

ARTICLES

Washington State's 45-Year Experiment in Governmental Liability

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INTRODUCTION

In March 1961, the Washington State Legislature (the “Legislature”) eliminated the judicial doctrine providing sovereign immunity from tort liability for state government. Sovereign immunity is the right of government to be free from suit or liability.¹ Sovereign immunity originated in English law and both federal and state courts consistently applied the doctrine after the United States became a nation.² Courts perceived sovereign immunity to be a prudent protection for government functions and taxpayer funds.³

The Legislature eliminated the sovereign immunity of state government with a simple statutory “waiver” of the immunity, which read as follows:

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1. W. PAGE KEETON, ET AL., *Prosser and Keeton on the Law of Torts* § 131 (5th ed. 1984).

2. See Richard Cosway, Comment, *Abolition of Sovereign Immunity in Washington*, 36 WASH. L. REV. 312 (1961).

3. See *Hagerman v. Seattle*, 189 Wash. 694, 697, 66 P.2d 1152, 1154 (1937).

The State of Washington, whether acting in its governmental or proprietary capacity, hereby consents to the maintaining of a suit or action against it for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation. The suit or action shall be maintained in the county in which the cause of action arises: *Provided*, That this section shall not affect any special statute relating to procedure for filing notice of claims against the state or any agency, department or officer of the state.⁴

Attorney General John O'Connell described the Legislature's action in sweeping terms in September 1961:

Within the body of public law, the doctrine of governmental immunity from tort liability has been described as the towering thorn from the tree which bears no fruit. Through the years, courts and legislatures in this state and elsewhere have pruned the branches or chopped off whole limbs; but it was not until this year that the Washington State Legislature, in Chapter 136, Laws of 1961, apparently laid the axe to the very roots of this doctrine.⁵

The Attorney General's description was accurate when first given and remains accurate today. No other state had completely waived sovereign immunity.⁶ Washington's waiver has not been modified.

Washington's waiver has been in force for nearly forty-five years, during which time many questions have been answered. New litigation, however, continues to expand the scope of the waiver, and the extent of liability continues to raise new questions and present difficult problems. Major problems include the uncertainty of case-by-case determinations of government liability and the cost of liability for inherently risky governmental⁷ programs, such as corrections and child welfare.

Part I of this Article examines the waiver against the background of prior Washington law and the pattern of immunity waivers in other jurisdictions. This examination reveals surprising features of prior Washington law, such as the narrow scope of liability for local governments which lacked sovereign immunity before 1961. It also

4. 1961 Wash. Laws 136. The first sentence is the current WASH. REV. CODE § 4.92.090 (2002).

5. Attorney General, State of Washington, Tort Claims Against the State of Washington, panel discussion presented to the Washington State Bar Association Annual Convention, (Sept. 1961) at 1 [hereinafter Tort Claims].

6. New York had a waiver similar to the Washington waiver, but its administration and interpretation by a specialized tribunal made it significantly different from the Washington waiver, as explained *infra* Part C.

7. The term "governmental" indicates functions that are unique to government, such as the exercise of power to regulate conduct or the creation of public welfare programs. This use of the term is illustrated in Peter Herzog's article, *infra* note 47, discussing governmental liability under New York's waiver.

reveals fundamental differences between waivers in Washington and in other states. Washington's waiver contains no partial immunities, no limits on claims or damages, and no liability standards for government; it requires neither legislative review and approval of claims, nor adjudication of claims by special tribunals. Waivers in other states contain at least one of these features; most contain two or more.

Part II of the Article summarizes three very different periods of development of government liability law following the 1961 waiver. This part of the Article includes summaries of state experience with claim and defense costs, the effect of two tort reform acts (1981 and 1986), and three proposals for legislative control of government tort liability.

Part II also summarizes the substance of Washington's governmental liability law and compares it to the laws in other jurisdictions. In the public duty doctrine, for example, Washington law is similar to other jurisdictions. In other areas, including crimes committed by released criminal offenders, Washington law is very different. These differences have proved controversial because they have generated high costs and affected administration of important programs. The law in these areas remains unsettled.

Part III of this Article analyzes the results of Washington's waiver and identifies problems caused by the waiver, arguing that court interpretation of the waiver produced a result that was not intended by legislators 45 years ago—expansive liability for purely governmental functions and decisions. This liability has produced high legal defense costs and increasing tort payouts for harms caused, not by the government directly, but by third parties who have contact with broad government programs. The Legislature should take action to ensure that the waiver serves its original intent. The open-ended waiver should be discarded in favor of a statutory scheme that defines the extent of liability for various government functions, as such a scheme would better serve the public interest.

I. THE WAIVER AND ITS HISTORICAL CONTEXT

A. The 1961 Washington Waiver

The Washington Legislature's waiver of sovereign immunity contained no hint of later controversies about the extent and cost of government liability. House Bill (HB) 338, waiving the state's immunity, was introduced on January 30, 1961, and reported out of the Judiciary Committee with a do pass recommendation three days later.⁸

8. 1 House Journal, 37th Leg. Reg. Sess., at 184, 235 (Wash. 1961).

The bill had wide support. Committee members voting in favor of the bill included future Seattle Mayor Wes Uhlman, future state Attorney General and United States Senator Slade Gorton, and future Washington State Supreme Court Justice James Anderson. At its second reading on February 7, HB 338 received its only amendment, a proviso stating that the bill did not affect requirements for claim filing.⁹ On February 8, the House passed HB 338 by a vote of 93-0.¹⁰ There was a similar lack of controversy in the Senate. Although the waiver was rejected after it was amended to have retroactive effect, it passed, without the amendment, on March 6 by a vote of 32-9.¹¹

Attorney General O'Connell portrayed the waiver as an advance in social policy, writing the following:

The Federal Tort Claims Act of 1946, although limited in scope and strictly construed, represented the acceptance into the law of this country of a valuable principle; and once accepted, that principle expanded in scope, influence, and stature. Accordingly, with its acceptance, there was no longer any reason to continue to give effect to a doctrine universally condemned as productive of unnecessary injustice. The practical experience of modern government with its everyday contact with its citizens had shown that the state and its agencies could injure an individual citizen in a number of ways. The trend today is toward responsible government, that is, responsible toward those for whose benefit and needs it presumably exists. It was in recognition of sound principles of social policy for our state to abolish the doctrine of sovereign tort immunity.¹²

Neither the Attorney General nor the four assistants who made the 1961 bar convention presentation predicted major problems as a result of the waiver, though the assistants did note potential administrative difficulties because the waiver contained no provisions for implementing procedures or a method to fund claims.¹³ Only Assistant Attorney

9. *Id.* at 303.

10. *Id.* at 333.

11. 1 Senate Journal, 37th Leg. Reg. Sess., at 1010-11 (Wash. 1961). A supporter of the waiver was Senator Fred Dore who, like Representative Anderson, served as a Justice on the State Supreme Court during an era when the Court decided many of the important cases creating governmental liability. Justice Dore was notable for his strong support for the public duty doctrine and his strong dissent in the first case creating broad liability for state social welfare programs. *See Babcock v. State*, 116 Wash. 2d 596, 643, 809 P.2d 143, 167-68 (1991) (Dore, J. dissenting). Interestingly, Justice Anderson wrote a concurrence/dissent in the same case that expressed reservations on liability for social welfare functions. *Id.* at 623, 809 P.2d at 157 (Anderson, J. concurring in part, dissenting in part). The development of governmental liability law in these areas will be discussed in the second section of this article.

12. Tort Claims, *supra* note 5, at 9.

13. *Id.* at 38-48.

General Delbert Johnson forecasted that the generality of the waiver would cause difficulty.

Certainly, the areas of state immunity are not now clearly defined. The Washington statute gives little guidance. It would seem obvious that a substantial amount of litigation will be required before anyone can make any reasonable conclusions on extent of the area of exclusion from liability in the new act.¹⁴

Forty-five years after the waiver, as subsequent sections of this Article discuss, there is still ongoing litigation over the extent of tort liability for governmental functions in Washington.

In 1963, the Legislature provided procedures for claims, lawsuits, and funding.¹⁵ In that same year, *Kelso v. City of Tacoma* held that the state waiver included municipal corporations.¹⁶ The Legislature enacted a separate waiver, essentially identical to the state waiver, for local government in 1967.¹⁷ In response to concerns about increasing claims and costs, the 1989 Legislature added risk management provisions and changed claim and funding provisions.¹⁸ The 1999 Legislature moved legal defense costs "off-budget" by providing that they could be funded directly out of the non-appropriated liability account.¹⁹ There were no changes to the waiver itself in any of the later legislation.

B. *Washington Government Liability Before the Waiver*

Although the state had complete immunity prior to 1961,²⁰ cities, counties, and quasi-municipal corporations had liability for torts. Cities had liability for proprietary functions, which included common city services such as water, electricity, sewer, garbage, and maintenance of streets and sidewalks.²¹ The primary areas of municipal immunity were

14. *Id.* at 28.

15. 1963 Wash. Laws 159. The statutes contained no law governing liability and deleted the claim proviso.

16. 63 Wash. 2d 913, 916-17, 360 P.2d 2, 5 (1963).

17. WASH. REV. CODE § 4.96.010 (1967).

18. 1989 Wash. Laws 419.

19. 1999 Wash. Laws 163.

20. While the state had immunity, officials were sometimes sued in tort. In *Emery v. Littlejohn*, 83 Wash. 334, 145 P. 423 (1915), the plaintiff sued, accusing the state official of negligence for the release of a mental patient who shot the plaintiff. The court held that the claim should be dismissed because the release decisions were discretionary and quasi-judicial. The Legislature also paid "sundry" claims. See Laws of 1959, 1st Ex. Sess., ch. 11, which contains appropriations for a person shot during a prison riot and for various highway and game claims.

21. *Survey of 1953 Washington Case Law, Municipal Corporations, Tort Liability*, 29 WASH. L. REV. 137 (1954). Proprietary functions were generally activities analogous to those of private business.

governmental functions, such as police, parks, and health.²² Counties and quasi-municipal governments, such as school districts, had no immunity. The Revised Code of Washington (RCW) 4.08.120,²³ enacted when Washington was still a territory but still in effect today, provides in part that “an action may be maintained against a county or other of public corporations mentioned or described in RCW 4.08.110 . . . for an injury to the rights of plaintiff arising from some act or omission of such county or other public corporation.”

The lack of immunity for local governments did not produce broad liability. Suits against local governments were for routine torts caused directly by acts or omissions of public employees, such as failures to repair roads and sidewalks,²⁴ or injuries to children caused by property defects or actions of school employees.²⁵ The few cases that imposed broader liability stand out as deviations.²⁶

The limited local government liability before 1961 was consistent with common law doctrines at that time. In his recent article, *Un-making Law: The Classical Revival in the Common Law*, Professor Feinman points out that “classical” tort law had stable concepts of fault, causation, and damages which kept tort liabilities within well-defined parameters, and observes that tort law changed dramatically in a 20-year period beginning in the mid-1960s.²⁷ Courts adopted a “neoclassical” approach to tort law, which was influenced by enterprise liability and risk spreading.²⁸ Under neoclassical law, courts applied rules governing negligence and damages less rigorously, using tort law to make social policy, resulting in rapid liability expansion and large cost increases.

22. Tort claims were sometimes allowed even for these agencies. *Hosea v. City of Seattle*, 64 Wash. 2d 678, 393 P.2d 967 (1964), held that a city could be liable for an automobile accident caused by a jail inmate when he was charged with washing police cars, an act which the court considered proprietary.

23. 1869 Wash. Laws 166 at § 600.

24. *Bogges v. King County*, 150 Wash. 578, 274 P. 188 (1929) (highway repair).

25. *Morris v. Union High Sch.*, 160 Wash. 121, 294 P. 998 (1931) (injury caused by coach); *Stovall v. City of Toppenish Sch. Dist.*, 110 Wash. 97, 188 P. 12 (1920) (hazardous object).

26. *Berglund v. County of Spokane*, 4 Wash. 2d 309, 103 P.2d 333 (1940), held that the county could be liable to an injured pedestrian not for lack of repair on an old bridge, but for failure to fund capital improvements (adding sidewalks). *McLeod v. Grant County Sch. Dist.*, 42 Wash. 2d 316, 255 P.2d 360 (1953), held that a school district could be liable for the rape of a student based largely on a theory that the school was negligent for having an empty unlocked room which could be a site for a crime. A survey of 1953 case law approved *McLeod's* determination that the school district had no immunity, but stated that the 5-4 decision on the issues of duty, causation, and foreseeability “may be open to criticism on the basis of tort principles” and “[t]hat a school district may be held liable for rape of a student is admittedly startling.” *Survey of 1963 Washington Case Law, Municipal Corporations, Tort Liability*, 29 WASH. L. REV. 137, 138-39 (1954).

27. Jay Feinman, *Un-making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 29-33 (2004).

28. *Id.*

When the Legislature waived immunity, the perceived problem was that citizens could not recover for ordinary torts if they were committed by agencies performing governmental functions. For instance, *Hagerman v. City of Seattle* held that the city was immune from liability for a vehicle accident because the driver worked for the health department, a governmental agency.²⁹ The strong dissent did not object to immunity for “fire apparatuses, police cars, and ambulances responding to emergency call,” but rather objected to liability being determined by “the character of the department to which the vehicle is assigned for services, rather than to the character of use to which the vehicle is put.”³⁰

The Legislature waived immunity in a context in which courts disliked immunity because it prevented recoveries for commonplace torts—such as auto accidents—from agencies performing governmental functions. The context of the waiver indicates that it was intended to allow liability for commonplace torts rather than for governmental functions. The upcoming development of “neoclassical” tort theories and changing judicial views would give the waiver consequences far beyond those contemplated at the time of the waiver.

C. Waivers of Immunity in Other States

Although the Washington Supreme Court long urged the Legislature to waive immunity, no single case served as an immediate impetus for the waiver. However, judicial waivers in three other states might have influenced the Legislature. In 1957, the Florida Supreme Court refused to apply sovereign immunity to a claim arising from a fire at a jail.³¹ In 1959, the Illinois Supreme Court refused to apply sovereign immunity to a claim for a school bus accident.³² In January 1961, the California Supreme Court completely abrogated sovereign immunity in a case involving an injury at a public hospital.³³ All three cases involved common torts committed by agencies with governmental functions. Just like the cases that caused the Washington Supreme Court to suggest a waiver of immunity, the torts did not involve issues of governmental

29. 189 Wash. 694, 703-04, 66 P.2d 1152, 1156 (1937).

30. *Id.* at 706, 66 P.2d at 1157. *Kilbourn v. City of Seattle*, 43 Wash. 2d 373, 261 P.2d 407 (1953), a case in which the supreme court reiterated that it would leave to the Legislature the question of waiver of immunity, is similar. *Kilbourn* held that the city had immunity because the plaintiff child was injured by a tree limb in a city park. If the child had been injured on a sidewalk or on school or county property, there would have been no immunity.

31. *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130 (Fla. 1957), *superseded in statute*; *Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981).

32. *Molitor v. Kaneland Comm'ty Unif. Dist.* 302, 163 N.E.2d 89 (Ill. 1959) (noting that, in Washington, a school district would not have been immune).

33. *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961).

action, policy, or decision-making. The focus of the cases was on liability for injuries that would be compensable under then existing tort theories but for the fact that the agency causing the injury performed governmental functions.

Even if Washington's waiver was inspired by waivers in Florida, Illinois, and California, its breadth was unlike subsequent legislation in those states. Florida and Illinois quickly re-imposed immunity: Florida waived immunity in 1973, but imposed a \$100,000 per person limit,³⁴ and Illinois eventually waived immunity, but controlled liability through a special claims court and various limits.³⁵ California was reportedly deluged with lawsuits,³⁶ prompting its Legislature to impose a moratorium on claims, followed shortly by a re-imposition of immunity with detailed exceptions.³⁷

From the mid-1960s to the mid-1980s, all but a few states waived immunity for state and local government.³⁸ A majority of states imposed limits on damages, which now range from a low of \$50,000 per person and per incident in Nevada to a high of \$1 million per person and \$5 million per incident in Nebraska.³⁹ A majority of states have also either preserved immunities for a range of government functions or have preserved immunity generally and have enumerated functions for which liability could be imposed, sometimes with standards governing the liability.⁴⁰ Common areas in which tort claim acts did not allow liability were regulatory and licensing activities,⁴¹ discretionary decisions on governmental matters,⁴² release and supervision of offenders or mental

34. FLA. STAT. ch. 768.28 (1973).

35. 745 ILL. COMP. STAT. 5/1, 505/8 (1972). The damage limit is \$100,000 except for vehicle claims.

36. Colorado Legislative Council Research, *Governmental Liability in Colorado, Report to the Colorado General Assembly*, Pub. No. 134 at 112 (1968).

37. 1961 Cal. Stat. 1404; 1963 Cal. Stat. 1681, *et seq.* See generally CALIFORNIA BAR ASS'N, CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE (3d ed. 1992).

38. Keeton, *supra* note 1.

39. NEV. REV. STAT. § 41.035 (1995); NEB. REV. STAT. § 13-926 (2003). The Nebraska limits are for local governments whose claims are adjudicated by courts of general jurisdiction without a jury. The State of Nebraska has no damage limit, but tort claims are adjudicated by a special administrative tribunal. Nebraska has extensive exemptions from liability for such things as inspections, licenses, highway design and improvements, exercise of employee discretion, and snow or ice conditions on roads. NEB. REV. STAT. §§ 13-910, 81-8, 219 (2003).

40. NAT'L ASSOC. OF ATT'YS GENERAL, SOVEREIGN IMMUNITY: THE LIABILITY OF GOVERNMENT AND ITS OFFICIALS (Nov. 1976). Appendix I to this article is a chart comparing the waivers of immunity and damage limitations adopted in 49 other states.

41. See N.J. STAT. ANN. § 59:2-6 (2005).

42. See CAL. GOV'T CODE § 820 (West 2005).

patients,⁴³ and design of or lack of capital improvements to public roads or facilities.⁴⁴

New York was the only state to waive immunity before Washington, enacting an open-ended waiver in 1929. New York's waiver differed from Washington's in two respects. First, it provided that liability would be "determined in accordance with the same rules of law as applied to actions in the supreme court [trial court in New York] against individuals or corporations," but did not expressly waive liability for "governmental" functions.⁴⁵ Second, it assigned adjudication of claims to the Court of Claims, a court that handled contract claims, with no provision for jury trials.⁴⁶ New York developed law that allowed liability for ordinary torts committed by agencies with governmental functions, but rejected liability for governmental acts.⁴⁷ For instance, New York would be liable for injuries to prisoners caused by prison conditions, but not for confining, releasing, or supervising offenders who caused injury to others.⁴⁸

Some states performed detailed studies of proposed tort claim acts. Two studies in the 1960s examined the open-ended⁴⁹ approach adopted by Washington, and both rejected it. Kentucky concluded that the open-ended approach would cause problems with the scope of liability, uncertainty of risk, cost, and ability to obtain insurance. Kentucky's findings are as follows:

"Open-end" legislation usually carries wide open liability. This causes difficulty in operation; because of the wide area of unforeseen injuries and unlimited damages, the agency or governmental entity would have no basis upon which to foresee and pay claims. Insurance has proven difficult to obtain because of the expanse of the potential risk and indefinite scope of liability; of course, insuring against unlimited contingencies would be prohibitive.⁵⁰

Three years later, Colorado reached similar conclusions about open-ended waivers:

43. See ARIZ. REV. STAT. § 12-820.02(A) (1984); CAL. GOV'T CODE § 856(a)(3) (West 1995).

44. See IDAHO CODE ANN. § 6-904(7) (1971).

45. See N.Y. CT. CL. ACT § 8 (1939).

46. See N.Y. CT. CL. ACT § 12(3) (1939).

47. See Peter Herzog, *Liability of the State of New York for Purely Governmental Functions*, 10 SYRACUSE L. REV. 30 (1958).

48. See *Tarter v. New York*, 503 N.E.2d 84 (N.Y. 1986); *Williams v. New York*, 127 N.E.2d 545 (N.Y. 1955); *Scamato v. New York*, 83 N.E.2d 841 (N.Y. 1949).

49. Some articles call the Washington approach a "blanket waiver" and consider an open-ended approach to be one in which immunity is completely waived except for defined areas.

50. Michael Canover, *Governmental Immunity*, KY. LEGIS. RESEARCH COMM'N 22-23, 63 (Nov. 30, 1965).

The main criticism of this type of approach is that the nature of governmental and public activities and functions is not comparable to private activities and responsibilities. Public agencies necessarily engage in a broad spectrum of activities having no private counterpart, which often involve relatively high degrees of exposure to injury-producing events, and which the government cannot voluntarily terminate since they are performed as a matter of public duty. Private persons and corporations, on the other hand, are ordinarily free to withdraw from activities which entail undue risks of liability.

....

These differences suggest that it might not be wise to treat public and private entities alike for tort liability purposes.⁵¹

The conclusions reached by these legislative studies almost 40 years ago were insightful, predicting issues that would arise from Washington's open-ended waiver of immunity.

II. DEVELOPMENT OF WASHINGTON GOVERNMENT LIABILITY LAW AFTER THE WAIVER

Legal developments after the waiver can be divided into three periods in which government liability law went from a period of stability to a period of rapid expansion to a period of retrenchment and debate over the boundaries of liability for risk-prone programs.

A. *Washington Government Liability Law: 1961-1973*

1. Case Law Development

For the first dozen years after the waiver, Washington law showed no sign of liability expansion and remained similar to law before 1961.

The first significant case, *Evangelical Church of Adna v. State*,⁵² raised the issue of whether the 1961 waiver actually abrogated immunity for truly governmental functions. In *Evangelical*, plaintiffs successfully sued the State for fire damage caused by a juvenile who had escaped from an "open program" at a correctional facility. Plaintiffs contended

51. Colorado Legislative Council Research, *supra* note 36, at 118. Colorado rejected an open-ended waiver after noting: "Under this process, the extent of governmental liability cannot be determined with certainty. Many cases must be tried and processed through the courts, many of which may result in the government defendant not being held liable. The financial stability of many public entities may also be left unprotected because of the unavailability of insurance at rates that they can afford to pay, resulting from the unknown potential liability." Colorado Legislative Council Research, *supra* note 36, at 131.

52. 67 Wash. 2d 246, 407 P.2d 440 (1965).

that the State was negligent for having an open program and for assigning the juvenile to the program.⁵³ The State sought reversal because the state acts involved judgment and discretion.⁵⁴ *Evangelical* concluded that the waiver's requirement that liability be analogous to private liability meant that "the statute does not render the state liable for every harm that may flow from governmental action, or constitute the state a surety for every governmental enterprise involving an element of risk."⁵⁵ The court reversed the verdict, stating that there must be room for government policy decisions and their implementation without the threat of tort liability.⁵⁶

Evangelical was a seminal case because it interpreted the private liability limitation in the waiver as excluding governmental functions from liability. *Evangelical* was significant because it immunized not only policymaking, but also the operational steps taken by officials to implement policy. The court's interpretation of the waiver was consistent with both New York's interpretation of the private liability limitation in its waiver and the federal courts' interpretation of the discretionary immunity limitation in the federal waiver.⁵⁷

Although *Evangelical* followed existing law, the case had an internal inconsistency. The court held that discretionary immunity did not protect the State from liability for the assignment of the juvenile offender to a "boiler room detail" that was not affiliated with the open program.⁵⁸ In so doing, the court protected the State from liability for its implementation of the decision to have an open program—an administrative decision—but allowed liability for the risks inherent in the decision to have the underlying low security rehabilitation program—a legislative decision. This part of *Evangelical* forecast the approach taken in cases during the later period of expanding liability. The later cases would not apply the private liability limitation in the waiver and would

53. *Id.* at 252, 407 P.2d at 443.

54. *Id.*

55. *Id.* at 253, 407 P.2d at 444.

56. *Id.* at 254, 407 P.2d at 444.

57. A law review analysis criticized *Evangelical's* protection of policy implementation (the assignment to the open program). See *Discretionary Acts Protected by Governmental Immunity, Survey of Washington Laws*, 41 WASH. L. REV. 552 (1966) [hereinafter *Discretionary Acts*]. However, *Evangelical* relied on the leading federal case, *Dalelite v. United States*, 346 U.S. 15 (1953), which protected policy implementation. Later federal cases have continued that practice. See *United States v. Gaubert*, 499 U.S. 315 (1991). Some courts interpreted *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), as allowing liability for "operational" acts done to implement policy, but *Gaubert* and other decisions in the past 25 years have held that discretionary immunity protects judgments made by lower-level employees who are implementing policies that require making decisions concerning the application of policies and rules to facts. See Timothy B. Richards, *Tenth Circuit Survey, Torts Survey: Governmental Liability*, 72 DENV. U. L. REV. 821 (1995).

58. 67 Wash. 2d 246, 255, 407 P.2d 440, 455.

not use discretionary immunity to protect operational acts done to implement policies in risk-prone governmental programs.⁵⁹

In the years immediately after the waiver, only one other case discussed liability for truly governmental acts. *Creelman v. Svenning*⁶⁰ involved a claim that a prosecutor, a county, and the State should be liable for malicious prosecution and negligence in filing charges that were later dismissed. The supreme court affirmed a dismissal based on pre-waiver case law holding that prosecuting attorneys have absolute immunity.⁶¹ *Creelman* did not mention *Evangelical*, probably because counties have never had sovereign immunity. Older cases had protected the governmental prosecution function despite the statute providing for tort actions against counties. *Creelman* is consistent with *Evangelical* because it immunized, not only the decision to file charges, but also the ministerial details done to prepare for filing.⁶² Further, *Creelman* rejected an argument that the 1961 waiver meant that the prosecutor could have immunity, but the county and the State would be liable for the prosecutor's acts.⁶³ The court held that government liability would affect decisions of the prosecutor, rendering the prosecutor's immunity ineffective.⁶⁴

In the period after the waiver, all cases claiming liability for government highway functions concerned maintenance and signage issues.⁶⁵ Not one case raised questions about design or failure to make capital improvements, which could involve governmental issues such as funding, priority, or design choice. The supreme court decided one case that concerned maintenance issues, but had larger implications on the scope of governmental tort duties. That case, *Morgan v. State*,⁶⁶ involved

59. The import of *Evangelical's* discussion of the third claim was probably not appreciated at that time because the claim was dismissed based on lack of foreseeability. *Barnum v. State*, 72 Wash. 2d 928, 435 P.2d 678 (1967), also foreshadowed later cases by implying that immunity did not protect acts implementing policy decisions but, because it was only a reversal of a CR 12(b)(6) motion and a remand, it had very little effect.

60. 67 Wash. 2d 882, 410 P.2d 606 (1966).

61. *Id.* at 884, 410 P.2d at 607-08.

62. The complaint alleged not only liability for the decision to prosecute, but negligence in reviewing the information in the file and in failing to conduct an investigation before filing. *Id.* at 884, 410 P.2d 607.

63. *Id.* at 885, 410 P.2d at 608.

64. This rejected a theory of "state liability despite employee immunity" that had been advanced in the law review survey discussing *Evangelical*. See *Discretionary Acts*, *supra* note 57, at 552, 558.

65. *Bartlett v. N. Pac. Ry. Co.*, 74 Wash. 2d 881, 447 P.2d 735 (1968); *Provins v. Bevis*, 70 Wash. 2d 131, 422 P.2d 505 (1967); *Raybell v. State*, 6 Wash. App. 795, 496 P.2d 559 (1972). *Meabon v. State*, 1 Wash. App. 824, 463 P.2d 789 (1970), actually narrowed prior liability by holding that the duty to maintain and repair could be satisfied by posting signs warning of hazardous conditions.

66. 71 Wash. 2d 826, 430 P.2d 947 (1967).

a child who was killed after he wandered onto a freeway through a broken fence. In affirming dismissal based on lack of duty, the court relied on the absence of a statute creating a duty to fence roads and on an examination of accepted highway engineering standards.⁶⁷ The court used highway standards to determine that the purpose of highway fencing was to reduce obstructions for motorists, not to protect children.⁶⁸ The importance of *Morgan* lies in the court's examination of the details of the particular program in order to determine the scope of an agency's tort duty. The court's willingness to limit duty in the absence of statutes or standards mandating actions would become less evident in later cases.

The first regulatory liability cases were *Nerbun v. State*⁶⁹ and *Loger v. Washington Timber Prods., Inc.*⁷⁰ In those cases, the court of appeals held that the purpose of industrial safety inspection laws was to improve workplace safety, but workplace safety laws did not create a duty to protect individual workers.⁷¹ These cases were consistent with *Morgan* because they looked at statutes and standards to determine tort duty, and then looked to the breadth of that duty to determine if liability should be imposed.

In summary, Washington courts took a cautious approach to the waiver of immunity before 1974. There were no changes to already existing tort liabilities of government agencies.⁷²

2. Claim and Legal Defense Costs

The total cost of payments on tort lawsuits and claims through June 30, 1974, was miniscule. In the 1963-1965 biennium, the state paid 44 judgments and lawsuits, with a total payout of \$241,000.⁷³ In the next five biennia, total tort claim payments were:

67. *Id.* at 830, 430 P.2d at 949-50.

68. *Id.* at 828, 430 P.2d at 948.

69. 8 Wash. App. 370, 506 P.2d 873 (1973).

70. 8 Wash. App. 921, 509 P.2d 1009 (1973). *Loger* also determined that inspections were protected by discretionary immunity, finding that discretion was intrinsic to the inspections. Later cases rejected liability because inspections are related to workers' compensation and protected by workers' compensation immunity. See *Nielson v. Wolfkill Corp.*, 47 Wash. App. 352, 734 P.2d 961, *review denied*, 109 Wash. 2d 1008 (1987).

71. *Nerbun*, 8 Wash. App. at 376, 506 P.2d at 877 (1973); *Loger*, 8 Wash. App. at 931, 509 P.2d at 1015.

72. In *Fosbre v. State*, 76 Wash. 2d 255, 456 P.2d 335 (1969), the supreme court even held that the waiver of immunity did not include interest on judgments.

73. The state budgets on a biennial basis and the budget year runs from July 1 to June 30. The 1963-1965 biennium is the period from July 1, 1962, to June 30, 1964. The state has accurate tort claim cost records because 1963 Wash. Laws 159 at §§ 7 and 10 created a separate tort claims account and directed that all tort payments be made from this account. The payment records presented here are from compilations made in the 1970s by the chief of the Attorney General's

<u>Biennium</u>	<u>Claims Paid</u>	<u>Payments</u>
1965-67	77	\$315,000
1967-69	100	\$916,000
1969-71	143	\$985,000
1971-73	160	\$668,000
1973-75	192	\$972,000

Tort payments remained stable for eight years at under \$1 million per biennium.⁷⁴

In this period of traditional liabilities, more than 60 percent of claim payments were for highway maintenance liability claims. The only other agency with significant payments was the Department of Institutions, which included prisons and later became part of the Department of Social and Health Services (DSHS). The claims for this agency related to patient and inmate care and premises liability, but in three of the biennia, even this agency had no significant payments.⁷⁵

Claim adjustment and legal defense costs were also miniscule in this period. There was no identifiable claim adjustment cost because this function was delegated to each agency for routine claims.⁷⁶ The Attorney General's Office had no separate tort defense division until 1969, and, at that time, it consisted of only five attorneys, three legal secretaries, and one investigator, with a budget less than \$200,000 per year.⁷⁷

Office, Torts Division, from state budget agency data available at that time. State tort costs were paid from a general tort account, but the account was funded by reimbursements from the operating budgets of agencies that generated tort claims. 1963 Wash. Laws 159 at § 11.

74. These amounts do not include claims which were covered by insurance, but the state carried virtually no insurance. See BETTERLY CONSULTING GROUP, RISK MANAGEMENT STUDY FOR STATE OF WASHINGTON (1976). The state carried limited insurance for vehicle accidents and for some colleges and universities, but the 1976 consultant report advised that most insurance be cancelled as not cost-effective.

75. In 1963-65, institutions had no payments; in 1969-71 and 1971-73, they had only \$24,000 and \$31,000, respectively.

76. 1963 Wash. Laws 159 at § 8.

77. Cost figures for earlier years can be adjusted to later years by using the Gross Domestic Product (GDP) Deflator. Using the GDP Deflator, \$1.00 in 1974 was worth \$3.04 in 2003. Thus, the approximately \$1 million in tort payouts in the 1973-1975 biennium would be approximately \$3 million in 2003 dollars. Similar GDP Deflator figures for other years, for use in adjusting later figures are: \$2.13 in 1979; \$1.56 in 1984; \$1.34 in 1989; \$1.17 in 1994; and \$1.08 in 1999. See Samuel H. Williamson, *What is the Relative Value?* ECONOMIC HISTORY SERVS. (Apr. 15, 2004), available at <http://www.eh.net/hmit/compare>. Appendix II presents state tort claim costs from 1961 to present in a bar graph.

B. Washington Government Liability Law: 1974-1998

1. Case Law Development

The twenty-five years after 1973 produced unprecedented new liability for governmental functions. The courts created liabilities that were well beyond those imposed on the state and cities in the first dozen years after the waiver. The liabilities were also unlike any that had been imposed on counties and quasi-municipal governments in their 100 years without sovereign immunity. During this period, courts took a fundamentally different approach to public liability.

a. Discretionary Immunity

In 1974, *King v. City of Seattle*⁷⁸ removed the foundation supporting liability protections for governmental functions. Relying on a California case⁷⁹ rather than on *Evangelical*, the *King* court held that there was no immunity for discretionary activities unless the government could show that a “policy decision, consciously balancing risk and advantages, took place.”⁸⁰ The court also stated that there could be no immunity for decisions which were not “considered,” would have been adopted by “no reasonable official,” or were arbitrary and capricious.⁸¹ The focus on the wisdom of the decision was different from prior law, which had held that the correctness of the decision was immaterial. Earlier cases stated that the purpose of the immunity was to protect the ability of legislative and executive branches to implement policy, which could not be accomplished if the immunity depended on the courts’ view of a decision’s wisdom or motivation.⁸²

After *King*, the courts imposed further restrictions on discretionary immunity. Later cases stated that discretionary decisions must be made at a “truly executive level” rather than an operational level⁸³ and that immunity could apply only to executive level policymaking decisions rather than “field” decisions.⁸⁴ The effect of the new interpretation of discretionary immunity was to limit immunity to adoption of laws, regulations, and policies by legislative bodies, and elected or appointed

78. 84 Wash. 2d 239, 525 P.2d 228 (1974).

79. *Johnson v. State*, 447 P.2d 352 (Cal. 1968).

80. *King v. City of Seattle*, 84 Wash. 2d 239, 246, 525 P.2d 228, 232-3 (1974).

81. *Id.* at 247, 525 P.2d at 233.

82. *See, e.g., Evangelical Church of Adna v. State*, 67 Wash. 2d 246, 254, 407 P.2d 440, 444 (1965).

83. *Mason v. Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (1975).

84. *Miotke v. City of Spokane*, 101 Wash. 2d 307, 678 P.2d 803 (1984).

officials.⁸⁵ Unlike *Evangelical* and several relevant federal cases,⁸⁶ these new cases did not provide immunity when officials made decisions needed to implement policies.⁸⁷ Among the functions for which the court found had no immunity were: (1) the issuance or denial of permits;⁸⁸ (2) the initiation of police vehicle chases;⁸⁹ (3) the release of mental patients;⁹⁰ (4) the conduct of police investigations or response to emergency calls;⁹¹ (5) the supervision of paroled felons;⁹² (6) the design of highways;⁹³ and (7) military activities.⁹⁴

By allowing liability for implementation of policies, *King* created liability that had not existed previously in Washington or in other jurisdictions. Other states adopted immunities, damage caps, special procedures for government claims or, like New York, judicially limited liability for governmental functions. Moreover, while *King* relied on a California decision to limit discretionary immunity, California continued to apply discretionary immunity, along with various statutory limitations, to decisions made by lower-level officials.⁹⁵

85. The only significant governmental functions protected by discretionary immunity since *King* have been the Governor's issuance of an executive order on the Mount St. Helens volcano (*Cougar Bus. Owners Ass'n v. State*, 97 Wash. 2d 466, 647 P.2d 481 (1982); *Karr v. State*, 53 Wash. App. 1, 765 P.2d 316 (1988)), an agency director's decision to issue regulations (*Bergh v. State*, 21 Wash. App. 393, 585 P.2d 805 (1978)), and the Parole Board's decision to parole (*Noonan v. State*, 53 Wash. App. 558, 769 P.2d 313 (1989)).

86. See *United States v. Gaubert*, 499 U.S. 315 (1991); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Dalelite v. United States*, 346 U.S. 15 (1953).

87. The only later case that followed *Evangelical* in protecting policy implementation was *Jenson v. Scribner*, 57 Wash. App. 478, 789 P.2d 306 (1990). The court held that discretionary immunity applied to the Department of Transportation's implementation of the legislature's decision to fund installation of a median barrier.

88. *Miotke*, 101 Wash. 2d 307, 678 P.2d 803; *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976); *King v. City of Seattle*, 84 Wash. 2d 239, 246, 525 P.2d 228, 232-3 (1974).

89. *Mason v. Bitton*, 85 Wash. 2d 321, 325, 534 P.2d 1360, 1363 (1975).

90. *Petersen v. State*, 100 Wash. 2d 421, 671 P.2d 230 (1983).

91. *Bender v. City of Seattle*, 99 Wash. 2d 582, 664 P.2d 492 (1983); *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P.2d 451 (1983).

92. *Taggart v. State*, 118 Wash. 2d 195, 822 P.2d 243 (1992).

93. *Stewart v. State*, 92 Wash. 2d 285, 597 P.2d 101 (1979).

94. *Emsley v. Army Nat'l Guard*, 106 Wash. 2d 474, 722 P.2d 1299 (1986) involved an injury during training. *Emsley* not only rejected immunity, it did not mention the private liability condition, which the court had found determinative in an earlier military case. See *Edgar v. State*, 92 Wash. 2d 217, 595 P.2d 534 (1979), discussed *infra* note 97.

95. California cases protected difficult decisions that depended on evaluation of complex circumstances, such as decisions concerning abuse complaints and child placements. See *Thompson v. County of Alameda*, 614 P.2d 728 (Cal. 1980) (selection of custodians for minor state wards); *Alicia T. v. County of Los Angeles*, 271 Cal. Rptr. 513 (Ct. App. 1990) (investigation of child abuse); *Bratt v. City & County of San Francisco*, 123 Cal. Rptr. 774 (Ct. App. 1975) (police functions such as initiation of pursuits); *O'Hagan v. Bd. of Zoning Adjustment*, 113 Cal. Rptr. 501 (Ct. App. 1974) (permit and license issuance); *Burns v. City of Folsom*, 107 Cal. Rptr. 787 (Ct. App. 1973) (permit and license issuance). None of these activities are immune in Washington.

b. *Duty and Proximate Cause*

With the loss of most discretionary immunity, the state began receiving claims for negligence in performing basic governmental functions, such as driver licensing. In *LaPlante v. State*,⁹⁶ for example, the plaintiff claimed that the waiver of immunity made the State liable for injuries suffered in an accident caused by a taxi driver who was negligently licensed. The court rejected the argument that the waiver itself created tort duties, holding instead that a claimant must establish that the State had a duty under existing tort law and that the breach of the duty was a cause of the injury.⁹⁷

The major issue in cases after *LaPlante* became whether government agencies had a duty to prevent the harm alleged by a claimant. In *Brown v. MacPherson's*,⁹⁸ the court expanded the concept of government liability, holding that agencies could have liability for failure to perform duties lying outside the statutory authority of the agencies.⁹⁹ This holding was a major change from the traditional rule that an agency has no authority to act except pursuant to powers expressly granted by statute or necessarily implied therefrom.¹⁰⁰

After the Washington Supreme Court broadened the tort duties of government agencies, the court used proximate causation to limit some of those duties as a matter of "policy." In *King v. City of Seattle*, the court held that city permit errors should not lead to liability when the plaintiff had not taken actions that would have allowed a project to proceed despite city errors.¹⁰¹ In *Hartley v. State*,¹⁰² a case cited frequently in later decisions, the court held that the failure to revoke a driver's license was "too remote or insubstantial to impose liability"¹⁰³

96. 85 Wash. 2d 154, 531 P.2d 299 (1975).

97. The claim in *LaPlante* was ultimately dismissed on the basis of lack of causation and the court never reached the duty issue. *Edgar v. State*, 92 Wash. 2d 217, 595 P.2d 534 (1979), involving a claim by a state National Guard officer for alleged retaliatory conduct by a superior officer, reiterated that the waiver did not create any causes of action and that a plaintiff must show that a cause of action would exist in a private context before he or she can proceed with a claim against the state. The court held that the plaintiff in *Edgar* had no basis for his action because private employees have no right to sue supervisors for harsh supervision or abuse of discretion.

98. 86 Wash. 2d 293, 545 P.2d 13 (1975).

99. Plaintiffs contended that the state real estate broker licensing division had failed to convey a warning of an impending avalanche above a recreational subdivision. The licensing division (which asserted that it had relayed the information to the property broker) had no regulatory authority over the subdivision. The court held that the state could be liable for the implied promise of its employee.

100. See, e.g., *Barendregt v. Walla Walla Sch. Dist.* 140, 26 Wash. App. 246, 611 P.2d 1385, review denied, 94 Wash. 2d 1005 (1980).

101. 84 Wash. 2d 239, 252, 525 P.2d 228, 236 (1974).

102. 103 Wash. 2d 768, 698 P.2d 77 (1985).

103. *Id.* at 784, 698 P.2d at 84.

for a drunk driving accident. The court stated that it might be immaterial whether it analyzed liability based on duty or proximate cause.¹⁰⁴ The court also noted that licensing was not intended to protect particular persons, presumably meaning that there was no duty to plaintiffs.¹⁰⁵ *Hartley's* circuitous discussion of duty and legal causation indicates some uncertainty concerning the boundaries of regulatory liability which, until later decisions firmly established the public duty doctrine, was left largely unresolved.

c. Regulatory Liability

The narrow interpretation given to discretionary immunity in both *King v. City of Seattle* and *Mason v. Bitton* raised questions about liability for regulatory activities. *Georges v. Tudor*,¹⁰⁶ the first case after *King* to reject liability for regulation, provided the beginning of an answer. *Georges* was a lawsuit claiming city liability for a building collapse because the city had not enforced the building code. The court held that regulatory statutes create a duty to act for the public welfare, but do not create duties to protect individuals.¹⁰⁷ Three years later in *Baerlein v. State*,¹⁰⁸ the Supreme Court built on *Georges*, applying the same concept of duty and holding that the Legislature had not intended securities regulation to create a duty to protect individual investors.¹⁰⁹

The limitation of duty for regulatory functions was first called the "public duty doctrine" in *J&B Devel. v. King County*.¹¹⁰ It applied to licensing, permits, inspections, and police functions,¹¹¹ as well as to correctional and social programs that were intended to improve public welfare (such as by lowering the crime rate), but was not, however, intended to solve a public problem in every situation.¹¹²

104. *Id.* at 780, 698 P.2d at 84.

105. *Id.* at 785, 698 P.2d at 86.

106. 16 Wash. App. 407, 556 P.2d 564 (1976).

107. *Id.* at 410, 556 P.2d at 567.

108. 92 Wash. 2d 229, 595 P.2d 930 (1979).

109. *Baerlein*, like many regulatory cases, supported its conclusions with statements of legislative intent, the breadth of the regulatory scheme, and the limited amount of enforcement resources. *Id.*

110. 100 Wash. 2d 299, 669 P.2d 468 (1983).

111. *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 669 P.2d 451 (1983).

112. *Forest v. State*, 62 Wash. App. 363, 814 P.2d 1181 (1991), held that the parole system was intended to reduce crime generally, but not to prevent specific crimes. A later case, *Taggart v. State*, 118 Wash. 2d 195, 822 P.2d 243 (1992), held that parole supervision did create a duty to prevent crime, but used a different analysis. *Yonker v. State*, 85 Wash. App. 71, 930 P.2d 958 (1997), analyzed the investigative functions of child protective investigators and found that the public duty doctrine applied, but also held that an exception applied, permitting liability for investigation of child abuse.

Some court opinions stated that the public duty doctrine was inconsistent with the waiver,¹¹³ suggesting that the duty of a government agency should be analyzed without reference to its public status and using only analogies to private liabilities. However, the analogies were poor. For instance, the opinions suggested that the duty for building code inspections should be the same duty as for private fire, boiler, or elevator inspections.¹¹⁴ None of the opinions adequately acknowledged the difference between government inspections and private inspections, and none were able to convey the nuanced difference between government “spot checks,” not intended to identify all violations, and independently contracted private inspections, intended to identify all.¹¹⁵ The argument that the public duty doctrine was inconsistent with the waiver was eventually rejected under the rationale that the court must decide the appropriate scope of duty for government defendants, just as it does for private defendants.¹¹⁶

The public duty doctrine did not abolish all liability for regulation because the Washington Supreme Court found that the statutes for some programs or the actions of employees could create a duty to an individual. The court, through these cases, developed three exceptions to the public duty doctrine.¹¹⁷

The legislative intent exception created a duty if statutes showed “a clear intent to identify and protect a particular and circumscribed class of persons.”¹¹⁸ Only three cases found that this exception applied. The first involved a code for dilapidated hotels,¹¹⁹ another involved police action required in domestic violence cases,¹²⁰ and the final case involved investigation of child abuse complaints.¹²¹ This final case is the most

113. *J&B Devel.*, 100 Wash. 2d at 310-11, 669 P.2d at 475-6; *Bailey v. Town of Forks*, 108 Wash. 2d 262, 727 P.2d 1257 (1987).

114. *See, e.g., J&B Devel.*, 100 Wash. 2d at 310, 669 P.2d at 475.

115. A law review comment argued that liability for regulatory programs depends on whether programs *should* have a duty based on foreseeability of injury and ability to prevent injury. Jennifer K. Marcus, Comment, *Washington's Special Relationship Exception to the Public Duty Doctrine*, 64 WASH. L. REV. 401 (1989). This approach would result in liability for essentially all injuries within the regulated sphere of activity without recognition that regulatory programs typically audit only a percentage of regulated activity. Moreover, foreseeability is a legal concept which is not the basis for duty, but is a limitation on the scope of an acknowledged duty. *See, e.g., Halleran v. NuWest, Inc.*, 123 Wash. App. 701, 98 P.3d 52 (2004).

116. *Chambers-Castanes v. King County*, 100 Wash. 2d 275, 287, 669 P.2d 451 (1983); *Garnett v. City of Bellevue*, 59 Wash. App. 281, 796 P.2d 782 (1990).

117. Some cases list the “rescue doctrine,” discussed in *Brown v. MacPherson's, Inc.*, 86 Wash. 2d 293, 545 P.2d 13 (1975), as a fourth exception, but that was not a regulatory duty case, since the state had no regulatory authority over the matter at issue.

118. *Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978).

119. *Id.*

120. *Donaldson v. City of Seattle*, 65 Wash. App. 661, 831 P.2d 1098 (1992).

121. *Yonker v. State*, 85 Wash. App. 71, 930 P.2d 958 (1997).

important of the three, as it created a significant liability. *Yonker* identified abused children as a particular and circumscribed class intended to receive the benefit of child protective laws, rather than identifying all children to be beneficiaries of those laws.¹²² *Yonker* narrowed the class benefited by a regulatory statute to the subset of persons injured if the statute is not enforced.¹²³ This approach might bring all regulatory schemes within the exception. Every regulatory scheme that benefits a broad class, such as licensing of medical professionals, can be said to benefit only a circumscribed class if the class is limited to those injured if the scheme is not enforced, such as victims of medical errors.

The special relationship exception¹²⁴ created liability if a plaintiff had direct contact with a regulatory official who gave express assurances on which the plaintiff relied to his or her detriment.¹²⁵ In *J&B Devel. v. King County*, the court held that building department approval of plans was an assurance that the plans met the code.¹²⁶ This made government liable for contractor errors in plans.¹²⁷ The liability ended when *Taylor v. Stevens County* overruled *J&B Devel.*, holding that plan approval was not an express assurance. The courts have rarely applied the special relationship exception since *Taylor*.¹²⁸

The “failure to enforce” exception created liability if officials had actual knowledge of a statutory violation and failed to take corrective action, despite a mandatory duty to do so.¹²⁹ *Bailey v. Town of Forks*¹³⁰ was the first case to recognize this exception by name, but the exception had been applied earlier in *Campbell v. City of Bellevue*.¹³¹ After *Bailey*, three cases applied the failure to enforce exception broadly, holding local governments potentially liable because they failed to enforce laws when

122. *Id.* at 80, 930 P.2d at 963.

123. *Id.* at 76, 930 P.2d at 961.

124. The special relationship exception to the public duty doctrine should not be confused with the different special relationship which arises from government supervision of offenders, discussed *supra* Part II.B.1.d-e.

125. *Taylor v. Stevens County*, 111 Wash. 2d 159, 759 P.2d 447 (1988).

126. 100 Wash. 2d 299, 306, 669 P.2d 468, 473 (1983).

127. *Radach v. Gunderson*, 39 Wash. App. 392, 695 P.2d 128 (1985).

128. *Taylor*, 111 Wash. 2d at 167, 759 P.2d at 451 (1988). Following *Taylor*, the special relationship exception has been significant only in cases involving 911 calls. *Beal v. City of Seattle*, 134 Wash. 2d 769, 954 P.2d 237 (1998), and *Noakes v. City of Seattle*, 77 Wash. App. 2d 694, 895 P.2d 842 (1995), seemed to weaken the express assurances requirement by implying that statements that police would be dispatched were an express assurance of protection.

129. *Smith v. State*, 59 Wash. App. 808, 802 P.2d 133 (1990).

130. 108 Wash. 2d 262, 737 P.2d 1257 (1987).

131. 85 Wash. 2d 1, 530 P.2d 234 (1975). This was a case in which a city electrical inspector failed to order disconnection of electrical service, as required by the city code, after discovering dangerous wiring.

they had knowledge of violations.¹³² These cases overlooked the requirement of a statute making enforcement mandatory, an error not corrected until *McKasson v. State*, which held that the State was not liable for failing to enforce financial reporting requirements when the securities act did not mandate specific enforcement actions.¹³³ Subsequent cases strictly applied the mandatory duty element along with the actual knowledge element, resulting in little liability under this exception.¹³⁴

Between 1974 and 1998, the Washington Supreme Court created broad liability for regulatory and police functions, but thereafter narrowed this liability by adopting the public duty doctrine. The doctrine became a means to determine if regulatory schemes created an obligation to individuals or only an obligation to improve regulated areas without guaranteeing compliance.

The public duty doctrine had one anomaly: it protected officials when they declined to act, but did not protect them when they acted. For instance, in *Miotke v. City of Spokane*, officials were liable to downriver homeowners for modifying a pollution permit to allow a sewer plant upgrade, even though the duty of the officials was to act for the public welfare and not for the benefit of individuals.¹³⁵ If the permit had allowed the discharges, and if officials had declined to modify it at the request of the homeowners, the public duty doctrine would arguably have protected the officials. This anomaly occurs because Washington courts analyze affirmative regulatory acts under this state's narrow discretionary immunity rule, without considering that the duty is owed to the public and not individuals.¹³⁶ The anomaly does not occur in jurisdictions where discretionary immunity protects decisions about matters of public interest.

d. Liability for Highway Design and Improvement

Traditional highway liability was based on alleged failures to maintain or repair the highway itself or to install signs warning of

132. *Coffel v. Clallam County*, 58 Wash. App. 517, 794 P.2d 513 (1990); *Waite v. Whatcom County*, 54 Wash. App. 682, 775 P.2d 967 (1989); *Livingston v. City of Everett*, 50 Wash. App. 655, 751 P.2d 1199 (1988).

133. 55 Wash. App. 18, 24, 776 P.2d 971, 974 (1989).

134. *See, e.g., Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume*, 115 Wash. 2d 506, 799 P.2d 250 (1990).

135. 101 Wash. 2d 307, 330, 678 P.2d 803, 816 (1984).

136. For instance, *Haslund v. City of Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976), and *King v. City of Seattle*, 84 Wash. 2d 239, 246, 525 P.2d 228, 232-33 (1974), analyzed regulatory decisions on building permits under discretionary immunity whereas *Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978), and *Georges v. Tudor*, 16 Wash. App. 407, 556 P.2d 564 (1976), analyzed alleged failures of building officials to act as a public duty doctrine issue.

conditions not apparent to drivers, not on theories that the road was designed improperly or should have been improved. Case law had accepted state and federal highway standards, particularly the national highway signing manual,¹³⁷ as establishing the standard of care for government.¹³⁸ In the late 1970s, several cases expanded the bases for liability for traditional highway claims and permitted new claims on broader theories of liability.

In *Tanguma v. Yakima County*,¹³⁹ the plaintiff drove into a canal to avoid colliding with another vehicle which allegedly occupied more than its share of an old bridge. The driver sued the county on theories that the bridge should have met newer standards for width or had signs warning of the dangerously narrow width and allegedly limited sight distance.¹⁴⁰ *Tanguma* reversed a summary judgment granted based on lack of duty, and while *Tanguma* did not announce any specific new highway duty, it was significant because there was no road defect in the traditional sense, and the court allowed the case to proceed on a signage theory when the Manual of Uniform Traffic Control Devices (MUTCD) indicated that the bridge did not require a warning sign.¹⁴¹ Unlike earlier cases, *Tanguma* appeared to allow liability based on expert testimony that signage could have been better, without a specific showing that the sign manual or any other highway standard was violated.

Though *Tanguma* rejected the argument that a duty existed to replace a bridge with one meeting current standards, the decision in *Boeing Co. v. State*¹⁴² accepted failure to improve a road as a basis for liability. *Boeing* involved a truck that was damaged driving through a substandard railway underpass with a sign stating its clearance. The truck driver knew the clearance, but underestimated his load height.¹⁴³ *Boeing* allowed liability on theories that the city could have installed special warning devices for the underpass or rebuilt the highway.¹⁴⁴ *Boeing* was a major expansion of liability because it recognized claims of liability for older highways that did not meet current standards so long as claimants could present expert testimony that those highways were extra-hazardous

137. The State of Washington adopts by law the Manual of Uniform Traffic Control Devices published by the Federal Highway Administration, WASH. REV. CODE § 47.36.030 (1977); see also MANUAL OF UNIFORM TRAFFIC CONTROL DEVICES, available at <http://www.wsdot.wa.gov/biz/trafficoperations/mutcd.htm> (last updated Mar. 25, 2004).

138. See *Kitt v. Yakima County*, 93 Wash. 2d 670, 611 P.2d 1234 (1980); *Schneider v. Yakima County*, 65 Wash. 2d 352, 397 P.2d 411 (1964).

139. 18 Wash. App. 555, 569 P.2d 1225 (1977).

140. *Id.* at 557, 569 P.2d at 1227.

141. *Id.* at 557-60, 569 P.2d at 1227-28.

142. 89 Wash. 2d 443, 572 P.2d 8 (1978).

143. *Id.*

144. *Id.*

or inherently dangerous. *Boeing*, like *Tanguma*, also did not treat accepted highway sign standards as determinative of liability.

Highway liability expanded again in *Stewart v. State*¹⁴⁵ on a claim that the State was negligent because it did not have lighting on an interstate highway bridge. After rejecting discretionary immunity, *Stewart* held that the State could be liable for negligent design.¹⁴⁶ *Stewart* did not limit liability to claims that the bridge was not constructed to accepted design standards for freeways. Rather, *Stewart* indicated that liability might be based on expert testimony that a different design for lighting on the bridge would have been "good practice."¹⁴⁷ Unlike *Morgan v. State*,¹⁴⁸ decided 12 years earlier, *Stewart* did not look to federal or state design standards for such bridges to determine if the State should have liability.

Two later cases somewhat reduced the new highway design liability. In *McCluskey v. Handorff-Sherman*,¹⁴⁹ plaintiffs alleged that the State was negligent in failing to improve an older road by repaving it and by adding modern median barriers. *McCluskey* indicated that it might be proper for the State to present a funding limitation defense on claims for failure to make capital improvements.¹⁵⁰ More significantly, *McCluskey* contained *dicta* implying that discretionary immunity would protect against claims that arise from the State's failure to allocate funds for capital improvements through its statutory priority array process.¹⁵¹ A county case resolved a similar issue on the basis of duty rather than immunity. *Ruff v. County of King*, held that the county had no duty to upgrade an older road to current safety standards unless the road itself was inherently dangerous or deceptive to a prudent driver.¹⁵²

By the late 1970s, the waiver produced new liability for the governmental functions of road design and improvement. The Washington Supreme Court later limited liability for failure to upgrade older facilities, but did not limit liability for negligent original design,

145. 92 Wash. 2d 285, 597 P.2d 101 (1979).

146. *Id.* at 294, 597 P.2d at 106-07.

147. *Id.* at 293, 597 P.2d at 106.

148. 71 Wash. 2d 826, 430 P.2d 947 (1967).

149. 125 Wash. 2d 1, 882 P.2d 157 (1994).

150. *Id.* at 8-9, 882 P.2d 161.

151. Capital improvements to state highways are controlled by priority and funding procedures governing the state Department of Transportation, the Transportation Commission, and the Legislature. WASH. REV. CODE § 47.05 (1994). The supreme court has also held that evidence of funding considerations is material in government cases involving capital improvements because funding is an issue in government liability cases, even if it would not be an issue in private liability cases. *See Bodin v. Stanwood*, 130 Wash. 2d 726, 927 P.2d 240 (1996). Thus, one of the results of Washington's narrow discretionary immunity is that government budget issues are tried to juries.

152. 125 Wash. 2d 697, 707-08, 887 P.2d 886, 891 (1995).

even if the design complied with highway design standards.¹⁵³ There was inconsistency in this result. If a public agency was sued for failure to improve a road by rebuilding it to meet a standard adopted after the road's construction, the case would be dismissed based on *Ruff* because there would be no duty to upgrade the road with features not required by standards when the road was constructed. However, if an agency was sued for its alleged negligence in failing to incorporate these same features at the time of construction, the lawsuit could proceed based on *Stewart* if the court heard testimony that it would have been "good practice" for the agency to design the road differently.

*e. Liability for Release and Supervision of
Mental Patients and Criminal Offenders*

During the early 1980s, Washington courts began to consider claims that the government was liable for the crimes and accidents of released mental patients and criminal offenders. Over the next fifteen years, several cases created liability for these governmental functions.

The issue of liability for actions of released mental patients arose first. In 1983, *Petersen v. State* held that the State could be liable for an automobile accident caused by a former mental patient.¹⁵⁴ The basis of liability was a doctor's decision not to petition the court for an extra ninety-day commitment, and the doctor's failure to report probation violations on a burglary.¹⁵⁵ *Petersen* held that discretionary immunity did not protect the doctor's decisions.¹⁵⁶ *Petersen* then held that the doctor's "special relationship"¹⁵⁷ with the patient created a duty to protect anyone foreseeably endangered by the patient's drug-related mental problems.¹⁵⁸

Considering the civil commitment statutes and the unusual facts of *Petersen*, the court's holding in that case is an odd one. In *Petersen*, the patient had not been committed because he was dangerous to others or a bad driver, but because he was gravely disabled and a danger to

153. Design of highways is commonly excepted from liability in other states if the design conforms substantially with accepted standards. See IDAHO CODE § 6-904(7) (1971). Other states also provide that failure to make capital improvements or major repairs is excepted from liability.

154. 100 Wash. 2d 421, 435, 671 P.2d 230, 241 (1983).

155. *Id.*

156. *Id.*

157. *Id.* at 426, 671 P.2d at 236. The term is the same as used for the exception to the public duty doctrine, but the concept is different. A special relationship under the public duty doctrine is between the government and the plaintiff, whereas in release and supervision cases, it is between the government and the released patient or offender and not with the plaintiff, although it creates a duty running to the plaintiff.

158. The Legislature adopted a statute in 1987 which changed the liability standard from negligence to gross negligence. WASH. REV. CODE § 71.05.120 (1987).

himself.¹⁵⁹ State law prohibited holding drug abusers as mental patients unless they had an ongoing mental health problem,¹⁶⁰ and prohibited disclosing patient information to third parties, such as probation officers.¹⁶¹ *Petersen's* willingness to hold the State liable notwithstanding these circumstances contrasts starkly with *Evangelical*, which used foreseeability to avoid state liability for a fire set by an escapee who had a history of both escape and fire setting. Despite the unusual nature of its facts and its deviation from the *Evangelical* approach, *Petersen* became the basis for claims that government had a special relationship with offenders released from correctional facilities.

In the ten years after *Petersen*, governments, as well as private treatment facilities, were sued for failure to prevent crimes by offenders in treatment or under post-release supervision. Several cases were dismissed on the basis of lack of duty or proximate cause because the crime was unrelated to the crimes for which the offender was being treated or supervised.¹⁶² No case decided whether government could have liability for crimes by offenders under post-release supervision until 1991. *Forest v. State* held that there was no duty to prevent crimes by offenders on parole because the purpose of parole was to rehabilitate offenders and improve public safety generally, and not to protect individuals.¹⁶³ *Forest* found that the failure to enforce exception to the public duty doctrine did not apply because reporting of violations by parole officers was discretionary.¹⁶⁴ *Forest* stated that creating liability for parole would be poor public policy because it would negatively affect the parole system.¹⁶⁵

159. *Peterson*, 100 Wn. 2d at 424, 671 P.2d at 235. See WASH. REV. CODE § 71.05.150 (1983).

160. See WASH. REV. CODE § 71.05.040 (1983).

161. Former WASH. REV. CODE § 71.05.390 (1983).

162. See, e.g., *Johnson v. State*, 68 Wash. App. 294, 841 P.2d 1254 (1992); *review denied*, 121 Wash. 2d 1018, 854 P.2d 42 (1993) (drunk driving accident by offender with substance abuse problem, but who was in custody for reasons not related to substance abuse); *McKenna v. Edwards*, 65 Wash. App. 905, 830 P.2d 385 (1992), *review denied*, 120 Wash. 2d 1003 (1992) (drug and alcohol offender who committed rape and murder); *Noonan v. State*, 53 Wash. App. 558, 769 P.2d 313 (1989), *review denied*, 112 Wash. 2d 1027 (1989) (burglar in alcohol treatment who committed rape); *Baumgart v. Grant County*, 50 Wash. App. 671, 750 P.2d 271, *review denied*, 110 Wash. 2d 1033 (1988) (driving accident by a person with a bad driving record, but in custody only for burglary). Two of these cases (*Noonan* and *McKenna*) analyzed the issue as one of "duty," and two of the cases (*Baumgart* and *Johnson*) used the same analysis, but called the issue "proximate cause." Also, *Melville v. State*, 115 Wash. 2d 34, 39-40, 793 P.2d 952, 955 (1990) held that the State did not have a duty to provide mental health treatment that would prevent an offender from committing crimes after release.

163. 62 Wash. App. 363, 370, 814 P.2d 1181, 1185 (1991). The analysis in *Forest* was similar to the analyses in New York cases.

164. *Id.*

165. *Id.* at 369-70, 814 P.2d at 1185. Washington liability would also have been unfair because the offender was an Oregon parolee receiving interstate supervision. Under Oregon law, an officer

Forest indirectly rejected the *Petersen* analysis by analyzing supervision of offenders as a correctional function done to benefit society rather than as an activity meant to prevent crimes against individuals. However, in 1992, *Taggart v. State*, without overruling *Forest*, held that parole officers had a “take charge” relationship with parolees.¹⁶⁶ This holding created the kind of special relationship discussed in *Petersen*. The court stated that “parole officers had a duty to protect others from reasonably foreseeable dangers engendered by parolees’ dangerous propensities.”¹⁶⁷ *Taggart* held that neither discretionary immunity nor quasi-judicial immunity protected the state from liability.¹⁶⁸ The court characterized the parole officer’s supervision of parolees as administrative rather than quasi-judicial in nature.¹⁶⁹

Taggart was remarkably different from case law in other jurisdictions. Although the court discussed authority from other states, it relied on cases which contained special circumstances, such as disobedience of a court order, giving permission for prohibited employment, or failure to provide information.¹⁷⁰ When other jurisdictions directly considered whether parole officers had a duty to prevent crime by offenders, they found that there was no duty or that there was discretionary immunity.¹⁷¹ *Taggart* did cite two cases creating a duty to prevent crimes by offenders, but one of those cases was overridden by legislation and one has not been followed and is on the verge of being overruled.¹⁷² Subsequent to *Taggart*, other jurisdictions continued to find immunity or create no duty for this governmental function.¹⁷³

supervising an offender is not considered to have control over an offender and is not liable for an offender’s crimes. There is also a \$100,000 limit on any claims against the state. See *Kim v. Multnomah County*, 970 P.2d 631 (Or. 1998); OR. REV. STAT. § 30.270 (1987).

166. 118 Wash. 2d 195, 222, 822 P.2d 243, 257-58 (1992).

167. *Id.* at 224, 822 P.2d at 257-58.

168. *Id.* at 228-29, 822 P.2d at 260.

169. *Id.* at 205-6, 822 P.2d at 248.

170. *Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir. 1976), *cert. denied*, 429 U.S. 827 (1976); *Acevedo v. Pima County Adult Prob. Dep’t*, 142 Ariz. 319, 960 P.2d 38 (Ariz. 1984); *Johnson v. State*, 447 P.2d 352 (Cal. 1968).

171. See, e.g., *Berling v. Ohio Dep’t of Rehab. & Corr.*, 557 N.E.2d 174 (Ohio Ct. Cl. 1989); *C.L. v. Olson*, 422 N.W.2d 614 (Wis. 1988).

172. *Sterling v. Bloom*, 723 P.2d 755 (Idaho 1986), *overridden by* IDAHO CODE § 6.904A (1988); *Dep’t of Corrs. v. Neakok*, 721 P.2d 1121 (Alaska 1986), has not been applied in later cases, and *State v. Sandsness*, 72 P.3d 299 (Alaska 2003), indicates that it will likely be overruled if challenged.

173. See, e.g., *Schmidt v. HTG, Inc.*, 961 P.2d 677 (Kan. 1998). In *Schmidt*, the Kansas Supreme Court stated: “We reject this overbroad construction [*Taggart*] which escalates the State’s responsibility to that of a virtual guarantor of the safety of each and every one of its citizens from illegal and unlawful actions of every parolee or person released from custody under any type or kind of supervision.” *Schmidt*, 961 P.2d at 687.

Taggart created an expansive liability. The court expressed concern that liability might adversely affect the ability of parole officers to make decisions about the liberty of parolees and the safety of the public.¹⁷⁴ To mitigate this problem, *Taggart* created an immunity for parole supervision “if [the officer’s] action is in furtherance of a statutory duty and in substantial compliance with the directives of superiors and relevant regulatory guidelines.”¹⁷⁵ Three years later, *Savage v. State* effectively removed the immunity by holding that it protected only parole officers personally and not the State.¹⁷⁶

Taggart also expressed concern over the implications of its decision by stating that the Legislature could deal with problems created by the court’s decision. Before the waiver, the Washington Supreme Court declined to create liability for the State and deferred the policy issues implicit in government liability to the Legislature.¹⁷⁷ After the open-ended waiver, the court no longer deferred policy decisions on expansions of government liability to the Legislature, but made those decisions itself with the suggestion that the Legislature could deal with any resulting problems.

Later cases expanded *Taggart*. *Bishop v. Miche*¹⁷⁸ and *Hertog v. City of Seattle*,¹⁷⁹ for example, held that county and city probation and pretrial release officers could be liable for failing to monitor and report violations to the court.¹⁸⁰ *Bishop* and *Hertog* rejected arguments that officers reporting to the court had quasi-judicial immunity.¹⁸¹ However, *Bishop* ultimately dismissed the plaintiff’s claim because the court had broken the chain of causation by continuing the offender on probation after a full report by the probation officer two days before the offender caused the fatal accident.¹⁸²

174. *Taggart*, 118 Wash. 2d at 215, 822 P.2d at 253.

175. *Id.* at 216, 822 P.2d at 253-4. Dissenting Justice Guy characterized the qualified immunity as “illusory and nothing more than a negligence standard wrapped like a gift box which contains sticks and ashes.” *Id.* at 236, 822 P.2d at 263-4 (Guy, J. dissenting).

176. 127 Wash. 2d 434, 441-42, 899 P.2d 1270, 1274 (1995). *Savage* states that *Taggart* created qualified immunity only to protect parole officers from monetary loss, but, as both the dissent and a law review comment note, *Taggart* pointed out that all state employees have statutory indemnity from the state under WASH. REV. CODE § 4.92 (2002). Thus, the immunity in *Taggart* must have been intended to protect the state. See Kristi Anderson Bjornerud, *The Uncertain Scope of Sovereign Immunity in Washington After Savage v. State*, 71 WASH. L. REV. 1069 (1996).

177. See, e.g., *Kilbourn v. City of Seattle*, 43 Wash. 2d 373, 261 P.2d 407 (1953).

178. 137 Wash. 2d 518, 973 P.2d 465 (1998).

179. 138 Wash. 2d 265, 979 P.2d 400 (1999).

180. *Bishop*, 137 Wash. 2d at 525-26, 973 P.2d at 469; *Hertog*, 138 Wash. 2d at 275-76, 979 P.2d at 406-07.

181. *Bishop*, 137 Wash. 2d at 526, 973 P.2d at 469; *Hertog*, 138 Wash. 2d at 290-91, 979 P.2d at 414.

182. *Bishop*, 137 Wash. 2d at 532, 973 P.2d at 472.

Bishop and *Hertog* appeared to reject *Savage's* holding that the immunity of the officer does not apply to the government, as there was evidence in both cases that the officers complied with all directives governing supervision of the offenders. The courts stated that the qualified immunity that might protect the officers in this circumstance would not protect the city and county from claims for their negligence in adopting the regulations, but did not state that the city and county would remain liable for the officers' acts.¹⁸³

In *Hertog*,¹⁸⁴ the concurring judge argued that *Taggart* ignored the reality that officials often lack the means to control dangerous offenders.¹⁸⁵ The supreme court acknowledged the concurrence, but declined the invitation to modify *Taggart*, reiterating that the Legislature could respond to any liability problems.¹⁸⁶ The court noted that liability claims did not appear to have been a problem for the state after *Taggart*.¹⁸⁷ This would change soon after *Bishop*.

f. Social Welfare Liability

By the 1980s, the state's social programs faced claims of liability in several lawsuits involving programs for dependent children and investigations of child abuse.¹⁸⁸

*Babcock v. State*¹⁸⁹ was the first case that imposed liability on a social program. *Babcock* involved four girls who had been removed from the custody of their father by a Louisiana court and placed with their grandparents in Washington. Due to interference by the father, social workers removed the girls from their grandparents' home, placing them instead with their maternal aunt and uncle.¹⁹⁰ Later, the girls reported abuse by the uncle.¹⁹¹ The lawsuit claimed that the State had been negligent because it had not done a criminal background check on the uncle who had been acquitted of rape some years earlier.¹⁹² The supreme court originally affirmed a dismissal because the placements had been approved by the Washington court following contested hearings.¹⁹³ The asserted basis for liability was that the social workers had been negligent

183. *Id.* at 532; *Hertog*, 138 Wash. 2d. at 278, 979 P.2d at 408.

184. 88 Wash. App. 41, 63, 943 P.2d 1153 (1997) (Agid, J. concurring).

185. *Id.*

186. *Hertog*, 138 Wash. 2d. at 278-79, 291, 979 P.2d at 408, 414.

187. *Id.* at 278-79, 979 P.2d at 408.

188. Under WASH. REV. CODE § 13.34 (1977), the courts can take custody of abandoned, abused, or neglected children who are defined as "dependent."

189. 112 Wash. 2d 83, 768 P.2d 481 (1989).

190. *Id.* at 87, 768 P.2d at 483.

191. *Babcock v. State*, 112 Wash. 2d 83, 90, 768 P.2d 481, 486 (1989).

192. *Id.* at 91, 768 P.2d at 486.

193. *Id.* at 108, 768 P.2d at 494.

in preparing reports to the court because they had not discovered the uncle's acquittal.¹⁹⁴ The court held that the reports to the court must be protected by prosecutorial and witness immunity in order to preserve the integrity of the judicial process.¹⁹⁵

Two years later, the court reconsidered and held that social workers did not have absolute immunity.¹⁹⁶ On reconsideration, the court considered the social workers' investigation to be separate from the judicial process.¹⁹⁷ This was a major change from prior law which had held that prosecutorial and judicial immunity barred claims for negligence in investigations preceding decisions to prosecute or in preparing a report to the court.¹⁹⁸ The court's rejection of immunity for social workers involved in juvenile dependencies opened a large new area of governmental liability. Justice Dore's dissent argued that the extent of liability for alleged errors in dependencies could be a problem, noting that the state had but 850 social workers for 25,000 to 27,000 children in dependencies.¹⁹⁹

Later decisions interpreted *Babcock* broadly, creating more liability for governmental child welfare functions. *Babcock* had dealt only with the scope of immunity for a child placement decision, not with issues of duty and negligence, which were to be decided on remand.²⁰⁰

194. *Id.* at 94-95, 768 P.2d at 488.

195. The dependency statutes create a system of shelter care, disposition, and review hearings in which the court makes decisions concerning removal of children from parents, care of children while in court custody, and eventual permanent placement of children. The role of social workers is to act variously as investigators, prosecutors, and service coordinators within the court-directed system. WASH. REV. CODE §§ 13.34 (1977), 26.44 (1999), 74.13 (1965), 74.15 (1995).

196. *Babcock*, 112 Wash. 2d at 87, 768 P.2d at 483.

197. *Babcock v. State*, 116 Wash. 2d 596, 610, 809 P.2d 143, 151 (1991).

198. *See, e.g., Creelman v. Svenning*, 67 Wash. 2d 882, 410 P.2d 606 (1966). The *Creelman* court applied prosecutorial immunity to reject a claim that a prosecutor had inadequately investigated a case. The following two cases held that judicial immunity protected mental health officials from claims that they had been negligent in making recommendations to courts. *Tobis v. State*, 52 Wash. App. 150, 758 P.2d 534 (1988); *Bader v. State*, 43 Wash. App. 223, 716 P.2d 925 (1986).

199. *Babcock* did hold that social workers should have a qualified immunity from suit because, like police officers, they were charged with making decisions that greatly interfered with people's lives and making difficult decisions under difficult circumstances. *Guffey v. State*, 103 Wash. 2d 144, 690 P.2d 1163 (1984), created a qualified immunity for police officers. This immunity, like discretionary immunity in jurisdictions other than Washington, would protect social worker judgments, as long as no statutes or agency procedures were violated and their actions were "reasonable." In his concurrence, Justice Anderson objected to this qualified immunity as too narrow and "virtually non-existent and illusory." Justice Anderson's view appears to have been validated by *Waller v. State*, 64 Wash. App. 318, 824 P.2d 1225 (1992), *review denied*, 119 Wash. 2d 1014, 833 P.2d 1390 (1992), and *Lesley v. Dep't of Soc. & Health Servs.*, 83 Wash. App. 263, 921 P.2d 1066 (1996), *review denied*, 131 Wash. 2d 1026 (1997), which declined to grant qualified immunity to judgments made by social workers about investigations.

200. Duty and negligence were contested because state law did not require criminal background checks for relatives and because the uncle's arrests and acquittal were non-conviction

Nevertheless, a series of decisions interpreted *Babcock* as creating a duty to investigate, which ran in favor of the suspects in investigations.²⁰¹ Although *Babcock* stated that social workers would have absolute immunity if they had initiated a dependency and if all of their investigative results had been part of an adversary process, the Washington Court of Appeals held that this language was *dicta* and did not create social worker immunity.²⁰² In *Lesley v. Dep't of Soc. & Health Servs.*,²⁰³ the court refused to give collateral estoppel effect to a dependency court decision approving removal of children from parents after contested "shelter care" hearings. However, two years later, in *Tyner v. Dep't of Soc. & Health Servs.*,²⁰⁴ the court held that a social worker's alleged negligent investigation was not the proximate cause of a child's removal from her parents, which occurred only after a judge ordered removal following a hearing.²⁰⁵

The cases after *Babcock* were based on an assumption that the state owed a tort duty to parties in dependency proceedings. These cases did not resolve the question of whether statutes created a public duty to investigate child abuse for the overall benefit of society or a specific duty to investigate for the benefit of individuals. As noted previously in the discussion of the public duty doctrine, *Yonker v. Dep't of Soc. & Health Servs.* held that child protective statutes satisfied the legislative intent

data unavailable to non-law enforcement agencies such as the Department of Social and Health Services. Chief Justice Dore's dissent in *Babcock* discussed the duty and negligence issues extensively.

201. *Tyner v. Dep't. of Soc. & Health Servs.*, 141 Wash. 2d 68, 1 P.3d 1148 (2000); *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wash. App. 569, 950 P.2d 20 (1998), *review denied*, 135 Wash. 2d 1015, 960 P.2d 937 (1998); *Lesley*, 83 Wash. App. 263, 921 P.2d 1066 (1996); *Waller*, 64 Wash. App. 318, 824 P.2d 1225 (1992); *Dunning v. Pacerelli*, 63 Wash. App. 232, 818 P.2d 34 (1991). None of these cases acknowledged *Favors v. Matzke*, 53 Wash. App. 789, 770 P.2d 686 (1989), which held that state investigation statutes did not create a duty to subjects of investigations.

202. *Gilliam*, 89 Wash. App. 569, 950 P.2d 20 (1998). This was the conclusion even when a parent had stipulated to the dependency process and cooperated in the dependency investigation and resolution through the court process.

203. 83 Wash. App. 263, 921 P.2d 1066 (1996).

204. 92 Wash. App. 504, 963 P.2d 215 (1998), *rev'd by Tyner v. Dep't of Soc. & Health Servs.*, 141 Wash. 2d 68, 1 P.3d 1148 (2000).

205. *Tyner* stated that the social worker had presented all the material facts needed by the court to decide the issue of removal. *Tyner* distinguished *Lesley* on the basis that the social worker in *Lesley* had removed the child before obtaining a court order, whereas the *Tyner* social worker had acted wholly within the judicial process by first obtaining a court order. *Tyner* was in error on that point because social workers have no statutory authority to take custody of children without a court order; only police have this authority and the facts in *Lesley*, 83 Wash. App. at 266-67, 921 P.2d 1068-69, indicate that a police officer took custody of the child. *Tyner* was eventually reversed by the supreme court on the basis that there was a fact question on whether all material facts had been disclosed to the judge, but the proximate cause defense was left intact. *Tyner*, 141 Wash. 2d 68, 1 P.3d 1148.

exception to the doctrine and created a state tort duty to prevent child abuse.²⁰⁶

2. Claim and Legal Defense Costs

The total cost of state payments on tort lawsuits and claims rose steadily from 1974 to 1998. From 1975 to 1979, the tort payouts averaged approximately \$2 million per biennial period, slightly more than twice the average from the prior ten years.²⁰⁷ From that point, the payouts almost doubled in every biennium, except one, for ten years, reaching \$28 million in the 1987-89 biennium. The payouts averaged approximately \$20 million per biennium from 1989-95 and doubled to approximately \$40 million per biennium from 1995-99.

The increase in tort payouts aligned with decisions expanding governmental liabilities. The period in the 1980s in which payouts rose from less than \$2 million to \$28 million followed cases which narrowed discretionary immunity and created liabilities for regulatory, police, correctional, and highway design and improvement functions. The doubling of payouts after 1995 was consistent with the effect that would be expected from claims caused by the expansion of social welfare and correctional liability in *Babcock* (1991) and *Taggart* (1992).

In the 1980s, the state resolved ten claims for more than \$1 million, all but two of which involved a vehicle collision or a property claim. Large claims became more frequent in the 1990s, when twenty-two claims resolved for more than \$1 million between 1990 and 1998. Of these claims, twelve involved correctional, social welfare, highway design, or regulatory liabilities, four involved personnel or civil rights liabilities, and only six involved traditional liabilities.

The new liabilities for correctional and social welfare functions accounted for a large amount of the increase in claim payouts. The claims almost always involved murder, violent crimes, sex or physical abuse, severe neglect, or drunk driving. The claimants were usually children, disabled, surviving spouses, or crime victims. The fear that

206. 85 Wash. App. 71, 81-82, 930 P.2d 958, 964 (1997). This liability was initially inconsistent with police liability because the public duty doctrine protected police from liability for alleged negligence in investigation. The possibility that the State could risk manage its liability by sending complaints to the police, ended with *Rodriguez v. Perez*, 99 Wash. App. 439, 994 P.2d 874 (2000), *review denied*, 141 Wash. 2d 1020, 10 P.3d 1073 (2000), which held that police have the same liability as social workers.

207. Data for biennia before Fiscal Year (FY) 1985 are drawn from historical records maintained by the Attorney General's Torts Division of data originally compiled by the Office of Financial Management (OFM). Summary data after FY 1985 are drawn from the 1989-91 and 1999-01 Risk Management Biennial Reports prepared by the Division of Risk Management of the Department of General Administration.

sympathetic juries would return high awards to plaintiffs spawned increasingly high settlements in such cases. The three largest payments on claims filed between 1990 and 1998 were two jury verdicts and one settlement, together totaling over \$29 million and involving a murder by a parolee and claims of sexual and physical abuse in group or adult family homes.²⁰⁸

State legal defense costs remained modest throughout the 1970s. By 1980, the Torts Division had seven lawyers, eleven investigators, and other support staff, all on a biennial budget of approximately \$2 million. The state's staff remained relatively constant until the rapid increase in liabilities in the mid-1980s. In 1987, a management study recommended a large increase in tort defense due to the number, cost, and complexity of state liabilities.²⁰⁹ Torts Division staff increased to eighty-five, including over thirty lawyers. This staff remained essentially the same until 1999, with a budget increasing from \$11 million to \$20 million a biennium over that period. Tort claim costs declined for several years after the increase in the state's tort defense effort. There was an apparent correlation between the declining claim costs and increased defense efforts.

In contrast to the small and stable tort claim and defense costs from 1961 to 1974, the costs in the next twenty-five years rose substantially and consistently. In 1974, the total biennial cost of state tort liability was approximately \$2 million and stable. Twenty-five years later, the biennial cost was \$65 million or more and increasing steadily.²¹⁰

3. Tort Reform in the 1980s

Local government reacted quickly to the liability for governmental activities and the increase in claim costs. In his June 1978 remarks to municipal and prosecuting attorneys, the Seattle City Attorney viewed the waiver less positively than did the Attorney General in 1961:

208. The \$6.4 million jury verdict in the case involving a murder by a former parolee came shortly after *Bishop v. Miche* observed that liability under *Taggart* did not appear to have created problems for the state.

209. LEGAL SERVICES MANAGEMENT STUDY, OFFICE OF THE ATT'Y GEN., PHASE I, RECOMMENDED STAFFING LEVELS, Price Waterhouse (1987).

210. This cost did not include risk management and claim adjustment staff at the OFM, the DOT, and other agencies. The Price Waterhouse study had recommended a major increase in risk management. Legislation established a risk management and claim adjustment office at the Department of General Administration (DGA), which moved to the OFM in 1999. 1989 Wash. Laws 419. Large agencies also have risk management staff. The cost also did not include premiums (\$3 million in 1993) for the excess insurance policy that the state began purchasing in FY 1993 to cover claims over \$5 million. If the 1974 cost was adjusted using the price deflator, *supra* note 77, the 1998 tort cost would have been approximately \$5 million rather than \$65 million.

The years since 1961 have not been kind to the old King in the State of Washington. He was hit and run by the legislature with the adoption of RCW 4.92.090 and RCW 4.96.010, kicked in the shins by the Supreme Court when it struck down our claims statutes, and suffered a heart attack with the adoption of comparative negligence. If there is any life left in the old boy, he is now drowning in the rising tide of lawyers and litigation.

The cities and counties in the State of Washington are now suffering the consequences of the King's demise. Million dollar claims and unending theories of liability haunt nearly every government decision. Each year the governments we serve expand their responsibilities and regulations (from SEPA to Shorelines to Public Disclosure to traffic lights), yet each year there are increasing numbers of plaintiffs who appreciate our vulnerability. Comprehensive insurance coverage at affordable prices is rapidly becoming a thing of the past.²¹¹

The Seattle City Attorney proposed legislation assigning government liability only for activities comparable to those in the private sector, but not for uniquely governmental activities. The proposed legislation contained liability limitations for regulations (licensing, permits, inspections), road and facility design, fire protection, and failure to prevent crime.

Local government liability issues lead the Washington State House and Senate Local Government Committees to conduct a 1979 study on local government insurance problems.²¹² In addition to recommending legislation facilitating risk management and risk pooling, the study recommended changes in substantive law. The most significant proposal was to eliminate joint and several liability for government so that it would not be the "deep pocket" when it was joined as a defendant with

211. Douglas N. Jewett, *Submission of A Working Draft of Legislation Limiting Municipal Tort Liability*, presentation to Washington State Association of Municipal Attorneys and Washington State Association of Prosecuting Attorneys (June 15, 27, 1978). The reference to the claims statute related to *Hunter v. North Mason Sch. Dist.*, 85 Wash. 2d 810, 539 P.2d 845 (1975), which held that time limits on government claims were unconstitutional under the state constitution, despite article II, section 26 of the Constitution, which permitted the Legislature to direct the manner of suing the state. *Petersen v. State*, 100 Wash. 2d 421, 671 P.2d 230 (1983), later held that cost bonds in state tort cases were also unconstitutional.

212. Concerns about these issues also arose in other states with early waivers of immunity. Although California had re-imposed immunities for governmental functions, courts had interpreted the immunities narrowly, the immunities had eroded, and claims and large judgments had increased in areas not formerly subject to liability. Insurance companies in California viewed municipal liability as uncertain, with risks which were unstable, unpredictable, and often hard to manage due to their inherent risk. Staff Background Paper, *Government Liability*, (June 1977); *California Citizens' Commission on Tort Reform* at 52-53, 86-89, 111-12, INDEP. COMM'N REPORT (1977).

others who had no resources. The study also endorsed bills to provide for contribution among tortfeasors and to establish a 180-day claim filing deadline. Additionally, it proposed bills allowing governmental "affirmative defenses" based on compliance with standards in road and facility cases and lack of notice in inspection cases.

By the early 1980s, the liability for governmental functions created concerns for the state. In 1984, the Attorney General wrote a letter to legislative leaders suggesting that they consider immunities for certain government functions.²¹³ The letter emphasized that the loss of almost all discretionary immunity created extensive liability for judgment calls by public employees in areas of design, law enforcement, and social services. It further emphasized that most tort lawsuits did not involve the direct liability of the state, but involved indirect liability on a theory that the state failed to prevent another party's conduct.

In the ten years prior to the 1984 letter, the Legislature enacted two major tort law changes, the first of which increased government liability, the second of which did not.²¹⁴ The Legislature did not respond to the suggestions for government-specific tort reform, but events in the next two years led to a general tort reform that decreased government liability. In 1985 and 1986, there was a "hard" insurance market caused by declining interest rates, past competition and rate decreases in the insurance industry, and insurance underwriting losses caused by expanding liabilities in many corporate, professional, and public enterprises.²¹⁵ This change caused large premium increases or unavailability of insurance for enterprises with unpredictable risks.²¹⁶ In Washington, the "insurance crisis" produced a coalition of self-insured

213. Ken Eikenberry, *Letter to Legislative Leaders Re: Government Liability* (Apr. 3, 1984).

214. In 1974, the Legislature adopted comparative negligence rather than contributory negligence, which permitted claims against highway agencies by drivers who formerly had no claim. 1973 Wash. Laws 138. In 1981, the Legislature allowed joint tortfeasors to sue each other for contribution, but this did not help public entities who were deep pocket defendants in cases with insolvent codefendants. 1981 Wash. Laws 27.

215. RICHARD K. WILLARD & ROBERT L. WILLMORE, U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (Feb. 1986). An *ad hoc* committee of the National Association of Attorneys General (NAAG) disagreed with the conclusion that increases in tort liability had a connection with increasing insurance costs, but the experience of the state of Washington as a large uninsured entity was consistent with the Justice Department report and not the NAAG report. See FRANCIS X. BELLOTTI, NAT'L ASS'N OF ATTYS. GEN. AD HOC COMMITTEE ON INSURANCE, AN ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE (1986). Independent studies of the 1985-86 insurance issues revealed that routine cases, such as automobile claims, were not growing, but that "high stakes" torts were growing much faster in frequency and cost. See RAND CORPORATION, THE INSTITUTE FOR CIVIL JUSTICE, TRENDS IN TORT LITIGATION, THE STORY BEHIND THE STATISTICS (1987).

216. See *supra* note 199 and accompanying text.

businesses, local governments, nonprofit organizations, and professionals that successfully supported tort reform.²¹⁷ The two most significant reforms were a general damages cap and a change from joint and several liability to proportional liability in cases in which a plaintiff had some fault.²¹⁸

In 1989, the Washington Supreme Court held that the damage cap was unconstitutional,²¹⁹ but left joint and several liability unscathed. Proportional liability mitigated the effect of the loss of contributory negligence in cases against governments. If a plaintiff who had fault joined the government as a defendant with an uninsured driver or criminal, the government would only pay for its share of fault, which was often small.²²⁰ While the change in joint and several liability probably helped lower tort payments in the early 1990s, much of the benefit of this reform was lost when *Welch v. Southland* held that liability could not be apportioned to intentional tortfeasors under RCW 4.22.²²¹ This holding prevented governments from apportioning fault to criminals and drunk drivers who were often codefendants in the most expensive cases.

C. Washington Government Liability Law: 1999-2005

In the last six years, government liability has not expanded as rapidly as it did over the prior twenty-five years. While broad liabilities remain, certain governmental liabilities were curtailed, particularly in the area of offender supervision and child welfare. In contrast to mild retrenchment in those areas, liability for governmental highway design decisions has not receded.

1. Case Law Developments

a. Duty and Public Duty

Many cases which expanded governmental liability, such as *Petersen v. State*,²²² created new duties without reference to or in spite of the statutes governing the public agency. Recent cases have done the opposite by looking at governing statutes to determine if an agency has a tort duty. For instance, in *Murphy v. State*,²²³ a sheriff sued the Pharmacy

217. 1986 Wash. Laws 305. See Talmadge & Peterson, *In Search of a Proper Balance*, 22 GONZ. L. REV. 259 (1986).

218. 1986 Wash. Laws 305 at §§ 401, 501.

219. *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989).

220. If a plaintiff had no fault, the government would be responsible for the fault of an insolvent codefendant.

221. 134 Wash. 2d 629, 630, 952 P.2d 162, 163 (1998).

222. 100 Wash. 2d 421, 671 P.2d 230 (1983).

223. 115 Wash. App. 297, 62 P.3d 533 (2003).

Board for negligence in disclosing his confidential prescription records to support an unsuccessful prosecution. The *Murphy* court, deciding whether there was a duty to protect the confidentiality of the records by carefully examining pharmacy statutes, held that pharmacy statutes allowed disclosure to the prosecutor despite a Pharmacy Board practice of following medical privacy statutes.²²⁴ Ultimately, *Murphy* stated that agencies are creatures of statute whose duties are determined by the Legislature, not by their employees.²²⁵

Application of the public duty doctrine has remained consistent since the late 1990s. There have been no new cases applying the legislative intent exception. *Halleran v. State*²²⁶ is demonstrative. *Halleran* involved a lawsuit claiming negligent investigation by the State Securities Division, and the court reiterated that the failure to enforce exception requires a mandatory statutory duty to act rather than discretionary enforcement authority.²²⁷ The Washington Supreme Court continues to hold that statements by 911 operators can fall within the special relationship exception and create a duty to prevent crime.²²⁸ However, *Sinks v. Russell*²²⁹ limits the duty to situations in which the 911 call indicates that a crime is imminent rather than indicating simply that police assistance is desired.²³⁰

The public duty doctrine remains unevenly applied to affirmative acts by officials. In *Borden v. City of Olympia*,²³¹ plaintiffs sued the city after it approved a private storm water system that flooded on neighboring property. Even though the city did not own or operate the system, *Borden* held that the public duty doctrine did not apply because the city's role was "proprietary," not regulatory, as it was involved in financing and design assistance.²³² In contrast, *Babcock v. Mason County Fire Dist.* held that the public duty doctrine protected a fire district from liability for alleged negligent decisions about how to fight a fire, a markedly different treatment of affirmative acts.²³³ This holding was a rare decision applying the doctrine to protect against liability for acts rather than failures to act. If the officials had relied on discretionary

224. *Id.* at 304-5, 62 P.3d at 537.

225. *Id.* at 317, 62 P.3d at 543.

226. 123 Wash. App. 701, 98 P.3d 52 (2004).

227. *Id.* at 714, 98 P.3d at 58.

228. *Bratton v. Welp*, 145 Wash. 2d 572, 39 P.3d 959 (2002).

229. 109 Wash. App. 299, 34 P.3d 1243 (2001).

230. *Id.* at 302-3, 34 P.3d at 1245.

231. 113 Wash. App. 359, 53 P.3d 1020 (2002).

232. *Id.* at 371, 53 P.3d at 1026.

233. 144 Wash. 2d 774, 793, 30 P.3d 1261, 1272 (2001).

immunity rather than on the public duty doctrine, they likely would have been found liable because firefighting decisions are not policy decisions.

b. Correctional and Social Welfare Liability

Taggart v. State continues to hold the government liable for crimes committed by offenders under probation or post-release supervision.²³⁴ However, liability has been reduced by decisions that require proof that better supervision would have prevented the crime.

Taggart and subsequent cases dealt with duty and immunity issues but did not discuss how a plaintiff would prove that better supervision would prevent a crime. The assumption seemed to be that the plaintiff would show supervision violations that should have resulted in the offender being incarcerated. Two cases have now established that requirement. First, *Bell v. State* held that the plaintiff has the burden of proving that “but for” negligent supervision, the new crime would not have occurred.²³⁵ The court affirmed a jury verdict in favor of the State on the issue of causation, the basis of which was lack of evidence that the Parole Board would have revoked parole had violations been reported.²³⁶

Next, *Estate of Borden v. Dep't of Correction*²³⁷ made the causation requirement even more stringent. *Borden* reversed a plaintiff verdict because there was no evidence that the judge would have jailed the offender if alleged violations had been reported, no evidence that any jail sentence would have coincided with the date of the crime, and no evidence that the prosecutor would have noted the violations for hearing.²³⁸ *Borden* is significant because modern post-release systems provide for a return to jail only for short periods.²³⁹ Additionally, the case demonstrated just how difficult it is to prove that revocations of probation or release would have occurred when the revocation decisions are discretionary judicial or administrative decisions.

Couch v. Dep't of Corrections,²⁴⁰ another recent case, placed a second limitation on offender supervision, holding that the duty to supervise is defined largely by requirements imposed by statutes and

234. 118 Wash. 2d 195, 219, 822 P.2d 243, 255 (1992).

235. 147 Wash. 2d 166, 179, 52 P.3d 503, 510 (2002).

236. *Id.* at 183, 52 P.3d at 512.

237. 122 Wash. App. 227, 95 P.3d 764 (2004), *review denied*, 154 Wash. 2d 1003, 114 P.3d 1198 (2005).

238. *Id.* at 246-47, 95 P.3d at 774.

239. The Sentence Reform Act provides 12 different sanctions for offenders who violate release conditions, only one of which is jail, which is limited to 60 days per violation. *See* WASH. REV. CODE § 9.94A.634 (2004).

240. 113 Wash. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wash. 2d 1012, 69 P.3d 874 (2003).

court orders.²⁴¹ The court concluded that the state was not liable for a murder by an offender who was being supervised only for the purpose of collecting unpaid court costs and fines, thus limiting liability for offender supervision to crimes that are related to behaviors governed by the court orders and statutes under which the offender is supervised.²⁴² However, the law is not entirely settled because a later case, *Joyce v. State*,²⁴³ did not follow *Couch*, holding that the state had a duty to prevent an automobile accident by an offender who was allegedly in violation of reporting conditions related to third degree assault and possession of stolen property convictions, but who had no convictions related to driving.²⁴⁴ The Supreme Court declined review in *Couch* but granted it in *Joyce*.²⁴⁵

One new case removed an apparent statutory immunity for community notification about sex offenders when a statute²⁴⁶ allowed local law enforcement agencies to release sex offender information, but provided that there was no liability for failure to release such information. This case, *Osborn v. Mason County*, held that the immunity did not apply to an alleged failure to give notification because it was qualified by the phrase “except as otherwise provided by law.”²⁴⁷ *Osborn* concluded that the “other law” could be the tort law rescue doctrine. The result is that common law tort liability can be an exception to statutory immunity from tort liability.²⁴⁸

Several decisions have narrowed social welfare liability in a similar manner to correctional liability. No decision has renounced the liabilities created after *Babcock*, but decisions limit those liabilities in a variety of contexts.

241. *Id.* at 564, 54 P.3d at 201.

242. *Id.* at 571, 54 P.3d at 205.

243. 116 Wash. App. 569, 75 P.3d 548 (2003), *review granted*, 150 Wash. 2d 1032, 84 P.3d 1229 (2004).

244. *Id.* at 594, P.3d at 561.

245. *Joyce* based its duty holding on the foreseeability that an offender with mental health problems would have an automobile accident. *Murphy v. State*, 115 Wash. App. 297, 62 P.3d 533 (2003), rejected foreseeability as a basis for duty, holding that foreseeability is a limitation on a duty rather than a source of a duty. A case from another division of the Court of Appeals has applied *Couch* and distinguished *Joyce*. In *Estate of Davis v. State*, 127 Wash. App. 833, 113 P.3d 487 (2005), the court held that the state had no duty to prevent a property crimes offender from committing murder. The court distinguished *Joyce* by stating that no reasonable jury could find the *Davis* murder foreseeable. The court reached this conclusion despite evidence of the offender’s mental health problems, which had been *Joyce*’s basis for finding that an unrelated crime was foreseeable.

246. 1990 Wash. Laws 3.

247. 122 Wash. App. 823, 835, 95 P.3d 1257, 1264 (2004), *review granted*, 154 Wash. 2d 1002, 95 P.3d 1257 (2005).

248. *Id.* at 837, 95 P.3d at 1265.

Pettis v. State held that the duty to investigate child abuse runs only to parents and children.²⁴⁹ Third parties who are subject to investigation have no right to sue for negligent investigation.²⁵⁰ In a reversal of approach from cases over the past twenty years, *Pettis* also stated that any extension of liability was a policy matter to be deferred to the Legislature.²⁵¹ *M.W. v. Dep't of Soc. & Health Servs.*²⁵² further limited the duty to investigate. *M.W.* held that the duty applies only to claims by parents or children for negligent removal, negligent failure to remove, or negligent placement in harmful foster care, but not to claims that the conduct of the investigation itself caused an injury.²⁵³ *M.W.*, like many recent cases, is notable because it carefully examined statutes before reaching its conclusion on the scope of duty. *Terrell C. v. Dep't of Soc. & Health Servs.* similarly relied on statutes to hold that the duty to act to protect abused children does not extend to protecting other children from wrongs caused by the abused child.²⁵⁴ *Terrell C.* rejected a claim that the state had a special relationship with an abused child which created an obligation, analogous to that in *Taggart*, to prevent wrongs by the child.²⁵⁵

A recent case also gave collateral estoppel effect to a dependency court order, something that *Lesley v. Dep't of Soc. & Health Servs.*²⁵⁶ refused to do. *Miles v. Child Protective Servs.*²⁵⁷ held that an agreed dependency order estopped parents from claiming, in a later lawsuit against the State, that their children had not been abused.²⁵⁸

Additionally, a recent local government case expanded social welfare liability. The court in *Caulfield v. Kitsap County* held that a county social worker had a special relationship with a disabled plaintiff approved for in-home care funding, and that this relationship gave the county an obligation to oversee the home assistance provided by a third-party hired by the plaintiff.²⁵⁹ This holding potentially widens the state's liability because programs to fund self-directed services for independent

249. 98 Wash. App. 553, 562-3, 990 P.3d 453, 458-9 (1999).

250. *Pettis* was the first case to cite *Favors v. Matzke*, 53 Wn. App. 789, 770 P.2d 686 (1989), which had reached this conclusion ten years earlier.

251. 98 Wash. App. at 560, 990 P.3d at 457.

252. 149 Wash. 2d 589, 70 P.3d 954 (2003).

253. *Id.* at 602, 70 P.3d at 970.

254. 120 Wash. App. 20, 25-6, 84 P.3d 899, 902, *review denied*, 152 Wash. 2d 1018, 101 P.3d 109 (2004).

255. *Id.*

256. 83 Wash. App. 263, 921 P.2d 1066 (1996).

257. 102 Wash. App. 142, 6 P.3d 112 (2000).

258. *Miles* distinguished *Lesley v. Dep't of Soc. & Health Servs.*, 83 Wn. App. 263, 921 P.2d 1066 (1996), on the basis that the *Lesley* shelter care order was not final and appealable.

259. 108 Wash. App. 242, 249, 29 P.3d 738, 742 (2001).

elderly and disabled are growing. Statutes authorizing the funding do not provide that recipients are government wards or that their care is managed by government.²⁶⁰ *Caulfield* is different from recent cases because it determined duty without examining statutes governing such financial assistance programs.

Correctional and social welfare liability might be reduced by a decision interpreting the 1986 Tort Reform Act. *Tegman v. Accid. & Med. Invest., Inc.* held that damages caused by intentional tortfeasors must be segregated from damages caused by fault-based conduct and cannot be collected from negligent codefendants of intentional tortfeasors.²⁶¹ This holding means that governments do not have to pay the share of damages which a jury assigns to intentional tortfeasors who are codefendants or responsible entities in tort lawsuits. *Tegman* potentially reduces liability for large claims based on criminal conduct or drunk driving by third parties.

c. Highway Liability

While recent cases reduce some governmental liabilities, highway design liability remains broad. In *Owen v. Burlington N. & Santa Fe R.R. Co.*,²⁶² the plaintiffs were motorists in a traffic backup extending across multiple railroad tracks on a city street. When a train approached, motorists in front of the plaintiffs moved off of the tracks, but the plaintiffs pulled onto the tracks and were hit by the train.²⁶³ The crossing had the warning signals and gates required by standards, as well as signs warning motorists not to stop on the tracks.²⁶⁴ *Owen* held that the city could be liable because it had not adopted safety measures beyond those required by standards.²⁶⁵ *Owen* is similar to *Stewart v. State*²⁶⁶ because it creates liability for failing to design facilities to exceed standards.

A second case expanded the duty of care owed by governments for road maintenance. Although case law often proved inconsistent, many cases, as well as Washington Pattern Instruction 140.01, provided that a city's duty to maintain and sign streets was limited to "persons using them in a proper manner and exercising ordinary care for their own safety."²⁶⁷ *Keller v. City of Spokane*²⁶⁸ eliminated this qualification of the

260. 1999 Wash. Laws 336; 1989 Wash. Laws 427.

261. 150 Wash. 2d 102, 108, 75 P.3d 497, 499 (2003).

262. 153 Wash. 2d 780, 108 P.3d 1220 (2005).

263. *Id.* at 784-5, 108 P.3d at 1221-2.

264. *Id.*

265. *Id.* at 790, 108 P.3d at 1225.

266. 92 Wash. 2d 285, 597 P.2d 101 (1979).

267. WASH. PATTERN JURY INSTR. Civil §140.01 (3d ed.1991).

268. 146 Wash. 2d 237, 44 P.3d 345 (2002).

duty because it conflicted with the abolition of comparative negligence. However, *Keller* declined to remove the qualification that the city's duty was to keep the streets safe only for "ordinary travel."²⁶⁹

Liability for lack of capital improvements to highways has been reduced by federal highway laws. The Highway Safety Acts of 1966 and 1973 required states to develop safety data, including a computerized collision report database, to support funding requests.²⁷⁰ The plaintiffs used this data to claim that states had a duty to make capital improvements to older roads.²⁷¹ Congress concluded that this liability had a negative effect on participation in the federal program and enacted a statute prohibiting use of federal safety data in tort lawsuits.²⁷² In 2001, the Washington Supreme Court held that this statute was unconstitutional.²⁷³ The United States Supreme Court reversed that decision, holding that the statute was an exercise of Commerce Clause power because of its relationship to federal highway safety issues.²⁷⁴ The result is that state courts must apply the federal statute. The federal government has thereby indirectly restricted a major governmental liability in Washington.

2. Claim and Legal Defense Costs

Although the expansion of government liability slowed in the last six years, state claim costs continued to rise. Claim payouts were \$50 million in the 1999-2001 biennium, \$119 million in the 2001-2003 biennium, and almost \$64 million in the 2003-2005 biennium.²⁷⁵ In addition, the self-insured retention (SIR)²⁷⁶ on the state's excess insurance policy increased in FY 2001 from \$5 million to \$25 million per claim on DSHS/DOC cases and \$15 million per claim on cases for all other state agencies. The current premium for the policy is over \$10 million per biennium.

269. The limitation of the duty to motorists using a street for ordinary travel is consistent with cases holding that governments have no duty to protect motorists from extremely careless driving. *See, e.g.,* Braegelmann v. County of Snohomish, 53 Wash. App. 381, 766 P.2d 1137 (1989); Klein v. City of Seattle, 41 Wash. App. 636, 705 P.2d 806 (1985).

270. *See* 23 C.F.R. § 924.9 (2005).

271. WILLIAM E. KENWORTHY, *KUHLMAN'S KILLER ROADS FROM CRASH TO VERDICT*, 149, 161-62, 176-78 (2d ed. 1999). The history of prior collisions on roads was used to support arguments that roads were "hazardous" and in need of "repair."

272. 23 U.S.C. § 409 (1987).

273. Guillen v. Pierce County, 144 Wash. 2d 696, 31 P.3d 628 (2001).

274. Pierce County v. Guillen, 537 U.S. 129 (2003).

275. The payout data is derived from the same source as indicated in *supra* note 207 and OFM records of claim payments.

276. The SIR is an amount which must be paid on a claim before any insurance reimbursement.

The payouts and insurance premiums do not completely represent the state's exposure. In the past three years, two verdicts with a total value of approximately \$25 million have been reversed and dismissed. There are currently two verdicts on appeal with a value of approximately \$45 million.²⁷⁷

The trends from 1974-1998 remained after 1998. For claim years 1999 through 2004, there were twenty-seven verdicts or settlements over \$1 million, fifteen of those were over \$2 million. Moreover, there are still large claims pending for those claim years. Of the payouts over \$1 million, twenty-one of them were for correctional, social welfare, or regulatory liabilities. Five of the remaining six large claim payouts were for highway claims based at least partly on negligent design or failure to improve theories. The state's payouts are dominated by claims based on liability for governmental functions. As one might expect, legal defense costs increased in conjunction with the increasing complexity of lawsuits against the state. The Torts Division currently has a total staff of 135, including over fifty lawyers. The biennial budget is approximately \$38 million. Thus, the total cost of state tort liability has increased to an approximate range of \$110 million to \$150 million per biennium.

III. ANALYSIS OF THE WAIVER AFTER FORTY-FIVE YEARS

A. Application of the Waiver Has Not Been Consistent with Legislative Intent at the Time the Waiver was Enacted

The legal context at the time of the waiver indicates that the Legislature did not intend to create liability for governmental functions. At that time, the perception was that agencies should be liable for routine torts, not that agencies should be liable for uniquely governmental functions. Indeed, this interpretation was given to the New York waiver, which was similar to the Washington waiver. This was also the interpretation given to the Washington waiver. *Evangelical* interpreted the requirement that liability be analogous to private liability to mean that the waiver was not intended to create governmental liability.²⁷⁸ At that time, Washington counties and quasi-municipal governments had lacked sovereign immunity for almost 100 years. Washington cases had not created liability for governmental functions, despite the lack of sovereign immunity.

In the mid-1970s, Washington cases began interpreting the waiver as allowing liability for governmental functions. These cases did not

277. See discussion note 207, *infra*. The value includes post-judgment interest.

278. *Evangelical Church of Adna v. State*, 67 Wash. 2d 246, 254, 407 P.2d 440, 444 (1965).

analyze the context of the waiver or the effect of the private liability condition in the waiver, but relied on cases from other jurisdictions to reduce discretionary immunity.²⁷⁹ The new interpretation of the waiver dramatically changed the nature and cost of government liability in Washington.

B. Legal Consequences of the Waiver

The primary legal consequence of the waiver has been broad liability for the regulatory, police, correctional, social welfare, and highway design functions of government. Within the development of this liability, there have been several subordinate trends.

After the waiver, government liability remained unchanged for almost a dozen years. This period was followed by twenty-five years of liability expansion. Only a few cases, primarily those dealing with regulatory functions, limited governmental liability. In the last six years, decisions have reduced some governmental liability, particularly correctional and social welfare liability. Curiously, this trend has been different for state and local governments. Almost all recent state cases narrow liability, whereas local government cases expand liability on correctional, law enforcement, highway, and even social welfare claims.²⁸⁰

One difference among the three eras has been the degree to which cases rely on statutes to determine government duties. Following the waiver, cases such as *Evangelical*, *Morgan*, and *Loger* looked closely at governing statutes and the nature of programs to determine the existence and scope of duty. During the next twenty-five years, cases such as *Stewart*, *Petersen*, and *Taggart* paid less attention to statutes governing agencies. These cases created duties based on general tort principles or the Restatement of the Law of Torts. In the most recent period, cases returned to a close analysis of statutes and agency programs to determine the existence of duty and boundaries for liability. This is particularly

279. *Mason v. Bitton*, 85 Wash. 2d 321, 534 P.2d 1360 (1975), and *King v. City of Seattle*, 84 Wash. 2d 239, 525 P.2d 228 (1974), were the two cases that changed previous concepts of governmental liability. See *supra* Part III.B.a-b. The last case to mention the private liability condition was *Edgar v. State*, 92 Wash. 2d 217, 595 P.2d 534 (1979), dealing with the issue of military discipline. After the 1970s, Washington courts, unlike New York courts, did not use the private liability condition as a limitation on liability for governmental functions, although it was mentioned in *Cena v. State*, 121 Wash. App. 352, 89 P.3d 432 (2004).

280. See, e.g., *Keller v. City of Spokane*, 146 Wash. 2d 237, 44 P.3d 845 (2002); *Bishop v. Miche*, 137 Wash. 2d 518, 973 P.2d 465 (1999); *Hertog v. City of Seattle*, 138 Wash. 2d 265, 979 P.2d 40 (1999); *Osborn v. Mason County*, 122 Wash. App. 823, 95 P.3d 1257 (2004); *Caulfield v. Kitsap County*, 108 Wash. App. 242, 29 P.3d 738 (2001); *Rodriguez v. Perez*, 99 Wash. App. 439, 994 P.2d 874 (2000).

evident in *Couch*, in the newer social welfare cases such as *Pettis, M.W.*, and *Terrell C.*, and in regulatory cases such as *Murphy* and *Halleran*.

Over the forty-five years since the waiver, courts have changed their approach to separation of powers. *Evangelical*, consistent with New York and federal law, held that tort liability should not interfere with policies in the legislative and executive branches of government. By the mid-1970s, courts protected explicit policy-making by the highest officials, but allowed tort liability for the implementation of policies. By the 1990s, the Washington Supreme Court stated that liability should affect government policy-making in the areas of child welfare and the release and oversight of offenders in cases such as *Babcock*, *Savage*, and *Bishop*.²⁸¹ Washington cases adopted an approach to separation of powers which did not recognize the traditional deference given to policies of other branches of government.

C. Financial Consequences of the Waiver

The waiver initially had little effect on local government because county, city, and quasi-municipal governments already had liability for all activities except those of city departments with governmental functions. The waiver also had little effect on state government because claims for traditional tort liabilities were few in number and modest in cost. After decisions created liability for governmental functions, the effect of the waiver has been to produce very high tort costs for a relative handful of claims every year. For instance, DSHS resolved 259 FY 2004 claims for \$6.6 million through April 2005, but \$6,335,000 of that amount was paid on only six claims.²⁸² The major cost of state tort liability lies in lawsuits in which the government has joint and several liability with an offender, an underinsured motorist, or another third-party wrongdoer.

As a consequence of expanded tort liability, state and local governments lost the ability to insure most activity, and any available insurance was costly. Ironically, one of the original justifications for abolishing sovereign immunity was the availability of low cost insurance. Even in California, where liabilities are limited by statute, the

281. *Savage v. State*, 127 Wash. 2d 434, 899 P.2d 1270 (1995), citing *Babcock v. State*, 116 Wash. 2d 596, 809 P.2d 143 (1991), states that a purpose of state liability is “the salutary effect of providing the state an incentive to ensure that reasonable care is used in fashioning guidelines and procedures for the supervision of parolees.” *Savage* was cited for this point in *Bishop*, 137 Wash. 2d at 529-30, 973 P.2d at 470-71. This is a reversal in position from *Evangelical*, which held that tort liability for polices and procedures for supervising juvenile offenders “would do naught but stifle the basic governmental process and policy.” *Evangelical*, 67 Wn.2d at 258, 407 P.2d at 446-47.

282. These are claims filed in FY 2004 and these amounts represent claim resolutions through April 2005. These amounts will increase as additional FY 2004 claims are resolved.

availability and cost of insurance was a problem for local government by the mid-1970s. Local government in Washington experienced difficulty in the same period. These problems were serious by the mid-1980s, when local governments were part of the coalition supporting the 1986 Tort Reform Act. Since that time, state government has been largely uninsured, but the cost of its "excess" policy has risen sharply with reduced coverage as payouts for governmental liabilities increase in number and size.

Another consequence of expanded tort liability for governmental functions is the risk to local jurisdictions by the potential for major claims. In the past ten years, the state has had verdicts against it for \$2.6 million, \$3.6 million, \$6.4 million, \$8 million, \$8.4 million, \$9 million, \$15 million, \$17.8 million, and \$22.5 million. All of these verdicts were for correctional, social welfare, regulatory, and/or civil rights liabilities rather than traditional tort liability. Although four of these were reversed and dismissed on appeal and two are pending on appeal, they indicate the kind of exposures governments face.²⁸³ A smaller city or county government might not have legal defense and insurance or risk pool resources adequate for the claims and verdicts possible under current law.

D. Problems Presented by Washington's Open-Ended Waiver

1. Global Problems

When legislative researchers from Kentucky and Colorado studied immunity waivers, they concluded that the open-ended waiver was the poorest choice.²⁸⁴ They foresaw that case-by-case development of law would cause uncertainty due to the nature of government activity, and noted the difficulty of comparing it to private activity. They foresaw that this uncertainty would cause problems with insurability and high defense costs, and that risk management would be a problem because of high inherent risk and inability of government to withdraw from, limit, or manage activities as a private entity would. Additionally, they predicted

283. The four verdicts reversed on appeal are *Murphy v. State*, 115 Wash. App. 297, 62 P.3d 533 (2003); *Couch v. Dep't of Corrs.*, 113 Wash. App. 556, 54 P.3d 197 (2002), *review denied*, 149 Wash. 2d 1012, 69 P.3d 874 (2003); *Wilson v. State*, 84 Wash. App. 332, 929 P.2d 448 (1996), *review denied*, 131 Wash. 2d 1022, 937 P.2d 1103 (1997), *cert. denied*, 522 U.S. 949 (1997); and *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wash. App. 546, 878 P.2d 1259 (1994), *review denied*, 126 Wash. 2d 1002, 891 P.2d 37 (1995). *Joyce v. State*, 116 Wash. App. 569, 75 P.3d 548 (2003), *review granted*, 150 Wash. 2d 1032, 84 P.3d 1229 (2004), is pending in the supreme court along with an appeal of an \$8 million verdict in a case involving alleged liability for a crime committed by foster children. One large verdict was settled on appeal for a smaller amount.

284. *See discussion supra* Part I.C.

that some public entities would be unprotected due to problems with insurability and scope of risk. As a result, the researchers recommended that the legislature control public liability.

The researchers accurately predicted problems that occurred under Washington's waiver. Problems arose from the broad liability created for high-exposure governmental functions in a particular case, followed by years, even decades, of litigation and high claim costs as subsequent cases worked out the boundaries of the new liability. For instance, only now, twenty-two years after *Petersen*, are cases defining the boundaries of liability for supervision of offenders. Even with these boundaries, however, this is an expensive liability that presents a major risk for the government.

One kind of liability stabilized as a result of case law development. Regulatory liability became uncertain in the 1970s and 1980s because decisions created broad liability for building code enforcement and police activities. By the early 1990s, liability became more predictable with the adoption of the public duty doctrine and its exceptions. The doctrine can be adjudicated in summary judgment motions. However, it took almost twenty years to define the rules, and concurring and dissenting opinions in cases suggest that the certainty of the public duty doctrine should be discarded in favor of a more ad hoc approach.²⁸⁵

In addition to problems with uncertainty, insurability, and cost, the nature of the open-ended waiver creates heavy liability for unavoidably injury-prone government programs such as mental health, corrections, and social welfare. Case-by-case adjudication responds to facts in a particular case, and a court does not consider the effect of its decision upon a government program to be a reason to deny recovery on the merits of a specific case. Individual cases also do not provide evidence that enables a court to determine if liability that seems appropriate on limited facts would be problematic if applied to thousands of similar situations. A decision to award compensation to a sympathetic plaintiff in one case becomes precedent determining liability across a wide spectrum of government activity, as *Petersen v. State* did.

Government liability differs from private liability not only because a single case is likely to have broad effect, but also because government has limited ability to respond to increased liability. Some Washington decisions express the view that broad liability will force program

285. In *Babcock*, the concurring opinion suggested discarding the public duty doctrine in favor of using "traditional tort law analysis," but then resolved the issue of the duty of firefighters by analyzing whether there should be liability under the facts of the particular case. *Babcock*, 144 Wash. 2d at 800-01, 30 P.3d at 1275.

improvements by penalizing government conduct and policies.²⁸⁶ However, analogies to the accident reduction and risk spreading models of private tort liability are not necessarily sound in the government context. Liability for a private service forces the provider to improve the service or be displaced by another provider. If the liability is inherent in the service, then the liability cost simply becomes part of the cost of all providers, thus spreading risk. Government liability does not achieve this result. There is only one provider, and staff, resources, and level of service are largely fixed by budgets and statutes. Liability costs come out of agency budgets and reduce program services. There is no other provider who will displace the program, and there is no spreading of costs. Thus, liability for high-risk programs reduces funding for programs whose ability to manage risk is severely constrained because the risk is inherent in the governmental function.

2. Specific Problems

Several problems flow from the narrow interpretation of discretionary immunity in *King v. City of Seattle* and subsequent cases. By limiting immunity to high level policy decisions, *King* created potential liability for judgment exercised by officials on licenses, permits, investigations, law enforcement, firefighting, and similar matters. These are not decisions based on rule or formula. These decisions involve complex situations and the application of rules and policies, such as whether to amend a permit, whether to withdraw from a dangerous fire, or whether to recommend removal of a child. These decisions are commonly protected from liability under federal law and in other jurisdictions, including New York and California.²⁸⁷ Three Washington cases recognized qualified immunities for public officials,²⁸⁸ but these immunities were not applied in later cases.²⁸⁹

286. See discussion *supra* note 279.

287. The scope of discretionary immunity for decisions by public officials in California after *Johnson v. State*, 447 P.2d 352 (Cal. 1968), is summarized *supra* note 95 and, for federal officials, is summarized *supra* note 57. In New York, discretionary immunity is commonly applied to decisions of public officials on specific matters requiring the exercise of judgment, such as whether to release a juvenile offender or even whether to post non-mandatory highway warning signs. *Anton v. State of New York*, 757 N.Y.S.2d 338 (N.Y. App. Div. 2003); *Niles v. County of Chautauqua*, 755 N.Y.S.2d 157 (N.Y. App. Div. 2003), *leave to appeal dismissed*, 793 N.E.2d 413 (N.Y. 2004).

288. *Taggart v. State*, 118 Wash. 2d 195, 822 P.2d 243 (1992); *Babcock v. State*, 116 Wash. 2d 596, 809 P.2d 143 (1991); *Guffey v. State*, 103 Wash. 2d 144, 690 P.2d 1163 (1984).

289. No cases subsequent to *Babcock* and *Taggart* have applied qualified immunity to protect state or local government from liability. *Lesley v. Dep't of Soc. & Health Servs.*, 83 Wash. App. 263, 921 P.2d 1066 (1996), and *Waller v. State*, 64 Wash. App. 318, 824 P.2d 1225 (1992), declined to apply qualified immunity to social worker decisions. *Hertog v. City of Seattle*, 138 Wash. 2d 265, 979 P.2d 400 (1999), *Bishop v. Miche*, 137 Wash. 2d 518, 973 P.2d 465 (1999), and *Savage v. State*,

The lack of immunity for governmental decisions is most likely the reason for the continuing strength of the public duty doctrine in Washington. Regulators, police, and fire officials (but not correctional officers or social workers) are largely protected from liability by the doctrine in situations in which they decline to act or fail to enforce a law. However, there is an inconsistency when these same officials take affirmative action. Washington cases rarely apply the public duty doctrine to protect affirmative acts by regulators and police.

The lack of discretionary immunity for all but high level policy decisions effectively creates liability for those decisions if the decisions involve risk-prone governmental functions. For instance, if budget shortfalls cause the Legislature to direct the DOC to move 1,000 offenders into work release, the state would not be liable for the offenders' post-release crimes on the theory that the Legislature made a careless decision. However, the immunity for the Legislature would have little value because the state could be liable for the same crimes on the theory that the DOC's selection and supervision of each work release is an operational activity which presents a question of fact for the jury on state liability. The state's chance of prevailing before a jury on such claims would be remote. The fact that crimes occurred would all but prove that the DOC selected the wrong offenders for work release and supervised them carelessly. Therefore, the state could have liability for the inevitable consequence of the legislative decision.

The public duty doctrine is the one area of governmental liability that has developed rules protecting governmental functions, though problems nevertheless exist. The doctrine is reliably applied to reject claims for property, economic, and investment losses, but courts virtually always find an exception if the claim is for personal injury.²⁹⁰ Additionally, there are many licensing, inspection, and complaint programs in areas which have the potential for large claims if the government is liable for injuries caused by the licensed entities or alleged failures to investigate complaints about licensees. Daycares, nursing homes, group homes for juveniles and disabled, adult family homes, medical service providers, and foster parents are among the risk prone entities licensed by the state. The failure to apply the public duty doctrine

127 Wash. 2d 434, 899 P.2d 1270 (1995), stated that qualified immunity might protect individual employees from liability, but not government.

290. For instance, early public duty cases finding liability involved fatal accidents (*Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978); *Campbell v. City of Bellevue*, 85 Wash. 2d 1, 530 P.2d 234 (1975)), and cases finding no liability involved economic loss (*Baerlein v. State*, 92 Wash. 2d 229, 595 P.2d 930 (1979); *Georges v. Tudor*, 16 Wash. App. 407, 556 P.2d 564 (1976)). This pattern continues in later cases.

to regulated social welfare activities would produce major new governmental liabilities.

A second problem with the application of the public duty doctrine is the decision²⁹¹ that child abuse investigations are not protected by the doctrine. Other applications of the legislative intent exception created somewhat manageable liabilities because specific enforcement actions in defined circumstances could avoid liability.²⁹² In contrast, liability for child abuse investigation is broad and open-ended because it depends on judgments made by social workers, typically based on limited or conflicting evidence, while balancing child safety and family integrity. A social worker making a decision on a child abuse investigation does not have a clear action that he or she can take to avoid liability.

The liability for child abuse investigations is also complicated by the liability to parents for the temporary removal of a child, which exists even if a court approves child removals at shelter care hearings.²⁹³ Indeed, Justice Talmadge, in his dissent to *Tyner v. Dep't of Soc. & Health Servs.*,²⁹⁴ argued strongly that the duty to protect a child and the duties to the parents suspected of abuse are irreconcilable.

Liability for crimes by released offenders is an especially problematic liability. The conceptual basis for the liability is that post-release and probation systems give the government control over offenders, rendering the government liable for their crimes. Other than Washington, every jurisdiction that has considered this liability appears to have judicially or legislatively rejected it, except in narrow circumstances.²⁹⁵ This liability is costly because governments are codefendants in cases with offenders who have committed heinous crimes or caused tragic accidents, leading to punitive verdicts. The increasing potential for catastrophic liability claims in this area is a threat to our correctional and court systems.

291. *Yonker v. Dep't of Soc. & Health Servs.*, 85 Wash. App. 71, 930 P.2d 958 (1997).

292. In *Halvorson v. Dahl*, 89 Wash. 2d 673, 574 P.2d 1190 (1978), the city could mitigate the risk of tort liability by enforcing a hotel safety code in a limited number of old hotels. *Donaldson v. City of Seattle*, 65 Wash. App. 661, 831 P.2d 1098 (1992), *review dismissed*, 120 Wash. 2d 1031, 847 P.2d 481 (1993), created only a mandatory duty to arrest under defined and limited circumstances involving domestic violence.

293. Although police are authorized to take custody of children in an emergency, state social workers do not have that authority, but must petition the court for an order permitting removal. WASH. REV. CODE § 26.44.050 (2005).

294. 141 Wash. 2d 68, 1 P.3d 1148 (2000).

295. For instance, New York allows liability for a crime by an offender if police have made a promise to a specific person to protect that person from the offender. The liability is similar to the special relationship exception to the public duty doctrine. *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987).

The policy issue for many governmental functions is that liability relates to decisions that require judgment about the application of law and rules to disputed facts in risk-prone areas. The difficulty with governmental liability for highway design is different. Highways are built and signage is placed in accordance with standards developed by national experts. Prior to the era of governmental liability, Washington courts essentially accepted these standards as the basis for the government's duty in cases making claims for negligent repair and signage. Current law creates a problem for highway officials because it creates liability for design and signage, even if highways satisfy well-accepted national standards.

CONCLUSION

In 1961, the Legislature enacted an open-ended waiver of immunity that was intended to make state government liability comparable to private liability. This waiver worked well for several years, providing compensation to persons injured by routine government operations. The effect of the waiver changed, however, when courts no longer applied the private liability condition, which created a unique and unprecedented liability for government activities.

The open-ended waiver is no longer satisfactory. The case-by-case development of government liability law has been uncertain, inconsistent, and costly. The cases have not protected judgment exercised by public officials or the implementation of legislative and executive policy decisions. On the contrary, the cases have created liability for governmental functions with inherent risk factors, such as misconduct of third parties, which cannot be fully eliminated, even with the best possible risk management. The broad liability for these functions has diverted the resources of worthwhile programs to pay legal defense costs and verdicts that result from the act of governing.

The Legislature should replace Washington's waiver with statutes that precisely define the extent of liability for state and local government functions. A statutory liability scheme would serve the public better than would the open-ended waiver. The history of the waiver in Washington and in other states provides the Legislature with ample information to determine "where, in the area of governmental processes, orthodox tort liability stops and the act of governing begins."²⁹⁶

The most compelling need is to reiterate the original condition in the Washington waiver: that government liability be comparable to the liability of private parties. As in other jurisdictions, there should be no

296. *Evangelical Church of Adna v. State*, 67 Wash. 2d 246, 253, 407 P.2d 440 (1965).

liability for government functions that have no counterpart in the private sector. The Legislature should return Washington's waiver to the interpretation given in *Evangelical*, and should adopt the rules of law set forth in New York cases that have interpreted the same waiver language since 1929.

Consistent with a reiteration of the private liability condition, the Legislature should adopt a discretionary immunity that protects judgments made by public officials in areas of governmental decision-making, such as regulation, law enforcement, and social welfare. The qualified immunities adopted by Washington courts have not sheltered decisions in which public officials exercise judgment about the application of law, rules, and policies to facts. Again, the Legislature should return discretionary immunity to the interpretation adopted in *Evangelical*, which is similar to discretionary immunity under federal law and law in other states, such as New York.

Adopting a statutory discretionary immunity would reduce the need to use the public duty doctrine to determine when government actors are performing governmental functions that are not subject to liability. The doctrine would remain necessary to determine whether government had a duty to act in situations in which government *failed* to act. The Legislature should adopt the doctrine and its exceptions as means for determining whether regulatory, police, and social programs create a duty to act on behalf of individuals. However, the Legislature should define the legislative intent exception more carefully because the current interpretation of its criteria misapplies the doctrine by treating only injured persons, rather than all protected persons, as intended beneficiaries of social programs.

Under the open-ended waiver, courts have created heavy liability for high-risk governmental functions. Foremost among these functions are offender supervision and child protective activities. The risks in these programs cannot be mitigated by traditional risk management because government cannot eliminate or reduce the dangerous function, nor can it directly control the unlawful behavior of the third parties who cause the injuries. Liability for these functions is fundamentally at odds with the private liability condition in the waiver. Other states have limited this liability to narrow circumstances. The Legislature should similarly limit correctional and social program liability to harms caused by public employees directly or caused by their disobedience of statutes, court orders, or specific promises of protection. Funds should be spent on the programs and not on defense costs and claim payments inflated by emotion and outrage towards the criminal acts of codefendants in these cases.

The open-ended waiver has also caused uncertainty about liability for the governmental functions of designing highways and funding capital improvements. New York and other states typically limit liability for these functions by statute or by application of discretionary immunity. The Legislature should clarify the law by limiting liability for governmental highway programs. While liability for ordinary maintenance and lack of required warnings should remain, there should be no liability for facilities that substantially comply with standards for design and signage, and there should not be liability for failure to fund capital improvements. The design and funding of public highway systems presents issues and has constraints that are not comparable to those in private capital projects.

In examining alternatives to the open-ended waiver, the Legislature should also consider coverage limits that are analogous to private insurance coverage limits. When Washington waived immunity in 1961, tort liability was less prevalent and expensive than it is in today's trend towards deep pocket litigation. A large majority of states that waived immunity in the modern era imposed financial limits on public liability, and those that did not often exercised control through special tribunals or restrictive waivers. Appropriate coverage limits would provide reasonable compensation for injuries caused by government operations while protecting government from excessive claims.

The Washington Constitution expressly gives the Legislature control over lawsuits against the government.²⁹⁷ Forty-five years ago, the Legislature exercised this authority by enacting an open-ended waiver of the state's immunity from tort lawsuits. The passage of time and changes in tort law have made this open-ended waiver outmoded; it is a growing burden on legitimate government interests. The Legislature should revisit the waiver and adopt modern statutes that draw a clear boundary between orthodox tort liability and the act of governing.

297. WASH. CONST. art. II, § 26.

APPENDIX I

*OVERVIEW OF SOVEREIGN IMMUNITY
WAIVERS AND DAMAGE LIMITS*

These are abbreviated descriptions which will permit general comparisons of different approaches to the waiver of sovereign immunity. While most states now have overall state and/or local government tort claims acts, some states have a variety of different provisions for different government units or situations and this chart cannot capture all of this detail. Statutory citations are very abbreviated in order to fit this chart.

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
AL	Immune. ALA. CONST. art. I, § 14	No immunity.		\$100,000/ \$300,000 ²⁹⁸
AK	Partial waiver with immunity for discretionary acts. ²⁹⁹ ALASKA STAT. § 09.50.250	No immunity.	\$400,000 to \$1,000,000 for non-economic damages. ALASKA STAT. § 09.17.020	
AZ	Partial waiver with immunities for governmental functions. ARIZ. REV. STAT. § 12-820			
AR	Claims commission. ARK. CODE § 19.10.201 <i>et</i> <i>seq.</i>	Immune except to extent of insurance. ARK. CODE § 21.9.201 <i>et</i> <i>seq.</i>	\$10,000 ARK. CODE § 19.10.201 <i>et seq.</i>	Insurance limits. ARK. CODE § 21.9.201 <i>et</i> <i>seq.</i>

298. The first number is the limit per individual claim and the second is the limit for all claims in an occurrence or incident.

299. Statutory discretionary immunity is generally interpreted as preserving immunity for all decisions involving governmental issues such as release of prisoners, licenses and permits, crime, investigations, etc.

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
CA	Statutory scheme of liabilities and immunities. CAL. GOV'T CODE § 810 <i>et seq.</i>			
CO	Partial waiver with immunities for governmental functions. COLO. REV. STAT. § 24-10-106		None.	\$150,000/ \$600,000 COLO. REV. STAT. § 24-10-114
CT	State claims commissioner; tort lawsuits only if allowed by commissioner. CONN. GEN. STAT. § 4-160			
DE	Immunity except for vehicles, buildings, and pollution. DEL. CODE ANN. tit. 10, § 4012		\$300,000 or insurance limits. DEL. CODE ANN. tit. 10, § 4013	
FL	Waiver for acts or omissions which would create liability for private person. ³⁰⁰ FLA. STAT. ch. 768.28		\$100,000/\$200,000 or insurance limits. FLA. STAT. ch. 768.28	
GA	Partial waiver with immunities for governmental and operational functions. ³⁰¹ GA. CODE ANN. § 50-21-23 <i>et seq.</i>		\$100,000,000/\$3,000,000 GA. CODE ANN. § 50-21-29	
HI	Partial waiver with immunity for discretionary functions and no joint and several liability. HAW. REV. STAT. §662-1 <i>et seq.</i> , § 663-10.5			
ID	Partial waiver with governmental immunities. IDAHO CODE § 6-902		\$250,000 (non-economic damages) IDAHO CODE § 6-1603	

300. The limitation of liability to that comparable to a private person is generally interpreted as excluding liability for governmental functions.

301. Some states preserve immunities not only for governmental functions but for some operational activities, such as snow and ice removal on roads or medical care of residents of state institutions.

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
IL	Court of Claims. 705 ILL. COMP. STAT. 5/1	Partial waiver with governmental and operational immunities. 705 ILL. COMP. STAT. 10/2 -101 <i>et seq.</i>	\$15,000/ \$100,000	
IN	Partial waiver with governmental and operational immunities. IND. CODE § 34-13-3-3		\$300,000/\$5,000,000 IND. CODE § 34-13-3-7	
IA	Partial waiver with governmental and operational immunities. IOWA CODE § 669.1			
KS	Partial waiver with governmental and operational immunities. KAN. STAT. ANN. § 75-6104		\$500,000 KAN. STAT. ANN. § 75-6105	
KY	Immune.	Partial waiver with governmental immunities. KY. REV. STAT. ANN. § 65.200 <i>et seq.</i>		
LA	Waiver of immunity. LA. REV. STAT. ANN. § 13:5101 <i>et seq.</i>		\$500,000 (non-economic damages) LA. REV. STAT. ANN. § 13:5106	
ME	Immunity except for specified vehicle, property, road, and pollution claims. ME. REV. STAT. ANN. tit. 14, § 8104-A		\$400,000 ME. REV. STAT. ANN. tit. 14, § 8105	

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
MD	Partial waiver with immunity for willful or grossly negligent employee acts. MD. CODE ANN., CTS. & JUD. PROC. § 5-522	Partial waiver with immunity for discretionary acts. MD. CODE ANN., CTS. & JUD. PROC. § 5-507	\$200,000 MD. CODE ANN., STATE GOV'T § 12-104	\$200,000/ \$500,000 MD. CODE ANN., CTS. & JUD. PROC. § 5-303
MA	Partial waiver with governmental immunities. MASS. GEN. LAWS 258 § 2			
MI	Immunity for governmental functions with liability allowed for vehicles, highway maintenance, and proprietary functions. MICH. COMP. LAWS §§ 691.1401-1419			
MN	Partial waiver with governmental and operational immunities. MINN. STAT. § 3.736	Partial waiver with more extensive immunities. MINN. STAT. § 466.03	\$300,000/\$100,000 MINN. STAT. §§ 3.736, 466.04	
MS	Waiver of immunity. MISS. CODE ANN. § 11-46-5		\$500,000 MISS. CODE ANN. § 11-46-15	
MO	Immunity except for vehicles and dangerous property. MO. ANN. STAT. § 537.600.		Approx. \$300,000/ \$1,200,000 MO. ANN. STAT. § 537.610	
MT	Waiver to extent that a private person would be liable. MONT. CODE ANN. §§ 2-9-101 <i>et seq.</i>		\$750,000/\$1,000,000 MONT. CODE ANN. § 2-9-108	

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
NB	Claims Board with exemptions for governmental functions and legislative review of large claims. NEB. REV. STAT. § 81-8-209 to 235	Partial waiver with governmental and operational immunities. NEB. REV. STAT. § 81-8, 209 to 235		\$1,000,000/ \$5,000,000 NEB. REV. STAT. § 81-8, 209 to 235
NV	Waiver of immunity. NEV. REV. STAT. 41.031		\$50,000 NEV. REV. STAT. 41.035	
NH	Claims Board (under \$50,000); partial waiver with discretionary immunity. N.H. REV. STAT. ANN. 541-B:1 <i>et seq.</i>	Immune except for vehicles, premises, and road maintenance. N.H. REV. STAT. ANN. 507-B:2	\$250,000/ \$2,000,000 N.H. REV. STAT. ANN. 541-B:14	\$150,000/ \$500,000 N.H. REV. STAT. ANN. 507-B:4
NJ	Partial waiver with governmental and some operational immunities. N.J. STAT. ANN. §§ 59:1-1 to -7			
NM	Immunity except for vehicle, property, law enforcement, and certain specified operational functions. N.M. STAT. ANN. §§ 41-4-1 to -29		\$100,000-\$750,000 N.M. STAT. ANN. § 41-4-19	
NY	Waiver to the extent a private person would be liable.			

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
NC	Claims Board; waiver of immunity to extent that private person would be liable. N.C. GEN. STAT. § 143.291	Immune except to extent of insurance. N.C. GEN. STAT. § 160A-485	\$500,000 N.C. GEN. STAT. § 143.299.2	Insurance limits. N.C. GEN. STAT. § 160A-485
ND	Partial waiver with governmental and some operational immunity. N.D. CENT. CODE § 32-12.1-02	Partial waiver with immunity for certain governmental functions. N.D. CENT. CODE § 32-12.1.03	\$250,000/ \$1,000,000 N.D. CENT. CODE § 32-12.1.02	\$250,000/ \$500,000 N.D. CENT. CODE § 32-12.1.03
OH	Court of Claims; waiver to extent of private party liability. OHIO REV. CODE ANN. § 2743.02-03	Partial waiver with immunity for discretionary acts & gov't functions. OHIO REV. CODE ANN. § 27.44.01 <i>et seq.</i>		\$250,000 (non-economic damages) OHIO REV. CODE ANN. § 27.44.05
OK	Partial waiver with liability to extent of private parties and immunity for governmental and many operational functions. OKLA. STAT. tit. 51, §§ 151-60		\$250,000-\$200,000/ \$1,000,000 OKLA. STAT. tit. 51, § 154	
OR	Partial waiver with immunity for discretionary acts, tax collection, and claims covered by workers compensation. ORE. REV. STAT. § 30.265		\$50,000-\$200,000/\$500,000 ORE. REV. STAT. § 30.270	

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
PA	Immunity except for vehicles, roads, medical claims, liquor sales, and certain other functions. 42 PA. CONS. STAT. § 8522		\$250,000/\$1,000,000 42 PA. CONS. STAT. § 8528	
RI	Waiver to extent of private liability. R.I. GEN. LAWS 9-31-1		\$100,000 except no limit if function proprietary. R.I. GEN. LAWS 9-31-12	
SC	Waiver to extent of private liability. S.C. CODE ANN. § 15-78-40		\$300,000-\$1,200,000; \$600,000-\$1,200,000 S.C. CODE ANN. § 15-78-120	
SD	Waiver to extent of insurance coverage. S.D. CODIFIED LAWS 21-32-16		Insurance limits. S.D. CODIFIED LAWS 21-32-16	
TN	Immune except for vehicles, roads and property. TENN. CODE ANN. § 29-20-101 to 111		Insurance limits. TENN. CODE ANN. § 29-20-311	
TX	Partial waiver with immunity for discretionary acts and some governmental functions. TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 <i>et seq.</i>		\$100,000- 250,000/ \$500,000	\$100,000- \$250,000/ \$300,000- \$500,000 TEX. CIV. PRAC. & REM. CODE ANN. § 101.023
UT	Partial waiver with governmental immunities. UTAH CODE ANN. § 63-30d-301		\$221,400-\$553,500/ \$1,107,000 UTAH CODE ANN. § 63-30d-604	
VT	Partial waiver with governmental immunities. VT. STAT. ANN. tit. 12, § 5601		\$250,000/\$1,000,000 VT. STAT. ANN. tit. 12, § 5601	
VA	Partial waiver to the extent of private liability. VA. CODE ANN. § 8.01-195.1		\$100,000 or insurance limits. VA. CODE ANN. § 8.01-195.3	

State	Nature of Waiver		Damage Limits	
	State	Local	State	Local
WV	Partial waiver with governmental and operational immunities. W. VA. CODE § 29-12A-1 to -12		\$500,000 W. VA. CODE § 29-12A-3	
WI	Partial waiver with immunity for discretionary decisions. WIS. STAT. § 893.80		\$250,000 WIS. STAT. § 893-82	\$50,000, except for vehicle accidents. WIS. STAT. § 893-80
WY	Immunity except for vehicles, property, medical and law enforcement. WYO. STAT. ANN. § 1-39-101 to -121		\$250,000/\$500,000/ \$1,000,000 (medical claim) WYO. STAT. ANN. § 1-39-118	

APPENDIX II

Washington State Tort Costs by Biennium

