1994

A. B. Christenson. Personal Representative of the Estate of Michael Lance Christenson, Deceased v. N. D. (Pete) Hayward, Sheriff Of Salt Lake County; Roger F. Taylor, Deputy Sheriff, Salt Lake County; Michael M. Davis, Deputy Sheriff, Salt Lake County; Michael Stewart; Bart Barker; Tom Shimizu, Board Of Commissioners, Salt Lake County : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

A. B. CHRISTENSON, Personal Representative of the Estate of Michael Lance Christenson, Deceased

Plaintiff/Appellant

vs.

N. D. (PETE) HAYWARD, Sheriff of Salt Lake County; ROGER F. TAYLOR, Deputy Sheriff, Salt Lake County; MICHAEL M. DAVIS, Deputy Sheriff, Salt Lake County; MICHAEL STEWART; BART BARKER; TOM SHIMIZU, Board of Commissioners, Salt Lake County

Defendants/Respondents

Case No. 19391

BRIEF OF APPELLANT

Appeal from the Order of the
District Court of Salt Lake County
Honorable Dean E. Conder, Judge

WALTER R. ELLETT
5085 South State Street
Murray, Utah 84107
(Atty. for Plaintiff/Appellant)

L. E. MIDGLEY
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NATURE OF THE ACTION AND HOW IT AROSE

This is a claim for the wrongful death of Michael Lance Christenson, the plaintiff's decedent, which resulted from the defendants' failure to arrest Christenson and thereby prevent him from riding his motorcycle while he was drunk. As a result of the defendants' failure to act, Christenson was fatally injured.

DISPOSITION OF CASE IN THE LOWER COURT

Plaintiff filed a complaint in the Third Judicial District Court of Salt Lake County on April 18, 1983. The defendants moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure. The defendants' motion was granted by the Honorable Dean E. Conder.

TYPE OF RELIEF SOUGHT ON APPEAL

Plaintiff requests that the judgment of the lower court be reversed, and that the case be remanded for trial.

FACTUAL BACKGROUND

On July 24, 1982, at approximately 1:30 a.m., sheriff's deputies, Roger F. Taylor and Michael M. Davis, responded to a call from the manager of the Billiards Palace, located at the corner of 900 East and 3900 South, Salt Lake City, Utah. the purpose of the call was to assist and restrain Michael Christenson, plaintiff's decedent, who was extremely drunk and who had been causing a disturbance. The sheriff's deputies confronted Michael Christenson in the parking lot of the Billiards Palace, conversed with him and observed his behavior and, ultimately, told him to walk his motorcycle away from that location. The motorcycle was a Honda CD-750, weighing approximately 530 pounds. Both deputies knew that Michael Christenson was so drunk that he was unable to

drive his motorcycle without creating a danger to himself and others. Despite Christenson's obvious and apparent state of intoxication, both deputies failed to arrest him; neither did they take any steps to impound the vehicle. Michael Christenson lived approximately two and one-half miles from the Billiards Palace. The bike weighed over 500 pounds, and it would take a healthy and sober man between two and three hours to push the bike that distance. Several moments after talking with the sheriff's deputies, Michael Christenson was driving his motorcycle and failed to negotiate a curve at approximately 400 East and 4800 South, Salt Lake County, Utah, a distance of approximately 2.3 miles from the Billiards Palace. As a result of the accident, Christenson was transported to Cottonwood Hospital, where he died on July 31, 1982.

ARGUMENT

POINT I

POLICE OFFICERS HAVE A DUTY TO EXERCISE THE CARE AND CAUTION OF ORDINARY, REASONABLE AND PRUDENT PERSONS.

The defendants' memorandum asks if "(it can) be logically maintained that officers who permitted the decedent to "walk" or push his motorcycle could reasonably believe that in so doing he would 'injure another person' ... or himself?" (Defendants' Memorandum, p. 4). Certainly, it is reasonable to

assume that a drunk would drive, and not walk, his motorcycle, especially when he is required to walk the motorcycle over a distance of two and one-half miles. If it were reasonable to assume that drunks would not drive, this State would not have found it necessary to enact recent extensive and strict legislation on driving while intoxicated (Utah Code Annotated §41-6-43, §41-6-44). Also, this country would be spared numerous traffic deaths yearly resulting from the actions of drunk divers. Police officers, if anyone, should be aware of the erratic and unreasonable behavior of drunks. Officers should be aware that a drunk is quite likely to dive when he should stay from behind the wheel, or off his motorcycle.

In failing to arrest the plaintiff's decedent, the sheriff's deputies violated a duty imposed upon them by the statutes of this State:

> General duties. The sheriff shall:
>
> 1) Preserve the peace.
>
> 2) Make all lawful arrests.
>
> Utah Code Annotated, 17-22-2(1)(2). (1953).

The sheriff's deputies' intentional failure to arrest the decedent when they were aware of both his drunken state and of the probable likelihood that he would ride, rather than walk, his motorcycle, was a negligent act.

In the past, courts have held that statutory duties such as those imposed by §17-22-2, Utah Code Annotated, are owed to the general public and not to particular individuals. The courts have therefore denied individual claims based upon law officers' failure to perform their statutory duty, unless a special relationship exists between the officer and the plaintiff, giving rise to a specific duty owing to the plaintiff. This is not the trend of the law. The trend in the law is that public employees should be held liable for their tortious acts to the same extent as private persons.

The State of Arizona has recently rejected the distinction between a general duty to the public and a specific duty to an individual plaintiff in Ryan v. State, 656 P.2d 97 (Ariz. 1982):

> "We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery. (Citation). Thus, the parameters of duty owed by the State will ordinarily be co-extensive with those owed by others."
>
> Ryan at 599.

Alaska has also abandoned the general duty/specific duty distinction in Adams v. State, 555 P.2d 235 (Alaska 1976).

> "(W)e consider that the 'duty to all, duty to no-one' doctrine is in reality a form of sovereign immunity,

> which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine. . . . Where there is no immunity, the state is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not."

Adams at 241-42.

Finally, a Massachusetts court, in Irwin v. Town of Ware, Superior Court Department, Civil No. 17562, Hampshire County Superior Court, Northampton, Massachusetts, attached as Appendix A, found a town liable for injuries caused by a drunk driver. The court ruled "as a matter of law ... users of the highway are a discreet class of people to whom the police may owe a duty." Irwin, p. 6. In essence, the court's holding abolishes the general duty to the public/special duty to the individual, at least in respect to an officer's duty to enforce drunk driving laws.

Utah law has never decided this point specifically. To say that an officer is responsible only to the general public is merely another way of saying that a person injured by a deputy sheriff's negligence has no remedy against him. Thus, a deputy is under a general duty to the public to preserve the peace and make all lawful arrests, yet there is no particular individual who can enforce that duty. Individuals injured by the negligent acts of another should receive compensation for those injuries,

regardless of whether or not the tort-feasor is a public employee.

This case should still go to trial even if the court determines that the plaintiff must show that the deputies owed a special duty to Michael Chrisenson before recovery will be allowed. The complaint and the summary judgment memorandum allege facts sufficient to support the finding of such a special duty.

The defendants' memorandum, Point One, relies upon the case of Shore v. Town of Stonington, 444 A.2d 1379 (Conn. 1982), where a showing of a clear and unequivocal duty to a particular individual was required for a cause in action in negligence to be shown. In Shore, the Connecticut Supreme Court found that although a drunk driver had been stopped, but not arrested, by a town police officer, the plaintiff had no cause in action for negligence against the officer and the town for failure to enforce motor vehicle laws governing driving while under the influence. The court noted three exceptions to its ruling. The first exception is as follows:

> "We have recognized the existence of such a duty in sitations where it would be apparent to the public officer that his failure to act would be likely to subject an identifiable person to imminent harm."
>
> Shore at 1382.

In Shore, the plaintiff's decedent was a third party who was unknown to the officer when he stopped the drunk driver. After the officer released the driver, he (the driver) struck and killed plaintiff's decedent. In the present case, the deputies had immediate contact with plaintiff's decedent. They could have reasonably foreseen that if not restrained or arrested, he would propbably ride his motorcycle and be subject to imminent harm.

In Tompkins v. Kenner Police Department, 402 S.2d 276 (La. 1981), the Court of Appeals of Louisiana proposed the following rule to determine if an officer had a duty to a particlar individual:

> " . . . (I)n enforcement of a governmental regulation which, through closeness in proximity or time, results in a one-to-one relationship between the police officer and the injured party, the police officer ceases to act only for the public good and at that moment becomes obligated to the individual to conduct himself in such a way as not to cause him unnecessary injury."
>
> Tompkins at 280.

In Tompkins, a police officer failed to discover the plaintiff's decedent while investigating an automobile accident, even though the officer had been informed that the decedent was still alive three hours later, but, because of the lapse of time, he died later of loss of blood. The court found that the officer was negligently liable for the decedent's death.

In Tompkins, the officer never saw the decedent, but was still held liable for his death. In the present case, the plaintiff decedent, Michael Christenson, was in much closer proximity to the deputies. The deputies both saw and talked with Christenson. They were aware of his drunken state and the possibility that he might come to harm if they did not arrest him. Certainly, if the officer in Tompkins owed a duty to the plaintiff decedent, the deputies Taylor and Davis owed a duty to to Michael Christenson. The deputies failed to measure up to that duty.

It might be argued that deputies Taylor and Davis had no affirmative duty to intervene and remedy a situation involving an obviously intoxicated and unruly Christenson. However, the deputies understood this duty when they momentarily detained Christenson and ascertained that he was drunk and likely to harm himself or another. Justice Cardozo stated this principle in Mach Co. v. Rensselar Water Co., 247 N.Y. 160, 159 N.E. 892 (1928).

> "What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward." (Citation).
>
> Mach at 898.

Nor is it sufficient that the deputies left Christenson in a condition no worse than when they found him. The deputies, having assumed a duty towards Christenson, were required to take protective action against any reasonably foreseeable injury to the decedent.

> "The case law is clear that even when no original duty is owed to the paintiff to undertake affirmative action, once it is voluntarily undertaken, it must be performed with due care.
>
> . . . (T)his duty cannot be fulfilled by placing the helpless person in position of peril equal to that from which he was rescued."
>
> Parvi v. City of Kingston, 41 N.Y.2d, 553, 559, 362 N.E.2d 960, 964-65; 3294 N.Y.S.2d 161, 165, (1977).

Deputies Taylor and Davis had intervened when Christenson was drunk on the night of July 24, 1982, and could have exercised immediate physical control over him. Such was their statutory duty; instead, the deputies relinquished control over the decedent after instructing him to "walk" his motorcycle home. As a consequence, Michael Christenson was killed in a single vehicle accident. Of course, Christenson might have died in the same accident even if the officers had not intervened; this, however, is beside the point. As noted in Parvi, once the deputies intervened, it became their obligation to improve the decedent's position and not to let happen what may happen, when they failed to detain Michael Christenson. Certainly, under the above

authority, it is not possible to say that Deputies Taylor and Davis did not owe a clear duty to the plaintiff's decedent.

Utah law has tended to impose liability on individual public employees for mmisfeasance and malfeasance. In Benally v. L. G. Robinson, 14 Utah .2d 6, 376 P.2d 388 (1962), a drunk escaped the custody of an arresting officer while being booked. The drunk fell down the stairs, hitting his head on a cement floor. He died three days later from head injuries. The defendant officer argued that he was liable to the plaintiff only if he was guilty of "wrongful" conduct, and not merely guilty of negligence. The Utah Supreme Court found that officers' duty extended beyond avoiding "wrongful" conduct:

> "It is also argued that it was the deceased's fault in getting himself into what witnesses classified as a 'very drunken condition', thus initiating the chain of events which culminated in his tragic death, and that the defendant was not bound to protect him from his own folly. This assertion is not entirely without plausibility. Ordinarily one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself. But that absence of duty ended when Officer Robinson took Benally into custody. It then became his obligation to measure up to the standard of conduct which the law almost universally imposes: that of using the degree of care and caution which an ordinarily reasonable and prudent person would use under the circmstances. The deceased was entitled to have that degree of care observed in his behalf, even though he was drunk. As is sometimes said 'a drunk man is as much entitled to a safe sidewalk as a sober one, and is a great deal more in need of it.'"
>
> Benally at 390.

In Benally, the plaintiff's decedent was under the defendant officer's care and control. In the present case, Michael Christenson was under the defendant deputies' care and control. They could foresee that Christenson would attempt to ride his motorcycle and sustain serious injuries. The deputies' duty extended beyond refraining from unlawful acts of excessive violence. The deputies had a duty as reasonable and prudent persons to take steps to avoid decedent's death. The Benally court ruled: "Accordingly, it was error for the court . . . to refuse to instruct upon (the officer's) duty to exercise reasonable care for (the deceased's) safety." Benally at 390.

Whether Deputies Taylor and Davis "undertook" to assist and restrain the plaintiff's decedent is a question for the jury. If the deputies did undertake to assist the decedent, their actions gave rise to a duty towards him. Whether the deputies failed in that duty is a question for the jury. The foreseeability of the decedent's injuries is also a question for the jury.

If the existence of the deputies' duty is a matter of law, that law is not yet decided in Utah. Since 1963, Arizona has held both officers and their employees liable for the officer's negligent acts. Stone v. Arizona Highway Comm., 93 Ariz. 384, P.2d 107 (1963):

> "(T)he substantive defense of governmental immunity is now abolished not only for the instant case, but for all other pending cases, those not yet filed which are not barred by the Statute of Limitations and all future causes of action. All previous decisions to the contrary are overruled.
>
> There is perhaps no doctrine more firmly established that the principal that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception . . ."
>
> Stone at 112.

POINT II

PLAINTIFF'S DECEDENT COULD NOT, AS A MATTER OF LAW, HAVE "ASSUMED THE RISK."

In Utah, the law on assumption of risk contains two elements. There must be knowledge of a danger and a free and voluntary consent to assume it. Meese v. Brigham Young University, Ut., 639 P.2d 720.

> "This court has ruled that the essential elements of assumption of risk are (1) knowledge of a danger, and (2) a free and voluntary consent to assume it. It must be actual knowledge and it is not sufficient to say that in the exercise of ordinary care one would know that danger exists."
>
> Meese at 724.

Of course, the plaintiff's decedent should have known about the danger inherent in riding his motorcycle while drunk, but how could the decedent have given free and voluntary consent

to assume the risk while he was intoxicated? The decedent's judgment was severely impaired by his drunkenness, while the deputies were sober and possessed unimpaired judgment. Whether the officers were able to appreciate the risk of injury more clearly than the decedent is a question for the jury:

> "We thus hold that under our comparative negligence statute "Assumption of risk" language is not appropriate to describe the various concepts previously dealt with under that terminology but is to be treated, in its secondary sense, as contributory negligence. Specifically, and with particular reference to our comparative negligence act, the reasonableness of plaintiff's conduct in confronting a known or unknown risk created by defendant's negligence will basically be determined under principles of contributory negligence. Attention should be focused on whether a reasonably prudent man, in the exercise of due care, would have incurred the risk, despite his knowledge of it and, if so, whether he would have conducted himself in the manner in which the plaintiff acted in light of all the surrounding circmstances, including the appreciated risk . . . Then, if plaintiff's unreasonableness is viewed to be less than that of defendant, according to the terms of the statute, "Any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering." Jacobsen Construction Co., Inc. et al, v. Structo-Lite Engineering, Inc., 619 P.2d 306 (Utah 1980).

It might be argued that the decedent's voluntary drunkenness is an intervening act, relieving the defendants of liability; however, a reasonably foreseeable intervening act would not

supersede the defendants' original negligence, nor must the defendants' negligence be the sole cause of the decedent's death. The Court of Appeals of New York has said that a drunken plaintiff's actions are foreseeable and should not excuse a defendant's negligence. Parvi v. City of Kingston, 41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161 (1977):

> "Finally, a word of clarification may be in order as to the legal role of plaintiff's voluntary intoxication. To accept the defendant's argent, that the intoxication was itself the proximate causea of Parvi's injury as a matter of law, would be to negate the very duty imposed on the police officers when they took Parvi and Dugan into custody. It would be to march up the hill only to march down again. The clear duty imposed on the officers interdicts such a result if, as the jury may find, their conduct was unreasonable. (Citations). For it is the very fact of plaintiff's drunkenness which precipitated duty once the officers made the decision to act."

In the present case, the decedent's drunkenness precipitated the deputies' decision to act. The decedent's drunkenness was observed by the deputies. Their experience should have told them that the decedent was likely to ride instead of "walk" his motorcycle, as they directed him to do. Whether the deputies could have reasonably foreseen that the decedent might be injured or killed if he did ride his motorcycle is a question of fact. If the deputies were unaware of the decedent's drunkenness, or if he became drunk after the deputies encountered him, then the

decedent's actions might be an intervening cause sufficient, as a matter of law, to relieve the deputies of liability. But this is not the case; here, the deputies, aware of the decedent's intoxicated state, took the risk that the decedent would obey their command. If the deputies were negligent in taking the risk, then the jury should decide if the consequences of that negligence were foreseeable.

CONCLUSION

The existence of the deputies' duty is a question of law which has not been decided in Utah. The present trend in other jurisdictions is to find that such a duty exists. The plaintiff has alleged sufficient facts to show the existence of this duty, even if the court finds that there must be a special relationship between the deputies and the decedent. The foreseeability of the decedent's death, the reasonableness of the deputies' conduct and their ability to appreciate the risk, as compared to the decedent's ability, are questions of fact for the jury. The granting of summary judgment for the defendants should be reversed and the case remanded for trial.

Respectfully submitted,

WALTER R. ELLETT

/s/

Attorney for Plaintiff

Hand delivered copy of the foregoing to L. E. Midgley, Deputy County Attorney, Attorney for Defendants, 231 East 400 South, Salt Lake City, Utah 84111, this 2 day of April 1984.

/s/

CLERK-MAGISTRATE

See L.T. 2/21/85 p.2

LA 37
J 28

COMMONWEALTH OF MASSACHUSETTS

Hampshire, ss.

Superior Court
Civil Action
No. 17562

DEBBIE IRWIN, et al
Plaintiffs

vs.

TOWN OF WARE, MASSACHUSETTS
Defendant

RULINGS AND REPORT

The plaintiff, Debbie L. Irwin, brought this action against defendant Town of Ware on behalf of herself, the estate of her deceased husband Mark D. Irwin and deceased daughter Misty Jane Irwin, and as next friend of her son Steven Irwin. The plaintiffs charged that police officers of Ware negligently failed to take a driver who was under the influence of intoxicating liquor into protective custody, resulting in an accident which caused the injuries described below. The jury returned special verdicts for the plaintiffs in the amount of $873,690. Defendant brought these motions for judgment notwithstanding the verdict, or in the alternative, to reduce the jury's award, pursuant to Mass. R. Civ. P. 50(b) or 59(e).

Facts

Based on the evidence presented, the jury could have found the following facts.

At approximately 2:00 a.m. on Sunday, May 14, 1978, an on-duty

officer of the Ware Police Department stopped an automobile driven by Donald B. Fuller. This officer was joined by another officer, and as a result of their questioning of Fuller, the officers knew or should have known him to be under the influence of alcohol. [1]

Instead of taking Fuller into protective custody, the officers warned him to drive carefully and allowed him to continue on. Not more than ten (10) minutes later, Fuller's vehicle collided with a vehicle operated by Mark Irwin in which his wife and children were passengers. The Irwins' vehicle was proceeding northbound; Fuller automobile was going southbound in the northbound lane. As a result of the ensuing head-on collision, Mark and Misty Jane were killed while Debbie and Steven were severely injured. Fuller too was killed.

The jury found that the defendant breached a duty which it owed to the plaintiffs, and that such breach proximately caused plaintiffs' injuries. The jury assessed damages of $873,697 as follows: $471,348.50 to the estate of Mark Irwin; $1348.50 to Misty Jane Irwin's estate; $196,000 to Steven Irwin, and $205,000 to Debbie L. Irwin.

The Law

The defendant has maintained throughout that (1) the acts of Ware's police officer employees were discretionary, and therefore the town is not liable under G.L. c.258; (2) the town, through its

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[1] Fuller told the officers that he had been drinking alcohol. Scientific evidence subsequently established Fuller's blood content to have been 202 mg alcohol per 100 ml blood, or approximately twenty one-hundredths alcohol/blood. Under G.L. c.90, §24(e), an alcohol content of ten one-hundredths creates a presumption of intoxication

police officers, owed no duty to the Irwins who therefore are precluded from recovering under any negligence theory; and (3) in any event, the plaintiffs' recovery is limited by G.L. c.258, §2 to $100,000. These arguments will be considered separately.

(1) The liability of the Town of Ware for acts of its police officer employees.

Defendant argues it is not liable for the acts of its employee police officers in allowing Fuller to continue to operate his vehicle as such acts were discretionary rather than ministerial, and therefore are exempted from G.L. c.258, §2 by G.L. c.258, §10(b).

G.L. c.258 §10(b) provides that no liability attaches to a municipality for the negligent performance of a discretionary duty by its employees. Ware claims that the officers' decision to allow Fuller to proceed to operate his vehicle was the exercise of a discretionary function.

In Whitney v. Worcester, 373 Mass. 208 (1979), the Supreme Judicial Court considered what types of public functions might be considered "discretionary" and which functions would be considered "ministerial," giving rise to liability for negligence. The Whitney court noted:

> ...when the particular conduct claimed to be tortious involves...the carrying out of previously established policies or plans, such acts should be governed by the established standards of tort liability....[emphasis added]
>
> 373 Mass. at 218.

That"carnage caused by drunk drivers" on our highways has reached catastrophic proportions cannot be seriously disputed. See South Dakota v. Neville, 51 U.S.L.W. 4148, 4150 (Feb. 22, 1983). The removal from our highways of persons under the influence of

alcohol is a well-established policy in Massachusetts. See Cimino v. Milford Keg, Inc., 385 Mass. 323 (1982) and cases cited. While the officers may not have been under a duty to stop Fuller's car (this determination would require a finding of fact not made in the present action), once they decided to stop the vehicle, their obligation to appropriately investigate the driver's intoxication, under the facts of this case, was no longer a matter of discretion. The jury was presented with ample evidence upon which to base a finding that the officers negligently failed to take proper action in detaining Fuller. Where the officers stopped Fuller's car because it was proceeding erratically, they knew of the likelihood that Fuller was departing from a tavern at closing time, and Fuller told the officers he had been drinking, the officers' obligation to ensure the safety of the highways by investigating Fuller's intoxication was no longer discretionary. I rule as a matter of law that the officers' decision not to take Fuller into protective custody or at least further investigate his potential intoxication was the violation of a ministerial obligation, and therefore plaintiffs' action is not barred by the operation of G.L. c.258, §10(b).

(2) The duty of the Town of Ware, through its police officers, to the Irwins.

The defendant suggests that even if the officers negligently violated their duty, such a duty was to the public at large and not to the Irwins, and therefore no recovery should be allowed in this case.

Defendant relies on Dinsky v. Framingham, 386 Mass. 802 (1982), a case in which the Supreme Judicial Court found a town's building

inspector owed no duty to the purchasers of a home. The home had been negligently constructed in violation of the town's building code. In that case it was found that the building inspector knew or should have known of the failure to comply with conditions of the building permit, but that he nevertheless issued an occupancy permit.

The defendant urges that Dinsky precludes the finding of a duty to any particular plaintiff when a general duty is owed to the public at large. That argument is not persuasive for two reasons.

First, Dinsky and the cases cited therein deal with the issuance of building permits. The building inspector was performing a general service and the potential buyers were not forced to operate in reliance on the inspector. They could have performed or secured their own building inspection before entering into a purchase agreement.

Users of the highways, however, operate in reliance on the government to maintain the safety of the roads. While the police are not insurers of public safety, the function they perform cannot be duplicated or secured through any amount of private effort. Accordingly, while the Dinsky court found a duty to the general public precluded relief to any specific group, the duty of the police in the instant case is not to the general public. Rather, it is to a specific class: highway users.

Second, the defendant's position that there can be no liability by a municipality when a duty is owed to the public is inconsistent with the finding of the Supreme Judicial Court in Slaven v. Salem, 386 Mass. 805 (1982), a case decided after Dinsky. In Slaven the court left open the question of whether a town's employee (a jailer)

owed a duty to a prisoner to take reasonable measures to prevent the prisoner from hanging himself in his cell with his belt. Instead the court found the jailer had no knowledge or reason to know of the inmate's suicidal tendencies. The holding in Slaven undermines the defendant's arguments that no "public" duty can be owed to a particular class.

The court rules as a matter of law that users of the highway are a discreet class of people to whom the police may owe a duty. For that reason the Dinsky rule has no application to the instant case. 2/

(3) The $100,000 limit to recovery imposed by G.L. c.258, §2.

Defendant contends that under G.L. c.258, §2 the maximum amount for which it can be found liable is $100,000. Plaintiffs argue that the jury verdict of $873,697 should remain intact. While no Massachusetts appellate court has yet interpreted the meaning of the limitation clause of G.L. c.258, §2, the statute can be interpreted in various ways with different results.

There are at least four potential analyses of §2: (1) that it does not apply at all to the facts of this case; (2) that the $100,000 limitation applies to each cause of action; (3) that the limitation applies to each individual plaintiff; or (4) that the limitation applies to all plaintiffs collectively for injuries sustained in the same "incident."

The parties have not supplied, nor has the court been able to

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2/ While no Massachusetts cases of record appear to have considered whether a public duty exists as to users of the highway, other states have found highway users to be a distinct class to whom the duty may run. See Oleszczuk v. State of Arizona, 604 P 2d 639 (1979); Green v. Livermore, 117 Cal. App. 3d 82 (1981).

discover, any significant amount of legislative history demonstrating the intent of the lawmakers in establishing the $100,000 limitation. [3] Nevertheless the court is of the opinion that G.L. c.258, §2 does apply to the facts of this case. In particular, I reject plaintiffs' notion that the effect of G.L. c.229 is to repeal c.258, §2 in wrongful death actions. Section two of G.L. c.258 specifically includes "injury or death caused by the wrongful act or omission of any public employee...."

I also reject plaintiffs' contention that the $100,000 limit applies to each separate cause of action. "Causes of action" are arbitrary legal terms which may or may not be relevant for the purposes of awarding damages. To allow such terms to be measurements of damage would elevate form over substance.

While the legislators apparently chose not to pass a 1979 bill limiting recovery to "$100,000 per individual or $300,000 per incident," Glannon, fn. 128, p. 18, the bill as it was enacted does not clarify whether the limitation of $100,000 applies per individual or per incident. Accordingly, while I am inclined to agree with Professor Glannon that "[t]he legislature probably intended to limit each claimant's recovery to one hundred thousand dollars" (emphasis added), I am reporting this aspect of the case for determination by an appellate court. [4]

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[3] One law review article, "Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978," by Joseph W. Glannon, 66 Mass. Law. R. 7 (1981), does refer in passing to the legislative history of the limitation clause. See fn. 128, at 18.

[4] I note that on a per person basis plaintiffs' total recovery would be $301,348.50, as follows: $100,000 each for Debbie Irwin, Steven Irwin, and the estate of Mark Irwin; $1348.50 for the estate of Misty Jane Irwin.

Accordingly, I rule that defendant's motion for judgment notwithstanding the verdict be denied; and that the motion for reduction of damages be reported to the Appeals Court pursuant to Mass. R. Civ. P. 64 and Mass. R. App. P. 5. [5/]

Raymond P. Ciccone
Justice of the Superior Court

Entered:
April 1, 1983

[5/] Pursuant to Mass. R. App. P. 5, I designate the defendant Town of Ware as the aggrieved party.