

CASENOTE

***City of Rome v. Jordan*: Georgia is a Public Duty Doctrine Jurisdiction With No Waiver Of Sovereign Immunity—A Good “Call” by the Supreme Court**

In *City of Rome v. Jordan*,¹ the plaintiff sued the city of Rome, Georgia and its police department for negligently failing to dispatch a police vehicle in response to two emergency calls.² A man who had allegedly “escaped” from an alcohol rehabilitation center attacked and sexually assaulted plaintiff in her home late one night.³ Once the assailant entered plaintiff’s home, plaintiff’s sister-in-law called the

1. 263 Ga. 26, 426 S.E.2d 861 (1993).

2. *Id.* at 26, 426 S.E.2d at 861. The gravamen of plaintiff’s case was for nonfeasance by the police department. Plaintiff also sued for negligent training of radio dispatch personnel. The court of appeals affirmed the trial court’s grant of summary judgment to defendants on the negligent training theory. *Id.* at 26, 426 S.E.2d at 862.

3. *Id.* at 30, 426 S.E.2d at 864. The assailant was the estranged husband of plaintiff’s sister-in-law who went to plaintiff’s home asking for plaintiff’s sister-in-law. Neither the fact that a distant familial relationship existed between the two nor that the assailant had allegedly escaped from an alcohol rehabilitation center was pertinent to the discussion of the police department’s negligence in failing to dispatch a patrol car to plaintiff’s home. The sole issue was whether the municipality owed a tort duty to this plaintiff.

police department and informed them of the possible danger to plaintiff.⁴ The assailant sexually assaulted plaintiff twice at knifepoint over a period of one and a half hours, but the police never arrived.⁵ The trial court granted defendant's motion for summary judgment holding that plaintiff lacked a special relationship with the municipality, thus the police department had no duty (in tort) to protect plaintiff.⁶ The court of appeals reversed the trial court's grant of summary judgment holding that a "special relationship" is not required for municipal liability based upon the nonfeasance of its police department.⁷ On appeal the Georgia Supreme Court reversed. When a special relationship exists between the individual and the municipality that sets the individual apart from the general public and engenders a special duty owed to that individual, the municipality may be subject to liability for the nonfeasance of its police department.⁸ A special relationship exists when there is:

- 1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; 2) knowledge on the part of the municipality that inaction could lead to harm; and,

4. *Id.* During the first sexual assault, plaintiff's sister-in-law called plaintiff to make sure the police had arrived. Plaintiff answered the phone, indicated the police were not there, and she was sexually assaulted again. Plaintiff's sister-in-law called the police again. *Id.*

5. *Jordan v. City of Rome*, 203 Ga. App. 662, 664, 417 S.E.2d 730, 732 (1992). A detailed chronology of the facts can be found in the court of appeals opinion.

6. *Jordan*, 263 Ga. at 26, 426 S.E.2d at 861-62. Critical to an understanding of this case is that the trial court (and later the supreme court) decided the issue of duty prior to any analysis of sovereign immunity. The supreme court stated that "the threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care." *Id.* at 27, 426 S.E.2d at 862. The court stated that the question of duty precedes any question of sovereign immunity, which "is a defense rather than an inroad on one of the elements of a tort." *Id.*

The question rather, should be one of sovereign immunity first and then one of duty. If a municipality has the shield of sovereign immunity, any discussion of duty or special relationships is moot. *See infra* note 54.

7. *Jordan v. City of Rome*, 203 Ga. App. at 667, 417 S.E.2d at 734-35. The court of appeals' holding, if affirmed, would have made Georgia a jurisdiction that rejects the public duty doctrine and uses traditional tort principles to determine the liability of municipalities. The court stated:

[W]e hold that where a foreseeable risk of harm develops that is not caused by or created by the municipality, its duty to exercise ordinary care to protect an individual within its boundaries . . . arises only when it reasonably knew or should have known that its acts or omissions exposed an individual to the risk.

Id.

8. *Jordan*, 263 Ga. at 28-29, 426 S.E.2d at 863.

3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking.⁹

The public duty doctrine provides that since government owes a duty to the public in general, it does not owe a tort duty to any individual citizen.¹⁰ The origins of the public duty doctrine lie in the United States Supreme Court's decision in *South v. Maryland*.¹¹ In *South* plaintiff sued the local sheriff for breach of a duty to provide police protection when the sheriff refused to arrest and detain citizens whom the sheriff knew had threatened plaintiff.¹² The Court held that the powers and duties of the sheriff are by nature a public duty, "for neglect of which [the sheriff] is amenable to the public, and punishable by indictment only."¹³ The New York Court of Appeals addressed the issue of a duty to protect the public in the landmark decision *Moch Co. v. Rensselaer Water Co.*¹⁴ Judge Cardozo stated, in analyzing the tort liability of a water company arising out of a contractual duty to the public to provide water service, "[i]f conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward."¹⁵ A minority of jurisdictions consider the public duty doctrine to be a judicial means of "piercing" a governmental entity's sovereign immunity defense

9. *Id.* at 29, 426 S.E.2d at 862; *cf.* *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987) (required an additional element to special relationship test, *i.e.*, direct contact between plaintiff and municipality).

In Justice Fletcher's concurrence in *Jordan*, he stated that he would "go further" than the majority and adopt the direct contact test as the New York court did in *Cuffy* to limit the class of citizens to whom the municipality's special duty extends. 263 Ga. at 31, 426 S.E.2d at 864-65 (Fletcher, J., concurring).

10. *See, e.g.*, *Shore v. Town of Stonington*, 444 A.2d 1379 (Conn. 1982); *Schuster v. City of New York*, 154 N.E.2d 534 (N.Y. 1958); *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861. A special relationship requirement is an exception to the public duty doctrine. Therefore, as a general rule, no liability in tort attaches to a municipality when the duty breached was to the general public *unless* a special relationship exists (and thus a special duty).

11. 59 U.S. (18 How.) 396 (1855).

12. *Id.* at 401.

13. *Id.* at 403. The Court further held that the plaintiff failed to state a cause of action because plaintiff did not allege any "special individual right" the enjoyment of which the sheriff restrained or hindered by an intentional act or misfeasance or nonfeasance. *Id.*

14. 159 N.E. 896 (N.Y. 1928).

15. *Id.* at 898. Cardozo refused to follow plaintiff's argument that the water company had a duty to all. Plaintiff argued that the water company's contract with the city brought it within such a relation with everyone who might be potentially benefitted through the supply of water to make negligent performance of supplying water the basis of an action in tort. *Id.* at 898.

when sovereign immunity has not been abrogated or waived.¹⁶ Nevertheless, a majority of jurisdictions apply the public duty doctrine and require a "special relationship" to create any tort duty on a municipality.¹⁷ The public duty doctrine and special relationship exception are popular in jurisdictions where sovereign immunity has been abrogated or waived and has been criticized as an improper judicial

16. *Jordan v. City of Rome*, 203 Ga. App. at 665, 417 S.E.2d at 733-34; *see also Adams v. State*, 555 P.2d 235 (Alaska 1976); *Ryan v. State*, 656 P.2d 597 (Ariz. 1982) (overruling *Massengill v. Yuma County*, 456 P.2d 376 (Ariz. 1969), a public duty doctrine case stating that the public duty doctrine is a "severe hampering of a governmental function [and] thwart[s] . . . established public policy." *Ryan*, 656 P.2d at 600).

Note that the Georgia Supreme Court's decision in *Jordan*, applied the former Georgia Constitutional waiver of sovereign immunity to the extent of a governmental entity's purchase of liability insurance. GA. CONST. art. I, § 2, para. 9 (1983). The new constitution, as amended by the general election of 1990, removes the waiver of sovereign immunity, and sovereign immunity in tort can be waived only by an act of the General Assembly in a Georgia Tort Claims Act. GA. CONST. art. I, § 2, para. 9 (Supp. 1993). To reiterate, *Jordan's* logic is uncertain because the issue of duty is irrelevant if the municipality has the convenient shield of sovereign immunity. *See infra* note 54.

For a helpful analysis of the 1991 amendment to Georgia's constitution and its relationship with the 1992 Georgia Tort Claims Act, *see* R. Perry Sentell, Jr., *Local Government Tort Liability: The Summer of '92*, 9 GA. ST. U. L. REV. 405 (1993); David J. Maleski, *The 1992 Georgia Tort Claims Act*, 9 GA. ST. U. L. REV. 431 (1993).

17. *See, e.g., Schuster v. City of New York*, 154 N.E.2d 534 (N.Y. 1958) (acknowledged as the first case to create a special relationship exception to public duty doctrine. New York Court of Appeals denied the city's motion to dismiss because the city's police department owed a "special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration." *Id.* at 537.); *Cuffy*, 505 N.E.2d 937 (N.Y. 1987) (required special relationship the elements of which are: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party (*see supra* note 9); and, (4) that party's justifiable reliance on the municipality's affirmative undertaking).

See generally *Florence v. Goldberg*, 375 N.E.2d 763 (N.Y. 1978); *Weiner v. Metropolitan Transp. Auth.*, 433 N.E.2d 124 (N.Y. 1982); *DeLong v. County of Erie*, 457 N.E.2d 717 (N.Y. 1983); *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989); *Riss v. City of New York*, 240 N.E.2d 860 (N.Y. 1968).

Other jurisdictions follow New York's lead in applying the public duty doctrine and requirement of a special relationship: *Gardner v. Village of Chicago Ridge*, 219 N.E.2d 147 (Ill. App. Ct. 1966) (police owed special duty to plaintiff when police officer asked plaintiff to accompany the officer to the side of the highway and identify suspects in assault and battery and suspects beat plaintiff in presence of police); *Massengill v. Yuma County*, 456 P.2d 376 (Ariz. 1969) (applied public duty doctrine and special relationship test when plaintiff alleged that police negligently refused to arrest law-violating drivers who subsequently crashed into and killed plaintiff's decedent. *Id.* at 378, *overruled by Ryan*, 656 P.2d 597 (Ariz. 1982)).

revival of sovereign immunity.¹⁸ Jurisdictions adhering to the public duty doctrine state differing policies in support of it, including the following: government should be able to enact laws for the protection of the public without exposing the taxpayers to open-ended and potentially harsh liability from its attempts to enforce them;¹⁹ broad liability would discourage municipalities from acting at all;²⁰ police protection is a resource-allocating function that is better left to the discretion of the policy makers because it could impede municipal officials from allocating resources for fear of tort liability rather than promotion of the public welfare;²¹ and the doctrine restricts liability of the governmental entity for the actions of a third party by limiting duty similarly to the manner in which the liability of a private party is restricted.²² Jurisdictions not

18. See, e.g., Kelly M. Tullier, Note, *Governmental Liability For Negligent Failure to Detain Drunk Drivers*, 77 CORNELL L. REV. 873 (1992).

Courts continue to impose the functional equivalent of sovereign immunity . . . by using the public duty doctrine to shield the public entity from liability. Like sovereign immunity, the public duty doctrine shields the government from liability merely because of the status of the wrongdoer; the doctrine protects the government from liability when a private individual would be liable. Thus the public duty doctrine accomplishes the same unjust results as absolute sovereign immunity and, like sovereign immunity, must be abolished.

Id. at 903-04.

However, others herald the public duty doctrine because of its judicial notice of a municipality's (and in particular, police departments') role as one of resource allocating. See David A. Aaby, Comment, *The Scope of the Public/Special Duty Doctrine in Illinois: Municipal Liability For Failure to Provide Police Protection*, 10 N. ILL. U. L. REV. 269 (1990).

The need for such broad limitations on liability in the area of police protection is generally justified by public policy considerations which center on the functional aspects of police activity [which are] that police require a substantial amount of discretion in determining how and when police resources should be allocated Thus, for a court, in hindsight, to impose on the officer a duty to protect an individual would result in an unwarranted interference by the judicial branch in a decision properly allocated to the [police department].

Id.

This debate is best summed up by the Georgia Supreme Court and the Georgia Court of Appeals in the instant case, i.e., *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993), and *Jordan v. City of Rome*, 203 Ga. App. 662, 417 S.E.2d 730 (1992); see also *Leake v. Cain*, 720 P.2d 152 (Colo. 1986) (Colorado Supreme Court abolished public duty rule in Colorado, nick-naming it: "A duty to all . . . is a duty to none.")

19. *O'Connor v. City of New York*, 447 N.E.2d 33, 36 (N.Y. 1983).

20. *Id.*

21. *Id.*; *Jordan*, 263 Ga. at 28, 426 S.E.2d at 863; *Kircher v. City of Jamestown*, 543 N.E.2d 443, 445 (N.Y. 1989).

22. *Jordan*, 263 Ga. at 29, 426 S.E.2d at 862-63; see also *Associated Health Sys. v. Jones*, 185 Ga. App. 798, 366 S.E.2d 147 (1988), for Georgia law on duty to protect a potential victim from acts of third person.

adhering to the public duty doctrine question the policies given in support of its application, and proffer policies for applying traditional tort principles to determine the tort liability of a municipality such as:²³ public duty doctrine creates a shield behind which governmental entities can hide when sovereign immunity has been abrogated or waived which imposes a type of immunity exclusive to governmental defendants;²⁴ public office or employment should not be made a shield to protect careless public officials from the consequences of their misfeasances in the performance of their duties;²⁵ as in all negligence cases, plaintiffs (not in a public duty state) must still show a duty was breached, and that the breach proximately caused an injury, thus eliminating fear of widespread lawsuits on the breach of a duty to the general public;²⁶ the doctrine does not depend at all on the grade of the office, but exclusively upon the nature of the duty;²⁷ and the doctrine has a harsh effect on plaintiffs who would be entitled to recover for their injuries but for the public status of the tortfeasor (a municipality).²⁸ The viability of the public duty doctrine in tort law is ambiguous at best. As it seems to gain popularity in more and more jurisdictions, heavy criticisms surface.²⁹ Ironically, the critics seem to fuel the life of the doctrine since other states (*e.g.*, Georgia) are currently adopting it.³⁰

In the instant case, the Georgia Supreme Court had the choice of adopting the public duty doctrine or the decision of the court of appeals by applying traditional tort principles to cases when a plaintiff sues a municipality.³¹ The court addressed sovereign immunity only briefly before adopting the public duty doctrine, stating that the abrogation or

23. See *supra* note 18 and accompanying text.

24. *Jordan v. City of Rome*, 203 Ga. App. at 665, 417 S.E.2d at 734.

25. *Ryan v. State*, 656 P.2d 597, 598 (Ariz. 1982) (quoting *Ruth v. Rhodes*, 185 P.2d 304 (Ariz. 1947)).

26. *Id.* at 599. This argument misses the point because the public duty doctrine also requires the plaintiff to prove breach and causation; the public duty doctrine simply establishes a duty when a special relationship exists.

27. *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986).

28. *Id.* at 159.

29. See, *e.g.*, *Leake*, 720 P.2d 152; *Ryan*, 656 P.2d 597; *Adams v. State*, 555 P.2d 235 (Alaska 1976); and *O'Connor v. City of New York*, 447 N.E.2d 33, 36-38 (N.Y. 1983) (Wachtler, J., dissenting).

30. See *City of Rome v. Jordan*, 263 Ga. 26, 426 S.E.2d 861 (1993). It is ironic that the Georgia Supreme Court adopted the public duty doctrine after the amendment to the Georgia Constitution removing the waiver of sovereign immunity except as per a Georgia Tort Claims Act. The irony is that most jurisdictions adopting public duty do so where sovereign immunity has been abrogated or waived. See *infra* notes 46-47, 54 and accompanying text.

31. See *supra* notes 16-29.

waiver of sovereign immunity in Georgia³² did not create a duty on the part of the municipality when none existed before.³³ In adopting the public duty doctrine, Justice Sears-Collins, writing for the court, stated that:

to ensure responsibility and the utmost protection possible within limited means, it is important that a municipality be accountable for its negligence to some degree. Hence, where there is a special relationship between the individual and the municipality which sets the individual apart from the general public and engenders a special duty owed to that individual, the municipality may be subject to liability for the nonfeasance of its police department.³⁴

In support of the public duty doctrine, the court stated that government would now be liable for the actions of a third party in the same restricted manner as a private individual.³⁵ Further, the court reasoned that a municipality's provision of police protection is a resource-allocating function better left to the discretion of the policy makers.³⁶ Therefore, the court reasoned that no liability can attach to a municipality based on its duty to protect the general public.³⁷ A municipality can be liable for the acts or omissions of its police

32. See GA. CONST. art. I, § 2, para. 9 (1983).

33. *Jordan*, 263 Ga. at 28, 426 S.E.2d at 862. See also *supra* note 6. This statement is interesting because the 1991 amendment removes the "waiver through insurance," and the question should be one of immunity first and duty second. GA. CONST. art. I, § 2, para. 9 (Supp. 1993).

34. *Jordan*, 263 Ga. at 28-29, 426 S.E.2d at 863.

35. *Id.* at 28, 426 S.E.2d at 862-63. See *supra* note 22 and accompanying text for discussion of liability in Georgia of an individual for actions of third persons.

36. *Id.* at 28, 426 S.E.2d at 863. See also *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989). This argument in support of the public duty doctrine is essentially the same as the argument in note 21, *i.e.*, the courts do not want to hold police departments liable for negligent acts to the general public for fear that police officers will act (or fail to act) with the motivation of avoiding tort liability. This argument suggests that police officers will be able to protect and serve without the fear of lawsuits and thereby provide more efficient and effective service. The public duty doctrine extends to all governmental departments for all torts; the facts of *Jordan* apply to failure of a police department to act.

For cases involving governmental entities other than police departments, see *Williams v. City of Tusculumbia*, 426 So. 2d 824 (Ala. 1983) (fire department); *Dahlheimer v. City of Dayton*, 441 N.W.2d 534 (Minn. App. 1989) (fire department); *Weiner v. Metropolitan Transp. Auth.*, 433 N.E.2d 124 (N.Y. 1982) (local transit authority); *Fryman v. JMK/Skewer, Inc.*, 484 N.E.2d 909 (Ill. App. Ct. 1985) (restaurant inspection); *Pierce v. Spokane*, 730 P.2d 82 (Wash. Ct. App. 1986) (municipal soil inspector).

37. *Jordan*, 263 Ga. at 28, 426 S.E.2d at 863.

officers,³⁸ however, when a special relationship exists between the victim and the municipality.³⁹ The test for special relationship is:⁴⁰

- 1) an explicit assurance by the municipality, through promises or actions, that it would act on behalf of the injured party; 2) knowledge on the part of the municipality that inaction could lead to harm; and,
- 3) justifiable and detrimental reliance by the injured party on the municipality's affirmative undertaking.⁴¹

Applying the special relationship test to the facts of *Jordan*, the court found that there was no special relationship, and therefore, no duty or liability.⁴² The plaintiff failed to prove detrimental reliance because "[a]ny reliance on [plaintiff's] part on the police arriving was based solely on a belief that the police would come if called, not on any promise made by the police."⁴³ This prong of the special relationship is most difficult to prove and has the effect of reviving sovereign immunity in jurisdictions where it has been waived or abrogated.⁴⁴

Clearly, the significance of the supreme court's decision is that Georgia is now a public duty doctrine jurisdiction.⁴⁵ The most curious part of the decision is that the court adopted the public duty doctrine after the constitutional amendment removing the waiver of sovereign immunity.⁴⁶ Sovereign immunity plays a large role in any discussion of the

38. See *supra* note 36.

39. *Jordan*, 263 Ga. at 28-29, 426 S.E.2d at 863.

40. The Georgia Supreme Court adopted this test from the New York Court of Appeals in *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987). The New York court adopted the traditional special relationship test requiring (in addition to the three-pronged Georgia test) direct contact between the municipality and victim. The *Jordan* court rejected this requirement listing two reasons: (1) numerous cases would arise when the victim cannot directly contact the municipality due to physical limitations or other restraints, which would be unfair; and (2) jurisdictions requiring direct contact do so to satisfy the reliance requirement because there can be no reliance when there is no direct contact; but the *Jordan* court stated that the reliance requirement alone meets this concern. *Jordan*, 263 Ga. at 29, 426 S.E.2d at 863.

Justice Fletcher stated in a concurrence that he would go further and require direct contact because, "[a]lthough it is closely related to the reliance element, the two requirements are not synonymous . . . the additional requirement . . . would rationally limit the class of citizens to whom the municipality's special duty extends." *Id.* at 31, 426 S.E.2d at 864-65 (Fletcher, J. concurring).

41. *Jordan*, 263 Ga. at 29, 426 S.E.2d at 863.

42. *Id.* at 30, 426 S.E.2d at 864.

43. *Id.*

44. See *supra* note 18 and accompanying text.

45. See 38 A.L.R.4th 1194 (1985 & Supp. 1993) for a complete annotation of jurisdictions adhering to the public duty doctrine.

46. GA. CONST. art. I, § 2, para. 9 (Supp. 1993). The amendment lifted the waiver of sovereign immunity to the extent of liability insurance purchased by a municipality. The

public duty doctrine because analysis of one is commonly confused with analysis of the other.⁴⁷ Critics of the public duty doctrine argue that it is simply a judicial reinstatement of sovereign immunity when sovereign immunity has been waived or abrogated.⁴⁸ The public duty doctrine however, is not sovereign immunity, but rather is a *means* of creating a duty upon the municipality when a special relationship exists.⁴⁹ The true effect of the special relationship test is to limit highly litigious plaintiffs who wish to hold someone responsible for the acts of third persons. The special duty created by a special relationship levels the playing field between plaintiffs and governmental defendants because a special relationship is also required for a plaintiff suing a private defendant for both nonfeasance and liability for the acts of third

amendment provides in pertinent part:

[t]he General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act

[And subject to the Tort Claims Act] officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgement shall be entered against them, for the performance or nonperformance of their official functions.

Id. See Georgia Tort Claims Act O.C.G.A. §§ 50-21-20 to -36 (Supp. 1993).

47. See *Jordan*, 263 Ga. at 28, 426 S.E.2d at 862. The supreme court stated that the abrogation or waiver of sovereign immunity did not create a duty on the part of the municipality when none existed before. This statement shows that sovereign immunity and duty are two separate and distinct issues. While critics of public duty argue that it is a "judicial sovereign immunity," it is clear that the public duty doctrine allows a municipality to be sued in special circumstances, whereas sovereign immunity bars suit altogether and is a defense. See also *supra* note 18 and accompanying text.

48. See *supra* notes 18, 23-28. Critics of the public duty doctrine mainly complain that the public duty doctrine is a "duty to all, liability to no one" doctrine that is unfair to plaintiffs because they are limited by the mere fortuitous status of the tortfeasor. While this argument is powerful because it instills emotion and recognizes the plight of the plaintiff who has been wronged without a remedy, it is more emotional than legally sound and the supreme court correctly recognized this in rejecting the court of appeals analysis. The public duty doctrine recognizes that municipalities and all governments should be able to operate without concern for liability in tort. This argument is best illustrated by an example of a police officer who must debate over whether to arrest a suspect without probable cause because the officer and municipality may be subject to tort liability for the subsequent acts of the suspect if not arrested. The anti-public duty jurisdictions counter that police officers are not personally liable for acts of discretion or governmental duties. *But see* O.C.G.A. § 36-33-4 (1993), which states that officers of a municipal corporation shall be personally liable for special damages for the result of an official act done oppressively.

49. See *Jordan*, 263 Ga. at 28-29, 426 S.E.2d at 863. Justice Sears-Collins makes it clear that the public duty doctrine is a means of holding a municipality accountable for its negligence in some circumstances, and at the same time, ensures responsibility and the utmost protection possible within limited means.

persons.⁵⁰ The special relationship test ensures that plaintiffs are foreseeable to the governmental defendant because the test explicitly requires knowledge by the defendant that inaction could lead to harm.⁵¹ If Georgia required direct contact between the plaintiff and the municipality, plaintiffs would be even more foreseeable and detrimental reliance would be easier for a plaintiff to prove.⁵² *Jordan's* avoidance of the issue of sovereign immunity presents a curious question to the motives of the supreme court. The court stated that in any negligence action, the first inquiry is over duty.⁵³ This logic has the potential for wasted judicial resources and potential high costs to plaintiffs who do not have the resources to litigate over duty when the governmental entity has an affirmative defense of sovereign immunity.⁵⁴ Duty may be the proper first inquiry in a negligence action between private parties, but when a defendant has a defense of sovereign immunity, duty is immaterial.⁵⁵ It is also worth noting the impact *Jordan* will have on other governmental entities. Although *Jordan's* facts arose out of negligence of a municipality, it is safe to assume that the public duty doctrine will apply to all governmental entities such as fire departments, counties,⁵⁶ sheriff's departments, and the like.⁵⁷

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50. See *Associated Health Sys. v. Jones*, 185 Ga. App. 798, 366 S.E.2d 147 (1988). See also *supra* notes 22, 35 and accompanying text.

51. *Jordan*, 263 Ga. at 29, 426 S.E.2d at 863. Cf. *Feise v. Cherokee County*, 209 Ga. App. 733, 434 S.E.2d 551 (1993) (applying special relationship test set out in *Jordan* and holding that knowledge of defendant that inaction could lead to harm satisfied, but other two requirements not satisfied).

Knowledge by the municipality that inaction could lead to harm is actually a definition of foreseeable plaintiff. One purpose of the public duty doctrine is to limit the class of plaintiffs that can sue on this duty to the general public. Certainly with a duty to all, it cannot be argued that everyone to whom the duty is owed (all citizens) is a foreseeable plaintiff. Therefore, the special relationship requirement is consistent with traditional, established tort principles and should not negatively affect any issues of governmental immunity. See *Jordan*, 263 Ga. at 31-33, 426 S.E.2d 864-66 (Hunstein, J., concurring specially).

52. See *supra* note 40; *Jordan*, 263 Ga. at 31, 426 S.E.2d at 864-65 (Fletcher, J., concurring).

53. *Jordan*, 263 Ga. at 27, 426 S.E.2d at 862.

54. No dispute arose in *Jordan* over the waiver of sovereign immunity, but as noted previously, sovereign immunity in Georgia has recently undergone a facelift and while the waiver used to be self evident, it is no longer clear whether a given municipality, county, or agency has the defense of sovereign immunity available. See GA. CONST. art. I, § 2, para. 9 (Supp. 1993); Georgia Tort Claims Act O.C.G.A. §§ 50-21-20 to -36 (Supp. 1993).

55. See *supra* note 6 and accompanying text.

56. See *Feise v. Cherokee County*, 209 Ga. App. 733, 434 S.E.2d 551 (1993).

57. See *supra* note 36 and accompanying text.