COMMENT

The Scope of the Public Duty/Special Duty Doctrine in Illinois: Municipal Liability for Failure to Provide Police Protection

I. INTRODUCTION

Municipalities1 traditionally have been shielded from liability for conduct which can be characterized as a failure to provide general police protection. Courts provided this insulation from liability in two ways. Most jurisdictions applied the doctrine of governmental immunity2 to shield municipalities from liability arising from their tortious conduct during the performance of “governmental” functions.3 It is generally agreed that a municipality performs a governmental function when it provides police protection to the general public.4 When a governmental entity or its employee is protected by immunity, the person injured by the tortious conduct is barred from asserting what otherwise may be a meritorious claim.5

The second method of limiting municipal liability within the context of providing general police protection is through the judicial

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1. For the purposes of common-law immunity, a distinction was drawn between municipal corporations and quasi-municipal corporations. For a discussion of the differences, see infra text accompanying notes 48-51. The distinction, however, has generally been abandoned in those states where common-law immunity doctrines have been supplanted by a tort claims act.

2. The terms sovereign immunity and governmental immunity are closely related. Some authorities distinguish them defining sovereign immunity as a common-law doctrine applying only to the state, whereas governmental immunity applies to all levels of government. See 2 S. SPEISER, C. KRAUSE & A. GANS, THE AMERICAN LAW OF TORTS § 6.2 (1985) [hereinafter 2 SPEISER].

3. See Owen v. City of Independence, 445 U.S. 622, 645 n.27 (1980) (the Court discusses the history of immunity as applied to municipal corporations); see also infra text accompanying notes 70-73.

4. 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.51 (3d rev. ed. 1984). Although courts agreed that the municipal function of providing police protection is “governmental,” there was general disagreement among jurisdictions over which municipal functions should be classified as “governmental” and thus immune, and which municipal functions should be classified as “proprietary” and thus subject to potential liability. See infra text accompanying notes 115-117.

application of the public duty doctrine. The public duty doctrine is based on the premise that a governmental entity owes a duty to the general public for the performance of certain functions of government. Therefore, the governmental entity is not liable for a breach of a public duty which may injure any specific individual. Under this doctrine, the duty of a municipality to provide police protection to its inhabitants is considered to be a duty owed to the general public. When a municipality fails to provide, or inadequately provides, police protection, an individual injured as a result is prevented from establishing a cause of action by an application of the public duty doctrine.

An exception to the public duty doctrine is generally recognized. The municipality may be held liable if a special duty is owed to the injured individual. For a special duty to exist, the plaintiff must establish a special relationship with the municipality or its employee which sets the plaintiff apart from the general public. The criteria that courts use to determine whether a plaintiff has established a special duty vary greatly among jurisdictions. The mere existence of

6. "Governmental entity" includes the state and its subdivisions as well as local governmental units.

7. See Fessler by Fessler v. R.E.J., Inc., 161 Ill. App. 3d 290, 295, 514 N.E.2d 515, 518 (4th Dist. 1987) (public duty rule applied to a failure to provide police protection), appeal denied, 118 Ill. 2d 542 (1988); Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 804 (Minn. 1979) (public duty rule applied to a failure to make a fire code inspection).


9. See Turner v. United States and Creek Nation of Indians, 248 U.S. 354, 357-58 (1919) ("Like other governments, municipal as well as state, the Creek Nation was free from liability for injuries to persons or property due to mob violence or failure to keep the peace."); Huey v. Town of Cicero, 41 Ill. 2d 361, 363, 243 N.E.2d 214, 216 (1968) (municipality held not liable for failure to protect an individual from racial violence).

10. Huey, 41 Ill. 2d at 363, 243 N.E.2d at 216.

11. See McQuillin, supra note 4, § 53.04(b).

12. Compare Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 806-07 (Minn. 1979) (four factors to be considered in assessing a special duty: (1) the government's knowledge of the dangerous condition; (2) reasonable reliance by persons on the government's representations and conduct which cause the persons to forego other alternatives for protecting themselves; (3) an ordinance or statute setting forth mandatory acts clearly for the protection of a particular class of persons; (4) the government's use of due care to avoid increasing the risk of harm) and Cuffy v. City of New York, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987). Four elements must be established under this test for a special duty to exist:

(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge
a special duty, however, does not establish liability on the part of the municipality. Once the plaintiff has established that a special duty was owed to him by the municipal defendant, the plaintiff must still establish as elements of his cause of action that the duty was breached and that his injury proximately resulted from the breach. 13

Whether applying governmental immunity or the public duty doctrine, similar reasons are advanced in support of limiting the liability of municipalities for the function of providing general police protection. These reasons address public policy concerns regarding the effect expanded liability would have on the economic and functional aspects of municipal government. First, it is asserted that municipalities could not bear the economic hardship of expanded tort liability. 14 As a consequence of having to satisfy additional judgments against the municipality, funds would be diverted from public use. 15

on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Cuffy, 69 N.Y.2d at 260, 505 N.E.2d at 940, 513 N.Y.S.2d at 375; with Bailey v. Town of Forks, 108 Wash. 2d 262, 737 P.2d 1257 (1987). Delineating five situations in which a special duty is established:

(1) when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons . . . ; (2) where governmental agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation, fail to take corrective action despite a statutory duty to do so, and the plaintiff is within the class the statute intended to protect . . . ; (3) when governmental agents fail to exercise reasonable care after assuming a duty to warn or come to the aid of a particular plaintiff . . . ; (4) where a relationship exists between the governmental agent and any reasonably foreseeable plaintiff, setting the injured plaintiff off from the general public and the plaintiff relies on explicit assurances given by the agent or assurances inherent in a duty vested in a governmental entity . . . ;

Bailey, 108 Wash. 2d at 268, 737 P.2d at 1260 (citations omitted). The court added that a fifth situation which would create a special duty would occur when a governmental agency is operating in a proprietary rather than a governmental function. Id.


14. See Doe v. Hendricks, 92 N.M. 499, 502, 590 P.2d 647, 650 (1979) (no duty owed to plaintiff when police failed to respond quickly enough to reports of a sexual assault; to hold otherwise would lead to a “staggering” potential for liability).

15. See Warren v. District of Columbia, 444 A.2d 1, 9 (D.C. 1981) (no duty owed to plaintiff when police failed to adequately respond to a report of a burglary in progress; the result of imposing a duty in such cases would be that time and money would be spent on litigation rather than on governmental services).
Second, opponents of expanded tort liability contend that it would hinder the effectiveness of government. Specifically, it is argued that the courts should not review the discretionary decisions of a coordinate branch of government within the context of a tort action. Therefore, discretionary decisions, such as how and when police resources should be allocated, should not be subject to judicial second-guessing. In addition, it is suggested that expanded liability might deter a police officer from acting in situations where her conduct might expose a third party to a risk of injury. Furthermore, public service may become unattractive where expanded municipal liability exposes municipal employees to a greater potential for suit.

Proponents of expanded municipal liability dispute the contention that it would negatively affect municipal government. In response to the prediction of adverse economic consequences resulting from expanded liability, it is argued that municipalities are able to bear the burden of tort liability through the purchase of insurance or the creation of reserve funds. Some courts also maintain that an application of traditional tort principles would be adequate to limit the liability of municipalities, just as these principles protect private individuals and corporations from excess liability. Furthermore, modern concepts of justice favor compensating an individual whose injury results from the tortious conduct of a municipality or its

16. See Shore v. Town of Stonington, 187 Conn. 147, 157, 444 A.2d 1379, 1384 (1982) (No duty owed to plaintiff injured by a drunken driver whom police failed to stop. Imposing a duty "would cramp the exercise of official discretion beyond the limits desirable in our society."); Seibring v. Parcell's, Inc., 159 Ill. App. 3d 676, 680, 512 N.E.2d 394, 397 (4th Dist. 1987) (discretion for officers in the field is necessary to prevent constant consultation with superiors concerning priorities).
17. Seibring, 159 Ill. App. 3d at 680, 512 N.E.2d at 397.
18. See Warren, 444 A.2d at 9. The threat of liability on public officials "would dampen the ardor of all but the most resolute." 444 A.2d at 9 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
19. See id.
20. See Ryan v. State, 134 Ariz. 308, 309-10, 656 P.2d 597, 598-99 (1982) (noting the legislature's requirements for insurance coverage for state agencies as a solution to the greater potential for liability resulting from the abolition of sovereign immunity); Chambers-Castanes v. King County, 100 Wash. 2d 275, 292, 669 P.2d 451, 461 (1983) (Utter, J., concurring) (contending that governmental tort liability should have coextensive limits with the liability of private corporations).
21. Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986) (rejecting the public duty doctrine in favor of conventional tort principles); Chambers-Castanes, 100 Wash. 2d at 290, 669 P.2d at 460 (Utter, J., concurring) (would apply conventional tort principles to reach the same result as the majority who used the public duty doctrine to find defendant did not owe a duty to provide police protection to plaintiff).
employees. It is reasoned that when the defendant is a municipality the loss can be distributed over the public at large rather than fall solely upon the injured individual. In addition, compensating an individual for injuries received as a result of a municipality's tortious conduct is considered by some to be a proper expenditure of public funds. Although the government is not the insurer of the public safety, the argument has been made that the government should be responsible for those risks that it unreasonably imposes on a particular individual. Proponents of expanded municipal liability also contend that since the courts, within the context of a tort action, often review municipal decisions concerning the allocation of resources for non-police operations, a different standard should not be applied to the police department based on the presumption that governmental effectiveness is at stake.

Because the public policy arguments on both sides of the issue are persuasive, the public duty/special duty doctrine has received diverse treatment among the states. Some states have chosen to eliminate the doctrine entirely, reasoning that it is a throwback to sovereign immunity. Many states, however, continue to recognize

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24. See Molitor, 18 Ill. 2d at 22, 163 N.E.2d at 94 (the court disagreed that the payment of damages to children injured when a school bus crashed was an improper diversion of the school district's educational funds).
25. See Riss v. City of New York, 22 N.Y.2d 579, 583, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968) (the court recognized the public duty doctrine as applying to the case at bar, but stated that an exception would apply when the police undertake the duty to protect an individual then expose him to risks which result in an actual injury).
26. Id. at 903-04, 240 N.E.2d at 864, 293 N.Y.S.2d at 588 (Keating, J., dissenting) (would find no basis for treating the police department different from other operations of the government for purposes of tort liability).
27. The following states have rejected the public duty doctrine—Alaska: Adams v. State, 555 P.2d 235, 241-42 (Alaska 1976) ("Where there is no immunity, the state is to be treated like a private litigant."); Arizona: Ryan v. State, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982) ("The parameters of duty owed by the state will ordinarily be coextensive with those owed by others."); Colorado: Leake v. Cain, 720 P.2d 152, 160 (Colo. 1986) ("[T]he duty of a public entity shall be determined in the same manner as if it were a private party."); Florida: Commercial Carrier Corp. v. Indian River Cty., 371 So. 2d 1010 (Fla. 1979) (public duty doctrine is a function of sovereign immunity, which was abolished); Iowa: Wilson v. Nepstad, 282 N.W.2d
the public duty doctrine and apply it as a means of limiting the liability of governmental entities.28

In Illinois, the public duty doctrine, in regard to the duty to provide police protection, is codified in section 4-102 of the Local Government and Governmental Employees Tort Immunity Act.29 Illinois courts also recognize the special duty exception to the public duty rule.30 Because of the strict requirements of the special duty test which is generally applied by Illinois courts, it is of limited usefulness to a plaintiff in establishing a cause of action against a municipality.

The purpose of this article is to examine the application of the public duty doctrine and the special duty exception in Illinois. This

664, 671 (Iowa 1979) ("[T]he abrogation of governmental immunity means the same principles of liability apply to officers and employees of municipalities as to any other tort defendant. . . ."); New Mexico: Schear v. Board of County Comm’rs of County of Bernalillo, 101 N.M. 671, 674, 687 P.2d 728, 731 (1984) (public duty doctrine was a function of sovereign immunity which was abolished by the tort claims statute); Oregon: Brennen v. Eugene, 285 Or. 401, 591 P.2d 719 (1979) (tort immunity statute adequately provides for governmental liability protection without the addition of the public duty doctrine); Wisconsin: Coffey v. City of Milwaukee, 74 Wis. 2d 526, 537, 247 N.W.2d 132, 138 (1976) (public duty doctrine is inconsistent with the state’s position on municipal liability); Wyoming: DeWald v. State, 719 P.2d 643, 653 (Wyo. 1986) (reasoning that the public duty doctrine is a form of sovereign immunity which was legislatively abolished).


29. Section 4-102 of the Illinois Tort Immunity Act provides: Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent the commission of crimes, failure to detect or solve crimes, and failure to identify or apprehend criminals. This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee. ILL. REV. STAT. ch. 85, ¶ 4-102 (1987).

30. See infra text accompanying note 152.
article will first discuss the development of the immunity doctrine and the collateral public duty doctrine. Recent Illinois cases applying the public duty doctrine and special duty exception to situations involving claims of failure to provide police protection will be analyzed. Finally, possible modifications to Illinois' approach to the problem will be examined.

II. BACKGROUND

The public duty doctrine and the doctrine of governmental immunity both insulate from liability those functions which policy dictates should not be subject to review in a tort action. While recognized as separate doctrines, in practice they often achieve the same results. For that reason, it is informative to consider the origins and early applications of both the immunity doctrine and the public duty doctrine.

A. IMMUNITY AS APPLIED TO THE FEDERAL GOVERNMENT

The doctrine of sovereign immunity is said to have its philosophical basis in the English concept that "the King can do no wrong." This reasoning was not directly applicable in the United States where no monarchy exists. The underlying rationale, however, was adopted by some courts in this country and restated: In the absence of consent to be sued, a claim should not be able to be enforced against the authority that makes the laws upon which the claim depends. The adoption of sovereign immunity by the United States was probably a result of the acceptance of English legal traditions.


32. Benson v. Kutsch, 380 S.E.2d 36, 37 (W. Va. 1989) (the court applied the public duty rule and held the city not liable for failure to inspect an apartment for fire code violations; plaintiff's suit would have been foreclosed by governmental immunity, prior to its abolition).

33. See McQuillin, supra note 4, § 53.02; see also Bouchard, Government Liability in Tort, 34 Yale L. J. 1 (1924).

34. See C. Jacobs, The Eleventh Amendment and Sovereign Immunity 152 (1972).

35. Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907) (sovereign immunity was held to apply to Hawaii, a territory of the United States, because the administrative authority of the territory gave it the power to change the laws of contract and property upon which the plaintiff's right to sue depended).

36. Jacobs, supra note 34, at 163.
Sovereign immunity, as applied to the federal government, has no
evident constitutional basis. In 1846 the doctrine of sovereign immu-
ity was embraced by the United States Supreme Court in United
States v. McLemore.\textsuperscript{37} The Court held that a circuit court did not
have jurisdiction to hear a claim against the United States, because
the federal government was immune from suit.\textsuperscript{38} The rationale ex-
pressed by the court was that "the government is not liable to be
sued, except with its own consent, given by law."\textsuperscript{39}

The doctrine of sovereign immunity as applied to the federal
government was limited by the Federal Tort Claims Act of 1946.\textsuperscript{40}
This Act, in effect, provided the federal government's consent to suit
within the parameters of the act.

**B. IMMUNITY AS APPLIED TO THE STATES**

Application of sovereign immunity to the states occurred with
the adoption of the eleventh amendment.\textsuperscript{41} In Chisolm v. Georgia,\textsuperscript{42}
the United States Supreme Court allowed the State of Georgia to be
sued in federal court by a citizen of South Carolina. As a reaction to
Chisolm, the eleventh amendment to the United States Constitution
was passed which prohibited federal courts from hearing suits brought
by a citizen of one state against any other state. Subsequently, the
Court interpreted the eleventh amendment as prohibiting federal
courts from hearing suits brought by a citizen of a state against his
own state, in the absence of the state's consent to be sued.\textsuperscript{43}

\textsuperscript{37} 45 U.S. (4 How.) 286 (1846).
\textsuperscript{38} United States v. McLemore, 45 U.S. (4 How.) 286, 288 (1846) (McLemore
brought an action in equity in the circuit court seeking to have the United States
enjoined from pursuing a judgment against him claiming that he had paid the debt).
\textsuperscript{39} Id.
\textsuperscript{40} See 28 U.S.C. § 1346 (1982) (Federal Tort Claims Act; jurisdiction for tort
2401 (1978) (time for commencing tort action); 28 U.S.C. § 2402 (1954) (denial of
procedure).
\textsuperscript{41} U.S. Const. amend. XI states:
The Judicial power of the United States shall not be construed to extend to
any suit in law or equity, commenced or prosecuted against one of the
United States by Citizens of another State, or by Citizens or Subjects of
any Foreign State.
U.S. Const. amend. XI.
\textsuperscript{42} 2 U.S. (2 Dall.) 419 (1793).
\textsuperscript{43} See Hans v. Louisiana, 134 U.S. 1, 5 (1890). However, a state may waive
its immunity by expressly consenting to a suit against it in federal court. See Edelman
The modern trend is toward an expansion of the state's liability for its tortious conduct. Even those states which have abolished or substantially limited immunity, however, generally retain immunity for discretionary functions or duties. Discretionary immunity protects those activities which are legislative in nature or executive conduct which involves policy judgment. Therefore, discretionary immunity covers most activities performed at the planning level of state government. Conduct in the execution of state policy, however, may not be immune from suit.

C. IMMUNITY AS APPLIED TO LOCAL GOVERNMENTAL UNITS

The immunity of various local governmental units flows from a different historical source. Traditionally, courts drew a distinction between two categories of local governmental entities: quasi-municipal corporations and municipal corporations. A quasi-municipal corporation is created as a subdivision of the state to aid in the administration of sovereign affairs. As an arm of the state, quasi-municipal corporations were accorded the benefit of total sovereign immunity. Conversely, a municipal corporation is generally chartered by the state with the consent of the municipality's inhabitants. A municipal corporation is said to act primarily for the benefit of its inhabitants. It is also recognized, however, that a municipality can sometimes function much like a private corporation thereby acting for its own benefit. Courts granted immunity to municipal corporations for those functions that were essentially governmental in nature and for the benefit of the general public.

44. See 2 SPEISER, supra note 2, § 6.16.
45. See, e.g., ALASKA STAT. § 09.50.250 (Michie Supp. 1989); ARIZ. REV. STAT. ANN. § 12-820.01 (West Supp. 1989); N.Y. JUD. LAW § 8 n.71 (1989).
46. See Dalehite v. United States 346 U.S. 15, 34-36 (1953) (discussing the nature of discretionary acts as applicable to the Federal Tort Claims Act).
49. See Johnston v. City of Chicago, 258 Ill. 494, 499, 101 N.E. 960, 962 (1913) (discussing the differences between quasi-municipal and municipal corporations).
50. See id.
51. Id.
52. Id.
The immunity of quasi-municipal corporations may be attributed to a decision of the King's Bench in 1788. In *Russell v. Men of Devon* the plaintiff's wagon was damaged while crossing a public bridge. The bridge was in a state of disrepair and the county had the obligation of maintenance. The court held the county not liable for two reasons. First, a tort action could not be maintained against a county where the legislature had not specifically granted the authority to do so. Second, the county possessed no corporate fund from which damages could be paid. This would have resulted in damages being levied on one individual, or separate actions being brought against each individual in the county. In sustaining the defendant's demurrer the court reasoned that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." The rationale from *Russell* was first adopted in the United States by a Massachusetts court in 1812 in *Mower v. Inhabitants of Leicester* which held a county immune from tort liability.

A different rationale was applied in the case of municipal corporations. A municipality was viewed as having a dual nature; it could act in a governmental capacity, or a proprietary capacity. When a municipality performs a governmental function it exercises its power in the performance of a public duty. Whereas, when a municipality performs a proprietary function it exercises its private,

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56. *Id.* at 362.
57. *Id.*
58. *Id.*
59. *Id.*
60. 9 Mass. 247, 6 Am. Dec. 63 (1812) (plaintiff sued for the loss of his horse, killed as a result of a fall on a bridge in disrepair which the county was obligated to maintain).
61. The court's rationale paralleled that of *Russell*. Quasi-municipal corporations are created by the legislature for the purposes of public policy and are not subject to liability unless the action is granted by law. *Mower v. Inhabitants of Leicester*, 9 Mass. 247, 6 Am. Dec. 63 (1812).
62. See Kramer, *supra* note 22, at 815 (providing a historical perspective of the development of immunity as applied to municipal corporations).
63. Apparently the distinction originated in *Bailey v. Mayor of New York*, 3 Hill 531, 38 Am. Dec. 669 (1842) holding that the erection of a dam on a river was a proprietary function and that the city was liable for damages due to negligent construction. Thereafter, the governmental/proprietary distinction became the prevailing doctrine for analyzing when immunity should apply to municipal conduct. See also *Johnston v. City of Chicago*, 258 Ill. 494, 497, 101 N.E. 960, 962 (1913).
64. See McQuillin, *supra* note 4, § 53.24.
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corporate power. Courts used this to distinguish between the functions of government which merited immunity and those which should be subject to potential liability. Thus, a municipality is immune from suit in tort when performing a governmental function, while it is potentially liable when performing a proprietary function. Application of this distinction drew criticism, however, due to the difficulty in distinguishing whether a function is governmental or proprietary. Certain municipal conduct may share characteristics of each category. Under the governmental/proprietary distinction, the operation of a police department by a municipality is a governmental function. Therefore, a municipality is immune from suit for a failure to provide adequate police protection under this doctrine.

The rationale asserted by the courts for granting immunity to municipalities during performance of their governmental functions is that the public nature of the municipality is not analogous to a private individual or private corporation for purposes of tort liability. First, unlike a private corporation, the performance of a governmental function by the municipality benefits the public only. The municipality derives no profit from performing functions such as providing police and fire protection. Second, the functions of a municipality are sometimes required by the legislature. Therefore, it would be unreasonable to hold the municipality liable where it has not voluntarily assumed the function. Third, in performing duties required of the municipality by state law, public officers are agents of the state rather

65. See McQuillin, supra note 4, § 53.23.
67. In Illinois, for example, the maintenance of streets, sidewalks, bridges, and viaducts, the operation of public utilities, and the collection of garbage and rubbish were held to be proprietary functions. However, the exercise of police and fire protection duties, the maintenance of parks, playgrounds, and swimming pools were held to be governmental functions. See J. Appleman, 2 Preparing and Trying Cases in Illinois 1821-1839 (1951); see also cases cited infra notes 97-99.
68. See McQuillin, supra note 4, § 53.51.
69. See I. Silver, Police Civil Liability § 10.03 (1989).
70. See Van Astyne, Government Tort Liability: A Decade of Change, 1966 U. ILL. L. F. 919, 923 (advancing the rationale that public entities cannot avoid certain risks by refusing to perform a function).
72. Id. at 388, 189 N.E.2d at 861.
than the municipality; thus the doctrine of respondeat superior does not apply to the municipality.\textsuperscript{73}

The distinction between quasi-municipal and municipal corporations drew criticism as unnecessarily complicating the determination of tort liability.\textsuperscript{74} As a result, modern tort claims acts do not recognize the distinction.\textsuperscript{75} Most states have now enacted a tort claims act or similar legislation which provides a basis for determining the immunity or potential liability of the state and local governmental units.\textsuperscript{76} These

\begin{itemize}
\item \textsuperscript{73} See Roumbos v. City of Chicago, 332 Ill. 70, 75, 163 N.E. 361, 364 (1928) (distinguishing proprietary nature of municipal government from its governmental nature).
\item \textsuperscript{74} See Barnett, supra note 66, at 265.
\item \textsuperscript{75} See, e.g., ILL. REV. STAT. ch. 85, ¶ 1-206 (1987). Providing in pertinent part:
\begin{quote}
"Local public entity" includes a county, township, municipality, municipal corporation, school district, school board, forest preserve district, sanitary district, and all other local governmental bodies.
\end{quote}
\end{itemize}
acts generally may be grouped into two categories. One group of acts provides liability as the general rule subject to stated limitations. The other group of acts establish immunity as the rule subject to exceptions providing for potential liability. Some of these acts may incorporate aspects of the common law immunity distinctions in establishing their limitations or exceptions. For example, some tort claim acts continue to insulate the discretionary conduct of government from liability. Also, the public duty doctrine, in regard to potential liability for failure to provide police protection, has been codified within the tort claims act in some states.


D. THE PUBLIC DUTY/SPECIAL DUTY DOCTRINE IN THE UNITED STATES

The public duty/special duty doctrine was first recognized by the United States Supreme Court in 1855 in the case of South v. Maryland. In South, the sheriff of Washington County, Maryland was alleged to have failed to protect the plaintiff from kidnapping and extortion. The plaintiff claimed the sheriff had knowledge of these events, yet he failed to act. The Court characterized the sheriff’s duty to preserve the peace as a duty to the public in general. The Court held that the sheriff would not be liable in a civil action for the breach of a public duty. The Court’s decision was based on common law principles under which a sheriff was subject to civil liability only in two circumstances. First, an officer may be liable for his tortious conduct when acting in a ministerial capacity. Second, the officer may be liable if he acts maliciously and hinders a person from the enjoyment of a “special individual right, privilege, or franchise.” Subsequently, the public duty doctrine gained general acceptance as a method of narrowing the potential liability of governmental entities and employees.

III. HISTORY IN ILLINOIS

A. IMMUNITY IN ILLINOIS

1. State Sovereign Immunity

The doctrine of sovereign immunity was specifically enunciated in the 1870 Constitution of the State of Illinois. Article IV, paragraph 26 specified that, “The state of Illinois shall never be made defendant in any court of law or equity.” The Illinois Constitution of 1970 limited the broad grant of sovereign immunity contained in the 1870 Constitution. Article 13, paragraph 4 of the 1970 Constitution states

81. 59 U.S. (18 How.) 396 (1855).
83. Id. at 402.
84. Id. at 403.
85. Id. at 402.
86. Id. at 403 (as an example of this second cause of action the Court cited to an English case, Ashby v. White, 92 Eng. Rep. 126 (1790), in which a sheriff was held liable in a civil action for refusing to accept a citizen’s validly cast vote).
87. See supra note 9 and accompanying text.
88. ILL. CONST. art. IV, § 26 (1870).
that, "Except as the General Assembly may provide by law, sovereign immunity is abolished." 89

Prior to this constitutional change, the Illinois legislature responded to the need to provide a plaintiff with a mechanism through which a tort claim against the state may be pursued. The Court of Claims Act of 194590 established an administrative agency which could provide a plaintiff with a remedy for a meritorious tort claim.91 This act was evidence of the state's "consent" to limited tort liability, and a rejection of the rationale of absolute sovereign immunity.92

2. Immunity of Local Governmental Units

a. Quasi-municipal Corporations

The immunity of the state was extended to quasi-municipal corporations in Illinois in a series of decisions beginning in 1844 with Hedges v. The County of Madison.93 In Hedges, the plaintiff sought to recover damages for the death of his horse resulting from a fall on a bridge negligently maintained by the county.94 The Illinois Supreme Court reasoned that the county, as a subdivision of state government, was an involuntary association created by law for the benefit of the public.95 As such, its funds could not be diverted for the purpose of private indemnification unless specified by statute.96 The reasoning of Hedges was echoed in later decisions holding that townships,97 school

89. ILL. CONST. art. XIII, § 4.
90. See ILL. REV. STAT. ch. 37, ¶¶ 439.1 to 439.25 (1945) (current version at ch. 37, ¶¶ 439.1 to 439.25 (1987)).
91. In bringing a claim against the state before the Court of Claims, the ground for the action must be one that is recognized by civil courts in Illinois. Furthermore, the Act requires that the plaintiff must exhaust all other sources of recovery before the Court will make an award. This may mean bringing an action against other private individuals prior to making a claim against the state. Raucci, The Illinois Court of Claims: Its Purpose and Procedures, 77 III. B.J. 752, 752-53 (1989).
93. 6 Ill. (1 Gilm.) 567 (1844).
94. Hedges v. County of Madison, 6 Ill. (1 Gilm.) 567, 569 (1844).
95. Id. at 570.
96. Id. at 571.
97. See Town of Waltham v. Kemper, 55 III. 346, 8 Am. Rep. 652 (1870) (township was immune as a quasi-municipal corporation from suit brought by plaintiff who became ill while attempting to extricate his team and wagon which became mired in a public road which the township failed to repair).
districts,\textsuperscript{98} and park districts\textsuperscript{99} were quasi-municipal corporations.

b. Municipal Corporations

The application of immunity to municipal corporations in Illinois reflects the difficulty that courts encountered in reconciling the need to protect some activities of municipal government from liability with the recognition that a municipal corporation often functions much like a private corporation and should be subject to the same scope of liability.\textsuperscript{100} In \textit{Browning v. City of Springfield},\textsuperscript{101} the Illinois Supreme Court held that a municipal corporation was potentially liable in a private tort action.\textsuperscript{102} In \textit{Browning}, the plaintiff broke his leg as a result of falling on a city street which was in disrepair.\textsuperscript{103} The court took judicial notice of the public charter of the city.\textsuperscript{104} The court reasoned that the charter granted the municipal corporation the duty, authority, and the means to carry out its municipal functions.\textsuperscript{105} In return for this grant of power, the municipality assumes a reciprocal liability for failure to perform one of its municipal functions where the duty to perform is clear and the means available.\textsuperscript{106} In holding the municipality liable in \textit{Browning}, the court did not distinguish between those functions which were unique to a municipal corporation and those in which the municipality took on the character of a private corporation.

In subsequent decisions the Illinois Supreme Court limited the scope of liability of a municipal corporation. The court used the governmental/proprietary function distinction as a framework to establish limitations on liability. In \textit{Culver v. City of Streator},\textsuperscript{107} the plaintiff was shot by city employees who had been instructed to shoot and kill stray, unlicensed dogs.\textsuperscript{108} The court characterized the employ-

\textsuperscript{98} See Kinnare v. City of Chicago, 171 Ill. 332, 49 N.E. 536 (1898) (a worker was killed during the construction of a school building; the board of education of the City of Chicago was held to be a quasi-municipal corporation and, therefore, immune).

\textsuperscript{99} See Wilcox v. People, 90 Ill. 186, 192 (1878) (discussing the nature of the Board of West Chicago Park Commissioners, a quasi-municipal corporation).

\textsuperscript{100} See supra text accompanying notes 71-73.

\textsuperscript{101} 17 Ill. 143, 63 Am. Dec. 345 (1855).

\textsuperscript{102} Browning v. City of Springfield, 17 Ill. 143, 147, 63 Am. Dec. 349 (1855).

\textsuperscript{103} \textit{Id.} at 143, 63 Am. Dec. at 345.

\textsuperscript{104} \textit{Id.} at 147, 63 Am. Dec. at 349.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} 130 Ill. 238, 22 N.E. 810 (1889).

\textsuperscript{108} Culver v. City of Streator, 130 Ill. 238, 239, 22 N.E. 810, 811 (1889).
ees' function as an exercise of the municipality's police power. According to the court, when the municipality exercised its police power it performed a governmental function. The court reasoned that in performing a governmental function, a municipality was discharging the duties imposed on it by law for the preservation and promotion of the public good. Therefore, while the municipality was acting solely for the public benefit it should not be liable in tort. When the municipal corporation performed a proprietary function, however, it assumed the characteristics of a private corporation. The proprietary functions of a municipality relate to the management of its corporate or private concerns from which it often derives some advantage or monetary gain. Because of the private nature of these functions, the municipality should be potentially liable for the tortious conduct of its employees to the same extent as a private corporation.

The governmental/proprietary function distinction proved to be troublesome to apply because some functions of a municipality share the characteristics of both categories. For example, the operation of recreational facilities by a municipality was held to be a governmental function. A municipality, however, was held to act in a proprietary capacity when it rented rowboats to the public for use upon a lake which was part of a municipality's water works system.

Additionally, Illinois courts have applied the discretionary/ministerial function distinction as a test to determine whether a municipality should be liable for its tortious conduct. In Johnston v. City

109. Id. at 243, 22 N.E. at 811.
110. Id.
111. Id.
112. Id. at 244, 22 N.E. at 811.
113. Id. at 244-45, 22 N.E. at 811.
114. Id.
115. See, e.g., Eastern Illinois State Normal School v. City of Charleston, 271 Ill. 602, 111 N.E. 573 (1916). In supplying water for domestic or commercial purposes a municipality exercised a proprietary function; however, when a municipality operated a waterworks for the purpose of public health and safety, such as fire protection or flushing sewers, it was exercising a governmental function. Id. at 605, 111 N.E. at 575.
118. See Goodrich v. City of Chicago, 20 Ill. 445, 447-48 (1858) (plaintiff's steamboat was damaged when it struck a submerged hull; removing a sunken hull
of Chicago\textsuperscript{119} the Illinois Supreme Court illustrated how the two tests intertwine. Johnston involved the negligent operation of an automobile used to deliver books to branch libraries by an employee of the Chicago Public Library.\textsuperscript{120} The court held the city liable, finding the delivery of books by the employee to be a ministerial duty.\textsuperscript{121} The court reasoned that a municipality acted in a dual character. First, in performing its governmental functions, a municipality is immune.\textsuperscript{122} Govermental functions include the exercise of the judicial, legislative, or discretionary authority of the municipality.\textsuperscript{123} Second, when acting in a proprietary capacity, or performing a ministerial act, a municipality is liable for the negligence of its employees.\textsuperscript{124} A ministerial act is one involving the execution of a task required by law which does not require the exercise of judgment or discretion.\textsuperscript{125} When a municipality acts in a ministerial capacity, it has a duty to perform the task “in a reasonably safe and skillful manner.”\textsuperscript{126} While recognizing the existence of these distinctions, the court stated that uniform application of any rule was impossible and each case had to be decided on its facts.\textsuperscript{127}

In 1959, the decision of the Illinois Supreme Court in Molitor v. Kaneland Community Unit Dist. No. 302\textsuperscript{128} signaled a change in the application of immunity to local governmental entities in Illinois. In Molitor, the court held a school district liable for the torts committed by its employees in the scope of their employment.\textsuperscript{129} The plaintiff suffered injuries when a school bus in which he was a passenger left the road, struck a culvert, exploded, and burned.\textsuperscript{130} The complaint

\textsuperscript{119} 258 Ill. 494, 101 N.E. 960 (1913).
\textsuperscript{120} Johnston v. City of Chicago, 258 Ill. 494, 495, 101 N.E. 960, 961 (1913).
\textsuperscript{121} Id. at 501, 101 N.E. at 963.
\textsuperscript{122} Id. at 498, 101 N.E. at 962.
\textsuperscript{123} Id. at 497-98, 101 N.E. at 962.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 498, 101 N.E. at 962.
\textsuperscript{127} Id. at 497, 101 N.E. at 961.
\textsuperscript{128} 18 Ill. 2d 11, 163 N.E.2d 89 (1959).
\textsuperscript{129} Molitor v. Kaneland Community Unit Dist. No 302, 18 Ill. 2d 11, 163 N.E.2d 89, 98 (1959), cert. denied, 362 U.S. 968 (1960).
\textsuperscript{130} Id. at 13, 163 N.E.2d at 89.
alleged that the crash was a result of negligence on the part of the bus driver. The supreme court, however, stated that a departure from precedent was warranted by justice and public policy. The court held that immunity did not apply to the school district. The court reasoned that the doctrine of governmental immunity is opposed to the modern concept that individuals and corporations may be held liable for their tortious conduct. The rationale of Molitor was adopted in subsequent decisions in Illinois which clearly established that the judicial abolition of common-law immunity applied to all quasi-municipal and municipal corporations.

The Illinois legislature responded to Molitor's abolition of the immunity of school districts by passing a series of acts granting statutory immunity to selected governmental entities. This piecemeal approach to the restoration of immunity coalesced with the passage of the Local Government and Governmental Employees Tort Immunity Act in 1965. The Act placed limitations on liability and established procedures for pursuing tort claims against governmental units and their employees.

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131. Id.
133. Molitor, 18 Ill. 2d at 26-27, 163 N.E.2d at 96.
134. Id. at 29, 163 N.E.2d at 98.
135. Id. at 20, 163 N.E.2d at 93.
136. See Andrews v. City of Chicago, 37 Ill. 2d 309, 226 N.E.2d 597 (1967) (city liable for tortious acts of its police officers after Molitor); List v. O'Connor, 19 Ill. 2d 337, 340, 167 N.E.2d 188, 190 (1960) (stating in dicta that Molitor's abolition of immunity would apply to park districts; but held defendant immune because injury to plaintiff occurred prior to Molitor, which only applied prospectively).
139. See Baum, Tort Liability of Local Governments and Their Employees: An
B. THE PUBLIC DUTY/SPECIAL DUTY DOCTRINE IN ILLINOIS

The public duty doctrine is also applied by Illinois courts as a framework for determining when governmental entities and their employees should not be held liable for their tortious conduct. The public duty/special duty distinction was first recognized by the Illinois Supreme Court in 1904 in the case of *Gage v. Springer*. There, the court found the board of local improvements of the City of Wilmette owed a special duty to the plaintiff whose property was specially assessed for the purpose of road construction. The special duty consisted of providing the full benefit of the improvements to which the property owner was entitled because of the special assessment levied upon his property. That special duty was breached by the construction of a substandard road. The court’s analysis in *Gage* centered on the relationship between the board of local improvements and the plaintiff created by the special assessment. The court held that the plaintiff had an interest in the road created by the special assessment that set her apart from the public in general. Because of the plaintiff’s interest, the board owed a special duty to the plaintiff not to construct a substandard road.

1. The Special Duty Test

The criteria applied by Illinois courts to determine whether a special duty exists were united into the form of a four-pronged test by the Illinois Appellate Court for the First District in *Bell v. Village of Midlothian*. In *Bell*, the plaintiff sustained an injury while riding a minibike on property over which the village exercised its police powers. The complaint alleged, inter alia, that the village knew of

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140. 211 Ill. 200, 71 N.E. 860 (1904).
142. *Id.* at 207, 71 N.E. at 863.
143. *Id.*
144. *Id.* at 204, 71 N.E. at 862.
145. *Id.* at 206-07, 71 N.E. at 863. The court stated the public duty/special duty rule: "The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance." *Id.* at 204, 71 N.E. at 862.
146. *Id.* at 206, 71 N.E. at 862-63.
147. 90 Ill. App. 3d 967, 414 N.E.2d 104 (1st Dist. 1980).
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the dangerous trails and jumps on the property, yet failed to exercise its police powers to abate the dangerous condition.\textsuperscript{149} The court concluded that the situation fell within the public duty rule which does not impose liability on local governmental units for a failure to exercise their police powers.\textsuperscript{150} The court then held that the municipality was not liable because the plaintiff had not satisfied the criteria necessary to establish that the village owed him a special duty.\textsuperscript{151} The elements of the special duty test formulated by the \textit{Bell} court are:

1) The municipality must be uniquely aware of the particular danger or risk to which the plaintiff is exposed.
2) There must be allegations of specific acts or omissions on the part of the municipality.
3) The specific acts or omissions on the part of the municipal employees must be either affirmative or willful in nature.
4) The injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality.\textsuperscript{152}

The \textit{Bell} court drew upon previous Illinois decisions in formulating the four-pronged special duty test. The first two elements of the test were derived from the decision of the Illinois Supreme Court in \textit{Huey v. Town of Cicero}.

\textsuperscript{153} In \textit{Huey}—a wrongful death action—the plaintiff alleged willful and wanton neglect on the part of the police department in failing to provide his son with adequate police protection.\textsuperscript{154} Jerome Huey—an African-American—was attacked and beaten to death by four Caucasian youths armed with baseball bats. Mr. Huey was on his way to an employment office in Cicero at the time of the attack.\textsuperscript{155} The complaint alleged that the police knew or should have known that a large number of African-Americans entered Cicero daily to pursue employment, and that the presence of an African-American in Cicero at that time constituted a hazard to Mr. Huey's personal safety.\textsuperscript{156} In reviewing whether the complaint had stated a cause of action, the court applied the public duty rule.\textsuperscript{157} The court

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\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} at 969, 414 N.E.2d at 106.
\item \textsuperscript{151} \textit{Id.} at 970, 414 N.E.2d at 106-07.
\item \textsuperscript{152} \textit{Id.} at 970, 414 N.E.2d at 106.
\item \textsuperscript{153} 41 Ill. 2d 361, 243 N.E.2d 214 (1969).
\item \textsuperscript{154} \textit{Huey v. Town of Cicero}, 41 Ill. 2d 361, 362, 243 N.E.2d 214, 215 (1968).
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} at 364, 243 N.E.2d at 216.
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noted that Jerome Huey had not requested police protection, nor did the Cicero police have any knowledge that he was present in the town at the time of the attack. The plaintiff’s complaint also failed to allege any specific act or omission on the part of the Cicero police. The court held that the plaintiff’s complaint failed to make factual allegations which were sufficient to establish that the municipality owed Jerome Huey a special duty to provide him with police protection.

The special duty analysis of the Huey court did not address the criteria that make up the third and fourth elements of the Bell test. Nevertheless, from the facts presented in Huey it seems clear that neither of these elements would have been satisfied. Mr. Huey apparently could make no factual allegations of any willful or affirmative acts on the part of the Cicero police, nor was Mr. Huey in the direct control of the police at the time of his injury.

The third prong of the special duty test was attributed by the Bell court to the decision of the Illinois Appellate Court for the First District in Keane v. City of Chicago. In Keane, the plaintiff sued for the wrongful death of his wife—a teacher—who was murdered on the school’s premises by a student. The plaintiff made three allegations. First, the police department was negligent in not providing protection to those on the premises. Second, the police department removed protection that had previously been provided, although it knew or should have known a dangerous condition existed. Third, the police were negligent in allowing dangerous conditions to continue to exist. In holding the defendant not liable, the court found these allegations insufficient to serve as the basis for the city to owe a special duty to the decedent. The court stated that the failure of the municipality to perform a public duty, such as the provision of police protection, does not open the city to liability. A tortious act on the part of an employee which is willful or affirmative, however, may be sufficient to establish a special duty, thus making the municipality liable. The court asserted that an affirmative act which would

158. Id.
159. Id.
160. Id.
163. Id. at 461, 240 N.E.2d at 322.
164. Id. at 463, 240 N.E.2d at 322.
165. Id.
166. Id. at 462, 240 N.E.2d at 322.
establish a special duty would require the police to place the plaintiff in a position where an injury to him was foreseeable. The court’s requirement of an affirmative or willful act on the part of the police apparently mandates that the conduct of the police must go beyond merely increasing the magnitude of a general risk which the plaintiff may face. Rather, the conduct of the police must focus particularly on the plaintiff.

The fourth prong of the special duty test was attributed by the Bell court to the decision of the Illinois Appellate Court for the Second District in Brooks v. Lundeen. In Brooks—a wrongful death action—the plaintiff’s husband was killed when his automobile was struck by a driver attempting to elude the police. The police established a roadblock in an attempt to stop the driver. Mr. Brooks, approaching the roadblock, was directed to the side of the road behind the roadblock and detained there. The driver approached the roadblock at a high rate of speed, detoured around the roadblock, and crashed head-on into Mr. Brooks’ automobile.

The court held that the police had an affirmative duty to warn Mr. Brooks of the dangerous situation. This special duty existed based on the officers’ knowledge of the potential danger, their failure to inform the decedent, and the detention of the decedent in a place of potential danger by the officers. The detention of Mr. Brooks at the scene of the roadblock formed the basis of the “direct and immediate control” element of the four-pronged test from Bell.

IV. APPLICATION OF THE PUBLIC DUTY/SPECIAL DUTY DOCTRINE IN ILLINOIS

A. TREPAKHO v. VILLAGE OF WESTHAVEN

The recent decision of the Illinois Court of Appeals for the First District in Trepachko illustrates the application of the public duty/special duty doctrine in cases involving police conduct. The first question that a court must resolve when presented with factual allegations involving police conduct concerns the characterization of

167. Id.
168. 49 Ill. App. 3d 1, 364 N.E.2d 423 (2d Dist. 1977).
170. Id. at 4-5, 364 N.E.2d at 426.
171. Id. at 7, 364 N.E.2d at 427-28.
172. Id. at 7, 364 N.E.2d at 428.
the nature of the duty as presented by the pleadings. Should the court interpret the plaintiff's characterization of the police conduct as a failure to provide police protection, the public duty doctrine applies. Thus, the municipality and the officer would not be liable unless the plaintiff could establish the existence of a special duty. If, however, the court accepts the plaintiff's characterization of the police conduct as constituting activity other than a failure to provide police protection, then the potential liability of the officer and municipality increases. In Illinois, police officers and municipalities may be liable for their willful or wanton conduct in the execution or enforcement of any law. Furthermore, police officers may be liable for their negligent conduct in the performance of duties which fall outside of the enforcement or execution of any law.

In Trepachko, the plaintiffs claimed that the negligence of a village police officer resulted in the wrongful deaths of the plaintiffs' children. The circumstances arose when the officer stopped a vehicle for a traffic violation. The vehicle stopped in the right-curb lane of the highway. The officer positioned his squad car behind the vehicle. The officer then shined his spotlight toward the car's rearview mirror, and directed the driver to move the car to the median lane which separated the opposing lanes of traffic. While the officer continued to shine his spotlight on the rearview mirror, the driver moved his car across the highway. As the vehicle crossed the two lanes of traffic, the motorcycle on which the plaintiffs' children were riding collided with the car.

174. See supra text accompanying note 152.
175. Section 2-202 of the Illinois Tort Immunity Act addresses the liability of public employees for willful or wanton conduct. It states:
A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct.
176. Section 2-202 of the Illinois Tort Immunity Act does not make a police officer immune for all of his activities short of willful and wanton conduct. It is recognized that a police officer is liable for his negligent conduct during his duty hours for activities not in the execution or enforcement of a law. See Arnolt v. City of Highland Park, 52 Ill. 2d 27, 33, 282 N.E.2d 144, 147 (1972) (plaintiff permitted to maintain a cause of action for negligence against the city and police officer which arose when the plaintiff suffered injuries as a result of an automobile crash with a police vehicle).
178. Id.
179. Id.
The trial court held that the public duty doctrine applied and dismissed the plaintiffs' complaint for failing to plead or establish a special duty owed to the decedents by the police officer and the Village. The First District affirmed, agreeing with the trial court's characterization of the officer's actions as a failure to provide police protection to the decedents. The court rejected the plaintiff's argument which attempted to characterize the officer's duty as one to exercise ordinary care in the performance of his duties as a police officer. To accept the plaintiff's characterization of the officer's conduct, in the opinion of the court, would be to give too narrow of an interpretation to the term "police protection." The court found that the basis of the plaintiffs' complaint was that the police officer failed to perform his duties "in a manner protective of the decedent's safety." The court reasoned that the public duty doctrine applied, because the duty to provide protection was owed to the entire community rather than any one individual.

Applying the four-pronged special duty test, the court found that the "direct and immediate control" element was not satisfied. The court reasoned that the officer's control of the driver of the automobile was irrelevant to establishing whether a special duty was owed to the decedents. For the "control" element to be satisfied, the plaintiffs' complaint would have to present a factual allegation that the decedents were in the officer's control.

The Trepachko decision illustrates the problems facing a plaintiff in trying to establish a cause of action for negligence when the governmental conduct is characterized as a failure to provide police protection. The Trepachko court stated that the public duty doctrine as codified in section 4-102 of the Tort Immunity Act was supported by "strong public policy considerations." According to the court, expanding the duty to provide police protection to every member of

180. Id. at 244, 540 N.E.2d at 343.
181. Id. at 250, 540 N.E.2d at 348.
182. Id. at 245-46, 540 N.E.2d at 344-45. The dissent would have followed a line of case law in Illinois in which police officers were held liable for failing to exercise ordinary care for the safety of others when carrying out their responsibilities. See id. at 252, 540 N.E.2d 349 (Jiganti, J., dissenting).
183. Id. at 246, 540 N.E.2d at 345.
184. Id.
185. Id. at 244, 540 N.E.2d at 344.
186. Id. at 248, 540 N.E.2d at 346.
187. Id.
188. Id.
189. Id. at 244, 540 N.E.2d at 344.
the community would mean that the police would be required to guarantee the safety of each individual; this would be functionally unworkable. The Trepachko court, like other Illinois courts, apparently view the functional concerns of law enforcement as outweighing the need to compensate an individual for a loss which may be the result of governmental conduct.

B. POLINY v. SOTO

The decision in Poliny is representative of the difficulty that a plaintiff may have in establishing the existence of a special duty when faced with fulfilling the requirements of the four-pronged special duty test as enunciated in Bell. That difficulty centers on the tendency of Illinois courts to strictly interpret the "control" element of the test. The plaintiff, Valiant Poliny, claimed that he and Donald Nagolski were attacked and beaten by Rolando Calderon on a city street. As a result of the attack, Nagolski was taken to a hospital by witnesses at the scene. Calderon left the scene, and the plaintiff followed him for several blocks. Upon encountering a police car, the plaintiff reported the attack to the patrol officers. The officers then arrested Calderon. As the arrest was taking place, and in the presence of the officers, two friends of Calderon verbally threatened the plaintiff. The plaintiff asked the officers to "assist him back to the station-house." The officers refused the plaintiff's request. After the officers departed, the plaintiff was attacked and beaten by one of Calderon's friends.

The trial court dismissed the plaintiff's claim against the city and the officers, finding that it failed to state a cause of action. The First District affirmed, holding that the city and its police officers did not owe the plaintiff a special duty to protect him from attack. The plaintiff conceded, and the court agreed, that the "control" element of the special duty test was not satisfied. The plaintiff argued that the "control" element should be eliminated as a requirement for the

190. Id.
193. Id.
194. Id.
195. Id.
196. Id. at 206, 533 N.E.2d at 17.
197. Id. at 212, 533 N.E.2d at 21.
198. Id. at 207, 533 N.E.2d at 18.
existence of a special duty. The plaintiff based his argument on the premise that the *Brooks* case, which was cited by the *Bell* court in support of the “control” element, was misread.\(^{199}\) The plaintiff maintained that *Brooks*\(^{200}\) provides insufficient support for an element which requires that the police must be in control of the individual when the injury occurs. The *Poliny* court rejected the plaintiff’s argument, noting the tacit approval of the special duty test by the Illinois Supreme Court.\(^{201}\) The court in *Poliny* also rejected the plaintiff’s argument that the “control” element should be relaxed to include situations where a material witness to a crime requires police protection.\(^{202}\) The court reasoned that the plaintiff’s cooperation was not requested by the police. Rather, the plaintiff volunteered his assistance in apprehending Calderon.\(^{203}\) In the court’s view, this difference was sufficient to distinguish the case at bar from the cases cited by the plaintiff which held that the police may owe a special duty of protection to a material witness.\(^{204}\)

It is recognized that a mere request for police protection is insufficient to establish a special duty.\(^{205}\) This applies even in circum-

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199. *Id.* at 207-08, 533 N.E.2d at 18-19.
200. See supra text accompanying notes 168-172.
203. *Id.*
204. Mr. Poliny relied on Gardner v. Village of Chicago Ridge, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1st Dist. 1966), *aff’d in part, rev’d in part*, 128 Ill. App. 2d 157, 262 N.E.2d 829 (1970), *cert. denied*, 403 U.S. 919 (1971), in which the plaintiff was asked by police to accompany them to the site where they had apprehended suspects in an earlier attack on the plaintiff. While identifying the suspects at the scene, the suspects attacked and injured the plaintiff. The court held that the police owed the plaintiff a special duty of protection by placing him in a position of peril. *Id.* at 380, 219 N.E.2d at 150. Mr. Poliny also relied on Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), in which the plaintiff’s son responded to an FBI flyer seeking the whereabouts of a fugitive. Shortly thereafter, the plaintiff’s son was shot and killed by an unknown assailant. The court held that a special duty was owed to the decedent by the police’s use of him to make an arrest of the fugitive. *Id.* at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.
stances where the police are aware that an individual may suffer injuries as a result of police inaction.206 The rationale supporting this rule is that, in order to perform effectively, police officers need to have freedom to exercise discretion in the performance of their duties.207 Therefore, when a police officer makes a mistake in judgment about whether to provide police services, liability should not be imposed upon him or the municipality.208 To do so would make the police insurers of the safety of every individual with whom they have official contact.209

Authority exists, however, for the proposition that a special duty is created between the police and an individual who has collaborated with the police in the arrest or prosecution of a criminal.210 A three-pronged test has been suggested for evaluating whether a special duty exists in such cases.211 First, the police must request an individual or the general public to assist in the arrest or prosecution of a criminal. Second, the individual must respond to the police request. Third, it must reasonably appear to the police that the individual is in danger due to his collaboration.212 The rationale supporting the existence of a special duty in "collaboration" cases is derived from the decision of the United States Supreme Court in *In re Quarles.*213 In *Quarles,* the Court stated that a citizen has a right to inform law enforcement authorities of a violation of the law.214 Furthermore, the government

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211. See Miller, 561 F. Supp. at 1135.

212. *Id.*

213. 158 U.S. 532 (1894). Quarles was convicted of conspiracy in connection with a battery and attempted murder of an informant who reported illicit alcohol production to a United States Deputy Marshall. *Id.* at 533.

214. *In re Quarles,* 158 U.S. 532, 537 (1894).
has a duty to insure that an individual is able to exercise her right and protect her from violence while doing so.\textsuperscript{215}

In deciding not to alter the criteria for the existence of a special duty, the \textit{Poliny} court weighed the policy considerations implicit in the "collaboration" approach.\textsuperscript{216} The plaintiff argued that if material witnesses cannot be assured of some degree of police protection citizens will be hesitant to become involved in volunteering assistance to the police.\textsuperscript{217} The court maintained, however, that a strict application of the "control" factor of Illinois' special duty test is necessary to avoid placing too great of a burden on law enforcement.\textsuperscript{218} The court reasoned that law enforcement would be hindered if police officers were not allowed to exercise discretion in setting their priorities concerning the efficient performance of their duties.\textsuperscript{219} Furthermore, the difficulty that police would have in determining when a witness was legitimately in danger could involve an unwarranted consumption of time and manpower.\textsuperscript{220}

It is clear that the plaintiff in \textit{Poliny} would not have been able to establish a special duty even under the "collaboration" test. Mr. Poliny's collaboration with the police was at his own instigation.\textsuperscript{221} Therefore, the first element of the collaboration test\textsuperscript{222} would not be satisfied. Furthermore, there is no evident authority for the position that a special duty should exist in the absence of a request for assistance by the police.

It is not difficult to hypothesize a scenario, however, in which an individual collaborates with the police at their request but is injured outside of their "direct and immediate control." Such circumstances raise the question of whether Illinois courts, applying the test from \textit{Bell}, would find a special duty to exist. A strict application of the "control" element of the special duty test would lead to the conclusion that a special duty would not be established under such circumstances. The effect of such an application of the special duty test is that the police owe no duty to an individual even though their affirmative act places the individual in a position of peril and results in an injury to

\textsuperscript{215} \textit{Id.} at 536.
\textsuperscript{217} \textit{Id.} at 209, 533 N.E.2d at 19.
\textsuperscript{218} See \textit{id.} at 209, 533 N.E.2d at 20.
\textsuperscript{219} \textit{Id.} at 210, 533 N.E.2d at 20.
\textsuperscript{220} See \textit{id.} at 209-10, 533 N.E.2d at 20.
\textsuperscript{221} \textit{Id.} at 205, 533 N.E.2d at 17.
\textsuperscript{222} See supra text accompanying notes 211-212.
the individual. Other jurisdictions have viewed this result as inequit-able and would find a special duty to exist where an individual collaborates with the police at their request but was not in their presence when injured.223 The ultimate question seems to be whether the policy concerns advanced by Illinois courts could be adequately served by a special duty test which would allow greater latitude to a plaintiff seeking to establish a cause of action through the special duty doctrine.

V. RECOMMENDATIONS FOR CHANGING ILLINOIS' APPROACH TO THE PUBLIC DUTY/SPECIAL DUTY DOCTRINE

The public duty doctrine as codified in section 4-102 of the Illinois Tort Immunity Act broadly insulates the police and municipalities from liability for providing general police protection.224 In addition, the strict requirements of the four-pronged special duty test as set forth in Bell225 only allow a plaintiff to establish a special duty in rare situations. The need for such broad limitations on liability in the area of police protection is generally justified by public policy considerations which center on the functional aspects of police activity. The basis of these policy considerations is that police require a substantial amount of discretion in determining how and when police resources should be allocated.226 This discretion, at times, must be exercised by the officer in the field under circumstances where it may be impractical to consult with superiors.227 Thus, for a court, in hindsight, to impose on the officer a duty to protect an individual would result in an unwarranted interference by the judicial branch in a decision properly allocated to the executive branch.228

Focusing solely on these policy concerns, however, ignores the role of the police in our society. The nature of police functions can be viewed as a monopoly on the power to protect citizens who, in certain situations, rely on such protection.229 This power to assert physical control and use force for the protection of individuals who

223. See cases cited supra note 210.
224. See supra note 29.
225. See supra text accompanying note 152.
227. Seibring, 159 Ill. App. 3d at 680, 512 N.E. 2d at 397.
depend upon it may be viewed as a source of a duty. In response to direct contact with the police, the individual may forego other means of protection in reliance on police protection. At times, the police may default on their professional obligation to use their power in situations where their actions have caused an individual to rely on police protection. If this default is sufficiently egregious the officer may be subject to departmental sanctions or criminal prosecution. Nevertheless, these measures fall short of providing a remedy for an individual who is injured as a result of the failure of the police to provide him with protection.

It should be recognized that situations can occur where an individual’s reliance on police protection arising from affirmative police conduct can create a special duty without the individual being in the "direct and immediate control" of the police. Such circumstances may include: (1) when a court order of protection has been issued to an individual; (2) when police make an explicit assurance of protection to an individual, causing him to forego other avenues of protection; and (3) when a material witness collaborates with the police at their request, is injured as a result, and the injury occurs outside of the "direct control" of the police. Of course, in such circumstances the liability of the police should not be determined on a strict liability basis. It would seem, however, that these cases should

230. Id.

231. See Riss, 22 N.Y.2d at 584-85, 240 N.E.2d at 862, 293 N.Y.S.2d at 900 (Keating, J., dissenting) (noting that Ms. Riss obeyed the gun laws in force at the time of her attack and was not carrying a weapon despite numerous threats of harm by a known antagonist).

232. See Chambers-Castanes v. King County, 100 Wash. 2d 275, 669 P.2d 451 (1983) (police dispatcher assured plaintiff that assistance was on its way to the scene of plaintiff’s emergency calls).


235. See Sorichetti v. City of New York, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985) (an order of protection was issued to mother and child against father; police were aware of father’s threats and mother’s request for assistance therefrom).

236. See supra note 232.

237. See Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (witness responded to FBI request for assistance in apprehending fugitive; witness was shot and killed three weeks later).
not be dismissed solely on the grounds that a duty was not owed to the plaintiff merely because of her lack of proximity to the police at the time of her injury. The plaintiff in such situations must still surmount the hurdle of establishing that the police conduct was the proximate cause of her injury. In many cases this conventional tort principle will be sufficient to safeguard the interests asserted by the municipality. In cases where the plaintiff has a meritorious claim, however, recovery should not be denied by a mechanistic application of a duty analysis.

The four-pronged special duty test applied by Illinois courts oversimplifies the duty analysis in police protection situations. The test leaves no room for a balancing of other factors relevant to the formation of a special duty. In practice, the special duty analysis often hinges on the "control" element.\(^{238}\) It would seem that a less rigid special duty analysis would achieve a more equitable result. Several other factors have been suggested as being relevant to the special duty analysis. First, the court should weigh the amount and quality of the information possessed by the police concerning the situation.\(^{239}\) Second, the ability of the individual to defend himself against the attack or injury should be considered.\(^{240}\) Third, the court should determine the degree to which the individual relied on police assurances of protection.\(^{241}\) A special duty analysis which would allow a balancing of these factors as well as the factors already considered in Bell's four-pronged test would be better suited to making the special duty exception to the public duty doctrine a viable means for a plaintiff with a meritorious claim to recover damages.

VI. Conclusion

Traditional immunity doctrines and the public duty rule have historically been viewed as necessary to protect governmental operations from the economic and functional consequences of excess tort liability. However, many states have discarded these doctrines because

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239. See SHAPO, supra note 229, at 107.
240. Id.
241. Id.
they were viewed as being outdated. The modern trend is toward an expansion of governmental liability for the tortious conduct of its employees acting within the scope of their duty. States now employ other means of protection to safeguard their interests. These include liability insurance, reserve funds, and limitations on recoverable damages. In addition, requiring the plaintiff to establish the traditional elements of a negligence claim can prove to be sufficient protection for the governmental entity and their employees.

Illinois' application the public duty/special duty doctrine, in the context of a municipality's duty to provide police protection, seems overly restrictive when compared to modern trends. While the governmental interests at stake are substantial, to totally deny recovery to a plaintiff who may have a meritorious claim because she cannot satisfy the strict requirements of the special duty exception may achieve an inequitable result. Therefore, it would seem that Illinois should modify its criteria for the existence of a special duty. As other states have found, the minimal increase in exposure to liability will not subvert the interests traditionally protected by the public duty and immunity doctrines.

David A. Aaby