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Liability Of Municipal Corporations Under The State's Statutory Waiver Of Tort Immunity

*Schuster v. City of New York*¹

Plaintiff's intestate supplied information to the Police Department which led to the arrest and imprisonment of a dangerous and notorious criminal. His part in the arrest was widely publicized, and he immediately received numerous anonymous threats to his life. The police were notified of the threats and for a short while provided for his protection. The protection was then withdrawn although plaintiff's intestate protested that the threats continued. Three weeks after the criminal's arrest, plaintiff's intestate was shot and killed on a street near his home.² In a suit to recover damages, the complaint alleged, *inter alia*, that the city negligently failed to protect plaintiff's intestate after it "required and exacted" his services as an informer and had "actual and constructive knowledge" that his life was endangered.³

The trial court granted a motion by the city to dismiss the complaint as failing to state a cause of action.⁴ The intermediate appellate court affirmed, 4-1.⁵ The Court of Appeals divided 3-3 and, after appointing a justice to sit on the case, ordered reargument. The Court of Appeals then reversed the judgment of the lower court 4-3, holding that the complaint stated a cause of action based on the breach of duty by the municipality to exercise reasonable care for the protection of a person in decedent's position.⁶

The *Schuster* case presents the problem of a municipal corporation's liability for negligence under the statutory waiver of governmental immunity from tort liability in New York State.⁷ After exhaustively examining the history and status of governmental immunity from tort lia-

¹ 180 N.Y.S. 2d 265, 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958).

² For details of the crime, see the N.Y. Times, March 9, 1953, p. 1, col. 8. The criminal in question was the celebrated Willie Sutton. Plaintiff's intestate was Arnold Schuster, of whom the Court, at page 268 said:

"There is no suggestion that Schuster was an underworld character. On the contrary, he appears to have been a public spirited young man who had studied Sutton's picture on an FBI flyer that had been posted in his father's dry-goods store . . ."

Newsweek Magazine, Vol. 39:38, March 24, 1952, reported that the killing "aroused the most public feeling since the Lindberg kidnapping".

³ 207 Misc. 1102, 121 N.Y.S. 2d 735 (1953). The complaint alleged that Sutton and his associates had "a special reputation for violence".

⁴ *Ibid.*

⁵ 286 App. Div. 389, 143 N.Y.S. 2d 778 (1955).

⁶ *Supra*, n. 1.

⁷ For an explanation and discussion of the statute, see *infra*, *circa*, n. 21.

bility, Professor Borchard, a most influential writer on the subject,⁸ concluded in 1924 that ". . . the law governing the redress of the individual against the public authorities, national, State, or municipal, for injuries sustained in the exercise of governmental powers, is in a state of incongruity and confusion unique in history."⁹ The issues in the *Schuster* case have their origin in this discord.

Governmental immunity from tort liability originated in the English common-law maxim that "the King can do no wrong". By way of "one of the mysteries of legal evolution",¹⁰ this doctrine took democratic roots in the theory that neither the United States nor one of the several States could be sued without its consent. While such consent has been given in varying forms in all jurisdictions, suit against the government for its torts has not generally been permitted.¹¹

Much of the "incongruity and confusion" which has followed this retention of governmental immunity is found in the municipal area.¹² The tort immunity of the States

⁸ See, generally, Borchard, *Government Liability in Tort*, 34 Yale L.J. 1, 129, 229 (1924); Borchard, *Governmental Responsibility in Tort*, 36 Yale L.J. 1, 757, 1039 (1927), 28 Col. L. Rev. 577, 734 (1928); Blachly and Oatman, *Approaches to Governmental Liability in Tort: A Comparative Survey*, 9 L. & C.P. 181 (1942); David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. Rev. 1 (1959). See also PROSSER, *THE LAW OF TORTS* (2d ed., 1955), Ch. 24, § 109.

⁹ Borchard, *op. cit.*, *ibid.*, 34 Yale L.J. 1, 3.

¹⁰ *Ibid.*, 4.

¹¹ A recent notable exception is the Federal Tort Claims Act, 28 U.S.C.A. 1291 (1949), §§ 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680, which provides for substantial federal liability. See Gellhorn and Schenk, *Tort Actions Against the Federal Government*, 47 Col. L. Rev. 722 (1947).

"It is quite obvious that the states . . . do not even approach the position of the national government . . ." — Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. Rev. 1363, 1407 (1954). The authors, at 1364, offer three reasons for the prevalence of immunity:

"(1) an amorphous mass of cumbrous language about sovereignty and the nature of law which is usually contradictory within itself and is always contradicted by such modern legal facts as the Federal Tort Claims Act, the laws of most civilized nations other than our own, the New York law, and lesser reforms in most of the other American states;

(2) legislative and judicial inertia, which is probably the most potent single explanation that anyone can give as to why the American law is what it is; and

(3) financial fears, that the states and their sub-divisions actually cannot afford, in the face of other more urgent demands upon their treasuries, to pay out what they would be required to pay if tort liability were accepted."

See also Schumate, *Tort Claims Against State Governments*, 9 L. & C.P. 242 (1942).

¹² In *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 131, 60 A.L.R. 2d 1193 (Fla., 1957), the Court commented that "since 1900 well over two hundred law review articles have been written on the subject." See generally, Fuller and Casner, *Municipal Tort Liability in Operation*, 54

was extended to their sub-divisions upon the tenets of an early English case, *Russell v. Devon*.¹³ However, legal writers and the Maryland Court of Appeals¹⁴ have pointed out that the county in question in the English case, which was held non-liaible for a breach of duty resulting in injury to a citizen, was unincorporated and without corporate funds, while municipalities and county commissioners in this country are, without exception, incorporated and possessed of corporate funds.

Nevertheless, municipal corporations, in the exercise of governmental duties, as distinguished from proprietary duties, enjoy tort immunity. The Maryland Court of Appeals has stated the general distinction: "Where the act . . . is solely for the public benefit, with no profit or emolument enuring to the municipality . . . and has in it no element of private interest, it is governmental in its nature."¹⁵ Conversely, where the act is for the private benefit of the municipality, the function is proprietary.¹⁶

As a practical matter, however, this distinction has often been distorted by judicial efforts to effect a compromise between the rights of the injured individual and the financial risk to the municipality: "When one reads

Harv. L. Rev. 437 (1941); Repko, *American Legal Commentary on the Doctrines of Municipal Tort Liability*, 9 L. & C.P. 214 (1942); Smith, *Municipal Tort Liability*, 48 Mich L. Rev. 41 (1949); and Miller, *Recent Substantive Developments Affecting Municipal Tort Liability*, 21 Cinn. L. Rev. 31 (1952). Text sources are 18 McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* (3d ed., 1950), ch. 53, §§ 23-59; and 2 ANTIEAU, *MUNICIPAL CORPORATION LAW* (1958), chs. 11-13.

¹³ 2 Term. Rep. 667, 100 Eng. Rep. 359 (1788).

¹⁴ County Commr's of A.A. Co. v. Duckett, 20 Md. 468, 479 (1864).

¹⁵ Baltimore v. State, 173 Md. 267, 276, 195 A. 571 (1937).

¹⁶ Mr. Clarke, *infra*, n. 19, examines with completeness and clarity the classification of functions in Maryland. Parks, schools, police and fire departments, and public buildings are the primary governmental functions; and markets, removal of ashes and household refuse, streets, highways, waterworks, and sewers are the predominant proprietary ones. Maryland law in this area represents the great weight of authority. See Doddridge, *Distinction Between Governmental and Proprietary Functions of Municipal Corporations*, 23 Mich. L. Rev. 325 (1925); and Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 Va. L. Rev. 910 (1936).

Florida is the only state which has judicially toppled the governmental proprietary distinction. In *Hargrove v. Cocoa Beach*, *supra*, n. 12, the Court said, 133:

"The modern city is, in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism."

any opinion, it is usually appropriate to inquire whether the city is immune because the function is governmental or whether the function is governmental because the city should be immune."¹⁷ The inconsistent results of this process have been uniformly criticized as "absurd and unjust,"¹⁸ and there has been a persistent outcry for remedial legislation. In *Municipal Responsibility in Tort in Maryland*,¹⁹ George L. Clarke, taking a "critical view" of that body of law, said that in this era of increasing social consciousness and governmental activity, municipal immunity is "somewhat startling" since ". . . [the government's] purpose is not achieved when an individual member of the community, himself without fault, is made to bear the entire cost of the injury done him by a servant of the community."²⁰

New York State took a singular step in 1929 when it passed the Court of Claims Act, Section 12a, waiving the State's immunity from liability and consenting to have the same "determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals and corporations".²¹ In *Bernardine v. City of New York*,²² this waiver was held to extend to municipal corporations, thereby eliminating the governmental-proprietary distinction. Under familiar tort principles, the city, like the individual and private corporation, would be liable for negligence wherever it owed a *duty* to the injured plaintiff.²³

Less than six months after the *Bernardine* case, in *Steitz v. City of Beacon*,²⁴ the New York Court of Appeals,

¹⁷ Smith, *supra*, n. 12, 44.

¹⁸ Seasongood, *supra*, n. 16, 910. In *Baltimore v. Eagers*, 167 Md. 123, 173 A. 56 (1934), the Court of Appeals found that the removal by the municipality of a tree limb which protruded over a public footway involved the proprietary duty of keeping its streets safe, and that it would be "illogical and unreasonable" to term it a governmental duty although the same act, by the same employees, involved the governmental function of maintaining a public park.

¹⁹ 3 Md. L. Rev. 159 (1939).

²⁰ *Ibid.*, 174. At 159, Mr. Clarke states:

"Legal writers everywhere have sensed the anomaly involved and, almost uniformly have leveled shafts of criticism at the existing situation. Each analysis and subsequent complaint recognizes the omnipotence of *stare decisis* and the cry is for remedial legislation."

²¹ NEW YORK LAWS 1929, ch. 360.

²² 294 N.Y. 361, 62 N.E. 2d 604, 161 A.L.R. 364 (1945).

²³ In *Runkel v. City of New York*, 282 App. Div. 173, 123 N.Y.S. 2d 485, 490 (1953), the Court said:

". . . in each case the test now is whether an individual or private corporation, assuming that he or it were obligated to discharge the governmental duty involved, would be liable to the injured person for a breach of that duty."

²⁴ 295 N.Y. 51, 64 N.E. 2d 704, 163 A.L.R. 342 (1945).

in dismissing a complaint charging the city with negligently failing to keep in repair fire department water pipes, stated that:

“Such enactments [i.e. those in the city charter defining governmental powers] do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment 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.* * * * There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission . . . the people of the city could recover fire damages to their property.”²⁵

The Court reasoned that “[a]n 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.”²⁶

In *Murrain v. Wilson Line*,²⁷ where the police were charged with failing to provide adequate protection to people on a public pier, the Court, in dismissing the complaint, stated:

“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.*”²⁸

Upon the distinctions drawn in the *Steitz* and *Murrain* cases, it was held that where a village omitted the posting of safeguards at the scene of an accident,²⁹ and where the police refused protection to a woman whose husband previously made an attempt to take her life,³⁰ there was

²⁵ *Ibid.*, 706. Emphasis supplied.

²⁶ *Supra*, n. 24, 705.

²⁷ 270 App. Div. 372, 59 N.Y.S. 2d 750 (1946), *aff'd.* 296 N.Y. 845, 72 N.E. 2d 29 (1947).

²⁸ *Ibid.*, 753. Emphasis supplied.

²⁹ *Landby v. New York, N.H. & H. R. Co.*, 199 Misc. 73, 105 N.Y. 2d 836 (1950), *aff'd.* 278 App. Div. 965, 105 N.Y.S. 2d 839 (1950), motion for leave to appeal denied 303 N.Y. 1014, 102 N.E. 2d 840 (1951).

³⁰ *Rocco v. City of New York*, 282 App. Div. 1012, 126 N.Y.S. 2d 198 (1953).

no liability for injuries caused by the failure of police protection.

However, where the city omitted to enforce a statute prohibiting dangerous structures or public nuisances facing the highway,³¹ and where the state omitted to maintain traffic control lights upon the highway as it was bound by statute to do,³² there was liability for the omission of a governmental duty upon the determination of the court that the intent of the statutes involved was to create a governmental duty to the individual.

Where a policeman negligently shot an intoxicated tavern patron,³³ where three policeman negligently placed an armed intoxicated fourth policeman into a taxi and the fourth policeman shot the taxi driver,³⁴ where a policeman negligently injured the plaintiff with a shot aimed at a fleeing third person,³⁵ and where the police negligently returned a pistol to a man who subsequently killed himself and injured his wife,³⁶ the commission of a wrong (malfeasance) was the basis for liability.

In *McCrink v. City of New York*,³⁷ liability was founded upon an allegation that the city "negligently failed to discharge" a chronically incompetent policeman who, while off-duty, shot plaintiff's intestate with the police revolver he was required to carry with him at all times. However, the Court implied that there was the commission of a wrong in the "retention" of the policeman.

Manifestly, the effect of the *Steitz* and *Murray* cases was to reimpose municipal immunity, notwithstanding the statutory waiver, where (1) the function was governmental, not proprietary; and (2) the duty was owing to the general public, not to the individual; and (3) the breach was one of omission, not commission. This tripartite test³⁸ of the municipality's liability was at the center of the dispute in the *Schuster* case.

³¹ *Supra*, n. 23.

³² *Foley v. State*, 294 N.Y. 275, 62 N.E. 2d 69 (1945).

³³ *Flamer v. City of Yonkers*, 309 N.Y. 114, 127 N.E. 2d 838 (1955).

³⁴ *Lubelfeld v. City of New York*, 4 N.Y. 2d 455, 176 N.Y.S. 2d 302 (1958).

³⁵ *Wilkes v. City of New York*, 308 N.Y. 726, 124 N.E. 2d 338 (1954).

³⁶ *Benway v. City of Watertown*, 1 App. Div. 2d 465, 151 N.Y.S. 2d 485 (1956).

³⁷ 296 N.Y. 99, 71 N.E. 2d 419 (1947).

³⁸ See Lloyd, *Le Roi Est Mort; Vive Le Roi! (Municipal Tort Liability in New York — Sequel)*, 24 N.Y.U. L. Rev. 38 (1949); ANTIEU, *MUNICIPAL CORPORATION LAW* (1958), § 12.05; Notes and Comment, *Tort Liability of Municipal Corporations in New York*, 23 St. Johns L. Rev. 117 (1948).

The trial court, in dismissing the complaint, said that, at the most, there was an omission of police protection, for which no liability could lie.³⁹ The intermediate appellate court affirmed on other grounds, but, by *obiter dictum*, said that if there was a duty to protect an informer, such a duty was court-created.⁴⁰ Judge Beldock, in dissenting, found a duty to plaintiff's intestate based upon the foreseeability of injury.⁴¹

The Court of Appeals,⁴² in reversing the judgment, advised that there could be no liability to the general public from the failure of police protection. But, the Court said, there is 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."⁴³ The Court offered two bases for this "special duty". First, plaintiff's intestate's *enforceable duty* to aid in law enforcement, a duty "as old as history", created a *reciprocal duty* on the part of the city to reasonably protect one who had come to its assistance in this manner. Second, a "special duty" arose from the active use made of plaintiff's intestate by the city. The Court said that where the city has called upon and used the citizen in aiding law enforcement: "If conduct has gone forward to such a stage that inaction [in furnishing police protection to such persons] 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 In effect, having "gone forward", the city's subsequent omission to act becomes the commission of a wrong.

The dissenting judges maintained that an enforceable duty upon the individual to aid in law enforcement was without statutory or judicial precedent, and that, therefore, there could be no reciprocal duty on the part of the government. The "crushing" effects of the Court's holding were also feared. For example, Chief Justice Conway said that to entitle the informer to "special" police protection would subject the municipality to "an unreasonable

³⁹ 207 Misc. 2d 1102, 121 N.Y.S. 2d 735 (1953).

⁴⁰ 286 App. Div. 389, 143 N.Y.S. 2d 778 (1955).

⁴¹ Judge Beldock's opinion is discussed in detail, *infra*, circa n. 51.

⁴² 180 N.Y.S. 2d 265, 5 N.Y. 2d 75, 154 N.E. 2d 534 (1958). Two opinions, concurred in by each of the four justices voting for reversal, were written. Each of the three dissenting justices wrote a separate opinion, concurred in by the others.

⁴³ *Ibid.*, 537.

⁴⁴ *Supra*, n. 42, 538.

burden . . . which would incapacitate the entire police force and leave the general public without police protection", and Justice Froessel said that "the cost . . . of such protection would be incalculable".

In analyzing the effect of the holding in the *Schuster* case, the weakness of the rationale behind the governmental duty to protect informers becomes apparent. First, the legal structure of the reciprocal duty is unsound. While the early common law of England recognized the crime of misprision of felony, doubts have been expressed whether mere nondisclosure ever constituted an offense.⁴⁵ In this country, with limited exception,⁴⁶ misprision of felony has not been recognized as a common law offense.^{46a} The Supreme Court of the United States has said: "It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case, for not performing this duty, is too harsh for man."⁴⁷

Second, no more persuasive is the Court's holding that the city's active use of the citizen creates a relationship whereby the omission in not affording police protection becomes the commission of a wrong. Elementary tort principles — and New York case law⁴⁸ — include the outlines of the principle involved, but the "obvious elusiveness of [the] magic point"⁴⁹ at which an omission becomes a commission leaves its substance undefined and uncertain.

However, it is not suggested that the Court was unaware of the shakiness of its bases for liability. In fact, the Court restricted the existence of the duty to those situations where "it reasonably appears that they [the informers] are in danger due to their collaboration".⁵⁰ This qualification, in the light of the special facts in the *Schuster* case, clearly opens the way for future courts to distinguish the degree of danger to future informers and reintroduce non-liability. Plainly this was the intent of the Court —

⁴⁵ See PERKINS, CRIMINAL LAW (1957), ch. 5, § 3, 440.

⁴⁶ *State v. Wilson*, 80 Vt. 249, 67 A. 533 (1907).

^{46a} PERKINS, *op. cit.*, *supra*, n. 45.

⁴⁷ *Marbury v. Brooks*, 7 Wheat. 556, 575-6 (U.S. 1822). Although the United States Code (18 U.S.C.A. (1950) § 4) punishes whoever "conceals and does not . . . make known" the commission of a felony, affirmative concealment and suppression have been held to constitute the offense and not mere nondisclosure. See *Neal v. United States*, 102 F. 2d 643 (8th Cir. 1939); and *Bratton v. United States*, 73 F. 2d 795 (10th Cir. 1934).

⁴⁸ The Court relied heavily upon *H. R. Moch. Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896, 62 A.L.R. 1199 (1928). See also *Dunham v. Village of Canisteo*, 303 N.Y. 493, 104 N.E. 2d 872 (1952).

⁴⁹ *Lloyd*, *supra*, n. 38, 46.

⁵⁰ *Supra*, n. 42, 537.

to find liability in the instant circumstances without surrendering the limitations on liability raised by the *Steitz* and *Murrain* cases. By contriving a "special duty" to informers, and then emasculating its future applicability, the Court managed its purpose. The broad extension of liability, envisioned in the dissents, would appear to be illusory. Judge Beldock, in his dissent in the intermediate appellate court, had similarly reasoned that:

" . . . the city's obligation to the intestate is not to be measured by the requirement of 'special' police protection. . . . Rather, under the circumstances . . . the city's obligation simply was to furnish the intestate with such protection as would be adequate in view of his *known* status as an informer upon a criminal who, as a matter of common knowledge was extremely dangerous. * * *⁵¹

"It is on this ground — the absence of knowledge of the risk or danger to any particular individual — that a municipality has been held not to be liable to a person who is damaged by its negligence in the discharge of a statutory duty owing to the general public. . . ."⁵²

Where the municipality has injured an individual by its failure to perform a governmental function, Judge Beldock would find liability wherever the injury was *foreseeable*. The Court found liability where the injury was foreseeable *and* a "special duty" was owed the individual. In rejecting Judge Beldock's reasoning and substituting a "special duty", the Court, rather than engendering any substantive change in municipal liability, reaffirmed the *Steitz* and *Murrain* principles and brought into sharper focus the practice of the Court under the tri-partite test.

In principle, the Court's unequivocal position is that there can be no liability for the omission of a governmental duty owing to the general public. In practice, the Court has demonstrated that it is able and inclined to use the predicates of that position (i.e. the governmental-proprietary, general duty-individual duty, and omission-commission distinctions) as it used, prior to the *Bernardine* case,⁵³ the bare governmental-proprietary distinction. Where the facts allow any leeway, it appears that the

⁵¹ 286 App. Div. 389, 143 N.Y.S. 2d 778, 782 (1955). Emphasis supplied.

⁵² *Ibid.*, 786. *Steitz* and *Murrain* cases cited.

⁵³ 294 N.Y. 361, 62 N.E. 2d 604, 161 A.L.R. 364 (1945).

Court will weigh the interests involved and then fit a finding of liability or non-liability into the tri-partite test.⁵⁴

The history of municipal tort liability suggests that, as a practical matter, the real dispute in the *Schuster* case was over the degree of financial risk to the defendant municipality. The Court was convinced that the injury to plaintiff's intestate, together with the public policy interest in encouraging the citizenry to aid in law enforcement, outweighed the financial risk to the city. To the dissenters, the scale was balanced in the opposite direction.

The writer believes that the *Schuster* case, in ultimately delineating the principles and practice of the Court in determining municipal liability, invites criticism. In the face of the unqualified legislative waiver of government tort immunity, the Court's tenacious limitations on liability appear unjustified. While the financial feasibility of complete liability is a cognizable and serious problem,⁵⁵ the presumption here must be that the New York legislature appreciated and assumed the risks implicit in its waiver.⁵⁶ The reappearance of an "artificial formula"⁵⁷ (i.e. the tri-partite test) under which the Court will continue to juggle immunity and liability on a case by case basis is an additional objection to the Court's position.

In Maryland, the *Schuster* case and New York's experiences with a statutory waiver of governmental tort immunity are only of academic significance. Municipal

⁵⁴ Lloyd, *supra*, n. 38, 50, describes the general duty-individual duty and omission-commission distinctions as ". . . two generalized solving formulae so indefinite and uncertain as to constitute fresh, untrammelled instruments of policy determination". The stratagems of the Court in the *Schuster* case, *viz.*, the individual or "special" duty to informers and the omission of protection becoming the commission of a wrong, seem to illustrate the point.

⁵⁵ Even the most outspoken critics of governmental immunity recognize that comprehensive statistical studies uncovering actual areas of financial danger, if any, must precede remedial legislation. On the basis of studies already undertaken, legal writers are confident that the risks are minimal. In addition, many ways of obviating possible risks (e.g. insurance and maximum recovery limits) have been suggested and discussed. See David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. Rev. 1 (1959); Fuller and Casner, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437 (1941); French, *Research in Public Tort Liability*, 9 L. & C.P. 234; MacDonald, *The Administration of a Tort Liability Law in New York*, 9 L. & C.P. 262; Borchart, *Proposed State and Local Statutes Imposing Public Liability in Tort*, 9 L. & C.P. 282. Cf., Brown, *Municipal Tort Liability, Some Observations*, 30 N.Y. State Bar Bulletin 433 (1958).

⁵⁶ ANTIEU, *op. cit. supra*, n. 38, 119, observes that:

" . . . if the determination of municipal responsibility in tort is for the legislatures (as the courts continually insist) then determination of whether civic responsibility in a particular group of cases will constitute 'a crushing burden' is not for the conjecture of the courts."

⁵⁷ Lloyd, *Le Roi Est Mort; Vive Le Roi!*, 24 N.Y.U. L. Rev. 38, 50 (1949).

liability in Maryland follows a hardened path.⁵⁸ In a recent case, *State v. Baltimore County*,⁵⁹ where plaintiff's intestate was negligently killed by a policeman, the Court of Appeals, in upholding the conventional governmental-proprietary distinction, stated:

" . . . the point was settled in the case of *Wynkoop v. Hagerstown*, 159 Md. 594. * * * If, as the appellants argue, the rule ought to be changed so as to enlarge the liability of municipal corporations, it must be done by the Legislature and not by this Court."⁶⁰

If the Maryland Legislature should respond to a call for remedial legislation, the *Schuster* case and New York's experience with a statutory waiver of tort immunity will serve as a timely warning that the courts will look for a definite and clear statement of the extent of liability undertaken.

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⁵⁸ See *supra*, n. 16. Statutory liability in Maryland is confined to three areas:

1) where employees of the government are injured while engaged in extra-hazardous work (Workmen's Compensation Act, 8 MD. CODE (1957) Art. 101, § 33);

2) where police commandeer a motor vehicle (6 MD. CODE (1957), Art. 66½, § 180a, b);

3) where there is destruction of property by riot or tumultuous assemblage (7 MD. CODE (1957) Art. 82, §§ 1-4).

⁵⁹ 218 Md. 271, 146 A. 2d 28 (1958).

⁶⁰ *Ibid.*, 273.