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Torts--Municipal Corporations--Duty to Protect an Informer

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TORTS—MUNICIPAL CORPORATIONS—DUTY TO PROTECT AN INFORMER—Plaintiff's intestate was allegedly shot and killed by associates of one Willie Sutton after he had given information to the New York police department which led to Sutton's arrest, conviction and imprisonment. Sutton was an unusually dangerous character with a group of associates who had a special reputation for violence. The police department widely publicized the role of the intestate, who received numerous communications threatening his life. He was given "limited and partial protection" for a time, but was killed when the police protection was discontinued. His administrator, alleging breach of a duty to provide protection to an informer, brought a tort action against the city of New York. The lower court sustained a motion to dismiss. On appeal, affirmed. The court stated that if a duty of the city to afford special police protection existed, it called for protection only against acts of violence by known assailants. *Schuster* v. *The City of New York*, 121 N.Y.S. 2d 735 (1953), *aff'd* 143 N.Y.S. 2d 778 (1955). (One justice dissenting).

The furnishing of a police department by a city is clearly a governmental, as opposed to a corporate, function.[1] The general rule is that a municipal corporation may not be held civilly liable to individuals for neglect to perform, or negligence in performing, duties which are governmental in their nature, in the absence of statute.[2] One reason for this rule is that a state is immune under the historic maxim "The King can do no wrong."[3] The city in performing governmental functions delegated by the state, is an instrument of the state, and shares the same immunity. Another reason for governmental immunity is that public policy requires that public funds be protected.[4]

This common law rule, however, has been changed by statute in New York. The 1939 amendment to the Court of Claims Act provides:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations.[5]

[1] General Petroleum Corp. of Calif. v. City of Los Angeles, 22 Cal. App. 2d 332, 70 P. 2d 998 (1937), *rehearing denied* 22 Cal. App. 2d 332, 72 P. 2d 551 (1937); Evans v. Berry, 262 N.Y. 61, 186 N.E. 203, 89 A.L.R. 387 (1933); Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164, 27 A.L.R. 1497 (1922). For other cases, see 38 AM. JUR. 620 (1941).

[2] 18 MCQUILLIN, MUNICIPAL CORPORATIONS 192 (3rd ed. 1950).

[3] Evans v. Berry, *supra* note 1.

[4] MCQUILLIN, *op. cit. supra*, note 2, at 194-197.

[5] N.Y.L. 1939, c. 860, Sec. 8, as cited in Bernardine v. City of New York, 294 N.Y. 361, 62 N.E. 2d 604, 605, 161 A.L.R. 364 (1945).

This amendment has been construed by the courts to be a waiver of immunity for the city as well as the state.[6]

However, waiver of its immunity by the city does not aid the plaintiff in this case unless there was a duty owed to him by the defendant. Admittedly a city has no statutory duty to protect an informer and the courts are rather reluctant to imply imposition of a duty on a municipal corporation. Regarding the duty of the city to repair fire hydrants, the court stated in *Steitz* v. *City of Beacon* that "an intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect."[7]

The duty of New York City is set forth in its charter, which provides: "The police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime, detect and arrest offenders. . . ."[8] However, it has been held that the city owes no legal duty to an *individual* to provide him with police protection. As the New York Court of Appeals stated in 1946:

> The claim is that the police force failed to take the affirmative action which was necessary to avoid injury to members of the public, which is simply a failure of police protection. Such failure is not a basis of civil liability to individuals.[9]

Likewise, a city is not liable to one injured when it fails to give adequate protection from fire.[10]

Therefore, the rule simply stated is: a city is under a duty to its citizens and residents to provide them with police and fire protection; but such duty goes to its citizens and residents as a whole, and no cause of action inures to an individual in case of a breach of such duty.

But should there be such a duty to individuals? Perhaps a reason

[6] McCrink v. City of New York, 296 N.Y. 99, 71 N.E. 2d 419 (1947); Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E. 2d 704, 163 A.L.R. 342 (1945); Bernardine v. City of New York, *supra*, note 5; McCarthy v. City of Saratoga Springs, 269 App. Div. 469, 56 N.Y.S. 2d 600 (1945) *aff'd in memo*, 269 App. Div. 912, 57 N.Y.S. 2d 653 (1945); Evans v. Berry, *supra*, note 1. For general history of the Court of Claims Act, see Comment, 22 N.Y.U.L.Q. REV. 509, 511, note 8 (1947).

[7] 295 N.Y. 51, 64 N.E. 2d 704, 706, 163 A.L.R. 342 (1945). *But see* Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72, 9 A.L.R. 131 (1919) where the Ohio court interpreted the common-law rule so as to impose liability on the city for the wrongful acts of its policemen on the theory that this was a ministerial, not a governmental, function. Overruled in Aldrich v. City of Youngstown, *supra* note 1.

[8] NEW YORK CITY CHARTER, Sec. 435 (1938), as cited in Anastasio v. Monahan, 124 N.Y.S. 2d 328, 330.

[9] Murrain v. Wilson Line, Inc., 270 App. Div. 372, 59 N.Y.S. 2d 750, 754 (1946).

[10] Steitz v. City of Beacon, *supra* note 6; Hughes v. State, 252 App. Div. 263, 299 N.Y.S. 387 (1937). Also, see annot., 163 A.L.R. 348 (1946).

for the rule on non-liability is the fact that the municipal corporation usually is without knowledge of any impending danger to a particular individual. However, in the *Schuster* case, the defendant city had actual knowledge of the impending danger to the plaintiff's intestate. Notwithstanding this fact, it is believed that although it is one's civic duty to inform his government of a violation of the laws, no reciprocal duty should be placed upon the government to provide him with special police protection. To hold otherwise, would place a tremendous and costly burden upon the municipality.

Assuming there was no duty to act on the part of the city, may liability be predicated upon the principle of undertaking to act? The complaint alleged that the police department undertook a "limited and partial protection" of the intestate. And Professor Prosser states that "if the defendant enters upon an affirmative course of conduct affecting the interests of another, he is regarded as assuming a duty to act, and will thereafter be liable for negligent acts or omissions."[11] But one who undertakes to act is under no duty to act indefinitely. He may discontinue the services if he does not thereby leave the person in a worse position than he was in when the services were begun.[12]

If there were either a primary duty owed the plaintiff's intestate, or a duty created under the doctrine of undertaking to act, it is a question for the jury whether or not such duty was breached by the defendant. Further, the injury to the plaintiff must be caused in fact by the breach of an existing duty.[13] Again, facts of this case[14] seem to present a question on which reasonable men may differ, and should therefore be submitted to the jury.

To hold that a municipal corporation has a duty to provide special police protection to informers against acts of violence by unknown assailants even if limited to cases where the person informed on is an unusually dangerous character with associates having a reputation for violence would place too great a burden on the municipality. It is true that "informing" should be encouraged, but it is apparent that while several informers are having special police protection, thousands of others necessarily may have very little or no protection.

[11] PROSSER, TORTS 182 (2d ed. 1955). See also, CHAPIN, TORTS 11 (1917); Ritter v. State, 204 Misc. 300, 122 N.Y.S. 2d 334, 341 (1953); Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275, 276, 23 A.L.R. 1425 (1922).

[12] RESTATEMENT, TORTS sec. 323 (1934).

[13] PROSSER, TORTS 218 (2d ed. 1955).

[14] It should be noted that the plaintiff's intestate does not come within a New York statute which grants a cause of action to one injured or killed while aiding an officer in making an arrest, or in re-taking a person who has escaped from legal custody, or in executing any legal process. NEW YORK PENAL LAW, Sec. 1848, as cited in Schuster v. The City of New York, 121 N.Y.S. 2d 735, 746 (1953).

It is readily admitted that the result in the present case may seem unjust and inequitable, but the line must be drawn somewhere so as not to overburden public funds.[15] Therefore, we are merely balancing the equities to determine whether the interest of the public will outweigh the personal interest of an individual; and perhaps such is the situation in the case presented.

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[15] It has been suggested that in waiving immunity, there should be a maximum sum recoverable. See Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A.J. 747 (1934).