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Kent v. City of Columbia Falls: All for One—How Eroding the Public Duty Doctrine Threatens Modern Society

Megan Timm

I. INTRODUCTION

Defining the scope of a defendant's duty of care has sparked heated debate for decades,¹ and rightfully so. The obligations we have to one another dictate our societal structure at its core, for "in the absence of a duty, there can be no negligence."² Tort law, serving as a "deterrence of antisocial conduct," purposefully molds our behaviors by making us financially accountable for our choices.³ That which we choose to do—and refrain from doing—is directly impacted by both our duty and the cost of breaching it. As a result, positive behaviors may be indirectly deterred by demanding compensation when they fall short of perfection. Policy makers should be cautious not to lose sight of the greater good in a quest to compensate every harm.

The Public Duty Doctrine prevents tort law from deterring publicly beneficial services for the sake of a single citizen. By recognizing that that governmental agents performing public roles owe their duty to the public, not individuals,⁴ it prevents citizens from jeopardizing public services by demanding perfection from them. Without the doctrine, municipalities may have to terminate services as a whole in order to compensate a single mistake.

In *Kent v. City of Columbia Falls*,⁵ the Court has inexplicably torn apart the Public Duty Doctrine. It has stretched the boundaries of public duties to include countless individual citizens like Kent,⁶ opening the door to an unprecedented wave of lawsuits against municipalities. This note discusses the legal errors of the Court's holding that Kent can proceed against the City of Columbia Falls on the theory of a voluntarily assumed duty of ordinary care and argues that public policy supports the preservation of the Public Duty Doctrine.

II. BACKGROUND

State governments are Constitutionally recognized as sovereign. As such, they are immune from suit unless they consent to liability.⁷ As early as 1788, the principle of absolute immunity was extended to

¹ *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

² *Poole ex rel. Meyer v. Poole*, 1 P.3d 936, 939 (Mont. 2000).

³ 13 PETER NASH SWISHER, ROBERT E. DRAIM & DAVID D. HUDGINS, VIRGINIA PRACTICE SERIES: TORT AND PERSONAL INJURY LAW § 1:2 (2015 ed.).

⁴ *Kent v. City of Columbia Falls*, 350 P.3d 9, 13 (Mont. 2015).

⁵ *Id.*

⁶ *Id.* at 19.

⁷ *Alden v. Maine*, 527 U.S. 706, 712 (1999).

municipalities.⁸ Thereafter, because municipalities and other lower governmental entities are not themselves sovereign, the principle has been more aptly referred to as “governmental immunity.”⁹ Montana abolished its own sovereign and governmental immunity with the ratification of the Montana Constitution in 1972.¹⁰ While governmental entities are now liable for their torts, it is important to note that the Constitution established liability—not strict liability. A plaintiff in any tort suit must demonstrate a duty, a breach of that duty, causation and injury in order to recover.¹¹

The Montana Supreme Court has long recognized that when a governmental agent’s duty is owed to the public, the elements of liability upon which an individual citizen can recover are not automatically established.¹² This principle was first acknowledged in Montana as the Public Duty Doctrine in the 1999 case *Nelson v. Driscoll*.¹³ In *Nelson*, a police officer, suspecting the driver had been drinking, pulled a vehicle over on an icy road.¹⁴ Though he was unable to establish probable cause to arrest her for DUI, he requested that she and her passenger—both of whom admitted to drinking over the course of the evening—refrain from driving home.¹⁵ Trina, the decedent, led the officer to believe she would call a friend for a ride.¹⁶ Shortly thereafter, while walking along a roadway, Trina was killed by a passing motorist.¹⁷ While considering the officer’s duty to Trina, the Montana Supreme Court analyzed a Utah court’s holding¹⁸ that circumstantial exceptions to a publicly owed duty can establish an additional duty to an individual citizen.¹⁹ Following Utah, four exceptions were adopted by the Court in *Nelson*:

A special relationship can be established (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a

⁸ *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. R. 359 (1788).

⁹ *Mackin v. State*, 621 P.2d 477, 480 (Mont. 1980).

¹⁰ Lee C. Baxter, Note, *Gonzales v. City of Bozeman: The Public Duty Doctrine’s Unconstitutional Treatment of Government Defendants in Tort Claims*, 72 MONT. L. REV. 299, 301 (2011).

¹¹ 2 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 16:21, 0.5 (2d ed. 2015).

¹² *E.g.*, *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*, 291 P.3d 1129, 1132 (Mont. 2012); *Gonzales v. City of Bozeman*, 217 P.3d 487, 491 (Mont. 2009); *Nelson v. State*, 195 P.3d 293, 300 (Mont. 2008); *Nelson v. Driscoll*, 983 P.2d 972, 977 (Mont. 1999).

¹³ *Driscoll*, 983 P.2d at 978.

¹⁴ *Id.* at 975.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 976.

¹⁸ *Day v. State*, 980 P.2d 1171, 1175 (Utah 1999).

¹⁹ *Driscoll*, 983 P.2d at 978.

member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.²⁰

There are distinct grounds, therefore, upon which a governmental agent can be held liable to an individual even while performing his public duty. Despite the concurrence's classification of the Public Duty Doctrine in *Kent* as the "reviving... [of] governmental immunity for torts... by resort to a judicially-created theory,"²¹ this fact makes the two doctrines fundamentally distinguishable. Governmental immunity, like its sovereign predecessor, shielded entities from liability even when established duties were tortiously breached. The Public Duty Doctrine, on the other hand, simply recognizes that—as in all tort law—liability cannot exist when an individual is not within the scope of the actor's duty. When governmental agents are fulfilling a duty to the general public, such as fire and police protection²² or land use regulation, individual citizens that aren't privy to a "special relationship" are not within that scope.²³

That the legislature never intended to impose strict liability upon governmental units—the practical result of infinitely expanding the scope of duty—is underscored by the statutory definition of a "claim" against such entities at Mont. Code Ann. § 2-9-101(1). Adopted concurrently with the abolition of sovereign immunity, the statute explains that claims can be brought "under circumstances in which that entity, if a private person, would be liable to the claimant for damages."²⁴ The plain language of this statute places the same limits on the duty of governmental units as does the Public Duty Doctrine. While they are no longer immune from suits when a duty and breach are established, instances must be recognized when the government does not have a duty to ensure the optimal outcome of each and every individual citizen. These instances occur, as aptly labeled by the majority in the present case, when governmental agents perform "uniquely governmental"²⁵ activities.

III. SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

Casey Kent was killed in a skateboarding accident in a Planned Unit Development (PUD) in Columbia Falls, Montana.²⁶ Because a PUD

²⁰ *Id.*

²¹ *Kent*, 350 P.3d at 21.

²² *Gonzales*, 217 P.3d at 491.

²³ *Driscoll*, 983 P.2d at 978.

²⁴ MONT. CODE ANN. § 2-9-101(1) (2013).

²⁵ *Kent*, 350 P.3d at 18.

²⁶ *Id.* at 10.

“gives local governments and developers greater flexibility in designing a proposed subdivision than would be allowed with a traditional subdivision,”²⁷ the City of Columbia Falls played a direct role in its development. City planners made site visits, mandated the installation and location of walking and bike trails and “retained the right to ‘approve of the design and location of the trails prior to the start of construction.’”²⁸ Casey’s wife, Sara, brought numerous claims against the City.²⁹ Those that relate to her appeal alleged that the City voluntarily assumed statutory duties and a duty of ordinary care by taking part in and authorizing the PUD’s design.³⁰ The District Court determined that the Public Duty Doctrine applied to the City’s duty³¹ and proceeded to analyze Sara’s claims under the recognized exceptions to the doctrine.³² The court established that there was no evidence supporting a special relationship between Kent and the City,³³ nor was the statute that granted the City the authority to oversee the development one designed to protect citizens like Kent.³⁴ The District Court granted summary judgment for the City on both claims.³⁵ Sara appealed, requesting that the Supreme Court reconsider the Public Duty Doctrine’s applicability to the facts of her case.³⁶

IV. HOLDING

Sara reiterated two theories of liability on appeal.³⁷ Both were characterized as voluntarily assumed duties private in nature³⁸ so as to extend the scope of the City’s public duty to include her husband. First, she asserted that the City had assumed a statutory duty to regulate the walking path by ADA standards, which it failed to do.³⁹ The Court allowed her to proceed on this theory.⁴⁰ Second, she asserted that the City had voluntarily assumed a duty of reasonable care by working with the developer to design and approve the walking path.⁴¹ The Court concluded that because “many of the City’s actions were similar to those that would be typically undertaken by the architects, contractors, and

²⁷ *Id.* at 11.

²⁸ *Id.* at 11–12.

²⁹ *Id.* at 12–13.

³⁰ *Id.* at 14.

³¹ *Kent*, 350 P.3d at 15.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 13.

³⁶ *Id.* at 14.

³⁷ *Kent*, 350 P.3d at 16.

³⁸ *Id.* at 14.

³⁹ *Id.* at 18.

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 14.

engineers,”⁴² the City had exceeded the scope of its public duty to regulate land usage.⁴³ Sara was allowed to proceed on this theory as well.⁴⁴ The District Court’s grant of summary judgment for the City of Columbia Falls was reversed and the case was remanded for further proceedings on both of Sara’s claims.⁴⁵ This note focuses exclusively on the implications of the Court’s holding as to her second theory of liability – that City agents voluntarily assumed a duty of ordinary care by performing their public duties.

V. THE PRIVATE PERSON STANDARD

The Legislature created a statutory mechanism for the Court to use in determining when the Public Duty Doctrine applies.⁴⁶ By definition, a “claim” that can be brought against a governmental entity must arise from a duty that is private in nature.⁴⁷ Therefore, suits arising out of duties to the public are effectively barred by statute. The statute reads as follows:

“Claim” means any claim against a governmental entity, for money damages only, that any person is legally entitled to recover as damages because of personal injury or property damage caused by a negligent or wrongful act or omission committed by any employee of the governmental entity while acting within the scope of employment, under circumstances where the governmental entity, if a private person, would be liable to the claimant for the damages under the laws of the state.⁴⁸

This statute serves two logical purposes in regulating suits against governmental entities. First, it prevents a gradual shift toward strict liability - that is, “liability imposed without regard to the defendant’s negligence or intent to cause harm.”⁴⁹ As there can be no negligence without a duty to the plaintiff,⁵⁰ presumptively including every citizen within the scope of the duty of a governmental agent

⁴² *Id.* at 18.

⁴³ *Kent*, 350 P.3d at 18.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 19–20.

⁴⁶ MONT. CODE ANN. § 2–9–101.

⁴⁷ *Id.* at § 2–9–101.

⁴⁸ *Id.* at § 2–9–101.

⁴⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) 4 Scope Note (Tentative Draft No. 1, 2001).

⁵⁰ *Massee v. Thompson*, 90 P.3d 394, 400 (Mont. 2004).

imposes liability without due consideration of negligence. The “private person” standard ensures that governmental entities are only liable to individuals when their injuries are within the scope of the entity’s duty. Second, the statute serves as a roadmap to identifying when a governmental agent is operating within the protected scope of his public duties. The Second Edition of American Jurisprudence on Municipal, County, School, and State Tort Liability explains that:

Subject to some exceptions, the public-duty doctrine shields the State and its political subdivisions from tort liability arising out of discretionary government actions that, by their nature, are not ordinarily performed by private persons.⁵¹

The statutory definition of a viable claim against a government entity codifies this principle by reiterating the “private person” standard of the Public Duty Doctrine⁵² and establishes a straightforward mechanism for distinguishing between public and private duties: when a government actor takes an action that a private person would “not ordinarily perform,”⁵³ the statute assumes that the duty owed was to the public – not to any individual citizen. Unless a “special relationship”⁵⁴ creates an added duty to an individual, these public duties cannot give rise to a claim against the entity performing them under Montana law.⁵⁵

The “private person” standard was reflected in the Court’s recent holding in *Gatlin-Johnson ex rel. Gatlin v. City of Miles City*,⁵⁶ discussed extensively by the majority in *Kent*. In *Gatlin-Johnson*, the Court held the City of Miles City liable to a child injured on a slide at a City-owned park by way of premises liability.⁵⁷ Because a private person would have been liable to Gatlin-Johnson under the circumstances, a “specific duty” to her was established and the Public Duty Doctrine was inapplicable.⁵⁸ As the *Gatlin-Johnson* majority explained, “[The Public Duty Doctrine] does not apply where the government’s duty is defined by other generally applicable principles of law.”⁵⁹ The *Gatlin-Johnson* Court continued on to point out a rich history of cases against governmental entities on “generally applicable principles of law” such as premises liability.⁶⁰ The common-law history of the state and the statute were clearly aligned at

⁵¹ 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 76 (2015).

⁵² MONT. CODE ANN. § 2–9–101(1).

⁵³ 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability*, *supra* note 51, § 76.

⁵⁴ *Driscoll*, 983 P.2d at 978.

⁵⁵ See MONT. CODE ANN. § 2–9–101(1).

⁵⁶ *Gatlin-Johnson*, 291 P.3d at 1133.

⁵⁷ *Id.* at 1134.

⁵⁸ *Id.* at 1133.

⁵⁹ *Id.*

⁶⁰ *Id.*

the time the Court considered *Kent*. Because the District Court had established that no special relationship applied to the facts of the case,⁶¹ there was only one way Kent could proceed: the Court had to pinpoint a “generally applicable principle of law” that would apply to a “private person” as well as the City.

VI. THE DESTRUCTION OF THE PUBLIC DUTY DOCTRINE

In *Kent*, the Court’s reasoning proceeded off the beaten path when it allowed Sara to proceed against the City on a theory of a voluntarily assumed duty of ordinary care.⁶² Because there was no premise liability upon which Sara could bring suit,⁶³ she instead characterized the City’s actions in permitting the walking path as beyond the scope of its public duty.⁶⁴ In order to support its acceptance of this argument, the Court referenced various actions that the City took during the design and permitting process to make it clear that its agents exercised strict regulatory authority over the project and the walking path itself.⁶⁵ It then likened the City’s role to that of an architect or contractor,⁶⁶ but included as a key piece of its argument the fact that the city manager “retained the right to ‘approve of the design and location of the trails prior to the start of construction.’”⁶⁷

While this paints a picture of guilt for the reader, the Court’s reasoning undermines itself when compared to the “private person” standard. Threatening the viability of an entire building project to compel conformance to a set of desired specifications *is* a “uniquely governmental activity,” despite the Court’s unsupported assertion to the contrary.⁶⁸ The manner the City chose to enforce its authority⁶⁹ did not transform the duty to exercise it responsibly into one that a private person, contractor or architect could assume. Although the Court chose not to expressly overturn the Public Duty Doctrine, this decision has undercut it at its core by detaching the it from the “private person” standard.

The Court has given municipalities no way to determine from this ruling where the invisible line between public duty and a voluntary assumption of a duty of ordinary care lies. Instead, it drew an arbitrary distinction between the two based on a unique fact set without addressing the legitimately protected bounds of the City’s duties or how it should

⁶¹ *Kent*, 350 P.3d at 15.

⁶² *Id.* at 19.

⁶³ *Id.* at 15.

⁶⁴ *Id.*

⁶⁵ *Id.* at 18.

⁶⁶ *Id.*

⁶⁷ *Kent*, 350 P.3d at 18.

⁶⁸ *Id.*

⁶⁹ *Id.* at 19.

have acted to stay within them. Realistically, any and all action by a government agent could be deemed a “voluntary assumption” of a duty of reasonable care by this vague standard. We can now expect an inpouring of litigation against municipalities forced to defend the actual boundaries of their public duties. Notwithstanding its apparent enthusiasm for doing away with the Public Duty Doctrine, the least the majority could have done is lay out a firm rationale for governmental entities to use to define the scope of protected duties and act safely within them.

VII. PUBLIC POLICY AND PUBLIC DUTY

The majority holding in *Kent* undermines public policy by threatening the ability of municipalities to provide basic services to residents. Montana statutorily recognizes the provision of basic services as a policy objective.⁷⁰ A municipality’s ability to achieve this goal, however, is dependent upon its long-term financial stability.⁷¹ Threatening this stability by opening the door to a new wave of lawsuits is inconsistent with public policy and hazardous to public health and safety.

Municipal bankruptcy does not automatically impact a city’s ability to provide basic services to its residents. In fact, the program is designed to free up resources for these services by allowing a city to restructure its debt.⁷² In recent years, numerous cities have sought bankruptcy protection to deal with the blow of a lawsuit.⁷³ In these cases, when the lawsuit is an isolated event, restructuring is an effective way to relieve the burden.⁷⁴ Overturning the Public Duty Doctrine, on the other hand, does not create the risk of an isolated event. Instead, it bulldozes the last barrier to citizen suits for imperfectly performed public services, effectively creating an “underlying fiscal problem”⁷⁵ in the form of unrestrained vulnerability to successive lawsuits. As Winegarden explains, “municipal bankruptcy only provides relief if the underlying fiscal problems are addressed.”⁷⁶ When the problem is ongoing or recurring, cities cannot complete the lengthy bankruptcy recovery process to regain financial stability. After a city declares bankruptcy,

⁷⁰ MONT. CODE ANN. § 7-11-201 (2013).

⁷¹ Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120 (2014).

⁷² Wayne H. Winegarden, *Going Broke One City at a Time: Municipal Bankruptcies in America*, PACIFIC RESEARCH INSTITUTE, at *7.

⁷³ Richard Levin, Jonathan Solomon & Campbell Agyapong, *Some Causes of Municipal Distress and Bankruptcy*, NAT’L ASS’N OF BOND LAWYERS 3, 6, 7, 9 (June 2011), available at <http://perma.cc/Y69A-MVZA>.

⁷⁴ Steven Eide, *More Bankruptcies Won’t Solve Cities’ Problems*, BLOOMBERGVIEW (Aug. 1, 2013), available at <http://perma.cc/R26J-ZGG4>.

⁷⁵ Winegarden, *supra* note 72, at *5.

⁷⁶ *Id.*

heightened borrowing rates⁷⁷ and a negative stigma attached to the city inhibit economic development.⁷⁸ In itself, impaired economic development adds an additional strain on the city's long-term recovery:

The lower incentive to conduct business in a municipality that has declared bankruptcy weakens the regional economic environment and further erodes the future tax revenue base.⁷⁹

If the city fails to rectify the problems that caused its insolvency in the first place, an additional financial blow in this prolonged weakened state can be devastating.⁸⁰ Without the Public Duty Doctrine, every citizen that receives suboptimal results from public services can demand recovery. Even if careful decision making minimizes the frequency of ensuing suits, Winegarden's analysis makes it clear that recurring burdens negate the benefits of restructuring.⁸¹ When bankruptcy no longer frees up resources because previous fiscal wounds are unhealed, underfunded public services will gradually begin to suffer.⁸²

The health and well-being of citizens residing in a city with deteriorating public services is directly at risk. Michelle Wilde Anderson, Assistant Professor of Law, UC Berkeley School of Law, analyzes in her article *The New Minimal Cities* the ethical component of insolvent municipalities' decisions to cut basic services.⁸³ Due to cutbacks in police personnel in many struggling cities, "911 can rarely dispatch an officer for a call reporting a non-violent crime, such as car theft, drug dealing, or prostitution."⁸⁴ The City Attorney of San Bernardino, California is quoted as recommending that citizens "Lock your doors and load your guns."⁸⁵ Another familiar, albeit extreme, example of life with dissolving public services can be seen in Detroit. Although lawsuits were not the cause of the city's burdens, the purpose of analyzing Detroit's condition in this context was best stated by journalist Charlie LeDuff when he said, "You better look at Detroit, because that's what happens when you run out of money."⁸⁶

By the time Detroit officially declared bankruptcy in 2013,⁸⁷ the situation for citizens had already deteriorated to dangerous levels. In late

⁷⁷ Eide, *supra* note 74.

⁷⁸ Winegarden, *supra* note 72, at *4.

⁷⁹ *Id.*

⁸⁰ *Id.* at *3.

⁸¹ *Id.* at *5.

⁸² Anderson, *supra* note 71, at 1120.

⁸³ *Id.* at 1122.

⁸⁴ *Id.* at 1120.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1128.

⁸⁷ Winegarden, *supra* note 72, at *10.

2012, the police force hosted a rally to remind Detroit citizens and visitors to “Enter at your Own Risk” because officers were “overworked, understaffed, and at times, fearful for their lives.”⁸⁸ Less than a year later, days after filing for bankruptcy protection, the Wall Street Journal reported that “citizens wait an average of 58 minutes for the police to respond to their calls, compared to the national average of 11 minutes.”⁸⁹ Bankruptcy did little, if anything, to ameliorate citizen woes. In 2014, the UN was called in when the city disconnected the water of 27,000 homes with past-due bills⁹⁰ in an effort to reduce its debt.⁹¹ Even a lack of seemingly inconsequential activities like animal control have wreaked havoc city life.⁹² A 2013 news report by Bloomberg Business reports:

As many as 50,000 stray dogs roam the streets and vacant homes of bankrupt Detroit...Dens of as many as 20 canines have been found in boarded-up homes in the community of about 700,000 that once pulsed with 1.8 million people. One officer in the Police Department's skeleton animal-control unit recalled a pack splashing away in a basement that flooded when thieves ripped out water pipes.⁹³

Detroit's decline has been decades in the making, which is precisely the point: the effect of *long-term* financial instability poses a threat to the daily life of municipal residents. And, as long as the root of the problem is unsolved, long-term instability is essentially unavoidable.⁹⁴

The Court's holding in *Kent* opens the floodgates of litigation against municipalities and threatens the long-term health, well-being and even the lives of citizens. Long-term financial instability with such potential repercussions as declining education, failing sanitation systems and uncontrolled crime doesn't just pose a risk to the taxpayers' pocketbooks; it poses a risk to their health. Granted, a long road lies between the Court's holding in *Kent* and a crime-ridden society fraught with trash and feral dogs. The road between municipal lawsuits and

⁸⁸ CBS Detroit, *Enter at Your Own Risk: Police Union Says 'War-Like' Detroit Is Unsafe For Visitors*, DETROIT.CBSLOCAL.COM (Oct. 6, 2012) available at <http://perma.cc/62RT-2KTH>.

⁸⁹ Matthew Dolan, *Record Bankruptcy for Detroit*, THE WALL STREET JOURNAL (July 19, 2013), available at <http://www.wsj.com/articles/SB10001424127887323993804578614144173709204>

⁹⁰ UN News Centre, *In Detroit, city-backed water shut-offs 'contrary to human rights, say UN experts*, UN.ORG, (Oct. 20, 2014), available at <http://perma.cc/9B8R-EMDD>.

⁹¹ Bill Mitchell, *In Detroit, Water Crisis Symbolizes Decline, and Hope*, NATIONAL GEOGRAPHIC (Aug. 22, 2014), available at <http://perma.cc/V6WZ-AY7Z>.

⁹² Chris Christoff, *Abandoned Dogs Roam Detroit in Packs as Humans Dwindle*, BLOOMBERG BUSINESS, (Aug. 20, 2013), available at <http://perma.cc/6M34-RTAQ>.

⁹³ *Id.*

⁹⁴ Winegarden, *supra* note 72, at *5.

bankruptcy is shorter, though,⁹⁵ and the Court has taken the first step along it by conflating public and private duties. Upholding the Public Duty Doctrine means that some harms go uncompensated in the name of society. But, by the same token, society as we know it may be jeopardized in the name of compensating every harm.

VIII. CONCLUSION

In weighing the value of laws to our society, we must consider benefits against the risks. Even the best laws result in suboptimal outcomes for some citizens.

A seat-belted driver trapped in a burning vehicle may suffer harm at the hands of the “click it or ticket” law, but to overturn an otherwise life-saving traffic law to prevent that harm is nonsensical. Similarly, services provided for the public, such as police and fire protection and land use regulation, do not provide optimal results for all. A hostage may die while police negotiate to save the lives of a hundred others. A building may be destroyed to stop a town from burning to the ground. An undertrained or careless municipal employee may have too much responsibility delegated to him in order to maintain an acceptable pace of overall economic development. As a society, we have had a choice to make: accept that we may occasionally suffer a harm in an otherwise publicly beneficial system and trust that our gains outweigh our losses, or demand optimal results for every individual and recognize that public services as we understand them may cease to exist as a result. By allowing Kent to proceed on a theory of a voluntary assumed duty of ordinary care and effectively undercutting the Public Duty Doctrine, the Court’s knee-jerk reaction has made this decision for us—perhaps at a greater cost than we realize.

⁹⁵ Levin, Solomon & Agyapong, *supra* note 73, at 3.