

**CIVIL JUSTICE DATABASE FOCUS:
CRIME VICTIM SUITS AGAINST THE GOVERNMENT AND THE PUBLIC DUTY
DOCTRINE**

By Marnie Shiels, Esq.

A domestic violence victim calls the police, who do not respond, thereby allowing the abuser to kill the victim. A teacher calls child protective services to report suspected abuse of a student and child protective services takes no action, allowing the abuse to continue.

Sometimes, government agencies are responsible for failing to prevent a crime victim's injuries.

However, in order to hold a government agency responsible in many states, the plaintiff has to overcome the "public duty doctrine." Pursuant to this common law doctrine, liability may not be imposed on a public official unless "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general."ⁱ In other words, "a duty to all is a duty to no one."ⁱⁱ

The "public duty doctrine" evolved from the United States Supreme Court's decision in *South v. Maryland*,ⁱⁱⁱ in which the court held that a sheriff was not liable for failing to protect a kidnaping victim because the sheriff's duty to keep the peace was a "public duty, for neglect of which he is amenable to the public, and punishable by indictment only."^{iv} Courts have applied the doctrine in suits against law enforcement officers and agencies, child protective services, corrections officers, and other government employees.

There are various ways for plaintiffs to get around the public duty doctrine. In some states, the doctrine does not apply in cases brought under the state's tort claims act. Most states have a tort claims act which specifies when a government agency or official may be sued. Some courts have held that these statutes evince a legislative intent to abolish governmental immunity.^v

For example, in *Schear v. Board of County Comm'rs*, the New Mexico Supreme Court held that

liability under the state tort claims act is governed by “traditional concepts of duty under the reasonably prudent person standard.”^{vi} The public duty doctrine is too closely related to sovereign immunity to fit within “traditional concepts of duty.”^{vii} Therefore, the public duty doctrine does not apply to suits brought under the state tort claims act. However, a majority of jurisdictions continue to adhere to the public duty doctrine despite the passage of tort claims acts.^{viii} In *Ezell v. Cockrell*, the Supreme Court of Tennessee found that the tort claims act did not abolish the public duty doctrine because the statute did not affect the “duty of care” owed by a government entity.^{ix}

In addition, courts have recognized several exceptions to the doctrine. Some courts have held that when a state maintains an insurance policy which covers the damage sustained by the plaintiff, the plaintiff can recover up to the policy limits. All states allow recovery where there is a “special relationship” between the plaintiff and the government agency, although courts differ on what is required to establish a special relationship. Courts have found special relationships as a result of: promises or actions by government entities, duties to protect witnesses or informants, statutes creating a duty, and domestic violence protective orders. Some courts have found that when a duty is created by a statute or a government promise, this duty gives rise to a special relationship between the government and the plaintiff, while other courts have found that the duty created by statute or promise is a separate exception to the public duty doctrine.

EXCEPTIONS TO THE PUBLIC DUTY DOCTRINE

Insurance

Some courts have found that a state agency’s purchase of insurance waives the public duty doctrine to the extent of the insurance coverage. For example, in *Parkulo v. State Bd. of*

Probation and Parole, the Supreme Court of Appeals of West Virginia held that the public duty doctrine applies unless it is expressly waived or altered by the terms of an insurance contract.^x

The court found that the plaintiff's claim was blocked by the doctrine, but the plaintiff was still entitled to recover up to the limits of the insurance policy, provided that the state had "that kind of coverage which would afford recovery" under the circumstances of the case.^{xi} However, in *Coleman v. Cooper*, the Court of Appeals of North Carolina held that the purchase of insurance waived an immunity defense, but did not create a cause of action where none previously existed.^{xii} Because the public duty doctrine means that there is no duty owed by the government agency to the plaintiff, there is no cause of action even with an insurance policy.^{xiii}

Special Relationship

All states allow a plaintiff to recover if there is a "special relationship" between the state agency and the plaintiff which gives rise to a duty to the plaintiff, rather than a duty to the public at large. Several states apply the test set forth in *Cuffy v. City of New York* to determine whether such relationship exists.^{xiv} In *Cuffy*, Eleanor, Cyril, and Joseph Cuffy had an ongoing violent dispute with their neighbors. The Cuffys complained to the police on several occasions. Joseph Cuffy asked the police for protection and received assurances that the police would take action the next morning. However, the police did nothing. The next night, Ralston Cuffy, who did not live with the other Cuffys, went to their house. The neighbors struck Ralston with a baseball bat and slashed Eleanor and Cyril with a knife.^{xv} The Court of Appeals of New York held that the elements of a "special relationship" are:

- (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 affirmative undertaking.^{xvi}

The *Cuffy* court found that there was no evidence that the injured parties had relied on the police assurance, and dismissed the complaint.

Requirement of Direct Contact Between the Plaintiff and Defendant

In some states, in order to find a special relationship, there must be direct contact between the plaintiff and the defendant, while other states allow recovery where the special relationship is between the government agency and the third party who injured the plaintiff. In *Taggart v. State*, a parolee repeatedly raped a nine year-old boy. The parolee was a "maximum supervision" parolee, and failed to check in with his parole officer as required. The parole officer did not ensure that the parolee was arrested.^{xvii} The Supreme Court of Washington held that the state had a duty to take reasonable precautions to protect against reasonably foreseeable dangers posed by parolees.^{xviii} The relationship between a parole officer and a parolee is a special relationship giving rise to a duty.^{xix} The plaintiff had to show that he was foreseeably endangered. However, he did not need to show that the specific form of violence was foreseeable, only that violence in general was foreseeable.^{xx} The court held that the plaintiff established a special relationship, and reversed the trial court's dismissal of the case.

In *Parkulo v. State Bd. of Probation and Parole*, the court required that there be contact between the plaintiff and defendant in order to find a special relationship. In *Parkulo*, a released prisoner abducted and raped the plaintiff. The plaintiff sued the Board of Probation and Parole and the Division of Corrections for failure to supervise the released prisoner.^{xxi} The Supreme

Court of Appeals of West Virginia found that there was no special relationship because there was no contact between the plaintiff and the defendants.^{xxii}

In *White v. Beasley*, neighbors saw Sheila White's husband attack her.^{xxiii} The neighbors called the police. The police came to the scene, but did not investigate. Three hours later, Sheila died from stab wounds that her husband inflicted.^{xxiv} The court applied the *Cuffy* test and found that it was the neighbors who had contact with the police and not Sheila, so Sheila could not have relied on the police protection. Therefore, the police did not owe Sheila a duty.^{xxv}

Special Relationship Created by Statute

In some states, a statute can create a special relationship. A statute providing general authority to a government agency is not enough to create a duty.^{xxvi} The statute must create a duty to a particular identifiable class of plaintiffs. For example, in *Sabia v. State*, the plaintiffs' stepfather sexually abused them when they were minors.^{xxvii} A teacher reported the abuse to child protective services who failed to take any action. Three years later, the school made a second report and again child protective services took no action.^{xxviii} The Supreme Court of Vermont overturned the summary judgment granted to the defendants and found that the child protective laws create a duty to known child abuse victims.^{xxix} The court set out four factors to determine if a statute creates a duty:

(1) whether a statute sets forth mandatory acts for the protection of a particular class of persons;

(2) whether the government has knowledge that particular persons within that class are in danger;

(3) whether those persons have relied on the government's representations or conduct; and

(4) whether the government's failure to use due care would increase the risk of harm beyond what it was at the time the government acted or failed to act.^{xxx}

In *Bailey v. Town of Forks*, a police officer knew that Harvey Medley was intoxicated, yet allowed Medley to enter his truck and drive off.^{xxxii} Medley crashed into a motorcycle driven by Paul Peterson, killing Peterson and severely injuring Bailey, Peterson's passenger.^{xxxiii} The Supreme Court of Washington held that the statute prohibiting drunk driving is clearly intended to protect other vehicles on the road. A motorcycle driver and passenger are within the protected class.^{xxxiv} When a government agent knows of a violation of a DUI statute, the duty to protect runs to all members of the protected class, not just those who had contact with the agent.^{xxxv} By contrast, in *Ezell*, the Supreme Court of Tennessee held that the Tennessee drunk driving laws did not create a special duty to foreseeable victims of drunk drivers.^{xxxvi}

Special Relationship Created by Protective Order

A protective order may give rise to a special relationship between the holder of the order and law enforcement, thereby establishing a duty to enforce the order and protect the victim.^{xxxvii} For example, in *Sorichetti v. City of New York*, Frank Sorichetti repeatedly assaulted his wife, Josephine Sorichetti.^{xxxviii} Josephine obtained three separate protective orders and called the police on numerous occasions. The final protective order included visitation for Frank with their six year-old daughter, Dina. On the weekend after the final order was granted, Frank and Josephine met at the police station to exchange custody of Dina. Frank threatened to kill Dina and Josephine. Josephine told the police and showed them the order, but they refused to assist her. The following morning, Josephine returned to the police station and again begged for help and was refused. Later, Frank's sister went to his house and found him passed out drunk. She discovered that Frank had attacked Dina with a fork, a knife, and a screwdriver, and had attempted to saw off her leg, leaving her permanently disabled.^{xxxix} The Court of Appeals of

New York held that a special relationship existed between Josephine and the city which arose out of the protective order, the police department's knowledge of Frank's violent history, its response to Josephine's pleas for help, and Josephine's reasonable expectation of police protection.^{xxxix} A protective order does not require the police to arrest the respondent, but presentation of an order with an allegation of a violation does obligate the police to respond and investigate.^{xl}

On the other hand, in *Dunk v. United States*, Kelly Dunk obtained a protective order against her husband, Corporal Robert Dunk.^{xli} Robert abducted Kelly and threatened to kill her.

The military police arrested Robert, took him to a psychologist, and allowed him to return to full duty. A month later, Robert purchased a gun and killed Kelly.^{xlii} The United States Court of Appeals for the Fourth Circuit, applying North Carolina law, held that a protective order simply authorizes the police to arrest the respondent, but does not give rise to a duty or constitute a promise to protect the plaintiff.^{xliii}

Duty to Protect Witnesses or Informants

Some courts have found an exception to the public duty doctrine for protection of persons who have aided law enforcement as informers or witnesses. In *Brandon v. County of Richardson*, John Lotter and Marvin Nissen abducted, imprisoned, assaulted, and raped the victim, Teena Brandon.^{xliv} She escaped and sought aid from Sheriff Charles Laux. Brandon told Laux all about the assaults. She agreed to sign a complaint and to testify against Lotter and Nissen. A deputy investigated and told Laux that the physical evidence corroborated Brandon's statement. Laux did not arrest Lotter and Nissen, and did not inform Brandon of this decision. Laux delegated the rest of the investigation to the Falls City Police. The police detained Lotter and Nissen for questioning and then released them. In reliance on the expectation that Laux

would arrest Lotter and Nissen, Brandon remained in the county. Six days later, Lotter and Nissen shot and killed Brandon.^{xlv} The Supreme Court of Nebraska held that there is an exception to the public duty doctrine pursuant to which individuals who have aided law enforcement as informers or witnesses are to be protected. The court found that a special relationship existed after Brandon went to law enforcement officials and offered to testify and aid in the prosecution of Lotter and Nissen.^{xlvi}

Promise to Protect Creating a Duty

Under certain circumstances, a promise made by a government agency, which is relied upon by the plaintiff, can create a duty to the plaintiff.^{xlvii} In *Hobbs v. Dep't of Human Resources*, the plaintiffs, who were parents of a two year-old daughter, agreed to be foster parents to a twelve year-old boy.^{xlviii} The department knew that the boy was a sexual abuse victim, but did not inform the plaintiffs. The plaintiffs specifically asked the department if their daughter would be safe with the boy, and the department assured them that she would be.^{xlix} The court held that a special relationship is created when “a municipality, through its police officers, creates a . . . duty by promising protection to an individual, the protection is not forthcoming, and the individual’s reliance on the promise of protection is causally related to the injury suffered.”¹ However, where an officer only makes general assurances of protection, but does not specify what type of protection will be provided, there is no duty.^{li} The court found that the facts were sufficient to create a jury question as to whether the department owed the plaintiffs a duty of care.

Some courts will not find that a state has a duty even where the state agency made a promise which the plaintiff reasonably relied upon. In *Hawkeye Bank & Trust Co. v. Spencer*, Harvey Spencer, a former boyfriend of Victoria Graham, threatened to kill her.^{lii} Officer Scott

Williams told Graham that an extra watch would be placed on her home, that members of the police force would attempt to contact Spencer, and that officers would watch for the presence of Spencer or his vehicles in Graham's neighborhood. One officer looked for Spencer and failed to find him. The police took no other action. Four days later, Spencer killed Graham.^{liii} The Court of Appeals of Iowa rejected the exception to the public duty doctrine for justifiable reliance on a government promise and affirmed summary judgment for the defendants. The court found that the public is better served by a policy that encourages police to provide extra protection without fear of liability.^{liv}

The public duty doctrine can bar suits against government agencies and officials. In some states, an insurance policy can provide relief to the plaintiff despite this bar. In addition, a special relationship between the plaintiff and defendant can enable a plaintiff to avoid dismissal. Depending on the law in a specific state, this relationship can be formed by express acts or promises, a protective order, or a statute.

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1. *Taggart v. State*, 822 P.2d 243, 254 (Wash. 1992), citing *Taylor v. Stevens Cy.*, 759 P.2d 447 (Wash. 1988).

ii. *Id.*

iii. *South v. Maryland*, 59 U.S. 396 (1855)

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- iv. *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995).
- v. *Id.*
- vi. *Schear v. Board of County Comm'rs*, 101 N.M. 671, 673 (1984).
- vii. *Id.*
- viii. *Ezell*, 902 S.W.2d at 399.
- ix. *Id.* at 400.
- x. *Parkulo v. State Bd. of Probation and Parole*, 483 S.E.2d 507, 524 (W. Va. 1996).
- xi. *Id.* at 515.
- xii. *Coleman v. Cooper*, 366 S.E.2d 2, 5 (N.C. App. 1988).
- xiii. *Id.*
- xiv. *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987).
- xv. *Id.* at 939.
- xvi. *Id.* at 940.
- xvii. *Taggart*, 822 P.2d at 245-246.
- xviii. *Id.* at 255.
- xix. *Id.*
- xx. *Id.* at 258.
- xxi. *Parkulo*, 483 S.E.2d at 511.
- xxii. *Id.* at 525.
- xxiii. *White v. Beasley*, 552 N.W.2d 1, 2 (Mich. 1996).
- xxiv. *Id.*
- xxv. *Id.* at 7.
- xxvi. *Ezell*, 902 S.W.2d at 403.
- xxvii. *Sabia v. State*, 669 A.2d 1187, 1190 (Vt. 1995).

xxviii. *Id.*

xxix. *Id.* at 1192.

xxx. *Id.* at 1191.

xxxi. *Bailey v. Town of Forks*, 737 P.2d 1257, 1258 (Wash. 1987).

xxxii. *Id.*

xxxiii. *Id.* at 1260.

xxxiv. *Id.* at 1261.

xxxv. *Ezell*, 902 S.W.2d at 403.

xxxvi. *See, e.g., Matthews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999) (holding that a protective order creates an exception to the public duty doctrine because it was issued for the protection of a specifically identified person).

xxxvii. *Sorichetti v. City of New York*, 482 N.E.2d 70, 71 (N.Y. 1985).

xxxviii. *Id.*

xxxix. *Id.* at 75.

xl. *Id.*

xli. *Dunk v. U.S.*, 1996 U.S. App. Lexis 1171, 2 (4th Cir., 1996).

xlii. *Id.*

xliii. *Id.* at 9.

xliv. *Brandon v. County of Richardson*, 566 N.W.2d 776 (Neb. 1997).

xlv. *Id.* at 776-781.

xlvi. *Id.* at 780

xlvii. *See, e.g., Torres v. City of Anacortes*, 981 P.2d 891 (Wash. Ct. App. 1999) (holding that a promise by police to refer a case for prosecution could be a promise which induced reasonable reliance by the plaintiff).

xlviii. *Hobbs v. Dep't of Human Resources*, 520 S.E.2d 595, 598 (N.C. App. 1999).

xlix. *Id.*

1. *Id.* at 599, citing *Braswell v. Braswell*, 410 S.E.2d 897, 901 (N.C. 1991).

li. *Coleman*, 366 S.E.2d at 6-7.

lii. *Hawkeye Bank and Trust Co. v. Spencer*, 487 N.W.2d 94, 95 (Iowa App. 1992).

liii. *Id.*

liv. *Id.* at 97.