BRUM V. TOWN OF DARTMOUTH AND THE PUBLIC DUTY RULE: NAVIGATING AN INTERPRETIVE QUAGMIRE

Abstract: *In 1993, a group of youths entered the Dartmouth High School and stabbed sixteen-year old Jason Robinson to death in his social studies classroom. In 1999, in Brum v. Town of Dartmouth, the Supreme Judicial Court of Massachusetts held that the town was immune from suit pursuant to Massachusetts' statutory "public duty rule," which insulates public employers from liability where the employer does not "originally cause" the harm. This Article traces the evolution of public tort liability in Massachusetts, suggests a three-part framework for interpreting Massachusetts' public duty rule and proposes a narrowly-tailored exception to the rule in cases like Brum.*

INTRODUCTION

> *"Nice, huh?" a state police detective said [that] afternoon. "You send your kid to school and he gets killed in homeroom."*[1]

Dartmouth, Massachusetts is a small town nestled along the rugged coast of southeastern Massachusetts, composed of neat homes with weather-worn shingles and manicured lawns dotting its waterfront.[2] On Monday, April 12, 1993, Dartmouth, which had grown well-accustomed to the constant and familiar battery of its shores by the cold waters of the Atlantic, was newly rocked by the unfamiliar and formidable tide of violence.[3] At approximately 8:30 a.m., a group of youths entered Dartmouth High School wielding knives, a billy club, a baseball bat and a length of pipe, and stabbed sixteen-year old Jason Robinson to death in his social studies classroom.[4]

On that day, the people of Dartmouth picked up the newspaper and read the headlines; they turned on the TV and heard the news; they called their neighbors and spoke with their coworkers and

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[1] Mike Barnicle, *Death Comes to First Period*, BOSTON GLOBE, April 13, 1993, at 21. Jason Robinson was actually stabbed in his social studies classroom. *See* Brum v. Town of Dartmouth, 690 N.E.2d 844, 846 (Mass. App. Ct. 1998), *rev'd*, 704 N.E.2d 1147 (Mass. 1999).

[2] *See id.*

[3] *See Brum*, 690 N.E.2d at 846.

[4] *See id.* at 847.

awaited the return of their sons and daughters, all of whom tried to explain the day's events. The people of Dartmouth thought about the young man, Jason Robinson, and of their town. "How could this happen here?"

On that day, the school teachers—who had been teaching at Dartmouth High School for ten and twenty and thirty years, who had witnessed their fair share of fisticuffs among students and who had perhaps briefly glimpsed the attackers parading through the hallways that they knew so well—listened to each other's stories detailing the terrible commotion that had taken place. The school teachers at Dartmouth High School thought about the young student, Jason Robinson, and about their workplace. "How could this happen here?"

On that day, the students—who saw the young man falter after sustaining what looked like a mere punch to the stomach, who helped the young man to his feet in an attempt to bring him to the nurse's office and who shook their heads in disbelief upon hearing of the student's death that afternoon—wrote messages in memoriam on large banners draping the school's walls, while stepping over the forensic markings covering the school's floors. The students at Dartmouth High School thought about their peer, Jason Robinson, and about their school. "How could this happen here?"

Following her son's death, Jason Robinson's mother sued the town of Dartmouth and several school officials for negligence pursuant to the Massachusetts Tort Claims Act ("MTCA"), which makes public employers liable for the torts of their employees.[5] The plaintiff argued that the school officials had breached an affirmative duty to protect her son from harm and that the school officials' employer, the town of Dartmouth, should be held liable for his death.[6] According to the plaintiff, the school officials failed to implement adequate security measures as required by state law, and furthermore, when school officials were explicitly forewarned of the attackers' arrival at the school, the school officials failed to prevent them from entering the

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[5] *See id.*; Brief/Appendix for Appellant at 52a, Brum v. Town of Dartmouth, 690 N.E.2d 844 (Mass. App. Ct. 1998) (No. 96-P-687). The plaintiff also sued the town pursuant to the section 2 of the Massachusetts Wrongful Death Statute, MASS. GEN. LAWS. ch. 229, § 2 (1998), sections 11H and 11I of the Massachusetts Civil Rights Act, MASS. GEN. LAWS. ch. 12, §§ 11H, 11I (1998), and 42 U.S.C. § 1983, alleging the state's violation of the Fourteenth Amendment to the United States Constitution. *See id.* at 847, 851–52. Although these claims raise provocative and important issues concerning schools' duty to protect students, they are beyond the scope of this Article.

[6] *See* Brief/Appendix for Appellant at 5–6, *Brum* (No. 96-P-687).

school and proceeding into the social studies classroom.[7] If the school "had taken adequate safety measures," the plaintiff argued, "the deceased's attackers could not have entered the high school, and the murder would never have taken place in the classroom."[8]

In 1995, the Massachusetts Superior Court granted a motion to dismiss on grounds that the school was immune from liability under the MTCA because the school's failure to adopt security measures was a discretionary function immunized under chapter 258, section 10(b) of the General Laws of the Commonwealth of Massachusetts ("§ 10(b)"), and because the school's failure to act fell within the statutory public duty rule under chapter 258, section 10(j) of the General Laws of the Commonwealth of Massachusetts ("§ 10(j)").[9] In

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[7] *See id.* at 3, 5–6. The Massachusetts law mandating the implementation of security measures in public schools is chapter 71, section 37H of the General Laws of the Commonwealth of Massachusetts. *See* MASS. GEN. LAWS ch. 71, § 37H (1998); *Brum*, 690 N.E.2d at 851 n.11. Section 37H provides in relevant part that: "The superintendent of every school district shall publish the district's policies pertaining to the conduct of teachers and students. . . . Each school district's policies . . . shall include . . . standards and procedures to assure school building security of students and school personnel." MASS. GEN. LAWS ch. 71, § 37H.

[8] *See id.* at 6.

[9] *See* MASS. GEN. LAWS ch. 258, §§ 10(b), 10(j) (1998); *Brum*, 690 N.E.2d at 846–47. Section 10(b) states:

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

MASS. GEN. LAWS ch. 258, § 10(b). Section 10(j) states, in relevant part:

> [The provisions of sections one to eight of the MTCA shall not apply to] any claim 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 a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer. This exclusion shall not apply to:
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> (1) 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. A permit, certificate or report of findings of an investigation or inspection shall not constitute such assurances of safety or assistance; and
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> (2) any claim based upon the intervention of a public employee which causes injury to the victim or places the victim in a worse position than he was in before the intervention; and
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> (3) any claim based on negligent maintenance of public property; [and]

1998, in *Brum v. Town of Dartmouth* ("*Brum I*"), the Massachusetts Appeals Court reversed the superior court's decision and held the town of Dartmouth liable for the school's failure to institute security measures and failure to respond to a foreseeable threat of harm.[10] In 1999, however, in *Brum v. Town of Dartmouth* ("*Brum II*"), the Supreme Judicial Court reversed the appeals court and held that the school and school officials were immune from suit.[11]

This Article traces the evolution of Massachusetts public duty jurisprudence from its common law origins to its present-day codification in Massachusetts law, with particular focus on the Supreme Judicial Court's decision in *Brum II*.[12] Because the history of public tort liability is based upon judicial precedent as well as state statutory law, Part I of this Article reviews the evolution of public tort liability in Massachusetts prior to 1994, in light of both the Supreme Judicial Court's and the Legislature's attempts to expand and limit public tort liability.[13] Examination of this push-and-pull pattern includes the court's abrogation of the sovereign immunity doctrine, the Legislature's establishment of public tort liability through the MTCA, the court's adoption of the common law public duty rule that limited public tort liability and the Legislature's codification of the public duty rule in 1994, in § 10(j).[14]

Part II of this Article discusses the Supreme Judicial Court's application of § 10(j) in recent decisions.[15] Due to the relative newness of the provision and the dearth of Supreme Judicial Court case law, Part II also examines a relevant Massachusetts Appeals Court decision to supplement the Supreme Judicial Court's interpretations of § 10(j).[16] Part III of this Article charts the history of *Brum v. Town of Dartmouth* from its genesis in the Bristol Superior Court of Massachusetts in 1995, to the Massachusetts Appeals Court in 1998, and finally, to the Supreme Judicial Court in 1999.[17]

> (4) any claim based or on behalf of a patient for negligent medical or other therapeutic treatment received by the patient from a public employee.

MASS. GEN. LAWS ch. 258, § 10(j).

[10] *See Brum*, 690 N.E.2d at 846–47.

[11] *See* Brum v. Town of Dartmouth, 704 N.E.2d 1147, 1155 (Mass. 1999).

[12] *See id.* at 1152–55; *see also infra* notes 22–274 and accompanying text.

[13] *See infra* notes 22–177 and accompanying text.

[14] *See infra* notes 22–177 and accompanying text.

[15] *See infra* notes 178–204 and accompanying text.

[16] *See infra* notes 198–204 and accompanying text.

[17] *See infra* notes 205–74 and accompanying text.

Part IV of this Article analyzes the plain language of § 10(j) and suggests a new three-part framework for interpreting the provision in harmony with both its plain language and with existing public duty jurisprudence.[18] This Article then uses this framework to explore the weaknesses inherent in the Supreme Judicial Court's interpretation of § 10(j) in *Brum II*.[19] Finally, this Article explores the fine distinctions drawn by a correct interpretation of § 10(j) by proposing several hypotheticals and their likely resolutions under the provision.[20] In light of the harsh results of these distinctions, as demonstrated by *Brum II*, this Article suggests a new exception to public tort immunity for a public employer's actual notice of a risk of harm and deliberate indifference toward that risk of harm.[21]

I. The Evolution of Public Tort Liability in Massachusetts, Prior to Section 10(j)

Massachusetts, like most other states in the United States, imposes no affirmative duty of protection on its public schools through state statutory or constitutional directives.[22] In fact, state statutory law and its incorporation of traditional tort principles has made Massachusetts public schools and school districts largely immune to tort actions.[23]

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[18] *See infra* notes 275–356 and accompanying text.

[19] *See infra* notes 357–442 and accompanying text.

[20] *See infra* notes 443–63 and accompanying text.

[21] *See infra* notes 464–503 and accompanying text.

[22] *See* Mass. Gen. Laws ch. 258, § 10(j) (1998). Because of the lack of an affirmative duty to protect students and to provide safe schools under state statutory law, many plaintiffs bring claims against public schools under federal constitutional and statutory law. Specifically, 42 U.S.C. § 1983 of the Civil Rights Act of 1964 provides that any person "who, under color of any statute, ordinance, regulation, custom, or usage, of any State," deprives another person of some existing federal right, is liable to the injured party. Those advocating an affirmative duty of protection for public schools under § 1983 most often invoke the Due Process Clause, which courts have recognized as extending to parties who are deprived of the "right" to be free from physical or sexual abuse in school. This Article focuses on the duty of Massachusetts public schools to protect students; the federal duty to protect students is beyond its scope. For further discussion of the federal duty of public schools to protect students, see generally Deborah Austern Colsen, *Safe Enough to Learn: Placing an Affirmative Duty of Protection on Public Schools Under 42 U.S.C. Section 1983*, 30 Harv. C.R.-C.L. L. Rev. 169 (1995); Stephen Faberman, *The Lessons of Deshaney: Special Relationships, Schools & the Fifth Circuit*, 35 B.C. L. Rev. 97 (1993); Michael Gilbert, Comment, *Keeping the Door Open: A Middle Ground on the Question of Affirmative Duty in the Public Schools*, 142 U. Pa. L. Rev. 471 (1993).

[23] *See* Mass. Gen. Laws ch. 258, § 10(j).

A. *The Massachusetts Tort Claims Act: Abrogating Sovereign Immunity*

At common law, an individual could not sue the government in tort.[24] This "sovereign immunity" from suit came to the United States from England, where "the King could do no wrong" because there was no court above him and thus, no court could enforce a claim against him.[25] When the Declaration of Independence was signed, most American states adopted English common law, with the result that the federal government, the states and all of their agencies were immune from tort actions.[26] Although municipalities are not sovereign agencies of the government, but rather are corporations chartered by the sovereign, they are, nevertheless, traditionally accorded immunity from tort liability under common law.[27]

In 1977, the Supreme Judicial Court joined a growing number of states that had abolished or limited the sovereign immunity of states and municipalities in tort actions.[28] In *Whitney v. Worcester*, the court held that it intended to abolish the sovereign immunity doctrine, and therefore, the city of Worcester and its public school officials were not immune from suit by a student who was permanently blinded after being struck by a defective door at school.[29] In *Whitney*, a school official directed a first-grade student, who was totally blind in one eye and had limited vision in the other eye, to proceed to afternoon re-

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[24] *See* DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 387 (3d ed. 1997).

[25] *See id.*; Mark Valkenburgh, Note, *Massachusetts General Laws Chapter 258, S 10: Slouching Toward Sovereign Immunity*, 29 NEW. ENG. L. REV. 1079, 1081 (1995).

[26] *See* DOBBS & HAYDEN, *supra* note 24, at 387.

[27] *See id.* Despite the substantial immunity of municipalities at common law, immunity was precluded where the public employee was voluntarily engaged in conduct that was "commercial in nature" (and insofar as the employee's conduct constituted misfeasance), as opposed to conduct that was "for the common good of all without the element of special corporate benefit or pecuniary profit." Whitney v. City of Worcester, 366 N.E.2d 1210, 1214–15, 1217 (1977) (quoting Bolster v. Lawrence, 114 N.E. 722, 724 (1917)); *see also* Amy Beth Novit, Comment, *Tort Law—Abrogating the Massachusetts Public Duty Rule—Jean W. v. Commonwealth, 414 Mass. 496, 610 N.E.2d 305 (1993)*, 27 SUFFOLK U. L. REV. 986, 987–88, 996 n.16.

[28] *See* DOBBS & HAYDEN, *supra* note 24, at 388. In 1929, New York became the first state to waive its sovereign immunity, and in 1945, in *Bernadine v. City of New York*, this waiver was interpreted to extend to New York's municipalities as well. *See* DOBBS & HAYDEN, *supra* note 24, at 388 (discussing Bernadine v. City of New York, 62 N.E.2d 604 (N.Y. 1945)). By the 1960s and 1970s, many courts and legislatures followed New York's lead by abolishing or limiting the immunity of states and municipalities. *See id.* Today, most states have enacted statutes abrogating sovereign immunity, thus allowing at least some state or municipal liability for torts committed by public employees acting within the scope of their employment. *See id.*; Valkenburgh, *supra* note 25, at 1082–83.

[29] *See Whitney*, 366 N.E.2d at 1212, 1218.

cess in the school yard, which required the student to pass through a defective door without assistance.[30] When the door struck and injured the student, school officials directed the student to remain in the classroom, thus preventing the student from obtaining medical help that could have prevented total blindness.[31]

The court acknowledged that under the state's sovereign immunity doctrine, both the city and its school officials were protected from liability for their failure to prevent injury by neglecting to accompany the student to recess and by neglecting to seek immediate medical attention after the injury.[32] Noting that Massachusetts was one of only five remaining states that retained the sovereign immunity doctrine at both the state and local levels, the court decided that "the time for change [was] long overdue."[33] The court thus stated its intention to abolish sovereign immunity prospectively and erected in its place a new set of criteria under which public employers and employees could be held liable.[34] Under a "discretionary-ministerial distinction," the court reasoned that public employees should not be immune from liability for conduct that rested upon the exercise of judgment and discretion, but that they should be immune from liability for conduct that represented the implementation and execution of governmental planning and policy-making.[35] In light of its abrogation of the sovereign immunity doctrine and its proposed "discretionary-ministerial" analysis, the court concluded that the school officials, and consequently the city, were not immune from liability because their failure to take appropriate action constituted ministerial conduct.[36]

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[30] *See id.* at 1218.

[31] *See id.*

[32] *See id.* at 1218–19.

[33] *Id.* at 1213.

[34] *See Whitney*, 366 N.E.2d at 1212, 1216.

[35] *See id.* at 1216. "For example," the court stated, "a governmental entity is not liable for negligence in the planning of sewers but may be liable for negligence in their construction and maintenance." *Id.* This "discretionary-ministerial" distinction, the court added, was consistent with the law of at least eighteen other states, and effectively protected public employees from liability for conduct involving a high degree of discretion and judgment, while holding them to the same standard of liability as private parties for ministerial conduct involving the carrying out of previously established policies or plans. *See id.* By applying this discretionary-ministerial distinction to the "acts *and omissions*" of public employers, moreover, the court abandoned the traditional misfeasance-nonfeasance distinction that subjected public employers to liability "only when they have engaged in *overt and actively tortious conduct* in ministerial matters." *Id.* at 1217 (emphasis added).

[36] *See id.* at 1219. The court restricted its decision to the threshold determination of whether the city and school officials were immune from liability, *not* whether their conduct was in fact negligent. *See id.* at 1219 n.12.

Under pressure from the court, the Massachusetts Legislature enacted the MTCA.[37] Modeled after the Federal Tort Claims Act, the MTCA provides that public employers, including the state, cities, towns and other public entities, are liable for the negligent acts and omissions of their employees "in the same manner and to the same extent as a private individual under like circumstances."[38] By establishing standards for bringing suit against public employers for tortious injuries, the Legislature virtually eliminated the traditional distinction between public and private employers.[39] In so doing, the Legislature removed public employers' sovereign immunity defense.[40] Moreover, by including the "act or omission" language in the statute, the Legislature also eliminated the common law distinction between misfeasance and nonfeasance, thereby expanding public employers' liability by enabling suits to be brought against public employers for their employees' *failure* to act.[41]

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[37] *See* MASS. GEN. LAWS ch. 258, §§ 1–13; Valkenburgh, *supra* note 25, at 1092. The MTCA revised chapter 258 of the General Laws of the Commonwealth of Massachusetts. *See* Joseph W. Glannon, *The Massachusetts Tort Claims Act: Analysis and Update,* 75 MASS. L. REV. 52, 69 n.2 (1990).

[38] MASS. GEN. LAWS ch. 258, § 2 (1998).

[39] *See* Glannon, *supra* note 37, at 58.

[40] *See id.*; Novit, *supra* note 27, at 996 n.18.

[41] *See* MASS. GEN. LAWS ch. 258, § 2; Glannon, *supra* note 37, at 58. At common law, one party owes another no duty to take affirmative action for the other's protection. *See* Yania v. Bigan, 155 A.2d 343, 346 (Pa. 1959) (holding that defendant had no duty to rescue drowning plaintiff despite fact that defendant urged plaintiff to jump into water); DOBBS & HAYDEN, *supra* note 24, at 418–20. Indeed, although there is liability for misfeasance, which refers to "negligence in doing something active," and "the improper doing of an act which a person might lawfully do," there is no liability for nonfeasance, which refers to the complete failure to act in the first instance. *See Whitney,* 366 N.E.2d at 1217 (quoting Trum v. Paxton, 109 N.E.2d 116, 118, 119 (Mass. 1952)); DOBBS & HAYDEN, *supra* note 24, at 418; Steven H. Gifis, Law Dictionary 297 (2d ed. 1984). Thus, under the general rule, and provided that sovereign immunity has been abolished in the respective jurisdiction, public employers are liable for their employees' misfeasance, but not for nonfeasance (under the MTCA, of course, public employers are liable for both). *See* MASS. GEN. LAWS ch. 258, § 2.

There is, however, an exception to the general rule that imposes a duty of affirmative action upon one party to protect the other, when the two share a "special relationship." *See* DOBBS & HAYDEN, *supra* note 24, at 424–25. With respect to public school officials' duty or lack of duty to public school students (with whom public school officials likely share a "special relationship"), in many jurisdictions, including Massachusetts, the common law "public duty rule" or a statutory version of the rule immunizes public employers from school officials' failure to act to prevent harm—thus explicitly rejecting an affirmative duty of public schools to protect their students. *See infra* note 57.

B. *Limiting Liability: The MTCA's Exceptions*

While opening doors of potential liability through the MTCA, the Massachusetts Legislature simultaneously closed others by attaching several important exceptions to the MTCA that limited public employers' liability.[42] Specifically, § 10(a) of the MTCA excludes claims based upon acts or omissions of public employees where such employees have demonstrated due care in executing state or local laws, regardless of the laws' validity.[43] Closely paralleling a provision in the Federal Tort Claims Act, the § 10(a) exclusion likely stems from a judicial desire to immunize uniquely "public" functions prescribed by law, irrespective of the wisdom of the underlying statute or regulation.[44] Moreover, by exempting from liability claims based upon public employees' acts or omissions involving the exercise of "due care," the Legislature disposes of frivolous suits that would likely fail under a traditional negligence analysis.[45]

In addition, § 10(b) of the MTCA provides that immunity for discretionary functions—traditionally enjoyed by public employers and public employees at common law—should be protected by excluding claims arising from the exercise of or failure to exercise a discretionary function, whether or not the discretion involved was abused.[46] The underlying reasoning for this exception, according to the Supreme Judicial Court in *Whitney*, was the belief that the judiciary's ability to review the reasonableness of legislative and executive branch policy decisions undermined the separation of powers.[47] In addition, the court determined that the discretionary activities of public employees were fundamentally different from conduct regularly performed by privately-employed individuals and therefore deserved distinct treatment under the law.[48] Thus, because judicial inquiry into such discretionary activities "might impede governmental operations by subjecting governmental decision-making to after-the-fact judicial tort

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[42] *See* Mass. Gen. Laws ch. 258, §§ 10(a)–10(c) (1998). Another important "limitation" on liability under the MTCA was the limiting of damages awards to $100,000 per plaintiff. *See* Mass. Gen. Laws ch. 258, § 2.

[43] *See* Mass. Gen. Laws ch. 258, § 10(a) (1998).

[44] *See id.*; *see also Whitney*, 366 N.E.2d at 1216; Joseph W. Glannon, *Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978*, 71 Mass. L. Rev. 7, 11 & n.65 (1981).

[45] *See* Dinsky v. Town of Framingham, 438 N.E.2d 51, 53 (Mass. 1982).

[46] *See* Mass. Gen. Laws ch. 258, § 10(b); Glannon, *supra* note 37, at 59.

[47] *See Whitney*, 366 N.E.2d at 1217; Valkenburgh, *supra* note 25, at 1084.

[48] *See Whitney*, 366 N.E.2d at 1216; Valkenburgh, *supra* note 25, at 1084.

analysis" and the threat of potential legal liability, the court concluded that these decisions should be insulated from such review.[49]

Finally, under § 10(c), the MTCA also excludes claims arising out of the intentional torts of public employees.[50] Patterned after the Supreme Judicial Court's consistent holdings favoring immunity for public employers in intentional tort cases, § 10(c) also reflects common law considerations of vicarious liability and proximate cause.[51] Indeed, because employees' intentional torts are, in general, independently motivated and beyond the control of public employers, they necessarily fall outside of the above-mentioned common law doctrines establishing liability.[52] Thus, the Legislature likely intended § 10(c) to prevent public employers from bearing the costs of such unforeseeable actions that occur outside of the scope of employment.[53]

C. Dinsky v. Town of Framingham *and the Public Duty Rule: Further Limiting the Liability of Public Employers*

With the passage of the MTCA and the resulting abrogation of sovereign immunity, the Supreme Judicial Court needed to determine the extent to which public employers would be liable for negligence in broad public oversight functions—"public duties" imposed by the Legislature upon public officials "for the common good."[54] Despite the protections against liability already afforded to public employers by the MTCA under §§ 10(a), 10(b) and 10(c), the court was con-

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[49] *Whitney*, 366 N.E.2d at 1215. Currently, the test for determining whether an act or omission is discretionary, and thus foreclosed by the discretionary exception under §10(b), involves a two-step analysis articulated by the Supreme Judicial Court in *Harry Stoller & Co., Inc. v. City of Lowell. See* 587 N.E.2d 780, 782–83 (Mass. 1992). First, the court must decide "whether the governmental actor had any discretion at all as to what course of conduct to follow," as prescribed by statute, regulation, established agency practice, or by some other readily ascertainable standard. *Id.* at 783. If conduct is not so prescribed, the second level of inquiry requires a determination of whether the actor's discretionary conduct involved policy-making or planning—acts which are immune from suit. *See id.* at 782–83; *see also* Valkenburgh, *supra* note 25, at 1085–86.

[50] *See* MASS. GEN. LAWS ch. 258, § 10(c) (1998). Consistent with the common law, public employees remain *personally* liable for their intentional torts. *See* Glannon, *supra* note 37, at 65.

[51] *See* DOBBS & HAYDEN, *supra* note 24, at 223–26, 546, 559–60; Glannon, *supra* note 37, at 58, 65.

[52] *See* Glannon, *supra* note 37, at 58, 65.

[53] *See* DOBBS & HAYDEN, *supra* note 24, at 546.

[54] *Whitney*, 366 N.E.2d at 1214; *see Dinsky*, 438 N.E.2d at 56; Joseph W. Glannon, *Liability for "Public Duties" Under the Tort Claims Act: The Legislature Reconsiders the Public Duty Rule*, 79 MASS. L. REV. 17, 17 (1994).

cerned that governmental inspection and licensing procedures, as well as police and fire protection, would become the target of numerous negligence suits that would cripple public employers' ability to provide those needed services.[55] In 1982, in *Dinsky v. Town of Framingham,* the Supreme Judicial Court addressed the "public duty" issue for the first time in the context of a public employer's alleged negligent inspection of a home.[56] The *Dinsky* court held that under the MTCA, plaintiffs must prove the usual elements of a negligence claim to recover damages, and that under the common law "public duty rule," public employers are not liable for breach of a duty to make inspections *because* inspection is a duty owed to the general public rather than to specific individuals.[57]

In *Dinsky,* after their one-family residence was severely flooded, the plaintiffs sued the town of Framingham for negligently failing to inspect the lot prior to construction and issuing building and occupancy permits in violation of grading and drainage requirements.[58]

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[55] *See Dinsky,* 438 N.E.2d at 56; Glannon, *supra* note 54, at 17.

[56] *See Dinsky,* 438 N.E.2d at 53–56.

[57] *See id.* at 53, 55–56. The public duty rule was first recognized in 1855 in *South v. Maryland,* where the Supreme Court held, "[i]t is an undisputed principle of the common law, that for breach of a public duty, an officer is punishable by *indictment* . . . . It is a public duty, for neglect of which he (the public employee) is amenable to the public, and punishable by indictment only." Valkenburgh, *supra* note 25, at 1108 n.63 (quoting South v. Maryland, 59 U.S. 396, 402–03 (1855)). Widely cited as authority for the public duty doctrine, COOLEY ON TORTS states:

> The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then neglecting to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. The failure of a public officer to perform a public duty can constitute an individual wrong only when some person can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance.

DOBBS & HAYDEN, *supra* note 24, at 404–05 (quoting THOMAS M. COOLEY, COOLEY ON TORTS § 300, at 385–86 (D. Avery Haggard ed., 4th ed. 1932)); *see* Valkenburgh, *supra* note 25, at 1108 n.64. Justice O'Connor of the Supreme Judicial Court of Massachusetts has defended the "traditional public duty rule" in multiple opinions, citing the rule's reflection of current social values as well as its promotion of sound public policy, in addition to the rule's adoption by an "overwhelming majority" of courts. *See* Jean W. v. Commonwealth, 610 N.E.2d 305, 317–18 & n.1 (Mass. 1993) (O'Connor, J., concurring); Cyran v. Town of Ware, 597 N.E.2d 1352, 1358 (Mass. 1992) (O'Connor, J., concurring); A.L. v. Commonwealth, 521 N.E.2d 1017, 1028 (Mass. 1988) (O'Connor, J., dissenting).

[58] *See Dinsky,* at 51–52.

Although the state building code imposed a statutory duty on the State to inspect new lots, the court reasoned that this duty was owed to the public at large and was not intended to furnish individual property owners with a private cause of action.[59] Thus, because the public employer owed no "duty" to the homeowners in the first place, the court reasoned that there was necessarily no breach or causation to trigger liability.[60] The court determined that absent a special duty owed to the plaintiffs as members of a particular class of persons under the statute—a statutory intent exception to the public duty rule—no cause of action could be maintained.[61] Furthermore, the court noted that a contrary decision would deter municipalities from enacting new regulations for the public good out of fear of increased liability.[62] Joining other jurisdictions in its adoption of the common law public duty rule, the court concluded that the town was not liable for negligent inspection because inspection was a public duty and not a duty owed to specific individuals.[63]

Despite the Supreme Judicial Court's attempt in *Dinsky* to restrict the application of the public duty rule to negligent governmental inspections, the court since has extended the public duty rule to other cases involving a wide range of public protective services.[64] For example, between 1982 and 1993, the court denied liability for failure to enforce the housing code, failure to provide adequate police protection, failure to follow proper gun permitting procedures and failure to revoke an automobile registration.[65] There were some exceptions,

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[59] *See id.* at 55.

[60] *See id.* at 56.

[61] *See Dinsky*, 438 N.E.2d at 56. The "statutory intent" exception, Justice O'Connor explains, is a well-established exception to the public duty rule, which provides that where a statute contains language expressly identifying particular classes of individuals as intended beneficiaries, those individuals are owed a special duty of protection—the violation of which will support a private cause of action. *See, e.g., Jean W.*, 610 N.E.2d at 317 (O'Connor, J., concurring); *Cyran*, 597 N.E.2d at 1357 (O'Connor, J., concurring); *A.L.*, 521 N.E.2d at 1028–29 (O'Connor, J., dissenting). Because the plaintiffs in *Dinsky* could not show that individual property owners like themselves were expressly protected from negligent home inspections under the state building code, they could not establish a statutory intent exception to the public duty rule. *See* 438 N.E.2d at 56.

[62] *See id.*

[63] *See id.* at 55–56.

[64] *See Jean W.*, 610 N.E.2d at 310 (Liacos, C.J., concurring); *see also* Glannon, *supra* note 54, at 18 & 31 nn.13–16.

[65] *See* Rinkaus v. Town of Carver, 637 N.E.2d 229, 229–30 (Mass. 1994) (no liability for failure to provide adequate police protection); Sampson v. Lynn, 537 N.E.2d 588, 589 (Mass. 1989) (no liability for failure to follow proper gun permitting procedures); Nickerson v. Commonwealth, 492 N.E.2d 90, 91 (Mass. 1986) (no liability for failure to revoke

however, in which the court was willing to impose liability on public employers for the negligent performance of general protective services.[66]

D. *The Statutory Intent and Special Relationship Exceptions: Limiting the Public Duty Rule*

In addition to the statutory intent exception to the public duty rule articulated in *Dinsky*, which allows public employers to be sued by plaintiffs who are expressly protected by statute, the Supreme Judicial Court, recognized a second exception based upon the relationship between public employers and plaintiffs.[67] In 1984, in *Irwin v. Town of Ware*, the Supreme Judicial Court held that a town was liable for its police officer's failure to arrest an intoxicated motorist who subsequently caused an accident resulting in harm to the plaintiffs because a special relationship existed between the police officer and the plaintiffs.[68] This special relationship, the court determined, imposed a special duty upon the officer "to take affirmative action to protect the plaintiff[s]," thereby creating an exception to the public duty rule.[69] Having stopped a motorist on the road for speeding, the police officer in *Irwin* subsequently released the motorist who demonstrated clear signs of intoxication.[70] Ten minutes later, the motorist collided head-on with the plaintiff's decedents.[71]

Noting the heavy burden required to prove that the motorists were members of a special statutory class under *Dinsky*'s statutory intent exception, the *Irwin* court articulated another exception to the public duty rule—the special relationship exception—based upon the

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auto registration); Appleton v. Hudson 494 N.E.2d 10, 13 (Mass. 1986) (no liability for failure to provide adequate police protection); Ribeiro v. Granby, 481 N.E.2d 466, 469 (Mass. 1985) (no liability for failure to enforce housing code); *see also* Salusti v. Town of Watertown, 635 N.E.2d 249, 251 (Mass. 1994) (no liability for failure to properly fight fire and to inspect and repair fire hydrants); Judson v. Essex Agric. and Technical Inst., 635 N.E.2d 1172, 1174–75 (Mass. 1994) (no liability for failure to inspect workplace and to ensure that employer provided workers' compensation insurance); Connerty v. Metropolitan Dist. Comm'n, 495 N.E.2d 840, 842–44 (Mass. 1986) (no liability for failure to enforce environmental protection statute).

[66] *See* Glannon, *supra* note 54, at 18; *see also A.L.*, 521 N.E.2d at 1021, 1023 (exception to public duty rule because of special relationship between plaintiff and defendant); Irwin v. Town of Ware, 467 N.E.2d 1292, 1303–04 (Mass. 1984) (same).

[67] *See Irwin*, 467 N.E.2d at 1303–04

[68] *See id.*

[69] *See id.* at 1300.

[70] *See id.* at 1304.

[71] *See id.* at 1305.

existence of a special relationship between the actor whose duty was at issue and the potential plaintiff.[72] In applying the exception, the *Irwin* court first considered the applicable statutes governing police officers' responsibilities toward intoxicated motorists.[73] The court noted that although these statutes did not expressly identify the motorists as a protected class under the statutory intent exception, the statutes evinced a legislative intent to protect both intoxicated persons as well as other highway users.[74] More importantly, the court also considered the foreseeability, immediacy and severity of the risk of harm; the unique ability of the police officer to prevent the harm; and the public policy concern for providing an effective remedy for persons injured by the negligence of public employers, while limiting the comprehensiveness of the public duty rule.[75] In light of statutes "giving police officers the right to deal with intoxicated persons," as well as the immediacy and foreseeability of the risk of physical injury "created by the negligence of a municipal employee," the court determined that "a duty of care should reasonably be found."[76] Thus, the *Irwin* court concluded that because of the existence of a special relationship between the police officer and the motorists, the officer

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[72] *See Irwin*, 467 N.E.2d at 1299–1301; *see also Jean W.*, 610 N.E.2d at 309 (Liacos, C.J., concurring). The "special relationship exception," Justice O'Connor explains, is a second exception to the public duty rule, entirely distinct from the statutory intent exception, and is based upon situations involving a public employee's specific assurances of protection that give rise to justifiable reliance by the victim. *See, e.g., Jean W.*, 610 N.E.2d at 317 (O'Connor, J., concurring); *Cyran*, 597 N.E.2d at 1357–58 (O'Connor, J., concurring); *A.L.*, 521 N.E.2d at 1029 (O'Connor, J., dissenting); *Irwin*, 467 N.E.2d at 1311 (Nolan, J., dissenting). Although the court in *Irwin* stated that it was applying the special relationship exception to the public duty rule, the exception that the court applied was essentially a hybrid of the traditional special relationship and statutory intent exceptions. *See A.L.*, 521 N.E.2d at 1030 (O'Connor, J., dissenting). Indeed, lacking either express or implied representations of protection on the part of the police officer, the court in *Irwin* looked instead to the legislative intent as well as to the foreseeability of harm as the basis for applying the special relationship exception—thereby expanding the grounds under which a special relationship would be found. *See id.* In addition, having relied, in part, upon a broad reading of statutory intent in applying the exception, the court in *Irwin* borrowed criteria from *Dinsky*'s statutory intent exception—thus expanding the grounds under which statutory intent would be found. *See id.* Thus, "by radically modifying [both] exceptions to the traditional public duty rule, the court formulated a new rule"—a "new" special relationship exception. *See id.*

[73] *See Irwin*, 467 N.E.2d at 1302.

[74] *See id.* at 1303–04; *see also Jean W.*, 610 N.E.2d at 309 (Liacos, C.J., concurring).

[75] *See Irwin*, 467 N.E.2d at 1299–1300, 1304.

[76] *See id.* at 1300, 1302.

owed the motorists a special duty of protection that constituted an exception to the public duty rule.[77]

In addition to *Irwin*, the Supreme Judicial Court has applied the special relationship exception in one other public duty case: *A.L. v. Commonwealth*.[78] In 1988, in *A.L.*, the court held that the commonwealth was liable for a probation officer's failure to enforce the specific probation conditions imposed upon a sex offender, who subsequently procured a job working with young boys whom he sexually molested, because a special relationship existed between the probation officer and the boys.[79] Having received an eighteen-month suspended sentence conditioned upon his refraining from teaching and from associating with young boys, the sex offender obtained employment in a school.[80] The probation officer met with the offender regularly, but never attempted to verify that the offender was neither teaching nor working in an environment in close proximity to young boys.[81]

Despite the lack of any *statute* specifically identifying the young boys as a protected class, the court reasoned that "the *conditions of probation* imposed by the sentencing judge . . . were designed to protect young boys" as a class, thus creating a special relationship between the boys and the probation officer.[82] In addition to the probation conditions, the court also based its finding of a special relationship on the foreseeability of the risk of molestation created by the officer's failure to monitor the nature of the offender's employment, the chronic and

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[77] *See id.* at 1303–04. In a strongly-worded dissent, Justice Nolan, joined by Justices Lynch and O'Connor, argued that the majority decision "flies in the face of our decision in *Dinsky v. [Town of] Framingham*." *Id.* at 1311 (Nolan, J., dissenting). Justice Nolan argued that under *Dinsky*, the public duty rule barred all claims against public employers absent a special duty owed to specific plaintiffs, "different from that owed to the public at large." *Id.* Such a duty, Justice Nolan added, was not present in *Irwin* because there was no statute identifying the plaintiffs as a protected class, thus setting them apart from the general public, and there were no specific assurances of protection giving rise to "justifiable reliance by the victim." *See id.* By imposing upon the town a duty of protection in the absence of the requisite special relationship that creates the duty, Justice Nolan accused the majority of abandoning the public duty rule and imposing a new "common law duty" of protection in its place. *See id.* at 1312. The effect of discarding *Dinsky*'s statutory intent exception to the public duty rule in favor of a broader exception that extended "to all possible plaintiffs," Justice Nolan added, was both "regrettable" and "frightening." *See Irwin*, 467 N.E.2d at 1312.

[78] *See A.L.*, 521 N.E.2d at 1020.

[79] *See id.* at 1019–21.

[80] *See id.* at 1019.

[81] *See id.*

[82] *Id.* at 1021 (emphasis added).

immediate nature of the risk of molestation, and the unique ability of the probation officer—as opposed to the young boys or their parents—to prevent the harm, given his knowledge of the offender's criminal record.[83] The court concluded that because of this relationship, the probation officer had a special duty to verify the place of the offender's employment, thus making the public duty rule inapplicable.[84]

E. *Further Eroding the Reach of the Public Duty Rule: Liability Imposed for Actively Creating the Risk*

At the same time that the Supreme Judicial Court was fashioning exceptions to the public duty rule in *Irwin* and *A.L.*, a separate line of

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[83] *See A.L.*, 521 N.E.2d at 1021–23.

[84] *See id.* at 1023. In a dissenting opinion, Justice O'Connor argued that the majority decision in *A.L.*, like the decision in *Irwin*, "increase[ed] the already substantial confusion about . . . public tort liability for indirectly caused injuries and losses to private individuals." *Id.* at 1027 (O'Connor, J., dissenting). In contrast to *Dinsky*, where the court had begun to develop a clear and cohesive theory of public tort liability, Justice O'Connor determined that the court's decision in *A.L.* was incapable of yielding "principled and predictable dispute resolutions in harmony with sound public policy." *See id.* As to predictability, Justice O'Connor argued that the special relationship exception was "difficult, if not impossible, to apply evenhandedly and without orientation," and discussed several cases with facts analogous to those in both *Irwin* and *A.L.*, where the court nonetheless concluded that the special relationship exception did *not* apply. *See id.* at 1030–33 (discussing *Nickerson*, 492 N.E.2d at 91 (finding that special relationship exception did not apply to commonwealth's failure to revoke automobile registration of uninsured motorist, despite existence of statutes pertaining to revocation of automobile registrations, and foreseeable risk that failure to revoke registrations would cause harm); *Appleton*, 494 N.E.2d at 12–13; *Ribeiro*, 481 N.E.2d at 467–69; *Dinsky*, 438 N.E.2d at 55–56); *see also Cyran*, 597 N.E.2d at 1359–60 (O'Connor, J., concurring) (finding that special relationship exception did not apply to town's failure to properly fight fire, despite foreseeability and immediacy of risk of harm to plaintiffs).

In addition to the inconsistent application of the exception, Justice O'Connor accused the majority of formulating a special relationship exception so broad that the exception in effect swallowed the public duty rule, thus favoring the compensation of individual plaintiffs at the cost of imposing upon governments unacceptably heavy financial burdens that threatened their ability to function effectively. *See A.L.*, 521 N.E.2d at 1028–30 (O'Connor, J., dissenting). Justice O'Connor suggested that the court renounce the special relationship exception announced in *Irwin* and adopted by the majority in *A.L.*, and follow the traditional public rule and its narrow exceptions. *See id.* at 1032. "It may be less than perfect," Justice O'Connor added, "but it has the important virtue of being reasonably predictable, and it properly recognizes as a fact of life that government is unduly burdened by a rule that permits recovery in any of the situations presented by *Dinsky*, *Irwin*, and their progeny." *Id.* at 1032. In light of public policy favoring the insulation of governments from undue financial burdens, the Justice reasoned that, "[i]t is not unfair in such cases that plaintiffs must look for compensation to those persons directly responsible for their injuries." *Id.*

cases arose that further limited the public duty rule.[85] Notwithstanding *Whitney*'s and the MTCA's rejection of the misfeasance/nonfeasance distinction, this line of cases embraced the distinction and held that where a public employee acts negligently—creating a risk of harm that comes to pass—the public duty rule is not applicable.[86] Rather, the employee is liable under a traditional misfeasance analysis, whereby "one who *takes action* ordinarily owes to everyone else who may be affected thereby a duty to act reasonably."[87]

In 1990, in *Onofrio v. Department of Mental Health*, the Supreme Judicial Court held that the public duty rule was not applicable where a public employee took action that exposed the plaintiff to risk because the employee was bound "as any other person would be [under a traditional misfeasance analysis], to act reasonably."[88] In *Onofrio*, a Department of Mental Health employee placed a client in a property owner's home without warning the property owner of the client's proclivity for starting fires, and the client subsequently set fire to the home.[89]

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[85] *See* Mamulski v. Town of Easthampton, 570 N.E.2d 1028 (Mass. 1991); Onofrio v. Department of Mental Health, 562 N.E.2d 1341 (Mass. 1990); *see also* Bruce E. Falby & John C.P. Goldberg, *The Eventful Life, Pending Death, and Possible Salvation of the Public Duty Rule*, 38 BOSTON B.J. 5, 15 (1994).

[86] *See Mamulski*, 570 N.E.2d at 1029; *Onofrio*, 562 N.E.2d at 1344–45; *see also supra* notes 35, 41 and accompanying text. This line of cases is distinguishable from *Irwin* and *A.L.* because it does not implicate an *exception* to the public rule by allowing recovery for a public employee's failure to render general protective services. *See A.L.*, 521 N.E.2d at 1021 (finding exception to public duty rule because of special relationship between plaintiff and defendant); *Irwin*, 467 N.E.2d at 1303–04 (same). Rather, this line of cases holds that the public duty rule—"with or without its special relationship exception"—is *not applicable* in the first instance because the public employee did not merely fail to render general protective services, but rather, the employee actively created the risk of harm. *Onofrio*, 562 N.E.2d at 1344–45 (holding public duty rule inapplicable because of defendant's creation of risk); *see Mamulski*, 570 N.E.2d at 1029 (same).

[87] *Onofrio*, 562 N.E.2d at 1345 (emphasis added). For example, where a police officer negligently drives a cruiser in the course of his employment (i.e., in the course of a "public duty") and causes an accident, the public duty rule is inapplicable because the officer took action that created risk. *See id.* at 1344; Glannon, *supra* note 54, at 18. As a result of his actions, "the duty owed by the police officer would not have been grounded in his employment contract but rather would have been the duty of care that every motorist owes to every one else on the highway." *Onofrio*, 562 N.E.2d at 1344.

[88] *See id.* at 1345. By imposing liability upon the public employer for its employee's *creation of the risk*, the Supreme Judicial Court upheld the superior court's determination that the employee owed the property owner a duty of care, but expressly rejected the superior court's analysis, which was based upon the existence of a *special relationship* between the employee and the property owner. *See id.* at 1344.

[89] *See id.* at 1343.

The *Onofrio* court based its application of the public duty rule upon the common law distinction between misfeasance and nonfeasance—between "taking action that expose[s] [another] to risk" and merely failing to prevent a third person's harmful activity.[90] The court reasoned that the public duty rule applied only in situations where "a plaintiff has been directly harmed by the conduct of a third person and only indirectly by a public employee's dereliction of a duty—a duty imposed on him solely by his contract of employment—to interrupt or prevent the third person's harmful activity."[91] Simply stated, the court determined that liability would not attach where the public employer failed to prevent or diminish an independent, third party-created risk of harm that came to pass.[92] By contrast, under the facts of *Onofrio,* the court reasoned that the public employee had created the risk of harm that came to pass by actively placing the client in the house, and thus, the employee owed the property owner a duty of reasonable care.[93] In light of the misfeasance/nonfeasance distinction, the *Onofrio* court concluded that although the public duty rule protected public employers from liability for failing to prevent intervening third parties' wrongful conduct, liability *would* apply to an employee's wrongful, risk-creating acts.[94]

The court did not address, however, the application of liability to a situation where, in the absence of an intervening third party, the employee's apparent failure to act may have created the risk of harm that came to pass.[95] This issue presented itself in 1991, in *Mamulski v. Easthampton,* where the Supreme Judicial Court held that the public duty rule did not apply to a public employee's failure to replace a missing stop sign because the employee actively created the risk of harm that came to pass.[96] In *Mamulski,* the plaintiff's decedent was killed in an automobile accident allegedly resulting from a public employee's failure to replace a missing stop sign at a major intersec-

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[90] *See id.* at 1344–45.

[91] *Id.* at 1344; *see* Falby & Goldberg, *supra* note 85, at 15.

[92] *See Onofrio,* 562 N.E.2d at 1344.

[93] *See id.* at 1344–45.

[94] *See id. But see Cyran,* 597 N.E.2d at 1353–54 (holding that town was not liable under public duty rule for firefighter's negligence in fighting fire, despite absence of intervening third party).

[95] *See Mamulski,* 570 N.E.2d at 1029; *Onofrio,* 562 N.E.2d at 1344–45.

[96] *See Mamulski,* 570 N.E.2d at 1029. By imposing liability upon the town for its employee's creation of the risk, the Supreme Judicial Court reversed the superior court, which held that the town did not owe the plaintiff's decedent a duty of care because it had no special relationship with the decedent. *See id.*

tion, despite numerous warnings by concerned people in the area.[97] The court first analogized to *Onofrio,* citing the lack of any wrongful, third party conduct.[98] Noting the absence of an independently-created risk of harm, the court reasoned implicitly that were it not for the employee's failure to replace the stop sign, the risk of a deadly car accident would not have come to pass.[99] The court further reasoned that because the town controlled the public land upon which motorists traveled and actively held out roads to be reasonably safe for public use, the town had "a duty to exercise reasonable care toward persons lawfully on that property."[100] Therefore, the court reasoned implicitly that by failing to replace the stop sign, the town did not merely fail to prevent the risk of harm that came to pass, but rather, the town "itself set[] in motion forces which cause[d] the harm."[101] The court concluded that because the public employee actively created the risk of harm, the public duty rule did not apply and thus, the town was liable for the harm that came to pass.[102]

In contrast to the majority of cases applying the public duty rule to shield employers from liability, *Irwin, A.L., Onofrio* and *Mamulski* reflected the Supreme Judicial Court's growing dissatisfaction with the public duty rule's broad application and its interest in shaping

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[97] *See id.* at 1028–29.

[98] *See id.* at 1029. Indeed, the driver of the car that collided with the plaintiff's decedent was presumably not negligent in any way. *See id.* at 1028.

[99] *Id.*

[100] *See Mamulski*, 570 N.E.2d at 1029.

[101] *Id.*

[102] *See id.* The *Mamulski* court's characterization of a town's negligent failure to maintain public premises as risk-*creating* conduct, and the court's corresponding decision to impose liability on the town, paralleled the Supreme Judicial Court's earlier decision in *Doherty v. Town of Belmont. See* Doherty v. Town of Belmont, 485 N.E.2d 183, 184–85 (1985). In *Doherty,* the Supreme Judicial Court held that a town was liable for injuries sustained by the plaintiff as a result of the town's failure to maintain a public parking lot. *See id.* While walking across the lot, the plaintiff in *Doherty* injured herself after tripping over the exposed stub of a parking meter that had been negligently removed more than a year earlier. *See id.* Although the *Doherty* court did not expressly address the misfeasance/nonfeasance distinction articulated in *Onofrio* and *A.L.*, the court reasoned implicitly that where claims arose from the town's role as a landowner, and where the town actively maintained a parking lot for public use, the town's failure to make repairs constituted risk-creating conduct that violated the duty of reasonable care. *See id.* Thus, because the town created the risk, the court concluded that the public duty rule did not apply and that the town was liable. *See id.*; *see also* Sanker v. Town of New Orleans 538 N.E.2d 999, 1000–02 (Mass. 1989) (holding that town was liable for death of plaintiff's decedent who lost control of motorcycle after striking tree branch, based upon town's negligent failure to prune tree branch overhanging road); Gallant v. City of Worcester, 421 N.E.2d 1196, 1198, 1201 (Mass. 1981) (holding that city was liable for death of plaintiff's decedent who was struck by car, based upon city's negligent design, construction and maintenance of public way).

cohesive and consistent exceptions to the rule.[103] Moreover, these cases also evinced the court's effort to balance public policy issues of private compensation and public accountability with the protection of government from crippling financial liability and the creation of incentives for the provision of public services.[104] In its attempt to narrow the scope of the public duty rule, however, the court exposed cracks in the very justification of the rule.[105] Indeed, despite the consensus on granting immunity for public duties under *Dinsky,* subsequent court cases had not yet drawn "an intellectually defensible line between immune 'public' duties and actionable negligence."[106] Far from mere aberrations, these exceptional cases were harbingers of change.

F. Cyran v. Town of Ware: *Special Exceptions Versus Creation of the Risk*

The separate lines of cases narrowing the public duty rule came together in 1992, in *Cyran v. Town of Ware.*[107] In *Cyran,* the Supreme Judicial Court held that a town's firefighters were not liable under the public duty rule for negligently fighting a fire because the obligation to provide fire protection was a public duty and plaintiffs were not members of a statutory class required to trigger a special duty exception.[108] In *Cyran,* a fire broke out in a two-family residential building and the plaintiffs alleged that the fire department responded to and fought the fire negligently, causing foreseeable damage to the property.[109] The court reasoned that the fire department's duty was a general duty of fire protection owed to the town and required only that the fire department respond to and deal with the fire as permitted by their resources and training.[110] Drawing upon the misfeasance/nonfeasance distinction articulated in the *Onofrio* line of cases, the court reasoned that because the fire department did not actively create the fire, it was not liable for failing to prevent the damage that the fire caused.[111] The court explained that the fire department's conduct was distinguishable from *Onofrio* and *Mamulski* because the

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[103] *See* Glannon, *supra* note 37, at 64.

[104] *See Cyran,* 597 N.E.2d at 1358 (O'Connor, J., concurring).

[105] *See* Glannon, *supra* note 37, at 64; Memorandum from Senate Judiciary Committee and Sen. Cheryl A. Jacques 1 (1993) (on file with Sen. Cheryl A. Jacques, Senate Chair, Post Audit and Oversight Committee) [hereinafter Memorandum].

[106] *Id.* at 64; *see also* Memorandum, *supra* note 106, at 1.

[107] *See* Falby & Goldberg, *supra* note 85, at 15.

[108] *See Cyran,* 597 N.E.2d at 1353–54.

[109] *See id.* at 1352.

[110] *See id.* at 1354.

[111] *See id.* at 1353–54.

fire department failed to act to effectively fight the fire, as opposed to having negligently caused the fire.[112]

The court also ruled out a possible special relationship exception to the public duty rule because the plaintiffs were not members of a special statutory class.[113] Additionally, the court considered the existence of a special relationship exception based upon assurances of special care given by the fire department, but summarily rejected this theory of exception in the absence of such assurances.[114] Finally, the court determined that imposing liability for negligent firefighting would violate public policy because cities and towns would be exposed to liability for damages each time a plaintiff considered a fire department's acts to be unsatisfactory.[115] Thus, the *Cyran* court concluded that in the absence of any statute creating a special relationship, the town was not liable for the firefighter's negligence under the public duty rule.[116]

In his concurrence, Justice O'Connor supported the court's refusal to impose liability, reasoning that the case fell directly under the precepts of the public duty rule: that no State, municipality or county should be liable "for injuries and losses sustained by individuals as a result of a public employee's failure to act, as required by the terms of his or her employment, to prevent or diminish the harmful consequences of a condition or situation *not originally caused by* the employee."[117] Consistent with the majority's holding, Justice O'Connor's reasoning in support of the public duty rule was implicitly based upon the misfeasance/nonfeasance distinction articulated in *Onofrio* and *Mamulski*, insofar as liability would be imposed for originally causing the risk of harm (i.e., by actively creating the risk), but not for "fail[ing] to prevent or mitigate" the risk of harm (by taking no action at all).[118] Moreover, Justice O'Connor's emphasis on "original cause" implicitly suggested an expansion of the public duty rule as defined

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112 *See id.* at 1355.

113 *See Cyran*, 597 N.E.2d at 1353. Insofar as the plaintiffs were unable to cite a statute imposing such a special duty on the fire department, the court distinguished the case from *Irwin* and *A.L.*, where the special relationship exception was applied based upon issues of foreseeability as well as statutes or "agreements" extending protection to the respective classes of plaintiffs. *See id.* at 1353, 1355–56.

114 *See id.* at 1354, 1356.

115 *See id.* at 1354.

116 *See id.* at 1353–54.

117 *Id.* at 1357 (O'Connor, J., concurring) (emphasis added).

118 *See Cyran*, 597 N.E.2d at 1360 (O'Connor, J., concurring); *see also Jean W.*, 610 N.E.2d at 319 (O'Connor, J., concurring); *Onofrio*, 562 N.E.2d at 1344–45.

by prior cases.[119] According to Justice O'Connor, the public duty rule would apply not only to situations where an employee failed to prevent an independent, third-party-created harm, but also to any situation "in which a plaintiff has been harmed by a condition or situation which was not originally caused by the public employee, and is attributable to the employee only in the sense that the employee failed to prevent or mitigate it."[120] Under Justice O'Connor's formulation, this "originally caused by" language would shield public employers from liability for their failure to prevent not only third-party harms, but also *any other* harms (including contributory wrongdoing on the part of the plaintiff or other extraneous causes of harm, like the fire in *Cyran*) not "originally caused by" public employees.[121]

Justice O'Connor also suggested that only two narrow exceptions—neither of which he believed was applicable in *Cyran*—be made to the public duty rule to bring it into conformity with the "traditional" common law rule: first, where a special duty was owed because the plaintiff was within a specifically identified statutory class; and, second, where a special relationship existed between the plaintiff and the public employee insofar as the employee expressly or implicitly represented to the plaintiff that special care would be taken.[122] By limiting the public duty rule to its traditional exceptions, Justice O'Connor implicitly rejected the "new" special relationship exception applied in *Irwin* and *A.L.* that established liability on the part of public employers.[123] Contrary to the majority, which distinguished *Irwin* and *A.L.* from *Cyran* based upon the existence of special statutory protection for the plaintiffs, Justice O'Connor argued that but for this "new" exception, the three cases were factually indistinguishable and wrongly decided.[124] Justice O'Connor urged the majority to overrule

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[119] *See Cyran,* 597 N.E.2d at 1357, 1360 (O'Connor, J., concurring).

[120] *Id.* at 1360.

[121] *See Cyran,* 597 N.E.2d at 1360 (O'Connor, J., concurring); *see also Jean W.,* 610 N.E.2d at 311 (O'Connor, J., concurring).

[122] *See Cyran,* 597 N.E.2d at 1357–58 (O'Connor, J., concurring).

[123] *See id.*

[124] *See id.* at 1358–60. Based upon his suggested exceptions to the public duty rule, Justice O'Connor reasoned that a special relationship exception should not have applied in either *Irwin* or *A.L.* because no statute cited by the plaintiffs in *Irwin* expressed a legislative intent to specifically protect the plaintiffs, and no "agreement" cited by the plaintiff in *A.L.* constituted a promise to the plaintiff that induced reliance. *See id.* In addition, the Justice added, both cases' reliance upon the immediacy and foreseeability of the risk of physical injury was misplaced. *See id.* The Justice noted that the very same issues of immediacy and foreseeability were present in *Cyran* and were appropriately left out of the majority's analysis—having no place under a traditional public duty analysis. *See id.* Furthermore, under a

Irwin and *A.L.*, thereby bringing public duty case law into harmony with the public duty rule articulated in *Cyran*.[125] By applying the public duty rule, with its narrow exceptions, in this sweeping fashion, Justice O'Connor emphasized that "the public duty rule in Massachusetts [would] be made clear," predictability of liability would be greatly improved and the twin public policy concerns of private compensation and governmental protection would be reasonably balanced.[126]

G. *The Court Retreats:* Jean W. v. Commonwealth *and the Abrogation of the Public Duty Rule*

In 1993, in *Jean W. v. Commonwealth*, the Supreme Judicial Court held that the public duty rule was inconsistent with the MTCA and thereby announced its intention to abolish the rule prospectively after the conclusion of the 1993 legislative session.[127] In *Jean W.*, a Massachusetts Parole Board clerk erroneously granted the parole of a convicted murderer.[128] Although the parolee regularly reported to his parole officer, the officer failed to discover the error.[129] Six months after his release, the parolee raped, beat and threatened the plaintiff, who later sued the commonwealth, the parole board and the Department of Corrections for negligence.[130]

The Massachusetts Superior Court dismissed the claim on the ground that it was barred by the public duty rule because the plaintiff had not shown that the defendants owed her a special duty different from that owed to the general public.[131] On appeal, the plaintiff argued that a special relationship existed based upon the foreseeability of the risk of harm to the plaintiff, and therefore, the public duty rule should not apply.[132] Taking the appeal on its own initiative, the Supreme Judicial Court, in a decision featuring four separate concur-

misfeasance/nonfeasance analysis, Justice O'Connor implicitly reasoned that the public employees in *Irwin* and *A.L.*, like those in *Cyran*, did not actively create the risk. *See id.*

[125] *See id.* at 1361 (O'Connor, J., concurring). The majority, however, chose not to overrule *Irwin* and *A.L.*, finding that the cases had "their place in a plan of evolving law." *Id.* at 1356.

[126] *Id.* at 1358, 1361.

[127] *See Jean W.*, 610 N.E.2d at 307 (Liacos, C.J., concurring).

[128] *See id.* at 306–07.

[129] *See id.*

[130] *See id.* at 307.

[131] *See id.* at 315.

[132] *See Jean W.*, 610 N.E.2d at 307 (Liacos, C.J., concurring).

ring opinions, abrogated the public duty rule and unanimously reversed the lower court's dismissal.[133]

According to Chief Justice Liacos, the "inconsistent and irreconcilable parts" of the public duty rule, namely the "public duty-special relationship dichotomy," had left "both the Justices and the litigants quite incapable of predicting when and why liability will be imposed."[134] As an example, the Chief Justice articulated the confusion surrounding the application of the special relationship exception by comparing *Irwin* and *A.L.*—where liability was imposed because of a special relationship exception to the public duty rule—with various other cases where the public duty rule barred the imposition of liability despite the existence of statutes that seemed to confer special relationships.[135] In addition, Chief Justice Liacos reasoned that, in light of more recent cases such as *Cyran*, the framework for applying the public duty rule as determined by the court in *Onofrio* and *Mamulski* had also led to inconsistent results.[136] Narrowly interpreting the former cases to require the presence of an independent, third-party-created harm in order to trigger the public duty rule, the Chief Justice held that the public duty rule should not to have applied to *Cyran* because there was no intervening perpetrator.[137] Moreover, the Chief Justice explicitly rejected Justice O'Connor's broad interpretation of the *Onofrio* line of cases in *Cyran*, where Justice O'Connor reasoned that the public duty rule's application in *Onofrio* and *Mamulski* rested not on the presence or absence of a third-party-created harm, but on whether the employee "originally caused" the risk of harm.[138] According to the Chief Justice, this misfeasance/nonfeasance distinction was too flexible to provide "certainty and predictability essential to the

[133] *See id.* at 307.

[134] *Id.* at 307, 310.

[135] *See id.* at 309–10; *see, e.g.*, *Sampson*, 537 N.E.2d at 589 (statutes governing issuance of firearms permits did not create special relationship between city and victim of gunshot); *Connerty*, 495 N.E.2d at 842–44 (statutes prohibiting pollution of tidal waters and statutes governing issuance of clamming permits did not create special relationship between environmental agency and injured clam digger); *Appleton*, 492 N.E.2d at 12–13 (statutes governing issuance of liquor licenses did not create special relationship between town and plaintiffs injured by intoxicated motorists); *Nickerson*, 492 N.E.2d at 91 (statutes governing revocation of motor vehicle registration did not create special relationship between commonwealth and injured motorist); *Ribeiro*, 481 N.E.2d at 467–69 (statutes requiring specific means of egress from apartment did not create special relationship between town and decedent).

[136] *See Jean W.*, 610 N.E.2d at 310–12 (Liacos, C.J., concurring).

[137] *See id.* at 311.

[138] *See id.* at 311–12.

law," because the defendants' conduct in *Mamulski* and *Cyran* could be characterized as either acting negligently (misfeasance) or failing to act at all (nonfeasance), thus leading to contradictory outcomes.[139]

In addition to the confusion engendered by the inconsistent application of the public duty rule, the Chief Justice likened the rule's comprehensiveness to the "antiquated and outmoded concepts of sovereign immunity" that the court and the Legislature had shed, respectively, in *Whitney* and in the MTCA.[140] Calling attention to the fundamental inconsistency between the abolition of sovereign immunity and the preservation of the public duty rule, the Chief Justice criticized the unfairness inherent in a rule that resulted in "a duty to none when there is a duty to all" on the one hand, and "tortured analyses" resulting from desperate attempts by courts "to avoid harsh results without squarely facing the problem" on the other.[141] The Chief Justice suggested that abrogation of the public duty rule would remedy such discrepancies by eliminating the distinction between private persons and public employers as envisioned by the MTCA and thus would regularize the imposition of liability.[142] Acknowledging fears of the potential financial burden that would be imposed on public employers by the rule's abrogation, the Chief Justice indicated that the plaintiff's burden of proof of negligence (duty-breach-causation-damages) and the statutory cap on damages, in addition to preexisting immunity for discretionary acts under § 10(b) and intentional torts under § 10(c), would protect the commonwealth from spiraling costs.[143] Finally, turning to the facts of *Jean W.*, the Chief Justice held

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139 *Id.* at 312; *see* Falby & Goldberg, *supra* note 85, at 17.

140 *See* 610 N.E.2d at 307 (Liacos, C.J., concurring).

141 *See id.* at 313.

142 *See id.* at 312. Rejecting the public duty rule's insulation of uniquely "public" duties merely because they are owed to the public as a whole and not to private individuals, Chief Justice Liacos reasoned implicitly that *all* duties—public *and* private—must be exercised with reasonable care and subject to the common law of negligence. *See id.* "The fact that a public employee's employment imposes on him an affirmative duty to act where a private person would not have such a duty," the Justice explained, "does no more than identify the source of the duty. [Indeed, p]rivate persons have affirmative duties arising from their employment responsibilities that [public employees] do not have." *Id.* Thus, whether public or private, the duty to act reasonably is the same. *See id.*

143 *See Jean W.*, 610 N.E.2d at 313–14 & n.11 (Liacos, C.J., concurring). Chief Justice Liacos noted that "[w]hile a sizable number of jurisdictions still adhere to the public duty rule . . . the trend has been to abolish the rule"—especially among jurisdictions that provide *other* limitations on governmental liability, such as a discretionary act exception. *Id.* at 312–13 & n.10. The following jurisdictions have abolished the public duty rule: Alaska, Arizona, Colorado, Florida, Iowa, Louisiana, Nebraska, New Hampshire, New Mexico, Oregon, Wisconsin and Wyoming. *See id.*; Valkenburgh, *supra* note 25, at 1108 n.91.

that the case be remanded to allow the plaintiffs to establish the existence of a special relationship between either themselves and the defendants or between the defendants and the third party perpetrator (a second type of special relationship), which would trigger a duty of protection.[144]

Justice O'Connor, joined by Justices Nolan and Lynch, supported the reversal of the lower court's decision based upon the misfeasance/nonfeasance distinction.[145] Applying the reasoning of *Onofrio*, Justice O'Connor determined that *Jean W.* was "not a case in which the plaintiffs were injured as a result of a public employee's failure to act to rectify a situation not created by the employee," but rather, the employee actively exposed the plaintiff to a new risk by releasing the convicted murderer.[146] Despite his refusal to apply the public duty rule in *Jean W.*, however, Justice O'Connor did not support abrogation of the public duty rule.[147] Rather, Justice O'Connor championed the rule's application in previous cases as being consistent with traditional tort principles of misfeasance and nonfeasance, as well as with current social values and public policy concerns of private compensation, governmental protection and predictability.[148]

Furthermore, in opposition to Chief Justice Liacos' assertion that the public duty rule had no basis in principles of misfeasance and nonfeasance, Justice O'Connor vehemently argued that "there [is] no question about it. . . . The traditional public duty rule does make such a distinction," and that "for nearly ninety years the court has been distinguishing between a defendant's acts and omissions in determining whether a duty of care exists . . . ."[149] This distinction, Justice O'Connor reasoned, was well-established in prior case law where the court consistently held that public employees, "required by the terms of their employment to prevent or diminish harmful consequences to the public of conditions or situations not originally caused by the employees, did not owe to *individual* members of the public a duty of

[144] *See Jean W.*, 610 N.E.2d at 315 (Liacos, C.J., concurring).

[145] *See id.* at 316–17 (O'Connor, J., concurring); Falby & Goldberg, *supra* note 85, at 18.

[146] *Jean W.*, 610 N.E.2d at 316–17 (O'Connor, J., concurring).

[147] *See id.* at 316.

[148] *See id.* at 317–18; *see, e.g.*, *Cyran*, 597 N.E.2d at 1353 (public duty rule applied where firefighters failed to extinguish fire that they did not originate or aggravate); *Mamulski*, 570 N.E.2d at 1029 (public duty rule did not apply where town failed to replace sign on public way that they actively maintained for travel).

[149] *Jean W.*, 610 N.E.2d at 318–19 (O'Connor, J., concurring).

protection commensurate with their duty to the public as a whole."[150] Justice O'Connor argued that by abrogating the public duty rule the court not only paved the way for broad-based public tort liability, but also destroyed the critical distinction between acts and omissions—thus imposing a duty of care upon public employees regardless of whether they created the risk of harm.[151]

Moreover, according to Justice O'Connor, this "new" duty of care ran counter to the purpose and intent of the MTCA.[152] Indeed, whereas the MTCA sought to make public employers liable in the same circumstances that would result in private employer liability, Justice O'Connor determined that the court's abrogation of the public duty rule and its attendant undermining of the misfeasance/nonfeasance distinction would force public employers to shoulder an additional burden of liability not borne by private individuals.[153] This new duty, Justice O'Connor reasoned implicitly, would make public employers liable for their failure to act in response to a situation that they did not create, i.e. nonfeasance, but would have no application to private individuals' failure to prevent or diminish harm.[154] Justice O'Connor thus concluded that the public duty rule properly gauged the imposition of governmental liability under the MTCA and cautioned against its proposed abrogation, which he determined would lead to catastrophic governmental liability by creating entirely new duties for public employers.[155]

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150 *Id.* at 319 (emphasis added); *see, e.g.*, *Nickerson*, 492 N.E.2d at 91 (holding that commonwealth was not liable for injury to motorist by uninsured motorist under public duty rule, based upon commonwealth's failure to revoke registration of uninsured motorist); *Appleton*, 492 N.E.2d at 12–13 (holding that town was not liable for injury to motorists by intoxicated minors under public duty rule, based upon town's failure to prevent underaged drinking at club); *Ribeiro*, 481 N.E.2d at 467–69 (holding that town was not liable for injury to apartment resident by fire under public duty rule, based upon town's failure to require second means of egress from apartment).

151 *See Jean W.*, 610 N.E.2d at 319–20 (O'Connor, J., concurring).

152 *See id.*

153 *See id.*

154 *See id.* Justice O'Connor added that:

> In the absence of a "special relationship" of the kind contemplated by the traditional public duty rule, this court has never held that a private party is liable in tort for failing to prevent or diminish harm due to a condition or situation that the private party did not create, and nothing in the [MTCA] provides that a public employee or public employer is subject to a different rule.

Id.

155 *See id.* at 318–19. In another concurring opinion, Justices Wilkins and Abrams supported abrogation of the public duty rule in lieu of its inconsistent evolution, as demon-

H. *The 1993 Amendments to the MTCA: Codifying the Public Duty Rule*

Prompted by the court's announcement in *Jean W.* that it would abrogate the public duty rule and by fears of unlimited liability for cities and towns, the MTCA was amended to protect public employers from liability in situations previously covered by the common law public duty rule.[156] The MTCA amendments, added by Statute 1993, chapter 495, were enacted as part of the supplemental budget and took effect when the governor signed the budget on January 14, 1994.[157] The amendments added several new exceptions to liability for public employers under § 10 of the MTCA.[158] Closely paralleling the holdings of prior public duty cases, the first four subsections, §§ 10(e)–10(h), immunize public employers from any claim based upon the execution or failure to execute specific public functions.[159] Specifically, § 10(e) shields public employers from liability for negligent licensing;[160] § 10(f) bars liability for negligent inspection by public employers;[161] § 10(g) bars liability for negligent fire prevention

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strated by the lower court's erroneous application of the public duty rule in *Jean W.*, which clearly involved "active wrongdoing." *See id.* at 316 (Wilkins, J., concurring). In light of the futility involved in distinguishing between active negligence and the failure to act, the Justices argued that both should be excepted from the public duty rule. *Id.*; Falby & Goldberg, *supra* note 85, at 17. Finally, the Justices warned that even with the abrogation of the public duty rule, all problems would not be solved as difficult line-drawing would endure in proving causation under a traditional tort analysis. *See Jean W.*, 610 N.E.2d at 315–16 (Wilkins, J., concurring).

In a final concurring opinion in *Jean W.*, Justice Greaney supported abrogation of the public duty doctrine and emphasized the importance of legislative action within the prospective period designated by the court. *See id.* at 320–21 (Greaney, J., concurring); Falby & Goldberg, *supra* note 85, at 17–18. Not persuaded by Justice O'Connor's support for the public duty rule, and unconvinced by Chief Justice Liacos' balancing of private and public activities, Justice Greaney called upon the Legislature to determine the scope of governmental liability in light of previous case law under the MTCA and the statute's original intent. *See Jean W.*, 610 N.E.2d at 320–21 (Greaney, J., concurring). Without legislative action, Justice Greaney reasoned, abrogation of the rule would not clarify current inconsistencies, and might lead to "a deluge of lawsuits against governmental agencies, particularly municipalities," which would exact a heavy toll both in terms of damages paid as well as in defense costs. *Id.* at 321.

156 *See* Glannon, *supra* note 54, at 17.

157 *See id.* at 17 & 31 n.4.

158 *See* Glannon, *supra* note 54, at 19.

159 *See id.*; Memorandum, *supra* note 106, at 1.

160 *See* MASS. GEN. LAWS ch. 258, § 10(e) (1998); *see also Nickerson*, 492 N.E.2d at 91 (no liability for failure to revoke motor vehicle registration); *Sampson*, 537 N.E.2d at 588–89 (no liability for failure to follow proper procedure in issuing gun permit).

161 *See* MASS. GEN. LAWS ch. 258, § 10(f) (1998); *see also Ribeiro*, 481 N.E.2d at 466, 468–69 (no liability for failure to abate dangerous condition revealed by inspection); *Dinsky*,

(not including claims based upon the negligent operation of motor vehicles);[162] and § 10(h) bars liability for negligent police protection (not including claims based upon the negligent operation of motor vehicles, or the negligent protection, supervision or care of persons in custody).[163] In addition, § 10(i) shields public employers from liability for claims based upon the release, parole or escape of persons in public custody, unless gross negligence is shown.[164] Together, these amendments codify the Supreme Judicial Court's decision in *Dinsky* and its progeny—that public employers should not be held liable for negligence in broad public oversight functions.[165]

In contrast to the above-mentioned sections that provide public employers with immunity for specific public functions, § 10(j) applies to all public functions—shielding public employers from liability for "any claim 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 a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer."[166] In the wake of the court's abrogation of the common law public duty rule in *Jean W.*, § 10(j) was intended to replace the rule by providing a broad, catch-all exception to liability for public employers, not limited to any particular public function.[167]

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438 N.E.2d at 55–56 (no liability for failure to properly inspect premises before issuing building permit).

162 *See* MASS. GEN. LAWS ch. 258, § 10(g) (1998); *see also Cyran*, 597 N.E.2d at 1353–54 (no liability for failure to properly fight fire).

163 *See* MASS. GEN. LAWS ch. 258, § 10(h) (1998); *see also Appleton*, 494 N.E.2d at 12–13 (no liability for failure to enforce traffic laws).

164 *See* MASS. GEN. LAWS ch. 258, § 10(i) (1998). Section 10(i) represents a compromise between cases like *Onofrio* that advocate the imposition of public liability where the public employer "takes charge of the person who poses a threat of harm," and cases like *Jean W.* which bar liability unless the plaintiff can prove the existence of a special relationship. *See also* Glannon, *supra* note 54, at 25. Thus, under section 10(i), public liability may be imposed in the absence of a special relationship, but only if the public employee is *grossly* negligent. *See* Glannon, *supra* note 54, at 25.

165 *See* Glannon, *supra* note 54, at 17–19; Valkenburgh, *supra* note 25, at 1101.

166 MASS. GEN. LAWS ch. 258, § 10(j) (1998); *see* Glannon, *supra* note 54, at 19.

167 *See* Glannon, *supra* note 54, at 19, 25; Memorandum, *supra* note 106, at 2. Following the court's decision in *Jean W.*, public employers pressed the Legislature for an amendment to the MTCA that would provide general protection to public employers, citing the potential for costly law suits. *See* Glannon, *supra* note 54, at 25. Municipal lawyers echoed these sentiments in their defense of the proposed amendments, asserting that the abrogation of the common law public duty rule would deal a "harsh financial blow" to local governments, the state, and the states' residents as well. *See* Claire P. Rattigan, *Bar Debates Future of Public Duty Doctrine*, MASS. LAW. WKLY., August 9, 1993, at 3. Hyannis town counsel, Robert D. Smith, argued that public employers should not be "treated like anybody else,"

Consistent with the *Onofrio* line of cases decided by the Supreme Judicial Court, § 10(j) is founded upon a misfeasance/nonfeasance distinction: a public employer will be held liable for actively creating a risk of harm that comes to pass, but will not be held liable for failing to prevent a risk of harm "not originally caused by the public employee," even where the employee has a statutory or contractual employment duty to act.[168] Section 10(j)'s "originally caused by" phrase thus sharpens *Onofrio*'s misfeasance/nonfeasance inquiry by emphasizing the employee's material involvement in the creation of the risk of harm as grounds for imposing or refusing to impose § 10(j) liability.[169] Furthermore, as alluded to above, the emphasis on original causation also expands the scope of the public duty rule by shielding public employers from liability for failure to prevent not only third-party-created risks of harm, but *any* risks of harm not originally caused by public employees.[170]

Reluctant to provide unqualified immunity to public employers who failed to prevent harm, the drafters of the MTCA amendments crafted several exceptions to § 10(j) that are consistent with the holdings of prior public duty cases.[171] Section 10(j)(1) embodies a re-

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because, unlike private employers, "[i]f a private company does a wrong and judgment is rendered, the company goes out of business and society rolls merrily along.... Does that happen with government?" *Id.* Critics of the proposed amendments argued that the public duty rule created unreasonable protection from liability for public employers. *Id.* Michael E. Mone, president-elect of the Massachusetts Bar Association, added that such "[i]mmunity creates irresponsibility," and that in light of the confusion surrounding the court's enforcement of the public duty rule, Mone added, "This is the one time when the appropriate action for the Legislature is to do nothing.... When you cannot explain the rule, you ought to abolish it." *Id.*

[168] *See* Glannon, *supra* note 54, at 26.

[169] *See id.* at 26–27.

[170] *See supra* note 121 and accompanying text. Joseph W. Glannon provides several examples of how the "originally caused by" phrase applies to bar liability under § 10(j). *See* Glannon, *supra* note 54, at 26. He suggests that where "a town health director is notified that a rabid raccoon is running loose but delays in responding," and where "a child is bitten by the raccoon," § 10(j) would apply. *Id.* Even though there was technically no intervening third party, and even though the health director "might have averted the harm by timely response," the health inspector did not create the "situation" that came to pass. *See id.* Rather, "the situation which injured the child was a rabid raccoon." *Id.* In addition, where "a motorist's car breaks down on a highway on a cold night, and the motorist suffers hypothermia," § 10(j) would apply. *Id.* Even though there is no intervening third party, and even though the town might have averted the harm by "[adequately] patrolling the highway for stranded motorists," the weather and the breakdown of the car—not the town's employees—created the situation which caused harm. *See* Glannon, *supra* note 54, at 26.

[171] *See* MASS. GEN. LAWS ch. 258, § 10(j)(1)–(4)(1998); *see also* Glannon, *supra* note 54, at 27.

stricted form of the traditional special relationship exception, providing that § 10(j) will not apply where public employees give specific assurances of safety or assistance—beyond general representations that investigation or assistance will be or has been undertaken—to an individual or to a member of the individual's family and where the individual or family member relies on those assurances to their detriment.[172] Section 10(j)(1) reflects the common law view that even where a public employee does not create the risk of harm, an employee's assurances to a plaintiff that special care will be taken "justify[] the plaintiff's reliance on the employee's carrying out his responsibility."[173] Additionally, § 10(j)(2) bars the application of § 10(j) to any claim based upon the actual intervention of a public employee that causes injury to the victim or places the victim in a worse position than he was in before the intervention.[174] This exception reflects traditional common law tort principles insofar as it allows the imposition of liability against a rescuer who negligently assists a victim or who actively creates the risk of harm that comes to pass.[175] Consistent with *Doherty v. Belmont,* where, in 1985, the Supreme Judicial Court held that negligent maintenance of property was risk-creating conduct and was therefore actionable under the MTCA, § 10(j)(3) excludes negligent maintenance of public property from protection under § 10(j).[176] Finally, § 10(j)(4) prevents the immunization of public employers for negligent medical or other therapeutic treatment and

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172 *See* MASS. GEN. LAWS ch. 258, § 10(j)(1); *see also* Glannon, *supra* note 54, at 27–28.

173 *A.L.*, 521 N.E.2d at 1029; *see* Glannon, *supra* note 54, at 28. In addition to § 10(j), §§ 10(f), (g) and (h) also provide for the imposition of liability under § 10(j)(1) where specific assurances of safety or assistance are given. *See* MASS. GEN. LAWS ch. 258, §§ 10(f)–(h)(1998).

174 *See* MASS. GEN. LAWS ch. 258, § 10(j)(2); *see also* Glannon, *supra* note 54, at 28.

175 *See* Glannon, *supra* note 54, at 28.

176 *See* MASS. GEN. LAWS ch. 258, § 10(j)(3); *see Doherty*, 485 N.E.2d at 185; Glannon, *supra* note 54, at 28–29. Liability for negligent maintenance of public property under § 10(j)(3) is limited, however, by chapter 21, section 17C(a) of the General Laws of the Commonwealth of Massachusetts, which states, in relevant part, that

> [a]ny person having an interest in land . . . who lawfully permits the public to use such land for recreational, conservation, scientific, educational, environmental, ecological, research, religious, or charitable purposes without imposing a charge or fee therefor . . . shall not be liable for personal injuries or property damage sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person.

MASS. GEN. LAWS. ch. 21, § 17C(a) (1998); *see* Glannon, *supra* note 54, at 28–29.

is consistent with prior case law that held medical malpractice actionable under the MTCA.[177]

II. The Application of the Statutory Public Duty Rule, Section 10(j)

In the wake of the MTCA amendments, the Supreme Judicial Court wasted no time in applying § 10(j)'s statutory public duty immunity.[178] In applying § 10(j), the court did not attempt to define the plain language of the provision, but rather imposed liability on public employers for creating the risk, consistent with *Onofrio*'s misfeasance/nonfeasance distinction.[179] Thus, in 1994, in *Pallazola v. Town of Foxborough*, the Supreme Judicial Court held that § 10(j) applied retroactively to bar a plaintiff's claim against a town for failure to provide sufficient police protection and prevent the unlawful removal of a

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[177] *See* Glannon, *supra* note 54, at 29; Memorandum, *supra* note 106, at 2. Section 10(j)'s exceptions do not include either a statutory intent exception as discussed in *Dinsky*, or a special relationship exception of the *Irwin-A.L.* variety. *See* Mass. Gen. Laws. ch. 258, § 10(j)(1)–(4)(1998); *see also supra* notes 54–84. Thus, even if the harm that comes to pass is foreseeable, and even if the public employee has a statutory or employment duty to act, § 10(j) provides that the public employer is *not* liable for acting or failing to act to prevent harmful consequences. *See* Mass. Gen. Laws. ch. 258, § 10(j)(1)–(4); *see also* Pallazola v. Town of Foxborough, 640 N.E.2d 460, 462 (Mass. 1994) (refusing to create new exception from immunity in addition to those already enumerated under § 10(j)).

[178] *See* Carleton v. Town of Framingham, 640 N.E.2d 452, 455 (Mass. 1994). Indeed, section 144 of Statute 1993, chapter 495, provided that the 1993 amendments to the MTCA would "apply to all claims upon which a final judgment has not entered, or as to which an appeal is pending or the appeal period has not expired, and to all claims upon which suit is filed after the effective date of this act." *See id.* Consistent with these terms, in 1994, in *Carleton*, the Supreme Judicial Court held that retroactive application of the 1993 amendments to abolish the plaintiffs' claims did not deny the plaintiffs due process of law in violation of the state or federal constitutions. *See id.* at 458. Despite the Legislature's codification of the public duty rule through the passage of § 10(j) in January of 1994, and its manifest intent that § 10(j) apply to cases pending appeal, several cases pending review before the Supreme Judicial Court in May of 1994 were decided on the basis of the *common law* public duty rule. *See id.*; *see also* Rinkaus v. Town of Carver, 637 N.E.2d 229, 229–30(Mass. 1994) (holding that the common law public duty rule was applicable); Judson v. Essex Agric. and Technical Inst., 635 N.E.2d 1172, 1172 (Mass. 1994)(holding the same); Salusti v. Town of Watertown, 635 N.E.2d 249, 250–51 (Mass. 1994)(holding the same). *But see Pallazola*, 640 N.E.2d at 461–62 (§ 10(j)(holding that the common law rule was not applicable). Finally, in December of 1994, in *Bonnie W. v. Commonwealth*, the Supreme Judicial Court announced its intention to preempt the common law public duty rule by applying *only* § 10(j) to claims involving public duty issues. *See* Bonnie W. v. Commonwealth, 643 N.E.2d 424, 427 (Mass. 1994). The court stated that, "We do not intend to have applicable both the legislated public duty rule and a common law public duty rule that might be applicable when the legislated public duty rule is inapplicable." *Id.* at 426–27.

[179] *See, e.g.*, Lawrence v. City of Cambridge, 664 N.E.2d 1, 3 (Mass. 1996); *Bonnie W.*, 643 N.E.2d at 426–27; *Pallazola*, 640 N.E.2d at 462 .

portion of an aluminum goal post from a football stadium.[180] In *Pallazola,* the plaintiff was seriously injured when a portion of a goal post, removed and carried by other spectators, came into contact with an overhead power line and fell on him.[181] Relying on the plain language of § 10(j), the court held that § 10(j) barred the plaintiff's claim because the failure to prevent harm fell within the limits of the public duty rule.[182]

In December of 1994, in *Bonnie W. v. Commonwealth,* the Supreme Judicial Court held that the commonwealth was not liable for a parole officer's negligent failure to supervise a parolee and prevent the parolee from gaining access to the plaintiff's mobile home that resulted in the sexual assault of the plaintiff.[183] Conversely, the *Bonnie W.* court held that the commonwealth was liable for the parole officer's negligent recommendation of the parolee's continued employment to park management as well as the officer's misrepresentation of the parolee's criminal history.[184] In *Bonnie W.,* a man convicted of rape and robbery was released on parole and then hired as a maintenance man at a trailer park in which the plaintiff lived.[185] In the ensuing months, the parole officer failed to meet with the parolee as the parole board rules required and, in response to questions by park management pertaining to the parolee's employment, the parole officer negligently recommended the parolee's continued employment at the park and made several misrepresentations about the parolee's criminal record.[186] Possessing keys to all of the park units, the parolee gained access to the plaintiff's mobile home and sexually assaulted her.[187]

Because the plaintiff's claim of negligent supervision was based upon the negligent failure of the parole officer to prevent harm, as specifically excluded by § 10(j), the court reasoned that § 10(j) barred that claim.[188] Relying upon *Onofrio*'s misfeasance/nonfeasance distinction, however, the court reasoned that the commonwealth was liable for the parole officer's negligent recommendation of the parolee's continued employment at the trailer park and misrepresenta-

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180 *See Pallazola,* 640 N.E.2d at 461.

181 *See id.*

182 *See id.* at 462.

183 *Bonnie W.,* 643 N.E.2d at 426.

184 *See id.* at 425–26.

185 *See id.*

186 *See id.* at 426.

187 *See id.*

188 *See Bonnie W.,* 643 N.E.2d at 426.

tion of the parolee's criminal history.[189] Insofar as the parole officer "[took] action that exposed the plaintiff to risk," the court reasoned that the parole officer "was bound, as any other person would be, to act reasonably."[190] Thus, the court concluded that § 10(j) barred the plaintiff's claim based on the parole officer's negligent supervision because such conduct constituted a failure to prevent harm.[191] The court also held that § 10(j) did not bar the plaintiff's claim based on the parole officer's negligent recommendation and misrepresentation because such conduct constituted an active creation of the risk of harm.[192]

In addition, in 1996, in *Lawrence v. City of Cambridge*, the Supreme Judicial Court of Massachusetts stated, in dictum, that insofar as the police did not make explicit and specific assurances of safety or assistance to the plaintiff, § 10(j) barred a storeowner's claim against the city based upon the failure of the police to protect him from attack.[193] In *Lawrence*, third-party assailants assaulted a storeowner outside of his store, after which he identified the suspects for police who subsequently arrested the assailants.[194] In light of one assailant's extensive criminal record, the police promised to protect the plaintiff in the days leading up to the assailant's arraignment and did so for three consecutive days.[195] On the fourth day, the police were not present and the plaintiff was shot after closing the store.[196] Briefly reiterating the plain language of § 10(j), the court stated that absent explicit and specific assurances, § 10(j) barred the plaintiff's claim based on the police officers' failure to fulfill their promise of protection because such conduct constituted a failure to prevent harm.[197]

Consistent with the reasoning of the Supreme Judicial Court, the Massachusetts Appeals Court likewise based its application of § 10(j) on an implicit misfeasance/nonfeasance analysis, while refusing to define the plain language of the provision.[198] Thus, in 1998, in *Allen v.*

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189 *See id.* at 426–27.

190 *Id.* at 427.

191 *See id.* at 426–27.

192 *See id.*

193 *See Lawrence*, 664 N.E.2d at 3. Despite the applicability of § 10(j), the court in *Lawrence* held that because the police officers may have given "explicit and specific assurances of safety or assistance" to the plaintiff, the § 10(j)(1) exception prevented § 10(j) from barring the suit. *Id.* at 3–4.

194 *See id.* at 2.

195 *See id.*

196 *See id.*

197 *See id.* at 3.

198 *See* Allen v. City of Boston, 693 N.E.2d 699, 700–01 (Mass. App. Ct. 1998).

City of Boston, the Massachusetts Appeals Court denied a city's motion for summary judgment, holding that § 10(j), in the absence of further evidence, did not bar the plaintiff's claim against the city based on the school's negligent "handling" of a student (Mr. Reynolds), who fatally stabbed a fellow student.[199] In *Allen,* Mr. Reynolds had been suspended from two other schools for possessing a knife, before being enrolled at the school in which the attack occurred.[200] The school provided no evidence in support of their motion for summary judgment—other than the text of the "Boston Public Schools Code of Discipline"—that they considered questions of whether to enroll Mr. Reynolds at the school; whether to integrate Mr. Reynolds with the general school population; and how to oversee Mr. Reynold's attendance.[201] In addition, the school supplied no evidence detailing its consideration of security questions in light of the threat of harm that Mr. Reynolds posed.[202] The court reasoned implicitly that because the school knew of the threat posed by Mr. Reynolds and nevertheless actively enrolled him without concern for his placement at the school or the safety measures in existence, the city failed to adequately support the contention that it was immune from liability under § 10(j) for Mr. Reynolds' violent act.[203] Thus, the court concluded that § 10(j) did not bar the plaintiff's claim because based on the evidence, the city the did not establish that the school merely failed to prevent harm.[204]

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[199] *See id.*

[200] *See id.* at 700.

[201] *See id.*

[202] *See id.* at 700–01.

[203] *See Allen,* 693 N.E.2d at 700. Despite the school's assertion that its "handling" of Reynolds with respect to placement and security issues was protected under § 10(b) because it involved "weighing alternatives and making choices with respect to public policy and planning," as opposed to "merely acting ministerially in implementing established policy," the court held that the claimed § 10(b) immunity suffered from the same lack of factual support that prevented the application of § 10(j) immunity. *Id.* at 701.

[204] *See id.* at 700–01. Emphasizing the almost complete lack of evidence offered by the city in support of its motion for summary judgment, the Appeals Court implied that *any* evidence ("deposition, affidavit, or otherwise") showing that the school considered both the placement of Mr. Reynolds and the security of the school might be sufficient to support the claimed § 10(j) immunity. *See id.* at 700–01. The court added that § 10(j) immunity is by no means a heavy burden for public employers to meet: "We are not suggesting that [the § 10(j) defense is] maintainable only by heroic amounts of evidence on the part of the public employer. On the contrary, the cases show that the evidence can often be readily assembled and presented where it exists." *Id.* at 701.

III. *Brum v. Town of Dartmouth:* Chronicling an Interpretive Quagmire

Despite its several interpretations of § 10(j), the Supreme Judicial Court did not directly address § 10(j)'s plain language until 1999, in *Brum II,* in which the court held that a town was not liable for the death of a student in the school because the school officials' failure to implement proper security measures and to apprehend the attackers did not "originally cause" the condition or situation that led to the harm.[205] Because *Brum II* represents the Supreme Judicial Court's most recent and most comprehensive analysis of § 10(j), its holding provides the benchmark against which all future public tort liability cases will be measured.[206] Moreover, *Brum II* reversed the Massachusetts Appeals Court in *Brum I,* which departed from prior public duty jurisprudence (favoring public immunity) and held that a school *was* liable for failure to properly secure the school and to deter attackers.[207] The appeals court's decision in *Brum I,* although subsequently reversed, is important because of the Supreme Judicial Court's adoption of portions of its reasoning and because of its uniqueness in the scheme of Massachusetts public duty jurisprudence.[208]

A. *The Lower Courts' Treatment*

On April 12, 1993, shortly before the beginning of classes at Dartmouth High School, two groups of youths, including several Dartmouth High School students, were involved in a violent altercation on the school premises.[209] Tensions between the two groups had escalated during the prior week and had erupted in a physical confrontation on the previous evening.[210] School officials detained two of Jason Robinson's friends for their role in the altercation on the morning of April 12.[211] The other group of youths immediately fled the school following the incident.[212] One of the detained students involved in the ongoing dispute warned the principal that at least three youths from the opposing group had threatened to return to the high

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[205] *See* Brum v. Town of Dartmouth, 704 N.E.2d 1147, 1153 (Mass. 1999).

[206] *See id.*

[207] *See* Brum v. Town of Dartmouth, 690 N.E.2d 844, 850–51 (Mass. App. Ct. 1998), *rev'd,* 704 N.E.2d 1147 (Mass. 1999).

[208] *See infra* notes 222–242 and accompanying text.

[209] *Brum,* 690 N.E.2d at 846.

[210] *See id.*

[211] *See id.*

[212] *See id.* at 847.

school to retaliate against him and his friends, including Robinson.[213] Shortly after 8:00 A.M., the principal and other school officials witnessed the trio enter the front door of the high school.[214] The intruders openly brandished weapons, including two knives, a billy club, a baseball bat and a length of pipe.[215] The school officials did nothing to confront or obstruct the three youths, who proceeded unimpeded to a second-floor classroom.[216] At least two of the three students entered a social studies classroom believing that they would find a particular individual, and when they failed to find him, they instead attacked and stabbed Robinson, who died in the classroom.[217]

In 1995, Robinson's mother, Elaine Brum, commenced action against the town of Dartmouth, school officials and other municipal officials.[218] The plaintiff sought damages for the violation of Robinson's federal and state civil rights, for Robinson's wrongful death and for negligence under the MTCA, including (1) the failure of the responsible municipal officials and school officials to institute any security measures to protect the high school students, and (2) the failure of the principal to respond to the foreseeable (and explicitly forewarned) threat of harm that the youths who murdered Robinson presented.[219] The defendants filed a motion to dismiss.[220]

On October 20, 1995, a judge of the Bristol Superior Court of Massachusetts granted the motion to dismiss, holding that the town was immune from liability because (1) the adoption of security measures was a discretionary function under § 10(b), and (2) the school officials' failure to act—while not a discretionary function—fell within the "public duty rule" of § 10(j).[221] The plaintiff appealed, and in February, 1998, in a 2–1 vote, the Massachusetts Appeals Court reversed the judgment with respect to the negligence claims.[222] The court held that the school had no discretion to adopt and implement

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[213] *See id.*

[214] *See Brum*, 690 N.E.2d at 847.

[215] *See id.*

[216] *See id.*

[217] *See id.*

[218] *See id.* at 846.

[219] *See Brum*, 690 N.E.2d at 846–47.

[220] *See id.* at 846.

[221] *See id.* at 847. The judge of the Massachusetts Superior Court held that although the principal's alleged negligent failure "to anticipate, and to establish and enforce adequate security in light of the 'serious and specific threat of immediate harm to students on April 12, 1993'" fell within the public duty rule of § 10(j), the principal's conduct was not a discretionary function under § 10(b). *Id.* at 847 n.5

[222] *See id.* at 849–51.

a school safety policy because of a state statute requiring schools to publish policies pertaining to student and teacher conduct, and to enact safety standards and procedures at the school.[223] Therefore, the court determined that the officials' failure to take such action was not immune under § 10(b).[224] The court also held that the school officials' failure to prevent harm was not immune under § 10(j) because the failure to implement a safety policy, along with the failure to deter the trio from proceeding into the school, "caused" the "condition" that led to the murder.[225]

Turning to § 10(j), the appeals court framed the issue as whether the school's failure to adopt or implement any security measures, as well as the school officials' failure to deter the "known and imminent threat" posed by the attackers' entry into the school, originally caused the condition or situation that led to the death of Robinson.[226] Finding no case definitively interpreting the meaning of the words "not originally caused by," the court decided that it was able to apply the words in accordance with their plain meaning: to "create[]" a condition or situation, or a "risk," that leads to harm.[227] The court thus reasoned that by failing to adopt and implement security measures, the school officials originally caused a condition or situation "of total insecurity" at the school which led to "foreseeable harmful consequences" (i.e., the "invasion and fatal attack on Robinson by the returning trio of violent students").[228] Moreover, the court determined that by failing to deter the "known and imminent threat" that the attackers posed once they *entered* the school, the school officials exacerbated the condition of insecurity that they had created, "thereby materially contributing to the circumstances" that led to the to the harmful consequences.[229] According to the court, the failure of the

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[223] *See id.* at 849; MASS. GEN. LAWS ch. 71, § 37H (1998); *see also supra* note 7.

[224] *See Brum,* 690 N.E.2d at 849.

[225] *See id.* at 850–51. The Appeals Court's reversal of judgment included both the plaintiff's MTCA claim as well as the plaintiff's wrongful death claim—which the court held was dependent upon the town's asserted liability under the MTCA. *See id.* at 847 n.4. In addition, the court held that the school's failure to act did not amount to the requisite threats, intimidation or coercion required to give rise to a claim under the Massachusetts Civil Rights Act, and did not violate 42 U.S.C. § 1983. *See id.* at 851–52.

[226] *See id.* at 850.

[227] *See id.*

[228] *See id.*

[229] *See Brum,* 690 N.E.2d at 850–51. In her brief, the plaintiff rejected Justice O'Connor's articulation of the "originally caused by" language in his *Cyran* concurrence, finding that it "exclude[d] all failures to act," and was thus inconsistent with the "inherent implication" of § 10(j) which provided that "a failure to act to prevent or diminish the

school to act in either instance was an original cause of the harm insofar as it "created" the risk of harm that came to pass.[230]

In a footnote to the *Brum I* opinion, the court explicitly rejected the town's argument that because the school merely failed to prevent or mitigate the harm, as opposed to actively causing the harm, the public duty rule had no application.[231] Quoting *Whitney*, the 1977 case in which the court vacated a decision denying recovery to a student injured at school and announced its intention to abolish the sovereign immunity doctrine, the court stated that municipal liability "should not be influenced by the finite distinctions drawn in [the] cases [involving misfeasance-nonfeasance analysis], distinctions which have no real connection with sound reasoning or policy."[232] Therefore, the court reasoned that the applicability of § 10(j) in *Brum I* did not hinge upon the misfeasance/nonfeasance analysis involving passive versus active involvement in the harmful consequences that came to pass.[233] Rather, the court determined that § 10(j)'s applicability

harmful consequences of a condition or situation . . . that is originally caused by the public employer is *not* excluded by the Act." Brief/Appendix for Appellant at 35–36, *Blum* (No. 96-P-687) (emphasis added). The plaintiff suggested that because neither the statute nor case law defined "originally caused," the words should be interpreted in light of their plain meaning. *See id.* at 35. According to *Black's Law Dictionary*, the plaintiff argued, "original" is defined as "first in order," and thus, the public employer's act or failure to act need only be the first cause—not "the *only* cause, the primary cause or the proximate cause." *Id.* at 35. Thus, the plaintiff concluded that the failure of the school to take appropriate security measures, and to respond to a known threat, was the first, original cause of Robinson's murder because "[t]he entire scenario, possibly even including the morning's altercation that led to the murder, could have been avoided if non-students were not permitted in the school and if the school had effective procedures to follow to prevent violence and to stop the escalation of disagreements into violence." *Id.* at 35.

[230] *See Brum*, 690 N.E. 2d at 850–51. In addition to its analysis of § 10(j)'s plain meaning, the court based its interpretation of the provision on the holdings of several other cases—all of which were decided on grounds other than § 10(j). *See id.* at 850. The court reasoned that under *Irwin*, the policy behind the MTCA—to abrogate sovereign immunity—favored private compensation for persons injured by public entities. *See id.* (discussing *Irwin*, 467 N.E.2d at 1308). Additionally, the court relied on *Mullins v. Pine Manor College*, which identified the duty of a private college to protect students against the criminal acts of third parties and which recognized deficient security as a potential factor in causing the risk of harm that comes to pass; *Board of Education v. School Committee*, which defined the municipal obligation to enforce school attendance; and *Doe v. Superintendent*, which linked this obligation with the obligation to provide a safe and secure environment in which children can learn. *See id.* at 850 (discussing Doe v. Superintendent of Schs., 653 N.E.2d 1088, 1096 (Mass. 1995); Board of Educ. v. School Comm., 612 N.E.2d 666, 669–70 (Mass. 1993); Mullins v. Pine Manor College, 449 N.E.2d 331, 334–36, 338–39, 341–42 (Mass. 1983)).

[231] *See id.* at 851 n.11.

[232] *Id.* (quoting *Whitney*, 366 N.E.2d at 1218).

[233] *See id.*

rested on whether the public employees' action or inaction created the risk; in other words, whether the public employees' failure to institute security measures in violation of § 37H "made possible" the harmful consequences that came to pass and whether the public employees' action or failure to act, after the attackers had entered the building, "brought about or contributed" to those consequences.[234] The court thus concluded that § 10(j) did not bar the plaintiff's claim based on the school's failure to institute adequate security measures and the school officials' failure to deter the youths from entering the school because those failures constituted risk-creating conduct.[235]

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[234] *See id. at* 851 n.11. By contrast, the town argued that in light of Justice O'Connor's concurrence in *Cyran*, in order for the school to have originally caused the harmful condition or situation, the school must have actively created the risk of harm that came to pass—as opposed to merely failing to prevent or mitigate such harm. *See* Brief of Defendants-Appellees at 23–24, Brum v. Town of Dartmouth, 690 N.E.2d 844 (Mass. App. Ct. 1998) (No. 96-P-687). Because there was no evidence that the town or its employees originally caused the "escalating tensions between at least two (2) groups of students, which ultimately led to Jason Robinson's death," the town concluded, it could not be held liable under § 10(j). *Id.* In support of this proposition, the town relied on *Bonnie W.*, where the court held that § 10(j) barred the plaintiff's claim based on the failure of a parole officer to supervise properly a parolee who subsequently assaulted the plaintiff because the officer's conduct constituted "a failure to act." *Id.* at 24. The Appeals Court rejected this argument without discussion, stating that the holding of *Bonnie W.* "does not support the defendants' analysis of [the case]." *Brum*, 690 N.E.2d at 851 n.11.

[235] *See Brum*, 690 N.E.2d at 850–51. The Massachusetts Appeals Court also addressed the issue of whether the school's failure to institute security measures (as distinct from the school officials' failure to deter the youths once inside the building) was protected from liability by the discretionary function exception in § 10(b). *See id.* at 849. The *Brum* court held that insofar as § 37H required school districts to publish policies containing "standards and procedures to assure school building security and safety of students and school personnel," the school's failure to adopt or implement *any* security policies, procedures, or safeguards—beyond the posting of a "No Trespassing" sign near the front door of the school—was not a discretionary function under the first part of the *Stoller* test, and thus was not immunized by § 10(b). *Id.*; *see also supra* note 49. By contrast, the town, echoing the holding of the Massachusetts Superior Court, argued that although § 37H mandated the promulgation and publication of safety standards and procedures, the statute did not mandate "the nature and extent" of those policies. *See Brum*, 690 N.E.2d at 849 n.8; Brief of Defendants-Appellees at 25, *Brum* (No. 96-P-687). Thus, although the school did not have discretion to do *nothing*, the town argued that the school did have discretion to gauge the adequacy of those policies that were in fact implemented. *See* Brief of Defendants-Appellees at 25, *Brum* (No. 96-P-687). According to the town, then, the school's determination of what security measures to implement constituted discretionary conduct involving policy-making under the *Stoller* test, and was thereby immunized by § 10(b). *See id; see also supra* note 49.

In light of the potential liability facing towns like Dartmouth for noncompliance with § 37H, Massachusetts school officials and other interested parties now refer to § 37H as the "Dartmouth Policy."

[235] *See Brum*, 690 N.E.2d at 849–50.

In a dissenting opinion, Justice Kass attacked the majority for basing its decision not on the language of § 10(j), but on public policy considerations favoring private compensation for harms inflicted by third parties "or other extraneous causes . . . that competent public action might have prevented."[236] According to Justice Kass, it was the task of the Legislature—not the court—to resolve such public policy questions and that in this instance, where a student was killed by third-party attackers, "the Legislature ha[d] done so unmistakably."[237] The Justice reasoned implicitly that under § 10(j), liability should be imposed only insofar as the public employer originally caused the harmful consequences.[238] Therefore, because "[n]o school official stabbed Robinson to death," but rather, the school officials merely failed to prevent the killing, the Justice concluded that the school officials' conduct fell squarely within the exclusionary language of § 10(j).[239]

In addition to citing the absence of any affirmative action on the part of the school officials in support of immunity for the school, Justice Kass also argued that the Legislature's inclusion of the phrase "violent or tortious conduct of a third person"—conspicuously absent from the original draft of the MTCA amendments—indicated an intent to exclude the type of claim brought by the plaintiff in *Brum I*.[240] The Justice asserted that because Robinson's death was originally caused by the violent acts of third parties, the school was explicitly excluded under § 10(j).[241] Finding the language of § 10(j) unambiguous, Justice Kass concluded that the majority's analysis was nothing short of "judicial nullification of a legislative act."[242]

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[236] *See id.* at 852.

[237] *Id.*

[238] *See id.*

[239] *Id.* Justice Kass added that by employing such "convoluted reasoning" and tortured analysis to circumscribe the applicability of § 10(j), the majority had effected a regrettable turnaround in public duty case law—"return[ing] the courts to making the sort of indefensible distinctions that *Jean W.* lamented and that gave rise to the 1993 amendments in the first place." *Id.*

[240] *See* 690 N.E.2d at 852 (Kass, J., dissenting); Glannon, *supra* note 54, app. at 32.

[241] *See Brum*, 690 N.E.2d at 852 (Kass, J., dissenting).

[242] *See id.*

B. *The Supreme Judicial Court's Treatment*

In 1999, in *Brum II,* the Supreme Judicial Court reversed the Massachusetts Appeals Court.[243] The court stated that the issue in *Brum II,* whether the school officials' failure to implement proper security measures and to otherwise deter the intruders originally caused the condition or situation that led to Robinson's death, presented an "interpretive quagmire," and cited for support § 10(j)'s inconsistent application by superior court judges.[244] The court also acknowledged that the Supreme Judicial Court had never directly addressed the meaning of "originally caused by," specifically at issue in *Brum II.*[245]

Turning to the "convoluted and ambiguous" language of § 10(j), the court reasoned that the principle purpose of § 10(j) was to provide public employers with a substantial measure of immunity from liability arising out of a public employee's failure to prevent or diminish "certain harmful consequences."[246] The only exception to this broad immunity, the court determined, was where the condition or situation giving rise to such consequences was "originally caused by the public employer."[247] In addition, by interpreting the "including the violent or tortious conduct of a third person" clause—in harmony with proper grammar and common sense—to modify the noun "consequences," and not the words "condition or situation," the court reasoned that violent or tortious third-party conduct was not a condition or situation but was rather a harmful consequence.[248] The court thus determined that § 10(j) immunized public employers from all harmful consequences befalling a plaintiff, including the consequence of violent or tortious third party conduct, except where the employee originally caused the condition or situation leading to those harmful circumstances.[249]

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[243] *See Brum,* 704 N.E.2d at 1155. In a companion case to *Brum II,* in *King v. Commonwealth,* the court held that neither the commonwealth of Massachusetts nor the Middlesex District Attorney's Office was liable for the death of the plaintiff's decedent by a third party who was released from custody on his own recognizance pursuant to an agreement with the District Attorney's Office because the judicial officer, not the named parties, was ultimately responsible for the third party's release. *See id.* at 1149, 1151. Finding no proximate causation, the court never reached the issue of whether § 10(j) was applicable. *See id.* at 1151.

[244] *See id.* at 1153.

[245] *See id.*

[246] *See id.*

[247] *See id.*

[248] *See Brum,* 704 N.E.2d at 1153; *see also supra* note 9.

[249] *See Brum,* 704 N.E.2d at 1153.

The court next applied this interpretation of § 10(j) to the facts of *Brum II*.[250] The court, echoing the arguments of the plaintiff, determined that "the killers' acts or the death of their victim" were "the harmful consequences," and, implicitly adopting the appeals court's reasoning, further determined that the "injury-causing condition of physical insecurity" was the condition or situation that led to such consequences.[251] Reasoning that the failure to secure the school and to deter the intruders constituted a "neglect of duty" of protection and that this neglect of duty was in fact "a failure to act to prevent or diminish" harm, the court held that the school officials' conduct did not originally cause the condition or situation that led to harm.[252] Citing Kass's dissent in *Brum,* the court reasoned that although the school officials might have prevented the killing, their failure to prevent it was in the "excluded category" of § 10(j).[253] Indeed, to recast the school's failure to prevent the killing as an original cause of the harmful condition or situation, the court added, would undermine the principal purpose of the provision, which was to immunize "act[s] or failure[s] to act to prevent," and would allow the exception to immunity to swallow the rule.[254] The court further stated that it would be hard put to find any example of a condition leading to a harmful consequence, where the condition was originally caused by the public employer versus being brought about by the public employer's failure to prevent the condition.[255]

In contrast to the policy interests that the Massachusetts Appeals Court invoked to support the broad application of public tort liability under § 10(j), the *Brum II* court relied upon Justice O'Connor's concurrence in *Cyran* as the most likely interpretation of § 10(j), thus supporting public immunity where the school merely "failed to prevent or mitigate" the harmful condition or situation.[256] The court also relied on the circumstances giving rise to § 10(j)'s enactment for support, concluding that, in the wake of *Jean W.*, § 10(j) was a statutory codification of the public duty rule, "intended to provide some substantial measure of immunity from tort liability to government

[250] *See id.*
[251] *See id.*
[252] *See id.*
[253] *See id.*
[254] *See Brum,* 704 N.E.2d at 1153.
[255] *See id.*
[256] *See id.* at 1154.

employers."[257] In light of this legislative intent, the court reasoned that it should avoid interpreting the provision "so broadly as to encompass the remotest causation and to preclude immunity in nearly all circumstances."[258] As further support for its holding, the *Brum II* court likened the failure of school officials to secure the school and to apprehend the intruders with the parole officer's failure to properly supervise the third-party parolee in *Bonnie W.* and to the police officers' failure to protect the storeowner in *Lawrence*.[259] The court observed that in each case, the actions of third parties originally caused the plaintiffs' injuries; the defendants, on the other hand, never acted at all, and thus were not liable for failing to prevent the harm.[260] By contrast, the court determined that the school's failure to act was unlike the parole officer's negligent recommendation of the parolee in *Bonnie W.* because the parole officer's conduct constituted an "affirmative act" that gave the parolee access to the trailer and thus caused the harm.[261]

In the final footnote to its opinion, the majority stated that it was "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."[262] Despite the unsettling results of immunizing the town, the majority believed that it would "distort the general regime of § 10(j)" for the court to interpret the provision to give rise to liability in *Brum II*.[263] Indeed, because § 10(j) applied to all public employers and in a wide range of circumstances, the court left the task of changing the law explicitly to the Legislature.[264] Thus, unwilling to undermine the principal purpose of § 10(j) by imposing liability for inaction, the court concluded that § 10(j) barred that plaintiff's claim based on the school's failure to act to prevent harm.[265]

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[257] *Id.*

[258] *Id.*

[259] *See Brum*, 704 N.E.2d at 1155.

[260] *See id.*

[261] *See id.*

[262] *Id.* at 1162 n.17.

[263] *See id.*

[264] *See Brum*, 704 N.E.2d at 1162 n.17.

[265] *See id.* at 1155. The Supreme Judicial Court also addressed the issue of whether the public employees' failure to institute security measures was protected from liability by § 10(b)'s discretionary function exception. *See id.* at 1152. The court determined that if the school had in fact failed to adopt *any* security measures at all, in violation of § 37H, claims based on this failure would not be barred by § 10(b). *See id.* Because the suit was

In a powerfully-worded concurrence, Justice Ireland, joined by Justices Abrams and Marshall, agreed with the decision, but suggested that the Legislature respond to the "unfortunate" result by changing the law.[266] Justice Ireland argued that the decision compelled by § 10(j) was wrong from a public policy perspective because regardless of who or what caused harm to a student on school property, "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."[267] In addition to parents' reasonable assumptions about the safety of their children, the Justice suggested that the Legislature was of the view that schools were responsible to protect students, as demonstrated by its passage of § 37H requiring standards and procedures assuring school building security and the safety of students and school personnel.[268] The security measures mandated by the statute, the Justice added, could reasonably be interpreted to protect students against any harm, regardless of who caused it.[269]

Justice Ireland argued that a duty of protection should apply where a school official has advance notice of the risk of harm and where the officials show deliberate indifference toward that risk by failing to take any action to prevent it.[270] Repeating the facts of the case, Justice Ireland emphasized that the school officials took no action to prevent the risk of harm despite notice of a prior altercation between several students and the assailants, and notice of threats of retaliation.[271] In addition, when several school officials witnessed the assailants enter the school, the officials took no action to prevent the risk of harm.[272] In fact, the only measures taken to prevent harm, the Justice continued, consisted of a "No Trespassing" sign that directed visitors to the school office.[273] The Justice added that although school

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barred by § 10(j), however, the court declined to consider whether the school's "No Trespassing" sign directing visitors to the school office constituted a security measure. *See id.*

In addition, the court also rejected the plaintiff's claims under 42 U.S.C. § 1983 and the Massachusetts Civil Rights Act. *See id.* at 1156–62.

[266] *See id.* at 1162–63 (Ireland, J., concurring).

[267] *Id.* at 1162.

[268] *See id.* at 1163.

[269] *See Brum*, 704 N.E.2d at 1163 (Ireland, J., concurring).

[270] *See id.*

[271] *See id.*

[272] *See id.*

[273] *See id.*

officials are not absolute guarantors of students' safety, they should "be expected to take reasonable measures to protect children when they have advance notice of danger" and that it is up to the Legislature to impose such a duty on school districts.[274]

IV. Remedying Section 10(j)'s Interpretive Quagmire and Curing Its Harsh Results

A. Brum II*'s Reverberations*

Brum II marks the first time that the Supreme Judicial Court has attempted to address the ambiguity plaguing § 10(j), and its decision leaves much to be desired.[275] In fact, although it reversed the appeals court decision holding the town liable, the Supreme Judicial Court's reasoning in *Brum II* is as profoundly dissatisfying, unsettling and ultimately ambiguous as the appeals court's reasoning in *Brum I*.[276] Indeed, in its attempt to clarify the language and intent of § 10(j) once and for all, the *Brum II* court reduced § 10(j) to a mere act/failure-to-act inquiry, failing to appreciate the fine distinctions made by the provision with regard to creation of risk and perpetuating an over-simplified statutory interpretation for lower courts to follow.[277] As a

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[274] *Brum*, 704 N.E.2d at 1163 (Ireland, J., concurring).

[275] *See* Brum v. Town of Dartmouth, 704 N.E.2d 1147, 1153 (Mass. 1999); *see, e.g.*, Bonnie W. v. Commonwealth, 643 N.E.2d 424, 426–27 (Mass. 1994) (finding that § 10(j) barred claim without discussing meaning of "originally caused by"); Pallazola v. Town of Foxborough, 640 N.E.2d 460, 461–62 (Mass. 1994) (holding the same); Carleton v. Town of Framingham, 640 N.E.2d 452, 456 n.7 (Mass. 1994) (finding that because § 10(h) barred claim, court did not need to resolve meaning of "originally caused by").

[276] *See Brum*, 704 N.E.2d at 1153; Brum v. Town of Dartmouth, 690 N.E.2d 844, 850–52 (Mass. App. Ct. 1998), *rev'd*, 704 N.E.2d 1147 (Mass. 1999). *Brum* was wrongly decided by the Massachusetts Appeals Court. *See Brum*, 690 N.E.2d at 852 (Kass, J., dissenting). The appeals court's flawed interpretation of § 10(j) was a regrettable regression into the same tortured analyses that defined the court's public duty jurisprudence prior to the passage of the 1993 amendments, thus nullifying § 10(j). *See id.* (Kass, J., dissenting). Moreover, by concluding that the town of Dartmouth could be held liable for failing to institute proper security measures and to deter third-party attackers, the appeals court's decision threatened to impose an affirmative duty upon Massachusetts public schools to protect students. *See id.* at 850–51.

[277] *See Brum*, 704 N.E.2d at 1153–55. My contention is that the *Brum II* court's action/inaction analysis is not equivalent to the misfeasance/nonfeasance analysis articulated in *Onofrio* and subsequent cases. Indeed, although a misfeasance/nonfeasance analysis necessarily involves a determination of whether a person acted or failed to act, and although a public employer should be held liable for an employee's negligent acts and should not be held liable for an employee's complete failure to act, the results of a pure action/inaction analysis can be misleading. Thus, a proper misfeasance/nonfeasance analysis, as will be demonstrated below by the "three-step analysis," should also involve

result, § 10(j) remains an "interpretive quagmire," engulfing public duty jurisprudence in a morass of ambiguity.[278] In the wake of *Brum II*, important public policy questions continue to plague § 10(j), demanding that a clear judicial interpretation be made on behalf of "the [c]ommonwealth and other 'public employers' who must evaluate, settle or otherwise litigate [MTCA] claims" and whose perception of the ambiguity in the law may have a "chilling effect" upon their ability to provide important public services; "the citizens of the [c]ommonwealth whose tax dollars ultimately pay judgments under [the MTCA]"; "injured litigants who must determine whether compensation for their injuries is barred as a matter of law"; and public employees whose decision to act or not act is informed by their understanding of the duty owed to students.[279]

B. *Defining the Plain Language of Section 10(j)*

Painting with broad brush strokes, the *Brum II* court's decision ignores or misunderstands critical elements set out in § 10(j)'s plain language, namely, the creation of the risk.[280] Because the true meaning of § 10(j) remains unclear and will continue to elude courts in the future, § 10(j)'s plain language warrants closer examination. What follows is a suggested interpretation of the plain language of § 10(j), including a discussion of the phrases: (1) "act or failure to act

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consideration for the creation of the risk. *See Onofrio*, 562 N.E.2d at 1344–45; Glannon, *supra* note 54, at 18.

In most cases, an action/inaction analysis yields the same result as an inquiry into creation of the risk, thus making the distinction irrelevant. For instance, where a housing authority fails to supervise a guard who subsequently attacks a tenant, or where a police officer fails to monitor a public function at which a fight subsequently ensues, a court's determination that the employees failed to act or that the employees did not materially contribute to the risk of harm will lead to the same finding of immunity. In other cases, however, a mere action/inaction analysis may be a poor substitute for a more searching inquiry into the creation of the risk, thus making the distinction an extremely important one. For instance, where a public service agency fails to warn a homeowner that a tenant—placed in the home by the agency—has a history of starting fires, an action/inaction analysis may provide immunity to the agency for *failing* to inform the homeowner of the tenant's history, while an inquiry into the creation of the risk will more accurately reveal that the agency in fact created the risk by *actively placing* the tenant in the home. For this reason, a misfeasance/nonfeasance analysis based solely upon an inquiry into action and inaction is incomplete in its reasoning, and may well be incorrect in its holding.

278 *See id.* at 1153.

279 *See* Commonwealth of Massachusetts' Amicus Statement in Support of the Allowance of the Town of Dartmouth's Application for Further Appellate Review, at 1–2, Brum v. Town of Dartmouth, 690 N.E.2d 844 (Mass. App. Ct. 1998) (No. 96-P-687).

280 *See Brum*, 704 N.E.2d at 1155.

to prevent or diminish"; (2) "originally caused by"; (3) "condition or situation"; and (4) "harmful consequences."

First, contrary to *Whitney*'s and the MTCA's across-the-board imposition of liability for negligent acts and omissions, § 10(j)'s initial proposition is that public tort liability will not apply to any claim based upon the public employer's (or employee's) act to prevent or diminish harmful consequences, or failure to act to prevent or diminish harmful consequences, unless exceptional criteria apply.[281] The "act" and "failure to act" language is derived from the common law public duty rule that the Supreme Judicial Court first employed in *Dinsky* to relieve public employers from civil liability newly imposed by the MTCA's abrogation of the sovereign immunity doctrine.[282] Under that rule, a public employer was not liable for failing to perform the public duty (here, the duty to prevent or diminish harmful consequences), or for inadequately or erroneously performing the public duty, unless exceptional criteria applied.[283] Therefore, the inclusion of this language presumes that immunity will apply to public employers, unless the presumption is rebutted by reference to an exception (i.e., where the public employer or employee originally causes a condition or situation that leads to harm) contained within the provision.[284]

Second, under § 10(j), a claimed act or failure to act is not actionable unless the harmful condition or situation is "originally caused by" the public employer or employee.[285] The phrase "originally caused by" is the most elusive and controversial language contained in § 10(j).[286] Until *Brum I* and *Brum II*, both the Supreme Judicial Court and the Massachusetts Appeals Court had expressly declined to consider the meaning of "originally caused by."[287] In light of the enduring ambiguity surrounding the phrase and the inconsistency with which the words have recently been interpreted, it is useful to chart the intended meaning of the phrase.[288]

Under traditional negligence analysis, a plaintiff proves causation by showing that the defendant's breach of a duty of a reasonable,

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[281] *See* Mass. Gen. Laws ch. 258, § 10(j) (1998).

[282] *See Dinsky*, 438 N.E.2d at 55–56; *see also Jean W.*, 610 N.E.2d at 316 (O'Connor, J., concurring); *Cyran*, 597 N.E.2d at 1356–57 (O'Connor, J., concurring).

[283] *See* Dobbs & Hayden, *supra* note 24, at 405 (quoting Thomas M. Cooley, Cooley on Torts § 300, at 385–86 (D. Avery Haggard ed., 4th ed. 1932)).

[284] *See* Mass. Gen. Laws ch. 258, § 10(j).

[285] *Id.*

[286] *Id.*; *see* Glannon, *supra* note 54, at 26–27.

[287] *See supra* note 275 and accompanying text.

[288] *See supra* notes 205–65 and accompanying text.

prudent person in fact caused the harm that came to pass, and more specifically, that the defendant's breach of a duty was the proximate cause of that harm.[289] By contrast, § 10(j) does not look to whether a public employer breached the duty of a reasonable, prudent person because under § 10(j), the public employer's alleged act or failure to act to prevent or diminish harm implicates a distinctly public duty.[290] In addition, § 10(j) looks not to whether the public employer caused the harmful consequence, but to whether the employer caused the condition that led to that harm.[291] Thus, § 10(j) necessarily demands an entirely different inquiry into causation than does traditional negligence because the former does not implicate the actual merits of a negligence suit, but rather involves a threshold inquiry into whether a suit may in fact be brought.[292] For these reasons, the meaning of "originally caused by" does not rest in common law tort analysis.[293] Rather, the "originally caused by" phrase derives its meaning from Justice O'Connor's concurrence in *Cyran* (in which the phrase first appeared), the decision by the committee formulating § 10(j) to use this language, the evolution of public duty case law that gave rise to the phrase and the writings of Professor Joseph W. Glannon, who participated in the drafting of § 10(j) and whose writings have greatly informed courts' interpretation of the provision.[294]

Section 10(j)'s "originally caused by" language is adapted from Justice O'Connor's concurrence in *Cyran*.[295] In that opinion, Justice O'Connor stated that the "traditional [common law] public duty rule" distinguished between a public employee's originally causing a condition or situation that led to the plaintiff's harm and a plaintiff's being "harmed by a condition or situation which was not originally caused by the public employee, and is attributable to the employee *only in the sense that the employee failed to prevent or mitigate it*."[296] The traditional public duty rule, Justice O'Connor further stated, applied only in the latter case.[297]

The meaning of Justice O'Connor's phrase "originally caused by," then, relies upon a negative inference: original cause is *not* the failure

[289] *See* Dobbs & Hayden, *supra* note 24, at 126, 180–81, 202–03.
[290] *See* Mass. Gen. Laws ch. 258, § 10(j); *see also Dinsky*, 438 N.E.2d at 55–56.
[291] *See* Mass. Gen. Laws ch. 258, § 10(j).
[292] *See id.*
[293] *See id.*
[294] *See infra* notes 295–319 and accompanying text.
[295] *See Cyran*, 597 N.E.2d at 1357, 1360 (O'Connor, J., concurring).
[296] *See id.* at 1360.
[297] *See id.*

to prevent or mitigate an injury-causing condition or situation.[298] Thus, original cause is the act of creating the injury-causing condition or situation.[299] To illustrate the meaning of this phrase, Justice O'Connor suggested an example used in *Onofrio,* involving a police officer's negligent driving of a cruiser that caused injury.[300] Justice O'Connor reasoned implicitly that in such a case, the public duty rule would not be applicable because the police officer did not merely fail to prevent or mitigate the injury-causing condition or situation, but was rather an active participant—and in fact the sole participant—in creating that condition or situation.[301] In his concurrence in *Jean W.*, Justice O'Connor further defined the meaning of the phrase by repeating the public duty rule's distinction between "originally caus[ing]" the harm and "fail[ing] to act to rectify a situation not created by the [public] employee," and by explicitly comparing the parolee's originally causing harm in *Jean W.* to the employee's "taking action that exposed [another] to risk" in *Onofrio.*[302] Moreover, Justice O'Connor's concurrence in *Jean W.* explicitly premised the application of the traditional public duty rule—and thus, the "originally caused by" phrase—upon the distinction between misfeasance and nonfeasance, and between acts and omissions.[303] Based upon this time-honored distinction of "long duration," Justice O'Connor stated that there was to be "no question about it" that the phrase "originally caused by" presumed the misfeasance of a public employee and only misfeasance could overcome the application of the public duty rule.[304]

Significantly, by invoking the Supreme Judicial Court's prior public duty jurisprudence in defining the meaning of "originally caused by," Justice O'Connor implicitly recognized that the misfeasance required to trigger public tort liability necessarily involved a public employee's creation of the risk.[305] Indeed, despite the confusion engendered by the *Onofrio* line of cases, Justice O'Connor understood those cases to rely upon an inquiry into the creation of risk: where the public employer had actively created the risk of harm that came to pass

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[298] *See id.*

[299] *See id.*

[300] *See Cyran,* 597 N.E.2d at 1360 (O'Connor, J., concurring) (citing *Onofrio,* 562 N.E.2d at 1344).

[301] *See id.*

[302] *See Jean W.*, 610 N.E.2d at 316–17 (O'Connor, J., concurring).

[303] *See id.* at 318.

[304] *See id.*

[305] *See Cyran,* 597 N.E.2d at 1360 (O'Connor, J., concurring); *see, e.g., Mamulski,* 570 N.E.2d at 1029; *Onofrio,* 562 N.E.2d at 1344–45.

(misfeasance), the public duty rule did not apply, and where the public employer merely failed to prevent an independent, third-party risk of harm from coming to pass (nonfeasance), the public duty rule did apply.[306] Justice O'Connor's articulation of the "originally caused by" phrase in *Cyran* was therefore an attempt to bring the public duty rule into conformance with this inquiry.[307] Furthermore, by adopting both Justice O'Connor's words as well as his reasoning in drafting § 10(j), the committee formulating the provision necessarily intended to preserve this inquiry into the creation of the risk.[308] Thus, from its common law origins to its codification by statute, the phrase "originally caused by" implies the creation of risk.[309]

In addition to Justice O'Connor's explication of the "originally caused by" phrase and its codification by statute, the writings of Joseph Glannon, a legal scholar and member of the committee that formulated § 10(j), have been widely cited by courts for their elucidation of § 10(j)'s language and are thus instructive in determining the meaning of the "originally caused by" phrase.[310] Consistent with Justice O'Connor's and the committee's understanding of the phrase, Glannon notes that the provision's inclusion of the words "originally caused by" requires some creation of the risk—"something more than the pure failure to alleviate private harm. . . . some involvement of a public employee in creating the initial injury-causing scenario, not simply a failure to respond adequately after it arises."[311] Glannon further states that § 10(j), by adopting O'Connor's exact language, "embodies the distinction . . . between publicly-created risk"—that is, a public employer's "creating a risk which causes harm to another" and

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306 *See Cyran*, 597 N.E.2d at 1360 (O'Connor, J., concurring); *see, e.g.*, *Mamulski*, 570 N.E.2d at 1029; *Onofrio*, 562 N.E.2d at 1344–45.

307 *See Cyran*, 597 N.E.2d at 1357, 1360 (O'Connor, J., concurring).

308 *See id.*; Memorandum, *supra* note 106, at 2 (stating that § 10(j) "bars liability claims based on the negligent failure of a governmental entity to prevent or diminish harm caused by a condition or risk not initially caused by the governmental entity").

309 *See Cyran*, 597 N.E.2d at 1357, 1360 (O'Connor, J., concurring); Memorandum, *supra* note, at 2.

310 *See* Glannon, *supra* note 54, at 25–27.

311 *Id.* at 26. In his explication of § 10(j)'s language, Glannon distinguishes between the meaning of the provision's "originally caused by" phrase and "the common law distinction between misfeasance/nonfeasance," arguing that in certain cases, § 10(j) will impose liability where the common law would not. *See id.* at 27. Nevertheless, if one accepts my contention that the misfeasance/nonfeasance distinction relied upon by Justice O'Connor implicitly requires an inquiry into the creation of risk, § 10(j) and the common law should yield identical results, thus making Glannon's distinction immaterial to § 10(j)'s "original[] cause[]" inquiry. *See Cyran*, 597 N.E.2d at 1360 (O'Connor, J., concurring); Glannon, *supra* note 54, at 27.

"the fail[ure] to prevent harm from a private [independent source of] risk."[312] In other words, Glannon adds, § 10(j) should not bar recovery if the public employee "materially contributed" to the creation of the risk that led to injury.[313]

Third, insofar as "originally caused by" refers to the employer or employee's creation of the risk of harm, it follows that the "condition or situation" is the actual risk of harm that comes to pass and thus leads to harmful consequences.[314] The Legislature's insertion of the clause, "including the violent or tortious conduct of a third person," insofar as it modifies the phrase "a condition or situation," bolsters the view that a condition or situation is the risk of harm that comes to pass, such as a person's wrongful or otherwise "risky" conduct and from which harmful consequences necessarily arise.[315] Furthermore, this definition of the phrase is supported by a memorandum that Senator Jacques of the Senate Judiciary Committee circulated prior to the passage of § 10(j), in which the words "condition or situation" and "risk" were used interchangeably.[316]

Finally, the American Heritage Dictionary defines "consequence" as "[s]omething that logically or naturally follows from an action or condition."[317] Because the plain meaning of "consequence" presumes a precipitating action or condition, a harmful consequence is that which follows certain risky actions or conditions; it does not, however, "include the precipitating action or condition itself."[318] Under § 10(j), "harmful consequences" should thus be understood as the logical results arising from a preceding risky "condition or situation" or as the natural product of the risk of harm that came to pass.[319]

C. *Application of Section 10(j)'s Plain Language to Public Duty Jurisprudence: The Three-Step Analysis*

Assuming that a plaintiff's claim against a public employer alleges a negligent act or failure to act to prevent or diminish harmful conse-

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[312] *Id.* at 25–26.

[313] *Id.* at 27.

[314] *See* MASS. GEN. LAWS. ch. 258, § 10(j); Supplemental Brief of Defendant-Appellee at 6–8, Brum v. Town of Dartmouth, 704 N.E.2d 1147 (Mass. 1999) (No. SJC-07744).

[315] *See* MASS. GEN. LAWS. ch. 258, § 10(j); Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744).

[316] *See* Memorandum, *supra* note 106, at 2.

[317] Supplemental Brief of Defendant-Appellee at 6, *Brum* (No. SJC-07744) (quoting AMERICAN HERITAGE DICTIONARY (2d College ed. 1982)).

[318] *See id.*

[319] *See id.*

quences, thus bringing it within the scope of § 10(j), the court must next determine whether public duty immunity will apply or whether the public employer is excepted from immunity for creating the risk that came to pass.[320] As demonstrated by the prior attempts of both the Supreme Judicial Court and the Massachusetts Appeals Court to avoid defining § 10(j) altogether and more recently by the Massachusetts Appeals Court's completely erroneous interpretation of § 10(j) in *Brum I* and the Supreme Judicial Court's insufficient and dissatisfying explanation of § 10(j) in *Brum II*, § 10(j)'s plain language presents a formidable obstacle to making this reasoned determination.[321] Correct and consistent results depend upon a proper and thorough reading of § 10(j) by the courts, for whom the following three-step analysis should serve as a guide: (1) determine the "harmful consequences" (i.e., death, physical injury, emotional distress, property damage); (2) determine the risk of harm ("condition or situation") that produced the harmful consequences; and (3) determine whether the public employer or employee's alleged wrongful acts or inaction created ("originally caused") that risk of harm that came to pass.[322] If a public employee originally causes a condition or situation that leads to a harmful consequence, the public employer should be held liable under § 10(j); if not, the public employer should not be held liable.[323] This three-step analysis, although not explicit in either public duty jurisprudence or in current legal scholarship, is consistent with both prior public duty cases interpreting the common law public duty rule as well as recent cases decided under § 10(j).[324] Because these cases necessarily inform the future application of § 10(j), an analysis demonstrating § 10(j)'s consistent application to public duty case law will serve as a useful guide for determining the future liability of public employers under § 10(j).[325]

It is instructive to apply the proposed three-step analysis to prior public duty cases because § 10(j) is the legislative embodiment of the common law public duty rule and should yield results that are consistent with that rule.[326] Under *Onofrio*, where an employee of the Department of Mental Health placed a client in the plaintiff's home

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[320] *See* MASS. GEN. LAWS ch. 258, § 10(j).

[321] *See supra* notes 178–265 and accompanying text.

[322] *See* MASS. GEN. LAWS ch. 258, § 10(j).

[323] *See id.*; *see also supra* note 310 and accompanying text.

[324] *See infra* notes 326–442 and accompanying text.

[325] *See infra* notes 326–442 and accompanying text.

[326] *See Carleton*, 640 N.E.2d at 455.

without first warning the plaintiff of the client's proclivity for starting fires and where the court refused to apply the public duty rule, § 10(j) would probably not apply insofar as the public employee "[took] action that exposed [the homeowner] to risk."[327] Applying § 10(j)'s three-step analysis to *Onofrio* demonstrates that: (1) the plaintiff's home was damaged by a fire set by the client; (2) the risk of harm that came to pass was the tenant's starting a fire in the home; and (3) the employee created the risk of harm by actually placing the client—who had a propensity for starting fires—within the home without any warning to the homeowner.[328] In *Onofrio,* the employee did not merely fail to prevent the risk of harm which came to pass, but rather, the employee's conduct materially contributed to the risk of harm that came to pass; but for the employee's placement of the client, the plaintiff would not have been exposed to the risk of the fire that came to pass.[329]

In *Mamulski,* where the court refused to apply the public duty rule, § 10(j) would probably not apply to bar liability, insofar as: (1) a motorist was killed in a car accident; (2) the risk of harm that came to pass was a motorist's failure to stop at an intersection and collision with an oncoming vehicle; and (3) the town created the risk by failing to replace the stop sign that it knew to be missing.[330] Although the town technically "failed" to replace the stop sign, this does not mean that such conduct amounted to "a failure to prevent or mitigate" the risk of harm that came to pass.[331] Indeed, the risk of harm would not have existed but for the town's conduct and thus the town would be liable for exposing the motorist to that risk.[332]

On the other hand, in the case of *A.L.*, where a probationer abused young children and where the court refused to apply the public duty rule because a "special relationship" existed between the town and the children, § 10(j) would likely bar liability.[333] In *A.L.*, (1) the plaintiffs were injured as a result of abuse, (2) the risk of harm that came to pass was the probationer's taking advantage of his proximity to the plaintiffs and perpetrating such abuse, and (3) the town did not create this risk, but rather, the town merely failed to prevent the

[327] *See Onofrio,* 562 N.E.2d at 1343–45; Glannon, *supra* note 54, at 30–31.
[328] *See Onofrio,* 562 N.E.2d at 1343–45.
[329] *See id.* at 1344–45; Glannon, *supra* note 54, at 30–31.
[330] *See Mamulski,* 570 N.E.2d at 1028–29.
[331] *See id.* at 1029.
[332] *See id.*
[333] *See A.L.*, 521 N.E.2d at 1019, 1021–23; Glannon, *supra* note 54, at 31.

risk by improperly supervising the probationer's place of employment.[334] Indeed, the nature and extent of the town's involvement with the probationer's abuse of the plaintiffs was insufficient to constitute a source or root of that risk of harm.[335] Regrettably, but for the employees' conduct, the plaintiffs would still have been exposed to the risk of harm.[336] By contrast, if the public employees had placed the probationer in proximity to the children, such involvement would have constituted a creation of the risk, exposing the plaintiffs to a risk of assault that did not previously exist.

Despite the fact that before *Brum I* and *Brum II* neither the Massachusetts Appeals Court nor the Supreme Judicial Court had explicitly interpreted the language of § 10(j), their decisions to apply and to not apply public duty immunity are nonetheless consistent with the three-step analysis under § 10(j).[337] In 1994, in *Pallazola,* the Supreme Judicial Court held that where a football fan was injured by a goal post carried by other fans, § 10(j) barred the fan's claims against the town based on the town's failure to provide sufficient police protection and the to prevent the unlawful removal from the stadium of a portion of the aluminum goal post.[338] Although the *Pallazola* court did not definitively interpret the language of § 10(j) before applying public duty immunity (stating merely that the "sort" of claim asserted against the town was foreclosed by § 10(j)), the court's holding comports with the three-step analysis.[339] In *Pallazola,* (1) the plaintiff was injured by an electrified goal post, (2) the risk of harm that came to pass was the crowd's removing and carrying a portion of the unwieldy goal post that came into contact with a high voltage power line, and (3) the failure of the town to provide sufficient police protection or to prevent the removal of the goal post in no way "materially contributed" to the risk of harm that came to pass.[340] Indeed, the police officer's conduct was not a source or root of the crowd's risky behavior, but rather, it was a failure to prevent that risk of harm from coming to fruition.[341]

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334 *See A.L.*, 521 N.E.2d at 1019, 1021–23; Glannon, *supra* note 54, at 31.

335 *See A.L.*, 521 N.E.2d at 1021–23.

336 *See id.*

337 *See infra* notes 338–356.

338 *See Pallazola,* 640 N.E.2d at 461–62.

339 *See id.* at 462.

340 *See id* at 461–62.

341 *See id.* at 461–62; Supplemental Brief of Defendant-Appellee at 9–11, Brum v. Town of Dartmouth, 704 N.E.2d 1147 (Mass. 1999) (No. SJC-07744).

Likewise, in *Bonnie W.*, the Supreme Judicial Court held that where the plaintiff was assaulted by a parolee, § 10(j) barred the plaintiff's claim of negligent supervision, but did not bar the plaintiff's claim of negligent recommendation and misrepresentation.[342] Despite its lack of elaboration on the language of § 10(j), the court's reasoning is nonetheless consistent with the three-step analysis.[343] Where the court held that § 10(j) barred the parole officer's negligent supervision of the parolee: (1) the plaintiff suffered injury as a result of an assault perpetrated against her in her mobile home; (2) the risk of harm that came to pass was the parolee's taking advantage of his employee status, gaining access to and assaulting the plaintiff; and (3) the failure of the parole officer to supervise properly the parolee did not materially contribute to the risk of assault of the plaintiff.[344] Indeed, if the parole officer never met with the parolee at all, the plaintiff would still have been exposed to the risk of assault; the parolee's own actions and intentions created the risk of harm that came to pass and the parole officer merely failed to prevent it.[345] On the other hand, consistent with the court's analysis, § 10(j) did not bar the parole officer's affirmative efforts in support of the parolee's continued employment, insofar as those acts materially contributed to the risk of assault by actively maintaining the parolee's employment status.[346] This latter point is an extremely important one, for by disallowing the application of § 10(j) immunity to the parole officer's negligent recommendation and misrepresentation in *Bonnie W.*, the court enabled a public employer to be held liable in cases where the plaintiff is injured by the conduct of a third party.[347] The test, consequently, is whether the defendant's conduct was separate in time and place from the third party's tortious conduct, or whether the defendant's conduct was so inextricably linked to the third party's conduct as to have materially contributed to (originally caused) the risk of harm that came to pass.[348]

In *Lawrence*, the Supreme Judicial Court stated in dicta that where a storeowner was assaulted by a third party outside of his store,

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[342] *See Bonnie W.*, 643 N.E.2d at 426–27.

[343] *See id.*

[344] *See id.* at 426.

[345] *See id.*

[346] *See id.* at 426–27.

[347] *See Bonnie W.*, 643 N.E.2d at 426–27.

[348] *See id.*; Supplemental Brief of Defendant-Appellee at 9–11, Brum v. Town of Dartmouth, 704 N.E.2d 1147 (Mass. 1999) (No. SJC-07744).

§ 10(j) barred the storeowners' claim against the city based upon the failure of the police to protect him from attack.[349] Although the court again did not engage in any significant statutory interpretation of § 10(j), the court's holding is consistent with the three-step analysis insofar as: (1) the plaintiff was shot multiple times; (2) the risk of harm that came to pass was the brutal attack perpetrated by a third-party; and (3) the police officer's failure to protect the plaintiff, despite knowledge of the risk of assault (the plaintiff had warned the police of such an attack), did not create the risk of attack that came to pass.[350] Indeed, the third party's murderous intent to keep the plaintiff from testifying against him at a grand jury hearing created the risk of attack that came to pass; the officer's failure to act was independent of that risk.[351] If, however, the police had purposefully "arranged" with the third party to be absent from the crime scene on the night of the attack, this conduct would have materially contributed to the risk of assault by affirmatively "placing" the third party in a position to effect that risk of harm.

Furthermore, in a recent Massachusetts Appeals Court decision decided under § 10(j), the appeals court's reasoning is supported by the proposed three-step analysis.[352] In *Allen*, where a student was fatally stabbed by a second student during an altercation in school, the court denied the city's motion for summary judgement, holding that § 10(j), in the absence of further evidence, did not bar the plaintiff's claim against the city based on the school employee's failure to properly "handle" the student.[353] Although the court did not explicitly interpret the language of § 10(j), the court's holding squares with § 10(j)'s three-step analysis: (1) the plaintiff's decedent was stabbed and killed; (2) the risk of harm that came to pass was the stabbing of the decedent by a second student as the culmination of an altercation; and (3) because the town did not provide sufficient evidence to the contrary, the town's failure to take special precautions in enrolling the student and in providing for the safety of others within the school—in view of the student's known history of weapons violations at other schools—materially contributed to the risk of harm that came

[349] *See Laurence*, 664 N.E.2d at 2–3.
[350] *See id.*
[351] *See id.*
[352] *See Allen*, 693 N.E.2d at 700–01.
[353] *See id.* at 700.

to pass.[354] This is a close case, but insofar as the school knew of the threat posed by the student and yet did not consider this threat when making the decision to enroll the student and to plan for safety, the school's "failure" to handle the student properly was analogous to affirmatively "placing" the student in the position to effect the risk of harm.[355] Indeed, by actively bringing the student into the school without consideration of his background—much like the parole officer's negligent recommendation of the parolee's continued employment in *Bonnie W.*—the school exposed the plaintiff to a risk of attack that did not previously exist.[356]

In contrast to its decisions in recent public duty cases, the Supreme Judicial Court in *Brum II* misconstrues the language of § 10(j), and in so doing, renders much of § 10(j)'s language a nullity.[357] By adopting much of the lower court's confused analysis, the court reaches the "correct" result by the wrong method of analysis, thus circumventing the fine distinctions made by § 10(j) at the expense of a clear and final interpretation of the provision.[358] What remains is a statutory provision stripped of distinction, a mere shell of the former § 10(j), and reduced to an inquiry into whether the public employee acted or failed to act.[359]

Implicitly incorporating nearly all of the appeals court's reasoning, the *Brum II* court disagreed with the appeals court only as to its

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[354] *See id.* at 700–01. The only evidence that the school provided was the text of the school's "Code of Discipline" that banned possession of weapons on school premises and described the sanctions for such infractions. *See id.* Although this may have been sufficient in other cases, the court stated that in this case, where the student's history of violence made him a significant threat, the school needed to produce specific evidence with regard to its handling of the student. *See id.* Such evidence might include a deposition or affidavit explaining "how the school considered and acted upon the 'placement' questions" (the decision to enroll, to integrate, to oversee and to supervise the student), as well as the "security questions" (the existing safety measures and employees' methods of confronting problems of violence). *See id.*

[355] *See id.*

[356] *See id.* If the school had provided information that specifically addressed its consideration of the placement and enrollment of the student, § 10(j) would likely have barred liability. *See id.* Under that scenario, the court would probably have determined that the school did not create the risk of harm because it took special measures to minimize the risk of harm inherent in their enrollment of the student. *See id.* Without such information, this case is closely analogous to the "negligent hiring" cases—leaving the court no choice but to hold the public employer liable for exposing others to a risk of harm because the school did not take reasonable measures to ensure safety. *See id.*

[357] *See Brum*, 704 N.E.2d at 1153–55.

[358] *See id.*

[359] *See supra* note 277 and accompanying text.

characterization of original cause.[360] According to the Supreme Judicial Court, the "killers' acts" (presumably, the invasion and attack on Robinson) and "the death of their victim" were the harmful consequences.[361] The condition or situation that led to the harm was a state of "physical insecurity" within the school, or arguably, was left undefined because it was irrelevant to the court's analysis.[362] Finally, although the court never stated what the original cause was, the court explained that the original cause was not the "neglect of duty" by the school's employees who both failed to adopt and implement security measures in the first instance as required under § 37H, and subsequently failed to implement interventionist security measures to prevent the attackers from entering the school.[363] The court reasoned that to hold the school liable for neglect of a duty or a failure to act, as did the appeals court, would undermine the very basis of § 10(j), which was to immunize public employers for failures to act.[364]

Despite the correctness of its holding, *Brum II*'s analysis wholly contradicted the three-step analysis both explicitly and implicitly articulated in prior cases decided under the common law public duty rule and § 10(j), and thus churned the already muddied waters surrounding the plain language of § 10(j).[365] Without a clear precedent for deciding subsequent public duty cases involving public schools, lower courts have been left to sink or swim.[366] Given *Brum II*'s inconsistent holding and uncertain implications, several important questions emerge, neatly coinciding with the specific junctures posited by § 10(j)'s three-step analysis.[367]

Question one: What were *Brum II*'s "harmful consequences"? Despite the court's conclusions to the contrary, the harmful consequence in *Brum II* was Robinson's fatal injury—not the killers' acts.[368] To answer this question, however, it is first necessary to inquire into the court's interpretation of "harmful consequences."[369] As mentioned above, harmful consequences refer to the final injury or inju-

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[360] *See Brum*, 704 N.E.2d at 1152–55.
[361] *See id.* at 1153.
[362] *See id.* at 1152–53.
[363] *See id.*
[364] *See id.* at 1153.
[365] *See Brum*, 740 N.E.2d at 1153–55; *see also supra* notes 322–56.
[366] *See Brum*, 740 N.E.2d at 1153–55; *see also supra* notes 322–56.
[367] *See Brum*, 740 N.E.2d at 1153–55; *see also supra* notes 322–56.
[368] *See Brum*, 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6, *Brum* (No. SJC-07744).
[369] *See Brum*, 704 N.E.2d at 1153.

ries that flow from an immediately prior condition or situation (risk of harm that came to pass).[370] They do not implicate the risk of harm itself.[371] In *Brum II,* the harmful consequences that the school failed to prevent or diminish were the injury and death of Robinson—not the fatal injury *and* the invasion *and* attack that gave rise to that fatal injury.[372] This point bears repeating: the invasion and attack on Robinson were not harmful consequences—they were the risk of harm that came to pass.[373]

Rather than separating the harmful consequence (the fatal injury) from the risk of harm that gave rise to that consequence (the invasion and attack), the court, echoing the arguments of the plaintiff, merges these two distinct junctures into one, stating that "*either* the killers' acts *or* the death of their victim were 'the harmful consequences.'"[374] But does not the third-party invasion and attack constitute a condition or situation giving rise to harm, rather than a consequence itself?[375] The court did not think so and supported this proposition by determining that § 10(j)'s clause—"including the violent or tortious conduct of a third person"—could not grammatically or logically modify the words "condition or situation," and therefore must necessarily modify the words "harmful consequences."[376] Thus, because the youths' invasion and attack on Robinson was without question violent or tortious conduct, the court summarily concluded that such conduct was a harmful consequence.[377]

By combining the killers' acts with the fruition of those acts, the fatal injury of Robinson becomes encapsulated within the killers' attack itself, as both are rendered indivisible parts of the whole consequence.[378] And herein lies the rub: the harmful consequences of a risk of harm that comes to pass must be kept separate from that risk of harm, for the two junctures involve two entirely different inquiries.[379] To say that the invasion and the resultant death were but one

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[370] *See supra* notes 317–18 and accompanying text.

[371] *See supra* notes 317–18 and accompanying text.

[372] *See Brum,* 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6, *Brum* (No. SJC-07744).

[373] *See Brum,* 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[374] *See Brum,* 704 N.E.2d at 1153.

[375] *See id.*; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[376] *See Brum,* 704 N.E.2d at 1153.

[377] *See id.*

[378] *See id.*; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[379] *See* Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

consequence ignores the fact that one followed "logically or naturally" from the other, and renders the distinction between the two meaningless.[380] This distinction is a crucial one, for by collapsing "risk of harm" into "harmful consequence," the court relegates the true and final harmful consequence (the fatal injury) to an ancillary status that is presumed to exist but only in communion with the other harmful consequence (the invasion and attack).[381]

In other words, where the invasion and attack is deemed the harmful consequence of a preceding risk of harm, the resultant injury or death of the victim is understood to be only a part of that consequence, as opposed to a separate and independent harmful consequence of the invasion and attack.[382] It is the distinction between a motorist's involvement in a car collision, without determining what harm, if any, was suffered by the motorist; the distinction between a person's lighting a fire without inquiring into the damages caused by the fire; or the distinction between a parolee's violation of the terms of his parole by committing abuse, without inquiring into who was injured and the extent of the injury. Harmful consequences encompass the damages sustained, not the risk that gives rise to those damages.[383] Thus, in answer to the first question, the harmful consequences contemplated by § 10(j) were indeed the injury and death of Robinson.[384]

Question two: What was *Brum II*'s "condition or situation"? Although the court implicitly determined that a condition of "physical insecurity" led to Robinson's death, the harmful condition or situation in *Brum II* was in fact the attackers' violent conduct.[385] Indeed, after lumping the invasion and attack together with the fatal injury that resulted from the attack, the court arguably makes a second conceptual leap in deciding that the condition or situation that gave rise to the harmful consequences was that of "physical insecurity" against

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[380] *See Brum*, 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6, *Brum* (No. SJC-07744).

[381] *See Brum*, 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[382] *See Brum*, 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[383] *See* Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[384] *See Brum*, 704 N.E.2d at 1153; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[385] *See Brum*, 704 N.E.2d at 1152; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

interlopers at the school.[386] Although the court never explicitly defined the particular condition or situation that gave rise to the harmful consequences, it did cite the lower court's mention of "the initial injury-causing condition of physical insecurity," and thus implicitly adopted that definition in its own analysis.[387] Moreover, this implicit adoption of school insecurity as the harmful condition or situation is more plausible because the court explicitly ruled out the killers' invasion and attack as a possible condition or situation.[388]

Presuming that the court intended to adopt the appeals court's definition of condition as "physical insecurity," the court's reasoning falls apart.[389] Indeed, under the three-step analysis, it is difficult to see how insecurity could be considered the risk of harm that came to pass.[390] The school's insecurity did not itself lead to harmful consequences of injury or death, but merely preceded in time the risk of harmful conduct (invasion and attack) that subsequently followed.[391] Section 10(j)'s statutory language supports this view by modifying the words "condition or situation" with the phrase "including the violent

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[386] *See Brum*, 704 N.E.2d at 1152.

[387] *See id.* (quoting *Brum*, 690 N.E.2d at 850).

[388] *See id.* Whether or not the court intended to adopt the appeals court's definition of "condition" as "physical insecurity" is not altogether certain. *See id.* at 1153. Indeed, an alternative reading of the case reveals that the court may have intended to delete the "condition or situation" clause from its application of § 10(j) altogether. *See id.* As mentioned above, the court never explicitly defined the condition or situation in the context of the *Brum II* case, and according to the court's decision, § 10(j) did not require the court to do so. *See id.* Indeed, the court determined that the "principle purpose" of § 10(j) was "to confer immunity on public employees for harm that comes about as a result of their [employees'] 'failure . . . to prevent' the 'violent or tortious conduct of a third person,'" and to restrict the conferrence of immunity "in the presence of the clause which removes that immunity where the 'harmful consequences' were 'originally caused by the public employer.'" *Id.* Conspicuously absent from the court's interpretation was any mention of condition or situation, and this is an extremely important deficiency. *See Brum*, 704 N.E.2d at 1153. If the Legislature had intended the "condition or situation" clause to be read out of § 10(j), it would not have included the clause in the first place, but would rather have stipulated that employers are not liable for the failure to prevent harmful consequences unless they originally caused *those consequences*. *See id.* The Legislature did not say this, however, and instead required that immunity be "removed" where an employer originally causes the condition or situation that, in turn, gives rise to harm. *See id.* Thus, by arguably reading "condition or situation" out of the provision, the court makes the imposition of liability solely dependent upon a public employee's creation of harmful consequences, as opposed to creation of the *risk* of harm that comes to pass. *See id.*

[389] *See id.*

[390] *See id.*

[391] *See Brum*, 704 N.E.2d at 1152; Supplemental Brief of Defendant-Appellee at 7, *Brum* (No. SJC-07744).

or tortious conduct of a third person."[392] Thus, § 10(j) contemplates that the condition or situation that gives rise to harmful consequences will likely consist of some sort of conduct (i.e., an employee's affirmative conduct, a third party's intervening conduct, an injured party's contributory conduct, or even a fire's destructive "conduct") that comes to pass and not from peripheral and attenuated risks (i.e., insecurity) that preceded the harmful conduct.[393]

Contrary to the Supreme Judicial Court's analysis, because the tortious conduct of a third party is most reasonably thought of as constituting a risk of harm with potential and independent harmful consequences, as opposed to being itself a mere harmful consequence of some precedent risk, the "tortious conduct" phrase most "logically" constitutes a "condition or situation."[394] In addition, because the "tortious conduct" phrase follows immediately after the words "condition or situation" and not after the word "consequences," the phrase also "grammatically" constitutes a "condition or situation."[395] Furthermore, if conduct were indeed a consequence, as the court maintains, then what exactly would be the harm arising out of that consequence?[396] Section 10(j) says nothing about subsidiary consequences. Therefore, because the "tortious conduct" phrase most reasonably modifies the words "condition or situation" and because the phrase contemplates a risk of harmful conduct, the court's condition of "physical insecurity" fails for lack of any basis of conduct.[397]

Thus, rather than identifying the interlopers' actual conduct of invasion and attack as the risk of harm that came to pass, the court instead traced all preceding risks in connect-the-dot fashion back to the proverbial "first" risk and deemed *that* risk to be the risk of harm that came to pass—regardless of its attenuation from the actual injury

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[392] MASS. GEN. LAWS ch. 258, § 10(j) (1998); *see* Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744); *see supra* notes 314–16 and accompanying text.

[393] *See* Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744).

[394] *See* MASS. GEN. LAWS ch. 258, § 10(j); Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744). The *Brum* court, on the other hand, determined that the "tortious conduct" phrase "must modify the noun 'consequences,' rather than the nearer nouns 'condition' or 'situation,' because conduct cannot grammatically or logically constitute 'a condition or situation.'" *Brum*, 704 N.E.2d at 1153.

[395] *See* MASS. GEN. LAWS ch. 258, § 10(j); *see also* JOHN C. HODGES & MARY E. WHITTEN, HARBRACE COLLEGE HANDBOOK 279 (5th ed. 1962) (stating that "phrases should be placed near the words they modify").

[396] *See Brum*, 704 N.E.2d at 1153.

[397] *See id.* at 1152–53; Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744).

and death.[398] Accordingly, the court implicitly determined that "physical insecurity" was the risk of harm that came to pass and that presumably led to the interlopers invading the school wielding weapons *and* the attack on Robinson *and* the fatal injuries sustained by Robinson.[399] Such an interpretation substitutes attenuated risks for the risk of harm that actually came to pass and that gave rise to the harmful consequences.[400] Indeed, under this analysis, one could hypothetically say that the risk of harm that led to the death of Robinson was Robinson's own involvement in fights with the alleged interlopers that very morning, the previous evening or during the prior week; the interlopers' acquisition of weapons; or the school employees' security training.[401] Under the court's analysis, any preceding risk in the chain of events leading up to the harmful consequences is free game for pinning the tail of liability.[402] Had the court correctly applied § 10(j), they would have concluded that the risk of harm that came to pass in *Brum II* was clearly the interlopers' actual invasion and attack on Robinson.[403] Thus, in answer to the second question, it is evident that the condition of such violent conduct—not the condition of insecurity—constituted the "condition or situation" that led to harmful consequences.[404]

Question three: What was *Brum II*'s "original cause"? Although the court completely failed to specify what originally caused the risk of harm, *Brum II*'s original cause was the murderous intent of the attackers.[405] The court's analysis of original cause is misguided not only because of what it states, but more importantly, because of what it does not state.[406] The court reasoned in the negative that the school's failure to implement a school security policy and to apprehend the perpetrators on the day of the murder did not originally cause the

[398] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 7, *Brum* (No. SJC-07744).

[399] *See* Supplemental Brief of Defendant-Appellee at 7, *Brum* (No. SJC-07744).

[400] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 7, *Brum* (No. SJC-07744).

[401] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 8 n.1, *Brum* (No. SJC-07744).

[402] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 13, *Brum* (No. SJC-07744).

[403] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[404] *See Brum*, 704 N.E.2d at 1152–53; Supplemental Brief of Defendant-Appellee at 6–7, *Brum* (No. SJC-07744).

[405] *See* Supplemental Brief of Defendant-Appellee at 8–9, *Brum* (No. SJC-07744).

[406] *See Brum*, 704 N.E.2d at 1152–55.

harm, but never discussed what exactly was the original cause of harm.[407] Rather, the court summarily concluded that the "principal thrust" of § 10(j) was to immunize public employers for failing to prevent harm.[408] Thus, by characterizing the school officials' conduct as a "neglect of duty"—defined as "a failure to act to prevent or diminish [harm]"—liability did not apply.[409]

Although the court correctly identified the legislative intent behind § 10(j), which was to provide "some substantial measure of immunity from tort liability to government employers," the court went too far in protecting public employers.[410] Absent from the court's analysis is any significant discussion of the creation of the risk, that is, whether or not the school officials' conduct in fact created the condition or situation of "physical insecurity" that led to the invasion, attack and death.[411] All that is stated is that the school neglected a duty and thus failed to prevent Robinson's death.[412] By premising original causation solely upon an action/inaction distinction, however, without regard for the creation of the risk of harm, the court shrank the three-step analysis articulated by § 10(j) into a one-step analysis: whether or not the public employee acted.[413] Indeed, the court "remedied" the ambiguity in § 10(j)'s plain language by oversimplifying the provision.[414] It may be argued that because a person's failure to act necessarily precludes that person from originally causing harm, thus eliminating the need for further inquiry into risk of harm and its consequences, only one step is needed or required by § 10(j). This assumption, however, fails on two separate grounds.

The first and most obvious reason that original causation analysis must involve more than simply an action/inaction inquiry is that where a public employee is found to have acted, that does not necessarily mean that § 10(j) immunity should not apply. Indeed, the court must scrutinize whether the public employee's conduct materially contributed to the harm that came to pass, or whether the employee's acts were so attenuated as to render the conduct a mere failure to prevent the risk of harm.[415] Second, although it is true that a com-

[407] *See id.*

[408] *See id.* at 1154–55.

[409] *See id.* at 1153.

[410] *See id.* at 1154.

[411] *See Brum*, 704 N.E.2d at 1152–53.

[412] *See id.* at 1153, 1155.

[413] *See supra* note 277 and accompanying text.

[414] *See supra* note 277 and accompanying text.

[415] *See* Glannon, *supra* note 54, at 26–27.

plete failure to act would necessarily preclude a person from originally causing harm and would thus constitute a failure to prevent the risk of harm, a court cannot be certain that a public employee failed to act unless it first looks to the other steps in the analysis—to the risk of harm and its consequences.[416] Without any inquiry into the risk of harm that came to pass, the characterization of an employee's conduct as either "action" or "inaction" is relative, and is thus left entirely up to the discretion and whim of the court.[417] In the words of Chief Justice Liacos, who cautioned against an action/inaction distinction in public duty cases: "[a] standard so flexible cannot provide the certainty and predictability essential to the law."[418]

Despite these warnings, the *Brum II* court, in its attempt to narrowly define the circumstances in which a public employer would be held liable, enabled public employees' future actions to be recast as harmless inaction by use of the action/inaction distinction.[419] Although the court derived the correct result in *Brum II* because the school officials did not create the risk of harm, the danger inherent in the court's action/inaction distinction is clearly evident in a host of other scenarios, such as: (1) where a school institutes a policy providing that a school's floors will be cleaned while students are in class and neglects to put out a "Caution: Wet Floor" sign; (2) where a town changes a two-way street into a one-way street and forgets to post a "One-way" sign; or (3) where a public agency employs a security guard at a housing complex and neglects to check the guard's criminal record. Despite the action taken in the above examples, the danger is that under the court's reasoning in *Brum II,* the court may recharacterize any one of these circumstances as inaction—a "neglect of duty"—and thus, as a failure to prevent or diminish a risk of harm.[420]

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[416] *See supra* note 277 and accompanying text.

[417] *See supra* note 277 and accompanying text.

[418] *Jean W.*, 610 N.E.2d at 312 (Liacos, C.J., concurring).

[419] *See Brum,* 704 N.E.2d at 1152–55.

[420] *See id.* at 1153, 1155. Following the *Brum* decision, the plaintiff's lawyer, James E. Riley, Jr., implied that by enabling public employers to recharacterize their conduct as a failure to act to prevent harm in order to shield themselves from liability, the court's decision would virtually wipe out all potential claims against public employers involving violent or tortious third party conduct. *See* Ric Oliveira, *SJC Clears Dartmouth in '93 Student Murder,* Standard Times, Jan. 22, 1999, at A2. Mr. Riley further stated that "[a]s a result of this decision, you cannot sue a school official when your child gets injured or killed on the school property in any situation other than if the teacher or school official themselves in the perpetrator of the injury." *Id.* By contrast, the town of Dartmouth's attorney, John J. Davis, agreed with the action/inaction distinction articulated by the court, stating that, "If you were to rule the other way, there's a whole lot of other cases that would come down

Fearing that a broad interpretation of original cause would allow every failure to prevent harm to be recast as originally causing a harmful condition, "encompass[ing] the remotest causation and preclud[ing] immunity in nearly all circumstances," the court thus sacrificed a clear interpretation of § 10(j) and its intricacies for an interpretation based solely upon action and inaction.[421] In the wake of *Brum II*, what is left of § 10(j) is a streamlined, albeit more straightforward, shell of the former rule: if public employers do not act, they are not liable.[422]

Because the court's analysis of original causation stopped short with the finding that the school officials failed to act, the court never properly addressed why the school officials' neglect of duty was not an original cause of the harmful condition or situation.[423] A proper analysis under § 10(j) must answer this question not by showing that the public employee did not act, but rather, by showing that the public employee did not create the risk.[424] In its brief, the town of Dartmouth argued that the source or root of the violent and tortious attack that led to Robinson's death was the assailants' murderous intent.[425] Indeed, it was this murderous intent of retaliation that created the risk of invasion and attack that came to pass.[426] Although the school failed to secure the building properly, the school's failure to act "was not a source from which the assailants' murderous intent incepted."[427] Indeed, as demonstrated by the negligent enrollment of the student in *Allen*, in order for a public employer to be held liable, the school officials' conduct must have *materially* contributed—along with the third party's conduct—to produce the risk of harm that came to pass.[428] Thus, had the principal of the school summoned the three

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the pike . . . and I don't know if the Legislature wants that to happen." *Id.* He added, "If the elected representatives in this state want to hold public officials accountable for incidents like this one—a madman comes in and causes harm to another on the property—that's up to the Legislature. It's not in the law right now." *Id.* According to Mr. Davis, the court's decision preserved a workable scheme of public tort liability, and avoided the slippery slope that would enable "[t]he shove on the playground [to] become a case." *Id.*

[421] *See Brum*, 704 N.E.2d at 1154.

[422] *See id.* at 1155.

[423] *See id.* at 1153.

[424] *See id.*

[425] *See* Supplemental Brief of Defendant-Appellee at 8–9, *Brum* (No. SJC-07744).

[426] *See id.* at 8.

[427] *Id.* at 8–9.

[428] *See Allen*, 693 N.E.2d at 700–01. In the three cases decided by the Supreme Judicial Court under § 10(j), all of which involved an intervening third party, the court imposed public immunity in all but one case—where the public employee affirmatively and unlawfully aided a third party in maintaining employment status in proximity to the plaintiff. *See*

youths to the school for a meeting or enrolled the youths in the school despite knowledge of their murderous intent and thereafter a violent altercation had caused injury to the plaintiff, §10(j) immunity would have been inapplicable. In that scenario, the public employees by "placing" the students in the school would have materially contributed to the risk of harm that came to pass.[429]

Unlike the school officials' negligent enrollment in *Allen*, however, the school officials in *Brum II* did not "place" the third party in the position to effect the risk of harm.[430] In *Brum II*, the youths placed themselves in the position to effect harm when they chose to invade the school, thereby creating the risk.[431] More specifically, in *Allen*, the employees created the risk by actively bringing the third party into the school.[432] Were it not for the employee's negligent action, the third parties would not likely have been there to effect the risk of harm in the first place.[433] The same cannot be said of the employees' inaction in *Brum II*.[434] Because the employees did nothing to invite or deter the interlopers, the third parties may, and just as easily may not, have invaded the school and attacked Robinson.[435] Thus, the school's lack of security, although not making the attack any more difficult, did not affirmatively make the attack any easier by placing the third parties in the position to cause harm.[436] In short, whereas the officials' conduct in *Allen* was part and parcel of the risk that came to pass, the school officials' failure to secure the school properly in *Brum II* was sufficiently removed from the violent attack that took place and could hardly be said to have materially contributed to that attack.[437] In fact, much like the parole officer's failure to supervise the parolee properly in *Bonnie W.*, the school officials' failure to provide security (of

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Bonnie W., 643 N.E.2d at 426–27. Thus, where a third party is involved in injury to the plaintiff, the plaintiff bears a heavy burden of showing that the public employee's conduct "combined with the [third party's] conduct in producing the injury," and that without the public employee's conduct, the third party could not reasonably have caused the injury. Supplemental Brief of Defendant-Appellee at 10–11, *Brum* (No. SJC-07744).

[429] *See* Glannon, *supra* note 54, at 459.

[430] *See Allen*, 693 N.E.2d at 700–01.

[431] *See* Supplemental Brief of Defendant-Appellee at 8–9, *Brum* (No. SJC-07744).

[432] *See Allen*, 693 N.E.2d at 700.

[433] *See id.* at 700–01.

[434] *See* Supplemental Brief of Defendant-Appellee at 8–9, *Brum* (No. SJC-07744).

[435] *See id.*

[436] *See id.*

[437] *See Allen*, 693 N.E.2d at 700–01; Supplemental Brief of Defendant-Appellee at 8–9, *Brum* (No. SJC-07744).

which supervision is but one type) merely preceded an intervening and unconnected risk of harm that followed.[438]

As Justice Kass argued in his ringing dissent in *Brum I*, "[n]o school official stabbed Robinson to death" and thus "[i]t requires convoluted reasoning to say . . . that the school authorities *originally caused* the violent act of [the three youths]."[439] Although the authorities might have prevented the killing, the Justice correctly added that it was the three interlopers alone that originally caused the invasion and attack.[440] Therefore, under a proper three-step analysis, the court should have concluded that: (1) Robinson's death was the harmful consequence; (2) the risk of harm that came to pass was the attack perpetrated against Robinson by the invading interlopers; and (3) the school's failure to secure the school properly and apprehend the perpetrators on the day of the murder did not originally cause the risk.[441] Thus, in answer to question three, the murderous intent of the three interlopers—not any act or failure to act on the part of the school officials—originally caused that risk.[442]

D. *The Harsh Law of Section 10(j)*

Because of the confusion still surrounding § 10(j) in the wake of *Brum II*, it is instructive to consider several hypothetical cases within the school context and their likely outcomes under § 10(j). The suggested resolutions of these hypotheticals illustrate the practical application of § 10(j) in harmony with its plain language and legislative intent. More importantly, these resolutions demonstrate § 10(j)'s

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[438] *See* Supplemental Brief of Defendant-Appellee at 11–12, *Brum* (No. SJC-07744).

[439] *Brum*, 690 N.E.2d at 852 (emphasis added).

[440] *See id.*

[441] *See Brum*, 704 N.E.2d at 1152–55.

[442] *See* Supplemental Brief of Defendant-Appellee at 8, *Brum* (No. SJC-07744). Notwithstanding *Brum II*'s oversimplified interpretation of § 10(j), recent lower court decisions are consistent with the three-step analysis. *See, e.g.*, Serrell v. Franklin County, 713 N.E.2d 389 (Mass. App. Ct. 1999) (refusing to bar liability where correctional officers caused iron gate to be pinned against plaintiff); Moores v. Callahan, 1999 WL 1295109 (Mass. Super. Ct. 1999) (barring liability where Animal Control Officer returned dog to owner despite knowledge of dog's propensity for violence, and where dog attacked plaintiff); Barret v. Wachusett Reg'l Sch. Dist., 1999 WL 1025398 (Mass. Super. Ct. 1999) (refusing to bar liability where teacher nominated handyman to assume responsibility of children at school-organized overnight program, and where handyman verbally and physically abused children); Bayles v. Love, 1999 WL 515627 (Mass. Super. Ct. 1999) (barring liability where teacher failed to prevent student from assaulting another student, despite knowing or having reason to know of student's intention to commit assault); Kent v. Commonwealth, 1999 WL 218509 (Mass. Super. Ct. 1999) (refusing to bar liability where commonwealth negligently paroled inmate who subsequently injured plaintiff).

practical effects on the lives of public employers, school officials, parents and students.

In a hypothetical suggested by the town's counsel at oral argument, a town would most likely be liable for injury to a child struck by a car on the way to school, if the school decided to start classes earlier in the day while it was still dark and the darkness contributed to the accident.[443] In that case, although the child was in fact struck by a third-party driver, the town's decision to start classes in the dark materially contributed to the risk of a child being injured in the dark; but for the town's decision, the child would not have been injured.[444] By contrast, if the town started classes early and several area youths began throwing rocks at the children attending school, the town would not be liable for injury to the children because its decision did not materially contribute to the risk of students being injured by stones. In that

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[443] *See* Transcript of Oral Argument, Brum v. Town of Dartmouth, 704 N.E.2d 1147 (Mass. 1999) (No. SJC-07744) (audio recording on file with Supreme Judicial Court); *see also* Monica Allen, *School Security Suit Unearths a Legal Surprise: Dartmouth Case Hinges On Law that Didn't Exist in '93*, Standard Times, Nov. 3, 1998, at A2. In *Brum II*, the court suggested that "[w]hat is needed is an example of a condition or situation leading to a harmful consequence, where the condition was originally caused by the public employer but not brought about by the public employer's failure to prevent it." *Brum*, 704 N.E.2d at 1153; *see also supra* note 254 and accompanying text. The above scenario provides one such example. Even though § 10(j) would most likely not bar liability, however, § 10(b) discretionary function immunity may be applicable.

[444] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744). Likewise, the town may also be liable if the school, without notice to students, changed the direction of traffic flow in the school parking lot, and as a result, a student was hit by a bus. In that case, although the child was in fact struck by a third party driver, the school's decision to change the traffic pattern materially contributed to the risk of a student being injured. Another example might include a school policy to clean floors during school hours, where a student falls on a wet floor after a school employee fails to put out a "Caution: Wet Floor" sign. In that case, the employee materially contributed to the risk of a student's falling and being injured. Indeed, had the floors not been cleaned during school hours, the student would not likely have fallen.

Noticeably absent from the above-mentioned examples is any intentional tortious action on the part of a third party. This is not to say that § 10(j) excludes all claims against public employers for harm inflicted by third parties. Indeed, § 10(j) should not shield public employers from liability for the violent or tortious conduct of a third party that arises from the negligent hiring of a teacher with a history of sexual abuse, or the negligent enrollment of a student with a history of violent crimes. Nevertheless, the presence of intentionally tortious third party conduct makes it much more difficult for the plaintiff to establish public employees' material contribution to harm, and the *Brum II* holding has made it even more difficult. In fact, it remains to be seen whether the *Brum II* court's interpretation of § 10(j) will enable plaintiffs to sue public employers based on violent or tortious third party conduct at all, or whether the court will bar all such claims based on a failure to act to prevent harm. *See supra* note 420.

scenario, the youths—not the town—created the risk of harm that came to pass.

In another hypothetical, the town's counsel suggested at oral argument that if a school principal created a policy stipulating that all school doors must be locked and then forgot to lock them, and if an interloper subsequently made his or her way into the school and attacked and injured a student, the town would be liable for the student's injury under § 10(j).[445] The language and intent of § 10(j) do not support such a conclusion. Indeed, under § 10(j), in order for liability to apply, the public employee must originally cause a condition or situation that leads to harmful consequences.[446] Although the principal failed to lock the doors in contravention of school policy, this failure alone did not create the condition that led to the harm any more than if the principal had failed to lock the doors without ever having made such a policy in the first place.[447] In both scenarios, the principal's failure to lock the doors merely coincided with the murderous intent of the third party, and although it may have made the invasion easier, it did not create the risk of injury.[448] Thus, in this case, an inquiry into the creation of the risk of harm leads not to the initial failure of the principal to lock the door, but rather, to the third party interloper's murderous intent.[449] Barring collusion on the part of the school or some other affirmative action taken with regard to the invasion and attack on the student, insecurity does not materially contribute to murder, but violent attacks do.[450]

Professor Glannon offers an additional hypothetical, involving a school official's negligent supervision of a playground during school hours and the subsequent injury of one student by another student.[451] He argues that in this case, although "[t]he direct source of the harm is the other child . . . it cannot be said that this injury is 'attributable to the employee only in the sense that the employee . . . failed to prevent or mitigate it.'"[452] Glannon maintains that because "the child is required to attend the school, and school officials have placed the child in a situation which involves a risk of injury without taking ade-

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[445] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[446] *See* MASS. GEN. LAWS ch. 258, § 10(j) (1998).

[447] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[448] *See id.*

[449] *See id.*

[450] *See supra* notes 428–29 and accompanying text.

[451] *See* Glannon, *supra* note 54, at 26–27.

[452] *Id.* at 27.

quate steps to protect him," § 10(j) should not apply because the public employee's negligent conduct materially contributed to producing the injury.[453]

At the time of Glannon's writing, the Supreme Judicial Court had not yet decided *Bonnie W.*, and thus, Glannon did not have the benefit of the Supreme Judicial Court's interpretation of § 10(j) regarding claims of negligent supervision.[454] *Bonnie W.* establishes that a claim of negligent supervision alone is generally insufficient to warrant a finding of liability against public employers—especially where the harm is caused by an intervening third party.[455] In this hypothetical, the school official's failure to monitor the school children adequately did not create the risk of harm that came to pass—that risk of harm was created by the other child's tortious conduct.[456] Unless the school official actively participated in creating the risk of harm to the child, as where an official negligently seats a child in a swing or organizes a dangerous game that results in injury to a child, the negligent supervision constitutes a mere failure to prevent harm and does not materially contribute to the risk of injury.[457]

In a final hypothetical, plaintiff's counsel argued at oral argument that the school's failure to implement security measures and to deter the known and imminent threat of three armed interlopers was comparable to a school official seeing a grenade in a schoolyard sandbox and failing to remove it.[458] According to plaintiff's counsel, liability must be imposed in either case under § 10(j).[459] In contrast, the town counsel's argued that under § 10(j), the town would not be liable "even if [the school official] saw the grenade, failed to remove it, and it exploded," so long as the school official did not actually

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[453] *Id.*

[454] *See Bonnie W.*, 643 N.E.2d at 426.

[455] *See id.*

[456] *See* Glannon, *supra* note 54, at 26–27.

[457] *See Bonnie W.*, 643 N.E.2d at 426. Indeed, in a footnote of its opinion, the Supreme Judicial Court determined that Professor Glannon's suggestion that liability should be applied in the "playground" hypothetical "perpetuate[d] some of the confusion caused by the statute." *Brum*, 704 N.E.2d at 1154 n.10. The court added that such a scenario was not readily distinguishable from other situations in which Glannon suggested that liability should *not* be imposed, such as where a child is bitten by a rabid raccoon after a public health director negligently delays in responding to reports of the raccoon. *See id.*

[458] Transcript of Oral Argument, *Brum* (No. SJC-07744); *see also* Allen, *supra* note 443, at A2.

[459] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

place the grenade in the sandbox in the first place.[460] Both the plain language and legislative intent of § 10(j) favor the town's interpretation of the hypothetical because the school official did not cause the grenade to be placed in the sandbox in the first place and thus did not create the risk that presumably led to harm upon explosion of the grenade.[461] Rather, the school official failed to prevent the risk of harm from coming to pass, which is specifically excluded from liability under § 10(j).[462] As dissatisfying as this result may be, the Legislature did not wish to make public employers liable for the malicious acts of third parties, for to do so would impose too great a burden on the employers whose officers and employees are constantly in contact with private individuals.[463]

E. *The Grenade with a Sign: A Suggested Exception to § 10(j)*

Troubled by the sweeping immunity given to schools under § 10(j), as suggested by the town's response to the "grenade-in-the-sandbox" hypothetical example at oral argument before the Supreme Judicial Court, Justice Fried pressed the issue of when a town becomes liable for school safety.[464] Modifying the hypothetical slightly, Justice Fried suggested that in addition to the grenade in the school sandbox, a sign was attached to the grenade, reading: "This grenade will go off in ten minutes."[465] The Justice added that a school official read the sign, saw the grenade and yet failed to act, at which time the grenade exploded, causing harm to students.[466] What result?

The town's counsel answered that the town would still not be liable, and according to § 10(j), the town was correct.[467] Because no school official placed the grenade in the sandbox or otherwise materially contributed to its placement and subsequent explosion, the school officials' indifference toward the grenade-with-sign constitutes only a failure to prevent an independently-created risk of harm from

[460] Allen, *supra* note 443, at A2; *see* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[461] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[462] *See* MASS. GEN. LAWS ch. 258, § 10(j) (1998).

[463] *See id.*

[464] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[465] *See id.*

[466] *See id.*

[467] *See id.*

coming to pass, despite the fact that the school official was on notice of the risk of harm that came to pass.[468]

Lurking behind Justice Fried's thankfully farfetched hypothetical are fundamental questions of foreseeability that go to the heart of the *Brum II* case: what did the school know, if anything, about the impending violence and what did the school do or fail to do in light of such knowledge?[469] In short, did the school officials at Dartmouth High School "read the sign"?[470] These questions are irrelevant to § 10(j) analysis, which involves only a threshold determination of whether or not a public employer originally caused the condition or situation that led to harm.[471] Indeed, questions of foreseeability are dealt with, if at all, only after the court has determined that § 10(j) immunity is inapplicable.[472] Thus, even if the risk of harm was in fact foreseeable, so long as the public employer did not create the risk of harm that came to pass, § 10(j) suggests that courts will never reach the issue of foreseeability.[473]

The *Brum I* court, however, suggested differently, concluding that the town's foreseeability of the risk of harm and its failure to act in light of that foreseeability, among other things, created the condition that led to harm.[474] As mentioned above, such a decision marks a firm departure from the language and spirit of § 10(j), and the legislative intent to limit public tort liability, to provide predictable results through litigation and to reach a careful balance between compensating injured plaintiffs and maintaining stable government.[475] By bringing foreseeability to bear on the application of the public duty rule and by holding the town liable for a complete and utter failure to act, the *Brum I* court destroyed the rule.[476] In light of the troubling resolu-

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[468] *See id.*

[469] *See* Transcript of Oral Argument, *Brum* (No. SJC-07744).

[470] *See id.*

[471] *See supra* notes 170, 291–93 and accompanying text.

[472] *See supra* notes 170, 291–93 and accompanying text.

[473] *See supra* notes 170, 291–93 and accompanying text.

[474] *See Brum*, 690 N.E.2d at 847, 850.

[475] *See supra* note 276.

[476] *See Brum*, 690 N.E.2d at 850–51. If the mere foreseeability of harm triggers a duty of protection, how far must school officials go to fulfill that duty and avoid liability? For example, if a "No Trespassing" sign is insufficient to fulfill a school's duty of protection to a student against foreseeable intruders, would not a locked door also be insufficient where intruders break down the door, and would not a metal detector be insufficient where the intruders wield wooden bats? Echoing this sentiment, an editorial opinion in a local newspaper stated:

tion of the grenade-with-sign hypothetical under § 10(j), however, perhaps the *Brum I* court was on to something by holding the school liable for an arguably foreseeable risk of harm, but merely approached it the wrong way.[477] What § 10(j) needs is a new *animus*, a new spirit that will enable liability to flow for harms resulting from such indifference; if that does not work, perhaps the Legislature will settle for something more mundane—a new exception.[478]

In light of *Brum II*'s resounding denial of liability, public duty jurisprudence and the public itself demand and deserve a new exception to § 10(j).[479] Currently, where a school official is aware of a risk of harm and does absolutely nothing to prevent that risk from coming to pass, the public employer may not be held liable because the official did not create the risk of harm.[480] This is a proper result under the letter and intent of the provision, but as illustrated by the grenade-with-sign hypothetical, it is not a particularly satisfying result. Despite concern over unpredictable court interpretations and crippling financial burdens on local governments that derive from an affirmative duty of schools to protect, we want school officials to protect students from harm of which they are aware. In addition, despite the importance of public tort immunity to the creative and efficient provision of public services by public servants, who can not possibly prevent every attack nor dissuade every attacker, we do not want school officials to act with indifference toward harm—we want them to act. Thus, in addition to the four exceptions enumerated under § 10(j), the Legislature and the courts should consider a new exception, § 10(j)(5), which whould stipulate that § 10(j) shall not apply to "any claim in which a public employer or any other person acting on behalf of the public employer had actual notice[481] of the condition or

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> Of course we want children to be safe in schools. But safety is a relative thing. Where is our level of comfort? Should schools be equipped with barricades, security doors, cameras and guards? Is a receptionist with a remote-control door lock enough? What about protecting students from each other inside the school? Is a school liable when a bully punches out another student's lights? Does a weapon need to be involved? . . . The questions are endless.

It Won't Be Easy to Determine When Schools Are Safe Enough, STANDARD TIMES, Jan. 24, 1999.

[477] *See id.*

[478] *See infra* notes 479–503 and accompanying text.

[479] *See Brum*, 704 N.E.2d at 1155.

[480] *See id.*

[481] "Actual notice" is distinguishable from principles of constructive notice and *respondeat superior* in which employers may be held liable for employee misconduct despite being unaware of such conduct. The Supreme Court in *Gebser v. Lago Vista Independent School*

situation that led to harmful consequences, and acted in deliberate indifference[482] to that condition or situation."[483]

This two-prong test for imposing liability, requiring (1) actual notice and (2) deliberate indifference on the part of school officials, is not new to the courts and has recently been applied to public employers of public schools in the Title IX context.[484] The two-prong test

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District defended this distinction in the Title IX context, finding that "As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a [public employer] where the [employer] is unaware of discrimination in its programs." *See* 524 U.S. 274, 285 (1998).

[482] The "deliberate indifference" standard, as suggested by the Court in *Gebser*, is a higher standard than ordinary negligence because of the Court's concern that a lower standard would enable a public employer to "be liable in damages not for its own official decision but instead for its employees' independent actions." *See* 524 U.S. at 290–91. The Seventh Circuit has defined the term "deliberate indifference" as conduct:

> evidenced by either actual intent or reckless disregard. Although the term "actual intent" is self-explanatory, reckless disregard is not. A defendant acts recklessly when he disregards a substantial risk of danger that either is known to him or would be apparent to a reasonable person in his position. Recklessness is characterized by highly unreasonable conduct or a gross departure from ordinary care in a situation where a high degree of danger is apparent. The standard is an objective one. Although subjective unawareness of the risk is no defense, the risk must be foreseeable. Indeed, risk is defined as a recognizable danger of injury. The risk also must be substantial.

Gilbert, *supra* note 22, at 472–73 & 509 n.5 (quoting Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985)). The deliberate indifference standard derives from Eighth Amendment prisoner cases such as *Estelle v. Gamble*, where the Court held that in order to recover in a § 1983 claim, the plaintiff must show that the State acted with deliberate indifference to a prisoner's medical needs. *See id.* at 503 n.5. This standard continues to be used by the Court in establishing § 1983 claims. *See e.g.*, Canton v. Harris, 489 U.S. 378, 388 (1989); Estelle v. Gamble, 429 U.S. 97, 104–06 (1976).

[483] *See Gebser*, 524 U.S. at 287–93.

[484] *See id.* In 1998, in *Gebser*, the United States Supreme Court held that a public school district was not liable for a teacher's sexual harassment of a student under Title IX of the Education Amendments of 1972 (prohibiting sexual discrimination in federally funded education programs), absent the school district's actual notice of, and deliberate indifference toward, the teacher's misconduct. *See id.* at 292–93. Because of the contractual nature of Title IX, "conditioning an offer of federal funding on a promise by the *recipient* [the school] not to discriminate," and because of Title IX's enforcement scheme by which Congress required agencies to put schools on notice before terminating federal funds, the Court decided that the federally funded entity must have notice of its employees' discrimination before the Court will impose liability. *See id.* at 286–90. In addition, the court reasoned that where a school district is on actual notice of discrimination, the school district's response to the violation must be one of "deliberate indifference"—"an official decision by the recipient not to remedy the violation." *See id.* at 290. The Court in *Gebser* concluded that the plaintiff failed to satisfy the first prong of the Title IX analysis because the plaintiff could not show that any school official had actual notice of the teacher's misconduct. *See id.* at 291–92. According to the Court, the only information pertaining to the teacher's misconduct—a complaint made by the parents of other students, charging that the teacher

is new, however, to Massachusetts public duty jurisprudence.[485] Still, because the test preserves the limited liability of public employers while enabling individual compensation in narrowly circumscribed cases, the two-prong test provides a workable model for a new exception to the statutory public duty rule.[486]

Indeed, this exception to public tort immunity is exactly the type of legislative solution demanded by *Brum II*'s majority because it is aimed at "achiev[ing] a satisfactory result" in the "special category" of school violence cases, yet narrowly tailored to meet the "wide range of circumstances" covered by the provision, including the police context.[487] Moreover, this exception mirrors the duty of protection that Justice Ireland, in his *Brum II* concurrence, determined should be legislatively imposed upon schools.[488] Rather than enabling school officials to "figuratively shrug and say 'the problem did not originate with us, so we are not responsible'" under § 10(j), this statutory exception would obligate schools to "take reasonable measures to protect children when they have advance notice of danger," as Justice Ireland suggested.[489]

Over the past twenty years, the Legislature has paid careful attention to the Supreme Judicial Court's pronouncements regarding public tort liability: after *Whitney*, the Legislature responded to the court's prospective abrogation of sovereign immunity by enacting the MTCA, and after *Jean W.*, the Legislature responded to the court's prospective abrogation of the public duty rule by enacting § 10(j).[490] Now, in *Brum II*, the court has spoken again, voicing its dissatisfaction with § 10(j)'s insulation of public schools.[491] In the words of *Brum II*'s ma-

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had made inappropriate comments during class—"was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." *See Gebser*, 524 U.S. at 290; *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (holding that private damages action may lie against recipient of federal education funds in cases of *student*-on-student sexual harassment under Title IX, where school officials are deliberately indifferent to known acts of harassment in school programs or activities, and where harassment is so severe, pervasive and objectively offensive that it effectively bars victim's access to educational opportunity or benefit).

485 *See id.* at 290.

486 *See id.* at 290–93.

487 *See Brum*, 704 N.E.2d at 1162 n.17. If the Legislature determined that the application of this exception to *all* public contexts would expose public employers to potentially crippling financial liability, the Legislature could limit the § 10(j)(5) exception to the "special category of case[s]" involving violence in *schools*. *See id.*

488 *See id.* at 1162–63 (Ireland, J., concurring).

489 *See id.* at 1163.

490 *See supra* notes 29–38, 156 and accompanying text.

491 *See Brum*, 704 N.E.2d at 1162 n.17 & 1162–63 (Ireland, J., concurring).

jority, the obligation to "achieve a satisfactory result in this special category of case" is "a task for the Legislature," and in the words of Justice Ireland, "[t]his entire matter is within the control of the Legislature."[492] The court, the commonwealth and its municipalities, parents, teachers and students alike are waiting.

As a policy matter, such an exception would not unduly burden the court's threshold inquiry into public duty immunity because it would admittedly apply in only a small number of cases in which there are grave concerns over whether or not the school positively knew of the risk of harm and tried to do anything about it.[493] In most cases, school officials will either be unaware of the risk that comes to pass until the harm is done, in which case the plaintiff will be unable to prevail under the actual notice prong, or school officials will make some sort of attempt to prevent the harm, in which case the plaintiff will be unable to show deliberate indifference.[494] In addition, the exception will not bankrupt local governments in favor of injured parties because, as mentioned above, the exception will not likely apply in the majority of cases.[495] Moreover, even where there are reasonable questions pertaining to school officials' actual notice and deliberate indifference, the plaintiff bears the heavy burden of proving both prongs of the exception, which means showing not that the official should have known of the risk of harm, but rather, that the official did know of the risk and officially refused to attempt to remedy it.[496] Furthermore, even if the plaintiff prevailed on both prongs, the claim may still be barred under § 10(b) immunity, and if not, the municipality stands to lose no more than $100,000—the damage cap set by the MTCA.[497]

In addition, the new exception will provide consistent and predictable results because it is based upon a careful and well-reasoned two-prong analysis, and renders unnecessary courts' attempts to circumvent § 10(j) in creative and confusing ways on public policy grounds, as the appeals court did in *Brum I*.[498] Additionally, the new exception will advance public policy by providing an incentive for school officials to err on the side of affirmative action when they be-

[492] *Id.* at 1162 n.17 & 1163.

[493] *See supra* notes 481–83 and accompanying text.

[494] *See supra* notes 481–83 and accompanying text.

[495] *See supra* notes 481–83 and accompanying text.

[496] *See supra* notes 481–83 and accompanying text.

[497] *See supra* notes 42, 46–49 and accompanying text.

[498] *See Brum*, 690 N.E.2d at 850–51; *see also supra* notes 481–83 and accompanying text.

come aware of risks of harm, thus resulting in greater safety for school students as well as greater accountability for the failure to act in spite of knowledge of such risks.[499] Finally, the new exception will help to ease a fundamental inconsistency between federal and state law: under Title IX, a student who is sexually harassed in school may recover damages from the school, while under state tort law, the family of a child murdered in school receives nothing.[500] With the passage of such an exception, school officials would become liable for displaying deliberate indifference to a risk of harm of which they have notice; indeed, school officials would become liable for failing to take any action after reading the sign on the grenade and for failing to do anything to deter the known and imminent threat of three armed intruders.[501]

This exception embodies the hope that when school officials are aware of a risk of harm to students, they will take action.[502] In light of the young man slain in his high school social studies classroom on April 12, 1993, and in light of increasing numbers of students attacked and injured in schools in recent years, this does not seem like too much to ask.[503]

Conclusion

Since 1978, Massachusetts public duty jurisprudence has been engaged in a balancing of competing social values: "the compensation of injured individuals and the protection of government from financial burdens that threaten its ability to function." Throughout the years, this balancing has been performed by the Massachusetts courts in concert with the Legislature, who have created and limited

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[499] *See supra* notes 481–83 and accompanying text.

[500] *See Gebser*, 524 U.S. at 292–93; *Brum*, 704 N.E.2d at 1155; *see also supra* notes 481–483 and accompanying text.

[501] *See supra* notes 481–83 and accompanying text.

[502] *See supra* notes 481–83 and accompanying text.

[503] Shortly after Robinson's death, the Dartmouth School Committee established a Security Evaluation Committee to evaluate security at the Dartmouth High School. As a result of the Committee's recommendations, in September 1993, the Dartmouth High School took the following steps to improve security: (1) two full-time security monitors were hired; (2) all doors are locked; (3) visitors are viewed by way of a closed-circuit security camera and are admitted through a door-buzzer system; (4) security monitors and administrators carry walkie-talkies; and (5) photographic identification cards are issued to all students. *See* Brief/Appendix for Appellant at 21a-23a, *Blum* (No. 96-P-687). In addition to the security measures taken in response to the tragedy, a plaque in memorial to Jason Robinson hangs in the hallway of the Dartmouth High School, a short distance from the classroom in which he was attacked.

the laws enabling public employers both to be sued and to be protected from suit. More importantly, however, this balancing has been informed by the issues raised and the concerns faced by the citizens of Massachusetts, whether they be a sight-impaired child permanently blinded by a defective door at school, or a women sexually assaulted in her home by a parolee.

Today, in the wake of *Brum II,* the Massachusetts citizenry has a new voice. It is the voice of parents and of children, of teachers and of school administrators, and of federal and state government officials, who fear the tragic balance newly struck by the court in its decision to immunize a school for the stabbing death of its student, despite the school's notice of the risk of attack and its deliberate indifference toward the attackers. The court has spoken, but the people wait. Now it is the Legislature's turn to work a new balance between private compensation and public immunity, between the protection of government and the protection of a sixteen-year old high school student stabbed to death in his social studies classroom. It is the Legislature's turn to cast their eyes and ears upon the people of Massachusetts—to see an injustice that may be averted and to hear stories of violence tinged with hope for change.

There can be no doubting that *Brum II* was correctly decided under the law, nor can there can be any doubt that the law is wrong. Legal accountability must exist for the failure of school officials to protect students when they have actual notice of the risk of harm and yet demonstrate deliberate indifference toward that risk. There must be change. But change in the law that accounts for unforeseen circumstances, that balances compensation and public immunity in light of evolving social values, must not come in the form of tortured judicial analyses that twist and turn the law to make it fit a particular circumstance. The appeals court tried to effect such change in *Brum I* and succeeded only in further confusing an already ambiguous provision. *Brum II,* of course, did not change anything with regard to this balance. In fact, the Supreme Judicial Court's oversimplification of the law swung the pendulum in the other direction, far away from compensation of potential victims; so long as the conduct of a public employee can be manipulated into a failure to act to prevent harm, the court will dismiss the case. Thus, the interpretive quagmire remains.

In order for change in the balancing of social values to be lasting and meaningful, that change must be tempered by the policy of predictability. This requires both an accurate and consistent reading of § 10(j) by the courts in harmony with the three-step analysis, as well as the formulation of a clearly and narrowly defined exception to § 10(j) by the Legislature, based upon principles of actual notice and deliberate indifference. These proposals are lofty and the stakes are high, but needed change demands carefully chosen and effective means. Indeed, *Brum I* and *Brum II* make clear that a faulty vessel in harsh seas will never reach its destination, nor will a vessel that remains tethered to its mooring. This Article's proposals, however, chart a middle course. The Legislature's allowance for an exception to § 10(j) will better equip the provision to deal with special categories of cases, while the court's consistent and correct interpretation of § 10(j) will calm the seas of confusion surrounding public duty jurisprudence. Together, the Legislature and the court may smooth the passage to a change in the balance of competing social values, favoring compensation in special circumstances. This is important because in some cases, public employers should be held liable; indeed, the lives of students and the peace of their families may well depend on it.

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