

## **MUNICIPAL TORT LIABILITY: SPECIAL DUTY ISSUES OF POLICE, FIRE, AND SAFETY**

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According to the program bulletin, my topic is “Special Duty Issues” of tort liability under the overall conference heading of “Municipal Liability.” The conference organizer, Robert Heverley, in extending the invitation to me to take part in the conference, asked that I concentrate my presentation on police and fire protection. I have taken the liberty of adding to these two subjects the question of liability growing out of failures in carrying out safety inspection services. This, of course, leaves untouched broad areas of public responsibility, such as the duty to provide a public education for children of the community; the responsibility for public health; granting, denial or revocation of licenses; the abatement of public nuisances; the provision of social services; etc. These are, however, to a greater or lesser extent, governed by some of the same principles which I shall be discussing, and I shall leave their elaboration to other speakers or to another day. In addition, I have not touched upon the so-called section 1983 actions—that is, actions under post-Civil War civil rights statutes—which could, in themselves, be a subject for a separate paper.

### **I. GENERAL PRINCIPLES**

Although other speakers may have already developed the general principles that may govern municipal liability for the provision of public services, I believe that at least a brief overview of these principles is appropriate to lead us into a discussion of particular principles that may apply to particular types of municipal services. These principles are not universal, however, and for any one of them there may be several states where the rule may not apply. Since most of our attendees are drawn from New York, I have, for the most part, cited New York sources of authority, although I have tried to give a flavor of the prevailing rules in other states where they may differ from New York’s rules.

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The first applicable principle, it seems to me, is that a municipal corporation, unlike a state, to which it owes its existence and corporate personality, has not traditionally been regarded as being endowed with the attributes of sovereignty inherent in the state or national government. Except where it is exercising "governmental" functions under delegation of power from the state, it is akin to a private corporation, and, in a proper case, can be held liable for its tortious acts in the same manner as a private corporation. This traditional view has not remained intact, however, inasmuch as in most states the liability or immunity of a municipal corporation is today, to a large extent, governed by state statute. The New York statute may be found in the Court of Claims Act, which provides, in its essential part, as follows: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations . . . ."<sup>1</sup> You will note that the statute does not refer specifically to the waiver of municipal immunity, but the New York Court of Appeals, in an early decision interpreting the statute, held that since municipal authority flowed from the state, a waiver of immunity by the state automatically waived the immunity of all governmental subdivisions.<sup>2</sup> Or as stated by the court:

The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed. On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, even if no separate statute sanctions that enlarged liability in a given instance.<sup>3</sup>

In addition, in most jurisdictions, as in New York, there is a large body of interpretive law which has put a significant gloss on this traditional view.

One of the more important doctrines making up this gloss is

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1. N.Y. CT. CL. ACT § 8, as amended (1989).

2. *Bernardine v. City of New York*, 62 N.E.2d 604 (N.Y. 1945).

3. *Id.* at 605 (citations omitted).

the distinction most courts have made between what are regarded as governmental functions (those that are peculiar to government) and those that are proprietary in nature (those that can also be performed by private persons). For the former, that is, governmental functions, most state statutes or the decisions which have interpreted them allow governmental immunity for municipal corporations; for the latter, no immunity exists. The rationale for this distinction may be found in the idea that when performing governmental functions, the local government is acting on behalf of, or as an agent of, the state, but it is not as to proprietary acts. The distinction between the two types of activities is not always clear, however, and some courts have developed interpretive rules to assist in determining which are which. Some courts have attempted to clarify the distinction by classifying acts as legislative or quasi-legislative or judicial or quasi-judicial acts, as opposed to proprietary or operational acts.

A second and closely related doctrine adopted by most states, either in their immunity statutes or by court decision, is the discretionary-act rule, under which discretionary acts by public officials do not subject municipalities to tort liability, whereas non-discretionary acts or purely ministerial acts may. The theory behind this difference appears to be found in the respect for the division of powers among the branches of government. Where discretion is involved—and particularly if it involves the allocation of resources between activities—the courts have been reluctant to substitute their judgment, or that of juries, for that of the legislative or executive branch. Again, to revert to the words of the New York Court of Appeals:

It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. . . . [T]o prefer [a jury's verdict] over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts.<sup>4</sup>

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4. *Weiss v. Fote*, 167 N.E.2d 63, 65-66 (N.Y. 1960).

But determining what acts are discretionary within this doctrine and what acts are not has been a source of considerable uncertainty for courts, and a whole body of law has grown up around this difficult question.

A third general doctrine that pervades the whole area of liability for public services is the so-called public-duty principle. Under this principle it is held, for example, that the duty a municipality owes to provide police or fire protection runs to the public in general and not to specific individuals, unless some special relationship with a particular person has been created by some act or circumstance. As several courts have pointed out, the waiver-of-immunity statutes have not created new causes of action where none existed before; they have only removed the shield of governmental immunity where a cause of action would exist if the tort-feasor were a private person. Courts are not always clear in their opinions as to when they are denying liability on the basis of immunity and when they are doing so because no duty exists.

Another doctrine—not peculiar to the law of governmental immunity—is the general tort-law principle that a person is generally not liable for failure to act, whereas once he chooses to act, he must not do so negligently. This is manifested in the field of municipal liability in cases where courts have refused to hold a municipality liable for failure to provide a public service but have found liability when the service has been provided but performed negligently.

And one final general point—the issues addressed in this paper are limited to those of immunity of the municipality itself, not to the personal liability of the government official. Although this latter subject is closely related, and in many cases in which injured plaintiffs sue a municipality they also join the government employee or official as an additional defendant, the immunity applicable to the governmental unit is not necessarily co-extensive with that of its employees or officials.

## II. POLICE PROTECTION

Police protection is, of course, a type of service which is uniquely governmental in character. Thus, under the principle distinguishing between governmental and proprietary acts, negligence in the provision of police protection would clearly fall on the immunity side of the equation. Nevertheless, most immunity statutes

waive immunity for negligent *acts* of police officers (such as use of excessive force), but incidents of *failure to act* may still fall under the doctrines exempting from waiver discretionary acts or the doctrine that the *duty* of providing police protection runs to the public as a whole and not to individual citizens. Perhaps the best example of the application of these principles is found in the cases examining the duty of police officers to respond to calls for help on “911” lines. The leading case in this field, *DeLong v. County of Erie*,<sup>5</sup> comes from the New York Court of Appeals. In that wrongful-death case the decedent called the Erie County 911 emergency-response line reporting a burglary in progress. She was assured of a response “right away.” When, however, the responding vehicle could not locate the address of the caller, the responding police were released from the call. Within minutes after the release, the caller stumbled from her house to the street bleeding from multiple stab wounds inflicted by the burglar. She died within minutes. In affirming a judgment for the plaintiff, the New York Court of Appeals, while reasserting the general rule of non-liability for “negligence in the performance of a governmental function, including police and fire protection, unless a special relationship existed between the municipality and the injured party,” held that the evidence of the decedent’s reliance on the 911 operator’s assurances that help was on the way was sufficient to sustain the jury’s finding that a special relationship had been created.<sup>6</sup>

Although situations in which a special relationship has been found to exist are highly fact-specific, the New York Court of Appeals, in a subsequent case,<sup>7</sup> articulated a four-factor test for determining whether such a special relationship exists, as follows:

- (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
- (2) knowledge on the part of the municipality’s 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 af-

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5. 457 N.E.2d 717 (N.Y. 1983). Incidentally, this case was decided at the appellate division with an opinion by our Introduction author, then Supreme Court Justice Stewart Hancock. *DeLong v. County of Erie*, 455 N.Y.S.2d 887 (4th Dep’t 1982).

6. *DeLong*, 457 N.E.2d at 721.

7. *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987).

firmative undertaking.<sup>8</sup>

Two years later, in a case where would-be rescuers of an abducted woman, gave up their rescue attempt after encountering a police officer who promised to "call it in," the Court of Appeals reaffirmed this four-part test but denied liability in the case because the injured party did not personally rely on the municipality's undertaking.<sup>9</sup> Judges Hancock and Bellacosa dissented, taking the position that the contact between the rescuers and the municipality's agent and their reliance on his undertaking to take action made them surrogates for the victim, who was unable herself to have direct contact with the police.<sup>10</sup>

Most jurisdictions follow the same rationale as the New York Court of Appeals with respect to the necessity for a special relationship to serve as a basis for liability for failure to provide police protection. Among the circumstances which have been held to create a duty upon which liability rests are the relationships with police informers,<sup>11</sup> undercover agents,<sup>12</sup> witnesses summoned to make identification of dangerous criminal suspects,<sup>13</sup> persons under court orders of protection,<sup>14</sup> persons threatened by the returning of weapons by police to a dangerous person,<sup>15</sup> and persons injured by a prisoner released from custody without notice after such notice has been promised.<sup>16</sup>

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8. *Id.* at 940.

9. *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989); *See also Merced v. New York*, 551 N.E.2d 589 (N.Y. 1990).

10. *Kircher*, 543 N.E.2d at 448 (Hancock, J., dissenting); *id.* at 450 (Bellacosa, J., dissenting).

11. *Schuster v. New York*, 154 N.E.2d 534 (N.Y. 1958).

12. *Swanner v. United States*, 309 F. Supp. 1183 (D. Ala. 1970).

13. *Gardner v. Village of Chicago Ridge*, 219 N.E.2d 147 (Ill. App. Ct. 1966), later appeal on different issue, 262 N.E.2d 829 (1970), *cert. denied*, 403 U.S. 919 (1971).

14. *Sorichetti v. State of New York*, 482 N.E.2d 70 (N.Y. 1985).

15. *Benway v. Watertown*, 151 N.Y.S.2d 485 (4th Dep't 1956).

16. *Johnson v. State*, 447 P.2d 352 (Cal. 1968). Note that the key to liability is the promise to give warning. Courts have generally held that a decision to release or parole is protected by the immunity statute as a discretionary, governmental or quasi-judicial act. *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980); *Morgan v. County of Yuba*, 41 Cal. Rptr. 508 (Dist. Ct. App. 1964). *Cf. Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976). *But see Robilotto v. State*, 429 N.Y.S.2d 362 (Ct. Cl. 1980), in which liability was found even though no promise of warning had been given and in which the robbery/rape victim was not a person specifically threatened by a released juvenile offender.

Generally, no special relationship has been found where police have declined to take into custody a driver who is stopped for drunk driving and subsequently injures someone after being allowed to proceed by the police.<sup>17</sup> A fairly recent Massachusetts case, *Irwin v. Town of Ware*,<sup>18</sup> has expressed an opposite view. The court held that a combination of Massachusetts statutes authorizing warrantless arrest of drunk drivers, creating implied consent to chemical testing of users of the highways, permitting protective custody of drunk drivers, and requiring police officers to "suppress and prevent all disturbances," was sufficient to create a special relationship between the police and persons subsequently injured by drivers who were stopped and allowed to proceed. The court also held that an officer's decision not to arrest was not discretionary but ministerial within the meaning of the Massachusetts immunity statute. The Massachusetts case now appears to have picked up adherents in New Hampshire,<sup>19</sup> Idaho,<sup>20</sup> and New Mexico.<sup>21</sup>

Other circumstances that have been held not to create a special relationship with those injured by an intoxicated driver include merely observing the driver wandering around drunk in a parking lot,<sup>22</sup> ordering a teenager to drive out of a public parking lot when he was obviously intoxicated,<sup>23</sup> casual conversation between a police officer and an intoxicated motorcycle operator,<sup>24</sup> issuing a warning to a drunk driver and allowing him to proceed,<sup>25</sup> sobriety testing of a driver and allowing him to proceed,<sup>26</sup> or directing an allegedly drunk driver to follow a police vehicle to the police station.<sup>27</sup>

In a wider context, the special relationship creating a duty of protection to an individual has been found not to exist: where

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17. See, e.g., *Shore v. Stonington*, 444 A.2d 1379 (Conn. 1982).

18. *Irwin v. Town of Ware*, 467 N.E.2d 1292 (Mass. 1984).

19. *Weldy v. Kingston*, 514 A.2d 1257 (N.H. 1986).

20. *Sterling v. Bloom*, 723 P.2d 755 (Idaho 1986).

21. *California First State Bank v. State*, 801 P.2d 646 (N.M. 1990).

22. *Fusilier v. Russell*, 345 So. 2d 543 (La. Ct. App.), cert. denied, 347 So. 2d 261 (La. 1977); *Barratt v. Burlingham*, 492 A.2d 1219 (R.I. 1985).

23. *Hostetler v. Ward*, 704 P.2d 1193 (Wash. 1985).

24. *Crosby v. Bethlehem*, 457 N.Y.S.2d 618 (3d Dep't 1982).

25. *Shore v. Stonington*, 444 A.2d 1379 (Conn. 1982).

26. *Harris v. Smith*, 203 Cal. Rptr. 541 (Ct. App. 1984).

27. *Burchins v. State of N.Y.*, 360 N.Y.S.2d 92 (3d Dep't 1974), aff'd, 353 N.E.2d 848 (N.Y. 1976).

based on a mere request for police protection,<sup>28</sup> where plaintiff has made repeated and urgent telephone calls for help to the police,<sup>29</sup> where police had knowledge of threats to an individual,<sup>30</sup> where police have released from custody without warning a dangerous person unless there were specific threats against an identified individual,<sup>31</sup> and, in the absence of a specific statute, where police have failed to control mob violence.<sup>32</sup>

The New York Court of Appeals has articulated the rationale for the special relationship rule "to rationally limit the class of citizens to whom the municipality owes a duty of protection."<sup>33</sup> It justifies this derogation from the general no-liability rule on the basis that the appropriate authority of the municipality, by making an illusory promise to the individual, has already "determined how its resources are to be allocated in respect to that circumstance and has thereby created a 'special relationship' with the individual seeking compensation."<sup>34</sup> In its view then, exercising jurisdiction in such cases does not violate principles of separation of powers between the branches.

### III. FIRE PROTECTION

Since the principles that govern the question of municipal liability for fire protection are essentially a reprise of those applicable to police protection, this section of the paper will be quite brief. Those principles are the ones we have already seen as the dichotomies between the governmental and the proprietary, between discretionary and ministerial acts, and the duty to the public as opposed to the duty to individual members of the public.

As early as 1895, the New York Court of Appeals held that firefighting was a public rather than private function and that methods and tactics of fighting fires were discretionary functions

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28. *Riss v. State of N.Y.*, 278 N.Y.S.2d 110 (1st Dep't 1967), *aff'd*, 240 N.E.2d 860 (N.Y. 1968).

29. *Riss v. City of N.Y.*, 240 N.E.2d 860 (N.Y. 1968).

30. *Freitas v. City & County of Honolulu*, 574 P.2d 529 (Haw. 1978).

31. *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980); *Taylor v. State*, 320 N.Y.S.2d 343 (3d Dep't 1971), *motion to dismiss appeal denied*, 309 N.E.2d 128 (N.Y. 1971). *Cf.* *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976).

32. *Jahnke v. City of Des Moines*, 191 N.W.2d 780 (Iowa 1971).

33. *Kircher*, 543 N.E.2d 443, 447 (N.Y. 1989).

34. *Id.* at 446.



which would not subject a municipality to liability for negligent acts or misjudgments.<sup>35</sup> Also of prime importance to the court in that case was the danger of bankruptcy if a municipality were subjected to legal responsibility for individual losses from alleged mistakes in fighting fires. Perhaps the leading New York case is *Steitz v. City of Beacon*,<sup>36</sup> in which the Court of Appeals held that even where a municipality had the statutory duty to maintain a fire department,

[s]uch enactments do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals.<sup>37</sup>

Whether the failure is the inadequacy of the water supply,<sup>38</sup> allegedly bad decisions on how to fight the fire,<sup>39</sup> neglect or incompetence of firefighters,<sup>40</sup> or defective or inadequate fire-fighting apparatus,<sup>41</sup> the decisions appear to be uniform in that governments are not liable to individuals for failures in their fire-fighting functions.

Although, as was the case in police-protection cases, the courts have recognized that a special relationship may create a duty to an individual; the circumstances of firefighting are less likely to create a special relationship with a member of the public than are police operations.<sup>42</sup> The only New York case I have discovered in which liability has been found (other than in the context of safety inspections, discussed below) is the Appellate Division case of *Matlock v. New Hyde Park Fire District*,<sup>43</sup> in which three different fire departments called to a fire engaged in an on-scene dispute as to which

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35. *Springfield Fire & Marine Ins. Co. v. City of Keeseville*, 42 N.E. 405 (N.Y. 1895). The fact that citizens paid "water rents" was held by the court not to affect its decision.

36. 64 N.E.2d 704 (N.Y. 1945).

37. *Id.* at 706.

38. *Id.*; *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).

39. *Harland Enter. v. Commander Oil Corp.*, 475 N.E.2d 104 (N.Y. 1984).

40. *Heller v. Sedalia*, 53 Mo. 159 (1873).

41. *LaDuca v. Town of Amherst*, 386 N.Y.S.2d 269 (4th Dep't 1976).

42. *Haehl v. Village of Port Chester*, 463 F. Supp. 845 (S.D.N.Y. 1978).

43. 228 N.Y.S.2d 894 (2d Dep't 1962).

had jurisdiction preventing any of them from attacking the fire.<sup>44</sup>

#### IV. SAFETY INSPECTIONS

The law with respect to municipal liability for negligence in conducting and following up on safety inspections of various sorts, as required or authorized by state law or municipal ordinances, can be analogized to the law with respect to police protection. The dominant doctrines are the "public-duty" and "discretionary-function" doctrines. They are manifested in a number of contexts, the most frequently litigated being fire and building inspections.

Some states have statutes explicitly granting to governmental entities, including municipalities, immunity for their inspection activities.<sup>45</sup> Some of these statutes have been interpreted as encompassing subsequent corrective and enforcement actions as well.<sup>46</sup> If the statutes exempt "discretionary acts," they have generally been held to apply to inspection services;<sup>47</sup> likewise, statutes exempting "governmental functions" have been so interpreted.<sup>48</sup> In addition, even without an explicit statute, some states, notably including New York, have applied the public-duty doctrine to find no duty to an individual whose premises were negligently inspected or where follow-up enforcement was negligently deficient.<sup>49</sup> The decisions are not uniform, however, even within the same jurisdiction, and some courts have found a special relationship based on the particular facts of the case. In New York, for example, an appellate division decision held that where a city was not under a duty to inspect

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44. There have been a few cases in other jurisdictions in which a duty to individual members of the public has been found to exist. *See, e.g., Williams v. City of Tusculumbia*, 426 So. 2d 824 (Ala. 1983); *Davis v. City of Lexington*, 509 So. 2d 1049 (Miss. 1987).

45. *See, e.g., CAL. GOV'T CODE* § 818.6 (West 1994).

46. *See, e.g., Cochran v. Herzog Engraving Co.*, 205 Cal. Rptr. 1 (Ct. App. 1984); *National Spring Co. v. Pierpont Assoc., Inc.*, 368 A.2d 973 (N.J. Super. Ct. Law Div. 1976); *see also Bosch v. Hain*, 445 A.2d 465 (N.J. Super. Ct. Law Div. 1982).

47. *See, e.g., Evon v. Andrews*, 559 A.2d 1131 (Conn. 1989); *Lewis v. Estate of Smith*, 727 P.2d 1183 (Idaho 1986).

48. *Stemen v. Coffman*, 285 N.W.2d 305 (Mich. Ct. App. 1979).

49. *Sanchez v. Liberty*, 366 N.E.2d 870 (N.Y. 1977); *O'Connor v. City of New York*, 447 N.E.2d 33 (N.Y. 1983). *Cf. Garrett v. Holiday Inns, Inc.*, 447 N.E.2d 717. *Garrett* was a case decided on the same day as *O'Connor*, in which the court held that a municipality was liable for its proportionate share of damages to a joint tortfeasor required to respond in damages to an injured plaintiff even though the municipality was not directly liable to the original plaintiff.

a building but did so at the request of a purchaser, who relied on the certificate of occupancy, a special relationship was created between the city and the individual.<sup>50</sup> The Iowa Supreme Court has impliedly abrogated the public-duty doctrine in the case of negligent fire inspections, holding that inspections are intended for the protection of a "special identifiable group of persons," that is, lawful occupants of the inspected dwellings.<sup>51</sup> The Wisconsin Supreme Court appears to have gone a step further, stating that, "[a]ny duty owed to the public generally is a duty owed to individual members of the public."<sup>52</sup> The Alaska Supreme Court ruled likewise,<sup>53</sup> but its rule was reversed by subsequent amendment of the state's municipal immunity statute explicitly precluding municipal liability in actions based on negligence in safety inspections or follow-up actions.<sup>54</sup>

There is a paucity of auto-inspection cases, but the few that have been decided seem to turn on the public-duty doctrine.<sup>55</sup>

Although it is too early to classify the movement as a trend, appellate cases from a number of states have rejected the public-duty doctrine as it has been applied to safety inspections, applying instead the ordinary tort doctrine of reasonable foreseeability of harm. Rhode Island appears to have done so with respect to automobile safety inspections.<sup>56</sup> Louisiana apparently rejected the doctrine for building inspections, at least as to those injured by accidents during construction.<sup>57</sup>

In the related area of safety measures generally, the courts have usually held that municipalities are immune in their planning actions but generally not so for negligence in the operation or

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50. *Gordon v. Holt*, 412 N.Y.S.2d 534 (4th Dep't 1979); see also *Sexstone v. Rochester*, 301 N.Y.S.2d 887 (4th Dep't 1969).

51. *Wilson v. Nepstad*, 282 N.W.2d 664 (Iowa 1979). In *Nepstad* the Iowa Supreme Court discerned a trend among state court decisions toward "imposing liability upon governmental units for negligence in execution of statutory duties." *Id.* at 668.

52. *Coffey v. City of Milwaukee*, 247 N.W.2d 132, 139 (Wis. 1976).

53. *State v. Jennings*, 555 P.2d 248 (Alaska 1976).

54. ALASKA STAT. § 09.65.070(d)(1) (1993). See *Wilson v. Municipality of Anchorage* 669 P.2d 569 (Alaska 1983).

55. See Richard P. Taylor, Annotation, *Liability for Negligence in Carrying Out Governmentally Required Inspection of Motor Vehicle*, 70 A.L.R.3d 1239 (1976).

56. *Buszta v. Souther*, 232 A.2d 396 (R.I. 1967) (defendant in this case was a privately owned official inspection station).

57. *Stewart v. Schmieder*, 386 So. 2d 1351 (La. 1980).

maintenance of safety installations or systems. The leading case in this area is *Indian Towing Co. v. United States*.<sup>58</sup> Although this is a case involving the federal government and not a municipality, the principle it states is equally applicable to all levels of government—federal, state or local. In this case a private tugboat ran aground allegedly as a result of the Coast Guard's negligent failure to maintain in working order a previously established navigational light. The Supreme Court of the United States held that the Coast Guard was free not to undertake the lighthouse service or not to establish a lighthouse at the particular location, but having done so, "it was obligated to use due care to make certain that the light was kept in good working order."<sup>59</sup> Under similar rationale, courts have held that municipalities were immune in suits for alleged negligence in the failure to erect traffic-control devices at dangerous intersections, for their placement, and for their sequencing.<sup>60</sup> On the other hand, decisions are divided on whether, once such traffic-control devices are in place, governments are liable for failure to use due care in maintaining them.<sup>61</sup> Although the basic rationale applied is that of *Indian Towing*, state courts have also justified their holdings on other rationales as well. Some have held that the acts of maintaining such safety aids were non-discretionary acts and thus not within the exceptions to the waiver-of-immunity statutes;<sup>62</sup> others have said that failure to keep such devices in working order amounted to maintaining a nuisance;<sup>63</sup> and still others have concluded that maintaining existing devices is a proprietary (or corporate) function and not subject to immunity.<sup>64</sup>

#### CONCLUSION

The law of municipal liability for torts is a mixture of court-

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58. 350 U.S. 61 (1955).

59. *Id.* at 69.

60. *See, e.g.*, *Weiss v. Fote*, 167 N.E.2d 63 (N.Y. 1960).

61. New York appears to be among those states that recognize liability (*Sanchez v. Lippincott*, 455 N.Y.S.2d 457 (4th Dep't 1982)), and appears also to hold a municipality liable for its failure periodically to review previously adopted systems of control to ensure their continuing adequacy as conditions change but not for the wisdom of the plan adopted as a result of such a review. *Atkinson v. County of Oneida*, 432 N.Y.S.2d 970 (4th Dep't 1982).

62. *See, e.g.*, *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

63. *See, e.g.*, *City of Bowman v. Gunnells*, 256 S.E.2d 782 (Ga. 1979).

64. *See, e.g.*, *Johnston v. East Moline*, 91 N.E.2d 401 (Ill. 1950).

developed and statutory rules designed to balance the interests of individuals who may be injured by the wrongs of governmental entities and the interest of governments to be reasonably free to govern without unreasonable interference by the imposition of burdensome tort liability. The doctrines that distinguish public from private acts, discretionary from ministerial acts, governmental from proprietary functions, and the duty of a public entity to the public as a whole from a duty to individual members of the public have been developed and applied to strike the proper balance. They continue to apply even though all American jurisdictions now have in effect general waiver-of-immunity statutes in one form or another. Whether they strike the correct balance is a source of continuing debate—in the courts, in legislatures and in the legal literature.

Yale Law Professor Peter Schuck, in his book *Suing Government*,<sup>65</sup> states that an ideal regime for government liability should have the following characteristics:

- It should avoid chilling decision-making by government officials;
- It should compensate deserving victims;
- It should deter official misconduct; and
- It should reduce system costs.

He concludes that the present public tort system does not meet these objectives because of its failure to incorporate fully the remedial principle of enterprise liability, a concept that private tort law assimilated three centuries ago.

We would do well to examine the system I have described in the light of Professor Schuck's critique.

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65. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR CIVIL WRONGS* (1983).

