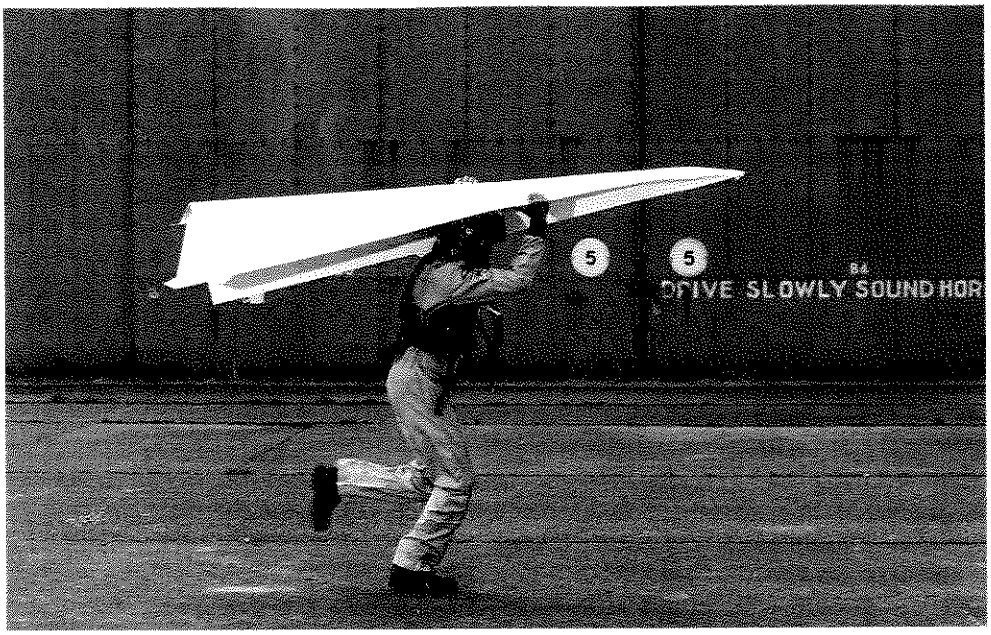

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The "Governmental Function Immunity" Defense in Personal Injury Cases in the Post-*McLean* World

By Michael G. Bersani

The Court of Appeals has, within the last few years, published a series of cases, starting with *McLean v. New York City*, which have troubled the waters of the "Governmental Function Immunity" defense.[1] This article is intended to help attorneys navigate the post-*McLean* seas.

What Is the Governmental Function Immunity Defense?

Despite the state's general waiver of *sovereign immunity* (Court of Claims Act § 8), our courts have applied the court-made doctrine of *governmental function immunity* to most policy-imbued governmental actions.[2] Generally, the government, and its various agencies and employees, benefit from immunity (either qualified or absolute) when they are legislating, adjudging, and making governmental or quasi-governmental discretionary decisions. The rationale for the survival of this vestige of sovereign immunity in personal injury actions is the courts' reluctance to second-guess governmental decisions of a quasi-judicial nature that implicate, at least to some extent, discretionary decisions on how to best allocate limited public resources for the provision of public services owed to the public at large, and that, if disallowed, may hamstring decision making for fear of lawsuits.[3]

The Pre-*McLean* World

Before *McLean*, most practitioners and judges were comfortable believing that the governmental function immunity defense, though somewhat muddled in the case law, could be described generally as follows: If a government's agent (e.g., police officer, clerk, housing inspector) negligently caused harm to a plaintiff, and the agent's harm-causing action or inaction was deemed *ministerial*, then the government employer could be held liable even absent a "special duty" to the individual plaintiff. On the other hand, if the harm-producing action or inaction was deemed *discretionary*, the government could be held liable only if the plaintiff proved the agent had a "special duty"

to the plaintiff, beyond the general duty the government has to the public at large.

The "special duty" could be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which the plaintiff is a member;[4] (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty;[5] or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.[6]

The second method – of establishing a "special relationship" with a governmental actor – is the most commonly litigated. To succeed, the plaintiff must meet all of four requirements: (1) an assumption by the public entity through promises or action of an affirmative duty to act on behalf of the injured or deceased party; (2) knowledge by the public entity's agents that inaction could lead to harm; (3) some form of direct contact between the public entity's agents and the injured or deceased party; and (4) the injured or deceased party's justifiable reliance on the public entity's affirmative promise.[7]

Several Appellate Division cases and two Court of Appeals cases, *Pelaez v. Seide*[8] and *Kovit v. Estate of Hallums*,[9] lent support to this general understanding that *ministerial* governmental actions could create liability even when no special duty was established, while a prerequisite for liability for *discretionary* governmental actions was a special duty toward the plaintiff. The rule as enunciated in *Kovit*, for example, was "municipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, *except* when plaintiffs establish a special relationship with the municipality."[10] In *Pelaez*, the Court said, "[M]unicipalities generally enjoy immunity from liability for discretionary activities they undertake through their agents, except when plaintiffs establish a 'special relationship' with the municipality."[11]

McLean v. City of New York

The post-*McLean* world starts, obviously, with *McLean v. City of New York*.[12] In that case, the mother of a child who was injured at a city-registered home daycare center brought a negligence action against the city. Before sending her child to that daycare center, the mother had called the city agency responsible for "registering" privately owned home daycare centers. The agent on the telephone sent her a list of registered home daycare centers, and the mother picked a daycare from that list, assuming that registration indicated some kind of city supervision or inspection. As it turned out, the daycare center had a history of negligence-related child injuries, and the city agency had improperly, in *contra* of its own regulations, renewed the center's registration. In other words, if the agency had done what it should have done – that is, keep track of offending daycares and deny registration to them – the mother would never have selected that particular daycare.[13]

One of the main defenses to the case was that, although the agency may have acted negligently in failing to do what it should have done, the plaintiff could not establish a "special relationship" with the offending agency. Thus, the case should fail for lack of "duty." The plaintiff's lawyer, however, was no fool; he tried to circumvent the special relationship requirement by arguing that the agency's negligence in renewing the daycare's registration in contradiction of its own rules was a "ministerial" not a "discretionary" act. Under the governmental immunity doctrine, as the plaintiff then understood it, she was not required to show that the agency owed her a "special duty" or that she had established a "special relationship" with the city agency if the negligent act complained of was "ministerial" rather than "discretionary." The plaintiff was able to rely on precedent, including dictum from the Court of Appeals cases of *Kovit*[14] and *Pelaez*,[15] to support this argument.

But, to the disappointment of the plaintiff, and the surprise of the bar, the *McLean* court disavowed this understanding of the governmental function immunity defense.[16] The Court distilled the rule to a simple sentence: "Discretionary municipal acts may never be a basis for liability; whereas, ministerial municipal acts may support liability only if a special duty is found to exist."[17]

This newly enunciated rule caused the *McLean* plaintiff to lose her case. The Court found that, even if the city agency's negligence in wrongfully renewing the daycare's registration in violation of its own rules could be qualified as "ministerial," *the plaintiff failed to show a duty*. The government's daycare registration requirements and rules for renewing them were intended to protect the public at large, not just the plaintiff, and she had failed to show that the agency had made some special commitment to her, in that casual telephone call, or else had otherwise established a *special duty* to her in at least one of the three permissible ways.[18]

McLean imparts two lessons to the bar: (1) governmental functions that are discretionary can *never* be the basis of liability; and (2) even if the act is ministerial, the plaintiff must still show a special duty. This second principle, though harsh for plaintiffs, is not, in fact, surprising. Every first-year law student knows that, in order for a negligence claim to prevail, a plaintiff must first establish that the defendant owed the plaintiff a duty of care. Since our courts determine "duty" based on public policy concerns, often with an eye toward hemming in boundless liability, it is not surprising that Court of Appeals jurisprudence determined long ago that a plaintiff must show a "special" duty was owed to the individual plaintiff, beyond the general duty owed to the public at large.

Dinardo v. City of New York

Duty is paramount. It trumps everything else. The Court of Appeals made this perfectly clear in its first post-*McLean* case, *Dinardo v. City of New York*.[19]

In *Dinardo*, a special education teacher was injured when she tried to restrain one student from attacking another. She alleged the school administrators had promised her, sometime beforehand, that "something" was going to be done about the assailant student, whose behavior had made the teacher fear for her safety. The Court rejected her claim, because the teacher-plaintiff could not show that she "justifiably relied" on the vague promises made by the school to "do something" about the troublesome student. Without justifiable reliance, there could be no "special duty" under the four-prong *Cuffy* test.[20] Because there was no duty, the Court refused to decide the issue of governmental immunity, that is, whether the school's failure to remove the student was "discretionary" or "ministerial." The distinction-drawing between ministerial and discretionary actions was of no matter because, post-*McLean*, a "duty" is always required.

Duty is paramount. It trumps everything else. The Court of Appeals made this perfectly clear in its first post-*McLean* case.

In Justice Lippman's *Dinardo* dissent, he summarizes the *McLean* rule (with which he disagrees) as follows: "According to *McLean*, the special relationship exception only applies where the challenged municipal action is ministerial." A more accurate restatement of the *McLean* rule, as clarified in *Dinardo*, is that the special relationship exception – the special duty – becomes relevant *only* if the action is ministerial. Even if there is a special duty, the plaintiff cannot prevail if the act was discretionary. Governmental discretionary actions are *always* insulated from liability, even when there is a duty.

Valdez v. City of New York

The next Court of Appeals pronouncement on the governmental immunity defense was *Valdez v. City of New York*.[21] In *Valdez*, a city police officer promised a frightened woman by telephone that the police would arrest her estranged boyfriend who had threatened to do her harm. The officer told her she could go home because the ex-boyfriend was going to be arrested. She returned to her apartment, feeling safe with the knowledge that her ex-boyfriend would not be there to stalk her. But the police failed to arrest the ex-boyfriend, and a few days later, when she opened her door to take out some trash, she was met with bullets.[22]

The Court of Appeals decided that the plaintiff could not prevail because she could not show that a special relationship had been formed, which would have created a special duty toward her. Specifically, she could not show the "justifiable reliance" element of a special relationship, specifically the *justifiable* part. The Court reasoned that she should have called to confirm that the ex-boyfriend had been arrested, and she was not *justified* in relying solely on the verbal promise. In conducting its analysis, the Court articulated the principle that duty should be analyzed separately from the governmental immunity defense itself. The "duty" requirement and the "governmental function immunity" defense are two separate creatures. The Court recognized that the two issues had been conflated in the case law, including Court of Appeals case law, over the years.[23]

Having determined that the duty element was lacking in *Valdez* (i.e., no special relationship), the Court noted that it had "no occasion to address whether . . . [the city] could have avoided liability under such a [governmental immunity] defense on the rationale that the alleged negligence involved the exercise of discretionary authority."[24] In other words, a plaintiff must first show "duty" before a court will engage in the governmental immunity defense analysis.[25]

Because "lack of duty" and "governmental immunity" are in fact two separate defenses, the *McLean* rule ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[26]) can be viewed as a shorthand manner of describing, in one breath, the tandem effect of both defenses. The "discretionary" and "ministerial" language pertains to the governmental immunity defense, while the "special duty" language pertains to the "lack of duty" defense. Since there must always be "duty" for liability to attach, and since discretionary actions are always immune under the governmental immunity doctrine whether or not there is a duty, it follows that "duty" becomes a relevant inquiry only if the action is deemed "ministerial." Stated otherwise, the issue of duty is moot when the action is *discretionary* because the government immunity doctrine has already annihilated any liability. Nevertheless, as the Court indicated in *Valdez v. City of New York*[27] and later in *Metz v. State of New York*,[28] discussed below, the Court prefers to first dispose of the "duty" issue and, only if it finds a duty, to then proceed to the governmental immunity defense analysis.

Metz v. State of New York

Metz v. State of New York concerned a boating accident on Lake George.[29] A privately owned tourist vessel, the *Ethan Allen*, was certified for many years, by the state

agency charged with conducting tour boat safety inspections, to hold a maximum of 48 passengers. The owner modified the vessel, equipping it with a new, heavier "canopy," which made it somewhat top heavy. Meanwhile, the average American's weight was climbing. The state agency nevertheless continued year after year to "rubber stamp" the 48-passenger capacity rating without re-testing the vessel. On a beautiful day, a small wave struck the vessel, and it capsized, killing and injuring many of its 48 elderly passengers. After-the-fact studies showed that the actual capacity rating of the top-heavy ship should have been only 18. The plaintiff claimed that the state's failure to conduct stability tests to determine safe maximum passenger limits in light of the ship's top-heavy remodeling, and the supersizing of Americans, amounted to negligence.[30]

At deposition, the state's employees readily admitted that they had *discretion* to conduct, or not to conduct, fresh stability tests to determine the vessel's correct passenger capacity. This might have seemed to them an unassailable defense, since *McLean* had declared that *"discretionary* municipal acts may never be a basis for liability."[31] The defendant here, however, learned the hard way that the rule as articulated in *McLean* was incomplete. The Third Department granted summary judgment to the plaintiff, dismissing the governmental immunity defense because, although the state had discretion to test the passenger capacity of the vessel, *it failed to exercise this discretion*. It engaged in no decision-making process as to whether to keep the old passenger capacity rating of 48 or conduct new testing. Rather, it simply rubber stamped the old rating with no thought whatsoever of changed circumstances.[32]

At the Third Department level, this was fatal to the state's governmental immunity defense because the court said that the state had not "exercised" the discretion it clearly had. Long before *McLean*, it was well settled that, where a government actor is entrusted with discretionary authority, but *fails to exercise any discretion* in carrying out that authority, the governmental defendant will not be entitled to governmental immunity from liability.[33] This makes sense, because the sole purpose of the governmental function immunity defense is to allow the government to exercise its governmental, policy and quasi-judicial *discretion* without fear of lawsuits. If the government actor fails to exercise any discretion at all, there is no policy reason to enforce the governmental immunity defense. In simple terms, we might call this the "don't-use-it-you-lose-it" rule.

The *Metz* plaintiff won the battle but however, lost the war. When *Metz* reached the Court of Appeals, the Court refused to address the governmental immunity defense analysis until it had first disposed of the issue of duty. The Court noted that the duty the state agency had to inspect passenger vessels, and ensure that the passenger capacity was safe, was to the public at large, and not to the particular plaintiffs in the lawsuit. No "special duty" had been established.[34]

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required.

The Court cautioned that the plaintiffs must *first* establish duty *before* the Court would tackle the governmental immunity defense proper. The Court stated: "As we recently made clear in *Valdez v. City of New York* . . . claimants must first establish the existence of a special duty owed to them by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity."[35]

The Complete Post-*McLean* Governmental Immunity Defense Rule

The rule as pronounced in *McLean* ("*discretionary* municipal acts may *never* be a basis for liability; whereas, *ministerial* municipal acts may support liability only if a *special duty* is found to exist"[36]) falls short of enunciating the complete rule encompassing the tandem workings of the "duty" requirement and the "government immunity" defense. The Court of Appeals cases that followed in the wake of *McLean* (*Dinardo, Valdez* and *Metz*) exposed the complete rule.

The complete rule can be stated like this: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is generally required. Only if such a duty is found will the actions or omissions of the government officer then be examined. If those actions or omissions are deemed *discretionary*, and that discretion was actually *exercised*, then the government is always immune. But if the action is *discretionary* and no discretion was *exercised*, or if the action was *ministerial*, the governmental immunity defense will fail.

Even this might not be complete statement of the rule, however, as the following discussion will show.

Does the Nonfeasance/Misfeasance Distinction Survive *McLean*?

A pre-*McLean* line of cases, including Court of Appeals cases, drew a distinction between governmental *misfeasance* and *nonfeasance*. If a government's agent (e.g., police officer, clerk, housing inspector) caused harm to

a plaintiff through his or her *misfeasance* (such as, for example, a police officer shooting his gun into a crowd), the government could be held liable for the officer's negligence regardless of whether a "special" duty was established. If, on the other hand, the alleged negligent act amounted to *nonfeasance*, in the sense of negligently failing to provide governmental services or to enforce a statute or regulation (for example, failing to provide police protection or firefighting services or to enforce housing regulations), then the plaintiff must show a *special* duty. In other words, if the negligence complained of amounted to active *misfeasance* rather than passive *nonfeasance*, the duty followed the act. Put another way, where the government official *actively* caused harm, rather than simply, passively permitted harm from some other quarter to befall the plaintiff by failing to provide governmental services or by negligently providing them, the act of causing the harm itself was sometimes deemed to create the duty.[37]

One post-*McLean* court has questioned whether the *misfeasance* exception to the general requirement that a "special duty" must be shown survives *McLean*.[38] In *Applewhite v. Accuhealth, Inc.*,[39] in a footnote, the First Department noted that "in *McLean*, the Court of Appeals did not discuss the doctrine of a special duty or relationship in terms of misfeasance and nonfeasance, but clearly intended to apply the special relationship doctrine to all acts that constitute a government function." The court thus refused to "evaluate this case using a distinction between nonfeasance and misfeasance."[40]

Nevertheless, an argument might be made that the *misfeasance/nonfeasance* distinction survives *McLean*. The only post-*McLean* Court of Appeals case that addressed an unambiguous case of *misfeasance* (the line between misfeasance and nonfeasance is often nebulous) was *Johnson v. City of New York*.[41] In that case, a police officer's decision to shoot at armed robbers (thus causing injury to a bystander) was deemed "discretionary," and thus the governmental immunity defense prevailed. Recall that the post-*McLean* Court of Appeals has announced it will not reach the issue of the governmental immunity defense until it first finds a duty. Since the *Johnson* court found the officer's actions were discretionary, we must assume the court first found the officer had a duty toward the injured plaintiff. This duty could not be a special duty because the facts of the case do not lend themselves to establishing a special duty in any of the three ways permitted by Court of Appeals case law.[42] The duty had to be there by virtue of the misfeasance itself. Thus, *Johnson* lends support to the argument that the misfeasance/nonfeasance distinction survives *McLean*.

If so, the full post-*McLean* rule encompassing the tandem workings of the duty requirement and the government immunity defense must be restated yet again as follows: For liability to attach, a duty is first in all instances required. Since the government's duty to the public at large will not do, a special duty toward the particular plaintiff is required in cases of nonfeasance. In some cases of misfeasance, however, the misfeasance may create the duty. If any duty is found, then the actions of the government officer will be examined. If those actions are deemed discretionary, and that discretion was actually exercised, then the government is always immune. If the action is discretionary but no discretion was exercised, or if the action was ministerial, the governmental immunity defense must fail. ■

1. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
2. *In re World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428 (2011).
3. *Riss v. City of N.Y.*, 22 N.Y.2d 579 (1968); *Cuffy v. City of N.Y.*, 69 N.Y.2d 255, 260 (1987).
4. In *Pelaez v. Seide*, 2 N.Y.3d 186, 202 (2002), the Court of Appeals enunciated a three-prong test to determine whether the Legislature, in passing the law in question, intended to create a private right of action for a plaintiff. The plaintiff must show that he or she is (1) one of a class of persons for whose particular benefit that statute was created; (2) that recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) that to do so would be consistent with the legislative scheme.
5. *Id.* at 195.
6. The third way of establishing a "special duty" between the public corporation and the injured person or class of persons is exceedingly rare. Examples of instances where it was established are: where a town knew of blatant, dangerous violations on a motel's premises, but the town affirmatively certified the premises as safe by issuing a certificate of occupancy, upon which representation plaintiffs justifiably relied in their dealings with the premises, then a proper basis for imposing liability on the town may well have been demonstrated. *See Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253 (1983). And where a city sewer inspector observed that private sewer system trench violated rules and code since it had been excavated to a depth of over 11 feet without bracing or shoring and inspector stated to decedent, before he descended therein, that the walls looked pretty solid and that the inspector did not think they needed bracing, city was liable for death of decedent killed in cave-in of trench, by reason of the inspector's positive action in assuming direction and control at jobsite in absence of decedent's supervisor. *See Smullen v. City of N.Y.*, 28 N.Y.2d 66 (1971).
7. *Cuffy*, 69 N.Y.2d 255.
8. 2 N.Y.3d at 195.
9. 4 N.Y.3d 499, 505 (2005).
10. *Id.*
11. *Pelaez*, 2 N.Y.3d at 195.
12. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).
13. *Id.*
14. *Kovit*, 4 N.Y.3d at 505.
15. *Pelaez*, 2 N.Y.3d at 195.
16. *See McLean*, 12 N.Y.3d 194.
17. *Id.*
18. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.
19. 13 N.Y.3d 872 (2009).
20. *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).
21. 18 N.Y.3d 69 (2011).
22. *Id.*
23. *Id.*

24. *Id.*

25. *Id.*

26. *McLean*, 12 N.Y.3d 194.

27. *Valdez*, 18 N.Y.3d at 80.

28. *Metz v. State*, 20 N.Y.3d 175 (2012).

29. *Id.*

30. *Id.*

31. *McLean*, 12 N.Y.3d 194.

32. *Metz v. State of N.Y.*, 86 A.D.3d 748 (3d Dep't 2011), *rev'd*, 20 N.Y.3d 175 (2012).

33. *Mon v. City of N.Y.*, 78 N.Y.2d 309, 313 (1991); *Haddock v. City of N.Y.*, 75 N.Y.2d 478, 485 (1990).

34. *Metz*, 20 N.Y.3d 175.

35. *Id.* (citing *Valdez*, 18 N.Y.3d 69).

36. *McLean*, 12 N.Y.3d 194.

37. *See Perez v. City of N.Y.*, 298 A.D.2d 265 (1st Dep't 2002) (police could be held liable for accidental shooting of a bystander); *Wilkes v. City of N.Y.*, 308 N.Y. 726 (1954) (same); *Flamer v. City of Yonkers*, 309 N.Y. 114 (1955) (same); *Rodriguez v. City of N.Y.*, 189 A.D. 2d 166 (1st Dep't 1993) (same, and Court explained that "the special duty rule is limited to cases involving nonfeasance, where the municipality is alleged to have failed to take action in breach of some general duty imposed by law or voluntarily assumed for the benefit of the public as a whole" . . . and "the rule has no application to plaintiff's theory of negligence in the officer firing across the crowded street and hitting plaintiff"). The rationale for finding a duty where *misfeasance* is involved is that "even when no original duty is owed to the plaintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care." *Parvi v. City of Kingston*, 41 N.Y.2d 553 (1977) (police officers' taking intoxicated men into custody created a duty on the part of the police officers to exercise reasonable care to secure their safety and police could be held liable for leaving the intoxicated men near the Thruway where they were later hit by a passing car); *Walsh v. Town of Cheektowaga*, 237 A.D.2d 947 (4th Dep't 1997) (police officers who affirmatively prevented a drunk driver from driving his car, and then let him go on foot across a railroad track, could be held liable for his being hit by a train, despite absence of a "special duty"). *See also Schuster v. City of N.Y.*, 5 N.Y.2d 75, 81–82 (1958).

38. *McLean v. City of N.Y.*, 12 N.Y.3d 194 (2009).

39. 90 A.D.3d 501 (1st Dep't 2011).

40. *Id.*

41. 15 N.Y.3d 676 (2010).

42. As discussed above, Court of Appeals case law allows a *special duty* to be formed in three ways: (1) by a statute that was enacted for the benefit of a particular class of persons of which plaintiff is a member; (2) by the government official's voluntary assumption of a duty toward a private party who then justifiably relies on proper performance of that duty; or (3) by a government official assuming positive direction and control in the face of a known, blatant and dangerous safety violation.