

## “Inevitable Inequities:”<sup>1</sup> The Public Duty Doctrine and Sovereign Immunity in North Carolina

### INTRODUCTION

On January 30, 2005, a young mother and her son made their way down a meandering country road in rural North Carolina on their way to church. Accompanying them were two sisters, a six-year-old and a ten-year-old, who were friends of the family. A few miles from church, the right front tire of the compact car in which the group rode dropped off into a washout which had, over time, eroded its way into the asphalt driving surface. Apparently, the Department of Transportation had failed to both inspect and repair the washout as mandated by statute.<sup>2</sup> The washout was deep enough to cause the underside of the car to slam into the road, robbing the driver of the ability to control the vehicle. As she struggled to regain control of the car, it careened back into the road and into the path of an oncoming SUV. Three-year-old Austin Partida lost his life that day, as well as six-year old Heather Brown.<sup>3</sup> Fortunately, under the North Carolina Court of Appeals’s current rule regarding the application of the public duty doctrine, a claim against the North Carolina Department of Transportation for failure to properly inspect and repair the highway, in this scenario, would not be barred.<sup>4</sup>

Now consider the following incident.<sup>5</sup> A food processing plant in rural North Carolina had been in operation for almost a dozen years.<sup>6</sup> Not once in more than a decade had a North Carolina Department of Labor official set foot on the premises in order to inspect it for adequate fire exits as the department is charged by law to do.<sup>7</sup> As a result, the employer had either obstructed or failed to provide these exits.<sup>8</sup> One fateful day, a fire in the plant took the lives of twenty-five employ-

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1. *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991).

2. See N.C. GEN. STAT. § 143B-346 (2005).

3. This comment is dedicated to Amanda Partida James in memory of Austin Partida and Heather Brown.

4. See *Myers v. McGrady*, 613 S.E.2d 334 (N.C. Ct. App. 2005), *disc. rev. allowed*, 619 S.E.2d 510 (N.C. 2005).

5. This scenario is based on the case of *Stone v. N.C. Dep’t of Labor*, 495 S.E.2d 711 (N.C. 1998).

6. *Id.* at 713.

7. *Id.* at 713-14.

8. *Id.*

ees who were not able to escape the flames.<sup>9</sup> In stark contrast to the first scenario, the court held in this case that a claim could not stand against the department because it was barred by the public duty doctrine.<sup>10</sup> If you find these two results difficult to reconcile you are not alone. The courts' application of the public duty doctrine in North Carolina produces inconsistent and unjustifiable results, as it has in other states.<sup>11</sup>

Since the public duty doctrine first arrived on the scene in *South v. Maryland ex rel. Pottle*,<sup>12</sup> it has been the object of much derision and a constant source of confusion for attorneys and, apparently, judges as well.<sup>13</sup> The doctrine is a common law construction that serves to bar claims against the government.<sup>14</sup> Initially, it only applied to cases involving local law enforcement.<sup>15</sup> The public duty doctrine simply states that when a governmental entity owes a duty to the public in general, it owes no duty at all to specific individuals.<sup>16</sup> This, in effect, eviscerates one of the essential elements of a negligence claim, the existence of a duty owed to the plaintiff.<sup>17</sup> Without this duty the plaintiff's claim is dead on arrival. The doctrine is often applied in North Carolina to claims brought under the authority of the North Carolina Tort

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9. Twenty-five people died and fifty-six were injured in the inferno. Charles D. Thompson Jr., Editorial, *Honoring Hamlet*, RALEIGH NEWS & OBSERVER, Feb. 29, 2000 at A10.

10. *Stone*, 495 S.E.2d 711.

11. See *Adams v. State*, 555 P.2d 235, 241-42 (Alaska 1976); *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982); *Leake v. Cain*, 720 P.2d 152, 159 (Colo. 1986); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1015 (Fla. 1979); *Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1986); *Jean W. v. Commonwealth*, 610 N.E.2d 305, 308 (Mass. 1993); *Maple v. City of Omaha*, 384 N.W.2d 254, 257 (Neb. 1986); *Schear v. Bd. of Comm'rs*, 687 P.2d 728, 730-31 (N.M. 1984); *Brennen v. City of Eugene*, 591 P.2d 719, 724-25 (Or. 1979); *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976).

12. 59 U.S. 396 (1855).

13. *Leake*, 720 P.2d at 159 (holding the public duty doctrine "created needless confusion in the law and resulted in uneven and inequitable results"); Anita Brown-Graham, *Local Governments and the Public Duty Doctrine After Wood v. Guilford*, 81 N.C. L. REV. 2291, 2292 (2003) ("[T]he North Carolina courts' application of the public duty doctrine stands out as problematic.").

14. *Coleman v. Cooper*, 366 S.E.2d 2, 6 (N.C. Ct. App. 1988).

15. *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991).

16. Suzanne M. Dardis, Note, *Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity*, 43 S.D. L. REV. 706, 707 (1998).

17. Brown-Graham, *supra* note 13, at 2294 (arguing the public duty doctrine does not contravene the will of the legislature).

Claims Act against state agencies<sup>18</sup> and to claims brought against local governments under statutes that allow municipalities and counties to purchase liability insurance.<sup>19</sup> Together these statutes amount to a statutory waiver of the state's sovereign immunity.<sup>20</sup> When applied to such cases, the effect of the doctrine is to reinstate the sovereign immunity that the state legislature has explicitly waived.<sup>21</sup> In addition, the North Carolina courts' decisions concerning when and when not to apply the public duty doctrine to bar claims against the state have been arbitrary and are founded upon trivial factual distinctions that do not justify divergent results in cases that are principally the same.

This comment first examines the muddled past of the application of the public duty doctrine by the Court of Appeals and the Supreme Court of North Carolina with the aim of showing that it is unworkable, confusing, and unjust. Second, it suggests the Supreme Court of North Carolina should completely abrogate the public duty doctrine in deference to the legislature's intent to waive sovereign immunity to the extent it has done so in the Tort Claims Act.<sup>22</sup> Finally, in its stead, an alternative approach is offered. The North Carolina Supreme Court should adopt a traditional negligence standard of reasonable care under the circumstances, modified to recognize the peculiar challenges faced by governments due to the limited resources at their disposal and the discretionary decisions they are called upon to make.

## I. BACKGROUND

### A. *The Doctrine's Genesis*

Early common law in England, and subsequently in America, provided the sovereign could not be held civilly liable for a breach of duty owed to individual citizens. As Justice Holmes stated, "there can be no legal right as against the authority that makes the law on which the right depends."<sup>23</sup> Although the doctrine lacked any real philosophical

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18. See, e.g., *Stone v. N.C. Dep't of Labor*, 495 S.E.2d 711, 714 (N.C. 1998); *Hunt v. N.C. Dep't of Labor*, 499 S.E.2d 747 (N.C. 1998).

19. See, e.g., *Sinning v. Clark*, 459 S.E.2d 71 (N.C. Ct. App. 1995).

20. *Gammons v. N.C. Dep't of Human Res.*, 472 S.E.2d 722, 723-24 (N.C. 1996). Sovereign immunity is a common law doctrine that immunizes governmental entities from civil suits by private citizens. The doctrine is best described by the famous maxim, "the king can do no wrong." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 131 (5th ed. 1984).

21. *Stone*, 495 S.E.2d at 719 (Orr, J., dissenting).

22. Dardis, *supra* note 16, at 707.

23. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

justification, it quickly took root in American jurisprudence and has remained relatively unchallenged.<sup>24</sup>

Just as the sovereign makes the law on which the right to recourse depends, it may also willingly waive its immunity by legislative acts.<sup>25</sup> The United States government and the majority of states have passed such legislation, allowing citizens to bring suits for damages resulting from actions or inactions of government agents so long as they are not discretionary or policy decisions.<sup>26</sup> However, where an attempted waiver of governmental immunity exists, the public duty doctrine is sure to arise. With the advent of statutes abrogating sovereign immunity came the judicial application of the public duty doctrine.<sup>27</sup>

North Carolina passed the Tort Claims Act in 1951, vesting in the Industrial Commission the power to act as “a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State.”<sup>28</sup> This legislation amounted to a partial waiver of the state’s sovereign immunity.<sup>29</sup> Although sovereign immunity still protects many local governments, “[i]t is subject . . . to certain legislatively created exceptions allowing local governments to purchase liability insurance to protect the public.”<sup>30</sup> Under these statutes, the purchase of insurance operates as a waiver of the local government’s sovereign immunity up to the amount of insurance acquired.<sup>31</sup> This remained the status quo until 1991 when the North Carolina Supreme Court first utilized the public duty doctrine to shield the government from liability in the case of *Braswell v. Braswell*.<sup>32</sup> Though it was not a Tort Claims Act case, it signaled the beginning of a trend in North Carolina of reinstating, judicially, the doctrine of sovereign immunity under an assumed name.

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24. JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 371 (6th ed. 2003).

25. KEETON ET AL., *supra* note 20.

26. *Id.*

27. Frank Swindell, Note, *Municipal Liability for Negligent Inspections in Sinning v. Clark - A “Hollow” Victory for the Public Duty Doctrine*, 18 CAMPBELL L. REV. 241, 248-49 (1996).

28. N.C. GEN. STAT. § 143-291 (2005).

29. *Zimmer v. N.C. Dep’t of Transp.*, 360 S.E.2d 115, 117 (N.C. Ct. App. 1987).

30. *Lovelace v. City of Shelby*, 526 S.E.2d 652, 654 (N.C. 2000).

31. N.C. GEN. STAT. § 160A-485(a) (2005) (referring to cities); N.C. GEN. STAT. § 153A-435(a) (2005) (referring to counties).

32. *Myers v. McGrady*, 613 S.E.2d 334, 338 (N.C. Ct. App. 2005) (citing *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991)), *disc. rev. allowed*, 619 S.E.2d 510 (N.C. 2005).

In *Braswell*, the son of a woman killed by her husband brought suit against his father and against the county sheriff for negligence in failing to protect his mother.<sup>33</sup> The sheriff in this case was aware the husband, who happened to be one of the sheriff's deputies, had threatened to kill his wife as well as himself.<sup>34</sup> Consequently, the sheriff had assured her "that his men would be keeping an eye on her" and that "he would see she got back and forth to work safely . . ."<sup>35</sup> That day Mrs. Braswell died at the hands of her husband.<sup>36</sup> Despite the sheriff's knowledge of the threat and his failure to take steps to alleviate a volatile situation, the supreme court held the claim against the sheriff was barred based on the public duty doctrine.<sup>37</sup> The court reasoned:

The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the *limited resources* of law enforcement and refuses to judicially impose an *overwhelming burden of liability* for failure to prevent every criminal act.<sup>38</sup>

This rule made no provision for situations where an official's decisions about how to appropriate resources were in no way connected to limitations on those resources. Even if the official's acts or omissions were completely unjustified and unrelated to limitations on its available resources, the government would still be shielded by a rule that is premised upon resource limitations that may or may not actually exist. The court in *Braswell*, not willing for the rule to be overly simplistic and recognizing the harsh results this rule was bound to generate, offered two exceptions to the general rule that the public duty doctrine always applies to local law enforcement. The court noted that "to prevent inevitable inequities to certain individuals"<sup>39</sup> the public duty doctrine would not apply 1) where there is a "special relationship" between the injured and the defendant,<sup>40</sup> and 2) when the defendant "creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."<sup>41</sup>

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33. *Braswell v. Braswell*, 410 S.E.2d 897, 899 (N.C. 1991).

34. *Id.* at 900.

35. *Id.*

36. *Id.* at 901.

37. *Id.* at 902.

38. *Id.* at 901 (emphasis added).

39. *Id.* at 902.

40. *Id.*

41. *Id.* (quoting *Coleman v. Cooper*, 366 S.E.2d 2, 6 (N.C. Ct. App. 1988)).

At this point in the doctrine's evolutionary trek through the North Carolina courts, it seemed the public duty doctrine would be applied only to cases involving local law enforcement,<sup>42</sup> and the doctrine would always be applied to such cases unless one of the two enumerated exceptions existed.<sup>43</sup> Though the rule sounded narrow enough, it would prove itself very expansive as the court worked to stretch it further than its original language would allow.

B. *The Tort Claims Act: The Flood Gates Open*

The next step in the evolution of this doctrine came in *Stone v. North Carolina Department of Labor*<sup>44</sup> and *Hunt v. North Carolina Department of Labor*.<sup>45</sup> In *Stone*, the owner of a food products plant had failed to provide unobstructed and adequate fire exits, and workers, as a consequence, were unable to escape the plant during a fire.<sup>46</sup> The decedents' estates and those injured sued the Department of Labor under the Tort Claims Act alleging it negligently failed to inspect the facility for adequate fire exits<sup>47</sup> in dereliction of its statutorily imposed duty, thereby causing deaths and injuries.<sup>48</sup> The court applied the public duty doctrine, expanding its scope to shield state agencies in addition to local law enforcement.<sup>49</sup> The court used the same policy justifications it articulated in *Braswell*, namely, limited resources and the ominous specter of an overwhelming burden of liability.<sup>50</sup> Its legal reasoning was, inter alia, that the Tort Claims Act incorporated the common law negligence rules, which included the public duty doctrine.<sup>51</sup>

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42. This is in keeping with its historical application in the United States. See generally Dardis, *supra* note 16, at 707 (discussing in depth the history of the doctrine's application and evolution).

43. *Braswell*, 410 S.E.2d at 902.

44. 495 S.E.2d 711 (N.C. 1998).

45. 499 S.E.2d 747 (N.C. 1998).

46. *Stone*, 495 S.E.2d at 713.

47. The problem of inadequate fire exits was only one of many the Department of Labor would have found had it made an attempt to inspect the plant. Such problems included locked doors, no markings on exits, no fire alarms, obstructed exits, and no automatic fire suppression plan. U.S. Department of Labor, Poultry Processing Industry etool, [http://www.osha.gov/SLTC/etools/poultry/general\\_hazards/firesafety.html](http://www.osha.gov/SLTC/etools/poultry/general_hazards/firesafety.html) (last visited Mar. 24, 2006).

48. *Stone*, 495 S.E.2d at 713.

49. *Id.* at 716.

50. *Id.*

51. *Id.* at 714. Interestingly, the public duty doctrine was not a part of the common law recognized by North Carolina courts at the time of the passage of the Tort Claims Act. *Id.* at 719 (Orr, J., dissenting).

That same year in *Hunt*, the court held the public duty doctrine applied when an inspector for the Department of Labor negligently inspected an amusement ride and concluded its safety restraints were up to code.<sup>52</sup> It was later discovered the restraints were not in compliance.<sup>53</sup> As a result of the inspector's failure to discover and enforce the Department of Labor's standards, an eleven-year-old boy sustained serious abdominal injuries when the go-kart he was riding in collided with a pole after the brakes failed.<sup>54</sup> These two cases left unanswered the question of where the doctrine would stop, if at all. It was now clear the court was willing to apply the doctrine to shield state agencies from claims brought under the Tort Claims Act. The question remained, however, whether the doctrine would be applied to all state agencies and in all circumstances, or just in cases involving failure to adequately inspect pursuant to a statutory duty. The cases that followed on the heels of *Hunt* and *Stone* did little to clear the air.

C. *Lovelace v. City of Shelby*:<sup>55</sup> *Putting on the Breaks*

With the *Lovelace* case came a change of course in the doctrine's development. Justice Orr, who dissented in *Hunt* and *Stone*, now found himself in the majority of a different three-judge panel wishing to stop the ever burgeoning expansion of the public duty doctrine. Justice Orr reasoned *Braswell* was limited to its facts in keeping with the history of the public duty doctrine.<sup>56</sup> The majority conceded the doctrine had been expanded to apply to cases against state agencies,<sup>57</sup> but it moved quickly to define the limits of that expansion. In dicta, the majority characterized the extension of the doctrine at the state level narrowly, as covering cases involving inspections by the state for the purpose of protecting the general public.<sup>58</sup> It also limited the expan-

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52. *Hunt v. N.C. Dep't of Labor*, 499 S.E.2d 747, 751 (N.C. 1998).

53. *Id.* at 748.

54. *Id.*

55. *Lovelace v. City of Shelby*, 526 S.E.2d 652 (N.C. 2000).

56. *Id.* at 654 ("The holding in *Braswell* was specifically limited to the facts in that case and to the issue of whether the sheriff negligently failed to protect the decedent. This limitation is consistent with the origin of the public duty doctrine in the United States in *South v. Maryland ex rel. Pottle*, 59 U.S. 396 (1855)."); see also *Stone*, 495 S.E.2d 711, 718 (Orr, J., dissenting) (arguing the public duty doctrine was never intended to expand outside the limits of local law enforcement cases, and the expansion of the doctrine beyond its original purpose is not consistent with the history of the doctrine).

57. *Lovelace*, 526 S.E.2d at 654.

58. *Id.*

sion of the doctrine at the local level to law enforcement,<sup>59</sup> thereby preventing its use to protect other subdivisions of local government like fire departments.<sup>60</sup>

D. Viar, Drewry, and Myers: *Wrestling with Lovelace*

Since *Lovelace*, the development of the doctrine's application has proceeded primarily within the court of appeals. This development culminated in three seminal cases that evidenced the schizophrenia from which the court suffered concerning this issue: *Viar v. North Carolina Department of Transportation*,<sup>61</sup> *Drewry v. North Carolina Department of Transportation*,<sup>62</sup> and *Myers v. McGrady*.<sup>63</sup> All three of these cases involved state agencies and the Tort Claims Act.

In *Viar*, the court of appeals reversed the opinion of the Industrial Commission,<sup>64</sup> and held the estates of two young girls had failed to show the Department of Transportation (NCDOT) was negligent.<sup>65</sup> The Viar girls were killed in a head-on collision when they skidded across an Interstate 85 median with no barrier into an oncoming tractor-trailer.<sup>66</sup> The court opined the Industrial Commission did not properly apply the law of negligence.<sup>67</sup> Interestingly, it only addressed the application of the public duty doctrine in dicta, responding to the dissent's argument that the doctrine barred the claim.<sup>68</sup> The majority dealt with the issue in passing, with that particular section of the opinion constituting less than a page out of a fourteen-page decision.<sup>69</sup> The opinion pointed out that three past court of appeals cases, when

59. *Id.* (declining to expand the doctrine at the local level).

60. *Id.* (“[W]e have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public . . .”).

61. *Viar v. N.C. Dep’t of Transp.*, 590 S.E.2d 909 (N.C. Ct. App. 2004), *vacated*, 610 S.E.2d 360 (N.C. 2005) (holding the appeal should have been denied by the court of appeals based on a failure to comply with the Rules of Appellate Procedure).

62. *Drewry v. N.C. Dep’t of Transp.*, 607 S.E.2d 342 (N.C. Ct. App. 2005), *disc. rev. denied*, 612 S.E.2d 318 (N.C. 2005).

63. *Myers v. McGrady*, 613 S.E.2d 334 (N.C. Ct. App. 2005), *disc. rev. allowed*, 619 S.E.2d 510 (N.C. 2005).

64. The Industrial Commission acts as the trial court pursuant to the Tort Claims Act. N.C. GEN. STAT. § 143-291 (2005).

65. *Viar*, 590 S.E.2d at 913 (stating the commission's findings were “based upon erroneous application of the law to the facts, and are not supported by its findings of fact”).

66. *Id.* at 911.

67. *Id.* at 915.

68. *Id.* at 918-19.

69. *Id.* at 909.

taken together, clearly established a precedent that “the public duty doctrine has never been applied to shield the NCDOT from acts of negligence.”<sup>70</sup> Additionally, the latest word from the supreme court in *Lovelace* was that it had only acknowledged an extension of the doctrine to state agencies if the agency was “required by statute to conduct inspections for the public’s general protection . . . .”<sup>71</sup> The defendant appealed, and when the case finally reached the supreme court, it was vacated on the grounds that the appeal from the Industrial Commission’s decision was improper under the Rules of Appellate Procedure.<sup>72</sup> The court never addressed the disagreement at the court of appeals over whether the public duty doctrine applied to bar the claim.<sup>73</sup>

At the same time the supreme court was considering the *Viar* appeal, the court of appeals was, once again, faced with the same question in *Drewry*.<sup>74</sup> This time, the lone dissenter in *Viar*,<sup>75</sup> along with two different judges, seized the opportunity afforded by the vacating of the majority’s holding in *Viar* to set a precedent consistent with his earlier dissent.<sup>76</sup> Redirecting the bark of the court of appeals, the new majority, relying on *Stone*, held the public duty doctrine applied to shield state agencies from liability under the Tort Claims Act unless one of the two previously enumerated exceptions existed.<sup>77</sup> This was an expansion the language of *Lovelace* did not warrant.

Finally, the court saw the need to clear the air once and for all with a bright-line rule in keeping with *Lovelace*.<sup>78</sup> The court accomplished this in *Myers v. McGrady*,<sup>79</sup> in which a passenger was killed when the car in which he was riding struck the rear of a stopped tractor-trailer in a multi-vehicle accident.<sup>80</sup> The passenger’s estate brought

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70. *Id.* at 919 (citing and summarizing these cases).

71. *Lovelace v. City of Shelby*, 526 S.E.2d 652, 654 (N.C. 2000) (supporting this proposition on the basis of *Hunt* and *Stone*).

72. *Viar*, 610 S.E.2d at 361.

73. *Id.* (focusing exclusively on the plaintiff’s violations of appellate procedure because it felt the appeal should have been dismissed).

74. *Drewry v. N.C. Dep’t of Transp.*, 607 S.E.2d 342, 346 (N.C. Ct. App. 2005), *disc. rev. denied*, 612 S.E.2d 318 (N.C. 2005).

75. Judge Tyson dissented in *Viar*, 590 S.E.2d at 920.

76. In fact the language the majority used concerning the public duty doctrine is verbatim that found in the *Viar* dissent. *Drewry*, 607 S.E.2d at 346.

77. *Id.* Though the court did not address this specifically, it can be inferred from its reliance on *Stone*.

78. *Myers v. McGrady*, 613 S.E.2d 334, 339 (N.C. Ct. App. 2005), *disc. rev. allowed*, 619 S.E.2d 510 (N.C. 2005).

79. *Id.*

80. *Id.* at 337.

an action against the allegedly negligent motorists.<sup>81</sup> The motorists then brought third-party claims against the Division of Forest Resources and a forest ranger alleging he negligently failed to protect and warn motorists of the danger of reduced visibility caused by smoke from a forest fire that contributed to the accident.<sup>82</sup> The court of appeals, interpreting the supreme court's holding in *Lovelace*, held the public duty doctrine did not shield the division from liability under the Tort Claims Act<sup>83</sup> because "after *Lovelace*, it appears that the public duty doctrine [only] applies where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of a state's departments or agencies to detect and prevent misconduct of others through improper inspections."<sup>84</sup> The court observed that a forest ranger is not a law enforcement officer and that the allegations of negligence were not based on any duty of the ranger to detect and prevent the misconduct of others through inspections.<sup>85</sup> With this opinion the court of appeals attempted to solidify the attempts made by the supreme court in *Lovelace* to scale back the expansion of the doctrine's use by articulating a clear rule regarding when the doctrine should and should not be applied.<sup>86</sup>

The *Myers* opinion represents the current state of the law on the issue of the public duty doctrine. The present rule, although it is drastically scaled back in comparison to *Stone*, is still fraught with problems and will lead to inconsistent and irrational results. While the current rule is clear, questions still remain. Is the law as it stands now the best policy? By way of the struggle between the two opposing perspectives, have we arrived at the appropriate synthesis? Is the rule we now have the rule that will best balance the right of the injured to a remedy at law with the practical challenges faced by a government accountable to all? In short, has the court done justice?<sup>87</sup>

## II. A BETTER WAY

The current rule is not the product of a well reasoned and thoroughly thought out decision. Concomitantly, it does not issue from a

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81. *Id.*

82. *Id.*

83. *Id.* at 340.

84. *Id.* at 339.

85. *Id.* at 340.

86. *Id.* at 339.

87. *Psalm* 82:3 (King James) ("Defend the poor and fatherless: do justice to the afflicted and needy.").

unified court driven by a sincere desire to do right by all parties. Rather, the current state of the law is one with which neither side can be happy; it is, in actuality, merely a representation of how far one side of the debate could expand the rule before the other could stop the expansion. This result is not in the best interests of the government or the citizens of North Carolina. It will hurt citizens by denying them redress for wrongs to which they would be entitled were the tortfeasor a private individual,<sup>88</sup> and it will hurt the government by turning it into a shelter for careless and incompetent bureaucracies.<sup>89</sup>

The North Carolina Supreme Court has recognized the doctrine may produce unjust and unacceptable results.<sup>90</sup> This was the consideration behind the court's action when it adopted the two exceptions to the doctrine in *Braswell*.<sup>91</sup> But these exceptions are not enough to remedy the harms caused by such an austere rule. Instead of this one-size-fits-all, blanket rule that holds the public duty doctrine always applies in two particular kinds of cases, the court should adopt a more workable test. The new rule should recognize how diverse situations can be, even within the two pigeonholed categories the court of appeals has enumerated.

The North Carolina Supreme Court should totally abrogate the public duty doctrine and adopt a traditional negligence standard applicable to all government employees whose acts or omissions cause injuries while in the course of their employment.<sup>92</sup> This new rule should incorporate factors and considerations aimed at addressing the legitimate concerns of those who support the public duty doctrine's use.<sup>93</sup> Under such a common law-based rule, the plaintiff will still be required to prove that the government owed him or her a duty<sup>94</sup> and that the duty was breached, proximately causing the plaintiff's injury.<sup>95</sup>

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88. N.C. GEN. STAT. § 143-291 (2005).

89. Swindell, *supra* note 27, at 250 (“[T]he application of the [public duty] doctrine promotes incompetence by providing no meaningful incentive for the governmental entity to provide services of optimal quality.”).

90. *Stone v. N.C. Dep’t of Labor*, 495 S.E.2d 711, 717 (N.C. 1998).

91. *Braswell v. Braswell*, 410 S.E.2d 897, 902 (N.C. 1991).

92. *Stone*, 495 S.E.2d at 718 (Orr, J., dissenting).

93. For example, consider those concerns raised by the court in *Braswell* and repeated in *Stone* and *Hunt*, namely, limited resources and the danger of an overwhelming burden of liability.

94. This is where much of the dissent lies. Even though a statute or ordinance may define a duty, supporters of the public duty doctrine argue the duty does not extend to individuals.

95. *Kientz v. Carlton*, 96 S.E.2d 14, 17 (N.C. 1957).

### A. *The Duty of Care*

In *Stone*, the court held even though North Carolina General Statute Section 95-4 charged the Department of Labor with a duty to inspect a plant, the duty was for the benefit of the general public and did not specifically apply to any individual.<sup>96</sup> This defeats the first element of a common law negligence claim.<sup>97</sup> The concept of “[a] duty to all is a duty to none”<sup>98</sup> is inherently illogical. If the government has a duty to the public, it also has a duty to the individuals who make up the public,<sup>99</sup> because the mythical personality the law calls “the public” cannot bring suit in order to be made whole or to hold government accountable. Only individuals can do this.

In addition, the plain language of the Tort Claims Act, authorizing civil suits against the government, waives the sovereign immunity of the state “under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina.”<sup>100</sup> Under the common law rules of negligence in North Carolina if a private person is not protected by the public duty doctrine,<sup>101</sup> then the government should not be either. As Marshall Shapo stated, “[i]t would seem curious that the possession of information [by government officials] about hazards and the ability to communicate it or to remedy dangerous conditions should impose liability on a private person but not on a government.”<sup>102</sup> In sum, if the legislature charges a state agency or governmental entity with a duty to do some task for the protection of the general public, the courts should treat it as just that, a duty. Dereliction of such a duty should have consequences.

### B. *Breach of Duty*

Breach of duty is the second element of a traditional negligence claim.<sup>103</sup> This element alone is commonly referred to as “negligence.”<sup>104</sup> Whether someone has breached a duty that was owed is

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96. *Stone*, 495 S.E.2d at 716.

97. *Brown-Graham*, *supra* note 13, at 2294.

98. *Hunt v. N.C. Dep’t of Labor*, 499 S.E.2d 747, 753 (N.C. 1998) (Orr, J., dissenting).

99. *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 138 (Wis. 1976) (holding a public duty is also a duty owed to individual members of the public).

100. *Stone*, 495 S.E.2d at 718 (Orr, J., dissenting) (quoting N.C. GEN. STAT. § 143-291(a) (1996)).

101. *See Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991).

102. MARSHALL S. SHAPO, *THE DUTY TO ACT* 81 (1977).

103. KEETON ET AL., *supra* note 20.

104. *Id.*

based on an objective standard.<sup>105</sup> Dean Prosser describes the duty itself as an “obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.”<sup>106</sup> The breach of that duty is described as “[a] failure on the person’s part to conform to the standard required . . . .”<sup>107</sup> “[T]he conduct, to be negligent, must be unreasonable.”<sup>108</sup> As Prosser notes, in light of the recognizable risk, “negligence is a failure to do what the reasonable person would do ‘*under the same or similar circumstances.*’”<sup>109</sup> This element presents the court with the opportunity to allow for special considerations affecting a person’s decision to act or refrain from acting in a certain way.<sup>110</sup>

Reasonableness can only be determined on a case-by-case basis, taking into account all the variables affecting the person’s decision.<sup>111</sup> The “reasonableness under the circumstances” standard, as articulated by Judge Learned Hand in the famous *Carrol Towing* case, allows the court to consider the offender’s burden of taking adequate precautions and weigh that burden against the probability the possible harm would occur, coupled with the severity of the harm that would result, if and when it did occur.<sup>112</sup> The formula is often represented as follows: if the burden of taking adequate precautions outweighs the probability of harm, multiplied by the severity of the possible harm, then the tortfeasor’s acts or omissions were reasonable.<sup>113</sup>

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105. *Id.* at 173-74.

106. *Id.* at 164.

107. *Id.*

108. *Id.* at 170.

109. *Id.* at 175 (quoting RESTATEMENT (SECOND) OF TORTS § 283 (1965) (emphasis added)).

110. SHAPO, *supra* note 102, at 82 (“Judicial decision in cases of this kind necessarily must take into account governmental problems in the reconciliation of competing demands.”).

111. KEETON ET AL., *supra* note 20 (“Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in *each particular case* must be left to the jury, or to the court.”) (emphasis added).

112. *United States v. Carrol Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

113. ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 17 (3d ed. 1990). This theory is widely accepted but has been roundly criticized as a purely economic approach to negligence. See, e.g., Patrick F. Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465, 468-69 (1978).

C. *Limited Resources*

The court should modify the first factor in the Hand formula in cases where the government is the defendant to address any concerns about limited resources<sup>114</sup> and excessive liability. The factor could be modified by the court's consideration of the following: 1) whether any *actual* limitation on resources existed at all, 2) the extent of the limitation placed on the particular governmental entity's resources, and 3) whether the limitation was one that should justify the government's allegedly negligent act or omission. These considerations should be used when determining the government's burden of taking adequate precautions.<sup>115</sup> Using this modified Hand formula to determine whether the defendant's act or omission was reasonable is sufficient to ensure a just result and to prevent the discretionary freedom of the governmental entity from being hampered unnecessarily.<sup>116</sup>

For example, suppose on the day Mrs. Braswell died at the hands of her husband, the sheriff knew Mr. Braswell had specifically threatened to take her life that day during her commute and the sheriff, having full knowledge of the volatility of the situation,<sup>117</sup> assigned no officers to see her safely to and from work or even to check on her. Suppose also the sheriff had his entire force on security duty at a peaceful gathering of a pacifist group. In addition, assume the sheriff had dealt with this group and its activities on prior occasions without incident and that the sheriff had no reason to believe this occasion would be any different. Even so, on the day in question, the sheriff simply did not take the threat seriously, and since the perpetrator was an employee and a friend, he did not want to be seen as an intrusive, meddling boss. As a result, the sheriff took a chance nothing bad would happen.

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114. SHAPO, *supra* note 102, at 82.

115. *Id.* at 82-83 ("In any event, whichever standard of reasonableness is selected, it should be applied to government and citizens alike, with courts simply factoring in the extra burdens that government may face because of multifarious demands on their police resources. It should be added that when the issue involves an ability to exercise power that is crucial for personal safety, the basic level of obligation of governments should tend to be heightened, providing an appropriate counterpart to the relaxation of their duties in particular cases to account for their peculiar burdens.").

116. The argument often leveled by proponents of the public duty doctrine is that the limited nature of resources available to governmental entities requires them to make discretionary decisions about the apportionment of those resources and that those discretionary decisions concerning the apportionment of resources should not be influenced by the looming threat of litigation, so the officials can use their best judgment without fear of excessive liability. Swindell, *supra* note 27, at 250-51.

117. *Braswell v. Braswell*, 410 S.E.2d 897, 900 (N.C. 1991).

Clearly this is reckless and unreasonable behavior that, had this been an individual citizen, would have likely led to a civil remedy for the injury suffered due to the defendant's negligence.<sup>118</sup> In this hypothetical situation, no actual limitation on the sheriff's resources existed, and thus, no justifiable reason for the nonfeasance that culminated in such a tragedy existed. Nevertheless, since the government is the one allegedly at fault, the public duty doctrine, premised upon limited resources, would relieve the sheriff of his duty to the plaintiff and, consequently, of all liability.<sup>119</sup> This is in spite of the fact the sheriff had specific knowledge concerning the threat to this victim that made his actions manifestly unreasonable.<sup>120</sup> In this situation, the existence of the "special relationship" and the "special duty" exceptions are ineffective "to prevent inevitable inequities to certain individuals."<sup>121</sup> Under the current rule, in a case such as this, manifest negligence on the part of law enforcement would be shielded, and no remedy would be available for those injured thereby.<sup>122</sup>

When situations like this arise, such unreasonable behavior should give rise to a cause of action, so the victim may be made whole again<sup>123</sup> and the government held accountable for unjustifiable and unreasonable acts or omissions. Reason requires that when the resource restrictions placed on the government have no bearing whatsoever on the government's actions or failures to act, the government should not be allowed to escape liability. Traditional negligence standards coupled with the modifications mentioned earlier would allow judges to take into consideration the lack of limitations on resources in cases like this. The proposed rule would also allow citizens to hold government accountable while, at the same time, protecting government when it exercises due care to do the best job possible to protect the public with the resources made available to it. Had the sheriff

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118. N.C. GEN. STAT. § 143-291(a) (2005) ("The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, *under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.*") (emphasis added).

119. *Braswell*, 410 S.E.2d at 901-02.

120. This is a question of foreseeability. This murder was reasonably foreseeable because of what the sheriff knew about the threats and the perceived risk of harm in each of the situations competing for his attention.

121. *Braswell*, 410 S.E.2d at 902.

122. *Braswell*, 410 S.E.2d 897.

123. See KEETON ET AL., *supra* note 20, § 1 (discussing the socio-economic purpose and function of tort law).

acted as a reasonably prudent person in his position and in light of his available resources, then there would exist no breach of the duty incumbent upon him by virtue of his position as sheriff and, therefore, no liability.

Such a flexible standard is necessary in order to deal in a fair and just way with the challenges faced by local governments in regard to the limited resources afforded them. The following example illustrates why. Suppose two small towns have the same population base. This does not necessarily mean they will have a constituency comprising people with similar income levels, property of the same value, a similar tax base, or an equal amount of state and federal funding. Therefore, the local law enforcement and the local government in these two towns may be radically divergent in comparison to one another in regard to available resources and ability to meet certain risks to the public. It is very possible one town may have significantly more resources at its disposal to fight crime. Under the current state of the law, the public duty doctrine will hold both of these municipalities to the same standard.<sup>124</sup> Even though one has more than adequate resources to deal with the risk of harm and the other does not, the public duty doctrine declares neither is accountable for failing to use them to prevent harm to the public, even if it would have been reasonable in light of all the circumstances and even if it amounted to willful and wanton disregard.<sup>125</sup> Such inequities will disappear with the death of the public duty doctrine if, in its place, the court adopts a rule distinguishing between cases involving actual limitations on resources and those where resource limitations are nothing more than pretextual.

Society does not expect perfection from government and law enforcement, but it does expect due diligence to be given and reasonable steps to be taken to protect the public and individuals when it is reasonable and necessary in light of the circumstances. This is not too much to ask of government. But, to reach this goal, the rules determining when government will be held liable need to be flexible enough to conform to the special challenges, or lack thereof, that different enti-

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124. The courts' current rule applies, irrespective of actual resources, to every governmental entity based on the false premise that every entity's resources are limited. *Myers v. McGrady*, 613 S.E.2d 334 (N.C. Ct. App. 2005), *disc. rev. allowed*, 619 S.E.2d 510 (N.C. 2005).

125. *See Stone v. N.C. Dep't of Labor*, 495 S.E.2d 711, 718-19 (N.C. 1998) (Orr, J., dissenting) (pointing out that under the common law in place before the court's application of the public duty doctrine the state was shielded from liability under sovereign immunity for all torts, even "wanton" or "reckless" acts; going on to say that the majority has simply reinstated this scheme by adopting the public duty doctrine, rendering the Tort Claims Act "virtually obsolete").

ties of government face, so each entity can be judged on the basis of its own unique circumstances.

D. *Laws Haphazardly Enforced Versus No Laws*<sup>126</sup>

In *Stone*, the court noted, “[The] Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible,” and “[a]fter the fire, the [department] conducted their first and only inspection in the plant’s eleven-year history of operation.”<sup>127</sup> The court opined, “[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures or omissions in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all.”<sup>128</sup>

Such an argument is haphazard in itself. The logical extension of such reasoning is that the government, by law, can charge certain of its officers and employees with duties to inspect for the protection of the general public, but, in reality, no duty exists to carry it out. In *Stone*, no inspection was performed until it was too late,<sup>129</sup> and no one was accountable for the failure to fulfill that duty.<sup>130</sup> So, in essence, the government is saying to its officers and employees, “You have a duty (i.e., responsibility or obligation) to protect the public, but, if you do not keep that charge, there will be no consequences.” If there are no consequences for negligent or incompetent discharge of one’s statutory duties, there is no duty; performance becomes optional. From a policy standpoint this is unacceptable because it turns the government, which many depend on to protect them from certain harms, into a haven for incompetent, irresponsible, and ineffective bureaucracies.<sup>131</sup>

When laws are not present that purport to protect the public from certain harms, citizens are responsible for their own welfare and cannot charge the government with responsibility for misfortune. However, when laws are made that place a duty upon the government to perform certain protective services for citizens they induce reliance and dependence upon the government in the psyche of the citi-

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126. *Id.* at 716.

127. *Stone*, 495 S.E.2d at 713.

128. *Id.* at 716 (quoting *Grogan v. Kentucky*, 577 S.W.2d 4, 6 (Ky. 1979)).

129. *Id.* at 713.

130. *Id.* (holding the public duty doctrine shielded the agency from liability for the resulting deaths and injuries).

131. See RABIN, *supra* note 113, at 16 (arguing private rights of action against the government can be a means of safety regulation).

zenry.<sup>132</sup> This reliance creates a dynamic in which the people choose not to take personal responsibility for their own safety because the government has created in their minds a false sense of security by promising to do it for them. If the government then fails to do what it said it would do, the end result is no one looking out for the safety of those to whom the government owed the duty. The government is not compelled to place such responsibilities on itself, but, when it does, it should be required to perform competently that which it has obligated itself to do. When no limitation on the government's resources exists, but ample governmental negligence is present, the public duty doctrine only serves to shelter haphazard enforcement of the law.<sup>133</sup>

The proposed modified Hand formula will hold the government to a higher standard than does the public duty doctrine without unduly subjecting it to excessive litigation. Even if such a rule does bring increased exposure to liability, the government will have nothing to fear so long as it does its duty, not to prevent harm in every circumstance, but rather, to take steps reasonable under the circumstances to prevent that harm. This is all the public asks.

#### E. *The Burden of Liability*

Those who oppose abrogation of the public duty doctrine always point to the specter of a crippling burden of liability that will ensue if individuals are allowed to sue the government for negligence.<sup>134</sup> These concerns are inflated and unfounded<sup>135</sup> for two reasons. First, the legislature has had ample opportunity to debate and consider this factor, and after doing so, the Tort Claims Act and other statutes subjecting the government to suit by its citizens were nevertheless passed. As Justice Orr pointed out in his dissent from the *Stone* decision, had the legislature intended to continue to shield the government from the burden of litigation it could have left the law as it was,<sup>136</sup> however, it did not. From this action, it is evident the legislature intended for the state to be liable in all situations where the private individual would be,<sup>137</sup> and for the state's statutory duties to the public to be duties to individ-

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132. SHAPO, *supra* note 102, at 81 ("The key to duty . . . resides in the *dependence* of the unknown plaintiff . . .") (emphasis added).

133. See *Stone*, 495 S.E.2d at 716 (citing *Grogan v. Kentucky*, 577 S.W.2d 4, 6 (Ky. 1979)).

134. See, e.g., *id.* at 717; *Braswell v. Braswell*, 410 S.E.2d 897, 902 (N.C. 1991).

135. The effects of excessive liability of governments are speculative at best. Dardis, *supra* note 16, at 721.

136. *Stone*, 495 S.E.2d at 719 (Orr, J., dissenting).

137. *Id.*

uals.<sup>138</sup> Aside from this, even if it could be proved the waiver of immunity would bankrupt the state, it is not the job of the courts to usurp the power of the legislature by supplanting the body's judgment with its own. Second, under a traditional negligence scheme of liability with the modification to the reasonableness standard proposed, the instances in which the state has suit filed against it may be increased, but the instances that the state is actually held liable will not rise to the astronomical levels predicted by the gainsayers. This is due to the fact the court will be allowed to consider the resources the government *actually* had available to meet the risk it failed to prevent, in order to determine whether negligence was present. In this process, those claims where the government entity's acts or omissions are justified because of such limitations will not likely see success.

#### CONCLUSION

The public duty doctrine was not a part of North Carolina common law in 1951 when the legislature decided to waive the state's sovereign immunity by passing the Tort Claims Act, and it was not applied until 1991.<sup>139</sup> Yet, part of the justification for its adoption is the argument that the legislature incorporated the common law, which included the doctrine, when it passed the Tort Claims Act.<sup>140</sup> Had the legislature wished to incorporate such a common law principle, it could have specifically stated such. Since it was not in use in North Carolina at the time, the public duty doctrine simply could not have been in the mind of the legislature when it waived the state's sovereign immunity. Effectively, this doctrine emasculates the legislature's action in passing statutes allowing private individuals recourse against the government, and its application is therefore in direct contravention of the intent of the legislature.<sup>141</sup>

The Supreme Court of North Carolina should totally abrogate the public duty doctrine in deference to the will of the legislature. Disdain for the doctrine is spreading, with numerous states having already taken this step.<sup>142</sup> Instead, the traditional rules of negligence should

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138. See, e.g., *Coffey v. City of Milwaukee*, 247 N.W.2d 132 (Wis. 1976) (holding a public duty is also a duty owed to individual members of the public).

139. See *Braswell*, 410 S.E.2d 897.

140. *Stone*, 495 S.E.2d at 715.

141. *Id.* at 719 (Orr, J., dissenting).

142. See, e.g., *Adams v. State*, 555 P.2d 235 (Alaska 1976); *Ryan v. State*, 656 P.2d 597 (Ariz. 1982); *Leake v. Cain*, 720 P.2d 152 (Colo. 1986); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979); *Brennen v. City of Eugene*, 591 P.2d 719 (Or. 1979); *Coffey v. City of Milwaukee*, 247 N.W.2d 132 (Wis. 1976).

govern whether the governmental entity in question should be held liable for an alleged wrong. In order to address the challenges faced by government because of limited resources, the question whether the state breached its duty through unreasonable acts or omissions should include considerations geared toward the unique situation in which governmental officers and entities find themselves. In this way the courts can, in a more just and consistent way, allow recovery when the circumstances warrant, while also protecting the government from suits that will unnecessarily hamper its work. If the legislature is of the opinion that liability needs to be further limited, it may do so through the democratic process.

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