# The Public Duty Doctrine—Saga of a Common Law Renegade

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## The Venerable Tradition of Governmental Inviolability

In 1792, a South Carolinian named Alexander Chisholm sued the state of Georgia on behalf of a decedent who had not been paid for goods supplied to Georgia during the Revolutionary War. Georgia did not even bother to appear, asserting that as a state it was immune to litigation instituted by an out of state plaintiff. Much to Georgia's consternation, and that of legal scholars who believed that sovereign immunity precluded such a lawsuit, the Supreme Court permitted *Chisholm v. Georgia*[1] to proceed.

The states acted quickly to restore their supremacy. Within a year, Congress adopted the Eleventh Amendment, specifically granting immunity to the states from lawsuits in federal courts by citizens of other states, foreign countries, or their citizens:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.[2]

A century later, the Supreme Court would declare that states were also immune to suits brought against them in federal court by their own citizens. In *Hans v. Louisiana*[3] the Court refused to find jurisdiction over an action brought by a Louisiana bondholder who was concerned that changes to the state's constitution were impairing his contractual rights to receive payment.

Although state sovereign immunity was not absolute (for example, the Eleventh Amendment would not foreclose extensive litigation in federal courts against state or local officers alleged to have violated citizens' rights under the Civil Rights Act of 1871),[4] for much of the nation's history, suits against the states for negligence—and even for many species of intentional acts—were foreclosed.

Following World War II and the passage by Congress in 1946 of an expansive mechanism to facilitate legal actions against the national government under the Federal Tort Claims Act,[5] a more equitable view emerged at the state level. One by one, state legislatures questioned, and then curbed, sovereign immunity. By the 1960's blanket state immunity was largely a relic. In its stead, most legislatures adopted state tort claims acts, often borrowing from the federal model, which spelled out the conditions and circumstances under which citizens could sue their states for money damages.

(The waiver of state sovereign immunity was nuanced. Today, for example, at least 33 states impose statutory caps on damages that are recoverable from judgments against the state, and 29 states (mainly a subset of the "cap" states) prohibit judgments against the state for punitive or exemplary damages.)[6]

Some states also infused their tort claims acts with additional provisions intended to reduce the ambiguity inherent in lingering common law traditions. This category includes New Mexico, which asserted:

> The Tort Claims Act shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty.[7]

But despite the statutory clarity imparted by many laws at the federal and state level, the boundaries of governmental liability remain complex, in part because of the persistent influence of common law precepts. For example, in contrast to New Mexico, many states continue to reject governmental immunity for "ministerial" responsibilities which are perfunctory and do not require analysis (such as

repairing potholes) while conferring immunity on "discretionary" actions which require the government to exercise judgment (such as designing a roadway and determining the optimal placement of traffic signs).[8]

**A Common Law Renegade**

Other common law traditions survive. One such outlier which has tenaciously endured, arousing more than its share of controversy along the way, is the public duty doctrine. The doctrine has been succinctly--and sometimes derisively--summarized as "a duty to all, but a duty to no one."[9]

Reviled by some and defended by others, the public duty doctrine originates in the common law of England. It was legitimized as the law of the United States by the Supreme Court in *South v. Maryland.*[10] In *South*, the plaintiff alleged that he had been kidnapped for four days and was released only after he produced the ransom monies demanded by his captors. He claimed that the local sheriff was well aware of the kidnapping but did nothing, and sued the sheriff for refusing to enforce the laws and for failing to protect him. The lower courts awarded plaintiff a substantial judgment. The Supreme Court reversed. It found that the 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."[11]

**The Rationale for Public Duty**

Defenders of public duty argue that, like governmental immunity, it is vital to allowing states and municipalities to provide an extraordinary breadth of services--police, fire, ambulance, courts, schools, infrastructure maintenance, licensing, zoning, and many more--for all constituents, without reservation. In contrast, private actors can provide services selectively, based on risk-reward matrices. (For example, the physician in private practice typically has no general responsibility to the public and can choose the number, nature and complexity of patients--and charge fees based on the difficulty of the diagnosis and treatment, even refusing service to those who cannot pay).

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Public duty is premised on the logic that our states, counties, cities and towns would not be able to discharge these critical responsibilities if, in so doing, they were constantly subject to litigation seeking compensation for errors or omissions in the performance of those services. If left completely unchecked, tort litigation (particularly when fueled by contingency fee arrangements), with its complex judicial elements of standard of care, foreseeability, proximate causation, contributory negligence and so on, would fatally over-consume the finite defense capabilities of government. Preservation of scarce public finances for the benefit of all, the argument goes, precludes recovery by the individual.

A broader rationale for the doctrine is provided by Professor McQuillin in *The Law of Municipal Corporations*:

> First, it is impractical to require a public official charged with enforcement or inspection duties to be responsible for every infraction of the law. Second, government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially crushing liability from its attempts to enforce them. Third, exposure to liability for failure to adequately enforce laws designed to protect everyone will discourage municipalities from passing such laws in the first place. Fourth, exposure to liability would make avoidance of liability rather than promotion of the general welfare the prime concern for municipal planners and policymakers. Fifth, the public duty rule, in conjunction with the special relationship exception, is a useful analytical tool to determine whether the government owed an enforceable duty to an individual claimant.[12]

**How Does the Public Duty Doctrine Differ From Sovereign Immunity?**

Conceptually, public duty may seem to parallel immunity. Indeed, the outcome of the two principles may converge, eliminating governmental damage awards for negligence. But public duty is an even more powerful shield than immunity, if only in a highly esoteric sense. While immunity prevents plaintiffs from prosecuting a case where the government may otherwise be liable, the public duty doctrine avoids a finding of liability, *ab initio.* This is so, because with few exceptions, negligence law starts with the presumption of a duty to exercise care to avoid reasonably foreseeable harm to others.[13] Under public duty, the municipality is simply not accountable, because the primary ingredient necessary to a finding of negligence—duty—does not exist:

As the Connecticut Supreme Court noted, in upholding the public duty doctrine: "It is important to distinguish between the *existence* of a duty and the *violation* of that duty."[14] Stated otherwise:

> Unlike governmental immunity, which protects a municipality from liability for breach of an otherwise enforceable duty to the plaintiff, the public duty rule asks whether there was any enforceable duty to the plaintiff in the first place. A defendant who pleads immunity conditionally admits the plaintiff's case, but asserts immunity as a bar to liability. In contrast, the public duty rule is a defense that denies an element of the plaintiff's cause of action--the existence of a duty of care to the individual plaintiff.[15]

*Continued on page 16*

Public Duty Doctrine Cont'd from page 15

**The Pivotal Role of Duty**

Removal of duty from the consideration of governmental liability will necessarily absolve even foreseeable governmental negligence: "Immunity revolves around the necessity or desirability of freeing policy decisions from jury speculation; *a duty of care, on the other hand, concerns foreseeability.*"[16]

The public duty doctrine's extraordinary sleight of hand, which can eliminate the governmental duty of care to the individual in certain instances, presents an insurmountable obstacle to many plaintiffs--and an inequity in the eyes of some jurists. In a recent case testing the bounds of Washington, D.C's expansive public duty doctrine, a judge had this to say regarding the rendering of an incorrect diagnosis by EMT personnel:

> Surely no one would contend that Ms. Woods would be barred from bringing suit against a private physician who examined her at her friend's home and then provided the same negligent diagnosis and advice to refrain from seeking further treatment. Such a claim would be governed by garden-variety principles of tort law, and it is not at all clear to me why Ms. Woods' claim against the District should not be resolved in the same manner.[17]

Public duty adherents will argue that applying "garden variety" tort principles would greatly increase the cost and duration of the litigation process, whether or not the plaintiff succeeds. When "duty" remains part of the legal calculus, an extensive inquiry follows:

> When the court has considered whether a duty should be imposed based on a particular relationship, it has balanced numerous factors to aid in that determination: (1) the foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.[18]

The public duty doctrine avoids any such protracted analysis, preserving governmental assets.

**The Implications of "Duty-Free" Government**

The consequences of a "duty to all is a duty to no one" legal principle can seem harsh:

-A Maryland 911 operator receives an anonymous call on a cold November evening reporting the general location of a girl lying motionless in a wooded area behind a row of townhouses. The operator communicates a different, incorrect, location to officers, who search extensively but ultimately find nothing and conclude that the call is a hoax. The teenager is left outside through the night and dies of hypothermia. Based on the public duty doctrine, neither the operator nor the county owes a duty to the girl and neither is liable in damages for the girl's death.[19]

-A county in Washington issues a building permit, ostensibly an official confirmation that construction complies with all applicable codes, to owners of an unfinished house shortly before they sell the residence. The home is purchased and the new owners soon confront significant violations of the county code which render the house defective. They sue the sellers, the realtor, and the county. The sellers and realtor then seek indemnity from the county. Neither plaintiff obtains relief, because under the public duty doctrine, the county owes them no duty on an individual level.[20]

-A West Virginia police officer stops a heavily intoxicated woman in a nightclub parking lot and prohibits her from driving. The officer allows the woman's male companion to drive her home, despite having reason to suspect that he is also intoxicated. The man is subsequently driving in the wrong lane towards oncoming traffic, headlights off, when he hits a car head-on. A woman occupant in the other vehicle is badly injured and her husband is killed (as is the intoxicated driver). The survivor sues the city and the officer for negligence but her case is dismissed under the public duty doctrine.[21]

-A Washington DC woman is visiting a friend when she becomes extremely ill and 911 is called. An ambulance arrives and the emergency response staff examines the woman, concluding that she is merely suffering from the effects of having recently quit smoking. They do not transport her or prescribe any remedy. Throughout the day her condition worsens. When she finally checks herself into the emergency room, it is determined that she has suffered a stroke. In a decision which prompted the dissenting opinion referenced near the beginning of this article, the court finds that the plaintiff cannot sue the ambulance crew. Under the public duty doctrine, their rendering a diagnosis is a duty owed to the public generally and not to her as an individual.[22]

-Detroit police officers respond to a 911 call reporting that a husband is attacking his wife in an apartment and that she is screaming for help. Neighbors confirm to the officers that they have seen and heard the attack and provide the officers with the specific apartment number. The officers take down witnesses' names, circle the building once and then leave, without knocking on the apartment door or inquiring of its occupants. Three hours later, the husband calls 911 to report that he has just stabbed his wife to death. The estate's representative sues the city, the Police Department, the officers and others. All defendants are protected by the public duty doctrine.[23]

These examples are merely a small

subset of the body of case law resulting from application of the public duty doctrine. While objectionable to some, they reflect a policy decision by the jurisdictions involved that law enforcement and other governmental functions must evade individual duty analyses in order that those services to remain available for all.

**The Supreme Court's Limits on Governmental Duty**

The Supreme Court has not specifically spoken on the public duty doctrine, but one if its more celebrated decisions is frequently referenced in public duty cases. *DeShaney v. Winnebago County*[24] is the tragic story of a father who obtained custody of an infant boy in 1980. In 1983, police filed a report of child abuse after the infant required a trip to the hospital. The Winnebago County, Wisconsin Department of Social Services rapidly obtained a court order to hold the child in the hospital's care. But three days later, on the advice of a 'child protection team' including a pediatrician, a police detective, the County attorney, various caseworkers and others, the court returned the boy to the custody of his father.

Five subsequent visits by social workers to the DeShaney home revealed continuing abuse, but no action was taken. Even after caseworkers were not allowed to see the boy because he was, according to his father, too ill for a visit, the County took no further steps to protect him.

In March 1984, four-year old Joshua DeShaney was beaten so savagely by his father that he required lifesaving brain surgery. The operation revealed multiple traumatic injuries inflicted over several years. His brain damage was so horrific that he would be severely retarded and require special care for the rest of his life.

The boy's mother sued the County and the social services department under 42 U.S.C. §1983, claiming that by failing to protect him from abuse about which they knew or should have known, they violated Joshua's Fourteenth Amendment due process rights.

She was unsuccessful. Affirming the Seventh Circuit and the Eastern District of Wisconsin, the Supreme Court held that due process protects against state action; here it was the father, not the County and its agencies, who inflicted the abuse. The County could not be found liable, as a matter of constitutional law, for failure to protect the child from a private actor.

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The Court did not accept the mother's argument that the actions of the social services department in taking the boy under their care had created a special relationship which obligated them to a continuing duty. While conceding that there are instances where the state and its agencies are obligated to provide protection against private actors, the Court found such a duty only arises where the victim has been taken into the state's custody:

> The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf... it is the State's affirmative act of restraining the individual's freedom to act on his own behalf - through incarceration, institutionalization, or other similar restraint of personal liberty - which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[25]

**Exceptions to the Public Duty Rule**

*DeShaney* was decided on substantive due process grounds and not under a public duty analysis. But its consideration of a special relationship which triggers a duty by the state is a useful segue, because "special relationship" is one of the primary exceptions to public duty's shield against governmental liability.

A plaintiff can circumvent the government's public duty argument by alleging and proving a "special relationship" consisting of: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agent that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[26]

Consider the case of a Montana police officer who stopped a vehicle being driven erratically in icy conditions; although not issuing a DUI citation, he advised both occupants that they would not be permitted to continue driving the car and should find alternate transportation. The intoxicated driver, dressed almost completely in black, wandered off, apparently to seek a ride and was fatally struck while walking on a nearby highway. Her estate successfully argued that the officer had created a special relationship with the decedent, by denying her the opportunity to drive her vehicle even though he did not formally ticket her.[27]

Other exceptions also make the public duty barrier permeable. These include the "legislative intent" exception, the "failure to enforce" exception,[28] the "rescue" exception, the "danger creation" exception, and others.

To prevail under the "danger creation exception," a complainant must show that the government's action or inaction "affirmatively placed the plaintiff in a position of danger, that is, where state action creates or exposes an individual to a danger which he or she would not have otherwise faced."[29] Thus, where a woman passenger was removed from a vehicle by a police officer during a DUI arrest of the driver, left alone on a roadside in a high-crime area, and subsequently

*Continued on page 18*

Public Duty Doctrine Cont'd from page 17

raped, the officer was deemed to have put her in harm's way and may have "deprived her of a liberty interest protected by the Constitution."[30]

**A Gradual Death Spiral?**

Exceptions to the public duty doctrine are just that--exceptions. Often the facts do not align (or are not construed) to provide a plaintiff with a mechanism to pierce the doctrine. Given the unpopular outcomes occasioned by public duty and the confusing application of its principles, some jurisdictions have moved to discard it. Courts in at least eight states have jettisoned (or declined to recognize) public duty over the past four decades, including Alaska, Arizona, Colorado, Louisiana, New Mexico, Oregon, Vermont and Wyoming.[31] Other jurisdictions have significantly narrowed its scope, deciding, as Georgia has, that public duty only applies in the context of law enforcement activity[32] or, as Ohio has, that the doctrine cannot apply to supersede a statute protecting the welfare of children.[33]

The most recent revolt against public duty occurred in Illinois. That state's judiciary decommissioned the public duty doctrine on January 22, 2016 when a divided Illinois Supreme Court decided *Coleman v. East Joliet Fire Protection District.*[34] *Coleman* involved a depressingly familiar-sounding fact pattern, with a woman calling 911 from her home and complaining that she couldn't breathe; an operator failing to connect the call to a dispatcher; an ambulance being first directed to an incorrect address; ambulance workers knocking at the correct residence but leaving; and ultimately their locating the woman, expired due to cardiac arrest, some 41 minutes after her initial call.

The trial court granted the defendants summary judgment, not only on the gross negligence counts brought by the decedent's estate, but also on the counts alleging wanton and willful misconduct—based on the absence of an individualized duty to the decedent under the public duty doctrine. The appellate court affirmed.

The Illinois Supreme Court reversed, refusing to recognize a common law shield for willful acts. It rejected public duty—but not because it conflicts with the abandonment of sovereign immunity, as many other states have opined:

> The primary rationale employed by the courts that abolished the public duty rule is that the doctrine is nothing more than a continuation of sovereign immunity and should not exist when sovereign immunity has been abolished. The Illinois Supreme Court has already rejected this argument. The public duty rule is not a form of sovereign immunity. Rather, the existence of a duty and the existence of an immunity are separate issues. The Court has consistently held that the public duty rule survived the abolition of sovereign immunity and passage of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq. (2014). Nevertheless, after much reflection, the Illinois Supreme Court has determined that the time has come to abandon the public duty rule and its special duty exception.[35]

The Illinois majority went on to define why its actions were appropriate, despite *stare decisis* to the contrary over more than 50 years:

> (1) the jurisprudence has been muddled and inconsistent in the recognition and application of the public duty rule and its special duty exception; (2) application of the public duty rule is incompatible with the legislature's grant of limited immunity in cases of willful and wanton misconduct; and (3) determination of public policy is primarily a legislative function and the legislature's enactment of statutory immunities has rendered the public duty rule obsolete.[36]

**-Or a Stubborn Survivor?**

As suggested by the Illinois court and many others, public duty is a juridical conundrum. A survey of the case law illustrates that it leads to diametrically opposite results among the states, even on very similar fact patterns. But despite a rising chorus of public duty detractors, rumors of its demise are, to paraphrase Mark Twain, greatly exaggerated.

Just as some state tort claims acts have expressly incorporated the common law governmental-proprietary and/or ministerial-discretionary tests for immunity, some state judiciaries have affirmatively recognized the continuing vitality of the public duty doctrine alongside tort claims acts. A case in point is Iowa, sometimes erroneously characterized by foes of public duty as having abolished the doctrine:

> Our cases decided after the adoption of the State Tort Claims Act continue to recognize the public-duty doctrine . . . [The cases cited by plaintiffs] were not aimed at the protection of the public in general (as required by the public-duty doctrine), but to narrow groups of persons, thereby establishing special relationships and making the public-duty doctrine inapplicable. *Kolbe*, 625 N.W.2d at 729. . . . In *Kolbe* we recognized that the public-duty doctrine is still viable despite enactment of the State Tort Claims Act.[37]

The same is true in West Virginia, as evidenced in a decision rendered late in 2015:

> Moreover, the [tort claims] statute and the common law doctrine are, without question, harmonious. W.Va. Code [§] 29-12A-5(a)(5)[1986], which provides, in relevant part, that a political subdivision is immune from tort liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection [,]" is coextensive with the common-law rule not recognizing a cause of action for the breach of a general duty to provide, or the method of providing, such protection owed to the public as a whole.[38]

And the history of Florida's judiciary reveals that even after public duty has ostensibly been banished from a state, it may re-emerge. True, the Florida

Supreme Court announced in 1979 that the doctrine was "a function of municipal sovereign immunity" which had been waived by Florida's legislature:

> [I]t 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. If this be so, does the *Modlin* doctrine survive notwithstanding the enactment of section 768.28 [waiving governmental immunity in tort]? We think not.[39]

But after a hiatus, the Florida judiciary is again employing public duty analysis:

> The public duty doctrine exception to the statutory waiver of sovereign immunity recognizes that "there can be no governmental liability unless a common law or statutory duty of care exist[s] that would have been applicable to an individual under similar circumstances."
> A plaintiff suing a governmental entity in tort must, therefore, allege and prove that the governmental entity owed [5] a duty of care to the plaintiff individually rather than to the public in general.[40]

The reality is that public duty is still very much alive. To return to Professor McQuillin's authoritative compendium of municipal law, the public duty doctrine "is in effect in most jurisdictions."[41] In fact, the doctrine is clearly alive in at least 30 states and the District of Columbia, perhaps more.[42] Recent decisions continue to affirm the validity of public duty as a legitimate touchstone for evaluating governmental liability. Some of these opinions expressly challenge the thinking of other jurisdictions that have abolished the doctrine:

> The Supreme Court of Utah disagrees with the reasoning of the courts that have abandoned the public duty doctrine. The public duty doctrine is not a subsidiary branch of sovereign immunity, as asserted by some courts. Rather, the doctrine informs a court's determination of whether a government actor owes a common law duty of care to a plaintiff. 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.[43]

**Who Decides the Future of Public Duty?**

As illustrated above, a survey of the relevant case law reveals that many courts have not hesitated to assert the authority to reshape or reject the public duty doctrine. But it is clearly arguable that the more appropriate forum for making such decisions lies in the legislature.

As the Supreme Court held in *DeShaney*, admittedly in a different context, the degree to which state and local governments should be shielded from liability is a matter for lawmakers, not judges:

> The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[44]

Some state courts have respected this separation of powers when assessing common law allocation of governmental liability. For example, the Vermont Supreme Court stated that legislative approval of municipal immunity doctrines precluded action by that court:

> Plaintiff points out that municipal immunity and the governmental/proprietary distinction are common-law doctrines that a variety of courts have abrogated without legislative action. Yet this Court's ability to act does not turn on whether the doctrines in question are judicially created, but on whether the Legislature has expressed approval of these doctrines since their formulation. Such approval precludes judicial action.[45]

Connecticut's highest court came to the same conclusion, declining to abrogate the public duty doctrine, noting that "whether the principals of governmental immunity from suit and liability can best serve this and succeeding generations has become, by force of the long and firm establishment of these principles as precedent, a matter for legislative, not judicial, determination."[46]

Deference to the legislative role is also expressed in decisions *not* to apply public duty. As the Ohio Supreme Court pronounced, in a case often cited by public duty doctrine foes: "If the public-duty rule is to become a rule of substantive law applicable to suits in the Court of Claims, it is the General Assembly--the ultimate arbiter of public policy--that should make it so by way of legislation."[47]

**Conclusion**

The public duty doctrine is now more than 160 years old. Despite the enactment of tort claims acts across the nation, public duty continues to play a significant role in American jurisprudence, coexisting with other tenets of sovereign immunity. Its continued survival seems assured for so long as state and local governments require a safe harbor from which to serve their constituents.

**Note**

1. 2 U.S. 419, 1 L. Ed. 440 (1793).
2. U.S. Const. 11th Amend. (1793).
3. 134 U.S. 1, 10 S. Ct. 504 (1890).
4. (42 U.S.C.A. § 1983).
5. (28 U.S.C.S. §§ 1346, 2671-2678, 2680).
6. http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx (last accessed Feb. 2, 2016).
7. N.M. Stat. Ann. §41-4-2. *See also* Wyo. Stat. §1-39-101(b): "In the case of the state, this act abolishes all judicially created categories such as 'governmental' or 'proprietary' functions and 'discretionary' or 'ministerial' acts previously used by the courts to determine immunity or liability."
8. *See, for example* Mich. Comp. Laws Ann. §691.1407(2) regarding ministerial duties.
9. Karen Kruger, "Duty to All–Duty to No One: Examining the Public-Duty Doctrine and Its Exceptions," The Police Chief, vol. 74, no. 5, May 2007. http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1172&issue_id=52007 (last accessed

*Continued on page 20*

**Public Duty Doctrine Cont'd from page 19**

Feb. 4, 2016).
10. 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855).
11. *Id.*
12. Eugene McQuillin, *The Law of Municipal Corporations* § 53.04.25, at p. 199 (3rd ed. 2003) (footnotes omitted).
13. Restat 2d Of Torts, §283 (2d ed. 1979).
14. Shore v. Stonington, 187 Conn. 147, 444 A.2d 1379 (Conn. 1982) (*emphasis added*).
15. Wininger v. Hong, 2010 Conn. Super. LEXIS 2298 (Conn. Super. Ct. 2010).
16. Chandler v. District of Columbia, 404 A.2d 964, 967 (D.C. 1979) (*emphasis added*).
17. Woods v. District of Columbia, No. 11-CV-1011 (D.C. Cir. 2013) (Associate Justice Oberly, concurrence page 23).
18. Natrona County v. Blake, 81 P.3d 948 (Wyo. 2003).
19. Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 (Md. 2002).
20. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (Wash. 1988).
21. Ezell v. Cockrell, 902 S.W.2d 394 (Tenn. 1995).
22. Woods v. District of Columbia, 63 A.3d 551 (D.C. 2013).
23. White v. Beasley, 453 Mich. 308, 313, 552 N.W.2d 1, 2 (Mich. 1996).
24. 489 U.S. 189 (1989).
25. 489 U.S. 189, at 201.
26. White v. Beasley, *supra*.
27. Nelson v. Driscoll, 1999 MT 193, 295 Mont. 363, 983 P.2d 972 (Mont. 1999).
28. The "failure to enforce" exception establishes a duty where governmental agents responsible for enforcing statutory requirements [1] possess actual knowledge of a statutory violation, [2] fail to take corrective action despite a statutory mandate to do so, and [3] the plaintiff is within the class the statute is intended to protect. [39]
Jamison v. Storm, 426 F. Supp. 2d 1144, 1159 (W.D. Wash. 2006).
29. Johnson v. City of Seattle, 474 F.3d 634, 639 (9th Cir. 2006).
30. Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) *cert. denied*, 498 U.S. 938 (1990).
31. Jurisdictions which have unambiguously abandoned (or refused to adopt) public duty include: Alaska (Adams v. State, 555 P.2d 235 (Alaska 1976)); Arizona (Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (Ariz. 1982)); Colorado (Leake v. Cain, 720 P.2d 152 (Colo. 1986)); Louisiana (Stewart v. Schmieder, 386 So. 2d 1351 (La. 1980)), New Mexico (Schear v. Bd. of County Comm'rs, 101 N.M. 671, 687 P.2d 728 (N.M. 1984)), Oregon (Brennan v. Eugene, 285 Ore. 401, 519 P.2d 719 (Ore. 1979)); Vermont (Hudson v. Town of E. Montpelier, 161 Vt. 168, 638 A.2d 561 (Vt. 1993)); and Wyoming (Natrona County v. Blake, 2003 WY 170, 81 P.3d 948 (Wyo. 2003)). North Dakota's Supreme Court abrogated the doctrine in that state (Ficek v. Morken, 2004 ND 158, 685 N.W.2d 98 (N.D. 2004), but the North Dakota legislature rapidly filled the void with a statutory solution essentially replicating public duty, including a special duty exception. N.D. Cent. Code §32-12.1-03 (2015).
32. Hamilton v. Cannon, 267 Ga. 655, 482 S.E.2d 370 (Ga. 1997).
33. Brodie v. Summit County Children Services Board, 51 Ohio St. 3d 112, 554 N.E.2d 1301 (Ohio 1990).
34. 2016 IL 117952 (Ill. Jan. 22, 2016).
35. *Id.*
36. *Id.*
37. Raas v. State, 729 N.W.2d 444, 448-449 (Iowa 2007).
38. Danner v. City of Charles Town, 2015 W.Va. LEXIS 1130, *9 (Nov. 20, 2015).
39. Commercial Carrier v. Indian River County, 371 So. 2d 1010, 1016 (Fla. 1979).
40. Miami Dade County v. Fente, 949 So. 2d 1101 (Fla. Dist. Ct. App. 3d Dist. 2007).
41. McQuillin, *supra note 12*, at 207.
42. These include: California (Adams v. City of Fremont, 68 Cal. App. 4th 243, 80 Cal. Rptr. 2d 196, (Cal. App. 1st Dist. 1998); Connecticut (Coley v. City of Hartford, 140 Conn. App. 315, 59 A.3d 811 (Conn. App. Ct. 2013); Delaware (Millman v. Town of Milton, 755 A.2d 389 (Del. 2000)); District of Columbia (Varner v. District of Columbia, 891 A.2d 260 (D.C. 2006)); Florida (Pollock v. Fla. Dep't of Highway Patrol, 882 So. 2d 928, 932 (Fla. 2004)); Georgia (Ratliff v. McDonald, 326 Ga. App. 306, 756 S.E.2d 569 (Ga. Ct. App. 2014)); Hawaii (Ruf v. Honolulu Police Dept., 89 Haw. 315, 972 P.2d 1081 (Haw. 1999)); Idaho (Ransom v. Garden City, 113 Idaho 202, 743 P.2d 70 (Idaho 1987)); Iowa (Kolbe v. State, 625 N.W.2d 721 (Iowa 2001)); Kansas (Fudge v. Kansas City, 239 Kan. 369, 720 P.2d 1093 (Kan. 1986); Kentucky (Gibson v. Hicks, 2012 Ky. App. LEXIS 125 (Ky. Ct. App. 2012); Maryland (Muthukumarana v. Montgomery County, 370 Md. 447, 805 A.2d 372 (Md. 2002)), Minnesota (Hage v. Stade, 304 N.W.2d 283 (Minn. 1981)); Missouri (Jungerman v. Raytown, 925 S.W.2d 202 (Mo. 1996)); Montana (Nelson v. State, 346 Mont. 206, 195 P.3d 293 (Mont. 2008)); Nevada (Coty v. Washoe County, 108 Nev. 757, 839 P.2d 97 (Nev. 1992)); New Hampshire (Wolfeboro Neck Prop. Owners Ass'n v. Town of Wolfeboro, 146 N.H. 449, 773 A.2d 633 (N.H. 2001); New York (Cuffy v. New York City, 69 N.Y.2d 255, 505 N.E.2d 937 (N.Y. 1987)); North Carolina (Stone v. North Carolina Dept. of Labor, 347 N.C. 473, 495 S.E.2d 711 (N.C. 1998)); Pennsylvania (Melendez v. Philadelphia, 320 Pa.Super. 59, 466 A.2d 1060 (Pa. 1983)); Rhode Island (Torres v. Damicis, 853 A.2d 1233 (R.I. 2004)); Barratt v. Burlingham, 492 A.2d 1219 (R.I. 1985)); South Carolina (Steinke v. South Carolina Dept. of Labor, 336 S.C. 373, 520 S.E.2d 142 (S.C. 1999)); South Dakota (Tipton v. Tabor, 567 N.W.2d 351 (S.D. 1997)); Tennessee (Luna v. White County., 2015 Tenn. App. LEXIS 525 (Tenn. Ct. App. June 29, 2015)); Texas (Vaquera v. Salas, 810 S.W.2d 456 (Tex. App. 1991)); Utah (Rollins v. Petersen, 813 P.2d 1156 (Utah 1991)); Virginia (Mpras v. Community Living Alternatives, 35 Va. Cir. 264, 1994 Va. Cir. LEXIS 156 (Va. Cir. Ct. 1994)); Washington (Oberg v. Dept. of Natural Resources, 114 Wash.2d 278, 787 P.2d 918 (Wash. 1990)); West Virginia (Allen v. Greenbrier County Sheriff's Dep't, 2013 W.Va. LEXIS 819 (W.Va. 2013)).
43. Cope v. Utah Valley State College, 342 P.3d 243, 246 (Utah 2014).
44. *DeShaney, supra note 24*, at 203.
45. Hillerby v. Town of Colchester, 167 Vt. 270, 273, 706 A.2d 446, 447 (Vt. 1997).
46. Gordon v. Bridgeport Housing Authority, 208 Conn. 161, 169, 544 A.2d 1185 (Conn. 1988).
47. Wallace v. Ohio Department of Corrections, 96 Ohio St. 3d 266, 278, 773 N.E.2d 1018, 1029 (Ohio 2002).

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