THE PUBLIC DUTY DEFENSE TO TORT LIABILITY

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INTRODUCTION

The public duty doctrine is a rule which provides that in order for an injured person to recover in tort against a public entity or an officer or employee thereof, he must show the breach of a duty owed to him as an individual and not merely the breach of a duty owed to the public as a whole. In the absence of such a private duty owed to the injured person, there is no liability for the failure to enforce a statute or to provide protection or services that are intended to benefit only the general public. Although the public duty doctrine has long been recognized as a defense in tort litigation against public entities and their officers and employees, its use and application have been overshadowed by the much broader defense of sovereign immunity as well as the immunity for discretionary functions.

Because the doctrine of sovereign immunity itself has generally been an insurmountable defense for most of the history of the United States, less attention was paid to the public duty doctrine in actions against public entities. The main function of this doctrine, and its very origin, was in actions against public officers and employees because they were not protected by sovereign immunity and were therefore personally liable for their torts. As explained by John C. Vance in his paper, "Personal Liability of State Highway Department Officers and Employees" (Vol 4, Ch. VIII, p. 1835):

> The law of personal liability of public officials developed long before the law of tort liability of the sovereign. Cases were brought against public officials (as a poor second best) because the sovereign was beyond reach in the courts. In the long sweep of judicial history, it is only recently (at least in the United States) that the sovereign has been amenable to suit and made to account for the torts of its agents. Quite naturally, some of the principles that developed in connection with the law of personal liability of public officials were later carried over into the law of liability of the sovereign (most particularly the discretionary–ministerial distinction), but it should be borne in mind that the law of tort liability of the individual and of the State developed separately, and there are fundamental distinctions between the two.

The public duty doctrine is thus one of the principles that developed in connection with the law of personal liability of public officials that was carried over into the law of liability of the sovereign. Now that the great majority of States are no longer protected by sovereign immunity

and have consented to at least some liability for torts,[1] the public duty doctrine has assumed new importance in the defense of tort actions against public entities. Traditionally, the doctrine has had its broadest application in the area of police and fire protection and also in building and safety inspection cases. The defense has not been raised as frequently in highway litigation, but the potential for doing so exists. The principal purpose of this paper is to consider this potential in light of the decided cases in order to alert highway lawyers of the existence of the public duty doctrine as a defense in tort suits arising from State highway activities.

While the public duty doctrine is presently recognized and adhered to by a majority of jurisdictions, there is an unfortunate and growing trend to reject the public duty–private duty dichotomy as a basis for determining the tort liability of public entities.[2] The cases rejecting the public duty doctrine do so primarily on the assumption that it is in reality a form of sovereign immunity. This conclusion is based on a misconception of the origin and nature of the doctrine and the resulting failure of the courts to distinguish between conduct that is not tortious and tortious conduct that is subject to an immunity from liability. In the absence of a duty of care owed to an injured person, there is simply no basis for imposing tort liability whether the defendant is a private person or a public entity. A stated in PROSSER & KEETON, THE LAW OF TORTS at p. 357 (5th ed. 1984):

> [W]hen negligence began to take form as a separate basis of tort liability, the courts developed the idea of duty, as a matter of some specific relation between the plaintiff and the defendant, without which there could be no liability. We owe this to three English cases, decided between 1837 and 1842. The rule which developed out of them was that no action could be founded upon the breach of a duty owed only to some person other than the plaintiff. He must bring himself within the scope of a definite legal obligation, so that it might be regarded as personal to him. "Negligence in the air, so to speak, will not do."

The public duty doctrine exemplifies this basic principle by denying liability because there is no tort when no private duty is owed to an injured person. On the other hand, the defense of sovereign immunity is not based on the absence of a tort but, like all immunities, it is based on the special status of the defendant. Thus, it is explained in PROSSER & KEETON, *supra,* at p. 1032, regarding sovereign immunity:

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[1] *See,* PROSSER & KEETON, THE LAW OF TORTS, § 131, at 1044–1045 (5th ed. 1984); and *see generally,* RESTATEMENT (SECOND) OF TORTS §§ 895B, 895C app. (1982) (compilation of each state's position on state and local immunity).

[2] See Annot., *Modern Status Of Rule Excusing Governmental Unit From Tort Liability On Theory That Only General, Not Particular, Duty Was Owed Under Circumstances,* 38 A.L.R. 4th 1194 (1985). Since 1976, at least ten states have rejected the doctrine outright: Alaska, Arizona, Colorado, Florida, Iowa, Louisiana, New Mexico, Nebraska, Oregon and Wisconsin. See Appendix.

> The immunity was traditionally quite broad and protected the defendant even in cases that undoubtedly involved tortious behavior. The idea was that, though the defendant might be a wrongdoer, social values of great importance required that the defendant escape liability.

The discretionary function immunity is likewise not based on the absence of a tort. Rather, it is based on the concept that certain governmental activities are legislative or executive in nature and any judicial control of these activities in tort suits would disrupt the separation of powers of the three branches of government. It follows that the public duty doctrine differs fundamentally from both the doctrine of sovereign immunity and the discretionary function immunity. Before discussing these distinctions in more detail, it will be helpful to first examine the origin and nature of the public duty doctrine itself.

ORIGIN AND NATURE OF THE PUBLIC DUTY DOCTRINE

The case of *South v. Maryland,* 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1856) is often cited as the origin of the public duty doctrine. Plaintiff, while attempting to collect a debt, was imprisoned by a mob and held for ransom. He sued the local sheriff, alleging that he knew plaintiff had been unlawfully detained but did nothing to obtain his release. The Supreme Court reversed a judgment awarded plaintiff against the sheriff and held that a sheriff's duty to keep the peace was "a public duty, for neglect of which he is amenable to the public, and punishable by indictment only." The opinion stated that in the history of the law, no civil action has been sustained against a sheriff by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

Thus, it is apparent that the rule was intended to protect the sheriff as a public official from personal liability in the performance of certain law enforcement duties the court found he owed only the public generally as a result of his office. However, it is also true, but sometimes overlooked, that not all duties of public officials are owed only the public generally; some duties may be owed to a specific person or persons as well as to the public as a whole. The *South v. Maryland* case recognized that for breach of the latter type of duty, public officials may be personally liable. Hence, it is important to observe that the public duty doctrine applies as a defense only when a public official breaches a public duty which is not also a private duty.

That the doctrine is so limited was made clear at an early date in F. MECHEM, A TREATISE ON PUBLIC OFFICES AND OFFICERS (1890), §§ 598, 672, 673, and 674, where it was said:

> Sec. 598. . . . public officers, in respect of the person or persons to whom their duty is owing, are divided into two classes—those whose duty is owing solely to the public, and those whose duty is owing in some degree to individuals. The first question for determination, therefore, in considering the liability of a public officer to private action is whether that officer owes any duty to the individual complaining. If he does not, then

> the individual has no right of action, even though he may have been injured by the action or non-action of the officer. The remedy in such a case must be by public prosecution.
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> . . .
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> Sec. 672. . . . So it is immaterial that the duty is one primarily imposed upon public grounds and therefore a duty owing primarily to the public, if, notwithstanding, the individual has in it a distinctive and direct interest and the legal right to require its performance; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance against which it was in part the purpose of the law to protect him.
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> Sec. 673. . . . But, as has been seen, where the duty is one owing solely to the public, no liability for its non-performance is incurred to the individual however much he may be injured.
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> Sec. 674. . . . It is largely a restatement of the same rule to say that the individual suing must show that he has suffered an injury from the breach of a duty owing to himself. It is not enough that he has sustained an injury, or that the officer has violated a duty owing to someone; but the plaintiff must show that these two things concur: that he has sustained a special and peculiar injury, and that it results from a breach of duty which the officer owed to him.

To the same effect, see also T. COOLEY, LIABILITY OF PUBLIC OFFICERS (1877). This rule was repeated in T. COOLEY, A TREATISE ON THE LAW OF TORTS (1st ed. 1879) through its several editions. The following statement from Volume 2 of Cooley's 4th edition in 1932, pp. 385–386, has been widely quoted in the cases:

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

The critical question then is what duties are public duties only and what duties are also owed to a specific person or persons. Neither the courts nor the commentators have been able to provide a definitive statement of the distinction between the two except in very general terms.[3] For example, see 18 MCQUILLIN, MUNICIPAL CORPORATIONS § 53.04b (3d ed. 1984), where it is said at pp. 165–166:

> In answering the question of when the duty of a public officer extends to the general public only and not to any particular citizen, the several states have differed. In some states the duty of a public officer becomes

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[3] Benson v. Kutsch, 380 S.E.2d 36, 40 (W. Va. 1989); 57 AM. JUR. 2d, *Municipal, County, School and State Tort Liability,* § 142, p. 155.

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> a special duty, i.e., a duty owed to an individual, when the governmental agency by its dealings or activities deals directly with the injured party on an individual basis. In other words there must be some direct contact between the public employee and the injured party. Other states do not require specific direct contact, but rather consider whether the provision of services or facilities was for the direct use by members of the public in contrast to the provision of governmental services for the protection of the public generally from particular hazards. Under this theory, services such as inspections mandated by municipal building or fire codes or other inspection laws are considered as services provided to the public in general and are not services rendered to the particular individual. Such laws, it is said, are not to protect the personal or property interest of any individual, but on the contrary, are designed to secure to the municipality as a whole the benefits of a well-ordered municipal government, or are for the benefit of the common good.

The difficulty that exists in determining what duties are public duties only and what duties are also private duties is essentially the same problem that exists under general tort law in determining when one person owes another person a duty to care. As stated in PROSSER & KEETON, *supra,* at pp. 357–358:

> The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. Yet it is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised. But it should be recognized that "duty" is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.

When properly understood, the public duty doctrine fits precisely into this category. Although no universal test has been or can be formulated, it may be said that a duty is a public one only and no liability attaches when the court concludes that policy considerations dictate that an individual plaintiff is not entitled to legal protection against defendant's conduct based on the facts involved. A good statement of the appropriate factors to be considered is contained in *Davidson v. City of Westminster,* 649 P.2d 894 (Cal. 1982), as follows:

> In determining the existence of a duty of care in a given case, pertinent factors to consider include the "foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (Citation omitted.) "When public

> agencies are involved, additional elements include 'the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; . . .' " (Citations omitted.)

As mentioned above, a breach of a public duty that is also found to be private duty may result in the imposition of liability. This aspect of the rule has sometimes been characterized as an "exception" to the public duty doctrine and it exists when there is found to be a special relationship between the governmental defendant and the plaintiff. But this so-called "exception" based upon a special relationship is not unique to the public duty doctrine. For example, the real thrust of plaintiff's action against the sheriff in *South v. Maryland* is that the sheriff failed to protect plaintiff from the misconduct of third persons. Apart from the public duty doctrine, there would be no liability in this situation under general principles of tort law because a person ordinarily has no duty to prevent the misconduct of third persons.[4]

The mere fact that a sheriff, by virtue of his office, has law enforcement duties that he owes to the public as a whole, does not alter this common law rule. In other words, there is ordinarily no special relationship between a peace officer and individual members of the public that requires the officer to take affirmative action to protect such individuals. As stated in *Williams v. State of California,* 664 P.2d 137 (Cal. 1983), application of the common law rules regarding duty in the area of law enforcement has produced confusion and conflict because of the misconceptions concerning the duty owed by the police to individual members of the public. In spite of the fact that tax dollars support functions, the *Williams* court concluded that the common law rules of duty are nevertheless applicable. Quoting from *Warren v. District of Columbia,* 444 A.2d 1, 4–9 (D.C. 1981), the court said:

> A person does not, by becoming a police officer, insulate himself from any of the basic duties which everyone owes to other people, but neither does he assume any greater obligation to others individually. The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large.

This principle is not limited to peace officers but is applicable to virtually all public officials. In *Walker v. County of Los Angeles,* 238 Cal. Rptr. 146 (Cal. 1987), involving the conduct of an animal control officer, the court first observed that nothing in negligence law has confounded

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[4] *See,* RESTATEMENT (SECOND) OF TORTS § 315, which reads:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
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> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
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> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

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courts, law professors, or treatise writers more than the concept of duty. And the issue becomes even more complicated when public officials are involved because:

> Private citizens ordinarily do not owe an affirmative duty to save their fellow citizens from harm unless they personally created the risk. (Citation omitted.) But in a very real sense the general public pays public employees specifically for the purpose of having them assume an affirmative duty to aid everyone in that general public. Thus, if ordinary standards applied they might be held responsible in tort for every injury suffered by every member of society every time a public employee negligently failed to do something which could have prevented harm. However, it is feared this concept of duty might expose public employees and especially the public treasury to intolerable financial burdens. To avoid this possibility, most jurisdictions have required something extra before public employees owe a duty in tort to do something to prevent injury to any member of the general public.
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> In California this concern is addressed by requiring a "special relationship" between the public employee and a specific private citizen before a duty is created. A "special relationship" exists if and only if an injured person demonstrates the public officer "assumed a duty toward [him] greater than the duty owed to another member of the public." (Citation omitted.)

When the public duty doctrine is viewed in this manner, it can be seen that it is not a peculiar rule applicable only to governmental torts.[5] Rather, it is simply a rule applicable to public entities based on common law tort principles. In a thoughtful and well-reasoned opinion, the Supreme Court of Minnesota said in *Cracraft v. City of St. Louis Park,* 279 N.W.2d 801, at 806 (Minn. 1979):

> We refuse, therefore, to abolish the distinction between public duty and special duty. The concept of a special duty is not unique to government torts. "Special duty" is nothing more than convenient terminology, in contradistinction to "public duty," for the ancient doctrine that once a duty to act for the protection of others is voluntarily assumed, due care must be exercised even though there was no duty to act in the first instance. (Citation omitted.) "Special duty," therefore, could also effectively be termed "assumed" duty. It is somewhat unfortunate that the terms "public" duty and "special" duty have been used, inasmuch as they give the misleading impression that the distinction applied only to governmental tortfeasors. Perhaps "no duty" and "assumed" duty would be more appropriate.

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[5] The public duty doctrine has frequently been applied to abutting private property owners in sidewalk cases where municipal ordinances which impose a duty to repair upon the property owners have been construed to be only for the benefit of the city, not persons injured on the sidewalk. RESTATEMENT (SECOND) OF TORTS, § 288, illustration 5; and see Williams v. Foster, 265 Cal.Rptr. 15 (Cal. 1989).

The same view was expressed in *Taylor v. Stevens County,* 759 P.2d 447 (Wash. 1988), where the Washington Supreme Court said:

> The threshold determination in a negligence action is whether a duty of care is owed by the defendant to the plaintiff. Whether the defendant is a governmental entity or a private person, to be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. (Citation omitted.) This basic principle of negligence law is expressed in the "public duty doctrine". Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)." (Citations omitted.)

Prior to discussing more fully the fundamental distinction between governmental conduct that is not tortious and tortious conduct that is subject to either sovereign immunity or the discretionary function immunity, the relationship between all three dichotomies will be briefly considered, viz., the public duty–private duty doctrine, the governmental-proprietary activity immunity, and the discretionary–ministerial function immunity.

THE RELATIONSHIP BETWEEN PUBLIC AND PRIVATE DUTIES, GOVERNMENTAL AND PROPRIETARY ACTIVITIES, AND DISCRETIONARY AND MINISTERIAL FUNCTIONS

It is readily apparent that if the public and private duty dichotomy is considered as the threshold issue in a tort action against a public entity, no liability may be imposed if it is determined that no private duty is owed to the injured person. As the existence of a public duty only cannot be the basis of a tort action, there is no need to decide whether an immunity is applicable. However, assuming the public entity does owe plaintiff a private duty of care, the governmental and proprietary activity dichotomy, if applicable in the jurisdiction involved, should be considered next. Here again, it is clear that if the activity is deemed governmental rather than proprietary, the public entity will be immune from liability.

Finally, assuming the existence of a private duty of care and the activity involved is proprietary rather than governmental, the discretionary and ministerial function dichotomy must then be applied and resolved. If the function is discretionary, there is still no liability, but liability may result if the function is ministerial.

In summary, it is necessary for a plaintiff seeking to impose tort liability upon a public entity to show: (1) the existence of a private rather than only a public duty of care; and (2) the existence of a proprietary rather than a governmental activity; and (3) the existence of a ministerial rather than a discretionary function.

Unfortunately, the courts have frequently not decided cases based on the foregoing conceptual analysis. Rather, the cases tend to confuse and intermix the various dichotomies. Thus, public duties, governmental ac-

tivities, and discretionary functions are often equated with each other or the terms are used interchangeably, with the common result that liability is not imposed. The same problem exists for private duties, proprietary activities, and ministerial functions. Liability is imposed when the courts determine that these concepts are involved without clearly differentiating among them.

A good example is *Hitchcock v. Sherburne County,* 34 N.W.2d 342 (Minn. 1948), an action brought against a county and several county commissioners for injuries sustained in a vehicle accident allegedly due to a dangerous condition of a highway. In affirming the order sustaining defendants' demurrer, the court said:

> [I]n the maintenance of public highways, the county acts in its governmental capacity, and the duty of the county commissioners in that connection is a purely public one, owing to the state. Failure to perform such duty will not give rise to a cause of action in favor of an individual. If such duty is ministerial only, "that is, when it is in obedience to the mandate of legal authority and the act is to be performed in a prescribed manner, without the exercise of the officer's judgment upon the propriety of the act, and the failure to perform is the proximate cause of the injury sustained," liability attaches.... There is no allegation in this complaint that the county commissioners were performing any ministerial act....

It can be seen that in holding there was no liability, the court used all three dichotomies without making any distinctions between them. Thus, maintenance of the highways was held to be governmental, not proprietary; the duty to maintain was said to be public, not private; and the court apparently also found the highway maintenance function to be discretionary, not ministerial. Although the decision is not clear, it may be that the court meant to apply the immunity for governmental activities to the county and the discretionary function immunity to the county commissioners who, as individuals, were not entitled to governmental immunity. However, because the public duty defense was applicable to both the county and the commissioners, the action could have been disposed of solely on this ground without considering either sovereign immunity or the discretionary function immunity.

By way of contrast, the decision in *Rieser v. District of Columbia,* 563 F.3d 462 (D.C. Cir. 1977), correctly disposed of a wrongful death action by the father of a woman who was murdered by a parolee, plaintiff's theory being inadequate police protection. The court first noted that sovereign immunity based on the governmental–proprietary test had been replaced by the discretionary–ministerial function dichotomy in the District of Columbia. However, the court actually decided the case on the public duty doctrine, stating that:

> Governmental units are sometimes held to owe no duty to members of the general public for injuries arising out of the negligent provision of services designed to benefit the community at large. This doctrine is applied apart from that of sovereign immunity, so that there may be no actionable duty even if the acts involved are "ministerial."

In so doing, the court observed that while some courts have viewed the public duty doctrine as a rule based on sovereign immunity, it is "inappropriate" to combine considerations of duty and sovereign immunity and these concepts should be examined separately.

It is beyond the scope of this paper to discuss the difficult distinctions between governmental and proprietary activities and the equally complex differences between discretionary and ministerial functions. The governmental–proprietary test is no longer of any legal consequence in most jurisdictions, and the discretionary–ministerial function immunity has been well treated by John C. Vance in his paper, "Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments," *Selected Studies in Highway Law,* Vol. 4, p.—(also appears in NCHRP *Legal Research Digest 6,* June 1989). Suffice it to say that, like the distinction between public and private duties, no "bright line" has ever been devised and the courts must of necessity decide these issues on a case-by-case basis.

What is significant for highway lawyers is to understand and make certain the court understands that the issues of liability and immunity are separate and distinct. As pointed out in the above-cited paper by Vance, the discretionary function immunity recognized in nearly all jurisdictions is an exception to the waiver of sovereign immunity, i.e., it constitutes a retention of sovereign immunity for functions that are deemed to be discretionary rather than ministerial. Like sovereign immunity itself, it is not based on the absence of a tort. This is true although the courts have sometimes confused the issues of duty and negligence on the one hand with the issue of discretionary immunity on the other. Thus, it is said in PROSSER & KEETON, *supra,* at pp. 1042 and 1047:

> [C]ourts have confused the issues of duty and negligence on the one hand with the issue of the discretionary immunity on the other. It seems fairly clear in at least some of the cases that courts have decided negligence or duty issues under the guise of "discretion."
>
> . . .
>
> There are a great many other cases, however, in which the state clearly appears to be negligent or in which a trier of fact might so find, and in which the state is nonetheless shielded from all responsibility on the ground that there is general discretion or some particular statutory version of it.

While it is entirely possible that some actions, on the particular facts involved, may be properly disposed of either because of the public duty doctrine or the discretionary function immunity (see PROSSER & KEETON, *supra,* at p. 1049), this is not always the case. For example, see *Crider v. United States,* 885 F.2d 294 (5th Cir. 1989), a personal injury action under the Federal Tort Claims Act for the negligent failure of park rangers to detain an intoxicated driver who then collided with plaintiff. In accordance with Texas tort law, a $7.5 millon judgment against the United States was reversed and the case dismissed. The court initially held that it must disregard state rules of sovereign immunity as well as the

discretionary immunity because these conflict with Congress's analogy to "private person" liability under the Federal Tort Claims Act. The court then said that the dispositive inquiry is the first question addressed in all negligence cases: whether the defendants, the park rangers, owed a duty to the plaintiff. Applying the public duty doctrine recognized in Texas, it was held that defendants owed no private duty to plaintiff.

The distinction between liability and immunity, therefore, is vitally important and should not be overlooked.[6]

LIABILITY AND IMMUNITY DISTINGUISHED

As mentioned above, the cases which reject the public duty doctrine do so primarily on the mistaken assumption that the doctrine is a form of sovereign immunity. For example, in *Adams v. State of Alaska,* 555 P.2d 235 (Alaska 1976), the first modern case to reject the doctrine, suit was brought against the State as a result of a hotel fire in which five people died. State officials had inspected and discovered fire hazards but took no further action prior to the fire. The court recognized that the public duty doctrine is a well-respected one but rejected it because "[W]e consider that the 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity." Because Alaska had rejected sovereign immunity by statute, the court said the statute should not be amplified by a court-created doctrine.

However, it is clear that the issue of a public entity's liability and the issue of its immunity are two complete and distinct issues. Sovereign immunity does not deny the tort but only the resulting liability. On the other hand, in the absence of a duty of care owed to plaintiff, there is no tort and therefore no liability. In this situation, it is unnecessary to even consider the issue of immunity. The distinction was aptly made in *Davidson v. City of Westminster, supra,* 649 P.2d 894 (Cal. 1982), where it was said:

> In sorting out the issues presented, it is important to consider first things first. Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.

The court in *Davidson* also made it clear that the absence of an immunity does not create liability where none otherwise exists. Most courts recognize this logic and do not equate the absence of sovereign immunity with the existence of liability in all cases. Thus, in *Cootey v. Sun Investment, Inc.,* 718 P.2d 1086 (Haw. 1986), it was said that the effect of the statute making the State liable in tort to the same extent as a private

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[6] *See generally,* PROSSER & KEETON, THE LAW OF TORTS, § 131, p. 1032 (5th ed. 1984); 57 AM. JUR. 2d, *Municipal, County, School and State Tort Liability* § 4, p. 31.

individual waives sovereign immunity but does not create any cause of action where none existed before. Fundamental in any determination of liability for negligence is the existence of a duty of care owed the plaintiff. In balancing the relevant policy considerations in determining whether a duty exists, the court in *Cootey* said it is essential to consider that government is not intended to be an insurer of all the dangers of modern life, and governmental entities are mandated by law to perform a variety of activities that have no counterpart in the voluntary activities of private persons.

The court in *Adams v. State of Alaska* overlooked these principles in rejecting the public duty doctrine and labeling it a form of sovereign immunity. In finding that the State owed a common law duty to the victims of the fire, the court correctly recognized that the State had no duty to take affirmative action to protect them from the negligence of the hotel owners, i.e., the State was not obliged to require others to obey the law. But the court held that the State assumed a duty by its voluntary conduct in inspecting the hotel for fire hazards. In so holding, the court was really applying the special relationship (or assumed duty) exception recognized under general tort law as well as under the public duty doctrine. In fact, the court cited RESTATEMENT (SECOND) OF TORTS § 324 which reads:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

It is highly questionable that this rule was applicable to the facts because the State's inspection of the hotel and subsequent inaction did not increase the risk of harm; nor did the State undertake to perform the duties of the hotel owners; and there was no evidence that the harm suffered by the victims was due to their reliance on the inspection by the State. The dissenting opinion forcefully makes this argument. The point is, however, that it was not necessary for the court to reject the public duty doctrine in order to impose liability on the State. If, in fact, a special relationship existed between the victims of the fire and the State, the State's public duty to inspect for fire hazards would have also been a private duty and the basis of a tort action.

The dissenting opinion in *Adams v. State of Alaska* reflects the majority view in other states that, absent a special relationship, the public duty doctrine would be a defense because:

> A decision of whether an actionable duty arises from the performance

> of fire inspections must also include a consideration of the public policy to be advanced by such a decision. While the creation of a right of action for negligent fire inspection would benefit the persons harmed by fires which subsequently result from such negligence, this must be balanced against the adverse effects which such a liability can have on the enforcement of fire safety codes. The potential liability for inspecting, or for failure immediately to remedy discovered defects, might well dissuade enforcement officers from conducting inspections at all. Alternatively, if the enforcement officers must act at the peril of being sued for the use of poor judgment in selecting particular means of enforcement, the effect might well be to evoke in these officers only the most extreme response in each situation, i.e., complete closure of buildings for even minor fire or safety hazards, pending their correction. I do not think that such results do, overall, promote the public interest.

It is important to notice that although *Adams v. State of Alaska* was actually decided on the basis of the existence of a common law duty arising from the State's affirmative conduct, the court noted that various statutes imposed fire inspection duties on the State. Whether similar statutes impose only a public duty or a private duty was considered in the subsequent case of *Cracraft v. City of St Louis Park, supra,* 279 N.W.2d 801 (Minn. 1979). The court observed that the very same test applicable to private tortfeasors was also applicable to alleged public tortfeasors, viz., the test embodied in RESTATEMENT (SECOND) OF TORTS § 288, which states in relevant part:

> The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively
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> (a) to protect the interest of the state or any subdivision of it as such, or
>
> (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or
>
> (c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public,. . .

The comments and illustration to § 288 clearly illustrate its meaning and demonstrate that the public duty doctrine is not a peculiar rule applicable only to public entities. Thus, the comments read:

> **Comment on Clause (a):**
>
> b. Many legislative enactments and regulations are intended only for the protection of the interests of the community as such, or of the public at large, rather than for the protection of any individual or class of persons. Such provisions create an obligation only to the state, or to some subdivision of the state, such as a municipal corporation. The standard of conduct required by such legislation or regulation will therefore not be adopted by the court as the standard of a reasonable man in a negligence action brought by the individual.
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> . . .
>
> **Comment on Clause (b):**
>
> c. Other legislative enactments and regulations are intended only for

> the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm. Thus a statute may be intended only to secure the public right of unobstructed passage on the public highway . . . [H]arm suffered by such an individual is not within the purpose of the provision, and the statute or regulation will not be taken to lay down a standard of conduct with respect to such harm.
>
> . . .
>
> **Comment on Clause (c):**
>
> d. Other legislative enactments and administrative regulations are intended only for the purpose of imposing upon the actor the performance of a service which the state, or some subdivision of it, has undertaken to give to the public. They are intended to make the actor responsible to the state, rather than to any individual. . . .

The court in *Cracraft v. City of St. Louis Park* therefore concluded that the distinction between the public duty and private (or special) duty applies to alleged private tortfeasors as well as alleged public tortfeasors. It specifically rejected the rationale of *Adams v. State of Alaska* that the public duty doctrine is a relic of sovereign immunity and should be discarded, stating:

> We disagree. By abolishing the distinction between public duty and special duty, this court would depart from vast precedent and traditional common-law principles of negligence. The distinction is not merely a relic of the verbiage used by courts in days of sovereign immunity. Instead, it is a corollary to a basic tenet of negligence law: general duties owed to the entire public rather than a specific class of persons cannot form the basis of a negligence action.[7]

Most courts that have addressed this issue take the same view. See, e.g., *Motyka v. City of Amsterdam,* 204 N.E.2d 635 (N.Y. 1965) ("[I]t is necessary to decide whether a city . . . is under a duty to a plaintiff irrespective of sovereign immunity."); *Johnson v. Municipal University of Omaha,* 169 N.W.2d 286 (Nebraska 1969) ("The issue of immunity and the issue of liability are two complete and distinct issues. The removal of governmental immunity in a specified area of tort actions does not impose absolute liability in place of immunity. It only makes a governmental entity subject to the same rules which apply to nongovernmental persons or corporations who do not have the shield of sovereign governmental immunity."); *Texaus Investment Corp., N.V. v. Haendiges,* 761 F.2d 252 (6th Cir. 1985) ("[O]hio case law strongly supports the proposition that the abolition of sovereign immunity did not abolish the private duty/public duty doctrine."); *Cootey v. Sun Investment, Inc., supra,* 718 P.2d 1086 (Hawaii 1986) ("Whether there is a duty of care owed by

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[7] For an interesting discussion of the *Cracraft* decision, see "Municipal Tort Liability and the Public Duty Rule: A Matter of Statutory Analysis," 6 WM. MITCHELL L. REV. 391 (1980).

the government tortfeasor to the injured party should be determined by an analysis of legislative intent of the applicable statute or ordinance."); *Martin v. Lion Uniform Co.*, 536 N.W.2d 736 (Ill. 1989) ("The issue of a governmental entity's immunity and the issue of liability are two complete and distinct issues . . . Significantly, the common law rule of no duty . . . remains in force even where sovereign immunity has been abolished."); and *O'Brien v. State of Rhode Island,* 555 A.2d 334 (R.T. 1989) ("We are of the opinion that the special-duty doctrine does not resurrect the concept of sovereign immunity but it does take into account the questionable fact that many activities performed by government could not and would not in the ordinary course of events be performed by a private person at all.").

This fundamental distinction between liability and immunity is capsulated in the RESTATEMENT (SECOND) OF TORTS § 895B(4), where it is said regarding the State's sovereign immunity:

> Consent to suit and repudiation of general tort immunity do not establish liability for an act or omission that is otherwise privileged or is not tortious.

Comment (e) to § 895B further explains this statement and tacitly approves of the public duty doctrine by observing:

> In many cases in which a State or its agency has been held not liable for damages in tort, the reason given has been that of governmental immunity, when there was actually no tort committed at all. The mere fact that a person has been harmed by governmental action does not automatically mean that his damage was tortious. In the oft-quoted phrase of Justice Jackson dissenting, in *Delehite v. United States,* (1953) 346 U.S. 15, 57: "Of course, it is not a tort for government to govern." . . . Even more clearly, tort liability does not automatically arise from the failure of the State to perform an act, to furnish a service or to provide a benefit. If there was no affirmative duty on the part of the State, there has been no tort.
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> . . .
>
> In these types of cases no tort has been committed. The abrogation of governmental tort immunity does not have the effect of making a State or its agency liable, and it is misleading to explain the result in terms of an immunity.

With this important distinction in mind, it will be instructive to review a selected number of public duty decisions in the more traditional areas where the doctrine has been applied before discussing the defense in highway litigation.

POLICE PROTECTION CASES

The most common application of the public duty doctrine has been in the area of police protection. The very origin of the doctrine in *South v. Maryland* invoked the now well-settled rule that public entities are not liable for the failure to provide police protection because the duty owed

is a public one, not one owed to any particular individual unless some special relationship is shown.[8]

This rule was applied in *Massengill v. Yuma County,* 456 P.2d 376 (Ariz. 1969), which involved a head-on vehicle collision resulting in the tragic death of five persons and a sixth person disabled for life. Prior to the accident, a deputy sheriff observed two drivers emerge from a parking lot used by patrons of several bars and drive side by side in a reckless manner at a high rate of speed down the two-lane highway. The deputy sheriff followed the two vehicles but made no effort to arrest or stop them before the collision with the innocent oncoming victims. In an action for wrongful death and personal injuries against the county, the court first noted that sovereign immunity was no defense because it had been discarded in *Stone v. Arizona Highway Commission,* 381 P.2d 107 (Ariz. 1963), the court stating: "[T]his court in the most questionable terms relegated that archaic doctrine to the dustheap of history."

However, the court then held that the abolition of sovereign immunity did not change the basic elements of actionable negligence including the requirement of a duty owed to the plaintiff. Thus, the court explained:

> What the plaintiffs urge here is a doctrine that the obligations of public officers are duties owed personally to each and every individual member of the public. The extent of potential liability to which such a doctrine could lead is staggering. By our decision in *Stone, supra,* . . ., we stripped the shackles of sovereign immunity from persons seeking redress for negligent injuries caused by public officers, but we did not relieve claimants of the responsibility of establishing all the elements of actionable negligence.
>
> The duty of the defendants here is patently one owed to the general public, not to the individual plaintiffs, and no facts are pleaded which would bring this case into the realm of the exceptions to the rule.

In a surprising departure from this sound view, the Supreme Court of Arizonia overruled the *Massengill* case and abandoned the public duty defense in *Ryan v. State of Arizona,* 656 P.2d 597 (Ariz. 1982). The court apparently overlooked the distinction between liability and immunity recognized in *Massengill* and characterized the public duty doctrine as "the old proprietary-governmental distinction in a bright new word-package." This, of course, is simply not so because, as shown above, the public duty doctrine is neither new nor is it based on sovereign immunity.

In essence, the same mistaken approach was taken by the court in *Leake v. Cain,* 720 P.2d 152 (Colo. 1986), a wrongful death action following the death of two pedestrians struck by a vehicle driven by an intoxicated person whom the police had detained but then released prior to the acci-

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[8] See Annot., *Liability of Municipality or Other Governmental Unit For Failure To provide Police Protection* 46 A.L.R. 3d 1084 (1972); and Annot., *Failure To Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer,* 48 A.L.R. 4th 320 (1986).

dent. The trial court had granted summary judgment based on the public duty doctrine. The Colorado Supreme Court then overruled the public duty doctrine but affirmed the summary judgment on other grounds, viz., the police officers owed no common law nor statutory duty to decedents and the officers were also protected by the discretionary immunity. The decision contains an exhaustive review of the public duty doctrine, commencing with its origin in *South v. Maryland,* as well as the cases that have followed it and the cases in those jurisdictions that have abandoned the doctrine. Citing, *inter alia, Adams v. State of Alaska* and *Ryan v. State of Arizona,* the court said that the argument in favor of rejecting the doctrine is "particularly compelling *if* the public duty doctrine is seen as a function of sovereign immunity, rather than as an independent concept of negligence (emphasis added)."

Although the court did not decide this question, it nevertheless rejected the doctrine for an equally erroneous reason:

> Finally, whether or not the public duty rule is a function of sovereign immunity, the effect of the rule is identical to that of sovereign immunity. Under both doctrines, the existence of liability depends entirely upon the public status of the defendant.

In fact, the existence of liability under the public duty doctrine does not depend entirely on the public status of the defendant. This is a misconception and it has already been shown herein that the public duty doctrine is not unique to government torts. Ironically, the court in *Leake v. Cain* proceeded to demonstrate that this is so by finding there was no common law duty because of RESTATEMENT (SECOND) OF TORTS § 315 (no duty to prevent a third person from harming another, absent a special relationship), and also finding there was no statutory duty because the decedent was not a member of the class the statute (requiring intoxicated persons to be taken into protective custody) was designed to protect (see RESTATEMENT (SECOND) OF TORTS § 288). This is the same legal analysis and result the majority of jurisdictions use under the public duty doctrine.

It is interesting to notice that the court in *Leake v. Cain* cited and relied on *Commercial Carrier Corp. v. Indian River,* 371 So.2d 1010 (Fla. 1979), as authority for discarding the public duty doctrine. In that case, the Florida Supreme Court did overrule the public duty doctrine that had previously been recognized in *Modlin v. City of Miami Beach,* 201 So.2d 70 (Fla. 1967), on the mistaken ground that the doctrine was a function of sovereign immunity and not a traditional negligence concept with meaning apart from the governmental setting. But it appears that a number of subsequent decisions of the Florida Supreme Court have effectively reinstated the public duty doctrine.[9]

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[9] See, e.g., Trianon Park Condominium Assoc. v. City of Hialeah, 468 So.2d 912 (Fla. 1985); Reddish v. Smith, 468 So.2d 929 (Fla. 1985); and Everton v. Williard, 468 So.2d 936 (Fla. 1985).

Thus, in *Everton v. Williard,* 468 So.2d 936 (Fla. 1985), an action for wrongful death and personal injuries was brought arising from a collision caused by an intoxicated motorist who had been released on citation by a deputy sheriff rather than arrested. In holding that the deputy and county were not liable, the court relied on both the discretionary immunity and the public duty doctrine. In fact, the court seemed to combine these two distinct doctrines by stating that there never has been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted to a police officer to make an arrest and to enforce the law. Nevertheless, the court clearly returned to the public duty doctrine by stating:

> A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim. This majority view was expressed by the United States Supreme Court in its early decision in *South v. Maryland,* 59 U.S. (18 How.) 396, 15 L.Ed. 433 (1855). A substantial majority of the jurisdictions in this country that have addressed this issue follow this view.

The court then noted that only two jurisdictions had expressed a contrary view, citing *Ryan v. State of Arizona, supra,* 656 P.2d 597 (Ariz. 1982) and *Irwin v. Town of Ware,* 467 N.E.2d 1292 (Mass. 1984). Unlike the *Ryan* decision, the court in *Irwin v. Town of Ware* recognized and did not overrule the public duty doctrine. However, liability was based on the special relationship exception to the doctrine, the court finding that the Massachusetts statutes which establish police responsibilities evidenced a legislative intent to protect both intoxicated persons and other users of the highways.[10]

This same approach was taken in *Bailey v. Town of Forks,* 737 P.2d 1257 (Wash. 1987), where the court stated that although the wisdom and viability of the public duty doctrine remains a subject of debate, the case fits into an exception to the doctrine. The court found that Washington statutes which prohibit drunk driving and require police officers to take drunk drivers into custody create an actionable duty of care to users of the highways who are injured by drunk drivers.

Suffice it to say that in the area of police protection, the public duty doctrine continues to be recognized and applied in the vast majority of

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[10] In "Governmental Tort Liability: A New Limitation On The Public Duty Rule in Massachusetts, Irwin v. Town Of Ware", 19 SUFFOLK U. L. REV. 667 (1985), the author concluded that the decision to limit, rather than abolish, the public duty rule is a sound one because ". . . in future governmental tort cases the duty imposed will be decided on the flexibility negligence standard of reasonable foreseeability under the circumstances, rather than the rigid rule that a duty to everyone is a duty to no one."

jurisdictions. Cases like *Ryan v. State of Arizona,* discarding the doctrine for the police protection function, and *Irwin v. Town of Ware* and *Bailey v. Town of Forks,* finding the special relationship exception to the doctrine to be applicable, are a distinct minority view.

Rather, the majority view is well stated in *Ashburn v. Anne Arundel County,* 510 A.2d 1078 (Md. 1986). First, the public duty doctrine itself is thoroughly discussed and the court recognized that it is based on the general rule applicable to all persons that there is no duty to control a third person's conduct so as to prevent harm to another, absent a special relationship. Second, the court rejects the notion that there is a special relationship between officers and members of the general public, including persons injured by drunk drivers. In this regard, the court expressly refused to follow *Irwin v. Town of Ware.* Third, the court properly treated the public duty doctrine and the discretionary immunity as separate and distinct defenses. Although the court found that the officer's decision as to whether to take a drunk driver into custody was a discretionary one, it held there would still be no liability even if the decision was ministerial because:

> [T]he "duty" owed by the police virtue of their positions as officers is a duty to protect the public, and the breach of that duty is most properly actionable by the public in the form of criminal prosecution or administrative disposition. See, e.g., *Morgan v. District of Columbia, supra,* 468 A.2d at 1311 ("duty to protect individuals from criminal conduct 'is a public duty, for neglect of which the officer is amenable to the public, and punishable by indictment only' ", citing *South v. Maryland,* 59 U.S. (18 How.) 396, 403, 15 L.Ed. 433 (1856)) . . .

The cited case of *Morgan v. District of Columbia,* 468 A.2d 1306 (D.C. 1983), contains an excellent review of the public duty doctrine as well as the special relationship exception to the doctrine, stating:

> In narrow situations, however, the no-liability rule does not apply. Where a "special relationship" exists between the police and a particular individual, a specific legal duty may be created rendering the police liability for failure to act.

The court discusses the boundaries of the exception and collects many of the leading cases that illustrate these boundaries. It is first noted that a special relationship undoubtedly exists where an individual assists law enforcement officials in the performance of their duties, citing *Schuster v. City of New York,* 154 N.E.2d 534 (N.Y. 1958).[11] In contract, a special

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[11] In the well-known *Schuster* case, plaintiff's intestate supplied the police department with information leading to the arrest of Willie Sutton, a dangerous fugitive and a criminal of infamous reputation. Although the informant received threats against his life as a result, the police refused to provide protection and he was shot and killed shortly thereafter. A special relationship was recognized and recovery allowed against the City of New York.

relationship does not come into being simply because an individual requests assistance from the police.

Between these boundaries are circumstances where the police do not benefit from a citizen's aid but nevertheless act to protect a specific individual or group of individuals from harm, and there is justifiable reliance by plaintiffs on the police. *Florence v. Goldberg,* 375 N.E.2d 763 (N.Y. 1978), is given as an example and liability was imposed where police provided a school crossing guard at a busy intersection in Brooklyn but failed to provide a replacement when the guard reported sick one morning. It was shown that the mother of a 6 year old child who was hit by a taxicab at this location had relied on the presence of the guard for several weeks prior to the accident and had consequently stopped walking her child to school herself.

In summarizing the law on this subject, the court in *Morgan v. District of Columbia* said:

> Absent a special relationship, therefore, the police may not be held liable for failure to protect a particular individual from harm caused by criminal conduct. A special relationship exists if the police employ an individual in aid of law enforcement, but does not exist merely because an individual requests, or police officer promises to provide protection. Where the police by their actions affirmatively undertake to protect an individual under circumstances creating a special relationship or there is a statute or regulation which mandates protection of a particular class, and where the individual justifiably relies upon such undertaking of the police, or the statute or regulations, the special relationship is sufficient to support a finding of liability.

The court did not find that the police regulations plaintiff relied on in *Morgan* mandated protection of a particular class of persons as distinguished from the public generally. And in most cases involving the failure of the police to arrest or detain a drunk driver, the courts have also found that the statutes and regulations relating to this subject are only for the benefit of the public generally. As mentioned above, *Irwin v. Town of Ware* and *Bailey v. Town of Forks* are a distinct minority in this regard. As stated in *Schaffrath v. Village of Buffalo Grove,* 513 N.E.2d 1026 (Ill. 1987):

> Plaintiffs' reliance on *Irwin* is misplaced because that decision has been rejected in Illinois and in a majority of the courts of other states.
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> . . .
>
> The general rule that a municipality and a police officer are not liable as a result of the failure to make an arrest or to enforce a law in the absence of a special relationship is based on sound public policy. The special duty doctrine developed because there are legitimate and valid reasons for not imposing liability on municipalities and their police officers for injuries allegedly caused by a police officer failing to make an arrest.

Sound public policy reasons also justify the application of the public

duty doctrine in fire protection and in building and safety inspection cases. A selected number of these cases will now be reviewed.

FIRE PROTECTION AND BUILDING AND SAFETY INSPECTION CASES

Most jurisdictions hold that there is no liability for the failure to provide adequate fire protection services, including the failure to suppress a fire, to maintain sufficient personnel, equipment or facilities, or for the condition of fire fighting equipment of facilities.[12] For example, in *Stang v. City of Mill Valley,* 240 P.2d 980 (Cal. 1952), plaintiffs sued to recover damages suffered as the result of a fire on their property, asserting liability against a city by reason of its failure to maintain certain fire fighting equipment in good working condition. In holding plaintiffs' complaint did not state a cause of action because of the public duty doctrine, the court said:

> Upon analysis, it clearly appears that the gravamen of plaintiffs' complaint is the failure of a governmental function. Such failure involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress (Restatement of Torts, § 288), which right must be predicated upon the violation of a duty of care owed to the injured party. (Citation omitted.) As the maintenance and operation of a fire department is so distinguished as a governmental function for the public good, it is "well settled that a municipal corporation is not responsible for the destruction of property within its limits by a fire which it did not set, merely because, through the negligence or other default of the corporation or its employees, the members of the fire department failed to extinguish the fire." (38 Am.Jur. § 926, p. 327.)

In support of its decision, the court cited the leading case of *Steitz v. City of Beacon,* 64 N.E.2d 704 (N.Y. 1945), where a city was held not liable for a fire loss due to an insufficient supply of water. Although New York had waived sovereign immunity by statute, the court held that the public duty doctrine prevented the imposition of liability, pointing out the no liability would exist against a private person or corporation on the same facts.

More recently, in *Martin v. Lion Uniform Company, supra,* 536 N.W.2d 736 (Ill. 1989), the court stated broadly that:

> It has long been established in Illinois that a municipality owes no duty under the common law to any individual for failure to provide a governmental service such as fire protection. (Citations omitted.)
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> . . .
>
> The Illinois rule of nonliability follows the general rule in most jurisdictions that a municipality usually cannot be held liable in damages for

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[12] See Annot., *Municipal Liability For Negligent Fire Inspection and Subsequent Enforcement,* 69 A.L.R. 4th 739 (1989).

negligence in connection with firefighting. (E. McQuillin, 18 The Law of Municipal Corporations §§ 53.52, 53.82 (3d Ed. 1984).)

In so holding, the court was careful to point out that this conclusion was not based on sovereign immunity (which had been abolished in Illinois) but on the absence of a duty owing to plaintiff, either by statute or at common law.

Similarly, most jurisdictions also hold that there is no liability for the failure to enforce building and safety inspection statutes or ordinances.[13] Traditionally, such laws are considered as having been enacted for the benefit of the public as a whole and, in the absence of a special relationship, violations do not give rise to a private right of action. A typical and leading case is *Motyka v. City of Amsterdam, supra,* 204 N.E.2d 635 (N.Y. 1965), involving an action against the city for negligence in violating the Multiple Residence Law, requiring building inspections. Plaintiffs' building was damaged in a fire apparently caused by a defective oil heater which had also caused an earlier fire. Although a city fire captain had discovered the defect after the first fire, the city took no action in regard to the heater which subsequently caused the second fire.

The court in *Motyka* first noted that in earlier days, the action would have been disposed of on the ground of sovereign immunity. However, because New York had waived this immunity by statute, the court said it was necessary to decide whether the city is under a duty to plaintiffs irrespective of sovereign immunity. Citing *Steitz v. City of Beacon, supra,* 64 N.E.2d 704 (N.Y. 1945), it was held that the statutory enactment was only for the benefit of the public generally and there was no liability to plaintiffs for failure to supply fire protection.

This conclusion was reaffirmed in *O'Connor v. City of New York,* 447 N.E.2d 33 (N.Y. 1983), a case involving a gas explosion in a commercial building which caused the death of 12 persons and injuries to many others. The gas system was inspected by a city inspector who authorized the resumption of service despite the presence of obvious defects. In reversing a judgment for plaintiffs, the court held that the underlying purpose of the inspection regulations was intended for the benefit of the general public only.

Essentially the same result was reached in *Modlin v. City of Miami Beach, supra,* 201 So.2d 70 (Fla. 1967), which involved a wrongful death action against a city for death of a patron of a store who was crushed when the mezzanine fell on her. The action was based on negligence in failing to inspect or in negligently inspecting the mezzanine prior to the

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[13] See Annot., *Liability of Municipal Corporation for Negligent Performance of Building Inspector's Duties,* 41 A.L.R. 3d 567 (1972). See also, *Municipal Liability For Negligent Inspection,* 23 LOY. L. REV. 458 (1977); *State Tort Liability for Negligent Fire Inspection,* 13 COLUM. J. L. & SOC. PROBS. 320 (1977); and *Municipal Liability for Negligent Building Inspections—Demise of the Public Duty Doctrine,* 65 IOWA L. REV. 1416 (1980).

accident. The defense of sovereign immunity was unavailable because of the court's previous decision abolishing the doctrine in *Hargrove v. Town of Cocoa Beach,* 96 So.2d 130 (Fla. 1957). However, the court said:

> It is a well recognized principle of tort law that a fundamental element of actionable negligence is the existence of a duty owed by the person charged with negligence to the person injured. (Citation omitted.) However, there is also a doctrine of respectable lineage and compelling logic that holds that this duty must be something more than the duty that a public officer owes to the public generally.
>
> . . .
>
> It is evident that under this principle the respondent city's inspector would not have been personally liable to Mrs. Modlin for damages resulting from the negligent performance of his duties. At the time he allegedly negligently performed the inspection, he owed no duty to Mrs. Modlin in any way different from that owed to any other member of the public. Therefore, the city is not liable under the rule of respondeat superior.

Other leading cases in accord with this view are *Hoffert v. Owatonna Inn Towne Motel, Inc.,* 199 N.W.2d 158 (Minn. 1972); *Duran v. City of Tucson,* 509 P.2d 1059 (Ariz. 1973); *Cracraft v. City of St. Louis Park, supra,* 279 N.W.2d 801 (Minn. 1979); *Platt v. District of Columbia,* 467 A.2d 149 (D.C. 1983); and *Texaus Investment Corp., N.V. v. Haendiges, supra,* 761 F.2d 252 (6th Cir. 1985).

By way of contrast, liability was imposed on a city in *Campbell v. City of Bellevue,* 530 P.2d 234 (Wash. 1975). The city had been requested to inspect an underwater lighting system in a stream in a residential area. Although the inspection revealed serious violations of State and local laws, no effective action was taken to ensure that the stream would not become electrically charged. Plaintiff's wife subsequently died from electrical shock when she fell into the stream in attempting to rescue her young son who had received a paralyzing electrical shock while playing in the water.

The city relied on the public duty doctrine and cited most of the leading cases listed above. The Washington Supreme Court did not reject but declined to apply the doctrine on the facts involved, stating:

> We have no particular quarrel at this time with the general premise on which the cases relied upon the City stand, i.e., negligent performance of a governmental or discretionary police power duty enacted for the benefit of the public at large imposes no liability on the part of a municipality running to individual members of the public. Nevertheless, we note that running either explicitly or implicitly through some of the leading cases cited by the City is the thread of an exception to the general rule they espouse, i.e., where a relationship exists or has developed between an injured plaintiff and agents of the municipality creating a duty to perform a mandated act for the benefit of particular persons or class of persons, then tort liability may arise.

In affirming the imposition of liability under this special relationship exception to the public duty doctrine, the court found that the ordinances

requiring the city inspector to disconnect the lighting system until it was brought into compliance with the electrical code were designed not only for the protection of the general public but also for the benefit of those persons or class of persons residing within the ambit of the danger involved.

Liability has also been imposed upon a State for negligence as the result of failing to take action after an inspection disclosed the existence of fire hazards in a hotel. As discussed earlier, this was holding in *Adams v. State of Alaska, supra,* 555 P.2d 235 (Alaska 1976), the first modern case to completely reject the public duty doctrine. In the companion case of *State of Alaska v. Jennings,* 555 P.2d 248 (Alaska 1976), the court reaffirmed its rejection of the public duty doctrine but nevertheless found the State not liable for the deaths of 11 people in another hotel fire because, unlike the facts in *Adams,* the State had not itself undertaken to inspect the hotel but referred complaints about its condition to the city fire marshall. The court refused to impose absolute liability on the State for violations of the fire code and also declined to hold the State liable for the negligence of the city. It is interesting to observe that in response to the *Adams* and *Jennings* decisions, the Alaska legislature in 1977 enacted legislation precluding tort liability in actions based on the inspection of private property for violations of statutes, regulations and ordinances, or for hazards to health or safety (see *Wilson v. Municipality of Anchorage,* 669 P.2d 569 (Alaska 1983).

Following the lead of the *Adams* and *Jennings* decisions, the public duty doctrine was rejected in three other jurisdictions in cases involving the alleged negligent inspection of private buildings. See *Coffey v. City of Milwaukee,* 247 N.W.2d 132 (Wisc. 1976) (office building fire); *Wilson v. Nepstad,* 282 N.W.2d 664 (Iowa 1979) (apartment building fire); and *Stewart v. Schmieder,* 386 So.2d 1351 (La. 1980) (collapse of building under construction).

The *Coffey* case was based on the mistaken assumption that the public duty doctrine is a form of sovereign immunity and with no real analysis, the court summarily concluded: "Any duty owed to the public generally is a duty owed to individual members of the public." The Wisconsin Supreme Court adhered to this statement and its rejection of the public duty doctrine in *Wood v. Milin,* 397 N.W.2d 479 (Wisc. 1986). *Wilson v. Nepstad* followed what the court perceived to be a "growing trend" to impose liability for negligence in the execution of statutory duties, citing the *Adams, Jennings* and *Coffey* cases. Similarly, *Stewart v. Schmieder* noted that the public duty doctrine has come under considerable attack in recent years because it was thought to be a form of sovereign immunity, citing both the *Adams* and *Coffey* cases.

The fact is, however, that cases like *Adams, Coffey, Wilson,* and *Stewart* still represent a minority view. Thus, in a recent annotation, *Municipal Liability For Negligent Fire Inspection and Subsequent Enforcement,* 69 A.L.R. 4th 739 (1989), it is said:

> Apart from statutory immunity, the view is widely expressed that a

> municipality's duty to conduct a fire safety inspection, being a duty owed to the public generally, is not actionable by a private individual for its breach, absent a statute or circumstances creating a special relationship invoking a municipal duty to a particular individual or class to exercise due care in fire inspection activities. Although in jurisdictions espousing the public duty doctrine it is recognized that a municipality may be held liable for negligent fire inspection and subsequent enforcement where a statute creates a duty to act for the protection of an identifiable class, it appears from the reported authority that the statute must be fairly specific in declaring such an intent before a duty in that regard will be deemed to exist . . . .

Even in Florida, where the public duty doctrine recognized in *Modlin v. City of Miami Beach, supra,* 201 So.2d 70 (Fla. 1967) was expressly overruled in *Commercial Carrier Corp. v. Indian River, supra,* 371 So.2d 1010 (Fla. 1979), the Florida Supreme Court has effectively reinstated the doctrine. In *Trianon Park Condominium Assoc., Inc. v. City of Hialeah,* 468 So.2d 912 (Fla. 1985), a building inspection case, the court first observed that there must be either a common law or statutory duty of care for there to be governmental tort liability. Second, it was recognized that the enactment of a statute waiving sovereign immunity does not establish any new duty of care for governmental entities; rather, the waiver means only that existing duties for private persons apply to governmental entities. The court then stated:

> Third, there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals.

These same rules were subsequently applied by the Florida Supreme Court in a fire protection case in *City of Daytona Beach v. Palmer,* 469 So.2d 121 (Fla. 1985), the court holding:

> [W]e conclude that there has never been a common law duty of care to individual property owners to provide fire protection services. Further, we find no statutory duty of care upon which to base governmental liability for such conduct.

Finally, it is important to notice that at least one jurisdiction which had never before considered the public duty doctrine has recently elected to adopt it rather than reject it. In *Benson v. Kutsch,* 380 S.E.2d 36 (W. Va. 1989), an occupant of an apartment sued the city for injuries sustained in a fire, alleging the city was negligent in failing to inspect and discover that the building was not equipped with smoke detectors in violation of fire and building codes. The court observed that the public duty doctrine had not been considered before in West Virginia, probably because of the doctrine of sovereign immunity itself had afforded public entities a complete defense.

In a scholarly and well-reasoned opinion, the court traced the origin of the public duty doctrine to *South v. Maryland, supra,* 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1856) and stated what other courts rejecting the

doctrine have overlooked: "The public duty doctrine is a principle *independent of* the doctrine of governmental immunity . . ." (emphasis added). The court then explained the rationale for the doctrine as follows:

> The rationale for the doctrine lies in the inherent difficulty in determining what general responsibilities of a public agency should give rise to a cause of action. Implicit in this inquiry is the recognition that it is impractical to require a public official to be responsible for every infraction of regulatory legislation that requires inspection or enforcement from his office. There is the added principle that the government should be able to enact laws for the protection of the public without thereby exposing the taxpayers to liability for omissions in its attempts to enforce them. (Citations omitted.) Thus, a general duty is not thought to give rise to a cause of action unless the ordinance imposes some specific liability for the failure to enforce it.

Next, the leading cases rejecting the doctrine were considered by the court, including the cases discussed above, from Alaska, Arizona, Colorado, and Wisconsin. It was noted that Alaska has reinstated the public duty doctrine by statute and that the broader exposure to liability resulting from the rejection of the doctrine in Arizona and Wisconsin is tempered by statements in these courts' decisions that public policy may require interposing a rule of nonliability in a given case. Regarding the Colorado case of *Leake v. Cain, supra,* the court astutely pointed out:

> The result in *Leake* is not novel when it is considered that the public duty theory creates no duty. Therefore, the rejection of the doctrine does nothing more than to require the plaintiff to show a viable cause of action against the city and its officials. Thus, we believe that Colorado, despite its suggestion of creating a broader form of public liability, actually falls within those areas that recognize that a special relationship will support governmental liability.

Having distinguished the cases rejecting the public duty doctrine, the court in *Benson v. Kutsek* correctly concluded that the majority of jurisdictions which recognize the doctrine nevertheless find liability where a special relationship exists between the injured plaintiff and the public entity. It was said that only a few courts have attempted to formulate any general rules as to when a special relationship exists and most courts do not define what relationship may give rise to a special duty which creates liability. On the facts involved, the court concluded:

> [T]here is no such explicit language in the City's building code providing for a cause of action. In this case, there is no showing of any special relationship giving rise to a duty to the plaintiffs. The fact that the City failed to make an inspection of the plaintiffs' apartment for possible fire violations is insufficient to create a duty.

In light of the foregoing discussion regarding the origin and nature of the public duty doctrine, its relationship to and distinction from the defense of sovereign immunity, including the discretionary immunity, and a review of the decided cases relating to police protection, fire protec-

tion and building and safety inspections, this paper will now turn to its principal concern: the application of the public duty doctrine in highway litigation.

HIGHWAY CASES

The public duty doctrine has not been raised frequently as a defense in tort litigation arising out of alleged negligence in the design, construction, or maintenance of State or local highways and streets. This is no doubt true, in part, because of the existence until relatively recently of the doctrine of sovereign immunity in most jurisdictions. Moreover, even after sovereign immunity was abolished or limited, the public duty doctrine has not often been raised because of its perceived overlapping and confusion with the better known and widely accepted discretionary function immunity. Finally, it is likely that the public duty doctrine has sometimes not been asserted because highway lawyers simply have either overlooked or not considered it as a possible defense in highway litigation as distinguished from its use in police and fire protection cases as well as in building and safety inspection cases.

As a starting point, reference is made to the brief discussion of the public duty doctrine and the four cases cited by Vance in his paper, "Personal Liability of State Highway Department Officers and Employees" (Vol. 4, Chapter VIII, pp. 1855–1859, *supra*). As pointed out therein, there are but a handful of highway cases in which the public and private duty concept has been used to determine the result. The first case cited and discussed was *Lusietto v. Kingan,* 246 N.E.2d 24 (Ill. 1969), a wrongful death action against a maintenance supervisor of a State highway with a large and dangerous hole that caused the death of plaintiff's intestate when his vehicle struck it and left the road. A judgment for plaintiff was reversed on dual grounds, viz., the discretionary function immunity and the public duty defense.

As to the latter, the court first held that defendant, as a State highway employee, was not entitled to the defense of sovereign immunity of the State itself. However, it was said that before defendant could be held individually liable, it must appear that he owed a duty of care in favor of the person injured. On this issue, the court said:

> [T]he defendant's duty to supervise the maintenance of a certain portion of the State's highways assigned to him by the State Highway Division is a condition of his employment. A violation of which may give rise to such lawful sanctions as his employer may choose to exercise against him. However, unless a violation of a condition of his employment is simultaneously and independently of such condition also a violation of some duty owed to an individual, such violation will not give rise to legal liability to an individual. Our Supreme Court in *Nagle v. Wakey,* 161 Ill. 387, 393, 43 N.E. 1079 recognized this distinction between the duty which a Commissioner of Highways owes to an individual and that which he owes to the public in general, holding that for a violation of the former he may be sued by an individual but not so for a violation of a duty he

> owes to the public in general. In the *Nagle* case the duty of the Commissioners of Highways to repair and maintain roads and bridges was considered to be a public duty for the violation of which an individual could not maintain an action against the Highway Commissioners.
>
> . . .
>
> Applying this distinction to the present case, we are of the opinion that the defendant's duty to maintain the highway in question was a duty owed to the public generally and not to an individual.

The *Lusietto* case was cited and followed in *Oppe v. State of Missouri,* 525 N.E.2d 1189 (Ill. 1988). A motorist and his wife, a passenger, brought suit against a county and a number of State and local public employees for injuries arising out of a high speed chase and roadblock set up in an attempt to apprehend an escaped criminal. Although the doctrine of sovereign immunity was discarded in Illinois in *Molitor v. Kaneland Community Unit Dist. No. 302,* 163 N.E.2d 89 (1959), the court said:

> The doctrine of public official immunity rests on the theory that government officials should not be impeded from acting in ways they perceive are in the public's best interest because of fears of personal liability. Even after *Molitor,* the courts have recognized the doctrine of public officials immunity. (Lusietto v. Kingan (1969), 107 Ill.App.2d 239, 246 N.E.2d 24.)

Finding that the efforts of the public employees to apprehend an escaped criminal was a discretionary function, the court held they were immune from liability to plaintiffs on this ground. The public duty defense relied on in the *Lusietto* case was apparently not asserted by the defendants and it was not discussed by the court.

However, in the subsequent case of *Keene v. Bierman,* 540 N.E.2d 16 (Ill. 1989), the public duty doctrine was raised and applied by the court to bar the action. Plaintiff was injured when the car he was riding in struck a tree approximately 3ft from the road. He sued his driver and also the State highway engineer who designed the highway. As in *Lusietto,* the case was disposed of on dual grounds of the discretionary function immunity and the public duty doctrine. Concerning the latter, the court said:

> Hare [the State highway engineer] had no relationship with Cope [the injured plaintiff] as an individual and therefore his status as a professional would not give rise to any basis for liability. Any duty owed by Hare was owed to the public generally. See *Lusietto v. Kingan* (1969), 107 Ill.App.2d 239, 246 N.E.2d 24.

Although no Illinois case has been discovered which applied the public duty doctrine to the State itself in a highway case, it is arguable that the defense is available since the State has consented to be sued for claims in tort provided a like cause of action would be against a private person or corporation (ILL. ANN. STAT. ch. 37, § 439.8).

The second case cited in John C. Vance's article was *Rose v. Mackie,* 177 N.W.2d 633 (Mich. 1970), which was also squarely decided on the

basis of the public duty doctrine. The case arose from a head-on automobile collision allegedly due to the faulty design of the highway in narrowing suddenly and without warning from three to two lanes. Although at the time of the accident, the State of Michigan enjoyed sovereign immunity, plaintiffs sued a State highway commissioner personally alleging that he neglected to make or cause any change to be made in the design of the highway after notice that it was dangerous. In holding for defendant, the court said his duty as a highway official was a public one and no private duty was owed to plaintiffs.

Subsequently, in *McGhee v. Bhama,* 363 N.W.2d 293 (Mich. 1985), a non-highway case, it was said that Michigan appellate courts have come to divergent conclusions as to the proper standard to be employed in determining the liability of governmental employees. Citing *Rose v. Mackie,* one of the tests used was said to be the "public/private duty" test which holds that an act that breaches only a public duty is not tortious. That test was employed in *Hoberla v. Glass,* 372 N.W.2d 630 (Mich. 1985), an action based on the alleged negligence of the Department of State and its employees in issuing a driver's license to a convicted felon whose license was suspended. The court declined to apply the discretionary function immunity because it had not been pleaded but, nevertheless, held in favor of defendants based on the public duty doctrine, citing *Rose v. Mackie.* Thus, the court said:

> In *Rose v. Mackie,* 22 Mich.App. 463, 177 N.W.2d 633 (1970), lv. den. 383 Mich. 787 (1970), the plaintiff averred that the State Highway Commissioner had wilfully violated a duty to ensure that a certain highway was built in a safe manner. This Court ordered dismissal, holding that defendant's duty was a "public duty". *Id.,* 22 Mich.App. p. 468, 177 N.W.2d 633.
>
> Plaintiff alleges a breach of defendant's duty to keep individuals with recent, serious traffic offenses off the road. This, we believe, is a public duty. The individual defendants may not be held liable for the alleged negligent issuance of the license to Barker.

Plaintiff in *Hoberla v. Glass* also relied on a Michigan statute which permits the recovery of damages by any person injured by reason of the failure of the governmental agency with jurisdiction over a highway to maintain it in reasonable repair so that it is reasonably safe and convenient for public travel. The court did not decide whether the public duty doctrine would be a defense in an action under this statute because:

> Obviously, this provision deals with injuries resulting from the condition of the road itself, not the condition of travelers thereon. This statutory exception to governmental immunity does not apply.

Here again, it is certainly arguable that the public duty doctrine remains a viable defense, at least to the extent that an action (as in *Rose v. Mackie*) is based on the failure to redesign or reconstruct the highway as distinguished from the mere lack of maintenance.

The third case cited in John C. Vance's article was *Genkinger v. Jeffer-*

son County, 93 N.W.2d 130 (Iowa 1958). This was a wrongful death action arising from an accident at an unmarked and unguarded "T" intersection in which decedent was killed when she proceeded straight ahead and drove into a 17-ft drainage ditch. Both the county and the county engineer were sued on the basis of negligence in (a) failing to post a warning sign of the presence of the "T" intersection, (b) failing to have a sign warning of the termination of the road, and (c) failure to have a guardrail or barrier at the "T" intersection. The dismissal of the county was upheld based on sovereign immunity and the county engineer was also held not liable because ". . . his duty [to erect warning signs] is one owing to the general public and not to any certain individual . . .".

It will be recalled, however, that Iowa rejected the public duty doctrine in *Wilson v. Nepstad, supra,* 282 N.W.2d 664 (Iowa 1979), a case involving alleged negligence in inspecting an apartment building as required by State statutes and city ordinances relating to fire safety. In doing so, the Supreme Court cited and quoted from *Harryman v. Hayles,* 257 N.W.2d 631 (Iowa 1977), as follows:

> We believe the trial court was wrong, too, in its conclusion the individual defendants owed no duty to plaintiffs. The cases upon which that theory depends are also based on governmental immunity. For example, in *Genkinger v. Jefferson County,* [250 Iowa 118, 120, 93 N.W.2d 130, 132 (1958)], the court held the statutory duty of a county engineer to maintain roads in a safe condition was "owing to the general public and not to any certain individual or this decedent, except as such individual is a part of the general public." In this situation, the court said, "the immunity of the County extends to the employee." [Emphasis added.]
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> We hold the abrogation of governmental immunity means the same principles of liability apply to officers and employees of municipalities as to any other tort defendants, ...
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> . . .
>
> In this case, the Board of Supervisors and county engineer clearly had a duty to maintain the county roads in proper condition. (Citation omitted.) This duty runs to all those rightfully using the roads. (Citation omitted.) A breach of that duty can occur either by negligent commission or omission. Whether the duty was breached, and if so, whether it was a proximate cause of the injuries, are matters to be determined at trial.

It is therefore apparent that Iowa no longer follows the public duty doctrine in tort litigation of any kind, including highway cases. An interesting law review comment which was critical of the judicial abolition of the public duty doctrine in *Wilson v. Nepstad* in the negligent fire inspection context did not quarrel with its demise in highway cases. Thus, it was said in *Municipal Liability For Negligent Building Inspections-Demise of the Public Duty Doctrine,* 65 IOWA L. REV. 1416 (1980):

> [T]he *Wilson* court's argument that municipalities should be liable for negligent building inspections just as counties are liable for road maintenance becomes unconvincing upon further analysis. The statutory duty to repair and maintain roads is substantively different from a city's statutory duty to inspect for housing code violations. Because the county

> or city owns all roads, it is solely responsible for road maintenance; if there is a defect, the governmental unit itself must repair it. In contrast, the owner of an apartment has the primary responsibility for correcting building code violations. The city's duty—to enforce the apartment owner's obligation to repair defects—is only secondary. Under this analysis, the rationale for holding a county liable for negligent road repair, a duty for which it is solely responsible, is much stronger than the rationale for holding a city liable for negligent building inspections.

The fourth and final highway case cited in John C. Vance's article was *Richardson v. Belknap,* 213 P. 335 (Colo. 1923). Plaintiff was injured and his wife was killed when their vehicle ran off the road at the approaches to a bridge because there were no guardrails at the accident scene. Although the defendants, members of the board of county commissioners, were obligated by statute to maintain and keep in repair all public highways, the Supreme Court held they were not liable for the lack of guardrails because this statutory duty was owed to the public, not to any individual. For this reason, the court said ". . . it necessarily follows that, since the duty defendants are charged with violating or having violated is a duty to the public, the plaintiff cannot maintain an action against them in his own behalf."

The public duty doctrine was apparently reaffirmed in Colorado in *Quintano v. Industrial Commission,* 495 P.2d 1137 (Colo. 1972), in a non-highway case in reliance on several cases, including *Richardson v. Belknap,* which had been decided almost 50 years earlier. The Supreme Court rejected plaintiff's argument that the statute in question (requiring the inspection of machinery in all factories for the purpose of protecting employees and guests) was intended to also impose a private duty upon defendant commissioners toward employees and guests, stating:

> If the General Assembly has the intent that employees and guests may use this statute as the basis for civil liability, then its expression of this intent should be loud and clear, i.e., by authorizing the remedy. This is not a subject in which we should attempt to infer such a legislative intent. We hold, therefore, that the petitioner may not use the statute as a basis for recovery.

Surprisingly, just 10 years later, the Colorado Court of Appeals ignored *Richardson v. Belknap* entirely and attempted to distinguish *Quintano v. Industrial Commission* in refusing to follow the public duty doctrine in *Martinez v. City of Lakewood,* 655 P.2d 1388 (Colo. 1982). A pedestrian was struck by a car after she stepped into the street either in front of or behind an illegally parked car. The street was unimproved and contained no sidewalks or crosswalks, but the city had erected a "no parking" sign in the area which was obscured by overgrowth. It was this latter fact that caused the Court of Appeals to reverse the summary judgment granted the city by the trial court because:

> The City is correct in contending that the decision as to whether to install sidewalks, to provide crosswalks, and to provide an ingress or

> egress is at the discretion of the City. (Citation omitted.) However, once the City attempted to alleviate the problem, an affirmative duty arose, and it had the duty, to use reasonable care to protect foreseeable plaintiffs. (Citations omitted.)
>
> We hold that the injured plaintiff was a foreseeable victim, in that the purpose behind the attempt to increase visibility was to prevent accidents, both to pedestrians and other automobiles.

With regard to the public duty defense which was the basis of the ruling of the trial court, it was said:

> [T]he concept of public duty, i.e., a general duty versus a special duty "is [merely] a function of municipal sovereign immunity and not a traditional negligence concept which has a meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity." *Commercial Carrier Corp. v. Indian River, supra.* The concept of a public duty cannot stand either with the enactment of the statute abrogating sovereign immunity, nor in instances where there is a common law duty of a public entity to the plaintiff. As noted in numerous opinions from various jurisdictions, application of the public duty—special duty dichotomy results in "a duty to none where there is a duty to all." *Stewart v. Schmieder,* 386 So.2d 1351 (La. 1980); *Commercial Carrier Corp. v. Indian River, supra; Adams v. Alaska,* 555 P.2d 235 (Alaska 1976).

As previously discussed herein, the Colorado Supreme Court itself subsequently rejected the public duty doctrine in *Leake v. Cain, supra,* 720 P.2d 152 (Colo. 1986). It will be recalled that *Leake,* a wrongful death action, involved the failure of the police to prevent an intoxicated person from driving and that after rejecting the public duty doctrine, the summary judgment for defendants was nevertheless affirmed on the ground that the police officers owed no common law or statutory duty of care to decedents.

The *Leake* decision effectively overruled *Richardson v. Belknap* and the public duty defense, as such, is not now recognized in Colorado (see *Board of County Commissioners v. Moreland,* 764 P.2d 812 (Colo. 1988), stating that the general duty–special duty test is no longer relevant). However, it has been said that the rejection of the doctrine does nothing more than to require the plaintiff to show a viable common law cause of action and that Colorado falls within those cases that recognize that a special relationship will support governmental liability (*Benson v. Kutsch, supra,* 380 S.E.2d 36 (W. Va. 1989).

Paradoxically, it appears uncertain whether the public duty doctrine currently applies in highway cases in Minnesota, although that State is a strong proponent of this doctrine in other areas as evidenced by *Hoffert v. Owatonna Inn Towne Motel, Inc., supra,* 199 N.W.2d 158 (Minn. 1972); *Cracraft v. City of St. Louis Park, supra,* 279 N.W.2d 801 (Minn. 1979); *Hage v. Stade,* 304 N.W.2d 283 (Minn. 1981); and *Audrade v. Ellefson,* 291 N.W.2d 836 (Minn. 1986). It is clear that the doctrine was applied in *Hitchcock v. Sherburne County, supra,* 34 N.W.2d 342

(Minn. 1948), a case already discussed herein involving the alleged failure to properly maintain a highway so that a ridge of loose sand made it dangerous.

Hitchcock was cited with approval in *Hoffert* which in turn was cited with approval in *Cracraft,* both non-highway cases. However, the court in *Cracraft* carefully noted that it was not concerned with the legal duties owed by public entities "as owners and operators of buildings, roadways, or other facilities." And in the dissenting opinion in the *Hage* case, the *Hitchcock* decision was characterized as being based on sovereign immunity prior to its abolition in Minnesota.

Moreover, *Anderson v. City of Minneapolis,* 296 N.W.2d 383 (Minn. 1980), held that even prior to the abolition of sovereign immunity, the State could be liable for negligence in highway cases under certain enumerated circumstances without any discussion of the public duty defense. Subsequent cases have confirmed that the State may owe a duty and be liable in highway cases provided the State had knowledge that the highway was dangerous. See, e.g., *Ostendorf v. Kenyon,* 347 N.W.2d 834 (Minn. 1984) (duty to erect more or better signs); *Seaton v. Scott County,* 404 N.W.2d 396 (Minn. 1987) (no duty to warn or erect guardrails absent notice of a dangerous condition); *Berg v. City of St. Paul,* 414 N.W.2d 204 (Minn. 1987) (no duty to install median barriers absent notice of a dangerous condition); and *Nusbaum v. Blue Earth County,* 442 N.W.2d 713 (Minn. 1988) (duty to extend a speed zone to include accident curve).

Although it does not appear that the public duty doctrine per se was raised as a defense in these cases, the State did argue in *Nusbaum* that it owed plaintiff no duty to extend a speed zone to include the accident curve. The Minnesota Supreme Court rejected this argument stating that the State has a duty to exercise reasonable care in determining whether to authorize a speed zone, including where to place signs marking the end of the zone. It further held that such duty was owed to Nusbaum, as a driver and foreseeable plaintiff. This would clearly indicate that the State's duty was not regarded merely as a public duty.

On the other hand, Florida recognized the public duty doctrine as a defense in highway litigation even after sovereign immunity was overruled in *Hargrove v. Town of Cocoa Beach, supra,* 96 So.2d 130 (Fla. 1957). In *City of Tampa v. Davies,* 226 So.2d 450 (Fla. 1969), a judgment against the city for injuries sustained by plaintiff at an intersection collision due to the failure to replace a stop sign which had been knocked down was reversed on appeal. Because the public duty doctrine had been adopted by the Supreme Court in *Modlin v. City of Miami Beach, supra,* 201 So.2d 70 (Fla. 1967), the court in *Davies* said:

> The duty owed by the city's agents or employees, as to the plaintiff, was no different at the time of the alleged negligence than that owed to every other member of the public. In short, the duty breached was a public duty, not a duty owed to the individual injured, foreseeability notwithstanding.

The same result was reached on identical facts in *Mathews v. City of Tampa,* 227 So. 211 (Fla. 1969) and the rule was also applied in *Clifton v. City of Ft. Pierce,* 319 So.2d 195 (Fla. 1975), involving malfunctioning traffic control signals. However, the Florida Supreme Court overruled the *Modlin* case and discarded the public duty doctrine in *Commercial Carrier Corp. v. Indian River, supra,* 371 S.2d 1010 (Fla. 1979). In that decision, the court instead adopted the immunity for discretionary functions as a defense in governmental tort suits. On the facts, however, it held that neither the failure to replace a missing stop sign nor the failure to properly maintain traffic signals was a discretionary function.

As to the public duty doctrine, the court in the *Commercial Carrier Corp.* case said:

> [W]e believe it to be circuitous reasoning to conclude that no cause of action exists for a negligent act or omission by an agent of the state or its political subdivisions where the duty breached is said to be owed to the public at large but not to any particular person. This is the "general duty" "special duty" dichotomy emanating from *Modlin, supra.* By less kind commentators, it has been characterized as a theory which results in a duty to none where there is a duty to all. Regardless, it is clear that the *Modlin* doctrine is a function of municipal sovereign immunity and not a traditional negligence concept which has meaning apart from the governmental setting. Accordingly, its efficacy is dependent on the continuing vitality of the doctrine of sovereign immunity.

Nevertheless, by employing the discretionary immunity defense rather than the public duty doctrine, subsequent Florida decisions have been very favorable to public entities in highway cases. In *Dept. of Transportation v. Neilson,* 419 So.2d 1071 (Fla. 1982), the Supreme Court held that there was no liability for the State's failure to install traffic control devices, or to properly design or upgrade a multi-street intersection, i.e., the State is not required to construct "Cadillac" roadways.

Although the *Neilson* decision purports to be based on the discretionary immunity defense adopted in the *Commercial Carrier* case, the same result could easily have been reached by holding that the State has no duty to install traffic control devices or to redesign or upgrade an existing highway. In fact, language in the opinion tends to support such an analysis ("... it cannot be tortious conduct for a government to govern.").

The *Neilson* opinion cites and reviews seven earlier Florida highway decisions favorable to public entities, involving lack of traffic signals and pedestrian controls; the position, size, and shape of a median; the design of an intersection; the failure to extend a road and construct a guardrail; not installing more sophisticated traffic control signals; failure to regulate traffic on a beach; and the placement or nonplacement of traffic and pedestrian control signals.[14] All of these cases could well have been decided

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[14] A. L. Lewis Elementary School v. Metropolitan Dade County, 376 So.2d 32 (Fla. 1979); Ingham v. Department of Transportation, 399 S.2d 1028 (Fla. 1981); Banta v.

on the public duty doctrine rather than on the discretionary immunity defense. In fact, in *Ingham v. State Dept. of Transportation,* 419 So.2d 1081 (Fla. 1982), decided by the Supreme Court as a companion case to *Neilson,* the court held that the State could not be held liable for constructing a road with a curve, in determining the position, shape, and size of a median and in failing to provide traffic signals, suggesting that these features are not actually defects.

It has already been pointed out that Florida has effectively reinstated the public duty doctrine in police protection cases (*Everton v. Williard, supra,* 468 So.2d 936 (Fla. 1985)) as well as in fire protection and building and safety inspection cases (*Trianon Park Condominium Assoc., Inc. v. City of Hialeah, supra,* 468 So.2d 912 (Fla. 1985)). These cases recognized that there must be either a common law or statutory duty of care for there to be governmental tort liability, and that waiving sovereign immunity does not establish any new duty of care for governmental entities. Regarding highways, it was said in the *Trianon Park* case that there is no liability for the failure to build, expand, or modernize them, but once they are built, a public entity has the same common law duty as a private person to properly maintain and operate his property.

The most recent Florida decisions show that highway cases are being decided on the basis of lack of duty as well as on the discretionary immunity. For example, in *Masters v. Wright,* 508 So.2d 1299 (Fla. 1987), a summary judgment for the State was affirmed in an action arising from the death of a pedestrian who was struck by a vehicle while fishing from a bridge. As to the decision to permit fishing from an unprotected pedestrian walkway, the discretionary immunity was held applicable in reliance upon the *Commercial Carrier* and *Neilson* cases. Regarding the failure to warn of the danger, the court held that the State had no duty to warn of such an open and obvious hazard.

Similarly, it was held in *Nehmad v. Metropolitan Dade County,* 545 So.2d 300 (Fla. 1989) that the county was not liable for the death of a pedestrian struck by a vehicle while walking along a highway. Although the court cited both the *Trianon Park* and *Neilson* cases, it based its decision on the absence of a duty rather than the discretionary immunity, stating:

> For there to be governmental tort liability, there must be an underlying common law or statutory duty of care. *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah,* 468 So.2d 912 (Fla. 1985). There is no liability for the failure of a government entity to build, expend, or modernize capital improvements such as buildings and roads. (Citation omitted.)

Rosier, 399 So.2d 444 (Fla. 1981); Payne v. Palm Beach County, 395 So.2d 1267 (Fla. 1981); Romine v. Metropolitan Dade County, 401 So.2d 882 (Fla. 1981); Ralph v. City of Daytona Beach, 412 So.2d 875 (Fla. 1982); and Department of Transportation v. Vega, 414 So.2d 559 (Fla. 1982).

. . .

There was no statutory or common law duty to provide a walkway for pedestrians like the Nehmads. A road shoulder for vehicles was maintained but the county never assumed the duty of providing a walkway when it created and maintained the shoulder. Therefore, the county cannot be held liable for the breach of a duty which it never assumed. See *Puhalski v. Brevard County,* 428 So.2d 375, 376 (Fla. 5th DCA 1983) (Coward, J., dissenting); see also *Stahl,* 438 So.2d at 20 (citing Judge Cowart's no duty analysis in *Puhalski*).

The no duty analysis contained in *Puhalski v. Brevard County,* 428 So.2d 375 (Fla. 1983), is worthy of attention. Plaintiffs, bicyclists, decided to abandon a bicycle path because it was poorly maintained and to ride instead on the edge of a highway where they were struck by a vehicle. A summary judgment for the county was affirmed, not because the accident was not foreseeable but because even though it was foreseeable, the county had no duty to provide a bicycle path. The opinion explains as follows:

This is but another of many cases where it is erroneously argued, albeit sometimes successfully, that anyone that can foresee how others (here bicyclists and motorists) may negligently cause injuries, by such foresight alone, incures a legal duty to take affirmative action (to provide or maintain bicycle paths, to give warnings, etc.) to prevent the active but foreseeable negligence of others and the resulting foreseeable injury. *The fact that one realizes, or should realize, that an affirmative act on his part is necessary for another's protection does not itself impose upon him a duty to take such action.* When the claimed negligent conduct consists not of an act, but of the failure to do an act which is necessary for the protection of another, the act which was not done must be one which the alleged negligent party was under a duty to do. *The county's lack of maintenance did not result in defects that proximately caused appellants' injuries but resulted in the county's failure to provide a properly maintained bicycle path.* However, that did not breach any legal duty owed because *the county had no legal duty to provide a bicycle path,* well-maintained, unmaintained or at all and, having once provided one, no duty to continue to provide one. There being no legal duty there is no breach of duty and no negligence and no liability. (Emphasis added.)

The case of Zebrasky v. Ohio Dept. of Transportation, 477 N.E.2d 218 (Ohio 1984), provides another excellent example illustrating that mere foreseeability that an affirmative act is necessary for another's protection does not itself impose a legal duty. Plaintiff driver was injured when an unknown person dropped a tire from a pedestrian bridge which penetrated the windshield of his vehicle. The bridge had a 5-ft 2 in. chain link fence in a 6-in. concrete curb for a total height above the walkway of 5 ft 8 in. Plaintiff sued the State, contending that past experience showed that this was inadequate and that protective screening to prevent objects from being thrown onto traffic was required. In affirming a summary judgment for the State highway department, the court said:

The duty of the state, if any, to provide extraordinary protection de-

> vices against injury from criminal misconduct is a duty owed generally to society but not a duty owed to a particular person.
>
> . . .
>
> The issue in this case is police protection, not negligent design of a highway bridge. A policeman stationed on the bridge would be the best protection against injury to a motorist from an object hurled by a criminal onto the highway. Neither a criminal-proof overpass nor a policeman is required to avoid monetary liability of the state to an injured person.

The *Zebrasky* case was cited with approval and, in a case of first impression, the Supreme Court of Ohio expressly approved of and adopted the public duty doctrine in *Sawicki v. Village of Ottawa Hills,* 525 N.W.2d 468 (Ohio 1988). After observing that several courts of appeal in Ohio had adopted the public duty doctrine, the Supreme Court correctly pointed out:

> [T]his doctrine has been obscured by, yet was coexistent at common law with, the doctrine of sovereign immunity. Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with the principles of negligence, and was applicable to the determination of the extent to which a statute may encompass the duty upon which negligence is premised. If a special relationship is demonstrated, then a duty is established, and inquiry will continue into the remaining negligence elements. (Citations omitted.) It can therefore be concluded that the public duty rule is an independent doctrine and, consequently, survives the abrogation of sovereign immunity.

The court in *Sawicki* further explained the basis for the doctrine as follows:

> Various public policy rationale have been set forth to justify the public duty doctrine. One of the basic policy considerations has been that of finance. It is most often asserted that because the available public resources are limited by the resources possessed by the community, the deployment of them must remain in the realm of policy decision.
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> . . .
>
> For this and other reasons, the public duty rule has become the majority rule among the state jurisdictions.

The *Sawicki* case itself involved lack of police protection and the rule was reaffirmed in *Commerce and Industry Insurance Co. v. City of Toledo,* 543 N.E.2d 1188 (Ohio 1989), which involved lack of fire protection. As evidenced by the *Zebrasky* case, the rule is applicable in highway cases as well. See also *Williamson v. Paulovich,* 543 N.E.2d 1242 (Ohio 1989), where a school child was struck by an automobile allegedly due to traffic congestion caused by the city's failure to properly supervise and control its highways by enforcing its traffic laws and ticketing or removing illegally stopped cars in front of an elementary school. In holding that the city was not liable, the Supreme Court said:

> [T]he appellant claims that it was not under a duty to either ticket or remove the parked cars that were causing the alleged nuisance. We agree since the enforcement of the traffic ordinance in this case was a duty

> imposed upon the city through its police department, and this duty was to the public generally. Thus, a failure to perform, or inadequate performance of this type of duty in the absence of a special relationship, is generally a public and not an individual injury.

The court further held that merely because the city had enacted and was obligated to enforce its traffic ordinances did not create a special relationship with any individuals such as plaintiff. As a result, the directed verdict for the city was affirmed on appeal.

In applying the public duty defense in highway cases, the State of Rhode Island probably has gone further than any other jurisdiction. In a series of highway decisions commencing with *Knudsen v. Hall,* 490 A.2d 976 (R.I. 1985), the Supreme Court has steadfastly upheld the application of the defense to defeat liability in a variety of factual situations. The *Knudsen* case involved the collision of two vehicles at a State highway intersection which plaintiffs contended was negligently maintained for several reasons, viz., a stop sign was missing; a stop line was missing; signs warning of the approaching intersection were missing; and brush on the side of the road reduced visibility at the intersection to below acceptable standards. In reversing a jury verdict for plaintiffs, the court cited *Ryan v. State Dept. of Transportation* 420 A.2d 841 (R.I. 1980), a non-highway case, for the proposition that the public duty doctrine survived the abrogation of the doctrine of sovereign immunity. Thus, it was said:

> There is no question here that the state was responsible for the maintenance of the intersection at which the mishap occurred. General Laws 1956 (1979 Reenactment) § 24-8-14 requires that the state keep its highways in "good repair." *However, the state's duties in this respect clearly extend to the motoring public in general.* In the cases in which we have affirmed the existence of a special duty, either the plaintiffs have had prior contact with state or municipal officials who then knowingly embarked on a course of conduct that endangered the plaintiffs, or they have otherwise specifically come within the knowledge of the officials so that the injury to that particularly identified plaintiff can be or should have been foreseen. No such circumstances have been alleged by the Knudsens. *There is not a shred of evidence on the record before us that would indicate that the Knudsens could have been foreseen as "specific, identifiable" victims of the state's negligence here.*
>
> In the absence of circumstances giving rise to a special duty owed to the Knudsens by the state, there is no basis for state liability. (Emphasis added.)

The *Knudsen* case has been cited and followed in three subsequent Supreme Court highway decisions: see *Kowalski v. Campbell,* 520 A.2d 973 (R.I. 1987) (negligence in maintaining safety lines on a highway); *Carroccio v. Morgan,* 553 A.2d 1076 (R.E. 1989) (failure to keep highway in state of repair); and *Polaski v. O'Reilly,* 559 A.2d 646 (R.I. 1989) (stop sign mutilated beyond recognition and obscured by trees, shrubs, and bushes).

It should be noted that the public duty doctrine is not a defense in all

tort actions against public entities in Rhode Island. As explained by the Supreme Court in the *Polaski* case:

> This result is not changed by the doctrine that we recently enunciated in *Catone v. Medberry,* 555 A.2d 328 (R.I. 1989), and *O'Brien v. State,* 555 A.2d 334 (R.I. 1989). In those cases we declined to apply the public duty doctrine to activities conducted by the state of a type which might be performed by any private person (owner of motor vehicles or land). Here, on the other hand, in placing, or failing to place or maintain a traffic-control sign, the city of Warwick was acting in an area in which no private person could intrude. Thus, the *Catone-O'Brien* opinions have no impact upon the case at bar.

Catone v. Medberry, 555 A.2d 328 (R.I. 1989), involved the negligent driving of a vehicle by an employee of the State Department of Transportation, and *O'Brien v. State,* 555 A.2d 334 (R.I. 1989), involved the negligent placement of a horseshoe stake amid the grass in a State park. Both activities might well be performed by private persons, hence the public duty doctrine was held inapplicable. But the doctrine itself was vigorously defended, the Supreme Court stating in the *O'Brien* case:

> We are of the opinion that the special-duty doctrine does not resurrect the concept of sovereign immunity but it does take into account the unquestionable fact that many activities performed by government could not and would not in the ordinary course of events be performed by a private person at all.... Within this category we believe that the activity under consideration in *Knudsen v. Hall, supra,* should be included. In that case the complaint alleged that the state had negligently maintained a rural intersection and had also failed to place and replace appropriate signs at that intersection. *This involved the state's duty to maintain and lay out a highway system for the benefit of all the people who may travel within the state.* We held that the special-duty doctrine was applicable and that the state had no notice of the particular duty that might be owed to the plaintiffs in that case and therefore did not have such a special duty to the plaintiffs upon which liability might be predicated. (Emphasis added.)

On the other hand, a number of other jurisdictions have not applied the public duty doctrine in highway cases. And in those jurisdictions which have expressly rejected the doctrine in non-highway cases, the doctrine will obviously not be a viable defense even if it had been previously so recognized. As already discussed, the States of Iowa and Colorado fall into this category.

When Arizona abolished the doctrine of sovereign immunity in *Stone v. Arizona Highway Commission, supra,* 381 P.2d 107 (Ariz. 1963), a highway case, the public duty doctrine was still recognized as a defense in non-highway cases until it too was abolished in *Ryan v. State of Arizona, supra,* 656 P.2d 597 (Ariz. 1982). But even before *Ryan,* the defense was held inapplicable in highway cases. See, for example, *Duran v. City of Tucson,* 509 P.2d 1059 (Ariz. 1973), where the court cited the *Stone* case and indicated that the public duty doctrine did not apply to

activities of the government which provide services or facilities for the use of the public such as highways. Thus, the court said:

> The basis for liability is the provision of the services or facilities for the direct use by members of the public. This is to be contrasted with the provision of a governmental service to protect the public generally from external hazards.

To the same effect, see also *State v. Superior Court of Maricopa County,* 599 P.2d 777 (Ariz. 1979), where it was said:

> A duty to the individual may also exist when the governmental agency is itself the active tort feasor. For example, if the State of Arizona is building highways it has a duty to the individual driver to build safe highways. See, *Stone, supra.*

In overruling the public duty doctrine in *Coffey v. City of Milwaukee, supra,* 247 N.W.2d 132 (Wisc. 1976), the Wisconsin Supreme Court pointed out that the doctrine had not previously been applicable in cases involving the maintenance of stop signs. Thus, the court explained:

> Both the erection and maintenance of stop signs is a duty owed by the municipality generally to the public. Yet, . . . this court has not required the existence of a special duty owed by the municipality before allowing recovery in causes of action based upon improperly maintained traffic signs.

The courts in Louisiana and New Mexico have taken the same view by holding that although the maintenance of highways is a duty owed to the general public, the failure to properly carry out this function is actionable by an injured individual. In rejecting the public duty doctrine, it was said in *Stewart v. Schmieder,* 386 So.2d 1351 (La. 1980):

> This court has not before now had occasion to consider the applicability of the "public duty doctrine" in Louisiana. We have, however, in many instances, held governmental entities or public officials liable for the breach of duties which, at first blush, appear to be owed to the public rather than any individual. For example, the maintenance of highways and streets by the state and local governments is an undertaking that benefits the general public and is not carried out for any particular individual. Nevertheless, we have not hesitated to find the state or local entities liable for failure to maintain the streets and highways in a reasonably safe condition.

And in discarding the public duty doctrine in *Schear v. Board of County Commissioners,* 687 P.2d 728 (N.M. 1984), it was likewise noted that the "public duty" to maintain highways was actionable even prior to the enactment of legislation expressly imposing such liability in New Mexico.

It is readily apparent that there is a lack of uniformity among the States that have considered the public duty doctrine as a defense in highway litigation. Those jurisdictions that have rejected the doctrine itself, usually on the assumption that it is a form of sovereign immunity,

will certainly not apply the public duty doctrine in highway cases.[15] And even some jurisdictions, which recognize and apply the doctrine in non-highway cases, will not do so in highway cases. It has been seen that a number of courts make a distinction between the provision of highways for direct use by the public and the provision of other governmental services to protect the public from external hazards. Thus, the duty to provide police and fire protection and building and safety inspections is regarded as a public duty in these jurisdictions, whereas the duty to provide safe highways is considered an actionable, special duty owed to users of the highway.

But a close examination of all the highway cases shows that a duty to the individual user is usually imposed only when the action is based on the negligent construction or maintenance of the highway rather than when it is based on the design of the highway. For example, in *Coffey v. City of Milwaukee, supra,* 247 N.W.2d 132 (Wisc. 1976), the court observed that a public entity had no duty to erect a stop sign in the first instance but, having done so, it is required to maintain it for the traveling public. And the Florida cases discussed above also make it clear that the duty to maintain highways does not include a duty to install traffic control devices or to redesign or upgrade or modernize existing highways.

In fact, only the State of Rhode Island appears to apply the public duty doctrine in highway cases without regard to whether the action is based on negligence in the design, construction, or maintenance of the highway. Although it is unlikely that this broad view will be adopted in other jurisdictions, it is suggested that the absence of a duty has the potential for being a significant and viable defense in actions based on the design of a highway as distinguished from actions based on the negligent construction or maintenance of a highway. This is true even in those jurisdictions which have expressly rejected the public duty doctrine itself so long as the highway lawyer grounds his legal argument on lack of a general duty of care rather than on the public duty doctrine. This, of course, is precisely what occurred in *Leake v. Cain, supra,* 720 P.2d 152 (Colo. 1986), where although the public duty doctrine was rejected, the failure of the police to prevent an intoxicated person from driving was nevertheless held not actionable because of the lack of a common law or statutory duty of care. This proposed no duty analysis that may be asserted in highway design cases will now be discussed.

PROPOSED NO DUTY ANALYSIS IN HIGHWAY DESIGN CASES

The law relating to the extent of the general duty owed by the State to users of its highways is well discussed by Larry W. Thomas in his paper, "Liability of State Highway Departments for Design, Construction and

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[15] See Appendix, listing the states which have specifically rejected the public duty doctrine.

Maintenance Defects" (Vol. 4, Chapter VIII, p. 1771, *supra*). After noting the difficulty in attempting to summarize the law where actions are brought pursuant to the many and varied State statutes in effect, the author first quoted from 39 AM. JUR. 2d, *Highways,* § 337, p. 721, where it is said:

> . . . that persons using highways, streets, and sidewalks are entitled to have them maintained in a reasonably safe condition for travel. One traveling on a highway is entitled to assume that his way is reasonably safe, and although a person is required to use reasonable care for his own safety, he is neither required nor expected to search for obstructions or dangers.

Larry W. Thomas then concludes in his paper:

> Even in a jurisdiction holding the State to the same standard of care as private corporations or citizens the State is not an "insurer of the safety of travelers using its highways." A duty transcending that of reasonable care and foresight will not be imposed upon the State.... Moreover, all that is required of the State "is to adequately design, construct, and maintain said highways and to give adequate warning of existing conditions and hazards to the reasonably careful driver."
>
> In sum, the State is required only to exercise reasonable care to make and keep the roads in a reasonably safe condition for the reasonably prudent traveler. Although the State has no duty to make the roads absolutely safe, a motorist using a public highway has the right to presume that the road is safe for the usual and ordinary traffic, and he is not required to anticipate extraordinary danger, impediments, or obstructions to which his attention has not been directed.

With these standards in mind, it seems clear that the State, having elected to provide a highway for public use, has assumed a duty to exercise reasonable care in designing and constructing the highway in the first instance and in thereafter maintaining it in a reasonably safe condition for travel by prudent drivers. But since the State is not an insurer of the safety of persons using a highway and it has no duty to make roads absolutely safe, it is arguable that the State should not have a duty to design or redesign or modernize its highways in order to protect users from their own negligent conduct or the conduct of third persons. In other words, the State should not have a duty to make a reasonably safe road even safer merely because it is foreseeable that the intentional or negligent conduct may cause an accident in the absence of such further precautions.

To illustrate, there should be no duty to control traffic at uncontrolled highway intersections by installing stop signs or traffic signals. A majority of jurisdictions are in accord with this view.[16] Nor should there be a

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[16] See Annot., *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused By Failure To Erect Or Properly Maintain Traffic Control Device At Intersection,* 34 A.L.R. 3d 1008 (1970).

duty to install median barriers on highways in order to prevent head-on collisions. While most of the decided cases treat this issue in terms of the immunity for discretionary functions, with mixed results,[17] at least one jurisdiction has squarely held that there is simply no duty to install median barriers on highways.

Thus, in *Charpentier v. City of Chicago,* 502 N.W.2d 385 (Ill. 1986), the court said:

> Under common law, local governments have a duty to maintain public property in a reasonably safe condition. (Citation omitted.) Municipalities are not liable for failing to undertake public improvements on the roadways. (Citation omitted.) The responsibility of public entities has only been extended to undertakings which they choose to carry out. (Citation omitted.) Thus, defendant had no common law duty to install median barriers on Lake Shore Drive.

The *Charpentier* case was cited and followed in *Ross v. City of Chicago,* 522 N.E.2d 215 (Ill. 1988), where the court said:

> In *Charpentier v. City of Chicago* (1986), 150 Ill.App.3d 988, 104 Ill.Dec. 122, 502 N.E.2d 385, we recently held that the City had no duty to provide median barriers in a case involving a "crossover" collision at a location on South Lake Shore Drive where only a double yellow line separated northbound and southbound lanes of traffic. Although the instant action presents an added dimension, since it is alleged that a median "strip" was provided by defendant City, the distinction warrants no different conclusion. As stated above, a municipal corporation is liable only when it acts to provide public improvements which directly render the street, itself, defective such that travel thereon becomes unreasonably dangerous. (Citation omitted.) Providing a median "strip" rather than a median barrier did not render the subject portion of Lake Shore Drive physically defective or unsafe for the normal course of travel for which the roadway was intended.

It has also been held that there is no duty to provide street lights on highways,[18] nor to provide left-turn lanes[19] or shoulders on highways.[20] As shown above, Florida cases have held that there is no duty to provide

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[17] See Annot., *Governmental Tort Liability As To Highway Median Barriers,* 58 A.L.R. 4th 559 (1987).

[18] Antenor v. City of Los Angeles, 220 Cal.Rptr. 181 (Cal. 1985), citing 39 AM. JUR., *Highways, Streets and Bridges* § 405, pp. 803–804.

[19] Pickering v. Washington 260 So.2d 340 (La. 1972), citing with approval in Williams v. Peterson 551 So.2d 37 (La. 1989), which held that there is also no duty to install stop signs at an uncontrolled intersection merely because there have been a number of accidents there.

[20] Hughes v. County of Burlington, 240 A2d 177 (N.J. 1968); *cf.* Kyle v. City of Bogalusa, 506 So.2d 719 (La. 1987), holding it is a question of fact whether there is a duty to provide a shoulder on a state highway.

a walkway for pedestrians on highways nor to provide a bicycle path.[21] There is also no duty to provide crosswalks for pedestrians[22] and Ohio has held that the State highway department has no duty to provide protective screening on a pedestrian bridge to prevent objects from being thrown onto the highway below.[23]

There are but a few examples of situations where the highway lawyer can argue that the State has no duty to design or redesign or otherwise provide protective features in order to make a reasonably safe highway even safer. In jurisdictions where the public duty doctrine has either been expressly rejected or is not recognized in highway cases, the argument can still be made based on common law principles relating to duty as an essential element of a tort. As mentioned above, such an argument was successful in *Leake v. Cain, supra,* 720 P.2d 152 (Colo. 1986) even though the court rejected the public duty doctrine itself.

California provides another example of a jurisdiction where a no duty analysis may be used in highway design cases. Although the public duty doctrine is recognized in police and fire protection cases as well as in building and safety inspection cases, California has not specifically applied or discussed the doctrine in highway cases against public entities. Nevertheless, California cases have held that there is no duty to provide stop signs at uncontrolled highway intersections;[24] and in a case where traffic signals had been installed at an intersection but were turned off because of a malfunction, it was held there was no liability because the intersection, in effect, reverted to being an uncontrolled one and there was no duty to control or otherwise direct traffic.[25] Similarly, it has been held there is no duty to provide street lights on California highways.[26]

In this connection, it should be observed that California public entities are liable in tort only as expressly provided by statute and all common law tort liability has been abolished.[27] There is a statute making California public entities liable for "dangerous conditions" of public property, including highways, but this statute does not mention duty of care as an element of liability.[28] Nevertheless, California has held that lack of duty is a valid defense under the "dangerous condition" statute as evidenced by cases such as *Gray v. America West Airlines, Inc.,* 256 Cal.Rptr. 877 (Cal. 1989), where it was said:

> As in any cause of action for premises liability, the existence of a duty to protect the plaintiff is an essential element of a cause of action for

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[21] Nehmad v. Metropolitan Dade County, *supra,* 545 So.2d 300 (Fla. 1989), and Puhalski v. Brevard County, *supra,* 428 So.2d 375 (Fla. 1983).

[22] Swett v. Village of Algonquin, 523 N.E.2d 594 (Ill. 1988).

[23] Zebrasky v. Ohio Department of Transportation, *supra,* 477 N.E.2d 218 (Ohio 1984).

[24] Mittenhuber v. City of Redondo Beach, 190 Cal.Rptr. 694 (Cal. 1983), citing Perry v. City of Santa Monica, 279 P.2d 92 (Cal. 1955).

[25] Goodman v. Raposa, 312 P.2d 65 (Cal. 1957).

[26] Antenor v. City of Los Angeles, *supra,* 220 Cal.Rptr. 181 (Cal. 1985).

[27] CAL. GOV'T CODE § 815.

[28] CAL. GOV'T CODE § 835.

> dangerous condition of public property, while the lack of such a duty is a complete defense. (Citations omitted.)

It seems likely that most if not all jurisdictions will recognize that lack of a duty of care owed to the injured person is a potentially valid defense in highway litigation. At least in actions based upon the design of the highway, as distinguished from negligence in the construction or maintenance thereof, the decided cases indicate that the courts will be receptive to this argument provided the highway was reasonably safe at the time of the accident. As stated previously, the State is not an insurer of the safety of persons using a highway and it has no duty to make roads absolutely safe for travel. The highway lawyer should focus on this issue and attempt to persuade the court that the test is not whether the highway could be made safer or the subject accident could have been prevented by more elaborate precautions, but whether the State has fulfilled its duty to make the highway *reasonably* safe for travel by prudent drivers. This test is expressed well in *Fuller v. State of California,* 125 Cal.Rptr. 586 (Cal. 1975), as follows:

> The "dangerous condition" of the property should be defined in terms of the manner in which it is foreseeable that the property will be used by persons exercising due care in recognition that any property can be dangerous if used in a sufficiently abnormal manner. Thus, a public entity should not be liable for injuries resulting from the use of a highway—safe for use at 65—at 90 miles an hour, even though it may be foreseeable that persons will drive that fast. The public entity should only be required to provide a highway that is safe for reasonably foreseeable careful use. (Citation omitted.)

It is submitted that when properly presented, most courts should be willing to adopt this as the standard for the extent of the duty owed by the State to highway users.

CONCLUSION

Although the public duty doctrine is recognized in a majority of jurisdictions and its use is widespread in police and fire protection cases as well as in building and safety inspection cases, it has not been raised as frequently nor has it been as successful in highway litigation. Moreover, there is an unfortunate and growing trend to reject the doctrine as a basis for determining the tort liability of public entities on the mistaken assumption that it is a relic of sovereign immunity. When properly understood, however, the public duty doctrine is separate and distinct from sovereign immunity, including the immunity for discretionary functions. When no duty of care is owed to an injured person, there is no tort and no tort liability whether defendant is a private person or a public entity. On the other hand, neither sovereign immunity nor the discretionary immunity is based on the absence of a tort nor do these doctrines apply to private persons.

The confusion has probably been caused by the label "public duty" doctrine which gives the impression that the defense applies only to public

entities and its officers and employees. But it is not a peculiar rule applicable only to governmental torts. On the contrary, it is essentially the same rule applicable under general tort law that defendant must owe a duty of care to the injured plaintiff in order to be liable. Certainly in those jurisdictions where the public duty doctrine has been judicially abolished or it has not specifically been recognized, the highway lawyer would do well to avoid using the label "public duty" doctrine.

Rather, the argument to be made in appropriate cases is that the State owes no duty to plaintiff to provide a highway that is safe when used in a negligent or abnormal manner nor to protect plaintiff from negligent or criminal third party conduct. The authorities cited in this paper lend support to this position. For example, the State should not be liable for an accident on a highway—safe for use at 65—when plaintiff drives 90 miles per hour. Nor should the State be liable for not providing a median barrier on a highway to prevent a drunk or otherwise negligent driver from crossing the center line and causing an accident. This is particularly true when it is recalled that all but a very few jurisdictions hold there is no duty on the part of the police to arrest and thereby prevent a drunk driver from causing an accident.

Finally, it bears repeating that the lack of a duty of care is the threshold issue in any tort action and it should ordinarily be raised and decided as a question of law prior to the consideration of other defenses and immunities, including the immunity for discretionary functions. In this regard, this writer is in agreement with the "surprising" conclusion of John C. Vance in his above-cited paper, "Impact of the Discretionary Function Exception on Tort Liability of State Highway Departments," viz., that many of the cases decided on the basis of the discretionary immunity are in fact decided on the basis of duty and negligence principles in the guise or cloak of discretion. He gives as an example cases involving the length of clearance in traffic signals where the courts invoke the discretionary immunity when the decisions were plainly based on a finding that reasonable care had been exercised in determining the length of the clearance interval.

For these reasons, highway lawyers should be constantly alert in raising the issue of duty first whenever it is appropriate to do so on the facts involved, e.g., it should be argued that the State has no duty: to provide stop signs or traffic signals at intersections; to provide median barriers on highways; to provide street lights, left-turn lanes or shoulders on highways; to provide walkways or crosswalks for pedestrians; to provide bicycle paths; to provide protective screening on pedestrian bridges or highway overcrossings; and so forth. Whether couched in terms of the public duty doctrine or simply in terms of ordinary tort principles relating to duty, this argument should not be overlooked as it provides an additional weapon in the arsenal of defenses available to highway lawyers.

APPENDIX

STATES THAT HAVE REJECTED THE PUBLIC DUTY DOCTRINE

ALASKA
Adams v. State of Alaska, 555 P.2d 235 (1976)

ARIZONA
Ryan v. State of Arizona, 656 P.2d 597 (1982)

COLORADO
Leake v. Cain, 720 P.2d 152 (1986)

FLORIDA
Commercial Carrier Corp. v. Indian River, 371 So.2d 1010 (1979)

IOWA
Wilson v. Nepstad, 282 N.W.2d 664 (1979)

LOUISIANA
Stewart v. Schmieder, 386 So.2d 1351 (1980)

NEBRASKA
Maple v. City of Omaha, 384 N.W.2d 254 (1986)

NEW MEXICO
Schlar v. Board of County Commissioners, 687 P.2d 728 (1984)

OREGON
Brennen v. City of Eugene, 591 P.2d 719 (1979)

WISCONSIN
Coffey v. City of Milwaukee, 247 N.W.2d 132 (1976)