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Georgia's Public Duty Doctrine: The Supreme Court Held Hostage

by R. Perry Sentell, Jr.*

A study published in 1994 sought to determine the single most litigated topic in Georgia local government law over the past thirty years.¹ What legal issue of local government administration had most often confronted Georgia's appellate courts over that recent but considerable span of time?² The revealed answer to that inquiry commanded serious consideration—not because of its unexpectedness but rather its unequivocal conclusiveness:

Local government liability for the alleged misconduct of officers and employees dwarfs all other subtopics. For the past thirty years, liability has extracted more time and attention from Georgia's appellate courts than any other subject of local government law. "Liability" will assuredly constitute this century's thorn in the crown of local government administration.³

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1. R. Perry Sentell, Jr., *Georgia Local Government Law: A Reflection on Thirty Surveys*, 46 MERCER L. REV. 1 (1994). The study was a part of the effort to summarize the surveys of important developments in Georgia local government law over the past thirty years. It purported to categorize topics litigated during the past three decades, to calculate the frequency of their appearances in the appellate courts, and to highlight those topics proving the most controversial. The article attempted to trace the thirty-year substantive developments of the four most popular litigated topics and, finally, to obtain from the then-members of Georgia's appellate courts their impressions on the corpus of local government law.

2. *Id.* at 11. The study reported a total of 1,563 surveyed cases and determined that five subjects accounted for a remarkable 68% of those cases. *Id.*

3. *Id.* at 13. The other, but considerably lesser, dominating sub-topics were as follows: "Zoning," "Officers and Employees," "Taxation," and "Powers." *Id.*

A companion inquiry of the 1994 study engaged the oracles themselves—the justices and judges of Georgia’s appellate courts.⁴ That inquiry sought insight into the appellate judiciary’s assessment of legal issue complexity. How would the jurists generally characterize the level of substantive difficulty inherent in local government cases that came before them? Comparatively evaluated, could the analytical challenges of local government law be even roughly calculated? Once again, the results counseled rapt attention:

“As compared with issues in other cases,” the question elaborated, would respondents rate local government law issues to be: “of average complexity”; “of less than average complexity”; or “of more than average complexity”? Here, not a single respondent declined to answer; four checked “average complexity,” and seven deemed “greater than average” to be the appropriate characterization.⁵

Ironically, at that precise point in time the Georgia Supreme Court was initiating an epoch that would dramatically mesh the two surveyed facets: (a) local government liability and (b) judicial complexity.⁶ The object of rather routine announcement, the formative issue would emerge with deceptive casualness and, over a remarkably short evolution, completely paralyze the court’s analytical processes. Rarely in Georgia law has the court so promptly suffered doctrinal default upon a deed of its own doing.

Rarely has the court devolved to such devastating analytical divisiveness as that generated by the “Doctrine of Public Duty.”

I.

One of the hornbook essentials to the tort of negligence is that of “duty.”⁷ As a prerequisite to establishing a negligence cause of action, plaintiff must affirmatively answer the following inquiry: “[D]id the defendant owe the plaintiff a duty to conform his conduct to a standard necessary to avoid an unreasonable risk of harm to others?”⁸ A failure to furnish that answer dooms plaintiff’s claim to dismissal, and no

4. *Id.* at 25-34.

5. *Id.* at 31.

6. *See, e.g., City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993).

7. “The traditional formula for the elements necessary to [a negligence] cause of action may be stated briefly as follows: (1) A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks” WILLIAM PROSSER ET AL., *TORTS* 164 (5th ed. 1984) [hereinafter *TORTS*].

8. RICHARD EPSTEIN, *CASES & MATERIALS ON TORTS* 166 (6th ed. 1995).

immunity issue ever arises.⁹ Duty, as negligence law proclaims it, constitutes a part of plaintiff's case and not a part of defendant's defense.¹⁰

The "duty limitation" upon negligence liability looms large in the common law's distinction between misfeasance and nonfeasance: misfeasance breaches a legal duty; nonfeasance generally does not.¹¹ Traditionally, therefore, the law refuses to impose a duty upon one individual to take affirmative action for the benefit of another.¹² A legendary instance of that refusal finds application in the context of controlling the conduct of third parties.¹³ Absent a special relationship between them, one individual is under no duty to prevent a third person from causing physical harm to another.¹⁴ A plaintiff injured by the

9. "A plaintiff who brings a negligence action loses unless he establishes that the defendant was guilty of negligence. He also loses if the defendant owed him no duty to use care." CLARENCE MORRIS, *TORTS* 139 (1953).

10. "The plaintiff has the burden of proving each of the essential elements of a cause of action for negligence." 4 FOWLER HARPER ET AL., *THE LAW OF TORTS* 1 (2d ed. 1986).

11.

Our law says that you do not have to volunteer to relieve others from dangers not due to your own fault; but if you *do* volunteer—if you engage in some activity that is followed by harm to such another—then a court may let a jury scrutinize what you did and call it actionable negligence—no matter how hard you tried If you are not under a duty to "fease," then nonfeasance can never be held actionable. But if you do engage in fease toward anybody, then under most circumstances you must "fease" carefully.

Charles Gregory, *The Good Samaritan and the Bad: The Anglo-American Law*, in *THE GOOD SAMARITAN AND THE LAW* 23, 28 (James A. Ratcliffe ed., 1966). "Hence there arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance'—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm." *TORTS*, *supra* note 7, at 373.

12. "The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not." James Ames, *Law and Morals*, 22 *HARV. L. REV.* 97, 112 (1908). "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *RESTATEMENT (SECOND) OF TORTS* § 314 (1965).

13. "The distinction between affirmative conduct and the mere omission to act comes into play in deciding whether an actor has the duty to control the conduct of others." 3 *HARPER ET AL.*, *supra* note 10, at 732.

14.

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 relationship 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.

RESTATEMENT (SECOND) OF TORTS § 315 (1965).

third person thus shows no breach of legal duty by the defendant's inaction and fails to establish the tort of negligence.¹⁵

These general negligence principles permeate local government law. Thus, one suing a local government in negligence must prove the existence of a duty owed to the plaintiff and a breach of that duty by the local government.¹⁶ A plaintiff proves no such breach by showing only a local government's inaction. Under the historical doctrine of public duty, the local government owes its protections to the public at large and not to any particular individual.¹⁷ A local government's failure to provide police or fire protection, for instance, breaches no duty to an injured individual and affords that individual no claim in negligence.¹⁸ Accordingly, plaintiff's suit suffers dismissal, and no issue of local government immunity ever arises. Absent a "special relationship" between local government and victim, "the overwhelming current of decisions continues to reject liability based on a general failure to provide police protection."¹⁹

II.

The Georgia Supreme Court announced adoption of the public duty doctrine in its 1993 decision of *City of Rome v. Jordan*.²⁰ Plaintiff in *City of Rome* alleged injury from an attack in her home; she also alleged the city's negligent failure to dispatch police in response to several telephone calls for assistance.²¹ Reversing the court of appeals,²² the

15. "[I]n the absence of the requisite relationship, there generally is no duty to protect others against harm from third persons." TORTS, *supra* note 7, at 385.

16. "In accord with general tort principles, a plaintiff suing a local government must prove the existence of a duty owed to the plaintiff, [and a] breach of that duty by the local government . . ." 2 SANDRA STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 35.06[1] (1998).

17. "The public duty doctrine, which holds that some unspecified duties are owed only to the public and that private individuals have no redress for their violation, appears to have originated in T. Cooley, *Liability of Public Officers* (1877) and to have been repeated . . . through its several editions." TORTS, *supra* note 7, at 1049 n.81.

18. TORTS, *supra* note 7, at 1049; 2 STEVENSON, *supra* note 16, at 35.06[2][b]; 5 HARPER ET AL, *supra* note 10, at 639-43.

19. TORTS, *supra* note 7, at 1050. The public duty doctrine "reflects vestigial distinctions between misfeasance and nonfeasance." 5 HARPER ET AL, *supra* note 10, at 642.

20. 263 Ga. 26, 426 S.E.2d 861 (1993).

21. *Id.* at 26, 426 S.E.2d at 861. Plaintiff, while home alone, was attacked by her sister-in-law's estranged husband. Plaintiff called her sister-in-law who told her to allow her husband to come in and that she would call the municipal police. Upon the sister-in-law's call, the police dispatch officer told her a police car was on its way to plaintiff's home. Subsequently, while plaintiff was still under attack, the sister-in-law called her, was told that the police had not arrived, and assured plaintiff that she would call again. Plaintiff

supreme court sustained the trial court's summary judgment that "the City owed no duty to the [plaintiff] upon which liability could be based."²³

The supreme court's groundbreaking opinion, expressing the view of six justices,²⁴ initially pared the case of extraneous concerns. First, the "threshold issue" was duty,²⁵ a question preceding "any discussion of sovereign immunity."²⁶ This fact rendered immaterial to the case any immunity waiver the state may have created for local governments.²⁷ Decreasing immunity could not increase duty.²⁸ Second, "this case involve[d] [a] municipality's *failure* to act, as opposed to any affirmative act of negligence."²⁹ The court thus perpetuated as seemingly pivotal the common law's nonfeasance-misfeasance dichotomy.

As its primary ground for embracing the public duty doctrine, the court stressed parity between governmental and private tortfeasors.³⁰ "To impose liability on the City based on a general duty to protect all citizens from the actions of third parties" would surpass both the "duty and potential liability" traditionally imposed on individuals.³¹ Contrarily, the public duty doctrine would confine governmental liability "similarly to the manner in which the liability of a private party is restricted."³² As a secondary justification for adopting public duty, the

argued that she did not attempt to fight her assailant because she thought the police were coming. *Id.* at 30, 426 S.E.2d at 864.

22. *Jordan v. City of Rome*, 203 Ga. App. 662, 417 S.E.2d 730 (1992).

23. 263 Ga. at 26, 426 S.E.2d at 862. "We granted certiorari to determine '[t]he duty of police officers of a city to respond to emergency requests for help.'" *Id.* at 27, 426 S.E.2d at 862.

24. Justice Sears-Collins authored the opinion; Justice Fletcher agreed in a brief concurrence. *Id.* at 26, 31, 426 S.E.2d at 861, 864.

25. "The threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care." *Id.* at 27, 426 S.E.2d at 862.

26. *Id.* at 27 n.1, 426 S.E.2d at 862 n.1.

27. *Id.* at 28, 426 S.E.2d at 862. "[W]e find that the abrogation or waiver of sovereign immunity in Georgia did not create a duty on the part of a municipality where none existed before." *Id.*

28. *Id.*

29. *Id.* at 27 n.2, 426 S.E.2d at 862 n.2 (emphasis added).

30. The court quoted the "majority rule" to be that

liability does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public[,] [except where there is] a special relationship between the governmental unit and the individual giving rise to a particular duty owed to that individual.

Id. at 27, 426 S.E.2d at 862 (quoting 38 A.L.R.4th 1194, § 1[a] (1985)).

31. *Id.* at 28, 426 S.E.2d at 862.

32. *Id.*, 426 S.E.2d at 863.

court stressed nonparity between governmental and private tortfeasors.³³ Providing police protection to citizens was limited "by the resources of the community;" it called for a "legislative-executive decision" on deployment, a function "better left to the discretion of the policy makers."³⁴ The adoption of the public duty doctrine freed the exercise of that governmental discretion from the pressures of potential tort liability.

Melding those contrasting rationales, the court enunciated its doctrine of public duty: "[W]here failure to provide police protection is alleged, there can be no liability based on a municipality's duty to protect the general public."³⁵

With duty limitation in place, the court immediately emphasized its restriction to "the general public."³⁶ Thus, the public duty doctrine presented no bar to one possessing a special relationship to the local government.³⁷ That status "sets the individual apart from the general public and engenders a *special duty*" entailing municipal obligation "for the nonfeasance of its police department."³⁸ The court adumbrated three requirements for determining special relationship:³⁹ (a) the municipality's "explicit assurance" of aid; (b) municipal knowledge that "inaction could lead to harm"; and (c) the injured individual's "justifiable and detrimental reliance" on the municipal undertaking.⁴⁰

33. *Id.*, 426 S.E.2d at 862-63.

34. *Id.*, 426 S.E.2d at 863 (quoting *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 256, 543 N.E.2d 443, 445-46 (1989)).

35. *Id.*

36. *Id.* "However, in order to ensure responsibility and the utmost protection possible within limited means, it is important that a municipality be accountable for its negligence to some degree." *Id.*

37. *Id.*

38. *Id.* at 28-29, 426 S.E.2d at 863.

39. *Id.* at 29, 426 S.E.2d at 863. "In order to determine whether such a special relationship exists, we adopt the following requirements:" *Id.* The court expressly "adapted" this test from *Cuffy v. City of New York*, 69 N.Y.2d 255, 505 N.E.2d 937 (1987). The court specifically deleted from the New York test the requirement "that there be 'direct contact' between the injured party and the municipality." *Id.*

40. 263 Ga. at 29, 426 S.E.2d at 863. By footnote, the court specified the following reservation:

Since the situation is not presented by the facts of this case, we do not determine whether a special duty may exist even in the absence of a special relationship where a police officer is present at the scene of a crime, has the knowledge and the resources to act to the benefit of the injured party, yet does not act.

Id. at 29 n.4, 426 S.E.2d 863 n.4. It was upon this point that Justice Fletcher elaborated by a concurrence: "I would go further than the majority, however, and adopt the direct contact requirement as a necessary element in determining whether a special relationship exists between a municipality and an injured party." *Id.* at 31, 426 S.E.2d at 864 (Fletcher, J., concurring).

Finally, the court applied its test to plaintiff and held her lacking in “detrimental reliance.”⁴¹ Evidence revealed plaintiff to be unaware of any police promise of assistance.⁴² “Any reliance on her part on the police arriving was based solely on a belief that the police would come if called, not on any promise made by the police.”⁴³ Absent appropriate reliance, plaintiff enjoyed no special relationship to the municipality.⁴⁴ Absent special relationship, plaintiff fell among the general public to whom the municipality’s inaction breached no duty.⁴⁵ Accordingly, plaintiff’s negligence action became the first casualty of Georgia’s public duty doctrine.⁴⁶

The only justice disagreeing with the court’s exercise in *City of Rome* feared, not its limitation on liability, but rather its potential lessening of municipal immunity.⁴⁷ The public duty doctrine’s special relationship limitation “creates an across-the-board exception to governmental immunity that is applicable where such immunity would otherwise be a complete defense to the negligent performance of discretionary acts.”⁴⁸

City of Rome thus introduced Georgia local governments to the public duty doctrine. A near-unanimous supreme court lifted the principle from the general negligence nucleus of common law torts, emphasizing its conceptual isolation from governmental immunity. The court also located the doctrine within its traditional context of nonfeasance—a failure to act as opposed to an affirmative duty. So fashioned, the doctrine served the court’s contrasting policy grounds of both parity and nonparity between private and governmental tortfeasors.

As announced, the doctrine operated subject to the exception of special relationship, an exception imposing a rare tort duty of affirmative action.

41. *Id.* at 30, 426 S.E.2d at 864. “Applying the test for a special relationship to these facts, we find there was no genuine issue of fact with regard to the requirement of detrimental reliance.” *Id.*

42. *Id.* “The evidence shows that [plaintiff] was not aware that the police had made any promise of assistance, if in fact they did.” *Id.*

43. *Id.* “To allow such an expression of reliance to satisfy the reliance requirement in the special relationship test would render the requirement virtually meaningless.” *Id.*

44. *Id.*

45. *Id.*

46. *Id.* “Therefore, we find that the trial court was correct in granting summary judgment based on a finding that there was no special relationship between [plaintiff] and the municipality.” *Id.*

47. *Id.* at 31, 426 S.E.2d at 865 (Hunstein, J., concurring specially).

48. *Id.* As indicated, this justice concurred with the court’s judgment but on another ground: “[T]he record is devoid of any evidence that the City had any police units available to respond to [the telephone call] at that time. Hence, the record establishes that no questions of fact remain regarding [defendants’] complete defense to [plaintiffs’] suit alleging negligent failure to provide police protection.” *Id.* at 32-33, 426 S.E.2d at 866.

City of Rome not only structured the test for determining that relationship, it also instanced the supreme court's initial application. Special relationship, that exercise indicated, would not find casual applicability.

Even at its inception, public duty drew disagreement within the court itself. A dissenting opinion for a single justice not only confirmed that point, it also demonstrated the confusing ease with which the doctrine could be analytically commingled with the issue of governmental tort immunity.

III.

For the next three years, Georgia's public duty doctrine evolved exclusively from the court of appeals. Indeed, that evolution commenced almost immediately in *Feise v. Cherokee County*,⁴⁹ an action for injuries received from a neighbor's attack.⁵⁰ Although plaintiff had previously suspected the neighbor of anonymous telephone threats, the police possessed no evidence upon which to detain him prior to the attack.⁵¹ Working through *City of Rome's* special relationship requirements, the court found no "explicit assurance" and no "justifiable and detrimental reliance."⁵² Thus, "despite specific knowledge that inaction probably would lead to harm," the police breached no negligence duty to plaintiff.⁵³

The court's succinctness accelerated in *Smail v. Douglas County*,⁵⁴ a claim for injuries to plaintiff's wife caused by a rock thrown from an interstate highway bridge.⁵⁵ Although the county had received prior reports of debris thrown from the bridge,⁵⁶ the court declared plaintiff "unable to establish such a relationship between the county and

49. 209 Ga. App. 733, 434 S.E.2d 551 (1993). The court of appeals decided the case some four months following the supreme court's decision in *City of Rome v. Jordan*.

50. In a previous decision, *Feise v. Cherokee County*, 207 Ga. App. 17, 427 S.E.2d 294 (1992), the court of appeals had reversed a summary judgment for the county. On certiorari, the supreme court remanded for reconsideration in light of its decision in *City of Rome v. Jordan*. 428 S.E.2d 785 (Ga. 1993).

51. 207 Ga. App. at 18, 427 S.E.2d at 295. Plaintiff had contacted the police with her suspicions, but the police had been unable to find the caller. *Id.*

52. 209 Ga. App. at 734, 434 S.E.2d at 551-52.

53. *Id.*, 434 S.E.2d at 552. The court thus affirmed the trial court's summary judgment for the county. *Id.* A specially concurring opinion maintained that "there was no specific action that [the police] reasonably failed to take." *Id.* at 735, 434 S.E.2d at 552 (Andrews, J., concurring specially).

54. 210 Ga. App. 830, 437 S.E.2d 824 (1993).

55. The rock passed through the windshield of plaintiff's vehicle traveling on the interstate and crushed plaintiff's wife to death. *Id.* at 830, 437 S.E.2d at 825.

56. The county had received such reports over a period of two months prior to the death of plaintiff's wife. *Id.*

his wife" as to impose liability for "the nonfeasance of its police department."⁵⁷

The court first moved the public duty doctrine beyond law enforcement in *City of Lawrenceville v. Macko*,⁵⁸ an action for the periodic flooding of plaintiffs' home.⁵⁹ In appraising a claim for municipal negligence in inspecting the house and issuing the building permit, the court focused upon the city's building code.⁶⁰ That code declared its purpose as protecting "the safety, health, and general welfare of its citizens;" it created no "duty of care to any particular resident."⁶¹ Having thus purported to establish the public duty limitation,⁶² the court considered the possible exception of "special relationship."⁶³ That exception's first requirement, however, was lacking: the city made no "specific assurances to [plaintiffs] or promises *prior* to the [house] inspection and approval."⁶⁴ Aside from any issue of immunity, the court explained, plaintiffs' action failed "a traditional negligence analysis."⁶⁵

By the conclusion of 1993, the calendar year of its Georgia birth, the public duty doctrine had undergone substantial evolution. Entrusted exclusively to the court of appeals, *City of Rome's* early progeny evidenced no qualms in routinely immersing the doctrine in the corpus

57. *Id.* at 831, 437 S.E.2d at 825. The court thus affirmed the trial judge's grant of summary judgment for the county. *Id.*

58. 211 Ga. App. 312, 439 S.E.2d 95 (1993).

59. A builder constructed the house; the city inspected it and issued a certificate of occupancy; and plaintiffs subsequently purchased the house. Several months later, plaintiffs experienced the first of three major floods in their garage. *Id.* at 312-13, 439 S.E.2d at 97.

60. *Id.* at 313, 439 S.E.2d at 97.

61. *Id.* at 315, 439 S.E.2d at 99. "Accordingly, any negligence in failing to properly inspect property pursuant to the building codes and its negligence in the issuance of the building permit does not create any duty of care to a particular resident." *Id.*

62. *Id.* "Although this 'public duty doctrine' has not been applied in this State to municipalities . . . involving the negligent inspections of homes or negligent issuance of building permits, other jurisdictions have applied this doctrine to actions of a municipality in this capacity." *Id.*

63. *Id.* "Applying this public duty doctrine to the facts of this case, we must determine whether a special relationship existed between the [plaintiffs] and the City at the time that the alleged negligent acts occurred." *Id.*

64. *Id.* at 315-16, 439 S.E.2d at 99. Although one of the plaintiffs testified that a city representative promised to repair a drainage pipe after the first flood, the court held this testimony hearsay. *Id.* at 316, 439 S.E.2d at 99. "Accordingly, this statement cannot be used to establish the necessary assurance on behalf of the City to satisfy the special relationship requirement in light of the explicit disclaimer provided by the City in its building code." *Id.*

65. *Id.* at 315, 439 S.E.2d at 99. "As [plaintiffs] did not establish that a duty of care was owed to them by the City based upon a special relationship, the trial court erred in failing to grant the City's motion for directed verdict." *Id.* at 316, 439 S.E.2d at 99.

of local government law. In the sphere of governmental negligence liability, the court confirmed the doctrine's substantive focus on sufficiency of the plaintiff's case, not the defendant's immunity. In the context of origin, the nonfeasance of local government law enforcement, the court virtually assumed doctrinal applicability. Such judicial analysis as appeared went only to the principle's possible exception. That exception, special relationship, proved no easy hurdle. Its triumvirate elements of "assurance," "knowledge," and "reliance" resisted casual acceptance.⁶⁶ They were not satisfied by police awareness of potentially impending harm, even to the individual plaintiff. Nor, it appeared, could they be shown by the local government's initial investigation in seeking to identify the likely danger source.

With *City of Lawrenceville v. Macko*,⁶⁷ the court abruptly moved the public duty doctrine beyond both law enforcement and nonfeasance. There, plaintiffs charged negligence in the governmental acts of inspecting a house and issuing a building permit. Ignoring the absence of nonfeasance, the court derived public duty applicability from a general welfare declaration in the city building code. Because that declaration created no duty of care to any particular resident, neither did the city's inspection and approval of a particular resident's home.⁶⁸ Those positive actions proved equally unavailing, moreover, to demonstrate assurance, knowledge, and reliance for purposes of special relationship. The analytical excesses of *Macko* brought tumultuous closure to Georgia's initial evolution of public duty.

The focus reverted to law enforcement in *Landis v. Rockdale County*,⁶⁹ an action for the death of plaintiff's decedent caused by an intoxicated driver. Some two hours prior to the fatal accident, a county deputy sheriff had observed the intoxicated driver but failed to arrest her.⁷⁰ Plaintiff maintained that the deputy had thus breached a negligence duty to the decedent.⁷¹ Rejecting the claim, the court of

66. *City of Rome*, 263 Ga. at 29, 426 S.E.2d at 863.

67. 211 Ga. App. 312, 439 S.E.2d 95 (1993).

68. *Id.* at 315, 439 S.E.2d at 99.

69. 212 Ga. App. 700, 445 S.E.2d 264 (1994).

70. The "noticeably intoxicated driver who approached and spoke to [the officer] while he was directing traffic at an intersection . . . [T]wo hours later, after the driver left a party, . . . [the driver] caused an automobile accident which resulted in the death of the plaintiff's husband." *Id.* at 700, 445 S.E.2d at 265.

71. *Id.* Plaintiff relied upon the supreme court's express reservation in *City of Rome*: "[W]e do not determine whether a special duty may exist even in the absence of a special relationship where a police officer is present at the scene of a crime, has the knowledge and the resources to act to the benefit of the injured party, yet does not act." *Id.* at 701, 445 S.E.2d at 266 (citing *City of Rome*, 263 Ga. 26, 29 n.4, 426 S.E.2d 861, 863 n.4 (1993)). The court of appeals in *Landis* understood that reservation to contemplate "some circumstances

appeals emphasized that when the deputy confronted the driver, the “decendent was not an identifiable victim in immediate danger of harm.”⁷² Thus, “the deputy’s duty to enforce the drunk driving laws was to the public in general, not specifically to plaintiff’s decendent.”⁷³ Accordingly, “defendants violated no duty for which they could be held liable in tort for the plaintiff’s claims.”⁷⁴

The court perpetuated its *Landis* approach one year later in resolving *Tilley v. City of Hapeville*.⁷⁵ *Tilley* featured an action for the negligence of a municipal police officer “in failing to warn or direct [plaintiff] away” from an abandoned vehicle parked at night on an interstate highway.⁷⁶ Plaintiff sought recovery for injuries incurred when he collided head-on with the vehicle.⁷⁷ Applying *City of Rome*’s public duty formula to the “allege[d] various inactions,”⁷⁸ the court also rejected the formula’s special relationship exception.⁷⁹ Finally, the court employed *Landis* to

where a police officer is present at the scene of a crime about to be perpetrated against the citizen (who at that point is *an identifiable victim*) and the officer fails to act to protect the citizen despite his ability to do so.” *Id.* at 702, 445 S.E.2d at 266-67.

72. *Id.* at 702, 445 S.E.2d at 267. “At that point, the deputy sheriff had no contact with plaintiff’s decendent.” *Id.*

73. *Id.*

A clear majority of states which have considered whether police officers have a duty to restrain a drunk driver have followed the rationale of the “public duty” doctrine, which, as adopted in *City of Rome*, . . . requires that liability be based on facts establishing a duty owed to the injured individual rather than a duty to protect the general public.

Id.

74. *Id.* at 705, 445 S.E.2d at 268-69. The court affirmed the trial court’s grant of summary judgment to defendants. A dissenting opinion for two judges argued that *City of Rome* should not apply to the extent of requiring direct contact between the governmental officer and the injured person. The duty “arises from the *unique* position, power, knowledge of the officer, and foreseeability, to prevent the tort.” *Id.* at 706-07, 445 S.E.2d at 269-70 (Beasley, P.J., dissenting).

75. 218 Ga. App. 39, 459 S.E.2d 567 (1995).

76. *Id.* at 39, 459 S.E.2d at 568. The police officer testified that he was on the scene and attempting to position his car for purposes of warning when plaintiff collided with the parked vehicle. Plaintiff testified that he saw no police car nor any warning lights. *Id.* at 40, 459 S.E.2d at 568.

77. *Id.* at 39, 459 S.E.2d at 567.

78. *Id.* at 41, 459 S.E.2d at 569. The court asserted that plaintiff had charged no “affirmative acts of negligence.” *Id.* Rather, his “entire complaint alleges various inactions by [the city] and [the officer].” *Id.*

79. *Id.* The court found no evidence of explicit assurance or detrimental reliance: “In fact, the record demonstrates that before the collision [plaintiff] was not aware of the existence of the [parked vehicle] or any efforts to remove it from the roadway.” *Id.*

rebut the argument of "special duty".⁸⁰ "When [the police officer] arrived at the scene . . . , [plaintiff] was not an identifiable victim in immediate danger of harm."⁸¹ Accordingly, "[the officer's] duty was only to the general public and not to [plaintiff]."⁸²

Finally, the court evidenced no tendency toward backing off *Macko's* earlier public duty extension beyond the setting of law enforcement. *Finley v. Lehman*⁸³ presented a wrongful death action against a city engineer present at a work site when an improperly shored ditch collapsed on plaintiff's decedent.⁸⁴ Rejecting a claim for defendant's negligent failure to inspect the ditch, the court wasted no energy on elaboration: "A private citizen does not have a cause of action for breach of such a duty by a governmental employee in the absence of a special relationship between the citizen and the governmental unit."⁸⁵ Giving no "explicit assurance . . . , through promises or action, that it would act on behalf of the injured party," defendant had created no special relationship.⁸⁶

80. The argument arose from *Landis's* observation that a special duty to protect [a] citizen might be found under some circumstances where a police officer is present at the scene of a crime about to be perpetrated against the citizen (who at that point is *an identifiable victim*) and the officer fail[ed] to act to protect the citizen despite his ability to do so.

212 Ga. App. at 702, 445 S.E.2d at 266-67.

81. 218 Ga. App. at 41, 459 S.E.2d at 569.

82. *Id.* The court affirmed the trial court's grant of summary judgment for defendants. *Id.* at 42, 459 S.E.2d at 569.

83. 218 Ga. App. 789, 463 S.E.2d 709 (1995).

84. Defendant was present at the work site as a courtesy to the subdivision developer to ensure compliance with city requirements. He testified that he made no inspections as to the shoring of the ditch although he did observe that it was not being shored. *Id.* at 790, 463 S.E.2d at 710.

85. *Id.* at 791, 463 S.E.2d at 710-11.

86. *Id.*, 463 S.E.2d at 711. The court thus affirmed summary judgment favoring defendant. *Id.*

Other applications of the doctrine, within this time frame, included *Washington v. Jefferson County*, 221 Ga. App. 81, 470 S.E.2d 714 (1996), and *Booth v. Firemen's Insurance Co.*, 223 Ga. App. 243, 477 S.E.2d 376 (1996). In the first case, the court rejected an action for the death of plaintiff's son caused by a county arrestee out on bail. 221 Ga. App. at 81, 470 S.E.2d at 715. Marking an absence of any special relationship between the county and the decedent, the court held there was no "duty to protect [decedent] any more than any other member of the general public." *Id.* at 83, 470 S.E.2d at 716. The latter case featured a charge that a county deputy sheriff breached his official bond in failing to serve plaintiff's interests regarding a traffic altercation. 223 Ga. App. at 243, 477 S.E.2d at 377. Given the absence of a special relationship between the parties, the court held, plaintiff "failed to offer any evidence that [the deputy] had a duty under the law that ran specifically to [plaintiff], which is an essential element in a cause of action against a deputy's bond." *Id.* at 247, 477 S.E.2d at 380.

IV.

The Georgia Supreme Court allowed three full years to pass before addressing the public duty doctrine for the second time. In 1996, however, *Department of Transportation v. Brown*⁸⁷ presented the court an opportunity to revisit its creation. *Brown* featured a wrongful death claim arising from a highway intersection collision. Plaintiff alleged negligence in the DOT's opening the newly constructed intersection before installing permanent traffic lights. As a result, plaintiff maintained, decedent's driver ran a temporary stop sign resulting in the collision.⁸⁸ As one ground for its motion for directed verdict,⁸⁹ the DOT proffered the doctrine of public duty.⁹⁰ The court of appeals affirmed denial of the motion,⁹¹ and the supreme court granted the DOT's petition for certiorari.

In a unanimous opinion, the supreme court summarily affirmed that public duty "has no impact on this case."⁹² Its decision in *City of Rome*, the court briefly elaborated, "was directed squarely and only at the duty owed by a governmental entity to provide police protection to individual citizens."⁹³ That duty involved "third parties whose behavior may be unpredictable."⁹⁴ In contrast, "[t]he duty DOT owes to each member of the public does not involve third parties, only the way in which DOT's performance or nonperformance of its duty impacts individuals."⁹⁵ "[T]hat difference in duties," the court concluded, "warrants limitation

87. 267 Ga. 6, 471 S.E.2d 849 (1996).

88. The DOT had rejected a bid for the installation of a traffic light signal to control traffic in both directions but decided to proceed with opening the new intersection.

DOT erected temporary stop signs to control traffic in both directions on the cross-road, and made the new Hwy. 365 temporarily a through highway without any traffic control signals. [Decedent] was killed when the car in which she was a passenger was struck by a dump truck while the car was crossing Hwy. 365 after failing to stop at the stop sign.

Id. at 6, 471 S.E.2d at 850.

89. The case was tried under the Georgia Tort Claims Act, with defendant claiming exceptions to liability under that statute, O.C.G.A. § 50-21-24. *Id.*

90. *Id.*, 471 S.E.2d at 851. "DOT also moved for a directed verdict based on the public duty doctrine." *Id.* "Finally, DOT asserts that our decision in *City of Rome v. Jordan* requires the conclusion that, absent some special relation between DOT and the victim of its alleged negligence, it has no liability." *Id.* at 8, 471 S.E.2d at 852 (citation omitted).

91. Department of Transp. v. Brown, 218 Ga. App. 178, 460 S.E.2d 812 (1995).

92. 267 Ga. at 9, 471 S.E.2d at 852.

93. *Id.* at 8, 471 S.E.2d at 852.

94. *Id.* "The essential difference between that duty and the duty at issue in this case is the involvement of third parties whose behavior may be unpredictable." *Id.*

95. *Id.*

of the public duty doctrine adopted in [*City of Rome v. Jordan*] to the situation involved there, the provision of police services.⁹⁶ Thus, the DOT could not avoid negligence liability by availing itself of the public duty doctrine.⁹⁷

With its decision in *Brown*, therefore, the supreme court purported, somehow, to limit the doctrine it had birthed in *City of Rome*. The limitation turned, the court indicated, upon the difference in duties involved in the two cases.⁹⁸ The municipality's employee in *City of Rome* provided police protection to individual citizens; the state's employee in *Brown* did not.⁹⁹ City police protection involved third parties; DOT employee services did not.¹⁰⁰ Third-party behavior may be unpredictable; DOT employee duties involved no such behavior.¹⁰¹ This difference in duties limited the public duty doctrine to the situation involved in *City of Rome*: "the provision of police services."¹⁰²

Neither of the court's indicated distinctions wore well upon reflection. Many duties of DOT employees were as "protective" to members of the general public as the duties performed by city police. Indeed, both classes of employees bore responsibility for public highway safety. As for intervening, unpredictable, third-party behavior, what essential difference delineated plaintiff's unlawful attacker in *City of Rome* and plaintiff's unlawful driver in *Brown*? Both were intervening third parties, and the conduct of each was unpredictable. Moreover, how did the court's reasons for adopting the public duty doctrine in *City of Rome* render the doctrine so unsuited for the circumstances of *Brown*? Initially, what of the historic misfeasance-nonfeasance dichotomy: a pivotal point in *City of Rome* but completely ignored in *Brown*? Second, why does the court's desire for parity between governmental and private tortfeasors, so crucial in *City of Rome*, fade from view in *Brown*? Finally, what of the court's earlier overarching concern for freeing the discretion of resource deployment from the pressures of tort liability? Why does that concern not augur equally for the DOT's resource deployment discretion? The unanswered questions all coalesced to the same basic quandary: How did the DOT's failure to provide a traffic light, as opposed to the city's failure to provide police protection, both

96. *Id.* at 8-9, 471 S.E.2d at 852.

97. *Id.* at 7, 471 S.E.2d at 851. "[H]aving determined that the Court of Appeals was correct in affirming the trial court's judgment, we affirm that of the Court of Appeals." *Id.*

98. *Id.* at 8-9, 471 S.E.2d at 852.

99. *Id.* at 8, 471 S.E.2d at 852.

100. *Id.*

101. *Id.*

102. *Id.*

obligations owed to the public at large, yield a legitimate line of limitation?

Less than a year later, the supreme court applied its *Brown* decision to *Hamilton v. Cannon*.¹⁰³ *Hamilton* presented a wrongful death claim charging an “affirmative act of gross negligence” by a county deputy sheriff.¹⁰⁴ The claim specified the deputy’s interruption of a private CPR attempt upon the unconscious decedent at a public swimming pool.¹⁰⁵ Plaintiff brought the action in federal district court only to suffer summary judgment based on the public duty doctrine.¹⁰⁶ Upon plaintiff’s appeal to the Eleventh Circuit,¹⁰⁷ that court submitted the following question to the Georgia Supreme Court: “Does the ‘public duty doctrine’ established in *City of Rome* apply outside the police protection context and in the circumstances of this case?”¹⁰⁸

By a four-to-three division of its membership,¹⁰⁹ the supreme court declared *Brown* “conclusive” upon its answer to *Hamilton*.¹¹⁰ Accordingly, “the public duty doctrine adopted in *City of Rome* is limited to the situation in that case and thus does not apply outside the police

103. 267 Ga. 655, 482 S.E.2d 370 (1997).

104. *Id.* at 655, 482 S.E.2d at 371.

105. Plaintiff asserted that deceased collapsed as she emerged from the city swimming pool, that a pool patron began successfully administering CPR, that the deputy sheriff was called to the scene and, upon arrival, ordered everyone to clear away thus causing the patron to cease the CPR efforts. Plaintiff alleged the sheriff’s “affirmative act of gross negligence . . . when he interrupted a private rescue attempt without providing a meaningful alternative.” *Id.*

106. *Hamilton v. Cannon*, 864 F. Supp. 1332 (M.D. Ga. 1994).

107. *Hamilton v. Cannon*, 80 F.3d 1525 (11th Cir. 1996).

108. 267 Ga. at 655, 482 S.E.2d at 372. The court also submitted the additional questions:

(2) Does the *City of Rome* public duty doctrine apply to affirmative acts of negligence, such as those alleged in this case, in addition to failures to act? (3) Does the “reliance prong” of the *City of Rome* special relationship test require an objective manifestation of assent by the plaintiff, or may assent be inferred from the reliance of others or from the circumstances of this case? (4) Does the *City of Rome* special relationship test apply when a law enforcement officer acts with gross negligence in performing duties at the scene of an emergency, as is alleged in this case, such that the officer would not otherwise be shielded from liability by O.C.G.A. § 35-1-7?

Id. at 655-56, 482 S.E.2d at 372.

109. Justice Hunstein wrote the majority opinion, noting that *Brown* was rendered two months after the Eleventh Circuit certified the questions in this case. *Id.* at 657, 482 S.E.2d at 372. Chief Justice Benham, and Justices Carley and Thompson apparently concurred. *Id.* at 656-57, 482 S.E.2d at 372.

110. *Id.* at 656, 482 S.E.2d at 372. In *Brown*, “[t]his court rejected the DOT’s assertion that it had no liability in the absence of a special relationship between the DOT and the plaintiff’s decedent, a car collision victim.” *Id.*

protection context."¹¹¹ Georgia's public duty doctrine, it resulted, did not preclude plaintiff's claim for the deputy's conduct in *Hamilton*.¹¹²

Hamilton's dissenting opinion criticized the court's answer as "shorter than the question" and as relying upon a case (*Brown*) "that also states a result without any persuasive reasoning."¹¹³ Charging the court with "unnecessarily and unwisely limit[ing] the public duty doctrine,"¹¹⁴ the dissent urged its applicability "to police and other public employees who provide police services."¹¹⁵ Such "services" should include "preserving public order; promoting public health, safety, and morals; and preventing, detecting and punishing crime."¹¹⁶ That formulation reached the actions of this deputy sheriff "who performed traditional police services."¹¹⁷ Finally, the dissent proposed a further extension: "the public duty doctrine should apply to affirmative acts of negligence as well as the failure to act."¹¹⁸

With the public duty doctrine applied, the dissent turned to the special relationship exception. That exception was not limited to the requirements stated in *City of Rome* but could also be established by an officer's voluntarily assuming "to act for the protection of injured persons at an emergency scene."¹¹⁹ In *Hamilton*, the dissent maintained, the depu-

111. *Id.*

112. *Id.* at 656-57, 482 S.E.2d at 372. "Accordingly, we answer the first certified question in the negative. Our resolution of the first question renders it unnecessary for us to address the remaining questions, all of which are premised upon the extension of the public duty doctrine outside the police protection context." *Id.*

113. *Id.* at 657, 482 S.E.2d at 372 (Fletcher, P.J., dissenting). Justices Sears and Hines concurred in the dissent. *Id.*

114. *Id.* at 657, 482 S.E.2d at 372-73. "This result excludes other public employees who are charged with protecting the general public from the actions of third persons in emergency situations, such as firefighters. It also exposes police officers to liability when their actions fall 'outside the police protection context.'" *Id.* at 658, 482 S.E.2d at 373.

115. *Id.* at 659, 482 S.E.2d at 374.

116. *Id.* "This definition protects public employees who provide police services from unreasonable liability and protects local governments from unreasonable interference with their decisions on allocating limited community resources." *Id.*

117. *Id.* The deputy was "a law enforcement officer who performed traditional police services when he responded to the call for an ambulance, turned on his siren and blue lights while driving to the pool, and exercised crowd control at the emergency scene." *Id.*

118. *Id.* The dissent argued that "the nature of the negligent act is more relevant to the issue of whether a special relationship exists than whether a special relationship is required I would evaluate allegations of affirmative acts of negligence as part of the special relationship analysis." *Id.* at 660, 482 S.E.2d at 374-75.

119. *Id.* at 661, 482 S.E.2d at 375.

This duty is based not on a general duty to protect the public; rather, it is based on the specific actions of the police officer at the scene of the emergency in exercising control over an identifiable individual and voluntarily undertaking to assist that person. Like private persons who act as Good Samaritans, police

ty's rescue actions set the decedent apart from the general public and "engender[ed] a special duty owed by the county to her."¹²⁰ Accordingly, the deputy "had a special duty to not worsen [decedent's] condition by stopping an ongoing, private rescue effort that may have had successful results, without offering a reasonable alternative."¹²¹

The Georgia Supreme Court thus stood impaled upon its own doctrinal petard. Obviously, the doctrine of public duty—a concept of its own modern adoption—had assumed a status of deep divisiveness within the court. In the period of less than one year,¹²² the justices' position of unanimity had deteriorated to one of virtual, and substantial, deadlock. In its two decisions of the period, its only public duty decisions since *City of Rome*, the court denied the doctrine's application. Virtually oblivious to the court of appeals three-year evolution, the court provided the principle only the most elementary analysis. In *Brown* the court summarily centered upon the behavior of third parties and "the provision of police services" as its guiding (limiting) standards.¹²³ In *Hamilton* the court "conclusively" narrowed "police services" to "police protection," thereby denying the doctrine's coverage to most police conduct.¹²⁴ In *Brown* no justice registered a note of analytical discord; in *Hamilton* the discord was both defining and deafening.

Disturbed, perhaps, by their own previous conceptual complacency, the *Hamilton* dissenters criticized the court for its stylistic casualness with issues "deserv[ing] a more thoughtful discussion."¹²⁵ They also countered the court's substantive limitation of the public duty doctrine. First, the dissent urged a considerable broadening of police services: both the types of included functions, and the types of "public employees" who performed them.¹²⁶ Second, the dissent counseled the public duty doctrine's outright extension to governmental actions as well as

officers who engage in the rescue of an injured person have a special duty not to make that person's situation worse or affirmatively increase the harm associated with that person's circumstances.

Id.

120. *Id.*

121. *Id.* at 661-62, 482 S.E.2d at 376.

122. The supreme court decided *Department of Transportation v. Brown* on June 17, 1996; the court decided *Hamilton v. Cannon* on March 21, 1997.

123. *Brown*, 267 Ga. at 8-9, 471 S.E.2d at 852.

124. *Hamilton*, 267 Ga. at 656, 482 S.E.2d at 372.

125. *Id.* at 657, 482 S.E.2d at 372 (Fletcher, P.J., dissenting).

126. *Id.* at 657-59, 482 S.E.2d at 373-74.

inactions.¹²⁷ These operative expansions coalesced convincingly, the dissenters maintained, with *City of Rome's* precipitating rationale.¹²⁸

To counterbalance its proposed expansions of the doctrine, the dissent also advanced a liberalization of its exceptions. The special relationship exception could be triggered by factors other than those enumerated in *City of Rome*.¹²⁹ Thus, the relationship might be established by a governmental effort at rescue which increased the victim's harm.¹³⁰ In this fashion, the dissent advocated, common law misfeasance went not to the public duty doctrine's applicability but rather to its exception.¹³¹ These operative limitations coalesced convincingly, the dissenters maintained, with *City of Rome's* precipitating rationale.¹³²

By early 1997, therefore, the promise of Georgia's public duty doctrine was one of high uncertainty.

V.

Because the supreme court would not add to the vicissitudes of Georgia's public duty doctrine for another two years, evolution reverted once again to the court of appeals. Initially, that court carried out the assignment minus analytical fanfare.

For instance, the court summarily employed the doctrine against an employee's claim that the county failed to vaccinate him for hepatitis B.¹³³ Declaring the action deficient in duty, the court emphasized plaintiff's failure "to offer any evidence establishing the existence of a special relationship between him and the public officials or an affirmative undertaking taken on his behalf."¹³⁴

Conversely, the court rejected the doctrine's application against a complaint that the city's Fourth-of-July parade route endangered the safety of spectators.¹³⁵ In reversing summary judgment for the

127. *Id.*

128. *Id.* at 659, 482 S.E.2d at 374.

129. *Id.* at 660, 482 S.E.2d at 375.

130. *Id.* at 660-61, 482 S.E.2d at 375.

131. *Id.*

132. *Id.* at 664, 482 S.E.2d at 377.

133. *Diaz v. Gwinnett County*, 225 Ga. App. 807, 485 S.E.2d 42 (1997). In this case, decided only ten days after the supreme court's decision in *Hamilton v. Cannon*, plaintiff alleged that he contracted hepatitis B while working as an undercover narcotics investigator and that his supervisors failed to vaccinate him. *Id.* at 807, 485 S.E.2d at 43.

134. *Id.* at 808, 485 S.E.2d at 43. The court simply cited the supreme court's decision in *City of Rome* and affirmed the trial judge's grant of a summary judgment for defendants. *Id.* at 808-09, 485 S.E.2d at 44.

135. *Queen v. City of Douglasville*, 232 Ga. App. 68, 500 S.E.2d 918 (1998). Plaintiff's two small daughters were struck by a train on a railroad track that was parallel and adjacent to the parade route which had been used for many years. *Id.* at 68, 500 S.E.2d

municipality, the court explained the trial judge's actions as preceding the supreme court's *Hamilton* decision.¹³⁶ That decision now "limits the public duty doctrine to police officers and to police protection."¹³⁷ In designating the parade route and failing to provide protection against known hazards, the city's alleged negligence went "beyond issues of police protection to the choices made . . . in planning the parade."¹³⁸

The appropriate "police protection" context reappeared in a negligence action for municipal failure to prevent unlicensed children from driving on public roads.¹³⁹ Rejecting plaintiff's claim for her husband's death,¹⁴⁰ the court quoted *City of Rome's* familiar precept: "[W]here failure to provide police protection is alleged, there can be no liability based on a municipality's duty to protect the general public."¹⁴¹ The claim of special relationship fared no better.¹⁴² "In fact, [plaintiff] stated that no official with the Town . . . ever promised her they were going to do something and then did not try to do it."¹⁴³

The court of appeals prevailing calm on the issue unaccountably shattered asunder with its treatment of *Coffey v. Brooks County*.¹⁴⁴ The case featured an action by motorists who wrecked their vehicles on

at 919.

136. *Id.* at 70, 500 S.E.2d at 921. "In concluding that there was no evidence of the City's negligence, the superior court relied upon the public duty doctrine set forth in *City of Rome v. Jordan*. The summary judgment being appealed was entered before the decision in *Hamilton v. Cannon*." *Id.* (citation omitted).

137. *Id.*

138. *Id.* "The negligence claim presents genuine issues of material fact for resolution by a jury." *Id.* See also *Dollar v. Dalton Public Schools*, 233 Ga. App. 827, 505 S.E.2d 789 (1998), a case rejecting not the public duty doctrine's applicability but rather its exception. Plaintiff sued the public school district for injuries to her small child on playground equipment. *Id.* at 827, 505 S.E.2d at 789.

[Plaintiff's] reliance on *City of Rome v. Jordan* as authority for her argument that the school district had a special duty of care to her, is misplaced. The Supreme Court of Georgia has held that the public duty doctrine adopted in *City of Rome* does not apply outside of the police protection context.

Id. at 828, 505 S.E.2d at 790 (citation omitted).

139. *Dybas v. Town of Chester*, 234 Ga. App. 113, 505 S.E.2d 274 (1998).

140. Plaintiff's 89-year-old husband was walking on the right side of the road when struck by a 13-year-old driver. *Id.* at 113, 505 S.E.2d at 275.

141. *Id.* at 114, 505 S.E.2d at 275 (quoting *City of Rome v. Jordan*, 263 Ga. 26, 28, 426 S.E.2d 861, 863 (1993)).

142. The court enumerated *City of Rome's* three special relationship requirements and observed that "by her own admission [plaintiff] cannot meet the third part of the test for a special relationship because neither she nor her husband ever justifiably or detrimentally relied on any affirmative undertaking by the town." *Id.* at 114-15, 505 S.E.2d at 276.

143. *Id.* The court thus affirmed the trial judge's grant of summary judgment to the town. *Id.*

144. 231 Ga. App. 886, 500 S.E.2d 341 (1998).

a county road washed out by an unusually heavy rainstorm.¹⁴⁵ Plaintiffs sued the county, its officers, and its employees, alleging negligence in failing to properly inspect and barricade the road.¹⁴⁶ Those charges, the court formalized, "involve[d] various claims based on [defendants'] omissions, rather than any affirmative act of negligence by them."¹⁴⁷ So synthesized, the case proved analytically irresistible: it enticed the entire court into confronting the current status of Georgia's public duty doctrine.

First, the court struggled to divine the precise limitations the supreme court had levied upon *City of Rome by Brown and Hamilton*. Those limitations centered upon "police protection to individual citizens"¹⁴⁸ and "acts or omissions of third parties whose behavior may be unpredictable."¹⁴⁹ Seemingly, the court ventured, they excluded from the public duty doctrine's protection any "public servants other than those engaged in [or responsible for] law enforcement activities."¹⁵⁰

Given those "somewhat imprecisely defined limitations,"¹⁵¹ the court proffered several "first impression" views about them.¹⁵² In respect to covered law enforcement activities, police protection should be broader than merely protecting against third-party criminal activity; it should include "certain other protective police services."¹⁵³ Moreover, the doctrine should cover services protective against naturally caused hazardous conditions as well as conditions resulting from the negligence of "some third-party persons or entities."¹⁵⁴ Based on these views, the court inferred that county "law enforcement officers were engaged in police protection of the public when they inspected and elected whether

145. Plaintiffs sought recovery for both wrongful death and injuries sustained in the wrecks. *Id.* at 886, 500 S.E.2d at 344.

146. Defendants included the county, the sheriff, deputy sheriffs, road superintendents, and employees. *Id.*

147. *Id.*

148. *Id.* "The public duty doctrine, however, has been limited in application to situations involving the duty owed by a governmental entity 'to provide police protection to individual citizens.'" *Id.* (quoting *Department of Transp. v. Brown*, 267 Ga. at 8, 471 S.E.2d at 852).

149. *Id.* "The public duty doctrine likewise appears to have been limited to situations involving the acts or omissions of third parties whose behavior may be unpredictable." *Id.*

150. *Id.* at 887, 500 S.E.2d at 344. The court observed that this would limit any applicability of the doctrine in this case to the county, the sheriff, and his deputies. *Id.*

151. *Id.*, 500 S.E.2d at 344-45.

152. *Id.*, 500 S.E.2d at 344.

153. *Id.*, 500 S.E.2d at 344-45.

154. *Id.*, 500 S.E.2d at 345.

to blockade public roads within the county which were in various stages of flooding."¹⁵⁵

The court of appeals recognized, however, that its inferences could not withstand the supreme court's express limitations: "police protection to individual citizens," and "acts or omissions of third parties."¹⁵⁶ Accordingly, the court reluctantly concluded, "we are compelled not to extend the public duty doctrine to . . . the law enforcement officers engaged in the protection of the public at large from hazardous conditions caused by the weather rather than by a third party."¹⁵⁷ On these grounds, plaintiffs in *Coffey* did not need to clear the hurdle of public duty.

It would be difficult to miss the note of analytical exasperation, indeed outright bafflement, exuded by the court of appeals opinion in *Coffey*. The doctrine of public duty, the court implied, plays a legitimate role of liability limitation in local government law.¹⁵⁸ It provides negligence law's general duty protection to local government inaction under emergency conditions. Since originally announcing the doctrine, however, the supreme court has unaccountably blunted its reach to a status of paralyzing uncertainty. That its requirements could not logically be exacted of plaintiffs in the circumstances of *Coffey* sufficiently illustrated the point. In the event the supreme court would not "revisit" its "imprecisely defined limitations," the court of appeals candidly counseled appeal to the General Assembly.¹⁵⁹ In the wake of such consternation, would the supreme court respond?

155. *Id.*

156. *Id.* at 888, 500 S.E.2d at 345.

157. *Id.* "Thus, unless the Supreme Court revisits this issue, future protection, by the public duty doctrine, of law enforcement officials in situations involving hazardous or emergency conditions such as this may depend upon the will of the General Assembly." *Id.* Having thus disposed of defendants' public duty argument, the court proceeded to a discussion of both governmental and official immunity in the case. Regarding its eventual decisions on immunity, there was a specially concurring opinion as well as a dissenting opinion. These, however, went only to the immunity determination and not to the decision on public duty. *Id.* at 894, 500 S.E.2d at 349 (Blackburn, J., concurring specially); *Id.* at 896, 500 S.E.2d at 350 (Eldridge, J., dissenting). As to the latter, the court appeared to be unanimous.

158. *Id.* at 887-88, 500 S.E.2d at 345.

159. *Id.* at 888, 500 S.E.2d at 345.

VI.

The Georgia Supreme Court took the case on certiorari (under the style of *Rowe v. Coffey*),¹⁶⁰ and promptly disintegrated. A bare majority of four justices—a “majority” by virtue of two opinions for two justices each—reversed the court of appeals.¹⁶¹ Accordingly, the public duty doctrine protected the county law enforcement officers in *Coffey* against negligence claims resulting from the washed out road.¹⁶² That result, however, represented the full extent of judicial consensus in the case. Otherwise, *Coffey* revealed a supreme court completely at odds over a doctrine it had introduced into local government law only six years earlier. It was a doctrine, moreover, which the court had unanimously refined some three years following introduction. A mere description of *Coffey*’s four opinions well indicates not only the depth of the dissention but the diversity of the focus.¹⁶³

The first opinion in the case (referred to as the “majority”) reflected the views of but two justices;¹⁶⁴ it joined with another two-justice opinion to constitute the court’s controlling position.¹⁶⁵ This “majority” opinion reviewed the court of appeals reading of the limitations imposed on *City of Rome by Brown and Hamilton*.¹⁶⁶ The lower court understood those limitations as refusing to extend the public duty doctrine to the facts of *Coffey*: i.e., “law enforcement officers engaged in the protection of the public at large from hazardous conditions caused by the weather rather than by a third party.”¹⁶⁷ In retrospect, the “majority” opinion indicated, *Brown*’s reference to “third parties” was misleading,¹⁶⁸ thus, “a better expression . . . would simply have been that *City*

160. 270 Ga. 715, 515 S.E.2d 375 (1999). “This court granted the writ of certiorari and posed the question, ‘Whether the public duty doctrine applies in this case.’” *Id.* at 715, 515 S.E.2d at 376.

161. *Id.* at 716-17, 515 S.E.2d at 377.

162. *Id.* at 716, 515 S.E.2d at 377.

163. There was the two-justice “majority” opinion constituting a part of the “controlling” order of reversal; there was a two-justice “specially concurring” opinion constituting the other part of the “controlling” order; there was a two-justice dissenting opinion; and there was a one-justice dissenting opinion.

164. Chief Justice Benham wrote this opinion; Justice Hines apparently concurred. *Id.* at 715, 515 S.E.2d at 376.

165. *Id.* at 717, 515 S.E.2d at 377.

166. *Id.*

167. *Id.*, 515 S.E.2d at 376.

168. *Id.* at 715-16, 515 S.E.2d at 376-77. “Looking back at the language used in *Dept. of Transp. v. Brown*, . . . we see that language used in distinguishing the situation in that case from the situation in *City of Rome* could fairly be interpreted as the Court of Appeals did in this case.” *Id.*

of *Rome* involved police protection and *Department of Transportation v. Brown* did not.¹⁶⁹ In turn *Hamilton* “should be read only to limit the application of the [public duty] doctrine to situations involving police protection in general.”¹⁷⁰ Although still not prepared to set “exact limits” on covered “protective police services,”¹⁷¹ the “majority” held those services to include the actions of the officers in *Coffey*.¹⁷²

According to the “majority” (two-judge) opinion in *Coffey*, therefore, confusion over the public duty doctrine could be eliminated by some subtle maneuvering of the supreme court’s prior impreciseness.¹⁷³ Although the doctrine still covered only protective police services, those services included police protection in general.¹⁷⁴ That protection, moreover, need not be directed only against unpredictable third-party behavior; protection against impending natural dangers could trigger the doctrine as well.¹⁷⁵ All *Brown* and *Hamilton* had been about, it resulted, was limiting *City of Rome* to the failure to provide police protection and excluding the DOT’s alleged negligence.

The second two-justice opinion in *Coffey* (termed a “special concurrence”)¹⁷⁶ apparently agreed with the “majority” in reversing the court of appeals.¹⁷⁷ Beyond that, the concurrence paid virtually no attention to *Coffey* itself but focused rather upon a larger synthesis¹⁷⁸—a

169. *Id.* at 716, 515 S.E.2d at 377.

170. *Id.* “*City of Rome* may be fairly read to limit the scope of the doctrine to the police protection context, but neither *City of Rome*, nor *Dept. of Transp. v. Brown*, nor *Hamilton v. Cannon* expressly limits the application of the doctrine to protection from the acts of third parties.” *Id.*

171. *Id.* “The scope of ‘police protection’ is broad enough to include, as the Court of Appeals reasoned in this case, other protective police services.” *Id.*

172. *Id.*

While we do not undertake in this case to set out the exact limits of those services, we take note of the persuasive foreign authority cited by the Court of Appeals in its opinion in this case, applying the public duty doctrine in the context of “hazardous conditions caused by nature,” and conclude that the scope of police protection for the purposes of the public duty doctrine includes the activities undertaken by [the officers] in this case.

Id. (citation omitted).

173. *Id.* at 715-16, 515 S.E.2d at 376-77.

174. *Id.* at 716, 515 S.E.2d at 377.

175. *Id.*

176. Justice Sears wrote this opinion; Presiding Justice Fletcher concurred. *Id.* at 717, 515 S.E.2d at 377.

177. *Id.* at 718, 515 S.E.2d at 378 (Sears, J., concurring). The concurrence conceded that the court’s prior decisions “have engendered uncertainty in its application,” citing the court of appeals decision in the present case. *Id.*

178. *Id.* “I believe, therefore, that this appeal presents a ripe opportunity to clarify the doctrine’s applicability and scope.” *Id.*

complete “restatement” of Georgia’s public duty doctrine.¹⁷⁹ On the one hand, this restatement would explicitly broaden covered police services to include “preserving public order; promoting public health, safety, and morals; and preventing, detecting and punishing crime.”¹⁸⁰ A local government’s failure to provide those services would receive the protection of the public duty doctrine.¹⁸¹ On the other hand, the restatement would add to the doctrine’s limitations.¹⁸² First, it would retain the special relationship exception (created, as previously, by the elements of assurance, knowledge, and reliance).¹⁸³ Additionally, the restatement would enforce a “particularized duty to an individual” when “one with a duty to provide police services is present at the scene of a crime or emergency, has knowledge of the danger and resources to aid an injured or imperilled party, yet fails to act.”¹⁸⁴

Under this reformulation, the concurrence conjectured, the public duty doctrine would still apply in *City of Rome* (involving a failure to provide police services and no special relationship); and it still would not apply in *Brown* (involving no failure to provide police services but rather the “faulty design of an intersection”).¹⁸⁵ *Hamilton*’s decision that the doctrine did not apply, however, “should be overruled.”¹⁸⁶ Under the restatement *Hamilton* would now meet the expanded exception: “[I]t involved a law enforcement officer providing police services and arriving at the scene of an emergency with knowledge of the danger and resources to aid the individual.”¹⁸⁷

179. *Id.* at 719, 515 S.E.2d at 379. “I would restate the public duty doctrine as follows:” *Id.*

180. *Id.* The concurrence adopted these broadened police services from the dissenting opinion in *Hamilton v. Cannon*, 267 Ga. 655, 659, 482 S.E.2d 370, 374 (1997) (Fletcher, J., dissenting). 270 Ga. at 719, 515 S.E.2d at 378-79.

181. 270 Ga. at 719, 515 S.E.2d at 379 (Sears, J., concurring).

182. *Id.* (Sears, J., concurring). “I believe that the doctrine should be expanded to include a provision for a particularized duty to an individual to arise separately from the formulation of a ‘special relationship’ as contemplated in *City of Rome*.” *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 720, 515 S.E.2d at 379. “This Court’s decision in *City of Rome* would have been the same under the restated doctrine Likewise, the result would have been the same in *Dept. of Transp. v. Brown*” *Id.*

186. *Id.* at 720, 515 S.E.2d at 380. “[U]nder the public duty doctrine as restated in this concurrence, the answer to the first certified question in *Hamilton* would have been different. The 11th Circuit asked, ‘(1) Does the “public duty doctrine” established in *City of Rome* apply outside the police protection context and in the circumstances of this case?’ *Id.*, 515 S.E.2d at 379.

187. *Id.*, 515 S.E.2d at 380. “[T]he holding in *Hamilton* that the doctrine did not apply would be incorrect under the doctrine as restated in this concurrence.” *Id.*

The "special concurrence" of *Coffey* thus agreed only with the "majority's" decision to reverse; it differed dramatically in its suggested approach to clarifying the confusion the court had inflicted upon the public duty doctrine. Rather than a subtle maneuvering of nuances, the concurrence labored to unfold a self-styled "restatement" of the doctrine itself. Its substitute moved far beyond the "majority's" grudging concession that the doctrine's police services concept must be broadened.¹⁸⁸ Instead, the concurrence advanced a specifically crafted formulation of the concept—ranging from addressing crime to promoting the public's order, health, and morals. A local government's failure to provide any of these public safety services would draw the coverage of the restated public duty doctrine. Contrarily, the concurrence also broadened the doctrine's exceptions. In addition to, and explicitly separate from, the special relationship limitation, the restatement fashioned an exception based on "presence," "knowledge," and "resources."¹⁸⁹ One failing to provide police services in those circumstances breached a "particularized duty" to an imperilled individual.¹⁹⁰ Accordingly, the public duty doctrine would not bar that individual's negligence action.

As noted, the concurrence purported to apply its restatement formulation to each of the court's prior public duty cases. (Ironically, the only case upon which the concurrence did not expressly demonstrate was the case before it—*Coffey*.) As tested, the decisions in both *City of Rome* and *Brown*, opposite in result, were confirmed.¹⁹¹ *Hamilton*, however, presented a problem. Because it featured a provider of police services possessed of presence, knowledge, and resources, it fell within the restatement's newly crafted exception. Accordingly, the court should have advised the Eleventh Circuit that the public duty doctrine did apply, and "*Hamilton* should be overruled."¹⁹²

This treatment of *Hamilton* is intriguing. The court's original decision held that the public duty doctrine did not apply; thus, plaintiff's suit successfully hurdled the no-duty limitation of negligence law. Now, the concurrence asserts, *Hamilton* falls under its new exception, with the result that the public duty doctrine does apply.¹⁹³ The exception, however, operates to free the case from the public duty doctrine. The result is that the plaintiff's suit will successfully hurdle the no-duty

188. *Id.* at 716, 515 S.E.2d at 377.

189. *Id.* at 719, 515 S.E.2d at 379.

190. *Id.*

191. *Id.* at 720, 515 S.E.2d at 379.

192. *Id.*, 515 S.E.2d at 380.

193. *Id.*

limitation of negligence law. In effect, therefore, the concurrence declared the case under the doctrine because it meets the exception which frees the case from the doctrine! The result in *Hamilton* is the same whether the doctrine does not apply or whether the doctrine's exception does apply.

Coffey's third opinion (expressly labeled a "dissent") reflected the views of two justices.¹⁹⁴ This opinion characterized *City of Rome's* public duty doctrine as a means of holding a municipality "liable for its failure to protect individuals from the criminal acts of third parties where a 'special relationship' existed."¹⁹⁵ The dissent's emphasis, therefore, went exclusively to the "exception" part of the concept rather than to its duty-limitation essence. That focus facilitated the dissent's view of the public duty doctrine as one imposing rather than limiting local government liability. That view, in turn, yielded the substantive context for the dissent's blistering objections to the "majority's" decision.

The dissent charged the "majority" with "disapproving *Brown*," "overruling *Hamilton*," and effecting an unwarranted "expansion of the public duty doctrine."¹⁹⁶ The "majority," the dissent asserted, "cannot even resolve the straightforward issue of what constitutes 'protective police services.'"¹⁹⁷ The erroneous result was to extend the public duty doctrine beyond the confines of "nonfeasance"¹⁹⁸ and to "pierce immunity defenses."¹⁹⁹ In sum, the dissent forcefully protested "expanding the public duty doctrine to acts of misfeasance committed by public employees who are not operating to protect individuals from the criminal acts of third parties."²⁰⁰

The two-justice dissenting opinion of *Coffey* thus refused to view the public duty doctrine as one of duty limitation. Focusing rather upon the doctrine's special relationship exception, the dissent deemed the

194. Justice Hunstein wrote the dissenting opinion; Justice Thompson concurred. *Id.* at 721, 723, 515 S.E.2d at 380-81.

195. *Id.*, 515 S.E.2d at 380 (Hunstein, J., dissenting).

196. *Id.*

197. *Id.*

198. *Id.* The majority holds "without any discussion whatsoever—that the public duty doctrine applies to a case involving an allegation of misfeasance." *Id.*

199. *Id.*

Prior to the majority's holding in this case, a deputy sheriff who rendered aid to an injured person at an automobile accident scene was immune from liability for both malfeasance and nonfeasance except where gross negligence was involved. OCGA § 35-1-7. Under the public duty doctrine, however, the deputy may now be held liable for acts of misfeasance and nonfeasance whenever the plaintiff establishes that a "special relationship" existed between the parties.

Id. at 722, 515 S.E.2d at 380-81.

200. *Id.* at 722-23, 515 S.E.2d at 381.

principle an imposition of local government liability.²⁰¹ It was a doctrine, indeed, operating to pierce the defenses of governmental immunity.²⁰² When the dissent lamented the “majority’s” “expan[sion]” of the public duty doctrine,²⁰³ therefore, it intended condemnation of an undue limitation upon governmental immunity—not liability. Although it bemoaned “the dire consequences of extending this judicially-created immunity,” the dissent’s concern centered upon expanding responsibility.²⁰⁴ That concern went to confounding the misfeasance-nonfeasance dichotomy and to public employees who fail to protect others from third-party criminal acts.

The final opinion of *Coffey* (a separate “dissent”) expressed the view of one justice.²⁰⁵ Disagreeing with the “majority,” this dissent rejected applicability of the public duty doctrine to defendants in this case.²⁰⁶ On the other hand, the opinion also disputed the two-justice dissent on the nature of the doctrine itself.²⁰⁷ As announced in *City of Rome*, public duty was not “an across-the-board exception to governmental immunity”²⁰⁸ nor “a means of piercing an immunity defense.”²⁰⁹ Rather, “[t]he question of duty . . . precede[s] and [is] separate and distinct from the issue of the defense of immunity.”²¹⁰ Accordingly, the public duty doctrine limits local government liability—not immunity.²¹¹ Indeed, it was “[f]or that reason alone” (*i.e.*, liability limitation) that the doctrine “ought to be severely restricted, if retained at all.”²¹²

Coffey’s final dissenting opinion thus exhibited disagreement with every preceding view in the case. It took basic issue with the “majority’s” affording public duty protection to the county defendants for the washed out road. Presumably, the dissent rejected an expansion of protective police services to the actions of the county officers. Likewise,

201. *Id.* at 722, 515 S.E.2d at 380-81.

202. *Id.* at 721, 515 S.E.2d at 380.

203. *Id.* at 722, 515 S.E.2d at 381.

204. *Id.*

205. *Id.* at 723, 515 S.E.2d at 381 (Carley, J., dissenting).

206. *Id.* “I would affirm the Court of Appeals’ decision insofar as it finds the public duty doctrine to be inapplicable to the facts of this case.” *Id.* The dissent offered no express rationale for its decision that the county officers should not enjoy the limitation of the public duty doctrine in this factual setting.

207. *Id.* at 722, 515 S.E.2d at 381.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* “The incorporation of the public duty doctrine into Georgia’s tort jurisprudence has resulted in a limitation on liability which is *in addition to* that provided by constitutional governmental immunity.” *Id.*

212. *Id.*

the dissent found no acceptable solution in the special concurrence's elaborate "restatement" of the public duty doctrine: neither its explicit broadening of police services nor its addition of a major new exception. Finally, the single-justice opinion disputed the other dissent's entire concept of the public duty doctrine. Instead of limiting governmental immunity, public duty operated in precisely the opposite direction—and for that very reason deserved severe judicial restriction.

VII.

This saga of the public duty doctrine graphically illustrates two facets from a 1994 study of Georgia local government law.²¹³ First, local government liability leads all litigated subjects in appearances before the appellate courts.²¹⁴ Second, those courts justifiably view local government cases as presenting issues of considerable complexity.²¹⁵

The public duty doctrine itself arises from tort law's traditional refusal to impose a "duty of affirmative action," or an obligation of nonfeasance.²¹⁶ Thus, a local government ordinarily breaches no enforceable negligence duty to an injured individual when it "merely" fails adequately to provide a protective public service.²¹⁷ Unless the individual enjoyed some special relationship to the government, there is no valid negligence claim; and it matters not at all whether, if a negligence claim existed, the government would possess immunity from it.²¹⁸

When (in 1993) the Georgia Supreme Court embraced the public duty doctrine in *City of Rome v. Jordan*,²¹⁹ its near-unanimous opinion rang most of the changes: the issue was one of duty, it preceded consideration of immunity, it concerned municipal nonfeasance, and it rested upon two (albeit contrasting) policies of legal parity. Special relationship, the court made clear, constituted an exception to the doctrine—not the doctrine itself.²²⁰

The job of putting the principle into jurisprudential play fell immediately to the Georgia Court of Appeals. That court routinely applied the doctrine in a number of cases over the next three years. Indeed, without indicating cognizance of the fact, the court extended the principle beyond the contexts of both nonfeasance and law enforcement. In those cases,

213. Sentell, *Georgia Local Government Law*, *supra* note 1.

214. *Id.*

215. *Id.*

216. 2 SANDRA STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 35.06 (1998).

217. *See supra* note 19.

218. 2 SANDRA STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 35.06 (1998).

219. 263 Ga. 26, 426 S.E.2d 861 (1993).

220. *Id.* at 28, 426 S.E.2d at 863.

moreover, the court remained largely unreceptive to claimants' efforts at invoking the special relationship exception.

In 1996 the supreme court returned to the evolutionary scene with its decision in *Department of Transportation v. Brown*.²²¹ There, the court unanimously rejected the DOT's reliance on public duty.²²² Minus any effort at elaboration, the court limited the doctrine to the failure of police protection against the "behavior of third parties."²²³ Neither of the court's proffered distinctions between *City of Rome* and *Brown* wore well upon reflection, nor were the policy concerns of the former case expressly demonstrated as unsuited to the circumstances of the latter case.

Less than one year later, in *Hamilton v. Cannon*²²⁴ (only its third public duty decision), the supreme court abandoned all pretense of unanimity.²²⁵ A four-justice majority opinion summarily and conclusively limited *City of Rome* to its facts; a suddenly enlightened three-justice dissent urged a broadening of both doctrine and exception, as well as the doctrine's outright extension to governmental misfeasance.

Whatever the convoluted message of *Hamilton*, the court of appeals labored to apply it in *Coffey v. Brooks County*.²²⁶ There, the court's entire bench appeared to believe that the public duty doctrine should apply. However, the judges also appeared to believe that *Hamilton* precluded applicability. Under *Hamilton*, they reluctantly concluded, the doctrine simply could not cover *Coffey's* local law enforcement officers who failed to protect the public from hazardous road conditions resulting from a rainstorm.²²⁷ Expressing an unmistakable note of analytical exasperation, the court of appeals openly challenged the supreme court to revisit the embroglio.

Regrettably, the supreme court accepted the challenge. A contrived controlling combination of two two-justice positions reversed the court of appeals, declaring the public duty doctrine applicable to the case.²²⁸ Under that doctrine, county officials breached no enforceable negligence duty in inspecting and failing to barricade the washed-out road.²²⁹ That conclusion, however, represented the single point in *Coffey* on which more than two justices could agree.²³⁰

221. 267 Ga. 6, 471 S.E.2d 849 (1996).

222. 218 Ga. App. 178, 460 S.E.2d 812 (1995).

223. 267 Ga. 655, 482 S.E.2d 370 (1997).

224. 267 Ga. at 8, 471 S.E.2d at 852.

225. 267 Ga. 655, 482 S.E.2d 370 (1997).

226. 231 Ga. App. 886, 500 S.E.2d 341 (1998).

227. *Id.* at 887-88, 500 S.E.2d at 345.

228. 270 Ga. at 716, 515 S.E.2d at 377.

229. *Id.*

230. *Id.* at 716-17, 515 S.E.2d at 377.

As of 1999, therefore, the various opinions in *Rowe v. Coffey*²³¹ offer a view (and more) for each taste. First, there is the view (two justices) that *City of Rome*, *Brown*, and *Hamilton* can all be “read” in harmony; that the reader will simply omit *Brown*’s obsession with “third parties”; that the public duty doctrine is limited to “protective police services”; and that, although those services are not yet fully known, they do cover the failure to protect against natural hazards. Second, there is the view (two justices) that a mere rereading of the prior cases will not suffice—that the public duty doctrine must now be restated. The restatement offers both an explicitly crafted definition of police services (general public safety protections) and a newly fashioned additional exception (based on presence, knowledge, and resources). Under the restatement, *City of Rome* and *Brown* can stand; *Hamilton*, however, is overruled because it falls under the new exception (which operates to exclude the case from the doctrine). Third, there is the view (two justices) that the public duty doctrine imposes a new liability upon local governments, a liability piercing the protections of governmental immunity. *Coffey*, as opposed to both *Brown* and *Hamilton*, (a) furthers that liability imposition, and (b) unwisely extends public duty to acts of misfeasance. Fourth, there is the view (one justice) that the public duty doctrine plays no part of governmental immunity, that it operates to restrict governmental liability, and that it should receive severe judicial limitation—a limitation at odds with affording the doctrine’s protection to the county officials in *Coffey*.

VIII.

From 1993 to 1999, via a total of only four decisions, the Georgia Supreme Court has analytically decimated the doctrine of public duty—and vice versa. At the conclusion of this six-year evocative evolution, the court stands captive to a bewildering labyrinth of doctrinal expositions. No one of those elaborated syntheses garners the support of the other, much less musters a majority of the court. What manner of “doctrine” can so thoroughly paralyze a modern jurisdiction’s highest judicial tribunal?

Doubtlessly, the court fully appreciates the debilitating emanations from its decisional default. Without question, its members will regroup sufficiently to ensure that litigants at least understand why they fail or prevail on this basic issue of local government law. This confluence of clarification hopefully will soon ensue. It would facilitate fairness and foster freedom—the freedom of a court held hostage to its own creation.

231. 270 Ga. 715, 515 S.E.2d 375 (1999).