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## Municipal Law- Negligence- Failure of Police to Provide Protection to the Holder of Family Court Order of Protection States a Valid Cause of Action

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## CASE NOTES

**MUNICIPAL LAW—Negligence—Failure of Police to Provide Protection to the Holder of a Family Court Order of Protection States a Valid Cause of Action.** *Sorichetti v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (Sup. Ct. 1978).

In November 1975, Josephine Sorichetti sought and obtained an order of protection<sup>1</sup> and a certificate of the order<sup>2</sup> from a Bronx family court judge.<sup>3</sup> The order directed her estranged husband, Frank, to refrain from assaulting, harassing or threatening his wife and, further, to stay away from his wife's home.<sup>4</sup> The family court judge, with full knowledge of Frank's prior assaults upon his wife, and over vigorous objections by Josephine Sorichetti's counsel, granted her husband the right to visit their daughter, Dina, on weekends.<sup>5</sup>

When Frank Sorichetti called for his daughter one Saturday morning, two days after the order was issued, he threatened both her life and the life of his wife.<sup>6</sup> At that time, and again Sunday evening, Josephine Sorichetti reported her husband's threats to the police. The police refused to take any action upon presentation

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1. This order was issued pursuant to section 842 of the New York Family Court Act, which governs family offense proceedings. *See id.* (McKinney 1975).

2. Certificates of an order of protection are authorized under N.Y. FAM. CT. ACT § 168 (McKinney 1975). The certificate will state that an order of protection has been issued, and will set forth the terms of the order. The presentation of the certificate to any peace officer authorizes the arrest of the person charged with violating the order. *Id.*

The function of the certificate is to enable the possessor to obtain immediate police assistance when the order has been violated. N.Y. FAM. CT. ACT § 168 (McKinney 1975) (practice commentary).

3. In July, 1975, Frank Sorichetti attacked his wife with a knife. Following her recovery from the attack, Josephine Sorichetti instituted a divorce action which prompted further violence from her husband. Mrs. Sorichetti sought the protection of the family court after her husband threatened to kill her and her child if she continued the divorce action. *Sorichetti v. City of New York*, 95 Misc. 2d 451, 452, 408 N.Y.S.2d 219, 221 (Sup. Ct. 1978) (citing facts of family court decision).

4. *Id.* at 453, 408 N.Y.S.2d at 221.

5. *Id.* at 452-53, 408 N.Y.S.2d at 221. Under the visitation arrangements provided by the family court, Dina Sorichetti was to be picked up at the 43rd police precinct at 10:00 a.m. each Saturday and returned to the precinct at 6:00 p.m. on Sunday.

6. *Id.* at 453, 408 N.Y.S.2d at 221. Frank Sorichetti indicated to his wife that she would be making "the sign of the cross" before the weekend was over. To the Sorichettis this meant that there would be a death.

of the certificate,<sup>7</sup> although they were aware of Frank's prior criminal record.<sup>8</sup> After Frank Sorichetti failed to return Dina at the required hour on Sunday, Mrs. Sorichetti repeatedly requested, but failed to obtain, police assistance.<sup>9</sup> Later that even Frank Sorichetti's sister arrived at his apartment and found that Frank had viciously attacked and severely injured his daughter.<sup>10</sup> The police were summoned and Sorichetti was taken into custody.<sup>11</sup>

Josephine Sorichetti brought a negligence action, on behalf of her daughter, in Bronx County Supreme Court,<sup>12</sup> alleging that the New York City Police Department had negligently failed to respond to her repeated requests for assistance after being presented with a certificate of an order of protection.<sup>13</sup> Defendants moved to dismiss the charge<sup>14</sup> on the grounds that the order of protection was issued solely for the protection of Josephine Sorichetti, who was not assaulted or attacked by her husband subsequent to the issuance of the order.<sup>15</sup> Absent special circumstances, the defense argued that the city was under no duty to provide police protection to Mrs. Sorichetti's daughter.<sup>16</sup>

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7. *Id.* at 453-54, 408 N.Y.S.2d at 221-22. After having been shown the certificate of the order of protection on a number of occasions, police Lt. Granelo's comment was "so what, what have you got there, they mean nothing."

8. *Id.* at 452, 408 N.Y.S.2d at 220-22. The police of the 43rd precinct were aware that Frank Sorichetti had been previously charged with committing assaults upon his family.

9. *Id.* at 454-55, 408 N.Y.S.2d at 221-22. In her attempts to secure the assistance Mrs. Sorichetti's fears were discounted. On one occasion, Lieutenant Granelo told Mrs. Sorichetti that perhaps Dina's father had taken her to a movie. The lieutenant advised Mrs. Sorichetti to go home, and her daughter would probably be returned there. At this point Mrs. Sorichetti abandoned her attempt to gain assistance.

10. *Id.* at 455, 408 N.Y.S.2d at 222. Dina was rushed to the hospital where she underwent seven hours of emergency surgery. She remained in critical condition for three weeks and spent a total of forty days in the hospital. As a result of the attack she was left permanently scarred and disabled.

11. *Id.* Frank Sorichetti was later convicted for the attempted murder of his daughter.

12. *Sorichetti v. City of New York*, 95 Misc. 2d 451, 408 N.Y.S.2d 219 (Sup. Ct. 1978). Mrs. Sorichetti also brought a derivative action for loss of services and damages resulting from the injuries sustained by her daughter. Under present New York law, Mrs. Sorichetti suing derivatively as a parent, would be barred from recovering on her cause of action if it were held that her infant-daughter had no cause of action against the city. See *O'Hearn v. O'Hearn*, 55 A.D.2d 766, 768, 389 N.Y.S.2d 651, 654 (3d Dep't 1976); accord, *Kotary v. Spencer Speedway, Inc.*, 47 A.D.2d 127, 129, 365 N.Y.S.2d 87, 89 (4th Dep't 1975).

13. 95 Misc. 2d at 452, 408 N.Y.S. at 220.

14. *Id.* The motion to dismiss for failure to state a cause of action was made pursuant to N.Y. Civ. PRAC. LAW § 3211(a)(7) (McKinney 1970).

15. 95 Misc. 2d at 455, 408 N.Y.S.2d at 222.

16. *Id.* at 456, 408 N.Y.S.2d at 223.

Justice Chananau denied the motion to dismiss. The order of protection was held to extend to Dina.<sup>17</sup> If, however, the extension were invalid, a question of fact remained as to whether the city was liable to Mrs. Sorichetti on a general negligence theory in failing to protect the infant.<sup>18</sup>

In family offense proceedings orders of protection are issued pursuant to section 842 of the New York Family Court Act.<sup>19</sup> These orders are intended to assist the court in implementing remedial and preventive relief<sup>20</sup> and set forth standards of behavior to be maintained by the party against whom the order is directed.<sup>21</sup> Under section 842 persons to whom the order relates may be required to refrain from conduct which would be harmful to a child.<sup>22</sup> A reading of the legislative history of the statute upon which section 842 is based clearly indicates that "orders of protection may be issued either with respect to the other spouse or to a child."<sup>23</sup> Orders of protection are apparently intended by the legislature to state which parties are to be protected by the order.

Following the intention of the legislature, the New York courts have specifically included minors in the terms of the order of protection. In *Ruth "S" v. George "S"*,<sup>24</sup> the New York Family Court issued an order of protection and certificate on behalf of a young girl whose brother had committed incest her her.<sup>25</sup> The order, issued specifically for the protection of the younger sister, under sections 815(a)(v) and 842, forbade the youth to live in his sister's home or to

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17. *Id.* at 462, 408 N.Y.S.2d at 227.

18. *Id.* at 467, 408 N.Y.S.2d at 230. Under this theory the plaintiff would be required to establish a police duty, breach of that duty and demonstrate that the police's negligent conduct was a concurrent proximate cause of the injuries sustained. See *Evers v. Westerberg*, 38 A.D.2d 751, 752, 329 N.Y.S.2d 615, 618 (2d Dep't 1972), *aff'd*, 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973) (mem.).

19. N.Y. FAM. CT. ACT § 842 (McKinney 1975).

20. A. SAMUELS, FAMILY COURT LAW AND PRACTICE IN NEW YORK § 53 (rev. ed. 1972); ACT, RECOMMENDATION AND STUDY RELATING TO POWER OF THE CHILDREN'S COURTS AND THE DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK TO ISSUE ORDERS OF PROTECTION, 1960 LEG. DOC. NO. 65D, at 25, reprinted in STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1960, at 141 [hereinafter cited as LAW REVISION REPORT].

21. N.Y. FAM. CT. ACT § 842 (McKinney 1975).

22. *Id.* This section provides that persons to whom the order relates may be required "to abstain from offensive conduct against the child [or] to refrain from acts of commission or omission that tend to make the home not a proper place for the child." *Id.* § 842(c) & (e).

23. LAW REVISION REPORT, *supra* note 20, at 148 (construing sections 30(a)(6) and (7) of the former New York Children's Court Act, now incorporated in N.Y. FAM. CT. ACT § 842).

24. 63 Misc. 2d 1, 311 N.Y.S.2d 169 (Fam. Ct. 1970).

25. *Id.* at 14, 311 N.Y.S.2d at 181-82.

approach her outside of court except for limited periods and in the presence of a chaperone.<sup>26</sup> Upon violation of the terms of the order, the certificate would authorize the police to arrest the youth.<sup>27</sup>

A child may be included in an order of protection without being named when the order includes all members of a household. In *Potter v. Bennett*,<sup>28</sup> Justice Benjamin dissented from the majority opinion dismissing the action for lack of jurisdiction.<sup>29</sup> Justice Benjamin's opinion that the order of protection issued to members of the household included the couple's child helps define the scope of "household" in such orders.<sup>30</sup>

The family courts, when issuing orders of protection have followed the intention of the drafters of the Family Court Act by including minors in the scope of the order when the family courts have concluded that the child was in need of protection.<sup>31</sup> The *Sorichetti* court's decision to extend the order to Dina, who was not named in the order, is not supported by either the legislative intent of section 842 or by prior case law. If the family court judge who issued the order of protection intended it to apply to Dina, arguably, that fact would have been stated in the order. The court also had the ability to protect Dina in the order by issuing it to include all members of the *Sorichetti* household. However, the court chose to issue the order solely to Josephine *Sorichetti*.<sup>32</sup> Further, ordering visitation rights is inconsistent with the notion that the protective order was issued to prevent Frank *Sorichetti* from harming his daughter, as well as his wife.

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26. *Id.*

27. *Id.*

28. 40 A.D.2d 546, 334 N.Y.S.2d 511 (2d Dep't 1972).

29. *Id.* at 546-47, 334 N.Y.S.2d at 513-14 (jurisdiction lacking because parties not married).

30. *Id.* at 548, 334 N.Y.S.2d at 514 (Benjamin, J. dissenting). Justice Benjamin found authority for this conclusion in section 842(c) & (e) of the New York Family Court. See *People v. James*, 55 Misc. 2d 953, 960, 287 N.Y.S.2d 188, 195 (Sup. Ct. 1968).

31. Such orders are frequently used to prevent parents from abusing their children. See, e.g., *Carol E. v. Guy E.*, 82 Misc. 2d 969, 371 N.Y.S.2d 95 (Fam. Ct. 1975) (temporary protection order issued directing father not to abuse his daughter by use of excessive corporal punishment); *Tammy S., v. Albert S.*, 408 N.Y.S.2d 716 (Fam. Ct. 1978) (court issued temporary order of protection under N.Y. FAM. CT. ACT § 828 to protect petitioner-mother and her child from violent behavior of child's father).

32. 95 Misc. 2d at 453, 408 N.Y.S.2d at 221.

Justice Chananau suggested another rationale for determining the issue of police liability; the failure of police to obey the certificate of the order issued to Mrs. Sorichetti gave rise to a valid cause of action, although Mrs. Sorichetti had not been injured.<sup>33</sup>

The *Sorichetti* court supported this line of reasoning by citing *Baker v. City of New York*,<sup>34</sup> which defendants admitted to be the law governing this action.<sup>35</sup> In *Baker*, a police officer shot his wife in the waiting room of the domestic relations court (now family court).<sup>36</sup> Plaintiff wife had received a court order of protection and certificate directing her husband not to assault, threaten or annoy her.<sup>37</sup> One month before the shooting police were summoned to plaintiff's home, where her estranged husband was creating a disturbance. The investigating officer refused to take action against the husband, even after being shown the certificate of the protective order. The officer described the certificate as worthless.<sup>38</sup> Several weeks later, plaintiff met with her husband and a probation officer of the domestic relations court. Plaintiff, for her protection, asked the officer if she could wait in his office. Her request was denied; plaintiff was required to stay in the unguarded waiting room, where she was shot.<sup>39</sup>

The appellate division, in reversing the trial court's dismissal of the complaint, held that the plaintiff had been singled out by the courts as a person in need of protection.<sup>40</sup> Thus, a genuine issue was raised of whether the responding officer and the probation officer were negligent in failing to provide plaintiff with special protection despite their awareness of the protective order.<sup>41</sup>

Defendants in *Sorichetti* attempted to distinguish *Baker*. In *Baker*, the order of protection was issued for the benefit of the plaintiff-victim, while in *Sorichetti* the order was issued to protect Mrs. Sorichetti, who was not injured.<sup>42</sup> Justice Chananau rejected

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33. *Id.* at 462, 408 N.Y.S.2d at 227.

34. 25 A.D.2d 770, 269 N.Y.S.2d 515 (2d Dep't 1966).

35. 95 Misc. 2d at 462, 408 N.Y.S.2d at 227.

36. 25 A.D.2d at 771, 269 N.Y.S.2d at 517.

37. *Id.*

38. *Id.*

39. *Id.* at 771, 269 N.Y.S.2d at 517-18.

40. *Id.* at 772, 269 N.Y.S.2d at 518.

41. *Id.*

42. 95 Misc. 2d at 462, 408 N.Y.S.2d at 227. The defendants may have ignored the fact that the order of protection also directed Frank Sorichetti not to threaten or harass his wife.

this argument. The failure of the police to arrest Frank Sorichetti after being informed by Mrs. Sorichetti of his violation of the order of protection, was sufficient to bring the issue of the police's negligence before the jury.<sup>43</sup> Following *Baker*, Justice Chananau concluded that the issuance of the certificate of the order of protection placed a duty upon the police to supply protection to Mrs. Sorichetti.<sup>44</sup> Had the police fulfilled the duty placed upon them by the certificate and arrested Frank Sorichetti for threatening his wife, in violation of the order, the assault on Dina would not have occurred.<sup>45</sup>

A second question of police negligence arose when Frank Sorichetti failed to return Dina at the required hour on Sunday.<sup>46</sup> When Dina was not returned Mrs. Sorichetti repeatedly informed the police of the violation, showed them the certificate of the order and requested police assistance.<sup>47</sup> The failure of the police to act at this time, as required by the certificate, presented a further question of police negligence to the jury.<sup>48</sup>

Justice Chananau deemed significant police awareness of both violations. The police failed to act on the second violation despite their knowledge that the first violation had occurred the previous day.<sup>49</sup> In allowing these claims to be maintained Justice Chananau placed particular emphasis on the failure of the police to fulfill their duty to act, under section 168 of the Family Court Act, when a violation of an order of protection occurs.<sup>50</sup>

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The threats made by Frank Sorichetti when picking up his daughter at the police station clearly constituted a violation of the order.

43. *Id.*

44. *Id.* Mrs. Sorichetti, like the plaintiff in *Baker*, had been singled out by the family court as a person in need of protection. The issuance by the family court of the certificate of the protective order established the duty owed to Mrs. Sorichetti by the police.

45. *Id.*

46. 95 Misc. 2d at 463, 408 N.Y.S.2d at 227. Frank Sorichetti was required by the order of protection to bring Dina back to the police station at 6:00 p.m. *Id.* at 221.

47. *Id.* Mrs. Sorichetti made four separate requests for police assistance after her daughter had not been returned on schedule. All of the requests were ignored. *Id.* at 452-53, 408 N.Y.S.2d at 221.

48. *Id.* at 463, 408 N.Y.S.2d at 227.

49. *Id.* The court apparently felt that the police should definitely have acted on the second violation when they were aware that a first violation had already occurred.

50. *Id.* at 463-64, 408 N.Y.S.2d at 227-28. The Manual For Police in the State of New York (N.Y.S. Police, rev. as of Sept. 1, 1974) recognized the duty of peace officers to act on reports of violations of orders of protection. However, despite this recognition and the clear mandate of section 168 of the Family Court Act regarding police duty to obey the certificates the New York City Police Department did not instruct its police officers regarding their duties under the state law.

The policy of the New York City Police Department of ignoring the dictates of section 168 was challenged in *Bruno v. Codd*.<sup>51</sup> In *Bruno*, twelve battered women sought to enjoin the police from continuing their policy of automatically refusing to make an arrest when the victim's assailant was her husband.<sup>52</sup> The New York Supreme Court held that the courts have "the power to compel the Police Department, defendants, to perform the duty imposed upon them by law to exercise their discretion, [to make arrests] and to exercise it in a reasonable non-arbitrary manner."<sup>53</sup>

While the appeal was pending,<sup>54</sup> the parties entered into a consent decree<sup>55</sup> which stipulated, among other terms that: (1) the police department and its employees have a duty to respond to pleas for assistance based on alleged violations of temporary or final orders of protection;<sup>56</sup> (2) officers shall not attempt to force a reconciliation where there is reason to believe that a husband has violated an order of protection issued to a wife (in such cases, the husband shall be placed under arrest);<sup>57</sup> and (3) an officer, acting within the scope of section 168 of the Family Court Act and upon information<sup>58</sup> that a violation of an order of protection has taken place, shall arrest

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51. 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dep't 1978).

52. 90 Misc. 2d at 1049, 396 N.Y.S.2d at 976.

53. *Id.* at 1050, 396 N.Y.S.2d at 976.

54. *Bruno v. Codd*, 64 A.D.2d 582, 407 N.Y.S.2d 165 (1st Dep't 1978).

55. *Bruno v. McGuire*, No. 21946/76 (Sup. Ct. N.Y. County, June 26, 1978) (consent decree). Although the appellate division reversed the findings of the supreme court in *Bruno v. Codd* and granted defendant's motion to dismiss, that decision did not affect the consent decree entered into by the parties before the case came up on appeal. 64 A.D.2d at 582-83, 407 N.Y.S.2d at 166 (change of named defendant in consent decree reflected fact that Robert McGuire, a defendant in *Bruno v. Codd*, was later appointed New York City Police Commissioner, replacing Commissioner Codd.).

56. Consent Decree at 2, *Bruno v. McGuire*, No. 21946/76 (Sup. Ct. N.Y. County, June 26, 1978).

57. *Id.* at 3.

58. *Id.* The information must take the form of a charge of the violation made either by the wife or someone acting on her behalf. This stipulation should be read in light of the commentary to section 168 of the Family Court Act, which states that this section extends the circumstances under which the police may make an arrest beyond those found in the Criminal Procedure Law. However, the commentary adds that unsupported allegations of an "interested party" or a "person whose veracity is unknown to the police" would not constitute sufficient grounds to make an arrest. The arrest of a person charged with violating an order of protection must still conform to the standards of due process. A showing of probable cause for the arrest is required, and the arrest would be subject to the applicable sections of the Criminal Procedure Law. N.Y. FAM. CT. ACT § 168 (practice commentary).



the husband if reasonable cause exists to substantiate the charge.<sup>59</sup>

Justice Chananau viewed the decree as an indication of a police duty to obey certificates of orders of protection issued pursuant to section 168. The failure of the police to obey the certificate issued to Mrs. Sorichetti formed the basis for the justice's decision to rule in her favor by allowing a cause of action to be brought on behalf of her child.<sup>60</sup>

*Sorichetti* also presented the question of whether, due to special circumstances, the police had a duty to protect Dina, and failed to fulfill this duty.<sup>61</sup> The special circumstances were the police's knowledge of Frank Sorichetti's previous violent behavior towards his family.<sup>62</sup> The defense attempted to apply the rule of police nonliability for failure to provide protection to an individual.<sup>63</sup>

This rule had been enunciated previously in *Murrain v. Wilson Line*,<sup>64</sup> where police were not held liable when they failed to protect plaintiff who was injured by a disorderly crowd.<sup>65</sup> Under the nonliability rule, an individual is not entitled to police protection merely because he requests it.<sup>66</sup> The New York Court of Appeals reaffirmed

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59. Consent Decree at 3, *Bruno v. McGuire*, No. 21946/76 (Sup. Ct. N.Y. County, June 26, 1978).

60. 95 Misc. 2d at 466-67, 408 N.Y.S.2d at 229-30. In upholding Dina's cause of action on these grounds Justice Chananau appears to be relying on the established rule in New York that a duty assumed by a municipality extends to the risk foreseeably seen. *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). However, before the question of foreseeability is reached, a duty owed to the individual plaintiff must be established. *Bass v. City of New York*, 38 A.D.2d 407, 410, 330 N.Y.S.2d 569, 573 (2d Dep't 1972), *aff'd without opinion*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973); *Florence v. Goldberg*, 44 N.Y.2d 189, 195, 375 N.E.2d 763, 766, 404 N.Y.S.2d 583, 586 (1978).

The *Baker* decision supports the conclusion that the police had a duty to protect Mrs. Sorichetti because she was named as the beneficiary of a court order of protection. However, in failing to name Dina in the order, the certificate of the order did not create a police duty as to her. Thus, granting Dina a cause of action runs afoul of the rule that a special relationship must exist between a municipality and a plaintiff resulting in the creation of a duty to exercise due care for the benefit of a particular individual. *Florence v. Goldberg*, 44 N.Y.2d 189, 195, 375 N.E.2d 763, 766, 404 N.Y.S.2d 583, 586 (1978).

61. 95 Misc. 2d at 467, 408 N.Y.S.2d at 230.

62. *Id.*

63. *Id.* at 455-56, 467, 408 N.Y.S.2d at 223-24, 230.

64. 270 A.D.2d 372, 59 N.Y.S.2d 750 (1st Dep't 1946), *aff'd without opinion*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

65. *Id.* at 375, 377, 59 N.Y.S.2d at 754. In *Murrain*, police were present at the outbreak of the disturbance. Plaintiffs claimed that the police were negligent in failing to act although they were aware of the crowds disorderly behavior. No specific request for police protection was made.

66. *Florence v. Goldberg*, 44 N.Y.2d 189, 195, 375 N.E.2d 763, 766, 404 N.Y.S.2d 583, 586

this rule in *Riss v. City of New York*.<sup>67</sup> Plaintiff in *Riss* was repeatedly threatened by a rejected suitor.<sup>68</sup> Although the plaintiff requested protection on a number of occasions, each time protection was refused.<sup>69</sup> Subsequently, plaintiff was seriously injured by a third party who was hired by the former suitor to attack her.<sup>70</sup>

In affirming the lower court's dismissal of the complaint, the court of appeals spoke of its reluctance to determine the allocation of the police department's resources. The court feared that allowing such actions to be maintained would unduly expand tort liability in an area which should be left to legislative control.<sup>71</sup> The *Riss* court did indicate, however, under circumstances where a special relationship exists between the police and the individual seeking protection, the police may be under a duty to provide such persons with the protection sought.<sup>72</sup> However, no guidelines were formulated to help determine when such a relationship exists.

Defendants in *Sorichetti* attempted to rely on the general rule of police nonliability as restated in *Riss*. However, Justice Chananau distinguished *Riss* on its facts and declined to dismiss *Sorichetti* on this basis.<sup>73</sup> In *Riss* the defendant was deemed to be of good character (he was an attorney) who, prior to the assault on Ms. Riss, had never taken any steps to carry out his threats. Furthermore, although Ms. Riss had filed a complaint against him, she later withdrew it. Frank Sorichetti had a prior arrest record known to the police. In the past, Mrs. Sorichetti was attacked by her husband and applied to court to obtain an order of protection.<sup>74</sup>

The special relationship alluded to in *Riss* has been found to exist in a variety of factual circumstances.<sup>75</sup>

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(1978). This rule is based on the court's view that the duty of police to protect citizens is owed to the public rather than to any one particular individual. *Id.*

67. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

68. *Id.* at 583, 240 N.E.2d at 862, 293 N.Y.S.2d at 899 (Keating, J. dissenting).

69. *Id.* at 583, 240 N.E.2d at 862, 293 N.Y.S.2d at 900 (Keating, J. dissenting).

70. *Id.* (Keating, J. dissenting).

71. *Id.* at 581-82, 240 N.E.2d at 861, 293 N.Y.S.2d at 898.

72. *Id.* at 583, 240 N.E.2d at 862, 293 N.Y.S.2d at 899.

73. 95 Misc. 2d at 467-68, 408 N.Y.S.2d at 230-31.

74. *Id.*

75. See, e.g., *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1968) (special duty on police and municipality to protect police informers); *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (liability of municipality to provide school crossing guards where that responsibility had been assumed); *Baker v. City*

In *Benway v. City of Watertown*,<sup>76</sup> the plaintiff charged the police with negligently returning a pistol to her husband, who used the gun to shoot plaintiff and himself. The police were aware of the husband's unlicensed possession of the gun and of his prior threats to the life of his wife and others.<sup>77</sup> According to the appellate division, special knowledge of the police in this case was sufficient evidence for the trial court to find a valid cause of action.<sup>78</sup>

In *Jones v. County of Herkimer*<sup>79</sup> the assailant had harassed, assaulted and threatened plaintiff's decedent over a period of three years prior to the fatal incident and had even served a prison sentence for assaulting the decedent in the District Attorney's office. He had continued the assaults after his release.<sup>80</sup> The plaintiff alleged that decedent had communicated the threats and assaults to the police and village officers, but had received no police protection.<sup>81</sup> On these facts, the supreme court held that the police owed a special duty of care to the decedent.<sup>82</sup>

The facts of *Benway* and *Jones* clearly resemble those presented in *Sorichetti*. In all three cases the police were aware of the violent propensities of the assailants and of the attacks made previously on the persons seeking protection. In *Jones* and *Benway* this awareness played a part in the court's finding that a "special duty" was owed by the police to the victims. This knowledge by the police existed in *Sorichetti*, and further assisted Justice Chananau in upholding plaintiff's cause of action.<sup>83</sup> However, both *Benway* and *Jones* were decided before *Riss*. In light of *Riss* it is unlikely that the factual circumstances which created the "special duty" found in *Benway* and *Jones* would currently give rise to police liability.

In *Sorichetti* three separate theories were set forth creating police liability for failing to provide adequate protection to plaintiff-infant. The *Sorichetti* decision presented the novel question:

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of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (2d Dep't 1966) (duty owed to persons under court orders of protection).

76. 1 A.D.2d 465, 151 N.Y.S.2d 485 (4th Dep't 1956).

77. *Id.* at 467, 151 N.Y.S.2d at 487.

78. *Id.*

79. 51 Misc. 2d 130, 272 N.Y.S.2d 925 (Sup. Ct. 1966).

80. *Id.* at 131-32, 272 N.Y.S.2d at 927-28.

81. *Id.* at 133, 272 N.Y.S.2d at 928-29.

82. *Id.* at 137-38; 272 N.Y.S.2d at 933-34.

83. 95 Misc. 2d at 467-69, 408 N.Y.S.2d at 230-31.

whether an order of protection, issued to an adult, can be extended judicially to include the adult's unnamed minor child. The court's extension of an order of protection issued to Mrs. Sorichetti to cover her daughter appears to be without merit. In addition to directly extending the order, the court also concluded that the violation of a policy duty owed to Mrs. Sorichetti under Family Court Act section 168 could give rise to police liability for the injuries received by Dina Sorichetti.<sup>84</sup> This potential liability would arise from the failure of the police to fulfill their duty to arrest Frank Sorichetti before he assaulted his daughter.<sup>85</sup> However, under this theory the infant-plaintiff would still have the burden of establishing that the police owed her a duty, the breach of which was the proximate cause of the injuries she sustained.<sup>86</sup> Liability would be based on the failure of police to obey the certificate of the order of protection issued solely to Mrs. Sorichetti.

Plaintiff-infant's ability to prove that the police owed her a "special duty" would afford her the best opportunity to recover for injuries received as a result of the police's failure to provide protection. *Benway* and *Jones* established the existence of a special duty by demonstrating that the police had knowledge of an alleged assailant's violent history. Although the *Sorichetti* court based its refusal to dismiss the action, in part, upon its finding that such a special duty existed,<sup>87</sup> the recent reaffirmation of the *Riss* rule of police nonliability by the New York Court of Appeals undermines the validity of the "special duty" doctrine in *Sorichetti*.<sup>88</sup>

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84. 95 Misc. 2d at 463, 408 N.Y.S.2d at 227. The certificate issued to Mrs. Sorichetti was based on the order of protection she was granted pursuant to FAM. CT. ACT § 842. In 1977, the New York State legislature added section 842-a to the Family Court Act. This section provides that the court shall file a copy of an order of protection with "the appropriate police agency having jurisdiction." The petitioner could file the copy if the court failed to do so. N.Y. FAM. CT. ACT § 842-a (McKinney supp. 1977). Although this section was enacted after the incidents in *Sorichetti* took place, the enactment of the section is an indication of an attempt to increase police recognition and enforcement of orders of protection issued pursuant to FAM. CT. ACT § 842.

85. 95 Misc. 2d at 462, 408 N.Y.S.2d at 227.

86. See notes 18 & 60 *supra*.

87. 95 Misc. 2d at 467-69, 408 N.Y.S.2d at 230-31.

88. Despite Justice Chananau's attempt to distinguish *Sorichetti* from *Riss*, the rule of police nonliability enunciated in *Riss* still remains viable. Under this rule the mere fact that a person is in danger of becoming the victim of a crime does not place a special duty on the police to afford that person police protection. *Dutton v. City of Olean*, 60 A.D.2d 335, 338, 401 N.Y.S.2d 118, 120 (4th Dep't 1978); see also *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978).

The policy of the nonenforcement of certificates of orders of protection by the New York City Police was a major influence in the *Sorichetti* decision. In refusing to dismiss the action, the court demonstrated its displeasure with this policy.<sup>89</sup> Decisions such as *Sorichetti* will encourage police recognition of their duty to obey certificates of orders of protection. A directive issued by New York City Police Commissioner McGuire, requiring that orders of protection be honored, is recent evidence of one police department's changing attitude toward the enforceability of these orders.<sup>90</sup>

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89. 95 Misc. 2d at 463-67, 408 N.Y.S.2d at 227-30.

90. New York City, Department of Police, Operations Order 78 (Aug. 25, 1978). Among other things, the order directs all police commands (precincts), when dealing with husband and wife disputes, to "respond to every request for assistance sought by persons alleging that a violation . . . of an order of Protection has been committed against such person by a spouse . . . . Where probable cause exists that a spouse . . . has violated an Order of Protection, the arrest of such spouse will be made. An officer shall not attempt to reconcile the parties or to mediate the situation." *Id.* The basis for this directive can be found in the consent decree entered into by Police Commissioner McGuire in *Bruno v. Codd*.

The problems of family abuse and the difficulty that family members face in obtaining protection (police or judicial) from such abuse has been recognized by the Massachusetts legislature which recently enacted an abuse prevention law. 1978 Mass. Adv. Legis. Serv., ch. 447. Section 6 of this law provides that where there is reason to believe that a member of the household has been abused in a domestic dispute, police have a duty to notify the abused person of their right to file a complaint in court requesting the issuance of court orders to obtain temporary relief. Included are orders similar to the orders of protection issued by the New York Family Court. The law also provided the victim with the statutory right to receive police protection under varying circumstances. An abused family member has the right to demand that an officer remain at the scene of the dispute until the victim or the child of the victim can leave the scene in safety. *Id.* § 6.