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Municipal Corporations - Tort Liability - Duty to Protect Informers

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MUNICIPAL CORPORATIONS—TORT LIABILITY—DUTY TO PROTECT INFORMERS—Decedent Schuster supplied information to the police which led to the arrest of the notorious Willie "The Actor" Sutton. After decedent's part in the arrest was widely publicized he received threats against his life. He demanded police protection, which was denied on a belief that the threats were not seriously made.[1] Three weeks later the decedent was shot and killed by an unknown assailant. Plaintiff, administrator of decedent's estate, sued the defendant city to recover damages for wrongful death. The supreme court dismissed the complaint,[2] and the appellate division affirmed.[3] On appeal, *held,* reversed, three judges dissenting.[4] The complaint stated a cause of action based on negligence, as the city owes a special duty to use reasonable care to protect persons collaborating with it in the arrest of criminals, at least where protection is demanded. *Schuster v. City of New York,* (N.Y. 1958) 154 N.E. (2d) 534.

Traditionally, municipal corporations have been held immune from suit for tortious acts or omissions connected with the performance of their

[1] The third and fourth counts of the plaintiff's complaint, alleging that the city falsely represented to the decedent that he was not in danger and thereby induced him to appear on the street where he was killed, were not discussed by the court.

[2] 207 Misc. 1102, 121 N.Y.S. (2d) 735 (1953).

[3] 286 App. Div. 389, 143 N.Y.S. (2d) 778 (1955), notes, 34 CHI-KENT L. REV. 164 (1956); 44 KY. L. J. 389 (1956); 54 MICH. L. REV. 1019 (1956); 58 W. VA. L. REV. 305 (1956); 1955 SCOTS LAW TIMES 201.

[4] Judges Conway, Desmond and Froessel dissented.

governmental functions, unless the immunity is waived by statute.[5] Since it has been unanimously held that the police activities of municipalities are governmental functions,[6] the principal action would in most jurisdictions have been barred by municipal immunity.[7] But New York, unlike any other jurisdiction, has a general statutory waiver of such immunity.[8] Because of this waiver New York municipalities often may be liable for the tortious conduct of their police officers.[9] With a fear that overall tort liability might place an overwhelming burden on municipal treasuries, however, the New York courts have sought to limit liability to areas where it is felt the liability can "safely" be borne.[10] They have been especially reluctant to hold municipalities liable for nonfeasance in connection with governmental functions. The primary ground used to deny such liability is that a city generally owes no duty upon which an individual plaintiff can base a recovery.[11] These decisions establish that a municipality gener-

5 See, generally, 18 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §53.23 (1950); Borchard, "Government Liability in Tort," 34 YALE L. J. 1, 129, 229 (1924); 36 YALE L. J. 1, 757, 1039 (1927); 28 COL. L. REV. 577, 734 (1928); Smith, "Municipal Tort Liability," 48 MICH. L. REV. 41 (1949). Florida has recently by judicial decision discarded the traditional governmental-proprietary distinction and held that its municipalities may be liable for negligent performance of governmental functions. Hargrove v. Town of Cocoa Beach, (Fla. 1957) 96 S. (2d) 130, notes, 71 HARV. L. REV. 744 (1958); 56 MICH. L. REV. 465 (1958).

6 "It is firmly established that municipal corporations are engaged in the performance of governmental functions, and hence are not liable for torts in the operation of a police department. . . ." RHYNE, MUNICIPAL LAW 780 (1957).

7 "The failure to provide, or inadequacy of, police protection usually does not give rise to a cause of action in tort against a city...." 18 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., p. 290 (1950). See, e.g., Brogan v. Philadelphia, 346 Pa. 208, 29 A. (2d) 671 (1943). In Florida, however, immunity might have been no bar in the principal case. See Hargrove v. Town of Cocoa Beach, note 5 supra.

8 Sec. 8, Court of Claims Act, N.Y. Laws (1939) c. 860, §8. This statute was interpreted by the court of appeals as a waiver of municipal immunity in Bernardine v. City of New York, 294 N.Y. 361, 62 N.E. (2d) 604 (1945). The background for this decision is discussed in Lloyd, "Municipal Tort Liability in New York, a Legislative Challenge," 23 N.Y. UNIV. L. Q. REV. 278 (1948).

9 See, e.g., Lubelfeld v. City of New York, 4 N.Y. (2d) 455, 151 N.E. (2d) 862 (1958); O'Grady v. City of Fulton, 4 N.Y. (2d) 717, 148 N.E. (2d) 317 (1958); Flamer v. Yonkers, 309 N.Y. 114, 127 N.E. (2d) 838 (1955).

10 Antieau, "Statutory Expansion of Municipal Tort Liability," 4 ST. LOUIS UNIV. L. J. 351 (1957); Lloyd, "Le Roi Est Mort; Vive Le Roi!" 24 N.Y. UNIV. L. Q. REV. 38 (1949).

11 Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E. (2d) 704 (1945); Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S. (2d) 750 (1946), affd. 296 N.Y. 845, 72 N.E. (2d) 29 (1947); Scott v. City of New York, 2 App. Div. (2d) 854, 155 N.Y.S. (2d) 787 (1956), app. granted 3 N.Y. (2d) 930, 145 N.E. (2d) 888 (1957); King v. City of New York, 3 Misc. (2d) 241, 152 N.Y.S. (2d) 110 (1956). Another possible ground for denying liability in the nonfeasance area, that the Court of Claims Act did not waive municipal immunity in regard to nonfeasance connected with governmental functions, was suggested in the Murrain case. This was made the ground for decision in Landby v. New York, N.H. & H. R.R. Co., 278 App. Div. 965, 105 N.Y.S. (2d) 839 (1951), motion for leave to appeal den. 303 N.Y. 1014, 102 N.E. (2d) 840 (1951). The distinction was rejected in Runkel v. City

ally has no duty to act unless such duty is imposed by contract or statute,[12] and even where a mandatory duty is imposed by statute or city charter a plaintiff cannot recover for damages caused by a failure to perform the duty unless the statute was intended to benefit him as a particular individual and not simply as a member of the general public.[13] The theory of the action in the principal case, founded upon the city's negligent failure to provide police protection, is apparently based on nonfeasance.[14] Does the principal case, in holding that the city may be liable for this omission, mark a fundamental departure from the prior decisions on nonfeasance of a governmental function? The majority opinion indicates it does not.

The majority's decision rests on the narrow ground that the citizen's duty to supply information of known criminals to the police creates a reciprocal duty to provide protection.[15] This position seems questionable. While the common law made it a legal duty implemented by criminal sanctions to inform in some situations,[16] the common law is not incorporated into New York's criminal code.[17] The modern device for obtaining information is the reward, which in itself belies the idea of a legal duty to inform, for if there is such a duty the act of informing would probably not be sufficient consideration to make a promise of reward binding.[18] It would seem, therefore, that when the courts speak of a duty to inform they are referring only to a moral duty. To argue that a moral duty begets a legal duty, as the majority in the principal case appears to argue,[19] seems tenuous. The decision could have been placed on firmer grounds. The court could have relied on the provision of the New York City Charter giving the police department the duty of preventing crime and preserving the public peace.[20] Past decisions had found such provisions no basis for actions against municipalities because they were intended to protect the injured party only as a member of the general public and not as a particular individual.[21] These decisions could have been avoided, however, by

of New York, 282 App. Div. 173, 123 N.Y.S. (2d) 485 (1953), which held the waiver absolute. The principal case is silent on the point, and in holding that the city can be held liable for its failure to provide protection, may be regarded as impliedly rejecting this basis of non-liability.

12 See Steitz v. City of Beacon, note 11 supra.

13 See note 11 supra.

14 Judge McNally, concurring in the principal case at 541, took the view this was a tort of commission because there was some evidence the police supplied partial protection and then withdrew it. The opinion of the court does not take this position, however.

15 Principal case at 538.

16 CLARK AND MARSHALL, CRIMES, 6th ed., 486 (1958).

17 39 N.Y. Consol. Laws (McKinney, 1944) §22.

18 1 CONTRACTS RESTATEMENT §76(a) (1932). And see 1 CORBIN, CONTRACTS §70 (1950).

19 "For present purposes it matters little whether this duty be described as legal or moral." Principal case at 538.

20 New York City Charter §435 (1936).

21 Steitz v. City of Beacon, note 11 supra (charter gave city duty of fire protection);

adopting the analysis used in a dissenting opinion in the lower court,[22] that where a municipality reasonably should foresee that its failure to perform a statutory duty is likely to bring harm to a particular individual the municipality has a duty to act. Past decisions could have been distinguished by the lack of such foreseeability. That the court preferred a more dubious reciprocal duty analysis to this broader concept of foreseeability indicates that the court sought to establish a basis for liability without opening a major breach in the wall of municipal non-liability for nonfeasance in connection with governmental functions. By making the city's duty dependent not on the foreseeability of danger to the decedent but on his status as an informer, the court limited the impact of the case to the informer situation.[23] The decision, therefore, should not be regarded as a basic departure from precedent; it is rather a further attempt to delineate the area of "safe" municipal liability.[24]

The court clearly felt the narrow informer situation was one which did not create much likelihood of overburdensome liability, though on this point a strong dissent was registered.[25] The position of the dissent would be stronger if the duty now imposed is to protect all informers, rather than merely those requesting protection, as the majority suggests.[26] Since the "professional" informer is in his own best interest not likely to request protection, there would be no duty to protect this large category of informers, and the burden does not appear overwhelming. Under such circumstances the result in the principal case seems justified. While the court is open to the criticism that it has invited uncertainty and exception-making by the lower courts, its temporary setting aside of the general rules of nonliability where liability is felt "safe" and its willingness to be bound not by the letter of its rules but by their purpose is to its credit. To the argument that the court is not the body to determine which liability is "safe," the answer is that some such protection is needed and until the legislature draws the line only the courts are available to give it.

Thomas E. Kauper, S.Ed.

Murrain v. Wilson Line, note 11 supra (New York City Charter §435, 1936, held not intended to protect plaintiff individually).

22 See the opinion of Judge Beldlock, dissenting below in the principal case, 286 App. Div. 389 at 391 (1955).

23 The informer category includes any persons who as a result of aiding in the arrest and prosecution of criminals need police protection, since a similar reciprocal duty analysis could be used.

24 It should be borne in mind that the principal case merely establishes a potential basis for tort liability against the city. It remains for determination whether any causal relation in fact can be shown between the failure to give protection and decedent's slaying. See the dissenting opinion of Judge Froessel, principal case at 546.

25 See the dissenting opinion of Chief Judge Conway, principal case at 542, 545, expressing the fear that liability of this nature "will incapacitate the entire existing police force and leave the general public without police protection."

26 Principal case at 537.