

# A Common Carrier, Whether Municipally or Privately Owned, May Be Liable for the Failure of Its Employees to Summon Aid upon Witnessing the Attack of a Passenger

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strain from inflicting bodily injury upon the attacker.<sup>35</sup> It is submitted that this fine line between deadly and non-deadly threatening conduct needs to be more clearly defined in order to better effectuate the purpose of the law of self-defense.

Mary Flynn

#### DEVELOPMENTS IN THE LAW

*A common carrier, whether municipally or privately owned, may be liable for the failure of its employees to summon aid upon witnessing the attack of a passenger*

Although municipal corporations have traditionally enjoyed governmental immunity from liability in tort,<sup>1</sup> all states have consented to waive this immunity to some extent.<sup>2</sup> New York distin-

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<sup>35</sup> See *id.* at 29, 496 N.E.2d at 860, 505 N.Y.S.2d at 840.

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<sup>1</sup> W. PROSSER & W. KEETON, *THE LAW OF TORTS* 1051 (5th ed. 1984):

The traditional rule was that municipalities held a governmental immunity in tort, but one different both in origin and scope from the 'sovereign' or governmental immunity of the state. Since municipalities exhibited a corporate or proprietary face, . . . the traditional immunity was narrower than the full range of municipal activities, protecting only the governmental activities and not the proprietary ones.

*Id.* The doctrine of sovereign immunity originated in England and is based on the concept that "the King can do no wrong." *Id.* at 1032-33. "[Sovereign immunity] was accepted by American judges in the early days of the republic, and ever since the law of the United States has been that, except to the extent the government consents to suit, it is immune."

*Id.* Municipal tort immunity has its roots in the sovereign immunity doctrine. See Note, *Municipal Tort Liability For Criminal Attacks Against Passengers on Mass Transportation*, 12 FORDHAM URB. L.J. 325, 326 (1984) [hereinafter *Municipal Tort*]; Note, *Municipal Torts: The Rule Is Liability-The Exception Is Immunity*-Enghauser Manufacturing Co. v. Eriksson Engineering Ltd., 9 U. DAYTON L. REV. 327, 328 (1984) [hereinafter *Note*].

<sup>2</sup> *Municipal Tort*, *supra* note 1, at 326. New York State's waiver of sovereign immunity was effected through the Court of Claims Act. N.Y. Judiciary Court of Claims Act Law § 8 (McKinney 1963). Other states have similarly waived immunity for tort liability. See, e.g., KAN. STAT. ANN. § 74-4707-08 (1978); ME. REV. STAT. ANN. tit. 14, § 8104 (1980); MICH. STAT. ANN. § 3.996(107) (Callaghan 1985); MISS. CODE ANN. § 37-29-83 (1972). One reason for the waiver of sovereign immunity is the "availability and use of insurance or other modern funding methods [which] render an argument based on economics invalid." Enghauser Mfg. Co. v. Eriksson Eng'g Ltd., 6 Ohio St. 3d 31, 34, 451 N.E.2d 228, 231 (1983).

New York's Court of Claims Act provides, in part, that "the state hereby waives its immunity from liability . . . and consents to have the same determined in accordance with

guishes between a municipal corporation's governmental and proprietary capacities,<sup>3</sup> and maintains the rule that liability cannot be imposed for torts which result from characteristically governmental acts.<sup>4</sup> The municipal corporation may be liable, however, for

the same rules of law as applied . . . against individuals or corporations . . ." N.Y. Judiciary Court of Claims Act Law § 8 (McKinney 1963). This waiver also applies to municipalities. *See* *Becker v. City of New York*, 2 N.Y.2d 226, 235-36, 140 N.E.2d 262, 268, 159 N.Y.S.2d 174, 183 (1957) (municipality liable for negligent medical act of registered nurse); *Bernardine v. City of New York*, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945) (state's waiver of sovereign immunity extends to civil divisions of the state). However, New York's waiver of immunity is not a total one. *See* *Weiss v. Fote*, 7 N.Y.2d 579, 586-87, 167 N.E.2d 63, 66, 200 N.Y.S.2d 409, 414 (1960) (Court of Claims Act does not place state on parity with private corporation in respect to all defenses). The court stated in *Urquhart v. City of Ogdensburg*, 91 N.Y. 67 (1883), that:

The rule is well settled that where power is conferred on . . . a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is quasi judicial or discretionary . . . and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained.

*Id.* at 71.

<sup>3</sup> *See* *Bass v. City of New York*, 38 App. Div. 2d 407, 410-411, 330 N.Y.S.2d 569, 573-74 (2d Dep't 1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973). The courts must distinguish governmental activities which are of a proprietary nature, such as those which have displaced or supplemented traditionally private enterprises, from those functions which are truly governmental in nature. *See* *Riss v. City of New York*, 22 N.Y.2d 579, 581, 240 N.E.2d 860, 860, 293 N.Y.S.2d 897, 897-98 (1968); *W. PROSSER AND W. KEETON*, *supra* note 1, at 1051. "For example, activities of police or firefighters, though tortious, are usually considered governmental in the sense that they involve the kind of power expected of government . . ." *Id.* at 1053. Other states also use the governmental/proprietary function distinction. *See, e.g.,* *Canade, Inc. v. Town of Blue Grass*, 195 N.W.2d 734, 736 (Iowa 1972) (fire department not liable for leaving scene of fire on plaintiff's property without extinguishing blaze); *Gardner v. McDowell*, 202 Kan. 705, 709, 451 P.2d 501, 505 (1969) (governmental immunity protects police officers who opened fire with revolvers on 70 year old woman); *Moffit v. Asheville*, 103 N.C. 237, 255, 9 S.E. 695, 697 (1889) (governmental immunity protects police officers who jailed individual who became ill due to exposure).

Conversely, if the municipality operates an electric or water company for which fees are charged, this activity is considered proprietary. *See, e.g.,* *Rannells v. City of Cleveland*, 41 Ohio St. 2d 1, 4, 321 N.E.2d 885, 887 (1975) (city water department functions in proprietary capacity; city liable for escape of chlorine gas); *Rice v. Lumberton*, 235 N.C. 227, 235, 69 S.E.2d 543, 549 (1952) (city electric department operates in proprietary capacity).

<sup>4</sup> *Miller v. State*, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829 (1984). In *Miller*, the court stated:

Public entities remain immune from negligence claims arising out of the performance of their governmental functions including police protection, unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual, and the individual relied on the performance of that duty.

*Id.* at 510, 467 N.E.2d at 495, 478 N.Y.S.2d at 831 (citations omitted). *See also* *Weiner v. New York City Transit Auth.*, 55 N.Y.2d 175, 181, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982) (allocation of police resources constitutes governmental function for which there can be no liability absent special relationship); *Riss*, 22 N.Y.2d at 583, 240 N.E.2d at 661,

torts committed while functioning in its proprietary capacity.<sup>5</sup> This distinction was confronted recently in *Crosland v. New York City Transit Authority*,<sup>6</sup> in which the New York Court of Appeals held that a municipally owned carrier was not immune from liability when its employees failed to summon aid when witnessing an attack upon a passenger.<sup>7</sup>

In *Crosland*, several high school students waiting at the 125th street subway platform were attacked by a youth gang armed with deadly weapons; Steven Crosland, Jr., the plaintiff's decedent, died soon thereafter.<sup>8</sup> Although policemen normally patrolled the station "around-the-clock,"<sup>9</sup> none were present during the attack, which occurred during a brief period between shifts.<sup>10</sup> Plaintiff alleged, however, that not only did trackworkers witness the incident,<sup>11</sup> but two trains also passed through the station during the attack.<sup>12</sup> Further, no one summoned police, although they could have done so at no personal risk.<sup>13</sup>

Plaintiff brought a wrongful death action against, *inter alia*, the Transit Authority, basing its claim on three different theories: first, that the Transit Authority breached its special duty to

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293 N.Y.S.2d at 899 (municipality not liable for failure to provide adequate police protection to repeatedly threatened member of the public).

<sup>5</sup> See *Nola v. New York City Transit Auth.*, 115 App. Div. 2d 461, 495 N.Y.S.2d 697, (2d Dep't 1985) (Transit Authority traditionally viewed as fulfilling a private function and thus performs in proprietary capacity); see also *Miller v. State*, 62 N.Y.2d 506, 511, 467 N.E.2d 493, 496, 478 N.Y.S.2d 829, 832 (when state operates college dormitory, it has same duty as private landlords and is deemed to perform in proprietary capacity); *Riss*, 22 N.Y.2d at 581, 240 N.E.2d at 860, 293 N.Y.S.2d at 897-98 (operation and control of rapid transit system constitutes proprietary governmental activity). "When a city performs tasks that have traditionally been engaged in by private landlords . . . , it is performing a corporate function and acting in a proprietary capacity and the imposition of liability on established principles of tort law would logically follow." *Bass*, 38 App. Div. 2d at 411, 330 N.Y.S.2d at 573-74.

<sup>6</sup> 68 N.Y.2d 165, 498 N.E.2d 1143, 506 N.Y.S.2d 670 (1986).

<sup>7</sup> *Id.* at 167, 498 N.E.2d at 143, 506 N.Y.S.2d at 670.

<sup>8</sup> *Id.*, 498 N.E.2d at 143-44, 506 N.Y.S.2d at 671. Steven had attended a show with several other students at the New York City Music and Art High School between the hours of 8:00 and 11:00 P.M. on the night of the attack. After the show, several of the students decided to wait for the express train downtown at the 125th Street IND subway station. A gang of approximately ten to fifteen boys brutally beat the students. Steven died as a result of his injuries. *Id.*

<sup>9</sup> *Id.* at 168, 498 N.E.2d at 144, 506 N.Y.S.2d at 671.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 167, 498 N.E.2d at 144, 506 N.Y.S.2d at 671. Plaintiff alleged that motormen saw the attack but chose to ignore it.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Steven to provide "around-the-clock" police protection in light of prior assaults that occurred in the station; second, that the defendant's employees violated the Transit Authority's internal mandate to "take every precaution to prevent . . . injuries to persons"; and third, that the defendant, as a common carrier, breached its duty to protect passengers.<sup>14</sup> The defendant's motion for summary judgment was denied by the Supreme Court at Special Term.<sup>15</sup> The Appellate Division dismissed the first two causes of action,<sup>16</sup> but affirmed on the basis of the third.<sup>17</sup> The question was certified to the Court of Appeals as to whether the order was properly made.<sup>18</sup>

In a per curiam opinion, the Court of Appeals affirmed the Appellate Division's holding that liability could not be based on the absence of police protection<sup>19</sup> or violation of the Transit Authority's internal rules.<sup>20</sup> In dismissing the cause of action based on

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<sup>14</sup> *Crosland*, 110 App. Div. 2d 148, at 149, 493 N.Y.S.2d 474, 475-76 (2d Dep't 1985). Plaintiff's first theory alleged that because the Transit Authority knew of "the inordinately high rate of serious crimes in the area" and "assigned police-people . . . for shifts around-the-clock," a special duty was owed to plaintiff's decedent. *Id.* at 149, 493 N.Y.S.2d at 476. Plaintiff's second theory was predicated on Transit Authority Rules and Regulations Rule 85, which requires that employees "take every precaution to prevent . . . injuries to persons." *Id.* Plaintiff alleged that because the Transit Authority employees either deserted their post or "ignored . . . permitted and encouraged the . . . attack," the employees breached the Transit Authority's rule. Plaintiff's third theory claimed that in carrying out activities which have traditionally been maintained by private enterprises, the Transit Authority failed to meet the standard of care owed to passengers by privately owned common carriers. *Id.* at 155-56, 493 N.Y.S.2d at 480-81.

<sup>15</sup> *Crosland*, 68 N.Y.2d at 168, 498 N.E.2d at 144, 506 N.Y.S.2d at 671.

<sup>16</sup> *Crosland*, 110 App. Div. 2d at 154-56, 493 N.Y.S.2d at 477-481.

<sup>17</sup> *Id.*

<sup>18</sup> *Crosland*, 68 N.Y.2d at 168, 498 N.E.2d at 144, 506 N.Y.S.2d at 671.

<sup>19</sup> *Id.* "[S]ome direct contact between agents of the municipality and the injured party" is necessary to create a special duty. *Sorichetti v. City of New York*, 65 N.Y.2d 461, 469, 482 N.E.2d 70, 75, 492 N.Y.S.2d 591, 596 (1985). No justifiable reliance was created since Steven and the police had no direct contact. In *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978), it was held that the City of New York was liable for negligently breaching a special duty owed to children who crossed at designated intersections while traveling to and from school. *Id.* at 196, 375 N.E.2d at 767, 404 N.Y.S.2d at 587. A duty was also found to be owed to a person who collaborated with the police in the arrest of a dangerous fugitive. *See Schuster v. City of New York*, 5 N.Y.2d 75, 80-81, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958). However, the mere scheduling of policemen is a discretionary function which does not create a special duty. *See Weiner v. New York City Transit Auth.*, 55 N.Y.2d 175, 181, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982).

<sup>20</sup> *Crosland*, 68 N.Y.2d at 168-69, 498 N.E.2d at 144-45, 506 N.Y.S.2d at 671-72. Rule 85 of the Transit Authority's Rules and Regulations imposes a higher than ordinary standard of care. However, this internal directive does not impose a higher standard of liability on the Transit Authority. *Id.* Any common carrier merely owes "ordinary care commensurate with the existing circumstances." *Thomas v. Central Greyhound Lines*, 6 App. Div. 2d 649, 652, 180 N.Y.S.2d 461, 465 (1st Dep't 1958).

lack of police presence, the court followed *Weiner v. Metropolitan Transit Authority*,<sup>21</sup> which held that allocation of police resources is a governmental activity and, in the absence of specific representations, creates no special duty to protect any specified individual.<sup>22</sup> However, the court held that the third cause of action was proper; a public carrier acts through its employees in its proprietary capacity and may therefore be liable for their failure to summon aid when witnessing the attack of a passenger.<sup>23</sup>

Although the court correctly held that the Transit Authority's employees have an affirmative duty to summon help, at least when they can do so at no risk to themselves, it is suggested that the court did not adequately discuss two crucial points. First, the court failed to explore the distinction between the governmental and proprietary capacities of municipal corporations.<sup>24</sup> For example, the maintenance of adequate police or fire protection by the state constitutes a discretionary function which is afforded the protection of governmental immunity.<sup>25</sup> Conversely, when the state per-

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<sup>21</sup> 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982).

<sup>22</sup> *Id.* at 178, 433 N.E.2d at 125, 448 N.Y.S.2d at 142.

<sup>23</sup> *Crosland*, 68 N.Y.2d at 169-70, 498 N.E.2d at 144-45, 506 N.Y.S.2d at 672; *see Weiner*, 55 N.Y.2d at 175, 433 N.E.2d at 124, 448 N.Y.S.2d at 141. The court interpreted *Weiner* to mean that because the distribution of police resources is a function of governmental capacity, a municipally owned common carrier may not be held liable for injuries to passengers resulting from such allocation decisions. *Crosland*, 68 N.Y.2d at 169, 498 N.E.2d at 145, 506 N.Y.S.2d at 672. In determining whether a publicly owned common carrier should be liable, the court must look to "the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred . . . [and] not whether the agency involved is engaged generally in proprietary activity." *Id.* (quoting *Weiner*, 55 N.Y.2d at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144).

<sup>24</sup> *See Crosland*, 68 N.Y.2d at 169, 498 N.E.2d at 145, 506 N.Y.S.2d at 672. Despite the fact that the Court of Appeals only briefly touched upon this point, the Appellate Division discussed this crucial distinction in great detail. *See Crosland*, 110 App. Div. 2d at 154-56, 493 N.Y.S.2d at 479-80. The court stated "that in the absence of a 'special relationship,' and reliance thereon, 'public entities remain immune from negligence claims arising out of the performance of their governmental functions, including police protection.'" *Id.* at 154-55, 493 N.Y.S.2d at 479 (quoting *Weiner*, 55 N.Y.2d at 175, 433 N.E.2d at 141, 448 N.Y.S.2d at 124). "Public entities, however, are not immune from negligence claims stemming from the performance of their proprietary functions." *Crosland*, 110 App. Div. 2d at 155, 493 N.Y.S.2d at 479-80. *See also* *Rubino v. City of New York*, 114 App. Div. 2d 243, 246, 498 N.Y.S.2d 831, 833 (1st Dep't 1986) (distinction between governmental and proprietary capacity frequently determined by judicial interpretation). The distinction was also recognized in *Bass v. City of New York*, 38 App. Div. 2d 407, 411, 330 N.Y.S.2d 569, 573-74 (2d Dep't 1972), *aff'd*, 32 N.Y.2d 894, 300 N.E.2d 154, 346 N.Y.S.2d 814 (1973), where the court held that the maintenance of a police force by the Housing Authority constituted governmental operation for which liability may not be imposed absent a special relationship. *Id.* at 414, 330 N.Y.S.2d at 576.

<sup>25</sup> *See Miller v. State*, 62 N.Y.2d 506, 510, 467 N.E.2d 493, 495, 478 N.Y.S.2d 829, 831.

forms a service traditionally provided by private landlords, it acts in its proprietary capacity.<sup>26</sup> Under these circumstances, it has been held that the state may be liable for negligence in carrying out such proprietary functions.<sup>27</sup> New York has long recognized the rule that a privately owned common carrier may be liable for the negligent acts of its employees.<sup>28</sup> Therefore, it is submitted that the state should face the same proprietary liability for the negligent acts of its employees in the operation, management and control of a publicly owned common carrier.

In *Crosland*, the allegations centered upon the failure of the Transit Authority employees to summon police assistance upon witnessing the attack of a passenger.<sup>29</sup> Since the alleged negligence involved the conduct of the municipality's employees and did not result from executive decisions or allocation of resources,<sup>30</sup> it does not fall within the boundary of governmental immunity.<sup>31</sup> Instead, the specific inaction alleged to have proximately caused the injury falls within the proprietary capacity for which liability may be im-

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Allocation of police resources is a governmental function for which there can be no liability absent a special relationship. *See, e.g., Weiner*, 55 N.Y.2d at 181, 433 N.E.2d at 127, 448 N.Y.S.2d at 144 (1982) (city not liable for failure to provide adequate police protection absent a special relationship).

<sup>26</sup> *See Rubino*, 114 App. Div. 2d at 249, 498 N.Y.S.2d at 835. In an action by the plaintiff-teacher to recover for injuries sustained while supervising a class in a school yard, the court held that "the wrongdoing charge here in no way involves the allocation or deployment of police resources or activities but on the contrary, stems from a failure to fulfill proprietary duties traditionally imposed on landlords or landowners to maintain their property in a reasonably safe condition . . ." *Id.* When the state operates university housing facilities, it owes the same duties to its tenants as private landlords in the maintenance of physical security devices in the building. *See Miller*, 62 N.Y.2d at 508, 467 N.E.2d at 494, 478 N.Y.S.2d at 830. *See also Caldwell v. Village of Island Park*, 304 N.Y. 268, 274, 107 N.E.2d 441, 443 (1952) (municipality owes "duty of reasonable and ordinary care" to citizens who enter public park).

<sup>27</sup> *See Miller*, 62 N.Y.2d at 509-10, 467 N.E.2d at 494, 478 N.Y.S.2d at 830 (plaintiff-rape victim may recover damages against state for failure to keep dormitory locked).

<sup>28</sup> *See Gillespie v. Brooklyn Heights R.R.*, 178 N.Y. 347, 353, 70 N.E. 857, 859 (1904) (citing BOOTH ON RAILWAYS § 372) (privately owned common carrier must "safely carry its passengers and . . . compensate them for all unlawful and tortious injuries inflicted by its servants").

<sup>29</sup> *Crosland*, 68 N.Y.2d at 167, 498 N.E.2d at 144, 506 N.Y.S.2d at 671.

<sup>30</sup> *Crosland*, 110 App. Div. 2d at 155-56, 493 N.Y.S.2d at 480. *See Enghauser Mfg. Co. v. Eriksson Eng'g Ltd.*, 6 Ohio St. 3d 31, 35, 451 N.E.2d 228, 232 (1983). The "appropriate dividing line falls between those functions which rest on the exercise of judgment and discretion and represent planning and policy-making and those functions which involve the implementation and execution of such governmental policy or planning." *Id.*

<sup>31</sup> *See Crosland*, 68 N.Y.2d at 169-70, 498 N.E.2d at 145, 506 N.Y.S.2d at 672.

posed.<sup>32</sup> Imposing such liability for the inaction of employees will not put the courts in the position of intruding upon legislative or executive functions.<sup>33</sup>

Second, the *Crosland* court did not discuss the defendant's duty to its passengers by virtue of its status as a common carrier.<sup>34</sup> New York maintains the rule that a common carrier must reasonably provide for the safety of its passengers.<sup>35</sup> This includes summoning help during the attack of passengers.<sup>36</sup> A municipally owned common carrier must, like a privately owned carrier, take reasonable precautions for the safety of its passengers.<sup>37</sup> The defendant's employees in *Crosland* were thus under an affirmative duty to summon aid when they received notice that a passenger was being attacked.<sup>38</sup> Consequently, if it is found that the Transit Authority failed in its proprietary duty as a common carrier to summon aid, it will be liable for injuries proximately caused by this failure.<sup>39</sup>

The New York Court of Appeals was correct in holding that

<sup>32</sup> *Crosland*, 110 App. Div. at 155-56, 493 N.Y.S.2d at 480.

<sup>33</sup> See *Weiner v. Metropolitan Transit Auth.*, 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982).

<sup>34</sup> *Crosland*, 110 App. Div. 2d at 155-57, 493 N.Y.S.2d at 478-80.

<sup>35</sup> *Eisman v. Port Auth. Transp. Hudson Corp.*, 96 Misc. 2d 678, 409 N.Y.S.2d 578 (Sup. Ct. N.Y. County 1978). If non-governmental carriers have a duty to reasonably provide for the safety of its passengers, "[s]uch a duty would appear to be equally applicable to a government maintained railroad." *Id.* at 681, 409 N.Y.S.2d at 580-81. In *Amoruso v. New York City Transit Auth.*, 12 App. Div. 2d 11, 207 N.Y.S.2d 855 (1st Dep't 1960), the court noted:

There is no question but that the defendant, a railroad carrier, is under a duty to take reasonable precautions for the protection and the safety of its passengers.

The nature and extent of such duty is dependent upon the circumstances of each particular situation and danger reasonably to be anticipated.

*Id.* at 12, 207 N.Y.S.2d at 856; see also *Green Bus Lines v. Ocean Accident & Guar. Corp.*, 287 N.Y. 309, 312, 39 N.E.2d 251, 251-53 (1969) (upon notice of attack by fellow passenger, privately owned common carrier owes duty to protect passenger). Other states follow the same rule. See *Kenny v. Southeastern Pennsylvania Transit Auth.*, 581 F.2d 351 (3d Cir. 1978) (common carrier owes duty to protect fare paying passengers from reasonably expected criminal activity), *cert. denied*, 439 U.S. 1073 (1979).

<sup>36</sup> See *Green Bus Lines*, 287 N.Y. at 312, 39 N.E.2d at 251-53.

<sup>37</sup> See *Prinz v. City of New York*, 98 Misc. 2d 952, 953-54, 415 N.Y.S.2d 200, 201 (Sup. Ct. N.Y. County 1979). Although the *Prinz* court held that a public carrier's duties are coextensive with those of private carriers, *id.*, both *Weiner* and *Crosland* establish that a public carrier will not be liable for lack of police security, while a private carrier might. See *Crosland*, 68 N.Y.2d at 169, 498 N.E.2d at 144-45, 506 N.Y.S.2d at 671-72; *Weiner*, 55 N.Y.2d at 179, 433 N.E.2d at 125, 448 N.Y.S.2d at 142.

<sup>38</sup> Cf. *Green Bus Lines*, 287 N.Y. at 309, 39 N.E.2d at 252-53 (duty imposed on private carrier to protect passenger upon due notice of attack).

<sup>39</sup> See *Crosland*, 68 N.Y.2d at 170, 498 N.E.2d at 146, 506 N.Y.S.2d at 673.

plaintiff made out a case sufficient to withstand a motion for summary judgment. The effect of this holding will likely encourage the Transit Authority to take greater responsibility in supervising its employees. If municipally owned common carriers are subject to the same liability as private carriers, perhaps the subways will become a much safer place for passengers.

*Brenda F. Szydlo*