# CASE NOTES

TORTS—A MUNICIPALITY IS LIABLE FOR TORTIOUS COMMISSIONS AND OMISSIONS WHEN AUTHORITY AND CONTROL OVER THE FIRE SAFETY OF APARTMENTS HAVE BEEN DELEGATED TO IT BY STATUTE AND BREACH OF THAT DUTY INVOLVES A FORESEEABLE RISK OF INJURY TO AN IDENTIFIABLE CLASS TO WHICH THE PLAINTIFF BELONGS.—*Wilson v. Nepstad* (Iowa 1979).

In the early morning hours of September 27, 1975, fire destroyed an apartment house located at 1128 6th Avenue, Des Moines, Iowa. Five cases concerning the deaths and injuries which resulted from the fire were filed in the District Court for Polk County and were later consolidated for the submission of motions. The owners of the apartment house, Gregory L. and Dona J. Nepstad, and the City of Des Moines were listed as defendants in each action. The plaintiffs alleged that the city failed to perform its duty of enforcing state statutes and city ordinances[1] relating to building codes, occupancy permits and fire regulations. The plaintiffs further alleged that agents of the city negligently inspected the apartment building on February 7, 1975 and issued an inspection certificate[2] impliedly warranting the safety of the premises. The deaths and injuries sustained by the fire victims[3] were claimed to have been the result of either the city's negligent conduct or its breach of warranty.[4]

The city filed motions to dismiss in four of the cases and a motion for judgment on the pleadings in the fifth case.[5] In support of these motions the city argued that the "public duty" doctrine was established as the law of

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1. The state statutes violated were unspecified in the petition. The city ordinances violated were also originally unspecified. However, the plaintiffs amended their petition and claimed that city ordinances number 7609, 7516 and 7912 were violated. Record, app. at 35-40. Alleged defects included:

> inadequate means of egress; obstructions and encumbrances on fire escapes, stairs and passageways; dangerous materials stored on, under, or at the bottom of exit stairways, exit hallways and other means of egress. [Also] [t]here was inadequate lighting of stairways, hallways and other means of egress; absence of suitable fire detecting devices and extinguishing appliances; and no immediate access from each dwelling unit located on the second floor and above to two or more means of egress.

Wilson v. Nepstad, 282 N.W.2d 664, 672 (Iowa 1979).

2. Housing Code Enforcement Inspection 1021 (Feb. 17, 1975). Record, app. at 23.

3. The fire victims were alleged to be residents or guests in the building. 282 N.W.2d at 666.

4. The plaintiffs did not pursue the breach of warranty theory on appeal. *Id.* at 666.

5. *Id.*

Iowa in *Jahnke v. Incorporated City of Des Moines.*[6] This judicially created doctrine has been followed by a majority of courts and has been utlized in jurisdictions where sovereign immunity has been diminished or abolished.[7] The "public duty" doctrine distinguishes between the recipients of duties so that municipalities are liable in tort only when the duty breached was one owed to a particular individual and not one owing to the public in general.[8] The city contended that the applicable state and municipal inspection laws were designed to protect the general public and therefore did not create a duty of care to the fire victims individually.[9]

The district court sustained the city's motions ruling that a complaining party must show a duty of care directed towards the complaintant as an individual before a municipality can be held liable.[10] On the appeal of the consolidated cases,[11] the Supreme Court of Iowa, with three judges specially concurring,[12] *held* reversed. A municipality is liable for tortious commissions and omissions when authority and control over a particular activity have been delegated to it by statute and breach of that duty involves a foreseeable risk of injury to an identifiable class to which the plaintiff belongs. As a matter of law on motions to dismiss,[13] it cannot be determined that the City of Des Moines owed no duty to the occupants of the apartment under consideration. *Wilson v. Nepstad,* 282 N.W.2d 664 (Iowa 1979) *(en banc).*

Until recently, the doctrine of sovereign immunity would have protected the city from the potential liability it is subjected to as a result of the *Wilson* decision.[14] Although the doctrine of sovereign immunity was created

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6. 191 N.W.2d 780 (Iowa 1971).

7. Note, *State Tort Liability for Negligent Fire Inspection,* 13 COLUM. J. L. & SOC. PROB. 303, 322-41 (1977) [hereinafter cited as COLUMBIA Note].

8. *Id.*

9. 282 N.W.2d at 667.

10. Record, app. at 62.

11. The motion for judgment on the pleadings was treated in the same manner as the motions to dismiss. 282 N.W.2d at 666.

12. Justice McCormick filed a special concurrence which was joined by Justice LeGrand and Justice McGiverin. Justice Allbee took no part in the decision. However, in a subsequent case involving the same issue as the *Wilson* case, Justice Allbee joined the three justices concurring in result in *Wilson* in a similar special concurrence. *See* Gribble v. Nahas, 286 N.W.2d 415 (Iowa 1979). The *Gribble* concurrence stated that it was a concurrence in result only based on the reasons stated in the *Wilson* special concurrence. Pursuant to Iowa R. App. P. 25, the decision in *Gribble* was not reported. *Id.* Copies of the opinion may be obtained from the office of the Clerk of Court.

13. On appeal of motions to dismiss, the plaintiff's allegations are accepted as true. The *Wilson* court therefore assumed: (1) the city had certain statutory duties to inspect the apartment; (2) the city was negligent in its inspections and (3) the city's negligence proximately caused the deaths and injuries of the victims. 282 N.W.2d at 667. The court also summarily concluded that the lower court's dismissals were appealable final judgments because the bases of liability asserted against the two defendants were not dependent on each other or intertwined. *Id.* at 666.

14. *See* COLUMBIA Note, *supra* note 7, at 305.

and established by the judiciary, the Iowa Supreme Court refused to judicially abolish it and maintained that legislative action was required to abrogate the doctrine.[15] In 1965, the legislature took action to limit sovereign immunity by passing the Iowa Tort Claims Act.[16] The Iowa Supreme Court, however, construed this legislation as being applicable only to the state and its agencies.[17] This construction allowed cities, school districts and counties to continue shielding themselves from liability under the sovereign immunity doctrine.[18] In response, the legislature enacted the Tort Liability of Governmental Subdivisions Act in 1967.[19] This legislation subjected municipalities and other subdivisions to a broader range of liability than the liability to which the state itself was subjected. For example, though the state was not exposed to liability for any acts of an employee in performance of a discretionary function,[20] the subdivision legislation lacked this exemption.[21] After the 1967 abrogation of municipal immunity, the Iowa Supreme Court decided three cases which are important to an analysis of the *Wilson* case. The *Wilson* majority and special concurrence drew different conclusions concerning the effect these three cases had on municipal liability, and these opposing conclusions form one basis for their contrary holdings.

In *Jahnke v. Incorporated City of Des Moines*,[22] the minor plaintiff alleged that as a result of the city's negligence,[23] he was injured when a mob threw concrete blocks at the car in which he was a passenger.[24] In affirming the city's motion to dismiss, the *Jahnke* court determined that the definition of tort in section 613A.2[25] imposed liability for all torts except those

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15. Boyer v. Iowa High School Athletic Ass'n, 256 Iowa 337, 348, 127 N.W.2d 606, 612 (1964).

16. IOWA CODE ch. 25A (1979).

17. Graham v. Worthington, 259 Iowa 845, 854-55, 146 N.W.2d 626, 633 (1966).

18. *See id.* One commentator noted that the court's construction left Iowa in an incongruous position. Because immunity originated in the sovereign, the only reason lower subdivisions had immunity was because the sovereign state itself had immunity. Since subdivision immunity is purely derivative, when the state's immunity is abolished then logically there can no longer exist any derivative immunity. *See* 16 DRAKE L. REV. 35 (1967).

19. Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 984 n.249 (1971); *See* IOWA CODE ch. 613A (1967).

20. IOWA CODE § 25A.14 (1978).

21. IOWA CODE § 613A.2 (1979).

22. 191 N.W.2d 780 (Iowa 1971).

23. Specifically, the plaintiff alleged negligence in failing to warn of the danger to passing motorists when the city was aware of such danger, negligence in failing to close the street and divert traffic away from a course of known danger, negligence in failing to supervise and control a public street, and negligence in failing to exercise due care to notify plaintiff of a known danger. 191 N.W.2d at 781.

24. *Id.*

25. This section states: "[e]xcept as otherwise provided in this chapter, every municipality is subject to liability for its torts and those of its officers, employees, and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary

within the four exceptions of section 613A.4.[26] Although none of the exceptions were applicable,[27] the court denied recovery because it determined that the municipality owed no duty to the individual plaintiff.[28] The court stated that a general tort statute is not sufficient to allow recovery for an individual plaintiff injured as a result of mob action and therefore, to recover, a plaintiff's claim must be based on a mob violence statute specifically authorizing recovery.[29] The court further noted that the plaintiff did not allege facts which supported a conclusion that "the city owed him a duty separate or superior to that which it owed the public generally. In absence of such an obligation he cannot recover."[30]

The *Jahnke* dissent[31] rejected the majority's rationale that the city owed a duty of protection from mob violence to everyone, but not to individual plaintiffs.[32] Instead, the dissent urged that Iowa's unique case law created municipal obligations based on statutory powers delegated by the state to the municipalities.[33] The dissent noted that as early as 1868 the Iowa Supreme Court recognized that a statutory delegation of power to a municipality carried a concomitant duty regarding that subject matter.[34] The dissent also quoted with approval a 1955 opinion which stated, "the city's duty arises because authority and control over a particular activity have been delegated to it."[35] The dissent determined that the city and its employees, by virtue of sections 368.7, 368A.17 and 368.18,[36] had the statutory power and duty to use due care to suppress or control a riot.[37] After concluding a duty to the plaintiff existed, the dissent further noted that the legislative enumeration of exceptions[38] indicated that municipal liability should apply to all claims not specifically excepted.[39] If the legislature had intended nonliability when mob violence caused damage, mob violence

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function." IOWA CODE § 613A.2 (1971).

26. IOWA CODE § 613A.4 (1971); 191 N.W.2d at 782.

27. The four exceptions deal with claims covered by worker's compensation, claims connected with taxes, claims based on the act or omission of an employee exercising due care in executing a statute or ordinance and claims where other stautes provide for municipal immunity. IOWA CODE § 613A.4 (1979).

28. 191 N.W.2d at 783, 786.

29. *Id.* at 783.

30. *Id.* at 787.

31. Justice Reynoldson filed a dissent which was joined by Justice Baker and by Justice Uhlenhopp in division II.

32. *Id.* at 789 (Reynoldson, J., dissenting).

33. *Id.* at 791 (Reynoldson, J., dissenting).

34. *Id. See* Soper v. Henry County, 26 Iowa 264 (1868).

35. 191 N.W.2d at 792 (quoting from Florey v. City of Burlington, 247 Iowa 316, 319, 73 N.W.2d 770, 772 (1955)).

36. IOWA CODE §§ 368.7, 368A.17, 368A.18 (1974).

37. 191 N.W.2d at 794.

38. IOWA CODE § 613A.4 (1971).

39. 191 N.W.2d at 797 (Reynoldson, J., dissenting).

would have been added as a fifth exempted area in the legislation.[40] Therefore, the majority's decision was viewed by the dissent as judicially grafting an additional exception onto the imposition of municipal liability.[41]

In *Symmonds v. Chicago, Milwaukee, St. Paul and Pacific Railroad,*[42] the Iowa Supreme Court ruled that a county has a responsibility to the traveling public with respect to the highways or streets within the county's jurisdiction.[43] The court noted that the law prior to the enactment of the legislation abrogating immunity established that a city's liability in tort arose because authority and control over a particular activity had been delegated to it.[44] The same concept applied to counties until the counties were extended the state's immunity, and the *Symmonds* court concluded that this concept should once again apply to counties since their immunity was abrogated by chapter 613A.[45] Therefore, the plaintiff, whose decedents were killed when their automobile was struck by a train, had a cause of action against the county for its failure to place a stop sign on a secondary road at a dangerous railroad crossing.[46] Statutory sections giving the county the jurisdiction over secondary roads and the authority to place traffic control devices on roads[47] were the court's basis for imposing on the county an affirmative obligation to act where due care would require it.[48]

The only reference to the *Jahnke* decision in *Symmonds* was a citation to that decision as authority for the proposition that the immunity previously accorded to subdivisions was eliminated by the legislature except for the torts specifically excluded by section 613A.4.[49] The *Symmonds* court recognized that the definition of a chapter 613A tort had been amended by the legislature in 1974 to include "error or omission; . . . breach of duty, whether statutory or other duty."[50] Regarding this expanded definition, the *Symonds* court stated, "[n]o one contends the legislature intended anything other than making more specific its original intention. . . . "[51]

The final case playing a role in the differing conclusions reached by the *Wilson* majority and special concurrence is *Harryman v. Hayles.*[52] *Harryman* involved a claim by a minor and his parents against the individual

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40. *Id.*

41. *Id.*

42. Justice Reynoldson, who wrote the *Jahnke* dissent, wrote for the majority in the *Symmonds* decision. There were no dissenting opinions in *Symmonds.* 242 N.W.2d 262 (Iowa 1976).

43. *Id.* at 265.

44. *Id.*

45. *Id.*

46. *Id.* at 263.

47. IOWA CODE §§ 306.4, 321.255, 321.342 (1976).

48. 252 N.W.2d at 265.

49. *Id.* at 264.

50. *Id.* (quoting from IOWA CODE § 613A.1 (1971)).

51. 252 N.W.2d at 264.

52. 257 N.W.2d 631 (Iowa 1977).

members of the Lee County Board of Supervisors and against the county engineer for injuries the minor sustained when the truck in which he was a guest passenger overturned after striking a washed-out portion of the county road.[53] The *Harryman* court reversed the lower court's holding that the alleged negligent acts were statutory duties performed by the defendants in their official capacities and that those duties were only owing to the general public and not to the plaintiffs individually.[54] Statutory provisions[55] provided that the defendants had a duty to maintain the county roads in proper condition, and the court concluded that this maintenance duty runs to all those who are rightfully using the roads.[56] In reaching its decision, the *Harryman* court rejected the "no duty to plaintiffs" argument on the grounds that this theory was based on governmental immunity cases.[57] The court did not mention either the *Jahnke* or *Symmonds* rulings in reaching its decision.[58]

Against this backdrop of Iowa case law, the *Wilson* plaintiffs alleged that the obligations of the city arising from building codes and fire regulations created a duty of due care toward them as individual plaintiffs.[59] The city countered with case law from eight jurisdictions in which governmental subdivisions were relieved from potential liability because their statutory duties were only owing to the public in general and not to individual members of the public.[60] The city further argued that the applicable statutes relied on by the plaintiffs were designed only for the purpose of protecting the public generally,[61] and that the "public duty" doctrine had been established as the law of Iowa in *Jahnke*.[62]

In rejecting the city's authorities drawn from other jurisdictions, the *Wilson* majority noted that those authorities were not based on statutory language comparable to the controlling Iowa law abolishing municipal immunity and imposing municipal liability,[63] chapter 613A.[64] The specific and

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53. *Id.* at 633.

54. *Id.* at 638-39.

55. IOWA CODE §§ 309.67, 319.1, 319.7 (1973).

56. 257 N.W.2d at 638.

57. *Id.*

58. *See* 257 N.W.2d at 636-38.

59. 282 N.W.2d 664, 666-67 (Iowa 1979).

60. The cases relied upon by defendant City of Des Moines were Duran v. City of Tucson, 20 Ariz. App. 22, 509 P.2d 1059 (1973); Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967); Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917 (1977); Grogan v. Commonwealth, 577 S.W.2d 4 (Ky. 1979); Dufrene v. Guarino, 343 So. 2d 1097 (La. Ct. App. 1977); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, 199 N.W.2d 158 (1972); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965); Georges v. Tudor, 16 Wash. App. 407, 566 P.2d 564 (1976).

61. 282 N.W.2d at 667.

62. *Id.* at 670.

63. *Id.* at 669.

64. IOWA CODE ch. 613A (1979). *See* note 60, *supra*. The Kentucky, Florida, and Louisiana

novel language of three statutes within chapter 613A,[65] plus the concept previously adopted by the court that chapter 613A "created a new right of action"[66] lead the *Wilson* court to conclude that non-Iowa decisions "should

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cases were not applicable because the case language did not indicate that the plaintiffs' claim was based on any statutory formula or definition of tort. An additional factor distinguishing those three cases was the method used to abrogate sovereign immunity. The courts, not the legislatures, abolished tort immunity in Florida and Kentucky. Louisiana utilized a constitutional provision to end the doctrine. LA. CONST. art. 12, § 10. The Minnesota, New York and Washington cases did refer to statutes abolishing immunity, but the statutory basis of those cases was distinguished by the court by the difference in language from the relevant Iowa statutes, chapter 613A. These other jurisdictions had no statutory language defining tort in terms of a breach of a statutory duty and they also lacked language imposing liability for an employee's tortious conduct relating "to the business or affairs of the municipality." MINN. STAT. ANN. §§ 466.01, .02 (West 1977 & Supp. 1980); N.Y. CT. CL. ACT. § 8 (McKinney 1963); WASH. REV. CODE ANN. §§ 4.96.010, .020 (West Supp. 1978). *See* note 66 *infra*. The final two authorities of the city, cases from Arizona and Illinois, were distinguished by the court as turning in part on specific statutes and ordinances granting immunity for negligent inspection or for a failure to inspect. This is true of the Arizona case. However, in the Illinois case, the reference to statutory immunity for negligent inspection was in dicta and the Illinois court specified that it had no need to consider the specific statutory immunities in reaching its decision denying the plaintiffs a cause of action. Hannon v. Counihan, 54 Ill. App. 3d 509, 369 N.E.2d 917, 922 (1977). This clearly undermines the *Wilson* court's conclusion that the legislation was a signal that liability would be imposed absent the legislation. 282 N.W.2d at 670.

65. The court quoted the following statutes and supplied the emphasis.

> Except as otherwise provided in this chapter, every municipality is subject to liability for its torts *and those of its officers, employees,* and agents *acting within the scope of their* employment or *duties,* whether *arising out of a governmental* or proprietary *function.*
>
> A tort shall be deemed to be within the scope of employment or *duties* if *the act or omission reasonably relates to the business or affairs of the of the municipality* and the officer, employee, or agent acted in good faith and in a manner a reasonable person would have believed to be in and not opposed to the best interests of the municipality.

§ 613A.2

> "Tort" means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and includes but is not restricted to actions based upon negligence; error or omission; nuisance; *breach of duty, whether statutory or other duty* or denial or impairment of any right under any constitutional provision, statute or rule of law.

§ 613A.1(3)

> (a)ny claim based upon an act or omission of an officer or employee, *exercising due care, in the execution of a statute, ordinance,* or officially adopted resolution, rule, or regulation of a governing body.

§ 613A.4(3); 282 N.W.2d at 669.

66. 282 N.W.2d at 669. The new right of action concept definitely distinguished Iowa's view of its statutes abrogating municipal immunity from the view taken by other jurisdictions. Illinois, Arizona and Minnesota all express the majority view that abrogation of sovereign immunity removes the defense of immunity but does not create any new liability for a municipality. *See* Duran v. City of Tucson, 20 Ariz. App. 22, ____, 509 P.2d 1059, 1061 (1973); Hannon v. Counihan, 54 Ill. App. 3d 509, ____, 369 N.E.2d 917, 919 (1977); Hoffert v. Owatonna Inn Towne Motel, Inc., 293 Minn. 220, ____, 199 N.W.2d 158, 159-60 (1972).

have little impact" on its resolution of the issue.[67] The majority determined that sections 613A.2, 613A.1(3), and 613.1(4)[68] clearly revealed a legislative intent to impose municipal tort liability for negligent breaches of a statutory duty.[69] The municipality is exempt only as indicated in section 613A.1(3), in those situations where an employee exercises due care in executing statutory duties.[70] In addition, the majority stated that its statutory interpretation was supported by cases from other jurisdictions which indicated the development of a growing trend toward holding governmental entities liable for the negligent execution of their statutory duties.[71]

The majority also rejected the city's contention that the "public duty" doctrine of *Jahnke*[72] mandated affirmance of the lower court's dismissal of the plaintiff's complaint.[73] The majority noted that *Jahnke* was limited to an esoteric area of law and that the case was resolved in the context of a failure to supply general police or fire protection.[74] The court concluded that

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67. 282 N.W.2d at 669.

68. *See* note 65 *supra*.

69. 282 N.W.2d at 669.

70. *Id.*

71. The trend, however, may not be as strong as the *Wilson* court indicated. The majority concluded that in four of the eight jurisdictions whose cases were relied on by the city, Florida, New York, Minnesota and Washington, other cases indicated that liability would be imposed. A careful reading of those other cases indicates that the majority's conclusion is a true statement for only one of the eight jurisdictions, Florida. *See* Department of Health & Rehabilitative Services v. McDougall, 359 So. 2d 528 (Fla. Dist. Ct. App. 1978). Minnesota, Washington and New York still follow the traditional rule that the general purpose of building codes, permits, and inspections is to protect the public. Therefore, to recover against the city the plaintiff must show more than a breach of an obligation owed to the general public, he must establish a breach of a duty owed to him individually.

The cases relied on by the *Wilson* court to show a trend toward liability in those three jurisdictions fit within the exceptions that have developed to the traditional rule. One exception is that a duty of care may be created by an ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons. Also, an exception exists where the defendant has a special relationship with the plaintiff individually. *See* Cracraft v. City of St. Louis Park, ___ Minn. ___, ___, 279 N.W.2d 801, 806-07 (1979). These three jurisdictions, contrary to the majority's conclusion, do not follow the new rule developing in other jurisdictions. However, these three cases were adequately distinguished by the majority on other grounds. *See* text accompanying notes 63-66 *supra*.

The *Wilson* majority cited the following cases as examples of jurisditions following the new rule that building and housing codes in general impose a tort duty upon municipalities to adequately enforce the codes: Royal Indemnity Co. v. City of Erie, 372 F. Supp. 1137 (W.D. Pa. 1974) (Pennsylvania law); State v. Jennings, 555 P.2d 248 (Alas. 1976); Adams v. State, 555 P.2d 235 (Alas. 1976); Sexstone v. City of Rochester, 32 A.D.2d 737, 310 N.Y.S. 2d 887 (1969); Coffey v. City of Milwaukee, 74 Wis. 2d 526, 247 N.W.2d 132 (1976); Dutton v. Gobnor Regis Urban District Council, (1972) 1 Q.B. 373, The New York case however, does not support the trend. It was a short, unreasoned memoranda opinion that should be classified as one of the exceptions to the traditional rule.

72. 191 N.W.2d 780.

73. 282 N.W.2d at 670-71.

74. 282 N.W.2d at 670.

these factors distinguished *Jahnke* since the *Wilson* plaintiffs alleged negligence in carrying out inspection duties imposed by law and did not allege a failure to supply general police or fire protection.[75]

Second, the majority pointed out that chapter 613A[76] had been amended extensively in 1974[77] after the *Jahnke* decision.[78] The *Wilson* court concluded that the amendment which added breach of a statutory duty to the definition of tort, section 613A.1(3),[79] was a legislative response to *Jahnke* since that case had turned upon breach of a statutory duty.[80]

According to the *Wilson* majority's analysis, the Iowa Supreme Court's recognition of these legislative changes was evidenced in *Symmonds*.[81] The *Symmonds* court held that the county's statutory jurisdiction over roads and its statutory authority to place stop signs at dangerous railroad crossings imposed a duty of due care to the traveling public.[82] In the *Harryman* decision[83] the following year, the county's statutory obligation to maintain the county roads created a duty to all those rightfully using the roads.[84] *Harryman* was viewed by the *Wilson* court as indicating a continued recognition of liability for breach of a statutory duty designed to protect a particular segment of the general public.[85]

In summarizing the Iowa law, the *Wilson* majority announced that it was not necessary for it to determine whether the doctrine of *Jahnke* had survived intact the 1974 legislative amendments, *Symmonds* and *Harryman*.[86] However, the majority stated that in light of those developments, "it cannot be said that *Jahnke* is the rule and *Symmonds* and *Harryman* the exception."[87] *Symmonds* and *Harryman* were read to clearly indicate that a municipality is liable for its torts when authority and control over a particular activity have been delegated to it by statute and a breach of that duty involves a foreseeable risk to an identifiable class to which the plaintiff belongs.[88] Therefore, the majority concluded that a statutory duty designed to protect something larger than an identifiable class of persons, the general public, is the exception in Iowa and not the rule.[89]

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75. *Id.*
76. IOWA CODE ch. 613A (1975). Further amendments were added in 1976. *See* IOWA CODE § 613A (1979).
77. 1974 Sess. 65th G.A. ch. 1263.
78. 282 N.W.2d at 670. *See* 191 N.W.2d 780.
79. IOWA CODE § 613A.1(3) (1979).
80. 282 N.W.2d at 670. *See* 191 N.W.2d 780.
81. 282 N.W.2d at 671. *See* 242 N.W.2d 262.
82. 242 N.W.2d at 265. *See* text accompanying notes 42-51 *supra*.
83. 257 N.W.2d 631. *See* text accompanying notes 52-58 *supra*.
84. *Id.*
85. 282 N.W.2d at 670.
86. *Id.* at 671.
87. *Id. See* text accompanying notes 22-58 *supra*.
88. *Id.*
89. *Id.*

Having analyzed the Iowa law on municipal liability based on statutory duties, the *Wilson* court looked to the specific ordinances and statutes relating to fire inspection.[90] The specifity of statutes relating to fire escapes and exits,[91] the statutory directions to carefully inspect and to serve notice on noncomplying owners,[92] as well as the city ordinances forbidding encumbrances on fire escapes[93] formed the basis for the majority's conclusion that those provisions were designed to protect an identifiable group (lawful occupants of apartments) from a particular harm (death or injury from fire).[94] Further, the legislature had delegated to the city's inspectors the power to inspect and to insure compliance with statutory provisions relating to fire escapes and exits.[95] This delegation of power established the duty; express legislative imposition of liability for negligent inspection in those statutory provisions was therefore not required.[96] Accordingly, the majority reversed the lower court's holding that plaintiff's petition failed to state a cause of action because the city owed no duty to the occupants of the apartment building.[97]

Justice McCormick's special concurrence in the result was based on the procedural posture of the case, but the views he expressed on the merits of the case are in direct conflict with the views set forth by the majority.[98] He concluded that neither chapter 613A nor Iowa case law justified the *carte blanche* majority holding that municipal inspection statutes and ordinances create a duty to individuals.[99] Inspection statutes and ordinances were viewed as reflecting an effort by the government to require the owners of private property to meet their responsibilities and not as legislation purporting to make the municipality itself responsible for defects in the premises.[100] Such laws were therefore interpreted by Justice McCormick to serve the public at large rather than to benefit any particular class.[101]

In disagreeing with the *Wilson* majority on the intention of the Iowa legislature in enacting the controlling statutes, Justice McCormick argued

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90. *Id.* at 671-73.

91. IOWA CODE §§ 103.3-.9 (1979).

92. IOWA CODE §§ 103.13-.17 (1977).

93. *See, e.g.*, Des Moines Ordinance No. 7156 (1979).

94. 282 N.W.2d at 672.

95. *Id.* at 673.

96. *Id.*

97. *Id.*

98. 282 N.W.2d 674. Justice McCormick in his concurrence stated that the plaintiffs had failed to set forth the statutes and ordinances relied upon as imposing a duty and agreed with the majority's remand since it did not appear to a certainty that relief would be denied under any supportive state of facts which could be proven. *But see* note 1 *supra;* Jahnke v. Incorporated City of Des Moines, 191 N.W.2d 780, 783 (Iowa 1971) (the fact that plaintiff did not cite to the court the statutes he was relying on did not deter the court from resolving the issue).

99. 282 N.W.2d at 674.

100. *Id.*

101. *Id.*

that nothing in chapter 613A makes every breach of a statutory duty by a municipal employee a tort.[102] The statutory definition of tort in section 613A.1(3) was a traditional one in his opinion, and contained nothing unusual.[103] This statutory language indicating that a tort action may be based on a breach of a statutory duty did not mean that all breaches of statutory duty were actionable torts.[104] Further, Justice McCormick did not consider the 613A.1(3) exemption when an employee is exercising due care to be an affirmitive imposition of liability for all other acts or omissions,[105] regardless of the existence of a duty owing to the claimant. Therefore, he stated that for a municipality to have a duty to individuals based on building codes, inspection statutes and ordinances, those provisions must expressly or clearly imply such a duty because chapter 613A does not itself make breaches of those statutory provisions actionable.[106]

Justice McCormick contended that this view was in accord with the vast majority of courts and quoted the following general rule with approval.[107]

> We hold . . . that a municipality does not owe any individual a duty of care merely by the fact that it enacts a general ordinance requiring fire code inspections or by the fact that it undertakes an inspection for fire code violations. A duty of care arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class from the risks associated with fire code violations.[108]

*Jahnke, Symmonds,* and *Harryman* were viewed by Justice McCormick as evidence that Iowa law followed the general rule of the "public duty" doctrine.[109] *Jahnke* represented Iowa's recognition that the existence of an actionable tort depends upon the existence of a duty running from the defendant to the plaintiff.[110] *Jahnke* determined that chapter 613A did not create municipal liability when the claim involved a duty owing to the public in general and not one owing to any individual plaintiff.[111] Further, Justice McCormick viewed *Symmonds* and *Harryman* as consistent with the general rule because those cases fit within the exception providing for liability when a statute by its terms shows an intent to protect a particular class

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102. *Id.* at 676.
103. *Id. See* note 65 *supra.*
104. *Id.* at 676.
105. *Id.*
106. *Id.*
107. *Id.* at 675.
108. Cracraft v. City of St. Louis Park, ___ Minn. ___, 279 N.W.2d 801, 806 (1979).
109. 282 N.W.2d at 675.
110. *Id.*
111. *Id.*

of persons.[112] Because the particular statutes involved in *Symmonds* and *Harryman* were held by the Iowa court to create duties to the individual travelers on the streets, he concluded that the two cases could be classified within this "additional indicia" exception.[113] Based on this analysis, Justice McCormick's concurrence advocated a holding that "building codes and inspection statutes and ordinances do not create a duty to individuals unless they do so in express terms or by clear implication."[114]

Serious flaws are evident in both the analysis presented by the *Wilson* majority and the reasoning advanced by the McCormick concurrence. First, the *Jahnke* decision suggests that in 1971 the Iowa Supreme Court interpreted chapter 613A as not imposing liability on municipalities for duties owing to the general public.[115] This interpretation is in accord with the views of the McCormick concurrence, and contrary to the *Wilson* majority's conclusion that tort liability will be imposed in all cases where due care was not exercised.[116] The *Wilson* majority adopted the position argued by the *Jahnke* dissent, that the delegation of power created the duty, yet the majority did not feel compelled to overrule *Jahnke*.[117] The majority mistakenly attempted to distinguish *Jahnke* on the ground that the *Wilson* plaintiff did not allege a failure to provide adequate police and fire protection.[118] The *Jahnke* plaintiff likewise did not make such an allegation, but that fact did not prevent the *Jahnke* court from resolving the issue on the basis of failure to provide adequate police or fire protection.[119]

Second, the majority's conclusion that *Jahnke* prompted the amendment which added "statutory duty" to section 613A.1(3)[120] is similarly illogical. This can be more realistically viewed as a simple transfer of terms, because at the time of the *Jahnke* decision, section 613A.4 stated in part: "the remedy against the municipality . . . for injury or loss of property or personal injury or death resulting *from any action or omission* of an officer or employee *in the execution of a statute or ordinance.*"[121] Thus, the language at the time of *Jahnke* clearly recognized statutory duties, and when the quoted section was omitted in the 1974 amendments, the legislature merely transferred the statutory duty language to another section.[122] This conclu-

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112. *Id.*
113. *Id.*
114. *Id.* at 677.
115. *See* 191 N.W.2d 780; text accompanying notes 22-41 *supra.*
116. *See* 282 N.W.2d at 669.
117. *Id.* at 671. *See* 191 N.W.2d at 788-97 (Reynoldson, J., dissenting).
118. *See* 282 N.W.2d at 670.
119. *See* 191 N.W.2d 780; text accompanying notes 22-41 *supra.*
120. 282 N.W.2d at 670.
121. IOWA CODE § 613A.4 (1971) (emphasis added).
122. Another possible reason for the amendments, a legislative reaction to indemnification cases, is advanced in Harryman v. Hayles, 257 N.W.2d at 638, and in the special concurrence of *Wilson.* 282 N.W.2d at 676.

sion is further supported by the *Symmonds* court's language stating that the legislature's intention in adding statutory duty to section 613A.1(3) was only for the purpose of making more specific its original intention.[123] This same language in *Symmonds* also suggests the weakness of the *Wilson* majority's conclusion that the *Symmonds* case represented the Iowa Supreme Court's recognition of legislative changes enacted in response to *Jahnke*.[124] There is no language in the *Symmonds* decision purporting to base the holding on legislative amendments enacted as a legislative reaction to *Jahnke:* in fact, the only mention of *Jahnke* occurred when the *Symmonds* court cited *Jahnke* as authority for the proposition that chapter 613A imposed liability except for the torts excluded in 613A.[125]

Additionally, the *Wilson* majority's reasoning was inaccurate when it claimed that *Harryman* was a continuation of the statutory liability doctrine of *Symmonds*.[126] Though the *Harryman* decision was filed one year after the *Symmonds* case,[127] the *Harryman* court used chapter 613A as it existed before the 1974 amendments because the alleged tort occurred in 1972.[128] Therefore, the *Harryman* decision was based on the pre-amendment statutory language and cannot be a continuation of a *Symmonds* doctrine purportedly based on the 1974 amendment.

Unfortunately, Justice McCormick's reasoning in categorizing *Symmonds* and *Harryman* as within the "additional indicia" exception to the public duty doctrine of *Jahnke*[129] is also inaccurate. The statutes involved in *Symmonds*[130] and *Harryman*[131] were very generalized and did not have the exception's prerequisite of terminology specifically expressing that the statute was promulgated to protect the class to which the plaintiffs belonged.[132]

Though *Harryman* and *Symmonds* are not responses to legislative amendments, as declared by the majority, nor exceptions to the public duty doctrine, as purported by the concurrence, they are also not aberrations in Iowa law. These two cases can best be understood by categorizing the different types of services provided by governmental entities. Where highways or public buildings are involved the government is providing a service or facil-

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123. *See* text accompanying note 51 *supra*. Iowa keeps no record of debates or discussions concerning statutes which makes the intention of the legislature even more difficult to ascertain.

124. 282 N.W.2d at 670. *See* text accompanying notes 76-80 *supra*.

125. *See* text accompanying note 49 *supra*.

126. *See* 282 N.W.2d at 670.

127. *Harryman* was filed in 1977 and *Symmonds* was filed in 1976. *See* 242 N.W.2d 262; 257 N.W.2d 631.

128. 257 N.W.2d 633-34, 638.

129. 282 N.W.2d at 675-76. *See* text accompanying notes 112-13 *supra*.

130. IOWA CODE §§ 306.4, 321.255, 321.342 (1974).

131. IOWA CODE §§ 309.67, 319.1, 319.7 (1974).

132. *See* 282 N.W.2d at 675.

ity for direct use by the public. This direct service category is distinguishable from a category involving a governmental service that protects the public generally from external hazards, as for example, by ensuring that a third party complies with the law.[133] The concept advanced in *Symmonds* and *Harryman*, that a governmental duty arose because authority and control had been delegated to the governmental entity,[134] originated in Iowa cases within the category of the government's providing a service for direct use by the public.[135] Iowa cases with language supporting the "delegation equals duty" concept involved supervision and control of streets,[136] establishment and maintenance of public parks,[137] and the establishment and maintenance of public restrooms.[138] Since *Harryman* and *Symmonds* dealt with the county's responsibility regarding roadways,[139] they can logically be viewed as a continuation of the long-prevailing Iowa law that "delegation equals duty" in situations where the government provides a service for direct use by the public. Despite the origin of the "delegation equals duty" concept, the *Wilson* majority grafted this concept onto a new area of Iowa law, fire inspection and building codes. Today this concept is the Iowa standard even when the city is not providing a direct service but instead is fulfilling its statutory duty of attempting to assure that a third party complies with the law.[140]

Therefore, Iowa law recognizes a cause of action against a municipality for negligent execution of its statutory duty to inspect apartment buildings.[141] Obviously, any municipal inspection department that strictly complies with the codes and ordinances will not create potential liability for its city. In addition, the city's duty is not an absolute one. *Wilson* does not subject municipalities to a strict liability standard[142] so that a city will be forced to pay damages for every apartment building fire. Damages are only recoverable upon proof of negligence—proof of the city's failure to exercise due care. Since negligence is the basis for recovery, fault, proximate cause and foreseeability are factors which a plaintiff must establish and therefore

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133. Other jurisdictions distinguish the situations where the goverment is providing a direct service and therefore is potentially liable, from situations where the government is enforcing the law by ensuring that a third party complies with the law and therefore is not subject to liability. *See* Duran v. City of Tucson, 20 Ariz. App. 22, ___, 509 P.2d 1059, 1062 (1973); Dufrene v. Guarino, 343 So. 2d 1097, 1099 (La. Ct. App. 1977); Cracraft v. City of St. Louis Park, ___ Minn. ___, ___, 279 N.W.2d 801, 803 (1979).

134. 282 N.W.2d at 671.

135. *See* cases cited in notes 136-38 *infra*.

136. *See, e.g.*, Soper v. Henry County, 26 Iowa 264, 268 (1868).

137. *See, e.g.*, Fetters v. City of Des Moines, 260 Iowa 490, 149 N.W.2d 815 (1967); Lindstrom v. Mason City, 256 Iowa 83, 126 N.W.2d 292 (1964); Florey v. City of Burlington, 247 Iowa 316, 73 N.W.2d 770 (1955).

138. *See, e.g.*, Bauman v. City of Waverly, 164 N.W.2d 840 (Iowa 1969).

139. *See* text accompanying notes 43, 56 *supra*.

140. 282 N.W.2d 664.

141. *Id.*

142. *See* 191 N.W.2d at 791 (Reynoldson, J., dissenting).

are factors which limit a plaintiff's ability to recover against a municipality.[143] Municipalities are therefore not held to an impossibly high standard; *Wilson* only requires cities to exercise due care in conducting fire safety inspections.

Though *Wilson* created a new potential demand upon a municipality's financial resources, the majority correctly recognized that its ruling would not have a disastrous financial impact. First, the court noted that the city might be entitled to recover over against the property owner.[144] Second, the potential fiscal liability created in *Wilson* is minimal when compared to the potential liability resulting from duties relating to streets and roads as exemplified in *Harryman* and *Symmonds*.[145] Also, the majority did not believe it was certain that fiscal disaster was inevitable or even likely.[146] Finally, the court noted that the legislature has the primary responsibility of weighing the financial consequences of its legislation and such financial consequences should not weigh heavily in the court's interpretation of statutes.[147] Therefore, the *Wilson* decision, which holds municipalities to a standard of due care in conducting fire inspections, does not forecast financial disaster for Iowa municipalities.

As a matter of public policy, the *Wilson* extension of "delegation equals duty," though based on a questionable analysis of Iowa law, can be viewed as a positive result. This decision should cause municipalities to evaluate their fire inspection department and its procedures. If the department is not presently performing adequate, non-negligent fire inspections, then changes and improvements in personnel and policy will need to be made. As the *Wilson* court noted, municipalities will not be motivated to make meaningful inspections when they are shielded from the negligence of their employees who perform the inspection function.[148] Because the *Wilson* decision removes the shield, municipalities should be motivated to evaluate, improve and supervise their fire inspection department so that meaningful inspections will be conducted.

If meaningful inspections are conducted by the fire inspectors, individual citizens of the community will benefit. When a prospective apartment tenant sees a certificate of inspection, he generally assumes that the building is free of fire hazards. The *Wilson* decision should encourage municipalities to provide the type of inspections upon which an individual tenant can reasonably rely, and will therefore encourage municipalities to meet the reasonable expectations held by their citizens.

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143. *Id.*

144. 282 N.W.2d at 674.

145. *Id.*

146. *Id. See* Mayle v. Pennsylvania, 479 Pa. 384, 394-96, 388 A.2d 709, 714-15 (1978); Hicks v. State, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975).

147. 282 N.W.2d at 674.

148. *Id.* at 673-74.

A third benefit of the *Wilson* decision is that lives and property will be saved by meaningful inspections which uncover and force correction of defects and dangers that are presently unrectified. The substantial cost to the municipalities of disastrous fires, in terms of fire fighting effort expended and the impact on the economy from fire losses, will also be reduced by an effective program of fire inspections.[149]

Finally, further support for expanding municipal liability in this area is found in the policy of risk spreading. The municipality, not the injured, innocent plaintiff, should bear the cost of any damage which results from the municipality's negligence.[150]

As indicated in the preceding analysis, public policy favors the result reached by the *Wilson* majority. Iowa municipalities should now be motivated to meaningfully fulfill their statutory duty of fire inspection.

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149. *See* Adams v. State, 555 P.2d 235, 244 (Alas. 1976).
150. *Id.*