No. 85984-1

CHAMBERS, J. (concurring) — I concur with, and have signed, the majority opinion. It properly describes and applies our 911 jurisprudence. I write separately because based upon the briefing we have received and the Court of Appeals opinions I have reviewed, I believe there is great confusion about what our public duty doctrine jurisprudence means. We (and I include myself) have not been careful in what we have said in past cases. This has given rise to deeply held and greatly divergent views on the doctrine. Some think the public duty doctrine is a tort of its own imposing a duty on any government that gives assurances to someone. Some view it as providing some sort of broad limit on all governmental duties so that governments are never liable unless one of the four exceptions to the public duty applies, thus largely eliminating duties based on the foreseeability of avoidable harm to a victim. In fact, the public duty doctrine is simply a tool we use to ensure that governments are not saddled with greater liability than private actors as they conduct the people's business.

Although we could have been clearer in our analyses, the only governmental duties we have limited by application of the public duty doctrine are duties imposed by a statute, ordinance, or regulation.[1] This court has never held that a government

[1] A review of our case law makes this clear. *See generally Harvey v. Snohomish County*, 157 Wn.2d 33, 134 P.3d 216 (2006); *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006);

did not have a common law duty solely because of the public duty doctrine. This concurrence will attempt to explain why that is so.

There was a time when the king could do no wrong and the sovereign was immune from suit. *Alden v. Maine*, 527 U.S. 706, 768 n.6, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (Souter, J., dissenting); *see also Kelso v. City of Tacoma*, 63 Wn.2d 913, 914-15, 390 P.2d 2 (1964). Over time, this principle became increasingly unpopular among courts, certain legislators, and legal scholars, who believed government should be more accountable for its conduct. *Kelso*, 63 Wn.2d at 915-16. In 1961, the Washington Legislature repealed the State's immunity for

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Cummins v. Lewis County, 156 Wn.2d 844, 133 P.3d 458 (2006); *Aba Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006); *1515• 1519 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.*, 146 Wn.2d 194, 43 P.3d 1233 (2002); *Howe v. Douglas County*, 146 Wn.2d 183, 43 P.3d 1240 (2002); *Bratton v. Welp*, 145 Wn.2d 572, 39 P.3d 959 (2002); *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 30 P.3d 1261 (2001); *Hertog, ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999); *Bishop v. Miche*, 137 Wn.2d 518, 973 P.2d 465 (1999); *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998); *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998); *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992); *Atherton Condo. Apartment-Owners Ass'n Bd. of Dir. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990); *Oberg v. Dep't of Natural Res.*, 114 Wn.2d 278, 787 P.2d 918 (1990); *Honcoop v. State*, 111 Wn.2d 182, 759 P.2d 1188 (1988); *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988); *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988); *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988); *Bailey v. Town of Forks*, 108 Wn.2d 262, 737 P.2d 1257, 753 P.3d 523 (1987); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985); *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983), *overruled on other grounds by Meaney*, 111 Wn.2d 174; *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983); *Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979); *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978); *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1360 (1975); *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975); *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974); *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965).

governmental functions. Laws of 1961, ch. 136, § 1 (codified as RCW 4.92.090). And in 1967, the legislature expressly repealed immunity for local governments. Laws of 1967, ch. 164, § 1 (codified as RCW 4.96.010). Amended only once since, in Laws of 1963, chapter 159, section 2, the repeal of State immunity presently reads as follows: "The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." RCW 4.92.090.

But treating governments the same as private persons or corporations became problematic where statutes and ordinances imposed duties on governments not imposed upon private persons or corporations. *See Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965) ("Essentially, then, the official conduct giving rise to liability must be *tortious*, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation."). Private persons do not govern, pass laws, or hold elections. Private persons are not required by statute or ordinance to issue permits, inspect buildings, or maintain the peace and dignity of the state of Washington. We therefore found the "traditional rule" helpful when a duty was imposed or mandated upon a government entity by statute or ordinance. *Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

According to the traditional rule, "municipal ordinances impose a duty upon municipal officials which is owed to the *public* as a *whole*, so that a duty enforceable in tort is not owed to any particular *individual*." *Id.* This traditional rule became known as the public duty doctrine. *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 303-04, 669 P.2d 468 (1983), *overruled on other grounds by Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988). Because we were interpreting legislation, our goal was to determine legislative intent. *See, e.g., Halvorson*, 89 Wn.2d at 676. We used the public duty doctrine as a tool to analyze whether a mandated government duty was owed to the public in general or to a particular class of individuals. *See id.*

Because the legislature had declared that governments were to be liable for their tortious conduct just like private persons or corporations, the public duty doctrine was not applied to duties that governments had in common with private persons. Thus, for example, the public duty doctrine applies to a city's building department's actions when issuing building permits because that is a function imposed by ordinance and not a duty shared with private persons. *Meaney*, 111 Wn.2d at 178-79. But the same building department owes common law, premises-liability duties to those who enter the building department's offices because all possessors of land owe the same duties to those who enter, whether the landowners are public or private entities. *See generally Oberg v. Dep't of Natural Res.*, 114 Wn.2d 278, 787 P.2d 918 (1990) (holding public duty doctrine did not apply where

state agency had independent common law and statutory duties that applied to all landowners). The following excerpts from our cases illustrate that the public duty doctrine is properly applied to duties mandated by statute or ordinance as opposed to common law duties:

> The traditional rule is that municipal ordinances impose a duty upon municipal officials which is owed to the *public* as a *whole*, so that a duty enforceable in tort is not owed to any particular *individual*. . . .
>
> The traditional rule has an exception, however, which is applicable in this case. Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons.

Halvorson, 89 Wn.2d at 676 (Utter, J., writing for a unanimous court) (citations omitted).

> By our language in *Halvorson*, we advised legislative bodies that, when they impose a duty on public officials as a whole, no duty in tort is owed to a particular individual. If, on the other hand, the legislation evidences a clear intent to identify a particular and circumscribed class of persons, such persons may bring an action in tort for violation of the statute or ordinance. Thus, the first question we must determine in this case is if such a clear legislative intent exists.

Baerlein v. State, 92 Wn.2d 229, 232, 595 P.2d 930 (1979) (Dolliver, J., writing for a unanimous court).

> In *Chambers-Castanes*, we acknowledged that the law may impose "a duty to perform a mandated act for the benefit of particular persons or class of persons."

Hartley v. State, 103 Wn.2d 768, 782, 698 P.2d 77 (1985) (Dolliver, C.J., writing for a unanimous court) (quoting *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285, 669 P.2d 451 (1983)).

> Traditionally state and municipal laws impose duties owed to the public as a whole and not to particular individuals. . . . Thus "'for one to recover from a municipal corporation in tort it must be shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.*, a duty to all is a duty to no one).'"

Meaney, 111 Wn.2d at 178 (citations omitted) (Callow, J., writing for a unanimous court) (quoting *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987) (quoting *J&B*, 100 Wn.2d at 303)).

> The public duty doctrine provides that regulatory statutes impose a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any actionable duty that is owed to a particular individual.

Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988) (Dore, J., writing for the court) (citing *Bailey*, 108 Wn.2d at 265-66; *Chambers-Castanes*, 100 Wn.2d at 284).

> Liability may exist, however, where a relationship exists or has developed between the plaintiff and the municipality's agents giving rise to a duty to perform a *mandated act* for the benefit of a particular person or class of persons.

Beal v. City of Seattle, 134 Wn.2d 769, 784-85, 954 P.2d 237 (1998) (Madsen, J.,

writing for the majority) (emphasis added) (citing *Chambers-Castanes*, 100 Wn.2d at 285).

> Additionally, under the public duty doctrine, the State is not liable for its negligent conduct *even where a duty does exist* unless the duty was owed to the injured person and not merely the public in general.

Aba Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006) (Owens, J., writing for the majority) (emphasis added) (citing *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988).

Perhaps the best example of all is *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988), written by Justice Durham. In this Washington Public Power Supply System bond case, the court considered six claims under different headings: statutory duties; fraudulent misrepresentation; negligent misrepresentation; The State Securities Act of Washington, chapter 21.20 RCW; interference with a business relationship; and unjust enrichment. The court was not precise in its description of the public duty doctrine, saying, "We first address the public duty doctrine. Under that doctrine, the State cannot be held liable for tortious acts of its officials if that liability is based on a duty owed to the public generally." *Id.* at 421-22 (citing *J&B*, 100 Wn.2d at 303). But the court then discussed the public duty doctrine only in connection with the statutory claim and not the common law claims; it obviously limited application of the public duty doctrine to those duties imposed by statute or ordinance.

I will concede that several of our cases have appeared to analyze both

statutory duties and common law duties under the public duty analytical framework. But usually we have done so only to say a special relationship existed and both statutory and common law claims survived. *See Taggart v. State*, 118 Wn.2d 195, 217-19, 822 P.2d 243 (1992); *Bishop v. Miche*, 137 Wn.2d 518, 530, 973 P.2d 465 (1999) (both cases disposed of the public duty doctrine defense on claims of negligent supervision of probationers based upon duties established in *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983)); *see also Aba Shiekh*, 156 Wn.2d at 454 (treated both public duty doctrine and common law claims under traditional public policy approach). We have also often used broad language describing the public duty doctrine. However, our research reveals no cases where a common law duty was limited solely because of a public duty analysis.

The distinction between mandated duties and common law duties is important because duties imposed by common law are owed to all those foreseeably harmed by the breach of the duty. *See Christen v. Lee*, 113 Wn.2d 479, 491-92, 780 P.2d 1307 (1989). In contrast, under the public duty doctrine analysis, unless there is a duty to enforce legislation, the duty is generally owned only to those with whom the government has a special relationship. This distinction is illustrated in *Oberg*, 114 Wn.2d 278.

A fire broke out on Department of Natural Resources (DNR) land, and DNR failed to contain it. It spread, damaging several neighbors' properties. DNR admitted that "'[p]rivate landowners in Washington have a common law duty to exercise reasonable care in preventing fire from spreading to lands of neighboring

owners.'" *Id.* at 281 (quoting DNR's brief). DNR also conceded that, as a property owner, it had a duty to take reasonable steps to contain a fire on its property and that duty extended to neighbors foreseeably harmed. But DNR argued its common law duty was "'subsumed'" into its statutory duty to prevent and suppress forest fires. *Id.* at 287, 289 (quoting DNR's brief). According to DNR's argument, because its common law duty was subsumed into its statutory duty to provide fire protection to the public, under the public duty doctrine, it had no duty to its neighbors.[2] Had DNR been successful in its argument, it would have had a duty to its neighbors only if a special relationship had been created. This court rejected the argument. *Id.* at 289.

As *Oberg* makes clear, limiting the government's common law duties to only those with whom the government has a special relationship, while extending the liability of private individuals to all those foreseeably harmed by a breach of the same common law duties, would violate the clear declaration of the legislature that governments are to be liable "to the same extent" as private persons or corporations. RCW 4.92.090; RCW 4.96.010(1). We also expressed this concern in *Bailey*, 108 Wn.2d at 267 (noting "the difficult question as to whether affording special protection to agents of the government violates the Legislature's directive, which requires governmental bodies to be liable in tort").

[2] In fact, DNR's duty to prevent the spread of fire as a landowner was based on both common law and statutory duties. *See Oberg*, 114 Wn.2d at 282-83. However, its statutory duty as a landowner was not a government duty mandated by statute or ordinance but was, like a common law duty, imposed on all landowners in Washington whether public or private. *Id.* The court held that the mandated government duty of fighting fires did not subsume and eliminate the landowner duties created by both statute and common law. *Id.* at 289.

The case before us is a 911 emergency operator case. It relies upon *Chambers-Castanes*, 100 Wn.2d 275, and its progeny. In *Chambers-Castanes*, several witnesses called the police to report a couple had been run off the road and were being threatened. Multiple callers were repeatedly assured by a 911 operator an officer was on the way. After a half hour Mrs. Chambers-Castanes herself called to report that her husband had been assaulted. When told no one was on the way she got upset with the operator. The operator told her, "'You'd better calm down or I won't send anybody.'" *Id.* at 279. By the time officers arrived the assault was long over and the assailants had fled.

The plaintiffs' theory was founded on both statutory and common law duties. *Id.* at 284. Although the plaintiffs argued in terms of a "special relationship" it is clear from their briefing that rescue doctrine cases played a large role in the development of their argument. Br. of Appellants at 18 ("The [rescue doctrine] case is particularly apposite to the instant case as both cases involve assurances by police . . . negligent handling of the calls . . . detrimental reliance and resulting harm."). The trial court had held King County had no duty to the plaintiff under the public duty doctrine. *Chambers-Castanes,* 100 Wn.2d at 284. The statute analyzed by the court in *Chambers-Castanes* was RCW 36.28.010, which requires that the sheriff and deputies "'[s]hall keep and preserve the peace'" and "'arrest . . . all persons who break the peace, or attempt to break it.'" *Id.* at 284 (alterations in original) (quoting RCW 36.28.010(1), (6)). This court concluded there was nothing in the statute that indicated intent to protect a particular class of individuals. *Id.* at 284-85.

The court then turned to the special relationship exception, citing the seminal case, *Campbell v. City of Bellevue*, 85 Wn.2d 1, 530 P.2d 234 (1975). *Id.* at 285. While the *Chambers-Castanes* court did not adopt the rescue doctrine approach, the court did incorporate the assurances by the county and reliance by the plaintiff argued by the plaintiffs in their briefing to support the creation of a special relationship. *Id.* at 286. All subsequent 911 cases have assumed there is a mandated duty under RCW 36.28.010 to preserve the peace and arrest those who disturb it and have held a special relationship is created by the assurances of a 911 operators upon which the plaintiff reasonably relies. *E.g.*, *Beal*, 134 Wn.2d at 784-85; *Bratton v. Welp*, 145 Wn.2d 572, 576-77, 39 P.3d 959 (2002). These cases were correctly decided as an exception to the public duty doctrine. These cases are also analogous to the common law rescue doctrine in the sense the rescue begins when the operator represents help is on the way and the plaintiff relies upon that representation to his detriment. *See Osborn v. Mason County*, 157 Wn.2d 18, 25, 134 P.3d 197 (2006) (rescue doctrine imposes a duty "because a public entity's assurances may induce reliance"). Because the special relationships in these 911 cases are in the nature of rescue doctrine cases, assurances and reliance are appropriate measures of whether a duty arose.

I agree with the majority and the Court of Appeals that where a 911 operator gives assurances, the accuracy or falsity of the information is irrelevant. It is the assurance upon which the operator may assume the assured will reasonably rely that creates a duty. A party may breach that duty by negligently performing that which

was assured.

It is ultimately and uniquely the responsibility of this court to determine when duties arise. While I would clarify that the public duty doctrine applies to governmental duties mandated by legislative bodies and not common law duties owed by every private and public entity alike, I would not change any of our precedents. I would not reexamine any case where we have held the government does or does not owe a duty.

Our goal should be to fulfill the legislature's intent to make governments accountable to the same degree as private individuals and corporations, but also to ensure that governments have no greater liability than others. We must recognize that some governmental functions are not meaningfully analogous to anything a private person or corporation might do. *Evangelical*, 67 Wn.2d at 252-53. We have a rich tradition and body of jurisprudence to guide us in settling new claims regarding the duties of governments.

With these observations, I join the majority.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson	Justice Debra L. Stephens
	Justice Charles K. Wiggins
	Justice Steven C. González