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MUNICIPAL TORT LIABILITY AND THE PUBLIC DUTY RULE: A MATTER OF STATUTORY ANALYSIS

[Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979)].

I. INTRODUCTION

The doctrine of sovereign immunity, derived from the maxim "the King can do no wrong," has been justified "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." The doctrine acted as a harsh exception to the traditional tort principle that all individuals have the right to have their wrongs redressed. Accordingly, this archaic doc-

1. W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 238 (1765). The authority most often cited for the proposition is the English case of Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788). Russell, however, did not establish the doctrine of sovereign immunity. Russell and others brought an action against the men living in Devon for property damage caused by a bridge in disrepair. The court denied relief but not on the ground of sovereign immunity. Rather, the court reasoned that since the County of Devon had not incorporated, there existed no single entity against whom the suit could be brought. To allow suit against the county inhabitants at the time the action commenced, the court reasoned, would be unjust:

Even if we could exercise a legislative discretion in this case, there would be great reason for not giving this remedy; for the argument urged by the defendant's counsel, that all those who became inhabitants of the county, after the injury sustained and before judgment, would be liable to contribute their proportion, is entitled to great weight.

Id. at 362 (Lord Kenyon, C.J.).

The doctrine became fully established in sixteenth-century England when the government was controlled by an absolute monarch. See generally 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 463-69 (5th ed. 1942). When monarchies were replaced by a more modern and broader form of government, sovereign immunity was supported by the theory that to allow a suit against a governing body without its consent would be antithetical to the notion of supreme executive power. See Maier, Sovereign Immunity and Act of State: Correlative or Conflicting Policies?, 35 U. CIN. L. REV. 556, 556-60 (1966).

It is unclear how the doctrine was transplanted to the rather rebellious democratic republic of the United States, but, in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), Chief Justice Marshall declared, without elaboration or analysis, that no suit could be commenced or prosecuted against a sovereign, independent state without its consent. Id. at 380 (dictum). For a more thorough historical background of the development of sovereign immunity in the United States, see Kramer, The Governmental Tort Immunity Doctrine in the United States, 1790-1955, 1966 U. ILL. L.F. 795.


3. MINN. CONST. art. 1, § 8 ("Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial,

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Vestiges of sovereign immunity remain, however, in the form of statutory exceptions and, as demonstrated by the Minnesota Supreme Court in Cracraft v. City of St. Louis Park, a judicial exception in the form of a common-law doctrine that may insulate municipalities from liability.

In Cracraft two youths were killed and a third seriously injured when a drum of extremely volatile and flammable duplicating fluid exploded at a local high school. Several weeks prior to the explosion, the school had been inspected by a city fire inspector but no mention of the drum had been made in the inspector’s report. Plaintiffs brought an action against the city for the inspector’s alleged negligent failure to discover the drum, the presence of which violated a municipal ordinance. The trial court granted defendant’s motion for summary judgment.

Minnesota cases are replete with examples of the injustice wrought by the doctrine of sovereign immunity. See, e.g., Nissen v. Redelack, 246 Minn. 83, 89-90, 74 N.W.2d 300, 304 (1955) (claim against city barred when child was negligently allowed to drown in city swimming pool); Mokovich v. Independent School Dist. No. 22, 177 Minn. 446, 448, 225 N.W. 292, 293 (1929) (school district held immune when its school used unslaked lime in marking football field resulting in blinding of student); Snider v. City of St. Paul, 51 Minn. 466, 471-73, 53 N.W. 763, 763-64 (1892) (Mitchell, J.) (relief denied when plaintiff’s foot crushed by city hall elevator).

4. See 51 N.D.L. Rev. 885, 886 & n.9 (1975) (18 states and the District of Columbia have judicially abrogated immunity; six have legislatively abrogated immunity; five states follow the traditional common-law approach; three states have adopted modified approaches to governmental immunity).


6. See MINN. STAT. § 466.03 (1978).

7. 279 N.W.2d 801 (Minn. 1979).

8. Id. at 803. Each of the youths received first, second, and third-degree burns over his entire body. The surviving youth received severe burns over 50% of his body. Id.

9. Id. The drum was located on the loading dock of the school. The dock is adjacent to the school’s football field and is a common means of entrance and exit for students.

10. Id. at 807. The inspection revealed some code violations and a letter was sent by the city to the school informing the school of the violations that needed immediate correction and those which should be corrected as soon as time permitted. Id.

When deposed, the inspector testified that he had not seen the drum on the dock, but if he had seen it, he would have ordered its removal. Id. at 803.

11. The plaintiffs in the action against the city were the surviving youth, his father, and the trustee for the heirs of one of the youths killed by the explosion. Id. at 802.

12. See id. at 803.

13. See id. at 802. The trial court, however, granted defendant’s motion for summary judgment and without delay, conformable to the laws.

promptly and without delay, conformable to the laws.

see Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979) (sovereign immunity clearly contradicted Minnesota’s constitutional protections for tort victims).

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THE PUBLIC DUTY RULE

The supreme court affirmed, holding that the duty to inspect pursuant to a fire ordinance is a public duty. The court applied the “public duty” rule of *Hoffert v. Owatonna Inn Towne Motel, Inc.*, under which the municipality was deemed immune from suit.

The “public duty” rule is not unique to Minnesota. Under the rule, derived in part from section 288 of the *Restatement (Second) of Torts* (Restatement), a statute intended exclusively “to protect the interests of the state,” or “to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public,” may not be

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14. See 279 N.W.2d at 807-08.
15. 293 Minn. 220, 199 N.W.2d 158, 159-60 (1972).
16. Id. *Hoffert* involved the alleged negligent issuance of a building permit for remodeling a motel in a manner violative of the city’s building code. Two of the plaintiffs and the decedent of the third plaintiff were guests in the motel when a fire broke out trapping the second-floor guests because of improper stairway enclosures constructed in violation of the building code. *Id.* at 221-22, 199 N.W.2d at 159.

The city of Owatonna, whom Hoffert had sued directly and against whom the motel brought third-party complaints, sought to dismiss the complaints on the ground that they failed to state a cause of action. *Id.* The trial court granted the city’s motion and the supreme court affirmed stating that building permits and building inspections “are designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with the building codes.” *Id.* at 223, 199 N.W.2d at 160. The *Hoffert* court stated that “[i]n order to recover against the city, appellants must show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public.” *Id.* at 222, 199 N.W.2d at 160.

17. See, e.g., Massengill v. Yuma County, 104 Ariz. 518, 520, 523, 456 P.2d 376, 378, 381 (1969) (duty of patrol officer to stop reckless driver believed to be intoxicated is duty owed to public in general; plaintiffs whose decedents were killed by reckless driver had no cause of action); Duran v. City of Tucson, 20 Ariz. App. 22, 26-27, 509 P.2d 1059, 1063-64 (1973) (fire inspection is for benefit of public generally; individual injured as a result of negligent inspection does not have cause of action against municipality); Leger v. Kelley, 19 Conn. Supp. 167, 171-73, 110 A.2d 635, 638-39 (1954) (injured infant had no cause of action against commissioner of motor vehicles for injuries sustained by broken glass in car windshield when commissioner granted renewal registration despite fact that windshield was not equipped with statutorily required safety glass), aff’d, 142 Conn. 585, 116 A.2d 429 (1955); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 139-40, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 597-98 (1965) (failure of city fire department captain to take affirmative action to alleviate known fire hazard does not create cause of action for individual injured by subsequent fire).
20. *Id.* § 288(b). Section 288(c) further provides that no duty of care is derived from a statute that has an exclusive purpose of imposing “upon the actor the performance of a
used to establish a standard of care unless the statute creates a special duty owed to the individual plaintiff. If there is only a public duty, there is "no duty" to the plaintiff, and there can be no finding of negligence per se.

The ruling in *Cracraft* specifically relied on the common-law origin of section 288. The court observed that the distinction between a public duty and a special duty applies to both private and public tortfeasors. Before the abolition of sovereign immunity, however, courts had no occasion to apply the section 288 concept to cases that involved a public tortfeasor. In the first negligence per se case against a municipality following the abrogation of sovereign immunity, the *Hoffert* court held that all building code ordinances operate to create a public duty and cannot create a duty owed to individuals. In adhering to *Hoffert*, the *Cracraft* court gave no consideration to whether the particular statute being construed in *Cracraft* fell within the rule of section 288. Placing all statutes of the type considered in *Cracraft* in the public duty category raises the question of whether the Minnesota court has treated negligence per se cases similarly when only private litigants are involved. Therefore, this Comment will focus on the two lines of cases under which a plaintiff has attempted to establish a defendant's standard of care pursuant to a statute. First, an analysis of the cases that involve litigation between private parties will be undertaken. A second discussion will examine the cases in which a governmental body is the defendant. Finally, this Comment will analyze both approaches in view of the result in *Cracraft*.

II. STATUTORY VIOLATION AS THE BASIS FOR LITIGATION BETWEEN PRIVATE PARTIES

It is well established that one of the prerequisites to a negligence action—a standard of care—may be created by legislative enactment.

service which the state or any subdivision . . . undertakes to give the public.” *Id.* § 288(c).

21. *See* notes 75-82 *infra* and accompanying text.
22. *See* *Cracraft* v. City of St. Louis Park, 279 N.W.2d at 806 (public duty and special duty terminology "unfortunate"); "[p]erhaps 'no duty' and 'assumed' duty would be more appropriate").
23. *See* notes 30-69 *infra* and accompanying text.
24. 279 N.W.2d at 805 n.5 (quoting RESTATEMENT (SECOND) OF TORTS § 288, Comment b (1965)).
25. *But see* notes 115-16 *infra* and accompanying text.
27. *See* notes 30-69 *infra* and accompanying text.
28. *See* notes 70-95 *infra* and accompanying text.
29. *See* notes 96-136 *infra* and accompanying text.
30. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 36, at 190 (4th ed. 1971) (this is the standard of conduct required of a reasonable person).
31. *Id.*
The leading English case of *Gorris v. Scott*[^32^] held that violation of a statute may provide the basis for a negligence action if a two-part inquiry is satisfied. First, the damage suffered by the plaintiff must be of such a nature as was contemplated by the statute[^33^]. Second, the plaintiff must be within the class of persons intended to be protected by the statute[^34^]. If the plaintiff successfully demonstrates both elements, there is negligence as a matter of law or negligence per se[^35^].

Negligence per se, as it developed in the United States, did not differ significantly from the English theory[^36^]. Courts in the United States, however, have developed three approaches regarding the first element—determination of the risk protected by a statute[^37^]. The most narrow and seemingly unreasonable approach is that demonstrated by the Missouri Supreme Court in *Mansfield v. Wagner Electric Manufacturing Co.*[^38^]. In that case, the court held that a statute requiring emery wheels to be hooded was intended to protect against dust, not to protect against injuries to the

[^32^]: L.R. 9 Ex. 125 (1874). *Gorris* involved the defendant's violation of a statute requiring carriers to provide separate pens for animals being transported. The defendant failed to do this and plaintiff's sheep were washed overboard during a storm at sea. Because the statute defendant violated was enacted for purposes of sanitation, not security, plaintiff could not rely on that statutory standard of care. *Id.*

[^33^]: *Id.* at 128.

[^34^]: *Id.*

[^35^]: See, e.g., *Zerby v. Warren*, 297 Minn. 134, 139, 210 N.W.2d 58, 62 (1973) (breach of statutorily imposed duty of care is conclusive evidence of negligence, i.e., negligence per se).

Even if a plaintiff is prevented from using a statute to create a duty of care, the plaintiff may still rely on common-law principles to establish negligence. See *Osborne v. McMasters*, 40 Minn. 103, 105, 41 N.W. 543, 544 (1889) (Mitchell, J.) ("All that the statute does is to establish a fixed standard by which the fact of negligence may be determined."). The plaintiff's burden is less when a statute is used rather than common law because an unexcused violation of a statute conclusively establishes the defendant's negligence and the plaintiff is entitled to a jury instruction to that effect. See W. Prosser, *supra* note 30, at 200.

[^36^]: In *Perry v. Tozer*, 90 Minn. 431, 97 N.W. 137 (1903), the court stated:

Where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent.


The four-element standard for negligence per se adopted by the American Law Institute substantially echoes the two-step approach of *Gorris*. See *Restatement (Second) of Torts* § 286 (1965), quoted in *Scott v. Independent School Dist. No. 709*, 256 N.W.2d 485, 488 (Minn. 1977).


[^38^]: 294 Mo. 235, 242 S.W. 400 (1922).
workers' eyes. Thus, under the approach typified by Mansfield, only the harm specifically addressed by the statute would be within the statute's protection.

The second approach requires only that the injury suffered be within the same general class of risks to which the statute is directed. Under this approach, if an injury was reasonably foreseeable following a violation of the statute, the plaintiff may use the statute to set forth the required standard of care, assuming that the plaintiff satisfies the second part of the test.

The third approach provides that all injuries resulting from the violation of the statute are within the statute’s protection. Under this most liberal approach, a mere showing that a person has violated a statute is sufficient to establish negligence per se.

The Minnesota Supreme Court, apparently following the second approach, has provided limited discussion of negligence per se actions between private parties. Discussion of the first half of the test generally has been confined to cases in which the injury is obviously of the type to be prevented by the statute. For example, in the leading Minnesota case of Dart v. Pure Oil Co., the court stated that the mislabeling of volatile liquids in violation of a statute created a cause of action for one injured

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39. Id. at 244-45, 242 S.W. at 403; cf. Moore v. Dering Coal Co., 242 Ill. 84, 89 N.E. 674 (1909) (requiring drum for sinking mine to be equipped with flanges does not apply to mine under construction).

40. See, e.g., Wildwood Mink Ranch v. United States, 218 F. Supp. 67, 74 (D. Minn. 1963) (minks injured as result of plane flying below required flight level might be within risks contemplated by statute; statute might be directed toward providing a buffer zone to prevent risks of low flying aircraft); Middaugh v. Waseca Canning Co., 203 Minn. 456, 460, 281 N.W. 818, 820 (1938) (defendant hauled three coupled units on street in violation of statute; fatal injury to child on units within risks foreseen by statute); DeHaen v. Rockwood Sprinkler Co., 258 N.Y. 350, 179 N.E. 764 (1932) (defendant held negligent for injury caused by radiator falling down a shaft when purpose of statute was to prevent injury to persons who might fall down shafts).


43. See, e.g., Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558-59 (Minn. 1977) (installation of furnace in violation of applicable ordinances was proximate cause of fire that injured plaintiffs’ property); Scott v. Independent School Dist. No. 709, 256 N.W.2d 485, 488-89 (Minn. 1977) (failure of industrial arts instructor to enforce statute requiring wearing of safety glasses constituted negligence per se when student’s eye injured as direct result of instructor’s violation of statute).

44. 223 Minn. 526, 27 N.W.2d 555 (1947) (plaintiff’s decedent killed by an explosion of gas from oils; oils were regulated by statute’s handling and labeling precautions).
as a result. 45

Prior application by the Minnesota court of the concept embodied in section 288 of the Restatement has been directed specifically towards the second inquiry in negligence per se cases—whether the plaintiff is in the class intended to be protected by the statute. In conducting the second inquiry, the Minnesota court has interpreted the declared purpose of the specific statute that the plaintiff seeks to use as a standard of care. 46 Four types of statutes have emerged under the Minnesota court’s analysis of negligence per se cases.

The first type of statute may be viewed as protecting only the interests of the state. These statutes may not be used to establish a standard of care. For example, in 1943, Minnesota enacted a statute mandating a speed limit of thirty-five miles per hour for all motor vehicles. 47 In Cooper v. Hoeglund, 48 the defendant sought to establish plaintiff’s contributory negligence by showing that plaintiff had exceeded the speed limit in violation of the statute. 49 The court rejected defendant’s argument on the ground that the 1943 law’s declared purpose was to ‘‘conserve essential materials,’ as a wartime measure.’’ 50 The 1943 law was not intended to protect against automobile accidents; it was intended to save gasoline. 51

45. Id. at 532-33, 27 N.W.2d at 558-59.
46. See, e.g., Travelers Ins. Co. v. Iron Ranges Natural Gas Co., 289 Minn. 260, 264, 183 N.W.2d 784, 787-88 (1971) (“court looks to the statutory language in light of the evils to be remedied or the harm to be prevented”); Judd v. Landin, 211 Minn. 465, 469, 1 N.W.2d 861, 863 (1942) (“[T]he first issue . . . is whether . . . the codes to which we have referred imposed a duty upon respondents to comply therewith . . . .”). But see Akers v. Chicago, St. P., M. & O. Ry., 58 Minn. 540, 544-45, 60 N.W. 669, 670 (1894) (Mitchell, J.) (“[A]ll statutes requiring the owner or occupant of premises to adopt certain precautions to render them safe are designed for the protection, not of the wrongdoers or trespassers, but of those who are rightfully upon them.”).
47. See Cooper v. Hoeglund, 221 Minn. 446, 450, 22 N.W.2d 450, 453 (1946) (35 mile per hour speed limit authorized by Legislature and promulgated by governor’s executive order as wartime conservation measure).
48. 221 Minn. 446, 22 N.W.2d 450 (1946).
49. Id. at 450-51, 22 N.W.2d at 453.
50. Id. at 450, 22 N.W.2d at 453 (quoting Act of Apr. 1, 1943, ch. 252, § 1, 1943 Minn. Laws 355, 355 (expired 1945)).
51. Id.; cf. Zerby v. Warren, 297 Minn. 134, 140, 210 N.W.2d 58, 62 (1973) (“[L]egislative intent can be deduced from the character of the statute and the background of the social problem and the particular hazard at which the statute is directed.”).

RESTATMENT (SECOND) OF TORTS § 288, Comment b, Illustration 1 (1965) employs the facts of Cooper:

In war time, pursuant to a statute authorizing him to do so, the governor of a state issues an executive order fixing a speed limit of 35 miles an hour on state highways. The statute and the order recite that they are solely for the purpose of conserving gasoline and tires as necessary war materials. A drives on the state highway at a speed of 40 miles an hour, but otherwise in the exercise of all reasonable care. While doing so he has a collision with B, as a result of which B is injured. The executive order does not provide a standard of conduct for the benefit of B.
A second type of statute, intended only to protect a public right, was construed in *Hanson v. Hall*. In *Hanson* the defendants in an automobile accident case were held liable because they had blocked the highway in violation of a public nuisance statute. In affirming the trial court's refusal to submit the question of contributory negligence to the jury, section 288 of the *Restatement* was cited. The court stated that:

> since the purpose of this statute is to secure to everyone the enjoyment of a public right, the violation of the statute does not give a private individual a cause of action if the only wrong he suffers is one common to all members of the public [unless] he has suffered some special damage [or] harm to his person or property.

Although the special damage necessary to create liability was present in *Hanson*, the case is important because the court limited its discussion to the statute before it and concluded that only a public right had been created.

The court, in *Anderson v. Settergren*, discussed the third type of statute. In *Anderson* defendant loaned a firearm to a minor who subsequently injured plaintiff with the weapon. In reversing the judgment of the trial court in favor of defendant, the court held that a statute may be used as a standard of care when it both creates a duty to the public and a duty to private individuals. The court held that in such cases, the class of individuals intended to be protected by the statute should be broadly construed. If the plaintiff is within the group of persons intended to be protected by the statute, there may be negligence per se. In this in-

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52. 202 Minn. 381, 279 N.W. 227 (1938).
53. Id. at 385, 279 N.W. at 229.
54. Id.; cf., e.g., Kronzer v. First Nat'l Bank, 305 Minn. 415, 424-25, 235 N.W.2d 187, 193 (1973) (court cited section 288 in its analysis of whether statute precluding unauthorized practice of law created duty to individual or public generally); *Restatement (Second) of Torts* § 288, Comment c (1965) (“Other legislative enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.”).
55. 100 Minn. 294, 111 N.W. 279 (1907).
56. See id. at 296-97, 111 N.W. at 279-80.
57. See id. at 297, 111 N.W. at 280.
58. Id. In *Dart v. Pure Oil Co.*, 223 Minn. 526, 27 N.W.2d 555 (1947), plaintiff brought a wrongful death action as administratrix of the estate of her late husband due to the sale to decedent by defendant of a drum of kerosene mixed with gasoline in violation of state law. Although the court reversed and granted a new trial because application of strict negligence per se liability by the trial court was not proper, see *Zerby v. Warren*, 297 Minn. 134, 210 N.W.2d 58 (1973), the court appeared to sanction use of the statute to create a standard of care. In making a distinction similar to that made by the *Anderson* court, the *Dart* court stated: “[T]he potential dangers to the public at large resulting from [the] negligent handling of kerosene or gasoline is so general that we believe the statute was enacted for the general public, as well as for the users of such products.” 223 Minn. at 540, 27 N.W.2d at 562.
stance, section 288 of the Restatement does not apply because the statute does not exclusively create a public duty.

The fourth group of statutes is intended only to protect a limited class. Persons not in that class may not depend on the statute to establish a standard of care. In Bott v. Pratt, defendant left his team of unhitched in violation of a municipal ordinance. When the horses ran loose and damaged plaintiff's wagon, suit was brought for negligence. The court stated that highways are for the use of travellers and, as such, travellers have a right to rely on hitching ordinances for their protection. Because plaintiff was within the class intended to be protected by the ordinance, recovery was allowed.

It appears that the first two classifications in which there is no standard of care created by the statute, are the exception rather than the rule. This may be because most statutes that govern conduct are logically directed toward the protection of a particular class of individuals. The cases just discussed demonstrate, however, that the class of persons intended to be protected by a statute may be very broad or quite narrow depending on the court’s interpretation of the terms of the particular statutes being construed. Each of these cases could have been placed in any of the four categories. One must examine prior case law in order to predict how a particular case should be analyzed. For example, the Minnesota Supreme Court has declared that statutes “induced by public considerations of safety,” are to be construed broadly to effectuate the general goal sought by the statute. Therefore, statutes forbidding the

59. 33 Minn. 323, 23 N.W. 237 (1885).
60. See id. at 325, 23 N.W. at 238.
61. Id. at 325-27, 23 N.W. at 238; cf. Dusha v. Virginia & Rainy Lake Co., 145 Minn. 171, 172, 176 N.W. 482, 482 (1920) (child labor statute intended to protect children who, because of their immaturity, are unable to protect themselves).
62. In Wilson v. Nepstad, 282 N.W.2d 664 (Iowa 1979), the Iowa Supreme Court made a similar observation. After examining apparently similar cases with opposite results arising under Restatement section 288, the court stated that the inconsistency “points up the problem of mere result-oriented application of ‘duty’ or ‘no duty’ labels.” Id. at 672.
63. Judd v. Landin, 211 Minn. 465, 470, 1 N.W.2d 861, 864 (1942) (construing a building code requirement that stairways of a certain width be equipped with handrails).
64. Id. (“Courts therefore should be careful not to apply such . . . ‘a rigid and literal reading [as] would in many cases defeat the very object of the statute and exemplify the maxim that ‘the letter killeth, while the spirit keepeth alive.’” ) (citation omitted) (quoting State ex rel. City of Minneapolis v. St. P., M. & M. Ry., 98 Minn. 380, 396, 108 N.W. 261, 266 (1906)).

In Travelers Ins. Co. v. Iron Ranges Natural Gas Co., 289 Minn. 260, 183 N.W.2d 784 (1971), the court broadly construed the class intended to be protected by the statute in question. In responding to the argument that safety statutes not limited by their terms are enacted for the benefit of every member of the public who is exposed to injury or loss by a violation, the court stated that “[a]s a general rule, a statute is intended to protect those who may normally be expected to suffer particular injury from its violation. . . . To
sale of glue to minors, a pure food act, and a statute requiring druggists to label poisons were construed to protect any member of the public who was injured as the result of a violation.

The thrust of the case law suggests that if the plaintiff can establish that the statute is valid, that it applies to the defendant and is intended to protect the plaintiff, and that the plaintiff's injuries were a reasonably foreseeable consequence of and proximately caused by a violation of the statute, the plaintiff will be allowed to hold the defendant to the statutory standard of care.

III. STATUTORY VIOLATION AS THE BASIS FOR LITIGATION AGAINST A MUNICIPALITY

A. Public Duty Rule

Following the abrogation of sovereign immunity, the Minnesota ascertain this protected group the court looks to the statutory language in light of the evils to be remedied or the harm to be prevented." Id. at 264, 183 N.W.2d at 787-88 (citation omitted).

67. Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889) (Mitchell, J).
68. Permitting application of the statute is not equivalent to imposition of liability. A person attempting to use a statute to establish a standard of care must still satisfy the elements of foreseeability and proximate cause. See Kronzer v. First Nat'l Bank, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975) (violation of statute prohibiting unauthorized practice of law not proximate cause of injury); Anderson v. Theisen, 231 Minn. 369, 372, 43 N.W.2d 272, 273 (1950) (negligent driving by thieves proximate cause of decedent's death but statutory violation of owner by leaving keys in car too remote to be proximate cause of death); Westlund v. Iverson, 154 Minn. 52, 54, 191 N.W. 253, 254 (1922) (statute requiring motorist to keep on right side of street was for purpose of regulating travel not for protection of pedestrian); Smith v. St. Paul City Ry., 79 Minn. 254, 256, 82 N.W. 577, 578 (1900) (ordinance requiring dogs to be licensed has no bearing in suit against motorist for negligently running over dog); Opsahl v. Judd, 30 Minn. 126, 128-29, 14 N.W. 575, 576 (1883) (deceased passenger's violation of Sunday travel law not connected to duty of care owed to passenger); Restatement (Second) of Torts §§ 281, 328A (1965); cf. Cracraft v. City of St. Louis Park, 279 N.W.2d at 811 (Kelly, J., dissenting) (permitting plaintiffs to sue municipality would not impose "an absolute duty to enforce [the municipality's] laws and ordinances," but "cities will be held only to a standard of due and reasonable care, liability being limited by such principles as proximate cause and foreseeability").
69. Bott v. Pratt, 33 Minn. 323, 326, 23 N.W. 237, 238 (1885); W. Prosser, supra note 30, § 36.
70. See notes 4-5 supra and accompanying text. When the doctrine of sovereign immunity was in force, a city could be held liable for negligence when the act was proprietary—an activity usually engaged in by private parties or related to the construction and maintenance of streets and sidewalks. Municipalities were not liable for performance of a governmental function. See generally Peterson, Governmental Responsibility for Torts in Minnesota (pt. 1), 26 Minn. L. Rev. 293, 296-99 (1942). There is no apparent rationale for the peculiar rule imposing liability when a city negligently constructs or maintains a street or sidewalk. The court's analysis in such cases involves basic negligence principles with no
Supreme Court first addressed municipal liability for negligence based upon violation of a statute or ordinance in *Hoffert v. Owatonna Inn Towne Motel, Inc.* Plaintiffs were injured in a fire at the defendant's motel. Shortly before the fire, the motel was inspected pursuant to an ordinance. A building permit subsequently was issued even though the motel's stairway enclosures violated a building code provision. The supreme court held that the city's negligent inspection did not create a cause of action for plaintiffs because building codes, building inspections, and the issuance of building permits create an obligation owed solely to the general public and not to individuals injured by their violation. Thus, in *Hoffert*, a rule akin to section 288 of the *Restatement* was established for municipalities, although that section was not cited.

### B. Special Duty Rule

In addition to creating the public duty rule, the *Hoffert* court implicitly established the "special duty" rule under which recovery is allowed when plaintiffs show "a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public." While the *Hoffert* court established the special duty rule, it did not suggest circumstances in which a special duty would be found. Five years after *Hoffert*, Minnesota further elucidated the distinction between public duty and special duty in *Lorshbough v. Township of Buzzel*. The defendant municipality in *Lorshbough* had negligently failed to maintain its dump in compliance with a state statute and agency regulations. The city's negligence precipitated a fire that spread to and damaged plaintiff's property.

In affirming the lower court's order denying defendant's motion for
summary judgment, the supreme court stated that the city's actual knowledge of the dangerous condition created a special relationship between the city and the injured plaintiff. By showing that the city had actual knowledge, the plaintiff prevented application of the public duty doctrine. The court also observed that a plaintiff may be distinguished from the general public when contact between the governmental unit and the plaintiff induces detrimental reliance by the plaintiff.

C. Public Duty/Special Duty Distinction under Cracraft

The Cracraft court further clarified the distinction between public duty and special duty. Citing section 288 of the Restatement, the court held that establishment of a standard of care by statute or ordinance would not be precluded if a four-factor special-duty analysis was met; the trial court may examine whether the municipality had actual knowledge of the dangerous condition; whether plaintiff reasonably relied on the governmental unit's careless negligence; whether plaintiff reasonably relied on inspector's representations); 82. 279 N.W.2d at 806-07. 84. Compare id. at 806 (actual knowledge is a factor) with Lorshbough v. Township of Buzzle, 258 N.W.2d 96, 102 (Minn. 1977) (general principle includes "should have had knowledge," but court limited principle's application by showing actual knowledge). When the cause of action is alleged negligence, the plaintiff does not have to show that the defendant actually knew of the dangerous condition. It is sufficient if the plaintiff shows that the defendant knew or should have known of the condition. See, e.g., Dean v. Weisbrord, 300 Minn. 37, 43, 217 N.W.2d 739, 743 (1974); Hollinbeck v. Downey, 261 Minn. 481, 486, 113 N.W.2d 9, 12-13 (1962); Slinker v. Wallner, 258 Minn. 243, 247-48, 103 N.W.2d 377, 381 (1960); Johnson v. Clement F. Sculley Constr. Co., 255 Minn. 41, 50, 95 N.W.2d 409, 413 (1959).

In a companion case arising from the explosion in Cracraft, plaintiffs deposed one Father Corwin Collins, co-principal of the high school at the time of the explosion. Father Collins testified that the drum of duplicating fluid had been on the dock for an uncertain length of time and that he had notified the St. Louis Park Fire Department about the drum. Deposition of Father Corwin Collins at 13, Kasper v. Benilde-St. Margaret's High School, No. 716821 (Minn. 4th Dist. Ct. Aug. 26, 1975). The plaintiffs attempted to enter Father Collins' deposition into evidence against the City of St. Louis Park, but because the city did not have notice of the deposition, the trial court would not permit its introduction.
THE PUBLIC DUTY RULE

municipality's representations and conduct; 85 whether a statute or ordinance was enacted for the protection of a particular class of persons rather than for the protection of the public generally; 86 and, whether the municipality aggravated the harm. 87 In applying these factors, the Cracraft court found that no special duty was created or assumed by the city in its inspection of the school. 88 The fire inspector testified that he had not seen the drum during his inspection, 89 but that if he had seen it, he would have ordered its removal. 90 With respect to plaintiffs' reliance, the court stated that "no grounds for reasonable reliance exist with regard to hazards not set forth in the [inspector's] letter [listing conditions that required correction]." 91 Since the inspector had made no mention of the drum, plaintiffs could not have relied upon his report. 92 The court

for the summary judgment motion. See Order at 3, Cracraft v. City of St. Louis Park, Nos. 726924, 727075 (Minn. 4th Dist. Ct. Apr. 19, 1977). Had the deposition been admitted, the issue of whether the fire inspector was aware of the drum's presence would have been in dispute and, for the purposes of summary judgment, resolved in favor of the non-moving parties, the plaintiffs. In that event, the facts of Cracraft would have more clearly resembled those in Lorshbough. Thus, had actual knowledge of the drum's presence been shown, a special relationship would have been created allowing the plaintiffs to proceed to trial on their claims.

85. 279 N.W.2d at 806-07. It has been suggested that by statutorily requiring fire inspections to be performed for the benefit of the owners and occupiers of the premises inspected, the body mandating such inspection "occupies the field; it discourages, and usually forbids, competition." M. SHAPO, THE DUTY TO ACT 93 (1977); cf. note 99 infra. RESTATEMENT (SECOND) OF TORTS § 324A (1965), relied upon in part by the Cracraft court in establishing reliance as a factor, see 279 N.W.2d at 807 n.9, suggests a similar analysis in one of its comments:

The actor is also subject to liability to a third person where the harm is suffered because of the reliance of the other for whom he undertakes to render the services, or of the third person himself, upon his undertaking. This is true whether or not the negligence of the actor has created any new risk or increased an existing one. Where the reliance of the other, or of the third person, has induced him to forego other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.

RESTATEMENT (SECOND) OF TORTS § 324A, Comment e (1965).

86. See 279 N.W.2d at 807. Although the Cracraft court, by establishing this factor, provides for analysis of each statute upon which a party relies, the statute upon which the Cracraft plaintiffs relied was not individually scrutinized. See notes 126-28 infra and accompanying text.

87. 279 N.W.2d at 807.
88. Id. at 808.
89. Id. at 803. But see note 84 supra.
90. 279 N.W.2d at 803.
91. Id. at 807.
92. It would seem that if a city inspector, presumably acting with a certain degree of expertise in the area concerned, was known to make periodic inspections, the owner or occupier of the premises would not be remiss in relying on those inspections rather than hiring an additional, private expert to duplicate the inspection process. If the city inspector informed the owner or occupier of certain defects, or of the lack of defects, it appears at least logical that the owner or occupier could rely on the implicit representation that all defects had been detected that could be detected through the use of due care. In Cracraft,
similarly found that "the applicable codes, ordinances, or statutes have not been drawn with sufficient specificity to create an inspection duty in favor of a class of individuals rather than the public as a whole."93 Finally, the court stated that because the risk of explosion following the inspection was no greater than the risk prior to the inspection, "the municipality did nothing to increase the risk."94 Thus, under the Hoefert-Cracraft-section 288 rule, a municipality will be immune from suit unless one, two, or possibly all of the four factors are present.95

however, the supreme court stated, in effect, that only if the inspector had specifically mentioned the drum's presence could plaintiffs reasonably rely on his report. Of course, as the inspector testified, had he seen the drum he would have ordered its removal. Id. at 803. Therefore, plaintiff's reliance would only be reasonable if no reliance was necessary. 93. Id. at 807-08. For a further discussion of this Cracraft element, see notes 126, 131 infra.

94. 279 N.W.2d at 808 ("Even assuming the 55-gallon drum was on the dock at the time of the inspection, the risk of explosion was the same as after the inspection.").

95. The Cracraft court did not specify how many of the four factors must be proven for a plaintiff to survive a summary judgment motion, nor did the court state the relative importance of the factors. Elucidation of the use made of the four factors would greatly aid trial courts facing summary judgment motions in similar cases. For example, had the Cracraft plaintiffs been aware of the four-factor analysis at the time of the summary judgment motion, they conceivably could have shown actual knowledge on the part of the city. Whether that factor alone would have been sufficient to defeat the motion remains unclear. In a companion case to Cracraft, the plaintiff deposed Father Corwin Collins, co-principal of the high school at the time of the explosion. See Kasper v. Benilde-St. Margaret's High School, No. 716821 (Minn. 4th Dist. Ct. Aug. 26, 1975). Father Collins testified that he knew the drum of duplicating fluid was on the loading dock for an uncertain length of time prior to the explosion and that the drum was inside the door leading to the dock for at least one year prior to the explosion. See Deposition of Father Corwin Collins at 12-13, Kasper v. Benilde-St. Margaret's High School, No. 716821 (Minn. 4th Dist. Ct. Aug. 26, 1975). Father Collins also testified that he informed the St. Louis Park Fire Department that the drum was placed on the dock "to be dumped at some future time." Id. at 14.

The deposition was held inadmissible for the purposes of the summary judgment motion in Cracraft on the ground that the city was not a party to the action and did not have notice of the deposition. See Order at 3, Cracraft v. City of St. Louis Park, Nos. 726924, 727075 (Minn. 4th Dist. Ct. Apr. 19, 1977). Had the deposition been admitted, one factor, that of actual knowledge, would have been in dispute and could have furnished a basis for denial of the city's motion for summary judgment. See, e.g., Ahlm v. Rooney, 274 Minn. 259, 262-63, 143 N.W.2d 65, 67-68 (1966) (motion for summary judgment properly granted only when there is no genuine issue of material fact). The plaintiffs in Cracraft conceivably could have redeposed Father Collins or submitted an affidavit regarding the length of time the drum was on the dock and his conversation with the fire department concerning the drum. See MINN. R. CIV. P. 56.03. Because actual knowledge generally is not significant in negligence actions, however, and its importance in tort actions against municipalities could not have been anticipated prior to Lorshbough v. Township of Buz- zle, 258 N.W.2d 96, 102 (Minn. 1977), which was decided several months after the summary judgment motion was granted by the district court in Cracraft, the Cracraft plaintiffs could not have been aware of the significance of Father Collins' testimony.

Although the Cracraft court did not specify the weight to be given each of the four factors, a close reading of Lorshbough and Cracraft indicates that the single most important
IV. THE PUBLIC DUTY RULE: AN ANALYSIS OF ITS LEGAL FOUNDATION

The Cracraft decision rests on the public duty doctrine as formulated by the Hoffert decision\(^ {96}\) and section 288 of the Restatement.\(^ {97}\) The Cracraft court also expanded upon its Hoffert rationale, stating that to abolish the public duty doctrine would be to abolish Restatement section 288, "a corollary to a basic tenet of negligence law."\(^ {98}\) The court stated that creation of a new tort imposing upon a municipality the duty "to inspect and correct the fire code violations of a third person,"\(^ {99}\) should be legislatively, not judicially, mandated.\(^ {100}\)

Because the Hoffert decision was the underlying basis for Cracraft, an examination of Hoffert's application of the public duty doctrine is crucial. The Hoffert court relied on three Minnesota cases, Hitchcock v. County of Sherburne,\(^ {101}\) Stevens v. North States Motor, Inc.,\(^ {102}\) and Roerig v. Houghton,\(^ {103}\) to support the proposition that a building inspector acts solely for the benefit of the public and, therefore, that "an individual who is injured by any alleged negligent performance of the building inspector . . . does not have a cause of action."\(^ {104}\) Hitchcock, Stevens, and Roerig, however, were decided prior to enactment of the statute that abrogated the immunity of municipalities from tort claims.\(^ {105}\) The decisions in Hitchcock, Stevens, and Roerig were based upon the rule that a governmental body would not be held liable for the negligent performance of a governmental, as opposed to proprietary, function. Prior to the abrogation of sovereign immunity, a municipality could not be held liable for acts

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96. 279 N.W.2d at 804 ("The Hoffert decision is controlling in this case.").
97. Id. at 805 (quoting RESTATEMENT (SECOND) OF TORTS § 288 (1965)).
98. Id. at 804.
99. Id. The Cracraft court distinguished Lorshbough on the basis that the latter case involved "the duty of a municipality to comply with its own safety codes," while Cracraft was concerned with "the municipality's unique duty to enforce the law by taking steps to assure that third persons comply with the law." Id. at 803.
100. Id. at 808.
101. 227 Minn. 132, 34 N.W.2d 342 (1948) (county not held responsible to individual injured as the result of negligent maintenance of a county road by county's employee).
102. 161 Minn. 345, 201 N.W. 435 (1925) (construction and maintenance of municipal road is public duty and not ministerial duty; thus, an individual does not have cause of action for negligent performance of that duty).
103. 144 Minn. 231, 175 N.W. 542 (1919) (city and inspector not liable for damages sustained by individual resulting from construction delay due to judicial proceedings brought by individual against city for denying a building permit).
104. 293 Minn. at 223, 199 N.W.2d at 160.
105. See Minnesota Municipal Tort Liability Act, ch. 789, 1963 Minn. Laws 1396 (current version at MINN. STAT. ch. 466 (1978 & Supp. 1979)).
performed in its governmental capacity, but could be liable for acts performed in a proprietary capacity. Governmental acts were those that only the government could perform adequately, such as the enactment and enforcement of laws, building inspections, and the maintenance and operation of public schools. Proprietary acts are those that could be performed by the government or a private party with equal ease. When a municipality collects revenue for performing a service, courts are more likely to find the service to be proprietary.

In *Hitchcock* the court held that when a county undertakes the maintenance of a county aid road, it "acts in a governmental capacity when it maintains it." Thus, because the act was governmental and not proprietary, the court held that the "public officer is not responsible for the tort of his subordinates or servants who are employed by him or under him in the discharge of his official duties." In *Stevens* the court also applied the distinction between governmental and proprietary duties in holding court officials not liable for the alleged negligent performance of a governmental act. When the duty is governmental, the *Stevens* court stated, it "is a purely public duty, owing to the state . . . [and] a failure to perform such duty will not give rise to a
cause of action in favor of an individual."116

In Roerrig a city building inspector refused to issue a building permit upon an application submitted by plaintiff. Plaintiff procured a writ of mandamus compelling the permit to be issued and subsequently sought damages caused by the refusal to issue the permit when first requested.117 The supreme court held that because the city, under whose authority the inspector acted, could not be liable to plaintiff for damages arising out of its performance of a governmental function,118 it would be anomalous to hold the city’s agent liable.119 The court stated, “[a] public officer or

116. Id. Stevens and Howley v. Scott, 123 Minn. 159, 143 N.W. 257 (1913) have been cited as supporting the duty-no duty concept of Restatement section 288. See Restatement (Second) of Torts, app. § 288, Reporter’s Notes at 366 (1966); Note, Negligence—Violation of Statute or Ordinance as Negligence or Evidence of Negligence—Rules in Minnesota, supra note 36, at 672 & nn.34 & 36. The result in these cases, however, should be viewed as turning upon Minnesota’s application of the doctrine of sovereign immunity. See notes 70, 106-11 supra; notes 118, 123 infra. Because suit in each case was predicated upon violation of a statute, the court was required to inquire whether the person injured was the one to whom performance was due under the statute. See Stevens v. North States Motor, Inc., 161 Minn. at 348-49, 201 N.W. at 436; Howley v. Scott, 123 Minn. at 162-63, 143 N.W. at 259. Beyond this initial inquiry, the court discussed principles used in undertaking a sovereign immunity analysis. First, Stevens discussed the term “public duty,” stating “if the duty is a purely public duty, owing to the state, then a failure to perform such duty will not give rise to a cause of action . . . .” 161 Minn. at 348, 201 N.W. at 436. While one may argue that this language represents a section 288 discussion, the term “public duty” should be viewed as being synonymous with the term “governmental function.” See note 118 infra. Second, both Stevens and Howley noted that a public officer may not be held liable unless he failed to perform a ministerial duty. See Stevens v. North States Motor, Inc., 161 Minn. at 348, 201 N.W. at 436; Howley v. Scott, 123 Minn. at 162, 143 N.W. at 259. This discussion clearly indicates that the court was engaged in a sovereign immunity analysis. See note 123 infra. Finally, if one looks to Bolland v. Gihlstorf, 134 Minn. 41, 158 N.W. 725 (1916), the case that Stevens cited as “in principle, very much like the one at bar,” 161 Minn. at 349, 201 N.W. at 436, it becomes apparent that the Stevens and Howley decisions were based upon an application of the sovereign immunity doctrine. In Bolland, the court, in finding that failure by public officers to warn of a dangerous condition on a bridge did not create a cause of action, first distinguished Howley on the grounds that the public officer had been found “liable for a failure to perform a ministerial duty imposed upon him by statute.” 134 Minn. at 42, 158 N.W. at 725. The court indicated the exact principle upon which liability was denied in concluding “that the better rule favors exemption from liability. This rule . . . accords with the general understanding of lawyers and laymen as to the liability of town officers.” Id.

117. 144 Minn. at 232-33, 175 N.W. at 542-43.

118. Id. at 234, 175 N.W. at 543.

The Minnesota court frequently used the terms “governmental” and “public” interchangeably. The clear meaning of the court in using either word was that commonly attached to governmental functions. See Peterson, supra note 70, at 234-35 (“The term ‘governmental’ has been used in the decisions interchangeably with ‘public,’ ‘police,’ and even ‘administrative;’ ‘proprietary’ has been used synonymously with ‘corporate,’ ‘private,’ ‘corporate ministerial,’ ‘corporate proprietary,’ and ‘nongovernment.’ ”) (footnotes omitted).

119. See 144 Minn. at 235, 175 N.W. at 544.
agent, engaged in the performance of a public duty in obedience to the command of a statute, should not suffer personally for an error of judgment."120

The distinction between governmental and proprietary functions as applied by the court in Hitchcock, Stevens, and Roerig, was explicitly abolished by the Minnesota Legislature in 1963 when it enacted section 466.02 of the Minnesota Municipal Tort Liability Act.121 That statute provides that “every municipality is subject to liability for its torts . . . whether arising out of a governmental or proprietary function.”122 Thus, the three cases relied upon by the Hoffert court to establish what has become known as the “public duty rule” were declared by the Legislature no longer to be applicable in cases involving municipal tort liability.123 This fact is particularly important because it was Roerig that the Hoffert court used to establish the position that no statute relating to building codes, building inspections, and the issuance of building permits may be used to create a standard of care in a negligence action.124

120. Id. at 234, 175 N.W. at 544.
121. See Minnesota Municipal Tort Liability Act, ch. 789, § 2, 1963 Minn. Laws 1396, 1397 (current version at MINN. STAT. § 466.02 (1978)).
122. Id.
123. In abolishing sovereign immunity, the Legislature necessarily abolished the governmental-proprietary distinction because a municipality performing a governmental function is thereby acting in its sovereign capacity and able to assert sovereign immunity. Similarly, a municipality performing a proprietary function is not acting in its sovereign capacity and is not able to claim sovereign immunity. See, e.g., Hahn v. City of Ortonville, 238 Minn. 428, 57 N.W.2d 254 (1953); Brantman v. City of Canby, 119 Minn. 396, 138 N.W. 671 (1912); Miller v. City of Minneapolis, 75 Minn. 131, 77 N.W. 788 (1898). The Cracraft court recognized that by abolishing sovereign immunity the Legislature also abolished the governmental-proprietary distinction. See 279 N.W.2d at 806 n.6 (“Municipalities are subject to tort liability even if the activity is governmental rather than proprietary.”).

The distinction between “discretionary” and “ministerial” acts is also derived from the doctrine of sovereign immunity. See Peterson, supra note 70, at 296-99. Ministerial acts are those that are mandated, “amounting to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own.” W. PROSSER, supra note 30, § 132, at 988-89. Discretionary acts are those requiring personal deliberation, decision, and judgment. Id. at 988. In employing the discretionary-ministerial distinction under the doctrine of sovereign immunity, the court first determined whether the act performed was governmental or proprietary. If the act was governmental, liability was precluded irrespective of the discretionary or ministerial nature of the act. If the act was proprietary, however, liability would be imposed only if the act was also ministerial. See, e.g., Peterson, supra, at 298.

124. See 293 Minn. at 223, 199 N.W.2d at 160. The Hoffert court also relied upon 7 E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 24.307, at 523 (3d ed. 1968), which provides:

The enactment and enforcement of building codes and ordinances constitute a governmental function. The primary purpose of such codes and ordinances is to secure to the municipality as a whole the benefits of a well-ordered municipal government, or, as sometimes expressed, to protect the health and secure the
The *Hofert* court's reliance upon three sovereign immunity cases to extend the *Restatement* section 288 doctrine to governmental entities without considering prior Minnesota case law applying the concept has resulted in considerable confusion. Rather than adopting the approach followed in cases prior to the abrogation of sovereign immunity between private tortfeasors, the *Hofert* court established a blanket rule preclassifying an entire genre of statutes and precluding their use to create a standard of care in negligence actions. The *Cracraft* court, in an apparent effort to clarify the harsh ramifications of *Hofert*, established a four-factor test that draws the issue further from the analysis Minnesota previously has used in negligence per se cases. *Cracraft's* four factors scrutinize the relationship between the parties and the statute, while prior Minnesota case law and *Restatement* section 288 inquire only into the relationship between the statute and the party relying upon the statute. Thus,

safety of occupants of buildings, and not to protect the personal or property interests of individuals.

Id. (footnotes omitted), quoted in *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. at 222-23, 199 N.W.2d at 160. The *Hoffert* court's reliance upon *McQuillin* may be criticized on two grounds. First, the *McQuillin* section refers to enactment and enforcement of building codes and ordinances as being a governmental function. The Minnesota Legislature, however, specifically abolished distinctions between governmental and proprietary functions. See notes 121-23 supra and accompanying text. Second, the *McQuillin* proposition overlooks Minnesota's analysis of negligence per se cases. By relying on *McQuillin*, section 288 would apply in every instance because no building code, ordinance, or regulation could be construed to create a duty to individuals. The *McQuillin* section does not address itself to a negligence per se analysis in which some statutes may or may not be construed as being enacted solely for the protection of the general public, depending on the terms of the statute in question.

125. See notes 101-24 supra and accompanying text. 126. See 279 N.W.2d at 806-08. Of the four factors, only the third requires analysis of the statute. See id. at 807. The remaining factors—actual knowledge, reliance, and aggravation of harm—are in addition to the factors involved in a traditional negligence per se analysis. See notes 30-69 supra and accompanying text.

On its face, the third factor of the *Cracraft* analysis appears to require a case-by-case interpretation of each statute relied upon by a party. Such an analysis is mandated by the pre-abrogation case law applying the section 288 concept to private tortfeasors. See id. The *Cracraft* court, however, may actually have established a superfluous element by adopting the holding of the *Hoffert* court without embarking on a thorough analysis of the St. Louis Park ordinance. Further evidence that the third factor in *Cracraft* may have little practical impact may be observed in *Perkins v. National R.R. Passenger Corp.*, 289 N.W.2d 462 (Minn. 1979). The *Perkins* court held that failure of the Public Service Commission to hold timely hearings regarding a dangerous railroad crossing pursuant to statute did not give rise to liability in the subsequent death of an individual. Id. at 467-68. Without discussing the provisions of the statute and without examining the class of persons intended to be protected by the statute, the court merely cited *Hoffert* and *Cracraft*, observing that no duty was owed "beyond that duty it owed to the general public." Id. at 468. It now appears that application of the section 288 concept to governmental entities has reached the point of a presumption to be rebutted only by the "special relationship" or "assumed duty" idea embodied in the *Cracraft* four-factor test.

127. See, e.g., *Kronzer v. First Nat'l Bank*, 305 Minn. 415, 424-25, 235 N.W.2d 187, 193
in a section 288 analysis, the court examines the purpose of the particular statute that is the subject of the lawsuit and determines whether the plaintiff is a member of the class intended to be protected by the statute. If the statute is intended exclusively to protect the interests of the state, to secure public rights to private individuals, or to impose upon an actor performance of a service the government undertakes to provide the public, section 288 applies. If the statute is intended to benefit a particular class of individuals by themselves or together with the general public, section 288 does not apply. The Cracraft decision appears to raise application of Restatement section 288 to the level of a presumption when a governmental entity is a party, thereby precluding application of the statute unless rebutted by the new four-factor inquiry. Because the court in Cracraft purported to apply a common-law approach fundamental to the law of Minnesota, the court should return to the analysis used in those prior discussions of the law of negligence per se.

It is apparent that the Cracraft court could have reached the same result if it had used a common-law negligence per se analysis by narrowly interpreting the applicable provisions of the St. Louis Park ordinance. One criticism of Restatement section 288 is that the analysis lends itself to result-oriented decisions. A statute may be narrowly or broadly construed depending upon the statute and the equities in each case. A nar-

(1975); Nees v. Minneapolis St. Ry., 218 Minn. 532, 535-36, 16 N.W.2d 758, 761 (1944) (by implication).

128. See Restatement (Second) of Torts § 288(a)-(c) (1965).

129. See Anderson v. Settergren, 100 Minn. 294, 296, 111 N.W. 279, 280 (1907) (statute may not be used to create a duty only if "duty prescribed by the statute is wholly public, and not at all for the benefit of private individuals").

130. See 279 N.W.2d at 806 ("[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 . . . . A duty of care arises only when there are additional indicia . . . . "); note 126 supra.

131. If the Cracraft majority had analyzed the specific terms of the St. Louis Park ordinance relied upon by plaintiffs, the court could have interpreted the ordinance's requirement that "[t]he inspection and examination authorized . . . shall be for the purpose of reporting and correcting the following fire hazards pertaining to buildings and their occupants," 279 N.W.2d at 805 n.4, to fall within Restatement section 288(c). This section renders the actor responsible solely to the state rather than to any individual. A thorough reading of the ordinance, however, demonstrates that such an interpretation would be strained. The ordinance provisions, including "[c]onditions endangering other property or occupants," and "other fire hazards dangerous to life or property," 279 N.W.2d at 805 n.4, appear to express an intent to protect a particular class of individuals consisting of the foreseeable occupants of the building inspected. Cf. Wilson v. Nepstad, 282 N.W.2d 664, 672 (Iowa 1979) (separate section 288 analysis of building code statutes and ordinances similar to those relied upon in Cracraft; court found that the statutes evidenced "a purpose to protect occupants . . . not members of the public generally"); Judd v. Landin, 211 Minn. 465, 469, 1 N.W.2d 861, 863-64 (1942) (purpose of building code to protect "occupants of buildings governed thereby").

132. See Wilson v. Nepstad, 282 N.W.2d 664, 672 (Iowa 1979) (analysis of ironies re-
row construction of many building codes and related statutes, however, would be contrary to the often-repeated intention of the court to construe broadly laws enacted to protect public health and safety. Recognizing that the statute in *Cracraft* was enacted in part to protect public health and safety and in part to protect a specific class of individuals, the occupants of inspected premises, the inquiry turns to whether plaintiffs are within the class intended to be protected by the statute. It would appear that under the previously discussed analysis of *Anderson v. Settergren*, the class of individuals in *Cracraft* should have been broadly construed and the statute should have been viewed as creating a duty both to the public and to private individuals. Therefore, *Restatement* section 288 and the "public" or "no" duty rule should not have been applied in *Cracraft*.

V. CONCLUSION

Automatic application of *Restatement* section 288 to negligence per se cases involving governmental entities does not represent the common-law approach that the *Cracraft* court purported to be perpetuating. Rather than a blanket application of the section 288 concept with a second analysis of whether a "special relationship" is present, negligence per se cases between private tortfeasors involve in the first instance a determination resulting from application of public duty rule "points up the problem of mere result-oriented application of 'duty' or 'no duty' labels.

133. *See* notes 63-67 *supra* and accompanying text.

134. In *Judd v. Landin*, 211 Minn. 465, 1 N.W.2d 861 (1942), the Minnesota Supreme Court construed a building code to establish a standard of care in a suit involving private parties. The building code provision in *Judd* required that handrails be installed on all stairways of a certain width. Plaintiff fell on defendants' stairway and, due to the absence of handrails, was unable to avert her fall. *See id.* at 467, 1 N.W.2d at 863. The court stated that the intent of the ordinance was to "safeguard and protect from injury guests and occupants of buildings governed thereby," *id.* at 469, 1 N.W.2d at 863-64, and that plaintiff, a guest in defendants' hotel, "was clearly within the class of persons the codes were designed to aid by preventing or lessening accidents." *Id.* at 473, 1 N.W.2d at 865.

135. 100 Minn. 294, 111 N.W. 279 (1907); *cf.* *Wilson v. Nepstad*, 282 N.W.2d 664, 671 (Iowa 1979) ("A statutory duty designed to protect something larger than an identifiable class of persons is the exception, not the rule.").

136. The *Cracraft* court stated that "[i]t is somewhat unfortunate that the terms 'public' duty and 'special' duty have been used, inasmuch as they give the misleading impression that the distinction applies only to governmental tortfeasors. Perhaps 'no duty' and 'assumed' duty would be more appropriate." 279 N.W.2d at 806. Under the analysis previously used in negligence per se actions involving private tortfeasors, *see* notes 46-69 *supra* and accompanying text, the terms "duty" and "no duty" might be more accurate. *Cracraft*’s four-factor test—the "assumed duty" portion of the court’s analysis—is probably the result of the broad application of the *Restatement* section 288 concept established by the *Hoffert* court. By confining section 288 to the scope given it under prior Minnesota case law, the harsh results caused by automatic preclusion of liability under section 288 could be avoided and use of an assumed duty test to create liability despite application of section 288 might be unnecessary.
of whether section 288 applies at all. The approach adopted by the court in Hofert and modified by the Cracraft court's four-factor analysis creates a double standard distinguishing cases involving public tortfeasors from cases in which only private parties are present. In order to place public and private tortfeasors on an equal footing, the Minnesota court should consider adopting a case-by-case approach to the question of whether Restatement section 288 is applicable to preclude a finding of negligence per se. Such an approach might make use of Cracraft's four-factor test unnecessary and result in a more consistent treatment of the law of negligence per se in Minnesota.

137. See note 136 supra.