"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

Torts

A tort is a civil wrong in which the plaintiff seeks monetary compensation for harm to the plaintiff's person or property. Tort law was created originally by common law. Over the years, much of tort law has been codified into statutory law, so that today tort law exists in, and is being changed by, both statutory and case law.

A tort action based on negligence consists of the following elements: (1) A *duty* of the defendant towards the plaintiff; (2) *breach* of that duty; (3) *causation* of the injury by the breach; and (4) *damages* to the plaintiff.

Tort law imposes a duty upon everyone to use reasonable care when his or her actions create a foreseeable risk of harm to others. The standard of care owed is that of not being negligent. Negligence means the failure to exercise the degree of care that a reasonably prudent person would exercise under the same or similar circumstances.

Sovereign Immunity

At common law, states were immune from tort liability under a doctrine known as sovereign immunity. The Washington Constitution, in Article 2, section 26, provides that the Legislature shall direct in statute the manner in which the state may be sued. The Legislature adopted a broad waiver of state governmental immunity in 1961 and local governmental immunity in 1967. These statutes provide that a governmental entity can be sued "to the same extent as if it were a private person or corporation."

Despite this stated policy of holding government liable to the same extent as private persons, the courts have imposed some limitations on government liability in cases where the government is engaged in a governmental function not provided by the private sector, under what is called the "public duty doctrine." Governmental functions are those that are for the benefit of the public generally, and include regulatory programs, police and fire protection, correctional programs, and social welfare programs.

In contrast, the government acts in a proprietary capacity when it engages in a business-like function or service that is normally performed by the private sector. Examples of proprietary functions include garbage service, water and electrical service, and medical and psychiatric care. When the government is engaged in a proprietary function, the courts do not apply the public duty doctrine. Rather, the government is held to the same duty of care as a private individual engaging in the same activity.

Public Duty Doctrine

The public duty doctrine is a judicially-created doctrine that provides a governmental entity with a defense against tort liability. The public duty doctrine is applied in cases where the

governmental entity is acting in a governmental capacity, as opposed to a proprietary capacity. The premise of the public duty doctrine is that, when engaged in a governmental function, a governmental entity has a duty to the public in general, not a duty to any individual person. Under the public duty doctrine, a governmental entity is not liable for injuries resulting from its negligent actions unless it is shown that a duty was owed to the injured person as an individual, and not merely to the public generally. ***Babcock v. Mason County Fire Dist. No. 6***, 144 Wash.2d 774, 784-85, 30 P.3d 1261 (2001). See also ***Cummins***, 156 Wash.2d at 852, 133 P.3d 458 (citing ***Taylor v. Stevens County***, 111 Wash.2d 159, 163, 759 P.2d 447 (1988)).

Over the years, a number of exceptions have developed to the public duty doctrine. These exceptions recognize particular situations where the government acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs. These exceptions are: legislative intent; failure to enforce; rescue doctrine; and special relationship.

Legislative Intent: The legislative intent exception applies when there is a statute clearly indicating that it is intended to protect a particular and circumscribed class of persons and where the plaintiff is a member of the protected class. This exception has been applied to allow governmental liability for negligent investigation of child abuse, since the statute creating a duty to investigate child abuse shows a legislative intent to protect both children and their parents. ***Rodriguez v. Perez.***

The legislative intent exception applies "when the terms of a legislative enactment evidence an intent to identify and protect a particular and circumscribed class of persons." ***Bailey v. Town of Forks***, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). This legislative intent must be clearly expressed, not implied. ***Ravenscroft v. Wash. Water Power Co***., 136 Wash.2d 911, 930, 969 P.2d 75 (1998). To ascertain legislative intent, courts look to the statute's declaration of purpose. ***Dorsch v. City of Tacoma***, 92 Wash.App. 131, 134, 960 P.2d 489 (1998), review denied, 137 Wash.2d 1022, 980 P.2d 1283 (1999).

Failure to Enforce: The failure to enforce exception to the public duty doctrine applies when: (1) A government agent is responsible for enforcing a statute, (2) the agent has actual knowledge of a statutory violation and fails to take corrective action despite a statutory duty to do so, and (3) the plaintiff is within the statute's protected class. For example, in ***Bailey v. Forks***, the failure to enforce exception applied where a police officer allowed a known intoxicated person to drive, resulting in an accident that injured another person.

Rescue Doctrine: The rescue doctrine exception applies when a governmental entity has engaged in volunteer rescue efforts. This exception follows from the common-law principle that one who undertakes to render aid to another or to warn a person in danger must exercise reasonable care doing so. For example, in ***Brown v. MacPherson's, Inc***., the state was found liable for failing to provide a warning of a known avalanche danger after stating the warning would be given.

Special Relationship: Courts have held that the public duty doctrine does not protect a governmental entity from liability where the governmental entity had a special relationship with the injured person. A special relationship arises where: (1) there is direct contact or privity

between the public official and the injured plaintiff which sets the latter apart from the general public; (2) there are express assurances given by the public official; and (3) the plaintiff justifiably relies on the assurances. In ***Chambers-Castanes v. King County***, the court held that a special relationship giving rise to reliance on the part of the victim was established between a person who had called a police dispatcher repeatedly for help and the police dispatcher assured the person that police were being sent. ***Caulfield v. Kitsap County***, 108 Wash. App. 242, 251, 29 P.3d 738 (2001). ***Beal v. City of Seattle***, 134 Wash.2d 769, 785, 954 P.2d 237 (1998) (quoting ***Taylor***, 111 Wash.2d at 166, 759 P.2d 447) (emphasis added). An "express assurance" occurs where an individual makes a direct inquiry and the government clearly sets forth incorrect information, the government intends that the individual rely on this information, and the individual does rely on it "to his detriment." ***Babcock***, 144 Wash.2d at 789, 30 P.3d 1261 (quoting ***Meaney v. Dodd***, 111 Wash.2d 174, 180, 759 P.2d 455 (1988)).

The special-relationship exception derives from the Restatement (Second) of Torts § 315 (1965), which provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless;
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Thus, a special relationship may exist "between the defendant and either the third party or the foreseeable victim of the third party's conduct." ***Caulfield***, 108 Wash. App. at 253, 29 P.3d 738 (quoting ***Niece v. Elmview Group Home***, 131 Wash.2d 39, 43, 929 P.2d 420 (1997)).

Only when there is an established special relationship between the defendant and the plaintiff has a defendant in a negligence action generally been held to owe a duty to protect the plaintiff from foreseeable harm by a third party. ***Hutchins v. 1001 Fourth Ave. Assoc***., 116 Wash.2d 217, 227, 802 P.2d 1360 (1991). These relationships are typically custodial or supervisory in nature. ***Caulfield***, 108 Wash. App. at 255, 29 P.3d 738. For example, Washington courts have recognized this type of special relationship, and **corresponding duty**, between certain individuals and schools, common carriers, hotels, hospitals, business establishments, taverns, possessors of land, and custodial mental institutions. ***Hutchins***, 116 Wash.2d at 228-29, 802 P.2d 1360.

Duty of care: In order for a cause of action for negligence to exist, there must first of all be a ***duty of care*** on the part of the defendant. ***Morgan v. State***, 71 Wn.2d 826, 430 P.2d 947 (1967); ***Lewis v. Scott***, 54 Wn.2d 851, 341 P.2d 488 (1959). The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim. ***Halvorson v. Dahl***, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

In ***Halvorson,*** we announced what was called an "exception" to the traditional rule: "Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons." While we have characterized the ***Halvorson*** doctrine as an "exception." Obviously a statute which by its terms creates a duty to individuals can be the basis for a negligence action where the statute is violated and the injured plaintiff was one of the persons designed to be protected by the legislation. A clear statement of legislative intent to protect individuals does not need an "exception" to the traditional rule; it is simply a statutory duty imposed upon the governmental entity.

The courts have also recognized that a governmental entity's duty to control a third person's conduct creates a special relationship that may be the basis for liability. If the governmental entity has control over a dangerous person, the governmental entity has a duty to protect others from reasonably foreseeable dangers posed by the dangerous person. This duty to control doctrine is the basis for state and local governmental liability for the conduct of criminal offenders being supervised in the community.

The state and local governmental entities are not liable for conduct, whether in a governmental or proprietary capacity, unless the conduct breached a duty owed to the individual injured person, rather than to the public in general. The state or a local governmental entity is liable only under one of the following circumstances:

- *A legislative enactment states a clear intent to identify and protect a particular and circumscribed class of persons, and the injured person is within this class;*

- *A public official responsible for enforcing a statutory requirement had actual knowledge of a violation, failed to take corrective action despite a mandatory statutory duty to do so, and the injured person is within the class intended to be protected by the statute. In building code actions, there must also be knowledge that the violation created an inherently dangerous condition;*

- *A public official had direct contact or privity with the injured person in response to a specific inquiry, the official provided express assurances directly to the injured person, and the injured person justifiably relied on the assurances to his or her detriment;*

- *There is a duty to warn or come to the aid of a particular person, which exists only if the following conditions are met: (1) Express assurances of a successful warning or rescue are given to a person, or one in privity with the person, in response to a report of an emergency; (2) the person, or one in privity, reasonably relies on the assurances to his or her detriment; and (3) the person suffers injury as a result of the governmental entity's negligence; or*

- *The governmental entity had a responsibility to supervise a person charged with or convicted of a crime, and the governmental entity had actual knowledge that a specific person, as opposed to the general public, was in imminent danger of injury caused by the supervised person, and the specific person suffered injury.*

Conclusion

Washington Tort Claims Act provides that all political subdivisions and municipal corporations of the State are held liable for damages for their or their employees' tortious conduct to the same extent as if they were a private person or a corporation.

A tort is a civil (as opposed to criminal) wrong, other than a breach of contract, for which courts award damages. A tort has four elements:

(1) A pertinent duty must be imposed on the defendant (local government);
(2) The defendant (local government) must have violated that duty;
(3) The victim must have been injured or suffered damages; and
(4) There must be a causal connection between the negligence and the harm suffered by the victim.

Negligence is the usual standard by which a defendant's actions are judged in order to determine whether a duty was violated. The concept of negligence is commonly based on the rule of reasonableness.

How would a reasonable person have acted under similar circumstances?
Could the injury or loss have been foreseen?
What was the apparent magnitude of the risk?
What were the relative costs and benefits of action versus inaction?
Has the defendant complied with applicable statutory or regulatory standards?

If negligence is established, the local government can raise applicable defenses, the most important of which is the discretionary immunity. The discretionary immunity applies to basic policy decisions that have a planning, rather than an operational, character. For example, a city council's decision to enact a law requiring a landowner to disclose geologic and soil conditions prior to selling their property or building on it would be immune to liability as a discretionary function. The city manager's decision to waive the requirement may or may not be immune, depending on the language of the ordinance, the factors used to make the decision, and the State in which the manager is located. The clerk who issues a building permit without requiring the disclosure document is not immune under the discretionary immunity.

The discretionary immunity was created by the Washington judiciary as an exception to the rule of general liability of local governments (see ***Evangelical United Brethren* v. *State***, 67 Wn. 2d 246, 407 P.2d 440 (1965)). To avail itself of the immunity, the act of a local government must meet a four-part test. The challenged act must:

(1) Involve a basic governmental policy, program, or objective;

(2) Be essential to the realization or accomplishment of that same policy, program, or objective;

(3) Require the exercise of basic policy evaluation, judgment, and expertise; and

(4) Be performed by the government agency having the requisite authority and duty to perform the act.

In addition, the municipality must demonstrate that it actually exercised discretion (see ***King* v. *Seattle***, 84 Wn. 2d 239, 525 P.2d 228 (1974)). Finally, Washington appears to give some weight to the position of the decision maker in the governmental hierarchy in assessing whether the decision was truly discretionary (***Chambers Castanas* v. *King County,*** 100 Wn. 2d 275, 869 P.2d 451 (1983)). However, the issue of position in the hierarchy is less important than in some other States, such as California.

A duty may be imposed on the local government under the public-duty doctrine, which applies when a so-called special relationship exists between the local government and the victim. If the enabling statute for the governmental action states a clear legislative intent to protect an identifiable class of persons and a member of the class is injured, then a special relationship exists (see ***Baerlein* v. *State***, *92* Wn. 2d 229, 595 P.2d 930 (1979)). A general duty to regulate private-sector activity for the benefit of the general public does not create a special relationship. If a statute obligates a local entity to abate a special known and dangerous condition, failure to do so will create a special relationship between a plaintiff and a defendant (see ***Campbell v. City of Bellevue***, 85 Wn. 2d 1, 530 P.2d 234 (1975)). If an injured party relies on expressed or implied assurances by a governmental agency with whom the party had direct contact, a special relationship also may be created.

Washington's local governments also have potential liability for injuries on private property, although the exposure is less than on public property. Local governments in most States are immune from liability for most actions relating to the issuing of permits or inspection activities. Washington courts, on the other hand, have consistently found liability for building-inspection and permitting activities so long as the injured party can establish a special relationship under Washington's public-duty doctrine.

We arrived at several conclusions, it is important to understand the role of judges and juries in a jury trial. Questions of fact (concerning whether something is factually true or untrue or whether something did or did not occur) are the province of the jury except under extreme circumstances. Questions of law (requiring that the law be interpreted or applied) are the exclusive province of the judge. However, it is the jury that decides (as a matter of fact) whether or not it would have been reasonable to do more, thereby determining (as a matter of law) that negligence exists.