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Holsten v. Massey: The Coexistence of the Public Duty Doctrine and the Governmental Tort Claims and Insurance Reform Act

Stephanie M. Bonnett
West Virginia University College of Law

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HOLSTEN v. MASSEY: THE COEXISTENCE OF THE PUBLIC DUTY DOCTRINE AND THE GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACT

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I. INTRODUCTION

"[I]t is better that an individual should sustain an injury than the public should suffer an inconvenience."1

The notion that public entities and their employees should be insulated from tort liability in specific instances is certainly not a controversial theory. Common sense tells us that if public entities and their agents were openly exposed to litigation, political subdivisions would face enormous burdens, economically, socially, and politically. These entities would have difficulty sustaining themselves

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when faced with the possibility of litigation every time a member of the public had a grievance. But in some jurisdictions, common sense is ignored when a human life is lost, whatever the role of the public entity or its agents. Consider the case where a woman is killed in an automobile accident by a drunk driver, a repeat offender who was not only a notorious drunk, but had been involved in another fatal accident only four months prior.\(^2\) The investigating officer of the first accident did not incarcerate the driver or revoke his driver's license. When faced with these facts, a clear majority of courts would not impose liability on the police officer, the police department or the municipality for failure to restrain or incarcerate the drunk driver.\(^3\) On July 16, 1997, in Holsten v. Massey, the West Virginia Supreme Court of Appeals joined the majority of courts and insulated the County Commission, the deputy sheriff, and the sheriff's department from a negligence cause of action involving a fatal drunk driving accident.\(^4\)

The main discussion in Holsten, however, did not revolve around the tragic facts of the case. Instead, the court discussed the essence of the common law public duty doctrine, its special relationship exception, the Governmental Tort Claims and Insurance Reform Act\(^5\) and how these common law and statutory authorities can survive together.\(^6\) The opinion provides a history of the public duty doctrine in West Virginia and the subsequent emergence of the Governmental Tort Claims and Insurance Reform Act.\(^7\) It also stresses the importance of these doctrines' coexistence, absent specific legislative abrogation.\(^8\) In deference to other prevailing theories, however, the court does not ignore the fact that some jurisdictions have


\(^3\) See, e.g., Shore v. Town of Stonington, 44 A.2d 1379, 1383 (Conn. 1982) (holding that although a drunk driver had been stopped but not arrested by a police officer, the plaintiff had no cause of action in negligence against the officer or the town for failure to enforce motor vehicle laws governing reckless driving and driving while under the influence); accord Landis v. Rockdale County, 445 S.E.2d 264, 267 (Ga. 1994) (holding that a widow of deceased motorist did not have a cause of action against the county, sheriff or deputy because a deputy sheriff's duty to enforce drunk driving laws was to the public in general, not specifically to the motorist who was killed in the collision with a drunk driver whom the deputy had failed to arrest).

\(^4\) See Holsten, 490 S.E.2d at 864.

\(^5\) W. VA. CODE § 29-12A-1 to -18.

\(^6\) See Holsten, 490 S.E.2d at 870.

\(^7\) Id. at 870-871.

\(^8\) Id. at 871.
abandoned the public duty doctrine with the subsequent passage of tort liability legislation for political subdivisions.\textsuperscript{9}

This Comment will examine the decision of the West Virginia Supreme Court of Appeals in \textit{Holsten v. Massey}. It will provide a brief history of municipal liability in West Virginia, paying particular attention to the relevant common law and statutory authority. It will also discuss two approaches to municipal liability adopted by various jurisdictions, with an analysis of the policy considerations adopted by both views.

II. \textit{HOLSTEN v. MASSEY}

On April 26, 1993, the appellant’s wife, Angela Holsten, was killed in a car accident in Boone County, West Virginia when Russell Massey crossed the center line and drove head-on into Mrs. Holsten’s car.\textsuperscript{10} Massey’s blood-alcohol content measured .284.\textsuperscript{11}

On December 26, 1992, approximately four months prior to this accident, Massey had been involved in another accident (“1992 Accident”) in which he drove a vehicle while allegedly under the influence of alcohol wherein his only passenger was killed.\textsuperscript{12} The facts surrounding the 1992 Accident are in dispute. Deputy Greene, the deputy who investigated the 1992 Accident, recalled of that evening that the roadways in Boone County were slick and icy and that he had investigated two other single-car accidents prior to Massey’s accident.\textsuperscript{13} Deputy Greene spoke with Mr. Massey only for a few minutes before he was taken to a local area hospital,\textsuperscript{14} but at the hospital, Deputy Greene talked with Massey and discovered that he had, in fact, been drinking.\textsuperscript{15} Furthermore, Deputy Greene noted in his

\textsuperscript{9} \textit{Id.} at 872.

\textsuperscript{10} \textit{Id.} at 867.

\textsuperscript{11} See \textit{Holsten}, 490 S.E.2d at 867. According to the West Virginia Code, any person who has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight is guilty of a felony. \textit{W. VA. CODE} § 17C-5-2(a)(1)(E) (1996).

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Id.} at 868.

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}
police report that other officers at the scene had observed that Massey had been drinking.\textsuperscript{16}

The appellants asserted that Deputy Greene recklessly failed to obtain Massey’s blood test results as an integral part of the criminal investigation, even though he was informed they were readily available.\textsuperscript{17} Furthermore, certain hospital employees denied that Deputy Greene had even requested the results; however, the appellees asserted that Deputy Greene went to great lengths to obtain the blood test results, and that the hospital ignored subpoenas requesting the production of them.\textsuperscript{18} Regardless of why the results were not available, it was not until April 21, 1993, five days before Mrs. Holsten’s accident, that Massey was indicted for the passenger’s death in the 1992 Accident.\textsuperscript{19}

The appellant contended that if the 1992 Accident had been properly investigated, his wife’s accident would never have occurred because Massey would have been incarcerated or, at least, would have had his license revoked.\textsuperscript{20} In addition, the complaint alleged that the County Commission of Boone County was also liable for damages caused by the negligence of Deputy Greene pursuant to the Governmental Tort Claims and Insurance Reform Act.\textsuperscript{21}

The Circuit Court of Boone County granted summary judgment in favor of the appellees because the appellees were not liable for the failure to provide adequate police protection, and because the appellant failed to assert any facts giving rise to a special relationship under the public duty doctrine.\textsuperscript{22} Furthermore, the circuit court noted that even if the appellant had asserted the breach of a special duty, the appellees were still immune under the Governmental Tort Claims and Insurance Reform Act.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{16} See Holsten, 490 S.E. 2d at 868.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} See Holsten, 490 S.E.2d at 868.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\end{itemize}
III. BACKGROUND OF THE LAW

The history in West Virginia of the qualified immunity, from tort liability, available to municipalities and certain other political subdivisions of the state is consistent with the typical pattern in most of the other jurisdictions: a broad, often total, abrogation by the judiciary of the state common-law local governmental tort immunity, followed soon thereafter by the enactment of governmental tort claims legislation, typically providing in substance for a broad reinstatement of local governmental immunity from tort liability.24

A. Local Governmental Immunity: Constitutional and Common-Law Authority

Article VI, section thirty-five of the West Virginia Constitution grants immunity from claims against the state.25 This concept of sovereign immunity also applied to municipalities until 1974, when the court in Higginbotham v. City of Charleston26 specifically abrogated the concept as applied to municipalities. In other words, the state’s absolute immunity from tort liability would no longer be available to a municipality. A year after the Higginbotham decision, the court decided Long v. City of Weirton,27 which removed even more immunity from municipalities. In Long, the court held that the “rule of municipal governmental immunity [was] now abolished in this state,”28 and that “[a] municipal corporation


25 This section states in part that the State of West Virginia shall never be made a defendant in any court of law or equity. W. VA. CONST. art. VI, § 35.

26 204 S.E.2d 1, Syl. Pt. 4 (W. Va. 1974) (holding that cities could be held liable in private actions for failure to maintain its streets and sidewalks in violation of a state statute).

27 214 S.E.2d 832 (W. Va. 1975). In Long, a minor child was injured in a gas explosion and her divorced parents brought a negligence action against the gas company, the city, and the two companies which were performing work on the street for the city at the time the gas main was struck. Id. at 840. The circuit court entered judgment in favor of the plaintiffs against the gas company, but held that the city was immune under the theory of governmental immunity and was not a joint tortfeasor. Id. at 842. On appeal, the court held that the evidence sustained finding that the gas company’s and the city’s negligence was concurrent and that municipal governmental immunity was abolished. Id. at 859.

28 Id. at Syl. Pt. 10.
shall be liable, as if a private person, for injuries inflicted upon members of the public which are proximately caused by its negligence in the performance of functions assumed by it.\textsuperscript{29} The court in \textit{Long} also discussed the inconsistent application of the governmental/proprietary distinction and explicitly abolished the dichotomy.\textsuperscript{30} In extending \textit{Long}, the West Virginia Supreme Court of Appeals also abolished the common-law tort immunity for county commissions and for boards of education.\textsuperscript{31} After these decisions and the apparent total abrogation of municipal immunity, the West Virginia Supreme Court of Appeals tried to limit the effects of these holdings by invoking the public duty doctrine in subsequent decisions.

1. Public Duty Doctrine

Although it achieves much the same result as the doctrine of governmental immunity, the public duty doctrine is an independent principle.\textsuperscript{32} Under the public duty doctrine, a governmental entity is not liable because of its failure to enforce

\textsuperscript{29} \textit{Id.} at Syl. Pt. 11.

\textsuperscript{30} The \textit{Long} court traced the government/proprietary distinction to the 19th century and discussed \textit{Mendel \& Co. v. City of Wheeling}, 28 W. Va. 233 (1886), and how the distinction was to be defined:

It seems therefore to be well settled, that, when a municipal corporation through its officers as agents is merely carrying out or exercising its purely governmental powers, it is not liable for any negligence of its officers or agents. This is so held from the wisest public policy; because, should a different rule obtain, municipal corporations could not exist. But there is another large class of cases, in which the powers of a municipal corporation are extended beyond what is strictly necessary for the protection of the lives, health, prosperity and peace of its citizens; as where it carries on works of internal improvement, and in the construction of these works there is misfeasance, and by the unskilful and careless doing of the thing authorized to be done, persons or property are injured. In such cases the municipal corporation is held liable.


\textsuperscript{32} \textit{See Benson v. Kutsch}, 380 S.E.2d 36, 37 (W. Va. 1989). In \textit{Benson}, an occupant of an apartment sued the city of Wheeling for injuries sustained in a fire. \textit{Id.} The plaintiff alleged that the city was negligent in failing to inspect the apartment building. \textit{Id.} An inspection would have revealed that the apartment building was not equipped with smoke detectors which was a violation of building and housing codes. \textit{Id.} The circuit court entered summary judgment in favor of the defendants, and the Supreme Court of Appeals affirmed, holding that the enactment of a fire and building code by the city did not create a duty to the individual plaintiffs to inspect their apartment for possible code violations. \textit{Id.}
This doctrine was derived from the rule stated by the United States Supreme Court in *South v. Maryland*, which held that a sheriff was not liable for the kidnapping of an individual because a sheriff’s duty to enforce the law was “a public duty, for neglect of which he is amenable to the public and punishable by indictment only.” Accordingly, the rationale behind the doctrine is to circumvent the difficulty in determining when a failure to perform properly gives rise to a cause of action. Furthermore, it would be impractical to require a public official to be responsible for every infraction of a regulation that requires enforcement. Moreover, “[t]here is the added principle that the government should be able to enact laws for the protection of the public without thereby exposing the taxpayers to liability for omissions in its attempts to enforce them.” Thus, a public official’s breach of a general duty does not give rise to a cause of action unless such cause of action is specifically intended by the ordinance or regulation. However, the special relationship exception to the public duty doctrine exists and, thus, the doctrine is not a guarantee against tort liability for a municipal corporation.

2. Special Relationship Exception

A special relationship between an individual and a government entity can give rise to liability in certain situations and can undermine the immunity granted by the public duty doctrine. Prior to the existence of any bright-line rules, when determining whether a special relationship existed, the determination was usually

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33 *Id.* at 38.

34 59 U.S. (18 How.) 396, 403 (1855). The plaintiff in *South* claimed that the sheriff knew he had been kidnapped and where he was detained, yet did nothing to secure his release. *Id.*

35 *Id.*

36 *Benson*, 380 S.E.2d at 38.

37 *Id.*

38 *Id.* at 40.
fact-specific.\textsuperscript{39} However, in \textit{Wolfe v. City of Wheeling},\textsuperscript{40} the court adopted a four-part test to determine if a special relationship exists:

To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty owed to such an individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity’s agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity’s agents and the injured party; and (4) that party’s justifiable reliance on the local governmental entity’s affirmative undertaking.\textsuperscript{41}

The \textit{Wolfe} court emphasized that the injured party’s reliance is a critical step in establishing the existence of a special relationship because the element of reliance provides the “essential causative link between the special duty assumed by the local governmental entity and the injury.”\textsuperscript{42} Furthermore, the element of direct contact is conceptually related to the element of reliance and is a corollary of the need to show a “special relationship” between the plaintiff(s) and the local governmental entity beyond the relationship with the government that all the citizens share in common. In addition, the requirement of direct contact serves as a basis for rationally

\textsuperscript{39} Some jurisdictions, like New York, relied on the specific facts to determine whether a special relationship exists. \textit{See, e.g.,} Sorichetti v. City of New York, 482 N.E.2d 70 (N.Y. 1985). In \textit{Sorichetti}, liability was imposed on the city for injuries a father inflicted on his infant daughter. \textit{Id.} at 77. The child’s mother had secured a protective order against the father, last contacting the police on the day the infant was severely abused. \textit{Id.} at 74. Based on these facts, the court found a special relationship between the police and the plaintiff and held the city liable. \textit{Id.} at 75.

\textsuperscript{40} 387 S.E.2d 307 (W. Va. 1989). In \textit{Wolfe}, two homeowners sued the city alleging negligence and breach of contract when the city’s fire department failed to respond to the fire at their home. \textit{Id.} at 309. The house was outside the city’s borders, but the homeowners had, nevertheless, paid the fire fee. \textit{Id.} at 308. The circuit court certified questions to the Supreme Court of Appeals as to what test determined when a special duty existed. \textit{Id.} at 310.

\textsuperscript{41} \textit{See Wolfe}, 387 S.E.2d at 307, Syl. Pt. 2.

\textsuperscript{42} \textit{Id.} at 311 (citing Cuffy v. City of New York, 505 N.E.2d 937, 940 (N.Y. 1987)).
limiting the class of individuals to whom the local governmental entity's 'special' duty extends.\textsuperscript{43}

Thus, it seems as though the correct inquiry as to whether a municipal corporation is liable in tort is whether a special relationship existed between the injured party and the governmental entity.

B. \textit{Local Governmental Immunity: Statutory Authority}

Initially, the state could not be named as a defendant in a court of law or equity.\textsuperscript{44} However, a plaintiff was not without any recourse; he could seek a recognition by the legislature of his claim as a moral obligation of the state, pursuant to West Virginia Crime Victims Compensation Act.\textsuperscript{45} In addition to providing a method of redressing claims under the moral obligation theory, the legislature also authorized the state to purchase insurance providing coverage for its property, activities, and responsibilities, regardless of its sovereign immunity.\textsuperscript{46}

\textsuperscript{43} \textit{Id.} (citing \textit{Cuffy}, 505 N.E.2d at 940).

\textsuperscript{44} W. VA. CONST. art. VI, § 35.


The Legislature finds and declares that a primary purpose of government is to provide for the safety of citizens and the inviolability of their property. To the extent that innocent citizens are victims of crime, particularly violent crime, and are without adequate redress for injury to their person or property, this primary purpose of government is defeated . . . . In establishing the West Virginia crime reparation act of 1981, the Legislature stated its findings that the provision of governmental services to prevent crime is not wholly effective and expressed its intent to establish a system of compensation for the victims of crime which would provide a partial remedy for the failure of the state to fully achieve this primary purpose of government.

The Legislature now finds that the system of compensation established by the act as an experimental effort by the Legislature of this state on behalf of its people . . . should be continued and retained in the legislative branch of government as an expression of moral obligation of the state to provide partial compensation to the innocent victims of crime for injury suffered to their person or property.


\textsuperscript{46} See Parkulo, 483 S.E.2d at 514 (quoting W. VA. CODE § 29-12-5(a) (1992)). Section 29-12-5(a) reads as follows:

The board [of risk and insurance management] shall have general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; determination of amount and
In fact, the West Virginia Supreme Court of Appeals also recognized the erosion of sovereign immunity when it held that "[s]uits which seek no recovery from State funds, but rather allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional bar to suits against the State."  The court did eventually mandate, however, that the pleadings must state the qualifications entitling the injured party to bring the claim, that the recovery sought is limited to the applicable insurance coverage, and the scope of the coverage and its exceptions must be apparent from the record.

Along with providing some redress for injured plaintiffs against the state in chapter twenty nine, article twelve, the legislature also limited tort liability for political subdivisions by enacting the West Virginia Governmental Tort Claims and Insurance Reform Act (the Act). The Act was deemed constitutional in Randall v. Fairmont City Police Department, when it survived claims that it denied constitutional remedies and that it violated equal protection. The purpose of the

kind of coverage, including, but not limited to, deductible forms of insurance coverage, inspections or examinations relating thereto, reinsurancce, and any and all matters, factors and considerations entering into negotiations for advantageous rates on and coverage of all such state property, activities and responsibilities. Any policy of insurance purchased or contracted for by the board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the state of West Virginia against claims or suits; Provided, That nothing herein shall bar the insurer of political subdivisions from trying upon any statutory immunity granted such political subdivisions against claims or suits ....


See Parkulo, 483 S.E.2d at 516. In Parkulo, the plaintiff sued the West Virginia Board of Probation and Parole and Division of Corrections after she was abducted, raped and beaten by a parolee. Id. at 511. The circuit court granted the board's motion to dismiss and the division's motion for summary judgment. Id. at 512. On appeal, the court held that the public duty doctrine applied to both the board and division and that there was insufficient evidence whether the state's purchase of insurance waived its defenses. See id. at Syl. Pts. 5 & 10.


See Randall, 412 S.E.2d at Syl. Pt. 1, stating,
When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably
Act is to limit tort liability of political subdivisions and to provide tort immunity in certain situations in order to regulate the costs and coverage of insurance available for such liability. Furthermore, the legislature found that political subdivisions of this state are unable to procure adequate liability insurance coverage at a reasonable cost due to: The high cost of defending such claims, the risk of liability beyond affordable coverage, and the inability of political subdivisions to raise sufficient revenues for the procurement of such coverage without reducing the quantity and quality of traditional governmental services. Therefore, it is necessary to establish certain immunities and limitations with regard to the liability of political subdivisions and their employees, to regulate the insurance industry providing liability insurance to them, and thereby permit such political subdivisions to provide necessary needed governmental services to its citizens within the limits of their available revenues.

Effective alternative remedy is provided by the legislation, or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

See id. at Syl. Pt. 4, stating,
Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

51 A political subdivision includes a municipality, a county commission, a county board of education, and certain other local governmental entities. W. Va. Code § 29-12A-3(c) (1992).


According to the Act, a political subdivision is insulated from civil liability when its acts or omissions cause a death, injury or loss to persons or property.\textsuperscript{54} The Act also immunizes an employee of a political subdivision from tort liability, "unless his or her acts were manifestly outside the scope of employment or official responsibilities; [his or her] acts or omissions were with malicious purpose, in bad faith or in a wanton or reckless manner; or unless any statute expressly imposes liability upon the employee."\textsuperscript{55}

The \textit{Randall} court analyzed the Act's relevant section for purposes of the \textit{Holsten} decision, which is chapter twenty nine, article 12A, section 5(a)(5).\textsuperscript{56} That section reads that a political subdivision is immune, among other things, from liability for "the failure to provide, or the method of providing, police, law enforcement or fire protection."\textsuperscript{57} The \textit{Randall} court construed the immunity provided by that section to be subject to the public duty doctrine, notwithstanding the special relationship exception.\textsuperscript{58} Furthermore, the \textit{Randall} court limited the application of the public duty doctrine to nondiscretionary functions because the Act incorporated the common-law rule of local governmental immunity with respect to legislative, quasi-legislative, judicial, quasi-judicial, or prosecutorial functions as seen in chapter twenty nine, article 12A, section 5(a)(1)-(2),(4).\textsuperscript{59} The \textit{Randall} court did point out, however, that unless the legislature has provided for immunity

\textsuperscript{54} See \textit{Randall}, 412 S.E.2d at 742 (citing W. VA. CODE § 29-12A-4(b)(1) (1992)).

\textsuperscript{55} See \textit{Randall}, 412 S.E.2d at 742-743 (citing W. VA. CODE § 29-12A-5(b)(1)-(3) (1992)); see also State v. Chase Securities, Inc., 424 S.E.2d 591, 599-600 (W. Va. 1992) ("[A] public executive official who is acting within the scope of his authority and the provisions of W. VA. Code 29-12-1, \textit{et. seq.}, is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.") (overruling State \textit{ex rel. Boone Nat'l Bank of Madison v. Manns, 29 S.E.2d 621 (W. Va. 1944)} (footnotes omitted)).

\textsuperscript{56} See \textit{Randall}, 412 S.E.2d at 748.


\textsuperscript{58} See \textit{Randall}, 412 S.E.2d at 747-748 (stating that "the duty to provide ... police protection runs ordinarily to all citizens ... therefore absent a special duty to the plaintiff, no liability attaches to a ... police department's failure to provide adequate ... police protection") (citing \textit{Wolfe}, 387 S.E.2d at 310)). In \textit{Randall}, the wrongful death and negligence action was brought on behalf of the decedent's estate who was killed by a man who had been harassing her. The decedent had notified the police numerous times about her assailant, and ironically, was killed beside the city police department building. \textit{Randall}, 412 S.E.2d at 740-741.

\textsuperscript{59} \textit{Id.} at 747, n.13.
under the circumstances, “the general common-law goal of compensating injured parties for damages caused by negligent acts must prevail.”

With a basic understanding and limited overview of municipal liability and immunity in West Virginia, the Holsten case can now be examined in light of the common law and statutory authority’s coexistence.

IV. THE COURT’S DECISION

A. The Public Duty Doctrine

The Holsten court began its opinion by providing the standard of review for a circuit court’s entry of summary judgment and for granting summary judgment. Specifically, the court needed to determine whether the circuit court erred in concluding that the appellant failed to present any evidence that the law enforcement officer breached any duty to the appellant or the decedent, such as failing to adequately protect the decedent by conducting an insufficient investigation of the 1992 Accident.

The court first tackled the issue of whether Deputy Greene had a duty to the appellant and/or to the decedent. The court explained that the failure to provide adequate police protection to an individual is defined by the public duty doctrine, because the duty is owed to the public as a whole, the failure to fulfill this duty is not actionable in tort. However, the court quickly qualified the assertion and stated that if the plaintiff can satisfy Wolfe’s four-part test and establish a special relationship, a lawsuit against the political subdivisions is entirely within reason. In its analysis, the court found that a special relationship between Mrs. Holsten and Deputy Greene did not exist because there was no evidence that Deputy Greene

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60 Id. at 748.
61 See Holsten, 490 S.E.2d at 868-869.
62 Id. at 869.
63 Id.
64 Id.
65 Id.
66 See supra note 41 and accompanying text.
67 See Holsten, 490 S.E.2d at 870; see also supra notes 38-41 and accompanying text.
made any promises or acted in any way that would indicate that he assumed an affirmative duty to protect the decedent.\textsuperscript{68} Furthermore, the court found that there was no evidence that Deputy Greene knew that the decedent would be injured by Massey, that there had not been any contact with the decedent and Deputy Greene, and that the decedent had not relied on Deputy Greene to protect her from Massey.\textsuperscript{69}

However, the appellant’s argument was not based on the existence of a special relationship, but rather he asserted that the legislative intent behind adopting the Act was “to prohibit municipalities and county commissions from perpetuating sovereign immunity in the guise of the public duty doctrine.”\textsuperscript{70} The court determined, though, that the appellant confused the public duty doctrine with the concept of immunity,\textsuperscript{71} for the public duty doctrine is not based on immunity from existing liability, rather it determines whether or not a duty exists to give rise to liability.\textsuperscript{72} Furthermore, the court stifled appellant’s contention of “legislative abrogation” by stating that the legislature has the authority to “enact statutes which abrogate the common law,”\textsuperscript{73} but that the legislature did not expressly abrogate the public doctrine in the Act.\textsuperscript{74} Moreover, because this court had already established that the Act did not abrogate the public duty doctrine in the context of the method

\footnotesize{
\textsuperscript{68} Id. The court noted, however, that the appellant did not argue that a special relationship existed between the decedent and Deputy Greene. \textit{Id.}

\textsuperscript{69} Id.

\textsuperscript{70} \textit{See Holsten, 490 S.E.2d at 870; see also Appellant’s Brief at 24, Holsten, 490 S.E.2d. 864.}

\textsuperscript{71} \textit{See Holsten, 490 S.E.2d at 870-871 (providing a history of the public duty doctrine and the Local Governmental Tort Claims and Insurance Reform Act); see supra notes 24-60.}

\textsuperscript{72} Id. at 871 (citing \textit{Parkulo}, 483 S.E.2d at 518). The \textit{Parkulo} court stated that “[w]e recognize that the ‘public duty doctrine’ does not rest squarely on the principle of governmental immunity, but rests on the principle that recovery may be had for negligence only if a duty has been breached which was owed to the particular person seeking recovery.” \textit{Parkulo}, 483 S.E.2d at 518. The \textit{Holsten} court also cited \textit{Jones v. Wilcox}, 476 N.W.2d 473, 476 (Mich.1991), \textit{appeal denied by 483 N.W.2d 918 (Mich. 1992) (stating that “[t]he public duty doctrine is premised on the existence of an element of a cause of action for negligence. On the other hand, the governmental immunity issue concerns the creation of exceptions to liability based on the functions of a governmental actor.”).}

\textsuperscript{73} \textit{See Holsten, 490 S.E.2d at 871 (citing Perry v. Twentieth Street Bank, 206 S.E.2d 421, Syl. (W. Va. 1974) (“By virtue of the authority of Article 8, Section 21 of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law.”).}

\textsuperscript{74} \textit{See supra} notes 58-60 and accompanying text.
}
of providing police protection,\textsuperscript{75} the appellant had to establish a “special relationship” between the decedent and Deputy Greene in order to establish liability.\textsuperscript{76}

After concluding that the public duty doctrine applied to the facts of the case, the court relied on other jurisdictions to support its conclusion.\textsuperscript{77} The court addressed the policy considerations that have been offered in support of the retention of the doctrine.\textsuperscript{78} First,

\begin{quote}
[I]ndividuals, juries and courts are ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public. Some courts have theorized that severe depletion of those resources could well result if every oversight or omission of a police official resulted in civil liability.\textsuperscript{79}
\end{quote}

A second policy consideration in retaining the public duty doctrine is that “police officials often act and react in the milieu of criminal activity where every decision is fraught with uncertainty.”\textsuperscript{80} Lastly, there are other methods of punishment, other


\textsuperscript{76} See Holsten, 490 S.E.2d at 875.

\textsuperscript{77} Id. at 872.

\textsuperscript{78} Id. (citing Ezell v. Cockrell, 902 S.W.2d 394, 397-98 (Tenn. 1995); see also generally, Note, Police Liability for Negligent Failure to Prevent Crime, 94 HARV. L. REV. 821, 832-35 (1981). In Ezell, the plaintiff sued the City of Elkont, the chief of police, and others on various theories of negligence after she was seriously injured and her husband was killed in a drunk driving accident. See Ezell, 902 S.W.2d at 396-97. The plaintiff alleged that the chief of police allowed the driver of the vehicle to operate the vehicle when he knew that the driver, along with the passenger, was intoxicated. Id.

\textsuperscript{79} Ezell, 902 S.W.2d at 398 (citing Morgan v. District of Columbia, 468 A.2d 1306, 1311 (D.C. 1983)).

\textsuperscript{80} Id. (citing Morgan, 468 A.2d at 1311). The Ezell court also demonstrated this point citing Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982):

The adoption of a rule of liability where some kind of harm may happen to someone would cramp the exercise of official discretion beyond the limits desirable in our society. Should the officer try to avoid liability by removing from the road all persons who pose any potential hazard, he may find himself liable in many instances for false arrest. We do not think that the public interest is served by allowing a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman’s discretionary professional duty. Such discretion is
than civil actions, such as internal disciplinary proceedings or criminal prosecutions, in which a police officer is held accountable for his dereliction. In addition, other courts have reasoned that without the public duty doctrine, police officials would be placed in the "untenable position of insuring the personal safety of every member of the public, or face a civil suit for damages."

In further support of its conclusion, the court asserted that the cause of action alleged by the appellant — that Deputy Greene failed to incarcerate Massey after the first fatal accident and/or that he failed to revoke Massey's driver's license — is the exact type of situation that, pursuant to the application of the public duty doctrine, does not give rise to liability. Relying on Randall, the court stated that no discretion at all.

Ezell, 902 S.W.2d at 398 (quoting Shore, 444 A.2d at 1384).

See Ezell, 902 S.W.2d at 398 (citing Morgan, 468 A.2d at 1312) ("Such courts have concluded that, on balance, the community is better served by a policy that both protects the exercise of law enforcement discretion and affords a means of review by supervisory personnel who are best able to evaluate the officer's alleged negligent behavior.").

Id. (citing Landis v. Rockdale County, 445 S.E.2d 264, 268 (Ga. Ct. App. 1994)). In Landis, the court stated that "[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause or being mulcted in damages if he does." Ezell, 902 S.W.2d at 398 (quoting Landis, 445 S.E.2d at 268).

See Holsten, 490 S.E.2d at 873; see also supra note 58 and accompanying text.
“providing police protection runs ordinarily to all citizens,” and thus, there is no liability absent a special relationship.

Faced with the same facts as in Holsten, other jurisdictions have also held that liability could not be imposed on police officers for failure to restrain drunk drivers absent a “special relationship” with the injured party. For example, in Crosby v. Town of Bethlehem, the mother of a young girl killed by a drunk driver brought an action against the police officer and the police department for failing to arrest or to prevent the drunk driver from operating his motorcycle. The plaintiff

84 Id. (citing Randall, 412 S.E.2d at 747-48. The appellant also argued, however, that Deputy Greene’s knowledge of a violation of a statute gives rise to a duty to any person who comes within the risk caused by the violation of the statute. See Holsten, 490 S.E.2d at 875 n.11; see also Appellant’s Brief at 28-29, Holsten, 490 S.E.2d 864. The appellant argued that Deputy Greene violated West Virginia Code chapter 17C, article 5A, section one, which addresses the police officer’s authority to take away the driver’s license of a suspected drunk driver and report it to the Department of Motor Vehicles within 48 hours. See Appellant’s Brief at 28-29, Holsten, 490 S.E.2d 864. The appellant concluded that Deputy Greene’s failure to revoke Massey’s license and knowledge of the statute created a duty to protect the decedent because she fell within the class of users of the highway who were to be protected from accidents caused by intoxicated drivers. Id. at 28. However, the court agreed with the appellees, who argued that West Virginia law does not impose a mandatory duty that defines how law enforcement officials must investigate or arrest for criminal offenses. See Holsten, 490 S.E.2d at 875 n.11; see also Appellee’s Brief at 17, Holsten, 490 S.E.2d 864. Furthermore, the appellee’s argued that a law enforcement officer’s decisions regarding a suspected drunk driver are discretionary, which the court agreed with as well. See Holsten, 490 S.E.2d at 875 n.1; see also Appellee’s Brief at 18, Holsten, 490 S.E.2d 864 (citing W. VA. CODE § 17C-5-4 (1992)) (preliminary breath analysis may be administered); W. VA. CODE § 17C-5-5 (1992) (law enforcement officer may require a person to submit to a preliminary breath analysis). Finally, the court concluded that there is no existing statute or authority explicitly stating that a police officer’s knowledge of a violation of a statute gives rise to a higher duty when providing police protection other than the public duty doctrine and its exceptions. See Holsten, 490 S.E.2d at 875 n.11.

85 Id. at 873. One case representative of the majority was Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982). In Shore, the plaintiff brought an action against the town and one of its police officers for his wife’s death, caused by a drunk driver. See Shore, 444 A.2d at 1380. The drunk driver had been stopped, but not arrested, by the police officer prior to the plaintiff’s wife’s accident. Id. at 1381. The court concluded that the police officer’s duty was to the public and that he owed no special duty to the plaintiffs. Id. at 1380. The Holsten court also cited to Landis v. Rockdale, 445 S.E.2d at 267, which stated that “[a] clear majority of states which have considered whether police officers have a duty to restrain a drunk driver have followed the rationale of the ‘public duty’ doctrine[]”; see also Ezell, 902 S.W.2d at 403 (“[W]e join the clear majority of courts and conclude that statutes pertaining to drunk driving and public intoxication, do not, in conjunction with statutes authorizing warrantless arrests, give rise to a ‘special-duty’ of care where a plaintiff alleges that a police officer failed to arrest or detain an alleged drunk driver.”); see also James L. Isham, Annotation, Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer, 48 A.L.R.4TH 320, § 2 (1986).

asserted that an off-duty police officer had observed the drunk driver’s intoxicated condition earlier at a party. After the drunkard left on his motorcycle, the officer called the Bethlehem Police Department, advising the duty officer that people were leaving the party in an intoxicated condition. The court held that neither the police officer who had observed the intoxicated driver’s condition nor the officer who had received the phone call had a duty to the decedent because there was no special relationship.

However, not all jurisdictions have followed the majority view with regard to drunk driving accidents. For example, in *Irwin v. Town of Ware*, the court held that the municipality was liable for damages to the injured plaintiffs because of the negligent failure of the police officers to remove an intoxicated driver from the highway. The *Irwin* court reasoned that a special relationship did arise between the plaintiff and the defendant and that such a special relationship was predicated on “whether a defendant could reasonably foresee that he would be expected to take affirmative action to protect the plaintiff and could anticipate harm to the plaintiff for failure to do so.” Furthermore, the court held that “[w]here the risk created by the negligence of a municipal employee is of immediate and foreseeable physical injury to persons who cannot reasonably protect themselves from it, a duty of care reasonably should be found.” However, the West Virginia Supreme Court of Appeals has not chosen to follow the *Irwin* decision and its interpretation of the public duty doctrine. Rather, the court concluded that without evidence showing that a special relationship exists, “neither a local governmental entity’s liability nor a police officer’s liability to that particular individual may be predicated upon the police officer’s failure to restrain a tortfeasor who is driving while intoxicated or under the influence of alcohol and subsequently causes an injury to [that] particular individual.”

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87 *See id.* at 619.

88 *Id.*

89 467 N.E.2d 1292 (Mass. 1984). In *Irwin*, the plaintiffs alleged that the police officers of the town negligently failed to take a motor vehicle operator into protective custody who was intoxicated and subsequently caused the plaintiff’s injuries. *Id.* at 1295; *see also* Bailey v. Town of Forks, 737 P.2d 1257, 1259 (Wash. 1987) (applying basic tort principles, such as foreseeability and policy considerations, as opposed to the public duty doctrine to discern whether there was a duty between a motorcycle driver who was injured after colliding with a truck driven by an intoxicated driver and the police officer who knew the driver was drunk).

90 *See Irwin*, 467 N.E.2d at 1310-11.

91 *Id.* at 1300.

92 *Id.*
individual..." Therefore, based upon this analysis, the court determined the circuit court correctly entered summary judgment for the appellees based on the public duty doctrine.\footnote{Holsten v. Massey, 490 S.E.2d 864, 875 (W. Va. 1997):}

\section*{B. The Tort Claims and Insurance Reform Act}

The Holsten court also assessed the appellees' liability with regard to the common law in light of the applicable legislation and stated that "regardless of whether the public duty doctrine gives rise to a cause of action, we conclude that the appellees would be immune under the Governmental Tort Claims and Insurance Reform Act."\footnote{See id.} In addition, the court noted that although the public duty doctrine determines a municipality's liability, it will be read in context with the Act, "unless it clearly appears from the statute that the purpose of the statute was to change the common law."\footnote{Id.} Because different provisions apply to each of the appellees, the court treated each one separately.

\subsection*{1. Deputy Greene}

The appellant first asserted that Deputy Greene was not immune from liability because, as an employee,\footnote{Id. (citing Smith v. West Virginia State Bd. of Educ., 295 S.E.2d 680, Syl. Pt. 2 (W. Va. 1982)).} "[h]is acts ... or omissions were ... in a wanton or reckless manner..."\footnote{Employee is defined as follows: [A]n officer, agent, employee, or servant, whether compensated or not, whether full-time or not, who is authorized to act and is acting within the scope of his or her employment for a political subdivision. 'Employee' includes any elected or appointed official of a political subdivision. 'Employee' does not include an independent contractor of a political subdivision." W. Va. Code § 29-12A-3(a) (1992). Deputy Greene's qualification as an employee was not disputed. See Holsten, 490 S.E.2d at 876 n.13.} The appellant relied on Mallamo v. Town of Rivesville,\footnote{W. Va. Code § 29-12A-5(b)(2) (1992); see also Holsten, 490 S.E.2d at 876. The court noted that the "wanton and reckless manner" exception is an exception separate and distinct from the public duty doctrine. See Holsten, 490 S.E.2d at 876. The court stated that since the legislature has the}
In which the court concluded that summary judgment had been improperly entered against the plaintiff because he had provided enough evidence of a malicious purpose or bad faith on the part of the police to raise a question of fact under West Virginia Code chapter twenty nine, article 12A, section 5(b)(2). Although the court determined what kind of showing was required for a “malicious purpose” or “bad faith,” nothing was mentioned about the evidence needed to show “willful, wanton or reckless conduct.”

In order to ascertain what kind of showing is required to demonstrate willful, wanton or reckless conduct, the Holsten court defined the phrase as follows:

[T]he actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.

In applying this standard to Deputy Greene’s conduct, the court found that he did not act in a “willful, wanton or reckless manner.” There was no evidence that Deputy Greene intentionally failed to quickly investigate the 1992 Accident or that he was “consciously indifferent” of the possibility that Massey would be involved

\[9\] 477 S.E.2d 525 (W. Va. 1996).

\[10\] See id. at 535. In Mallamo, the police shot and injured the plaintiff who was hiding in the closet while attempting to arrest him for failing to appear for a court proceeding. Id. at 527-28. West Virginia Code, chapter 29, article 12A, section 5(b)(2) states, “[a]n employee of a political subdivision is immune from liability unless . . . [h]is or her acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.”

\[101\] See Holsten, 490 S.E.2d at 877.

in another accident four months later.\textsuperscript{103} Thus, the court concluded that the appellant failed to assert any evidence of reckless conduct which would render summary judgment improper.

2. The County Commission of Boone County

The appellant further alleged that the county commission\textsuperscript{104} was not immune from liability because political subdivisions are liable for death caused by the negligent acts of employees while acting within the scope of their employment.\textsuperscript{105} Although the appellant conceded that a political subdivision is immune from liability when the injury results from the method of providing police protection,\textsuperscript{106} he asserted that this kind of immunity was inapplicable based on the court's holding in Beckley \textit{v. Crabtree}\.\textsuperscript{107} However, the court stated that the appellant overlooked the integral language of West Virginia Code chapter twenty, article 12A, section 5(a)(5) which states that a "political subdivision is immune

\textsuperscript{103} See \textit{id} at 877-878. The court further points out that even though the record indicates that the investigation took over three months, that should not imply that Deputy Greene acted in a reckless manner. \textit{Id.} at 878.

\textsuperscript{104} Under West Virginia Code, chapter 29, article 12A, section 3(c), a county commission is considered a political subdivision. W. VA. CODE § 29-12A-3(c) (1992).

\textsuperscript{105} See \textit{supra} note 55 and accompanying text.

\textsuperscript{106} See \textit{supra} note 58 and accompanying text.

\textsuperscript{107} See \textit{Holsten}, 490 S.E.2d at 878 (citing Beckley \textit{v. Crabtree}, 428 S.E.2d 317, 320 (W. Va. 1993) (holding that the method of providing police protection refers to the governmental decisions as to how to provide police protection and that these decisions remain immune from liability) (citing State \textit{v. Terrell}, 588 S.W.2d 784, 787-788 (Tex. 1979))). In \textit{Beckley}, a state trooper was injured when a sheriff attempted to place a shotgun in the trunk of the police car and the shotgun accidentally discharged. \textit{See id.} at 318. The trooper brought a negligence action against the sheriff and the county commission in which the court held that the sheriff was immune under West Virginia Code chapter 29, article 12A, section 5(b) and that the county commission could be held liable under West Virginia Code, chapter 29, article 12A, section 5(a) because the sheriff was not involved in the implementation of policy decision when the shotgun discharged. \textit{Id.} at 321. The court also stated that "[r]esolution of the issue of whether a loss or claim occurs as a result of the method of providing law enforcement protection requires determining whether the allegedly negligent act resulted from the manner in which a formulated policy regarding such protection was implemented." \textit{Id.} (emphasis added); see also Mallamo \textit{v. Town of Rivesville}, 477 S.E.2d 525, 535 (W. Va. 1996) (stating that the phrase "method of providing police protection . . . is aimed at such basic matters as the type and number of . . . police cars considered necessary for the operation of the respective departments; how many personnel might be required; [and] how many and where police patrol cars are to operate."”) (quoting Jackson \textit{v. City of Kansas City}, 680 P.2d 877, 890 (Kan. 1984)).
from liability if a loss or claim results from ... the failure to provide ... police [protection].” 108 As the court pointed out, the phrases “method of providing” and “failure to provide” are inherently different and carry substantially different meanings. 109 Furthermore, because the language is clear and unambiguous, the court found no reason to interpret it. 110 Thus, the court concluded that the county commission was immune from liability because Deputy Greene’s failure to incarcerate Massey should a failure to provide adequate police protection and should, therefore, fall under West Virginia Code chapter twenty nine, article 12A, section 5(a)(5). 111 Moreover, the court concluded that summary judgment was correctly entered against the appellant because the appellees were immune under the Governmental Tort Claims and Insurance Reform Act. 112

V. THE PUBLIC DUTY DOCTRINE: IS IT INCONSISTENT WITH LOCAL GOVERNMENTAL TORT CLAIMS AND INSURANCE REFORM ACTS?

Some jurisdictions have abandoned the public duty doctrine in light of the adoption of insurance reform legislation. The most repeated argument in favor of the abandonment of the public duty doctrine and its exceptions is that “it is confusing and leads to inequitable, unpredictable, and irreconcilable results.” 113 One judge even wrote, “[a]ny court-created tort-immunity rule should be forthrightly abandoned when its injustice and its unreality are so evident as to produce exceptions, interpretations and inconsistencies galore.” 114 Furthermore, these jurisdictions argue that concerns over excessive governmental or public employee liability are without foundation because of the limitations on liability afforded by local legislation, conventional tort principles, and exceptions to waivers


109 See Holsten, 490 S.E.2d at 879.

110 Id. (citing State v. Elder, 165 S.E.2d 108, Syl. Pt. 2 (W. Va. 1968)).

111 Id. at 880.

112 Id.


114 See Jean W., 610 N.E.2d at 310 (citing Motyka v. City of Amsterdam, 204 N.E.2d 635, 637 (N.Y. 1965) (Desmond, C.J., dissenting)).
of sovereign immunity.\textsuperscript{115} Basically, these jurisdictions attempt to justify why they decline to adopt another means of limiting liability for the government and its employees when these entities are already protected to some extent.\textsuperscript{116}

Policy reasons also play a dominant role in support of the doctrine’s abandonment, especially the need to compensate those who are seriously injured by the government or its agents’ tortious acts.\textsuperscript{117} The argument follows that the government should be responsible in damages to any plaintiff injured by one of its employees acting within the scope of his employment and that damages should be viewed as simply the cost of administration.\textsuperscript{118} It is assumed that the government is more suited to bear the cost because the costs can be allocated to the public through taxation.\textsuperscript{119}

Furthermore, the jurisdictions in favor of the doctrine’s abandonment emphasize that the purpose of many of the state Governmental Tort Claims and Insurance Reform Acts is to treat public entities (i.e., political subdivisions and their employees) the same as private persons subjected to liability.\textsuperscript{120} Accordingly, these jurisdictions intend to subject the government and its employees to conventional tort principles when determining liability, in which the plaintiff would have to make the same showing as he would when utilizing the special relationship exception.\textsuperscript{121}

\textsuperscript{115} See Hudson, 638 A.2d at 566 (citing Leake, 720 P.2d at 160; Jean W., 610 N.E.2d at 313-14).

\textsuperscript{116} Id. at 568.

\textsuperscript{117} See Krause, supra note 1, at 503.

\textsuperscript{118} Id. (citing Dalehite v. United States, 346 U.S. 15, 24 (1953) (holding that government should assume obligation to pay damages caused by public employees)).

\textsuperscript{119} Id. (citing W. Prosser, HANDBOOK OF THE LAW OF TORTS § 131, at 978 (4th ed. 1971)).

\textsuperscript{120} See, e.g., Jean W., 610 N.E.2d at 312 (Liacos, C.J., concurring).

\textsuperscript{121} See Krause, supra note 1, at 523 n.123, stating that
In an action for negligence, the plaintiff has the burden of proving:
(a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct [duty],
(b) failure of the defendant to conform to the standard of conduct [breach of duty],
(c) that such failure is a legal cause of the harm suffered by the plaintiff [proximate cause], and
(d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages [damages].

These jurisdictions also believe that the status of being a government entity alone should not dictate an entity’s liability.\textsuperscript{122} Proponents argue that the use of conventional tort principles will still protect the government from liability because the mere existence of a duty does not give rise to liability: there must be a breach, proximate cause, and damages.\textsuperscript{123} However, these advocates do not ignore that plaintiffs confront problems when trying to establish proximate cause, especially when a public employee’s purported negligence stems from a situation which he did not cause.\textsuperscript{124} In order to combat this dilemma, courts will have to rely on foreseeability and immediacy of the harm more heavily.\textsuperscript{125} In applying these tort principles to police protection, it is urged that

The use of an ordinary negligence standard would not impose an absolute duty . . . to protect its citizens and to enforce its laws; nor would it require that the police be at the scene of every crime. Rather, police departments would be held to a standard of due care, and their liability appropriately limited by the requirements of proximate cause and foreseeability.\textsuperscript{126}

Plus, use of conventional tort principles would at least give the plaintiff a chance to have a jury assess a municipality and/or a police officer’s negligence.\textsuperscript{127} Opponents of the doctrine’s abandonment urge, however, that judges and juries would make improper decisions when assessing public entities’ liability because they are ill-suited to evaluate governmental decisions concerning the allocation of resources to protect the public.\textsuperscript{128} But in response, most police activities can be evaluated using documentary evidence and expert testimony.\textsuperscript{129}

\textsuperscript{122} See Jean W., 610 N.E.2d at 315 (Liacos, C.J., concurring).
\textsuperscript{123} Id. at 314.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Krause, supra note 1, at 524.
\textsuperscript{127} Id. at 526.
\textsuperscript{128} See supra note 80 and accompanying text.
\textsuperscript{129} See Krause, supra note 1, at 526. The author admits that there is still a need for police discretion and that “continued immunity for a limited number of . . . discretionary functions is justified. . . .” Id.
Finally, proponents of abandoning the doctrine assert that although elimination would undoubtedly create broader liability, the effects on judicial and municipal resources would be negligible. First, establishing liability would be difficult because not only would a plaintiff have to demonstrate a duty and a breach, but he would also have to show that it was the political subdivision’s act or omission that was the proximate cause to his injuries. Furthermore, a plaintiff might also be found to be contributory negligent. Second, the economical impact on resources for torts committed by political subdivisions could be curbed by statutory limitations on recovery and the prohibition of punitive damages.

The arguments in favor of the doctrine’s retention are equally, if not more, compelling than those in favor of its abandonment. Two major rationales that support sovereign immunity also support the public duty doctrine and its exceptions. First, the protection of governmental agencies and their employees from the random imposition of liability by judicial authority is a necessary function. Furthermore, the inevitable conflicts of authority among the jurisdictions would interfere with the political subdivision’s decision-making. Second, adverse judgments against the government would require the use of funds essential to functions (i.e., police and fire protection) that protect the general public. Furthermore, political subdivisions would be so inundated with lawsuits that additional funds would be used to defend claims.

Courts have also argued that the public duty doctrine fairly reflects current social values and promotes sound public policy. It not only promises reasonably predictable results in cases involving harm indirectly (secondarily) caused by a public employee’s failure to act in response to a situation the employee

130 Id. at 527.
131 Id.
132 Id. at 528.
133 Id. The author concedes, however, that these measures would require additional financial resources. Id.
134 See Krause, supra note 1, at 502.
135 Id.
136 Id.
137 Id. at 503.
did not create, but also establishes a reasonable balance between competing values: the compensation of injured individuals and the protection of government from financial burdens of such magnitude as to threaten its ability to function.”138

Furthermore, to expose a political subdivision to liability every time a plaintiff is unsatisfied with a political subdivision (i.e., failure to provide adequate police and/or fire protection) would be catastrophic to large urban areas where liability could be limitless.139 Another point made by those jurisdictions is that because tort reform legislation treats public employers the same as private employers, a public employer should not be liable for failing to prevent or diminish harm due to a situation that it did not create.140

The dichotomy among jurisdictions demonstrates the differences among policy considerations, specifically economic issues. Can the argument among jurisdictions be resolved if it can be determined who should bear the loss? Or is one begging the question because the answer to who should bear the loss seems to create a controversy unto its own?

VI. CONCLUSION

Whenever an innocent person dies it is an autonomic reflex to assign the blame. However, should a political subdivision — in this case, a sheriff’s department and a county commission — be held liable for failure to prevent a death by not providing adequate police protection? It would simply be impractical to hold these entities accountable. To reiterate the holding of Holsten v. Massey and those jurisdictions that maintain the public duty doctrine in their systems, the financial effects would be too burdensome, and the floodgates to liability would open wide. The use of conventional tort principles is an option, but even then, litigation would be expanded because of the relaxed standard in determining if a duty exists. Those jurisdictions who favor abandoning the doctrine ignore an important distinction when concluding that the local legislation abrogates the common law: the public duty doctrine determines if a duty exists and the local Governmental Tort Claims and Insurance Reform Acts assess liability after a duty has been determined. Thus, with this inherent difference among the two authorities, why is it impossible for the

138 Jean W., 610 N.E.2d at 318 (O’Connor, J., concurring) (quoting Cyran v. Town of Ware, 597 N.E.2d 1352 (Mass. 1992) (O’Connor, J., concurring)).

139 Id. (quoting Cyran, 597 N.E.2d at 1352).

140 Id. at 320.
two to coexist without any detriment to the public? Certainly it is not impossible, and as Holsten demonstrates, it is preferable for these different authorities to coincide.

"A duty to all . . . is a duty to none."

Stephanie M. Bonnett

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