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Municipal Corporations—Liability for Police Negligence—Duty to Protect Informers

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It is apparent that the court has indulged in a vacillating construction of section 21-137. This construction has rendered the meaning of the section uncertain. Litigants and attorneys, who must necessarily look to statutory law for guidance in divorce proceedings, may justifiably hesitate to place any reliance on the court's latest construction. That such a situation is undesirable is plainly evident. Since parents often become dissatisfied with custody orders and frequently institute modification proceedings with regard thereto, the number of litigants affected is substantial. It appears that this situation might have been avoided if changes in the construction of the statute had been left to the legislature.

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MUNICIPAL CORPORATIONS—LIABILITY FOR POLICE NEGLIGENCE—DUTY TO PROTECT INFORMERS—Plaintiff's intestate son, in response to an FBI flyer, furnished information to the New York police concerning the whereabouts of the notorious criminal, Willie Sutton. His part in the capture of Sutton was widely publicized. Thereafter he received threats against the safety of himself and his family, and was afforded police protection for a short while. The threats continued but police protection was discontinued in spite of request. He was shot to death three weeks later, walking home from work. An action for damages was filed against the City of New York by decedent Schuster's father as administrator of his estate, alleging that his death was due to the negligent failure of the city to use ordinary or reasonable care for Schuster's security and protection. The complaint was dismissed on the ground that it lacked facts sufficient to constitute a cause of action. On appeal the New York Court of Appeals divided three and three. After appointment of an additional justice to sit on the case, on reargument before the Court of Appeals, *held,* reversed. A municipality has a duty, the breach of which will support a cause of action, to exercise reasonable care for the protection against retaliation of a person who has aided in the enforcement of the criminal law. *Schuster v. City of New York,* 5 N.Y.2d 75, 154 N.E.2d 534 (1958).

The breach of a duty is the foundation of any liability in negligence. Hence the problem with the instant case is to find, or create, a duty of reasonable protection running from the New York City Police to an informer who has aided them in a capture, and who reasonably appears to be in danger. Generally a duty arises from a relationship between the parties which brings them sufficiently close together that the conduct of each can have a substantial effect on the other. This relation may be one of activity and space, such as is involved in the operation of an automobile, or it can be a status relation such as "invitee" or "employee." A duty arising from an act can be inferred from the act itself without much difficulty. On the other hand, a duty breached by an omission, since there has been no act, must be established on independent grounds.[1] Since the instant case involved only inaction, any duty must be independently established.

[1]On duty generally, see Winfield, *Duty in Tortious Negligence,* 34 COLUM. L. REV. 41 (1934).

Schuster was not a mere volunteer; he responded to a public call for information. There is upon every citizen an ancient and fundamental duty to aid in law enforcement. The thirteenth century English citizen was bound by law to provide himself with arms and follow the "hue and cry."[2] In addition the common law crime of misprision of felony made it unlawful not to prevent the commission of a felony, or knowing of it, not to make it known to the proper officials.[3] Admittedly, informing of the whereabouts of a known criminal does not fall within the strict definition of misprision of felony, but these common law obligations indicate the existence of an ancient broad duty of the citizen to aid in law enforcement. Language in federal cases further sustains this contention. *In re Quarles and Butler*[4] states as dictum that it is both the right and duty of a citizen to inform of the commission of a crime; and *Wilson v. United States*[5] asserts a duty on everyone to aid in law enforcement.

The cooperation of a citizen with government, as in the instant case, would seem therefore to create a status or relation between them which would support a reciprocal duty. The majority opinion in the principal case suggests the relation is agency, or employment. The citizen's duty to cooperate should give that relation, whatever it is, an added moral quality resulting in a relation much closer than the ordinary relation between citizen and government; one that can charge the parties thereto with affirmative personal duties.

To establish a reciprocal governmental duty to protect an informer the majority opinion cites the *Quarles*[6] case and also *Motes v. United States*.[7] Both cases involve prosecutions under United States statutes making it a crime to conspire to threaten or intimidate any citizen in the full exercise of any right secured to him by the Constitution. The right involved is the right to inform of violations of the laws of the United States. These cases do not concern any duty on the part of the government to protect the informer. However the *Quarles* case does assert that an informer, just as a prisoner, has a right to be protected against lawless violence.

New York City has a history of police negligence cases that establish a trend towards decisions of this type. As pointed out in the dissenting opinion, the recognized problem in police cases is that while everyone admits the police have a broad general duty to protect the public from crime, no individual citizen has any right to complain because that protection failed in his particular unfortunate case. A slightly different question is raised by the negligent acts of the police themselves. The city has been held liable in several cases where a person has been negligently shot by

[2]Babington v. Yellow Taxi Corp., 250 N.Y. 14, 164 N.E. 726 (1928) (dictum).

[3]See 15 C.J.S. *Compounding Offenses* § 2 (1939). Although nearly non-existent as a crime today, misprision of felony was held to be a part of the common law of the state of Vermont in State v. Wilson, 80 Vt. 249, 67 Atl. 533 (1907), and was on the statutes of Louisiana until repealed in 1942. LA. REV. STAT., 1870, § 856.

[4]158 U.S. 532 (1895) (dictum).

[5]59 F.2d 390 (3d Cir. 1932) (dictum).

[6]Note 4 *supra*.

[7]178 U.S. 458 (1900).

the police.[8] In two additional cases the intentional acts of third persons were involved: *Lubelfeld v. City of New York*[9] concerned a taxicab driver who recovered for injuries when he was shot by a passenger placed in his car by three policemen.[10] *Benway v. City of Watertown*[11] held the municipality liable to a wife shot by her husband with a gun which had been returned to him by police in spite of the fact that he had no permit and had threatened her.

These two cases are especially significant because in each of them it was held that the intentional criminal act of another should have been foreseen and prevented by the municipality. At least that aspect of the instant case has support. The situation in the *Benway* case is similar to that of the instant case in that the police were charged with foreseeing that the plaintiff might be assaulted; and if they were not under a duty to protect her, were at least under a duty not to provide the means for the assault. The *Lubelfeld* case is pertinent in an additional respect because there the taxi driver could be viewed as within an "employment" relation which would give rise to a greater duty of care. The instant case involved both the foreseeable criminal act of a third party, and a special relationship between the plaintiff and the police. The extension of this sequence of police negligence cases to the case of negligent omission does not, then, seem too great.

The *Quarles* case and these New York cases seem to be the full range of applicable precedent, but there are other possible theories upon which liability might be founded. It was suggested above that Schuster could be treated as an employee of the police. At common law an employer was under a duty only to disclose to his employees the dangers of the employment. Yet great changes have been wrought upon the modern employer's liability. Holdings under the Federal Employers' Liability Act, which retains negligence as a basis of liability, have imposed upon the employer a duty to protect employees from foreseeable criminal misconduct of others.[12] If the theory that Schuster was an employee or agent has any validity, these holdings are relevant.

For a short while the New York City Police did extend protection to Schuster and his family. In so doing it could be said they recognized their duty to do so. The concurring opinion of Justice McNally continues from this point and establishes liability on the rule that once having assumed a duty one is bound to carry out its performance without negligence. Whether this rule always includes a duty to continue to perform as in this case is doubtful. However the Montana Supreme Court has taken just

[8]Meistinsky v. City of New York, 309 N.Y. 998, 132 N.E.2d 900 (1956); Flamer v. City of Yonkers, 309 N.Y. 114, 127 N.E.2d 838 (1955); Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1954); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947).

[9]4 N.Y.2d 455, 176 N.Y.S.2d 302, 151 N.E.2d 862 (1958).

[10]The fact that the passenger was a drunken off-duty policeman makes no difference for our purposes, since liability was based on the act of other policemen in placing him in the taxi.

[11]1 App. Div. 2d 465, 151 N.Y.S.2d 485 (1956).

[12]See Tatham v. Wabash R. Co., 412 Ill. 568, 107 N.E.2d 735, 33 A.L.R.2d 1287 (1952), involving intentional malicious acts of another employee, and Lillie v. Thompson, 332 U.S. 459 (1947), involving criminal acts of third parties.

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such a position in the case of *Stewart v. Standard Publishing Co.*[13] There the defendant had taken it upon itself to clear its sidewalks of snow, although it had no duty to do so. The court held the defendant negligent for having failed to do so on the particular morning the plaintiff fell. The rationale upon which a duty which was originally non-existent is created by a mere history of acting in a particular way and without reliance by anyone thereon is hard to comprehend. However such reasoning has been used and could be applied to situations like the instant case.

In the long run, is there any real need to find a duty well established by precedent in order to impose liability? Certainly no one can deny that there is a strong moral duty to protect a citizen endangered because of his cooperation with the police. Public policy would surely favor protection for the purpose of encouraging such action. Negligence is a broad concept which is continually being molded to fit new situations. Indeed the history of tort law has been the history of newly found duties. As stated by Prosser: "Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree it exists."[14]

It should be noted that the instant decision would not have been possible without a far-reaching waiver of sovereign immunity. New York has waived virtually all immunity from civil suit.[15] The waiver was held to extend to all civil divisions of the state in *Bernardine v. City of New York.*[16] And in addition the New York City police cases indicate that the traditional governmental-proprietary distinction in municipal functions is not followed.[17]

Until the 1959 legislative session, Montana's waiver of state immunity was very limited.[18] However, House Bill 237,[19] passed this year, waives the sovereign immunity of the state for damages caused by negligence, wrongful acts, or omissions of state employees who are acting within the scope of their employment, in any circumstance in which a private person would be liable in damages for the same act or omission; but *the waiver is limited to the extent of insurance coverage.* This of course severely limits the effect of the new provision, because the state can still avoid any liability under it by merely neglecting to take out insurance for tortious acts of state employees. Further, the new statute is seemingly limited to claims against the state itself, and does not extend to governmental subdivisions.

In all situations where the state is not insured against tort damages,

[13]102 Mont. 43, 55 P.2d 694 (1936).

[14]PROSSER, TORTS 168 (2d ed. 1955).

[15]The New York Court of Claims Act of 1929 § 12 (now § 8) reads as follows: "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 corporation [sic]."

[16]294 N.Y. 361, 62 N.E.2d 604 (1945).

[17]See Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 SYRACUSE L. REV. 30 (1958).

[18]See Note, 8 MONT. L. REV. 45 (1947).

[19]Laws of Montana 1959, ch. 254.

the general immunity apparently remains unchanged. The Montana Constitution[20] provides that the Governor, Secretary of State, and Attorney General, sitting as a board of examiners, must act on all claims against the state before the legislature can consider them. Aside from express statutory provision, municipalities and counties may be sued only for damages arising out of their proprietary functions. Statutes other than the new legislation provide that cities may be sued for negligence in the maintenance of streets and ways,[21] except for failure to remove snow;[22] and cities are responsible for injuries to property within their corporate limits caused by mobs or riots.[23]

Cases like the instant one do appear highly unusual. At least a partial explanation lies in the very recent development of governmental liability. Perhaps there should be a recognition that governmental liability will naturally involve different situations than ordinary negligence cases because of the unique functions of governing bodies. The growth of waiver statutes and decisions like the principal case are consistent with a growing dissatisfaction with the doctrine of sovereign immunity.[24] It has become recognized that the doctrine is founded upon the prerogatives of kings, and the idea that the ultimate source of sovereign power is the sovereign itself. Such concepts are not consistent with the modern theory that a state's powers are derived from its subjects, and it is responsible to them. As the doctrine of governmental irresponsibility fades away, cases of the instant type will be more likely to occur.

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[20]Art. VII, § 20.
[21]REVISED CODES OF MONTANA, 1947, § 11-1305.
[22]*Id.* at § 11-1306.
[23]*Id.* at § 11-1503.
[24]Taylor v. New Jersey Highway Authority, 22 N.J. 454, 126 A.2d 313, 62 A.L.R.2d 1211 (1956).