Florida State University Law Review

Volume 14 | Issue 1 Article 7

Winter 1986

Everton v. Willard, 468 So. 2d 936 (Fla. 1985)

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Torts—SOVEREIGN IMMUNITY—The FLORIDA SUPREME COURT DECIDES LAW ENFORCEMENT OFFICERS HAVE NO DUTY TO ARREST DRUNK DRIVERS—*Everton v. Willard*, 468 So. 2d 936 (Fla. 1985)

I. INTRODUCTION

The problem of intoxicated drivers has reached tragic proportions in the United States. Half of all highway deaths involve alcohol.[1] Traffic accidents involving drunk drivers kill approximately 25,000 persons each year[2] while another 700,000 are injured.[3] Fifty percent of all Americans will at some time be involved in an alcohol-related accident.[4] The economic costs associated with this human loss and suffering are predictably high, estimated at $21 to $24 billion per year.[5]

In response to these staggering losses, citizen groups have demanded stricter laws;[6] Congress and all fifty state legislatures have responded.[7] However, even the strictest laws cannot accomplish their intended purpose without adequate enforcement. As many as ten percent of all drivers on weekend nights meet the legal definition of intoxication.[8] Yet a drunk driver's chances of being stopped by the police[9] are estimated to be as low as one in 2,000.[10]

Marion Willard was a drinking driver who was stopped by the police.[11] Although the officer knew Willard had been drinking, he allowed Willard to continue on his way. Within twenty minutes

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1. PRESIDENTIAL COMM'N ON DRUNK DRIVING, FINAL REPORT 1 (1983) [hereinafter cited as FINAL REPORT]; *see also* Leo, *One Less for the Road?*, TIME MAG., May 20, 1985, at 76.

2. *Federal Legislation to Combat Drunk Driving Including Nat'l Driver Register: Hearings on S. 2158 Before the Subcomm. on Surface Transp. of the Comm. on Commerce, Science, and Transp.*, 97th Cong., 2d Sess. 65 (1982) (statement of Diane K. Steed, Deputy Adm'r, Nat'l Highway Safety Admin.) [hereinafter cited as *Hearings on S. 2158*]. Another estimate places the figure at 28,000 deaths annually. Friedrich, *Seven Who Succeeded*, TIME MAG., Jan. 7, 1985, at 41.

3. Blank, *Drinking—and Dying—On America's Highways*, READER'S DIG., Sept. 1985, at 53.

4. Barlas, *What You Can Do to Stop Drunk Drivers*, READER'S DIG., Nov. 1985, at 91.

5. FINAL REPORT, *supra* note 1, at 1.

6. *See, e.g.*, Leo, *supra* note 1, at 76; Friedrich, *supra* note 2, at 41; *Making It Tougher to Drink and Drive*, NEWSWEEK, July 9, 1984, at 23.

7. Friedrich, *supra* note 2, at 76; *see also Making It Tougher to Drink and Drive*, *supra* note 6, at 23.

8. *Hearings on S. 2158*, *supra* note 2, at 66. The director of one state public safety department suggests that one out of 100 drivers on weekend nights is "absolutely blitzed, on the verge of comatose." Leo, *supra* note 1, at 76.

9. "Police" is used throughout this discussion to refer to any governmental traffic law enforcement unit, whether that of a city, county, or state agency.

10. Barlas, *supra* note 4, at 91.

11. Everton v. Willard, 426 So. 2d 996, 998 (Fla. 2d DCA 1983), *aff'd*, 468 So. 2d 936 (Fla. 1985).

Willard was involved in an accident in which the driver of another car was killed.[12] In *Everton v. Willard*,[13] the Florida Supreme Court refused to impose liability on the officer—and therefore on the county employing him—holding that governmental entities may not be held liable for discretionary decisions made by a police officer absent a duty owed beyond that owed to the public at large. A police officer's choice of arrest, detention, or release of an individual was held to be a discretionary decision.[14]

Everton was one of seven sovereign immunity cases decided in April 1985.[15] Those decisions severely limited an injured citizen's right to sue governmental bodies. In effect, the legislative waiver of sovereign immunity was invalidated for governmental actions deemed discretionary by the court. These actions include building inspection,[16] prison administration,[17] and enforcement of animal-control ordinances[18] and of drunk-driving laws.[19]

The purpose of this Note is to examine the application of the "discretionary decision" and "special duty" doctrines in drunk driving situations. The duty to arrest also will be examined in light of the public policy concerns behind governmental immunity.

II. *Everton v. Willard*

Although drunk driving is a problem that has been presented to the Florida Legislature for solution in recent years, *Everton* brought it before the state's highest court. More importantly, the case gave new life to the arguments that have revolved around the centuries-old doctrine of sovereign immunity.

A. The Facts

Early on the morning of July 22, 1979, Pinellas County Sheriff's Deputy C.W. Parker stopped Willard for a traffic violation.[20] Although Parker knew, both by his observations and Willard's own

12. *Everton*, 426 So. 2d at 998.
13. 468 So. 2d 936 (Fla. 1985).
14. *Id.*
15. Rodriguez v. City of Cape Coral, 468 So. 2d 963 (Fla. 1985); City of Daytona Beach v. Huhn, 468 So. 2d 963 (Fla. 1985); Duvall v. City of Cape Coral, 468 So. 2d 961 (Fla. 1985); Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985); Reddish v. Smith, 468 So. 2d 929 (Fla. 1985); Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985).
16. *Trianon*, 468 So. 2d at 912.
17. *Reddish*, 468 So. 2d at 929.
18. *Carter*, 468 So. 2d at 955.
19. *Everton*, 468 So. 2d at 936; *Duvall*, 468 So. 2d at 961; *Huhn*, 468 So. 2d at 963.
20. *Everton*, 426 So. 2d at 998.

admissions, that Willard had been drinking, he only gave Willard a citation for an improper U-turn and allowed him to drive away. Not more than twenty minutes later, the vehicle Willard was driving collided with a car driven by Renee Trinko. She was killed; a passenger in her car, Azor Everton, was seriously injured.[21] Trinko's father and Everton filed suit against Willard, Deputy Parker, the Sheriff's Department, and Pinellas County. The Circuit Court for the Sixth Judicial Circuit dismissed the counts of the complaint which sought damages from Parker and his employers, ruling that police officers must be allowed free exercise of the discretion "which lies at the very heart of the policy of law enforcement."[22]

The Second District Court of Appeal affirmed.[23] The court declined to find liability in the officer's exercise of discretion, noting that police discretion is essential to the planning and implementation of law enforcement.[24] This decision conflicted with the Fifth District Court of Appeal's decision in *Huhn v. Dixie Insurance Co.*[25] in which municipal liability was found in a strikingly similar fact pattern. Because of this conflict, the supreme court accepted review and held that the decision to arrest or detain a person is a basic, discretionary function of government. In the absence of a special duty of care, there can be no liability for an officer's exercise of such discretion.[26]

B. Background

The doctrine of sovereign immunity was recognized in Florida as early as 1888,[27] and was the law until 1973. In that year, the legislature, under authority of the Florida Constitution,[28] partially waived the tort immunity of the state, its agencies, and its subdivi-

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21. *Id.*
22. *Id.*
23. *Id.* at 1004.
24. *Id.* at 1003-04.
25. 453 So. 2d 70 (Fla. 5th DCA 1984).
26. *Everton*, 468 So. 2d at 937.
27. *See* McWhorter v. Pensacola & A.R. Co., 5 So. 129 (Fla. 1888). A complete discussion of the doctrine's foundation and history in Florida law is provided in Note, *Sovereign Immunity Trilogy:* Commercial Carrier *Revisited But Not Refined*, 10 FLA. ST. U.L. REV. 702 (1983). *See also* Comment, *Sovereign Immunity—Revisited But Still Not Refined*, 12 FLA. ST. U.L. REV. 401 (1984).
28. The pertinent section reads: "Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating." FLA. CONST. art. X, § 13.

sions.[29] Six years later in *Commercial Carrier Corp. v. Indian River County*,[30] the Florida Supreme Court ruled that certain "discretionary" (or "planning") functions of governmental bodies remained exempt from suit.[31] However, "operational" functions were not to be protected; they could stand as a basis for suits against governmental entities.[32] This distinction led to confusing and often contradictory results in the lower courts.[33] The supreme court has sought on numerous occasions to clarify the application of the discretionary/operational analysis.[34]

Nevertheless, at the time of *Everton* the appellate courts did not agree on the definition of "discretionary" and "operational" functions and therefore differed as to their application. The Second District Court in *Everton* held that a police officer's choice of arrest or release of a drunk driver involved discretionary, planning-level activity and was not subject to suit.[35] Eighteen months later the Fifth District Court in *Huhn* rejected the *Everton* rationale and found that such a decision "was not the exercise of a discretionary *governmental* function."[36] In *Huhn*, the plaintiff was found to have a cause of action against the governmental body.[37]

In an attempt to clarify this area of the law, the Florida Supreme Court reviewed several cases based on its jurisdiction over conflicts among the appellate courts.[38] In effect, the supreme court's "clarification" partially reinstituted sovereign immunity, contrary to the policy expressed by the legislature and the modern trend of allowing suits against governmental bodies.

C. Rationale

In *Everton* and six other cases[39] decided the same day, the supreme court took a firm stance in opposition to lawsuits against

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29. Ch. 73-313, § 1, 1973 Fla. Laws 711 (codified as amended at FLA. STAT. § 768.28 (1985)).

30. 371 So. 2d 1010 (Fla. 1979).

31. *Id.* at 1022.

32. *Id.*

33. *See* Note, *supra* note 27, at 702, 710-15; Comment, *supra* note 27, at 401-02, 410-15.

34. *See* Ralph v. City of Daytona Beach, 471 So. 2d 1 (Fla. 1983); Perez v. Department of Transp., 435 So. 2d 830 (Fla. 1983); City of St. Petersburg v. Collom, 419 So. 2d 1082 (Fla. 1982); Ingham v. Department of Transp., 419 So. 2d 1081 (Fla. 1982); Department of Transp. v. Neilson, 419 So. 2d 1071 (Fla. 1982).

35. *Everton*, 426 So. 2d at 1003-4.

36. *Huhn*, 453 So. 2d at 75 (emphasis in original).

37. *Id.* at 77.

38. FLA. CONST. art. V, § 3(b)(3).

39. *See supra* note 15.

governmental entities. The court emphasized that the legislature's waiver of sovereign immunity "created no new causes of action, but merely eliminated the immunity which prevented recovery for common law torts committed by the government."[40] Under this analysis, only those injuries resulting from activities for which there was a duty of care at common law could lead to recovery from a governmental body.

After requiring a common law duty of care, the court stated that the methods chosen by a government in law enforcement are a part of its "discretionary power . . . [which] is a matter of governance, for which there never has been a common law duty of care."[41] The court reasoned that the discretionary power afforded a police officer on the street is the same as that of a prosecutor or judge. Just as the decision whether to prosecute or imprison an individual is not subject to suit, so is a decision regarding arrest.[42]

The court found that the only possible exception to this rule would be a situation involving a special relationship between the victim and the governmental entity.[43] In the landmark case of *Schuster v. City of New York*,[44] such a special relationship gave rise to a duty of care. In *Schuster*, a young man was killed by an unknown assailant after assisting police in the capture of a notorious criminal. The New York Court of Appeals found that the city of New York owed "a special duty to use reasonable care" to protect a police informant who appeared to be endangered as a result of his cooperation with the police.[45] In contrast, the *Everton* court reasoned that a police officer who made a traffic stop did not assume a special duty to everyone on the roads. The officer had a general duty to protect the public, but this did not meet the *Schuster* standard for liability.[46]

In sum, the court found that the decision to arrest or release a drunk driver is a discretionary, judgmental choice inherent in the government's ability to set law enforcement policy. Where there is only a general duty to protect the public at large, rather than a *Schuster* special duty to an individual, no liability will attach to the officer's decision.

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40. *Trianon*, 468 So. 2d at 914; *see also Reddish*, 468 So. 2d at 932.
41. *Everton*, 468 So. 2d at 938 (quoting *Trianon*, 468 So. 2d at 919).
42. *Everton*, 468 So. 2d at 939.
43. *Id.* at 938.
44. 154 N.E.2d 534 (N.Y. 1958).
45. *Id.* at 537.
46. *Everton*, 468 So. 2d at 938.

The court noted that this reasoning was consistent with its holding in *Wong v. City of Miami*.[47] In that case, several city police officers were assigned to guard merchants' property during the Republican National Convention.[48] After the Mayor ordered the officers removed, rioters severely damaged property in the area. The court refused to "second-guess" the police chain of command and recognized that withdrawal of officers is a tactic often used to relax tensions in disturbed areas.[49] The supreme court held that the city was not liable because the freedom to choose appropriate strategy and tactics without fear of lawsuits is necessary for the exercise of municipal police power.[50] Like *Wong*, the court reasoned, *Everton* involved a police decision not amenable to judicial review. If financial responsibility for the outcome of such decisions is to be placed on the government and therefore on the taxpayers, the legislature must indicate clearly its intent to do so.[51]

D. Dissent

Everton and its companion cases drew sharp dissents.[52] The dissenters protested that the insistence on a common law duty of care was in fact almost a complete abrogation of the waiver of sovereign immunity.[53] Justice Ehrlich pointed out that "[a]t common law, the sovereign was immune from suit, thus the question of whether or not duty existed was moot, and never litigated."[54] To say that all decisions involving discretion are immune from suit goes too far, the dissenters argued; "it would be difficult to conceive of any official act . . . that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."[55] The majority was in fact adopting a long-rejected view that

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47. 237 So. 2d 132 (Fla. 1970).

48. *Id.* at 133.

49. *Id.*

50. *Id.* at 134.

51. *Everton*, 468 So. 2d at 939.

52. *Trianon*, 468 So. 2d at 923 (Ehrlich, J., dissenting); 468 So. 2d at 926 (Shaw, J., dissenting); *Reddish*, 468 So. 2d at 933 (Ehrlich, J., dissenting), 934 (Shaw, J., dissenting); *Everton*, 468 So. 2d at 939 (Ehrlich, J., dissenting); *Carter*, 468 So. 2d at 957 (Ehrlich, J., dissenting); 468 So. 2d at 958 (Shaw, J., dissenting); *Duvall*, 468 So. 2d at 961 (Ehrlich, J., dissenting), 962 (Shaw, J., dissenting); *Rodriguez*, 468 So. 2d at 964 (Ehrlich, J., dissenting); 468 So. 2d at 965 (Shaw, J., dissenting).

53. *See supra* note 52. "The series of decisions we issue today reflects the near total nullification of the legislative waiver of sovereign immunity." *Everton*, 468 So. 2d at 941 (Shaw, J., dissenting).

54. *Trianon*, 468 So. 2d at 924 (Ehrlich, J., dissenting).

55. *Everton*, 468 So. 2d at 944 (Shaw, J., dissenting) (quoting Johnson v. State, 447 P.2d

the government should be liable only for activities in which private individuals also engage.[56]

The dissenters stated that the government should retain its immunity from suit, not in the case of "discretionary" decisions, but in situations involving "non-justiciable political" questions.[57] The courts are not required to determine whether a drunk driving law should be enacted; that is the job of the legislature.[58] When that policy is set, however, the courts are responsible for hearing suits arising from its implementation.[59] In cases like *Everton*, the dissenters argued, policy has been set by the legislature.[60] Several options have been provided for dealing with intoxicated drivers,[61] but "[l]etting the drunk stay on the road is not an alternative."[62] Deputy Parker did not have the authority to turn a blind eye to a driver's intoxication, and therefore the Sheriff's Department should have been held liable for the "highly predictable" result of the deputy's failure to arrest Willard.[63]

Further, Justice Ehrlich distinguished *Wong*.[64] Deputy Parker, he suggested, was not making a policy-level decision about strategy and allocation of police resources when he released Willard.[65] The policy decision had been made; Deputy Parker's responsibility was to enforce the legislature's decision.[66] The dissenters believed that the legislature, through the passage of section 768.28, Florida Stat-

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352, 357 (Cal. 1968)); *see* Irwin v. Town of Ware, 467 N.E.2d 1292, 1298 (Mass. 1984). This point has been advanced by many writers. *See, e.g.*, Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 222 (1963).

56. *Everton*, 468 So. 2d at 942 (Shaw, J., dissenting). According to Justice Shaw, this restrictive view of sovereign immunity was rejected by the Florida Supreme Court in Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), but was tacitly accepted by the *Everton* majority. *Id.*

57. *Everton*, 468 So. 2d at 946 (Shaw, J., dissenting).

58. FLA. CONST. art. II, § 3.

59. *Everton*, 468 So. 2d at 946 (Shaw, J., dissenting); *see* FLA. CONST. art. I, § 3.

60. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting), 948 (Shaw, J., dissenting). Justice Shaw applauded the Supreme Judicial Court of Massachusetts' decision in Irwin v. Town of Ware, 467 N.E.2d 1292, 1299 (Mass. 1984), which emphasized that police officers are not responsible for setting policy but are responsible for implementing legislative policy. *Everton*, 468 So. 2d at 948.

61. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting). An officer confronted with an intoxicated person has the legislatively mandated options of arrest, FLA. STAT. § 316.193 (1985), protective custody, *id.* § 396.072, or taking the individual to his home or to a health facility, *id.* §§ 396.072, 856.011.

62. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting).

63. *Id.*

64. *Id.* at 939.

65. *Id.*

66. *Id.* at 940.

utes,[67] had been quite specific in its intent to subject governmental entities to this type of suit, and they urged that liability be imposed.[68]

III. Policy Considerations

The *Everton* court held that there must be a duty to protect the victim if the officer and his governmental employer are to be liable for his decisions regarding that victim.[69] At common law, the court noted, no such duty was generally found where discretionary policy decisions were made. Only when a "special relationship" existed between the victim and the government would the courts find liability.[70] Further, a police officer did not stand in such a duty-imposing relationship to each individual member of the public; his duty ran to the public as a whole.[71] Even though harm to a citizen might be prevented by reasonable law enforcement action, there was no duty of care; the officer was not required to act. This conclusion was based on a long line of precedents,[72] but it begs the important issue. The question is not "Is there a duty?" but "*Should* there be a duty for an officer to act?" As Dean Prosser pointed out, "duty" is merely a conclusion that, for whatever policy reasons, a person should be able to expect a certain type of protection.[73] Society's needs must be looked to in order to determine whether a police officer should have a duty to arrest a drunk driver.

One commentator has suggested that two factors led to subjecting governmental bodies to suit: the need to encourage the efficiency of a growing bureaucracy in meeting self-set goals, and the ability of such a large institution to spread the cost of injuries throughout society.[74] He noted that, as a government's size in-

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67. Fla. Stat. § 768.28 (1985).

68. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting), 953-955 (Shaw, J., dissenting).

69. *Id.* at 938.

70. *Id.*

71. *Id.*

72. *Id.* at 938-39; *see, e.g.*, South v. Maryland, 59 U.S. (18 How.) 396 (1855); Trautman v. Stamford, 350 A.2d 782 (Conn. Super. Ct. 1975).

73. W. Prosser, Handbook of the Law of Torts § 53, at 356 (5th ed. 1984); *see also* Riss v. New York, 240 N.E.2d 860, 861 (N.Y. 1968) (Keating, J., dissenting); Note, *Municipality Held to Have No Duty to Provide Police Protection to Individual Members of the Public*, 44 N.Y.U. L. Rev. 646 (1969).

74. Wangerin, *Actions and Remedies Against Government Units and Public Officers for Nonfeasance*, 11 Loy. U. Chi. L.J. 101, 102 (1979).

creases, public liability must also expand.[75] Another writer has presented four more factors which courts were actually addressing when, under the guise of the discretionary/operational analysis, they determined the presence or absence of a governmental duty of care.[76] These factors were the character of the plaintiff's injury, the existence of alternative solutions, the ability of a judicial proceeding to evaluate the officer's actions, and the effect of suits on the governmental entity and its administration.[77] In light of these factors, the question "Should there be a duty to arrest the drunk driver?" must be answered in the affirmative.

A. Efficiency in Meeting Governmental Goals

Sovereign immunity was established in a time when governments were much smaller than today's wide-reaching bureaucracies.[78] At that time, governments operated more efficiently in the absence of individual suits against the state.[79] However, governments in modern society have massive bureaucracies which serve to isolate high-level decision-makers from day-to-day realities. It has become increasingly necessary to prod these bureaucracies into carrying out governmental goals.[80] Suits against an agency help insure that its leaders know what their line officers are doing and that they instruct those officers concerning proper actions. If subordinate officers are not working to implement specific governmental goals, the government should be held liable for the subordinates' nonfeasance. The result of such liability will be increased governmental efficiency.[81]

When an officer stops an intoxicated motorist, the government's goal of stopping drunk driving is plainly served by requiring the officer to remove the motorist from the road, whether through arrest, protective custody, or another procedure provided by the legislature. The alternatives do not include "[l]etting the drunk stay on the road."[82] The legislature has formulated several options for dealing with intoxicated drivers; to find liability in this situation

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75. *Id.* at 110. However, liability should not be extended to a point where its costs deter necessary governmental functions. *Id.*

76. Jaffe, *supra* note 55, at 219.

77. *Id.*

78. *See* Wangerin, *supra* note 74, at 101-02.

79. *Id.*

80. *Id.* at 102.

81. *Id.* at 117-18.

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

would encourage high-level police officials to insure that their subordinates follow legislative directives.[83] As *Everton* illustrated, to do otherwise is to imply an exception in the statute and allow drunk drivers to continue with the permission of a police officer.

Sounder reasoning is found in *Irwin v. Town of Ware*.[84] There, the Supreme Judicial Court of Massachusetts found a municipality liable for a police officer's failure to remove a known drunk driver from the road. Based on facts similar to those in *Everton*, the Massachusetts court stated that "the policy and planning decision to remove such drivers ha[d] already been made by the Legislature."[85] The police officer was not acting in a discretionary manner, but "carrying out . . . previously established policies or plans."[86] Liability in such a case assured that set policies were carried out.[87]

Conversely, the *Everton* decision allows police agencies to disregard their line officers' nonimplementation of set policies. One commentator has posited hypotheticals which illustrate the illogic of *Everton* when carried to its extreme.[88] If a police officer knows a crime is taking place, whether by personal observation or through a third-party report, *Everton* suggests that there is no duty to intervene; no civil liability attaches to the officer because of his failure to stop the criminal activity.[89] Such a result can hardly be seen as advancing governmental policies. Liability is needed to ensure that the laws are enforced.[90]

B. Spreading Costs

A major goal in allocating tort liability is the spreading of costs.[91] Logically, those who benefit from a service should bear the

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83. Wangerin, *supra* note 74, at 116. For a discussion arguing that the allocation of accident costs shapes behavior, see G. CALABRESI, THE COSTS OF ACCIDENTS 68-129 (1970).

84. 467 N.E.2d 1292 (Mass. 1984).

85. *Id.* at 1299.

86. *Id.* (quoting Whitney v. Worcester, 366 N.E.2d 1210, 1216 (Mass. 1977)).

87. Wangerin, *supra* note 74, at 118.

88. Note, *supra* note 73, at 650-51.

89. This "no-duty-to-interfere" reasoning is found in a long line of cases. *See supra* note 72 and accompanying text.

90. Wangerin, *supra* note 74, at 117-18. "Government is supposed to accomplish the goals it sets for itself; whatever judicial means promote that end are appropriate." *Id.* at 134-35.

91. *Id. See* Owen v. City of Independence, 445 U.S. 622 (1982). "The principal of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct." *Id.* at 657.

costs of providing that service. The public receives the benefit of police activities; the public should bear its costs.[92]

As Justice Shaw stated, "[t]he choice is whether the tort victim should bear the full cost of the injuries or whether society at large, through its government, should bear the cost of torts committed in the scope of governmental activities."[93] When the legislature chose to waive sovereign immunity, loss-spreading became the norm. Justice Shaw referred to hearings before the House Judiciary Committee which indicated that the cost of compensating governmental tort victims is a "legitimate cost of government" which the people must bear.[94]

In *Everton*, a vast number of people benefitted from the operations of the Pinellas County Sheriff's Department. Yet the loss from a tortious action in those operations was allowed to fall on a small group of victims. Reasonable attempts at risk-spreading would have led to a finding of governmental liability.[95]

C. *The Character of Injury*

Professor Jaffe has suggested that "the character and severity of the plaintiff's injury" is a factor to be considered in placing the loss resulting from a governmental tort.[96] He notes that writers and theorists in this area have not given adequate attention to this factor.[97] When the interests of plaintiffs and defendants are balanced, some types of injury cry out for a remedy more than others.[98] Cases of governmental nonfeasance which result in loss of life or limb should receive more sympathy and are more deserving of compensation than those yielding only economic harm.[99] Cases involving personal injuries and death present a much stronger foundation for expanded liability than cases involving mere finan-

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92. Note, *Police Liability for Negligent Failure to Prevent Crime*, 94 HARV. L. REV. 821, 834 (1981). Actuarially, some mistakes are inevitable. These costs should be taxed to the public as are other expenses associated with providing police service. *Id.*

93. *Everton*, 468 So. 2d at 949 (Shaw, J., dissenting).

94. *Id.* at n.13.

95. *See* Note, *supra* note 92, at 834. "[Police mistakes] should not be borne solely by the unfortunate few upon whom the injuries fortuitously fall, for governmental defendants generally possess superior loss-bearing capacity." *Id.; see also* Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1194 (1977).

96. Jaffe, *supra* note 55, at 219.

97. *Id.* at 225.

98. *Id.*

99. Wangerin, *supra* note 74, at 132.

cial losses.[100] The nature of the injury is an important distinction between *Everton* and its companion case, *Trianon Park Condominium Association v. City of Hialeah*.[101] *Trianon* involved condominium units which were damaged by leaking roofs.[102] In *Everton*, one person was killed and another seriously injured.[103] These were not speculative or economic losses but severe personal injuries. In *Everton*, the character and severity of the plaintiffs' losses clearly cried out for compensation.

D. Feasibility of Alternative Remedies

The literature also suggests that where there are other ways to solve a problem governmental liability should not be imposed.[104] In fact, the intoxicated driver in *Everton* was a defendant. However, such a suit may not provide a real remedy. Many drivers may be uninsured or unable to pay damages. As a "deep pocket," the government may be the only defendant able fully to compensate a seriously injured plaintiff.

Further, as the dissenters in *Everton* pointed out, the injuries in this type of case result from a police officer failing to perform his duty.[105] The appropriate remedy for failure to enforce the law is a writ of mandamus.[106] However, as a practical matter, mandamus cannot be used to encourage police officers to remove drunk drivers from the road. In cases like *Everton*, a writ of mandamus can only be sought after the fact. Only a systematic avoidance of duty is normally remedied by mandamus. This situation is not amenable to an after-the-fact solution through the writ process. By holding the police liable, the harm to the victim will be redressed and officers will be encouraged to take action regarding drunk drivers before accidents occur.

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100. *Id.*

101. 468 So. 2d 912 (Fla. 1985).

102. *Id.* at 914.

103. *Everton*, 426 So. 2d at 998.

104. Jaffe, *supra* note 55, at 227-28.

105. *Everton*, 468 So. 2d at 940 (Ehrlich, J., dissenting), 947 (Shaw, J., dissenting).

106. *See, e.g.*, Walbolt & Casey, *Extraordinary Writs*, in FLORIDA CIVIL PRACTICE BEFORE TRIAL 690 (4th ed. 1983). A writ of mandamus is appropriate even in discretionary action if a clear abuse of that discretion is shown. Thus, mandamus could be used to address a clearly erroneous failure to arrest under the *Everton* majority's "discretionary function" analysis. *Id.*

E. Justiciability

In rejecting police liability, the *Everton* court relied heavily on the separation of powers doctrine. Commentators have suggested that sovereign immunity is appropriate in police-conduct questions because courts lack the authority to formulate policy for the executive branch.[107]

However, Justice Shaw pointed out that the constitutional and statutory provisions governing suits against Florida governmental bodies provide such authority.[108] The juxtaposition of these provisions "*mandate[s]* that tort suits against the state be heard by the judicial branch."[109] Article II, section 3 of the Florida Constitution provides for the separation of governmental powers, but it leaves an exception for such nonseparation as "expressly provided herein."[110] The provision allowing suits against the government is such an "expressly provided" exception. For the court to override the legislature's adoption of procedures for suits against governmental entities truly usurps legislative power.

Even when a waiver of immunity has been adopted by a legislative body, courts may still refuse to decide political questions which are held to be inherently nonjusticiable.[111] While the court may be unable as a political matter to determine the appropriateness of adopting a particular policy with regard to drunk driving, that was not the issue in *Everton*. The legislature had formulated the policy and provided alternative methods of meeting its goals. The nonpolitical, *justiciable* question involved in the suit had been whether Deputy Parker was negligent in performing his duties.[112]

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107. *See, e.g.*, Note, *Negligence of Municipal Employees: Re-defining the Scope of Police Liability*, 35 U. FLA. L. REV. 720, 726-27 (1983). In *Everton*, Justice Overton emphasized that only the legislature could impose a "new duty of care"; the judiciary could not "establish [it] by judicial fiat." *Everton*, 468 So. 2d at 939.

108. *Everton*, 468 So. 2d at 946 (Shaw, J., dissenting). *See* FLA. CONST. art. X, § 13; art. V, § 1; art. I, § 21; FLA. STAT. § 768.28(1) (1985).

109. *Everton*, 468 So. 2d at 946 (Shaw, J., dissenting) (emphasis in original).

110. FLA. CONST. art. II, § 3. The section reads in full: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Id.*

111. Justice Shaw suggests this is the current application of *Commercial Carrier*. *Everton*, 468 So. 2d at 946 (Shaw, J., dissenting).

112. Further, the court did not have to address which of the legislatively mandated alternatives, such as arrest or protective custody, Deputy Parker should have chosen. Such a question may be nonjusticiable. The decision, however, not to take any of the prescribed alternatives should be open to a determination of negligence.

Such a question can be addressed by the courts under Florida's system of government.

F. Effect of Suits on Governmental Entities

Sovereign immunity has found great support in the supposed effect of suits on the public coffers.[113] Although the Florida Supreme Court glossed over this point in *Everton*,[114] it has figured prominently in other cases involving police discretion.[115]

One contention is that exposing municipalities to liability for the acts of their police officers would drain cities' resources and undermine their ability to carry out essential governmental programs.[116] Such arguments always seem to be advanced when large institutions seek to avoid liability for negligence. A similar argument was offered against the removal of tort immunity for charities. Although there is no longer a general immunity for hospitals or charitable organizations, these groups still function. The specter of crippling judgments against governmental entities is often raised, but it is found to have little substance when sovereign immunity is removed. Speaking for the Arizona Supreme Court, Justice Hays said in *Ryan v. Arizona*:[117] "We are . . . told that not only will the public treasury suffer but government will come to a standstill because its agents will be afraid to act. We can't but recall the dire predictions attendant to the [judicial abolishment of governmental tort immunity]. Arizona survived!" The Florida Legislature took into account the possible adverse effects of lawsuits on municipal budgets when it made insurance provisions for governmental entities;[118] cities may obtain liability insurance in any amount they choose. Further, the legislature forbade the awarding of punitive damages against governmental bodies and capped compensatory damages at $100,000 per person and $200,000 per incident.[119] The

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113. *See, e.g.*, Bermann, *supra* note 95, at 1176. The doctrine of sovereign immunity was first recognized in Russell v. Men of Devon, 100 Eng. Rep. 359 (1788). A major factor in the *Men of Devon* decision was the lack of public funds from which to pay a judgment. *Id.*

114. "[T]he elected representatives in the legislative branch . . . may create this new duty of care and place this fiscal responsibility on the governmental entity and its taxpayers, rather than having the judiciary establish this new duty by judicial fiat." *Everton*, 468 So. 2d at 939. The district court had, however, mentioned the danger of "increasingly larger jury verdicts" as a factor leading to its decision. *Everton*, 426 So. 2d at 1000.

115. *E.g.*, *Riss*, 240 N.E.2d at 860; *see also* Note, *supra* note 107, at 727-29.

116. *See, e.g.*, Stigler v. Chicago, 268 N.E.2d 26 (Ill. 1971).

117. 656 P.2d 597, 598 (Ariz. 1982).

118. FLA. STAT. § 768.28(13) (1985). This section is discussed at length in Justice Shaw's dissent in *Everton*, 468 So. 2d at 940 (Shaw, J., dissenting).

119. FLA. STAT. § 768.28(5) (1985).

legislative branch has taken steps to advance two policies: the permissibility of suits against government entities and the protection of government revenues. Because the legislature has made the decision to allow damages up to certain limits, it is not up to the judiciary to further protect the public coffers.

G. *Other Policy Considerations*

Everton established that governmental entities cannot be sued for their police officers' failure to arrest or detain a known drunk driver. The court indicated that "sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence."[120] Yet it is clear that police officers do not have complete discretion over their choice of tactics. They cannot perform unlawful searches and seizures, they cannot hold a suspect incommunicado, and they cannot commit other civil rights violations.[121] Police officers can be held liable for other inappropriate actions, and *Everton* can be seen as a problem of line-drawing. When an officer chooses to disregard legislatively authorized procedures, this choice should be subject to judicial review.

An important point to remember is that the plaintiff, in a case like *Everton*, if allowed to present his case, must prove all the elements of applicable tort law; causation, negligence, and damages would need to be shown for liability to attach. Only the legislatively determined duty would be established as a matter of law. The governmental defendant would be allowed to show that the officer's decision not to remove the intoxicated driver from the road was appropriate, given the circumstances, his training and experience, the constraints within which the officer must work, and other factors.

IV. Conclusion

Everton exempts municipalities from liability for their police officers' failure to take drunk drivers off the road because such a decision is judicially considered a discretionary, policy-making governmental function. Such governmental immunity from suit usually rests upon several factors: efficiency in meeting governmental goals and cost-spreading along with analyses of the character of

120. *Everton*, 468 So. 2d at 939 (quoting Wong v. Miami, 237 So. 2d 132, 134 (Fla. 1970)).

121. *See, e.g.*, Monroe v. Pape, 365 U.S. 167 (1961).

the plaintiff's injury, the feasibility of alternative remedies, the separation of governmental powers, and the fiscal effects of suits on governmental bodies. When *Everton* is examined in light of these factors, it is clear that governmental immunity is not appropriate in cases involving police options in dealing with drunk drivers. Far from defeating governmental goals, the finding of liability in such circumstances would help increase governmental efficiency, spread costs among those who profit from police protection, advance legislative policies, and preserve the separation of powers.

Because of the serious social costs of drunk driving, governments must assume responsibility for the way their police officers deal with this problem. Liability for an officer's negligence in failing to remove a drunk driver from Florida's highways should be imposed.

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