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liability to discharge the encumbrance upon it. To avoid this result he radically alters the common law entireties estate by extending survivorship to a debt which the entireties property secures, in order to destroy a valid contract obligation. Both the means employed and the end sought seem to be legally indefensible.

If it be thought that the result reached by the courts which deny contribution—that is, that a deceased debtor be released from his liability to contribute merely because his spouse acquires title by survivorship to the land securing the debt—is an "equitable" result, its advocates should resort to the legislatures and not to the courts.

JOSEPH L. LYLE, JR.

MUNICIPAL LIABILITY FOR FAILURE TO PROVIDE POLICE PROTECTION

The many authorities advocating reform in the area of municipal tort liability will find little comfort in a recent four-to-three decision by the Court of Appeals of New York. For many years criticism has been heaped upon the doctrine of municipal immunity from tort liability,[1] and New York received wide praise as the first state to abolish this doctrine.[2] However, with this abolition, the legislature of New York did not intend to impose an absolute liability on the municipality as an insurer, and it was felt that certain limitations were required to balance the conflict between private and public interests. Through a process of inverse reasoning,[3] the Court of Appeals, in the case of *Schuster v. City of New York*,[4] appears to have

[1]There is extensive literature dealing with this problem of municipal tort immunity, and particular attention is called to the following: Borchard, Government Liability in Tort, 34 Yale L.J. 1, 129, 229 (1924-25); 36 Yale L.J. 1, 757, 1039 (1926-27); 28 Colum. L. Rev. 577, 734 (1928); Fuller and Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437 (1941); Green, Municipal Liability for Torts, 38 Ill. L. Rev. 355 (1944); Harno, Tort Immunity of Municipal Corporations, 4 Ill. L.Q. 28 (1921); Seasongood, Municipal Corporations: Objections to the Governmental or Proprietary Test, 22 Va. L. Rev. 910 (1936); Tooke, The Extension of Municipal Liability in Tort, 19 Va. L. Rev. 97 (1932).

[2]Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363, 1391 (1954).

[3]The reasoning of the court was inverse in the sense that the question of liability appears to have been decided first, and then the reasoning was molded so as to support this decision. The killing of Arnold Schuster aroused great public sentiment, and it is quite possible that this, in addition to the extreme circumstances surrounding this case, was influential in causing the Court of Appeals to lay down too broad a rule.

[4]5 N.Y.2d 75, 154 N.E.2d 534 (1958).

imposed such an absolute liability upon the defendant City by holding it liable to the estate of a murdered informer for alleged negligence in failing to provide him with proper police protection, after he had received threats and had requested protection.

This action was instituted by plaintiff as administrator of the estate of his deceased son, Arnold L. Schuster, to recover damages from the City for the son's wrongful death. Young Schuster recognized Willie Sutton, the notorious criminal, and furnished the New York City Police Department with information that led to Sutton's arrest. Schuster's part in the apprehension of Sutton was acknowledged by the police and received wide publicity. Shortly thereafter, the deceased received threatening phone calls and letters, and he was furnished *limited and partial police protection at his home and place of business.* At a later date, after assuring Schuster that he was in no danger, the police department removed this protection. On the evening of March 8, 1952, approximately three weeks after his identification of Sutton, Schuster was shot and killed while *walking on the street.*[5] The trial court dismissed the suit for failure to state a cause of action,[6] and on appeal the Appellate Division of the Supreme Court affirmed per curiam.[7] The Court of Appeals reversed, holding that the complaint did state a cause of action against the City.[8]

A decision such as this would be inconceivable under the doctrine of *sovereign immunity,* accepted and followed by the overwhelming majority of state courts. The source of the doctrine was the English theory that "the King can do no wrong,"[9] and under its original application, the sovereign, be it national, state, or local, was completely immune from all tort liability.[10] Because of the injustice that this application worked upon the individual, and in an effort to balance

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[5]For a more detailed report of the slaying, see New York Times, March 9, 1953, p. 1, col. 8.

[6]Schuster v. City of New York, 207 Misc. 2d 1102, 121 N.Y.S.2d 735 (Sup. Ct. 1953).

[7]The Appellate Division of the Supreme Court held that there was no duty on the City of New York to protect Arnold Schuster, and even if such a duty did exist, the complaint failed to show that the violation of the duty was the proximate cause of Schuster's death. Schuster v. City of New York, 286 App. Div. 389, 143 N.Y.S.2d 778 (2d Dep't 1955).

[8]See note 4 supra.

[9]The ancient English maxim that "The King can do no wrong" was translated into the legal concept that the sovereign could not be sued without its consent. Borchard, Government Liability in Tort, 36 Yale L.J. 1, 17 (1926).

[10]The immunity of the state was extended to the municipality as a subdivision of the state. Russell v. Men of Devon, Willes 74, 100 Eng. Rep. 359 (K.B. 1788).

public and private interests,[11] the functions of the sovereign were split into two classes: *governmental and proprietary*.[12] The sovereign was liable for torts of commission and omission resulting from the performance of a proprietary function, but was immune from liability for torts of commission and omission resulting from the performance of a governmental function.[13] However, due to continued ambiguity and uncertainty, the latter immunity was further refined, and the liability of the sovereign was extended to torts of *commission* resulting from the performance of a governmental function.[14] The immunity in respect to torts of *omission* resulting from the nonperformance of governmental functions was continued.[15] This was the general situation in New York in 1929, when section 12a (now section 8) of the Court of Claims Act was enacted.[16] This waived the State's immunity from tort liability and established that the liability of the State was to be determined by the same rules of law applicable to individuals and corporations. The immunity of the municipalities of New York remained unaffected by this waiver until the decision in *Bernardine v. City of New York* in 1945,[17] when the Court of Appeals held that since the immunity of the municipality was merely an exten-

[11]"Every thoughtful consideration of the problem of municipal liability in modern times has inevitably faced two conflicting propositions: (1) the widespread fear that a rule of liability would impose an unbearable financial burden upon municipal corporations, and thus upon the public, has been opposed to (2) the manifest unfairness of a rule of non-liability to the injured individual, and the social desirability of spreading the risk of loss." Lloyd, Municipal Tort Liability in New York, 23 N.Y.U.L.Q. Rev. 278, 291 (1948).

[12]Bailey v. City of New York, 3 Hill 531 (N.Y. 1842).

[13]18 McQuillin, Municipal Corporations §§ 53.02, 53.23, 53.24 (3d ed. 1950).

[14]Lubelfeld v. City of New York, 4 N.Y.2d 455, 151 N.E.2d 862 (1958); 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 (1955); Bloom v. Jewish Bd. of Guardians, 286 N.Y. 349, 36 N.E.2d 617 (1941); Miller v. City of New York, 266 App. Div. 565, 43 N.Y.S.2d 79 (1st Dep't 1943).

[15]Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945); Springfield Fire and Marine Ins. Co. v. Village of Keeseville, 148 N.Y. 46, 42 N.E. 405 (1895); Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946); Ferrier v. City of White Plains, 262 App. Div. 94, 28 N.Y.S.2d 218 (2d Dep't 1941); Landby v. New York, N.H. & H.R.R., 199 Misc. 73, 105 N.Y.S.2d 836 (Sup. Ct. 1950); Finkelstein v. City of New York, 182 Misc. 271, 47 N.Y.S.2d 156 (Sup. Ct. 1944).

[16]N.Y. Laws 1929, ch. 467. This was amended by N.Y. Ct. Cl. Act § 8, which provides as follows: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations...."

[17]294 N.Y. 361, 62 N.E.2d 604 (1945). This action was brought against the City under § 50-b of the General Municipal Law which imposed liability for the negligence of employees in the operation of municipally-owned vehicles or facilities of transportation.

sion of the immunity of the State, the waiver by the State of its immunity necessarily resulted in a waiver of the municipality's immunity.[18] With the waiver of its own immunity, as well as that of its municipalities, New York became the most liberal state in the United States in regard to the question of municipal tort liability.[19]

As liberal as it is, New York has nevertheless felt constrained to place some limitations upon this liability, to avoid making insurers of the municipalities—a position that would threaten their financial stability. Even though the immunity of the municipalities has been waived, the general classification of the functions of the municipality as governmental and proprietary has in effect been retained, and has served as a basis for determining liability since the decision in *Bernardine*.[20] Without question, the municipalities are liable for torts of commission or omission resulting from the performance of a *proprietary* function.[21] They are also liable for torts of commission resulting from the performance of *governmental* functions.[22] The problem arises, as it did in *Schuster*, when the courts attempt to deal with the question of liability for torts of omission resulting from the nonperformance of a governmental function. When there is no statutory duty, as under a permissive statute, no liability is imposed.[23] Where there is a statutory duty, as under a mandatory statute, liability is imposed when the duty runs to the individual, and is not imposed when it does not.[24]

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[18]Id. at 605. See also McCarthy v. Saratoga Springs, 269 App. Div. 469, 56 N.Y.S.2d 600 (3d Dep't 1945); Young v. Village of Potsdam, 269 App. Div. 918, 58 N.Y.S.2d 102 (3d Dep't 1945); Holmes v. Erie County, 266 App. Div. 220, 42 N.Y.S.2d 243 (4th Dep't 1943).

[19]Leflar and Kantrowitz, Tort Liability of the States, 29 N.Y.U.L. Rev. 1363, 1391 (1954). This article, which contains a state by state summary of municipal tort liability, is highly recommended. For a discussion of the liability of the federal government under the Federal Tort Claims Act, see Gellhorn and Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U.L. Rev. 1325 (1954).

[20]Lloyd, Municipal Tort Liability in New York, 23 N.Y.L.Q. Rev. 278, 286 (1948). In his sequel to this article, Mr. Lloyd suggests that the court was wholly justified in recasting this distinction. Lloyd, "Le Roi Est Mort; Vive Le Roi!," 24 N.Y.U.L.Q. Rev. 38, 43 (1949).

[21] Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750, 753 (1st Dep't 1946).

[22]Ibid. Accord, Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Miller v. City of New York, 266 App. Div. 565, 43 N.Y.S.2d 79 (1st Dep't 1943); Holmes v. Erie County, 266 App. Div. 220, 42 N.Y.S.2d 243 (4th Dep't 1943). See also note 14 supra.

[23]"Failure to act, where there is no mandatory duty . . . is no ground of recovery against a municipality." 18 McQuillin, Municipal Corporations § 53.08 (3d ed. 1950). See also Lloyd, "Le Roi Est Mort; Vive Le Roi!," 24 N.Y.U.L.Q. Rev. 38, 44 (1949).

[24]"The violation of such a duty, resulting in damage, gives rise to an action in tort, if, but only if, the intent of the statutory enactment is to protect an in-

Such was the state of law in New York at the time the *Schuster* case came before the Court of Appeals. Since police protection is historically a governmental function,[25] and since this was clearly a case of omission, in order to impose liability upon the City, the court had to find, first, a *duty,* and second, a *duty to the plaintiff.* In an attempt to satisfy this requirement, the majority sought to establish a duty in three ways: (1) as a reciprocal duty, (2) as a statutory duty, and (3) as an assumed duty.

I. Reciprocal Duty

In an effort to justify its imposition of liability upon the defendant, the Court of Appeals first sought to establish a duty on the part of Schuster to inform, which in turn involved a *reciprocal duty* on the part of the defendant to protect Schuster once he had informed. The basis of Schuster's duty lies in the common law, according to the majority, and it is quite true that the early common law of England did require the private citizen to inform as to any known felony.[26] Failure to do this constituted the crime of misprision of a felony, but, as Judge Stephen pointed out,[27] this crime was almost obsolete three-quarters of a century ago, and with rare exceptions has not been recognized in this country. The rare exception will not be found in New York, as the common law crime of misprision of a felony is not a part of the penal law of New York.[28] Thus falls the major premise of the majority: that Schuster's legal duty to inform begets a reciprocal legal duty on the City to protect him once he has informed.

Even if the New York penal law did provide for the common law crime of misprision of a felony, it is extremely doubtful under the present circumstances whether Schuster would be guilty of a violation of it if he failed to inform, and thus he would be under no *legal* duty to inform. The federal statute dealing with misprision of a felony provides for a penalty when a private citizen "conceals and does not...

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dividual against invasion of a property or personal interest." Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704, 706 (1945).

[25]18 McQuillin, Municipal Corporations § 53.51 (3d ed. 1950).

[26]Commonwealth v. Lopes, 318 Mass. 453, 61 N.E.2d 849, 850 (1945).

[27]2 Stephen, History of the Criminal Law of England 238 (1883).

[28]154 N.E.2d at 544. An extensive search of the New York statutes has failed to bring to light any provision dealing with misprision of a felony. Rather than place the private citizen under a duty to inform, and make his failure to inform a crime, the modern method of handling this problem is to create an incentive, in the form of a reward, which will induce the private citizen to aid in law enforcement.

make known" a felony.[29] "Under it some affirmative act toward the concealment of the felony is necessary. Mere silence after knowledge of the commission of the crime is not sufficient."[30] In the light of this interpretation, even if the New York penal law did contain a provision similar to the federal statute, Schuster would be under a legal duty not to take any affirmative act toward concealment of the whereabouts of Sutton, but he would be under *no* legal duty to inform the police as to the whereabouts of Sutton. Judge Van Voorhis, in the majority opinion, states that it matters little whether Schuster's duty was legal or moral.[31] This appears to be an ill-considered statement. It is conceded that Schuster was under a *moral* duty to aid the police, but if his was a moral duty, so was the reciprocal duty of the police. It is inconceivable that a moral duty to inform would beget a reciprocal *legal* duty to protect.

II. Statutory Duty

Apparently recognizing that an extremely tenuous argument supporting a duty to protect had been propounded, the majority attempted to strengthen its position by asserting the existence of a *statutory duty*. Section 435 of the New York City Charter states that "the police department and force shall have the power and it shall be their duty to preserve the public peace, prevent crime ... protect the rights of persons and property, guard the public health ... remove all nuisances on the public streets ... enforce and prevent the violation of all laws ... and for these purposes to arrest all persons guilty of violating any law or ordinance. ..."[32] Clearly this statute envisions a *broad* duty to protect the general public from crime, and such an enactment does not import an intention "to protect the interests of any individual except as they secure to all members of the community the enjoyments of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals."[33] Having found a broad duty to the general public, the majority then sought to establish that this duty ran to the individual. Section 1848 of the Penal

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[29]18 U.S.C. § 4 (1952).

[30]Bratton v. United States, 73 F.2d 795, 798 (10th Cir. 1934). See also Neal v. United States, 102 F.2d 643 (8th Cir. 1939).

[31]154 N.E.2d at 538.

[32]As quoted in 154 N.E.2d at 543.

[33]Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750, 754 (1st Dep't 1946).

Law[34] imposes an absolute liability upon the City, causing the City to respond in damages for the "personal injury or death of persons injured or killed while aiding policemen at their direction in making arrests."[35] This statute is completely inapplicable here, but the majority asserts that it represents a general public policy in favor of the municipality responding in damages to persons injured or killed while aiding in law enforcement.[36]

By enacting section 12a (now section 8) of the Court of Claims Act,[37] a statute in derogation of the common law, the legislature recognized that it had not effected any solution to the problem of municipal tort liability,[38] and this section was followed by a series of enactments specifically imposing liability upon the municipalities in a number of the most common situations.[39] Section 1848 of the Penal Law is an example of such a specific imposition, and by enacting this section, while refraining from enacting a provision covering the situation in the principal case, the legislature exhibited the extent to which it was willing to go. "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."[40]

III. Assumed Duty

Judge McNally, in his concurring opinion, supports the majority's imposition of liability for the alleged negligent performance of a reciprocal duty and a statutory duty, and also advocates the additional basis of an *assumed duty*.[41] "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."[42] This rule places the

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[34]N.Y. Pen. Laws § 1848.

[35]154 N.E.2d at 539.

[36]The Court of Appeals cited § 1848 as a manifestation of a legislative policy evincing "care and solicitude for the private citizen who co-operates with the public authorities in the arrest and prosecution of criminals." 154 N.E.2d at 540.

[37]See note 16 supra.

[38]Lloyd, Municipal Tort Liability in New York, 23 N.Y.U.L.Q. Rev. 278, 285 (1948).

[39]N.Y. Munic. Laws § 50-a (liability for negligence in operation of municipally-owned vehicles); N.Y. Munic. Laws § 50-b (liability for negligence in operation of municipally-owned vehicle or other facility of transportation); N.Y. Munic. Laws § 50-c (liability for negligence of firemen and policemen in operation of any vehicle); N.Y. Munic. Laws § 50-d (liability for malpractice of physicians and dentists employed in municipally-operated institutions); N.Y. County Laws § 6-b (assumption of liability by county for torts of officers and employees).

[40]Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704, 706 (1945).

[41]154 N.E.2d at 541.

[42]Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275, 276 (1922).

defendant under a duty not to injure or aggravate an existing injury of the one to whom aid is offered. However, 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.[43]

It is quite true that the police undertook to give Schuster limited and partial protection at his home and at his place of business, but he was not taken into protective custody. When the police withdrew its gratuitous special protection, Schuster was left in exactly the same position he was in before the protection was undertaken. His condition was in no way *aggravated* or *altered.* In addition, Schuster was killed while walking the streets of New York, and the police had never undertaken to protect him in this area. Thus, even if the protection had been continued, and the police department had been negligent in the performance of this limited assumed duty, this would have no relation to Schuster's death and would not serve as a basis for the imposition of liability.

The majority lays great emphasis upon the statement that when "inaction would *commonly result,* not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward."[44] The validity of this statement is conceded, but can it be said that inaction in failing to provide an informer with complete police protection *commonly* results in injury to or the death of the informer? When the number of informers who are actually injured or killed is compared with the total number of informers, it is submitted that it cannot be said that injury or death of the informer is a common result of the failure to provide police protection. Injury or death is the exception, and no relation arises which creates a duty to go forward.

Thus it appears that the majority has failed to establish a valid basis for imposing a legal duty on the defendant City to provide police protection to persons in Schuster's situation. However, even if it is assumed *arguendo* that such a duty does exist, and that the duty does run to the individual, it is submitted that the complaint still fails to state a cause of action. In order for tort liability to result, there must be a *duty,* as well as a *violation of this duty* which was the proximate cause of the plaintiff's injury or death.[45] Judge Learned

[43]Restatement, Torts § 323 (1934).

[44]154 N.E.2d at 538, citing with approval Judge Cardozo's opinion in Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928). (Emphasis added.)

[45]Palsgraf v. Long Island Ry., 248 N.Y. 339, 162 N.E. 99 (1928).

Hand propounded three widely accepted variables used in determining whether conduct has violated a duty. He said that the probability that injury will result and the gravity if it does result must be balanced against the burden of adequate precautions.[46]

When the number of informers who are actually injured or killed is considered, it becomes apparent that the probability that injury or death will result is extremely low, while the gravity if injury or death does result is high. On the other hand, the burden of adequate precaution is extremely large. In order to protect informers adequately, three policemen would have to be assigned to the protection of each of these informers. The cost of maintaining a police force of sufficient size to meet this demand, in addition to the normal demands placed upon it, would be prohibitive. It is submitted that even if a duty did exist to provide police protection to informers, the discretionary failure to provide this protection, or the discretionary removal of partial protection already provided, should not constitute a violation of this duty.

In asserting the existence of a duty to provide police protection to persons in Schuster's situation, the majority is virtually imposing an absolute liability on the defendant. Hereafter, the police department acts at its own peril in refusing to furnish such police protection, for even if the protection is unnecessary in the opinion of the police department, a jury may find at a later date that the police were negligent in failing to provide the protection. "Duties have their genesis in concepts of reasonableness .... Reasonableness demands that the need for *special police protection* be left to the *absolute discretion* of the police department."[47] If the decision as to the need for special police protection is not left to the discretion of the police department, the effective functioning of this department will be greatly hindered. "A mere mistake in judgment by the department should not be the basis for the imposition of liability upon the municipality else... the police department will find itself faced with the impossible task of supplying *all* witnesses and *all* informers with special protection...."[48]

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[46]The duty "to provide against resulting injuries is a function of three variables: (1) The probability... (2) the gravity of the resulting injury... (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than... PL." Chief Judge Learned Hand in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[47]154 N.E.2d at 545. (Emphasis added.)

[48]Ibid. Professor William Miller of New York University suggests "that even under the complete waiver in New York there is still no liability where the officer