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TORT CLAIMS ACT—The Death of the Public Duty—Special Duty
Rule: *Schear v. Board of County Commissioners*.

I. INTRODUCTION

In *Schear v. Board of County Commissioners*,¹ the New Mexico Supreme Court held that under the Tort Claims Act a cause of action exists against a governmental entity and its law enforcement officers for negligent performance of their duty.² The court held that it was the duty of law enforcement officers, after notification, to protect a citizen from imminent danger and injury.³ Until *Schear*, the public duty—special duty rule had acted as a barrier to suit against governmental entities engaged in the performance of public duties.⁴ The public duty—special duty rule was a common law doctrine which rested on the presumption that governmental entities engaged in public functions⁵ owed a duty to the public generally but owed no actionable duty to an individual.⁶ In reaching its decision, the New Mexico Supreme Court interpreted sections of the Tort Claims Act,⁷ which excluded certain governmental employees from immunity,⁸ as abolishing the public duty—special duty rule.⁹

1. 101 N.M. 671, 687 P.2d 728 (1984).

2. *Id.* at 677, 687 P.2d at 734.

3. *Id.* at 672, 687 P.2d at 729.

4. *See Doe v. Hendricks*, 92 N.M. 499, 503, 590 P.2d 647, 651 (Ct. App. 1979).

5. An example of the type of governmental entity engaged in a public function is a law enforcement organization.

6. The public duty—special duty rule goes by many names. The court in *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976) referred to this rule as the “duty to all, duty to no one” doctrine. Another name used for this rule is the “Modlin Doctrine.” *See Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla. 1967). However, it will be referred to as the public duty—special duty rule throughout this Note as the court in *Schear* chose that reference. *Schear*, 101 N.M. at 673, 687 P.2d at 730.

7. N.M. Stat. Ann. §§ 41-4-1 to -27 (Repl. Pamp. 1982).

8. Since the Tort Claims Act applies to governmental entities (e.g. local public bodies) and public employees as well as the State as a sovereign, the immunity waived by the Tort Claims Act is both sovereign and governmental. Some courts have found a distinction between sovereign and governmental immunity. *See Seymour Nat. Bank v. State*, 384 N.E.2d 1177 (Ind. Ct. App. 1979), *vacated* 422 N.E.2d 1223, *reh'g granted modified* 428 N.E.2d 203 (Ind. 1981); *Austin v. Baltimore*, 286 Md. 51, 405 A.2d 255 (1979); *Mackin v. State*, 621 P.2d 477 (Mont. 1980). The doctrine of sovereign immunity was part of ancient common law prior to the adoption of the United States Constitution and applies only to the state. It emerged from the idea that the king can do no wrong. *Adams v. State*, 555 P.2d 235, 244 (Alaska 1976). In contrast, governmental or municipal immunity extends to countries, cities, towns, and all other local governmental entities. That doctrine first appeared in *Russell v. The Men of Devon* (2 Term Rep. 667, 100 Eng. Rep. 359 (1788)). *See S. M. Speiser, C. F. Krause, A. W. Gans, Vol. 2, The American Law of Torts*, pages 16–18 (1985); *W. Page Keeton, Prosser & Keeton on Torts*, 1033 (5th ed. 1984); *Worthington v. State*, 598 P.2d 796, 800 (Wyo. 1979). Neither the legislature in the Tort Claims Act or the supreme court in *Schear* make a distinction between sovereign and governmental immunity. Therefore, for purposes of this Note, both types of immunity will be referred to as sovereign immunity.

9. *Schear*, 101 N.M. 671, 687 P.2d at 728.

This note analyzes the supreme court's interpretation of the New Mexico Tort Claims Act, discusses its abolition of the public duty-special duty rule, and suggests various implications of *Schear* for New Mexico tort law.

II. STATEMENT OF THE CASE

Ms. Susan Schear, the plaintiff, alleged¹⁰ that on February 16, 1982 she was brutally raped and tortured in her home after the Bernalillo County Sheriff's Department refused to answer a call for help.¹¹ When her companion, Anthony Pena, placed that emergency call, he informed the sheriff that an armed perpetrator had broken into the plaintiff's home, assaulted him with a gun, and forced him out.¹² This left Ms. Schear alone and in apparent danger.¹³ The sheriff's office responded by dialing Ms. Schear's phone number. When it received no answer, the office decided to terminate its investigation.¹⁴ The sheriff's call went unanswered because the armed perpetrator smashed the phone after it began to ring.¹⁵ Mr. Pena placed a second call for assistance and was informed by the sheriff's office that no further action would be taken.¹⁶

Ms. Schear filed suit in the Bernalillo County District Court against the Board of County Commissioners and James Jimerson, the Bernalillo County Sheriff.¹⁷ Her complaint alleged gross negligence in failure to adopt a proper procedure for responding to criminal acts and failure to respond to or investigate a reported crime in progress.¹⁸ The district court dismissed the complaint for failure to state a claim upon which relief could be granted.¹⁹ The court of appeals affirmed the district court's dismissal, holding that under the facts of the case, the sheriff's office owed a duty to the public generally and a private cause of action did not arise from an inadequate or erroneous performance of that duty.²⁰ The supreme court granted certiorari and reversed the court of appeals.²¹ The

10. The facts stated in the court of appeals decision are those alleged in plaintiff's complaint. Those facts are accepted as true for purposes of the appeal, as the plaintiff appealed from a N.M.R. Civ. P. 12b(6) dismissal. *Schear v. Board of County Commissioners*, 23 N.M. St. B. Bull. 192 (Ct. App. February 16, 1984) citing *Buhler v. Marujo*, 86 N.M. 399, 524 P.2d 1015 (Ct. App. 1974).

11. *Schear*, 23 N.M. St. B. Bull. 192, 193 (Ct. App. February 16, 1984).

12. *Id.* at 193.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Schear*, 101 N.M. at 671, 687 P.2d at 728.

18. *Id.* at 672, 687 P.2d at 729.

19. *Id.*

20. *Schear*, 23 N.M. St. B. Bull. at 193. This holding is essentially an expression of the public duty-special duty rule. See accompanying note 5.

21. *Schear*, 101 N.M. at 677, 687 P.2d at 734.

supreme court in *Schear* addressed only the issue of duty and remanded to the trial court the questions of breach of duty, proximate cause, and damages.²²

III. DISCUSSION AND ANALYSIS

The New Mexico Supreme Court held that the Bernalillo County Sheriff owed a statutory duty to Ms. Schear.²³ This statutory duty requires law enforcement personnel to investigate all alleged violations of the criminal law of which they are aware.²⁴ Although the court found an actionable statutory duty owed, it had to determine whether the duty was owed to the public generally or to the individual members of the public injured by the breach of that duty.²⁵ The court determined that no statutory, common law, or policy barrier existed which should preclude plaintiff's private cause of action.²⁶ Thus, it found the police owed a duty to individual members of the public.²⁷

Until 1976, governmental entities were immune from liability in New Mexico through the doctrine of sovereign immunity.²⁸ The New Mexico judiciary abolished sovereign immunity in 1975.²⁹ In reaction to that abolition the New Mexico Legislature enacted the Tort Claims Act several months later.³⁰ This Act reinstated the judicially-abolished principle of sovereign immunity for all governmental entities' activities except those specifically enumerated.³¹ Law enforcement officers were among those

22. *Id.*

23. *Schear*, 101 N.M. at 677, 687 P.2d at 734. The finding of a duty owed is the traditional first step in tort analysis for private parties. Here the court used the step against a governmental entity. W. Page Keeton, *Prosser & Keeton on Torts*, 164-65 (5th ed. 1984). However, as under any negligence scheme, Ms. Schear would still be required to establish a breach of duty and causation before liability would attach. Restatement (Second) of Torts, § 895(b) (1979). The plaintiff settled the case before trial on remand, therefore that determination was never made. (Confirmed through a phone conversation with plaintiff's attorney's office, Parham & Fine, P.A., Albuquerque, New Mexico.)

24. N.M. Stat. Ann. § 29-1-1 (1978):

It is hereby declared to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware. . . .

25. *Schear*, 101 N.M. 671, 687 P.2d 728 (1984).

26. *Id.*

27. *Id.*

28. *See supra* note 7.

29. *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975).

30. *Methola v. County of Eddy*, 95 N.M. 329, 331, 622 P.2d 234, 236 (1980).

31. N.M. Stat. Ann. § 41-4-5 to -12 (Repl. Pamp. 1982). Those excepted from sovereign immunity by the Tort Claims Act are public employees acting within the scope of their duty and involved in: 1) the operation or maintenance of any motor vehicle, aircraft or watercraft, § 41-4-5; 2) the operation or maintenance of any building, public park, machinery, equipment or furnishing, § 41-4-6; 3) operation of airports, § 41-4-7; 4) operation of these public utilities and services: gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation, § 41-4-8; 5) operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or the

excepted from immunity for certain tortious conduct.³² The supreme court, relying on this exception, determined that a private cause of action can arise from the negligence of a law enforcement agent.³³

In order to arrive at that determination the court had (1) to abolish the public duty–special duty rule³⁴ and (2) to clarify its interpretation of the Tort Claims Act³⁵ found in *Methola v. County of Eddy*.³⁶ These two steps will be examined separately.

A. *The Abolition of the Public Duty–Special Duty Rule*

The public duty–special duty rule abolished in *Schear* was a common law doctrine.³⁷ Under general common law a governmental entity owed a duty to the public generally and did not owe an actionable duty to any individual unless special circumstances existed.³⁸ Essentially, if there was a “duty to all there [was] a duty to none,”³⁹ unless the duty narrowed into a special obligation to a specific individual.⁴⁰ In order to obtain redress under that doctrine, public prosecution was necessary.⁴¹

Under common law, the public duty narrowed into a special duty in a number of situations.⁴² One of these situations was when the victim is a member of a special group, which might include informers,⁴³ undercover agents,⁴⁴ witnesses,⁴⁵ or someone under a court order for protection.⁴⁶ Courts have also found a special duty when the police failed to discharge

like facilities, § 41-4-8, 6) the providing of health care services, § 41-4-10; 7) the maintenance of or for the existence of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area, § 41-4-11; 8) law enforcement, § 41-4-12.

32. N.M. Stat. Ann. § 41-4-12 (1978):

The immunity granted pursuant to subsection A of section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

33. *Schear*, 101 N.M. at 677, 687 P.2d at 734.

34. *Id.* at 674, 687 P.2d at 731.

35. *Id.* at 674-75, 687 P.2d at 731-32.

36. 95 N.M. 329, 622 P.2d 234 (1980).

37. *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1014 (Fla. 1979) (citing *Modlin v. City of Miami Beach*, 201 So.2d 70 (Fla. 1967)).

38. *Id.*

39. *Adams v. State*, 555 P.2d 235, 241 (Alaska 1976).

40. *Commercial Carrier Corp.*, 371 So.2d at 1014 (1979) (citing *Modlin v. City of Miami Beach*, 201 So.2d 70 (1967)).

41. *Id.*

42. Annot., 46 A.L.R.3d 1084, 1088 (1972).

43. *Id.* at 1088 (citing *Schuster v. New York*, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958)).

44. *Id.* (citing *Swanner v. United States*, 309 F. Supp. 1183 (D.C. Ala. 1970)).

45. *Id.* at 1088–89 (citing *Gardner v. Chicago Ridge*, 71 Ill. App.2d 373, 219 N.E.2d 147, *rev'd in part and aff'd in part*, 128 Ill. App.2d 157, 262 N.E.2d 829, *cert. den.* 403 U.S. 919, 29 L.Ed.2d 696, 91 S. Ct. 2230 (1966)).

46. *Id.* at 1089 (citing *Baker v. New York*, 25 App. Div.2d 770, 269 N.Y.2d 515 (1966)).

a duty voluntarily assumed,⁴⁷ failed to provide a promised warning upon release of a dangerous person,⁴⁸ or affirmatively caused danger to a victim.⁴⁹

The court of appeals relied on the public duty–special duty rule in its decision in *Schear*.⁵⁰ It held that the sheriff owed a duty to the general public and that “the failure to perform that duty or an inadequate or erroneous performance does not give rise to a private cause of action.”⁵¹ In erecting the barrier to suit, the court of appeals decided that the Tort Claims Act⁵² permitted survival of the public duty–special duty rule despite the waiver of sovereign immunity for specific conduct of law enforcement officials.⁵³ The court of appeals determined that the public duty–special duty rule was a traditional tort concept which the legislature directed the court to apply.⁵⁴ The dissenters on the supreme court reached this same conclusion.⁵⁵

The majority of the supreme court in *Schear*, however, held that the public duty–special duty rule had no viability in New Mexico because the legislature specifically waived the judicially-created concept of sovereign immunity as to law enforcement officials for certain conduct.⁵⁶ The Tort Claims Act also abolished judicially-created categories that were once used to determine immunity or liability such as government or proprietary functions and discretionary or ministerial acts.⁵⁷ Under those

47. *Id.* (citing *Mentillo v. Auburn*, 2 Misc.2d 818, 150 N.Y.S.2d 94 (1956)).

48. *Id.* (citing *Morgan v. County of Yuba*, 230 Cal. App.2d 938, 41 Cal. Rptr. 508 (1964)).

49. *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (Ct. App. 1979).

50. 23 N.M. St. B. Bull. 192, 193 (Ct. App. February 16, 1984).

51. *Id.* at 193.

52. N.M. Stat. Ann. § 41-4-2(B) (1978) provides:

The Tort Claims Act shall be read as abolishing all judicially-created categories such as “governmental” or “proprietary” functions and “discretionary” or “ministerial” acts previously used to determine immunity or liability. Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty. . . .

53. *Schear*, 23 N.M. St. B. Bull. 192.

54. *Id.* at 196.

55. *Schear*, 101 N.M. at 678, 687 P.2d at 735.

56. *Id.* at 674, 687 P.2d at 731.

57. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L.Rev. 249 (1976). Professor Kovnat describes the judicially created categories that were abolished in section 41-4-2(B) of the Tort Claims Act.

[Activities such as the] operation of a municipal swimming pool in a public park, construction and repair of sewers and sewerage plants, and construction and maintenance of streets to avoid defects and obstructions were characterized as proprietary functions of municipalities [which were not immune from suit] whereas activities such as operation of a police department, a county hospital, and a firefighting service, installation of stopsigns, and maintenance of roads, had all been held to be governmental activities, immunizing the municipality from liability despite an allegation of negligence. Kovnat, *supra*, at 252.

At common law if an officer were at a sufficiently high policymaking level, he was immune from suit for injuries caused by his discretionary activities to avoid dampen[ing] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. [No such immunity was available to those who performed ministerial acts.] *Id.* at 254 (1976).

categories when an activity was categorized as proprietary (e.g. operation of a municipal swimming pool), the governmental entity was not immune from suit.⁵⁸ However, if the activity was classified as governmental (e.g. the operation of a police department), it was immune from suit.⁵⁹ Those engaged in high level discretionary policy-making decisions were immune from suit while persons engaged in ministerial tasks were not.⁶⁰ The supreme court ruled that the legislature implicitly abolished the public duty–special duty rule along with the above categories as vestiges of sovereign immunity.⁶¹

By abolishing the use of the public duty–special duty rule, the supreme court put an end to the injustice that occurs when the victims of negligence are estopped from seeking redress by an immunity barrier.⁶² The court rejected the concerns of those jurisdictions which cling to that vestige of sovereign immunity out of fear that susceptibility to liability would unduly cramp the discretionary judgment of law enforcement officials.⁶³ It also rejected warnings of the floodgate effect and the financial consequences of such a holding on the municipality.⁶⁴ In response to the financial concerns, the supreme court stated that the cost of imposing liability upon law enforcement agents for their negligent actions would be outweighed

58. *Id.* at 252.

59. *Id.*

60. *Id.* at 254.

61. *Shear*, 101 N.M. at 674, 687 P.2d at 731.

62. *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (1979) is an example of the kind of injustice the public duty–special duty rule can work. The facts in *Doe* are sadly similar to those in *Shear*.

An adult male abducted a twelve-year-old boy and dragged him into an abandoned house. *Id.* at 501, 590 P.2d at 649. Two teenagers witnessed the abduction. *Id.* The teenagers sought the help of their brothers and sisters in placing a call for assistance to the police department. *Id.* The chief of police, the only officer available to respond to the call, chose to finish his conversation with a visiting sheriff before answering the call. *Id.* After receiving no response from the police, two neighboring children went to the police station. *Id.* The children told an officer who simultaneously arrived at the station about the incident. *Id.* This officer immediately went to the abandoned house and found that the assailant had sexually assaulted the boy. *Id.*

At the time of the *Doe* incident, the Tort Claims Act was not in effect; however, at the time of the court of appeals decision, it was. The operative statute in *Doe* was the Peace Officers Liability Act because the Tort Claims Act was not retroactive, N.M. Stat. Ann. § 39-8-1 to 39-8-17 (2d Repl. Vol. 6, 1973 Supp.). The Peace Officers Liability Act provided for protection from personal liability for police officers when performing public duties. *Id.* The court discussed the distinction between special and public duty and determined that the young victim did not fit into any of the special duty categories. The court held that the law fixes the duty of police officers. *Doe*, 92 N.M. at 503, 590 P.2d at 651. It stated, "such duty is a public duty owed to the public generally and absent a special relationship, the plaintiff does not have a cause of action against the police officer." *Id.* It should be noted that the court of appeals in *Doe* was somewhat uneasy with its decision and called upon the people of New Mexico to make a change in policy through the legislature. *Id.* It is unclear why it failed to acknowledge the clear expression of change brought about by the legislature in the Tort Claims Act. See *Shear*, 23 N.M. St. B. Bull. 192.

63. Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 Harv. L. Rev. 821, 832 (1981).

64. *Doe v. Hendricks*, 92 N.M. 499, 501, 590 P.2d 647, 649.

by the advantages to society of a more responsive agency.⁶⁵ The court also expressed its policy of treating all governmental employees excepted from immunity⁶⁶ in the same way as all other litigants.⁶⁷

B. The Tort Claims Act

In reaching its decision, the supreme court corrected the court of appeals' statutory interpretation of section 41-4-12 of the Tort Claims Act. Section 41-4-12 provides:

The immunity granted pursuant to subsection A of section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when *caused by* law enforcement officers while acting within the scope of their duties. (emphasis added)⁶⁸

The court of appeals in *Shear* had interpreted the words "caused by" in the Act to mean direct causation⁶⁹ rather than the broader sphere of negligent causation. That appellate court then used its interpretation to limit law enforcement officers' liability to acts directly caused by them.⁷⁰ It also used this interpretation to support its position that the Act implicitly embodies the public duty-special duty doctrine by its requirement of direct causation.⁷¹

65. *Shear*, 101 N.M. at 676-77, 687 P.2d at 733-34.

66. *See supra*, note 32, for a complete list of those excepted from immunity by the Tort Claims Act.

67. The supreme court revealed this policy by addressing the court of appeals decision in *Fireman's Fund Insurance Co. v. Tucker*, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980). *Tucker* involved a suit which arose out of two separate accidents. The accidents involved two tractor-trailers colliding with a cow on a public highway. The court of appeals held that the highway department could be sued for negligent maintenance of a fence along the state highway. The operative statute in that case, N.M. Stat. Ann. § 41-4-11 (1978), excepted public employees who maintain the highway from immunity. The language of § 41-4-11 is similar to that of § 41-4-12, the operative statute in *Shear*. The *Tucker* court did not impose the public duty-special duty rule, and without hesitancy, found liability on the part of the highway department worker. The supreme court in *Shear* found no reason to allow law enforcement agents to escape from liability for their negligent acts while holding highway department employees liable. *Shear*, 101 N.M. at 676, 687 P.2d 733.

68. N.M. Stat. Ann. § 41-4-4(A) (Repl. Pamp. 1982) provides:

A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by sections 41-4-5 to -12 NMSA 1978 [*see supra* note 31]. Waiver of this immunity shall be limited to and governed by provisions of sections 41-4-13 to -25 (NMSA 1978).

69. *Shear*, 23 N.M. St. B. Bull. at 196.

70. *Id.*

71. *Id.*

The court of appeals, in interpreting the Act, ignored clear precedent to the contrary in *Methola v. County of Eddy*.⁷² The supreme court in *Methola* had interpreted the words "when caused by law enforcement officers . . ." in the Tort Claims Act⁷³ to include not only harm caused by direct acts of officers but also harm caused by their negligent omissions.⁷⁴ The court of appeals in *Schear* distinguished *Methola* by stating that the defendants in *Methola* had a common law duty of custodial care which was absent in *Schear*.⁷⁵

The supreme court, with a mild admonition, reiterated its holding in *Methola*: "We again specifically hold that law enforcement officers need not be the *direct cause* of injury (in the sense of having inflicted it) in order for liability to attach."⁷⁶ In answer to the court of appeals' reliance on the special custodial care duty to distinguish *Methola*, the supreme court stated that those kinds of distinctions in the standard of care were arbitrary and the sort the legislature abolished in the Tort Claims Act.⁷⁷

IV. CONCLUSION

Schear is a narrow decision wherein the court took only the first step in finding negligence; it found a duty owed.⁷⁸ Before liability could attach, the factfinder still had to determine whether there was a breach of duty and proximate cause.⁷⁹ Further, this decision only applies to those governmental employees excepted from immunity by the Tort Claims Act.⁸⁰ Whether this decision will bankrupt the municipal coffers by a flood of negligence suits is yet to be seen. However, the purchase of insurance to ward off that consequence is one solution.⁸¹ Placing the burden on the State which can distribute its losses is more equitable than placing the entire burden on the injured individual's shoulders.⁸² A possible conse-

72. 95 N.M. 329, 622 P.2d 234 (1980). *Methola* was a consolidation of three cases which alleged negligence of jailors in the performance of their duty to protect persons in their custody. The supreme court held that the jailors were susceptible to actions for negligent omissions under section 41-4-12. *Id.*

73. N.M. Stat. Ann. § 41-4-12 (Repl. Pamp. 1982).

74. *Methola*, 95 N.M. at 333, 622 P.2d at 238.

75. *Schear*, 23 N.M. St. B. Bull. at 196.

76. *Schear*, 101 N.M. at 673, 687 P.2d at 730.

77. *Id.* at 676, 687 P.2d at 733. See *supra* note 52 for the text of § 41-4-2(B) and see also note 56 for the type of arbitrary distinction to which the supreme court refers.

78. *Id.* at 676, 687 P.2d at 733.

79. *Id.* Since this case settled before trial on remand, those questions were never answered by a jury.

80. *Id.* at 677, 687 P.2d at 734. See *supra*, note 31, for a full list of those excepted from immunity by the Tort Claims Act.

81. See N.M. Stat. Ann. §§ 41-4-20 to -29 (1978) regarding coverage for liability and insurance.

82. *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975). See also *Kovnat, supra* note 57, at 249. This is especially true in light of the two recent United States Supreme Court decisions interpreting 42 U.S.C. § 1983. Section 1983 provides a federal cause of action for violations of

quence of the *Shear* decision is a more efficient and cautious municipal work force.

The supreme court, by rejecting the public duty–special duty rule, followed the decisions of other jurisdictions which disparage that doctrine as a vestige of sovereign immunity.⁸³ The decision in *Shear* is in keeping with New Mexico's enlightened trends in tort law,⁸⁴ as well as its policy of imposing liability where fault lies.⁸⁵

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constitutional rights by persons who act under color of state law. The Supreme Court in both *Daniels v. Williams*, 54 U.S.L.W. 4090 (U.S. January 21, 1986) and its companion case, *Davidson v. Cannon*, 54 U.S.L.W. 4095 (U.S. January 21, 1986) essentially held that negligent acts do not give rise to a cause of action under § 1983. These holdings rest on the premise that the due process clause of the 14th Amendment is not violated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. Therefore, if Ms. *Shear's* negligence claim failed in state court because of sovereign immunity principles, she would be completely estopped from seeking redress for her injury.

83. *Adams v. State*, 555 P.2d 235 (Alaska 1976), *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979).

84. *Shear*, 101 N.M. at 677, 687 P.2d at 734.

85. See *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App. 1982).