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**Municipal Corporations - Failure of City Police To Protect Informer Held Actionable Negligence - Shuster v. New York, 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958)**

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the statute was not retroactive to past conveyances and had no life until 1953. The *Petri* case was decided on the strength of Judge Murphy's words in the *Hood* case, indicating that the surrender of a stock certificate to the corporation and the issuance of a new certificate to the parties as joint tenants was sufficient to satisfy the need for the four unities:

To create an estate in joint tenancy it is necessary that there be unity of interest, unity of title, unity of time and unity of possession. . . . We assume . . . that the transfer of the stock was effected under circumstances to meet the requirements of section 2 of the Joint Rights and Obligations Act to create a joint estate in personal property, but when Otto E. Lucius surrendered the first certificate and caused the second to issue to him and his wife as joint tenants, he thereby terminated all title in the stock evidenced by the first certificate and thereafter held as a joint tenant with his wife. To create the joint estate it was essential that his interest as a joint tenant be created at the same time as that of his co-tenant, for if it be otherwise there would be no joint tenancy. By the creation of the joint estate the contractual relationship of Otto Lucius to the bank and its depositors was changed from that of an individual to that of a joint tenant. From the date he acquired his stock, . . . to the date of the surrender of the certificate, . . . constituted one period of ownership and from the date of the establishment of the joint tenancy . . . to the date the bank was closed constituted another period of ownership. . . .<sup>15</sup>

Thus, the effect of the *Petri* case is to dispense with the illogical and cumbersome requirement of using a *strawman* in creation of joint tenancies in stock certificates.

<sup>15</sup> *Hood v. Commonwealth Trust & Savings Bank*, 376 Ill. 413, 423, 424, 34 N.E.2d 414, 420, 421 (1941).

#### MUNICIPAL CORPORATIONS—FAILURE OF CITY POLICE TO PROTECT INFORMER HELD ACTIONABLE NEGLIGENCE

Arnold Shuster, plaintiff's intestate, after studying an F.B.I. flyer, supplied information to the New York City police which led to the arrest of Willie Sutton, a notorious and dangerous fugitive. Three weeks later, the decedent, on a public highway near his home, was shot and killed by a person or persons unknown. Shuster's part in the arrest had been widely publicized and as a result, he had received letters and telephone calls threatening his life, of which he notified the police. Limited protection was at first given Shuster, only to be terminated shortly thereafter because the police felt that the threats were the work of cranks. The administrator of Shuster's estate sought damages from the city for the alleged negligence of the police in failing to provide Shuster adequate protection in view of his known status as an informer upon a criminal who, as a matter of common knowledge, was of a dangerous nature and who was known to have

dangerous cohorts. The trial court granted a motion to dismiss the complaint on the ground that no duty of police protection is owed to an informer. The New York Court of Appeals reversed, holding that a duty of protection is owed by the police department under the circumstances of this case. *Shuster v. New York*, 5 N.Y. 2d 75, 154, N.E. 2d 534 (1958).

Prior to the instant decision, as a general rule, the liability of a municipal corporation in New York extended to negligent commissions and omissions in the exercise of proprietary functions by the cities' officers and employees, and to negligent commissions in the exercise of governmental functions, such as police departments. Police work has been held in most states to be a governmental function.<sup>1</sup> The New York court, in recognizing a duty on the city's part to provide police protection to Shuster, seems to be extending the liability heretofore recognized by New York courts, viz., liability of the city for failing to exercise a governmental function.

English common law generally denied the liability of municipal corporations,<sup>2</sup> but this doctrine was repudiated in early American cases.<sup>3</sup> Early New York decisions found no difficulty in imposing corporate liability for torts, and the cities were held liable on the same basis as a private corporation or individual. This tort liability has undergone many extensions and changes since the dichotomy of liability for proprietary functions and non-liability for governmental functions was first formulated in *Bailey v. Mayor of New York*.<sup>4</sup>

The immunity of the state for governmental functions was based on an historical doctrine which found its source in the sovereign power of the state and was a survival of the maxim that the King can do no wrong.<sup>5</sup> Although the distinction made in the 1842 *Bailey* case did not make an

<sup>1</sup> *Murray v. City of New York*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933); *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922); *Hull v. Roxburo*, 142 N.C. 453, 55 S.E. 351 (1906).

<sup>2</sup> *McKinnon v. Penson*, 8 Exch. 319 (1853); *Russell v. Men of Devon*, 2 Term Rep. 667 (1788); Holdsworth, *History of the English Law*, Vol. 3 (3d ed., 1923) at page 469.

<sup>3</sup> *Hutson v. New York*, 9 N.Y. 163, 59 Am. Dec. 526 (1853); *Boyland v. New York*, 1 Sandf. 27 (N.Y. 1847); *Wilson v. New York*, 1 Denio 595, 43 Am. Dec. 719 (N.Y. 1845); *Shipley v. Mechanics Bank*, 10 Johns Rep. 484 (N.Y. 1813).

<sup>4</sup> 3 Hill 531 (N.Y. 1842); also see *Wilcox v. City of Rochester*, 190 N.Y. 137, 82 N.E. 1119 (1907); *Maxmilian v. New York*, 62 N.Y. 160, 26 Am. Rep. 468 (1875). *Contra*: *Darlington v. New York*, 31 N.Y. 164 (1865). Emphasis supplied.

<sup>5</sup> *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933); *Augustine v. Town of Brant*, 249 N.Y. 198, 163 N.E. 732 (1928); *Maxmilian v. New York*, 62 N.Y. 160 (1875); *Holmes v. County of Erie*, 266 App. Div. 220, 42 N.Y.S.2d 788, Affd. 291 N.Y. 798, 53 N.E.2d 369 (1944); See, for a history of the distinction, *Hill v. Boston*, 122 Mass. 344 (1877).

immediate impression<sup>6</sup> (it was actually repudiated in an 1865 case)<sup>7</sup> a decision in 1875 indicated acceptance of the distinction. There, it was said:

There are two kinds of duties which are imposed on a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, under the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. The former is not held by the municipality as one of the political subdivisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is entrusted to it as one of the political subdivisions of the State, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuse, nor for misuse by the public agents.<sup>8</sup>

Thus, it was settled that the liability of New York cities extended only to negligence regarding proprietary actions. This doctrine created the problem, however, of determining whether actions were proprietary or governmental. The confusion surrounding any solution of the problem led one court to abolish the distinction and revert back to total immunity for municipalities.<sup>9</sup> Should the *Shuster* case have been decided at this point during the history of the liability of New York municipalities, it seems fairly certain that plaintiff's complaint would have been dismissed, since the exercise of police power was considered a governmental function.<sup>10</sup>

The immunity of cities for governmental functions was abolished in 1929 by the addition of section 12(a) to the Court of Claims Act,<sup>11</sup> whereby the state waived immunity for the torts of its officers and employees. In 1939, by the enactment of section 8, the state broadly waived immunity and assumed liability to the same extent as an individual.<sup>12</sup>

<sup>6</sup> *Conrad v. Village of Ithaca*, 16 N.Y. 158 (1857). *Delmonico v. New York*, 1 Sandf. 222 (N.Y. 1848); *Boyland v. New York*, 1 Sandf. 27 (N.Y. 1847); *Wilson v. New York*, 1 Denio 595, 43 Am. Dec. 719 (N.Y. 1845). Contra: *Lloyd v. New York*, 5 N.Y. 369 (1851).

<sup>7</sup> *Darlington v. City of New York*, 31 N.Y. 164 (1865).

<sup>8</sup> *Maxmilian v. New York*, 62 N.Y. 160, 164, 26 Am. Rep. 468 (1875).

<sup>9</sup> *Lloyd v. New York*, 5 N.Y. 69 (1851). Cf. *Irwine v. Town of Greenwood*, 89 S.C. 511, 72 S.E. 228 (1911).

<sup>10</sup> *Murrain v. City of New York*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1953); *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922); *Hull v. Roxburo*, 142 N.C. 455, 55 S.E. 351 (1906).

<sup>11</sup> N.Y. Laws (1929) c. 860, § 12-a.

<sup>12</sup> N.Y. Laws (1939) c. 860, § 8.

About the time of the statutory changes, the New York Court of Appeals indicated its dissatisfaction with the old rule of municipal immunity and spoke, with approval, of "the modern tendency . . . against the rule of non-liability."<sup>13</sup> The court also described the statutory change as "a recognition and an acknowledgement of a moral duty demanded by the principles of equity and justice."<sup>14</sup>

In 1945, the court in *Bernardine v. New York*, holding the city of New York liable for damages to the plaintiff occasioned by a runaway police horse, affirmed the destruction of the immunity doctrine and said:

On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, even if no separate statute sanctions that enlarged liability in a given instance. The plea which was most often made for the immunity of the civil divisions of the State was an assertion that officers and employees thereof, when engaged in the discharge of so called governmental functions acted as delegates of the State. . . . But any viewpoint of that kind would be in vain, since the argumentation that had been contrived as a front for the doctrine of governmental immunity did not survive the renouncement of that doctrine.<sup>15</sup>

With immunity of the municipalities for negligence in the exercise of governmental functions destroyed, a problem of determining the duties owed by a city to the public and its members arose. This, essentially, is the issue of the *Shuster* case.

In *Foley v. New York*,<sup>16</sup> a case decided about the time of the *Bernardine* decision, where the plaintiff sued New York for injuries arising out of a highway collision allegedly caused by the negligent maintenance of traffic signals, the court ruled that a failure to perform a duty imposed by statute constitutes negligence. This case, at first blush, would seem to provide precedent for the decision in the instant case, in that the court there also ruled that the failure to perform a duty imposed by statute constituted actionable negligence. The *Foley* case can be distinguished in that the statute therein involved was for the sole purpose of protecting individuals. In one case, the New York court was faced with a violation of a statutory duty where the city pursuant to a duty of maintaining a fire department, installed hydrants, valves and other equipment but al-

<sup>13</sup> *Evans v. Berry*, 262 N.Y. 61, 186 N.E. 203 (1933); *Augustine v. Town of Brant*, 249 N.Y. 198, 163 N.E. 732 (1928).

<sup>14</sup> *Jackson v. State*, 261 N.Y. 134, 184 N.E. 735 (1933).

<sup>15</sup> 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945). Also see *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947); *Foley v. State of New York*, 294 N.Y. 275, 62 N.E.2d 69 (1945); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945).

<sup>16</sup> 294 N.Y. 275, 62 N.E.2d 69 (1945).

lowed the equipment to fall into disuse. The plaintiff was unable to get adequate water to extinguish a fire in his home, and he sued the city for its failure to exercise a governmental function. In denying relief, it was held that statutes providing for a police and fire department do not purport to protect the interests of any individual. They are intended for the benefit of the public as a whole, and neglect in the performance of such statutory requirements creates no civil liability to individuals.<sup>17</sup>

The old distinction between governmental and proprietary functions, thought to be abolished by the Court of Claims Act and the *Bernardine* decision, again became relevant when the court of appeals began to draw distinctions between commissions and omissions respecting governmental functions.<sup>18</sup> In one case, a suit was brought against New York City for failing to provide adequate police protection. In holding the city not liable, the court said:

The case is close to that fine line which can exist between a proprietary and a governmental function. The law is established that a municipality is answerable for the negligence of its agents in exercising a proprietary function, and at least for their negligence of commission in exercising a governmental function, but a municipality is not liable for its failure to exercise a governmental function such as to provide police or fire protection. . . . The waiver of sovereign immunity by Section 8 of the Court of Claims Act does not affect the matter. The waiver simply subjects the State and its subdivisions to the same liability as individuals or corporations for the same acts. It does not create liability on the part of a City for failure to exercise a governmental function.<sup>19</sup>

Another case decided in the same year did not follow the rule of non-liability for omissions in the exercise of governmental functions and held the city liable in a case where the Commissioner of Police, knowing that a policeman was often drunk, allowed him to remain on the force, and the policeman while off duty maliciously shot and killed the plaintiff's intestate. The complaint was framed on the ground that the Commissioner should have foreseen the potential danger and the city, therefore, should be liable for negligence.<sup>20</sup>

It is obvious, however, that some difficulty may arise as to what should properly constitute an omission and what should constitute a commission. In commenting on the case just described, one writer concluded that the failure of the Commissioner to discharge the policeman must have been a commission and that the case agreed with prior decisions.<sup>21</sup> If the case

<sup>17</sup> E.g. *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945). But cf. *Foley v. State*, 29 N.Y. 275, 62 N.E.2d 704 (1945). Contra; *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947).

<sup>18</sup> *Murray v. City of New York*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

<sup>19</sup> *Murray v. City of New York*, 59 N.Y. Supp.2d 750, 753, 72 N.E.2d 29 (1947).

<sup>20</sup> *McCrink v. City of New York*, 296 N.Y. 99, 71 N.E.2d 419 (1947).

<sup>21</sup> Consult: Professor Lloyd's article in 24 N.Y.U.L.Q. 38 for his discussion concerning the economic reasons for the rules regarding the liability of New York municipalities.

can properly be classified, and it appears that it can, as an omission, then it represents some precedent for the *Shuster* case holding the city liable for its omission in supplying police protection.

The reason advanced for refusing relief in cases of omission is that no duty can be found for the benefit of any one individual, but only a duty for the benefit of the public as a whole.<sup>22</sup> Without a duty there can be no breach and without a breach there can be no actionable negligence.<sup>23</sup> The court in the *Shuster* case recognized a duty to an individual, stating:

In our view the public owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger, due to their collaboration.<sup>24</sup>

There is some authority prior to *Shuster* that the police have a duty to protect an individual where there is some probability that a crime might be committed against him, under the general duty to preserve the public peace and prevent crime.<sup>25</sup> The majority opinion in the *Shuster* case recognized a duty on the part of a citizen to communicate any information he might have of a crime and held that as a result of this duty, a corresponding one arose on the part of the city to protect him.<sup>26</sup> The court drew an analogy between the duty owing to *Shuster* and the duty of the Federal Government to protect its citizens in the exercise of their rights and duties as was stated in *Quarles v. Butler*.<sup>27</sup>

The concurring opinion in *Shuster* agreed with the reasons stated by the majority and added the additional ground that the assumption by the police department of partial protection carried with it the obligation not to terminate such protection if under the circumstances, it was apparent that the risk of bodily harm to *Shuster* was prolonged or enlarged. A dissenting opinion stated that no duty existed to provide an individual in *Shuster's* position such protection and therefore the city could not have been guilty of negligence.

The instant case is significant in that the City of New York was held liable for an omission regarding a governmental function. Whether this case will be construed to have modified or destroyed the rule that cities

<sup>22</sup> *Murray v. City of New York*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945); *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928); *City of Rochester v. Campbell*, 123 N.Y. 405 (1890); *Finkelstein v. City of New York*, 182 Misc. 271, 47 N.Y. Supp.2d 156, aff'd. 269 App. Div. 662, 53 N.Y. Supp.2d 465.

<sup>23</sup> *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>24</sup> *Shuster v. City of New York*, 180 N.Y. Supp.2d 265, 269, 154 N.E. 534, 537 (1958).

<sup>25</sup> *Anastasio v. Monahan*, 124 N.Y. Supp.2d 328 (1953). Cf. *Liddle v. Hodges*, 2 Bos. 537 (1858); *Isereau v. Stone*, 207 Misc. 941, 140 N.Y. Supp.2d 585 (1955).

<sup>26</sup> *Worthington v. Scribner*, 109 Mass. 487 (1872).

<sup>27</sup> 158 U.S. 532 (1895).

are not liable for negligent omissions respecting governmental functions in New York, remains to be seen.

### NEGLIGENCE—DRY ICE HELD NOT INHERENTLY DANGEROUS SUBSTANCE IN HANDS OF A CHILD

In an action for damages, it was shown that defendant's truck driver, while in the process of removing dry ice<sup>1</sup> from defendant's truck which was parked near a vacant lot in which children were playing, offered some of the ice to several young boys who had approached his vehicle. One boy accepted. This lad and two of his companions each took some and carried it, in a cardboard carton, to the area of plaintiff's residence. Upon seeing the plaintiff the boys offered him some of the dry ice; he, in turn, accepted. Taking particles of the substance, he broke them into small pieces and inserted them in a bottle which he had already partially filled with water. Another young boy who was with the plaintiff capped the bottle and threw it into some grass nearby. The boys had expected that the action of the water on the ice would cause the top of the bottle to pop off. When the desired result did not occur, plaintiff went over to the bottle and picked it up; at this time it exploded in his face. Result—loss of the right eye of plaintiff, a boy of twelve years of age. At the conclusion of the plaintiff's opening statement to the jury, the trial court directed a verdict for the defendant. On appeal the decision of the lower court was affirmed. *Scott v. Ewing Dairy*, 317 S.W. 2d 477 (Ky., 1958).

The reviewing court based its decision on the idea that dry ice is not an inherently dangerous substance to children; that the use plaintiff put the product to was unusual;<sup>2</sup> and, that plaintiff did not offer proof of any custom of children to use dry ice for explosive purposes.<sup>3</sup> Therefore, the

<sup>1</sup> "Dry ice is Carbon Dioxide, or CO<sub>2</sub> in solid form. At ordinary temperature it is in a gaseous state. By applying pressure, it may be liquified and, in turn, solidified, whence comes the product known by the trade name 'Dry Ice.' It has a temperature of 110 degrees Fahrenheit, below zero. At normal temperatures dry ice changes from a solid to a gas rapidly and, increasingly so when placed in water and agitated. In the transition from solid to gas, its volume increases 500 times, and, when confined, as in a bottle, the pressure exerted naturally increases, and, if the container cannot withstand the expansion, it must burst. Because of its low temperature dry ice will cause frostbite if part of the body is exposed to it for any length of time." *New York Eskimo Pie Corp. v. Rataj*, 73 F.2d 184, 185, C.A.3rd, (1934) (emphasis added).

<sup>2</sup> Cf., that dry ice is used commercially for an explosive in blasting operations, *New York Eskimo Pie Corp. v. Rataj*, and *Tidwell v. Kay's of Nashville, Inc.*, cited in the instant case and in the text following.

<sup>3</sup> Cf., on customs of children, *Powers v. Harlow*, 53 Mich. 507, 19 N.W. 257, (1884), which has been cited as controlling in the substantial majority of states, and has never been overruled. This case held, at page 508, "Children, wherever they go, must be expected to act on childish instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this and take precautions accordingly."