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MUNICIPAL LIABILITY FOR FAILURE TO SUPPLY ADEQUATE POLICE SERVICE AND FOR CRIMINAL ACTS OCCURRING ON ITS PROPERTY

*Judge Thomas P. Quinn**

INTRODUCTION

The inadequacy of police protection and service, long considered an important political issue, has increasingly become utilized as a means of imposing liability upon municipalities. Immunity for the inadequate provision of police protection and service was codified by the Illinois Tort Immunity Act.¹ This Act remains an effective shield to municipal liability and is examined in this Article in three contexts.

First, section 4-102 of the Tort Immunity Act is looked at in its most common and obvious form, as a way to immunize police for their failure to prevent a criminal attack on another. Second, the interplay between section 4-102 and the property related duties of municipalities is viewed in light of the expanding tendency to hold owners liable for criminal acts that occur on their property. Finally, section 4-102 is analyzed as to how it has fared when it conflicts with duties imposed by statute or other common law tenets.

I. MUNICIPALITY LIABILITY FOR POLICE FAILURE TO PREVENT CRIMINAL ATTACK

Liability for inadequate police protection or service revolves around the issue of duty. The question of duty, the legal obligation imposed upon one for the benefit of another, is a question of law to be determined by the court.² In Illinois, the general rule is that a municipality is not liable for failure to provide adequate police protection or service.³ In providing police protection, police departments and municipalities owe a duty to the community to preserve the well-being of that community at large and do not

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1. ILL. REV. STAT. ch. 85, para. 4-102 (1979).

2. *Barnes v. Washington*, 56 Ill. 2d 22, 305 N.E.2d 535 (1973). See generally PROSSER, HANDBOOK OF THE LAW OF TORTS § 37, at 235 (5th ed. 1984) [hereinafter PROSSER].

3. *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983); *Huey v. Town of Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1968); *Adamczyk v. Zambelli*, 25 Ill. App. 2d 121, 166 N.E.2d 93 (1960).

owe a duty to specific individuals.⁴ This rule embodies the conclusion that a police department's negligence is not the proximate or legal cause of harms committed by others.⁵

Ultimately, the existence of a duty depends upon choices between competing policies.⁶ Generally, if it is recognized that police owe a duty to individuals, in the absence of special circumstances, the police are pressured to make hasty arrests.⁷ More importantly, if police are charged with the general duty to protect citizens, they are placed in the untenable position of being insurers and guarantors of the public safety.⁸ Police protection cases invite court discussion of public policy ramifications that invariably conclude that imposing such a duty would not be a desired social goal.⁹ Allegations that police failed to prevent a criminal act fare no better in federal court since there is no constitutional right to police protection.¹⁰ Originally embodied in the common law concept of sovereign immunity, municipal immunity for failure to provide adequate police protection is now contained in the Local Governmental Tort Immunity Act.¹¹

Illinois courts have recognized that certain circumstances can exist whereby police have assumed a "special duty" to a particular individual.¹² In order

4. *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983); *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 410 N.E.2d 610 (1980).

5. *Porter*, 88 Ill. App. 3d at 445, 410 N.E.2d at 612.

6. PROSSER, *supra* note 2, § 53, at 356-58.

7. *Santy v. Bresee*, 129 Ill. App. 3d 658, 473 N.E.2d 69 (1984); *Porter*, 88 Ill. App. 3d at 445, 410 N.E.2d at 612.

8. *Marvin*, 113 Ill. App. 3d at 178, 446 N.E.2d at 1188; *Porter*, 88 Ill. App. 3d at 446, 410 N.E.2d at 613; *Adamczyk*, 25 Ill. App. 2d at 128, 166 N.E.2d at 97.

9. *See, e.g., Marvin*, 113 Ill. App. 3d at 178, 446 N.E.2d at 1188 (police do not have to insure the safety of every Chicago Transit Authority passenger); *Adamczyk*, 25 Ill. App. 2d at 128, 166 N.E.2d at 97 (municipality cannot be liable in tort for the failure of its police to prevent people from violating the law).

10. *Beard v. O'Neal*, 728 F.2d 894 (7th Cir.), *cert. denied*, 469 U.S. 825 (1984).

11. ILL. REV. STAT. ch. 85, para. 4-102 (1979), which reads in pertinent part:

Section 4-102. Neither a local public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide adequate police protection or service, failure to prevent commission of crimes, *failure to detect or solve crimes* and failure to *identify and apprehend criminals*. *This immunity is not waived by a contract for private security service, but cannot be transferred to any non-public entity or employee.*

Section 4-107. Neither a local public entity nor a public employee is liable for an injury caused by the failure to make an arrest or by releasing a person in custody. The underlined portions were added by the Illinois Tort Reform Act, Public Act 84-1431, 3978 approved Sept. 26, 1986.

12. *See, e.g., Gardner v. Village of Chicago Ridge*, 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966), *aff'd in part and remanded*, 128 Ill. App. 2d 157, 262 N.E.2d 829 (1970), *cert. denied*, 403 U.S. 919 (1971) (duty to protect persons making identification of suspects from those arrested suspects). *But cf. Mallder v. Rasmussen*, 145 Ill. App. 3d 809, 495 N.E.2d 1356 (1986) (failure to carry out an arrest warrant does not impose a "special duty" upon the officer where the officer exercised proper discretion).

for a plaintiff to sufficiently allege that a special duty exists, the following criteria must be met:

- 1) The municipality must be uniquely aware of the particular danger or risk to which plaintiff is exposed;
- 2) there must be allegations of specific acts or omissions on the part of the municipality;
- 3) the specific acts or omissions must be either affirmative or wilful in nature; and
- 4) the injury must occur while the plaintiff is under the direct and immediate control of the employees or agents of the municipality.¹³

Few factual situations survive pre-trial motions when analyzed under the above criteria. One of the few that survived was *Gardner v. Village of Chicago Ridge*.¹⁴ In *Gardner*, police summoned the plaintiff, who had been the victim of a battery earlier that night, to identify four suspects who had been apprehended. Upon arriving at the scene, the plaintiff was threatened and berated by the suspects. When the police failed to intercede, two of the suspects attacked and injured the plaintiff.¹⁵ The court concluded that because the police had asked the plaintiff to come to the place where the suspects had been apprehended, they should have known that they were endangering the plaintiff and, therefore, had a duty to protect the plaintiff.¹⁶

Even if the court determines that section 4-102 is applicable, however, the more common result is for the court to hold that the requirements of the special duty exception were not fulfilled.¹⁷ Typically, the requirement that the plaintiff must have been under the direct and immediate control of the defendants, causes the courts to hold that no special duty existed.¹⁸ For example, the court has held that no cause of action was stated by the estate of a black man against a town for failing to protect him when it should have known that blacks within its borders were frequently the victims of criminal attack.¹⁹ There, the court determined that the decedent was not under the direct and immediate control of town officials or police while travelling through the town. Consequently, the special duty exception did not apply.²⁰

13. *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983); *Curtis v. County of Cook*, 109 Ill. App. 3d 400, 440 N.E.2d 942 (1982), *aff'd in part and rev'd in part*, 98 Ill. 2d 158, 456 N.E.2d 116 (1983); *Bell v. Village of Midlothian*, 90 Ill. App. 3d 967, 414 N.E.2d 104 (1980).

14. 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966), *aff'd in part and remanded*, 128 Ill. App. 2d 157, 262 N.E.2d 829 (1970), *cert. denied*, 403 U.S. 919 (1971).

15. *Gardner*, 71 Ill. App. 2d at 375, 219 N.E.2d at 148.

16. *Id.* at 375, 219 N.E.2d at 150.

17. *Neider v. Gacy*, 121 Ill. App. 3d 854, 460 N.E.2d 342 (1984); *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983).

18. *Galuszynski v. City of Chicago*, 131 Ill. App. 3d 505, 475 N.E.2d 960 (1985).

19. *Huey*, 41 Ill. 2d at 361, 243 N.E.2d at 214.

20. *Id.* at 363, 243 N.E.2d at 216.

A more plausible theory was attempted in *Marvin v. Chicago Transit Authority*.²¹ While paying his rapid transit fare, the plaintiff was struck by a youth in the presence of a Chicago police officer.²² The plaintiff requested that the officer accompany him to the northbound subway platform but the officer declined, explaining that since the youths had descended to the southbound platform, the plaintiff would be safe.²³ When the plaintiff arrived at the northbound platform, he again encountered the youths and was once again attacked.²⁴ The Illinois Appellate Court affirmed the dismissal of the complaint as to the City of Chicago, finding that the plaintiff's injuries did not occur while he was under the direct and immediate control of the police officer.²⁵ Disjunctive allegations that the officer "directed, permitted or caused" the plaintiff to descend from the platform, and that the officer had failed to accompany him despite knowledge of the risk of harm to the plaintiff, were not sufficient to satisfy the control requirement of the special duty exception.²⁶

Illinois courts have literally interpreted the "direct and immediate control" language used to impose a special duty on police.²⁷ Plaintiffs must seemingly be in the actual physical presence of police at the time of injury before a cause of action can be stated.²⁸ A recent example of this strict interpretation of the special duty requirement is found in the leading case, *Galuszynski v. City of Chicago*.²⁹ In *Galuszynski*, the plaintiff phoned the 911 emergency number to report that intruders were attempting to break into her home. The 911 dispatcher told Galuszynski that police officers were on their way and to watch for them. Police arrived twenty-four minutes later, during which time the intruders attacked and robbed the Galuszynskis.³⁰ The trial court dismissed the complaint and found that no allegations were made leading to the conclusion that the plaintiffs were under the direct and immediate control of police personnel.³¹ The appellate court agreed and distinguished the *Gardner* case, where plaintiff had been "called into a position of peril by police"³² and found the instant situation was more akin to that found in *Marvin*, where plaintiff sought police protection which was not provided.³³

21. 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983).

22. *Id.*

23. *Id.* at 174, 446 N.E.2d at 1185.

24. *Id.* at 175, 446 N.E.2d at 1185.

25. *Id.*

26. *Id.* at 177, 446 N.E.2d at 1187.

27. *Mallder v. Rasmussen*, 145 Ill. App. 3d 809, 495 N.E.2d 1356 (1986); *Tannebaum v. Lincoln Nat'l Bank*, 143 Ill. App. 3d 572, 493 N.E.2d 143 (1986).

28. *See supra* note 27.

29. 131 Ill. App. 3d 505, 475 N.E.2d 960 (1985).

30. *Id.* at 506, 475 N.E.2d at 961.

31. *Id.* at 508, 475 N.E.2d at 962.

32. *Id.* at 508, 475 N.E.2d at 963.

33. *Id.* at 509, 475 N.E.2d at 963.

The *Marvin* and *Galuszynski* opinions are very significant because both courts rejected theories of liability based on police failure to accompany the plaintiffs and police failure to respond quickly, undercutting two of the most popular theories for establishing a special duty owed by the police. These holdings clearly differ with those of other jurisdictions³⁴ and cast doubt on whether Illinois courts would recognize a cause of action where police failed to protect a state prosecution witness from injury.³⁵

The immunities of section 4-102 and section 4-107 have served to defeat numerous claims over the years.³⁶ In *Jamison v. City of Chicago*,³⁷ the court held that failing to take a man into custody whose violent behavior was reported to police was immunized conduct which defeated a claim by the estate of a murder victim.³⁸ The *Jamison* court also held that the Tort Immunity Act, which protects police from liability for law enforcement action unless their conduct is wilful and wanton,³⁹ is not a limitation on the more sweeping immunities of section 4-102 and section 4-107.⁴⁰ Courts have found little difficulty in deciding claims for failure to provide adequate police protection and service when the special duty exception is the only means available to state a cause of action.⁴¹ Because of the strict interpretation of the direct and immediate control requirement, the resolution of cases subject to the immunity of section 4-102 is relatively uncomplicated.

34. See, e.g., *Delong v. County of Erie*, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982) (holding the city liable for the failure of its police to promptly respond to an emergency call on the 911 system).

35. The courts in *Huey*, 41 Ill. 2d at 363, 243 N.E.2d at 216, and *Porter*, 88 Ill. App. 3d at 446, 410 N.E.2d at 612, both refer approvingly to *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534 180 N.Y.S.2d 265 (1958), which held the defendant municipality liable for failing to protect a state prosecution witness who had received death threats for cooperating with police. *Schuster* was shot, 19 days after helping police as he approached his house. At the time he was shot *Schuster* was not receiving police protection. This situation is similar to *Marvin* in that protection was not supplied. Because there was no direct and immediate control over plaintiff by police, it is apparent that no cause of action would exit under these facts in Illinois.

36. See, e.g., *Nieder v. Gacy*, 121 Ill. App. 3d 854, 460 N.E.2d 343 (1984) (police department's failure to follow up on missing person case does not state a cause of action); *Santy v. Bresee*, 129 Ill. App. 3d 658, 473 N.E.2d 69 (1984) (police department's failure to provide requested protection or to warn of the release of a dangerous person from custody, even if a warning was promised, does not state a cause of action); *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 410 N.E.2d 610 (1980) (police department's failure to investigate crimes and make arrests does not state a cause of action).

37. 48 Ill. App. 3d 567, 363 N.E.2d 87 (1977).

38. *Id.* at 569, 363 N.E.2d at 88.

39. ILL. REV. STAT. ch. 85, para. 2-202 (1979).

40. 48 Ill. App. 3d 567, 363 N.E.2d 87 (1977). See also *Luber v. City of Highland*, 151 Ill. App. 3d 758, 502 N.E.2d 1243 (1986) (failure to arrest a motorist, test for intoxication, ask him to remain at the scene, or seek alternative transportation for him was not wilful or wanton conduct under the statute).

41. *Hernandez v. Village of Cicero*, 151 Ill. App. 3d 170, 502 N.E.2d 1226 (1987); *Luber v. City of Highland*, 151 Ill. App. 3d 758, 502 N.E.2d 1243 (1986).

II. THE RELATIONSHIP BETWEEN SECTION 4-102 AND THE PROPERTY RELATED DUTIES OF A MUNICIPALITY

A municipal corporation engaged in a nongovernmental function, such as the operation of a public stadium or arena, a public transportation system, or a public housing project, must conform to the same standard of care as that imposed on a private party.⁴² While the general rule is that there is no duty to aid or protect, the existence of a "special relationship" creates a duty to take reasonable action to protect against risk of physical harm.⁴³ Lengthy discussion of the voluminous case law and authority dealing with all possible forms of liability for failure to protect against criminal attack is unnecessary for purposes of determining municipal liability for inadequate police service.⁴⁴ What is important to note is that a duty is much more likely to be found if analysis is made under a "special relationship" rather than a "special duty" concept. Although sometimes used interchangeably, the terms special relationship and special duty are different legal theories.⁴⁵ An analysis into whether a special relationship exists focuses on the status between the parties while an analysis of whether a special duty exists focuses on all of the circumstances surrounding a given situation. If a special relationship is established with a municipality engaged in a nongovernmental function, then section 4-102 should not apply. Special duty, on the other hand, is an exception to immunity once it is determined that section 4-102 applies.

In *Comastro v. Village of Rosemont*,⁴⁶ the appellate court addressed both issues, although the distinction between special duty and special relationship was not clearly drawn. In *Comastro*, the plaintiff was assaulted by unknown individuals after attending a concert at the Rosemont Horizon. The Village of Rosemont owns and manages the Horizon and uses members of its police force to provide security at concerts. The court found that the police owed

42. See, e.g., *Phillips v. Chicago Hous. Auth.*, 89 Ill. 2d 122, 431 N.E.2d 1038 (1982) (public housing); *Gill v. Chicago Park Dist.*, 85 Ill. App. 3d 903, 407 N.E.2d 671 (1980) (public stadium); *McCoy v. Chicago Transit Auth.*, 69 Ill. 2d 280, 371 N.E.2d 625 (1977) (public transportation).

43. These "special relationships" which require imposition of a reasonable duty to protect against harm, are described in the *Restatement* as follows: (1) carrier/passenger, (2) innkeeper/guest, (3) possessor of land/invitee, and (4) one who takes voluntary custody of another under circumstances such as to deprive the other of his normal opportunities for protection. RESTATEMENT (SECOND) OF TORTS § 314(A) (1965) [hereinafter RESTATEMENT].

44. For a good discussion of this subject matter, see Stalmack, *The Illinois Landlord's Obligation to Protect Persons On His Premises Against the Criminal Activities of Third Persons*, 68 ILL. B.J. 668 (1980) [hereinafter Stalmack]. See also Lesar, *Tort Liability of Illinois Landlords for Crimes of Third Persons*, S. ILL. U.L.J. 415 (1983) [hereinafter Lesar].

45. See, e.g., *Santy v. Bresee*, 129 Ill. App. 3d 658, 473 N.E.2d 69 (1984) (court uses special relationship and special duty interchangeably); *Porter v. City of Urbana*, 88 Ill. App. 3d 443, 410 N.E.2d 610 (1980) (special relationship and special duty used interchangeably).

46. 122 Ill. App. 3d 405, 461 N.E.2d 616 (1984).

a duty to the plaintiff because of the special relationship (business inviter-invitee) between the parties. Because the village had received sufficient advance warning of potential trouble at the concert, it was required to exercise a reasonable degree of care to prevent physical attacks.⁴⁷

In addition to the duty owed because of the existent special relationship, the *Comastro* court found that the police owed a duty because the village voluntarily undertook to provide special protection to specific members of the community. Because Horizon patrons were provided with greater protection than village residents at large, the police had a duty to perform those increased protective services with reasonable care.⁴⁸ This determination was not even necessary because, as the court correctly stated, "[T]he general rule of non-liability of municipalities for failure to exercise general police powers" was not applicable because the village was not engaged in a governmental function.⁴⁹ The latter finding merits consideration, however, because municipalities frequently provide one segment of the public with greater police protection than another. The *Comastro* court cited the holding in *Krautstrunk v. Chicago Housing Authority*⁵⁰ to support the special duty created when the governmental entity voluntarily undertakes to provide enhanced police protection.⁵¹

In *Krautstrunk*, the plaintiff was an elevator repairman who was shot while working on a vacant floor at the Cabrini-Green housing project.⁵² The floor had been closed off in order to prevent loitering and criminal activity. Plaintiff alleged that since the CHA had contracted with the City of Chicago for greater police protection, the CHA was liable for negligent performance of a voluntary undertaking.⁵³ No facts were alleged that the risk of criminal attack was increased by the CHA's voluntary security measures and this theory was dismissed. The *Comastro* court's reliance on *Krautstrunk* to support the proposition that greater police protection establishes a special duty, is further questioned in light of the fact that the provider of police, the City of Chicago, was not even a defendant in *Krautstrunk*.

Additionally, the *Marvin* court specifically rejected the theory that the City of Chicago should be charged for "negligent performance of a voluntary undertaking" when it assumed full responsibility for policing the CTA.⁵⁴ The *Krautstrunk* and *Marvin* courts both believed that public policy considerations dictated that municipalities should not be insurers against harm to a class of individuals simply because those individuals were provided with

47. *Id.* at 409, 461 N.E.2d at 620.

48. *Id.* at 408-09, 461 N.E.2d at 619.

49. *Id.* at 410, 461 N.E.2d at 620.

50. 95 Ill. App. 3d 529, 420 N.E.2d 429 (1981).

51. 122 Ill. App. 3d at 410, 461 N.E.2d at 621 (citing *Krautstrunk v. Chicago Hous. Auth.*, 95 Ill. App. 3d 529, 420 N.E.2d 429 (1981)).

52. 95 Ill. App. 3d at 530, 420 N.E.2d at 430.

53. *Id.* at 530-31, 420 N.E.2d at 431.

54. 113 Ill. App. 3d at 178, 446 N.E.2d at 1187.

greater police protection than the public at large. In fact, residents of high crime areas are, to some degree, provided with more police protection. It would be inconsistent to analyze the claims of crime victims from one area under a different theory than those from another area. The idea that special police protection carries with it certain higher duties is a theory that will surely be reviewed again but which should fail due to the sound policy considerations expressed by the *Marvin* court.

Illinois courts have not considered the direct conflict that can result when a municipality, in performing a governmental function, fails to provide adequate police protection and service to an individual with whom it has a special relationship. In *DeZort v. Village of Hinsdale*,⁵⁵ the appellate court imposed a municipal duty "to exercise ordinary and reasonable care" in order to preserve the life of an arrestee known to have suicidal tendencies.⁵⁶ In a footnote, the court noted that application of the Tort Immunity Act might have yielded a different result, although this argument had not been raised by either party.⁵⁷ Due to the huge inventory of public land, municipalities should probably be most concerned with the duties incumbent to the possessor of land/invitee special relationship. A hypothetical fact situation will best explain the issues involved when a property related duty of a municipality conflicts with the general notion of section 4-102 immunity.

Illustration

What happens when a municipality, pursuant to a governmental function, negligently maintains its property thereby causing a criminal act to take place? For example, how would the courts treat allegations that a burnt out or missing street light contributed to a felonious assault by providing a setting ripe for crime. Clearly, a municipality has a duty to maintain street lighting once provided,⁵⁸ but does this duty extend to victims of criminal attacks? The crucial consideration is, of course, whether or not a duty exists. In recognizing a duty, the court should consider the nature of the relationship between the parties, the foreseeability of the third party activity, and the maintenance of fair social policy. Sound public policy, in turn, requires that the duty be based upon "the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden on the defendant."⁵⁹

55. 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976).

56. *Id.* at 710, 342 N.E.2d at 473.

57. *Id.* at 712 n.3, 342 N.E.2d at 475 n.3.

58. *See* *Greene v. City of Chicago*, 73 Ill. 2d 100, 382 N.E.2d 1205 (1978).

59. *Trice v. Chicago Hous. Auth.*, 14 Ill. App. 3d 97, 100, 302 N.E.2d 207, 209 (1973). *See also Krautstrunk*, 93 Ill. App. 3d at 534, 420 N.E.2d at 431 (imposition of a legal duty is not dependent solely on foreseeability of injury; courts must take into account likelihood of injury and burden of guarding against it); *Stalmack*, *supra* note 45, at 671.

The existence of a special relationship imposes a duty to use reasonable care to prevent crime. Because the prevention of crime is specifically immunized by section 4-102, it would be inconsistent with the legislative scheme to subject municipalities to the same duty required of others engaged in a special relationship. Consistent with this reasoning is the 1985 amendment to section 27 of the Metropolitan Transit Authority Act.⁶⁰ This amendment, passed in response to the growing concern over liability exposure, immunized the Chicago Transit Authority for failure to protect against and prevent crime.⁶¹ This amendment effectively removes carrier/passenger from the status of special relationship because the higher duty required by that status is immunized. Likewise, section 4-102 immunizes municipalities, while acting in their governmental capacity, from having a duty to prevent crime regardless of the victim's status.

Although a finding of special relationship eases pleading and proof burdens, there are other circumstances where liability attaches for the criminal acts of others. Most widely accepted is the *Restatement* requirement that a party refrain from affirmative acts which expose one to a recognizable high degree of risk.⁶² Thus, parties will be liable if their acts create a foreseeable hazard which did not previously exist.

*Cross v. Wells Fargo Alarm Services*⁶³ is one Illinois case illustrative of affirmative acts which subject one to liability. The Chicago Housing Authority provided a private security force for its residents during the hours of 9 a.m. to 1 a.m. The plaintiff, who was assaulted at 1:15 a.m., alleged that the CHA actions had actually increased the incidence of crime after 1 a.m. On that basis, the Illinois Supreme Court held that the claim stated a legitimate cause of action.⁶⁴ In *Ney v. Yellow Cab*,⁶⁵ the Illinois Supreme Court recognized a duty owed by a cab company to the owner of an automobile whose car was struck by a stolen cab. The cab company was negligent because its driver had left the keys in the ignition and the motor running.⁶⁶

These decisions would control a situation, for example, where police apprehend a gang member and force him to exit the police vehicle in rival gang territory where he is subsequently attacked. These opinions, and the

60. ILL. REV. STAT. ch. 111 2/3, para. 327 (1978) (amended 1985).

61. *Id.* See also *Bilyk v. Chicago Transit Authority*, No. 86L-10380, slip op. at 5 (Ill. Cir. Ct. June 18, 1987) (legislature intended to immunize the Chicago Transit Authority from liability for the criminal acts of third persons).

62. RESTATEMENT, *supra* note 43, § 302B comment e.

63. 82 Ill. 2d 313, 412 N.E.2d 472 (1980).

64. *Id.* at 318, 412 N.E.2d at 475.

65. 2 Ill. 2d 74, 117 N.E.2d 74 (1954).

66. *Id.* at 83-84, 117 N.E.2d at 80. Cf. RESTATEMENT, *supra* note 43, § 302B illustration 2 (no duty is owed under similar circumstances). Additionally, the dissent in *Ney* voices legitimate concerns which should dictate a narrow interpretation of this opinion. 2 Ill. 2d at 86, 117 N.E.2d at 81 (Hershey, J., dissenting).

affirmative act exception, do not help in determining whether a municipality should be liable for a criminal attack that takes place due to the darkness caused by inadequate lighting. Failure to maintain a street light is not an affirmative act which has created a hazard that did not previously exist. The inquiry is still not complete because other exceptions have been carved out from the general rule of no liability for criminal attack.

Although a landlord and tenant are not considered to have a special relationship,⁶⁷ Illinois courts, through continual analysis of criminal attacks in this setting, have found ways to impose liability upon landlords for the criminal acts of others. In *Phillips v. Chicago Housing Authority*,⁶⁸ the plaintiff decedent was abducted by unknown persons and violently assaulted, raped, and murdered on a vacant floor of the Cabrini-Green Housing Project. The trial court did not recognize a cause of action and dismissed the complaint with prejudice. The appellate court reversed and remanded, and the CHA appealed. The Illinois Supreme Court upheld the appellate court because the defendant had voluntarily undertaken to close off and secure certain floors but had negligently allowed access to those floors through a stairway and an elevator.⁶⁹ The supreme court rejected the argument that a party could be liable only if its conduct actually increased the risks and dangers of criminal attack.⁷⁰

The Illinois Supreme Court in *Phillips* specifically declined to consider all of the grounds given by the appellate court to support its finding that the CHA had a duty to the plaintiff under the circumstances.⁷¹ These grounds are worth noting, however, because one of the exceptions could impact on the hypothetical example of a burnt out street light contributing to a criminal attack. In discussing the general rule that a landlord did not owe a duty to protect a tenant from criminal acts, the appellate court in *Phillips* stated the following:

Three exceptions, however exist to this general rule. The landlord may be liable to the tenant if the injury although due to criminal activity occurred because of a condition of the premises. In addition the landlord may be liable if it attempts to safeguard the premises but does so negligently, or liable if it attempts to safeguard the premises but does so negligently, or if by his acts he creates a hazard which did not previously exist.⁷²

67. *Pippin v. Chicago Hous. Auth.*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979).

68. 89 Ill. 2d 122, 431 N.E.2d 1038 (1982).

69. *Id.* at 126, 431 N.E.2d at 1040.

70. *Id.* at 127, 431 N.E.2d at 1040-41.

71. *Id.* at 126, 431 N.E.2d at 1040. The supreme court never discussed this "condition" of property theory of liability. See also Lesar, *supra* note 45, at 428 n.85, which states that the Illinois Supreme Court, in *Phillips*, recognized lesser liability when a condition of defendants property contributed to a criminal attack. While the appellate court clearly held this way, the highest court said it would be unnecessary to consider all of the grounds for the appellate court holdings.

72. 91 Ill. App. 3d 544, 547, 414 N.E.2d 1133, 1136 (1980) (citations omitted).

The latter two exceptions, which have already been discussed, are inapplicable to the maintenance issue involved in the burnt out street light hypothetical. The first exception, imposing a duty if a defective condition contributes to the criminal activity, represents an expansive departure from the general rule.

This departure was first enunciated by the Illinois Appellate Court in *Stribling v. Chicago Housing Authority*.⁷³ In *Stribling*, the plaintiffs were victimized by three burglaries that all occurred when thieves broke through the walls that separated the plaintiffs apartment from the vacant apartments on either side. Noting the bizarre circumstances of the case, the court found that the CHA had a duty to guard against the second and third burglaries after being notified of the circumstances surrounding the first burglary.⁷⁴

Although the appellate court in *Phillips* followed the *Stribling* opinion, it is a decision that has been distinguished⁷⁵ and found unpersuasive.⁷⁶ *Stribling* was however, recently relied upon in *Duncavage v. Allen*,⁷⁷ an opinion which goes farthest in establishing a duty on a landlord to prevent criminal acts.

In *Duncavage*, a woman was raped and murdered by an intruder, three days after moving into a new apartment.⁷⁸ Her estate filed a multi-count complaint against the landlord alleging, inter alia, failure to provide exit lighting, failure to trim high weeds, failure to provide adequate window locks, and failure to exercise reasonable care by storing a ladder in the yard adjacent to plaintiff's apartment. These actions allowed her assailant to conceal himself and to illegally gain entry to decedent's apartment. Additionally, it was alleged that the ladder had previously been used to enter the same window and burglarize the apartment.⁷⁹

Relying on *Stribling*, the appellate court found that the landlord had a duty to prevent the criminal acts because similar incidents had previously

73. 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975), *appeal denied*, 62 Ill. 2d 592 (1976).

74. 34 Ill. App. 3d at 556, 340 N.E.2d at 50.

75. *Smith v. Chicago Hous. Auth.*, 36 Ill. App. 3d 967, 970-71, 344 N.E.2d 536, 539-40 (1976) (unlike *Stribling*, the loss was inflicted by unknown persons and there was no causal or other connection with, or in relation to, the property itself and the condition of the premises did not contribute to the plaintiff's loss. "To impose liability in the case before us would unjustly place upon defendant as a property owner a legal duty which is impossible of performance.").

76. *Krautstrunk v. Chicago Hous. Auth.*, 95 Ill. App. 3d 529, 532-33, 420 N.E.2d 429, 432 (1981) (*Stribling* found distinguishable and not persuasive because "bizarre" facts led court to find duty in CHA to secure vacant apartment once CHA had notice of burglars' access to plaintiff's apartment by breaking through wall); *Pippin v. Chicago Hous. Auth.*, 58 Ill. App. 3d 1029, 1036, 374 N.E.2d 1055, 1059 (1978), *aff'd*, 78 Ill. 2d 204, 399 N.E.2d 596 (1979) (*Stribling* distinguishable because defendant, with notice, failed to act in a manner which would have prevented thefts in such a "bizarre" fashion and plaintiff's loss is a direct result of condition of the leased property itself).

77. 147 Ill. App. 3d 88, 497 N.E.2d 433 (1986).

78. *Id.* at 92-93, 497 N.E.2d at 434-35.

79. *Id.* at 93, 497 N.E.2d. at 435-36.

occurred which were connected with a physical condition of the property.⁸⁰ The court noted that prior decisions had limited *Stribling* to its facts but found no reason not to follow the legal premise imposing liability on a landlord when a repeated criminal act occurs due to a condition of the property.⁸¹

Duncavage and *Stribling* lend support to the position that a municipality could be liable for a criminal attack that allegedly takes place because of insufficient street lighting. Overriding policy considerations dictate, however, that such a duty not be imposed. The next several paragraphs deal with possible outcomes of the hypothetical problem.

Illinois courts could determine that section 4-102 immunizes municipalities from liability for all criminal acts. The recent additions to section 4-102 by the Tort Reform Act⁸² and the extension of this immunity to the CTA in the Metropolitan Transit Authority Act,⁸³ evinces a legislative desire to shield governmental bodies from liability. Although section 4-102 is entitled "Police Protection" and ch. 85, art. IV is entitled "Police and Correctional Activities," the broad language in section 4-102 that immunizes public entities for failing to prevent the commission of crimes, could be interpreted to apply to all municipal activity.

Furthermore, imposing such a duty on a municipality under the hypothetical fact situation would require the courts to find that the city breached its property related duty and that the criminal act was an intervening event that was reasonably foreseeable so as not to break the causal chain. Because the same fact pattern is involved, the identical result should be reached if analysis is instead made as to whether or not there is a legal duty to prevent a crime caused by a condition of municipal property. Since this second analysis is controlled by section 4-102 immunity, it could be argued that imposition of liability under the first theory would be a semantical circumvention of legislative intent.

Duncavage and *Stribling* are appellate court decisions which seem at odds with the Illinois Supreme Court opinion in *Fancil v. Q.S.E. Foods, Inc.*⁸⁴ In *Fancil*, plaintiff, a police officer, was killed when ambushed by suspected burglars while checking defendant's store. Defendant, whose business had experienced prior criminal activity, was allegedly negligent for disconnecting a mercury light that had been used for exterior illumination. After finding a special relationship between the parties, the court ruled that there was no duty to use reasonable care to protect the decedent.⁸⁵ The court based its

80. *Id.* at 98, 497 N.E.2d at 438-39.

81. *Id.* at 98, 497 N.E.2d at 439. The *Duncavage* court, for reasons not germane hereto, also found a duty based upon violations of the Chicago Building Code and the Consumer Fraud Act. *Id.* at 100-02, 497 N.E.2d at 440-42.

82. ILL. REV. STAT. ch. 85, para. 4-102 (1985).

83. ILL. REV. STAT. ch. 111 2/3, para. 327 (1985).

84. 60 Ill. 2d 552, 328 N.E.2d 538 (1975).

85. *Id.* at 560, 328 N.E.2d at 541.

ruling on the *Restatement of Torts* which subjects a possessor of land to liability for a condition of his property only if he expects invitees will not realize the danger or will fail to protect themselves from it.⁸⁶ The fact that the property was not illuminated, the court held, was a condition obvious to all.⁸⁷ Although the *Fancil* court emphasized that the decedent was involved in a risky occupation, that fact alone cannot explain the apparent higher duty required of landlords to their tenants. This is especially true since *Fancil* involved a special relationship while *Duncavage* and *Stribling* did not. This raises the possibility that the Illinois Supreme Court will not follow decisions which hold a party liable for criminal acts that occur because of a condition of the defendant's property.

These decisions could be reconciled, however, if Illinois courts recognize that special circumstances surround the landlord/tenant relationship which justify imposition of this higher duty. *Duncavage* and *Stribling* dealt with negligent conduct on the part of defendants that provided criminals with access to places where they did not belong. The causation factor is less speculative and the ability to prevent the acts is more certain. An assailant on public property, on the other hand, has a right to be where he is, and the idea that the provision of lighting would have safeguarded the victim is conjecture. As the *Fancil* court noted, there is always a danger of being ambushed by criminals lurking behind objects and in poorly illuminated areas. The burden of guarding against all such conditions on public property is far greater than the actions which would have been required of the lessors in *Duncavage* and *Stribling* to prevent illegal access to plaintiffs' homes.

Public policy ramifications are another consideration involved in the resolution of duty in the hypothetical fact pattern. Several courts have recognized the valuable evidence an assailant provides on the issue of causation.⁸⁸ Police efforts at apprehension should not be hampered by concerns over exposing their employer to liability. This is a conflict the courts may wish to avoid.

A strong case can be made for protecting municipalities from the type of liability lessors are exposed to when the condition of their property leads to a criminal act. Conversely, it would not be inconsistent with current judicial trends for courts to impose such a duty. The only certainty is that the higher courts will be confronted with this issue in the near future.

The mere existence of a criminal condition on the public way should never be sufficient to establish a duty on a municipality. For example, police

86. *Id.* at 557, 328 N.E.2d at 541 (citing RESTATEMENT, *supra* note 43, § 343(b)).

87. *Id.* at 558, 328 N.E.2d at 541.

88. *Duncavage*, 147 Ill. App. 3d at 97, 497 N.E.2d at 438. See also *Schuster v. City of New York*, 5 N.Y.2d 75, 84, 154 N.E.2d 534, 539, 180 N.Y.S.2d 265, 272 (1958) (civic duty and right to inform authorities; informant becomes government's "agent" and municipality may be held liable for any injury he suffers due to police department's negligence). See *infra* note 114.

knowledge of an outbreak of "smash and grab" crime at a certain location, although clearly a danger to motorists, should not subject a municipality to liability for failure to warn of a dangerous condition on its roadway. In this case it is the failure to eradicate crime—an omission immunized by section 4-102—that really forms the basis of the complaint. In its role as possessor of land, a municipality, if it is to have a duty for the criminal acts of others, should have that duty only if the dangerous condition is totally independent of any perceived inadequacies in police service.

III. STATUTORY DUTIES AND CLASSIFICATION OF POLICE ACTIVITY

In view of the relative difficulty of pleading a special relationship and duty thereunder or of fulfilling the four requirements of a special duty exception,⁸⁹ plaintiffs have alleged alternative theories based on statutory duties. The argument then becomes that section 4-102 immunity does not defeat their claim because inadequate police service is not the basis or the exclusive theory for recovery. The first step in any analysis, however, is whether section 4-102 is applicable.

Two appellate court decisions demonstrate the importance to litigants of the manner in which their claims are characterized by the court. In *Barth v. Board of Education*,⁹⁰ the court held that the provision of a 911 emergency program for ambulance service, although administered by police, was not afforded section 4-102 immunity.⁹¹ On the other hand, in *Long v. Soderquist*,⁹² the failure of police to warn of disabled vehicles protruding onto the roadway was held to be immunized conduct.⁹³ Although plaintiff's claims were clearly phrased in terms of a duty to keep the highway safe or to warn of a dangerous condition, the court felt that the underlying theory was actually a "failure to provide adequate police protection or service."⁹⁴

Two philosophies exist concerning the treatment of alternative theories of liability once section 4-102 is determined to apply. In *Galuszynski v. City of Chicago*⁹⁵ and *Mallder v. Rasmussen*,⁹⁶ the appellate court refused to consider theories of liability that conflicted with section 4-102 immunity.

In *Galuszynski* the court addressed the conflict presented by the 911 Act⁹⁷ which imposes liability upon operators for wilful and wanton misconduct. The court held that to subject the city to such liability would require a

89. See *supra* notes 13 & 46 and accompanying text.

90. 141 Ill. App. 3d 266, 490 N.E.2d 77 (1986).

91. *Id.* at 279, 490 N.E.2d at 86.

92. 126 Ill. App. 3d 1059, 467 N.E.2d 1153 (1984).

93. *Id.* at 1065, 467 N.E.2d at 1157.

94. *Id.* at 1065, 467 N.E.2d at 1157 (emphasis in original) (quoting ILL. REV. STAT. ch. 85, para. 4-102 (1985)).

95. 131 Ill. App. 3d 505, 475 N.E.2d 960 (1985).

96. 145 Ill. App. 3d 809, 495 N.E.2d 1356 (1986).

97. ILL. REV. STAT. ch. 134, paras. 31-46 (1985).

finding that the 911 Act implicitly repealed section 4-102.⁹⁸ The court was unwilling to so find and affirmed dismissal of the claim for the reasons previously mentioned.⁹⁹

Similarly, in *Mallder*, the appellate court stated that subjecting a sheriff to liability for his statutory violation¹⁰⁰ of failing to execute an arrest warrant "would obfuscate the legislature's intentions under sections 4-102 and 4-107 of the Tort Immunity Act."¹⁰¹ The defendant failed to arrest the subject of an arrest warrant whom he had observed drinking at a private residence. The subject subsequently, while under the influence of alcohol, caused an accident resulting in the death of plaintiff's decedent.¹⁰²

The other line of reasoning followed by Illinois courts is to treat the alternative theories separate and apart from the allegations that are found immunized under section 4-102. For example, in *Curtis v. County of Cook*,¹⁰³ the plaintiff sued for injuries she received when the car in which she was riding lost control and struck a signpost. The driver was drag racing his vehicle on a road constantly and repeatedly used for that purpose. Plaintiff alleged that the police failed to adequately patrol the area to prevent speeding, and, alternatively, that placement of signposts used to measure the distance of races constituted negligent design.¹⁰⁴ The Illinois Supreme Court considered the property related duty¹⁰⁵ separately from the police patrol issue, but found no liability under either theory.

In summary, while *Long* represents an expansive application of section 4-102 immunity, *Barth* represents a narrow one. Many courts display a willingness to consider alternative theories of municipal liability when inadequate police service is alleged¹⁰⁶ but seem inclined to follow the result of their

98. 131 Ill. App. 3d at 509, 475 N.E.2d at 963.

99. *Id.* It is the author's opinion that the obvious conflict in the First District between the Fourth Division in *Barth*, and the Second Division in *Galuszynski* is reconcilable only if the *Barth* decision is construed to apply to 911 service other than police.

100. ILL. REV. STAT. ch. 125, para. 16 (1985) (where sheriff may be held liable to injured third party for failure to perform command of warrant).

101. 145 Ill. App. 3d at 813, 495 N.E.2d at 1358.

102. *Id.* at 810, 495 N.E.2d at 1357.

103. 109 Ill. App. 3d 400, 440 N.E.2d 942 (1982), *modified*, 98 Ill. 2d 158, 456 N.E.2d 116 (1983).

104. 109 Ill. App. 3d at 402, 440 N.E.2d at 943-44.

105. The property related duty is contained at ILL. REV. STAT. ch. 85, paras. 3-102, 3-103 (1985).

106. *See, e.g.,* *Marvin v. Chicago Transit Auth.*, 113 Ill. App. 3d 172, 446 N.E.2d 1183 (1983) (city properly dismissed as party defendant in absence of allegation that plaintiff under direct control of city police when assaulted on subway platform; court also held common carrier exception to tort-immunity statute inapplicable to plaintiff's action against city for assault; city not liable even though Metropolitan Transit Act denied tort immunity); *Curtis v. County of Cook*, 109 Ill. App. 3d 400, 440 N.E.2d 942 (1982) (court considered negligence under police patrol issues and found no liability, but found liability under inadequate design theory), *aff'd in part and rev'd in part*, 98 Ill. 2d 158, 456 N.E. 2d 116 (1983). Another good example of the

special duty findings.¹⁰⁷ Other courts, such as the *Galuszynski* and the *Mallder* courts, treat these alternative theories of liability as inconsistent with the intent of section 4-102 and choose to ignore them.¹⁰⁸

CONCLUSION

Determination of municipal responsibility for the failure to provide adequate police service or protection depends, in large part, upon the legal framework in which the facts are analyzed. Defendants clearly want the situation considered a police service issue so that the immunity of section 4-102 is defeated only by compliance with the strict special duty exceptions. Any pendent theories of recovery should be ignored in that they misrepresent the true premise of the cause of action or require implicit repeal of section 4-102 immunity.

Defendants should prepare arguments that focus on the public policy implications of imposing a duty on municipalities for the criminal acts of others. Circumstances may exist whereby the opportunity for crime has been negligently enhanced. It is a more speculative task to determine the cause or motivation of a criminal act. Since this evidence is best provided by the criminal, it may not be in the interest of police to capture him.¹⁰⁹ Public policy would favor apprehension of criminals unrestricted by concerns of potential liability.

Plaintiffs, on the other hand, want to avert section 4-102 application by alleging a special relationship or violation of some municipal duty, other than inadequate police service. If section 4-102 is deemed applicable, plaintiffs should strenuously argue for separate consideration of their alternative theories for recovery. In this context, it is probably best to exclude any

separate consideration issue is *Marshall v. Ellison*, 132 Ill. App. 3d 732, 477 N.E.2d 830 (1985) (no special duty owed to intoxicated individual struck on the roadside after police stopped his car en route to emergency call and told individual to get off the roadway; no legislative intent to create cause of action for failure to take a person into custody when statute provides that police take incapacitated individuals into protective custody), *cited with approval in Schaffrath v. Village of Buffalo Grove*, No. 86-0880, slip op. (Ill. App. Ct. Sept. 8, 1987).

107. A notable exception is the appellate court treatment in *Curtis*, which found a duty under the negligent design theory but not the inadequate police patrol theory. 109 Ill. App. 3d 400, 440 N.E.2d 942. The Supreme Court eventually reversed on the design issue. *Curtis v. Court of Cook*, 98 Ill. 2d 158, 456 N.E.2d 116 (1983).

108. *Galuszynski*, 131 Ill. App. 3d at 509, 475 N.E.2d at 963; *Mallder*, 145 Ill. App. 3d at 813, 495 N.E.2d at 1358-59.

109. Lest this scenario be considered too exaggerated, consider *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958). Defendant argued that it was too speculative to presume that Schuster's death resulted from his cooperation with police and their failure to provide him with protection. The court said this matter could not be determined at the motion stage since it was possible that Schuster's murderer might be captured and the cause of his act learned. If police solved the crime, in other words, it would help prove plaintiff's case against the city.

allegations that arguably find their basis in the failure to adequately provide police protection.

