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THE UNCERTAIN SCOPE OF SOVEREIGN IMMUNITY IN WASHINGTON AFTER SAVAGE V. STATE

Kristi Anderson Bjornerud

Abstract: In a recent decision, Savage v. State, the Washington Supreme Court declined to extend a parole officer's personal qualified immunity to the State where the plaintiff alleged negligent supervision of a parolee. This Note examines the effects of the Savage decision on the scope of sovereign immunity in Washington. It argues that the court has needlessly confused the boundaries of sovereign immunity, and should act either to abolish all judicially created limits on state liability, or create a clear test to determine under what circumstances an underlying immunity will be extended to a government employer sued on a respondeat superior theory of liability.

The Washington Supreme Court, in Savage v. State, recently refused to extend the personal qualified immunity enjoyed by parole officers to the state where the State had been sued on a respondeat superior theory of liability. Briefly, the facts of the case were as follows: Martin Schandel raped Margaret Savage in July 1985. At the time of the rape, Schandel had been on parole for three months for an underlying conviction of second degree assault while armed with a deadly weapon. Schandel was convicted of the rape. Savage sued the Washington State Department of Corrections. She alleged negligent supervision of a parolee, both directly and on a respondeat superior theory of liability. Savage did not sue the parole officers assigned to supervise the parolee.

The trial court refused to instruct the jury on whether the parole officers enjoyed immunity and on the extension of that immunity to the

2. Id. at 447, 899 P.2d at 1277.
4. Savage, 127 Wash. 2d at 438 n.2, 899 P.2d at 1272 n.2. This Note assumes that Savage sued the State for its independent negligent acts in supervising its parole officers and on a respondeat superior basis for the negligent acts of its parole officers in supervising the parolee. This assumption is based on the fact that the State can supervise a parolee only through its parole officers and therefore can be liable for that supervision only vicariously. Additionally, the larger entity known as "the state" is responsible for the statutes, rules, and regulations that parole officers must follow while supervising parolees. Therefore, any negligence associated with making sure that parole officers are complying with those statutes, rules, and regulations can only be attributed to the State independently. Whether vicarious liability should be applied to the State at all, given that the State only can act through its employees, is beyond the scope of this Note.
5. Id.
State. The jury returned a verdict for Savage. The jury verdict did not indicate to what extent the State was held liable on a respondeat superior theory and to what extent it was held liable for its own acts. The trial court denied the State’s motions for a new trial and for judgment notwithstanding the verdict and entered judgment on the verdict for Savage in the amount of $204,752.

The Washington Court of Appeals reversed, holding that the trial court’s refusal to instruct the jury that the State could only be held liable for the actions of its parole officers if those actions were not protected by the officer’s personal qualified immunity was prejudicial error. However, the court of appeals held that the trial court correctly denied the State’s motion for judgment notwithstanding the verdict because it found that there was enough evidence of the State’s own independent negligent acts to sustain a verdict against it on that ground. The court remanded for a new trial. On review, the Washington Supreme Court reversed and reinstated the trial court’s judgment, holding that a parole officer’s personal qualified immunity should not be extended to the State.

The Savage case is significant because it departed from a long line of precedent in Washington State that extended various underlying employee immunities to the state employer where the policy supporting the underlying immunity also supported the extension of that immunity. In departing from established precedent in order to achieve the result in Savage, the supreme court undermined the foundation of sovereign immunity and blurred the boundaries of what was already a confusing body of law. In addition, Savage may be read as overturning several cases that had previously protected the state and other government entities from tort liability under specific circumstances. Finally, the court

6. Id. at 491–92, 864 P.2d at 1014.
7. Savage v. State, No. 86-2-15724-7, 1992 WL 609131, at *1 (Wash. Super. Ct. Feb. 10, 1992). The jury found Savage 20% contributorily negligent. It appears that the plaintiff convinced her attacker to leave her home before the rape occurred. However, the plaintiff subsequently neglected to lock her doors, allowing the attacker to gain entrance when he returned later the same night. This may be the basis of the jury finding of contributory negligence. The jury deliberated for three and one half days before returning a verdict in the amount of $204,752.
8. Savage, 127 Wash. 2d at 438, 899 P.2d at 1272.
11. Id. at 493, 864 P.2d at 1015.
12. Id. at 498, 864 P.2d at 1017.
could have reached the same result without disturbing the boundaries of sovereign immunity in this state.

This Note begins with an introduction to the facts of Savage v. State. Part I describes the framework of Washington’s sovereign immunity doctrine as it existed before the Savage decision. Part II examines how Savage departs from previous Washington law, and how the case confuses the law of sovereign immunity in this state. Part III addresses the negative consequences of the Savage decision—not only for state, county, and municipal governments, but for private corporations as well. Finally, part IV argues that in order to clarify the scope of sovereign immunity in Washington State, the Washington Supreme Court either should abolish all judicially created limitations on state liability, or devise a clear test to determine under what circumstances underlying immunities will be extended to governmental employers. This test should fit within the boundaries of sovereign immunity as they existed before Savage. Only then will the law provide a clear picture of when and how the state will be liable in tort.

I. THE FRAMEWORK OF WASHINGTON’S SOVEREIGN IMMUNITY DOCTRINE BEFORE SAVAGE V. STATE

The starting place for a discussion of sovereign immunity begins with the English monarchy. The principle that the King was infallible dates back almost 600 years and has traditionally protected the sovereign from suit. The theory of sovereign immunity was adopted initially in American law based on the notion that the sovereign creates both the law and the rights that the law protects. This notion is embodied in the U.S. Supreme Court’s declaration that “there can be no legal right as against the authority that makes the law on which the right depends.” The doctrine of governmental immunity from suit has now been either partially or completely abolished in most states by statute.

Until 1961, Washington followed the common-law tradition of sovereign immunity. Sovereign immunity was written into the state

15. Id.
constitutions, creating legislative power to decide when and how the state may be sued.\textsuperscript{18} Pursuant to this power, in 1961 the State Legislature enacted section 4.92.090 of the Revised Code of Washington, allowing the State to be sued in tort to the same extent as a person or corporation.\textsuperscript{19} This waiver of sovereign immunity has been construed broadly by the Washington Supreme Court.\textsuperscript{20} However, by providing for several limitations on state liability, the court has also made it clear that the statute does not render the state liable for every harm that may flow from governmental action.\textsuperscript{21}

\begin{itemize}
\item[A.] \textit{The Three Categories of Limitations on State Tort Liability in Washington}

The supreme court has recognized three categories of limitations on sovereign liability in Washington. The first is comprised of discretionary acts, the second concerns the public duty doctrine, and the third includes absolute and qualified immunities. When viewed in conjunction with section 4.92.090, the statutory waiver of sovereign immunity, these limitations form the boundaries of sovereign immunity in Washington as they existed before \textit{Savage v. State}.

\item[1.] \textit{The First Limitation on State Tort Liability Applies to Discretionary Acts}

In 1965, the Washington Supreme Court created the discretionary acts immunity\textsuperscript{22} and set out guidelines for its application.\textsuperscript{23} Under this exception to state tort liability, the State is immune from liability for its discretionary acts but is not protected from liability for its operational or

\begin{footnotes}
\item[18.] Wash. Const. art. II, § 26.
\item[19.] "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." Wash. Rev. Code § 4.92.090 (1994); \textit{see also} Wash. Rev. Code § 4.96.010 (1994) (providing parallel statute waiving sovereign immunity for municipalities and state subdivisions).
\item[21.] \textit{Id.} at 253, 407 P.2d at 444.
\item[22.] The cases discussing the discretionary acts doctrine indicate that the doctrine provides an immunity from liability. They do not, however, suggest the lack of a duty on the part of the State. \textit{See}, e.g., infra note 29.
\end{footnotes}
ministerial acts. This means that legislative acts, administrative rulemaking, and all judicial decisions should be immune from tort liability because such activities involve high-level, policy-making decisions. On the other hand, lower-level decisions implementing that policy are considered ministerial and therefore are not immune from tort liability. The discretionary acts immunity is meant to ensure that courts do not pass judgment on policy decisions made within the executive or legislative branches of the government. In *Evangelical United Brethren Church v. State*, the supreme court made clear that an act is considered discretionary if it fits all of the following criteria:

1. Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
2. Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
3. Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Washington Supreme Court decisions indicate that the discretionary acts limitation is extremely narrow. In fact, prior to the *Savage*

25. Mark M. Myers, Comment, *A Unified Approach to State and Municipal Tort Liability In Washington*, 59 Wash. L. Rev. 533, 536 (1984). An argument might have been made by the State in *Savage* that the State would be immune from liability for its independent negligent acts under the discretionary acts immunity. It is unclear whether such an argument would have succeeded.
26. *Id.*
27. *Bender*, 99 Wash. 2d at 588, 664 P.2d at 497.
29. *See, e.g.*, Taggart v. State, 118 Wash. 2d 195, 215, 822 P.2d 243, 253 (1992) (deciding that discretionary immunity exception does not shield parole officers from claims alleging negligent supervision because parole officers' supervisory decisions, however much discretion they may require, are not basic policy decisions); Emsley v. Army Nat'l Guard, 106 Wash. 2d 474, 479, 722 P.2d 1299, 1302 (1986) (holding that because discretionary acts exception is narrow, and firing of artillery during National Guard training required no policy evaluation, act was ministerial and not discretionary); Petersen v. State, 100 Wash. 2d 421, 434, 671 P.2d 230, 239-40 (1983) (finding that discretionary function exception does not provide state immunity for crimes of mental patient
decision, the supreme court expressly ruled that the discretionary acts exception did not shield a parole officer from claims alleging negligent supervision of a parolee. Considering this ruling, the discretionary acts prong of sovereign immunity in Washington was inappropriately weakened by the broad sweep of the Savage decision.

2. The Second Limitation Is the Public Duty Doctrine

A second limitation on Washington's broad waiver of sovereign immunity is the public duty doctrine. It originated as a principle for limiting the potentially widespread tort liability that followed the abolition of governmental tort immunity. The public duty doctrine protects a governmental entity from liability when the duty alleged to have been violated is a duty owed to the public generally, rather than to a private person. This doctrine is limited in that it contains several exceptions where the state is not afforded protection because it is found to have a duty toward the injured individual.

a. The Doctrine Does Not Protect the State Where There Is a Statute Meant To Protect a Class of Individuals

The first exception to the public duty doctrine recognizes a duty when there is a regulatory statute clearly indicating that it is intended to protect a class of individuals and where the class includes the plaintiff. In Halvorson v. Dahl, the Washington Supreme Court enunciated this

30. Taggart, 118 Wash. 2d at 215, 822 P.2d at 253.
31. The public duty doctrine does not provide immunity from liability. Rather, it provides that where the State owes a duty to the public as a whole, it owes no duty to an individual. See, e.g., Chambers-Castanes v. King County, 100 Wash. 2d 275, 284, 669 P.2d 451, 457 (1983).
33. Chambers-Castanes, 100 Wash. 2d at 284, 669 P.2d at 457.
35. 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978) (noting that plaintiff contended that city inspectors had knowledge of fire code violations in hotel prior to fire and did nothing to force building owner to comply with code).
duty and stated that when the Legislature clearly evinces an intent to protect certain people, those people may bring an action in tort for a violation of the statute or ordinance. It is only where the legislature imposes a duty on public officials to the public as a whole that those officials owe no duty to a particular individual.36

b. The Doctrine Does Not Protect the State Where the State Does Not Enforce a Specific Statute

The second exception to the public duty doctrine comes into play when the government has failed to enforce a specific statute. A duty of care is imposed where government agents who are responsible for enforcing statutory requirements possess actual knowledge of a statutory violation and fail to take corrective action despite a statutory duty to do so.37 A further requirement is that the plaintiff be within the class the statute is intended to protect.38

c. The Doctrine Does Not Protect the State Where the State Has Engaged in Volunteer Rescue Efforts

The third exception to the public duty doctrine is applicable when the government has engaged in volunteer rescue efforts. This exception follows from the common-law principle that one who undertakes to render aid to another or to warn a person in danger must exercise reasonable care.39 Based on Brown v. MacPherson's, Inc., the state is liable in tort if one of its employees gratuitously assumes a duty to aid or rescue an individual and then breaches that duty. This is the result even if the volunteer rescuer acted beyond the scope of his or her statutory authority.40

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36. Id.
37. Bailey v. Forks, 108 Wash. 2d 262, 268–69, 737 P.2d 1257, 1260 (1987) (finding duty to protect plaintiff under failure-to-enforce exception to public duty doctrine where police officer allowed apparently drunk individual to drive his truck, and individual then struck motorcycle on which plaintiff was riding).
38. Id. at 302, 545 P.2d at 19.
39. See, e.g., Brown v. MacPherson's, Inc., 86 Wash. 2d 293, 545 P.2d 13 (1975) (holding that where State had information regarding avalanche danger and Department of Licensing employee said he would notify landowners of danger, there was implied duty to warn those landowners within statute creating that agency).
40. Id.
The Doctrine Does Not Protect the State Where a Special Relationship Exists Between the Plaintiff and the State Worker

The final exception to the public duty doctrine arises where a special relationship exists between a government agent and a reasonably foreseeable plaintiff. This exception to the public duty doctrine applies only where the plaintiff relied on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity. In *Chambers-Castanes v. King County*, the court held that although the duty of the police to protect the population usually falls within the protection of the public duty doctrine, a special relationship giving rise to reliance on the part of the victim was established between a plaintiff who had called repeatedly for help and the police dispatcher who had answered the calls. After the *Chambers-Castanes* case, it appears that an actionable duty to an individual will arise on the part of a state or municipal employee if assurances of action are given to the individual.

Strictly applied, the public duty doctrine could undermine completely the waiver of sovereign immunity found in section 4.92.090 of the Revised Code of Washington. However, the four exceptions to the public duty doctrine, most notably the special relationship rule, have rendered it a weak tool in defending the state against tort actions. For example, the public duty doctrine does not protect a parole officer from liability for the acts of parolees. In *Taggart v. State*, the supreme court stated that a duty on the part of a parole officer exists because the parole officer has "taken charge" of the parolee under the special relationship exception to the public duty doctrine. Having taken charge of the parolee, the parole officer must exercise reasonable care to control the parolee and to prevent him or her from committing crimes. The fact that the public duty doctrine does not protect a parole officer from negligent

41. *See infra* note 42 and accompanying text.
42. 100 Wash. 2d 275, 286-87, 669 P.2d 451, 458-59 (1983).
43. Myers, *supra* note 25, at 537.
44. *Id.* at 540.
46. *Id.* at 224, 822 P.2d at 257. The court stated that:

The duty we announce here arises only once it has been shown that the defendant parole officer lacks both absolute and qualified immunity. To pierce these immunities, the plaintiff must show, first, that the officer's actions were not an integral part of any judicial or quasi-judicial process, and, second, that the officer failed to perform a statutory duty according to procedures dictated by statute and superiors. Only then does the question of duty arise.

*Id.*
supervision suits suggests that *Savage* should not have affected this prong of Washington's sovereign immunity framework.

3. **The Third Category of Limitations on the State’s Waiver of Sovereign Immunity Includes Absolute and Qualified Immunity**

The final, and most important limitation on state tort liability for the purposes of analyzing the scope of sovereign immunity after *Savage v. State*, exists in the immunities applied by the Washington Supreme Court. There are two types of immunities: absolute and qualified. The type of immunity that is applied in a given situation depends on the nature of the official’s public duties. It is the failure to extend an underlying personal qualified immunity from a state employee to the State that is the crux of the *Savage* decision.

a. **Absolute Immunity**

Absolute immunities extend to most tortious acts, regardless of whether they are done with malicious intent. Judicial and quasi-judicial immunities fall within the category of absolute immunities. One example of absolute immunity was recognized in *Creelman v. Svenning*, where the supreme court held that prosecutors enjoy a quasi-judicial immunity for acts performed in their official capacity. The quasi-judicial immunity enunciated in *Creelman* was absolute because it applied whether or not the prosecutor acted maliciously.

*Creelman* was also the first case in Washington to extend the immunity of a government employee to the government employer. The supreme court limited the Restatement (Second) of Torts rule that the immunity of one does not bar recovery against others, to situations where

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48. For the purposes of this Note, an “underlying immunity” is that given to the state employee. The immunity is “extended” when it protects the government employer from respondeat superior liability.

49. Grant, supra note 47.

50. 67 Wash. 2d 882, 884, 410 P.2d 606, 607–08 (1966) (holding that public policy required absolute immunity for prosecuting attorney, regardless of whether he acted with malice and without probable cause, in order to insure active and independent action of officers charged with prosecution of crime).

51. Id. (quoting Anderson v. Manley, 181 Wash. 327, 331, 43 P.2d 39, 40 (1935)).

52. Id. at 883, 410 P.2d at 606.
policy reasons supported immunity for one and not the others.\textsuperscript{53} This is the basis for the policy-driven analysis required by the court in later cases involving the extension of immunities.\textsuperscript{54} The court reasoned that the public policy supporting quasi-judicial immunity for the prosecutor also required immunity for both the State and county; otherwise, the objective sought by giving immunity to the prosecutor would be frustrated.\textsuperscript{55}

Another example of the extension of an underlying immunity to the governmental employer can be found in \textit{Lutheran Day Care v. Snohomish County}.\textsuperscript{56} That decision, while extending the quasi-judicial immunity of a County Hearing Examiner to the county for intentional interference with a business expectancy, clarified the policy analysis required by \textit{Creelman} in deciding whether to extend an underlying immunity to the government employer.\textsuperscript{57} The \textit{Lutheran Day Care} court stated that a strict reliance on precedent, without a corresponding policy analysis, would not be enough to justify the extension of an immunity.\textsuperscript{58} The \textit{Lutheran Day Care} policy analysis requires the following: (1) an inquiry into the legislative intent behind a statute creating or affecting an immunity; (2) a finding that the policy that supports the creation of the underlying immunity also supports the extension of that immunity to the employer; and (3) an assurance that extending an underlying immunity will not leave the plaintiff without a remedy.\textsuperscript{59} The \textit{Lutheran Day Care} court found that the policy concerns supporting an underlying immunity were not strong enough to support the extension of that immunity to the agency under the relevant statute.\textsuperscript{60} But public policy did support the extension of a county officer's quasi-judicial immunity to the county for intentional interference with a business expectancy.\textsuperscript{61}

\textsuperscript{53} \textit{Id.} at 885, 410 P.2d at 608.
\textsuperscript{54} \textit{Infra} notes 56--57 and accompanying text.
\textsuperscript{55} \textit{Creelman}, 67 Wash. 2d at 885, 410 P.2d at 608; \textit{see also} Anderson v. Manley, 181 Wash. 327, 331, 43 P.2d 39, 40 (1935) (stating that public policy is not for protection of officers, but for protection of public, in order to insure active and independent action of officers charged with prosecution of crime).
\textsuperscript{57} \textit{Id.} at 127, 829 P.2d at 764.
\textsuperscript{58} \textit{Id.} at 100, 829 P.2d at 750.
\textsuperscript{59} \textit{Id.} at 103--07, 829 P.2d at 751--53.
\textsuperscript{60} \textit{Id.} at 111, 829 P.2d at 755--56.
\textsuperscript{61} \textit{Id.} at 127, 829 P.2d at 764.
b. Qualified Immunity

Qualified immunities apply only if the government employee has fulfilled certain requirements, including a requirement of acting in good faith. An example of a qualified immunity is found in *Guffey v. State*. In *Guffey*, a state police officer was held to have a qualified immunity in an action for false imprisonment and arrest where the arrest was made pursuant to an unconstitutional statute. To receive qualified immunity, it was required that the officer act reasonably in carrying out a statutory duty according to the procedures dictated to him by statute and his superiors.

Courts have extended qualified immunities from government employees to the government employer on several occasions. In the *Guffey* case, a state trooper had stopped Guffey for a statutorily authorized "spot inspection" of his driver’s license, registration, and equipment. When Guffey was stopped, the trooper ran a radio check on his expired driver’s license and was advised that there was a felony warrant out for a man fitting Guffey’s description and with a similar name. As a result Guffey was detained erroneously. In dismissing the suit against the state trooper and the State, the court stated that there can be no liability as a master unless the servant is liable. The trooper was entitled to qualified immunity for false arrest and imprisonment as long as he was acting reasonably in furtherance of a statutory duty and according to the procedures dictated to him by statute and superiors. As a result, the court found that the State could not be held liable on a respondeat superior theory of liability.

62. Grant, *supra* note 47.
64. *Id.* at 152, 690 P.2d at 1167.
65. *Id.*
66. See Frost v. City of Walla Walla, 106 Wash. 2d 669, 724 P.2d 1017 (1986) (extending statutory qualified immunity of police officer to city for seizure and improper impoundment of vehicle); *Guffey*, 103 Wash. 2d at 153, 690 P.2d at 1168. *Guffey* relied on Nyman v. MacRae Brothers Construction, 69 Wash. 2d 285, 418 P.2d 253 (1966). In that case, the court stated that a master cannot be held liable on a respondeat superior theory of liability unless a servant is first found liable. The court also stated that a finding of respondeat superior liability required a determination that the servant was negligent and that his negligent act was the proximate cause of the plaintiff’s injuries. *Id.*
68. *Id.* at 152, 690 P.2d at 1167.
69. *Id.* at 152–53, 690 P.2d at 1167–68.
Another example of a qualified immunity's extension from an employee to the government employer is *Frost v. City of Walla Walla*. In that case, the supreme court held that a statutory immunity precluding liability for police officers engaged in the lawful performance of their duties extended to the city. The statute in question was section 69.50.506(c) of the Revised Code of Washington, which provided that no liability would be imposed under the Uniform Controlled Substances Act upon "any authorized state, county or municipal officer, engaged in the lawful performance of his duties." The court read this statutory language as providing a shield for the City of Walla Walla from liability under the doctrine of respondeat superior. The court reasoned that:

> It is readily apparent that the purpose behind RCW 69.50.506(c) was to promote efficient and unhampered police action, free from the hindrance created if liability could be imposed on police for their good faith, objectively reasonable actions. To give the officers protection against liability, while allowing suits against the jurisdiction employing them, would defeat this purpose.

Although not expressly stated by the court, the statutory immunity provided in *Frost* was clearly a qualified immunity, as it applied only if the officer was engaged in the lawful performance of his duties. If the statute had granted an officer immunity regardless of whether his actions were reasonable, lawful, or in good faith, it would have been an absolute immunity.

c. Absolute and Qualified Immunity as Applied to Actions of a Parole Officer

The Washington Supreme Court has applied both absolute and qualified immunities to the actions of parole officers while they are engaged in different duties. In *Taggart v. State*, the supreme court recognized that a parole officer is entitled to absolute quasi-judicial immunity only for actions that are an integral part of a judicial or quasi-

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70. 106 Wash. 2d 669, 724 P.2d 1017.
71. Id. at 673, 724 P.2d at 1020.
73. *Frost*, 106 Wash. 2d at 673–74, 724 P.2d at 1020.
74. Id. at 673, 724 P.2d at 1020.
75. 118 Wash. 2d 195, 822 P.2d 243 (1992) (allowing parole officers immunity for allegedly negligent parole release and supervision decisions where parolees assaulted and raped their victims).
judicial proceeding. Examples of such actions include enforcing the conditions of parole and providing the parole board with reports to assist in determining whether to grant parole.

The Taggart court also recognized that parole officers may be entitled to personal qualified immunity for those acts that fall outside judicial or quasi-judicial proceedings as long as they act in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant regulatory guidelines. The court reasoned that completely stripping parole officers of immunity would make them more concerned with avoiding lawsuits than with doing their jobs. At the same time, the court sought to ensure that parolees would receive adequate supervision by requiring that parole officers act within and in furtherance of statutes, guidelines, and the directives of superiors.

More importantly, Taggart made clear that a trial court should not address the question of whether a parole officer acted negligently until after it had determined that the parole officer was ineligible for immunity. The court stated specifically that: "The duty we announce here arises only once it has been shown that the defendant parole officer lacks both absolute and qualified immunity." In order to pierce these immunities, the plaintiff must show both that the officer's actions were not an integral part of any judicial or quasi-judicial process, and that the officer failed to perform a statutory duty according to procedures dictated by statute and superiors.

d. Babcock v. State Is the Only Washington Case Refusing To Extend an Underlying Immunity to the State

Prior to Savage, the only case where the supreme court refused to extend an underlying immunity to the State was Babcock v. State. In that case, the Department of Social and Health Services (DSHS) was not sued on a respondeat superior theory of liability, but rather, was sued

76. Id. at 213, 822 P.2d at 252.
77. Id.
78. Id. at 216, 822 P.2d at 253.
79. Id. at 215, 822 P.2d at 253.
80. Id. at 215-16, 822 P.2d at 253.
81. Id. at 224, 822 P.2d at 257.
82. Id. (emphasis added).
83. Id.
solely for its own independent negligent acts in placing children with a foster parent who subsequently raped them. The supreme court declined to extend a statutory immunity granted to caseworkers for emergency child placement decisions to DSHS. The court reasoned that the wording of section 26.44.060 of the Revised Code of Washington, the statute granting the immunity, expressly admonished the court not to construe the immunity as granting sovereign immunity. The statute states that "[n]othing in this chapter shall be construed as to supersede or abridge remedies provided in chapter 4.92 RCW." In addition, the court recognized the policy considerations cited in Creelman as controlling the question of whether a government agency can take advantage of its agent's immunity defense. The rule of Babcock, when viewed in light of other immunities cases, can thus be stated as follows: where the State is sued directly for its own independent negligent acts, the underlying immunity of the State's workers will not shield the State from liability.

II. THE SAVAGE CASE NEEDLESSLY CONFUSES THE FRAMEWORK OF SOVEREIGN IMMUNITY IN WASHINGTON STATE

The Washington Supreme Court ruled in Savage v. State that the policy reasons supporting the application of an underlying personal qualified immunity to a parole officer did not support the extension of that immunity to the State. That holding resulted in state respondeat superior liability for negligent supervision of a parolee on the part of parole officers. The Savage court could have reached the same result by following the framework of sovereign immunity as it has evolved in Washington through the Creelman, Guffey, Frost, Lutheran Day Care, and Babcock decisions. This result could have been reached by correctly applying the policy-oriented analysis required by Creelman and Lutheran Day Care to the question of whether or not to extend the parole officers' immunity to the State. If, in applying this analysis, the court found that the parole officers' underlying immunity should not be extended to the State, the plaintiff could have recovered either under the respondeat superior theory of liability or the direct theory of liability. If

85. Id. at 621, 809 P.2d at 156.
86. Id. at 620, 809 P.2d at 156.
88. Babcock, 116 Wash. 2d at 621, 809 P.2d at 156.
the analysis required the extension of the parole officers' immunity to the State, the court's holding in Babcock still would have allowed a finding of liability for the State's own independent negligent acts. The strict application of previously existing precedent would have allowed the extension of an underlying personal qualified immunity under some circumstances while maintaining the boundaries of sovereign immunity.

The Savage case convolutes the law of sovereign immunity in Washington and casts doubt on the precedential value of numerous landmark cases. Under Savage, determining what underlying qualified immunities, if any, will extend to government employers sued on a respondeat superior theory of liability is difficult. As a result, it is unclear under what circumstances a government employer will be held liable on a respondeat superior theory of liability for the negligent acts of its employees.

A. The Savage Court Incorrectly Relied on Babcock

The court relied on Babcock to support its decision not to extend the personal qualified immunity of an agent to the State. However, Babcock is inapposite to Savage for two reasons. First, the court cites Babcock for a proposition different from that for which it stands. Second, Babcock is distinguishable from Savage. Through its unique interpretation of Babcock, the Savage court has effectively overruled the Guffey and Frost decisions, and possibly the Creelman decision as well.

1. Babcock Stands for a Different Proposition Than That for Which It Was Cited

The Savage court chose to cite Babcock for the proposition that an agent's immunity does not establish a defense for the principal. The Babcock court did make that assertion, but it was dicta as regards a respondeat superior case, because Babcock only concerned direct liability. Babcock specifically rejected the use of respondeat superior liability and instead evaluated plaintiffs' claims on the basis of the agency's independent negligent acts. The court stated: "In the case at bench, however, the Babcocks have alleged that DSHS's negligent supervision caused injury. Personal immunities granted employees

90. Savage, 127 Wash. 2d at 438, 899 P.2d at 1273 (quoting Babcock, 116 Wash. 2d at 620, 809 P.2d at 156).
91. Babcock, 116 Wash. 2d at 621, 809 P.2d at 156.
cannot reach the *separate actions* of their employer because a judgment in favor of one tortfeasor does not terminate claims against a separate tortfeasor."\(^92\) Hence, the court stated only that personal immunities cannot be extended to the separate actions of the employer. The opinion said nothing about imputing an employee’s negligent acts to the employer on a vicarious liability theory.

Unless *Babcock* is viewed as standing for the proposition that underlying immunities will not be extended to the employer for the employer’s independent negligent acts, it does not make sense. If the case is interpreted to mean that an agent’s immunity will never establish a defense for the principal, then the *Babcock* decision overrules both *Creelman* and *Guffey*. If the *Babcock* court had meant to overrule *Creelman* and *Guffey*, it would not have taken pains to distinguish the facts of those cases from its own in the following statement: “But in both *Creelman* and *Guffey* the State had committed no acts of its own; the plaintiffs could only sue on the basis of respondeat superior.”\(^93\)

Therefore, *Babcock* does not foreclose the extension of any underlying immunity to the government employer. By holding that a social worker’s statutory immunity may not be extended to DSHS, the court only addressed the separate negligent acts of that agency.

2. Babcock Is Distinguishable from Savage

Another reason why the *Savage* court should not have relied on *Babcock* is that *Babcock* was based on a statute which was not applicable in *Savage*. The statute in question is section 26.44.060(3) of the Revised Code of Washington.\(^94\) This statute provides a qualified immunity to DSHS caseworkers for the emergency removal of children from abusive situations. However, “the Legislature made it clear in RCW 26.44.060(3) that it did not intend to supersede or abridge remedies in RCW 4.92.”\(^95\) The court therefore did not extend the common-law immunity it adopted

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\(^{92}\) Id. (emphasis added) (distinguishing *Creelman* and *Guffey* on grounds that they involved respondeat superior liability); see also *Babcock* v. State, 112 Wash. 2d 83, 103–14, 768 P.2d 481, 494–97 (1989) (Utter, J., dissenting), reconsidered at 116 Wash. 2d 596, 809 P.2d 143 (1991).

\(^{93}\) *Babcock*, 116 Wash. 2d at 621, 809 P.2d at 156.


\(^{95}\) *Savage* v. State, 127 Wash. 2d 434, 458, 899 P.2d 1270, 1282 (1995) (Madsen J., dissenting). Referring to Washington’s statute waiving sovereign immunity, Wash. Rev. Code § 22.44.060(3) states: “Conduct conforming with the reporting requirements of this chapter shall not be deemed a violation of the confidential communication privilege of RCW 5.60.060(3) and (4), 18.53.200 and 18.83.110. *Nothing in this chapter shall be construed as to supersede or abridge remedies provided in chapter 4.92 RCW.*” Id. (emphasis added); see also Wash. Rev. Code § 4.92.030 (1994).
for caseworkers to the State. There is no such statute applicable in the
Savage case. In light of the absence of statutory requirements in Savage,
Babcock is not controlling on the issue of whether or not to extend a
parole officer's personal qualified immunity to the State for the alleged
negligent supervision of a parolee.

B. The Savage Court's Reasoning Is Based on Restatement Language
That Had Been Explicitly Rejected in Washington

Savage has further confused the boundaries of sovereign immunity in
this state by applying the restatement rule over established Washington
precedent. The Restatements are not mandatory authority. They are a
general restatement of the common-law of the fifty states. As noted by
the dissent in Savage, they are not a restatement of the law of each
individual state, nor are they a restatement of the law of Washington
prior to the Savage decision. They were intended to promote
uniformity, but not to erase individual state treatment of particular
issues.

The rule reflected in the Restatement (Second) of Agency is that an
agent's immunity from civil liability generally does not establish a
defense for the principal. Prior to Savage, this rule had been rejected in
Washington. This is reflected in the fact that previous Washington cases
extending an underlying immunity to the State were decided in the face
of arguments based on the Restatement (Second) of Agency section 217
and the Restatement (Second) of Torts section 880. As stated in the
Savage dissent:

96. See Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713 (Haw. 1982) (stating that under theory of
vicarious liability where parole officer has immunity from suit, employer would also be immune);
see also Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992) (holding that with respect to high-speed
police pursuits, police officer's official immunity extends to his or her employer).

97. See Savage, 127 Wash. 2d at 451, 899 P.2d at 1279 (Madsen J., dissenting); see also Babcock,
116 Wash. 2d at 620–21, 809 P.2d at 156 (recognizing that some personal immunities of government
officials have been extended to government in this state in spite of fact that Restatement (Second) of
Agency § 217 states contrary rule).

98. See, e.g., Herbert F. Goodrich, Introduction to Restatement (Second) of Agency at vii–viii
(1958); William D. Lewis, Introduction to Restatement of Torts at viii–ix (1934); Herbert Wechsler,
Introduction to Restatement (Second) of Torts at ix (1964).

99. Restatement (Second) of Agency § 217.

100. Frost v. City of Walla Walla, 106 Wash. 2d 669, 674, 724 P.2d 1017, 1020 (1986). The Frost
on Restatement (Second) of Agency section 217 when refusing to extend underlying immunity to
municipal employer).

The agency principle upon which the majority relies did not require a different result [in Creelman]. . . . This conclusion was reached in precisely the kind of case now before the court—where a party is asserting that a general rule be applied to hold that immunity of a state agent does not extend to the State where the State is sued on the basis of respondeat superior.102

In addition, the dissent points out that the Frost decision disapproved an earlier case relying on the Restatement (Second) of Agency section 217.103 As discussed earlier, in Frost v. Walla Walla104 the supreme court extended the immunity of a police officer, acting lawfully in furtherance of the Controlled Substances Act, to the State. In so holding, the court disapproved the decision in Spencer v. King County105 that relied on the Restatement (Second) of Agency section 217 in refusing to extend individual policy officer immunity to the county under the involuntary commitment law.106 Disapproving Spencer was necessary, the court stated, because the decision there contradicted Creelman v. Svenning.107

The Creelman court rejected an argument similar to that embodied in the Restatement (Second) of Agency section 217. The Creelman court faced the general rule reflected in section 880 of the Restatement of Torts: the immunity of one of two or more persons, who would otherwise be liable for a harm, does not bar recovery against the others.108 The Creelman court rejected the wording of the rule and modified it.109 The court stated that the general rule would apply only in situations where the policy reasons supporting immunity for one party would not support immunity for the other party.110 The court went on to say that the policy reasons supporting absolute immunity for a prosecutor charged with malicious prosecution also support the extension of that immunity to the prosecutor’s employer.111

103. Id. at 452, 899 P.2d at 1279 (referring to Spencer, 39 Wash. App. 201, 692 P.2d 874, overruled by Frost, 106 Wash. 2d 669, 724 P.2d 1017).
104. 106 Wash. 2d 669, 724 P.2d 1017.
106. Id.
108. Restatement of Torts § 880 (1939).
110. Id.
111. Id.
Neither the Restatement (Second) of Agency section 217, nor Restatement of Torts section 880 represent the general rule in this state. This is reflected in the cases that have been decided in the face of those arguments. Therefore, the Savage court's use of section 217 to support its holding is misplaced in light of Washington case authority specifically contravening that general rule. If the Savage decision is read as adopting the restatement rule, then cases such as Creelman and Frost have been effectively overruled. This result may leave government employers open to liability on a respondeat superior basis for the negligent acts of both prosecutors and police officers.

C. The Savage Court's Policy Analysis Is Not Persuasive

Perhaps the most confusing aspect of Savage is its application of the policy analysis originally required by Creelman v. Svenning and later elaborated in Lutheran Day Care v. Snohomish County. The policy analysis is key to a court's determination of whether or not to extend an underlying immunity to the government employer. Unfortunately, the Savage court's analysis is not persuasive because it fails to examine thoroughly all of the pertinent policy questions.

1. Refusing To Extend a Parole Officer's Underlying Immunity to the State Does Not Necessarily Result in the State Using a Higher Level of Care To Draft Parole Guidelines

The Savage court reasoned that the rationale underlying the grant of personal qualified immunity to parole officers did not support the extension of that immunity to the State. The court recognized that parole officers supervising parolees are called upon to make difficult

112. Id. at 882, 410 P.2d at 606; Frost v. City of Walla Walla, 106 Wash. 2d 669, 724 P.2d 1017 (1986).

113. 67 Wash. 2d 882, 885, 410 P.2d 606, 608 (1966) (allowing extension of prosecutor's underlying immunity to government employer where public policy requiring immunity for prosecutor also required immunity for government).

114. 119 Wash. 2d 91, 106, 829 P.2d 746, 753 (1992) (holding that, when extending absolute quasi-judicial immunity of hearing examiner and county council to county on respondeat superior theory for intentional interference with business expectancy, three elements to analysis include (1) inquiry into legislative intent behind statute creating or affecting immunity, (2) showing how policy reasons justify underlying immunity also justify extension of immunity, and (3) showing that plaintiff will not be left without remedy), cert. denied, 506 U.S. 1079 (1993).

decisions that may be affected by the prospect of personal liability.\textsuperscript{116} However, the court stated that the same could not be said about state liability. On the contrary, the court argued that state liability could be expected to encourage the State to use reasonable care in fashioning guidelines and procedures for the supervision of parolees.\textsuperscript{117}

Certainly, encouraging the State to use reasonable care in constructing its procedures for supervision of parolees is an important public policy. However, that policy is advanced only by holding the State liable for its own independent negligent acts in constructing those procedures, in training its parole officers, and in establishing parole guidelines. Holding the State liable on a respondeat superior theory of liability for the negligent acts of its parole officers in supervising the parolee does nothing to forward that public policy. As suggested by the \textit{Savage} dissent, without an extension of the parole officer's underlying immunity, the State will be liable on a respondeat superior theory for a parole officer's negligent acts regardless of whether the officer substantially complied with directives and regulations.\textsuperscript{118} Because the State would thus be held liable for a parole officer's negligent acts regardless of whether or not the parole officer had fulfilled the requirements associated with personal qualified immunity, it would make little difference that the State drafted the guidelines with reasonable care.\textsuperscript{119}

Holding the State liable on a respondeat superior theory of liability for the negligent acts of parole officers in supervising parolees will not promote greater diligence on the part of the State in drafting requirements for parole officers. However, holding the State directly liable for its own negligent drafting will result in a greater level of diligence. Furthermore, allowing the State to share the parole officer's underlying immunity would advance the policy of protecting parole officers from undue scrutiny and fear of liability. In light of these advantages, the majority's public policy argument is unpersuasive.

\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.} at 456, 899 P.2d at 1281 (Madsen, J., dissenting).
\textsuperscript{119} \textit{Id.}
2. Both Absolute Quasi-Judicial Immunity and Personal Qualified Immunity Are Ultimately Designed To Protect the Public

Another policy argument made by the Savage majority was that Creelman v. Svenning\(^{120}\) did not control because Creelman dealt with absolute quasi-judicial immunity while Savage involved a personal qualified immunity.\(^{121}\) Savage asserted that quasi-judicial immunity and personal qualified immunity are designed to serve different functions.\(^{122}\) The court reasoned that quasi-judicial immunity was meant to protect persons whose functions are so comparable to a judge as to require the same protection as a judge. By contrast, the court asserted that personal qualified immunity was meant to protect the individual from the inhibiting effect that fear of personal liability would have on job performance.\(^{123}\)

The distinction drawn by the court is not persuasive. As pointed out in the Savage dissent, neither Washington case law nor common sense support such a distinction.\(^{124}\) In Creelman, the ultimate purpose of the absolute quasi-judicial immunity was the welfare of the public.\(^{125}\) That goal was accomplished by allowing a prosecutor to do his or her job without fear of precipitating tort litigation. By eliminating the fear of tort liability, prosecutors are free to prosecute unpopular cases and to proceed against those who might otherwise strike back at the prosecutor through the legal system.

The welfare of the public is also the ultimate purpose of the personal qualified immunity granted to parole officers. In Taggart v. State, the court made it clear that the purpose of granting qualified immunity to parole officers is to enable them to perform a difficult job under exacting conditions where decisions must be made after balancing the parolee's liberty and the safety of the public.\(^{126}\) To perform that job effectively, parole officers must be free of the fear of lawsuits.\(^{127}\)

Given that the supreme court has on other occasions articulated the proposition that the personal qualified immunity is meant to advance

\(^{120}\) 67 Wash. 2d 882, 410 P.2d 606 (1966).
\(^{121}\) Savage, 127 Wash. 2d at 441, 899 P.2d at 1273–74.
\(^{122}\) Id.
\(^{123}\) Id. at 441–42, 899 P.2d at 1274.
\(^{124}\) Id. at 454, 899 P.2d at 1280 (Madsen J., dissenting).
\(^{127}\) Id.
public welfare by protecting a parole officer from fear of litigation, 128 the majority’s attempt to distinguish absolute and qualified immunities on the basis of their underlying purposes is unpersuasive.

III. THE CONSEQUENCES OF THE SAVAGE DECISION

Savage may have several consequences. First, if the case is read to reject the extension of a personal qualified immunity under all circumstances, Savage will have effectively overruled both Frost v. Walla Walla and Guffey v. State. Second, it may affect other personal qualified immunities such as that provided in the good Samaritan statute. Finally, the court’s interpretation of section 4.92.090 of the Revised Code of Washington may render the discretionary acts immunity and the public duty doctrine void.

A. Savage Effectively Overrules the Frost and Guffey Decisions

If Savage is read broadly, as a refusal to extend any personal qualified immunity to the government where it has been sued on a respondeat superior theory of liability, the decision appears to overrule both Guffey v. State 129 and Frost v. City of Walla Walla. 130 Those two cases extended the underlying immunities of police officers to their government employers. As the Savage dissent points out, by rejecting the extension of a qualified immunity to the State, the court has left state and local governmental employers open to suit for the actions of their police officers. 131 This could have far reaching effects on public safety. For example, a police department that is trying to avoid respondeat superior liability for the negligent acts of its officers is likely to avoid sending officers to situations where such liability may result. This is exactly the sort of result that the Frost court was trying to avoid when it allowed the extension of a police officer’s underlying immunity to the government employer. 132

128. Id.
129. See supra note 63 and accompanying text.
130. See supra note 70 and accompanying text.
132. Frost v. City of Walla Walla, 106 Wash. 2d 669, 673, 724 P.2d 1017, 1020 (1986) (stating that purpose of statute creating immunity was to promote efficient and unhampa red police action, and refusing to extend immunity would defeat that purpose).
B. *If Savage Precludes the Extension of a Personal Qualified Immunity, Extension of this Rule to Other Qualified Immunities May Defeat Their Purposes*

A broad reading of *Savage* also opens up the possibility of undermining other immunities. For instance, Washington’s good Samaritan statute[^133] protects people who render medical aid or provide transportation in an emergency. The immunity provided is qualified because it applies only as long as the good Samaritan is a volunteer acting without gross negligence or willful or wanton misconduct. If the *Savage* decision precludes the extension of all underlying qualified immunities to a government employer, this could have far reaching results.

Given the possibility of respondeat superior liability for voluntary emergency aid rendered by state employees, it would make sense for a government employer to discourage such action. It is certainly conceivable that in a situation such as the 1995 bombing of the federal building in Oklahoma City, state employees could be deterred from rendering voluntary emergency aid by the fear that their actions might render their employer liable. If, on the other hand, the *Savage* decision precludes the extension of underlying qualified immunities to any employer, fear of tort liability could drive corporate entities to actively discourage their employees from rendering aid in emergencies. Such an outcome would defeat the purpose of the good Samaritan statute by discouraging people from helping each other in emergencies.

C. *The Savage Court’s Interpretation of Section 4.92.090 of the Revised Code of Washington Contradicts the Use of the Discretionary Acts Immunity and the Public Duty Doctrine*

The third consequence of *Savage* is that it contradicts the supreme court’s own prior use of the discretionary acts immunity and the public duty doctrine. The *Savage* court stated that section 4.92.090[^134] operates to make the State presumptively liable in all instances in which the legislature has not indicated otherwise.[^135] This broad statement is contradicted by the court’s use of the discretionary acts exception and the


[^134]: *Supra* note 19.

[^135]: *Savage*, 127 Wash. 2d at 445, 899 P.2d at 1276.
public duty doctrine to protect the State from tort liability, both of which evolved judicially as a response to the legislative waiver of sovereign immunity in 1961.\textsuperscript{136} The Legislature did not create these limits on state liability, nor has it ever codified them. Rather, they were created by the supreme court.

If the \textit{Savage} court's interpretation of section 4.92.090 is read literally, all of the judicially created limitations on state liability must fall along with the extension of a parole officer's personal qualified immunity. This certainly could not be the court's intended result. If the \textit{Savage} court had meant to destroy all three wings of sovereign immunity in Washington, it would surely have said so expressly. Therefore, the court erred in arguing that the State must be presumptively liable in all circumstances where the legislature has not otherwise allowed for immunity.

IV. THE WASHINGTON SUPREME COURT SHOULD CLARIFY THE BOUNDARIES OF SOVEREIGN IMMUNITY IN WASHINGTON STATE

Given the confused state of sovereign immunity doctrine in Washington after \textit{Savage}, the supreme court should clarify its boundaries. Are the discretionary acts immunity and the public duty doctrine still viable after \textit{Savage}? It is likely that the court did not intend to draw those doctrines into question with its interpretation of section 4.92.090. Is it the rule of \textit{Savage}, broadly, that no personal qualified immunity will be extended to the government employer? Or should it be read more narrowly so that the personal qualified immunity of a parole officer will not be extended to the government employer? From the majority opinion it is difficult to tell. After the \textit{Savage} court worked so hard to destroy any argument for the extension of an underlying personal qualified immunity, it is likely that the broad statement is a more appropriate interpretation of the holding. These questions would not have arisen if the court had allowed the extension of the parole officers' immunity on the vicarious liability claims and refused it on the direct negligence claims.

If the court wishes to abolish all limits on state liability, it should explicitly say so. If not, the supreme court should devise a clear test that makes policy sense, staying within the parameters of Washington case law as it existed before the \textit{Savage} decision, and determining under what

\textsuperscript{136} \textit{Supra} notes 23, 32.
circumstances underlying immunities will be extended to governmental employers sued on a respondeat superior theory of liability.

V. CONCLUSION

The Washington Supreme Court, in its enthusiasm to reach a particular result in Savage v. State, needlessly muddied the boundaries of sovereign immunity in Washington. Employers must be able to predict with some accuracy when they will be protected by their employee’s underlying immunities and when they will be left open to respondeat superior liability. Citizens should have a clearer picture of what torts will constitute liability for the State. This result can be achieved either by abolishing all judicially created limitations on State liability or by following Washington case law as it existed before the Savage decision.