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THE UTAH GOVERNMENTAL IMMUNITY ACT: WHOM DOES IT REALLY PROTECT?

McCLAIN NAPIER*

Utah, like most states, seeks to protect its government employees from frivolous civil suits that may arise through "the performance of the employee's duties."1 In its opening, the Utah Governmental Immunity Act states that, "...each governmental entity and each employee of a governmental entity are immune from suit for any injury that results from the exercise of a governmental function."2 With this sweeping statement of immunity, the question arises, where does Utah draw the line in protecting its employees? Is there any instance when a government agent may be held liable for committing negligent actions while on duty?

The Utah Governmental Immunity Act is not as all-encompassing in protecting government employees as implied in the act's absolutist opening. In fact, Utah courts in recent cases have more liberally denied immunity to government agents for actions performed on duty. The article will show how Utah has embraced this trend through an analysis of the evolution of the immunity act and through a review of significant cases under the current version. Furthermore, to better understand how current immunity code may sway future rulings, the article will apply the Utah Governmental Immunity Act to a developing case involving the limits of a peace officer's discretionary function.

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2 UTAH CODE ANN. § 63G-7-201(1) (2008).
I. A Brief History of the Utah Governmental Immunity Act

Utah's governmental immunity policy has changed frequently, especially during the past century. "Prior to 1965, the [Utah] government enjoyed immunity from all damages claims." Utah courts granted immunity waivers on only a few occasions. These occasions typically involved the just compensation for the public use or damage of private property or the private endeavors of municipal corporations. The only other option for a citizen seeking recovery came through petitioning the state legislature to alter immunity policy. Essentially, the state of Utah could not "be sued without its consent." Utah's immunity policy evolved gradually due to the myriad of modifications enacted by the Utah legislature. However, Utah courts often opposed these changes. This opposition came to a head in Laney v. Fairview City when the Utah Supreme Court ruled the Utah Governmental Immunity Act to be unconstitutional. In Laney, the plaintiff sought recovery from the defendant for the wrongful death of her husband who died from electrocution when irrigation pipes that he carried touched power lines. Laney claimed that the lines were hung negligently low. The city moved for summary judgment, claiming immunity since the maintenance of power lines met the criteria for discretionary function according to previous Utah code, § 63-30-10. The district court granted the city's motion, finding that

4 David West, Tort Claims Against the State of Utah, 5 UTAH L. REV. 246, 235-36 (1957).
5 Id. at 241.
6 Id. at 245.
7 Goldstein, supra note 3, at 381.
8 Laney v. Fairview City, 57 P.3d 1007, 1027 (Utah 2002).
9 Id. at 1011.
10 Id.
the height and condition of power lines did pertain to discretionary function.\textsuperscript{11} The appellate court upheld the judgment.

The Supreme Court agreed that the maintenance of power lines was a matter of discretionary function according to Utah code, but they determined that the code violated the Open Courts Clause of the Utah Constitution.\textsuperscript{12} Accordingly, the Utah Supreme Court reversed the trial court’s summary judgment and remanded for a new trial.\textsuperscript{13}

With the previous code deemed unconstitutional, the Utah Legislature set out to revise the policy on governmental immunity, ultimately leading to the Utah Governmental Immunity Act of 2004. This version removed the practice of granting immunity to actions that only the government could perform\textsuperscript{14} and it set a monetary cap on how much an individual could recover against the state.\textsuperscript{15}

II. JUDICIAL INTERPRETATION OF THE CURRENT IMMUNITY ACT

The developments following Laney indicated the state’s willingness to avoid total sovereign immunity, or the idea that the “king can do no wrong.”\textsuperscript{16} Utah has not completely abandoned immunity for its government agents,\textsuperscript{17} but trends show that Utah courts have become more accepting of state liability in civil suits.

The evolution of this trend is clearly seen before Laney. For instance, in Day v. State the plaintiff sought recovery for the death of her husband, claiming that the officer who had engaged a suspect

\textsuperscript{11} Id.

\textsuperscript{12} Utah Const. art. I, §11; Laney, 57 P.3d at 1027.

\textsuperscript{13} Laney, 57 P.3d at 1027.

\textsuperscript{14} Goldstein, supra note 3, at 383.

\textsuperscript{15} Id. at 384.

\textsuperscript{16} West, supra note 4, at 233.

in a high-speed pursuit was liable for the consequential crash that took her husband’s life. Although the state argued for immunity, the Supreme Court ruled in favor of the plaintiff saying that the officer owed a specific duty of care to any potential victims during the high-speed chase.

The Court examined Utah’s Public Duty Doctrine and explained how Ms. Day’s situation created a special relationship of due care between her husband and the police officer. The Court stated, “Although a government entity owes a general duty to all members of the public, that duty does not impose a specific duty of due care on the government with respect to individuals who may be harmed by governmental action or inaction.”

The Court then explained the few exceptions to the Public Duty Doctrine that create a specific duty between agent and civilian. They said:

At least four circumstances may give rise to a special relationship between the government and specific individuals. 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 government actions that reasonably induce detrimental reliance by a member of the public; and (4) under circumstances when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

This policy of a special duty of care between an agent and an injured party was upheld more recently in the case of *Tindley v. Salt*.

19 Id. at 1181.
20 Id. at 1175.
21 Id.
Lake City School District. In Tindley, the families of several high school students who were injured and killed sought recovery from the city for an accident caused by the negligent driving of a debate coach as the team returned from competition. The city conceded its negligence without contest. Although Tindley dealt primarily with the constitutionality of a recovery cap, it provides yet another example of a governmental entity recognizing its liability regardless of the Utah Governmental Immunity Act.

This same post-Laney challenge to immunity is seen again in Kouris v. Utah Highway Patrol. Similar to Day, this case questioned the liability of an officer for a fatality caused during vehicular pursuit. Tragically, the fatality was that of a young boy killed on his bicycle by the officer’s vehicle. The lower courts previous to Kouris granted the state’s motion for summary judgment. They found that the defendant was immune from any claim of negligence under the Utah Governmental Immunity Act since the operation of his emergency vehicle was a governmental function. The Utah Supreme Court, however, found that the trial court had hastily granted immunity to the defendant as it had yet to be determined if the officer had properly used his emergency lights according to Utah code. The Court remanded the case for trial ruling that if the officer had violated Utah code by not properly operating his emergency lights, the state would lose its immunity. Thus, Kouris stands as yet another

23 Id. at 297.
24 The cap on recovery for aggregate damages in Utah is $500,000 (Tindley, 116 P.3d at 298).
25 See Lyon v. Burton, 5 P.3d 616 (Utah 2000); see also Parks v. Utah Transit Authority, 53 P.3d 473 (Utah 2002).
26 Kouris v. Utah Highway Patrol, 70 P.3d 72 (Utah 2005).
27 Id. at 74.
28 Id. at 75.
29 Id. at 77.
30 Id.
post-Laney example of the Utah Court refusing to grant immunity to a government agency.

III. An Exploration of the Current Immunity Act through a Developing Case

In light of these recent cases and the apparent trend of the Utah Supreme Court toward leniency in waiving immunity, the goal of the article is to now predict how this trend might sway future rulings in negligence claims against the state. The article will apply current immunity code and recent cases relevant to the Immunity Act to a unique case that has not yet come before a court. Through this application, one will see how the latest evolutions of the Utah Governmental Immunity Act make it very likely that immunity will be waived not only in this developing case, but in other future cases where the limits of a peace officer’s discretionary function are called into question. The section will proceed by stating the facts of the case, examining applicable law, and by drawing conclusions for the case given the examined law. The purpose of this section is not to show whether the officer in question is guilty of negligence, but whether he would receive immunity.

A. The Case

The case involves an underage teenager who, while driving illegally, got into a car accident that left her terribly disfigured. Before the accident, she was stopped by an officer who knew her and knew she was underage. The girl pled with the officer to let her go since she was only out to get gas for the car and since she was so close to her home. The officer, persuaded by her pleas, gave her a warning and told her to go straight home.

Since this case has not yet had its day in court, the names of the involved parties and the location of the incident are withheld. Furthermore, due to the case’s early stage of development in the legal system, a proper citation for the details of the case cannot yet be given. Therefore, the reader may regard the case as hypothetical.
However, the officer did not accompany the girl to her house and the girl did not go home. She continued driving with her friends in the car, and was eventually involved in a traffic accident. Because of the high cost of the medical and insurance bills, the minor and her family now seek recovery from the city. The girl claims that the officer had it in his power and in his duty to prevent her from driving that day, and that the officer's failure to do so was a breach of his duty.

B. Applicable Law Concerning the Officer's Immunity

One might conclude that the officer is immune from liability since it was the girl's decision to drive illegally despite the officer's warning to go straight home. However, to determine a government agent's liability for actions performed while on duty, one must determine if those actions constitute discretionary function, as was central in Laney. Utah Code states:

(4) Immunity from suit of each governmental entity is waived as to any injury proximately caused by a negligent act or omission of an employee committed within the scope of employment. (5) Immunity from suit of each governmental entity is not waived... if the injury arises out of, in connection with, or results from (a) the exercise or performance, or the failure to exercise or perform, a discretionary function, whether or not the discretion is abused.32

Therefore, if the actions constitute the agent's discretionary function, then that agent is immune from liability. If not, then the Utah Governmental Immunity Act does not protect the agent.

1. Defining Discretionary Function

At first glance, the officer's actions may appear to be discretionary. For instance, an officer is typically not required to issue a ticket

every time he stops a speeder. He is given discretion in the matter. Would not the same hold true for the officer in question? Answering this question requires looking to Utah courts for the definition of discretionary function. The Court defines discretionary function as an act that (1) involves a basic governmental policy or objective; (2) must be essential to the realization or accomplishment of the policy or objective; (3) must involve judgment; and (4) is performed by a governmental entity with the proper authority.33

Determining whether the officer’s actions were discretionary hinges on whether his decisions were essential to the realization or accomplishment of a basic governmental policy or objective. State v. Harmon sheds further light on governmental objectives as they apply to the case at hand.34 The defendant, who was being charged with possession of narcotics, argued that her initial arrest after a traffic stop, based solely on the fact that her driver’s license had been recently suspended, was unmerited. The court ruled against the defendant saying that in light of the “governmental interest in removing unlicensed drivers from the road for public safety reasons” the officer in question had the reasonable duty to apprehend the unlicensed driver. They continued, “Her offense of driving on suspension is different from, for example, speeding, because allowing her to ‘proceed on her way’ without a valid license permits the continuation of her unlawful activity.”35

Furthermore, Utah Code states that “a person may not authorize or knowingly permit a motor vehicle owned by him or under his control to be driven by a person in violation of this chapter” (i.e. an unlicensed driver).36 Thus, according to Harmon and the above-cited statute, an officer has the duty to prevent a person from driving if that person is unlicensed. To do otherwise would permit the continuation of an unlawful activity and would break a basic government objective (i.e. “removing unlicensed drivers from the road”).37

35 Id. at 1203-1204.
37 See Harmon, 910 P.2d at 1203-04.
Finally, to determine whether the officer in question may be held liable at all, it must be shown whether the officer had a specific duty of care to the injured party. The Public Duty Doctrine, as explained in *Day*, states that although a peace officer owes a general duty to all members of the public "that duty does not impose a specific duty of due care on the government with respect to individuals who may be harmed by governmental action or inaction."\(^{38}\) As previously mentioned, *Day* states that "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. . . ."\(^{39}\)

### C. Conclusions for the Case at Hand

Therefore, it is essential to answer two questions in determining whether the officer may be held liable under the Utah Governmental Immunity Act. First, does the officer’s action in allowing the girl to continue driving the day of the accident meet the criteria for discretionary function? And second, did he have a specific duty of care to the girl?

The answer to the first question must only be no; allowing the girl to continue driving did not constitute a discretionary function. Based on Utah Code, a government entity’s decision must necessarily involve and be essential to the realization of a basic governmental policy or objective in order to be considered a discretionary function.\(^{40}\) The officer’s decision to let the girl drive away furthered no government objective. In fact, considering Utah’s push to “keep unlicensed drivers off the road,” the officer acted contrary to Utah’s policy objectives.\(^{41}\) Furthermore, by allowing the girl to continue

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38. *Day*, 980 P.2d at 1175.
39. *Id.*
driving, the officer failed to protect a group of minors from a dangerous situation and he violated Utah code since he essentially condoned the continuation of the plaintiff's illegal driving when he had sufficient control over the vehicle to prevent the action.\footnote{42}{\textit{UTAH CODE ANN.} § 53-3-203 (2008).}

In light of these Utah policy objectives, the decision to stop the plaintiff from driving left the realm of discretionary function and entered that of ministerial function, where the officer had no choice of his own in the matter.\footnote{43}{See Connell v. Tooele City, 572 P.2d 697 (Utah 1977) discussing the difference between discretionary function and ministerial function as the former being an open decision left to the officer, which receives immunity, and the latter being an order, which is exempt from immunity.} Therefore, since the officer's actions do not meet the criteria of discretionary function, the officer would be ineligible for immunity.

Concerning the second question, the answer must be yes; the officer had a specific duty of care to the girl due to the special relationship between the two parties. As described in \textit{Day},\footnote{44}{\textit{Day}, 980 P.2d at 1175.} the criteria to establish a special relationship in exception to the Public Duty Doctrine are, first, does the plaintiff pertain to a specific class of persons? Yes, she is a minor. Second, are there statutes in Utah that protect such minors? There are numerous statutes, namely statutory rape laws, anti-predatory laws, and drinking and smoking restrictions. More applicable, however, there are laws in Utah that prohibit minors from driving until a certain age and only after sufficient training and certification.\footnote{45}{\textit{UTAH CODE ANN.} § 41-8-1 (2008).} Clearly, the plaintiff belongs to a specific class of persons protected by Utah statute.

Second, a special relationship must be shown to have been established between the defendant and the plaintiff through the specific actions taken by the officer to protect the plaintiff. The moment that the officer pulled the girl to the side of the road with the intent of halting any further reckless driving—the moment that he issued her a warning and told her to go straight home—that relationship was established with its accompanying duty of due care.
Therefore, given the current version of the Utah Governmental Immunity Act and the current trend of Utah courts to more liberally waive immunity for government agents, it is clear that the state in this case would not receive immunity. Whether the officer’s actions were actually negligent, however, is an entirely different matter.

IV. CONCLUSION

What does this mean for the future of litigation in Utah? Will the current trend of diminished immunity lead to incessant frivolous legal suits against the state? Indeed, long gone are the days when the state enjoyed near total immunity. But, it would be an unfounded prediction to say the other extreme is forthcoming, and hopefully such a prediction would never come true. As has been shown, there have been several cases showing Utah’s willingness to waive immunity, but there are still those few strong cases, post-Laney, where the Court has maintained immunity. And that is the way it should be. Utah has reached the happy medium in governmental immunity. Although the Utah Governmental Immunity Acts opens on an absolutist line, that governmental entities “are immune from suit for any injury that results from the exercise of a governmental function,”6 Utah courts have clearly arrived at the reasonable exceptions to the rule.