Y4-KQQK>] (last visited Apr. 14, 2022).

170. 65A C.J.S. *Negligence* § 627 (2022).

171. *Id.*

possible dangerous conditions of which the owner does not know.”¹⁷² In other words, the law obligates private landowners to take reasonable precautions to uncover and remediate latent defects.

Some might argue that potholes are not latent defects, but the answer is a matter of perspective. If a pothole is large enough for a reasonable person to notice while driving past it, it is more likely a patent defect or an open and obvious danger. However, to RIDOT, which manages 6,025 miles of public roads,¹⁷³ that pothole is an infinitesimally small speck compared to the total land area it controls. As a practical matter, a pothole is effectively hidden and thus not within RIDOT’s direct contemplation. Accordingly, potholes should be treated as latent defects that ought to be uncovered and remediated through regular inspection.

B. *Budget and Fiscal Considerations*

The first question usually asked in response to a proposal for additional public spending is, “who is going to pay for it?” The answer, almost always, is the taxpayer. Fortunately, today, Rhode Island can use additional monies for road repair without raising state and local taxes. Under the Infrastructure Investment and Jobs Act,¹⁷⁴ Rhode Island will receive \$289.7 million in federal funding for highway repairs in 2022 and a total of \$1.7 billion over the course of the legislation.¹⁷⁵ RIDOT can presumably use these funds to acquire material, purchase equipment, and hire additional labor. If not, this influx of funding makes RIDOT a deep pocket. If drivers were allowed to sue, they might stand to win more if a

172. *Id.*

173. *Highway Statistics 2020: Public Road Length - 2020 Miles by Ownership*, FED. HIGHWAY ADMIN. (Oct. 26, 2021), <https://www.fhwa.dot.gov/policyinformation/statistics/2020/hm10.cfm> [<https://perma.cc/ZE5H-FNVY>].

174. *See generally* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

175. Press Release, Sheldon Whitehouse, U.S. Senator for R.I., New \$47.1M Federal Investment Will Upgrade & Strengthen RI Bridges (Jan. 14, 2022), <https://www.whitehouse.senate.gov/news/release/new-471m-federal-investment-will-upgrade-and-strengthen-ri-bridges#:~:text=Over%20the%20life%20of%20the,help%20low%2Dincome%20residents%20get> [<https://perma.cc/T5YG-WFAW>].

sympathetic Rhode Island jury is made aware of RIDOT's newfound riches.¹⁷⁶

Another consideration is the extent to which pothole-induced litigation will consume the budgets of RIDOT and local equivalents if the courts open them up to greater liability. If litigation expenses would take funding away from other projects, the state and municipalities might not have enough funding to improve the roads as intended. Moreover, governments are risk-averse by nature and increased liability may tempt decisionmakers to sit back and take the blows as they come, presenting an unproductive use of public resources, rather than spending their budget on road improvement projects.¹⁷⁷ On the state level, litigation expenses are a separate line item, meaning that RIDOT could earmark funds for compensating injured drivers without eating into their budget for other projects.¹⁷⁸ On the local level, though, it is not so clear. For example, Providence has one line item for each division of the public works department and no separate expense for litigation costs.¹⁷⁹ That does not necessarily mean that any litigation expense against the public works department would be subtracted from its overall budget, but more information is needed concerning how cities and towns set aside a separate litigation fund or if they even have one earmarked.

C. *Private and Political Considerations*

In addition to the benefits that might inure to Rhode Islanders already discussed, there are two additional miscellaneous benefits of a change in the law. The first is lower insurance costs. Under the “we pay” system, costs and losses are spread out; the majority pays more to offset the increased costs of the minority. Car insurance premiums are calculated on a community level, based on

176. See FRANCIS P. BENDEL ET AL., *B.N.Y. PRAC., PERSONAL INJURY PRACTICE IN NY* §§ 4:41, 4:42 (2021) (noting that “[j]urors tend to award higher verdicts in favor of plaintiffs with whom they identify”).

177. See A.C. Walters & V. Ramiah, *Is It Possible to be Too Risk Averse? Considerations for Financial Management in the Public Sector*, 23 *APPLIED ECON. LETTERS* 1210, 1212 (2016).

178. R.I. GEN. LAWS ANN. 35-3-4.1 (2022).

179. CITY OF PROVIDENCE, *APPROVED BUDGET: REVENUES & EXPENDITURES FOR THE FISCAL YEAR ENDING JUNE 30, 2022*, at 2 (2022).

accidents, thefts, and other insurance claims.¹⁸⁰ Insurance claims for pothole-related damage would decrease if the potholes were filled or drivers received greater compensation under the pothole claim statutes. Either way, fewer damage claims would result in fewer insurance payouts, which would lead to gradually decreasing car insurance costs.

Furthermore, there is an incentive for politicians to campaign for affording greater relief for pothole damage and personal injury. Potholes are a universally popular topic, even in today's divided political climate.¹⁸¹ Filling potholes nets political capital and raises politicians' chances of reelection.¹⁸² Conversely, when citizens "submit more road work requests in the six months before the election, incumbent officeholders suffer at the polls."¹⁸³ Thus, a push for greater attention to potholes is in the General Assembly's interest if they want to keep their seats.

CONCLUSION

While cognizant of the fact that the position taken in this Article presents an uphill battle—and that may be putting it mildly—Rhode Islanders are frustrated seeing the roads continue to deteriorate. The public duty doctrine and the scant relief the state and municipalities afford provide little comfort to drivers who put their property and safety at risk. It is extremely likely that governmental immunity is not going anywhere in Rhode Island. The more realistic solution to the pothole problem is the political process: electing people who are earnestly dedicated to improving infrastructure and can implement equitable changes to the pothole damage claim statutes—namely, by indexing statutory awards to inflation, expanding coverage to include relief for personal injuries, and extending the time limitation for filing a claim.

180. See *Why Did My Car Insurance Rate Go Up?*, PROGRESSIVE, <https://www.progressive.com/answers/why-insurance-rates-go-up/> [<https://perma.cc/LV2U-HCQV>] (last visited Apr. 14, 2022).

181. *Where Potholes and Politics Meet*, WARWICK BEACON (June 17, 2021, 1:00 AM), <https://warwickonline.com/stories/where-potholes-and-politics-meet,162565> [<https://perma.cc/LT5H-G9WH>].

182. Craig M. Burnett & Vladimir Kogan, *The Politics of Potholes: Service Quality and Retrospective Voting in Local Elections*, 79 J. POLITICS 302, 310 (2016).

183. *Id.*