Washington's Special Relationship Exception to the Public Duty Doctrine

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WASHINGTON'S SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE

Abstract: The public duty doctrine states that in order for a person to recover tort damages from a governmental entity, the individual must prove that the governmental entity breached a duty owed to him or her particularly, and not just a breach of a duty owed to the public. The "special relationship" exception to the doctrine provides a mechanism for proving a particularized duty. The Washington Supreme Court has now restricted this exception. By restricting the exception, the court may inappropriately bar certain injured plaintiffs from recovery. The restriction may also violate Washington statutes abrogating governmental immunity by giving government defendants treatment not afforded private defendants. This Comment analyzes the new exception in light of a traditional tort duty analysis. The Comment concludes that a traditional tort duty analysis provides a better framework for assessing governmental duty in negligence actions.

The public duty doctrine originated as a principle for limiting the potentially widespread tort liability of governmental entities that followed the abolition of governmental tort immunity. Under the public duty doctrine, governmental entities owe the public a general duty to perform their offices, but a particularized duty to no one person. A governmental entity cannot be liable to a private party for failure to perform duties owed solely to the general public. Exceptions to the public duty doctrine recognize affirmative duties to certain persons, preventing the doctrine from granting complete governmental immunity.

The "special relationship" exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public. The scope of this exception has been a subject of continuing litigation in Washington.

In 1988 the Washington Supreme Court decided three cases, Taylor v. Stevens County, Honcoop v. State, and Meaney v. Dodd, which modified the special relationship exception to the public duty doctrine. These decisions curtailed the court's previous expansion of govern-

1. "Governmental entity" refers to both state and municipal governments.
2. The public duty doctrine appeared in the United States as early as 1856. South v. Maryland, 59 U.S. (18 How.) 396 (1856) (sheriff not liable for standing by while plaintiff was robbed).
mental liability in *J & B Development v. King County*.

In *J & B Development*, the court stated that a special relationship existed if there was direct contact between the government and the plaintiff, implicit assurances by the government, and justifiable reliance on the assurances by the plaintiff.

The recent cases reject liability based on implicit assurances, and create a new rule: governmental tort duty is now limited to situations involving direct contact, explicit assurances, and justifiable reliance.

This Comment considers the new rule's effects on persons injured by governmental negligence, and compares the results to those reached under a traditional tort duty analysis. The Comment concludes that a limited group of policy considerations motivated the court to restrict the special relationship rule. In cases outside the scope of these policies, the new rule may unduly restrict liability. In addition, the restriction of governmental liability under the new rule arguably violates Washington statutes abrogating governmental immunity. This Comment argues that problems inherent in the public duty doctrine and the special relationship exception could be alleviated by substituting a traditional tort duty analysis.

I. BACKGROUND

A. Origins and Development of the Public Duty Doctrine

Governmental tort immunity prevailed in Washington until 1961.10 Governmental immunity did not negate the existence of a tort duty; rather, it barred recovery for a breach of that duty.11 The Washington

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9. Taylor, 111 Wash. 2d at 166, 759 P.2d at 451; Honecoop, 111 Wash. 2d at 191–92, 759 P.2d at 1194; Meaney, 111 Wash. 2d at 180, 759 P.2d at 457.

10. Governmental immunity developed from the English doctrine of sovereign immunity which states that "the King can do no wrong" and liability will not attach despite damage resulting from the King's tortious behavior. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958) (quoting W. BLACKSTONE, COMMENTARIES (10th ed. 1887)). The doctrine was first introduced in the United States in 1812 and was soon adopted in most states. Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 538 (1983). Governmental immunity has now been abolished in most states. See id. at 540.

11. According to the Washington Supreme Court:

[The 'public duty doctrine' recognizes the existence of a tort, authorizes the filing of a claim against a municipality and also recognizes applicable liability subject to some limitations. The concept of 'sovereign immunity,' while recognizing the existence of a tort, denies all liability within the limits of the immunity.] *J & B Dev. Co.*, 100 Wash. 2d at 303, 669 P.2d at 471.
Specal Relationship Exception

legislature abolished state governmental immunity in 1961. The legislature abolished governmental immunity for political subdivisions of the state in 1967. The Washington statutes render the state and its subdivisions liable for their tortious acts to the same extent that a private person or corporation would be liable. Thus, the statutes do not create any new causes of action.

Governments sometimes perform unique functions not seen in the private sector. As a result, the Washington statutes may be ambiguous about what tort duty the government would owe if it were a private person. A governmental entity owes a general duty to all persons to perform its offices. The Washington Supreme Court has used the public duty doctrine as a tool for determining whether a governmental entity owes a person an actionable duty distinct from the general duty. In addition to the above functional purpose of the public duty doctrine, the Washington Supreme Court has also cited two more traditional justifications. First, the doctrine protects state resources from tort damage awards. Second, the public duty doctrine, like governmental immunity, allows government officials to act without fear of liability.

12. WASH. REV. CODE § 4.92.090 (1987) provides: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

13. WASH. REV. CODE § 4.96.010 (1987) provides in part:

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


16. An example of a unique governmental function not provided by the private sector is the granting of building permits. "The County is the only governmental body empowered to grant or deny building permits." J & B Dev. Co., 100 Wash. 2d at 306, 669 P.2d at 473.

17. Id. at 304-05, 669 P.2d at 472; see also Comment, A Unified Approach to State and Municipal Tort Liability in Washington, 59 WASH. L. REV. 533, 542 (1984).


19. This justification for the public duty doctrine may violate Washington statutes abolishing governmental immunity. These statutes require that liability be imposed upon a negligent governmental entity as if it were "a private person or corporation." WASH. REV. CODE §§ 4.92.090, 4.96.010 (1987). A private defendant's ability to pay is not a legally recognized factor in a private negligence suit. Therefore, this justification violates statutory law by giving the government special treatment not afforded private defendants. See generally, Note, State Tort Liability for Negligent Fire Inspection, 13 COLUM. J.L. & SOC. PROBS. 303, 344-46 (1977).

20. One commentator has argued that this justification is unpersuasive and actually supports unlimited governmental liability:

The government should consider whether the benefits of the government program outweigh its total costs, including the cost of potential tort liability. If the cost of tort
A person who brings a tort action against a governmental entity must be able to prove that he or she falls within an exception to the public duty doctrine. The Washington Supreme Court has recognized four exceptions under which governmental entities owe particularized duties to individuals. Prior to Taylor v. Stevens County, Honcoop v. State, and Meaney v. Dodd, these exceptions were a means of avoiding the potentially harsh results of the public duty doctrine. The exceptions had almost entirely consumed the public duty doctrine, so that the doctrine seldom barred recovery against a governmental entity.

liability is not taken into account, then the government may undertake programs in which the actual cost to the public outweighs the benefits derived.

Comment, supra note 17, at 542–43.

21. The public duty doctrine differs from discretionary immunity, another doctrine frequently relied upon by governmental entities to avoid tort liability. Discretionary immunity shields governmental entities from tort liability stemming from basic policy-making decisions and is an exception to Washington's waiver of governmental immunity. See King v. Seattle, 84 Wash. 2d 239, 246, 525 P.2d 228, 231–33 (1974); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 255, 407 P.2d 440, 445 (1965); Comment, supra note 17, at 533–37.

22. The four exceptions are: Clear legislative intent; failure to enforce; rescue doctrine; and special relationship. See generally Bailey v. Town of Forks, 108 Wash. 2d 262, 268, 737 P.2d 1257, 1260 (1987).

The "clear legislative intent" and "failure to enforce" exceptions impose a particularized duty required by statute. Under the "clear legislative intent" exception, a governmental entity owes a particularized duty to a plaintiff who is a member of a class protected by statute. Halvorson v. Dahl, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978) (plaintiff's decedent who was killed in a hotel fire was within the clear legislative intent exception because housing code expressly protected building occupants).

Under the "failure to enforce" exception a government agent responsible for enforcing a statute intended to protect a class, of which the plaintiff is a member, owes a duty to the plaintiff to enforce the statute. Mason v. Bitton, 85 Wash. 2d 321, 325–26, 534 P.2d 1360, 1362–64 (1975).

The "rescue doctrine" states that a governmental entity must use reasonable care after warning or coming to the aid of a person. Brown v. MacPherson's, Inc., 86 Wash. 2d 293, 299, 545 P.2d 13, 18 (1975). The duty is based on the tort principle that a defendant who has promised to warn or rescue a plaintiff induces detrimental reliance on the part of the plaintiff, causing the plaintiff to worsen his or her situation by not seeking help elsewhere. RESTATEMENT (SECOND) OF TORTS § 323(a) (1965).

Under the "special relationship" exception, a governmental duty results from a more extensive relationship with a particular individual than with other members of the general public. See infra text accompanying notes 28–42.


27. "We have almost universally found it unnecessary to invoke the public duty doctrine to bar a plaintiff's lawsuit." Id. at 266, 737 P.2d at 1259; see also, Note, Municipal Liability, 19 GONZ. L. REV. 727, 730 (1983/84).
B. Development of the Special Relationship Exception

Taylor,28 Honcoop,29 and Meaney30 have significantly altered the public duty doctrine by narrowing the special relationship exception to the public duty doctrine. Governmental liability in J & B Development was based, in part, on the government’s implicit assurances that the plaintiff had complied with building codes.31 In J & B Development, assurances were inferred from the government’s building inspection and issuance of a building permit.32 Taylor and Meaney overruled J & B Development.33 Taylor, Honcoop, and Meaney all hold that the special relationship exception requires express, not implied, assurances from the government.34

I. Pre-1988 Special Relationship Rule

J & B Development imposed a significant risk of liability on governmental entities by holding that a “special relationship” was created when there was direct contact between the plaintiff and the governmental entity, and the plaintiff justifiably relied upon assurances which the governmental entity had made to him or her.35 In J & B Development, King County issued a building permit to a developer.36 The approving official and a later inspection failed to detect that the building plans did not comply with county setback requirements.37 The county later suspended the developer’s building permit after it was discovered that the building violated county setback requirements.38

The court found a special relationship between the developer and the county. The direct contact requirement was met because the developer “dealt directly with the County through its agents.”39 In addition, the developer had justifiably relied on assurances implied through the issuance of a building permit and a successful building inspection.40 The court reasoned that permit and inspection require-

32. Id.
33. Taylor, 111 Wash. 2d at 168, 759 P.2d at 452; Meaney, 111 Wash. 2d at 180, 759 P.2d at 458.
34. Honcoop, 111 Wash. 2d at 191-92, 759 P.2d at 1194 (citing the new rule stated by Taylor and Meaney).
36. Id. at 301, 669 P.2d at 470.
37. Id. at 301-02, 669 P.2d at 470-71.
38. Id. at 302, 669 P.2d at 471.
39. Id. at 307, 669 P.2d at 473.
40. Id. at 306-07, 669 P.2d at 472-73.
ments created both a general duty of care to the public and a particularized duty of care to builders. 41

2. New Special Relationship Rule

In contrast to the special relationship rule provided in J & B Development, the new rule, as stated in Taylor, Honcoop, and Meaney, applies the exception only when there is direct contact between the injured plaintiff and the governmental entity, and the plaintiff justifiably relies on express, not implied, assurances from the governmental entity. 42

C. Facts of Taylor, Honcoop, and Meaney

I. Taylor v. Stevens County

In Taylor v. Stevens County, 43 the Washington Supreme Court held that under the public duty doctrine the county owed no actionable duty to the plaintiffs, purchasers of a defective house, to issue a valid building permit. 44 A county inspector had issued a building permit to the sellers of the house, despite numerous existing building code violations. 45 The court overruled J & B Development, stating that under the previous special relationship rule, local governments were vulnerable to unlimited liability. 46 According to the court, building inspections and permits authorize construction, but do not imply that plans submitted are in compliance with all applicable codes. 47

The court cited several policy reasons for imposing the duty of compliance on individuals instead of on governmental entities. 48 First, the

41. Id. at 307, 669 P.2d at 473.
42. Under the new rule:
   A special relationship triggers an actionable duty where: (1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) give rise to justifiable reliance on the part of the plaintiff.
44. Id. at 161, 759 P.2d at 448.
45. Id. at 161–62, 759 P.2d at 448–49.
46. Id. at 170–71, 759 P.2d at 453.
47. “Building permits and building code inspections only authorize construction to proceed; they do not guarantee that all provisions of all applicable codes have been complied with.” Id. at 167, 759 P.2d at 452.
48. The court actually cited five reasons. Id. at 168–71, 759 P.2d at 452–53. For purposes of discussion, the reasons have been organized differently here.
primary purpose of building permits and building code inspections is to ensure consistent compliance with construction, zoning, and land use ordinances.\textsuperscript{49} The approval of construction plans and satisfactory inspections do not absolve a builder from the legal obligation to comply with statutes.\textsuperscript{50} Second, as a result of budgetary and personnel constraints, it is unreasonable to place the burden of compliance on local governmental entities.\textsuperscript{51} Third, imposing liability on individuals for noncompliance with building codes is consistent with the state’s zoning vested rights doctrine.\textsuperscript{52}

The supreme court acknowledged that it was engaged in an analysis of public policy considerations, previously unexamined in \textit{J & B Development}, when determining the existence of a duty.\textsuperscript{53} As a matter of policy, the Washington Supreme Court determined that a governmental entity responsible for enforcing compliance with building codes should not be liable for noncompliance with those codes.\textsuperscript{54}

2. \textit{Honcoop v. State}

In \textit{Honcoop v. State},\textsuperscript{55} dairy operators brought a negligence action against the State of Washington for losses suffered when their cattle became infected with brucellosis.\textsuperscript{56} The plaintiffs asserted that the director of the state Department of Agriculture had a duty to warn them of brucellosis in cattle imported from Idaho. The plaintiffs claimed that this duty was based on the “clear legislative intent,”\textsuperscript{57} “failure to enforce,”\textsuperscript{58} and “special relationship” exceptions to the public duty doctrine.

The court held that the state owed no duty to the plaintiffs under any of the exceptions, including the special relationship exception.\textsuperscript{59}

\textsuperscript{49} \textit{Id.} at 168–69, 759 P.2d at 452.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 169, 759 P.2d at 452.
\textsuperscript{52} \textit{Id.}\ The zoning vested rights doctrine holds that a permit holder’s right to develop land is protected from later zoning changes only if at the time the permit application was granted the application complied with all zoning and building codes. Apparently the court used this doctrine for comparative purposes to indicate that no rights accompany a permit unless the holder has complied with the applicable law. \textit{See id.}
\textsuperscript{53} \textit{Id.} at 168, 759 P.2d at 452.
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} \textit{Id.} at 188–89, 759 P.2d at 1190–91.
\textsuperscript{56} \textit{Id.} at 184–85, 759 P.2d at 1190–91. “Brucellosis is a highly contagious bacteriological disease that infects cattle and humans.” \textit{Id.} at 184, 759 P.2d at 1190.
\textsuperscript{57} \textit{Id.} at 188–89, 759 P.2d at 1192–93.
\textsuperscript{58} \textit{Id.} at 189–91, 759 P.2d at 1193–94.
\textsuperscript{59} \textit{Id.} at 191–93, 759 P.2d at 1194–95.
\textsuperscript{60} \textit{Id.} at 194, 759 P.2d at 1195–96.
Although seven of the eight plaintiffs had allegedly been in direct contact with the state, none of the plaintiffs received express assurances from the state that would, according to the court, give rise to justifiable reliance.  

3. Meaney v. Dodd

In Meaney v. Dodd, the plaintiff submitted an application to Skagit County for a sawmill permit. He indicated that the proposed sawmill would create a minimal increase in noise. However, he did not inform the county of the specific level of noise expected. The plaintiff constructed the sawmill, but was forced to stop operations when it was discovered that the mill did not comply with county noise regulations. He then sued Skagit County to recover losses incurred by the forced closure of the mill.

The Washington Supreme Court held that under the new special relationship rule stated in Taylor, Skagit County was not liable for two reasons. First, the county did not expressly assure the plaintiff that the sawmill would comply with noise regulations. Second, the plaintiff's reliance was unjustified because the plaintiff had not received express assurances. The court stated that a plaintiff's reliance is justifiable only if the government intended the plaintiff to rely on information produced by the government in response to a “direct inquiry.”

61. "Mere allegations that the State failed to provide adequate information or that the State failed to explore every possible risk or contingency is not sufficient to satisfy the assurance prong of the special relationship test." Id. at 192, 759 P.2d at 1195.
63. Id. at 175, 759 P.2d at 456.
64. Id.
65. Id.
66. Id. at 176, 759 P.2d at 456.
67. The Washington Court of Appeals had held that the county was liable because the issuance of a special use permit “inherently implies that the issuing agency has verified that the proposed use complies with the applicable provisions of the county code.” Meaney v. Dodd, 47 Wash. App. 386, 390, 735 P.2d 100, 102 (1987), rev'd. 111 Wash. 2d 174, 759 P.2d 455 (1988).
69. "We conclude the County did not give any express assurance that the sawmill would comply with noise regulations upon which the Dodds could justifiably rely." Meaney, 111 Wash. 2d at 181, 759 P.2d at 458-59.
70. Id.
71. Id. at 180, 759 P.2d at 458.
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D. Rationale for New Interpretation of the Special Relationship Exception

The Washington Supreme Court attempted in Taylor, Honcoop, and Meaney to prevent state and local governments from being, in effect, insurers against certain plaintiffs' economic losses.\(^72\) J & B Development had expanded governmental liability in the area of building inspections and permits, placing the cost of noncompliance with building and zoning regulations on governmental entities.\(^73\) The court made a policy decision to narrow the special relationship exception, placing the burden of noncompliance with regulations on the parties responsible for complying with the regulations.\(^74\)

II. ANALYSIS

A. Effect of New Rule on Persons Injured by Governmental Negligence

An analysis of the new special relationship exception's effect on different types of plaintiffs will provide a framework for discussion of the new rule. Application of the new rule will be compared with application of a traditional tort duty analysis. Results of the rule's application will be analyzed in light of underlying policy concerns and compared with results reached under a traditional tort duty analysis.

I. Homeowners Physically Injured as a Result of Faulty Construction

A homeowner who is physically injured by faulty construction approved through a building inspection will not be able to meet the three elements of the new special relationship rule. As a result, homeowners probably will be barred from recovery against the governmental entity that conducted the building inspection. Homeowners often do not establish "special relationships" with building inspectors within the meaning of the new rule. A homeowner who does not meet or speak with a building inspector neither establishes "direct contact" nor receives "express assurances."\(^75\) Because these elements of the

\(^72\) "[B]uilding codes are designed to protect the public safety, health and welfare, not to protect individuals from economic loss caused by public officials while carrying on public duties." Taylor, 111 Wash. 2d at 169, 759 P.2d at 452.

\(^73\) See id. at 166–68, 759 P.2d at 451–52.

\(^74\) See id. at 168–72, 759 P.2d at 452–54.

\(^75\) Because Taylor, Honcoop, and Meaney narrowed the special relationship exception, assurances cannot be implied from the fact that a building inspection failed to disclose any defects. Taylor, 111 Wash. 2d at 167, 759 P.2d at 451–52.
special relationship exception are not met, the third element—justifiable reliance—will also fail.\textsuperscript{76}

Even if a homeowner could establish "direct contact" and "express assurances," "justifiable reliance" still may not follow under the new rule. In \textit{Meaney}, the court indicated that justifiable reliance is to be measured from the perspective of the governmental entity—that is, the plaintiff's reliance is justifiable only if the governmental entity intended to induce reliance.\textsuperscript{77} If "justifiable reliance" is assessed from the government's perspective, the government may freely assert it did not intend contact with the plaintiff to induce reliance.\textsuperscript{78}

The denial of a governmental duty in homeowner cases follows from the new special relationship exception, and is aligned with policy considerations motivating the court to restrict the exception. The court restricted the rule largely to prevent governmental entities from being held as insurers against builders' economic losses resulting from the builders' failure to comply with regulations.\textsuperscript{79} The same policy reasons apply equally to lawsuits brought by physically injured homeowners because the duty to ensure compliance with building regulations is still on the builder, not the governmental entity. A physically injured homeowner, thus, could probably recover tort damages only from the builder.\textsuperscript{80}

\textsuperscript{76} Moreover, homeowners would have difficulty recovering under other exceptions, such as the "clear legislative intent" exception, because the Washington Supreme Court has held that state building inspections are intended to benefit the general public, and thus no duty emanates to individual members of the public. \textit{Id.} at 164–66, 759 P.2d at 450–51. \textit{But see} Halvorson \textit{v. Dahl}, 89 Wash. 2d 673, 676–77, 574 P.2d 1190, 1192–93 (1978) (city had an affirmative duty to individuals under the "clear legislative intent" exception because the housing code showed a "clear intent" to protect building occupants).

\textsuperscript{77} "It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound." \textit{Meaney v. Dodd}, 111 Wash. 2d 174, 180, 759 P.2d 455, 458 (1988) (specifically overruling the rule established by \textit{J & B Dev. Co. v. King County}, 100 Wash. 2d 299, 306, 669 P.2d 468, 472–73 (1983), which measured justifiable reliance from the plaintiff's perspective).

\textsuperscript{78} Whether a governmental entity could "freely assert" that it did not intend to induce justifiable reliance ultimately will depend on which party bears the burden of proving, or disproving, justifiable reliance.

The court's statement of justifiable reliance in \textit{Meaney} may hinder implementation of Washington statutes abrogating governmental immunity by preventing imposition of liability in situations where a private individual or corporation would be liable. \textit{See infra} text accompanying notes 97–102.

\textsuperscript{79} \textit{Taylor}, 111 Wash. 2d at 168–69, 759 P.2d at 452.

\textsuperscript{80} An injured homeowner could base his or her suit against the builder on a negligence theory. \textit{See Prosser and Keeton on the Law of Torts} § 104A, at 722 (W. Keeton 5th ed. 1984).
In cases involving physically injured homeowners, the new special relationship rule and a traditional tort duty analysis will produce the same result, but the tort analysis provides a more reliable process for reaching that result. The same result would be reached under a traditional tort duty analysis because the party responsible for building code compliance, the builder, is in the best position to foresee and avoid possible injury resulting from noncompliance.

A traditional tort duty analysis focuses on foreseeability of injury and proximate cause.\(^{81}\) In contrast, the elements of the new special relationship rule do not directly consider foreseeability or ability to avoid injury;\(^{82}\) rather, a mechanical application of the rule happens to lead to the right result. Also, a traditional tort duty analysis uses the same standard of care in negligence suits involving government and private defendants—that of a reasonable person. Thus, a traditional tort duty analysis allows full compliance with Washington statutes abrogating governmental immunity by applying the same tort analysis to both private and government defendants.\(^{83}\)

2. Unrelated Third Parties Physically Injured by Governmental Negligence

Unrelated third parties\(^{84}\) injured by governmental negligence arguably also will be unable to recover from the government under the new special relationship exception. Recovery will be denied under the new rule because the elements of the new rule do not reflect policy concerns involved when the plaintiff is an unrelated third party. Instead, the elements of the new rule stem from a preexisting privity relationship between the plaintiff and the government. A traditional tort duty analysis supports recovery by allowing the court to consider factors pertinent to each case.

In *Campbell v. City of Bellevue*,\(^{85}\) the plaintiff’s wife was killed after a city inspector failed to disconnect a dangerous electrical current.

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82. It will be foreseeable to governmental entities that some plaintiffs who have been in direct contact and received express assurances from them would be injured by negligent acts. “Direct contact” and “express assurances” are not always an accurate measure of foreseeability, however, since some persons will be foreseeably injured by governmental negligence despite their inability to establish these two elements. See infra text accompanying notes 84–96.
83. See infra text accompanying note 114.
84. For purposes of this Comment, “unrelated third parties” are persons without a “business-type” relationship to the governmental entity prior to suffering injury. See infra text accompanying notes 92–93.
85. 85 Wash. 2d 1, 530 P.2d 234 (1975) (plaintiff was able to prove that the defendant owed a duty under the pre-1988 special relationship rule).
The plaintiff had phoned the city electrical inspector about a “hot current” running through a creek on the plaintiff’s property. The inspector found faulty wiring in a neighbor’s underwater creek lighting and left a notice on the neighbor’s door, but failed to shut off the electricity. The plaintiff’s wife was subsequently electrocuted while trying to pull her son from the creek.

The plaintiff in *Campbell* would have difficulty meeting all three elements of the new special relationship exception. Because the plaintiff contacted the city about the dangerous condition, the first element, direct contact, would be met. However, the second element, express assurances, would fail unless the inspector expressly told the plaintiff that he or she would rectify the problem. Finally, under the new special relationship rule, the plaintiff’s reliance would not be “justifiable” because the inspector did not promise to remedy the dangerous condition.

The effect of the new special relationship rule in this case extends beyond the policy considerations underlying the rule. The court narrowed the exception primarily to prevent economically injured plaintiffs from holding governmental entities liable in tort as “insurers” against the plaintiffs’ noncompliance with codes. The elements of the new special relationship rule—“direct contact,” “express assurances,” and “justifiable reliance”—are thus intrinsically related to a “business” type of plaintiff-government relationship, such as that involved in a permit application. “Unrelated” plaintiffs will often be unable to meet the elements of the new special relationship exception because by definition they lack a “business” relationship with the government. This result is unfortunate because the court probably did not

86. *Id.* at 3, 530 P.2d at 235.
87. *Id.* at 3–4, 530 P.2d at 236.
88. *Id.* at 4, 530 P.2d at 236.
89. J & B Dev. Co. v. King County, 100 Wash. 2d 299, 307, 669 P.2d 468, 473 (1983) (stating that the direct contact element was met in *Campbell*).

The court did not make clear in *Taylor, Honcoop*, or *Meaney* whether an oral promise from a government official would meet the “express assurances” requirement, or if the official must be specifically authorized to give such assurances.
91. To avoid this result a court might attempt to find a statutory duty through the “clear legislative intent” exception. If, however, a statute or ordinance did not purport to protect a specified class of people that included the plaintiff’s decedent, there would be no recovery from the government. See *supra* note 22.

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seek to limit physically injured, unrelated third parties from recovering in tort against governmental entities.\textsuperscript{93}

As shown by the \textit{Campbell} scenario, the new special relationship rule restricts governmental liability without support from policy considerations other than those raised in \textit{Taylor}.\textsuperscript{94} A traditional tort duty analysis produces a different result—the defendant governmental entity owes the plaintiff a duty. Duty results if the plaintiff can establish that injury was foreseeable and the defendant proximately caused the injury.\textsuperscript{95} In \textit{Campbell}, the government agent could best foresee and prevent the danger of electrocution.\textsuperscript{96} Traditional tort duty analysis produces a better result because the denial of a duty under the special relationship rule lacks substantive justification.

\textbf{B. The New Special Relationship Exception May Prevent the Finding of a Duty Mandated by Statute}

Many states have abandoned the public duty doctrine because the doctrine is seen as a revival of governmental immunity.\textsuperscript{97} Because Washington courts have frequently used exceptions to the public duty doctrine to permit negligence suits, the public duty doctrine in Washington prior to 1988 did not bar otherwise valid claims, as would the doctrine of governmental immunity. However, in some situations the new special relationship exception will give the government preferential treatment not afforded private persons. This result contravenes statutes abrogating governmental immunity, in which the legislature indicated that governmental tort liability should not be affected by the defendant’s status as a governmental entity.\textsuperscript{98}

\textsuperscript{93} See supra text accompanying notes 72–74.
\textsuperscript{94} See supra text accompanying notes 48–54.
\textsuperscript{95} Chambers-Castanes v. King County, 100 Wash. 2d 275, 292, 669 P.2d 451, 461 (1983) (Utter, J., concurring in the result).
\textsuperscript{96} Although the plaintiff in \textit{Campbell} undoubtedly called the electrical inspector because of the danger he foresaw resulting from the “hot” current, the plaintiff could not legally disconnect his neighbor’s electricity. For a discussion of government police powers and the special relationship exception, see generally Note, Leake v. Cain: Abrogation of the Public Duty Doctrine in Colorado?, 59 U. COLO. L. REV. 383, 394–99 (1988).
\textsuperscript{98} J & B Dev. Co. v. King County, 100 Wash. 2d 299, 310–11, 669 P.2d 468, 475, (1983) (Utter, J., concurring in the result); see supra notes 12–13.
The new special relationship exception may exclude governmental liability where a private defendant would be held liable. This exclusion is most evident where the plaintiff is an unrelated third party unable to meet the restrictive requirements of the new special relationship exception. The Washington Supreme Court, one year prior to creating the new rule, expressed concern that the public duty doctrine and its exceptions possibly run counter to the legislature's intent. The court's concern is made even more compelling by the subsequent restriction of the special relationship exception. In essence, the court has broadened the impact of the public duty doctrine by restricting the special relationship rule. With a more narrow and restricted interpretation of the rule, little functional distinction exists between the public duty doctrine's presumption of "no duty" and governmental immunity from suit.

Application of a traditional tort duty analysis, in contrast to the public duty doctrine, would not perpetuate governmental immunity. Under a traditional tort duty analysis, the same duty analysis would be applied to both private and government defendants. Thus, a traditional tort duty analysis would allow courts to fully comply with Washington statutes by eliminating focus upon the status of the defendant.

C. The Court Should Abandon the Public Duty Doctrine and Substitute a Traditional Tort Duty Analysis

The public duty doctrine and the new special relationship exception inadequately respond to policy considerations essential to negligence suits between governmental entities and private parties. First, the public duty doctrine's underlying premise of a general duty to all people unnecessarily diverts focus from the real issue—whether the government owes the plaintiff a particularized duty. Second, a duty

99. See supra text accompanying notes 92–93.
100. The Washington Supreme Court stated:
In effect, the public duty doctrine places in this court's hands the task of determining as a matter of 'public policy' when a duty of care exists on the part of public employees. This raises the difficult question as to whether affording special protection to agents of the government violates the Legislature's directive, which requires governmental bodies to be liable in tort 'to the same extent as if they were a private person or corporation.' Bailey v. Town of Forks, 108 Wash. 2d 262, 267, 737 P.2d 1257, 1259–60 (1987).
102. Comment, supra note 17, at 537.
103. As Justice Utter noted:
analysis restricted by the elements of the new special relationship rule—"direct contact," "express assurances" and "justifiable reliance"—fails to address the fundamental issue of whether the government should owe a duty. Finally, application of the new rule may deny recovery to some plaintiffs because of the defendant's status as a governmental entity.  

A traditional tort duty analysis provides a better framework for assessing governmental duty, because a traditional tort duty analysis promotes consideration of whether the government should owe a duty in a given situation. Policy considerations are implicit within an analysis of whether the government should owe a duty. Under the special relationship rule, policy considerations are limited to concerns involved in permit cases. Under a traditional tort duty analysis, policy considerations stem from the facts of each case.

Justice Utter, a frequent critic of the court's use of the public duty doctrine, has suggested that the same duty analysis should be applied to both private and government defendants. When possible, an analogy should be drawn between similar functions performed in the private and public sectors. When a governmental entity performs a unique function not paralleled in the private sector, such as the issuance of permits, courts should focus duty analysis on policy concerns pertinent to the "unique public function."  

A court applying a traditional tort duty analysis in cases involving the negligent issuance of a permit would still hold that the builder, and

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The basic question is simple: whose duty is it to ensure that construction projects meet the standards of a local building code, the builder or the government? When we conclude there is no duty on the part of the County then it follows that the duty of compliance is on the shoulders of the builder alone. Taylor v. Stevens County, 111 Wash. 2d 159, 172–73, 759 P.2d 447, 454 (1988) (Utter, J., concurring); see also J & B Dev. Co. v. King County, 100 Wash. 2d 299, 309, 669 P.2d 468, 474 (1983) (Utter, J., concurring in the result); Note, supra note 27, at 735; Comment, supra note 17, at 542.  

104. See supra text accompanying notes 97–102.  
105. See supra text accompanying notes 95–96.  
106. "The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff’s interests are entitled to legal protection against the defendant's conduct.'" Taylor, 111 Wash. 2d at 168, 759 P.2d at 452 (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 357 (W. Keeton 5th ed. 1984)).  
107. See supra text accompanying notes 48–54.  
108. J & B Dev. Co., 100 Wash. 2d at 310, 669 P.2d at 475 (Utter, J., concurring in the result).  
110. J & B Dev. Co., 100 Wash. 2d at 311, 669 P.2d at 475 (Utter, J., concurring in the result).
not the governmental entity, was responsible for ensuring compliance with applicable codes and regulations.\textsuperscript{111} The builder would retain the duty of compliance because a consideration of pertinent policy factors has resulted in a determination that permits simply authorize construction to proceed, and do not ensure against noncompliance.\textsuperscript{112}

Traditional tort duty analysis, unlike the public duty doctrine and the special relationship exception, also allows the finding of a duty when the government negligently causes injury to an unrelated third party. Under a traditional tort duty analysis, an unrelated third party can recover if the government \textit{should} owe the plaintiff a duty of reasonable care. Whether the government should owe the plaintiff a duty depends on factors such as the government's ability to foresee injury, and its ability to avoid harm.\textsuperscript{113} A traditional tort duty analysis allows unrelated third parties an opportunity to prove the government owed them a duty. Under the new special relationship rule, the existence of a duty is prohibited through a mechanical application of a permit-oriented test.

A traditional tort duty analysis also avoids problems inherent in using a separate duty analysis for private and government defendants. Under a traditional tort duty analysis, the same duty analysis applies to all defendants. Thus, the government's status becomes irrelevant. By applying the same analysis to private and government defendants, courts will fully comply with Washington statutes mandating that no distinction be made between private and government defendants.\textsuperscript{114}

Abrogation of the public duty doctrine would not alter analysis under the other three exceptions to the doctrine. The "clear legislative intent" and "failure to enforce" exceptions recognize a duty created by statute.\textsuperscript{115} A statutory mandate is the same whether analyzed with or without the label of "public duty doctrine." The third exception, the "rescue doctrine," is a restatement of a traditional principle of tort and similarly applies regardless of the public duty doctrine.\textsuperscript{116}

A traditional tort duty analysis is a better analytical tool for determining governmental duty, because under a traditional tort duty analysis the primary focus is on whether the government \textit{should} owe a

\textsuperscript{112} Id.
\textsuperscript{114} See supra notes 97-102 and accompanying text.
\textsuperscript{115} See supra note 22.
\textsuperscript{116} \textsc{Restatement (Second) of Torts} § 323(a) (1965).
duty. Encompassed within an analysis of whether the government should owe a duty is an analysis of policy considerations pertinent to the type of function the government is performing. Finally, a traditional tort duty analysis allows full compliance with Washington statutes abrogating governmental immunity by applying the same duty analysis to all defendants.

III. CONCLUSION

In Taylor, Honcoop, and Meaney, the Washington Supreme Court created an exception to the public duty doctrine that is fraught with inherent problems. The "direct contact," "express assurances," and "justifiable reliance" elements of the new special relationship exception create an unduly narrow rule in cases involving injury to unrelated third parties. By limiting the special relationship exception to situations involving direct contact and express assurances, many unrelated third parties face exclusion from recovery merely because they have no relation to the governmental entity prior to suffering injury. Because the direct contact, express assurances, and justifiable reliance elements of the new rule reflect problems limited to permit cases, it may be easier for permit seekers to meet the requirements of the new special relationship rule than it will be for unrelated third parties. Plaintiffs who are economically, rather than physically, injured may have been able to prevent their losses through compliance with government regulations. Unrelated third parties, on the other hand, have no such opportunity. In addition, the disparate treatment of private and government defendants under the new rule arguably violates Washington statutes abolishing governmental immunity which require that no distinction be made based on the status of the defendant.

Traditional tort duty analysis provides a better mechanism for determining governmental duty by focusing on whether the governmental entity should owe a duty given the facts of the case. By applying a traditional tort duty analysis to government defendants, courts will use the same duty analysis in cases involving both private and government defendants, thus complying with Washington statutes. The Washington Supreme Court should abandon its use of the public duty doctrine and its exceptions and instead rely on a traditional tort duty analysis to determine governmental duty.

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