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Allowing the Drunk to Drive: Should the Government Pay

Darryl W. Howard

ALLOWING THE DRUNK TO DRIVE: SHOULD THE GOVERNMENT PAY?

Huhn v. Dixie Insurance Co.[1]

Due to legislative waiver and judicial decision, the traditional governmental immunities have been receding at an ever increasing rate. One of the untouched areas of immunity has been the protection afforded police departments for injuries suffered by those with whom the police have had no contact. However, given the mushrooming concern over the drunk driver, it was only a matter of time before this immunity was questioned.

In the last two years, courts in various jurisdictions have been faced with whether an action could be maintained for physical injuries based upon a police officer's negligent failure to detain and arrest an intoxicated driver. In the typical situation, a police officer had stopped a driver and then allowed him to continue. Usually the officer pulled the driver over for suspicion of intoxicated driving or some other moving violation. Shortly after being released by the officer, the driver had struck another vehicle and injured or killed its passengers. Upon subsequent testing, it is discovered that the suspicious driver was legally intoxicated when the officer stopped him. The injured parties or their survivors have then sued the governmental body that employed the officer for that officer's negligence.

Not surprisingly, the courts have come to different conclusions on different grounds. Courts have, however, been focusing on two issues. The first is the negligence element of duty. The courts have been asking whether the police officer has a duty to use reasonable care with respect to the plaintiffs. The second issue, often dispositive of the suit, is whether the individual state's concept of sovereign immunity allows such a suit. Most recently, the Florida Supreme Court, confronted with inconsistent district courts of appeal decisions, had to address this most difficult issue.

The purpose of this Note is to analyze the different approaches of the courts and the way in which the Florida Supreme Court decided this issue. This Note will also explore the viability of this new cause of action in Missouri courts.

1. 453 So. 2d 70 (Fla. Ct. Dist. App. 1984).

The absence of the negligence element of duty was addressed by the California Court of Appeal in *Harris ex rel. Masuda v. Smith*.[2] The California court recognized that before the question of sovereign immunity even arises, a duty to the plaintiff must be found.[3] Only when there is a duty upon which the governmental subdivision could be held liable is the concept of sovereign immunity relevant. Therefore, the court proceeded to deal with that question first.

The court first characterized the alleged negligence of the police officer as nonfeasance—the failure to prevent the intoxicated operator from driving.[4] The court then reaffirmed the general principle that a person has no duty to take affirmative action to aid another.[5] If, however, a person does come to the aid of another, the court stated that that person could be held liable if he placed the other in peril, increased his risk of harm, or promised to act and had not done so after the other had relied on the promise.[6] The court thus announced that the real question was whether the officer had acted affirmatively to increase the risk of harm.[7] Reviewing the evidence, the court found that the officer had not done so.[8]

However, the court never reconciled how it could find the necessary affirmative act after it had defined the officer's conduct as nonfeasance. The court also sidestepped the characterization problem inherent in such a distinction. The court could just as easily have defined the officer's actions as misfeasance—the negligent releasing of an intoxicated driver.

The court further stated that a duty to the plaintiff did not arise merely because the plaintiff was a reasonably foreseeable victim.[9] Although the court

2. 157 Cal. App. 3d 100, 203 Cal. Rptr. 541 (1984). A police officer had stopped a driver for speeding. Upon detecting alcohol on the driver's breath and being told by him that he had been drinking, the officer had the driver perform three field sobriety tests. The tests were the finger count, the standing balance, and either the finger-to-nose coordination test or another standing balance test. The driver passed all three tests. The officer also testified that the driver's speech and eyes were clear and normal, that the driver had no difficulty exiting or entering his car, and that he had no difficulty presenting his driver's license. The officer, believing he lacked probable cause to arrest, allowed the driver to continue. Nine minutes later the driver had an accident with the plaintiff. The driver died in the collision and it was subsequently discovered that his blood alcohol level was .17. *Id.* at 102-03, 203 Cal. Rptr. at 542.

The defendant in this suit was an attorney who had taken over the case and subsequently failed to add a cause of action against the state and county for plaintiff's injuries. When the statute of limitations ran, the plaintiff sued her attorney. Thus, the legal malpractice claim depended upon a finding of actionable negligence on the part of the state and county. *Id.* at 103, 203 Cal. Rptr. at 542.

3. *Id.* at 104, 203 Cal. Rptr. at 543.
4. *Id.*
5. *Id.* at 105, 203 Cal. Rptr. at 543.
6. *Id.*
7. *Id.* at 107, 203 Cal. Rptr. at 545.
8. *Id.*
9. *Id.* at 105, 203 Cal. Rptr. at 544.

admitted that foreseeability was one factor in deciding whether a duty is present,[10] the court sua sponte listed several other factors which California courts consider in deciding if a duty is present.[11] After discussing some of those factors[12] and an "all fours" case,[13] the court concluded that the police officer owed no duty to the plaintiff in this situation.[14]

However, when faced with a similar situation, the Supreme Judicial Court of Massachusetts in *Irwin v. Town of Ware*[15] found that a duty to the plaintiff

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10. *Id.* at 107, 203 Cal. Rptr. at 545.

11. *Id.* at 107-08, 203 Cal. Rptr. at 545. The court cited Thompson v. County of Alameda, 27 Cal. 3d 741, 167 Cal. Rptr. 70, 614 P.2d 728 (1980), for the list of factors. That court stated:

> [I]n considering the existence of a 'duty' in a given case several factors require consideration including 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved . . . . "When public agenices are involved, additional elements include the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; . . ."

Id. at 750, 167 Cal. Rptr. at 74-75, 614 P.2d at 732-33 (citations omitted).

12. *Harris*, 157 Cal. App. 3d at 108, 203 Cal. Rptr. at 545-46. The court stated that it believed no grave moral blame could be attached to the officer's conduct and that it could find only a tenuous connection between the officer's conduct and the plaintiff's injuries. It also asserted that the burden of performing an undetermined number of sobriety tests outweighed the benefit of prevention of future harm.

Perhaps most important, the court recognized that the officer had required the driver to pass three field sobriety tests and that the officer had testified that the driver had appeared sober and coherent. The court further implied that there was no serious suggestion of deficiency in the officer's conduct. It would seem that the court was saying that the officer was reasonable as a matter of law.

13. *Id.* at 108-09, 203 Cal. Rptr. at 546. In Jackson v. Clements, 146 Cal. App. 3d 983, 194 Cal. Rptr. 553 (1983), police officers investigated a party involving minors who were imbibing intoxicating beverages. Based on their investigation, the officers allegedly knew that the minors had drunk enough alcohol to become intoxicated and that the minors intended to drive away. The alleged negligence was that the officers did not halt the drinking nor did they prevent the minors from later driving. *Id.* at 985-86, 194 Cal. Rptr. at 553.

The *Harris* court, stating that *Jackson* was on all fours, seems to ignore the fact that the minors in *Jackson* had yet to drive at the time of the police officer's investigation. The possible negligence of the police officer in *Jackson* involved the failure to stop the minors from drinking and to prevent the possible future crime of driving while intoxicated. In *Harris*, the negligence involved the failure to stop a crime from continuing.

14. *Harris*, 157 Cal. App. 3d at 109, 203 Cal. Rptr. at 546.

15. 392 Mass. 745, 467 N.E.2d 1292 (1984). A police officer stopped a motorist for speeding upon leaving a bar. After two police officers talked to the driver, he was released without having undergone any field sobriety tests. Approximately ten minutes later the driver was involved in an accident in which he and two others were

did exist.[16] The town had argued that no duty was owed to the plaintiff under the public duty doctrine.[17] The public duty doctrine states that duties of public officers are normally owed to the general public *only* and thus a breach of that duty cannot support a private cause of action.[18] However, the court in *Irwin* ruled that the doctrine applied only to public inspections.[19]

The court then stated that a duty could be found in these situations if there was a special relationship between the plaintiff and the defendant.[20] The court stated that a prime consideration in finding such a special relationship was whether a defendant could reasonably foresee that he would be expected to take action to protect the plaintiff and could anticipate harm to the plaintiff if he failed to do so.[21] Further, such foreseeability could be based on statutorily imposed duties.[22]

The court next discussed its holdings in *Adamian v. Three Sons, Inc.*,[23] a case where an intoxicated patron was served liquor, and *Michnik-Zilberman v. Gordon's Liquor, Inc.*,[24] a case where packaged liquor was sold to a minor. The court found in those cases that the proprietors could be held liable to

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killed and two other persons were severely injured. *Id.* at 763-64, 467 N.E.2d at 1304-05.

Evidence had been introduced at trial that showed the officers had never illuminated the intoxicated driver's face or eyes. *Id.* at 763, 467 N.E.2d at 1304. A witness also testified that she observed the stop for five minutes and saw the driver swaying and holding on to a car door to steady himself; that there were no field sobriety tests conducted; and that the driver walked back to his car "unsteadily." *Id.*, 467 N.E.2d at 1304-05. Additionally, one of the officers, upon hearing that the driver had been in an accident, slammed his fist against a desk and proclaimed "I told you we should have kept him." *Id.* at 764, 467 N.E.2d at 1035.

16. *Id.* at 762, 467 N.E.2d at 1303-04.

17. The public duty doctrine had been adopted in Dinsky v. Town of Framingham, 386 Mass. 801, 438 N.E.2d 51 (1982), a public inspection case.

18. *Irwin*, 392 Mass. at 754-55, 467 N.E.2d at 1299.

19. *Id.* at 755, 467 N.E.2d at 1300. The Florida Supreme Court recognized in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), that the public duty doctrine, which had been adopted in Modlin v. City of Miami Beach, 201 So. 2d 70 (Fla. 1967), was actually a part of common law sovereign immunity. As such, the court concluded that such a doctrine had been overruled by the Florida sovereign immunity statute. *Commercial Carrier*, 371 So. 2d at 1015. Obviously, the Massachusetts court did not agree with that conclusion.

It is interesting to note that within *Dinsky*, quoted with approval, is a passage from a case which specifically lists the police department as one of the governmental functions falling under the public duty doctrine. *Dinsky*, 386 Mass. at 807, 438 N.E.2d at 54 (quoting Tuffley v. Syracuse, 82 A.D. 2d 110, 114, 442 N.Y.S.2d 326, 329 (1981)).

20. *Irwin*, 392 Mass. at 756, 467 N.E.2d at 1300.

21. *Id.*, 467 N.E.2d at 1300.

22. *Id.*, 467 N.E.2d at 1300.

23. 353 Mass. 498, 233 N.E.2d 18 (1968).

24. 390 Mass. 6, 453 N.E.2d 430 (1983).

third parties for injuries caused by their respective customers.[25] The duty in those cases had been predicated partially on the fact that the harm had been foreseeable and partially on the court's finding that the relevant statutes indicated the legislature's concern for the safety of the general public.[26]

The court found that special relationship with the plaintiffs in the instant case by analogy.[27] By reviewing the Massachusetts statutes detailing the police officer's power with regards to intoxicated drivers[28] and the statutes requiring the police to act,[29] the court found that the legislature had evidenced an intent to protect users of the highway.[30] The court had earlier stated that

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25. *Michnik-Ziberman*, 390 Mass. at 7, 453 N.E.2d at 431; *Adamian*, 353 Mass. at 501, 233 N.E.2d at 20.

26. *Irwin*, 392 Mass. at 757-58, 467 N.E.2d at 1301-02.

27. *Id.* at 758-59, 467 N.E.2d at 1302.

28. *Id.* at 759, 467 N.E.2d at 1302. The court quoted, in part as set out, the following statutes:

> Any officer authorized to make arrests . . . may arrest without warrant any person . . . who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor.

MASS. GEN. LAWS ANN. ch. 90, § 21 (West Supp. 1985).

> Whoever operates a motor vehicle upon any way or in any place to which the public has access . . . shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event he is arrested for operating a motor vehicle under the influence of intoxicating liquor. . . . Such test shall be administered at the direction of a police officer . . . having reasonable grounds to believe that the person arrested has been operating a motor vehicle . . . while under the influence of intoxicating liquor.

MASS. GEN. LAWS ANN. ch. 90, § 24(1)(f) (West Supp. 1985).

> Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station. To determine . . . whether or not such person is intoxicated, the police officer may request to submit to reasonable tests.

MASS. GEN. LAWS ANN. ch. 111B, § 8 (West 1983).

29. *Irwin*, 392 Mass. at 759-60, 467 N.E.2d at 1302. The court cites a statute which makes driving while intoxicated an automobile law violation. MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1985). The court finds a duty to act by citing the statute that requires that the officer issue a record upon a citation for each automobile law violation. MASS. GEN. LAWS ANN. ch. 90C, § 2 (West Supp. 1985).

Further, the court quotes a statute that states that the "[Police officers of all cities and towns] . . . shall suppress and prevent all disturbances and disorder." MASS. GEN. LAWS ANN. ch. 41, § 98 (West 1970).

30. *Irwin*, 392 Mass. at 762, 467 N.E.2d at 1304. The court predicates such a finding of legislative intent on traffic statutes. The premise that the statutes are promulgated to protect the public is unassailable. However, it does not necessarily follow that such an interpretation possesses sufficient strength on which the necessary special relationship can be based and a private cause of action allowed.

The statutes may have only been meant to give the police the power reasonably necessary to enforce the traffic statutes pertaining to driving while intoxicated. The fact that the police may not use their statutory powers does not mean that such a failure gives rise to a cause of action which runs to the individual plaintiff. Rather,

where the risk created by the negligence of a police officer is of immediate and foreseeable physical injury to persons who cannot reasonably protect themselves, then a duty of care should be found.[31] After convincing itself that other cases and courts agreed with its conclusions[32] and dismissing the town's policy arguments,[33] the court found a duty of care owed to the plaintiffs.[34]

The court in *Irwin* also had to decide whether the Massachusetts Tort Claim Act[35] allowed an action against public employers for the negligence

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such neglect may only warrant the officer's dismissal on a charge of dereliction of duty. *See infra* notes 139-41 and corresponding text.

Moreover, the court does not put any limitation on such finding of legislative intent within statutes. It is conceivable that whenever a police officer acts unreasonably and an unknown plaintiff is injured, the court will be able to base the necessary special relationship on an applicable statute within the state penal code. Compared with the traffic statutes which were meant to protect the offender and the public, the penal code was enacted with a much stronger, more narrow intent on the part of the legislature to protect the public.

31. *Irwin*, 392 Mass. at 756, 467 N.E.2d at 1300.

32. *Id.* at 757-62, 467 N.E.2d at 1302-03. The court string cited cases for the proposition that liability can arise soley from a violation of an affirmative duty to act with reasonable care to prevent harm to another caused by a third person. The cases cited, however, contain additional relationships either between the plaintiff and the defendant (businessperson/customer, common carrier/passenger) or between the person actually injuring the plaintiff and the defendant (parent/child, employer/employee, doctor/patient).

The court also cited a string of cases for the proposition that such a duty to prevent harm to a third person has been recognized for public employees as well. The Florida cases of *Commercial Carrier* and *Huhn* are found within this group.

33. *Irwin*, 392 Mass. at 762-63, 467 N.E.2d at 1304. The town had raised the possibility of economic hardship due to such claims. The court stated that the legislature, by enacting the tort liability statute, had decided to put the public funds at risk. The court was further persuaded in its conclusion by noting that the legislature had limited such claims to a $100,000 maximum.

The town had also argued that the task of determining whether any driver is intoxicated is inherently difficult. The town asserted that holding the town liable in these situations would either cause the police to arrest whenever they suspected intoxication, or else cause the police to avoid stopping doubtful cases for fear of suit by those arrested but not intoxicated.

The court stated that those arguments were at best speculative and simply not relevant to the issue of duty. By dismissing them as such, the court seems to implicitly accept the idea that the decision to stop and then the decision to arrest are within the realm of police judgment and discretion. For whatever reasons, the court did not address these policy arguments when deciding whether the police's actions were exempt as a discretionary act.

34. *Irwin*, 392 Mass. at 764, 467 N.E.2d at 1303-04.

35. MASS. GEN. LAWS ANN. ch. 258, § 2 (West 1978). The relevant part of the act states:

> Public employers shall be liable for injury or loss of property or personal

of their officers. The act imposes liability upon governmental entities for the negligence or wrongful acts of public employees acting within the scope of their employment. However, the statute exempts from liability any act based on the performance of a discretionary function or duty by a public employee.[36] Therefore, the court stated that it first had to determine whether the police officer's actions were of a discretionary nature.[37]

The court in an earlier decision had described discretionary acts as "those characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning."[38] Such acts were exempt from liability. Those acts which involved carrying out established policies and plans were not discretionary and therefore, not exempt. Applying this standard, the court found that no reasonable basis existed for arguing that the police officer was making policy.[39] The police officer's job was to carry out that policy established by the legislature through the state's statutes.[40] As such, if the plaintiff could prove the elements of negligence, the Massachusetts statute would permit recovery against the town.

Most recently, the Florida Supreme Court was faced with two directly conflicting decisions by two of the state's district courts of appeal. The Second District, in *Everton v. Willard*,[41] had dismissed such a cause of action based

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injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances. . . .

36. MASS. GEN. LAWS ANN. ch. 258, § 10 (West Supp. 1985) states, in it relevant part:

The provisions of sections one to eight, inclusive, shall not apply to: . . . (b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused; . . .

37. *Irwin*, 392 Mass. at 752, 467 N.E.2d at 1298.

38. *Id.* at 753, 467 N.E.2d at 1298 (quotation omitted). This definition is quite similar to the test adopted by the Florida Supreme Court in *Commercial Carrier*, 371 So. 2d at 1022. It is interesting to note that the Florida court based its decision on the separation of powers doctrine while the Massachusetts court relied on the statutorily mandated exception. Comparing the two, it seems possible that the definition, as adopted by the Massachusetts court, could be too restrictive. The adopted language would likewise seem to be dictated by the Massachusetts separation of powers doctrine. *See* MASS. CONST. Pt. 1, art. 30. This definition may have rendered legislative language superfluous unless the legislature had intended only to acknowledge the doctrine in the statute.

39. *Irwin*, 392 Mass at 753, 467 N.E.2d at 1299.

40. *Id.*

41. 426 So. 2d 996 (Fla. Dist. Ct. App. 1983). The complaint in *Everton* alleged

upon its reading of the Florida sovereign immunity statute as interpreted by the Florida Supreme Court in *Commercial Carrier Corp. v. Indian River County*.[42] In a later decision, *Huhn v. Dixie Insurance Company*,[43] the Fifth District had allowed such a suit after rejecting the *Everton* reading of the statutes and the case law. The issue in Florida revolved soley around whether their concept of sovereign immunity would protect the governmental entities from this type of suit.

In *Huhn* and *Everton*, both courts of appeal were called upon to apply the Florida sovereign immunity statute[44] as interpreted in *Commercial Carrier*. The petitioner in *Commercial Carrier* had noted that the Florida statute did not exclude discretionary acts from being the basis of liability.[45] Pointing out that the Federal Tort Claims Act[46] has such a provision[47] and that it had

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that 10 to 20 minutes after the alleged drunken driver was stopped by a county deputy for making an illegal U-turn, he collided with a car in which the plaintiff was a passenger, causing serious injury. Although the deputy allegedly knew by observation, and by the driver's admissions, that he had been drinking, the deputy allowed him to continue. *Id.* at 998.

42. 371 So. 2d 1010 (Fla. 1979).

43. 453 So. 2d 70 (Fla. Ct. Dist. App. 1984). The facts as pleaded stated that Laura Huhn had been struck and severely injured by a car driven by Timmy Lynn Collins while he was under the influence of alcohol. Shortly before the accident, Collins had been stopped by a City of Daytona Beach police officer who observed Collins' intoxicated state but did not detain, arrest, or otherwise prevent him from operating his automobile. *Id.* at 71.

44. The Florida sovereign immunity statute is found at FLA. STAT. § 768.28 (1981) and, in its relevant part, states:

> [T]he state . . . hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state. . . .

45. *Commercial Carrier*, 371 So. 2d at 1017.

46. 28 U.S.C. § 2674 (1975). In its relevant part, it states: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . ."

47. The exemption for discretionary acts is found in 28 U.S.C. § 2680 (1975), which states:

> The provisions of this chapter and section 1346(b) of this title shall not apply to-(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .

been the model for the Florida statute,[48] the plaintiff argued that the Florida legislature did not intend that discretionary acts be immune.[49] The Florida Supreme Court, after surveying how other courts had dealt with the identical problem,[50] stated that they were convinced that "certain policy-making, planning, or judgmental government functions"[51] could not be subject to traditional tort liability.

The court's concern in holding governmental bodies liable for discretionary acts went to the obstruction of normal governmental operations.[52] The court expressed its belief that judicial incursions would necessarily bring into question the decisions by those bodies.[53] The court was worried that this would be violative of the separation of powers doctrine. In essence, the court was worried about judge and jury substituting their judgment for the judgment of those who had the legitimate right to make such decisions.[54] If such liability were indeed imposed, a chilling effect on the government's decision-making processes was foreseen due to the breaking of the pattern of constitutionally and statutorily imposed separation.[55]

In order to exempt such functions, the court adopted the operational/planning test[56] as expressed by the California case of *Johnson v. State*.[57] Under that test, any decisions or acts dealing with basic policy decisions were to be immune.[58] Decisions or acts which carry out or implement that policy were operational and subject to tort liability.[59]

The court also directed the courts to use the four question test developed in *Evangelical United Brethren Church v. State*[60] as a "useful tool for analysis."[61] Those four questions are as follows:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the

48. *Commercial Carrier*, 371 So. 2d at 1017.
49. *Id.*
50. *See* Weiss v. Fote, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960); Harris v. State, 48 Ohio Misc. 27, 358 N.E.2d 639 (Ct. Cl. 1976); Evangelical United Brethren Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965) (en banc).
51. *Commercial Carrier*, 371 So. 2d at 1020.
52. *Id.* at 1018.
53. *Id.* at 1019 (quotation omitted).
54. *Id.*
55. *Id.* at 1020.
56. *Id.* at 1022.
57. 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968).
58. *Commercial Carrier*, 371 So. 2d at 1021.
59. *Id.*
60. 67 Wash. 2d 246, 407 P.2d 440 (1965).
61. *Commercial Carrier*, 371 So. 2d at 1022.

act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?[62]

In deciding *Everton*, the Second District Court of Appeals looked to how the supreme court had applied the *Commercial Carrier* standard.[63] In a later case, the supreme court had quoted *Commercial Carrier*, emphasizing that "there must be room for basic governmental policy decisions and implementation thereof."[64] The court of appeal then expressed the belief that too much emphasis had been placed on one sentence of *Commercial Carrier* that had declared the act in that case to be operational.[65] While admitting that the police's actions were operational,[66] the court believed that merely because an activity was operational did not mean that it did not fall within the implementation of governmental policy exception.[67] The court concluded the supreme court had not imposed an absolute operation test in *Commercial Carrier*.[68]

Stating that the case was a "square peg"[69] that fit neither the operational/planning nor discretionary/nondiscretionary categories, the court applied the *Evangelical* four-question test. Answering all four questions in the affirmative,[70] the court determined that the proper planning and implemen-

62. *Id.* at 1019 (quoting *Evangelical United Brethren Church*, 67 Wash. 2d at 255, 407 P.2d at 445).

63. *Everton*, 426 So. 2d at 1000-01 (discussing Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982)).

64. *Neilson*, 419 So. 2d at 1075 (quotations omitted).

65. *Everton*, 426 So. 2d at 1001. The court was referring to the last sentence in the following passage: "Recurring, then, to the instant cases. It is apparent that the maintenance of a traffic signal light which is in place does not fall within that category of governmental activity which involves broad policy or planning decisions. *This is operational level activity.*" *Id.* at 1001 (quoting *Commercial Carrier*, 371 So. 2d at 1022) (footnote omitted) (emphasis added).

66. *Everton*, 426 So. 2d at 1001.

67. *Id.*

68. *Id.* at 1003.

69. *Id.*

70. *Id.* The court supplied the following answers to the *Evangelical* test: (1) Yes, that program being a reasonable system of law enforcement. (2) Yes, because we believe that to remove discretion from the operational level of law enforcement would make a radical change in the ability to maintain a reasonable, workable system of law enforcement. (3) Yes, because probably nowhere else is evaluation, judgment, or expertise so immediately necessary as it may affect citizens' basic rights as with the law enforcement officer in the field. (4) Yes, again because if discretion were removed, law enforcement would necessarily undergo radical and unknown changes.

Id.

tation of a viable system of law enforcement must include the use of the officer's discretion.[71]

The court found the deputy's action to be immune because it concluded there was a basic governmental need to maintain a reasonable and adequate system of law enforcement.[72] The court believed that in order to meet that need the use of the officer's discretion while in the field was "essential,"[73] even though a system of law enforcement would necessarily consist of operational activities.[74] The concern that a radical change would result if such discretion was removed was expressed throughout the opinion[75] and formed the basis for answers the court gave to the *Evangelical* four-prong test.[76]

The *Everton* court next recommended a close reading of the Florida law concerning judicial and prosecutorial immunity under the Florida act.[77] The court concluded that it would not be fair to allow judges and prosecutors, acting deliberately "in the cool light of day,"[78] to remain immune, while imposing liability on the field officer under the pressures of the moment.[79]

In reaching the opposite conclusion in *Huhn*, the Fifth District Court of Appeal, after reviewing the history of sovereign immunity in Florida, emphasized the operational/planning test in *Commercial Carrier*. The court quoted the supreme court's conclusion that "certain policy-making, planning

71. *Id.*
72. *Id.* at 1001.
73. *Id.*
74. *Id.*
75. *Everton*, 426 So. 2d at 1002-03. The court quoted and discussed two articles detailing the use of and the need for discretion on the part of police officers. Besides discussing Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Adminstration of Justice,* 69 YALE L.J. 543 (1960), the court quoted extensively from a book entitled Arrest: The Decision to Take a Suspect Into Custody, by Professor Wayne R. LaFave. The book discusses the need to take into account the individual circumstances of the individual offender, whose characteristics complicate administration by mere application of the rules. LaFave quoted Justice Charles D. Breitel, who has stressed that: "[i]f every policeman . . . performed his . . . responsibilities in strict accordance with the rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable." W. LAFAVE, ARREST: THE DECISION NOT TO TAKE A SUSPECT INTO CUSTODY 72 (1965) (quoting Breitel, *Controls in Criminal Enforcement*, 27 U. CHI. L. REV. 427 (1960)). The LaFave article recognized that arrest discretion was not widely accepted due to the belief that circumstances should mitigate the punishment, not completely exonerate. Courts that did recognize the need for an officer's discretion often did so on the grounds that individual circumstances could make even arrest excessive. Therefore, discretion is believed to be needed at the early stages as well as the subsequent stages. W. LAFAVE, *supra*, at 69-70, 71-72.
76. *See supra* note 69 and accompanying text.
77. *Everton,* 426 So. 2d at 1003; *see* Berry v. State, 400 So. 2d 80 (Fla. Dist. Ct. App. 1981).
78. *Everton*, 426 So. 2d at 1003.
79. *Id.*

or judgmental governmental functions"[80] could not be subject to tort liability. The court, although listing the four questions that constitute the *Evangelical* test,[81] did not attempt to apply the test. Instead, after reviewing and rejecting *Everton* and its progeny,[82] the court read *Commercial Carrier* to hold that immunity would only be a protection in cases where the political subdivision exercises "'discretionary' *governmental* functions. . . ."[83] The court stated that only those functions "undertaken by the coordinate branches of government that impact on the free exercise of the operation of government"[84] would be afforded protection from tort liability. The court concluded that the officer was not exercising a discretionary governmental function in allowing a "visibly" intoxicated driver to continue to operate an automobile and thus reversed the trial court.[85]

In comparing the two decisions, the Fifth District Court of Appeal seems to be more in line with the supreme court's reasoning in *Commercial Carrier*. In *Huhn*, the court recognizes the separation of powers argument with its "coordinate branches"[86] language and the potential chilling effect with its "free exercise"[87] language. However, the Second District Court of Appeal in *Everton* asked the fundamental question—how can a government maintain a reasonable and adequate system of law enforcement if discretion is removed from the field? Believing that the goal could not be met with such a restriction, the court declined to hold the government liable on what appears to be a sound policy argument. Thus, the stage was set for the Florida Supreme Court.

On April 4, 1985, the Florida Supreme Court attempted to clear up the confusion surrounding *Commercial Carrier* and, by doing so, to decide whether *Huhn* or *Everton* was correct. The court, in *Trianon Park Condominium Association v. City of Hialeah*,[88] sought to clarify the Florida concept of sovereign immunity.

In *Trianon Park*, a condominium association had sued a city for its negligent inspection and certification of the units that its members had purchased.[89] Although plaintiff prevailed, it petitioned the court for review of

80. *Huhn*, 453 So. 2d at 73 (quoting *Commercial Carrier*, 371 So. 2d at 1020).
81. *Id.* at 74.
82. *Id.* at 74-75.
83. *Id.* at 75.
84. *Id.*
85. *Id.* at 75-77. It is interesting to note that the court, throughout its opinion, constantly uses such descriptive words as "visibly," "unquestionably," and "apparent" to describe the alleged drunken state of the driver. Although the court is merely echoing the adjectives alleged in the complaint, this cause of action would not seem to be limited to just those situations.
86. *Id.* at 75.
87. *Id.*
88. 468 So. 2d 912 (Fla. 1985).
89. *Id.* at 915.

a question that had been certified by the district court of appeal.[90] The Florida Supreme Court reversed,[91] stating that there was no common law duty that ran to citizens for the enforcement of "police power functions" and that to allow liability in these situations was a result never intended by the legislature or the city.[92] The court also expressed a concern that the government would be acting as an insuror.[93] In reaching its decision, the Florida Supreme Court appeared to overrule *Commercial Carrier* sub silentio despite protestations to the contrary.

In its opinion, the court first set out what it considered the basic principles in this field. Among those are the principles that legislative enactments do not automatically create duties of care to either individuals or specific classes[94] and that no duty exists to enforce the law for the benefit of an individual or specified group.[95] The court also reaffirmed the concepts upon which *Commercial Carrier* was based—that the constitutional separation of powers doctrine forbids certain suits which would allow the judiciary to substitute its judgment for the judgment of those in the legislative or executive branches and that certain discretionary functions, by their very nature, are inherent in the act of governing and are immune.[96]

Most significantly, the court read the sovereign immunity statute to mean that only the existing duties of private individuals would now apply to governmental entities[97] unless there exists a statutory duty. However, this idea had been argued to the court in *Commercial Carrier* and rejected.[98] Further, this argument has been widely rejected and discredited in many states as well as the federal system.[99]

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90. *Id.* The question certified was

> [W]hether under section 768.28, Florida Statutes (1975), as construed in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), a municipality retains its sovereign immunity from a suit predicating liability solely upon the allegedly negligent inspection of a building, where that municipality played no part in the actual construction of the building.

Id. at 914.

The supreme court restated the question, foreshadowing the eventual outcome, as

> [w]hether a governmental entity may be liable in tort to individual property owners for the negligent actions of its building inspectors in enforcing provisions of a building code enacted pursuant to the police powers vested in that governmental entity.

Id.

91. *Id.*

92. *Id.* at 915.

93. *Id.* In his dissent, Justice Ehrlich stated that this is simply not true because fault must still be proven. *Id.* at 925.

94. *Id.* at 917.

95. *Id.* at 918.

96. *Id.*

97. *Id.* at 917.

98. *Commercial Carrier*, 371 So. 2d at 1016-17.

99. *See, e.g.*, Indiana Towing Co. v. United States, 350 U.S. 61 (1955).

In order to further clarify the Florida concept of sovereign immunity, the court then categorized government functions and activities into four categories. The court looked at each cateory to decide whether liability could arise.

The first category the court delineated was labeled legislative, permitting, licensing, and executive officer functions.[100] This category was based squarely on the separation of powers concept and thus is wholly consistent with the ideas behind the planning exemption found within *Commercial Carrier*. Absent the violation of a constitutional or statutory provision, there seems to be little doubt that the judicial branch cannot hear certain cases which call into question the basic decisions of its sister branches.

The second category is the enforcement of laws and the protection of public safety.[101] The court stated that enforcing compliance with laws is a discretionary power within the act of governing and that no common law duty of care existed.[102] The court stated that such power was reflected in judges, prosecutors, arresting officers, law enforcement agencies, and inspectors of all types.[103] The court believed that such a "discretionary function exception" was recognized in the Federal Tort Claims Act and had been recognized as inherent by many states.[104] The court did, however, allow that actions based upon motor vehicle operations and handling of firearms were maintainable.[105]

The court said that its third category, functions, capital improvements, and property control,[106] could give rise to liability in some instances. Although the court reaffirmed that the decision to build, modernize, or expand was a discretionary decision and therefore immune,[107] the court did recognize that maintenance and control issues could give rise to liability just "as a private person" would be liable.[108]

The last, catch-all category, providing professional, educational, and general services,[109] can also give rise to liability. They "are performed by private persons as well as governmental entities" and therefore common law duties do exist.[110] It is to the third and fourth categories that the court directed the *Evangelical* test be applied.[111]

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100. *Trianon Park*, 468 So. 2d at 919.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 919-20.
105. *Id.* at 920. This exception again points to the acceptance of the argument that the statute only addressed duties common with the general public. *See supra* notes 96-98 and accompanying text.
106. *Trianon Park*, 468 So. 2d at 920.
107. *Id.*
108. *Id.* at 921.
109. *Id.*
110. *Id.*
111. *Id.*

Given its categories in *Trianon Part, Everton* and *Huhn* were easy cases for the court. *Everton* was affirmed in less than three pages;[112] *Huhn* was reversed in a paragraph.[113]

As might be expected, the dissents in all three cases were consistent and severe. Charges of retrenching the governmental/proprietary distinction,[114] embracing the dissent in *Commercial Carrier*,[115] and that this was a return to the statutorily overruled public duty doctrine[116] as expressed in *Modlin* were leveled by Justice Ehrlich in his *Trianon Park* dissent.[117] In his *Everton* dissent, Justice Ehrlich agreed fully with the *Huhn* decision.[118]

However, it is within the dissents of Justice Shaw that the correct approaches to the issues are outlined. His dissent in *Trianon Park* pointed out that the majority is continually confusing the question of duty with the question of sovereign immunity.[119] Such being the case, he limited himself to the question of duty in his *Trianon Park* dissent. He agreed with Justice Ehrlich and the public duty doctrine as expressed in *Modlin*.[120] Nonetheless, Justice Shaw thought that if *Modlin* was again viable, a special duty existed in this instance due to the government's and the police officer's actions.[121] Regardless of the approach used, Justice Shaw concluded that the city had a duty to use reasonable care with respect to the plaintiff.

Within his *Everton* dissent, Justice Shaw addresses the question of sovereign immunity. After discussing two errors of the district court of appeal,[122] Justice Shaw argued his belief that "government entities are not sovereignly immune from suit on discretionary, planning, or police power activities."[123]

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111. *Id.*

112. Everton v. Willard, 468 So. 2d 936 (Fla. 1985). The body of the opinion spans pages 937-39.

113. City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1985). The court, relying on *Everton II*, reversed and remanded in two sentences.

114. *Trianon Park*, 468 So. 2d at 924.

115. *Id.*

116. *Id.* at 926.

117. *Id.* at 923-26.

118. *Everton,* 468 So. 2d at 940.

119. *Trianon Park*, 468 So. 2d at 926.

120. *Id.* at 927-28.

121. *Id.* at 928.

122. *Everton*, 468 So. 2d at 940. The first error dealt with the district court of appeal's dismissal of the action against the police officer due to § 768.28(a)(9) of the Florida Statutes. That statute protects officers from liability absent some form of intent or bad faith. Justice Shaw pointed out that the statute had been passed after the incident now in question and that retroactive effect had been denied the statute in Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982).

The second error concerned the practice of treating all allegations found within a petition as being true for purposes of a motion challenging its statement of a cause of action. Justice Shaw did not believe the court had done so.

123. *Trianon Park*, 468 So. 2d at 926.

He first explained his belief that the majority had expanded sovereign immunity protection beyond its pre-statute scope with its "police power" language and thus had the effect of overruling the statute.[124] He next outlined exactly what *Commercial Carrier* had decided. He pointed out that the court in that case had rejected the governmental/proprietary distinction and the general/special duty argument.[125] Quoting from *Commercial Carrier*, he showed that the *Johnson* planning/operational exemption to the waiver had been predicated on the concern over the possible violation of constitutionally mandated separation of powers.[126] In Shaw's view, this was the court's "only defensible ground in Florida for creating a discretionary exception"[127] as it was not within the court's "authority to override the constitutional and statutory provisions authorizing access to the courts"[128] and that it was not the court's function to safeguard the public purse.[129]

Having said this, Shaw went back to the basics to try to clear the confusion. Among other Florida constitutional provisions, he set out Article X, section 13 which states that "[p]rovision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating."[130]

He also quoted Article II, section 3 which provides: "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches *unless expressly provided herein.*"[131]

Relying on those two provisions along with others set out in his dissent,[132] Justice Shaw read them as a mandate to hear tort cases against the state.[133] He reasoned that by enacting the sovereign immunity statute, the Florida legislature had exercised its powers under Article X, section 13 and thus the courts, which are the exclusive holders of the judicial power, must hear the

124. *Everton*, 468 So. 2d at 942-43.
125. *Id.* at 943.
126. *Id.* at 944 (quotations omitted).
127. *Id.* at 946.
128. *Id.*
129. *Id.*
130. *Id.* (quoting FLA. CONST. art. X, § 13).
131. *Id.* (quoting FLA. CONST. art. II, § 3) (emphasis added by Shaw, J., dissenting).
132. Justice Shaw also set out article V, section 1, which provides: "The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision, or any municipality . . . ." FLA. CONST. art. V, § 1.
Article I, section 21 was also quoted. It states that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administrated without sale, denial, or delay." FLA. CONST. art. I, § 21.
133. *Everton*, 468 So. 2d at 946.

case.[134] He further argued that even if the separation of powers argument is valid,[135] the Article II, section 3 exception emphasized above has been met by the Article X, section 13 allowance for "suits against the state."[136] He concluded that the *Commercial Carrier* exception can only be applied to "non-justiciable political questions."[137]

Justice Shaw appears to want to decide questions of tort liability as if the suit had been brought against an individual. He rejected the planning/operational distinction, stating that as long as a tort can be proven, it should not matter whether it was the result of a "plan."[138] While one may be hard pressed to find at present an example of a situation in which the legislative or executive branch has "planned" or will "plan" a tort, the fact that the majority of questions arising in tort are for a jury leaves too much room for second guessing the government's branches. For example, the question of what is reasonable in a negligence suit would be extremely troublesome. The jury would be, in effect, playing legislature or executive when it determines how they should have acted in deciding a factual issue. The separation of powers doctrine acts as a constitutional barrier to such litigation and is not subject to the dangers caused by a sympathetic plaintiff.

Given that the separation of powers doctrine still has a place in determining sovereign immunity, Justice Shaw's assertion that in such a case the exception of Article II, section 3 applies is incorrect. He has bootstrapped to reach that exception. The above-emphasized exception, "unless expressly provided herein," would seem to apply only to the exceptions found within the constitution itself, not statutes passed by the legislature at a later date. If one accepts his reading of the Florida Constitution, the legislature and the governor could then control the extent to which separation of powers will be followed in Florida. Using Shaw's view, laws could be passed allowing suits against any of the three branches on any of their decisions, no matter how fundamental. After such passage, nothing encompassed in the statute would be a non-justiciable political question as that doctrine, grounded in the separation of powers doctrine, has been modified via that exception. Further, such a reading would have the effect of bypassing the amendment mechanism found in the Florida Constitution. His reliance on Article I, section 21 is also not well founded. Although the section seemingly allows for any suit, in practice it does not have that effect. Access to courts is always controlled by statutes of limitations, procedural requirements, and other devices. It would appear that Justice Shaw has read the constitution too broadly.

134. *Id.* It is here Justice Shaw cites article I, section 21. *See supra* note 131.
135. *Everton*, 468 So. 2d at 946.
136. *Id.*
137. *Id.*
138. *Trianon Park*, 468 So. 2d at 928 n.4. (Shaw, J., dissenting).

The best way to approach this problem would have been to point to Article X, section 13 and the legislature's use of this exclusive power as found in section 768.28(1) of the Florida Statutes. Then relying on Article II, section 3, the supreme court should have carved out an exception based on the mandated separation of powers doctrine since the exception of that section had not been met. In essence, the supreme court should have reaffirmed *Commercial Carrier* and underscored the reasoning behind it. Then, much like the Supreme Judicial Court of Massachusetts declared in *Irwin*, the court could have stated that such a suit did not bring into question the separation of powers doctrine as no reasonable grounds existed for arguing that the police officer was making policy. The suit could have then been remanded for a decision on the merits.

It is the height of irony that the separation of powers doctrine, the original basis for *Commercial Carrier*, is now being violated by the Florida Supreme Court in deciding which governmental decisions can give rise to liability. That good public policies surround the majority's decision in *Trianon*, *Everton II*, and *Huhn II* cannot be doubted. However, without an exemption such as found in the Federal Tort Claims Act, those arguments should be irrelevant to a court. The floor of the legislature is the place to make such arguments, not the courtroom.

The availability of such a cause of action in Missouri will depend, of course, upon the plaintiff establishing actionable negligence. As defined in Missouri, a plaintiff must prove three elements: (1) there must be a duty on the part of the defendant to protect plaintiff from the injury of which he complains; (2) the defendant must fail to perform that duty; and (3) the injury must proximately result from such failure.[139] In proving and recovering for negligence in this type of situation, the plaintiff would face two substantial barriers—proving a sufficient duty and avoiding the defense of sovereign immunity.

The Missouri Supreme Court in *Parker v. Sherman*[140] adopted the public duty doctrine. In *Parker*, a sheriff was sued by a taxpayer for failing to prohibit the operation of games of chance to the detriment of the community's morals and the plaintiff's investments.[141] The court stated:

> Sheriffs should and must enforce the criminal laws of this State. If they fail to do so they can be removed from office. . . . However, this Court cannot recognize a civil cause of action to cover a sheriff's failure . . . when [the statute] does not so provide . . . chaos would result.[142]

Recently, in *Berger v. City of University City*,[143] the present viability of the public duty doctrine was tested. The Bergers had alleged that University

139. Dix v. Motor Mkt., 540 S.W.2d 927, 932 (Mo. Ct. App. 1976).
140. 456 S.W.2d 577 (Mo. 1970).
141. *Id.* at 578.
142. *Id.* at 580.
143. 676 S.W.2d 39 (Mo. Ct. App. 1984).

City firefighters, who were striking illegally, had prevented firefighters from surrounding municipalities from dousing a fire on their property. The plaintiffs were suing numerous city officials and the municipality for failing to enforce city ordinances and to provide police protection even though it was specifically requested.[144] The trial court had based its dismissal of the petition on the public duty doctrine.[145]

The Eastern District Court of Appeals stated that in Missouri public officers are not liable to particular individuals for injuries resulting from breach by the officers of a duty owed to the general public.[146] Such duties, the court stated, are not present between the particular individual and the public officer.[147] The court did take notice that some jurisdictions have adopted a special duty exception when there exist certain characteristics between the police and the individual.[148] However, the court recognized that such an exception had not been adopted in Missouri,[149] and therefore affirmed the trial court's decision as to the public officials and the municipality.[150] Applying this analysis to the situation at question here, it would appear that the plaintiff would be unable to prove a duty.

However, should a court find an enforceable duty, it would then have to apply the Missouri concept of sovereign immunity. In Missouri the common law doctrine of sovereign immunity still exists in large part. The basic rule remains that the state, its agencies, and subdivisions cannot be sued for negligence.[151] The Missouri legislature has, however, abrogated the doctrine to some extent.[152]

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144. *Id.* at 40-41.
145. *Id.* at 41.
146. *Id.*
147. *Id.*
148. *Id.* The court listed four elements needed for proving such a special duty:

> (1) the municipality is uniquely aware of the particular danger or risk to which the plaintiff is exposed; (2) there are allegations of specific acts or omissions on the part of the municipality; (3) the acts or omissions are either affirmative or willful in nature; and (4) the injury occurs while plaintiff is under the direct and immediate control of employees or agents of the municipality.

Id. (citation omitted).
149. *Id.*
150. *Id.* at 42.
151. O'Dell v. School Dist. of Independence, 521 S.W.2d 403 (Mo. 1975) (en banc).
152. The Missouri legislature has codified the common law in Mo. REV. STAT. § 537.600 (1978), which states, in part:

> Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby

Only one such exception to the general rule would be applicable in such cases. The legislature has enacted a statute which provides:

> [S]overeign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.[153]

Such insurance is not mandatory.[154] Therefore, not only must the state or its subdivision have procurred insurance, the plaintiff's claim must be covered by the policy. Further, even if it is covered, the legislature has set limits as to what can be recovered—$100,000 for any one person in a single occurrence, and $800,000 for all claims arising out of a single occurrence.[155] Thus, given Missouri common law and its statutes concerning sovereign immunity, this type of cause of action would be severely limited if brought against the state or its subdivisions.

If the injured party sued a municipal corporation, the court would have to apply a different rule. Missouri still adheres to the governmental/proprietary distinction when deciding whether the defense of sovereign immunity affords protection to a municipal corporation.[156] The court decides if the function that gave rise to the claim was a governmental function or a proprietary one by looking at the character of the act performed.[157] A governmental function has been defined as a function that is performed for the good of all.[158] If the act is a governmental function, then no liability will

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expressly waived in the following instances: (1) Injuries directly resulting from the negligent acts or omissions by public employees arising out of operation of motor vehicles or motorized vehicles within the course of their employment; (2) Injuries caused by the condition of a public entity's property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

153. Mo. REV. STAT. § 537.610.1 (1978).

154. *Id.* "[T]he governing body of each political subdivision . . . *may* purchase liability insurance . . . ." *Id.* (emphasis added).

155. Mo. REV. STAT. § 537.610.2 (1978).

156. Davis v. City of St. Louis, 612 S.W.2d 812 (Mo. Ct. App. 1981).

157. Jones v. State Highway Comm'n, 557 S.W.2d 225, 229 (Mo. 1977) (en banc).

158. *Davis*, 612 S.W.2d at 814.

attach from any injury that might have resulted.[159] However, if the act is a proprietary act, then the municipal corporation can be held liable.[160] A proprietary function is one that is performed for the profit or special benefit of the municipal corporation.[161]

In Missouri, it appears clear that the operation and maintenance of a police force is a governmental function.[162] However, the legislature has again provided for some limited relief in these situations. Section 71.185 of the Missouri Revised Statutes provides that a municipality may carry liability insurance to cover such governmental functions and may be held liable to the extent of the insurance provisions.[163]

Thus, it would appear that this type of cause of action against any political division in Missouri will be difficult, if not impossible, to bring and limited in recovery without some redefining and overruling by the judiciary and some legislative amending.

Although a new and relatively narrow new cause of action, this type of action does represent a new and difficult incursion into the area of governmental tort liability. Presenting issues that depend on each state's law, many different responses to such suits are likely to be seen. Those states where common law sovereign immunity still exists are likely to dismiss them easily. Those courts faced with a statute waiving immunity but without a discretionary exception must be careful not to legislate. Those courts in states which have waived the old immunities yet exempt discretionary actions will have the most difficult job. Such courts will be able to dismiss the petition due to a lack of duty. However, such a dismissal may be inconsistent with the legislature's intent when it enacted the statute. Further complicating the court's decision is the presence of the exception. The court will have to decide if the exemption means something more than a codification of the separation of powers doctrine. If it does, the court must decide if policy officers' field decisions are of a sufficently discretionary nature as to be immune from liability. Without a doubt, the policies argued by the town in *Irwin* and accepted by the Florida Supreme Court become extremely important.

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159. *Id.*
160. *Id.*
161. *Id.*
162. Carmelo v. Miller, 569 S.W.2d 365, 368 (Mo. Ct. App. 1978).
163. Mo. REV. STAT. § 71.185 (1978) provides:

> Any municipality engaged in the exercise of governmental functions may carry liability insurance . . . to insure such municipality and their employees against claims or causes of action for property damages or personal injuries, including death, caused while in the exercise of the governmental functions, and shall be liable as in other cases of torts for property damage and personal injuries including death suffered by third persons while the municipality is engaged in the excercise of the governmental functions to the extent of the insurance so carried.

Other questions will arise if liability is imposed. Should a police officer be treated as a professional, subject to a professional's standard of care? If so and the legislature does not protect the officer from personal liability, what does this portend for the future of policeman malpractice insurance and its costs to a historically poorly paid occupation especially in light of today's current government insurance availability crisis? Further, if it can be asked whether a reasonable police officer would have released a driver, can it now be asked whether a reasonable police officer would have stopped that car or taken heed of that tip? Where will the line be drawn?

This new cause of action raises all these questions and more. Although the courts have yet to address most of them, the answers already given have been conflicting. With this new door open, it will be interesting to see how far courts will be willing to hold governmental bodies liable for the injuries of third parties which police could, but did not, prevent.

DARRYL W. HOWARD