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Torts -- Municipal Corporations -- Liability for Failure to Provide Requested Police Protection Against Assault by a Third Person

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In short, the argument that the single contractor is often a poor risk-bearer and risk-shifter can be obviated if the lender who backs him is also held strictly liable.

Under any extension of strict liability to the lender, the builder-vendor should remain primarily liable since he is the one with the most immediate control over the construction. Then the lending agency can protect itself not only by spreading the risk through interest rates on loans and requiring the borrower to insure against products liability, but can also seek indemnification from a solvent builder who builds a defective house, at least if the builder was actively negligent.[34] These methods of protection might make courts less reluctant in the future to extend the *Connor* principle so that lenders financing builder-vendors are strictly liable for housing defects.

When all arguments on the subject are examined, such vicarious strict liability for lenders must rest on a social policy concept rather than on a fault principle. But this is nothing new in the law of torts.

> Vicarious liability is based on a relationship between the parties, irrespective of participation, either by act or omisson, of the one vicariously liable, under which it has been determined as a matter of policy that one person should be liable for the act of the other. Its true basis is largely one of public or social policy under which it has been determined that, irrespective of fault, a party should be held to respond for the acts of another.[35]

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Torts—Municipal Corporations—Liability for Failure to Provide Requested Police Protection Against Assault by a Third Person

The doctrine of immunity for municipal corporations has long been invoked to insulate municipalities from liability for the torts of their law enforcement officials.[1] Even in those jurisdictions that have abolished

[34] *See* Comment, *Liability of the Institutional Lender for Structural Defects in New Housing*, *supra* note 3, at 760-61 & n.122.

[35] Nadeau v. Melin, 260 Minn. 369, 375-76, 110 N.W.2d 29, 34 (1961) (citations omitted).

[1] On the doctrine of municipal immunity, see generally W. PROSSER, LAW OF TORTS 996-1013 (3rd ed. 1964) [hereinafter cited as PROSSER]. As to municipal liability for the torts of law enforcement officials, see 18 E. MCQUILLEN, MUNICIPAL CORPORATIONS §§ 53.79-53.81a (3rd ed. 1963); Comment, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475 (1963).

municipal immunity, however, a city does not become an insurer for those who are injured by the acts or omissions of police officers. Rather, the municipality is answerable in accordance with the same rules of law applicable to individuals and private corporations.[2] Municipal liability is thus imposed or limited by traditional concepts of tort law.

The recent case of *Riss v. City of New York*[3] is illustrative. Plaintiff was an attractive young woman who for more than six months had been terrorized by threats from a rejected suitor. Her repeated pleas for police protection were received with little more than indifference. Upon learning that plaintiff had become engaged to another, the suitor once more threatened to have her killed or maimed, indicating that it was her "last chance." Again the police refused to respond to her pleas for help. The next day a hired thug threw lye in plaintiff's face. She was blinded in one eye, lost a good portion of her vision in the other, and her face was permanently disfigured. She was given around-the-clock police protection for three and one-half years following the assault.

The Court of Appeals of New York affirmed a dismissal of the complaint, holding, despite a strong dissent, that police have no duty to furnish requested protection against assaults by third parties to individual members of the community. The failure to recognize such a duty was obviously predicated upon a general fear of the burdensome consequences that might ensue, and upon the uncertainty of whether liability based upon such a duty could be held within reasonable bounds. In so holding, the court failed to explore fully the relevant policy considerations. Moreover, in hinging its decision on the duty issue, it apparently did not consider the availability of other tort concepts that could be utilized to circumscribe the area of responsibility.

To merely state that there is or is not a duty would be, of course, to beg the essential question of whether plaintiff's interests are entitled to legal protection against the defendant's conduct.[4] Although various attempts have been made to define the factors that are relevant to the determination of a legally recognizable duty, the question can be answered

[2] *E.g.*, Brinkman v. City of Indianapolis, — Ind. —, 231 N.E.2d 169 (1967).

[3] 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). The New York law abolishing municipal immunity consists of specific statutory enactments augmented by a broader decisional liability. *See* Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Comment, *Municipal Liability for Torts of Firemen*, 31 ALBANY L. REV. 256 (1967).

[4] PROSSER 332-33.

only by an assessment of all policy considerations relevant to the factual situation at hand.[5]

Difficulties of administration have always been of great significance in any new development of the law,[6] and fear of admittedly unpredictable administrative consequences may have been a factor in the *Riss* decision. It is significant to observe, however, that such fear of drastically increased caseloads and groundless suits has seldom materialized.[7] Yet, for this reason, courts originally denied recovery for injuries resulting in death,[8] refused to allow recovery for nervous shock unless accompanied by a physical impact,[9] and denied protection to injured consumers of manufactured products in the absence of privity of contract with the manufacturer.[10] Undeniably the cumulative effect of recognizing these interests has had a significant impact upon the administrative burden of the courts, but in no single instance has the resultant burden been in proportion to the fears that it engendered. Furthermore, the existence of modern procedural devices makes it increasingly improbable that unmeritorious actions can survive.[11]

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[5] The ultimate question is whether such a duty *should* be imposed as a matter of policy. This in turn will depend upon the balancing of several factors, namely the burden it would put on defendant's activity; the extent to which the risk is one normally incident to the activity; the risk and the burden to plaintiff; the respective availability and cost of insurance to the two parties; the prevalence of insurance in fact . . . .

2 F. HARPER & F. JAMES, LAW OF TORTS § 18.6, at 1052 (1956) [hereinafter cited as HARPER & JAMES].

[6] See Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1044-45 (1928). See also Comment, *Municipal Immunity for the Torts of Police Officers in South Dakota*, 11 S.D.L. REV. 87 (1966), where it is stated:

> The initiation of municipal liability would ultimately result in an increase in the number of suits brought in local courts and might possibly stimulate false claims. Such an increase could overload our present judicial system and swamp the courts in a sea of litigation . . . .

Id. at 98.

[7] See Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 351 (1957). Dean Leon Green has suggested that courts have overestimated the number of cases that may be attributed to the negligence of governmental employees. Green, *Freedom of Litigation*, 38 ILL. L. REV. 369 (1944).

[8] *E.g.*, Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265 (1856); Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808).

[9] Brisboise v. Kansas City Pub. Serv. Co., 303 S.W.2d 619 (Mo. 1957); Bosley v. Andrews, 393 Pa. 161, 142 A.2d 263 (1958).

[10] *E.g.*, Berger v. Standard Oil Co., 126 Ky. 155, 103 S.W. 245 (1907); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N.E. 454 (1921); Heizer v. Kingsland & Douglas Mfg. Co., 110 Mo. 605, 19 S.W. 630 (1892).

[11] Modern pre-trial and discovery procedures should aid in the weeding out of groundless suits. Furthermore, prompt notice is normally a condition precedent to a suit against a municipality and should serve to thwart the malingering plaintiff.

In addition to the administrative considerations involved in carving out new areas of tort liability, the relative economic burdens to which the litigants may be subjected have concerned the courts.[12] The fear of potentially unbearable financial burdens that might be thrust upon municipalities has been a major factor in perpetuating the doctrine of municipal immunity.[13] Furthermore, even where the immunity doctrine has been abolished, courts have continued to fret over the specter of a depleted municipal treasury.[14] Yet empirical studies indicate that the imposition of tort liability has not saddled municipalities with as great a financial burden as was feared.[15] Of course, if recognition of a duty to provide police protection against personal assaults would seriously jeopardize the public treasury, such a duty should be denied.

It appears that courts, in assessing the potential economic impact, may have failed to distinguish between those losses attributable to the lack of adequate police protection and those involving a failure to provide fire protection. Such a comparison is imprecise at best. Municipal liability for fire damage could well become a crushing financial burden in the event of a conflagration. Moreover, fire insurance is widely held by property owners and, in comparison with the cumbersome process of imposing legal liability upon a city, may represent a more economical way to administer fire losses.[16] On the other hand, while personal accident insurance normally covers injuries intentionally inflicted by others,[17] it is unlikely that the coverage would be sufficient to compensate for serious injury or death. Furthermore, it may be that those who need such insurance the most are least likely to hold it.[18]

The possibility that a duty to provide police protection against per-

[12] "Finally . . . judges give attention to the parties before them. They place the loss where it will be felt the least and can best be borne." Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 256 (1929).

[13] See Warp, *Tort Liability Problems of Small Municipalities*, 9 LAW & CONTEMP. PROB. 363 (1942).

[14] *E.g.*, Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

[15] See Antieau, *supra* note 7; Warp, *supra* note 13.

[16] HARPER & JAMES § 18.6, at 1053; *cf.* Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 U.C.L.A.L. REV. 463, 513 (1963).

[17] 45 C.J.S. *Insurance* § 772 (1955).

[18] National victimization rates indicate that the risk of criminally inflicted personal injury is considerably greater for those persons in lower income groups. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 19 (1967). Because of their economic status (and perhaps other cultural factors), these individuals are less likely to carry personal accident insurance.

sonal injury, once recognized, might easily be extended to include a duty to protect against property loss, may be another factor in perpetuating fears of drastic financial burdens. However, the availability and practicality of property insurance, as distinguished from accident insurance, may also provide a rational basis for limiting liability for failure to provide police protection to those instances that involve personal injury. In addition, the municipality could insure against liability and spread the cost of premiums among the taxpaying public.

In refusing to recognize a duty to provide police protection because of the potential administrative and economic consequences, courts have apparently ignored the existence of other tort principles—principles that, given the existence of the duty, could still be used to hold liability within reasonable bounds.[19] Negation of the doctrine of municipal immunity does not contemplate the imposition of absolute liability; those seeking recovery must still satisfy the traditional elements of a negligence action. In addition to the establishment of a duty, plaintiff must also show a failure to exercise reasonable care in the performance of that duty. The application of a standard of reasonable care to the operation of a municipal police department would require that all circumstances be taken into consideration. The gravity of the foreseeable harm, the resources and other responsibilities of the police, the probability of injury, and the extent of protection necessary to prevent the injury would all be relevant factors.[20] Furthermore, given the duty and the breach of that duty, plaintiff must also establish a causal relationship between the breach and the injury, often in itself a formidable task. The availability of these traditional tort concepts, therefore, may be adequate to circumscribe the area of responsibility.

Quite apart from administrative and economic considerations, courts may rely upon the traditional dichotomy between misfeasance and nonfeasance to deny the existence of a duty to provide police protection against personal assault.[21] The distinction between active misconduct working positive injury, and passive inaction or failure to protect from harm, is

[19] Comment, *Municipality Liable for Negligent Failure to Protect Informer: The Schuster Case*, 59 COLUM. L. REV. 487, 503 (1959) [hereinafter cited as 59 COLUM. L. REV.].

[20] *Id.* at 503.

[21] *E.g.*, Murrain v. Wilson Lines, Inc., 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947) (although municipal immunity had been waived by statute, municipality not liable for failure to provide police protection).

deeply rooted in the common law.[22] Various rationalizations have been offered to explain the distinction, most of which appear to be a product of the extreme individualism characteristic of Anglo-Saxon legal thought.[23] It has been said that active conduct creates a new risk, while mere inaction fails to alter the status quo;[24] that one should provide for his own protection; and that forcing affirmative conduct places a more serious restraint upon personal freedom than imposing limitations on one's liberty to act.[25] A further, and perhaps more rational, justification for refusing to recognize a duty of affirmative action is the difficulty of imposing liability upon a particular individual when all members of a group have had the opportunity and failed to act.[26]

The misfeasance-nonfeasance rule is not without exception. A duty imposed by statute or charter has in some instances given rise to liability for a failure to act. For example, persons injured in automobile accidents have recovered upon the theory that the state failed to perform its statutory duty to maintain safe highways.[27] Liability has been denied, however, in cases where the cause of action is based upon a statutory or charter-imposed duty to provide police services.[28] The courts usually attempt to explain the distinction upon the rather dubious theory that the duty to maintain highways inures to the benefit of the individual members of a particular class of persons, while the duty to provide police protection runs to the general public rather than particular individuals.[29]

Additional theories have been utilized to undercut the nonfeasance rule. Courts have held that a duty to act may be created by the existence of a special relationship between the parties;[30] that one who gratuitously undertakes to render aid to another is under a duty to continue, unless withdrawal of such assistance would leave the other in a position no worse than when the aid was initially extended;[31] and that a duty to act

[22] PROSSER 334-46; Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217 (1908); Comment, *Affirmative Duties in Tort*, 58 YALE L.J. 1272 (1949).

[23] Bohlen, *supra* note 22, at 220.

[24] PROSSER 334; Bohlen, *supra* note 22, at 220-21.

[25] Comment, *Affirmative Duties in Tort*, *supra* note 22, at 1288.

[26] PROSSER 336-37.

[27] *E.g.*, Eastman v. State, 278 App. Div. 1, 102 N.Y.S.2d 925, *aff'd*, 303 N.Y. 691, 103 N.E.2d 56 (1951).

[28] 59 COLUM. L. REV. at 492.

[29] *Id.*

[30] *See generally* HARPER & JAMES § 18.7; HARPER & KIME, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

[31] 2 RESTATEMENT (SECOND) OF TORTS §§ 323-24 (1965).

may be found when one's prior conduct has created a risk of harm to another.[32] In *Schuster v. City of New York*,[33] these exceptions were applied in order to impose liability for failure to provide police protection. After recognizing Willie "the Actor" Sutton, an escaped criminal, Schuster promptly notified the police. After Sutton's arrest the police publicly acknowledged Schuster's role in effectuating the capture. Following telephone calls that threatened physical violence, Schuster was shot to death on a public street by unidentified persons. A decision affirming the trial court's dismissal of the complaint for failure to state a cause of action was reversed, on the theory that plaintiff's performance of his public "duty" to aid in the apprehension of a criminal gave rise to a reciprocal governmental duty to exercise reasonable care for his protection, or alternatively, that the city had a duty to continue the partial protection that had been extended. It has also been suggested that the publicity acknowledging Schuster's role in the capture could have been classified as prior conduct that created a risk of harm, thus giving rise to a duty to provide protection.[34]

One eminent commentator has suggested that *Schuster* could have been decided on the theory of a duty to exercise control over the conduct of third persons.[35] Courts have applied such a rule to impose an obligation upon common carriers to protect their passengers from the wrongful conduct of third persons,[36] and, in addition, the rule has been applied to such relationships as innkeeper-guest,[37] employer-employee,[38] jailer-prisoner,[39] and school-pupil.[40] Admittedly, the opportunity to control the potential wrongdoer in these relationships is inherently greater than that

[32] *Id.* § 321.

[33] 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). The *Riss* court cited and distinguished the *Schuster* case: "Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses . . . ." Riss v. City of New York, 22 N.Y.2d 579, —, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968).

[34] 59 COLUM. L. REV. at 495.

[35] PROSSER 344-45.

[36] *E.g.*, Birmingham Elec. Ry. Co. v. Driver, 232 Ala. 36, 166 So. 701 (1936); Kline v. Milwaukee Elec. Ry. & Light Co., 146 Wis. 134, 131 N.W. 427 (1911).

[37] *E.g.*, Fortney v. Hotel Bancroft, Inc., 5 Ill. App. 2d 327, 125 N.E.2d 544 (1955).

[38] *E.g.*, David v. Missouri Pac. R.R., 328 Mo. 437, 41 S.W.2d 179 (1931).

[39] *E.g.*, Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935).

[40] *E.g.*, McLeod v. Grant County Sch. Dist., 42 Wash. 2d 316, 255 P.2d 360 (1953).

which exists in the context of a police protection case.[41] But this distinction overlooks the fact that controlling the conduct of wrongdoers is the very essence of police work. Furthermore, if the opportunity to exert control over a potential wrongdoer is a factor to consider, then *Riss*, a case in which the identity of the plaintiff's suitor was known, becomes a stronger case for recognition of the duty than *Schuster*, where the party who made the threatening calls was unidentified.

Although the duty to protect was recognized in *Schuster*, it is clear that a plaintiff such as in *Riss* could not avail himself of either the "assumption of duty" or the "prior dangerous conduct" exceptions to the nonfeasance rule. Moreover, the New York court was obviously unwilling to find a special relationship—one that had been afforded to Schuster because of his status as an informer. The nonfeasance rule should not, however, be sacrosanct. It would seem that many of the justifications traditionally advanced for the distinction do not apply to a failure to provide police protection against assault by a third person.[42] The common law attitude of individualism, which regarded men as independent and self-reliant, should perhaps be tempered by the realization that, notwithstanding one's ruggedness, there may be occasions when preservation of life is dependent upon the affirmative action of the police.[43] Moreover, the rationale that regards the imposition of an affirmative duty to act as a serious encroachment upon individual liberty surely has no application to members of an institution charged with maintenance of the public safety. Even the most rational justification—the difficulty of imposing liability upon one of several who failed to render aid—is clearly inapplicable.

Considering the inapplicability of the traditional nonfeasance rules, it therefore seems quite plausible to argue that the potentially catastrophic individual loss brought about by a clear failure to protect life should weigh more heavily than the more remote possibility of serious administrative consequences or economic loss to the municipality.

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[41] *See* Note, *Torts: Municipal Corporation's Liability for Failure to Perform Governmental Acts*, 47 CAL. L. REV. 409, 412 (1959).

[42] 59 COLUM. L. REV. at 502.

[43] *Cf.* Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196, 214 (1946).