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# Seeing through the Smoke and Fog: Applying a Consistent Public Duty Doctrine in North Carolina after *Myers v. McGrady*

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## Seeing Through the Smoke and Fog: Applying a Consistent Public Duty Doctrine in North Carolina After *Myers v. McGrady*

Governments routinely provide important services to benefit the public as a whole. For instance, police officers and fire fighters protect communities from easily identifiable dangers—such as criminal acts and fires that destroy property. Likewise, safety inspectors help communities prevent harm from equally common, but less obvious dangers—such as latent construction defects. Yet, when public officials fail to do their jobs properly, injuries may result, and victims will understandably want some restitution for their injuries. The extent to which injured plaintiffs should be permitted to recover for damages caused by the negligence of government officials has been the subject of an ongoing debate for many years.<sup>1</sup> Some jurisdictions have addressed this dilemma by utilizing the public duty doctrine to prevent governmental entities from having to pay *anything* for the mistakes of a government official when the official acts for the benefit of the public as a whole.

As applied in North Carolina, the public duty doctrine “provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a ‘special relationship’ or ‘special duty’ between the entity and the injured party.”<sup>2</sup> This doctrine stems from the basic tort law principle that a defendant cannot be negligent unless he has violated a legal duty to the plaintiff bringing the action.<sup>3</sup> The underlying concept of the public duty doctrine is that a “public duty” is a responsibility conferred on a government employee for the benefit of the community as a whole and not for the benefit of specific individuals.<sup>4</sup> Therefore, if a public official does not owe a duty to particular individuals, then no individual can rightfully claim that the official’s negligence entitles

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1. See *infra* notes 7–10 and accompanying text.

2. *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 477–78, 495 S.E.2d 711, 714 (1998).

3. See *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002) (“To prevail in a common law negligence action, a plaintiff must establish that the defendant owed the plaintiff a legal duty, that the defendant breached that duty, and that the plaintiff’s injury was proximately caused by the breach.” (citing *Hunt v. N.C. Dep’t of Labor*, 348 N.C. 192, 195, 499 S.E.2d 747, 749 (1998))).

4. 63C AM. JUR. 2D *Public Officers and Employees* § 248 (1997) (citing *Onofrio v. Dep’t of Mental Health*, 562 N.E.2d 1341, 1344 (Mass. 1990)) (referring to the “public duty rule”).

her to damages. In North Carolina, for example, the doctrine has been used to protect police officers from liability when they fail to prevent crime<sup>5</sup> and to protect forest rangers from liability when they fail to warn motorists of the danger of a nearby forest fire.<sup>6</sup>

The value of the public duty doctrine has been challenged frequently in recent years.<sup>7</sup> Commentators have criticized the doctrine as being confusing,<sup>8</sup> inconsistently applied, or unjust,<sup>9</sup> and some courts have refused to apply it at all.<sup>10</sup> Yet while some critics

5. See *Braswell v. Braswell*, 330 N.C. 363, 372, 410 S.E.2d 897, 902 (1991).

6. See *Myers v. McGrady*, 360 N.C. 460, 468, 628 S.E.2d 761, 767 (2006).

7. See, e.g., G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 120 (2005) (arguing that the public duty versus private duty distinction is a "false dichotomy"); Stewart F. Hancock, Jr., *Municipal Liability Through a Judge's Eyes*, 44 SYRACUSE L. REV. 925, 928–30 (1993) (criticizing the public duty doctrine and arguing that the legislature, not the courts, should determine who receives immunity).

8. See, e.g., Anita R. Brown-Graham, *Local Governments and the Public Duty Doctrine After Wood v. Guilford County*, 81 N.C. L. REV. 2291, 2292 (2003) (referring to the application of the public duty doctrine in North Carolina as "problematic").

9. See, e.g., Aaron R. Baker, Comment, *Untangling the Public Duty Doctrine*, 10 ROGER WILLIAMS U. L. REV. 731, 747–48 (2005) (arguing that "[f]or the same reason the doctrine of sovereign immunity was abrogated—the confused and irreconcilable results obtained in distinguishing between governmental and proprietary functions—the public duty doctrine should be abolished as well"); Suzanne M. Dardis, Note, *Gleason v. Peters: An Application of the Public Duty Rule as a Judicial Resurrection of Sovereign Immunity*, 43 SAN DIEGO L. REV. 706, 707 (1998) (recommending the abrogation of the public duty doctrine); Gerald P. Krause, Comment, *Municipal Liability: The Failure To Provide Adequate Police Protection—The Special Duty Doctrine Should Be Discarded*, 1984 WIS. L. REV. 499, 500 (1984) (advocating for the application of ordinary tort principles to municipal liability for failure to provide police protection); G. Braxton Price, Comment, *"Inevitable Inequities": The Public Duty Doctrine and Sovereign Immunity in North Carolina*, 28 CAMPBELL L. REV. 271, 273 (2006) (recommending the complete abrogation of the public duty doctrine in North Carolina as an "unworkable, confusing, and unjust" doctrine); Kelly M. Tullier, Note, *Governmental Liability for Negligent Failure To Detain Drunk Drivers*, 77 CORNELL L. REV. 873, 904 (1992) (arguing that "the public duty doctrine accomplishes the same unjust results as absolute sovereign immunity and, like sovereign immunity, must be abolished").

10. See, e.g., *Adams v. State*, 555 P.2d 235, 241–43 (Alaska 1976) (rejecting the public duty doctrine), *superseded by statute*, 1977 Alaska Sess. Laws ch. 37, § 3, *as recognized in* *Wilson v. Anchorage*, 669 P.2d 569 (1983); *Wilson v. Nepstad*, 282 N.W.2d 664, 667 (Iowa 1979) (rejecting the public duty doctrine as a defense to negligent building inspections); *Jean W. v. Commonwealth*, 610 N.E.2d 305, 307 (Mass. 1993) (rejecting the public duty doctrine), *superseded by statute*, Massachusetts Tort Claims Act, 1993 Mass. Acts 1541, § 67, *as recognized in* *Lawrence v. City of Cambridge*, 664 N.E.2d 1 (Mass. 1996); *Doucette v. Bristol*, 635 A.2d 1387, 1390 (N.H. 1993) (stating that the public duty doctrine has caused "legal confusion, tortured analysis, and inequitable results in practice"); *Schear v. Bd. of County Comm'rs*, 687 P.2d 728, 731 (N.M. 1984) (rejecting the public duty doctrine); *Coffee v. Milwaukee*, 247 N.W.2d 132, 137 (Wis. 1976) (rejecting the public duty doctrine). Arizona courts have also criticized (and ultimately rejected) the public duty doctrine. For example, in *Ryan v. State*, 656 P.2d 597 (Ariz. 1982), the Arizona Supreme Court reversed the trial court's order granting the State's motion for summary judgment

oppose the use of the public duty doctrine, the legislatures and courts in several states, including North Carolina, have continued endorsing its application in some form.<sup>11</sup>

Thus the pragmatic question for jurisdictions that support the public duty doctrine becomes not merely *whether* to apply the doctrine, but instead *how* to apply it clearly and consistently. In *Myers v. McGrady*,<sup>12</sup> the Supreme Court of North Carolina answered that question by adopting a functional test.

The *Myers* court unanimously held that the doctrine applied to protect the North Carolina Department of Environmental and Natural Resources ("NCDENR") in its duties to prevent and control forest fires.<sup>13</sup> Rejecting a narrow interpretation of the public duty doctrine offered by the North Carolina Court of Appeals, the state supreme court outlined a framework that focuses on whether an agency's specific statutory duty is owed to the public at large.<sup>14</sup>

This Recent Development first describes the application of the common law public duty doctrine in *Myers* and discusses portions of

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when an inmate from a state correctional facility escaped and, while robbing a convenience store, shot a bystander. *Id.* at 597. The court determined that it would "no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery." *Id.* at 559. Arizona's legislature later superseded the *Ryan* decision by passing the Actions Against Public Entities or Public Employees Act. ARIZ. REV. STAT. ANN. § 12-820 (2003). The Act "codified various common law doctrines that conferred absolute and qualified immunity on various public entities and employees." *Tucson v. Fahringer*, 795 P.2d 819, 820 (Ariz. 1990).

11. Some jurisdictions have endorsed the doctrine by judicial decision. *See, e.g.*, *Miller v. District of Columbia*, 841 A.2d 1244, 1246 (D.C. 2004) (holding that "the duty to provide public services is owed to the public at large, and, absent a special relationship between the police and an individual, no specific legal duty exists" (quoting *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981))); *Rome v. Jordan*, 426 S.E.2d 861, 862 (Ga. 1993) (holding that "the abrogation or waiver of sovereign immunity in Georgia did not create a duty on the part of a municipality where none existed before"). Other states have endorsed the public duty doctrine by statute. *See, e.g.*, ALASKA STAT. § 09.65.070 (2004) (providing broad immunity for municipalities against tort suits); MASS. ANN. LAWS ch. 258, § 10 (LexisNexis); N.H. REV. STAT. ANN. 99-D:1 (LexisNexis 2004) ("It is the intent of this chapter to protect state officers . . . who are subject to claims and civil actions arising from acts committed within the scope of their official duty while in the course of their employment for the state . . ."); N.M. STAT. ANN. §§ 41-4-4, 41-13-3 (West 1978) (establishing governmental civil immunity); WIS. STAT. ANN. § 893.80 (West 2006) (limiting plaintiffs' ability to sue in tort). Interestingly, the Supreme Judicial Court of Massachusetts abrogated the public duty doctrine as contrary to the intentions of the Massachusetts legislature, *see Jean W.*, 610 N.E.2d at 307, only to have the legislature enact a statute granting broad civil immunity to government, *see* MASS. ANN. LAWS ch. 258, § 10 (LexisNexis).

12. 360 N.C. 460, 628 S.E.2d 761 (2006).

13. *Id.* at 463, 628 S.E.2d at 764.

14. *Id.*

the doctrine's background that are critical to understanding the *Myers* decision. Next, this Recent Development explains how the court correctly differentiated the public duty doctrine and sovereign immunity as two separate hurdles that plaintiffs must overcome to hold state officials liable in tort. In *Myers*, the supreme court distinguished between the partial abrogation of sovereign immunity provided in the North Carolina State Tort Claims Act<sup>15</sup> ("Tort Claims Act") and the affirmative defense to liability provided by the common law public duty doctrine. By recognizing the public duty doctrine as a distinct common law doctrine, *Myers* implicitly supports the proposition that the doctrine should be applied equally to both state and local government actors.<sup>16</sup> Finally, this Recent Development concludes that the functional test offered in *Myers* for applying the public duty doctrine is clear, consistent, and correctly focuses on the "nature of the duty"<sup>17</sup> conferred by statute, rather than on the identity of the government actor.

The supreme court's unanimous decision in *Myers* to bar the plaintiff's claim<sup>18</sup> does not diminish the plaintiff's loss. Gail Myers's husband and the driver seated beside him died in an automobile collision caused when smoke from a smoldering forest fire combined with fog to reduce visibility on a North Carolina interstate.<sup>19</sup> Myers, along with several other plaintiffs, sued the North Carolina Division of Forest Resources ("NCDFR")<sup>20</sup> alleging that NCDFR—through its

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15. N.C. GEN. STAT. § 143-291(a) (2005).

16. See *Myers*, 360 N.C. at 465, 628 S.E.2d at 766 ("The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity.").

17. This phrase originates from the opinion of the Supreme Court of North Carolina in *Wood v. Guilford County*, 355 N.C. 161, 168, 558 S.E.2d 490, 496 (2002). See *infra* notes 61–67 and accompanying text (discussing the *Wood* decision).

18. *Myers*, 360 N.C. at 463, 628 S.E.2d at 764.

19. *Id.* at 461, 628 S.E.2d at 763.

20. *Id.* at 462, 628 S.E.2d at 763. NCDFR is a division of NCDENR. *Id.* at 461, 628 S.E.2d at 763. As administratrix of the decedent's estate, Ms. Myers initially brought suit in superior court against the other drivers involved in the accident. *Id.* When these other drivers brought third-party complaints against ranger Michael Bennett and NCDFR, the decedent's estate then sued the State directly. *Id.* Under the Tort Claims Act, direct tort actions against the State must be brought before the administrative court of the Industrial Commission, rather than in superior court. See N.C. GEN. STAT. § 143-291(a). Thus, Ms. Myers would not have been able to sue the State in a direct action in state court. Instead, after the defendants brought the State into the suit for indemnification or contribution, the plaintiff brought suit against the State as a third-party defendant under Rule 14 of the North Carolina Rules of Civil Procedure. N.C. R. CIV. P. 14. Whether the plaintiff had the procedural right to bring a direct action against the State in this suit is unclear, as the supreme court found that the public duty doctrine protected NCDFR and thus did not reach this procedural issue on appeal. See *Myers*, 360 N.C. at 465, 628 S.E.2d at 765–66.

employee, forest ranger Michael Bennett—negligently failed to extinguish the forest fire, left the fire while it was smoldering, and failed to warn nearby motorists of the danger from rising smoke and fog.<sup>21</sup> The supreme court stated that the determinative issue in *Myers* was whether NCDNR “may be liable in negligence for failure to control a naturally occurring forest fire or failing to make safe a public highway adjacent to the fire.”<sup>22</sup> In deciding that the Agency’s statutory duty was owed to the public as a whole and therefore was not enforceable by individual plaintiffs,<sup>23</sup> the court applied “the common law public duty doctrine to the powers and duties conferred upon NCDNR [by the General Assembly] to prevent, control and extinguish forest fires.”<sup>24</sup> While the supreme court’s holding applies specifically to NCDNR’s statutory duties, the *Myers* court’s interpretation of the public duty doctrine will affect government tort liability broadly because it reasserts the expansive language used in prior cases to describe the doctrine<sup>25</sup> and distinguishes the public duty doctrine from sovereign immunity.<sup>26</sup>

The roots of the public duty doctrine can be traced back to *South v. Maryland ex rel. Pottle*,<sup>27</sup> an 1855 United States Supreme Court decision in which the Court held that the breach of a public duty could not subject a sheriff to civil liability.<sup>28</sup> The Supreme Court of North Carolina adopted the public duty doctrine as a matter of state law in *Braswell v. Braswell*,<sup>29</sup> where the court explained that municipalities cannot be held liable for failing to provide police protection to prevent every criminal act.<sup>30</sup> In *Braswell*, the supreme

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21. *Myers*, 360 N.C. at 462, 628 S.E.2d at 763.

22. *Id.*

23. *Id.* at 463, 628 S.E.2d at 764.

24. *Id.*

25. See, e.g., *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 478–79, 495 S.E.2d 711, 714 (1998).

26. See *Myers*, 360 N.C. at 465, 628 S.E.2d at 766.

27. 59 U.S. (18 How.) 396 (1855).

28. See *id.* at 403.

29. 330 N.C. 363, 410 S.E.2d 897 (1991).

30. See *id.* at 370, 410 S.E.2d at 901. The public duty doctrine as stated in *Braswell* protects municipalities only when they fail to prevent criminal acts. See *id.* By holding that a forest ranger protecting against a naturally caused forest fire was shielded from liability under the doctrine, *Myers* implicitly rejected any distinction based on whether the government was responding to intentional misconduct of a party. See *Myers*, 360 N.C. at 463, 628 S.E.2d at 764. For an example of an earlier case in which the court of appeals rejected the idea that the public duty doctrine barred only suits involving criminal acts, see *Lassiter v. Cohn*, 168 N.C. App. 310, 315–18, 607 S.E.2d 688, 693–95 (2005) (barring a suit against the city of Durham for the allegedly negligent actions of a police officer who required the plaintiff to stand in an area where the plaintiff was then struck by a car), *discretionary review denied*, 359 N.C. 633, 613 S.E.2d 686 (2005).

court found that a county did not owe a legally enforceable duty to protect a woman who expressed fears that her husband, a deputy sheriff, would harm her.<sup>31</sup> When the deputy sheriff later murdered his wife, her son sued the sheriff's office, claiming that the county government should be liable for not preventing his mother's death.<sup>32</sup> The supreme court barred the suit, stating that the public duty doctrine protected local government from overwhelming liability and prevented the plaintiff from bringing a claim that the municipality had breached a duty owed to the public as a whole.<sup>33</sup>

*Braswell* set out two exceptions in which the public duty doctrine would not insulate a government actor from liability:

- (1) where there is a special relationship between the injured party and the police, for example, a state's witness or informant who has aided law enforcement officers; and (2) "when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered."<sup>34</sup>

Under the "special relationship" and "special duty" exceptions the government owes a duty of care to the plaintiff only when the government has a specific connection to the plaintiff or has made a specific promise to the plaintiff.<sup>35</sup>

While *Braswell* applied the public duty doctrine specifically to local law enforcement,<sup>36</sup> the supreme court later applied the public duty doctrine to state agencies as well. In both *Stone v. North Carolina Department of Labor*<sup>37</sup> and *Hunt v. North Carolina Department of Labor*,<sup>38</sup> the supreme court found the public duty doctrine applied as a defense to protect state agencies from liability when performing inspections required by law.<sup>39</sup> In *Stone*, the court dismissed the claims of injured former employees and representatives of employees killed in a workplace fire.<sup>40</sup> The plaintiffs claimed that

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31. See *Braswell*, 330 N.C. at 370–71, 410 S.E.2d at 901.

32. *Id.* at 366–69, 410 S.E.2d at 899–900.

33. *Id.* at 370–71, 410 S.E.2d at 901.

34. *Id.* at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 266 S.E.2d 1, 6 (1988)).

35. See 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 84 (2001).

36. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901.

37. 347 N.C. 473, 495 S.E.2d 711 (1998).

38. 348 N.C. 192, 499 S.E.2d 747 (1998).

39. See *id.* at 199, 499 S.E.2d at 751; *Stone*, 347 N.C. at 482–83, 495 S.E.2d at 717.

40. *Stone*, 347 N.C. at 482–83, 495 S.E.2d at 717.

State Occupational Safety and Health Division inspectors were negligent in failing to properly inspect the workplace for fire hazards.<sup>41</sup> In *Hunt*, the supreme court barred the claim of a plaintiff injured in a go-cart accident who alleged that the state inspector was negligent in failing to require that the go-cart business owner install adequate seatbelts.<sup>42</sup> Together, *Stone* and *Hunt* established the rule for applying the public duty doctrine relied upon in *Myers*.<sup>43</sup>

In *Stone*, the supreme court explained its application of the public duty doctrine as follows:

Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*.<sup>44</sup>

The broad language used in *Stone*—and reaffirmed in *Hunt*—suggested that the purpose of the public duty doctrine was to avoid subjecting the State to greater liability than a private person.<sup>45</sup> Justice Orr offered a strong dissent in *Stone*, arguing that the common law did not provide any “basis for the majority taking the public duty doctrine beyond the original bounds of local law enforcement.”<sup>46</sup> However, after *Hunt*, the supreme court began to apply the public duty doctrine very differently, based on whether the defendant was an agent of the State or, instead, an agent of local government.<sup>47</sup>

While the supreme court articulated the public duty doctrine with broad language in *Stone* and *Hunt*,<sup>48</sup> the court later chose not to apply the doctrine as broadly to local government. In two cases decided on the same day in 2000, *Lovelace v. City of Shelby*<sup>49</sup> and *Thompson v. Waters*,<sup>50</sup> the supreme court narrowly restricted the public duty doctrine as applied to local government actors.<sup>51</sup> In

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41. *Id.*

42. *Hunt*, 348 N.C. at 194–95, 499 S.E.2d at 748–49.

43. See *Myers v. McGrady*, 360 N.C. 460, 466–67, 628 S.E.2d 761, 766 (2006).

44. *Stone*, 347 N.C. at 478–79, 495 S.E.2d at 714 (citations omitted).

45. See *id.* at 478–79, 495 S.E.2d at 714; *Hunt*, 348 N.C. at 196, 499 S.E.2d at 749.

46. *Stone*, 347 N.C. at 484, 495 S.E.2d at 718 (Orr, J., dissenting); see also *Hunt*, 348 N.C. at 200, 499 S.E.2d at 751–52 (Orr, J., dissenting) (reaffirming his dissent in *Stone*).

47. See *infra* notes 50–67 and accompanying text.

48. See *supra* notes 44–45 and accompanying text.

49. 351 N.C. 458, 526 S.E.2d 652 (2000).

50. 351 N.C. 462, 526 S.E.2d 650 (2000).

51. *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654; *Thompson*, 351 N.C. at 463–64, 526 S.E.2d at 651.



*Lovelace*, the supreme court refused to apply the public duty doctrine to bar a claim against a 911 operator who was allegedly negligent in failing to immediately dispatch fire fighters upon receiving a 911 call reporting a burning home.<sup>52</sup> The supreme court held that the public duty doctrine did not apply “to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public.”<sup>53</sup> In *Thompson*, the supreme court further narrowed the doctrine’s applicability to determine that the public duty doctrine did not prevent homeowners from bringing a tort claim against county inspectors for their alleged negligence in failing to identify construction defects while the plaintiff’s home was being built.<sup>54</sup> In doing so, the supreme court affirmed that the public duty doctrine did not apply to local government beyond law enforcement officers.<sup>55</sup> Though the supreme court had previously applied the public duty doctrine to protect state inspectors,<sup>56</sup> it refused to apply the same rule to local inspectors.<sup>57</sup> Moreover, while in *Stone* and *Hunt* the court applied the doctrine based on whether the government was performing a duty owed to the public as a whole, two years later in *Lovelace* and *Thompson* the court applied the doctrine to municipalities based on whether the defendant was a law enforcement officer.<sup>58</sup>

Thus, the supreme court instituted different rules of application for the public duty doctrine based on the identity of the actor involved. First, the court gave more protection to state government employees than it did to local government employees.<sup>59</sup> Second, the court distinguished “law enforcement” officers from all other local government employees, affording the protection of the public duty doctrine only to the former group.<sup>60</sup>

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52. *Lovelace*, 351 N.C. at 460, 526 S.E.2d at 654.

53. *Id.* at 461, 526 S.E.2d at 654.

54. *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652.

55. *See id.*

56. *See Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 482–83, 495 S.E.2d 711, 717 (1998).

57. *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652.

58. *See id.*; *Lovelace*, 351 N.C. at 461, 526 S.E.2d at 654.

59. State agencies were protected broadly under *Stone* and *Hunt*, while local government actors were subject to the narrower rules of *Thompson* and *Lovelace*. Compare *Stone*, 347 N.C. at 482, 495 S.E.2d at 716 (“[W]e hold that the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act . . .”), with *Thompson*, 351 N.C. at 465, 526 S.E.2d at 652 (“This Court has not heretofore applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement.”).

60. *See Thompson*, 351 N.C. at 465, 526 S.E.2d at 652.

The court's propensity to apply the public duty doctrine differently to law enforcement officers than to other local government actors was tested in *Wood v. Guilford County*.<sup>61</sup> In *Wood*, a woman who was assaulted inside the Guilford County courthouse sued the county for her injuries, claiming they resulted from the county's negligent failure to provide adequate security.<sup>62</sup> The supreme court explained that it would be too narrow a reading of *Braswell* to require that local government officials fall under the statutory definition of "law enforcement" in order to be protected by the public duty doctrine.<sup>63</sup> The court stated that the doctrine would best be applied to local governments by asking whether the employee was "providing a service analogous to police protection to the general public"<sup>64</sup> and found that "[t]he test of whether the public duty doctrine applies is a functional one and includes consideration of the nature of the duty assumed by the local government defendant."<sup>65</sup> The court barred the plaintiff's claim under the public duty doctrine, finding that the county was protected from liability because the courthouse security officers served the same function as law enforcement, exercising a duty to protect the public as a whole.<sup>66</sup> Yet even while the court in *Wood* chose not to adopt a narrow view of what constituted police protection, it recognized that it was applying the public duty doctrine more narrowly to local government than it had previously applied the doctrine to state government.<sup>67</sup>

While the supreme court in *Lovelace*, *Thompson*, and *Wood* consistently limited the public duty doctrine's application to local government, none of these decisions indicated how the court would apply the public duty doctrine to state agencies. Thus, in *Myers v. McGrady*,<sup>68</sup> the Supreme Court of North Carolina directly addressed the public duty doctrine's applicability to state defendants for the first time since *Stone* and *Hunt* in 1998.<sup>69</sup>

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61. 355 N.C. 161, 558 S.E.2d 490 (2002).

62. *Id.* at 162–63, 558 S.E.2d at 492–93.

63. *Id.* at 168, 558 S.E.2d at 496.

64. *Id.* at 167, 558 S.E.2d at 495.

65. *Id.* at 168, 558 S.E.2d at 496.

66. *Id.* at 166–68, 558 S.E.2d at 495, 496.

67. *Id.* at 169, 558 S.E.2d at 496.

68. 360 N.C. 460, 628 S.E.2d 761 (2006).

69. In *Viar v. North Carolina Department of Transportation*, 359 N.C. 400, 401, 610 S.E.2d 360, 361 (2005), the supreme court reviewed a decision of the court of appeals regarding the public duty doctrine as it applies to the State, but dismissed the suit without reaching the merits for violations of the rules of appellate procedure.

The court of appeals in *Myers* found that “the public duty doctrine applies where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections.”<sup>70</sup> The court reflected on the types of government actors that had been protected by the public duty doctrine in the past and concluded that the list was exhaustive.<sup>71</sup> By limiting the public duty doctrine to law enforcement and state inspectors, the court of appeals adopted an identity test, applying the public duty doctrine strictly to government actors having the same job description as public officials to whom the supreme court had previously given protection.<sup>72</sup> The court of appeals found the public duty doctrine did not protect the forest ranger in *Myers* because a forest ranger is neither law enforcement nor a state inspector.<sup>73</sup>

When *Myers* reached the Supreme Court of North Carolina, the court held that the public duty doctrine protected NCDENR from liability, despite the fact that the forest ranger was not a law enforcement officer or a state inspector.<sup>74</sup> The court analyzed the statutes in which the General Assembly listed the duties of NCDENR and highlighted language that explains the responsibilities of forest rangers.<sup>75</sup> Further, the supreme court found that the statutory duties of forest rangers were owed to the public as a whole, distinguishing this type of duty from those that “create a special duty or specific obligation to a particular class of individuals.”<sup>76</sup> Thus, the court placed special emphasis on the wording of the statutes conferring duties on NCDENR, reiterating that the determination of what constitutes a public duty rests with the intentions of the General Assembly.<sup>77</sup>

By focusing on the specific responsibilities that the General Assembly conferred on NCDENR and assessing whether NCDENR

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70. *Myers v. McGrady*, 170 N.C. App. 501, 507, 613 S.E.2d 334, 339 (2005), *rev'd.*, 360 N.C. 460, 628 S.E.2d 761 (2006).

71. *Id.*

72. *See id.* at 508, 613 S.E.2d at 340.

73. *Id.* at 507, 613 S.E.2d at 339. The court cited sections 14-288.1 and 113-55 of the General Statutes of North Carolina, respectively, to explain that law enforcement officers are authorized to make arrests and that forest rangers are expressly not permitted to make arrests. *See id.* Thereby, the court emphasized that forest rangers cannot be law enforcement officers.

74. *Myers v. McGrady*, 360 N.C. 460, 468, 628 S.E.2d 761, 767 (2006).

75. *See id.* at 467-68, 628 S.E.2d at 767.

76. *Id.* at 469, 628 S.E.2d at 767.

77. *See id.* at 467-68, 628 S.E.2d at 767.

owes these duties to the public as a whole, the court in *Myers* used a functional test in applying the public duty doctrine. The supreme court did not compare forest rangers to law enforcement or inspectors—groups to which the supreme court had previously applied the public duty doctrine. Instead, the court focused on the nature of the duties conferred by the General Assembly, which authorized the agency to “‘take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this state.’”<sup>78</sup> Taking note of this statute, the court determined that “[t]he General Assembly has vested NCDENR with broad powers to protect the health and well-being of the general public and North Carolina’s forests.”<sup>79</sup> Thus, the court in *Myers* grounded its holding on the nature of the duties undertaken by forest rangers—duties performed for the benefit of the public as a whole.

This functional test moved away from the identity test previously applied in *Lovelace*,<sup>80</sup> *Thompson*,<sup>81</sup> and the court of appeals decision in *Myers*.<sup>82</sup> Thus, the court no longer compares the job title or job description of the government defendant to safety inspectors or law enforcement to assess whether the public duty doctrine would apply. *Myers* also seems to move away from recognizing any distinction between state and local government actors when it comes to applying the public duty doctrine.<sup>83</sup> While the court did not explicitly abandon this distinction, the *Myers* test stands in opposition to some of the reasoning for applying the doctrine differently to these two groups.<sup>84</sup>

The rationale for applying the public duty doctrine differently based on whether the defendant worked for state or local government

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78. *Id.* at 467, 628 S.E.2d at 766–67 (quoting N.C. GEN. STAT. § 113-51 (2005)).

79. *Id.* at 468, 628 S.E.2d at 767.

80. See *Lovelace v. City of Shelby*, 351 N.C. 458, 461, 526 S.E.2d 652, 654 (2000) (“While this Court has extended the public duty doctrine to state agencies required by statute to conduct inspections for the public’s general protection, we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public.” (citations omitted)).

81. See *Thompson v. Waters*, 351 N.C. 462, 465, 526 S.E.2d 650, 652 (2000) (“This Court has not heretofore applied the public duty doctrine to a claim against a municipality or county in a situation involving any group or individual other than law enforcement.”).

82. *Myers v. McGrady*, 170 N.C. App. 501, 507, 613 S.E.2d 334, 339 (2005) (“[T]he public duty doctrine applies where plaintiffs allege negligence through (a) failure of law enforcement to provide protection from the misconduct of others, and (b) failure of state departments or agencies to detect and prevent misconduct of others through improper inspections.”), *rev’d*, 360 N.C. 460, 628 S.E.2d 761 (2006).

83. See *infra* notes 106–07 and accompanying text.

84. See *infra* notes 108–11 and accompanying text.

is unclear,<sup>85</sup> especially in light of the fact that other jurisdictions do not generally make such a distinction.<sup>86</sup> The *Lovelace* and *Thompson* courts may have seen *Stone* as holding that the public duty doctrine is an element of the State's waiver of sovereign immunity.<sup>87</sup> While *Myers* clearly indicates that the public duty doctrine is entirely distinct from a waiver of sovereign immunity,<sup>88</sup> *Stone* did not adequately recognize the distinction between the two doctrines.<sup>89</sup>

The common law doctrine of sovereign immunity provides that the state may not be sued unless it consents to adjudication of liability.<sup>90</sup> As a partial waiver of the State's sovereign immunity, the General Assembly has enacted the Tort Claims Act, which provides:

The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, *under circumstances where the State of North Carolina, if a private person, would be liable to the claimant* in accordance with the laws of North Carolina. If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the

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85. Cf. *Brown-Graham*, *supra* note 8, at 2327 ("One wonders whether it is at all possible for the court to construct an intellectually defensible basis for limiting the doctrine to law enforcement for local governments but applying it to safety inspections for the State.").

86. See *id.* at 2327 n.216.

87. See *infra* notes 95–98 and accompanying text.

88. See *Myers v. McGrady*, 360 N.C. 460, 463, 628 S.E.2d 761, 764 (2006) (stating that the public duty doctrine and sovereign immunity are two separate hurdles that potential tort plaintiffs must overcome).

89. By emphasizing that the General Assembly endorsed the public duty doctrine through the Tort Claims Act, *Stone* blurred the line between the public duty doctrine and sovereign immunity. See *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715 ("[W]e construe the Tort Claims Act as incorporating the existing common law rules of negligence, including [the public duty] doctrine.").

90. See *Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 207, 443 S.E.2d 716, 721 (1994) ("The doctrine of sovereign immunity—that the state cannot be sued in its own courts without its consent—is firmly established in North Carolina law.").

Commission shall determine the amount of damages that the claimant is entitled to be paid.<sup>91</sup>

Thus, the Tort Claims Act waives the State's sovereign immunity under circumstances where the State would be liable if it were a private person. Because the Tort Claims Act applies only to state government,<sup>92</sup> it does nothing to waive governmental immunity held by local government. Instead, the waiver of governmental immunity as it applies to counties and cities is based on other relevant statutes that waive immunity when the municipality purchases insurance.<sup>93</sup>

In applying the public duty doctrine to protect state agencies from liability, the *Stone* court stated that the doctrine served the "express intention" of the Tort Claims Act that state agencies should have an enforceable duty to individuals only when a private person would have such a duty.<sup>94</sup> Because of the strong presumption that sovereign immunity has not been waived unless a legislature has been absolutely clear in granting a waiver,<sup>95</sup> the supreme court inferred that the General Assembly was allowing judicial discretion as to how to apply the common law public duty doctrine.

In *Stone*, the court found that the Tort Claims Act incorporated the public duty doctrine<sup>96</sup> to fill whatever gaps were left by the Tort Claims Act.<sup>97</sup> By intertwining the public duty doctrine with the Tort

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91. N.C. GEN. STAT. § 143-291(a) (2005) (emphasis added). The Act appoints the North Carolina Industrial Commission to hear tort claims against state agencies, rather than having these claims heard in superior court. *Id.*

92. See *Meyer v. Walls*, 347 N.C. 97, 104-09, 489 S.E.2d 880, 883-87 (1997).

93. See N.C. GEN. STAT. § 153A-435 (permitting counties and cities to insure themselves against liability for employees acting within the scope of employment and waiving sovereign immunity to the extent of the insurance coverage for any action within the government's function); § 160A-485 (authorizing cities to waive immunity from civil liability in tort actions if they purchase liability insurance).

94. *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 478-79, 495 S.E.2d 711, 714 (1998). ("The public duty doctrine . . . serves the legislature's express intention to permit liability against the State only when a private person could be liable.").

95. See *Midgett v. N.C. Dep't of Transp.*, 152 N.C. App. 666, 672, 568 S.E.2d 643, 648 (2002) (finding that "'the State and its governmental units cannot be deprived of the sovereign attributes of immunity except by a clear waiver by the lawmaking body'" (quoting *Orange County v. Heath*, 282 N.C. 292, 296, 192 S.E.2d 308, 310 (1972))); cf. *State ex rel. Reg'l Justice Info. Serv. Comm'n v. Saitz*, 798 S.W.2d 705, 708 (Mo. 1990) ("Any purported statutory waiver of sovereign immunity must be clear on its face.").

96. *Stone*, 347 N.C. at 479, 495 S.E.2d at 715 (holding that "[u]ntil the legislature clearly expresses that immunity is to be waived even in situations in which the common law public duty doctrine would otherwise apply to bar a negligence claim, we construe the Tort Claims Act as incorporating the existing common law rules of negligence, including that doctrine").

97. See *Myers v. McGrady*, 360 N.C. 460, 466, 628 S.E.2d 761, 766 (2006) ("Because '[p]rivate persons do not possess public duties,' the Court [in *Stone*] reasoned that the

Claims Act, the court confused important distinctions between the public duty doctrine and sovereign immunity. While the court in *Stone* discussed the public duty doctrine in light of the Tort Claims Act to explain how there was no conflict between the two doctrines, the discussion allowed the court to infer later in *Thompson* and *Lovelace* that the court's decision in *Stone* was limited to state agencies.

To clarify any confusion it may have previously created, the supreme court in *Myers* explained that it was not relying on any waiver of the State's sovereign immunity to apply the public duty doctrine to bar the plaintiff's claims.<sup>98</sup> The court held that tort plaintiffs must overcome *both* sovereign immunity and the public duty doctrine when seeking to hold the State liable.<sup>99</sup> Further, the court stated that sovereign immunity is a separate concept that must be considered prior to the question of whether the defendant owes a duty to the particular plaintiff bringing suit against the State.<sup>100</sup> While sovereign immunity applies differently to state government and local government, the distinctions the court draws in *Myers* remove any justification for applying the public duty doctrine differently to state and local government. Thus, after *Myers*, the public duty doctrine should apply equally to both state and local government.

Similarly, in *Myers* the court applied the public duty doctrine using a functional test, focusing on the nature of the duty undertaken by the government actor rather than the actor's identity.<sup>101</sup> The method in *Myers* for examining the *nature* of a duty involved two determinations. First, is the duty conferred by statute? Second, is the duty one conferred for the benefit of the public as a whole? The

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General Assembly intended the public duty doctrine to apply to negligence actions filed against state governmental entities pursuant to the Tort Claims Act." (quoting *Stone*, 347 N.C. at 478-79, 495 S.E.2d at 714)).

98. *Myers*, 360 N.C. at 465, 628 S.E.2d at 766 ("The public duty doctrine is a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity.").

99. *Id.* at 463, 628 S.E.2d at 764.

100. *Id.*; see also *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 198, 499 S.E.2d 747, 751 (1998) ("[T]he defendant's failure to inspect [in *Stone*] did not create liability . . ."). The Georgia Supreme Court has also stated that "[t]he initial question of duty precedes any discussion of sovereign immunity." *City of Rome v. Jordan*, 426 S.E.2d 861, 862 n.1 (Ga. 1993) (Beasley, J., concurring) (citing *Jordan v. City of Rome*, 417 S.E.2d 730 (Ga. Ct. App. 1992)). The *Rome* court also found that "the abrogation or waiver of sovereign immunity in Georgia did not create a duty on the part of a municipality where none existed before." *Id.* at 862.

101. *Myers*, 360 N.C. at 465-66, 628 S.E.2d at 766 (holding that the public duty doctrine "provides that when a governmental entity owes a duty to the general public, particularly a statutory duty, individual plaintiffs may not enforce the duty in tort").

court did not compare state forest rangers with safety inspectors<sup>102</sup> or compare the duties of forest rangers with police duties.<sup>103</sup> Instead, the application of a functional test eliminated the need for comparisons.

Applying the public duty doctrine based on the identity of an actor or even based on duties analogous to those performed by a particular actor is not a consistent method. First, applying the doctrine solely based on an actor's identity is problematic because such a method is both overinclusive and underinclusive. It is overinclusive because the doctrine might be afforded to a government actor who passes the identity test but is not really acting for the benefit of the public as a whole.<sup>104</sup> It is underinclusive because immunity might be denied to an actor performing a duty for the benefit of the general public, merely because the actor does not fit into previously accepted categories.<sup>105</sup> While it seems intuitive that forest rangers attempting to put out forest fires should be given at least the same protection from tort claims as seat belt inspectors,<sup>106</sup> the identity test offered by the court of appeals in *Myers* would have prevented NCDENR from being treated with the deference afforded to the Department of Labor. Second, applying the public duty doctrine only to duties analogous to those performed by a particular actor (such as a police officer) is underinclusive because it falsely presumes the government actor has sufficiently broad duties to justify consistent application of the public duty doctrine to similar actors.<sup>107</sup> The court adopted such an approach in *Wood* by asking whether the security officer was "providing a service analogous to police

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102. See *supra* notes 54–55 and accompanying text (discussing *Thompson*).

103. See *supra* notes 61–67 and accompanying text (discussing *Wood*).

104. For example, an identity test would prevent a plaintiff from holding local government liable for a police officer's negligent driving, even if the officer was not responding to an emergency call. An identity test wrongly looks at the actor, rather than the action.

105. For example, a forest ranger who puts out a forest fire is not technically fulfilling a police function, but such a government employee has duties similar to a police officer to protect people from harms created by the fire. For a further example that an identity test can lead to underinclusiveness, see the Kansas Tort Claims Act, a statute that has been amended to the point that it includes a list of two dozen exceptions to the State's waiver of immunity. See KAN. STAT. ANN. § 75-6104 (1997).

106. See *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194–95, 499 S.E.2d 747, 748–49 (1998).

107. In most jurisdictions "[t]he public duty doctrine extends beyond police duties to all public entities." Christopher J. Roederer, *Another Case in Lochner's Legacy, the Court's Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order Is a "Sham," "Nullity," and "Cruel Deception,"* 54 *DRAKE L. REV.* 321, 325 n.13 (2006) (citing *DAN DOBBS, THE LAW OF TORTS* § 271 (2003)).



protection to the general public.”<sup>108</sup> Such a test considers the type of duty undertaken by a government actor, rather than exclusively considering the identity of the actor, and is thus an improvement over a pure identity test. The problem with this partially functional test is that it still compares the duties of one government actor with the duties of another actor rather than looking at the nature of each actor’s duties as conferred by the General Assembly.

Using a partially functional test would breed confusion in predicting and deciding outcomes. For example, if courts limit the public duty doctrine to duties analogous to “police protection,” these courts still have a vague standard to apply as to what constitutes police protection.<sup>109</sup> The problem with this partially functional test is that a duty does not become protected until the court has evidence of or can foresee a particular model actor engaging in that particular activity. This standard is unclear and unpredictable because it leaves too much to the whims of a particular court.

Moreover, applying the public duty doctrine based on one particular type of duty would fail to protect dissimilar duties of equal importance. For example, the general responsibilities of local fire fighters to extinguish fires are very similar to those of NCDENR in *Myers*. While fire fighters do not perform *police* duties, their responsibilities are of similar urgency and require similar discretion. After the *Myers* court adoption of a functional test to protect NCDENR from liability for fighting forest fires, local fire fighters should receive similar protection. Although the Supreme Court of North Carolina has never addressed the applicability of the public duty doctrine to local fire departments, the court of appeals held in *Willis v. Town of Beaufort*<sup>110</sup> that local fire departments were not protected under the public duty doctrine after the supreme court’s decision in *Lovelace*.<sup>111</sup>

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108. *Wood v. Guilford County*, 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002). See *supra* notes 61–67 and accompanying text (discussing *Wood*).

109. The decision of the Supreme Court of Georgia in *Rowe v. Coffey*, 515 S.E.2d 375 (Ga. 1999), exemplifies that such a standard is not clear. In *Rowe*, the court applied the public duty doctrine to protect a sheriff who decided not to put up a barricade to prevent water damage during a storm. See *id.* at 375–76. When the road washed out, the missing barricade caused several motor vehicle collisions and one death. See *id.* at 376. While limiting the application of the public duty doctrine to those cases involving “police protection,” the court interpreted “police protection” broadly enough to protect the government from liability for the sheriff’s actions. See *id.* at 377. After *Rowe*, then, a duty analogous to police protection includes the placement of barricades on the roadway.

110. 143 N.C. App. 106, 544 S.E.2d 600 (2001).

111. See *id.* at 110, 544 S.E.2d at 604. The result in *Willis* seems incongruous with *Myers*, and it is difficult to imagine that *Myers* would not at least influence the court’s

After *Myers*, a better approach to determine whether a government agency should be held liable for breaching a duty to an individual is to determine whether the General Assembly conferred on the government actor a duty to individuals. Focusing on the nature of the duty implies that the intent of the General Assembly, as evidenced by the relevant statute conferring a particular duty, should be a court's point of reference. If a particular duty was intended to benefit a narrow class of the public, then the agency responsible for the duty will be liable to those the statute intended to protect. If the duty was intended to benefit the public as a whole, then the public duty doctrine would apply to bar claims for negligence.

This functional standard applied in *Myers* is clear and will be applied more easily than either the identity or partially functional approaches because the test involves only two steps: (1) determine whether the General Assembly conferred a statutory duty on the defendant government actor; and (2) analyze the intent of the General Assembly to determine whether the statute is intended to benefit the public as a whole or, instead, a more narrow class of individuals. If the statute protects the public as a whole, then the public duty doctrine prevents the government from being held liable. If the statute protects a narrower class, then this class has standing to sue.

While the courts still will need to assess whom the General Assembly *intended* to protect within a given statute, this discretion will be exercised within a manageable framework. Rather than merely asking whether one duty is similar to another duty, the courts will look directly at the intentions of state lawmakers to determine whether they chose to protect a particular action from increased liability.

The functional test in *Myers* is not only a clear alternative to other approaches but the standard is in accord with the intentions of the General Assembly and can be applied more consistently to government agencies than can the other approaches. The *Myers* test is in accord with the intentions of the General Assembly because it looks directly at the relevant statutes in determining whom state lawmakers intended to protect and treats government the same as a private person would be treated. In *Myers*, the court looked directly at the statute through which the General Assembly conferred fire

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future application of the public duty doctrine to fire fighting duties. Since the *Myers* court distanced itself from identity tests and partially functional tests, North Carolina courts should adopt the functional test applied in *Myers*.

fighting duties on NCDENR and determined from the statute that the public duty doctrine should apply.<sup>112</sup> Under a functional test, the public duty doctrine's application rests on the wording provided by state lawmakers.

More generally, the public duty doctrine recognizes the "government's need to exercise discretion without the pressures of potential tort liability."<sup>113</sup> Granting immunity from civil actions gives government discretion as to where to allocate resources and gives specific government actors the discretion to use their best judgment under difficult circumstances without fear of being sued.<sup>114</sup> Moreover, the public duty doctrine protects the abilities of government officials to make discretionary decisions without second-guessing by courts and juries, who are "ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public."<sup>115</sup>

The *Myers* test also comports with the General Assembly's goal, explained in the Tort Claims Act, that the State should be treated as a private person and should not risk liability where a private person could not.<sup>116</sup> By applying a functional test, *Myers* recognizes that a "court must decide the appropriate scope of duty for government defendants, just as it does for private defendants."<sup>117</sup> This recognition is part of why "[t]he applicability of the public duty doctrine is a question of law to be raised at the pleading stage of a case."<sup>118</sup> Like a private person, the government cannot be negligent if it does not owe an enforceable duty.

In practice, courts seem more likely to apply the public duty doctrine when a government employee negligently fails to act and allows harm to occur (nonfeasance) than when the employee negligently acts and causes harm (misfeasance).<sup>119</sup> It is well established in tort law that "government is not liable for non-action

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112. See *supra* notes 75–77 and accompanying text.

113. Brown-Graham, *supra* note 8, at 2325.

114. *Id.* at 2324–25 (stating general public policy reasons cited for maintaining the public duty doctrine).

115. Brown-Graham, *supra* note 8, at 2325 (quoting *Ezell v. Cockrell*, 902 S.W.2d 394, 398 (Tenn. 1995)).

116. N.C. GEN. STAT. § 143-291(a) (2005).

117. Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in Governmental Liability*, 29 SEATTLE U. L. REV. 1, 19 (2005).

118. Brown-Graham, *supra* note 8, at 2323.

119. See Tardif & McKenna, *supra* note 117, at 21 (noting that "[t]he public duty doctrine had one anomaly: it protected officials when they declined to act, but did not protect them when they acted").

unless state law does impose such a duty.”<sup>120</sup> Moreover, courts apply the public duty doctrine more often when the government agency’s actions only indirectly cause harm. The North Carolina Court of Appeals stated as much in *Moses v. Young*:<sup>121</sup>

An exhaustive review of the public duty doctrine as applied in North Carolina reveals no case in which the public duty doctrine has operated to shield a defendant from acts directly causing injury or death. Rather, the application of the public duty doctrine in [North Carolina] has been confined to cases where the defendant’s actions proximately or indirectly result in injury.<sup>122</sup>

When the General Assembly confers a duty on a government agency to protect the public from third-party harm, the public duty doctrine protects the relevant agency from becoming a guarantor of safety. In doing so, the public duty doctrine treats the government agency in the same way that a private party would be treated.<sup>123</sup>

Aside from being more consistent with the intentions of the General Assembly, the *Myers* test also provides a consistent method of applying the public duty doctrine uniformly to various government actors. Because the inquiry into whether to apply the doctrine begins with the nature of the duty (or the action) involved rather than the identity of the actor, the functional test treats similar duties similarly, no matter who undertakes the duty. As discussed above, both the identity and partially functional tests focus first on the actor involved, and thus these tests will necessarily treat other actors differently.

In his dissent in *Stone*, Justice Orr argued that law enforcement officers are unique and require unique protections, largely because they protect the public from criminals, whose actions are unpredictable.<sup>124</sup> While law enforcement officers have unique duties, these officers are not alone in possessing responsibilities to protect

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120. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1035 (5th ed. 1984).

121. 149 N.C. App. 613, 561 S.E.2d 332 (2002).

122. *Id.* at 616, 561 S.E.2d at 334.

123. RESTATEMENT (SECOND) OF TORTS § 315 (1965) (“There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relationship exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.”).

124. *Stone v. N.C. Dep’t of Labor*, 347 N.C. 473, 484, 495 S.E.2d 711, 718 (1998) (Orr, J., dissenting).

the public.<sup>125</sup> By applying the *Myers* test to distinguish among duties rather than among actors, courts can consistently protect government actors whose duties are intended to benefit the public as a whole.

The *Myers* test is straightforward in its application and is consistent both with the intentions of the General Assembly and as applied across the range of government actors and duties. By moving away from an identity test or a partially functional test, the Supreme Court of North Carolina adopted a workable test that should apply equally to both state and local government actors. As a truly functional standard, the *Myers* test for applying the public duty doctrine will enable the Industrial Commission and the courts to fairly impose liability on state actors where appropriate and protect the State from liability where the State most needs protection. Focusing on the nature of the duty conferred on a government actor will allow for a more rational and consistent application of the public duty doctrine.

RYAN RICH

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125. For example, the duties of a forest ranger to extinguish fires are certainly duties to protect the public, even if they are not "police duties."

