MTLA Spring Seminar – MEDICAL ISSUES IN PERSONAL INJURY LITIGATION

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Evidence = *anything* that sways/persuades any juror to decide for or against you.

How do you know what jurors really think about the evidence?
How do you know what evidence jurors want to see?

How focus can help you answer these crucially important questions.

Paper medical records vs. the EMR. What's the evidentiary difference?

The purpose of tort law: What does it tell us about the evidence we need to offer?

Cases decided by citizens from the community
Deterrence/safety
Foreseeability
compensation

Jury instructions.

Statutes and Case law.

MCA 1-1-204
Busta vs. Columbus Hosp. Corp.
Fisher vs. Swift Transp. Co. Inc.
Newman vs. Lichfield
Bassett vs. Lamantia

Opening statements – what evidence should you emphasize?

Who are YOU? How is "who you are" evidence to the jury?

Why, how do we lose cases? What can we do about it?

Medical bills - Do you ask for them?

1-1-204. Terms denoting state of mind. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(1) "Corruptly" means a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to or to some other person.

(2) "Knowingly" means only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of the act or omission.

(3) "Malice" and "maliciously" mean a wish to vex, annoy, or injure another person or an intent to do a wrongful act, established either by proof or presumption of law.

(4) "Neglect", "negligence", "negligent", and "negligently" mean a want of the attention to the nature or probable consequences of the act or omission that a prudent person would ordinarily give in acting in the person's own concerns.

(5) "Willfully", when applied to the intent with which an act is done or omitted, means a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire any advantage.

History: En. Sec. 16, Pol. C. 1895; re-en. Sec. 16, Rev. C. 1907; amd. Sec. 4, Ch. 4, L. 1921; re-en. Sec. 16, R.C.M. 1921; Cal. Pol. C. Sec. 17; re-en. Sec. 16, R.C.M. 1935; amd. Sec. 1, Ch. 25, L. 1947; amd. Sec. 11-114, Ch. 264, L. 1963; amd. Sec. 3, Ch. 309, L. 1977; R.C.M. 1947, 19-103(part), (19) thru (23); amd. Sec. 5, Ch. 61, L. 2007.

276 Mont. 342
Supreme Court of Montana.

Ida O. **BUSTA**, as Personal Representative of the Estate of Delbert F. **Busta**, on behalf of the heirs of Delbert F. **Busta**, Plaintiff and Respondent,
v.
COLUMBUS HOSPITAL CORPORATION, Defendant and Appellant.

No. 95–050.
|
Submitted on Briefs Jan. 17, 1996.
|
Decided May 10, 1996.

Synopsis

Personal representative of estate of patient who had suffered fatal injuries when he attempted to leave hospital room through third-floor window and fell to ground brought action against hospital, and the District Court, Eighth Judicial District, County of Cascade, Thomas M. McKittrick, J., entered judgment on jury verdict which awarded $5,000 to patient's estate and $800,000 to patient's heirs and apportioned fault at 70% to hospital and 30% to patient, and denied hospital's motions for new trial and offset of damages. Hospital appealed, and the Supreme Court, Trieweiler, J., held that: (1) in cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that party's conduct was cause-in-fact of damage alleged, and no consideration of foreseeability is required in connection with causation, overruling *Kitchen Krafters, Inc.*, 242 Mont. 155, 789 P.2d 567; (2) trial court did not abuse its discretion in admitting photograph of patient to which poem written by his granddaughter was attached; (3) letter sent by plaintiff's counsel to Veterans' Administration (VA) seeking determination that death was related to patient's service-related condition was properly excluded; (4) any error in failing to define proximate cause in jury instruction was harmless; (5) error in failing to instruct jury on cause-in-fact was harmless; and (6) no factual basis existed to offset VA benefits received by patient's widow against award.

Affirmed.

Gray, J., concurred specially and filed opinion.

Erdmann, J., concurred in part and dissented in part and filed opinion in which Turnage, C.J., joined.

Attorneys and Law Firms

****124** ***346** James R. Walsh and Dennis P. Clarke, Smith, Walsh, Clarke & Gregoire, Great Falls, for Appellant.

Dennis Patrick Conner, Great Falls, for Respondent.

Opinion

TRIEWEILER, Justice.

The plaintiff, Ida O. Busta, filed her complaint in the District Court for the Eighth Judicial District in Cascade County in which she sought compensation for damages to Delbert F. Busta pursuant to § 27–1–501, MCA, and to his heirs pursuant to § 27–1–513, MCA, based on her allegation that Delbert's death was caused by the negligence of the defendant, Columbus Hospital Corporation. Following trial of the issues raised by the parties' pleadings, a Cascade County jury returned its verdict in which it found that Delbert's injuries and death were caused by the negligence of Columbus and the contributory negligence of Delbert and apportioned seventy percent of fault to the Hospital and thirty percent of fault to Delbert. The jury found that ***347** Delbert and his estate were damaged ****125** in the amount of $5,000 and that his heirs were damaged in the amount of $800,000 as a result of his death. Based on the jury's apportionment of liability, the District Court entered judgment in favor of Delbert's estate in the amount of $3,500 and in favor of his heirs in the amount of $560,000. Columbus appeals from the judgment of the District Court, from the order of the District Court denying its motion for a new trial, and from the District Court's denial of its motion for offset against the judgment pursuant to § 27–1–308, MCA. We affirm the judgment and orders of the District Court.

The issues raised by Columbus on appeal are as follows:

1. Did the District Court err when it admitted a photographic exhibit offered by the plaintiff which depicted the decedent, Delbert Busta, and included a tribute from his granddaughter?

342 Mont. 335
Supreme Court of Montana.

Wade **FISHER**, Plaintiff and Appellant,
v.
SWIFT TRANSPORTATION CO., INC.,
and J & D Truck Repair, Inc., Defendants,
Appellees and Cross–Appellants.

No. DA 06–0766.
|
Submitted on Briefs Oct. 3, 2007.
|
Decided April 1, 2008.

Synopsis

Background: State highway patrol officer brought negligence claims against owner of semi-truck trailer and against wreckage-removal company, alleging that while plaintiff was on scene of accident involving another semi-truck side-swiping two passenger vehicles parked on side of interstate freeway during snowstorm, and after defendant owner's semi-truck trailer, which had been driving in the blizzard, had slid into plaintiff's patrol car, plaintiff was crushed between his patrol car and defendant's semi-truck trailer when trailer, which company had unhooked from winch line on company's wrecker, slid across ice. The District Court, First Judicial District, Lewis and Clark County, Dorothy McCarter, J., granted in part and denied in part semi-truck owner's motion for summary judgment, and certified the issue for appellate review. Plaintiff appealed and semi-truck owner cross-appealed.

Holdings: The Supreme Court, W. William Leaphart, J., held that:

statutes provided basis for heightened duty of care;

plaintiff was reasonably foreseeable plaintiff, as element for legal duty; but

genuine issue of material fact as to whether injury to plaintiff, from alleged intervening cause relating to conduct of wreckage-removal company, was foreseeable to driver of defendant's semi-truck trailer, precluded summary judgment for defendant based on a determination of absence of proximate cause.

Affirmed in part, reversed and remanded in part.

John Warner, J., filed a dissenting opinion, in which Karla M. Gray, C.J., and Jim Rice, J., joined.

Attorneys and Law Firms

****605** For Appellant: James G. Hunt and Michael L. Fanning, Hunt Law Firm, Helena, Montana.

For Appellees: John F. Haffey and Robert J. Phillips, Phillips Boyher & Hedger, P.C., Missoula, Montana (**Swift**), Dan L. Spoon, Spoon Gordon, PC, Missoula, Montana (J & D).

Opinion

Justice W. WILLIAM LEAPHART delivered the Opinion of the Court.

***337** ¶ 1 Officer Wade **Fisher** ("**Fisher**") appeals the District Court's partial grant of summary judgment in favor of **Swift** Transportation Company ("**Swift**"). **Swift** cross-appeals the District Court's partial denial of its summary judgment motion. We affirm in part, and reverse and remand in part.

¶ 2 We restate the issues as follows:

¶ 3 I. Did the District Court err by partially denying **Swift's** motion for summary judgment, and concluding that **Swift** owed **Fisher** a duty of care as a matter of law?

¶ 4 II. Did the District Court err in partially granting summary judgment to **Swift** on the issue of causation, and concluding that **Fisher's** injury was unforeseeable as a matter of law?

BACKGROUND

¶ 5 An unseasonably severe storm hit the Sieben Flats area on April 28, 2004. Wade **Fisher**, an officer with the Montana State Highway Patrol, was called to respond to an accident on Interstate 15. The storm had created white-out conditions on the highway. Many motorists

364 Mont. 243
Supreme Court of Montana.

Judith NEWMAN, as Personal Representative of the Estate of Karlye Newman, Plaintiff and Appellant,
v.
Robert LICHFIELD, and World Wide Association of Specialty Programs and Schools, Inc., Defendants and Appellees.

No. DA 10–0548.
|
Submitted on Briefs: Dec. 14, 2011.
|
Decided: March 6, 2012.

Synopsis

Background: Mother of student who committed suicide brought negligence and wrongful death action against boarding school association and association's owner. The District Court of the Twentieth Judicial District, County of Sanders, John Warner, J., entered judgment on a jury verdict for association and association's owner, and mother appealed.

Holdings: The Supreme Court, Patricia O. Cotter, J., held that:

evidence of what the association and its owner knew regarding whether boarding school's program was designed for and successful with suicidal teens was admissible, where boarding school belonged to the association and association designed school's program;

genuine issues of material fact precluded summary judgment on issue of whether association and owner were joint tortfeasors with boarding school; and

trial court did not abuse its discretion by barring testimony of journalist who had investigated association's boarding schools.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

****627** For Appellant: Lawrence A. Anderson, Attorney at Law, Great Falls, Montana, James A. Manley, Ann L. Moderie, Manley Law Firm, Polson, Montana, Elizabeth A. Best, Best Law Offices, P.C., Great Falls, Montana, Thomas J. Beers, Beers Law Offices, Missoula, Montana.

For Appellees: Sue Ann Love, Jardine, Stephenson, Blewett & Weaver, P.C., Great Falls, Montana, William S. Kronenberg, Murphy, Pearson, Bradley & Feeney, San Francisco, California.

Opinion

Justice Patricia O. Cotter delivered the Opinion of the Court.

***244** ¶ 1 Judith Newman (Newman), mother of and personal representative of the estate of Karlye Newman, appeals from certain pretrial and trial rulings made in the Twentieth Judicial District Court of Sanders County, Montana, concerning the suicidal death of Karlye while at a boarding school for troubled teenagers. The District Court limited the scope of evidence regarding foreseeability, denied Newman's motion for partial summary judgment as to joint liability for the tortious conduct of the defendants, and excluded certain evidence of the history of the defendants' schools and programs. A jury found that defendants Robert Lichfield (Lichfield) and the World Wide ***245** Association of Specialty Programs and Schools, Inc.[1] (WWASP), were not negligent, did not commit deceit or negligent misrepresentation, and were not liable for the possible wrongful acts of other defendants regarding Karlye's death.

1 Also known as World Wide Association of Specialty Programs, Inc.

¶ 2 We affirm in part, reverse in part, and remand for a new trial.

ISSUES

¶ 3 Newman raises three issues on appeal. A restatement of the issues is:

391 Mont. 309
Supreme Court of Montana.

Robert D. **BASSETT**, Plaintiff and Appellant,
v.
Paul LAMANTIA; City of Billings,
Defendants and Appellees.

OP 17-0322
|
Argued and Submitted: November 29, 2017
|
Decided: May 8, 2018

Synopsis

Background: Bystander brought negligence action against city and police officer, alleging that officer tackled bystander during pursuit of suspect, causing shoulder injury. After removal to federal court, the United States District Court for the District of Montana, Sam E. Haddon, D.J., granted summary judgment for officer and city. Bystander appealed, and the Court of Appeals, 858 F.3d 1201, certified question.

Holdings: The Supreme Court, Laurie McKinnon, J., held that:

public-duty doctrine is inapposite and not relevant when the negligence action is premised upon the existence of a duty other than the law enforcement officer's duty to protect and preserve the peace, and

as a matter of first impression, where the plaintiff claims he was directly injured by a law enforcement officer's affirmative acts, the officer owes the plaintiff a legal duty to exercise the same care that a reasonable officer with similar skill, training, and experience would under the same or similar circumstances.

Question answered.

Beth Baker, J., concurred with opinion in which Rice, J., and Murnion, District Court Judge sitting by assignment, joined.

****302** ORIGINAL PROCEEDING: Certified Question, United States Court of Appeals for the Ninth Circuit, Cause No. DV 15-35045, Alex Kozinski and William A. Fletcher, Circuit Judges, and Frederic Block, Senior District Judge for the Eastern District of New York, sitting by designation

Attorneys and Law Firms

For Appellant: R. Russell Plath (argued), Hayley Kemmick, Russ Plath Law, LLC, Billings, Montana

For Appellees: Harlan B. Krogh (argued), Eric Edward Nord, Crist, Krogh & Nord, PLLC, Billings, Montana (for City of Billings), Brendon J. Rohan (argued), Poore, Roth & Robinson, P.C., Butte, Montana (for Paul Lamantia)

For Amici Curiae: Justin P. Stalpes (argued), Beck, Amsden & Stalpes, PLLC, Bozeman, Montana (for MTLA), Marty Lambert, Gallatin County Attorney, Bozeman, Montana (for MCAA, MSPOA, MACOP, and MPPA), Todd Hammer, Tammy Wyatt-Shaw, Benjamin J. Hammer, Hammer, Quinn & Shaw, PLLC, Kalispell, Montana (for MLCT, IMLA and MACo)

Opinion

Justice Laurie McKinnon delivered the Opinion of the Court.

***310** ¶ 1 The United States Court of Appeals for the Ninth Circuit presented the following certified question to this Court on May 30, 2017: "Whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff?" We accepted the question on June 6, 2017, and held oral argument on November 29, 2017. We exercise our authority pursuant to M. R. App. P. 15(4) and reformulate the question as:

> *Under Montana law, when a plaintiff claims he was injured directly by an officer's affirmative acts, does the public-duty doctrine exclude all duties that may arise* ****303** *pursuant*

to generally applicable principles of negligence?

¶ 2 For the reasons set forth below, we conclude that the answer to the reformulated question is no. Law-enforcement officers owe the public a general duty to preserve the peace and protect the public from harm inflicted by third persons or other independent sources. The public-duty ***311** doctrine recognizes that, because the duty to protect [1] is owed to the public generally, an officer does not have a legal duty to protect each individual plaintiff absent a special relationship. Accordingly, breach of that general duty is actionable only in the form of criminal prosecution or administrative disposition; it is not a proper basis for an individual plaintiff's negligence claim. However, independent of the duty to protect and based on generally applicable principles of negligence, an officer may owe a legal duty to a person injured directly by the officer's affirmative actions. The public-duty doctrine only applies to an officer's duty to protect the general public, and therefore does not apply to exclude the legal duty an officer may owe to a person injured directly by the officer's affirmative actions. In this case, Robert **Bassett**—a homeowner injured in the course of Officer Paul Lamantia's pursuit of a criminal suspect—alleges he was injured directly by Lamantia's affirmative acts. Therefore, the public-duty doctrine is inapposite and we find that Lamantia owed **Bassett** a legal duty to exercise the same care that a reasonable officer with similar skill, training, and experience would under the same or similar circumstances. [2]

1 When we refer to the duty to protect, this includes the duty to preserve the peace. *See*, *e.g.*, *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972 (noting a law-enforcement officer's "duty to protect and preserve the peace").

2 We confine our analysis and holding in this case to the facts giving rise to the certified question.

FACTUAL AND PROCEDURAL BACKGROUND

¶ 3 The United States Court of Appeals for the Ninth Circuit submitted factual information in its certification order, which we summarize as follows.

¶ 4 Officer Lamantia and his partner responded to a neighborhood disturbance around 12:30 a.m. At the scene, Lamantia observed a male suspect running into a driveway. The suspect jumped over a retaining wall and proceeded into **Bassett**'s backyard. Lamantia identified himself as a police officer and ordered the suspect to stop. The suspect continued to run and Lamantia followed on foot, jumping over the retaining wall but dropping his flashlight in the process.

¶ 5 In the meantime, **Bassett** came out of his house to investigate the commotion. Lamantia, searching for his flashlight, heard footsteps behind him and turned around to see **Bassett** approaching. Fearing for ***312** his safety, Lamantia tackled **Bassett** to the ground. Lamantia released **Bassett** as soon as he realized that **Bassett** was not a threat. **Bassett** then pointed Lamantia in the suspect's direction and Lamantia continued pursuit. Later that morning, Lamantia returned to check on **Bassett**, who declined an ambulance or medical help. A few hours later, however, **Bassett** called the police department to report that he was injured during his encounter with Lamantia. **Bassett** was subsequently diagnosed with a torn rotator cuff.

¶ 6 **Bassett** later sued Lamantia and the City of Billings in state court. **Bassett** alleged a state-law negligence claim against Lamantia for failing to exercise reasonable care in performing his duties and a 42 U.S.C. § 1983 violation. Lamantia and the City removed the case to federal court, where the United States District Court entered summary judgment in their favor on both claims. Regarding the negligence claim, the court found that the public-duty doctrine shielded Lamantia and the City from liability because no special relationship existed. **Bassett** appealed the court's decision concerning only the negligence claim to the Ninth Circuit Court of Appeals. Based on these facts, the Ninth Circuit certified to this Court the public-duty doctrine question. [3]

3 The scope of our analysis is limited to an answer of the reformulated certified question. *See Frontline Processing Corp. v. Am. Econ. Ins. Co.*, 2006 MT 344, ¶ 31, 335 Mont. 192, 149 P.3d 906. The Montana Trial Lawyers Association (MTLA); The Montana League of Cities and Towns, International Municipal Lawyers Association, and Montana Association of Counties; and The Montana County Attorneys

Association, Montana Sheriffs and Peace Officers Association, Montana Police Protective Association, and Montana Association of Chiefs of Police filed briefs as amici curiae.

Some of the issues raised by the parties and amici curiae are beyond the scope of the reformulated certified question. For example, MTLA filed an amicus brief in support of **Bassett**, arguing that the public-duty doctrine is unconstitutional. Multiple Justices have questioned the constitutionality of the public-duty doctrine throughout the years—Justice Nelson notably and continually asserted that the doctrine frustrates Article II, Section 18 of the Montana Constitution. *See*, *e.g.*, *Gonzales v. City of Bozeman*, 2009 MT 277, ¶¶ 54-87, 352 Mont. 145, 217 P.3d 487 (Nelson, J., dissenting); *Gonzales*, ¶ 53 (Cotter, J., concurring in part and dissenting in part) (agreeing with "Justice Nelson that the question of the Public Duty Doctrine's continuing viability is open to challenge in the proper case"); *Doris Nelson v. State*, 2008 MT 336, ¶¶ 64-78, 346 Mont. 206, 195 P.3d 293 (Nelson, J., concurring in part and dissenting in part) (hereinafter *Doris Nelson*); *Prosser v. Kennedy Enters., Inc.*, 2008 MT 87, ¶¶ 60-101, 342 Mont. 209, 179 P.3d 1178 (Nelson, J., dissenting); *Massee v. Thompson*, 2004 MT 121, ¶¶ 65-96, 321 Mont. 210, 90 P.3d 394 (Nelson, J., specially concurring in part and dissenting in part). However, amici curiae "are not parties and cannot assume the functions of parties, nor create, extend or enlarge issues." *Reichert v. State*, 2012 MT 111, ¶ 26, 365 Mont. 92, 278 P.3d 455 (citations omitted). Therefore, we only consider amici's arguments "insofar as they coincide with the issues raised by the parties to the action." *Reichert*, ¶ 26. Neither party raised the constitutionality of the public-duty doctrine, and we accordingly decline to consider that issue as we answer the reformulated certified question.

**304 *313 STANDARD OF REVIEW

¶ 7 M. R. App. P. 15(3) permits this Court to answer a question of law certified to it by another qualifying court. Accordingly, as a question of law, our review of a certified question is "purely an interpretation of the law as applied to the agreed facts underlying the action." *N. Pac. Ins. Co. v. Stucky*, 2014 MT 299, ¶ 18, 377 Mont. 25, 338 P.3d 56 (quoting *Van Orden v. United Servs. Auto. Ass'n*, 2014 MT 45, ¶ 10, 374 Mont. 62, 318 P.3d 1042).

DISCUSSION

¶ 8 Preliminarily, we observe from the parties' briefing and statements during oral argument that not all facts contained in the certification order are necessarily agreed upon. For example, **Bassett** disputes whether he approached Lamantia prior to being tackled; instead, he maintains that he was standing in his front yard near his house when tackled. We can nonetheless answer the certified question without relying on potentially disputed facts, as our inquiry deals exclusively with whether Lamantia owed **Bassett** a legal duty. Importantly, the certification order specifies that **Bassett** alleges Lamantia failed to exercise reasonable care in performing his duties when Lamantia tackled **Bassett** to the ground. Because our answer to the reformulated certified question depends entirely on what specific duty **Bassett** alleges Lamantia owed him, disagreement over other facts is immaterial to our analysis.

¶ 9 As another preliminary matter, we explain our reasons for reformulating the certified question. The question as originally asked risks an overly broad answer that could expand application of the public-duty doctrine to exclude other applicable duties. We also do not want to improperly blend negligence elements, such as duty and causation. The question as originally phrased asked us to consider whether the public-duty doctrine shielded "a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the" plaintiff's harm. In his briefing, **Bassett** urges us to hold that the public-duty doctrine does not apply in cases where an officer is "the direct and sole cause of the harm suffered by the plaintiff." Causation, however, is a separate element of a negligence claim, unrelated to identifying any legal duty the defendant may owe the plaintiff. ***314** *Lopez v. Great Falls Pre-Release Servs.*, 1999 MT 199, ¶ 18, 295 Mont. 416, 986 P.2d 1081. The public-duty doctrine applies only to the legal duty owed, not to causation. Further, any question of causation must be left to the fact finder. Our reformulated certified question allows for consideration of whether Lamantia owed **Bassett** a duty, independent of the duty to protect and preserve the peace. **Bassett** contends that he was injured directly by Lamantia's affirmative **305 acts, not from harm inflicted by a third party. Specifically, **Bassett** is not claiming that Lamantia failed to protect **Bassett** from an outside harm; instead, **Bassett** is claiming

that Lamantia's affirmative act of tackling him to the ground was negligent. Therefore, we reformulated the certified question to allow for inquiry of whether a duty, independent of the duty to protect and preserve the peace, is owed when a person in **Bassett**'s circumstances alleges he was directly injured by an officer's affirmative acts.

¶ 10 To succeed in a negligence claim, a plaintiff must establish that the defendant had a legal duty; the defendant breached that duty; the breach caused injury; and damages. *Lopez*, ¶ 18. Thus, any claim of negligence first requires that the defendant owe a legal duty to the plaintiff. *Lopez*, ¶ 18. Whether a legal duty exists is a matter of law to be decided by the court. *Massee*, ¶ 27. In determining whether duty exists, we consider whether imposing a duty comports with public policy and "whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 17, 342 Mont. 335, 181 P.3d 601. Thus, duty is mainly a question of foreseeability—whether the person injured was within the scope of risk created by the defendant's action. *Lopez*, ¶ 28.

¶ 11 Law-enforcement officers assume an obligation to the public to protect and preserve the peace. Indeed, law enforcement's duty to protect arises from its overarching duty to furnish police protection to the public in general. The public-duty doctrine, a rule of common law negligence, provides that a law-enforcement officer does not owe a legal duty to an individual plaintiff where the plaintiff alleges he or she suffered harm from the officer's breach of the general duty to protect and preserve the peace. *Nelson*, ¶ 21. In cases where the public-duty doctrine applies to exclude an officer's duty, no duty is owed because "a governmental entity cannot be held liable for an individual plaintiff's injury resulting from a governmental officer's breach of a duty owed to the general public rather than to the individual plaintiff." *Massee*, ¶ 41; *Gatlin-Johnson v. City of Miles City*, 2012 MT 302, ¶ 14, 367 Mont. 414, 291 P.3d 1129. The doctrine exists to address and define the element of duty and is premised upon the principle that each discretionary ***315** choice made by an officer while carrying out his professional duty to protect the general public should not be subject to a jury's review with the benefit of hindsight.

¶ 12 The public-duty doctrine "serves the important purpose of preventing excessive court intervention into the governmental process by protecting the exercise of law enforcement discretion," *Nelson*, ¶ 21, and protects government entities "from liability for failure to adequately enforce general laws and regulations, which were intended to benefit the community as a whole," *Gatlin-Johnson*, ¶ 14 (quoting E. McQuillin, *The Law of Municipal Corporations*, § 53.04.25 at 195-97 (3d ed. 2003)). Because of the often split-second decisions made by law enforcement, officers must be afforded "broad discretion to proceed without fear of civil liability in the unflinching discharge of their duties." *Ashburn v. Anne Arundel County*, 306 Md. 617, 510 A.2d 1078, 1084 (1986) (quoting *Morgan v. District of Columbia*, 468 A.2d 1306, 1311 (D.C. 1983)) (internal quotations omitted). The doctrine "expresses the policy that a police officer's duty to protect and preserve the peace is owed to the public at large and not to individual members of the public." *Nelson*, ¶ 21, *accord Gatlin-Johnson*, ¶ 14; *Massee*, ¶ 41. *See also Kent v. City of Columbia Falls*, 2015 MT 139, ¶ 23, 379 Mont. 190, 350 P.3d 9 (quoting *Gonzales*, ¶ 20) (reiterating that an officer's "duty to protect and preserve the peace is owed to the public at large and not to individual members of the public" and therefore the public-duty doctrine provides that an officer has "no duty to protect a particular person absent a special relationship"). The doctrine has acquired the simple and oxymoronic description of "a duty owed to all is a duty owed to none," because a government entity or person has no duty to each individual when the government owes that same duty to each and every person. *Massee*, ¶ 41 (quoting *Nelson*, ¶ 21). Therefore, we apply the public-duty doctrine to cases where the plaintiff claims that an ****306** officer breached his duty to protect and preserve the peace. [4]

4 There are exceptions to the public-duty doctrine where a special relationship exists between a government entity or person and the injured plaintiff. *Nelson*, ¶ 22. The parties agree that no special relationship exists between Lamantia and **Bassett**.

¶ 13 To better distinguish the duty to protect and preserve the peace from other independent duties a law-enforcement officer may owe an individual plaintiff, we begin by examining development of the public-duty doctrine and its application in Montana. In 1856, the United States Supreme Court first recognized the public-duty doctrine in *South v. Maryland*, 59 U.S. 396, 401, 18 How. 396, 15 L.Ed. 433 (1856), where a plaintiff, ***316** kidnapped and held for ransom, contended that the sheriff knew about the incident but neglected to "protect

and defend" him. The Court noted the plaintiff did not allege the sheriff breached a duty in which the sheriff was personally interested, such as execution of a writ, but instead the plaintiff alleged that the sheriff neglected to "*preserve the public peace*." *South*, 59 U.S. at 401 (emphasis added). The Court emphasized that the sheriff's alleged failure to preserve the public peace was a "public duty, for neglect of which he is amenable to the public, and punishable by indictment only." *South*, 59 U.S. at 403. The Court reasoned that such an interpretation was consistent with precedent, as "no instance [could] be found where a civil action [was] sustained against [a sheriff] for his default or misbehavior as *conservator of the peace* by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections." *South*, 59 U.S. at 403 (emphasis added). The Court explained that the sheriff owed no duty to the plaintiff because the individual plaintiff's rights were not "restrained or hindered by the malicious *act* of the sheriff." *South*, 59 U.S. at 403 (emphasis added).

¶ 14 Although not specifically naming it as such, Montana adopted the public-duty doctrine in *Annala v. McLeod*, 122 Mont. 498, 206 P.2d 811 (1949), relying on *South* to describe the doctrine as applying to the sheriff's general duty to preserve the peace. The plaintiff alleged that "riotous persons" damaged his property and that the sheriff "failed and neglected to carry out his duties as sheriff" as required by law. *Annala*, 122 Mont. at 499, 206 P.2d at 812. This Court, citing *South* extensively, held the sheriff was "*the conservator of the public peace* and not liable for an injury to the person or property of an individual occasioned from riotous assembly or mob, unless made so by Constitution or statute." *Annala*, 122 Mont. at 500, 206 P.2d at 813 (emphasis added).

¶ 15 This Court's analysis of the public-duty doctrine remained focused on law enforcement's general duty to protect and preserve the peace in *Phillips v. City of Billings*, 233 Mont. 249, 758 P.2d 772 (1988). In *Phillips*, we held that an officer was not liable for an alleged breach of the duty to protect when he failed to arrest a suspected intoxicated driver where there was no supporting probable cause. *Phillips*, 233 Mont. at 253, 758 P.2d at 775. We refused to "find a duty based on the officers' *general duty to protect the traveling public*." *Phillips*, 233 Mont. at 253, 758 P.2d at 775 (emphasis added). The plaintiff contended that the officer also had a duty to act with reasonable care under the circumstances, but we determined that the officer did not have a duty ***317** to act reasonably absent "a showing that the officers had a duty to protect [the plaintiff] from danger posed by [the officers]." *Phillips*, 233 Mont. at 253, 758 P.2d at 775.

¶ 16 We again addressed an officer's duty to protect a plaintiff from third-party harm in *Nelson v. Driscoll*, where we also first named the public-duty doctrine. In *Nelson*, an officer pulled over a suspected drunk driver. *Nelson*, ¶ 7. The officer did not believe he had probable cause to place the driver under arrest, but nonetheless did not want her driving. *Nelson*, ¶ 10. Therefore, he requested that she park the car and offered to give her and her passenger a ride home. *Nelson*, ¶ 10. Both refused a ride and proceeded to walk along the roadway. *Nelson*, ¶¶ 11-12. As she walked away, the driver was struck and killed by a vehicle operated by an intoxicated driver. *Nelson*, ¶ 13. Her survivors filed suit against the officer, alleging the officer negligently failed to protect her from the harm ****307** she suffered. *Nelson*, ¶¶ 14, 23. We noted that an officer owes a general duty to protect and preserve the peace to the public at large, not to individual members of the public. *Nelson*, ¶ 21. However, we held that a special relationship existed because the officer undertook specific actions to ensure the driver's safety and, by taking those actions, the officer assumed the duty to protect her from harm. *Nelson*, ¶ 38. Concluding the officer owed the driver a legal duty to protect her from harm inflicted by a third party because of the special relationship, we instructed that the question of whether the officer breached that legal duty was a question of fact for the jury to decide. *Nelson*, ¶ 40.

¶ 17 Following *Nelson*, our analysis of the public-duty doctrine remained focused on cases where officers allegedly breached a duty to protect the victim from outside or third-party harm. *See*, *e.g.*, *Gonzales*, ¶¶ 20, 26 (holding that the police officers were not liable for failing to protect a store clerk from harm inflicted by a robber because the only duty the officers owed the store clerk was one of a general duty to protect and preserve the peace, which is owed to the public at large and not to an individual member of the public); *Eklund v. Trost*, 2006 MT 333, ¶¶ 36-39, 335 Mont. 112, 151 P.3d 870 (holding that an officer had a duty to protect a person injured by the driver of a car the officer was pursuing in a high-speed chase because a special relationship existed based on statute); *Massee*, ¶¶ 42-43 (holding that a sheriff had a duty to protect a wife from her husband because a special

relationship existed based on statute). We continually recognize that the public-duty doctrine "expresses the policy that an officer's overarching *duty to protect and preserve the peace* is owed to the public at large, not to ***318** individual members of the public." *Doris Nelson*, ¶ 41 (citing *Eklund*, ¶ 33, and *Nelson*, ¶ 21) (emphasis added).

¶ 18 In this case, **Bassett** is not alleging that Lamantia breached a general duty to protect the public; instead, **Bassett** is alleging that Lamantia acted negligently in tackling him to the ground as Lamantia pursued a suspect. The public-duty doctrine is therefore inapposite and not relevant when, as here, the negligence action is premised upon the existence of a duty other than the duty to protect and preserve the peace. "A duty owed to all is a duty owed to none" does not apply when the alleged duty breached is not owed to "all," but rather owed to an individual. The foregoing precedent demonstrates that expanding the public-duty doctrine to apply to other duties owed to an individual in **Bassett**'s position, arising from generally applicable negligence principles, would be both analytically unsound and clearly inconsistent with the underlying principles justifying the doctrine. While an officer must be afforded discretion in protecting the public and preserving the peace, it does not follow that an officer owes no other duties to those he encounters as he carries out his job responsibilities.

¶ 19 Although we have not previously considered whether a duty independent of the duty to protect and preserve the peace arises where the plaintiff alleges he was directly injured by an officer's negligent affirmative acts, our precedent does recognize that the public-duty doctrine is not applicable in every negligence case where the defendant is a government entity or person. *Gatlin-Johnson*, ¶ 17. As we explained in *Gatlin-Johnson*, the public-duty doctrine "was not intended to apply in every case to the exclusion of any other duty a public entity may have. It applies only if the public entity truly has a duty owed only to the public at large ... [and] does not apply where the government's duty is defined by other generally applicable principles of law." *Gatlin-Johnson*, ¶ 17. When presented with a negligence claim where the defendant is a governmental entity or person, courts must first identify the alleged duty breached and determine whether the "defendant has a specific duty to a plaintiff arising from 'generally applicable principles of law' that would support a tort claim." *Kent*, ¶ 39 (quoting *Gatlin-Johnson*, ¶ 17). In most instances involving law enforcement, the alleged duty breached is the duty to protect and preserve the peace. The public-duty doctrine applies in those cases and provides that an officer does not owe a plaintiff a legal duty absent a special relationship. However, in instances where the facts inform that an officer owed a duty to an individual, independent ****308** of the general duty to protect and preserve the peace owed to the public, the public-duty doctrine does not foreclose a plaintiff's negligence claim. The inquiry ***319** necessarily focuses on identifying what duty, if any, is owed to whom. Where the plaintiff claims he was *directly* injured by an officer's *affirmative* acts, the officer owes the plaintiff a legal duty to exercise the same care that a reasonable officer with similar skill, training, and experience would under the same or similar circumstances.

¶ 20 Recently, in *Kent v. City of Columbia Falls*, we distinguished a claim of negligence based on an affirmative act by a government entity or person from a claim of negligence based on a failure to protect or preserve the peace. *Kent*, ¶¶ 47-50. We observed that in *Cope v. Utah Valley State College*, 342 P.3d 243, 255 (Utah 2014), the Utah Supreme Court reasoned that the government's affirmative actions "had advanced to a stage where it had a duty to act in a reasonable manner to prevent injuries." We analogized *Cope* to the situation in *Kent*, holding that the "City was actively involved in the design of the path, knew of its dangerous grade, had the statutory authority to compel a modification, and yet exercised its statutory and contractual authority to approve it." *Kent*, ¶ 52. Thus, we held the public-duty doctrine did not apply because "the City could be held liable to [the plaintiff] should [she] establish her claims premised on violation of statutory duty and/or the voluntary assumption of a duty to act with ordinary care" and remanded the case for a trial on the merits. *Kent*, ¶¶ 52-53.

¶ 21 Differentiating between a plaintiff's claim that he was injured because law enforcement breached a duty to protect or preserve the peace and a plaintiff's claim that he was injured directly by an officer's affirmative acts reflects our recognition that the public-duty doctrine does not apply simply because the defendant is a government officer or agency. *Gatlin-Johnson*, ¶ 17. *See also Kent*, ¶ 47; *Phillips*, 233 Mont. at 253, 758 P.2d at 775. Our precedent distinguishes between the government's duty "truly ... owed only to the public at large" and a duty situated in "other generally applicable principles of law."

Kent, ¶ 38 (quoting *Gatlin-Johnson*, ¶ 17). The distinction is also supported by other states' reasoning. *See, e.g., Cope*, 342 P.3d at 251 (limiting application of the public-duty doctrine to omissions and clarifying that the doctrine does not include affirmative acts); *Jones v. Maryland*, 425 Md. 1, 38 A.3d 333, 347 (2012) (recognizing that the public-duty doctrine "does not apply if law enforcement is not engaged in protecting the public from an injurious force caused by a member of the public, but rather is itself the alleged injurious force"); *Strickland v. Univ. of N.C. at Wilmington*, 213 N.C.App. 506, 712 S.E.2d 888, 893 (2011) (explaining that the public-duty doctrine applies only to duty, not causation, and shields "a governmental entity from liability only where the entity was ***320** not the impetus for, *i.e.*, did not bring about, the injurious force"); *Virginia v. Burns*, 273 Va. 14, 639 S.E.2d 276, 279 (2007) (refusing to extend the public-duty doctrine to include a road construction crew's affirmative acts in creating a dangerous roadway condition); *Liser v. Smith*, 254 F.Supp.2d 89, 102 (D.D.C. 2003) (noting that the public-duty doctrine deals specifically with a public official's duty to protect individual members of the general public and is "wholly inapposite in a case ... where the alleged harm was brought about directly by the officers themselves, and where there is no allegation of a failure to protect"); *Gleason v. Peters*, 568 N.W.2d 482, 484, 487 (S.D. 1997) (finding that officers had no duty to stop a house party because the officers' actions did not contribute to, increase, or change the already existing risk); *District of Columbia v. Evans*, 644 A.2d 1008, 1017 n.8 (D.C. 1994) (noting that the public-duty doctrine "deals with the question of whether public officials have a duty to protect individual members of the general public against harm from third parties or other independent sources" and therefore is inapplicable in a case where the plaintiff alleges harm "caused directly by the officers at the scene"); *Coty v. Washoe Cnty.*, 108 Nev. 757, 839 P.2d 97, 99 (1992) (holding that the public-duty doctrine does not apply in cases "where a public officer's conduct *'affirmatively causes' harm* to an individual") (internal citations omitted; emphasis in original); ****309** *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 667 P.2d 380, 385 (1983) (finding that the public-duty doctrine does not apply where an officer's affirmative act allegedly injures the plaintiff).

¶ 22 For the foregoing reasons, we conclude that the public-duty doctrine is inapplicable in the rare and limited factual situations, such as the one here, where the alleged duty breached is not one of a general duty to protect and preserve the peace. Because the public-duty doctrine does not preclude an officer's duty in those cases, courts must apply general negligence principles to determine whether a legal duty exists as a matter of law. *See*, *e.g.*, *Gatlin-Johnson*, ¶ 13 (explaining that the determination of whether a legal duty exists "is an issue of law for the court"); *Massee*, ¶ 27 (stating that the "existence of a legal duty is a matter of law to be determined by the court"). We turn now to the question of whether a legal duty is owed under common law principles of negligence to a person in the circumstances presented here, who alleges that he was directly injured by an officer's affirmative acts while the officer was engaged in his law-enforcement responsibilities.

¶ 23 The traditional, centuries-old, universally-recognized, common law rule is that we all share the duty to exercise the level of care that a ***321** reasonable and prudent person would under the same circumstances. *Fisher*, ¶ 16. *See also*, § 27-1-701, MCA ("[E]ach person is responsible ... for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person...."); § 28-1-201, MCA ("Every person is bound, without contract, to abstain from injuring the person or property of another or infringing upon any of another person's rights."). Thus, a person has a duty to exercise the same level of care that a reasonable and prudent person would when placed in a position where, if he did not use such care, he would injure another's person or property. In determining whether a duty exists, courts consider "whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." *Fisher*, ¶ 17.

¶ 24 Here, in considering whether imposing a duty comports with public policy, we need look no further than §§ 27-1-701 and 28-1-201, MCA. The Legislature codified public policy by expressly providing that "each person is responsible ... for an injury occasioned to another," § 27-1-701, MCA, and that "[e]very person is bound ... to abstain from injuring the person or property of another," § 28-1-201, MCA. These statutes, moreover, are consistent with well-established common law which requires that all individuals "use the degree of care that an ordinarily prudent person would have used under the same circumstance." *Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, ¶ 41, 326 Mont. 93,

107, 107 P.3d 471. *See also Fisher*, ¶ 16, *Massee*, ¶ 30. Thus, it is abundantly clear that the Legislature already considered and determined that imposing a duty not to injure others comports with public policy. We repeatedly hold that we will not interpret a statute beyond its plain language if the language is clear and unambiguous. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003; *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 152 P.3d 1288 ("We interpret a statute first by looking to the statute's plain language, and if the language is clear and unambiguous, no further representation is required."). Here, the Legislature could not have provided clearer, more unambiguous language. No person, including a law-enforcement officer, is excepted from the statutory language. We conclude that the Legislature's express codification of that public policy requires that "each person is responsible not only for the results of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care...." Section 27-1-701, MCA. Public policy, as determined by the Legislature, our precedent, and general principles of negligence, supports finding that an individual, in this ***322** case an officer, owes a duty of care to a plaintiff directly injured by that individual's affirmative acts. It is unnecessary to further examine whether imposing a general duty of care comports with public policy.

****310** ¶ 25 The existence of a legal duty also "turns primarily on foreseeability." *Eklund*, ¶ 40 (quoting *Lopez*, ¶ 27). Therefore, we ask whether the injured party was a foreseeable plaintiff—whether he "was within the scope of risk created by the alleged negligence of the tortfeasor." *Eklund*, ¶ 40 (citing *Lopez*, ¶ 28). While the question of duty is usually presented in terms of the actor's obligation, "the essential question [is] whether the plaintiff's interests are entitled to legal protection against the defendant's conduct." W.L. Prosser, *Handbook of the Law of Torts* 325 (4th ed. 1971). We explain foreseeability consistent with Judge Cardozo's description in *Palsgraf v. Long Island Railroad Company*, 248 N.Y. 339, 162 N.E. 99, 100 (1928):

> "The risk reasonably to be perceived defines the duty to be obeyed." [*Palsgraf*, 162 N.E. at 100.] That is to say, a defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first instance.

Fisher, ¶ 21 (quoting *Mang v. Eliasson*, 153 Mont. 431, 437, 458 P.2d 777, 781 (1969)). The question is "whether the defendant could have reasonably foreseen that his or her conduct could have resulted in an injury to the plaintiff." *Fisher*, ¶ 21 (quoting *Hinkle v. Shepherd Sch. Dist. No. 37*, 2004 MT 175, ¶ 30, 322 Mont. 80, 93 P.3d 1239).

¶ 26 When examining the question of foreseeability, the court's role in resolving questions of law and the jury's role in resolving questions of fact are separate and distinct. The question of foreseeability, however, is germane to both roles: the court's in determining the presence or absence of a legal duty and the jury's in determining causation. The court first considers foreseeability to define the legal duty. The jury then considers foreseeability to determine whether the defendant's conduct caused the plaintiff's injury. Even though the existence of a legal duty is normally determined by the trial court and necessarily depends on the facts of a particular case, we may decide the issue, as it is a matter of law and the determinative facts in this case—**Bassett**'s allegation that Lamantia's affirmative acts directly injured him—are not in dispute. Accordingly, we conclude that, under the circumstances presented, an officer owes a plaintiff a legal duty where a plaintiff claims that he was directly injured by the officer's affirmative acts.

¶ 27 Here, **Bassett** alleges that he was directly injured by Lamantia's affirmative acts. Lamantia's direct and affirmative acts ***323** establish the parameters of a legal duty that is independent of any findings the jury might make that Lamantia failed to exercise due care and caused **Bassett**'s injury. Lamantia could have reasonably foreseen that his conduct—tackling someone to the ground—could have resulted in injury to that person. We conclude that Lamantia owed **Bassett** a legal duty, as **Bassett** was a foreseeable plaintiff directly injured by Lamantia's affirmative acts. Because we find that Lamantia owed **Bassett** a legal duty, the question becomes what duty is owed.

¶ 28 The standard of care prescribes how a person must act to satisfy the duty of care he owes to the plaintiff. We begin by noting the obvious: an officer does not stand in the same shoes as an ordinary citizen when pursuing a criminal suspect. Inherent in an officer's job responsibilities is a potential risk of injury to those he encounters. In certain professions, the standard of care

is defined by determining what standard of care the reasonably prudent professional in that line of work would exercise. For example, a physician who is "a non-board-certified general practitioner is held to the standard of care of a reasonably competent general practitioner acting in the same or similar community in the United States in the same or similar circumstances." *Chapel v. Allison*, 241 Mont. 83, 92, 785 P.2d 204, 210 (1990). We have similarly defined the standard of care as necessitating considerations beyond the common experience and knowledge of ordinary citizens to dentists and orthodontists, *Llera v. Wisner*, 171 Mont. 254, 262, 557 P.2d 805, 810 (1976); manufacturers and distributors of pharmaceuticals, *Hill v. Squibb & Sons*, 181 Mont. 199, 206-07, 592 P.2d 1383, 1387-88 (1979); abstracters of title, *Doble v. Lincoln Cnty. Title Co.*, 215 Mont. 1, 5, 692 P.2d 1267, 1270 (1985); and veterinarians, ****311** *Zimmerman v. Robertson*, 259 Mont. 105, 108, 854 P.2d 338, 340 (1993). Upon a similar rationale, we conclude that a law-enforcement officer's actions should be judged by a standard of care which considers his profession and concomitant obligations.

¶ 29 We determine that law-enforcement officers owe a standard of care in cases where the plaintiff claims an officer breached a duty other than the general duty to protect and preserve the peace. Although the duty arises based on the plaintiff's claim that he was directly injured by the officer's affirmative acts, the standard of care an officer owes in that situation is the care that a reasonable officer with similar skill, training, and experience would exercise under the same or similar circumstances. Whether "similar circumstances" exist is a question for the trier of fact in determining whether the defendant breached the duty. *See Chapel*, 241 Mont. at 93, 785 P.2d at 210.

***324** ¶ 30 Accordingly, Lamantia owed **Bassett** a duty to exercise the care that a reasonable officer with similar skill, training, and experience would under the same or similar circumstances. Whether Lamantia departed from that standard of care and thus breached the duty he owed to **Bassett**, and whether his actions were the cause of **Bassett**'s injuries, are questions of fact to be resolved by the fact finder at trial. *See Gatlin-Johnson*, ¶ 13; *Lopez*, ¶ 31.

CONCLUSION

¶ 31 We exercise our authority to reformulate the certified question as: Under Montana law, when a plaintiff claims he was injured directly by an officer's affirmative acts, does the public-duty doctrine exclude all duties that may arise pursuant to generally applicable principles of negligence? We answer that the public-duty doctrine does not exclude other applicable duties under the circumstances presented by the certified question. The public-duty doctrine is only applicable to the duty to protect and preserve the peace, and therefore not relevant where the plaintiff alleges he was directly injured by an officer's affirmative acts. The public-duty doctrine does not exclude other duties which might arise independently pursuant to generally applicable principles of negligence. Here, where **Bassett** alleges that he was directly injured by Lamantia's affirmative acts, Lamantia owed **Bassett** a legal duty to exercise the same care that a reasonable officer with similar skill, training, and experience would under the same or similar circumstances.

We concur:

MIKE McGRATH, C.J.

JAMES JEREMIAH SHEA, J.

BETH BAKER, J.

DIRK M. SANDEFUR, J.

Justice Beth Baker, concurring.

¶ 32 I have joined the Court's Opinion and write with additional observations on our consideration of public policy. The Court observes that this case marks the first time we have been asked to determine whether a law enforcement officer owes a duty of care to a plaintiff alleging injury directly from an officer's "negligent affirmative acts." Opinion, ¶ 19. Before imposing a common-law duty for the first time, we consider both "whether the imposition of that duty comports with public policy, and whether the defendant could have foreseen that his conduct could have resulted in an injury to the plaintiff." Opinion, ¶ 23 (quoting *Fisher*, ¶ 17). Our analysis "includes determining the moral blame attached to the defendant's conduct, the prevention of future harm, the extent of the burden imposed, the consequence to the public of imposing [a] duty, and the availability and cost of insurance." ***325** *Gatlin-Johnson*, ¶ 13 (citing *Fisher*, ¶ 28). Because the existence of a common-law duty is

determined by the Court, we have considered these factors consistently in cases questioning whether such a duty arises—including cases filed against both private parties and government entities and actors. *Gatlin-Johnson,* ¶ 22; *Fisher*, ¶ 28; *Prindel v. Ravalli Cnty.*, 2006 MT 62, ¶ 37, 331 Mont. 338, 133 P.3d 165; *Henricksen v. State*, 2004 MT 20, ¶ 21, 319 Mont. 307, 84 P.3d 38; *Jackson v. Dep't of Fam. Servs.*, 1998 MT 46, ¶ 39, 287 Mont. 473, 956 P.2d 35; *Singleton v. L.P. Anderson Supply Co.*, 284 Mont. 40, 44-45, 943 P.2d 968, 971 (1997); ****312** *Estate of Strever v. Cline*, 278 Mont. 165, 173, 924 P.2d 666, 670 (1996); *Phillips v. City of Billings*, 233 Mont. 249, 253, 758 P.2d 772, 775 (1988).

¶ 33 The Court today relies on §§ 27-1-701 and 28-1-201, MCA, to determine that the Legislature has established the public policy to avoid injury to others, and the Opinion emphasizes—consistent with those statutes—that an officer's duty in the circumstances giving rise to the certified question is to exercise ordinary care or skill. Opinion, ¶ 24. Ordinary care, in turn, will be measured by the standard that a reasonable officer with similar skill, training, and experience would follow under the same or similar circumstances. Opinion, ¶¶ 2, 19, 29-31.

¶ 34 Because of its reliance on the statutes generally governing the duty of ordinary care, the Court does not separately examine the public policy considerations our cases have employed to determine whether a duty of care arises in a particular circumstance. It bears noting that our Opinion today imposes a common-law duty of negligence; it does not hold that an officer owes a statutory duty. We have not before relied exclusively on the general ordinary care statutes when determining whether a common-law duty exists in a given situation. To my knowledge, the only cases in which we have held the public policy consideration satisfied by legislative expression involved statutes that impose specific duties of care applicable to the circumstances of the case. *E.g.*, *Fisher*, ¶¶ 18-19, 28-29 (holding that several statutes within the motor vehicle code imposed specific duties of care for motor vehicle operators); *Prindel*, ¶ 29 (holding that specific statutes requiring a detention center to receive and confine a prisoner imposed a duty on the county to a plaintiff injured by a committed offender). In *Prindel*, even though we recognized a statutory duty of care, we considered the public policy factors when determining whether a common-law duty existed. *Prindel*, ¶ 37.

¶ 35 Although the Court does not separately examine these public ***326** policy considerations firmly established in our precedent, it does not overrule any prior decisions and reaffirms that public policy is part of the analysis in deciding whether to impose a common-law duty. Opinion, ¶¶ 10, 23. I do not read today's Opinion to suggest that §§ 27-1-701 and 28-1-201, MCA, require the imposition of a new common-law duty any time a person is injured by the acts of another. In the context of the circumstances of this case and the Opinion's thorough consideration of the responsibilities of law enforcement officers, our traditional public policy considerations support the imposition of a duty here.

¶ 36 Our precedent recognizes the moral blame that reasonably attaches where a person's conduct causes or allows serious injury. *Gatlin-Johnson*, ¶ 22; *Henricksen*, ¶ 24; *Estate of Strever*, 278 Mont. at 173, 924 P.2d at 670. A law enforcement officer's job is fraught with risk and danger, and the officer has powerful tools at her disposal. Failure to exercise that level of care and skill to which officers are trained—particularly when encountering members of the public in a volatile situation—quickly can lead to serious injury or death. And the desire to prevent future harm is compelling. There is near-daily news of law enforcement officers involved in confrontation and conflict; public interest in the safety of both officers and the people they encounter in their work is strong.

¶ 37 The third and fourth considerations tend to go hand in hand when public entities are involved. The extent of burden to the defendant and the consequences to the community of holding the public duty doctrine inapplicable here are important considerations. The community bears a cost either way: if a duty is imposed for a law enforcement officer's affirmative acts, the potential liability for breach ultimately falls on the taxpayers; but if a duty is not imposed, the community suffers from the potential that officers will not think through the consequences of their actions and from deterioration in public trust of law enforcement generally. The burden that will fall on the defendant by imposing a duty in the circumstances presented also brings potential to cut both ways. On one hand, the burden is not substantial when considered in light of the Court's ruling that the duty imposed is cabined by the standard of care to which a reasonable officer would be held in similar circumstances. Incorporating the standard of care will ensure that officers

****313** are held only to the standards they are trained to meet and that the fact-finder will consider the inherent risk of injury when determining whether an officer's affirmative acts constitute a breach of that legal duty. On the other hand, whether or not they ultimately are determined to be liable, law enforcement officers will be burdened ***327** by more litigation and court appearances to defend their actions. And the governments that employ them—and consequently, again, taxpayers—will assume the burden of defending those lawsuits and hiring experts to demonstrate that their officers exercised reasonable care in carrying out their duties.

¶ 38 The burden on government employers overlaps with the final consideration of insurance. We have recognized that public officers and entities are insured under state law. *See Gatlin-Johnson*, ¶ 22, *Henricksen*, ¶ 24. The public, of course, ultimately bears the cost of that insurance. But, as long as the officer is acting within the course and scope of employment and meets other requirements of law, she will not bear personal liability. *See* § 2-9-305, MCA.

¶ 39 On balance, the strong interests in safety, public trust in government, and accountability of public officers weigh in favor of concluding that public policy supports imposition of the duty the Court recognizes in this case.

Justice Jim Rice and District Court Judge Nickolas Murnion join in the Concurrence of Justice Beth Baker.

All Citations

391 Mont. 309, 417 P.3d 299, 2018 MT 119