

2004

James Webb v. University of Utah, a division of the State of Utah, Park Plaza Condominium Owner's Association, a Utah Non-Profit Corporation, and Jonette Webster : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

JAMES WEBB,

Plaintiff/Appellant/Respondent,

v.

THE UNIVERSITY OF UTAH, a
division of the State of Utah,

Defendant/Appellee/Petitioner,

PARK PLAZA CONDOMINIUM
OWNER'S ASSOCIATION, a Utah
Non-Profit Corporation, and JONETTE
WEBSTER,

Defendants.

Case No. 20040282

UTAH SUPREME COURT
BRIEF

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BRIEF OF RESPONDENT

On Writ of Certiorari to the Utah Court of Appeals,
Judges Billings, Bench, and Thorne

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(ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED) FILED

UTAH APPELLATE COURTS

AUG 24 2004

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JURISDICTION AND NATURE OF PROCEEDINGS

The petition in this case was taken from the decision entered by the Utah Court of Appeals in Webb v. University of Utah, 2004 UT App 56, 88 P.3d 664. The Utah Court of Appeals reviewed an order of the Third Judicial District Court dismissing the negligence claim brought by Webb against the University of Utah. The Utah Court of Appeals reversed, holding that the University of Utah owes its students the duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as part of its educational instruction. This Court has appellate jurisdiction over the judgment of the Utah Court of Appeals under UTAH CODE ANN. § 78-2-2(3)(a) (2002).

ISSUES PRESENTED FOR REVIEW

1. The Utah Court of Appeals did not err in holding that the University of Utah owes its students the duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as part of its educational instruction.

2. The Utah Court of Appeals did not err in holding that the University of Utah has a special relationship with its students when it requires them to engage in activities fraught with unreasonable risks.

DETERMINATIVE PROVISIONS OF LAW

There are no determinative provisions of constitutions, statutes, ordinances, or regulations which control the circumstances present in this case.

STATEMENT OF THE CASE

In 1998, Webb attended a class field trip as a student of the University of Utah. During the field trip, the University of Utah, through its agent, instructed Webb to travel upon icy and snow covered ground. Webb was injured when he slipped and fell on the ice and snow covering the ground upon which the University of Utah instructed Webb to walk. Webb filed a lawsuit against the University of Utah, alleging that the University of Utah was negligent in directing Webb, its student, to participate in a dangerous class activity.

The University of Utah filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure arguing that it owed no duty of care to its students because it did not have a special relationship with its students. On January 31, 2000, the trial court entered the Order granting the University of Utah's Motion to Dismiss. On November 13, 2002, the trial court entered an Order dismissing the remaining defendant named in the lawsuit.

The Utah Court of Appeals reversed the trial court's decision, holding that the University of Utah owes its students the duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as part of its educational instruction. Webb v. University of Utah, 2004 UT App 56, ¶ 6, 88 P.3d 664. The Utah Court of Appeals found that a finding of a special relationship is not necessary in a case of misfeasance. Id.

STATEMENT OF RELEVANT FACTS

1. Webb was a student of the University of Utah. See Complaint, ¶ 6; Records Index 2.
2. Webb was injured while participating in a university–mandated and supervised class activity. See Complaint, ¶¶ 7, and 9; Records Index 2.
3. Webb alleged that the University of Utah was negligent for instructing him to travel into a dangerous area. See Complaint, ¶ 12; Records Index 2.

SUMMARY OF ARGUMENT

The University of Utah never argued the application of the public duty doctrine below. Webb could not find one instance in the records where the phrase “public duty” was ever mentioned.

Even if public duty doctrine were raised below, it is not applicable because taking a class on a field trip does not constitute the exercise of general police powers on behalf of the nebulous general public at large. “For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large.” Ferree v. Utah, 784 P.2d 149, 151 (Utah 1989). The University of Utah does not owe a duty to take the general public at large on field trips.

Furthermore, the public duty doctrine is not applicable because the University of Utah owed a duty to Webb as an individual to exercise reasonable care when it directed him to engage in a specific activity as part of its educational instruction.

Additionally, an exception to the public duty doctrine exists in this case because there is a special relationship between Webb and the University of Utah. Webb alleged that the University of Utah instructed him to engage in a dangerous activity. The Utah Court of Appeals noted that “failure to find a special relationship under the facts of this case would permit the University to escape all liability when it injures students by requiring them to engage in activities fraught with unreasonable risks. Such adverse consequences for society would require that we find a special relationship in this case.” See Webb v. University of Utah, 2004 UT App. 56, ¶ 10 n.6.

Finally, this Court should follow the trend to eliminate the public duty doctrine because: (1) the doctrine creates confusion in the law and inequitable results; (2) imposing the public duty doctrine despite the Utah Governmental Immunity Act’s waiver of immunity creates immunity where the legislature did not intend it; and (3) a plaintiff must still establish a duty on the part of the government under conventional tort principles.

ARGUMENT

I. THE PUBLIC DUTY DOCTRINE WAS NOT ADDRESSED BELOW

The University of Utah never once mentions the phrase “public duty” below, and now, for the first time, focuses on the public duty doctrine as a basis for its argument that it does not owe any duties whatsoever to any of its students to act with reasonable care while providing educational instruction. This Court should not address the University of Utah’s new argument because it was not addressed below. See Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 880 (Utah 1996).

Now that the University of Utah is focusing on the public duty doctrine, Webb has reviewed the arguments made by the University of Utah below and has found that cases involving the public duty doctrine were cited below. However, Webb believed that the cases were cited because of the discussion of special relationships in the cases. Importantly, the University of Utah never clarified its position by clearly stating that its position was based on the public duty doctrine.

The University of Utah devoted the bulk of its court of appeals brief and its oral argument to a discussion of Beach v. University of Utah, 726 P.2d 413 (Utah 1986), and its application to the facts in this case. However, Beach did not address the public duty doctrine. Instead, Beach addressed whether the University of Utah could be negligent for failing to act on behalf of a student who, after class, got drunk, wandered off, and fell off a cliff in the middle of the night. This Court explained that “the law imposes upon one party

an affirmative duty to act only when certain special relationships exist between the parties.”

See id. at 415.

Furthermore, the Utah Court of Appeals did not address the public duty doctrine. Instead, the Utah Court of Appeals addressed whether Webb’s claim against the University was based on a negligent act or a failure to act (which requires a special relationship). See Webb v. University of Utah, 2004 UT App 56, ¶ 6, 495 Utah Adv. Rep. 17. The Restatement (Second) of Torts addresses the difference between negligent claims based on an act and a failure to act:

Negligent conduct may be either

(a) ***an act*** which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) ***a failure to do an act*** which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 284 (emphasis added).

The Restatement (Second) of Torts explains, “Where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with the respect to the doing of the act.” RESTATEMENT (SECOND) OF TORTS, topic 4. The Restatement (Second) of Torts notes that a person who engages in an affirmative act must do so with reasonable care (§ 298), with reasonable competence (§ 299), with reasonable preparation (§ 300), with reasonable warning (§ 301), without unreasonable risk of direct or indirect harm (§ 302), etc.

On the other hand, if the claim is based on non-feasance, “Liability for non-feasance is largely confined to situations in which there was some special relationship between the parties, on the basis of which the defendant was found to have a duty to take action for the aid of plaintiff.” RESTATEMENT (SECOND) OF TORTS § 314 cmt. c. Thus, a person does not owe a duty to act on another’s behalf unless a special relationship exists between the parties. For example, a person owes no duty to act on behalf of a drowning child and cannot be found negligent for failing to render assistance, supervision, or protection of the child.

However, an exception to the general rule exists when a special relationship is found between parties that gives rise to a duty to act. In the example above, the parents of a drowning child would owe a duty to render assistance to the drowning child because the parent-child relationship gives rise to a duty to render assistance.

Sections 314A-320 of the Restatement (Second) of Torts identify situations giving rise to special relationships, and therefore, liability for nonfeasance. In Beach v. University of Utah, 726 P.2d 413 (Utah 1986), this Court discussed special relationships that give rise to a duty to act, citing the Restatement (Second) of Torts § 314(A) (1964). See id. at 415-16. This Court noted that “special relationships include common carriers and passengers, employers and employees, owners and invitees, and parents and children. Other situations involve innkeepers and their guests and possessors of land and their guests.” Id. at 415 n. 2; see also DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 983) (holding that

“[r]elationships which give rise to such a duty [to act] include those between carriers and passengers, employers and employees, owners and invitees, and parents and children.”).

In Gilger v. Hernandez, 2000 UT 23, 997 P.2d 305, this Court noted that a plaintiff does not need to establish a special relationship with the tortfeasor when the negligence claim is based on an affirmative act. This Court noted that the defendant’s affirmative act of preventing a person from summoning help for an injured guest is “of course ‘misfeasance.’” Id. at ¶ 20. This Court noted that “[a]n act of misfeasance may constitute actionable negligence without reliance on a special relationship.” Id.

The Utah Court of Appeals, like this Court in Gilger, held that Webb did not need to demonstrate a special relationship with the University of Utah because his claim was based on an act of misfeasance. The Utah Court of Appeals noted that “the duty alleged in Webb’s complaint is not a duty to protect, but rather the University’s duty not to act negligently in providing instruction. Specifically, Webb alleges that the University directed him to enter a dangerous area on a school-sponsored and required field trip. Thus, this is not a case where a failure to act is alleged.” Webb v. University of Utah, 2004 UT App 56, ¶6, 495 Utah Adv. Rep. 17.

A number of other jurisdictions agree with the Utah Court of Appeals that a state institution owes a duty to its students to exercise reasonable care while providing educational instruction. For example, in Delbridge v. Maricopa County Community College Dist., 893 P.2d 55 (Ariz. Ct. App. 1995), a student at a community college was injured while, at his

instructor's direction, climbing a utility pole during a class exercise without a safety strap.

The court in Delbridge noted that:

[s]chool districts, administrators, and teachers have a legal obligation for the benefit of the students **enrolled in their classes**. This obligation includes a duty not to subject those students, through acts, omissions, or school policy, to a foreseeable and unreasonable harm.

Id. at 58 (emphasis added).

The community college argued that it did not owe a duty to its students, citing in support of its position Beach v. University of Utah, 726 P.2d 413 (Utah 1986). The court, however, distinguished Beach from the case it was reviewing. It noted that

the issue here, however, concerns a school district's duty to provide safe *in-class* environment for its students. . . . Even if we accept the fact that the class was held off-campus, [the student] was injured nonetheless while performing an exercise which was both supervised by the instructor and included in the curriculum. Therefore, **the custodial supervision and *in loco parentis* cases cited by [the community college] do not govern this appeal.**

By contrast, courts in a number of other jurisdictions have imposed liability on colleges and universities for injuries suffered by students while attending classes. E.g. Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941) (university liable to student injured in chemistry lab); LaVoie v. New York, 91 A.D.2d 749, 458 N.Y.S.2d 277 (1982) (same); DeMauro v. Tsuculum College, Inc., 603 S.W.2d 115 (Tenn. 1980) (university liable to student injured in physical education class); Amon v. New York, 68 A.D.2d 941, 414 N.Y.S.2d 68 (1979) (university liable to student cut by a table saw in the university scenery shop); Grover v. San Mateo Junior College Dist., 146 Cal.App.2d 86, 303 P.2d 602 (1956) (college liable to student injured during noncompulsory part of aeronautics course); Yarborough v. City University of New York, 137 Misc. 2d 282, 520 N.Y.S.2d 518 (Ct. Cl. 1987) (university liable to student injured in physical education class).

Delbridge v. Maricopa County Community College Dist., 893 P.2d 55, 59 (Ariz. Ct. App. 1995) (some emphasis in original and some added).¹

The Florida Supreme Court agrees with those jurisdictions that have held that a state-operated or owned university owes a duty to its students to exercise reasonable care in providing educational instruction to its students. The Florida Supreme Court recently rejected a university's argument that it did not owe a duty to its students merely because it does not stand in *loco parentis* with its students. See Nova Southeastern Univ., Inc. v. Gross,

¹Like the Arizona Court, Webb also found many other decisions in other jurisdictions in which courts held that a university owes a duty to exercise care while providing educational instruction to its students. E.g. Hores v. Sargent, 230 A.2d 712 (N.Y. App. Div. 1996) (holding that university owed duty to take reasonable precautions for safety of students participating in school-organized bicycle trip); Kyriazis v. University of West Virginia, 450 S.E.2d 649 (holding that "University owes a duty of due care to its students when it encourages them to participate in any sport."); Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993) (holding that university owes duty of care to student injured while participating in athletic event); Whittington v. Sowela Technical Inst., 438 So.2d 236 (La. Ct. App. 1983) (holding that school owes duty to student injured while on nursing school field trip); and Kirchner v. Yale Univ., 192 A.2d 641 (Conn. 1963) (holding that university was obligated to exercise reasonable care to instruct and warn shop students in safe and proper operation of machines).

758 So.2d 86, 89 (Fla. 2000). The Court explained that just because a school does not owe a duty to assume a custodial role with a student does not mean that fundamental principles of tort law do not apply to the school. See id. The Court noted that:

it is clearly established that one who undertakes to act, even when under no obligation to do so, thereby becomes obligated to act with reasonable care. . . . There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.

Id. at 89-90.

In Nova, a student brought a claim against a university under a common law negligence theory based upon the university's assigning her to participate in a mandatory practicum at a dangerous location. The trial court dismissed the case because it determined that the university did not owe a duty to its student. The student appealed the decision to the Florida Court of Appeals. The court of appeals distinguished cases that have held that schools do not "have a duty of supervision when the injuries have occurred *off-campus* while students have been involved in *non-school related* activities." Gross v. Family Serv. Agency, Inc., 716 So.2d 337, 339 (Fla. Dist. Ct. App. 1998) (emphasis in original). The court of appeals noted that in the case it was asked to review, the student was involved in a university-mandated activity at a location specifically approved and suggested by the university. The court of appeals held that the university had a duty "to use ordinary care in providing educational services and programs to one of its adult students." Id.

Like the numerous colleges and universities referred to in the cases cited above, the University of Utah owed Webb a duty to exercise reasonable care when providing educational instruction to him. Webb alleged in his complaint that the University of Utah was negligent in assigning him to participate in a dangerous, university-mandated activity. Thus, Webb satisfied his obligation under Rule 12(b)(6) of the Utah Rules of Civil Procedure to state a claim upon which relief can be granted because the University of Utah owed him a duty to exercise reasonable care while providing educational instruction to him.

The University of Utah cannot point to one instance where the public duty doctrine was even mentioned below. Thus, this Court should not address the University of Utah's new argument that, under the public duty doctrine, the University of Utah does not owe any duties whatsoever to any of its students to act with reasonable care.

**II. THE PUBLIC DUTY DOCTRINE IS NOT APPLICABLE
BECAUSE TAKING A CLASS ON A FIELD TRIP DOES NOT
CONSTITUTE THE EXERCISE OF GENERAL POLICE
POWERS ON BEHALF OF THE PUBLIC AT LARGE**

The public duty doctrine duty is not applicable in this case because taking a class on a field trip does not constitute the exercise of general police powers on behalf of the nebulous public at large. "For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of a duty owed him as an individual, not merely the breach of an obligation owed to the general public at large." Ferree v. Utah, 784 P.2d 149, 151 (Utah 1989).

The University of Utah does not owe a duty to conduct field trips for the general public at large. The University of Utah fails to explain how taking a class on a field trip is “an obligation owed to the general public at large.” Instead, the duty alleged by Webb, that the University of Utah exercise reasonable care while taking a class on a field trip, is owed to the students on the field trip, and not to the nebulous general public at large. Thus, the public duty doctrine is not applicable in this case.

III. THE PUBLIC DUTY DOCTRINE IS NOT APPLICABLE BECAUSE WEBB’S CLAIM IS BASED ON AN AFFIRMATIVE ACT BY THE UNIVERSITY OF UTAH

The public duty doctrine is not applicable because the University of Utah owed Webb, as an individual, a duty to act with reasonable care. The public duty doctrine does not apply if a plaintiff can show “a breach of a duty owed to him as an individual.” Ferree v. Utah, 784 P.2d 149, 151 (Utah 1989).

The Restatement (Second) of Torts explains, “Where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with the respect to the doing of the act.” RESTATEMENT (SECOND) OF TORTS, topic 4. The Restatement (Second) of Torts notes that a person who engages in an affirmative act must do so with reasonable care (§ 298), with reasonable competence (§ 299), with reasonable preparation (§ 300), with reasonable warning (§ 301), without unreasonable risk of direct or indirect harm (§ 302), etc.

A person owes a duty to exercise reasonable care to those whose interests are affected by the affirmative act. See RESTATEMENT (SECOND) OF TORTS, topic 4. The University of

Utah owed a duty to Webb to act with reasonable care in providing educational instruction to him because Webb is a person whose interests are foreseeably affected by the University of Utah's affirmative acts. The University of Utah's duty to act with reasonable care is owed to Webb individually, and not to the public at large. Thus, the public duty doctrine is not applicable because the duty Webb claims the University of Utah breached was not a duty owed to the nebulous public at large, but a duty owed to him individually.

Furthermore, this Court has noted that other courts have recognized an exception to the public duty doctrine "where there is an affirmative act." Day v. Utah, 1999 UT 46, ¶ 13 n.2, 980 P.2d 1171 (Utah 1999). Thus, an affirmative act either falls outside the scope of the public duty doctrine because a duty is owed to an individual, or falls within an exception to the public duty doctrine. Either way, the notion behind the public duty doctrine that "a duty to all is a duty to none" does not apply to claims based on affirmative acts of negligence.

IV. THE PUBLIC DUTY DOCTRINE IS NOT APPLICABLE BECAUSE WEBB HAS A SPECIAL RELATIONSHIP WITH THE UNIVERSITY OF UTAH

The University of Utah argues that the Utah Court of Appeals erred by concluding that a special relationship existed between Webb and the University of Utah. Webb alleged that the University of Utah instructed him to engage in a dangerous activity. The Utah Court of Appeals noted that "failure to find a special relationship under the facts of this case would permit the University to escape all liability when it injures students by requiring them to engage in activities fraught with unreasonable risks. Such adverse consequences for society

would require that we find a special relationship in this case.” See Webb v. University of Utah, 2004 UT App. 56, ¶ 10 n.6.

The University of Utah argues that the reason why Webb fell was because a student pulled him down. However, Webb made an alternative allegation in his complaint that the cause of his fall was the University of Utah’s negligence in instructing him to engage in a dangerous activity. See Complaint, ¶ 12; Records Index 2. The University of Utah had complete control over the decision as to where to take its students on the field trip. Thus, a special relationship exists between the University of Utah and its students when it controls the acts of its students by directing them to participate in a dangerous activity. See id.

The University of Utah argues that the Utah Court of Appeals’s decision is contrary to Beach. However, Beach is easily distinguishable from this case. In Beach, the issue was whether a special relationship exists between an adult student and the University of Utah which requires the University of Utah to babysit all of its students after class. This Court held that college administrators no longer “assume[] a role in loco parentis.” Beach v. University of Utah, 726 P.2d 413, 418 (Utah 1986) (holding that university did not have duty to supervise student after class was over). Accordingly, an educational institution is not required to “babysit each student” when the student is not in class. Id. However, Beach did not address whether the University of Utah has a special relationship with its students during mandatory, dangerous class activities. Thus, the Utah Court of Appeals’s decision is not inconsistent with Beach.

V. THIS COURT SHOULD ELIMINATE THE PUBLIC DUTY DOCTRINE BECAUSE IT IS UNNECESSARY AND CAUSES SIGNIFICANT CONFUSION

This Court should follow the trend to abrogate the public duty doctrine. In Rollins v. Petersen, 813 P.2d 1156 (Utah 1991), Chief Justice Durham, in a concurring and dissenting opinion, noted a trend to reject the public duty doctrine and expressed a desire to reconsider the continued application of the public duty doctrine. See id. at 1165-66.

Chief Justice Durham noted that other jurisdictions have abandoned the doctrine for several reasons: (1) the doctrine creates confusion in the law and inequitable results; (2) imposing the public duty doctrine despite the Utah Governmental Immunity Act's waiver of immunity creates immunity where the legislature did not intend it; and (3) a plaintiff must still establish a duty on the part of the government under conventional tort principles. See id. Chief Justice Durham argued that if the Court did not eliminate the doctrine, it should, "at a minimum recognize an exception to the doctrine." Id. at 1166.

The concerns articulated by Chief Justice Durham have manifested themselves in numerous appellate decisions issued since Rollins. The decisions find a number of exceptions to the public duty and seem to be result-oriented. Thus, the decisions do not provide a rational analysis for determining the application of the public duty doctrine.

For the reasons noted by Chief Justice Durham in Rollins, and the confusion created by subsequent decisions, Webb requests that this Court follow the trend of other jurisdictions and eliminate the public duty doctrine in Utah.

A. THE PUBLIC DUTY DOCTRINE CREATES CONFUSION IN THE LAW AND INEQUITABLE RESULTS

Since Rollins, the Utah Court of Appeals and this Court have followed Chief Justice Durham's request to recognize exceptions to the public duty doctrine when a special relationship exists between the government and for affirmative acts of negligence. See Day v. State of Utah, 1999 UT 46, ¶ 13 n. 1, 980 P.2d 1171 (noting exceptions to public duty doctrine). The numerous exceptions to the doctrine create confusion regarding the application of the doctrine.

The Colorado Supreme Court noted that the “most persuasive reason for the abandonment of the public duty rule is that it creates needless confusion in the law and results in uneven and inequitable results in practice.” Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986). The Colorado Supreme Court noted that a number of jurisdictions had significantly narrowed the scope of the application of the doctrine by finding numerous exceptions to the doctrine. Primarily, it noted that the doctrine was narrowed by the “special relationship” exception. It explained that the special relationship exception creates significant confusion because courts must “engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery.” Id.

In Utah, the exceptions to the public duty doctrine swallow the rule. In Utah, an exception to the public duty doctrine is recognized when a special relationship exists in failure to protect cases and when a governmental entity acts negligently. See Day v. State

of Utah, 1999 UT 46, ¶ 13 n. 1, 980 P.2d 1171 (noting exceptions to public duty doctrine). Under traditional tort principles, a person owes a duty to protect or render assistance on behalf of individuals with whom the person has a special relationship. Furthermore, a person owes a duty to act with reasonable care. Thus, in Utah, the public duty doctrine, with its exceptions, mirrors traditional tort principles.

While the exceptions to the rule swallow the rule, governmental entities utilize the confusion surrounding the public duty doctrine to successfully argue at the trial court level that they owe no duties to those they have injured. For example, governmental entities have used the confusion to convince trial courts that they have no duty to exercise reasonable care while operating motor vehicles, see Gabriel v. Salt Lake City Corp., 34 P.3d 234 (Utah Ct. App. 2001), that police officers owe no duty to exercise reasonable care in deciding to pursue a high speed chase through a residential neighborhood, see Day v. Utah, 1999 UT 46, 980 P.2d 1171, or that a city owes no duty to exercise reasonable care to maintain its sidewalks. See Trapp v. Salt Lake City Corp., 835 P.2d 161 (Utah 1992).

Probably the best example of the confusion the public duty doctrine creates is found in Day v. Utah, 1999 UT 46, 980 P.2d 1171. In Day, the plaintiff brought an action against the State for injuries that resulted from the collision of the plaintiff's vehicle with a person fleeing a Utah Highway Patrol Officer. The State argued that an officer owes only a general duty to the public at large to enforce the law; and therefore, the State cannot be held liable for its officer's conduct.

This Court noted an exception to the public duty doctrine when a special relationship exists between the government and the plaintiff which is established “by a statute intended to protect.” Id. at ¶ 13. This Court then found that a special relationship existed between the police officer and the plaintiff because the police officer “had a statutory duty to exercise reasonable care in using his patrol car.” Id. at ¶ 14.

The decision confuses the concept of a special relationship. A special relationship gives rise to a duty to act. Without a special relationship, a person owes no duty to affirmatively act on behalf of another. As the Court indicated, a special relationship can be established “by a statute intended to protect.” Id. at ¶ 13.

The Court relied on the Motor Vehicle Code which imposes a duty on operators of emergency vehicles to act with due regard for the safety of other persons. The statute describes *how* to act (with reasonable care), not *when* to act (to protect a member of the public). The statute does not create a duty to act on behalf of the plaintiff. The statute merely states that a person who engages in the affirmative act of operating an emergency vehicle must do so with reasonable care. Thus, the statute did not create a special relationship between the police officer and the plaintiff that gives rise to a duty to protect the plaintiff.

When Day was decided by the Utah Court of Appeals, Judge Bench, in a concurring opinion, argued that the public duty doctrine should insulate the police officer from his negligent conduct. See Day v. State of Utah, 882 P.2d 1150, 1160 (Utah Ct. App. 1994).

Judge Bench argued that the duty to exercise reasonable care while operating a vehicle is a duty owed to the public generally. See id. Judge Bench’s argument was also wrong. A person who acts owes a duty to those whose interests are affected by the act. Thus, a duty to exercise reasonable care while operating a motor vehicle is not owed to the general public, but to those whose interests could be foreseeably affected by the negligent act of the vehicle operator (pedestrians and other motor vehicle operators). Therefore, if a driver negligently operates a vehicle and causes a collision, the duty to exercise due care is owed to the other vehicle operator, not to the general public as a whole.

The majority of the Utah Court of Appeals did not apply the public duty doctrine at all because the duty to operate a vehicle is not a duty to the general public, but is a duty to “others on the road.” Day v. State of Utah, 882 P.2d 1150, 1155 n. 6 (Utah Ct. App. 1994). It explained that “we do not believe that the duty of due care imposed on all drivers on the highway is ignored simply because the driver of the vehicle happens to be a law enforcement officer.” Id.

Thus, in *Day*, three different opinions were rendered regarding the public duty doctrine: (1) the majority of the Utah Court of Appeals decided that the public duty doctrine did not apply; (2) the concurrence of the Utah Court of Appeals decided that the public duty doctrine applied and barred the plaintiff’s claims; and (3) this Court decided that the public duty doctrine applied but that the plaintiff’s claims fell within an exception to the public duty doctrine.

In this case, the University of Utah argues that under the public duty doctrine, it can never be found liable for negligently injuring a student. The University of Utah, however, concedes that “finding a general duty of care may be laudable public policy.” It further empathizes with Webb that the application of the public duty doctrine is “unconscionable.” Instead of finding numerous exceptions to the public duty doctrine to avoid unconscionable results, this Court should simply eliminate the public duty doctrine.

B. THE PUBLIC DUTY DOCTRINE CREATES IMMUNITY WHERE THE LEGISLATURE DID NOT INTEND IT

A number of opinions have criticized the public duty doctrine because it creates immunity where the legislature did not intend it. The Colorado Supreme Court noted that:

The major criticism leveled at the public duty rule is its harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor. . . . [T]he public duty rule makes the public status of the defendant a crucial factor in determining liability.

Leake v. Cain, 720 P.2d 152, 159 (Colo. 1986).

The Alaska Supreme Court questioned why the duty issue should be different when the defendant is a governmental entity:

Why should the establishment of a duty become more difficult when the state is the defendant? Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not.

Adams v. Alaska, 555 P.2d 235, 242 (Alaska 1976).

The Arizona Supreme Court argued that the public duty doctrine should not shield government actors from unreasonable conduct:

We think that a sound public policy requires that public officers and employees shall be held accountable for their negligent acts in the performance of their official duties to those who suffer injury by reason of their misconduct. Public office or employment should not be made a shield to protect careless public officials from the consequences of their misfeasances in the performance of their public duties.

Ryan v. Arizona, 656 P.2d 597, 598 (Ariz. 1982).

The Oregon Supreme Court refused to judicially create additional exceptions to governmental immunity that the legislature had not specifically provided for:

In abolishing governmental tort immunity, the Legislature specifically provided for certain exceptions under which immunity would be retained, ORS30.265(3), and we find no warrant for judicially engrafting an additional exception onto the statute.

Brennen v. City of Eugene, 591 P.2d 719, 725 (Ore. 1979).

Chief Justice Durham argued that the public duty doctrine creates immunity where the legislature did not intend it:

Section 63-30-4 of the Utah Governmental Immunity Act establishes that where governmental immunity is statutorily waived, 'liability of the entity shall be determined as if the entity were a private person.' Imposing the public duty doctrine over and above this statutory declaration creates immunity where the legislature did not intend it. The legislature's willingness to expose governmental entities to liability, as shown by its abrogation of absolute sovereign immunity, deprives the public duty doctrine of the reason for its existence.

Rollins v. Petersen, 813 P.2d 1156, 1166 (Utah 1991) (Durham, dissenting).

Webb believes that the arguments made in the foregoing opinions are persuasive and highlight the flaws inherent in applying a doctrine that judicially creates governmental immunity when the legislature has already waived immunity.

C. TRADITIONAL TORT PRINCIPLES ADDRESS THE SAME CONCERNS THAT GAVE RISE TO THE PUBLIC DUTY DOCTRINE, MAKING THE PUBLIC DUTY DOCTRINE SUPERFLUOUS

In Utah, the exceptions to the public duty doctrine swallow the rule. In Utah, an exception to the public duty doctrine is recognized when a special relationship exists in failure to protect cases and when a governmental entity acts negligently. See Day v. State of Utah, 1999 UT 46, ¶ 13 n. 1, 980 P.2d 1171 (noting exceptions to public duty doctrine).

Under traditional tort principles, a person owes a duty to protect or render assistance on behalf of individuals with whom the person has a special relationship. Furthermore, a person owes a duty to act with reasonable care. The Restatement (Second) of Torts addresses the two types of negligence claims:

Negligent conduct may be either

(a) ***an act*** which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) ***a failure to do an act*** which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 284 (emphasis added).

In Utah, under the public duty doctrine, a governmental entity is not liable for its failure to act or protect unless a special relationship gives rise to the duty to act. Furthermore, a governmental entity is liable for its failure to exercise reasonable care. See

Day v. State of Utah, 1999 UT 46, ¶ 13 n. 1, 980 P.2d 1171 (noting exceptions to public duty doctrine). Thus, the public duty doctrine, with its exceptions, mirrors traditional tort law.

Furthermore, elimination of the rule will not adversely effect governmental entities because plaintiffs still must establish duty and proximate cause on the part of the governmental entity under traditional tort principles.

Some courts opine that any fear of excessive governmental liability is dispelled by the fact that, even with the rejection of the public duty doctrine, a plaintiff must still establish a duty on the part of the government under conventional tort principles of foreseeability. The number of potential plaintiffs is further limited by requirements of proof of proximate cause. . . . Even without the public duty doctrine, public officials continue to enjoy qualified immunity and the protections of governmental immunity statutes.


Rollins v. Petersen, 813 P.2d 1156, 1166 (Utah 1991) (Durham, dissenting).

The public duty doctrine adds nothing to the duty analysis under fundamental tort law. Instead, the public duty doctrine only benefits governmental entities that wish to utilize the confusing doctrine to try to avoid liability for their negligent conduct.

CONCLUSION

The public duty doctrine was never addressed below. Nevertheless, the doctrine does not apply in this case because taking a class on a field trip is not a duty owed to the general public at large. Furthermore, the public duty doctrine should be eliminated because it causes confusion and inequitable results.

Dated this 24th day of August, 2004.



Brent Gordon

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2004, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing document to the following:

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