

## COMMENT

### SCHUSTER v. CITY OF NEW YORK: A MILESTONE IN THE RETREAT OF GOVERNMENTAL IMMUNITY

FLEMING JAMES, JR.\*

**A**RNOLD SCHUSTER gave information to the police which led to the capture of Willie Sutton, a notoriously dangerous criminal with notoriously dangerous associates. Schuster's part in the capture was widely publicized, and was followed by threats on his life. Less than three weeks later Schuster was shot and killed while approaching his home. Suit was brought by his administrator against the City of New York, under the wrongful death and survival statutes. The complaint embodied two theories of recovery, negligence and misrepresentation. To show negligence it was urged that the F.B.I. had called on citizens to furnish information that might lead to Sutton's arrest;<sup>1</sup> that Schuster had responded to this call by furnishing such information to the City police, by whom Sutton was "known and wanted";<sup>2</sup> that Schuster had told the police of the threats on his life and asked for protection, but that the City had failed to exercise reasonable care in supplying him with police protection, and instead advised him that the threats were not to be taken seriously. The shooting, it was charged, was the result of Schuster's informing on Sutton, and would have been prevented by reasonable police protection.

Defendant's motion to dismiss the complaint was granted by the trial court on the ground that a municipality's duty to furnish police protection was owed to the public at large and not to individuals, and that the City was not liable for its mere failure to exercise a governmental function.<sup>3</sup> The Appellate Division affirmed,<sup>4</sup> Beldock, J., dissenting. In addition to the ground stated by the trial court, the Appellate Division pointed to the complaint's failure to identify Schuster's assailant or the author of the threats. A majority of the Court of Appeals reversed the judgment and upheld the complaint against the motion to dismiss it.<sup>5</sup> Three judges dissented.

The question presented by this case would not even arise in most states.

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<sup>1</sup> This was not alleged in the complaint, but the FBI "wanted" flier was printed in Appendix A of plaintiff's brief in The Court of Appeals, and was noted in the opinion of the court. *Schuster v. City of New York*, 5 N.Y.2d 75, 79, 82, 154 N.E.2d 534, 536, 538 (1958).

<sup>2</sup> Complaint, par. 12, Record, p. 12.

<sup>3</sup> 207 Misc. 1102, 121 N.Y.S.2d 735 (1953).

<sup>4</sup> 286 App. Div. 389, 143 N.Y.S.2d 778 (1955). This decision was noted in [1955] *Scots L.T.* 201; 34 *Chi.-Kent. L. Rev.* 164 (1956); 44 *Ky. L.J.* 389 (1956); 54 *Mich. L. Rev.* 1019 (1956); 58 *W. Va. L. Rev.* 305 (1956).

<sup>5</sup> 5 N.Y.2d 75, 154 N.E.2d 534 (1958). There was a concurring opinion by McNally, J. Each of the dissenting judges wrote a separate opinion.

Governmental immunity from tort liability would bar Schuster's claim at the threshold.<sup>6</sup> But the New York legislature has removed this bar and provided that the State shall be liable "in accordance with the rules of law as applied to actions . . . against individuals or corporations."<sup>7</sup> And, her courts have held that this statute swept away the derivative immunity of the State's political subdivisions<sup>8</sup> and municipalities.<sup>9</sup>

The removal of governmental immunity exposes problems which are not met under a rule of immunity. Government performs some functions which have no analogies in the activities of individuals or private corporations. No one contends that government should compensate for all injuries caused by its mistakes. Certainly there is no present disposition to make government pay for harm suffered by individuals as a result of its political or regulatory blunders. If the courts were called on to enforce any such liability as that, they would quickly become involved in reviewing the wisdom of action taken by a coordinate branch of the government within its own proper sphere. Such an inquiry would be neither seemly nor well adapted to the judicial process. The drawing of a proper boundary for the newly created governmental tort liability presents one of the cardinal problems in this new field.

The two American statutes which comprehensively supplant immunity attack this problem in different ways. The Federal Tort Claims Act provides for government liability only "under circumstances where the United States, if a private person, would be liable."<sup>10</sup> This limitation is similar to the one found in the New York statute, quoted above. But the federal Act has another limitation not found in New York. Section 2680(a) excludes liability for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government whether or not the discretion involved be abused."<sup>11</sup>

It will be seen at once that under the federal act the facts of the Schuster case would raise a question whether the failure to assign police protection to the informant was simply the failure to perform a discretionary function or duty.<sup>12</sup> Surely the decision whether to afford such protection

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<sup>6</sup> Leflar and Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. Rev. 1363 (1954).

<sup>7</sup> N.Y. Court of Claims Act § 8.

<sup>8</sup> *Holmes v. Erie County*, 266 App. Div. 220, 42 N.Y.S.2d 243 (1943), *aff'd*, 291 N.Y. 798, 53 N.E.2d 369 (1944).

<sup>9</sup> *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945). The development is described in Lloyd, *Municipal Tort Liability in New York*, 23 N.Y.U.L. Rev. 278 (1948).

<sup>10</sup> 28 U.S.C.A. § 1346(b) confers on the district courts jurisdiction to hear claims described in the language in the text. See also *id.* §§ 2672, 2674.

<sup>11</sup> 28 U.S.C.A. § 2680(a).

<sup>12</sup> It is not clear that recovery would be excluded by § 2680(a) of the Federal Tort Claims Act. Some earlier decisions would probably lead to calling the police conduct here the exercise of a discretionary function. *Toledo v. United States*, 95 F. Supp. 838

called for the exercise of judgment by an officer acting in his official capacity. Yet the decision is not of a kind which only a government may be called upon to make. Agents of private industry or business are often required to make just such decisions and to exercise the same kind of "discretion" or judgment. Railroads, industrial plants, universities, theatres, and other kinds of business, for example, often have their own police or their own guards and attendants whose job in whole or in part is to protect persons or property. Where the private employer has the duty of protecting others he may not escape liability for a failure of protection simply because one of his responsible employees exercised judgment in declining to assign guards, or enough guards, to afford the protection. Private citizens must constantly exercise judgment about such matters at the risk of having their judgment reviewed afterward by a court or jury if it miscarries to the injury of another.<sup>13</sup> Where government officers make decisions under like circumstances, their employer should not be immune from liability *simply because the exercise of judgment was required*. What was reviewable "judgment" in the private citizen should not become unreviewable "discretion" in the public officer,<sup>14</sup> unless it is desired to retain a substantial portion of governmental immunity. New York is to be congratulated for having avoided one of the worst pitfalls in the federal act.

From this reasoning it does not follow, however, that government should be held for all injurious unreasonable mistakes of official judgment. First there must be a duty owing to the plaintiff, if ordinary tort principles are to be observed. And under the statute as we have seen the duty is to be

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(D. Puerto Rico 1950). Compare *Indian Towing Co. v. United States*, 211 F.2d 886 (5th Cir. 1954); *Olson v. United States*, 93 F. Supp. 150 (N.D. 1950).

More recent cases, however, suggest that the decision of the police in Schuster's case would not be regarded as discretionary at least if made on an "operational level." See, e.g., *American Exchange Bank v. United States*, 257 F.2d 938 (7th Cir. 1958); *Jemison v. The Duplex*, 163 F. Supp. 947 (S.D. Ala. 1958); cases collected in James, *The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity*, 10 U. of Fla. L. Rev. 184 (1957).

The Supreme Court interpreted § 2680(a) broadly (i.e. in favor of wide immunity for discretionary acts) in *Dalehite v. United States*, 346 U.S. 15 (1953). Later decisions have made the authority of *Dalehite* doubtful but have not overruled it. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), reversing 211 F.2d 886 (5th Cir. 1954); *United States v. Union Trust Co.*, 350 U.S. 905 (1955); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

Of all the sections of the Federal Tort Claims Act, § 2680(a) has been the most productive of litigation and, I submit, the most unsatisfactory. See 2 Harper & James, *Law of Torts* § 29.14, 29.15 (1956).

<sup>13</sup> The private employer will not be held simply because his agent's judgment turns out to have been mistaken. Neither will the City, under the present decision. In both cases the mistake in judgment must have been an unreasonable or negligent one to afford the basis of liability.

<sup>14</sup> Chief Judge Conway, however, thought that "The need for special protection must be left to the absolute discretion of the police force." 5 N.Y.2d at 94, 154 N.E.2d at 545.

measured by the law applicable to private individuals and corporations.<sup>15</sup> Here is where the difference between government and a private person appears. The City is under a statutory duty through its police department "to preserve the public peace, prevent crime" and "protect the rights of persons and property."<sup>16</sup> But all the judges agreed that the City's liability could not be based on this general duty. Chief Judge Conway said in his dissenting opinion: "Such enactments do not import intention to protect the interest 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."<sup>17</sup> It may be suggested that if this is so it is because the duty is one peculiar to government. No private individual or corporation owes a general legal duty to protect his fellow creatures from crime or violence. The breach of a duty owed only by government and having no private counterpart should not create liability under a statute which embodies "the law as applied to actions . . . against individuals or corporations."<sup>18</sup>

This conclusion, however, does not dispose of the case. A private individual or corporation *does* under some circumstances come under the duty to extend affirmative protection to others against the foreseeable misdeeds of third persons. One way to approach the case, therefore, is to see whether generally applicable tort principles would support a duty here. When the circumstances pointedly suggest danger to its patrons from violence or crime, a carrier,<sup>19</sup> a theatre owner,<sup>20</sup> a hotel proprietor,<sup>21</sup> for example, owes the duty of ordinary care to afford reasonable protection against the danger, by assigning guards or otherwise. This duty is owed whether the danger comes from fellow patrons<sup>22</sup> or from complete outsiders.<sup>23</sup> These cases are not precisely in point because they all involve injury inflicted on premises under defendant's control. Yet in all of them also defendant has, by his affirmative conduct invited or induced plaintiff to expose himself to extraordinary and foreseeable peril by entering into a relationship in which the

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<sup>15</sup> Text at note 7, *supra*.

<sup>16</sup> Section 435 of the New York City Charter, set out in 5 N.Y.2d at 90, 154 N.E.2d at 543.

<sup>17</sup> 5 N.Y.2d at 91, 154 N.E.2d at 543, quoting *Steitg v. City of Beacon*, 295 N.Y. 51, 54, 55, 64 N.E.2d 704, 705-706 (1945).

<sup>18</sup> Text at note 7, *supra*.

<sup>19</sup> *Reschke v. Syracuse, L.S. & N.R.*, 155 App. Div. 48, 139 N.Y. Supp. 555 (4th Dept. 1913), *aff'd*, 211 N.Y. 602, 105 N.E. 1097 (1914); *Callaghan v. City of New York*, 283 App. Div. 388, 128 N.Y.S.2d 206 (1st Dept. 1954); *Allessi v. N.Y. Rapid Tr. Corp.*, 163 Misc. 815, 297 N.Y. Supp. 1011 (Mun. Ct. N.Y. City, 1937); *Neering v. Illinois Cent. R.R.*, 383 Ill. 366, 50 N.E.2d 497 (1943) (intending passenger raped by hobo).

<sup>20</sup> *Davidson v. Radio City M.H. Corp.*, 262 App. Div. 826, 29 N.Y.S.2d 504 (1st Dept. 1941) *aff.* 288 N.Y. 553, 42 N.E.2d 15 (1942); *Philpot v. Brooklyn Nat. League Baseball Club*, 303 N.Y. 164, 100 N.E.2d 164 (1951).

<sup>21</sup> *Schubart v. Hotel Astor, Inc.*, 168 Misc. 431, 5 N.Y.S.2d 203 (Sup. Ct. K. Co. 1938); *aff.* 255 App. Div. 1012, 8 N.Y.S.2d 567, 281 N.Y. 597, 22 N.E.2d 167 (1939).

<sup>22</sup> As in the *Reschke*, *Callaghan* and *Allessi* cases, note 19 *supra*.

<sup>23</sup> As in the *Neering* case, note 19 *supra*.

defendant has an interest,<sup>24</sup> and the defendant is peculiarly equipped to afford protection against that peril. Viewed in this aspect these cases are seen to coalesce with the principle declared by Cardozo in *Moch v. Rensselaer Water Co.*<sup>25</sup> "If conduct has gone forward to such a stage that 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." And the relationship thus recognized is not tied to the occupation of land.

The majority opinion written by Judge Van Voorhis finds such a relationship between the City and Schuster. It stresses the active role of the police "in calling upon citizen for help, and in utilizing his help when it is rendered." It then paraphrases Cardozo's famous statement, quoted above, and applies it to the "inaction in furnishing police protection."<sup>26</sup> This, it is submitted, is a sound basis for the decision.

This opinion also sought to rest the City's duty on Schuster's duty to furnish the information. The latter it was thought beget the former by a principle of reciprocity.<sup>27</sup> The dissent points out that Schuster's duty to give information was not a legal one.<sup>28</sup> The majority apparently concedes this but points to the citizen's moral duty to aid law enforcement.<sup>29</sup> This may well be a pertinent factor in creating a relationship between the parties from which a duty of protection arises. But it should be noted that there is no reciprocity of duties in the cases between carrier and intending passenger, and the like. And it is doubtful whether there is any general principle of tort law that a duty of one party begets a reciprocating duty on the part of the other.

Judge McNally, in a concurring opinion,<sup>30</sup> rests the City's duty on an additional ground. The complaint alleged that the police did furnish partial protection for a time, then withdrew it before the shooting. This, Judge McNally thought, brought into play the "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." The police conduct, including the partial protection, may have "enlarged or prolonged" Schuster's danger. Moreover the assurances of safety given by the police may be shown to have put Schuster off his guard thereby increasing his danger. This latter point seems well taken, but it is hard to see how the partial protection would have made Schuster's plight any worse when protection

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<sup>24</sup> The interest need not be a pecuniary one. *Edwards v. Hollywood Canteen*, 27 Cal. 2d 802, 167 P.2d 729 (1946) (hostess at canteen injured by drunken service man was on premises "for the purpose of aiding it in the promotion of its objective of providing gratuitous entertainment for members of the armed forces").

<sup>25</sup> 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928).

<sup>26</sup> 5 N.Y.2d at 82, 154 N.E.2d at 538.

<sup>27</sup> 5 N.Y.2d at 83, 84, 154 N.E.2d at 538, 539.

<sup>28</sup> 5 N.Y.2d at 92-94, 154 N.E.2d at 544-545.

<sup>29</sup> 5 N.Y.2d at 83, 154 N.E.2d at 538.

<sup>30</sup> 5 N.Y.2d at 86-89, 154 N.E.2d at 541-542.

was withdrawn than it would have been if none at all had been afforded.

Several other aspects of the case deserve mention. Plaintiff may have trouble at the trial in proving that his intestate was killed because of the information he furnished<sup>31</sup> and that police protection might have saved him.<sup>32</sup> A serious question may also arise upon the length of time that reasonable care would call for protection. But these questions, as the majority indicates, must await the proof and should not be a basis for denying recovery upon the pleadings.

Another point of interest lies in the different treatments given to a statute. Section 1848 of the Penal Law requires citizens upon police command to aid an officer in making an arrest, and provides for strict municipal liability for injury or death incurred as a result of giving such aid. No judge thought that the statute was directly applicable to this case. Judge Froessel dissenting, urges: "That section sets the limit to which the legislature has been willing to go in establishing liability against municipal corporations to compensate individuals who aid the police."<sup>33</sup> This will be recognized as a variant of *inclusio unius exclusio alterius*. In the majority opinion written by Judge Van Voorhis this statute is cited as evidence of a governmental policy indicating "care and solicitude for the private citizen who cooperates with the public authorities in the arrest and prosecution of criminals." The attitude thus evidenced "dispels any inference that the public policy of the State is the other way."<sup>34</sup> This shows a recognition of the dynamic role statutes have played in the formation of the common law.

The dissenting judges raise again the specter of the flood of litigation and the possibility of a crushing burden of liability opened up by the decision. With the rule of liability carefully guarded as it is, these dire predictions seem unconvincing. In pragmatic terms the community may well gain more from the encouragement the decision gives to informers than it will lose from the liability it imposes. But more than that, it acknowledges a debt which most people will think society justly owes.

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<sup>31</sup> Schuster's murderer has never been identified. The opinion of Judge Van Voorhis noted that he might become known before trial, and further suggested that even without this identification, the probability might appear to be so great "of his having been shot by reason of his disclosures resulting in Sutton's capture, that a question of fact would be created on the issue." 5 N.Y.2d at 80, 154 N.E.2d at 536-537.

Judge Desmond put his dissent on the lack of the assailant's identification, 5 N.Y.2d at 96, 154 N.E.2d at 546.

<sup>32</sup> See *Lee v. National B.B. Club of Milwaukee*, 4 Wis.2d 168, 89 N.W.2d 811 (1958), where the court thought that on the evidence a jury might conclude that an usher could have protected a spectator from injury by other spectators who scrambled for a foul ball hit into the stands.

Compare also *Zinnel v. U.S. Shipping Board*, 10 F.2d 47, 49 (2d Cir. 1925); *Reynolds v. Texas & P. Ry.*, 37 La. Ann. 694, 698 (1885); 2 Harper & James, *Law of Torts* § 20.2 (1956).

<sup>33</sup> 5 N.Y.2d at 100, 154 N.E.2d at 548.

<sup>34</sup> 5 N.Y.2d at 85, 154 N.E.2d at 540.

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