

# Michigan Law Review

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Volume 54 | Issue 7

---

1956

## Municipal Corporations - Tort Liability - Duty to Protect Police Informer

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### Recommended Citation

Cyril Moscow, *Municipal Corporations - Tort Liability - Duty to Protect Police Informer*, 54 MICH. L. REV. 1019 (1956).

Available at: <https://repository.law.umich.edu/mlr/vol54/iss7/17>

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MUNICIPAL CORPORATIONS—TORT LIABILITY—DUTY TO PROTECT POLICE INFORMER—Decedent furnished information leading to the arrest of the notorious "Willie the Actor" Sutton. The police, after being notified of anonymous threats to decedent's person, furnished protection, which was later withdrawn. Soon afterwards, decedent was murdered by unknown assailants.<sup>1</sup> Decedent's administrator brought this action to recover damages for his death, claiming that there was a failure to provide adequate police protection. The trial court dismissed the action.<sup>2</sup> On appeal, *held*, affirmed per curiam, one justice dissenting. As a member of the general public, no duty of special protection was owed the decedent. Even assuming such a duty existed, it required protection only against known assailants from whom violence could reasonably have been anticipated. *Schuster v. City of New York*, 286 App. Div. 389, 143 N.Y.S. (2d) 778 (1955).

By waiving its sovereign immunity from suit for the acts of its agents or servants,<sup>3</sup> New York has become the most liberal state in its recognition of tort liability.<sup>4</sup> The waiver extends to municipalities,<sup>5</sup> making them liable in accordance with the same rules which govern actions against individuals and corporations.<sup>6</sup> The application of the principles of private tort law to public corporations raises particular problems in the area of negligent omissions.<sup>7</sup> Here the courts impose the troublesome distinction between governmental and proprietary functions<sup>8</sup> and generally hold that there is no liability for a negligent failure to perform a governmental function.<sup>9</sup> In the principal case the majority utilizes another test which is

<sup>1</sup> See N.Y. TIMES, March 9, 1953, p. 1:8, for details of the slaying.

<sup>2</sup> *Schuster v. City of New York*, 207 Misc. 1102, 143 N.Y.S. (2d) 778 (1953).

<sup>3</sup> Court of Claims Act, N.Y. Laws (1939) c. 860, §8.

<sup>4</sup> See Leflar and Kantrowitz, "Tort Liability of the States," 29 N.Y. UNIV. L. REV. 1363 (1954). See, generally, James, "Tort Liability of Governmental Units and Their Officers," 22 UNIV. CHI. L. REV. 610 (1955).

<sup>5</sup> *Bernardine v. New York*, 294 N.Y. 361, 62 N.E. (2d) 604 (1945). For the legislative and judicial development of this interpretation, see Lloyd, "Municipal Tort Liability in New York," 23 N.Y. UNIV. L. REV. 278 (1948). Cases are collected in 161 A.L.R. 367 (1946).

<sup>6</sup> Court of Claims Act, N.Y. Laws (1939) c. 860, §8.

<sup>7</sup> See Miller, "Recent Substantive Developments Affecting Municipal Tort Liability," 21 UNIV. CIN. L. REV. 31 (1952).

<sup>8</sup> There is a great body of literature on the subject. The classic study is Borchard, "Government Liability in Tort," 34 YALE L. J. 129, 229 (1924). See also 18 McQUILLAN, MUNICIPAL CORPORATIONS, 3d ed., §§53.29-53.32 (1950).

<sup>9</sup> "The law is established that a municipality is answerable for the negligence of its agents in exercising a proprietary function, and at least for their negligence of commission in exercising a governmental function . . . , but a municipality is not liable for its failure to exercise a governmental function, such as to provide police and fire protection." *Murray v. Wilson Line, Inc.*, 270 App. Div. 372 at 375, 59 N.Y.S. (2d) 750 (1946), *affd.* 296 N.Y. 845, 72 N.E. (2d) 29 (1947). *Accord:* *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E. (2d) 704 (1945); *Landby v. N.Y., N.H. & H. R. Co.*, 278 App. Div. 965, 105 N.Y.S. (2d) 839 (1951). But see *Runkel v. New York*, 282 App. Div. 173, 123 N.Y.S. (2d) 485 (1953); *Foley v. State*, 294 N.Y. 275, 62 N.E. (2d) 69 (1945). The distinctions and resulting confusion are discussed in Lloyd, "Le Roi Est Mort: Vive Le Roi!" 24 N.Y. UNIV. L. REV. 38 (1949).

often applied to limit this potentially ruinous tort liability:<sup>10</sup> a duty must be owed to the plaintiff specifically and not merely to the public at large.<sup>11</sup> Implicit in this approach is the real question of what elements, if any, raise a special duty to a particular person. The status of informer, by itself, does not provide a basis for finding any special duty. Although there is certainly an emotional appeal for a person who performs a public service,<sup>12</sup> the only authority indicating special treatment for the informer is the judicial recognition of the right of a citizen to inform<sup>13</sup> and the treatment of his disclosure as privileged.<sup>14</sup> However, there are indications that knowledge of a particular danger threatening an informer might give rise to a duty to protect him, not as an informer, but rather as a citizen clearly in danger.<sup>15</sup> The division of the court in the principal case is essentially over the degree of known danger which will raise such a duty. The majority considered the anonymous threats and possibility of retaliation against the decedent as insufficient<sup>16</sup> while the dissent asserted that reasonable care in light of the known propensity for violence among Sutton's associates should have required special protection.<sup>17</sup> It appears, therefore, that inaction after a clear indication that danger is present might be actionable negligence.<sup>18</sup> Although it does not squarely meet this issue, the majority's position is probably the most desirable since it allows interference with police discretion only after the most flagrant denial of protection. In attempting to balance the conflicting interests of the public and the injured party, the courts rely upon the conclusive "duty to public—duty to individual" test and the result only increases the confusion.<sup>19</sup> A clear statement by the legislature or the New York Court of Appeals defining the extent of liability, especially in the area of negligent omissions, would be highly desirable.

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<sup>10</sup> The usual proposals designed to protect municipalities from financial troubles because of enlarged tort liability are those for a maximum claim limit and some method of spreading the risk, e.g., a state fund or insurance plan. See Lloyd, "Municipal Tort Liability in New York," 23 N.Y. UNIV. L. REV. 278 at 293 (1948); Borchart, "Proposed State and Local Statutes Imposing Public Tort Liability," 9 LAW AND CONTEMP. PROB. 282 at 296 (1942).

<sup>11</sup> Principal case at 780; *Steitz v. City of Beacon*, note 9 supra, noted in 15 *FORD. L. REV.* 144 (1946).

<sup>12</sup> "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws." *Worthington v. Scribner*, 109 *Mass.* 487 at 488 (1872).

<sup>13</sup> *In re Quarles and Butler*, 158 *U.S.* 532, 15 *S.C.* 959 (1895).

<sup>14</sup> *Segurolo v. United States*, (1st Cir. 1926) 16 *F.* (2d) 563.

<sup>15</sup> *Isereau v. Stone*, 207 *Misc.* 941, 140 *N.Y.S.* (2d) 585 (1955) (principal case distinguished on knowledge grounds). Cf. *Runkel v. New York*, note 9 supra. See also discussion of the principal case in *SCOTS LAW TIMES*, Nov. 26, 1955, p. 201.

<sup>16</sup> Principal case at 780.

<sup>17</sup> *Id.* at 785.

<sup>18</sup> See *Isereau v. Stone*, note 15 supra.

<sup>19</sup> See Lloyd, "Le Roi Est Mort: Vive Le Roi!" 24 *N.Y. UNIV. L. REV.* 38 (1949).