

Judicial Deference or Bad Law: Why Massachusetts Courts Will Not Impose Municipal Liability for Failure to Enforce Restraining Orders

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On May 31, 2002, Henry Trudeau fatally stabbed Karen Trudeau, his wife of seventeen years and the mother of his two children.¹ Henry then committed suicide.² Upon learning Karen's fate, citizens from Blandford and other surrounding Massachusetts communities expressed disbelief and outrage.³ They directed their anger not only at Henry, but also at local law enforcement agencies for failing to do more to protect Karen. They knew that Karen "did what she could. After her husband punched her, destroyed her belongings and threatened her, [she] got a restraining order. And when Henry Trudeau repeatedly violated it, she filed five criminal complaints."⁴

Indeed, the police had arrested Henry and charged him for violating the restraining order just two months before he killed Karen.⁵ In that instance, however, the court released him without bail.⁶ Following his release, Karen complained three times within a ten-day period that Henry continued to violate the restraining order—complaints that advocates say were stalled in the courts,

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1. Associated Press, *Task Force Faults DA, Courts for Not Protecting Abuse Victim*, BOSTON HERALD ONLINE, Jan. 23, 2004, at <http://business.bostonherald.com/businessNews/view.bg?articleid=2368&format=text>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Associated Press, *supra* note 1.

6. Associated Press, *supra* note 1.

thus allowing Henry to remain a deadly threat to Karen.⁷

In the wake of this local tragedy, advocates formed a task force to investigate the events surrounding Karen's death. The task force ultimately issued a report critical of the District Attorney's Office and the courts for failing to provide Karen with sufficient protection.⁸ The text of the report suggested that Karen would still be alive if the system had functioned in a proper manner.⁹ This underlying assertion echoed the sentiments of her brother-in-law, who declared that, "Karen sincerely thought that going to the court would have protected her. . . . But the system didn't work for her. It failed her miserably in my eyes."¹⁰

Did the failures of the District Attorney's Office and the courts to provide Karen with sufficient protection rise to the level of negligence? If so, might that negligence represent a cause of Karen's death? The Hampden County District Attorney, William Bennett, is currently looking into the matter.¹¹ Yet, even if a prosecutorial body were to find that these governmental failures constituted negligence, and that such failures did contribute to Karen's death, any suit alleging municipal negligence probably would not succeed. Unfortunately, Karen Trudeau's circumstance represents the most recent manifestation of a twenty-five-year-old history of misunderstanding, misrepresentation, judicial reticence and legislative carelessness that has resulted in a landscape where no court in Massachusetts would hold municipal actors liable in negligence for failing to enforce domestic violence laws. This Article examines that landscape.

Almost twenty years before Karen Trudeau received her ultimately ineffective restraining order, another Massachusetts woman, Catherine Ford, obtained a restraining order to prohibit her husband, James Davidson, from abusing her, and requiring that he stay away from her home and her place of work.¹² Pursuant to Massachusetts General Laws chapter 209A, the police, once notified of the order, had a duty to arrest James for violating any of the order's provisions.

Over the next fifteen months, however, James continued to abuse Catherine by stalking her, calling her, and threatening to kill her. Catherine notified the Grafton police after each instance that James contacted her. The police, however, told her that there was nothing they could do. Indeed, one officer advised Catherine to purchase a firearm so that she may protect herself. Catherine received her final death threat on January 17, 1986. On that day,

7. Associated Press, *supra* note 1.

8. Southern Hilltown Domestic Violence Task Force, *The Domestic Violence Murder of Karen Trudeau: A Review of the Judicial System's Response* (unpublished paper) (on file with author).

9. *Id.*

10. Associated Press, *supra* note 1.

11. Associated Press, *supra* note 1.

12. *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1049 (Mass. App. Ct. 1998).

James went to her home and shot her in the face and neck, leaving her a quadriplegic.¹³

Catherine subsequently sued the Town of Grafton for failing to safeguard her from her abusive husband. In a powerful opinion in *Ford v. Town of Grafton*¹⁴ that spelled out every detail of Catherine's ordeal with James, the Massachusetts Court of Appeals held that the police had negligently failed to enforce the restraining order.¹⁵ The court declared that, had the police done their job, Catherine might never have suffered such a horrible deprivation of physical and psychological well-being.¹⁶ The court ultimately concluded, however, that the Town of Grafton stood as a governmental entity, and thus had immunity from suit under the Massachusetts Tort Claims Act.¹⁷ Although the court revealed feelings of sympathy for Catherine, it nonetheless insisted that it was bound by the legislature's grant of sovereign immunity within the Act.¹⁸ In concluding its opinion, the court invited the legislature to amend that Act if it wished to hold police liable for failing to enforce restraining orders.¹⁹

In this Article, we take up the challenge that was thrown down by the *Ford* court. The first part of this Article examines the somewhat tortured and fascinating history of the Massachusetts Tort Claims Act. We then describe the arguments Catherine Ford made, how the court responded, and why it responded as it did. In Part II, we examine Massachusetts' strong commitment to protecting and assisting victims of domestic violence. We describe a variety of legislative, executive and judicial initiatives that demonstrate that commitment, but focus on Massachusetts General Laws Chapter 209A, the restraining order statute. In so doing we reveal a clear legislative and judicial intent to grant victims of domestic violence meaningful protection from abuse.

Despite these efforts to shield domestic abuse victims from further harm, Massachusetts courts stand as the nation's only judiciary that refuses to hold police liable for failing to enforce restraining orders. In Part III of this Article, we analyze cases from several other states that mirror the factual circumstances of *Ford*. In these cases, however, each court held that the police were not entitled to immunity from suit because they shared a special relationship with the victims whom they failed to protect.

This Article also reflects upon the judiciary's repeated invitations to the legislature to clarify or amend the immunity legislation, and suggests several ways that the domestic violence and immunity laws could be changed in a manner consistent with judicial and legislative intent. Lastly, this Article

13. *Id.* at 1051.

14. 693 N.E.2d 1047 (Mass. App. Ct. 1998).

15. *Id.* at 1053.

16. *Id.* (noting town's negligence may be reasonably inferred from evidence).

17. *Id.* (indicating statute immunizes police from tort liability).

18. *Ford*, 693 N.E.2d at 1057.

19. *Id.* (declaring Massachusetts citizens may choose by legislation to hold towns and officials liable).

concludes with a warning. In light of the United States Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*,²⁰ rejecting the idea that the Constitution imposes general affirmative duties on state actors to protect individuals from private violence,²¹ state courts and tort laws exist as a domestic violence victim's last recourse.²² If these courts are incapable of ensuring that law enforcement agencies enforce domestic violence laws, this recourse lacks real meaning. Without clarifying the relationship between domestic violence laws and the Massachusetts Tort Claims Act in a manner that enables courts to hold police and other municipal actors liable for failing to enforce restraining orders, such orders offer no protection to victims like Catherine Ford and Karen Trudeau.

I. THE MASSACHUSETTS TORT CLAIMS ACT

The history of the Massachusetts Tort Claims Act is a fascinating look at the "call and response" patterns shared between the judiciary and the legislature. This dialogue, although continuing to this day, has yet to produce any lasting solutions. The most recent "call" from the judiciary seems have occurred in *Ford*, where the court once again requested legislative clarification regarding the Act.²³

A. *The Act Itself: A Waiver of Immunity for Public Employers*

In an attempt to revise the common law doctrine of governmental tort immunity, the Massachusetts Legislature enacted the Tort Claims Act.²⁴ The concept of governmental tort immunity arises from the doctrine of sovereign immunity, which enables governmental units to enjoy absolute immunity from

20. 489 U.S. 189 (1989).

21. *DeShaney*, 489 U.S. at 199-200. In rejecting Catherine Ford's due process claim, the *Ford* court relied upon *DeShaney* for its determination that the town did not violate her rights by failing to protect her. See *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1056 (Mass. App. Ct. 1998). The *Ford* court's reliance upon the Supreme Court's holding in *DeShaney* demonstrated the tremendous effect that this landmark decision has commanded over similar actions. See generally James T.R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police after DeShaney*, 93 W. VA. L. REV. 251 (1990-91) (detailing effects of *DeShaney* on due process claims for failure to protect). In *Town of Castle Rock v. Gonzales*, the United States Supreme Court will consider a claim under 42 U.S.C. § 1983 in a case involving a woman whose children were killed by their father after she asked the police to enforce her protection order and arrest him. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 417 (2004) (granting certiorari). The Colorado district court and Tenth Circuit rejected the substantive due process claim, relying upon the *DeShaney* decision, but the Tenth Circuit supported the procedural due process claim. See Marcia Coyle, *Justices to Weigh Orders of Protection to Decide if Police Are Liable*, NAT'L L.J., Mar. 7, 2005, at 1.

22. See Laura S. Harper, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues after DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393, 1424-25 (1990) (identifying state courts as more hospitable forum for remedying violations of battered women's rights).

23. See *Ford*, 693 N.E.2d at 1057 (determining current statute bars plaintiff from recovery).

24. See MASS. GEN. LAWS ch. 258, § 1 (2002); see also Joseph W. Giannon, *Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978*, 66 MASS. L. REV. 7, 7 (1981).

tort claims.²⁵ The impetus for this legislative action, however, did not arise from either house. Rather, lawmakers enacted these changes in response to the Supreme Judicial Court's threat to abrogate the common law principle of public immunity that it had traditionally relied upon in the absence of statutory guidance.²⁶

The text of the Act provides that, except under certain circumstances, public employers may be sued and held liable for the negligence of their employees.²⁷ When reflecting upon the purpose of the Act, the judiciary explained that it served to "provide an effective remedy for persons injured as a result of the negligence of governmental entities in the Commonwealth."²⁸ Thus, while a plaintiff must still establish the common law or statutory elements of a negligence action as required in suits against private parties, the legislature intended that the Act be "construed liberally for the accomplishment of [its] purpose."²⁹

B. Judicial Reaction to the Legislature: Exceptions, and Exceptions to the Exceptions

In adopting the Act, the Massachusetts Legislature sought to "replace the Byzantine intricacies of the common law with a simple, coherent and comprehensive system governing all negligence claims against public employers."³⁰ Unfortunately, the Supreme Judicial Court's subsequent interpretations of the Act constructed a level of complexity that continues to puzzle practitioners and academics alike. These interpretations have obstructed the development of what was originally considered to be a "fair, sensible and reasonably simple system of compensation for damages and injuries arising out of public activities."³¹ In turn, cases following the Act's initial passage created

25. See Mark L. Van Valkenburgh, Note, *Massachusetts General Laws Chapter 258, § 10: Slouching Toward Sovereign Immunity*, 29 NEW ENG. L. REV. 1079, 1081 (1995). The doctrine of sovereign immunity originated in Great Britain, and rested upon the premise that the King could not be subjected to suit because there was no court above him, and thus no court could enforce a claim against him. *Id.*

26. See generally *Whitney v. Worcester*, 366 N.E.2d 1210 (Mass. 1977); *Morash & Sons, Inc. v. Commonwealth*, 296 N.E.2d 461 (Mass. 1973).

27. See MASS. GEN. LAWS ch. 258, § 2. The Act provides a cause of action for "injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment," and provides for liability up to a limit of \$100,000. *Id.* With respect to the definition of "public employer," the Act interprets the term broadly to include cities, towns, counties, the commonwealth, local boards, districts, commissions, and virtually any other institution that discharges public functions. See Glannon, *supra* note 24, at 10.

28. *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1299 (Mass. 1984) (citing *Vasys v. Metro. Dist. Comm'n*, 438 N.E.2d 836, 839 (Mass. 1982)). In the *Vasys* opinion, the court noted that the Tort Claims Act provides claimants with valid causes of action to pursue negligent governmental entities while providing safeguards to ensure the stability and effectiveness of the state's government. See *Vasys v. Metro. Dist. Comm'n*, 438 N.E.2d 836, 840 (Mass. 1982).

29. *Irwin*, 467 N.E.2d at 1299 (citing MASS. GEN. LAWS ch. 258, § 2).

30. See Glannon, *supra* note 24, at 19.

31. See Glannon, *supra* note 24, at 22 (contending statute produces fair result in spite of Supreme Judicial

exceptions that proved so unwieldy that the judiciary ultimately gave up trying to interpret and implement the Act. Frustrated, the Massachusetts judiciary ultimately lobbed the concept of tort liability and immunity back into the hands of the legislature.

1. *The Public Duty Rule*

Almost immediately after the Act's passage, the Massachusetts judiciary expressed its dissatisfaction with the legislature's handiwork by injecting common law into the statutory scheme. In 1982, the court began limiting the breadth of the Act by establishing fact patterns under which public actors would enjoy immunity from liability. As it limited the effects of the Act, the judiciary primarily relied upon the common law public duty rule. This rule establishes that a breach of duty to the general public does not give rise to private tort causes of action.³²

Despite its own decision to invoke the public duty rule, the Supreme Judicial Court labeled it "unfair, unwise, and antithetical to traditional tort goals of loss-spreading and victim compensation, and a resurrection of sovereign immunity in disguise."³³ The court itself recognized the irony of its application of the public duty rule, noting that it may ultimately lead to the creation of broad-based municipal tort immunity.³⁴ It reasoned that, "whereas most public employees when acting within the scope of their employment ultimately are doing so in furtherance of the public good broadly defined, the principle of 'public duty' [applied here could] exempt public employers from tort liability for the negligence of most public employees."³⁵

2. *An Exception to the Exception: The Special Relationship Doctrine*

Two years after the Supreme Judicial Court invoked the public duty rule, the court ultimately sought to limit its applicability by invoking the special relationship rule.³⁶ Based in common law, this exception applies "when a citizen becomes singled out from the general population and a special duty is owed [to] him by the governmental entity."³⁷ In such a situation, this exception

Court's interpretations).

32. Joseph W. Glannon & Bennett S. Gordon, *Practice and Procedure Under the Massachusetts Tort Claims Act (G.L. c.258)*, 71 MASS. L. REV. 61, 70 (1986) (citing *Dinsky v. Town of Framingham*, 438 N.E.2d 51, 53-56 (Mass. 1982)).

33. See *Van Valkenburgh*, *supra* note 25, at 1089 (citing *inter alia* *Owen v. City of Independence*, 445 U.S. 622, 657 (1980)).

34. See *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1300 (Mass. 1984) (highlighting municipality's argument against liability).

35. *Id.* (describing application of public duty principle).

36. *Id.* at 1303-04 (adopting special relationship rule).

37. John H. Derrick, Annotation, *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R.4th 1194, 1196 (1985).

prevents the otherwise applicable public duty rule from providing immunity for the negligent state actor.

In *Irwin v. Town of Ware*,³⁸ police officers detained, but failed to arrest, a drunk driver who subsequently caused a fatal accident.³⁹ Despite the fact that the police did not create the risk that caused the accident, the Supreme Judicial Court concluded that the police owed a special duty to the accident victims.⁴⁰ In reaching this conclusion, the court relied heavily upon the foreseeability and immediacy of the harm, and reasoned that potential victims of drunk drivers lack the ability to protect themselves from harm.⁴¹

The *Irwin* court premised its ruling that the police officers were not immune from suit upon a two-pronged analysis. First, the court found a special relationship exception to the public duty rule and then applied traditional tort standards to determine negligence.⁴² The court's analysis, however, demonstrated the difficulty of overcoming the public duty rule by invoking the special relationship exception, as well as the court's narrow application of that exception. Indeed, between 1985 and 1989, the court found a special relationship in only one other case.⁴³

3. *The Judiciary's Threat to Abolish the Public Duty Rule*

For the fifteen years that followed the passage of the Act, the Supreme Judicial Court continued to employ a mixed common law and statutory approach when deciding governmental tort cases. The court, however, finally lost its patience with the state of the law and announced its intention to abolish the public duty rule due to its inconsistency with the Tort Claims Act.⁴⁴ In *Jean W. v. Commonwealth*,⁴⁵ the court acknowledged that, in its attempt to "distinguish viable claims from those subject to dismissal by use of the public

38. 467 N.E.2d 1292 (Mass. 1984).

39. *See id.* at 1295 (stating relevant factual history).

40. *Id.* at 1303-04 (concluding police possess duty to public when confronting intoxicated motorists).

41. *Id.* at 1311. The court declared: "Where 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." *Id.* at 1300.

42. *See Irwin*, 467 N.E.2d at 1303-07 (acknowledging special relationship rule and determining police acted negligently).

43. *A.L. v. Commonwealth*, 521 N.E.2d 1017, 1032 (Mass. 1988). In this case, the Massachusetts Supreme Judicial Court held that a probation officer, who was specifically ordered to prevent a sex offender from working with young boys, possessed a special duty to a subsequent victim of that offender. *Id.*; *see Jean W. v. Commonwealth*, 610 N.E.2d 305, 309-10 (Mass. 1993) (discussing five cases where court declined to find existence of special relationship). Due to the lack of black letter law regarding the required standard under the special relationship doctrine, this area of law is plagued by confusion and inconsistency. A striking example of such inconsistency may be uncovered by comparing the *Irwin* fact pattern with a similar case from Connecticut. In *Shore v. Town of Stonington*, the court held that a police officer's failure to detain a drunk driver did not create a special relationship between the police and the plaintiff who was injured by the drunk driver. 444 A.2d 1379, 1381-82 (Conn. 1982).

44. *Jean W.*, 610 N.E.2d at 307.

45. 610 N.E.2d 305 (Mass. 1993).

duty-special relationship dichotomy,” it had failed to produce a rule of predictable application.⁴⁶ Indeed, after reflecting upon prior relevant decisions, the court noted that it had essentially resurrected “the antiquated and outmoded concepts of sovereign immunity which [it] and the Legislature have sought to shed.”⁴⁷

Regardless of its aggressive posture, the court assured lawmakers that it would not act until the conclusion of the 1993 legislative session, thus providing the legislature with an opportunity to respond if it “believes that certain activities require more stringent protection.”⁴⁸ The court’s opinion also provided Massachusetts lawmakers with examples of statutory responses that other states had adopted when facing similar situations.⁴⁹ Despite these suggestions, the court cautioned that it did not seek “to suggest to the Legislature how it should proceed.”⁵⁰ The court acknowledged that the legislature might ultimately favor the existing statutory limitations on liability and decline to respond to the court’s decision.⁵¹

Despite their apparent uniformity, the justices clearly did not all agree with the decision to abolish the public duty rule. For example, Justice Greaney’s concurrence warned that the abolition of the public duty rule “could lead to a deluge of lawsuits against governmental entities, particularly municipalities.”⁵² Justices O’Connor, Nolan, and Lynch clearly embraced the public duty rule, opining that the court’s rejection of it was “a serious mistake.”⁵³ Each of these justices contended that the Act did not require the court to abandon its use of the public duty rule.⁵⁴ Specifically, these three justices reasoned that it was not necessarily inconsistent to apply both the Act and the common law public duty doctrine together as the court had previously done.⁵⁵ This absence of cohesion among the justices suggests that the judiciary might not have followed through with its threat to abolish the rule had the legislature failed to amend the Act.

46. *Id.* at 307 (noting court’s inconsistent application resulting from exceptions).

47. *Id.* (justifying abolishment of public duty rule as inconsistent with statutory law).

48. *Id.* (defining issue to legislature).

49. *Jean W.*, 610 N.E.2d at 314 (listing other states’ legislative responses to similar issues).

50. *Id.* at 314 n.12.

51. *Id.* at 314 (stating legislature may choose not to take any action).

52. *Id.* at 320-21 (Greaney, J., concurring) (opining abandonment of public duty rule will prove detrimental to municipal budgets). It has been suggested that Justice Greaney concurred in the *Jean W.* opinion because he felt that action had to be taken to rationalize the state of the law. *See* Glannon, *supra* note 24, at 18. Moreover, given the “unsavory alternative” posed by the opinion, he surmised the legislature would respond to the challenge. *See id.*

53. *Jean W. v. Commonwealth*, 610 N.E.2d 305, 317 (Mass. 1993) (O’Connor, J., concurring) (suggesting Massachusetts should not abolish public duty rule).

54. *Id.* at 319 (O’Connor, J., concurring) (urging court not to abandon public duty rule).

55. *Id.* (O’Connor, J., concurring) (indicating court should continue to determine when duty of reasonable care owed).

C. Legislative Response to the Judiciary: The 1993 Amendment to the Act

In the end, however, both the executive and legislative branches took steps to address the court's concerns. The Attorney General responded to *Jean W.* by drafting an amendment that essentially codified the public duty rule. Although originally accepting the measure as an outside section of the 1984 budget, the legislature opted against enacting it at that time. In response, Senator Cheryl Jacques and Larry Wenglin, counsel to the Senate Judiciary Committee, convened meetings of a working group to draft an amendment. The group consisted of representatives from the Attorney General's Office, the Governor's Office, the Joint Committee on the Judiciary, counsel for several municipalities, several representatives from the plaintiff's bar, and Suffolk University Law School Professor Joseph W. Glannon.⁵⁶

The drafting committee reasoned that "the balance between liability and immunity for broad public duties should be struck more or less along the lines of the Supreme Judicial Court's previous public duty cases."⁵⁷ As a result, the committee focused solely upon *Jean W.*'s requirement that the statute must contain "legislative limits on liability for broad public functions, as a substitute for the public duty rule rejected by the Court."⁵⁸ Beginning with the Attorney General's draft, the committee refined its scope by narrowing some of the document's exceptions and clarifying its broad "catch all" exclusion. Although this reworking may have narrowed the scope of immunity provided by the amendment, and thus expanded potential areas of liability, the committee's utilization of the Attorney General's "protective" bill as a starting point set a definitive and liability-limiting tone to the drafting process.

Once completed, the committee's bill received support from most of its members. Representatives of the plaintiff's bar, however, expressed displeasure with the breadth of its protection for public employers because the changes conferred substantial immunity in most public duty situations. In contrast, had the legislature failed to enact an amendment in response to the *Jean W.* decision, the court might have followed through on its threat to remove all public duty limits on liability. This result would have provided a tremendous benefit to tort plaintiffs. It is not surprising, then, that "[n]othing has happened since enactment of the 1993 Amendments that would cause the plaintiff's bar to change its views."⁵⁹ Indeed, plaintiff's counsel in a case decided after the Act's passage later described the amendment as "manifestly unfair" and criticized it for putting "an absolute chill on cases against

56. See Glannon, *supra* note 24, at 19 (describing formation of committee).

57. See Glannon, *supra* note 24, at 19.

58. See Glannon, *supra* note 24, at 19.

59. MASS. BAR ASS'N, CONTINUING LEGAL EDUCATION: HOT TOPICS IN GOVERNMENTAL TORTS AND CIVIL RIGHTS LITIGATION 21 (1996).

municipalities.”⁶⁰

In spite of these criticisms, the legislature enacted Chapter 495 of the Acts of 1993.⁶¹ The amendment added six additional exceptions to chapter 258, and four new “exceptions to the exception.” The newly added subsections (e)-(i) provide governmental immunity from claims based upon the occurrence of five public functions: licensing, inspection, fire protection, police protection, and the release or escape of persons in public custody.⁶² Subsection (j) essentially serves as a codification of the public duty rule, thus providing general protection to public employers without limitation to a particular function.⁶³ Subsections (h) and (j) of the amendment are particularly important to this analysis.

Subsection (h) of chapter 258 provides immunity against claims based upon a municipality’s “failure to establish a police department or a particular police service.”⁶⁴ If the municipality provides police protection, the statute protects the entity in the event that such protection proves inadequate, or if the department fails to detect, prevent, and investigate the commission of a crime.⁶⁵ The statute, however, does not provide immunity against claims arising from “the negligent operation of motor vehicles, negligent protection, supervision or care of persons in custody, or as otherwise provided in subsection (j)(1).”⁶⁶

On its face, subsection (h) exempts from immunity only the negligent operation of motor vehicles and a police department’s negligent protection, supervision, or care of persons in custody.⁶⁷ Any other possible avenues for tort relief with respect to police officers must stem from the exception contained in subsection (j)(1), discussed below. Notably, subsection (h) specifically immunizes law enforcement officers from liability based upon their failure to execute an arrest.⁶⁸ Prior to the adoption of this amendment, much of the immunity conferred by this section had been judicially permitted by the application of the public duty rule. Consequently, the line of cases decided before the amendment’s adoption would likely stand, albeit with one significant exception. It appears that subsection (h) would have modified or even abrogated the holding in *Irwin v. Town of Ware* because the plaintiff in that case based her claim upon a police department’s failure to arrest. As a result of the amendment, the type of claim at issue in *Irwin* would have fallen within the

60. See Claire Papanastasiou Rattigan, *Town Can't Be Sued for Letting Drunk Driver Go*, MASS. LAW. WKLY., Sept. 19, 1994, at 27.

61. 1993 Mass. Legis. Serv. 495 (West).

62. MASS. GEN. LAWS ch. 258, § 10(e)-(i) (2002).

63. See MASS. GEN. LAWS ch. 258, § 10(j).

64. See *id.* § 10(h).

65. *Id.*

66. MASS. GEN. LAWS ch. 258, § 10(h).

67. See *id.* § 10(h).

68. See *id.*

subsection (h) exclusion, thereby conferring immunity upon the officers.⁶⁹

Massachusetts General Laws chapter 258 section 10(j) immunizes municipalities against claims originating from an individual's failure to act towards preventing or diminishing the harmful consequences of a condition or situation.⁷⁰ These situations include "the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."⁷¹ This catch-all provision is essentially a "statutory public duty rule" that provides governmental immunity for an actor's failure to prevent or diminish harm caused by a third party.⁷² This subsection lends its most general protection to public employers, and, like subsection (h), embodies the distinction between publicly created risk and the failure to prevent harm from private or third-party risk.⁷³ As such, subsection (j) safeguards a public employee from liability even if he possessed a duty as part of his public employment to abate or prevent the hazard that injured the plaintiff.⁷⁴

In order to address situations where a victim suffered harm at the hands of a third party, the amendment provides four exceptions to subsection (j)'s catch-all immunity. Immunity is not available if the public employee communicated a "specific assurance of safety or assistance made to the direct victim or a member of his family or household by a public employee, beyond general representations that investigation or assistance will be or has been undertaken."⁷⁵ The statute requires, however, that the injury must result in part from reliance on those assurances.⁷⁶ The other three exceptions are when the public employee provides intervention that either worsens matters or itself is the cause of injury; negligently maintains public property; or negligently provides medical treatment.⁷⁷

The text of subsection (j)(1) holds particular importance in this discussion because it appears to represent a codification of the common-law special relationship exception to the public duty rule.⁷⁸ As such, this subsection seems

69. See Glannon, *supra* note 24, at 23-24.

70. See MASS. GEN. LAWS ch. 258, § 10(j) (2002).

71. *Id.*

72. Carleton v. Framingham, 640 N.E.2d 452, 455 (Mass. 1994) (discussing legislative history behind amendment).

73. See MASS. GEN. LAWS ch. 258, § 10(j).

74. See *id.* § 10. Subsections (h) and (j) fail to provide guidance in situations where a private party causes the injury but the public employee had some level of involvement in creating or failing to prevent the harm. See *id.* § 10(h), (j). In these cases, the critical inquiry is the interpretation of the phrase "not originally caused by the public employer." *Id.*

75. *Id.* § 10(j)(1).

76. *Id.*

77. See MASS. GEN. LAWS ch. 258, § 10(j)(2)-(4) (2002).

78. See, e.g., A.L. v. Commonwealth, 521 N.E.2d 1017, 1027 (Mass. 1988) (holding Commonwealth liable for abuse of students by convicted child molester then employed within school); Irwin v. Town of Ware, 467 N.E.2d 1292, 1299 (Mass. 1984) (ruling town was not immune to liability for bystander's death after police

to offer a ray of hope to citizens who interact individually with public actors, who then offer assistance and ultimately fail to provide it. Unfortunately, the language of this provision requires “specific assurance of safety or assistance” as opposed to “general representations.”⁷⁹ Therefore, the Act prevents courts from holding public actors liable even in situations where common sense would find the existence of a special relationship.

D. Judicial Reaction to the 1993 Amendment

1. Section 10(h) in *Carleton v. Town of Framingham*

Following the legislature’s enactment of the amendment, the Supreme Judicial Court faced a number of cases involving the Massachusetts Tort Claim Act. One of these cases, *Carleton v. Town of Framingham*,⁸⁰ shared a number of factual similarities with the *Irwin v. Town of Ware*.⁸¹ In *Carleton*, a police officer encountered an intoxicated driver at a local Dunkin’ Donuts. Rather than immediately take the individual into custody, the officer parked his cruiser across the street and waited for the intoxicated driver to continue his trip. Once he did so, the officer pursued the driver with his cruiser lights flashing. Unfortunately, the officer abandoned pursuit after the intoxicated driver failed to stop. Later that evening, this driver struck another car after failing to negotiate a curve and killed all of its passengers.

The Massachusetts Appeals Court issued their decision in *Carleton* prior to the amendment’s passage, and thus held that the public duty rule did not bar the plaintiff’s recovery.⁸² The court further concluded that the officer, like the officer in *Irwin*, possessed a duty to enforce the statutes regarding intoxicated operators of motor vehicles.⁸³ The court further reasoned that the officer could have anticipated that his “failure to take action to remove a drunk driver from the highway could result in immediate and foreseeable physical injury to a

failed to detain intoxicated driver).

79. MASS. GEN. LAWS ch. 258, § 10(j)(1).

80. 640 N.E.2d 452 (Mass. 1994).

81. See *Irwin*, 467 N.E.2d at 1292. Prior to the argument phase of the *Carleton* case, the Massachusetts Legislature enacted the amendment. Citing the legislature’s desire to have the amendment apply to pending cases and claims, the Supreme Judicial Court invited the parties to file supplemental briefs with respect to the applicability of the amendment to their case. See generally *Bonnie W. v. Commonwealth*, 643 N.E.2d 424 (Mass. 1994) (finding Commonwealth not liable for negligent supervision of parolee who attacked plaintiff); *Pallazola v. Town of Foxborough*, 640 N.E.2d 460 (Mass. 1994) (holding amendment bars plaintiff’s claim against town for injuries suffered at football game); *Rinkaus v. Town of Carver*, 637 N.E.2d 229 (Mass. 1994) (deciding municipality did not owe duty beyond what it owed to public at large); *Judson v. Essex Agric. & Technical Inst.*, 635 N.E.2d 1172 (Mass. 1994) (holding defendant did not possess a duty to protect plaintiff from negligence of third parties); *Salusti v. Town of Watertown*, 635 N.E.2d 249 (Mass. 1994) (concluding town was not liable for negligent actions of firefighters).

82. See *Carleton v. Town of Framingham*, 615 N.E.2d 588, 591 (Mass. App. Ct. 1993), *rev’d*, 640 N.E.2d 452 (Mass. 1994).

83. *Id.*

member of the public.”⁸⁴

Following the enactment of the amendment, however, the Supreme Judicial Court reversed the appeals court by concluding that section 10(h) of the amended Act “seeks to immunize a municipality when the criminal acts of a third person are a cause of plaintiff’s harm, and the police were negligent in not preventing that criminal conduct.”⁸⁵ The court found each of the Act’s exceptions inapplicable, although it failed to offer any analysis or explanation. The court declined to consider the applicability of section 10(j), having found immunity in the language of section 10(h).⁸⁶

Nonetheless, the court’s opinion revealed signs that it was not entirely satisfied with the legislature’s work in amending the Act. For example, the majority’s opinion suggested the possibility that “the Amendment itself will be shown to generate its own uncertainties.”⁸⁷ Chief Justice Liacos commented directly upon his opinion of the legislature’s work, stating that “I may not agree that the course chosen by the Legislature was the wisest one available.”⁸⁸ Lastly, the court suggested in a footnote that one could hypothetically argue that “the Amendment simply makes the Massachusetts Tort Claims Act inapplicable to claims described in the Amendment, leaving this Court free to apply common law principles to such claims, unfettered by statutory governmental immunity considerations.”⁸⁹

However interesting it might be to read the tea leaves of footnote six, the Supreme Judicial Court closes the door it arguably opened in that footnote by stating that “[i]t appears reasonable to infer that the Legislature intended to immunize municipalities from liability for those claims described in the Amendment.”⁹⁰ In reaching this conclusion, the court placed substantial emphasis on the legislature’s motives, concluding that they stood for the “public interest” of protecting the public treasury and “governmental entities from the expenditure of time, effort, and money in the defense of claims barred by the Amendment and in protecting against recovery on such claims.”⁹¹ The court further found that “the Amendment purports to clarify rights and obligations in an area of the law marked by uncertainty,” and deemed this a “worthy legislative goal.”⁹²

The fact that the court considered and interpreted legislative intent and

84. *Id.* at 591-92. The appeals court provided a detailed description of the officer’s testimony, revealing that the officer knew that the driver was drunk and would be a danger on the road. *Id.* at 590. In fact, the officer actually stated to the driver that he hoped he was not driving. *Id.*

85. *Carleton v. Town of Framingham*, 640 N.E.2d 452, 456 (Mass. 1994).

86. *See id.*

87. *Id.* at 458 (observing court’s criticism of amendment).

88. *Id.* at 460.

89. *Carleton*, 640 N.E.2d at 455 n.6.

90. *Id.* (noting court’s interpretation of legislature’s intent).

91. *Id.* at 458 (revealing court’s strict adherence to legislature’s intent).

92. *Id.*

motivation is interesting in light of the historical basis for this amendment. There is no evidence to support a conclusion that the legislature would have amended the Act of its own volition. It appears logistically clear that the legislature felt compelled to amend the statute in response to what could be considered either invitation or threat by the *Jean W.* court. Of course the legislature was free to respond to the court by taking no action. However, in light of Justice Greaney's warning of a "deluge of lawsuits" as a result of the court's decision to abolish the public duty rule, the legislature could have reasonably concluded that an amendment was both favored and necessary.⁹³ This is, of course, consistent with the *Carleton* court's interpretation of the legislative goal of protecting the public purse.

Moreover, the court's opinion that the legislature's attempt "to clarify rights and obligations in an area of the law marked by uncertainty" was a "worthy legislative goal" seems to represent a self-serving pat on the back.⁹⁴ Recall, it was the intention of the judiciary that the legislature clarify this area of law. Thus, whether the legislature had this goal in mind prior to the *Jean W.* mandate seems simply irrelevant in light of the timing of the amendment.

As a result, the *Carleton* court's literal, narrow, and perhaps uncreative interpretation of legislative intent appeared at least partially consistent with the judiciary's desire to replace the common law public duty doctrine with statutory language. How much weight, therefore, should the courts give to legislative intent when the amendment appears to have been motivated by the judiciary rather than the public? This inquiry seems particularly pertinent in light of decisions that the judiciary has rendered since the passage of the amendment, as well as the tension that still appears to exist between the judiciary and the legislature regarding this amendment.

2. Section 10(j) in *Brum v. Town of Dartmouth* and *Lawrence v. City of Cambridge*

In addition to the tension surrounding the court's interpretation of subsection 10(h), similar problems hamper the viability of subsection 10(j). The case of *Brum v. Town of Dartmouth*⁹⁵ provides a compelling example. In *Brum*, the Supreme Judicial Court seemed to look beyond its own common sense and fairness and reasoned that it had no choice but to engage in a narrow and literal interpretation of the Act's exception to the public duty rule.⁹⁶

The factual circumstances of *Brum* centered upon two groups of teenagers who were involved in a fight at Dartmouth High School.⁹⁷ Three of the youths

93. *Jean W. v. Commonwealth*, 610 N.E.2d 305, 320-21 (Mass. 1993) (Greaney, J. concurring).

94. See *Carleton v. Town of Framingham*, 640 N.E.2d 452, 458 (Mass. 1994).

95. 704 N.E.2d 1147 (Mass. 1999).

96. See *id.* at 1152-55.

97. See *Brum v. Town of Dartmouth*, 690 N.E.2d 844, 846-47 (Mass. App. Ct. 1998), *rev'd in part*, 704 N.E.2d 1147 (Mass. 1999).

fled school grounds following the altercation, and one of the students involved warned the school principal that the three youths had threatened to return and retaliate. The principal and other school officials then witnessed the three youths enter the school openly carrying knives, a billy club, a baseball bat, and a piece of pipe. These officials did not attempt to stop the youths, but instead allowed them to enter a second-floor classroom where they stabbed and killed one of the students involved in the fight.

The Appeals Court found that although the words "not originally caused by" had not been judicially defined, their plain meaning is clear "against the background" of "the policy that the [Tort Claims] Act is to be construed liberally for the accomplishment of its remedial purpose, to provide an effective remedy for persons injured as a result of the negligence of governmental entities in the Commonwealth."⁹⁸ The Court found that the school's

alleged mismanagement of the high school security system by failing to adopt or implement any security measures created, i.e., originally caused, a condition or situation of total insecurity against interlopers at the school, the foreseeable harmful consequences of which . . . the principal and other school officials wholly failed to prevent or diminish.⁹⁹

Justice Kass' dissent revealed him to be the prognostic fly on the wall of the chambers of the Supreme Judicial Court. His dissent warns the Appeals Court against judicial activism and a liberal statutory interpretation of this legislation. He chided the majority for employing "convoluted reasoning" in this arena for its holding that the school authorities originally caused the violent act.¹⁰⁰ While school officials might have prevented the killing, Justice Kass noted that the failure to do so does not open them to liability.¹⁰¹ He continued his dissent by declaring that the majority's

outflanking of the statutory exclusion returns the Court to making the sort of indefensible distinctions that *Jean W.* . . . lamented and that gave rise to the 1993 amendments in the first place. There is nothing obscure about the manner in which [section] 10(j) is written. The majority opinion is a regrettable

98. See *id.* at 850-51 (citing MASS. GEN. LAWS ch. 258, § 10(j) (2002)). Section 10(j) immunizes against any action "based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer." MASS. GEN. LAWS ch. 258, § 10(j) (2002); see also *Irwin v. Town of Ware*, 467 N.E.2d 1292, 1307-08 (Mass. 1984) (noting rationale behind Act). The *Brum* court based its finding upon the background of rule 12(b)(6) standards, as well as "judicial recognition that deficient school security can be a causative factor when students at the school are subjected to physical attack by outsiders." *Brum*, 690 N.E.2d at 850. The court additionally emphasized the municipality's obligation to "provide for and enforce school attendance . . . and to provide children . . . with a safe and secure environment in which they can learn." *Id.*

99. See *Brum*, 690 N.E.2d at 850-51 (noting court's observance of school officials' failure to take protective measures for student's safety).

100. *Id.* at 852 (Kass, J., dissenting).

101. See *id.* (Kass, J., dissenting).

exercise in judicial nullification of a legislative act.¹⁰²

Indeed, the Supreme Judicial Court subsequently reversed the appeals court and concluded that “there is immunity in respect to all consequences except where ‘the condition or situation’ was ‘originally caused by the public employer.’”¹⁰³ The majority further disagreed with the appeals court’s conclusion that the “not originally caused by” clause did not confer immunity when a public entity fails to prevent third-party harm, inasmuch as it would undermine the subsection’s purpose. Commending Justice Kass’ “pithy dissent,” the court concluded that under the appeals court’s interpretation of 10(j), “practically every ‘failure to prevent’ might be recast in this way as ‘originally caus[ing]’ a condition, the ‘harmful consequences’ of which are the wrongful ‘conduct of a third person’ and the ensuing harm to the plaintiff, and the exception would swallow the rule.”¹⁰⁴

In reaching this conclusion, the Supreme Judicial Court again relied upon legislative intent. Reasoning that Massachusetts lawmakers enacted subsection 10(j) in response to the *Jean W.* decision, the court observed that the text reflected an intent to provide government employers with “some substantial measure of immunity from tort liability.”¹⁰⁵ The court cautioned lower courts against construing the phrase “not originally caused by” so broadly as to include remote causation, thereby precluding immunity in almost every circumstance.¹⁰⁶

After reflecting upon the text of the statute, the court once again criticized the legislature’s work, observing that “to say that § 10(j) presents an interpretive quagmire would be an understatement.”¹⁰⁷ As revealed by the inconsistent decisions resulting from the judiciary’s analysis of this amendment, the Supreme Judicial Court raised a legitimate concern. Justice Ireland’s concurring opinion leveled a more expansive criticism of the result compelled by a straightforward interpretation of G.L. c. 258 s 10(j). He concluded with a now-familiar invitation to the legislature.¹⁰⁸

I believe . . . that the result in *Brum v. [Town of] Dartmouth* is unfortunate. Although constrained by the words of [chapter 258] . . . I believe that the practical effect of today’s ruling is wrong because I think that parents reasonably should be able to expect that the schools to which they entrust their children will take reasonable steps to protect their children from harm when, as here, the school officials are put on notice that the children are or may well be in jeopardy This entire matter is within the control of the Legislature,

102. *Id.* (Kass, J., dissenting).

103. *Brum v. Town of Dartmouth*, 704 N.E.2d 1147, 1153 (Mass. 1999).

104. *Id.*

105. *Id.* at 1154.

106. *Id.*

107. *Brum*, 704 N.E.2d at 1153.

108. *Id.* at 1162-63 (Ireland, J., concurring) (criticizing result reached in case).

which, I hope, will act to impose an obligation on school districts, and to ensure that the restrictions in the Massachusetts Tort Claims Act do not apply to these cases.¹⁰⁹

Although only two justices joined with Justice Ireland, this issue clearly hit a nerve within the entire court. In footnote seventeen of the opinion, the court acknowledged the concurrence's reservations and offered a similar, but less explicit, invitation to the legislature.

We are in complete sympathy with the concurrence's observations that it is unfortunate that school officials should escape all legal accountability for their failure to protect the children under their supervision. As the concurrence appears to acknowledge, it would, however, distort the general regime of § 10(j) to interpret its provision, which speaks to tort liability in a wide range of circumstances, to achieve a satisfactory result in this special category of case. This is a task for the Legislature.¹¹⁰

Presented with the chance to apply an exception to subsection (j), the Supreme Judicial Court appeared as reluctant as the Massachusetts Legislature to act. In *Lawrence v. City of Cambridge*,¹¹¹ the court encountered its first opportunity to consider the "exception to the exception" contained in section 10(j)(1).¹¹² This case involved a manager of a liquor store who was robbed at gunpoint in his car after closing the store for the evening. Based upon his identification of the assailants and the gun, the police eventually arrested the robbers. Prior to trial, the victim agreed to testify against the assailants if the police promised to protect him during his store's closing time. The police fulfilled that obligation for three nights by placing a police officer at the store during the agreed upon hours. Unfortunately, an officer failed to arrive on the fourth night and an assailant shot the victim in his back as he entered his car.

When hearing this case, the Supreme Judicial Court did not determine the ultimate question of liability under subsection (j)(1). Instead, it merely reversed the lower court's summary judgment decision in favor of the city, finding that the victim's uncontested allegation that the police promised him protection when he closed the store raised a genuine issue of fact.¹¹³

This case is instructive in its interpretation of "explicit" and "specific" in the context of the Act. The court first looked to Webster's Third International Dictionary, which defined "explicit" as "characterized by full clear expression;

109. *Id.* at 1163 (Ireland, J., concurring).

110. *Id.* at 1162 n.17.

111. 664 N.E.2d 1 (Mass. 1996).

112. MASS. GEN. LAWS ch. 258, § 10(j)(1) (2002). Subsection 10(j)(1) provides that a public employee may be liable under the Act when he gives a specific assurance of safety or assistance to a victim or members of her family or household, beyond general representation that investigation or assistance will be or has been undertaken, when the victim's injury result in part from her reliance upon those assurances. *Id.*

113. *Lawrence*, 664 N.E.2d at 3-4. The Supreme Judicial Court transferred the case from the appeals court on its own initiative.

being without vagueness or ambiguity; leaving nothing implied.”¹¹⁴ Turning to the definition of “specific,” the court noted that it meant “characterized by precise formulation or accurate restriction.”¹¹⁵ Within the context of section 10(j)(1), the court interpreted the legislature’s intention against the definition of these terms and concluded that “explicit” meant “a spoken or written assurance, not one implied from the conduct of the parties or the situation.”¹¹⁶ Using the same process, the court further concluded that “specific” meant that “the terms of the assurance must be definite, fixed, and free from ambiguity.”¹¹⁷

Turning to the facts of the case, the court centered its examination upon the durational element of the police officer’s promise of protection. As a result, the court reviewed the trial judge’s conclusion that the promise lacked sufficient specificity. In reaching the decision to grant summary judgment for the city, the trial judge stressed that the store owner “must be taken to know that the presence would not extend indefinitely” and the officers “made no specific statement as to duration of the so-called ‘protection.’”¹¹⁸ Recall that the single issue before the court was whether the trial court erred in granting the city summary judgment.¹¹⁹ With this in mind, the court did not render a final determination; rather it simply raised the question of how to interpret the duration of a promise of protection when the public entity failed to specify a time frame.¹²⁰ Finally, the court carefully closed any doors it might have suggestively opened by noting that “if the police had withdrawn the promise, no further reliance on it would be warranted and by the terms of the statute the city’s exposure to liability would cease.”¹²¹

E. The Final Judicial Word: Ford v. Town of Grafton

Given the Appeals Court’s decision in *Brum*, perhaps Catherine Ford and her attorney had reason to be optimistic. Instead, consistent with the Supreme Judicial Court’s otherwise narrow interpretation of the Act’s amendment, reading the *Ford* opinion is like watching the climax of an exhaustingly predictable movie. The facts, too, build to a tragic but unsurprising crescendo, which the Appeals Court spells out in a detailed, powerfully narrative

114. *Id.* at 3 n.5 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 801 (3d ed. 1993)).

115. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2187 (3d ed. 1993)).

116. *Id.* at 3.

117. *See* Lawrence v. City of Cambridge, 664 N.E.2d 1, 3 (Mass. 1996) (interpreting legislature’s intended meaning of key words).

118. *Id.* at 4.

119. *Id.* at 1.

120. *See id.* at 4 (declaring plaintiff’s unopposed allegation against police department raised genuine issue of material fact). Emphasizing that the plaintiff’s affidavit stood unchallenged, the court acknowledged that his “assertions must be taken as true, and the credibility of the plaintiff’s statements is an issue for the trier of fact.” *Id.*

121. *Lawrence*, 664 N.E.2d at 4-5.

opinion.¹²²

On October 18, 1984, Catherine Ford obtained a temporary protective order against her husband, James Davidson, pursuant to chapter 209A. The court subsequently extended it until October 25, 1985. The protective order required James to stay away from Catherine's residence, restrained him from harassing her at her workplace, and prohibited him from abusing her or imposing any restraint on her personal liberty. Catherine took her restraining order to the Grafton police station to be logged and posted.¹²³

In addition, Catherine visited a Grafton police officer at his home and sought his advice on how to deal with her husband. The officer, however, told Catherine that "the situation with her husband was her problem" and that "the police could not babysit her twenty-four hours a day."¹²⁴ Ultimately, he advised her to "buy a gun because the only way to deal with violence [is through] violence."¹²⁵

Four days later, James attacked Catherine as she left work. The Northborough police arrived and told Catherine that they would not arrest James for violating the restraining order because they had not yet served him with it. The police subsequently served James at the scene and then allowed him to leave.

Following this incident, Catherine went to the Grafton Police Department to file a report. While at the station, an official informed her that they could take no action because the attack had occurred in another town. Less than an hour later, James traveled to Catherine's parents' home and threatened to kill Catherine if her family refused to allow him to see or speak to her. Catherine's sister immediately reported this encounter to the Grafton police who responded by taking the intoxicated James into protective custody as "an incapacitated person."¹²⁶ The responding officer did not speak to Catherine or any member of her family concerning James' threats, and released him from custody on the following morning.¹²⁷

On the twentieth of November, Catherine informed the Grafton Police that James was driving an eighteen-wheel truck around her home, looking into her windows while apparently intoxicated. Catherine reminded the police of her valid restraining order. An officer responded that they could not act unless the police observed him at her home. The Grafton police then contacted both the Millbury and Shrewsbury police and requested that they check on whether

122. See generally *Ford v. Town of Grafton*, 693 N.E.2d 1047 (Mass. App. Ct. 1998).

123. See *id.* at 1049 (detailing events surrounding issuance of court order). Catherine also gave the protective order reflecting the extension to the Grafton police. *Id.* The police were aware of its provisions, but the order was not properly reflected in the department's logs. *Id.*

124. See *id.*

125. See *id.* (relaying officer's attitude and advice).

126. See *Ford*, 643 N.E.2d at 1049.

127. See *id.* (explaining James' arrest and subsequent release).

James possessed a valid driver's license. The Grafton police, however, did not request that either police department detain James for violating the protective order. The Millbury police eventually stopped James and, after determining that he was not driving under the influence of alcohol, allowed him to proceed on his way. The officer then relayed a summary of his encounter to the Grafton police.

Four days later, Catherine's sister reported to the police that James had called her home repeatedly and threatened to kidnap her children unless she allowed him to speak with Catherine. A Grafton officer patrolled the area surrounding the home, but opted against making any attempt to locate James.

The following day, Catherine and the Grafton police received a call from James' treating psychiatrist, informing them that James had threatened to kill Catherine. Catherine immediately contacted the Grafton police. In their reply, the police informed Catherine there was nothing that they could do about the situation, and merely recorded the incident by making a notation in their police log.

On January 10, 1985, after a clerk's hearing regarding a criminal complaint that Catherine had filed against James, James again threatened to kill Catherine. Upon hearing this, Catherine and her sister drove directly to their parents' home where they received a phone call from James threatening to come over if he was not permitted to speak with Catherine. While her sister contacted the police, Catherine attempted to hide because James subsequently arrived at the premises and remained outside their door. During her call to the police, Catherine's sister once again reminded them of Catherine's current restraining order. When two officers finally responded, they spoke only to James, advised him on how to retrieve his belongings from inside the home, walked him off of the property, and allowed him to drive away.

Less than a month later, Catherine informed the Grafton police that she believed James was trying to purchase a gun. The police logged the call but took no further action. The following day, Catherine's sister informed the police that James had arrived at her home and had rummaged through her mailbox. The police recorded the call, instructed her to contact the post office, and, predictably at this point, refused to take further action.

Catherine ultimately divorced James in March of that year and agreed not to pursue a criminal complaint for assault and battery arising out of the incident that had taken place at her workplace. Apparently, Catherine made this decision due to her fear of James as well as his promise that he would move out of the area. This promise held substantial weight, given that James provided her with a letter from his employer verifying an out of state job offer.

In late April, a Grafton police officer arrived at Catherine's home after receiving a complaint that James had entered Catherine's backyard through her neighbor's property. James had already left the property by the time that the officer eventually arrived. The officer then contacted the police department in

James' hometown of Millbury, and requested that they order him to report to the Grafton police station. James complied and subsequently admitted to the Grafton police that he had violated Catherine's restraining order by entering the grounds of her residence. The officer told James that he was "tired of [James] upsetting [Catherine]" and that if he "bothered her in the future, [he] would do his best to get him into court."¹²⁸ The officer did not arrest James for violating the restraining order, but instead told him that he would be summonsed to court for the violation.¹²⁹

In addition to obtaining a restraining order and seeking assistance from the police, Catherine took independent steps in her attempt to protect herself from James. First, she changed departments at work and requested her employer to inform James that she no longer worked there. Catherine also stopped driving and, except for purposes of traveling to and from work, ceased to travel in cars altogether. After enduring this situation for a year, Catherine began to periodically drive her car in October of 1985. Later that month, while stopped at a traffic light, James suddenly appeared and began pounding on her car. Shaken, Catherine immediately reported the incident to the Grafton police, who once again informed her there was nothing they could do.

Catherine allowed the protective order to expire on the twenty-fifth of October. Reflecting upon the events that had transpired, Catherine realized that she had not dared to live outside the protection of her sister's family for over a year. In addition to her own well-being, Catherine began to fear for the safety of her sister's family. With these concerns planted firmly within her mind, Catherine resolved to move out of the state in order to protect herself and those she cared about from James.

Just two weeks into the new year, James threatened Catherine's life again. Once more, Catherine contacted the Grafton police and reported the incident. In the early evening of January 17, 1986, while Catherine worked in her kitchen preparing dinner, she heard someone at the door and assumed it was her sister. To her surprise, she found James, who then forced his way into her home. Catherine immediately ran out the front door, with James closely following behind her. During her flight, Catherine sprinted in front of a moving car and was hit. Injured, she hurried to a neighbor's house and pounded on the door, but no one let her in. As she ran to the next house, James caught up to her and said, "Where do you want it? You bitch, you're going to die."¹³⁰ James then shot Catherine three times in the face and neck, rendering

128. *Id.* at 1051.

129. *Id.* The court summonsed James on September 19, 1985, some five months after the incident. *Id.* The prosecutor was provided with no information about the parties' history, nor was Catherine notified of the prosecution, made aware of any court dates, or summonsed as a witness. *Id.* Catherine learned that the court fined James for the violation by reading about the court proceeding in a newspaper. *Id.*

130. *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1051 (Mass. App. Ct. 1998) (detailing confrontation between James and Catherine).

her a quadriplegic. Afterwards, James fatally shot himself.

On July 2, 1987, Catherine filed suit against the Town of Grafton as a result of the shooting, claiming, among other things, that the town was liable under the Massachusetts Tort Claims Act.¹³¹ After examining the evidence, the trial court ruled that sections 10(h) and 10(j) of chapter 258 conferred immunity upon the Town of Grafton.¹³²

On appeal, Catherine argued that sections 10(h) and 10(j) did not preclude her claim for numerous reasons. First, she contended that the town directly assured her that she was receiving all of the protection available to her under chapter 209A, and she was injured as a result.¹³³ Furthermore, Catherine stressed that the town's intervention in her situation caused her injury or enhanced her vulnerability to James' threats.¹³⁴ Lastly, she contended that chapter 209A provided her with a claim under the savings clause of chapter 258 section 10.¹³⁵

After weighing Catherine's arguments, the appeals court first engaged in a traditional tort analysis, finding "[t]he evidence, taken in the light most favorable to [Catherine], establishes that the town failed repeatedly to arrest [James] despite its obligation to do so under G.L. c. 209A."¹³⁶ The court reasoned that "the town's negligence reasonably could be inferred from the evidence."¹³⁷ In spite of this conclusion, the court proceeded to deny liability on the part of the town. The appeals court interpreted the language of subsection 10(h) as the legislature's "explicit choice to immunize the town in the circumstances of this case," thus binding the court to rule accordingly.¹³⁸

Catherine had argued that subsection 10(j)(1) applied because the town directly assured her that she was receiving all of the her entitled protections under chapter 209A, and that she suffered injury as a result of her reliance upon those assurances. She also argued that "the act of the Legislature in enacting G.L. c. 209A—a statute of general applicability—and the act of the court in issuing her a protective order constitute an assurance of safety or assistance by individuals in the town's police department."¹³⁹ In other words, Catherine argued that she received both direct, explicit assurance from the Grafton police,

131. *Id.* at 1051-52.

132. *See id.* at 1053.

133. *Id.*

134. *See Ford*, 693 N.E.2d at 1054.

135. *See id.* at 1054.

136. *Id.* (communicating analysis of court).

137. *Id.* at 1053.

138. *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1054 (Mass. App. Ct. 1998). The court then stressed that the town's "alleged negligent intervention is based on its failure to investigate, detect crime, apprehend, arrest, and enforce the law." *Id.* It noted that the "intervention is not based on collateral negligence in the course of any one of these police functions" and that Catherine's claim fell "within the sec. 10(h) exclusion for police protection activities." *Id.* Lastly, the court acknowledged that it was "bound to consider only the specific limitations to this exclusion enumerated by the Legislature." *Id.*

139. *See Ford*, 693 N.E.2d at 1054.

as well as a statutory assurance arising from her receipt of a restraining order under chapter 209A.

The court rejected Catherine's argument that the police provided her with explicit and specific assurances. It arrived at this conclusion by relying upon the *Lawrence* interpretation of "explicit" and "specific," and thus determined that the assurances provided by the town were neither explicit nor specific.¹⁴⁰ According to the court, the town merely communicated to Catherine that it could not take any action until it either witnessed James violating the order or causing Catherine harm.¹⁴¹ In support of its holding, the court noted that the police actually informed Catherine that they were not her "babysitting service" and advised her to purchase a gun for protection.¹⁴² As a result, the court declared that "the evidence precludes a finding that the town gave 'explicit and specific assurances of safety or assistance' to [Catherine] or her family."¹⁴³ The court, however, failed to address Catherine's assertion that she had received statutory assurance arising from chapter 209A and her receipt of the restraining order.¹⁴⁴

The court's opinion did not discuss the common-law concept of special relationship within the context of the Act, although the statutory analysis suggested that recipients of protective orders do not fall into this category in such a way that would exempt the police from immunity. The court's rejection of Catherine's procedural due process claim seemed further instructive, as it explicitly stated that "[no] Massachusetts Court has determined that a protective order creates a special relationship between the police and a domestic violence victim."¹⁴⁵

Finally, Catherine argued that chapter 209A justified a claim against the town pursuant to the "savings clause" of chapter 258 section 10. The clause states that "[n]othing in this section shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employers or entities."¹⁴⁶ Consequently, she contended that the town's disregard of chapter 209A's arrest requirement rendered the municipality liable as a matter of law. The appeals court rejected this argument as well. In doing so, the court agreed that the statute mandates police officers to act in accordance with the statute but concluded that there is "no language in the

140. *Id.*

141. *Id.*

142. *Id.*

143. *See Ford v. Town of Grafton*, 693 N.E.2d 1047, 1054 (Mass. App. Ct. 1998).

144. *See id.* at 1047. Catherine further argued that the town was not entitled to immunity pursuant to the second exception, section 10(j)(2), because "the town's intervention caused injury or enhanced her vulnerability to [James'] threats." *Id.* at 1054. The court refused to consider this argument. *Id.*

145. *Id.* at 1055; *see supra* notes 20-21 and accompanying text (discussing impact of *DeShaney* on due process claims similar Catherine's cause of action).

146. *Ford*, 693 N.E.2d at 1053 (discussing particular aspects of Catherine's argument).

statute that holds officers liable for failing to do so.”¹⁴⁷

The *Ford* decision demonstrates that now that the dust has settled on the Act and its various amendments and interpretations, victims of domestic violence like Catherine Ford “have lost a claim against the less culpable wrongdoer, the entity that could have, but did not prevent [the third party] from committing the torts.”¹⁴⁸ Furthermore, the decision sends a message to the police that the very worst thing they can do is promise a victim of domestic violence that they will protect them within the statutory requirements of chapter 209A. Instead, the court’s holding encourages police to violate their statutory obligation to offer help, and thus avoid any liability that may attach to any such offer.

II. MASSACHUSETTS’ RESPONSES TO DOMESTIC VIOLENCE

The *Ford* court’s refusal to find that Catherine Ford had a claim against the Town of Grafton on these grounds marks a clear departure from the judiciary’s consistent efforts to effectuate the legislature’s intent for domestic violence victims to receive special protection from government. The legislature has demonstrated its commitment to assist and protect domestic violence victims in a multitude of ways. Indeed, as we demonstrate below, Massachusetts stands as one of the most forward-thinking and proactive states in terms of providing protection for victims of domestic violence and their families.

In this section, we describe Massachusetts’ domestic violence legislation, focusing on chapter 209A’s mandatory arrest provisions. We then examine various examples of executive action and legislative and judicial cooperation, all of which illustrate the state’s commitment to protect victims of domestic violence.¹⁴⁹ This section declares that, in light of the evidence of the legislature’s commitment, any court could reasonably conclude that Massachusetts lawmakers sought to hold the police liable for failing to enforce a restraining order in circumstances similar to those endured by Catherine Ford. The *Ford* court’s failure to reach this conclusion reveals a judiciary that remains confused by the current state of the immunity law. At the very least,

147. See *id.* at 1054-55 (conducting textual examination of statute to determine existence of liability).

148. *Carleton v. Town of Framingham*, 640 N.E.2d 452, 458 (Mass. 1994). See generally *Ford*, 693 N.E.2d 1047. Since the *Ford* holding, the Massachusetts judiciary has decided only one other case dealing with liability for failure to enforce restraining orders. This case, however, failed to proceed past the trial level. See *McClure v. Town of East Brookfield*, No. 972004B, 1999 WL 1323628, at *1 (Mass. Super. Mar. 11, 1999). In *McClure*, the plaintiff brought suit against the Town of East Brookfield under the Tort Claims Act and chapter 209A, for the police’s failure to protect her and her children from physical and mental abuse by their father, Thomas McClure. *Id.* at *1. The trial court reasoned that the decisions in *Ford* and *Brum* had precluded the judiciary from imposing “liability upon a municipality under the Massachusetts Tort Claims Act (G.L. c. 258) for an alleged failure to defend.” *Id.* at *5. As a result, the court granted the town’s motion for summary judgment. *Id.*

149. For more information regarding domestic violence initiatives, as well as applicable cases and laws not covered in this article, see the Massachusetts Coalition Against Domestic Violence website at <http://www.janedoe.org/>.

the court's failure demonstrates that the legislature must act to clarify the underlying causes of this confusion.

A. Legislative Response

The Massachusetts Legislature first demonstrated its commitment to protecting victims of domestic violence in 1978 when it became the second state government to enact a statute that created domestic violence restraining orders.¹⁵⁰ Massachusetts' Abuse Prevention Act, which is commonly referred to simply as chapter 209A, is considered one of the most comprehensive and far-reaching domestic violence laws in the United States because it encompasses both criminal and civil law issues.

In the absence of any legislative history, the Supreme Judicial Court has interpreted the text to provide a "mechanism by which victims of family or household abuse can enlist the aid of the State to prevent further abuse."¹⁵¹ The court expanded upon the legislative intent behind the statute by declaring that it represented a "response to the troubling social problem of family and household abuse in the Commonwealth."¹⁵² In the court's eyes, judicial orders issued pursuant to chapter 209A "afford abused individuals the opportunity to avoid further abuse and to provide them with assistance in structuring some of the basic aspects of their lives, such as economic support and custody of minor children, in accordance with their right not to be abused."¹⁵³

This legislation ultimately created a program that has served as a domestic abuse prevention model for the rest of the country. The statute calls for coordination and cooperation among various parties involved in domestic violence incidents including judges, district attorneys, police and social service agencies.¹⁵⁴ Such coordination streamlines the restraining order process by, among other things, creating a domestic violence clerk position to work exclusively on processing restraining orders within the court system.¹⁵⁵ The program also involves stringent monitoring and enforcement of probation for aggressors, coupled with a proactive response from the District Attorney's

150. See MASS. GEN. LAWS ch. 209A, § 6 (2002) (providing domestic abuse protection). Pennsylvania became the first state to enact statutorily-based domestic relations restraining orders. See PA. CONS. STAT. §§ 6101-6118 (1996) (codifying and amending 1975 statutes); see also Sally Engle Merry, *Rights, Religion and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 LAW & SOC'Y REV. 39, 50 (2001) (identifying Pennsylvania and Massachusetts as first two states to adopt restraining order laws).

151. See *Commonwealth v. Gordon*, 553 N.E.2d 915, 917 (Mass. 1990) (reflecting upon purpose of statute).

152. *Id.* at 918.

153. *Id.*

154. See Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1298 (2000) (explaining coordinated approach for addressing domestic abuse in Massachusetts).

155. See *id.* (illustrating function of domestic violence clerk).

Office.¹⁵⁶ The statute not only provides victims with immediate relief, but also possesses a capacity to address their long-term needs.¹⁵⁷ The definition of abuse is broad and the statute provides expansive coverage to individuals who suffer from it. The text of chapter 209A also grants courts a substantial measure of discretion when determining proper jurisdiction and venue.¹⁵⁸

Furthermore, chapter 209A section 6 clearly reveals the legislature's intent to confer a great deal of authority and responsibility upon law enforcement officials to assist and protect victims and restrain perpetrators.¹⁵⁹ Amended in 1983, section 6 states that "[w]henver any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse."¹⁶⁰ As a result, police officers possess a duty to assist those who have been abused, as well as those who are in danger of suffering abuse.

With respect to victim assistance, section 6 requires that an officer who believes abuse has occurred "shall take, but not be limited to the following action:" remain inside the alleged victim's dwelling after reporting to the scene of the incident; assist the victim in obtaining medical assistance if needed; provide the victim with a detailed explanation of her rights under Massachusetts law; help the victim locate and travel to a safe place; activate the emergency judicial system after court hours, if necessary; inform the victim that the perpetrator will be eligible for bail and may be promptly released.¹⁶¹ The original statute also added to the list of "reasonable means" that police officers must employ to prevent further abuse warrantless arrest of any individual in the following circumstances: (1) probable cause to believe that individual has committed a felony; (2) commits a misdemeanor that involves abuse within the officer's presence; (3) has probable cause to believe that an individual has violated a temporary restraining or vacate order; and (4) if the officer has probable cause to believe that the individual has committed an

156. *See id.*; *see also* Katherine Triantafillou, *Massachusetts: New Legislation to Help Battered Women*, 27 JUDGE'S J. 20, 22-23 (1988) (describing Abuse Prevention Act as effective response to domestic violence in Massachusetts).

157. MASS. GEN. LAWS ch. 209A, § 3 (2002). Section 3 provides broad and comprehensive relief to domestic violence victims. First, it orders the defendant to refrain from abusing or contacting the plaintiff. *Id.* § 3(a)-(b). It also prohibits the defendant from approaching the plaintiff's workplace and requires him to vacate the household. *Id.* § 3(c). In addition, the statute requires the defendant to pay temporary child support, financially compensate the plaintiff for losses suffered as a result of the abuse, and refrain from contacting the minor child. *Id.* § 3(e)-(f), (h). The statute further empowers courts to award the plaintiff temporary custody of a minor child, to order a defendant to attend a certified batterer's intervention program, and to impound information in the case record. *Id.* § 3(d), (g), (i).

158. *Id.* § 3(i).

159. *See id.* § 6; *see also* Triantafillou, *supra* note 156, at 51 (identifying section of Abuse Prevention Act regarding police duties as most important clause for preventing domestic abuse practice).

160. MASS. GEN. LAWS ch. 209A, § 6.

161. *Id.*

assault and battery that involved abuse.¹⁶²

The 1990 amendment to this section strengthened the statute's mandatory arrest language with regard to perpetrators whom law enforcement has probable cause to believe have violated a restraining order. The amendment declares that "when there are no vacate, restraining or no-contract orders or judgment in effect, arrest shall be the preferred response."¹⁶³ The amendments also explicitly deemed the safety of the victim and children a "paramount" consideration of police officers when deciding whether or not to arrest an alleged perpetrator.¹⁶⁴

These amendments have expanded police power to make mandatory warrantless arrests for specified misdemeanors in the context of domestic violence. This expansion of power is significant because, under common law, warrantless arrests for a misdemeanor involving a breach of the peace are not permitted unless the misdemeanor is committed in a police officer's presence and continues at time of the arrest. The legislature's decision to enlarge the power to arrest demonstrates its intent that the police play a significant role in assisting victims and restraining perpetrators of domestic violence.¹⁶⁵

B. Executive and Judicial Response

Action to address the problem of domestic violence was not, however, confined to the legislature. Immediately following the passage of chapter 209A, the Attorney General sponsored a statewide conference that included chief justices, police chiefs and district attorneys. In addition, the Consumer Protection Bureau produced a "rights card" and, following the conference, trial judges and district attorneys attended additional lectures. Moreover, the Chief Justices of the Massachusetts Probate and Family Court and the District Court promulgated compliance memos, and the Police Chiefs Association met with advocates to create a compliance handbook for training purposes.¹⁶⁶ Following the conference, the Administrative Office of the Massachusetts Trial Court issued the Guidelines for Judicial Practice.¹⁶⁷ These guidelines were designed to assist judges and court personnel address issues that often arose in chapter 209A proceedings. The Administrative Office described the guidelines as a tool for promoting the safety of chapter 209A applicants and ensuring the due

162. *Id.* § 6(4), (7).

163. *Id.*

164. MASS. GEN. LAWS ch. 209A, § 6(7)(c) (2002).

165. See Triantafillou, *supra* note 156, at 51 (explaining legislative intent vis-à-vis police powers under Abuse Protection Act).

166. See Triantafillou, *supra* note 156, at 51-52.

167. ADMINISTRATIVE OFFICE OF THE MASSACHUSETTS TRIAL COURT, GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS (Dec. 28, 2000), available at <http://www.mass.gov/Courts/formsandguidelines/domestic/dvg1.html>.

process rights of corresponding defendants.¹⁶⁸

Despite these initial efforts, Governor William Weld recognized that domestic violence victims continued to lack much-needed protections. In response, the Massachusetts governor declared domestic violence a public health emergency in September of 1992. Subsequently, the governor established a Registry of Civil Restraining Orders, the nation's first statewide, computerized domestic violence record-keeping system.¹⁶⁹ The registry features a centralized database that is accessible by judicial officials and law enforcement personnel for the purposes of issuing and enforcing abuse prevention orders in a more effective manner.¹⁷⁰

Various state agencies have implemented these systems into their mission protocol for preventing domestic violence. For example, the Massachusetts Department of Social Services (DSS) has employed domestic violence specialists in their statewide offices and created a groundbreaking integration model that incorporated domestic violence expertise into their child protective services.¹⁷¹ These specialists work side-by-side with child protection case workers and provide case consultation, direct advocacy, and connections to community resources for victims and their children. DSS policy supports decision-making within the agency that is responsive to the concerns of battered women. Such concerns generally include screening, investigation, risk assessment, family assessment, case planning and other related services.¹⁷²

The Massachusetts Office for Victim Assistance (MOVA) has pioneered an equally advanced program called SAFEPLAN.¹⁷³ The creation of SAFEPLAN resulted from a partnership between MOVA and community-based domestic violence programs, as well as through collaborations with district attorneys' offices, criminal justice and social services agencies, and legal services programs. SAFEPLAN advocates are trained and certified to provide legal

168. Barbara A. Dortch-Okara, *Forward to ADMINISTRATIVE OFFICE OF THE MASSACHUSETTS TRIAL COURT, GUIDELINES FOR JUDICIAL PRACTICE: ABUSE PREVENTION PROCEEDINGS* (Dec. 28, 2000), available at <http://www.mass.gov/Courts/formsandguidelines/domestic/foreward.html>.

169. Toni Locy, *Weld Signs Bill Creating Registry of Batterers*, BOSTON GLOBE, Sept. 23, 1992, at B10.

170. SANDRA ADAMS & ANNE POWELL, OFFICE OF THE COMMISSIONER OF PROBATION, TRAGEDIES OF DOMESTIC VIOLENCE: A QUALITATIVE ANALYSIS OF CIVIL RESTRAINING ORDERS IN MASSACHUSETTS 22 (1995). The statute that amended section 7 requires judges to search a defendant's record for instances of past civil or criminal domestic abuse. MASS. GEN. LAWS ch. 209A, § 7 (2002). If an outstanding warrant exists against the defendant and the defendant is found to pose a risk of injury to the plaintiff, the judge is also required to notify police as to the outstanding warrant. *Id.* The police officer will then "take all necessary actions to execute any such outstanding warrant as soon as is practicable." *Id.*

171. See Massachusetts Health and Human Services, *Help for Battered Women on Public Assistance*, at <http://www.mass.gov> (last visited Mar. 11, 2005).

172. See Linda Spears, *Building Bridges Between Domestic Violence Organizations and Child Protective Services*, VIOLENCE AGAINST WOMEN ONLINE RESOURCES (Feb. 2000), at <http://www.vaw.umn.edu/documents/dvcps/dvcps.html>.

173. See Massachusetts Office of Victim Assistance (MOVA), *About SAFEPLAN*, at <http://www.mass.gov/mova/page85.html> (last visited Feb. 25, 2005). SAFEPLAN stands for Safety Assistance For Every Person Leaving Abuse Now. See *id.*

advocacy and supportive services to victims who seek judicial intervention primarily through chapter 209A applications.¹⁷⁴ These advocates are based in thirty-six district and probate courts, and provide their services throughout the state.

Beyond these initiatives, the Weld Administration established the Governor's Commission on Domestic Violence. Governor Weld charged this advisory committee with the task of formulating innovative and coordinated policies that addressed the state's domestic violence problem. The commission's appointed members included various state secretaries who have continued to rely upon input from the courts, the Office of Probation, the Parole Board, the District Attorneys' offices, local state police departments, the Massachusetts Coalition of Battered Women's Service Groups, and state certified batterer's intervention programs. Among its other accomplishments, the committee helped create the first statewide Domestic Violence Law Enforcement Guidelines and modified the statewide certification standards for batterer intervention programs.¹⁷⁵

C. Legislative and Judicial Cooperation

Recognizing that it could not conclude its efforts to provide assistance and protection to domestic violence victims with the enactment of chapter 209A, the legislature enacted criminal legislation designed to support then-existing civil domestic violence statutes. The so-called "Dangerousness Statute," permits the Commonwealth to request an order of pretrial detention or release on conditions for felony offenses involving the use of force.¹⁷⁶ If, after the hearing, a court determines by clear and convincing evidence that any condition of release would fail to reasonably assure the safety of any person or the community, the court must detain the defendant without bail.¹⁷⁷ This legislation helps victims of domestic violence by ensuring that their batterers' violent history will be relevant for preventing certain conditions of release.

Since the enactment of such statutes, both the legislature and the judiciary have addressed the impact of domestic violence on child custody and visitation. In 1996, the Supreme Judicial Court held in *Custody of Vaughn*¹⁷⁸ that courts must consider the impact of domestic violence on children when making

174. See *MOVA*, *supra* note 173. Advocates conduct risk and needs assessments, inform victims of their legal rights and options in civil and criminal proceedings, and assist them with 209A paperwork. *Id.* In addition, SAFEPLAN advocates help victims understand current domestic violence laws and assist them throughout the process of obtaining a restraining order. *Id.* Lastly, advocates work with each victim to develop a safety plans, provide resource referrals, and advocate for the victim during her 209A proceedings. *Id.*

175. See Governor's Commission on Domestic Violence, *History of the Commission* (2002), available at <http://www.mass.gov/gcdv/comm.htm>.

176. See MASS. GEN. LAWS ch. 276, § 58A(1) (2002).

177. See *id.* § 58A(3) (requiring mandatory detention when safety of community not assured).

178. 664 N.E.2d 434 (Mass. 1996).

custody determinations.¹⁷⁹ Furthermore, the opinion required judges to make findings of fact that reflect their consideration of this issue.¹⁸⁰ The judicial mandate of *Vaughn* broadened the statutory requirement that courts must consider domestic violence in custody decisions.¹⁸¹ As a result of this expansion, the Massachusetts judiciary became the first in the nation to require judges to consider domestic violence during custody determinations and to memorialize that consideration in written findings. In a beautiful example of judicial and legislative cooperation, the legislature subsequently codified this requirement and took the decision a step further by amending the custody statute to create a rebuttable presumption against awarding custody to a battering parent.¹⁸²

D. Ford v. Grafton

The preceding sections demonstrate that, at the time of the *Ford* decision, Massachusetts had both a legislative scheme and a judiciary that strongly supported efforts to protect victims of domestic violence. Indeed, the *Ford* court explicitly revealed the ways in which Catherine Ford's situation fell within the previously described legislative and judicial scheme. The court noted that "the evidence, taken in the light most favorable to the plaintiff, establishes that the town failed repeatedly to arrest [James] despite its obligation to do so under G.L. c. 209A."¹⁸³ The obligation that the court referred to was the mandatory arrest provision contained in section seven of the statute. This observation holds particular significance because section seven became effective in 1990, well after the time period during which Catherine had a restraining order. Nonetheless, the appeals court still found that the Grafton police held a statutory obligation to arrest James.¹⁸⁴

The court agreed that the legislature intended for Catherine to be protected, and that the police had violated their statutory duty by failing to take sufficient action. With this established, however, the court refused to impose liability for that violation. This decision signified a departure from the judiciary's prior efforts to effectuate the legislature's intent to provide as much protection as possible for victims of domestic violence. This dramatic shift can be explained only in light of the confusing and painful parallel history described in the previous section. When read in that context, the *Ford* opinion reads much like a plea for clarification. Such assistance will then allow the court to resume its

179. See *id.* at 439-40 (emphasizing impact of domestic violence on children).

180. See *id.* at 439 (affirming *R.H. v. B.F.*, 653 N.E.2d 195 (Mass. 1995)).

181. See generally Philip C. Crosby, Case Comment, Custody of Vaughn: *Emphasizing the Importance of Domestic Violence in Child Custody Cases*, 77 B.U. L. REV. 483 (1997) (noting significance of *Vaughn* as a divergence from holdings in other state jurisdictions).

182. See MASS. GEN. LAWS ch. 208, § 31A (2002); MASS. GEN. LAWS ch. 209A, § 10(e).

183. *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1052 (Mass. App. Ct. 1998).

184. See *id.* (identifying police's obligation to arrest under chapter 209A).

partnership with the legislature in the fight against domestic violence.

III. ASSESSING LIABILITY FOR FAILURE TO ENFORCE RESTRAINING ORDERS

This plea for clarification becomes even more evident when considering that courts around the country—in jurisdictions with substantially similar governmental immunity and domestic violence statutes—have found ways to hold police departments liable for failing to enforce restraining orders. This section examines six such cases within the context of the arguments posed by Catherine Ford. This section ultimately concludes that the appeals court could have found the Town of Grafton liable for exactly the reasons Catherine Ford argued: the “savings clause” of the Massachusetts Tort Claims Act provides relief from the police claim of immunity, and the existence of domestic violence laws created a special relationship between Catherine Ford and the police that rendered the Massachusetts Tort Claims Act inapplicable.¹⁸⁵

A. Savings Clause

While remaining consistent with the existing Massachusetts statutory scheme of domestic violence and governmental immunity, as well as with case law around the country, the court could have held that the Town of Grafton lacked immunity from liability under the Act’s savings clause. As discussed, the Act provides immunity to police officers for failure to arrest, even if such failure was in fact negligent.¹⁸⁶ The Act’s savings clause states simply that no provision in the immunity statute should conflict with existing laws.¹⁸⁷ The pertinent existing law in this inquiry is the restraining order law of chapter 209A, which specifically requires police officers to execute arrests when they have probable cause to believe that the law has been violated.¹⁸⁸

Catherine Ford argued, therefore, that the police department’s repeated failure to arrest James represented a violation of state law. Specifically, she contended that the mandatory arrest requirement of chapter 209A rendered the town of Grafton liable as a matter of law. To this claim the court simply responded: “We agree that M.G.L. 209A mandates police officers to act in accordance with the statute. However, we find no language in the statute that holds officers liable for failing to do so.”¹⁸⁹

While perhaps understandable in light of the ongoing tension between the

185. MASS. GEN. LAWS ch. 258, § 10(h). Section 10 declares that none of its parts “shall be construed to modify or repeal the applicability of any existing statute that limits, controls or affects the liability of public employees or entities.” *Id.* § 10(j)(3).

186. *Id.* § 10(h). Section 10(h) provides immunity against any claim based upon the failure to arrest or detain suspects. *Id.*

187. *Id.*

188. MASS. GEN. LAWS ch. 209, § 6 (2002).

189. *Ford v. Town of Grafton*, 693 N.E.2d 1047, 1054-55 (Mass. App. Ct. 1998).

judicial and legislative branches described in Part I, this holding did not stand as the court's only recourse. In a very similar case in New Jersey, a trial court ruled that the state's savings clause denied the police immunity for failing to arrest someone whom they had probable cause to believe had violated a restraining order.¹⁹⁰

The New Jersey court based its decision upon facts that closely resembled the circumstances of the *Ford* case. In this case, police officers from the Town of Plainfield, New Jersey responded to a complaint made by the plaintiff, Joanne Campbell, informing them that her estranged husband, Michael, arrived at her home. When the police arrived on the scene, they ordered Michael to leave and then remained on the premises until his departure. While the police were still there, Joanne mentioned to them that she had a valid restraining order against Michael that prohibited him from having any contact with her. The police, despite knowledge of the restraining order and notice of previous incidents of domestic violence at Joanne's residence, failed to arrest Michael for this violation.¹⁹¹ Michael returned "a short time later" and shot Joanne.¹⁹²

Like Catherine Ford, Joanne Campbell brought an action alleging that the police officers were negligent for failing to arrest Michael. She further argued that the police officers' decision not to arrest Michael violated the New Jersey Prevention of Domestic Violence Act. Similar to Massachusetts law, the language of the New Jersey statute requires that an officer who responds to a domestic violence incident and "finds probable cause to believe that domestic violence has occurred . . . shall arrest the person who is alleged to be the person who subjected the victim to domestic violence."¹⁹³

The Town of Plainfield moved for summary judgment, claiming that the police were not negligent. The town additionally contended that, even if the officers were negligent, they received immunity from the New Jersey Tort Claims Act. Like its Massachusetts counterpart, the New Jersey statute provides that "neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody."¹⁹⁴

190. See *Campbell v. Campbell*, 682 A.2d 272, 275 (N.J. Super. Ct. Law Div. 1996).

191. *Id.* at 273.

192. *Id.*

193. N.J. STAT. ANN. § 2C:25-21 (West 1995).

194. N.J. STAT. ANN. § 59:5-4 (West 1992). The chapter titled Immunity and Liability of a Public Entity, states that "(a) public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." *Id.* § 59:2-2. Although "[a] public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity." *Id.* § 59:2-3. The statute also states that "[a] public entity is not liable for any injury caused by adopting or failing to adopt a law or failing to enforce a law." *Id.* § 59:2-4.

The Correctional Facilities and Police Activities chapter of the New Jersey Tort Claims Act also specifically deals with liability of police officers. Immunity from liability is provided "for failure to provide police protection service, or if police protection service is provided, for failure to provide sufficient police

The New Jersey Superior Court, however, did not accept the town's argument. Noting that the New Jersey Tort Claims Act "appears to be in direct conflict" with the Prevention of Domestic Violence Act's mandatory arrest requirement, the court held that the police were not immune from liability.¹⁹⁵ The court relied on what it described as the legislature's clear mandate that "a police officer must enforce a domestic violence order and all other laws which protect domestic violence victims."¹⁹⁶ In addition, the court cited the Prevention of Domestic Violence Act for its conclusion that "[i]t is the intent of the legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim."¹⁹⁷ The court reasoned that "this mandate compels [it] to conclude that this immunity [for failure to arrest] is inapplicable to domestic violence matters."¹⁹⁸

Aside from near parallel fact patterns, these two cases share many other similarities. First, the Massachusetts statute contains a mandatory arrest provision that is almost identical to New Jersey's domestic violence law.¹⁹⁹ Further, the Tort Claims Acts in both states share practically indistinguishable provisions that provide immunity to the police for failing to execute arrests.²⁰⁰ The Massachusetts Tort Claims Act contains a specific savings clause that prevents it from superseding other existing laws of the state.²⁰¹ The New Jersey court interpreted the legislative intent of the New Jersey Tort Claims Act to conclude that when the two bodies of legislation appeared to conflict, the domestic violence directives prevailed.

The New Jersey Legislature's intent in passing the Prevention of Domestic Violence Act was "to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim."²⁰² Although the Massachusetts domestic violence statute does not contain a specific section outlining legislative intent, it contains a similarly strong declaration that "[t]he safety of the victim and any involved children shall be paramount in any decision to arrest."²⁰³

protection services." *Id.* § 59:5-4, :5-5.

195. *See Campbell*, 682 A.2d at 275 (concluding immunity not applicable in domestic abuse cases).

196. *Id.* (interpreting New Jersey Legislature's statutory language).

197. *Id.*

198. *Id.* (identifying conflict between each statute).

199. *See infra* notes 204-205 and accompanying text (commenting upon similarities shared between mandatory arrest statutes in Massachusetts and New Jersey).

200. *See supra* notes 66-83 and accompanying text (highlighting pertinent language from Massachusetts Tort Claims Act); *infra* notes 204-205 and accompanying text (identifying pertinent language from the New Jersey Tort Claims Act).

201. *See supra* notes 194-196 and accompanying text (stating savings clause from Massachusetts Tort Claims Act).

202. N.J. STAT. ANN. § 2C:25-18 (West 1995) (discussing motivation of New Jersey Legislature for enacting statute).

203. MASS. GEN. LAWS ch. 209A, § 6(7)(c) (2002).

In light of the similarities shared between each statute, why did these two cases turn out so differently? Why did the Massachusetts appeals court hold that the Town of Grafton, through its police department, was negligent and in violation of the domestic violence law for failing to arrest James but not ultimately liable? As noted in Part I, the judicial and legislative branches in Massachusetts have long engaged in volleys over the question of municipal liability. Unfortunately, Catherine Ford appears to be an unwitting and unfortunate victim of the court's unwillingness to hold the government liable for its negligence without clear direction from the legislature. As discussed in the final section, the reluctant Massachusetts judiciary clearly requires more than just contrary case law from other jurisdictions to convince it that the law does not immunize the police for failure to arrest in domestic violence situations.

B. Special Relationship

Catherine Ford next argued that she essentially had a special relationship with the Grafton police that removed the general immunity provided by the Act's codification of the public duty rule. As described in Part I of this Article, the concept of the special relationship evolved as an exception to the common law public duty rule, which holds that a breach of duty to the general public does not give rise to private tort causes of action. In order to be excepted from the public duty rule, a plaintiff must demonstrate that a special relationship existed between herself and the governmental entity. The Act was a legislative attempt to replace the common law concept of sovereign immunity and the public duty rule with a more carefully tailored and clearly defined set of immunity rules. These concepts did not disappear entirely, however. The public duty rule appears codified in the Act's grant of immunity for failing to provide general services. Further, the Act codifies the special relationship doctrine in one of the exceptions to immunity, i.e. that immunity shall not apply to

any claim based upon explicit and specific assurances of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances.²⁰⁴

In order to demonstrate the existence of her special relationship with the Grafton police, Catherine relied upon the doctrine as codified by the Act. Although juxtaposed with the Act's codification of the public duty rule, its text nonetheless declares that governmental entities may not be held immune from claims in which they provided the victim with "explicit and specific assurances

204. MASS. GEN. LAWS ch. 258, § 10(j)(1).

of safety or assistance, beyond general representations that investigation or assistance will be or has been undertaken.”²⁰⁵ The Act, however, requires that the victim’s injury must have occurred as a result of the victim’s reliance on such assurances.”²⁰⁶ The text concludes that a “permit, certificate, or report of findings of an investigation or inspection shall not constitute such assurance of safety or assistance.”²⁰⁷

Relying upon this language, Catherine argued that this exception applied to the facts of her case because the police directly assured her that she was receiving all of the available protections under chapter 209A. She further contended that the legislature’s enactment of applicable domestic violence legislation, as well as the court’s issuance of her protective restraining order, constituted “assurances of safety or assistance by individuals in the town’s police department.”²⁰⁸ As previously noted, the appeals court rejected these arguments and found the exception inapplicable.²⁰⁹

In this section, we discuss decisions rendered by six state courts. Each of these courts concluded that the police in question were not immune from liability for negligently assisting a domestic violence victim. We conclude that the Massachusetts appeals court could have reached the same decision in the *Ford* case. Unlike the cases described in the previous discussion concerning the “savings clause” argument made by Ford, the decisions we describe in this section do not present exact analogies to the *Ford* case for one significant reason: none of the legislatures of the states from which these decisions come had codified the special relationship doctrine the way Massachusetts had. The Massachusetts judiciary could have, therefore, concluded that these cases did not constitute even persuasive authority, particularly in light of the legislative and judicial wrangling that framed the *Ford* case.

However, these cases present exact analogies to the *Ford* case in a more significant and fundamental sense. All these states’ legislatures share with Massachusetts the intent to provide protection to victims of domestic violence. Indeed, in some states, the domestic violence legislation is not as broad or far-reaching as that of Massachusetts, and even in those states, the courts found that a special relationship existed between the victim of domestic violence and the police. We therefore suggest that Massachusetts appeals court could have carried out the legislature’s clear intentions by concluding that a special relationship existed between Catherine and the police. The following cases offer examples of how the appeals court might have reached such a conclusion.

Within this context, five variations on the special relationship theme exist.

205. *Id.*

206. MASS. GEN. LAWS ch. 258, § 10(j)(1).

207. *Id.*

208. *See Ford v. Town of Grafton*, 693 N.E.2d 1047, 1053-54 (Mass. App. Ct. 1998).

209. *See supra* notes 139-141, 143-148 and accompanying text (detailing court’s analysis of Catherine’s claims).

Each argument relies upon slightly different evidence and circumstance to find that a special relationship existed between the police department and a victim of domestic violence who received a restraining order.

In *Campbell v. Campbell*,²¹⁰ the New Jersey Superior Court found that, in addition to the previously described savings clause, the police lacked immunity for failing to arrest Michael Campbell.²¹¹ The court reasoned that the restraining order Joanne Campbell had against Michael “established a ‘special relationship’ between the Plainfield police and plaintiff, which creates an exception to the immunity statute.”²¹² The court described this special relationship as “one that is created when the police assume a protective duty towards the plaintiff, either through a promise or by conduct, thereby inducing the plaintiff’s reliance on their protection.”²¹³ This description appears to closely resemble the Act’s codification of the special relationship doctrine.²¹⁴

In concluding that the victim and the police shared a special relationship, the court provided a detailed analysis of applicable law. The court noted that the state’s domestic violence law required officers to arrest violators of the order.²¹⁵ As a result, the holder of a restraining order possesses the right to rely on the order for protection from an abuser. Essentially, the court determined, the order creates a promise by the police to protect the plaintiff by enforcing the order. The court held that this promise created “a special relationship between the plaintiff and the police officers which exempts it from the immunity statute.”²¹⁶

The Massachusetts restraining order statute similarly contains a promise to protect, given that both the Massachusetts and New Jersey police bear a duty to arrest one who violates a restraining order.²¹⁷ In light of Catherine Ford’s possession of a restraining order, the Massachusetts appeals court could have found that the police provided her with “explicit and specific assurances of safety or assistance.” Furthermore, the court could have reasoned that Catherine’s injuries resulted “in part from reliance on those assurances.”²¹⁸

210. 682 A.2d 272 (N.J. Super. Ct. Law Div. 1996).

211. See *supra* notes 206-208 and accompanying text (providing summary of court’s analysis).

212. *Campbell*, 682 A.2d at 275 (reasoning immunity unavailable for officer who failed to execute arrest in domestic violence matter).

213. *Id.* (noting adoption of special relationship employed by California courts).

214. See *supra* notes 63-69 and accompanying text (discussing codification of special duty rule).

215. See *Campbell*, 682 A.2d at 276 (reasoning court order created special relationship between police and plaintiff).

216. *Id.* (evaluating relationship between police and a plaintiff who had a restraining order).

217. See MASS. GEN. LAWS ch. 258, § 10(j)(1) (2002).

218. *Id.* (stating claims and indemnity procedure for Commonwealth). The statute renders the Act’s immunity provisions inapplicable to claims based upon “explicit and specific assurances of safety or assistance.” *Id.* These assurances, however, must go beyond “general representations that investigation or assistance will be or has been undertaken, made to the direct victim or a member of his family or household by a public employee, provided that the injury resulted in part from reliance on those assurances.” *Id.* Furthermore, a “permit, certificate or report of findings of an investigation or inspection shall not constitute

This finding would have thereby conferred liability onto the police under the exemption to the Act.²¹⁹

In *Donaldson v. City of Seattle*,²²⁰ the Washington Court of Appeals framed the argument in a slightly different way. The *Donaldson* court held that Washington's Domestic Violence Protection Act created a special relationship between the holder of a restraining order and the police department.²²¹ By identifying a specific class of people to be protected, the statute removed situations involving restraining orders from the police force's duty to protect the populace. Once this specific class of victims fell outside the general populace, the police became liable whenever they negligently failed to enforce restraining orders.²²²

On May 29, 1985, Leola Washington filed for a temporary order of protection against Steven Barnes, her boyfriend of about three years. Although she received the order, the authorities never entered it into the Washington Criminal Information System. In August, a court sentenced Steven for malicious mischief regarding the May incident that first prompted Leola to file for the protective order. The court also ordered Steven to refrain from having any contact with Leola. Again, the state system failed to receive any notification of the "no contact" order.

Over the following months, Leola and Steven shared sporadic, yet amicable contact. On December 14, 1985, after spending the night together, they began to argue and Steven became physically abusive. Attempting to escape, Leola managed to leave her home and ran screaming to a neighbor's house. Although Steven followed her and threatened to kill her, he soon left and Leola called the police. Two officers arrived at her house, and Leola informed them of the no contact order. After conducting a radio check, the officers failed to produce a record of the order. Unfortunately, Leola could not locate her copy of the document. Nonetheless, the officers obtained Steven's description and began to search the area. After searching for him without success, the police offered to take Leola to a shelter or to a family member. Leola declined the offer. The next morning, Steven entered Leola's home and stabbed her to death.

such assurances of safety or assistance." *Id.*

219. See generally *Mathews v. Pickett County*, 996 S.W.2d 162 (Tenn. 1999). In *Mathews*, the Tennessee Supreme Court held that an order of protection "specifically identified [the plaintiff] and was issued solely for the purpose of protecting her." *Id.* at 165. As a result, the court reasoned that the plaintiff had apparently relied on the court's order of protection. *Id.* The court premised its conclusion upon the common law public duty rule, and held that the police had a "special duty" to protect the plaintiff and therefore were not entitled to immunity. *Id.* Like Massachusetts, Tennessee's domestic violence law features a mandatory arrest provision. See TENN. CODE ANN. § 36-3-611(a) (2004) (outlining arrest procedure for violation of court order). The statute provides that an "[o]fficer shall arrest without warrant if the officer has reasonable cause to believe that the respondent has violated or is in violation of an order of protection." *Id.* (emphasis added).

220. 831 P.2d 1098 (Wash. Ct. App. 1992).

221. *Id.* at 1105.

222. See *id.* at 1101.

The administratrix of Leola's estate brought a wrongful death action against several parties, including the City of Seattle. The city argued, in part, that the public duty rule barred any liability for negligence. After examining its merits, the court rejected the city's argument.²²³

The court founded its conclusion upon an examination of how the common law public duty interacted with the Domestic Violence Prevention Act.²²⁴ Such analysis was necessary because Washington had yet to enact a specific tort claims act.

Like its Massachusetts counterpart, Washington's Domestic Violence Prevention Act contains a mandatory arrest provision.²²⁵ In addition, the Domestic Violence Prevention Act states that a police officer's primary duty when responding to a domestic violence situation is to "enforce the laws allegedly violated and to protect the complaining party."²²⁶ The Massachusetts statute contains similarly strong language about the general duty of officers, providing that "[t]he safety of the victim and any involved children shall be paramount in any decision to arrest."²²⁷

The Washington court found that the Domestic Violence Prevention Act "does not create new laws prohibiting domestic violence, but requires police and other law enforcement bodies to better enforce the current laws in order to protect the victims of domestic violence."²²⁸ This requirement creates a duty on the part of the city to protect particular individuals by identifying them as a class, and by setting forth the specific duties of the police.²²⁹ Accordingly, the court rejected the city's claim that it owed no special duty to Leola and was therefore immune from liability.²³⁰

The underlying facts in the *Ford* case are even more compelling. Unlike the Washington case, the Grafton police had ample notice and knowledge of both the restraining order and the history of violence between Catherine and James. Chapter 209A of the Massachusetts General Laws defines victims of domestic violence who have restraining orders as a particular class of individuals that

223. *Id.* (rejecting city's claim).

224. *Donaldson*, 831 P.2d at 1101.

225. WASH. REV. CODE § 10.99.030(6) (2002). The statute declares that "when a peace officer responds to a domestic violence call and has probable cause to believe that a crime has been committed, the peace officer shall exercise arrest powers with reference to the criteria in RCW 10.31.100." *Id.* Section 10.31.100 outlines criteria for a warrantless arrest based on a domestic violence violation. *Id.* § 10.31.100. Additionally, section 10.99.055 reiterates the job of the peace officer by declaring that he "shall enforce an order issued by any Court in this state restricting a defendant's ability to have contact with a victim by arresting and taking the defendant into custody, when the officer has probable cause to believe that the defendant has violated the terms of that order." *Id.* § 10.99.055.

226. *Id.* § 10.99.030(5) (describing duty of police officer in domestic violence situation).

227. MASS. GEN. LAWS ch. 209A, § 6(7)(c) (2002).

228. *Donaldson v. City of Seattle*, 831 P.2d 1098, 1101 (Wash. Ct. App. 1992) (basing such finding on legislative intent).

229. *Id.*

230. *Id.*

require special protection. Moreover, chapter 209A sets forth the specific duties of the police to provide special protection by requiring them to arrest individuals whom they suspect are violating those restraining orders. This legislative delineation of a specific class, coupled with an enumeration of specific duties owed by the police to this particular group, certainly appears to create the type of special relationship between the police and restraining order recipients that would fall within the immunity exception of the Act. Although the *Donaldson* court extended the immunity exception to such a relationship, the Massachusetts appeals court failed to reach a similar conclusion.

Unlike the Massachusetts statute, Washington's Domestic Violence Prevention Act contains a clear statement of legislative purpose. Its language declares that the Act seeks to "recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide."²³¹ This statement of intent persuaded the *Donaldson* court to impose a duty on the City of Seattle to protect victims of domestic violence.²³² Perhaps a similar statement in the Massachusetts statute would have helped the *Ford* court achieve a like result.

The final two cases come from Florida and New York. Both states, however, have adopted domestic violence statutes that lack mandatory arrest provisions. Despite this divergence from Massachusetts law, both states concluded in their cases that the holder of a restraining order shared a special relationship with their police departments. As a result, the judiciary in each state held that the police were not immune from liability for their failure to enforce valid restraining orders.

In *Simpson v. City of Miami*,²³³ the Florida appeals court held that Florida's domestic violence legislation placed victims into a "special category of crime victim."²³⁴ The court reasoned that the creation of this particular category established a special relationship between the victim and the "responsible governmental entity."²³⁵ In this case, the court issued a per curiam opinion that reversed the trial court's dismissal of the plaintiff's complaint on sovereign immunity grounds.²³⁶ The court also produced an impassioned concurring opinion that described an all-too-familiar set of circumstances.

In June of 1993, Morena Simpson obtained a Permanent Injunction for Protection Against Domestic Violence that prohibited Carl Hurd from

231. WASH. REV. CODE § 10.99.010 (2004).

232. See *Donaldson*, 831 P.2d at 1101 (concluding statute provides basis for city's duty to protect victims of domestic violence).

233. 700 So. 2d 87 (Fla. Dist. Ct. App. 1997).

234. *Id.* at 89.

235. *Id.* (concluding legislation established relationship between victim and governmental entity).

236. *Id.* at 88.

“committing any abuse, threats or harassment” against her.²³⁷ In March of the following year, Carl traveled to Morena’s house, threatened to kill her, and then left. Morena immediately reported Carl’s threat to the City of Miami Police Department. Officers in the department had responded to previous incidents between Carl and Morena, so they understood that the couple had shared a volatile relationship. After the police confirmed that Morena had a valid protective injunction, they dispatched an officer to the scene. Upon arrival, the officer found Carl and placed him into his police car. Carl, however, managed to convince the officer to release him, and promised that he would leave Morena alone. The next day Carl, “not unexpectedly,” went back to Morena’s home and shot her to death.²³⁸

Betty Simpson, as the representative of Morena Simpson’s estate, brought an action against the city alleging that “the domestic violence protection statute created special protection for the benefit of domestic violence victims.”²³⁹ Simpson further contended that “the decedent was within the special protective sphere of the statute and that by releasing Hurd . . . the officer breached his duty of care to Morena Simpson.”²⁴⁰

The trial court granted the city’s motion to dismiss the complaint on the grounds that the Florida Tort Claims Act provided immunity to public actors.²⁴¹ The court of appeals reversed the lower court’s decision, however, and ultimately held that the City of Miami’s police department was not immune “because there was a special relationship between the plaintiff’s decedent and the police department, and the officer owed the decedent a duty of care.”²⁴²

In the concurring opinion, Judge Shevin explained that courts issue protective injunctions “pursuant to the Florida Legislature’s special protective measures addressing the ever-growing horrors of domestic violence in our society.”²⁴³ Therefore, because the state’s legal system had taken such measures to protect Morena from future abuse, Judge Shevin concluded that Morena shared a special relationship with the police.²⁴⁴ At the foundation of these measures, the Florida Legislature constructed “a special category of crime victim and established a special relationship between the decedent in this case and the responsible governmental entity.”²⁴⁵ As this language implies, the

237. *Simpson*, 700 So. 2d at 88 (describing restraints set forth by injunction).

238. *See Simpson*, 700 So. 2d at 88.

239. *Id.*

240. *Id.*

241. *See Simpson v. City of Miami*, 700 So. 2d 87, 88 (Fla. Ct. App. 1997) (citing FLA. STAT. ch. 768.28 (2004)).

242. *Id.* (identifying special relationship between decedent and police officer).

243. *Id.* (Shevin, J., concurring) (discussing reasons for enactment of special protection measures); *see* FLA. STAT. ch. 741.29-.31 (2004).

244. *See Simpson*, 700 So. 2d 87, 88-89 (Shevin, J., concurring) (noting establishment of special relationship).

245. *Id.* at 89 (Shevin, J., concurring) (observing legislative deference to special relationship).

legislature enacted these laws to dictate police conduct in response to domestic violence conditions.²⁴⁶

Massachusetts enforces a domestic violence law that, with even greater clarity, dictates the “special measures” that police officers must take to protect the same “special category of crime victim.” The state requires police officers to arrest those who appear in violation of restraining orders designed to protect the special category of crime victim. Why then, when the Massachusetts statute contains much stronger language, did the Massachusetts appeals court refuse to find the same special relationship that the Florida court found to exist between Morena and the police? Moreover, why were the Grafton police able to successfully claim immunity?

Twelve years earlier, the New York Court of Appeals reached the same conclusion as the Florida court despite the absence of legislation containing a mandatory arrest provision. In *Sorichetti v. City of New York*,²⁴⁷ Josephine Sorichetti obtained a temporary order of protection against her husband, Frank, forbidding him to “assault, menace, harass, endanger, threaten, or act in a disorderly manner” toward her.²⁴⁸ The court finalized this order for the duration of one year, and included a provision granting Frank weekly visitation privileges with their daughter, Dina, that extended from 10 a.m. Saturday until 6 p.m. on Sunday. The order adhered to the Family Court Act § 168, by reciting:

The presentation of this Certificate to any Peace Officer shall constitute authority for said Peace Officer to take into custody the person charged with violating the terms of such Order of Protection and bring said person before the Court and otherwise, so far as lies within his power, to aid the Petitioner in securing the protection such Order was intended to afford.²⁴⁹

When the following weekend arrived, Josephine delivered Dina to Frank in front of the forty-third precinct at the appointed visitation time. As he walked away with the child, Frank turned to Josephine and shouted, “You, I’m going to kill you.” He then pointed to his daughter and said “You better do the sign of the cross before this weekend is up.” He then made the sign of the cross on himself.²⁵⁰

Interpreting this communication as a death threat, Josephine reported the incident to an officer at the police station. She then presented the order of protection to the officer, reported that Frank had just threatened her and her child, and requested that the officer retrieve Dina and arrest Frank. The officer told Josephine that he could not help her because Frank had not touched her or

246. *Id.* (Shevin, J., concurring) (describing effects of legislation).

247. 482 N.E.2d 70 (N.Y. 1985).

248. *Id.* at 72-73 (reciting language of protection order).

249. *Id.* at 73.

250. *Id.* (reciting threats directed by Frank to Josephine).

otherwise harmed her in a physical manner.²⁵¹

On the following evening, Josephine confronted the police again and attempted for ninety minutes to persuade them to intervene. Despite their knowledge of Frank's violent tendencies, the police refused to act. Rather, the lieutenant in charge told Josephine to leave her number and go home.

While Josephine unsuccessfully pleaded for assistance, Frank's sister arrived home to her apartment. Upon entering, she found Frank lying unconscious next to an emptied bottle of whiskey. Although an hour had passed since Frank was supposed to have returned Dina to her mother, Frank's sister found the young child at the apartment as well—permanently disabled after Frank had severely beaten her.

Josephine and her daughter brought an action against the City of New York for the police department's failure to enforce the restraining order. The trial court denied the city's motion to dismiss, reasoning that it could be held liable to a third person "for breach of a special duty of care . . . [owed] to the holder of an order of protection."²⁵² The case went to trial and the jury returned a verdict for Josephine and Dina.²⁵³

Although the city appealed, the court of appeals affirmed the jury's verdict.²⁵⁴ The court began its discussion by describing the common-law public duty rule and the special relationship exception.²⁵⁵ The appellate body then declared that the city shared a special relationship with the plaintiffs that had arisen from numerous factors. The court pointed to Josephine's order of protection, the department's knowledge of Frank's violent history, the existence of the order of protection, and its understanding of the specific situation in which the child had been placed.²⁵⁶ In addition, the court identified the police department's response to Josephine's pleas for assistance on the day of the assault, as well as her "reasonable expectation of police protection."²⁵⁷

New York's relevant domestic violence legislation is housed in the Family Court Act section 168, which describes situations in which a police officer can arrest a suspected perpetrator of domestic violence.²⁵⁸ As noted earlier, New York's legislation diverges from Massachusetts law because it does not require

251. *Sorichetti*, 482 N.E.2d at 73 (discussing officer's rationale for failing to arrest Frank).

252. *Id.* at 74 (noting possible situations where police department would not be liable to victim).

253. *Id.* at 72 (acknowledging jury verdict).

254. *Id.* at 77.

255. *Sorichetti v. City of New York*, 482 N.E.2d 70, 74 (N.Y. 1985) (noting common-law rule). The rule states that "a municipality cannot be held liable for injuries resulting from a failure to provide adequate police protection absent a special relationship existing between the municipality and the injured party." *Id.* (citing *DeLong v. County of Erie*, 457 N.E.2d 719 (N.Y. 1983)).

256. *Id.* at 75 (identifying relevant factors in case).

257. *Id.* (noting court's deciding factors).

258. N.Y. FAM. CT. ACT § 168 (McKinney 2002). The rule states that the "presentation of a copy of an order of protection or temporary order of protection . . . to any peace officer, acting pursuant to his special duties, or police officer shall constitute authority for him to arrest a person charged with violating the terms of such order." *Id.*

the police to arrest someone whom they suspect has violated a restraining order. Rather, the presentation of a restraining order, “along with an allegation that the order has been violated, obligates the officer to investigate and take appropriate action.”²⁵⁹

Based on the language of the statute, which is significantly less stringent than the corresponding Massachusetts law, the New York Court of Appeals found sufficient contact between Josephine and Dina and the police to find a special relationship. As in other cases, the court reached this conclusion based on the legislative creation of a specific class of people that required such protection. The court noted that an order of protection represents a “pre-incident legislative and judicial determination that its holder should be accorded a reasonable degree of protection from a particular individual.”²⁶⁰ The court added that this class is necessarily limited by the terms of the order.²⁶¹

The New York Court of Appeals further buffered its conclusion by referring to the legislature’s purpose for creating the Family Court Act. The court stated that the legislature sought “to encourage police involvement in domestic matters, an area in which the police traditionally have exhibited a reluctance to intervene.”²⁶² As in Massachusetts, the Family Court Act does not contain any sections describing legislative intent. Rather, the court relied on statements published in the Practice Commentaries that follow the statute in the annotated book.²⁶³

Recall that the Massachusetts Legislature passed the domestic violence legislation to provide domestic violence victims with a practical tool for dealing with and stopping abuse in the midst of a domestic crisis. The statute provides victims with clearly-delineated rights, and informs police of their mandatory duties.²⁶⁴ When applying the reasoning of the New York Court of Appeals to the *Ford* case, the Massachusetts appeals court could have concluded that the legislature’s creation of chapter 209A—which defines police duties specifically to include a mandatory duty to arrest, and which clearly delineates the class of victims to be protected—demonstrated that Catherine Ford and the police share sufficient contact to justify denying immunity to the police.

Yet, the Massachusetts appeals court seemed unable or unwilling to find the police liable for negligence, even though it possessed numerous ways to do so. In fact, the *Ford* court appeared so fearful of reversal by the Supreme Judicial

259. See *Sorichetti*, 482 N.E.2d at 75.

260. *Id.*

261. *Id.* at 76.

262. *Id.* at 75.

263. *Sorichetti v. City of New York*, 482 N.E.2d 70, 75 (N.Y. 1985) (citing Douglas Beshrov’s Practice Commentary to N.Y. FAM. CT. ACT § 168 (McKinney 2002)).

264. See Triantafillou, *supra* note 156, at 22-23.

Court that it refused to enforce the savings clause of the Act without a specific command from the legislature that the domestic violence statute supercedes the immunity statute. This court seemed so cowed by previous narrow definitions of “specific assurances” that it refused find a special duty on the part of the police to enforce restraining orders. Rather, the court required a specific command from the legislature that restraining orders are indeed “specific assurances” that confers upon the recipient a special relationship with law enforcement. The court told Catherine that her restraining order, despite arising out of a complex and comprehensive body of legislation designed specifically to protect her, was only as good as James’ ability to abide by its terms or an individual officer’s willingness to assist her. In the wake of this decision, the court left police with the message that the best way to avoid liability is to give victims of domestic violence the “specific assurance” that the police can do nothing to help them and that they are better off buying themselves guns.²⁶⁵

As a result of its current position, Massachusetts stands as the only state in the nation that refuses to acknowledge that a special relationship is created when a domestic violence victim holds a restraining order and a police department negligently fails to enforce it.²⁶⁶ Is this really consistent with Massachusetts’ well-deserved reputation as forward-thinking and effective in preventing domestic violence? Is this really what the legislature intended to do when it crafted the complex and far-reaching chapter 209A legislation? Without a clearer message from the legislature regarding what it did intend to happen in these circumstances, the Massachusetts judiciary continues to interpret the Act to immunize police when they fail to enforce a restraining order.

IV. CONCLUSION: AN INVITATION TO THE LEGISLATURE AND A WARNING

In the final paragraph of the *Ford* opinion, the appeals court reflected upon the emotional backdrop of its decision. Quoting the United States Supreme Court’s decision in *DeShaney v. Winnebago County Department of Social Services*, the court recalled that “[j]udges and lawyers, like other humans, are

265. See generally *Ford v. Town of Grafton*, 693 N.E.2d 1047 (Mass. App. Ct. 1998).

266. At the time that *Ford* was decided, many states had already ruled that plaintiffs could not recover in such situations. These decisions, however, were made based upon legal or factual elements not present in the *Ford* case, or in the state’s previously described legal landscape. See generally *Calloway v. Kinkelaar*, 659 N.E.2d 1322 (Ill. 1995). *Calloway*, while factually analogous, is statutorily distinguishable; the Illinois’ Domestic Violence Act limits officers’ and municipalities’ liability to “willful and wanton conduct.” Illinois Domestic Violence Act, 750 ILL. COMP. STAT. 60/101 (1986). The court determined that the complaint did not sufficiently allege such conduct, so did not address the “special duty” question. *Calloway*, 659 N.E.2d at 1329; see also *Ardoin v. City of Mamou*, 685 So. 2d 294 (La. Ct. App. 1996). The *Ardoin* court concluded that Louisiana’s Domestic Abuse Assistance Act did not create a special duty because the plain language of the statute indicates that police officers are authorized rather than mandated to execute an arrest. 685 So. 2d at 299.

moved by natural sympathy in a case like this to find a way for [Catherine Ford] to receive adequate compensation for the grievous harm inflicted upon [her].²⁶⁷ The court proceeded to caution, however, that those same judges and lawyers—and particularly the court itself—“are bound by our Constitutions and laws.”²⁶⁸ The appeals court interpreted those laws to mean that the judiciary remained powerless to act on behalf of Catherine Ford, and that only “the people of Massachusetts may choose by legislation to hold towns and their officials accountable in situations like this one.”²⁶⁹

Given what we know about the history of the Massachusetts Tort Claims Act and what we see the court unable to bring itself to do in light of that history, the ball appears in the legislature’s court to address what the *Ford* case represents. In this final section, we suggest ways in which the legislature could take steps to remedy what is at best a confused landscape, and at worst a counter-productive and frustrating body of interrelated law. We conclude by providing a description of how dangerous this landscape actually is for victims of domestic violence and their families.

As previously noted, the judiciary requires guidance from a source more local and controlling than contrary case law from other jurisdictions. Bearing those persuasive cases in mind, the Massachusetts Legislature could take two actions that would help convince the reluctant Massachusetts judiciary that it intends to require police to enforce restraining orders or face liability for their failure to do so.

First, the legislature could add a statement of legislative intent to chapter 209A. This statement would clearly state that the duty to enforce the chapter’s provisions is of the highest priority. It would further provide that failure to enforce those laws would serve as grounds for liability on the part of the public employee, notwithstanding contrary provisions within the Tort Claims Act. Such a statement would reinforce both the savings clause of the Torts Claims Act, as well as the legislature’s commitment to providing protection for victims of domestic violence. With that amendment, the Massachusetts judiciary might feel empowered, as did the courts of New Jersey and Washington, to find public employees liable for failing to enforce restraining orders.²⁷⁰

In the alternative, the Massachusetts Legislature could take less subtle courses of action. For instance, lawmakers could amend the Tort Claims Act or chapter 209A to clarify that the holder of a restraining order has entered into a special relationship with the government and is thus entitled to special protection. Put another way, the amendment could provide that the issuance of

267. *Ford*, 693 N.E.2d at 1057 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189, 202-03 (1989)).

268. *Id.*

269. *Id.*

270. See *supra* notes 206-208, 238-240 and accompanying text (noting example of court focusing on legislative intent of domestic violence act).

a chapter 209A restraining order acts as a “specific assurance” of safety and protection from the court and the police department. Having granted this specific assurance, a public employee, as a representative of the court system or police department, would then lose any entitlement to the general immunity provided by section 10(h) of the Act.

What if the legislature takes none of these steps, and ultimately refrains from attempting to clarify the relationship between these two legislative schemes? Beyond its departure from Massachusetts’ clear commitment to provide protection to victims of domestic violence, the ramifications of the *Ford* decision seem immense. The holding in *Ford* essentially declares that obtaining a restraining order possesses meaning only if the batterer complies with its terms. By refusing to find the police liable for their failure to enforce the protections promised in Catherine Ford’s restraining order, the *Ford* court declares that restraining orders do not provide special protections. In reality, the decision to obtain a restraining order can be a terrifying and dangerous one for a victim of domestic violence. Not only has the victim attempted to escape a violent situation, but she has also taken a step to remove herself from her batterer—a step that often infuriates the batterer even more, thus placing the victim at an even greater risk.²⁷¹ Without the special protection promised on its face, as well as in its legislation, a restraining order becomes a mere piece of paper. In fact, it becomes worse than just a piece of paper because its issuance increases the risk of harm that a battered woman must face while providing no greater amount of protection.

The Supreme Court’s decision in *DeShaney* effectively removed the possibility of federal recourse for victims of domestic violence.²⁷² As a result of this holding, state actors stand as the only remaining providers of safety nets for people like Catherine Ford and Karen Trudeau. But as Florida’s Judge Shevin warns in her concurring opinion in the *Simpson* case:

If the domestic violence protection statutes are to have real meaning or impact, law enforcement personnel must play an integral role in advancing the legislative protection scheme. The officers are the persons charged with implementing the legislature’s safeguards and ensuring the success of the statutory provisions. If law enforcement agencies and personnel are shielded from liability for failing to carry out the very protections established by the legislature, then domestic violence injunction legislation is virtually meaningless and does not offer domestic violence victims any real protection To require anything less eviscerates the injunction and renders it a mere advisory court action that violators really need not heed.²⁷³

Is this really where we want to end up?

271. See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 394-95 (1993) (weighing options available to battered women).

272. See *supra* notes 21-22 and accompanying text.

273. *Simpson v. City of Miami*, 700 So. 2d 87, 89 (Fla. Dist. Ct. App. 1997) (Shevin, J., concurring).