Municipal Corporations - Governmental Immunity - Tort Liability - Negligence

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Municipal Corporations—Governmental Immunity—Tort Liability—Negligence—The New York Court of Appeals has held that the actions of a city and county in holding out the 911 number as a number to be called by someone in need of emergency assistance, the plaintiff’s placing of a telephone call in reliance on that holding out, and the plaintiff’s further reliance on the assurance that help was on its way, created a duty on the part of the city and county to respond to plaintiff’s plea for help in a non-negligent fashion.


Prior to her death, Amalia DeLong, her husband, and their three young children lived in Erie County, New York, at 319 Victoria Boulevard in the Village of Kenmore, outside the City of Buffalo. At approximately 9:30 in the morning of October 25, 1976, Amalia DeLong dialed 911 on her telephone. She was immediately connected to a complaint writer and requested emergency police assistance. The complaint writer incorrectly recorded the address Amalia DeLong had told him, as “219 Victoria” instead of “319 Victoria”.

2. Id. at 378, 455 N.Y.S.2d at 889.
3. Id. The complaint writer’s job was to receive and record complaints. As given in the training sessions and set forth in the “Manual for 911 Services,” complaint writers were directed to obtain exact information concerning the location of the call and to always repeat the address of the call for verification. The four basic questions to be asked are detailed in the manual: “1. What is the problem? — obtain this information first to determine Agency jurisdiction. 2. Where? 3. Who is involved? 4. When did it happen?” Among the telephone techniques and procedures for the complaint writers outlined in the manual is the direction to “use the caller’s name.” Id. at 381-82, 455 N.Y.S.2d at 890-91.
4. Id. at 378, 455 N.Y.S.2d at 889. The transcript of the call is as follows:

<table>
<thead>
<tr>
<th>Time</th>
<th>Caller:</th>
<th>Complaint writer:</th>
</tr>
</thead>
<tbody>
<tr>
<td>9:29:29</td>
<td>“Police?”</td>
<td>“911.”</td>
</tr>
<tr>
<td></td>
<td>“Police, please come, 319 Victoria right away.”</td>
<td>“What’s wrong?”</td>
</tr>
<tr>
<td></td>
<td>Complaint writer:</td>
<td>Caller:</td>
</tr>
<tr>
<td>9:29:34</td>
<td>“In there now?”</td>
<td>“I heard a burglar; I saw his face in the back; he was trying to break in the house; please come right away.”</td>
</tr>
<tr>
<td></td>
<td>Complaint writer:</td>
<td>Caller:</td>
</tr>
<tr>
<td></td>
<td>“Okay, right away.”</td>
<td>“Okay.”</td>
</tr>
</tbody>
</table>

Id.
Victoria.” The call had lasted 14 seconds, during which time the complaint writer had failed to ascertain the caller’s name or the fact that she was calling from the Village of Kenmore. Because there was a Victoria Avenue in the City of Buffalo, the complaint writer had assumed the caller lived in Buffalo. Thus, the complaint writer routed the call on the high priority conveyor to the Buffalo police dispatcher. If the call had been correctly identified as “319 Victoria Boulevard,” the complaint writer would have directly contacted the Village of Kenmore police by pressing two buttons. The Kenmore police station was located approximately 1375 feet from the DeLong house.

Instead, at 9:31 the Buffalo police dispatcher radioed the call to the cars on duty in the Buffalo precinct where Victoria Avenue was located. Unable to locate “319 Victoria,” one of the cars radioed back that the highest number of the avenue was “195.” The dispatcher released the precinct cars at 9:34 and no further action was taken. This was contrary to operating procedures which called for a follow-up in this type of situation. The call was treated as a fake.

At approximately 9:42, neighbors saw Amalia DeLong run from the front of her house, naked and bleeding profusely, and then fall onto the sidewalk. The Village of Kenmore Police Department responded to a call for assistance by arriving at the DeLong residence within one minute. At 9:53 Amalia DeLong had no vital signs. A pathologist testified that Amalia DeLong had died be-

5. Id.
6. Id.
7. Id. The 911 system was located in downtown Buffalo. Id. at 380, 455 N.Y.S.2d at 890.
8. Id. at 378, 455 N.Y.S.2d at 889.
9. Id. at 379, 455 N.Y.S.2d at 889.
10. Id.
11. Id.
12. Id.
13. Id.
14. Id. at 382, 455 N.Y.S.2d at 891. In such an event, the dispatcher was required to notify the complaint writer or the 911 lieutenant in charge, so that the tape recording of the call could be replayed and various street guides consulted. Then other communities having street names similar to the street name given by the caller could be immediately notified. Id.
15. Id.
16. Id. at 379, 455 N.Y.S.2d at 889. Amalia DeLong received seven knife wounds. The fatal laceration severed the jugular vein and carotid artery on the left side of her neck. Id.
17. Id.
18. Id.
tween 9:42 and 9:52, with the fatal blow having been inflicted at 9:38, approximately nine minutes after she had called for help. 19

In October, 1976, the Village of Kenmore, a suburb of Buffalo, New York, was one of four communities outside the city served by a 911 emergency telephone system. 20 The system was a joint venture operated by the Central Police Services, an agency of Erie County, in conjunction with the Buffalo Police Department. 21 It was located in the 911 room in Buffalo Police Headquarters in downtown Buffalo. 22 The city police performed the dispatching function and the county employees performed the complaint writing function, under the direct supervision of the Buffalo Police Department. 23 The operating procedures in effect on October 25, 1976, required, among other things, that all complaint writers ask the name of the caller, the exact location of the call, and repeat this basic information back to the caller. 24 The complaint writer who received the DeLong call failed to do so. 25 Furthermore, the dispatcher of the DeLong call ignored the required follow-up procedure in the event of not being able to locate an address. 26

As a result of Amalia’s death, her husband brought an action individually and as administrator of his wife’s estate against the

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19. Id. at 380, 455 N.Y.S.2d at 890. The pathologist reported that a person of Amalia DeLong’s size could have survived the laceration to the neck only two minutes and twenty-five seconds to four minutes and forty-nine seconds. Id.

20. Id. at 378, 455 N.Y.S.2d at 888-89. The purpose of the 911 emergency system is to expedite police assistance to the communities served. The public was made aware of the 911 system by a listing on a page in the telephone book for the metropolitan area of Erie County under the heading “Emergency Numbers.” For both local and general police the number given is “911.” Id. at 380, 455 N.Y.S.2d at 890.

21. Id. at 381, 455 N.Y.S.2d at 890.

22. Id. at 380, 455 N.Y.S.2d at 890.

23. Id. at 380-81, 455 N.Y.S.2d at 890-91. Pursuant to the contract entered into in March, 1975, the city agreed to furnish the facilities for the 911 operation at the Buffalo police headquarters for the county employees who acted as complaint writers. The contract also delegated the task of training, supervising, and guiding county personnel to the City Police Department for one year from the date of its signing. After that time, it was to be agreed upon between the two parties whether such training and supervision should continue. On October 25, 1976, the Buffalo Police Department was still training the complaint writers. Moreover, a lieutenant of the Buffalo Police Department or an acting lieutenant was always present in the 911 room. Id.

24. Id. at 381-82, 455 N.Y.S.2d at 890-91. See supra note 3.

25. 89 A.D.2d at 378, 455 N.Y.S.2d at 889. See supra note 4. In addition to mistakenly recording the address on the complaint card, the complaint writer failed to follow the prescribed procedures in four respects: (1) he did not ask the name of the caller; (2) he did not determine the exact location of the call; (3) he did not address the caller by name; (4) he did not repeat the address. 89 A.D.2d at 382, 455 N.Y.S.2d at 891.

26. 89 A.D.2d at 382, 455 N.Y.S.2d at 891. See supra note 14.
The Supreme Court, Erie County, Justice Cook, entered judgment on the verdict for the husband, finding both defendants co-equaly liable. Two awards for damages were granted: $200,000 for Amalia’s conscious pain and suffering and $600,000 for the wrongful death of the decedent. The city and county appealed. On appeal the Supreme Court, Appellate Division, unanimously affirmed the verdict for the widower as to the award of $200,000 for conscious pain and suffering, and also upheld the award of $600,000 for the wrongful death of the decedent.

Writing for the majority in affirming the lower court’s verdict for Amalia’s conscious pain and suffering, Justice Hancock first distinguished the instant case from the earlier case of Riss v. City of New York. There the New York Court of Appeals held that a municipality could not be held liable in tort for the failure to furnish special police protection to a member of the public who had been repeatedly threatened with personal harm and who eventually suffered serious personal injury due to a lack of such protection. Justice Hancock emphasized that the situation in the in-
stant case was markedly different.\textsuperscript{33} Here the police authorities created a special relationship with particular members of the public by establishing the 911 emergency telephone system.\textsuperscript{34} Once this relationship was created between a caller and the police, a special duty arose which made the government accountable for negligence in the performance of that duty.\textsuperscript{35} Justice Hancock cited other cases which illustrated how the development of a special relationship between the police and a certain sector of the public brings into play a concomitant special duty on the part of the government: those involving informers,\textsuperscript{36} persons under court orders of protection,\textsuperscript{37} and school children for whom the municipality assumed the duty of providing crossing guards.\textsuperscript{38}

In considering whether Amalia DeLong was a person to whom the municipality owed a special duty, Justice Hancock refuted the defendants' argument that the instant case was governed by \textit{Riss}.\textsuperscript{39} The defendants had argued that, in maintaining the 911 emergency telephone system for the public-at-large, the county and city assumed no special obligation to Amalia DeLong, unlike \textit{Schuster v. City of New York},\textsuperscript{40} where the government reciprocally incurred a duty to protect an informer, who, risking his life, collaborated with the police.\textsuperscript{41} Justice Hancock rejected their contention of no liability by explaining that it was not the establishment of the 911 system standing alone which created a special duty, but rather the holding out of the 911 number as one to be called to secure immediate assistance which gave rise to a special duty owing to any caller.\textsuperscript{42} This holding out induced Amalia DeLong to rely on the

\begin{itemize}
\item \textsuperscript{33} 89 A.D.2d 383-84, 455 N.Y.S.2d at 891-92.
\item \textsuperscript{34} Id. at 384, 455 N.Y.S.2d at 892.
\item \textsuperscript{35} Id.
\item \textsuperscript{37} \textit{See Baker v. City of New York}, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966). In \textit{Baker}, a wife was assured of protection from her estranged husband through the issuance of a court order.
\item \textsuperscript{38} \textit{See Florence v. Goldberg}, 48 A.D.2d 917, 369 N.Y.S.2d 794 (1975) in which New York City undertook to provide crossing guard services for school children. In violation of regulations, a crossing guard failed to inform the precinct desk officer of his absence. Thus a substitute was not provided, resulting in the death of a child at the unprotected intersection. \textit{Id.} at 917-18, 369 N.Y.S.2d at 796.
\item \textsuperscript{39} 89 A.D.2d at 383-84, 455 N.Y.S.2d at 891-92.
\item \textsuperscript{40} 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).
\item \textsuperscript{41} 89 A.D.2d at 383-84, 455 N.Y.S.2d at 892.
\item \textsuperscript{42} \textit{Id.} at 384, 455 N.Y.S.2d at 892.
\end{itemize}
telephone service, and the response to her plea for emergency help—"Okay, right away."—caused her to rely further.\textsuperscript{43} Justice Hancock pointed out that this was a case in which the municipality voluntarily assumed a duty to a particular person which it was obligated to perform in a non-negligent manner.\textsuperscript{44} Although without the voluntary assumption of a duty none would have existed,\textsuperscript{45} Justice Hancock noted that the affirmative actions of accepting Amalia DeLong’s call and transmitting her request to the dispatcher and police cars comprised the undertaking of the task of providing Amalia DeLong with police assistance.\textsuperscript{46} By voluntarily assuming a duty to act, the municipality also assumed the obligation to act with reasonable care.\textsuperscript{47}

The final question addressed by Justice Hancock was whether the evidence established that the conduct of the municipality had proceeded to the point that inaction not only deprived plaintiff of a benefit, but actively worked an injury.\textsuperscript{48} In spite of the lack of any direct evidence that Amalia DeLong had relied to her ultimate detriment on the assurance of police protection, Justice Hancock observed that the circumstantial evidence clearly indicated that she did so.\textsuperscript{49} The fact that after having called 911, Amalia DeLong remained defenseless in her home, instead of running out the front door to her neighbor’s home indisputably showed that the conduct of the municipality increased her risk of danger.\textsuperscript{50}

The majority also stated that the proof was sufficient to estab-

\textsuperscript{43} Id.  
\textsuperscript{44} Id.  
\textsuperscript{46} 89 A.D.2d at 384, 455 N.Y.S.2d at 892.  
\textsuperscript{47} Id. See Schuster, 5 N.Y.2d at 86-87, 154 N.E.2d at 541, 180 N.Y.S.2d at 274 (1958) (McNally, J., concurring) (positing that the voluntary assumption by the City of New York of the partial protection of a police informer carried with it the obligation not to terminate such protection as by doing so and by publicly acknowledging his role, the government increased his risk of harm). See also infra notes 88-92 and accompanying text.  
\textsuperscript{48} 89 A.D.2d at 384-85, 455 N.Y.S.2d at 892. See Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928). Justice Cardozo stated: “[i]f 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.” Id.  
\textsuperscript{49} 89 A.D.2d at 384-85, 455 N.Y.S.2d at 892.  
\textsuperscript{50} Id. See Zibbon v. Town of Cheektowaga, 51 A.D.2d 448, 382 N.Y.S.2d 152 (1976), in which the New York Court of Appeals held that the failure to fulfill an undertaking to provide police protection does not result in municipal liability unless it is shown that the police conduct in some way increased the risk. Id. at 453, 382 N.Y.S.2d at 156.
lish proximate cause. Justice Hancock noted that where different inferences may be drawn from the evidence, the question is one for the jury. The jury could have reasonably believed that without the critical mistakes made in the acceptance and transmission of Amalia DeLong’s call for help, a Village of Kenmore Police car would have arrived in time, at least in time to have prevented the infliction of the fatal wound. Furthermore, Justice Hancock observed that the evidence also supported the jury’s conclusion that the city and county were equally at fault.

Finally, Justice Hancock maintained that the jury’s award of $200,000 for Amalia DeLong’s twelve minutes of conscious pain and suffering was not so disproportionate to her injuries so as to be excessive. He acknowledged that the jury properly considered the fear and apprehension Amalia DeLong suffered during her struggle against the murderous intruder in their assessment of the damages. The New York Court of Appeals thus affirmed the judgment awarding Amalia DeLong’s administrator $200,000 for damages for conscious pain and suffering.

Writing for the majority in addressing the issue of damages for wrongful death, Justice Denman held that the jury’s award of $600,000 for the wrongful death of a 28-year-old housewife and mother of three young children was not excessive nor the result of an error at trial. He explained that although the standard for recovery is couched in terms of pecuniary loss, it has long been rec-

51. 89 A.D.2d at 385, 455 N.Y.S.2d at 892-93.
53. 89 A.D.2d at 385, 455 N.Y.S.2d at 892.
54. Id. at 385, 455 N.Y.S.2d at 892-93.
55. Id. See Juiditta v. Bethlehem Steel, 75 A.D.2d 126, 428 N.Y.S.2d 535 (1980). After bring struck by a railroad car, Beverly Juiditta, age 33, was left lying on a railroad track for approximately forty minutes before she died. The New York Supreme Court, Appellate Division, upheld the jury’s verdict of $70,000 for the conscious pain and suffering she experienced prior to her death. Id.
56. 89 A.D.2d at 385, 455 N.Y.S.2d at 893.
57. Id. at 389, 455 N.Y.S.2d at 893.
58. Id. at 386, 455 N.Y.S.2d at 893. Justice Denman was joined by Justices Dillon and Schnepp. Id. at 390, 455 N.Y.S.2d at 895.
59. Id. at 386, 455 N.Y.S.2d at 893. Justice Denman pointed out how decedent participated actively in raising her children by doing the cooking, cleaning, housekeeping, and bookkeeping, and even made most of the children’s clothes. Id. at 386, 455 N.Y.S.2d at 893.
60. See N.Y. EST. POWERS & TRUSTS § 5-4.3 (McKinney 1981). Section 5-4.3 provides the standard by which damages in a wrongful death action are measured. It states that the amount of recovery is “to be fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought.” Id.
ognized that parental nurturing and care and other such noneconomic benefits constitute pecuniary advantages to those so benefited.61 Furthermore, Justice Denman held that there was no error in allowing plaintiff to introduce expert testimony of a professor of economics who calculated that the replacement cost of the services performed by a housewife to a family statistically similar to that of the decedent was $527,659.62 In so holding, the majority rejected the rule of Zaninovich v. American Airlines,63 which disallowed expert testimony to show the cost of providing replacement services for those of a decedent housewife.64 Justice Denman explained that the rule's underlying assumption, that these were matters within the general knowledge and expertise of the jury, was false.65

Justice Hancock wrote a dissenting opinion on the issue of damages for wrongful death.66 He claimed that the excessive size of the verdict was influenced by the lower court's error in allowing, over objection, the expert testimony of a professor of economics who calculated the replacement cost of Amalia DeLong's services.67 Justice Hancock maintained that the rule established in Zaninovich was controlling, thus making such expert testimony inadmissible.68

61. 89 A.D.2d at 386, 455 N.Y.S.2d at 893. See Juiditta, 75 A.D.2d 126, 428 N.Y.S.2d 535 (1980); Edgecomb v. Buckhout, 146 N.Y. 332, 40 N.E. 991 (1895) (trial judge committed no error in allowing a person engaged in the business of hiring housekeepers to testify as to the value of housekeeping services); Annot. 77 A.L.R.3d 1175 (1977) (collection of cases in which courts addressed the issue of the admissibility or sufficiency of evidence of the value of a deceased housewife's services).

62. 89 A.D.2d at 386, 455 N.Y.S.2d at 894.

63. 26 A.D.2d 155, 271 N.Y.S.2d 866 (1966). The court in Zaninovich reasoned that the cost of providing substitute services for those of a decedent housewife was a matter "within the common ken and subject to so many variables and choices that no objective standards can be supplied by an expert, if one there be." Id. at 159, 271 N.Y.S.2d at 871.

64. 89 A.D.2d at 388-89, 455 N.Y.S.2d at 895.

65. Id. at 387, 455 N.Y.S.2d at 894. Justice Denman also noted that the assumptions made by the Zaninovich court that reliable expert testimony is not available and that the subject matter does not lend itself to precise measurement are no longer true today. Further, he observed that modern economists can calculate the cost of replacing a housewife's services based upon empirical data. Id. at 387-88, 455 N.Y.S.2d at 894.

66. Id. at 389, 455 N.Y.S.2d at 895 (Hancock, J., dissenting). Justices Hancock and Moule dissented in a separate opinion written by Justice Hancock. They would have reversed the verdict for wrongful death and granted a new trial on damages for that cause of action only. Id. at 390, 455 N.Y.S.2d at 895 (Hancock, J., dissenting).

67. Id. at 389, 455 N.Y.S.2d at 895 (Hancock, J., dissenting). Justice Hancock noted that under the rule of Zaninovich, it was error to allow expert proof as to the cost of providing a substitute for a housewife's services because of the general evidentiary proposition that expert opinion is not admissible when the subject of inquiry is one of popular knowledge and common sense. Id. at 389-90, 455 N.Y.S.2d at 895 (Hancock, J., dissenting).

68. Id. at 390, 455 N.Y.S.2d at 895 (Hancock, J., dissenting). Justice Hancock further
At English common law the doctrine evolved that “the King can do no wrong,” and thus it was a contradiction of his sovereignty to allow him to be sued as of right in his own courts. This feudal doctrine was slowly implanted in the democracy of the United States, culminating in the decision in *Gibbons v. United States.* There it was held that the federal government was immune from all liability in tort. However, with the enactment of the Federal Tort Claims Act in 1949, a judicial remedy was made available for the first time to those persons who suffered a tortious injury at the hands of a government employee.

On the level of state government, sovereign immunity likewise became firmly established. The rationale here was the same: the king had been replaced by the people and now the people could do no wrong. The immunity enjoyed by state governments, however, has not been absolute. All states have consented to a limited form of tort immunity by way of statutory provisions which either authorized particular individuals to maintain suits or allowed suits against the state or one of its administrative agencies in particular types of cases.

For the most part, the states failed to heed the policy change implemented in 1949 by the Federal Tort Claims Act, thus the annotated how the Zaninovich rule was recently upheld and applied in Ashdown v. Kluckhohn, 62 A.D.2d 1137, 404 N.Y.S.2d 461 (1978); 89 A.D.2d at 390, 455 N.Y.S.2d at 895.


70. 75 U.S. (8 Wall.) 269 (1868). In Gibbons, the plaintiff entered into a contract with the United States for the delivery of fungible goods. After delivering a portion of the goods, the plaintiff was absolved from delivering the residue, as called for by the terms of the contract, because convenient storehouses were not available. Afterwards Gibbons consented to deliver the remaining goods under a threat of an officer of the United States. Justice Miller, writing for the majority of the Court, claimed that the government is not liable to individuals for the torts committed by its officers while in its service. *Id.*

71. Id. at 274.


73. W. Prosser, *supra* note 69, § 131, at 972. See also *supra* note 72.

74. W. Prosser *supra* note 69, § 131, at 975.

75. *Id.* Another argument advanced by the courts in support of the theory of sovereign immunity was the impropriety of diverting public funds to compensate for private injuries and the subsequent inconvenience and embarrassment to the government in doing so. *Id.* See Bourn v. Hart, 93 Cal. 321, 28 P. 961 (1892); State v. Hill, 54 Ala. 67, 68 (1875).

ticipated uniform abrogation of state government immunity was not effected. By 1976, however, it was reported that 24 jurisdictions had legislatively or judicially abolished sovereign immunity.\footnote{7} New York has a long history of restricting sovereign immunity both judicially and legislatively. In 1842 in \textit{Bailey v. City of New York},\footnote{8} New York adopted the approach to state immunity of drawing a distinction between “public” and “private” functions.\footnote{9} The \textit{Bailey} court chose to limit governmental immunity to those municipal activities whose purposes were for the public good as opposed to the private emolument and advantage of the city: \textit{e.g.}, police, fire, public school, and courts.\footnote{10} But the classification of state functions as either public or private proved to be so difficult that it did not provide a feasible solution to the problem.\footnote{11}

In 1939, the New York legislature enacted the Court of Claims Act,\footnote{12} which completely waived the immunity of the State of New York from suit.\footnote{13} Later, in \textit{Bernardine v. City of New York}\footnote{14} this waiver was also held to include municipalities, those creatures of the state which act in both a corporate and governmental capacity. Furthermore it was reaffirmed that the tort liability of the State of New York was to be based on pure common law negligence.\footnote{15} Accordingly, in order to recover against a city or the state for negligence, a plaintiff had to prove that a duty ran to him, and that such a duty was violated, as was required in basic tort cases

\begin{itemize}
  \item \footnote{7} W. \textsc{Prosser}, \textit{supra} note 69, § 131, at 977.
  \item \footnote{8} See \textsc{Hicks} v. \textsc{State}, 88 N.M. 588, 593 app., 544 P.2d 1153, 1158 app. (1976).
  \item \footnote{9} 3 \textsc{Hill} 531 (1842).
  \item \footnote{10} \textit{Id.} at 539.
  \item \footnote{11} \textit{Id.}
  \item \footnote{12} W. \textsc{Prosser}, \textit{supra} note 69, § 131, at 979. \textit{See \textsc{Seasongood}}, \textit{Municipal Corporations: Objections to the Governmental or Propriety Test}, 22 \textsc{Va. L. Rev.} 910 (1936). The rules for making this distinction were termed “as logical as those governing French irregular verbs.” \textit{Id.} at 938.
  \item \footnote{13} \textsc{See \textsc{N.Y. Cr. Cl. Act}} § 8 (McKinney 1963). It declared: “The state hereby waives its immunity from liability and action and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations provided the claimant complies with the limitations of this article.” \textit{Id.}
  \item \footnote{14} \textit{Id.}
  \item \footnote{15} 294 \textsc{N.Y.} at 361, 62 N.E.2d 604 (1945). In \textit{Bernardine}, the plaintiff instituted an action against the City of New York for personal injuries caused by a runaway police horse. In his opinion upholding the Appellate Division’s judgment for the plaintiff, Justice Loughran held that by New York’s waiver of its state immunity with the enactment of section 8 of the Court of Claims Act, the exemption from liability heretofore enjoyed by its subdivisions was likewise brought to an end. Justice Loughran explained that the immunity of local governmental units derived from the state’s sovereign immunity. \textit{Id.} at 365-66, 62 N.E.2d at 605-06. \textit{See 161 A.L.R.} 364 (1946).
  \item \footnote{16} 294 \textsc{N.Y.} at 365-66, 62 N.E.2d at 605.
against individuals and private corporations.\textsuperscript{87}

It was not until the decision in the landmark case, \textit{Schuster v. City of New York},\textsuperscript{88} that the issue of duty was fully addressed. In that case the New York Court of Appeals espoused the doctrine of special relationship.\textsuperscript{89} This doctrine incorporates the old rule that the duty to furnish adequate police and fire protection runs only to the general public, as opposed to an individual,\textsuperscript{90} by holding the government answerable only when it has assumed a special duty toward an individual.\textsuperscript{91} Thus, in \textit{Schuster}, the City of New York was found to be under a duty to exercise reasonable care for the protection of an informant, since the government had actively encouraged him to collaborate with it in the arrest of a dangerous criminal.\textsuperscript{92}

Similarly, in a later case, \textit{Baker v. City of New York},\textsuperscript{93} a special duty was held to have arisen where a court had issued a protective order for the protection of the plaintiff from her estranged husband. Absent facts which showed that a special relationship existed between the plaintiff and the government, the individual was completely barred from recovery.\textsuperscript{94} This requirement of a "special

\begin{itemize}
\item \textsuperscript{87} Id.
\item \textsuperscript{88} 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265, (1958). In \textit{Schuster} the New York Court of Appeals held that the city was under a duty to furnish protection to police informers. \textit{Id.} at 80-81, 154 N.E.2d at 537, 180 N.Y.S. 2d at 269.
\item \textsuperscript{89} \textit{Id.} at 82, 83, 154 N.E.2d at 538, 180 N.Y.S.2d at 271. Justice Van Voorhis found that:

\begin{quote}
In a situation like the present, government is not merely passive; it is active in calling upon persons 'in possession of any information ... ' to communicate such information in aid of law enforcement. Where that has happened, as here, or where the public authorities have made active use of a private citizen in some other capacity ... 'there exists a relation out of which arises a duty to go forward.'
\end{quote}
\textit{Id.} (quoting \textit{Moch Co. v. Rensselaer Water Co.}, 247 N.Y. at 167, 159 N.E. at 889 (1928)).

\item \textsuperscript{90} See \textit{Moch Co. v. Rensselaer Water Co.}, 247 N.Y. 160, 159 N.E. 896 (1928). The New York Court of Appeals held that a member of the public was not entitled to maintain an action against defendant water company which had contracted with the city to furnish water at hydrants. Plaintiff sued for damages resulting from a fire due to defendant's failure to supply sufficient pressure. The court of appeals dismissed plaintiff's breach of contract count on the basis that no intention appeared in defendant's contract that it should be answerable to individual members of the public for losses ensuing from its failure to fulfill its promise. Also the court held that the action was not maintainable as one for common-law tort. Justice Cardozo explained that the failure to furnish an adequate supply of water was at most the denial of a benefit, not the commission of a wrong, thus not bringing the case within the ambit of the tort rule that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully. \textit{Id.} at 164-70, 159 N.E. at 897-99.

\item \textsuperscript{91} 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269-70.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966).
\item \textsuperscript{94} \textit{Id.} at 771, 269 N.Y.S.2d at 518 (quoting \textit{Motyka v. City of Amsterdam}, 15 N.Y.2d
duty" as opposed to a "public duty" has limited New York's statutory waiver of state immunity by still exempting cities and municipalities from liability to the general public for failing to provide adequate police or fire protection. 95

The rule of finding no duty on the part of the municipality for the failure to furnish general police protection was the turning point of the decision in *Riss v. City of New York*. 96 There the court found that the city had not incurred any legal responsibility by failing to provide Ms. Riss with protection because the police authorities had not undertaken any responsibility toward Ms. Riss. 97

The police authorities did nothing, in spite of Riss' repeated complaints; they never assured her of police assistance either explicitly, or as in the case of *Schuster*, implicitly. 98 Consequently, Ms. Riss never relied to her detriment on any promise made by the government. 99 This is in direct contrast to the case of Amalia DeLong who relied to her ultimate detriment on the assurances of police protection made to her by the 911 system. 100

In a dissenting opinion in *Riss*, Judge Keating claimed that the

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95. See *e.g.*, *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945). In *Steitz* plaintiffs complained of property damages suffered as a result of a fire which destroyed their property because of the carelessness and negligence of the city in failing to create and maintain an adequate fire department, and contended that the defendant breached its statutory duty to maintain a fire department. *Id.* at 54, 64 N.E.2d at 705. The New York Court of Appeals held that the negligent violation of municipal duties which are intended to serve the public created no civil liability of the municipality to individuals. *Id.* at 56, 64 N.E.2d at 706. See also 163 A.L.R. 342 (1946).

96. See 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968). This was an action by a woman, who was injured by a former suitor, against the city of New York for refusing to furnish police protection upon her request. The Supreme Court, Special and Trial Term, dismissed her complaint, and the plaintiff appealed. The Supreme Court, Appellate Division affirmed, and the plaintiff again appealed. *Id.* at 579, 240 N.E.2d at 860, 293 N.Y.S.2d at 897. The Court of Appeals in an opinion written by Justice Breitel, held that the city was not liable for failing to supply the police protection the plaintiff had demanded. *Id.* at 58, 293 N.Y.S.2d at 899, 240 N.E.2d at 861.

97. *Id.* at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899. See supra note 31 and accompanying text.

98. *Id.* In *Schuster*, the New York Court of Appeals held that where persons assist in the apprehension or prosecution of criminals, a reciprocal duty arises on the part of society to use reasonable care for their police protection, at least where reasonably demanded or sought. 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269-70 (1958).

99. 22 N.Y.2d at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899.

100. See 89 A.D.2d 376, 384-85, 455 N.Y.S.2d 887, 892.
state was, in effect, delimiting the consequences of the state’s waiver of immunity by making a distinction between special and public duties.\textsuperscript{101} He would have allowed the legal principles of negligence (such as fault and proximate cause) to keep liability within reasonable bounds, rather than deny a plaintiff his day in court by dismissing his complaint on the grounds that the duty to furnish police and fire protection runs to the general public and not to any individual.\textsuperscript{102} He believed that the government employees involved in \textit{Riss} could have been found to have acted negligently, because with actual notice of danger and ample time to investigate Ms. Riss’ complaints, a reasonable person would have taken some remedial action.\textsuperscript{103} Judge Keating predicted that the day is forthcoming when society will demand that the government, in carrying out its diverse functions, be held accountable for the negligent acts of its employees, as is a private employer.\textsuperscript{104}

In line with the decision in \textit{Riss}, a recent case, \textit{Weiner v. Metropolitan Transportation Authority},\textsuperscript{105} reaffirmed the principle that, absent facts establishing a special relationship between the police and the injured plaintiff, there is no duty on the part of the municipality to protect him, and thus no liability.\textsuperscript{106}

The cases wherein a special relationship has been held to exist have fallen into two categories: (1) those in which the municipality has held itself out as providing a special service to a certain class of persons,\textsuperscript{107} and (2) those in which the governmental unit has af-

\textsuperscript{101} See 22 N.Y.2d at 592, 240 N.E.2d at 907, 293 N.Y.S.2d at 899. (Keating, J., dissenting). Justice Keating noted that although the common law doctrine of sovereign immunity supposedly died with the broad language of section 8 of the Court of Claims Act of 1939, it has been kept alive under the guise of “public duty.” He reasoned that to say that there is no duty, is to start with the conclusion, and that, having undertaken to provide professional police and fire protection, municipalities should not be able to escape liability for damages caused by their failure to do even a minimally adequate job of it. He stated that a better approach to the issue of municipal tort liability is to allow the ordinary principles of tort law to limit liability rather than the fiction that there is no duty running to the general public. \textit{Id.} at 585, 591-93, 240 N.E.2d at 862, 866-67, 293 N.Y.S.2d at 901, 906-07 (Keating, J., dissenting).

\textsuperscript{102} See \textit{id.} at 586, 240 N.E.2d at 863, 293 N.Y.S.2d at 902 (Keating, J., dissenting).

\textsuperscript{103} See \textit{id.} at 593-94, 240 N.E.2d at 868, 293 N.Y.S.2d at 908 (Keating J., dissenting).

\textsuperscript{104} See \textit{id.} at 590, 240 N.E.2d at 866, 293 N.Y.S.2d at 905 (Keating J., dissenting).

\textsuperscript{105} 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982). In \textit{Weiner}, a woman had her purse strap and wrist slashed as she entered a New York City subway. Because there was no evidence that the defendant, New York City Transit Authority, had established a special relationship with the plaintiff, it escaped liability. Rather the Authority was held to be acting with only a general duty to provide police protection to its customers. \textit{Id.} at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144.

\textsuperscript{106} \textit{Id.} at 178, 433 N.E.2d at 125, 448 N.Y.S.2d at 142.

\textsuperscript{107} See, \textit{e.g.}, \textit{Florence v. Goldberg}, 48 A.D.2d 917, 369 N.Y.S.2d 794 (1975), in which
firmatively and voluntarily undertaken a responsibility to provide particular individuals with police protection. Unlike Riss, DeLong presented both situations. As the New York Court of Appeals underscored in DeLong, the unifying principle of these two groups is reliance. Once the municipality has taken steps which, in turn, induce reliance on the part of the individual, the municipality must carry out its activity in a nonnegligent fashion or liability will follow. As enunciated in DeLong, the responsibility brought about by creating reliance cannot be shirked by the government under the guise of "public duty."

Like the school child in Florence for whom the special service of crossing guards was voluntarily made available, Amalia DeLong was a member of a class of persons (those in need of immediate police assistance) which the 911 emergency telephone system was intended to serve. This service was held out to the public by, among other things, a listing in the area telephone books under the heading "Emergency Numbers." A promise was made and advertised by the state subdivisions that the most efficient way to receive a rapid, expert response to a plea for help was to dial "911" rather than the local police. This holding out of the 911 number as one to be called by someone in need of assistance, and Amalia DeLong's acceptance of the invitation of 911, made the government amenable for its failure to render such service with reasonable care.

Moreover, once Amalia DeLong's call reached "911", a second basis upon which a special duty may be founded arose. A special relationship has been recognized whenever the government has undertaken responsibility toward an individual by specifically assuring him of protection. Amalia DeLong received such assurance

New York City undertook to provide crossing guard services to school-age children. In violation of regulations, a crossing guard failed to inform the precinct desk officer of his absence. Thus a substitute was not provided, resulting in the death of a child at the unprotected intersection. Id. at 917-18, 369 N.Y.S.2d at 794-95.

108. See, e.g., Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966). A wife was assured of protection from her estranged husband through a court order, creating a special duty on the part of the government to provide such protection. Id.

109. 89 A.D.2d at 384, 455 N.Y.S.2d at 892.

110. Id.


112. 89 A.D.2d at 380, 455 N.Y.S.2d at 890.

113. See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534 (1958) (city was under a duty to provide protection to police informers); Baker v. City of New York, 25 A.D.2d 770, 269 N.Y.S.2d 515 (1966) (issuance of a court order created a special duty on the part of the government to provide such protection). See also
when the complaint writer answered to her: “Okay, right away.” DeLong was told to rely further upon the initial promise of immediate police assistance.\textsuperscript{114}

In either case, it is clear that \textit{DeLong} falls within the ambit of the special relationship doctrine. This was not a case of the failure of the municipality to furnish police protection owed to the public generally, but rather a case where the municipality chose to establish and hold out a special service of protection to the public.\textsuperscript{115} The promise of assistance so held out was then later reaffirmed by an agent of the government. This special protection which was advertised and unequivocally assured to Amalia DeLong was never delivered, thus making the government accountable for its breach of the special duty it had created.

As much as \textit{DeLong} adheres to the traditional case law in this area, it also enunciates an expansion of the special relationship doctrine. It is noteworthy that the \textit{DeLong} court focused its analysis on the element of reliance. The message is clear, at least in New York, that the courts will recognize and protect the plaintiff’s interest of reasonable reliance, notwithstanding the claim of “public duty.” What distinguishes \textit{DeLong} from previous cases is that a special relationship was held to exist between the public and the government. Other cases have held the government amenable only when it has assumed a special duty toward particular individuals\textsuperscript{116} or toward a sector of the public,\textsuperscript{117} but not when it has merely taken on a special duty toward the public-at-large. Herein lies the uniqueness of \textit{DeLong}. It has addressed the question of whether, in the State of New York, under the special relationship doctrine, the government can ever be liable for the breach of a duty of due care owing to the public in general.

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Zibbon v. Town of Cheektowaga, 51 A.D.2d 448, 382 N.Y.S.2d 152, appeal dismissed, 39 N.Y. 2d 1056, 355 N.E.2d 388, 387 N.Y.S.2d 428 (1976). In Zibbon, the town police affirmatively undertook to protect the plaintiff’s intestates, Mr. and Mrs. Deyo, from a dangerous criminal who was known to be intent on killing Mrs. Deyo. The police provided protection to Mr. and Mrs. Deyo for a period of hours, and then withdrew the protection without notifying them. They were subsequently murdered. The New York Supreme Court Appellate Division reversed the order of Special Term which had dismissed the complaint and entered summary judgment for the defendants. The majority found that there were triable issues of fact as to whether the Police Department had assumed a special duty toward Mr. and Mrs. Deyo by their actions. 51 A.D.2d at 453-54, 382 N.Y.S.2d at 156.

114. 89 A.D.2d at 378, 455 N.Y.S.2d at 889. See supra notes 3-4 and accompanying text.

115. 89 A.D.2d at 384, 455 N.Y.S.2d at 892.

116. See supra note 113.

117. See supra note 107.
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The DeLong court’s approach makes sense. It is an impossible task for a police force to furnish all members of the public adequate police protection in all instances. Yet if the government decides to break down its general service of protection into specialized services and invites the public to rely upon these services, the government invokes a duty of due care owing to the public in fulfilling these tasks. Whether the government wishes to classify any given service as a public or private one is irrelevant once it has induced reliance on the part of an individual, as it will be held accountable for the torts of its agents. What New York now has is a “reliance duty,” rather than a special duty. In essence, the element of reliance has been the common thread running through all the cases in which a special duty has been found. Whenever the government takes any affirmative action which invokes reliance on the part of an individual, it will forfeit the defense of governmental immunity.

By its decision in DeLong, the State of New York has most certainly taken an important step forward in ridding itself of the obsolescent, judicially invoked doctrine of sovereign immunity in the area of negligence. However, notwithstanding the demise of “public duty” and the focus on the element of reliance, one evasion of tort liability still exists: nonfeasance. As in Riss and Weiner, if the government chooses not to act, no reliance is induced, and thus the government cannot be held liable for negligence. This is in direct contrast to the private employer, who, with notice of a need for action, and ample time to take such action, can readily be held accountable for an unreasonable failure to act. Thus as much as DeLong moves the State of New York a step forward in carrying

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119. See Dutton v. City of Olean, 60 A.D.2d 335, 338, 401 N.Y.S.2d 118, 120 (1978). In Dutton, a person who was shot by a sniper brought an action against the city of Olean to recover damages for his injuries, claiming that the city had a special duty to protect him from the sniper and negligently failed to perform such duty. The New York Supreme Court, Appellate Division, held that the evidence was insufficient to show any special duty to plaintiff. Writing for the majority, Justice Denman described this special duty as a “reliance duty” in that such a duty to an individual is born of a situation wherein the municipality acts affirmatively, thereby inducing reliance on the part of the individual. Id. at 338, 401 N.Y.S.2d at 120.


123. W. Prosser, supra note 71, § 56, at 341-42.
out its legislative repeal of sovereign immunity, there still exists a viable loophole for state impunity.

In view of the surmounting criticism of the common law doctrine of sovereign immunity, it is no surprise that a recent decision has expanded the governmental base of liability. The arguments made in behalf of governmental immunity have all proved to be skewed toward emotion rather than fact. With the availability of public liability insurance, and in view of the constructive effects tort liability has had in the private sector, it only follows that society will no longer tolerate state impunity. In this age of risk-spreading, it is absurd that a tortious loss suffered by an individual is borne by one, rather than by many. The effect of such a practice has been to enable the government to hide the real costs of its incompetency.

126. See Ayala v. Philadelphia Board of Education, 453 Pa. 584, 595-96, 305 A.2d 877, 882 (1973). In Ayala, the common law doctrine of governmental immunity was abolished in Pennsylvania. In his opinion, Justice Roberts noted that there is no sound reason today why governmental units should escape tort liability. He explained that the arguments made in behalf of governmental immunity—that the courts will be flooded with litigation against the state and that governmental units cannot carry on their functions if money raised by taxation is diverted to the payment of claims—have all proved to be unsupported by empirical data.

127. See Riss, 22 N.Y.2d at 590, 240 N.E.2d at 865-66, 293 N.Y.S.2d at 905 (Keating, J., dissenting). He observed that the imposition of tort liability has had many healthy side effects on society by forcing the private sector to follow certain, established standards of conduct in order to avoid paying pecuniary damages. Id.
128. See Ayala, 453 Pa. at 595, 305 A.2d at 881. See supra note 129.
129. See Riss, 22 N.Y.2d at 589-90, 240 N.E.2d at 865, 293 N.Y.S.2d at 905 (Keating, J., dissenting). Justice Keating believed that the City of New York and other municipalities have been able to engage in “a sort of false bookkeeping in which the real costs of inadequate or incompetent police protection have been hidden by charging the expenditures to the individuals who have sustained catastrophic losses rather than to the community where
New York has wisely looked to the elastic concept of duty to define the judicial reach of its statutory waiver of immunity. Traditionally this element has expanded and contracted to meet changing economic and social mores. Thus the duty analysis posited by the courts of New York offers a ready device for New York to judicially abolish all vestiges of governmental immunity whenever its residents demand no less. The court in DeLong has made a marked stride in that direction.

Robin Graziano

it belongs, because the latter had the power to prevent the losses.” Id. 130. W. PROSSER, supra note 69, § 53.