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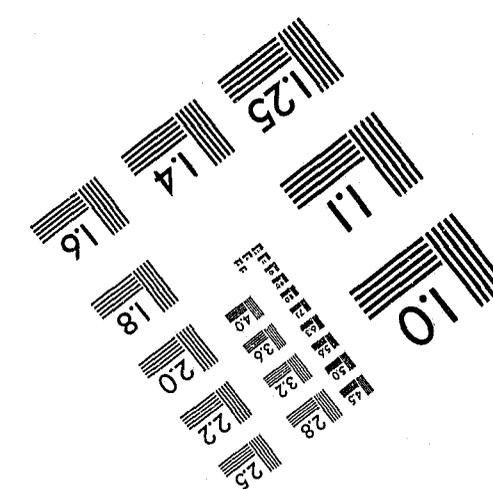
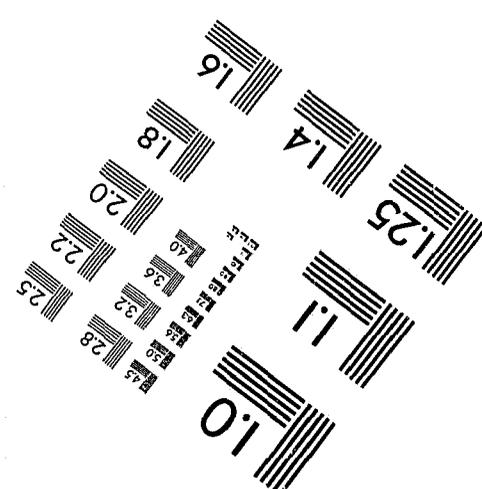
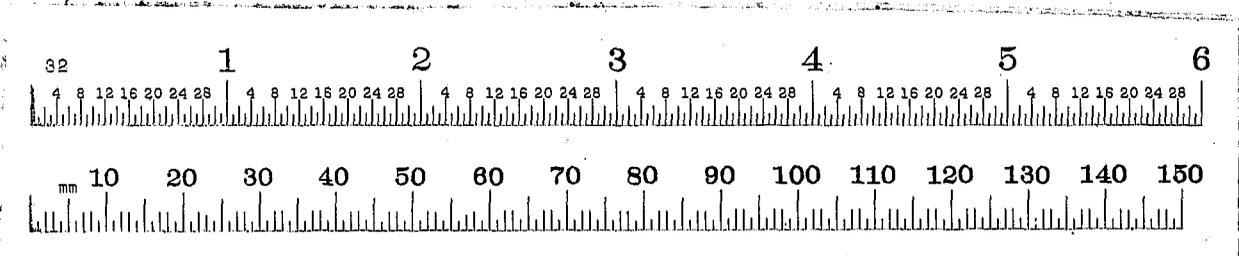
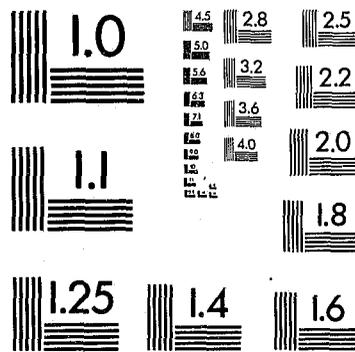
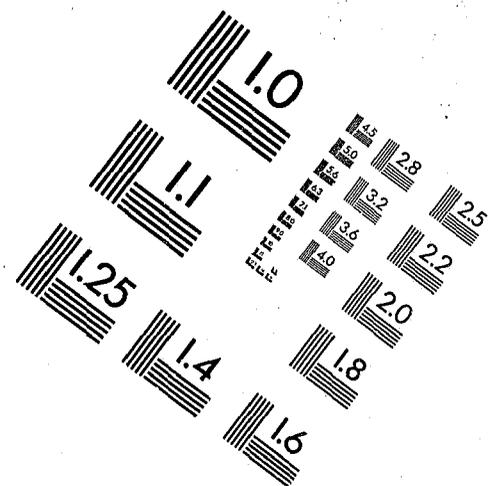
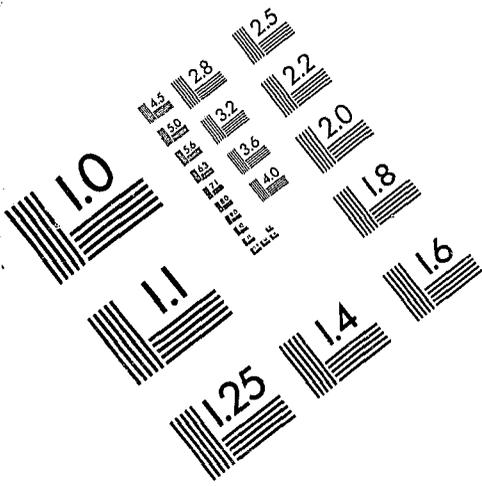
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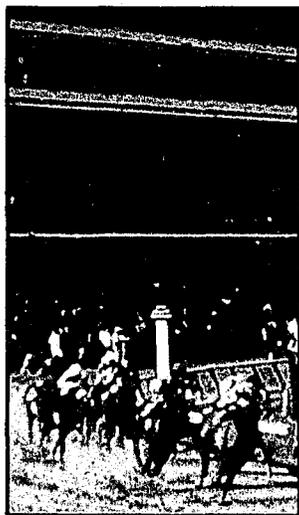
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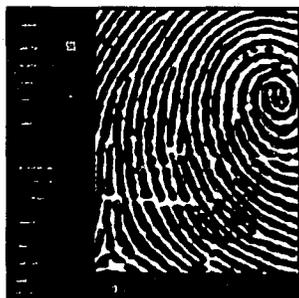
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On the Cover

The Law Enforcement Exhibition held concurrently with IACP's annual conference showcases all the latest innovations in police-related products and services. This issue of the *Police Chief* features advance coverage of the new and improved products to be unveiled this year in Louisville. On our cover are IBM's Application System/400 Model B30; Thumbstick Industries' Thumbstick® V, a less-than-lethal hand weapon; a segment from the "Roll Call" program aired by the Law Enforcement Television Network; one of V.H. Blackinton's custom-designed police badges; a bullet-resistant vest produced from Du Pont's Kevlar® 129; Remington Arms' Model 870 pump-action police gun; Tomar Electronics' PAR-36E police cruiser strobe lights; and Federal Signal's JetStream™ light bar. Pictured below, center, is an Automated Fingerprint Identification System from North American MORPHO Systems.

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Police Conduct at Accident Scenes: Avoiding Liability for Negligent Service

By VICTOR E. KAPPELER, Ph.D., Assistant Professor, Criminal Justice Administration, Central Missouri State University, Warrensburg, Missouri, and ROLANDO V. del CARMEN, J.S.D., Professor, Sam Houston State University, Huntsville, Texas

Police officers routinely provide an array of services to the public. Many of these services are designed to maintain safe conditions on public roadways, while others arise as a result of traffic accidents. Police officers provide warnings to motorists concerning safety hazards, assist persons injured in traffic accidents, investigate accidents and secure accident scenes so they do not present a danger to other drivers. The determination of what legal duties police officers have in these circumstances raises challenging issues for state courts.

During the 1970s and '80s, an increasing number of civil liability cases was brought before the courts, claiming negligence by police officers and municipalities in providing traffic-related services. Even though case law is growing, there is confusion and lack of uniformity in the law. This is likely the result of different judicial approaches to issues of police liability and the myriad situational contexts in which the police provide public service.

This article addresses three areas of potential police liability and explores different judicial concepts of negligence relating to a continuum of police functions. The article illustrates how the use of several theories of liability can either create a police duty where none has existed before or bar recovery by plaintiffs. Specifically discussed is the conduct of police officers before an accident, at the scene of an accident and following an accident. The following three legal aspects of police duty are examined (1) the duty to warn and protect, (2) the duty to render assistance and (3) the duty to secure accident scenes.

States and municipalities have a duty to use reasonable care in maintaining roadways for public safety.¹ This duty includes maintaining the physical condition of a roadway and the removal of obstructions and other road hazards. Sometimes this duty of care

is extended to police officers and law enforcement agencies.

Where a police officer or agency has actual or constructive knowledge of a potentially dangerous condition and fails to take reasonable action to correct the existing hazard, liability may be imposed.² Similarly, where a police officer takes control of a hazardous situation (a traffic accident scene, for example), the duty to warn can extend to third parties not directly involved in the initial accident.³ As one scholar has stated, "[t]here may be liability when the police [leave] the scene of an accident aware of the dangerous condition without properly warning later-arriving cars of the problem."⁴

A variety of conditions, such as oil spills, malfunctioning traffic control devices, straying cattle, smoke and disabled vehicles, may be considered hazardous and create police or municipal liability if an officer fails to act.⁵ Courts apply different theories of negligence to similar situations. The alternative theories are illustrated in recent cases on police liability for failure to warn.

In the case of *Naylor v. Louisiana Department of Public Highways*,⁶ state troopers responded to the scene of a single-car accident. The accident was caused by an oil spill on a dangerous portion of the roadway. The troopers asked the Department of Transportation to cover the spill with sand and then ignited flares to warn oncoming motorists of the danger. After securing the scene, the officers returned to their normal patrol activities.

Several hours later, one of the troopers returned to the scene of the accident and found traffic having trouble passing through the oil-laden curve. The officer saw that the oil had saturated the sand and the flares had expired. The trooper ignited additional flares and called for more sand. Remaining near the accident scene, the trooper parked his vehicle and activated his emergency lights. Meanwhile, the flares went out and the trooper failed to replace them. Within a few minutes, an unsuspecting motorcyclist approached the oil slick. Upon entering the oil-covered portion of the roadway,

the driver lost control of his motorcycle. The vehicle left the roadway, went over an embankment and struck a tree. The driver suffered severe brain damage.

Wrongful death action was brought against the Department of Transportation and the state police for negligent failure to warn. The trial court entered a judgment for the plaintiff. The court ruled that the presence of oil, sand and gravel in a curve created a hazard that the departments should have rectified. The trial court further held that the state police had a duty to provide for the physical safety of motorists when they are aware of potential danger. This includes the duty to warn and take adequate measures to prevent injury and damage. The police officer's duty was breached when the officer failed to have the oil removed, failed to replace the flares and improperly positioned his own vehicle. An award of \$4,036,535 was granted to the plaintiff.

The trial court's decision was appealed by the defendants and arguments were heard by a Louisiana Court of Appeals. The appellate court held that the state police had a duty to provide advance warning to drivers of existing highway dangers and that such a duty was breached when the officers failed to "replace flares prior to the accident"⁷ and position their vehicle to alert motorists of the danger. These breaches of duty, according to the court, were the proximate cause of the injury in that, absent the officer's breach, the plaintiff may have avoided the injuries. The court interpreted the officer's breach of duty as "a substantial factor in causing the accident"⁸ and affirmed the trial court's ruling.

The court in *Naylor* applied the traditional theory of negligence to the issue of police liability for failure to warn drivers of traffic hazards. The court distinguished the duty to warn from the police duty to protect members of the public. Other courts, however, have deviated from this tradi-

tional conception of negligence and have applied the public duty/special duty doctrine to similar situations. These courts do not recognize the distinction between a duty to warn and a duty to provide police protection.

The distinction between the duty to warn and the duty to protect is exemplified in the California case of *Westbrooks v. State*.⁹ In that case, a violent rainstorm washed away a bridge located on a well-travelled portion of roadway. State and county police were notified and responded to the call. Before notification, fire department officials in the area placed flares at the site in an effort to warn motorists of the hazard. State po-

lice officers diverted traffic on one side of the bridge, and a sheriff's department official diverted traffic on the other side. However, two vehicles went by the sheriff's post. The officers were able to stop the first vehicle, but the second vehicle ignored the flares and the officer's physical attempt to stop it. The vehicle reached the spot where the bridge had been and plummeted into the water below, killing the driver.

The widow and sons of the traffic accident victim brought suit against the state, county and a deputy sheriff, claiming that the officer breached a duty to warn motorists of existing road hazards. The jury found that the sheriff

had assumed the duty to protect motorists at the scene of a traffic hazard and concluded that the county was negligent in failing to warn of the hazardous road conditions. Judgment was entered for the plaintiff.

On appeal, the county and other defendants maintained that they voluntarily came to the aid of others and that in doing so they neither increased the risk of harm nor created a relationship of reliance with the plaintiff. In effect, the defendants argued that no special relationship existed between the sheriff's department official and the plaintiff, and that police officers had no duty to render aid or assistance. The California appellate court agreed and held that, "as a general rule, persons, including employees of public entities, have no duty to come to the aid of others unless there is a special relationship between them which gives rise to a duty to act."¹⁰ The court reversed the judgment against the county and remanded the case.

In *Westbrooks*, the court rejected the plaintiff's theory that police officers owe a duty to warn drivers of existing dangers. Without discussion, the court rejected the plaintiff's failure to warn argument and considered the case an issue of failure to render aid and protection. This allowed the court to apply the public duty/special duty rule rather than using traditional tort principles, thus precluding county liability by requiring a special relationship between the plaintiff and the defendant-county before liability would attach.

The above discussion and case analyses show that there are two approaches to police liability for failure to warn motorists of traffic dangers. First, a duty to warn can arise when a municipality or a police agency creates a danger to the public. Second, a duty to warn can arise when the municipality or police agency has knowledge of a dangerous situation but does not take precautionary measures to prevent injury or damage.¹¹ Under this concept of duty, many courts have held that police officers must take precautionary measures to prevent and avoid dangerous situations on the public roadways even when the officer or municipality did not create the danger or peril.¹²

Courts are free to take one of the above two approaches to determine whether police officers breach a duty to warn. Under the second approach, although police officers have a general duty to take precautionary measures to prevent injuries on the roadway, liability cannot attach without the presence of factors that show a breach of duty to an individual. Courts can apply the public duty doctrine and require the existence of a special relationship between the police or municipality and the injured individual before liability will be found.

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In contrast to this approach, some courts maintain that a police officer's conduct in maintaining the safety of public roadways is distinguishable from police protection cases. These courts apply ordinary tort principles rather than the public duty/special duty rule.¹³ Under this approach, plaintiffs are required to show the elements normally associated with negligence theory—duty, breach, proximate cause and damage. This position assumes the existence of a duty to warn by police officers. Recently, the duty to warn has been further extended in some jurisdictions to the actions or behaviors of third parties.¹⁴ Police officers may also be held to a duty to warn unsuspecting motorists of the hazardous behaviors of other drivers. Where a police officer fails to warn oncoming traffic of a hazard and injury results, negligence may be found.

As a general rule, there is no common-law duty to aid strangers in distress even if aid can be provided without any cost or risk to the would-be rescuer.¹⁵ This common-law position is based largely on the notion that liability should not attach where an individual does not engage in affirmative conduct that increases danger or risk. Omissions in these situations are not considered a source of liability; therefore, police officers are not liable for failing to aid or assist endangered individuals. Even though it has been argued that a police officer's official function may be to protect

and aid persons, this fact alone is not sufficient to establish liability. Failure of a police officer to render aid or assistance is not tortious conduct just because the defendant is a police officer whose employment function includes rescuing persons in distress.¹⁶

There are exceptions to this position that require clarification. Some courts have held that police officers have a duty to render aid and save lives at accident scenes.¹⁷ While this is a minority view, such a finding of duty requires officers to exercise reasonable care in rendering aid or assistance.¹⁸ Depending on a court's position, unique circumstances can create a duty to rescue persons in distress for which a breach may cause negligence and ultimately liability.

These courts base liability findings on the rationale that the general rule that a municipality is not liable for failure to provide service does not apply where there is a special relationship extending to a particular individual.¹⁹ The courts, therefore, apply the public duty/special duty doctrine rather than the common law position. Courts using this theory of duty have determined that the mere arrival of a police officer at the scene of an accident does not create a special relationship.²⁰ Factors beyond a police officer's presence must exist to establish a special relationship between the officer and injured subject. Courts have construed a variety of situations as indicative of such a relationship. While variation exists, there are three factors that may create a special relationship and the potential for liability.

First, once an officer begins to rescue

someone, a special relationship may be established. The officer must then complete the rescue in a non-negligent fashion even though there was no duty to rescue in the first place.²¹ A sufficient showing of negligence is made where an officer fails to take reasonable care not to increase the risk of harm. Similarly, liability may be imposed if harm is suffered because of the injured persons' reliance on the officer's undertaking.²²

Second, failure to take simple actions to reduce the risk of harm to an incapacitated individual may lead to liability. Failure of a police officer to summon or render medical aid or to transport an injured person from the scene of an accident has been considered a breach of duty by some courts.²³ These courts have traditionally recognized a greater duty to persons who are incapable of assisting themselves due to intoxication, injury or unconsciousness.

Third, liability may be found where an officer impedes medical aid or another's attempt at assistance.²⁴ This breach of duty may be either explicit or implicit. An officer's presence at the scene of an accident can create a situation where others will not assist because of the officer's presence. Courts reason that the public views police officers as trained experts. Would-be rescuers might, therefore, decline to render assistance. Compounding the problem is the fact that police officers often direct other drivers away from the scene of an accident, reducing the possibility that others will render aid. If any of these situations arise, a special relationship and breach of duty may be found.

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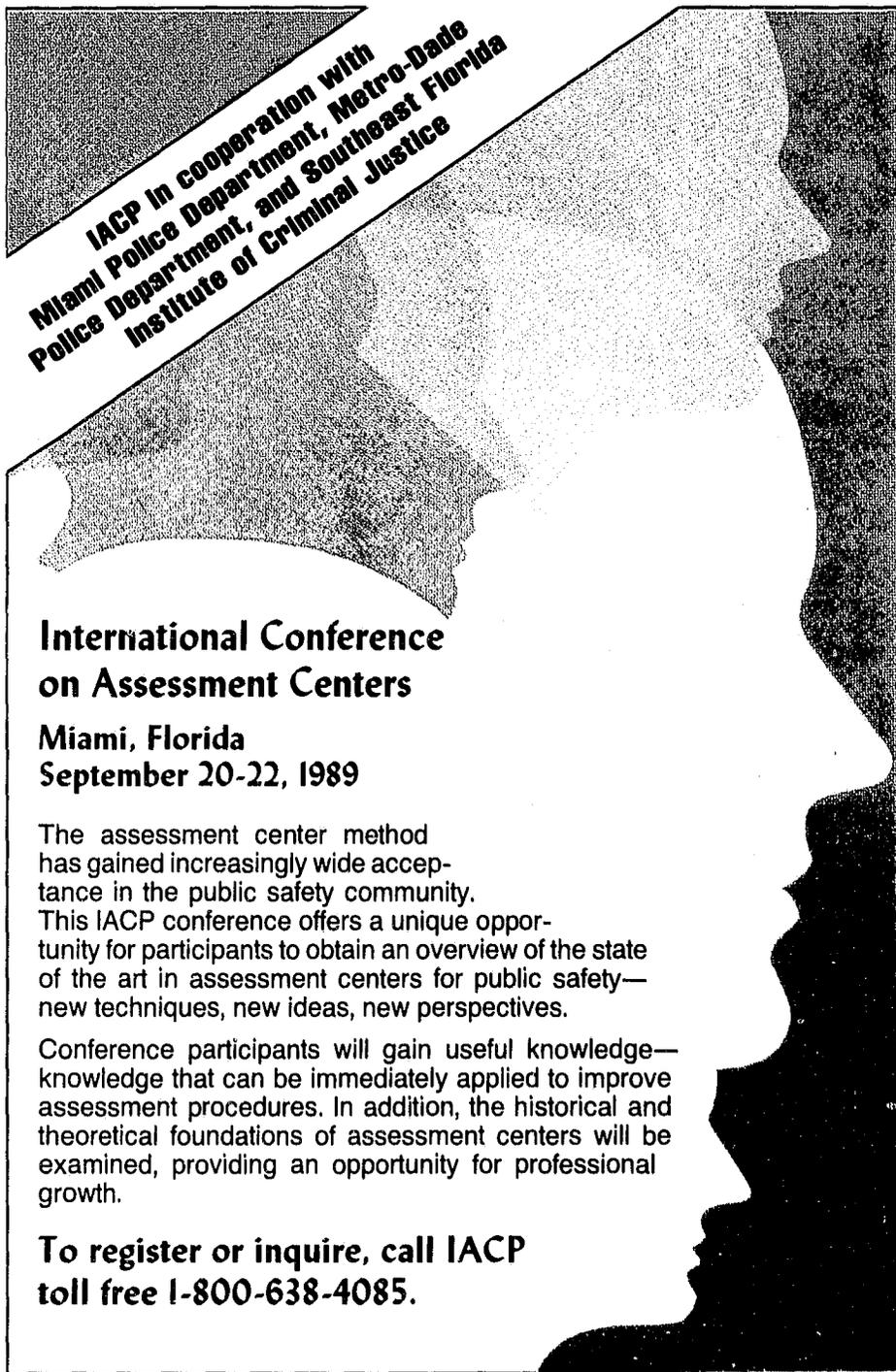
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These three possibilities are illustrated in the case of *Ramundo v. Town of Gunderland, Albany City*.²⁵ In this case, a driver was injured in a traffic accident. Police officers were summoned and, upon arrival at the scene, found the plaintiff lying unconscious with a hot exhaust system on his face. The officers failed to act to correct the situation and as a result the plaintiff received serious facial burns.

Civil suit was brought against the officers and municipality. The plaintiff argued that when the police officers arrived at the scene, they had voluntarily assumed a duty of assistance to the plaintiff and that officers breached that duty by failing to act to prevent the plaintiff's facial burns. The New York Supreme Court applied the public duty/special duty doctrine, noting that while police officers have no duty to provide assistance or protection to the general public, when a special relationship arises, liability may be found.

The court reasoned that the officers' presence at the accident scene was a deterrent to others who may have come forth to aid the injured party, since the public views police officers as trained to deal with these situations. Accordingly, the plaintiff's cause of action against the police and municipality was affirmed. Ironically, the court used the public duty/special duty doctrine (intended to reduce police liability) to create a duty in a situation where it has been traditionally recognized that no duty exists.

Police officers owe a duty of protection to the general motoring public following their arrival at the scene of an accident. This duty extends to persons directly involved in an accident and to third parties not involved in the initial accident. This duty, however, cannot result in police liability unless there is a special relationship between the police and a specific individual. Under this theory of negligence, failure of a police officer to remain at the scene of an accident to ensure the safety of innocent third parties is alone not sufficient to cause liability. However, leaving the scene of an accident, coupled with additional factors indicative of negligence, can constitute the basis for a finding of liability.²⁶ In this area of duty, courts have opted again to apply the public duty/special duty doctrine.

While case law in this area of liability is relatively scant, the analysis of several existing cases is illustrative of behaviors that may constitute a special relationship. In the case of *Johnson v. Larson*,²⁷ a Louisiana court of appeals addressed such an issue. Johnson was driving his vehicle down an interstate when he overtook a vehicle in the right lane. The driver of the disabled vehicle flagged Johnson

down. Both vehicles pulled off the travel portion of the roadway, and Johnson attempted to repair the disabled vehicle. A few minutes later, two deputy sheriffs arrived at the scene and inquired as to the motorist's trouble. The deputies remained at the scene a few minutes and determined that no assistance was required. They left the area and, shortly thereafter, a soldier travelling down the same roadway rear-ended one of the parked vehicles. Johnson was standing between the vehicles. As a result of the collision, he received serious injuries.

Johnson brought action against the two deputies, arguing that the officers could have taken precautionary measures to ensure his safety. The trial court ruled that the officers had no duty to protect the plaintiff from the type of injury he sustained. On appeal, the trial court's decision was affirmed. The appellate court reasoned that the special relationship exception to the public duty doctrine was controlling. A special relationship would have been found if the following circumstances were present: if the officer had knowledge of the impending danger;²⁸ if the danger had been obvious;²⁹ if a traffic hazard existed at the time;³⁰ and if the officers had ample opportunity to correct the situation but failed to do so. If these factors were present, there might have been a situation of liability.

Similar results were achieved in the case of *Long v. Soderquist*.³¹ In this case, a motorist struck a guard rail. The road conditions at the time of the accident were icy, and the driver's vehicle slid off the road. Another motorist saw the accident and stopped to assist the injured party. Shortly thereafter, a deputy sheriff arrived at the accident scene. After inquiring as to the subject's physical condition, the officer observed another traffic accident. Instructing the traffic accident victim and the would-be rescuer to remain in their respective vehicles, the officer went to investigate the second accident. Then, the officer left the scene without taking adequate measures to protect the parked vehicles. A few moments later, a third vehicle approached the first accident scene and struck the parked vehicles.

The driver of the third vehicle brought civil suit against the officer and argued that he was negligent in failing to light flares, direct other vehicles away from the accident scene, remove the parked vehicles, warn other motorists of the hazard and call for assistance. Applying the public duty doctrine, the appellate court held that, "although a municipality is generally not liable for failure to provide adequate police protection or service, this rule does not apply where the police have assumed a special duty to a person that elevates his status to something more than a member of the general public."³² The court went on to

determine that a special relationship requires the following:

1. the municipality must be uniquely aware of the particular danger or risk to which the plaintiff is exposed;
2. there must be allegations of specific acts or omissions on the part of the municipality;
3. the specific acts or omissions must be affirmative or willful in nature; and
4. the injury must occur while the plaintiff is under the direct and immediate control of employees or agents of the municipality.³³

Concluding that the plaintiff failed to establish a special relationship, in that he

was not under the immediate control of the police, the appellate court affirmed the summary judgment favoring the defendant-officer.

Under this theory of negligence, in order to establish a special relationship, the municipality or police officer must be aware of the particular danger or risk. Knowing such risk, the officer must subsequently make an act or omission and have direct or immediate control over the situation. If these factors are present, the courts may find a special relationship and duty to persons injured following an accident. However, reliance of the plaintiff or inducement by the state



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in providing a false sense of security is not sufficient to create a special relationship or cause of action.³⁴

States and municipalities have a duty to use reasonable care in maintaining roadways for the safety of the public. This duty of care is extended to police officers and law enforcement agencies where a police officer or agency has actual or constructive knowledge of a potentially dangerous condition. A variety of conditions is sufficient to be considered hazardous. Liability may attach if an officer fails to take reasonable action to correct existing road hazards. There are two primary facets of police liability for failure to warn. A duty to warn can arise when a municipality or a police agency creates a danger to the public, or it may arise when the municipality or police agency has knowledge of a dangerous situation but does not take precautionary measures to prevent injury or damages.

Police officers are not liable for their failure to provide aid or assistance to endangered individuals absent a statutory or special duty. Existing statutes can create a duty by police officers to render aid and save lives at accident scenes. Similarly, unique circumstances can create a special duty to rescue persons in distress for which breach may constitute negligence. While variations exist, there are three common factors that may create a special duty and the potential for police liability. First, once an officer begins to rescue someone, a special relationship may be established, even though there may have been no duty to rescue in the first place. Second, failure to take simple actions to reduce the risk of harm to an incapacitated individual may lead to liability. Third, liability may be found where an officer explicitly or implicitly impedes medical aid or another's attempt at assistance.

Police officers owe a duty of protection to the general public following their arrival at the scene of an accident. This duty, however, cannot result in police liability unless there is a special relationship between the police and a specific individual. A special duty may be found if the officer had knowledge of the impending danger, if the danger was obvious, if a traffic hazard had existed at the time, if the officer was in direct and immediate control, and if the officer had ample opportunity to correct the situation but failed to do so.

Rather ironically, the courts have expanded the use of the public duty/special duty doctrine in these areas of law. This practice has allowed for findings of liability where there has not previously been a duty by police officers. Law in this area of police liability is in a state of transition. Courts have been quick to

apply existing theories of negligence to these situations. This being the case, there is much confusion as to which theory of negligence should be applied to a given police service.

Several trends can be noted from the material presented here. First, while the public duty doctrine has declined in other areas of police liability, it seems to be enjoying new vitality in accident-related police liability cases. Second, courts seem to be split on whether to apply the traditional concepts of negligence or the public duty doctrine. Whether these trends will continue in the future and whether unity is brought to this area of case law remains to be seen. Until then, officers can only be mindful of the law in their jurisdiction and watch for new court decisions. ★

¹See e.g., *Naylor v. Louisiana Dept. of Public Highways*, 423 So.2d. 674 (La. App. 1982); *Wingenter v. State of New York*, 438 N.E.2d. 885 (N.Y. 1984); *Drawbridge v. Douglas City*, 311 N.W.2d 898 (Neb. 1981).

²See e.g., *Spotts v. City of Kansas City*, 728 S.W.2d. 242 (Mo. App. W.D. 1987).

³Silver, *Police Civil Liability* 1-59 (1986).

⁴*Coco v. State*, 474 N.Y.S.2d. 397 (N.Y. Ct. Cl. 1984).

⁵*Napolitano v. County of Suffolk*, 460 N.Y.S.2d. 353 (App. 1983); *Foremost Dairies v. State*, 232 Cal.Rptr. 71 (Cal. Ct. App. 1986); *Coco v. State*, 474 N.Y.S.2d. 397 (Ct. Cl. 1984); *Duvernay v. State*, 433 So.2d. 254 (La. App. 1983); *Commonwealth of Pa. Dept. of Trans. v. Phillips*, 488 A.2d. 77 (Pa. Comm. Ct. 1985).

⁶423 So.2d. 674 (La. App. 1982).

⁷*Id.* at 674.

⁸*Id.* at 674.

⁹219 Cal.Rptr. 674 (Cal. App. 1985).

¹⁰*Id.* at 677.

¹¹Silver, *supra* note 3 at 1-60.

¹²*Commonwealth of Pa. Dept. of Trans. v. Phillips*, 488 A.2d. 77 (Pa. Comm. Ct. 1985); *Peterson v. State of New York*, 235 N.Y.S.2d. 397, *aff'd* 235 N.Y.S.2d. 345.

¹³*Napolitano v. County of Suffolk*, 460 N.Y.S.2d. 353 (App. 1983); *Supra* note 4.

¹⁴Silver, *supra* note 3.

¹⁵*Jackson v. City of Joliet*, 715 F.2d. 1200 (7th Cir. 1983); *Williams v. State of California*, 664 P.2d. 137 (Cal. 1983).

¹⁶*Williams v. State of California*, 664 P.2d. 137 (Cal. 1983).

¹⁷*Battista v. Olson*, 516 A.2d. 117 (N.J. Super. A.D. 1986); *Caldwell v. City of Philadelphia*, 517 A.2d. 1296 (Penn. 1986).

¹⁸*Ramundo v. Town of Guiderland, Albany City*, 475 N.Y.S.2d. 752 (N.Y. Albany County 1984).

¹⁹*Long v. Sonderquist*, 467 N.E.2d. 1153 (Ill. App. 2nd Dist. 1984).

²⁰*Supra* note 26. See also, *Messico v. City of Amsterdam*, 215 N.E.2d. 163 (N.Y. 1983).

²¹*Jackson v. City of Joliet*, 715 F.2d. 1200 (7th Cir. 1983).

²²Restatement of Torts (2nd) Section 323.

²³*Battista v. Olson*, 516 A.2d. 117 (N.J. Super. A.D. 1986).

²⁴*Baldi v. City of Philadelphia*, 607 F.Supp. 162 (E.D.Pa. 1985).

²⁵*Ramundo v. Town of Guiderland, Albany City*, 475 N.Y.S.2d. 752 (N.Y. Albany County 1984).

²⁶*Contra, supra* note 2.

²⁷441 So.2d. 5 (La. App. 1983).

²⁸*Id.* See also, *Curry v. Iberville Parish Sheriff's Office*, 405 So.2d. 1387 (La. App. 1981).

²⁹*Id.* See also, *Duvernay v. State, through Department of Public Safety*, 433 So.2d. 254 (La. App. 1983).

³⁰*Id.* See also, *Lejeune v. Allstate Ins. Co.*, 365 So.2d. 471 (La. 1978).

³¹467 N.E.2d. 1153 (Ill. App. 2nd Dist. 1984).

³²*Id.* at 1157.

³³*Id.*

³⁴*Van Truag v. James*, 215 Cal.Rptr. 33 (Cal. App. 2 Dist. 1985).