

Penal Law § 10.00(11): Conduct Short of Discharging Firearm Constitutes Use of Deadly Physical Force; Penal Law § 35.15(2): Defense of Justification Is Applicable to Unintentional As Well As Intentional Crimes

Mary Flynn

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Flynn, Mary (1986) "Penal Law § 10.00(11): Conduct Short of Discharging Firearm Constitutes Use of Deadly Physical Force; Penal Law § 35.15(2): Defense of Justification Is Applicable to Unintentional As Well As Intentional Crimes," *St. John's Law Review*: Vol. 60 : No. 4, Article 14.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol60/iss4/14>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

for any benefit the plaintiff would have received but for the agent's lack of authority.³⁹ It is submitted that this remedy should have been available to the plaintiff in *Skyline*. In reliance upon the attorney's representation of authority, the plaintiff entered into a settlement agreement that, but for the lack of authority, would have been enforceable against Frank Coppotelli.⁴⁰

The *Skyline* court was correct in rejecting an anomalous rule that denied a defendant his procedural due process rights when an attorney appears for him without authorization. However, to protect the plaintiff against the expiration of the statute of limitations on his claim because the judgment was vacated, the plaintiff should be provided with a remedy against the offending attorney sounding in breach of implied warranty of authority. Until a remedy is provided, it is urged that the plaintiff's attorney verify the authority of counsel who enters an appearance on behalf of a defendant.

Sheila Corvino

PENAL LAW

Penal Law § 10.00(11): Conduct short of discharging firearm constitutes use of deadly physical force; Penal Law § 35.15(2): Defense of justification is applicable to unintentional as well as intentional crimes

Pursuant to section 35.15 of the Penal Law of New York,¹ a

that a contract can not be enforced against the principal despite the agent's lack of authority, the agent will not be liable in breach of warranty. *See, e.g.,* Gracie Square Realty Corp. v. Choice Realty Corp., 305 N.Y. 271, 282, 113 N.E.2d 416, 421 (1953) (contract void under statute of frauds creates no liability for unauthorized agent).

³⁹ *See* Cargo Ships El Yam v. Stearns & Foster Co., 149 F. Supp. 754 (S.D.N.Y. 1955); Harris v. Tams, 258 N.Y. 229, 234, 179 N.E. 476, 478 (1932). *See also* 3 H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP § 120 (1979) (discussion of damages to be awarded in warranty action).

⁴⁰ *See* 117 App. Div. 2d at 148, 502 N.Y.S.2d at 489.

¹ N.Y. PENAL LAW § 35.15 (McKinney 1975) provides in pertinent part:

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he reasonably believes such to be

person may use physical force upon another to the extent that he reasonably believes necessary to defend himself or a third person from unlawful attack.² Such person is justified in using deadly physical force when he reasonably believes his attacker is using or about to use commensurate force.³ Section 10.00(11) of the Penal Law defines deadly physical force as physical force which is "readily capable of causing death or other serious physical injury."⁴ Before using deadly physical force, however, the defender has a duty to retreat if he can do so with complete safety, except under limited circumstances.⁵ Recently, the Court of Appeals, in *People*

necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

- (a) The latter's conduct was provoked by the actor himself with intent to cause physical injury to another person; or
- (b) The actor was the initial aggressor; except that in such case his use of physical force is nevertheless justifiable if he has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or
- (c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

- (a) He reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating. . . .

Id.

² *Id.* at § 35.15(1); *see, e.g.*, *People v. Reyes*, 116 App. Div. 2d 602, 603, 497 N.Y.S.2d 463, 464 (2d Dep't 1986) (use of bat and knife against decedent greater than necessary force). *See generally* Abrahamsky, *Justification: Right to Use Deadly Force in New York*, N.Y.L.J., Feb. 4, 1985, at 1, col. 2 (existence of right to use physical force depends on attendant circumstances).

³ *See* N.Y. PENAL LAW § 35.15(2) (McKinney 1975 & Supp. 1987); *see, e.g.*, *People v. Collice*, 41 N.Y.2d 906, 907, 363 N.E.2d 340, 340, 394 N.Y.S.2d 615, 615-16 (1977) (defendant must reasonably defend self and reasonably perceive threatened deadly physical force for justification defense to stand).

⁴ *See* N.Y. PENAL LAW § 10.00(11) (McKinney 1975); *see also* MODEL PENAL CODE § 3.11(2) (1985) (deadly force is that which person uses with purpose of causing death or serious bodily injury).

⁵ *See* N.Y. PENAL LAW § 35.15(2)(a) (McKinney 1975 & Supp. 1987); *see, e.g.*, *People v. Dingley*, 42 N.Y.2d 888, 890, 366 N.E.2d 877, 877, 397 N.Y.S.2d 789, 790 (1970) (duty to retreat applicable when crime charged is assault); *Reyes*, 116 App. Div. 2d at 603, 497 N.Y.S.2d at 464 (defender must attempt to withdraw from encounter despite reasonable belief that attacker is about to use deadly force); *People v. Rodriguez*, 111 App. Div. 2d 879, 881, 490 N.Y.S.2d 273, 275-76 (2d Dep't 1985) (evading gunfire as only alternative does not reflect ability to retreat in safety). The Model Penal Code provides that deadly force is not

v. Magliato,⁶ held that the defense of justification is unavailable to a person who threatens and actively prepares to use deadly physical force upon an attacker, without first attempting to retreat, despite his lack of intent to inflict bodily injury upon such person.⁷

The defendant in *Magliato* was convicted of depraved indifference murder by a jury from facts arising out of an incident involving an automobile accident.⁸ The defendant's car was struck by another car, which immediately sped off with the defendant in pursuit.⁹ When the defendant overtook this car, an enraged passenger emerged and waived a billy club threateningly at the defendant.¹⁰ The defendant retreated to his apartment where he picked up his car registration, his wallet and a loaded handgun.¹¹ En route to reporting the incident to the police, the defendant saw the passenger on the street where he had left him,¹² and got out of

justified "if the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . ." MODEL PENAL CODE § 3.04(2)(b)(ii) (1985); see also Beale, *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567 (1903) (historic discussion of duty to retreat).

Under certain limited circumstances, New York does not require one to retreat before using deadly physical force. See N.Y. PENAL LAW § 35.15(2)(a) (McKinney 1975 & Supp. 1987). A person has no duty to retreat if: "(i) in his dwelling and not the initial aggressor; or (ii) a police officer or peace officer or a person assisting a police officer . . ." *Id.*

⁶ 68 N.Y.2d 24, 496 N.E.2d 856, 505 N.Y.S.2d 836 (1986).

⁷ See *id.* at 28-29, 496 N.E.2d at 859-60, 505 N.Y.S.2d at 839-40. For a general discussion of the principle of exculpatory defenses, see *People v. Valles*, 62 N.Y.2d 36, 38, 464 N.E.2d 418, 419, 476 N.Y.S.2d 50, 51 (1984).

⁸ *Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 857, 505 N.Y.S.2d at 837. Depraved indifference murder is defined as, "[u]nder circumstances evincing a depraved indifference to human life, [one] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." N.Y. PENAL LAW § 125.25(2) (McKinney 1975).

⁹ *Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. The defendant overtook the vehicle which had struck his car and forced it to a stop. *Id.* The defendant then got out of his car, holding a tennis racket. *Id.*

¹⁰ *Id.* The passenger was screaming "I'm going to kill you, get back in the car . . ." *Id.*

¹¹ *Id.* The statement of facts by the Court of Appeals suggests that the defendant stopped at his apartment while he and his passenger were in search of a police officer. See *id.* at 28, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. The Appellate Division, however, suggests that the two men deliberately returned to the defendant's apartment to get a gun, after unsuccessfully searching for a police officer. See *People v. Magliato*, 110 App. Div. 2d 266, 267, 494 N.Y.S.2d 307, 308 (1st Dep't 1985).

¹² *Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. The Court of Appeals' account describes the defendant as coming upon the passenger accidentally. See *id.* The Appellate Division, however, maintains that the defendant purposely drove to the location where he had left the passenger. See *Magliato*, 110 App. Div. 2d at 267, 494 N.Y.S.2d at 308.

his car to call the police.¹³ As the defendant began to cross the street, the passenger lurched out of his car, waving the billy club and shouting at the defendant.¹⁴ The defendant pointed the weapon at his adversary and cocked it.¹⁵ As a car passed between them the pistol fired, striking the passenger in the head.¹⁶ The defendant claimed that he had been startled and that the gun discharged accidentally.¹⁷ He asserted that he had never intended to fire the weapon.¹⁸

The Appellate Division, First Department, reduced the conviction to manslaughter in the second degree, on the ground that the jury was not warranted in finding "depravity" on the part of the defendant.¹⁹ The defendant appealed, contending that the defense of justification encompassing a duty to retreat was inapplicable to his situation since he was convicted of an unintentional crime.²⁰

¹³ *Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. On this point, the Court of Appeals contends that the defendant was attempting to call the police when the passenger began his attack. *See id.* The Appellate Division, however, stated that it was the defendant's passenger who was attempting to call 911 at the time of the confrontation. *See Magliato*, 110 App. Div. 2d at 267, 494 N.Y.S.2d at 308.

¹⁴ *Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 858, 505 N.Y.S.2d at 838.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 27-28, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. The defendant claimed to have panicked and stated that he did not recall pulling the trigger. *Id.* at 27, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. The passenger died two days later. *Id.* at 28, 496 N.E.2d 858, 505 N.Y.S.2d at 838.

¹⁸ *Id.* Evidence was brought forth at trial tending to prove that the defendant's weapon had a "hair trigger" to which the slightest pressure would result in discharge. *Id.* Defense counsel argued at the charging conference that he did not want the jury instructed on the defense of justification according to section 35.15 of the Penal Law, since the actual shooting was an accident. *Id.*; *see supra* note 5 and accompanying text (review of the duty to retreat). For a discussion of the application of the law of justification to unintentional crimes, see *infra* note 26 and accompanying text.

¹⁹ *See Magliato*, 68 N.Y.2d at 26, 496 N.E.2d at 857, 505 N.Y.S.2d at 837. "A person is guilty of manslaughter in the second degree when . . . [h]e recklessly causes the death of another person . . ." N.Y. PENAL LAW § 125.15(1) (McKinney 1975). *But see supra* note 8 (definition of depraved indifference murder).

²⁰ *Magliato*, 68 N.Y.2d at 28, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. The defendant reasoned that since the shooting was accidental, it was not in self-defense; alternatively, his preparatory conduct was intentional, and therefore only that portion of his actions was governed by the law of justification. *Id.* The defendant argued that since such preparatory conduct did not constitute "deadly physical force," no duty to retreat existed. *But see infra* note 25 and accompanying text.

The defendant also argued that his conduct was a "reasoned response to [his attacker's] threatening conduct." *Id.* at 26, 496 N.E.2d at 858, 505 N.Y.S.2d at 838. *Cf.* *People v. Goetz*, 68 N.Y.2d 96, 107, 497 N.E.2d 41, 48, 506 N.Y.S.2d 18, 25 (1986) (defender's belief that attacker will use deadly force must "comport with an objective notion of reasonableness").

Disagreeing with the defendant, the Court of Appeals affirmed the order of the Appellate Division.²¹ Judge Hancock, writing for the court, rejected the defendant's arguments that he was justified in drawing his weapon to repel the decedent's attack²² and that the defense of justification is applicable only to intentional crimes.²³

Holding that the defense of justification applied to the defendant's conduct, the court stressed that the consequences of the defendant's risk-creating conduct, not his intentions, were controlling.²⁴ Thus the court found no merit in the defendant's contention that justification was inapplicable to this situation because the defendant had fired the pistol recklessly.²⁵

²¹ See *Magliato*, 68 N.Y.2d at 31, 496 N.E.2d at 860, 505 N.Y.S.2d at 840.

²² See *id.* at 28, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. The defendant had contended that his drawing of the weapon was a reasonable and therefore justifiable act. See *id.* He also maintained, however, that the law of justification was inapplicable to his case since his actions did not constitute the use of "deadly physical force" within the meaning of section 35.15 of the Penal Law. See *id.* The court rejected these arguments as being "without merit." See *id.*; see also *infra* notes 29-32 and accompanying text.

²³ See *Magliato*, 68 N.Y.2d at 29, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. The Court of Appeals has stated that "there is no basis for limiting the application of the defense of justification to any particular *mens rea*." See *People v. McManus*, 67 N.Y.2d 541, 547, 496 N.E.2d 202, 205, 505 N.Y.S.2d 43, 46 (1986); see also *infra* note 26 and accompanying text (discussion of the application of justification defense).

²⁴ *Magliato*, 68 N.Y.2d at 28-29, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. In *People v. McManus*, the court stated that "[j]ustification does not make a criminal use of force lawful; if the use of force is justified, it cannot be criminal at all." *McManus*, 67 N.Y.2d at 545, 496 N.E.2d at 204, 505 N.Y.S.2d at 45 (1986). The intent of the actor is therefore irrelevant to the determination of whether the act was justified. *Id.* at 547, 496 N.E.2d at 205, 505 N.Y.S.2d at 46. The Model Penal Code, however, states that:

'deadly force' means force that the actor uses with the purpose of causing . . . death or serious bodily injury . . . Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force.

MODEL PENAL CODE § 3.11(2) (1985).

The Model Penal Code's explanatory note reflects the view that a threat is merely the use of moderate force; accordingly, no duty to retreat is invoked. See *id.* at § 3.11, commentary at 160 (1985). "[T]he actor who threatens deadly force is not considered to have used deadly force. . . ." *Id.* at 161 n.9; see also 2 P. ROBINSON, CRIMINAL LAW DEFENSES 3 n.2 (1984) ("threats . . . do not seem to be covered by the term 'force'").

²⁵ See *Magliato*, 68 N.Y.2d at 28, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. Alternatively, the defendant had claimed that drawing his pistol did not constitute "deadly physical force" within the meaning of Penal Law section 35.15; therefore, he had no duty to retreat. *Id.* The court rejected that argument, holding that the defendant's conduct rose to the level of "deadly physical force." See *id.* at 28-29, 496 N.E.2d at 859, 505 N.Y.S.2d at 839. But see W. LAFAYE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW 651 (1986) ("merely to threaten death or

The court in *Magliato* noted that it is the established law in New York that the application of the defense of justification is not restricted to any particular *mens rea*.²⁶ The court may instruct the jury on the law of justification whenever any evidence is adduced at trial that the defendant acted in self defense.²⁷ Moreover, the only justification for the use of deadly physical force in self-defense is contained in the Penal Law.²⁸

Finally, the court held that the defendant's preparatory conduct constituted the use of deadly physical force.²⁹ Accordingly, subsection two of section 35.15 was applicable and the duty to retreat thereby invoked.³⁰ The court equated the drawing and cocking of a loaded pistol with the use of deadly force since "it creates a danger so nearly approximating the discharge of a pistol as to be

serious bodily harm, without any intention to carry out the threat, is not to use deadly force").

²⁶ See *Magliato*, 68 N.Y.2d at 28, 496 N.E.2d at 859, 505 N.Y.S.2d at 839; see also *McManus*, 67 N.Y.2d at 544, 496 N.E.2d at 205, 505 N.Y.S.2d at 46 (1986)(justification defense available to a person convicted of depraved indifference murder). The *McManus* court based its decision on the fact that section 35.15 of the Penal Law contains no limiting language with respect to what offenses are applicable to the law of self-defense. See *id*; see also *People v. Huntley*, 59 N.Y.2d 868, 870, 452 N.E.2d 1257, 1258, 465 N.Y.S.2d 929, 930 (1983) (justification defense available to defendant convicted of second degree manslaughter); *People v. Ciervo*, 123 App. Div. 2d 393, 394, 506 N.Y.S. 2d 462, 463 (2d Dep't 1986) (same); *People v. Rodwell*, 100 App. Div. 2d 772, 772, 474 N.Y.S.2d 45, 46 (1st Dep't 1984) (same); *People v. Burnell*, 84 App. Div. 2d 566, 566, 443 N.Y.S.2d 261, 261 (2d Dep't 1981) (defendant's not guilty plea does not preclude submission of justification defense to jury).

²⁷ See *People v. Goetz*, 68 N.Y.2d 96, 106, 497 N.E.2d 41, 47, 506 N.Y.S.2d 18, 24 (1986) (evidence of justification warrants instruction to jury regardless of defense request); *People v. Kahn*, 113 App. Div. 2d 773, 774, 493 N.Y.S.2d 364, 365 (2d Dep't 1985) (jury instruction on justification issue applicable to first degree manslaughter), *aff'd mem.*, 68 N.Y.2d 921 (1986); *People v. Jenkins*, 93 App. Div. 2d 868, 870, 461 N.Y.S.2d 378, 380 (1983) (same); *People v. Benjamin*, 47 App. Div. 2d 861, 861-62, 366 N.Y.S.2d 44, 45 (1975) (same).

²⁸ See *Magliato*, 68 N.Y.S.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840. The legislature has also authorized the use of deadly physical force to affect the arrest of one who has committed a designated felony. See N.Y. PENAL LAW § 35.30 (McKinney 1975 & Supp. 1987). But see *People v. Jacobs*, 105 Misc. 2d 616, 621, 432 N.Y.S.2d 614, 619 (N.Y.C. Crim. Ct. N.Y. County 1980) (robbery victim not justified in recklessly shooting bystander while attempting to arrest fleeing felon).

²⁹ See *Magliato*, 68 N.Y.2d at 29, 496 N.E.2d at 860, 505 N.Y.S.2d at 840. The court did not term this conduct preparatory, but instead stated that the defendant's conduct could not properly be described as "a mere display, threat, or preparation for the use of deadly physical force." *Id*. Indeed, the court continued, "[it] would be illogical to restrict the meaning of the 'use of deadly physical force' to the deliberate discharge of a weapon or the intentional infliction of bodily injury, and to characterize as mere 'preparation' all other conduct with a deadly instrumentality which falls short of that." *Id.*; see *supra* notes 4 and 24 (discussion of what constitutes deadly physical force).

³⁰ See *Magliato*, 68 N.Y.2d at 29-31, 496 N.E.2d at 859-61, 505 N.Y.S.2d at 839-40; see also *supra* notes 1 (text of § 35.15) and 5 (discussion of duty to retreat).

reasonably deemed its equivalent for the purpose of the law of justification."³¹ In the court's view, this type of preparatory conduct was a "deadly act regardless of how or why the final bit of pressure is applied."³²

It is submitted that the court properly construed section 35.15 of the Penal Law as applicable to both intentional and unintentional crimes, and was also correct in its interpretation of "deadly physical force" in the instant case. It is suggested, however, that the court's distinction between the "display[ing] or brandishing of a pistol" in self-defense and drawing, cocking and aiming a weapon³³ may lead to future jury confusion as to what conduct constitutes the use of, rather than the preparation for, deadly force.

Practically speaking, the holding in *Magliato* implies that an individual must first attempt to retreat when possible, before threatening the use of deadly physical force, if such threat would create a substantial risk of serious bodily injury to the attacker and would itself equate deadly physical force.³⁴ This requirement is applicable regardless of the defender's intention to inflict or re-

³¹ *Magliato*, 68 N.Y.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840. *But see supra* note 24 (mere production of weapon not deadly force). For the purpose of determining civil liability, the Restatement (Second) of Torts creates a distinction between threatening and using deadly force similar to that found in the Model Penal Code. The Restatement provides in pertinent part:

The actor may be privileged in self-defense to do an act which is intended to put another in immediate apprehension of a harmful or offensive contact or other bodily harm or a confinement, which is in excess of that which the actor is privileged to inflict, if his act is intended and reasonably believed by him to be likely to do no more than to create such an apprehension.

RESTATEMENT (SECOND) OF TORTS § 70(2) (1977).

The particular weapon used by the defendant has a significant impact on the issue of reasonableness. The defendant proved at trial that the pistol had an extremely sensitive "hair trigger." *See Magliato*, 68 N.Y.2d at 27, 496 N.E.2d at 858-59, 505 N.Y.S.2d at 838-39. Therefore, it was reasonably foreseeable that the pistol would discharge upon application of the slightest pressure, and accordingly, that cocking and aiming this loaded pistol could result in the decedent's death. *See Magliato*, 110 App. Div. 2d at 271, 494 N.Y.S.2d at 311-12 (Asch, J., dissenting). Since the defendant had been instructed on the use of this particular weapon, holding him to this level of culpability is not unfair. *See id.*

³² *Magliato*, 68 N.Y.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840; *see supra* note 28. The court explained that "leveling a loaded pistol with the cocked hammer set to release under the slightest pressure, and pointing it at another approaching from across the street is conduct well beyond a warning or preparation for a deadly act." *Magliato*, 68 N.Y.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840.

³³ *Magliato*, 68 N.Y.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840. For a discussion of the importance of such a distinction, see Abrahamsky, *supra* note 2, at 1.

³⁴ *See Magliato*, 68 N.Y.2d at 30, 496 N.E.2d at 860, 505 N.Y.S.2d at 840.

strain from inflicting bodily injury upon the attacker.³⁵ 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,¹ all states have consented to waive this immunity to some extent.² New York distin-

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

¹ 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*].

² *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