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Article 10

Ct. Cl. Act § 8: In the Absence of a Special Relationship Imposing a Duty of Care Upon the Municipality to a Particular Plaintiff, the Municipality Remains Immune from Tort Liability

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tractual disability to circumvent valid business agreements. To be sure, such a solution would adequately safeguard the businessman's interests while guaranteeing minors the right to control their own exposure to commercial exploitation so that a child will not be left to the caprice of his guardian in the labyrinth of privacy law in New York.[65]

Bernard W. Hylan

COURT OF CLAIMS ACT

Ct. Cl. Act § 8: In the absence of a special relationship imposing a duty of care upon the municipality to a particular plaintiff, the

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tect] a person's feelings and right to be let alone." Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (citations omitted); *see* N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976). It is submitted that a celebrity such as Shields, who has affirmatively sought public recognition, would not have been able to demonstrate injury in the present situation. Thus, it is suggested that the right of disaffirmance would not have been available to her had a qualified right of disaffirmance been adopted by the Court. Indeed, in Shields v. Gross, 563 F. Supp. 1253 (S.D.N.Y. 1983), a case brought by the same plaintiff subsequent to the Court of Appeals' decision, Shields sought a preliminary injunction in federal court to restrain the defendant from publishing the same nude prints. *Id.* at 1253. In refusing to issue an injunction, Judge Leval held that "[p]laintiff's claim of harm is . . . undermined to a substantial extent by the development of her career projecting a sexually provocative image." *Id.* at 1257. The court also noted that the plaintiff's strategy of filing consecutive claims rather than concurrent suits was inequitable to the defendant who had already been restrained for over 2 years during the pendency of the state action. *Id.* at 1255.

[65] *See* Recent Decisions, *Civil Rights Law—Invasion of Privacy—Use of Photograph*—Murray v. New York Magazine Co., 35 ALB. L. REV. 790, 798 (1971) (describing the difficulties of separating privacy rights of the individual from the public's right to a free flow of information as a "quagmire"). *Compare* Bi-Rite Enters. v. Button Master, 555 F. Supp. 1188, 1198 (S.D.N.Y. 1983) (celebrity musicians garner no protection from section 51 since their "likenesses" are in the public domain) *and* Ann-Margret v. High Soc'y Magazine, Inc., 498 F. Supp. 401, 404-06 (S.D.N.Y. 1980) (famous actress cannot control faithful reproduction of scene from public performance) *with* Brinkley v. Casablancas, 80 App. Div. 2d 428, 440-42, 438 N.Y.S.2d 1004, 1012-13 (1st Dep't 1981) (poster photograph taken during cable television taping requires model's written consent for publication). The dearth of any logical development or systematic approach to the right of privacy in New York has been described as " 'still that of a haystack in a hurricane.' " *Brinkley*, 80 App. Div. 2d at 436, 438 N.Y.S.2d at 1010 (quoting Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481, 485 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956)). It is submitted that in the resulting morass that is contemporary privacy law in this state, the infant-plaintiff's heretofore unquestioned right of disaffirmance has been lost. *See generally* Huff, *Thinking Clearly About Privacy*, 55 WASH. L. REV. 777, 777-78 (1980) (analysis of lack of clarity in development of constitutional right of privacy); Comment, *Privacy Tort Law in New York: Some Existing Routes to Recovery*, 31 BUFFALO L. REV. 255, 256 (1982) (study of the confusion in New York privacy law).

municipality remains immune from tort liability

In New York, municipal liability is predicated on a statutory waiver of sovereign immunity.[66] Particularly in the area of tort law,

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[66] *See* Court of Claims Act, ch. 467, § 12-a, [1929] N.Y. Laws 994 (current version at N.Y. CT. CL. ACT § 8 (McKinney 1963)). Section 8 of the Court of Claims Act provides, in relevant part:

> The state hereby waives its immunity from liability and action and hereby assumes liability 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 . . . .

N.Y. CT. CL. ACT § 8 (McKinney 1963); *see also* Antieau, *Statutory Expansion of Municipal Tort Liability*, 4 ST. LOUIS U.L.J. 351, 370-77 (1957) (discussion of New York Court of Claims Act and the restrictions placed upon it by New York courts). Before waivers of sovereign immunity became prevalent, state and local governments enjoyed absolute immunity from tort liability. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970-71 & nn.5-13 (4th ed. 1971). The concept of absolute sovereign immunity, derived from the ancient axiom "the King can do no wrong," found universal acceptance at common law. *Id.* at 970; *see* Russell v. Men of Devon, 100 Eng. Rep. 359, 360 (K.B. 1788); Note, *Torts: Municipal Liability: Defects in Planning*: Weiss v. Fote, 46 CORNELL L.Q. 366, 367 (1961). This concept of sovereign immunity did not originally extend to municipalities. In 1845, however, the Court for the Correction of Errors affirmed a supreme court decision which had held that immunity extends to a municipality when performing a governmental function, as opposed to a proprietary function. Bailey v. City of New York, 3 Hill 531, 539 (N.Y. Sup. Ct. 1842), *aff'd*, 2 Denio 433 (N.Y. 1845); *see* Lloyd, *Municipal Tort Liability in New York: A Legislative Challenge*, 23 N.Y.U. L. REV. 278, 279-80 (1948); *see also* W. PROSSER, *supra*, § 131, at 979; Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations: The Antecedents of* Bailey v. City of New York, 16 OR. L. REV. 250, 257-68 (1937) (*Bailey* holding foreshadowed in a number of early English and American decisions). This distinction, which met with much judicial criticism, was dormant for nearly 30 years, at which time it was reaffirmed in Maxmilian v. Mayor of New York, 62 N.Y. 160, 170 (1875). The governmental/proprietary test was never applied to municipal subdivisons, notwithstanding the fact that such an application would have "resulted in mitigating the injustice of the absolute immunity rule." Lloyd, *supra*, at 283; *see* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02, at 104-05 (rev. 3d ed. 1977). The harsh realities of absolute sovereign immunity prompted the New York State Legislature to pass laws eliminating such immunity, the final vestiges of which were abrogated with the enactment of section 8 of the Court of Claims Act. *See* Bernardine v. City of New York, 294 N.Y. 361, 365, 62 N.E.2d 604, 605 (1945) (dictum).

Surprisingly, municipal immunity remained initially unaffected by the State's waiver of immunity. While it was clear that municipal immunity was a derivative of State liability, it appears that the Legislature did not intend to abrogate municipal immunity with the enactment of section 12-a (now section 8). *See* Antieau, *supra*, at 370; Lloyd, *supra*, at 286-87; Note, *supra*, at 368. Instead, municipal immunity was waived in certain causes of action by the enactment of laws that now are part of article 4 of the General Municipal Law. *See* GML §§ 50a-50d, 50j-50k (1977 & Supp. 1982-1983).

Municipal immunity in New York finally terminated in 1945, in the case of Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945). In a most influential decision, the Court of Appeals held that since the City's immunity was an extension of the State's, it naturally ceased by virtue of section 8 of the Court of Claims Act. *Id.* at 365, 62 N.E.2d at 605. Additionally, the Court rejected as unnecessary both the governmental/proprietary dis-

however, remnants of this dormant immunity have been "judicially resurrected" by requiring litigants who sue the city to establish that a duty is owed specifically to them, rather than to the public at large.[67] The limitation on municipal liability imposed by this requirement has the unfortunate side effect of leaving innocent victims without redress.[68] Recently, in *O'Connor v. City of New York*,[69] the Court of Appeals reaffirmed its commitment to this

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tinction and the need to proceed against the City under the General Municipal Laws. *Id.* at 365-66, 62 N.E.2d at 605-06. Thus, municipalities were subject to the same negligence liabilities as private persons and corporations.

[67] *See* Runkel v. City of New York, 282 App. Div. 173, 178-79, 123 N.Y.S.2d 485, 491 (2d Dep't 1953) (per curiam) (first New York case to apply the special/public duty analysis). Shortly after the abolition of municipal immunity in *Bernardine*, there was concern that unlimited liability would impose a crushing financial burden upon municipalities. Lloyd, *supra* note 66, at 292. In response, New York courts fashioned various restrictions, classifications, and conditions in an attempt to restore some immunity. *See generally* 18 E. McQUILLIN, *supra* note 66, § 53.03, at 120-21 & nn.3, 5 & 6.

One such classification favored by the New York courts is the special/public duty distinction. *See, e.g.*, Sanchez v. Village of Liberty, 42 N.Y.2d 876, 877-78, 366 N.E.2d 870, 871, 397 N.Y.S.2d 782, 783 (1977). In order for an injured party to recover against a New York municipality, a plaintiff must establish the existence of "a special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals . . . ." *Id.*; *see also* 18 E. McQUILLIN, *supra* note 66, § 53.04b, at 127. A special relationship is created by the intention of the municipality enacting the statute or ordinance involved. *See Sanchez*, 42 N.Y.2d at 878, 366 N.E.2d at 871, 397 N.Y.S.2d at 783. Thus, the injured persons must fall within the class that the municipal duty was intended to benefit. *See id.*; Runkel v. City of New York, 282 App. Div. 173, 178-79, 123 N.Y.S.2d 485, 491 (2d Dep't 1953). Various other classifications have received and continue to receive judicial acceptance. Some examples include: the misfeasance/nonfeasance test, *see* Milstrey v. City of Hackensack, 6 N.J. 400, 408, 79 A.2d 37, 41 (1951); the omission standard, *see* Murrain v. Wilson Line, Inc., 296 N.Y. 845, 847, 72 N.E.2d 29, 29 (1947) (per curiam); and the legislative-judicial/discretionary act analysis, *see* 18 E. McQUILLIN, *supra* note 66, § 53.04a, at 122-24. *See generally*, RESTATEMENT (SECOND) OF TORTS § 895C (1977) (discussing the various distinctions and their application in case law).

[68] *See* Comment, *Municipal Liability for Negligent Inspection*, 23 LOY. L. REV. 458, 459 (1977) [hereinafter cited as Loyola Comment]. If an injured party fails to fall within the protected class, recovery will be precluded irrespective of the damages incurred. *See, e.g.*, Sanchez v. Village of Liberty, 42 N.Y.2d 876, 877-78, 366 N.E.2d 870, 871, 397 N.Y.S.2d 782, 783 (1977) (fire hazards); Riss v. City of New York, 22 N.Y.2d 579, 583, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968) (police protection); Whitney v. City of New York, 27 App. Div. 2d 528, 529, 275 N.Y.S.2d 783, 785 (1st Dep't 1966) (boiler inspection). In recognition of the inequities that result from these restrictions, one commentator has stated that "[a]brogation of the doctrine of municipal governmental immunity [may be] said to merely remove the defense of immunity, but not to create any new liability for a municipality." 18 E. McQUILLAN, *supra* note 66, § 53.04b, at 126. Various arguments were offered to justify this position, including public policy considerations. *See* Leonard, *Municipal Tort Liability: A Legislative Solution Balancing the Needs of Cities and Plaintiffs*, 16 URB. L. ANN. 305, 308-09 (1979); Comment, *Municipal Liability for Negligent Building Inspections—Demise of the Public Duty Doctrine?*, 65 IOWA L. REV. 1416, 1424 (1980).

[69] 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

rule, holding that absent a special relationship to the plaintiff, a city is immune from tort liability.[70]

In *O'Connor*, a gas explosion ripped through a commercial building in lower Manhattan causing the death of twelve persons, injuring many others,[71] and giving rise to forty-three negligence actions against, *inter alia*, the City of New York and Consolidated Edison.[72] Prior to the incident, conversion of part of the building to a restaurant required installation of additional gas piping and modification of the existing gas system.[73] Pursuant to City regulations, a City inspector was sent to examine the new gas system.[74] Despite the presence of obvious defects,[75] the inspector issued a "blue card" authorizing the resumption of gas service.[76] The gas was turned on 9 days after the inspection.[77] Shortly thereafter, the

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[70] *Id.* at 187, 447 N.E.2d at 33, 460 N.Y.S.2d at 485.

[71] *Id.*

[72] *Id.* Forty-three actions were instituted against numerous defendants, including the City of New York, Consolidated Edison (Con Ed), Otto Schlink and Albert Bold, the plumbers responsible for the new installations, and China Dynasty Enterprises, Inc., the owner of a restaurant in the building. *Id.* Some of the actions, which were consolidated for trial on the issue of liability, were dismissed, except as against China Dynasty Enterprises, Inc., a defunct corporation that had defaulted. Gannon Personnel Agency, Inc. v. City of New York, 103 Misc. 2d 60, 62, 425 N.Y.S.2d 446, 448 (Sup. Ct. N.Y. County 1979), *rev'd*, O'Connor v. City of New York, 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

[73] 58 N.Y.2d at 188, 447 N.E.2d at 34, 460 N.Y.S.2d at 486. The plans for the new piping were designed by Con Ed and approved by the City's Department of Buildings. *See* 103 Misc. 2d at 64, 425 N.Y.S.2d at 449.

[74] 58 N.Y.2d at 188, 447 N.E.2d at 34, 460 N.Y.S.2d at 486; *see* NEW YORK, N.Y., ADMIN. CODE § C26-1606.1 (1978) (requiring the inspection of alterations of or additions to a gas piping system, to determine whether code requirements have been complied with).

[75] *See* 58 N.Y.2d at 188, 447 N.E.2d at 34, 460 N.Y.S.2d at 486. Prior to the final inspection, the city inspector visited the work site on two separate occasions. *Id.* At no time did the inspector complain about the plumber's work. *Id.* The Court noted that a proper examination certainly would have revealed open-ended (uncapped) pipe, and the absence of a shut-off valve required by City regulations. *Id.* at 189, 447 N.E.2d at 34, 460 N.Y.S.2d at 486; *see* NEW YORK, N.Y., ADMIN. CODE ch. 26, RS-16, § P115.2(a) (1977 & Supp. 1982-1983) (shut-off valve or stopcock required on every gas service connection). There also was evidence that another gap may have existed in the piping where a new gas meter was to be installed. 58 N.Y.2d at 188, 447 N.E.2d at 34, 460 N.Y.S.2d at 486.

[76] 58 N.Y.2d at 188, 447 N.E.2d at 34, 460 N.Y.S.2d at 486. After a final inspection was conducted, the inspector informed the plumber that he had done a "good job." *Id.* The blue card, issued by an inspector from the Department of Buildings, stated: "[t]his is to certify that the Gas Pipes of premises known as 7-11 Ann Street in the Borough of Manhattan conform to the rules and regulations of this Department." *Id.*

[77] *Id.* at 189, 447 N.E.2d at 34, 460 N.Y.S.2d at 486. After presenting the blue card to Con Edison, the proprietor of the restaurant was informed that a final check of the gas system was necessary before gas service could begin. *Id.* The owner, anxious to open the restaurant for weekend business, however, made other arrangements to have the gas turned on. *Id.*

catastrophic explosion occurred.[78] The lower court, applying traditional concepts of tort liability, held the City liable for the inspector's negligence in improperly issuing the blue card.[79] The decision was affirmed by the Appellate Division, First Department.[80]

On appeal, a sharply divided Court of Appeals reversed the decision of the Appellate Division and dismissed the complaint as against the City of New York.[81] Writing for the majority,[82] Chief Judge Cooke conceded that the City's negligence was indisputable.[83] Nonetheless, the Court adhered to the well-established New York rule protecting municipalities from negligence liability absent a special relationship with the injured party.[84] The Court examined the underlying intention of the inspection regulations and concluded that they were primarily intended to benefit the general public.[85] Recognizing that the plaintiffs were not members of any

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[78] *Id.* Shortly after gas service resumed, a strong gas odor was detected, as gas poured from the open-ended pipe into the basement of the building. *Id.* Within a short time, the explosion ensued. *Id.* Minutes after the mid-afternoon explosion, the entire building was leveled and scores of unwary shoppers were left injured or dead. 103 Misc. 2d at 62, 425 N.Y.S.2d at 448. In addition, all commercial establishments within the building were obliterated. *Id.*

[79] *See* 103 Misc. 2d at 78, 425 N.Y.S.2d at 458. The trial court interpreted the State's waiver of sovereign immunity as imposing liability on municipalities for the torts of its employees, just as corporations and other employers are liable for their employees' torts. *Id.* at 68-69, 425 N.Y.S.2d at 452. In so doing, the court applied traditional concepts of tort liability, as set forth in the Restatement of Torts:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
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> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1977); *see* 103 Misc. 2d at 68-69, 425 N.Y.S.2d at 452.

[80] 81 App. Div. 2d 755, 438 N.Y.S.2d 661 (1st Dep't 1981). Although the imposition of liability was affirmed by the appellate division, the case was remanded for modification of the judgment on the issue of apportionment of damages. 57 App. Div. 2d at 540, 394 N.Y.S.2d at 7-8.

[81] 58 N.Y.2d at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

[82] Chief Judge Cooke wrote the majority opinion in which Judges Jones, Jasen and Simons concurred. Judges Fuchsberg and Meyer joined Judge Wachtler in his dissenting opinion.

[83] 58 N.Y.2d at 189, 447 N.E.2d at 34, 460 N.Y.S.2d at 486. The Court unequivocally acknowledged the inspector's negligence for issuing the blue card since the gas system was not in conformity with the applicable regulations. *Id.* Although presumably the Con Ed inspection could have prevented the explosion, the Court noted that this fact did not mitigate the inspector's negligence. *Id.*

[84] *Id.*, 447 N.E.2d at 34-35, 460 N.Y.S.2d at 486-87; *see supra* note 67.

[85] 58 N.Y.2d at 190, 447 N.E.2d at 35, 460 N.Y.S.2d at 487. In the Court's determina-

special class, and that municipal liability has never been extended to the general public, the Court declared the City immune from liability.[86]

In a cogent dissent, Judge Wachtler advocated the abolition of what he termed a "judicially created caste system" under which liability is determined on the basis of a plaintiff's status with respect to a specially protected class.[87] Since classification schemes work an unacceptable contravention of basic negligence principles,[88] Judge Wachtler reasoned that unfair and arbitrary outcomes inevitably result.[89] Indeed, the dissent contended that in accordance with the spirit of sovereign immunity, ordinary rules of tort liability should apply to governmental entities.[90] Finally,

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tion of the relationship between the municipality and the plaintiff, it examined and compared the facts at bar with prior case law, which had limited municipal liability for breach of a general statutory duty. *Id.* at 190-91, 447 N.E.2d at 35-36, 460 N.Y.S.2d at 487-88; *see* Sanchez v. Village of Liberty, 42 N.Y.2d 876, 878, 366 N.E.2d 870, 871, 397 N.Y.S.2d 782, 783 (1977) (regulations for multiple dwellings intended to benefit the public at large); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 137, 204 N.E.2d 635, 635-36, 256 N.Y.S.2d 595, 596 (1965) (fire captain's failure to enforce multiple residence law did not establish liability since the statute's intent is to benefit the general public); Steitz v. City of Beacon, 295 N.Y. 51, 55, 64 N.E.2d 704, 706 (1945) (city charter provisions requiring the establishment of a fire department are designed "to secure the benefits of well ordered municipal government enjoyed by all as members of the community"); *see also* Messineo v. City of Amsterdam, 17 N.Y.2d 523, 524-25, 215 N.E.2d 163, 163, 267 N.Y.S.2d 905, 905 (1966) (fire department's failure to extinguish fire does not constitute valid cause of action). *See generally* H.R. Moch Co. v.. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 899 (1928) ("liability would be unduly and . . . indefinitely extended"); Comment, *supra* note 68, at 1424 (courts and legislatures have acknowledged limits to the abolition of state and municipal immunity).

[86] The Court distinguished the case from the earlier decision of Smullen v. City of New York, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971), noting that the imposition of liability in that case resulted from the inspector's direct supervision of the defendant at the time the plaintiff was injured, *id.* at 72, 268 N.E.2d at 767, 320 N.Y.S.2d at 24. In conclusion, the Court likened the gas regulations to the building regulations in *Sanchez*, and determined that although designed in part to protect against personal injury and property damage, the paramount intention behind enactment of the regulations was to benefit all members of the general public. 58 N.Y.2d at 190, 447 N.E.2d at 35, 460 N.Y.S.2d at 487. Because this is an insufficent ground upon which to predicate liability, the Court accordingly reversed the decision. *Id.* at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

[87] 58 N.Y.2d at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488 (Wachtler, J., dissenting).

[88] *Id.* (Wachtler, J., dissenting).

[89] *Id.* (Wachtler, J., dissenting). The dissent asserted that the classification of plaintiffs has created an "indefensible exception" to the traditional concept of tort law that "a plaintiff is entitled to compensation when he has been injured by the defendant's failure to observe standards of reasonable care under the circumstances." *Id.* (Wachtler, J., dissenting).

[90] *Id.* at 194, 447 N.E.2d at 37, 460 N.Y.S.2d at 489 (Wachtler, J., dissenting). Judge Wachtler noted that, based upon similar concerns regarding incongruous results, the Court recently overruled the distinction between invitees, licensees and trespassers in suits against

Judge Wachtler refuted the majority's contention that application of traditional tort concepts would cause open-ended liability, arguing instead that municipalities, like corporations and individuals, should be liable for damages only upon a finding of negligence.[91]

Although comporting with New York precedent,[92] the *O'Connor* decision preserves the "special duty" standard which has been severely criticized for failure to redress innocent victims who lack the judicially defined special relationship.[93] In addition, the arbitrary manner in which the protected classes are defined impugns the logic and consistency of the "special duty" requirement.[94] Indeed, there is no principled way to reconcile the

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negligent landowners. *Id.* at 192-93, 447 N.E.2d at 36, 460 N.Y.S.2d at 488 (Wachtler, J., dissenting); *see* Basso v. Miller, 40 N.Y.2d 233, 240-41, 352 N.E.2d 868, 871-72, 386 N.Y.S.2d 564, 567-68 (1976).

[91] 58 N.Y.2d at 194-95, 447 N.E.2d at 38, 460 N.Y.S.2d at 489-90 (Wachtler, J., dissenting). Judge Wachtler noted several vigorous dissents by members of the Court which consistently asserted that the special duty rule acts as a peculiar exception to the waiver of immunity statute. *Id.* at 193-94, 447 N.E.2d at 37, 460 N.Y.S.2d at 489 (Wachtler, J., dissenting).

[92] *See Sanchez*, 42 N.Y.2d at 878, 366 N.E.2d at 871, 397 N.Y.S.2d at 783; *Motyka*, 15 N.Y.2d at 139, 204 N.E.2d at 637, 256 N.Y.S.2d at 598; *H.R. Moch*, 247 N.Y. at 168, 159 N.E. at 898-99; *supra* note 85.

[93] The special duty rule has been subjected to extensive criticism because it imposes on victims the financial burden of damages caused by the municipality's negligence. *See* Hopkins, *Municipal Tort Liability in Iowa*, 31 DRAKE L. REV. 855, 861 (1981-1982) ("[b]etter the taxpayer bear the financial burden of injury than the guiltless injured party"). This criticism is exemplified by the following comment:

> True democratic principles do not countenance the doctrine that it is better that an innocent individual should suffer a great injury without remedy than that the community at large should be subjected to the risk of slight inconvenience . . . . [T]he damage resulting from the wrongful act of the government should be distributed among the entire community . . . where it justly belongs . . . .

David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit*, 6 U.C.L.A. L. REV. 1, 3 (1959) (quoting 120 A.L.R. 1376, 1377 (1939)).

Moreover, the legislative intent behind section 8 of the Court of Claims Act has been interpreted to require that no wronged individual be forced to bear his loss alone. *See* Note, *Tort Liability of Municipal Corporations in New York*, 43 COLUM. L. REV. 84, 87 (1943). Thus, in light of this interpretation, it has been argued that the person or group whose performance caused the damage should assume the responsibility of making the victim whole. *See id.*; *cf.* Jackson v. State, 261 N.Y. 134, 138, 184 N.E. 735, 736 (1933) (discussing state's moral duty to recompense victims of the former's negligence).

[94] *See* 18 E. MCQUILLIN, *supra* note 66, § 53.04b, at 128. The special/public duty distinction has been attacked as illogical and inconsistent, and has been subjected to the same criticism that resulted from the abrogation of the government/proprietary distinction. *Id.*; *see, e.g.*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 135-36 (1924) (citing Young v. Metropolitan St. Ry., 126 Mo. App. 1, 103 S.W. 135 (1907)). One commentator, pointing to the lack of a justifiable basis for this exception to the waiver of immunity statute, has charged that New York courts are quick to find that no duty is owed to a particular

O'Connor holding with *Garrett v. Holiday Inns, Inc.*,[95] a decision rendered by the Court on the same day. In *Garrett*, actions were brought against the Town of Greece and others for damages arising out of a motel fire.[96] The complaint alleged that the town had failed to enforce certain safety and fire regulations applicable to the motel, and failed to conduct an adequate inspection of the building.[97] The appellate division held that since the plaintiff alleged only a violation of a general duty owed to the public, no liability could be imposed upon the town.[98] Notwithstanding this appraisal of the town's liability to the plaintiff, the *Garrett* Court declared that the remaining defendants could implead the Town of Greece for contribution, on the theory that the town had issued a certificate of occupancy improperly, and thus had breached its duty to the defendants by allowing alterations to the motel which did not comply with applicable regulations.[99] Affirming, the Court of Appeals allowed the impleader action, reasoning that the town had breached its duty to use reasonable care by issuing a certificate of occupancy after failing to discover fire and safety violations at the inspection.[100] The *Garrett* Court found the building owners

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plaintiff. Antieau, *supra* note 66, at 371. Professor Antieau has criticized the policy of differentiating among plaintiffs, stating that the courts are "luxuriating in nightmares [they have] no right to entertain once [they have] abdicated any responsibility for justly demarcating municipal responsibility in tort." *Id.* at 372.

[95] 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

[96] *Id.* at 256-57, 447 N.E.2d at 718-19, 460 N.Y.S.2d at 775-76. Among the named defendants were Holiday Inns, Inc., the corporation that built the motel, the Town of Greece, and the present and previous owners of the motel. *Id.*

[97] *See* Garrett v. Town of Greece, 78 App. Div. 2d 773, 773, 433 N.Y.S.2d 637, 637 (4th Dep't 1980), *aff'd mem.*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981).

[98] *Id.* at 774, 433 N.Y.S.2d at 637.

[99] 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. In determining that an impleader action may properly be maintained by Holiday Inns against the town, the Court of Appeals relied primarily on Nolechek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). In *Nolechek*, a child was killed while riding his motorcycle on the defendant's property. *Id.* at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343. A negligence suit was instituted against the landowner by the child's father predicated on the presence of a dangerous condition on the property, and the landowner counterclaimed, arguing that the father had negligently entrusted his child with a dangerous instrument. *Id.* at 335-36, 385 N.E.2d at 1270, 413 N.Y.S.2d at 342. The *Nolechek* Court held that although no direct action could be maintained by the son against the father, the landowner was not precluded from seeking contribution from him. *Id.* at 336, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343. Thus, the holding departed from the general tort principle that joint liability must be predicated on a duty owed directly to the plaintiff. *See id.* at 339-40, 385 N.E.2d at 1272-73, 413 N.Y.S.2d at 345.

[100] *Garrett*, 58 N.Y.2d at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79. To establish the town's liability to the motel owners, the *Garrett* Court posited that the town

to be among those benefited by the regulations, and thus held that the motel owners' reliance on the regulation was a proper basis on which to predicate the town's liability.[101]

While *Garrett* appears to establish a special duty owed by the City to a building owner, *O'Connor* creates no such relationship with the building's occupants.[102] It is evident that the *Garrett* decision contradicts the *O'Connor* determination that the inspection regulations are for the benefit of the general public.[103] It is suggested that the inclusion of owners and the exclusion of occupants within the protected class is a distinction which renders the general/special duty dichotomy sterile.

It is clear that the courts have employed the "special duty" standard as a vehicle for limiting municipal liability.[104] Notwith-

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has a duty to use reasonable care when issuing occupancy certificates after inspections. *Id.* By virtue of this duty, the Court held that the motel owners were justified in relying on the town's assessment of the building's safety. *Id.* The town's liability "may also properly include the economic damages [that the motel owners] may suffer as a result of judgment against them in favor of the motel guests." *Id.* at 262, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

[101] *Id.* at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79.

[102] *O'Connor*, 58 N.Y.2d at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488. The Court further disavowed the existence of the requisite special relationship between the city and the injured parties by concluding:

> [I]t has long been the rule in this State that, in the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation. No such special relationship exists here.

Id.

[103] *Compare Garrett*, 58 N.Y.2d 253, 262-63, 447 N.E.2d 717, 721-22, 460 N.Y.S.2d 774, 778-79 (1983) (recognizing a duty of reasonable care owed by a municipality to building owners issuing occupancy certificates) *with* O'Connor v. City of New York, 58 N.Y.2d 184, 192, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983) (denying existence of a duty owed to specific citizens by municipal building inspectors). The *O'Connor* rationale rests indisputably on the Court's determination that the inspection regulation is intended to benefit the general public, and not a special class of plaintiffs. *O'Connor*, 58 N.Y.2d at 190, 447 N.E.2d at 35, 460 N.Y.S.2d at 487. This distinction is the dispositive factor in establishing the existence of a special relationship between the litigants. *See supra* note 67. However, in establishing a relationship between the town and the motel owners, the *Garrett* Court expressly found that the regulations were intended to benefit the building owner. *See Garrett*, 58 N.Y.2d at 262, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79. Thus, the Court has rendered two different interpretations of similar regulations, which lend credence to the criticism that courts often mold facts into a formula that lacks a sound basis in reason or policy. *See* Borchard, *supra* note 94, at 129; *see also Garrett*, 58 N.Y.2d at 266, 447 N.E.2d at 724, 460 N.Y.S.2d at 781 (Jasen, J., dissenting in part).

[104] *See supra* note 67. An examination of case law indicates that when applying this standard, different determinations often result even in seemingly indistinguishable situations. *Compare* Runkel v. City of New York, 282 App. Div. 173, 178, 123 N.Y.S.2d 485, 490-91 (2d Dep't 1953) (per curiam) (city held liable) *and* Smullen v. City of New York, 28

standing this objective, however, and in accordance with *Garrett*, a successful impleader action will impose liability on the city to the full extent of its negligence.[105] Moreover, the practical result of *Garrett* is to afford plaintiffs an indirect cause of action against

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N.Y.2d 66, 70-73, 268 N.E.2d 763, 765-67, 320 N.Y.S.2d 19, 21-24 (city liable) (1971) *with* Sanchez v. Village of Liberty, 42 N.Y.2d 876, 877-78, 366 N.E.2d 870, 871, 397 N.Y.S.2d 782, 783 (1977) (village held not liable) *and* Whitney v. City of New York, 27 App. Div. 2d 528, 529, 275 N.Y.S.2d 783, 785 (1st Dep't 1966) (per curiam) (city held not liable).

In *Runkel*, an action was brought against the city and the owners of an abandoned building on behalf of children injured while playing in the building. 282 App. Div. at 174-75, 123 N.Y.S.2d at 487. Although the building had recently been inspected and found to be unsafe, no action was taken to remedy the dangerous condition. *Id.* at 175-76, 123 N.Y.S.2d at 487-88. Using the "special duty" analysis, the court held that the children were within the class intended to receive the protection of the inspection regulation. *Id.* at 177-78, 123 N.Y.S.2d at 490-91. Indeed, no mention of the city's duty to the owner was mentioned.

In *Smullen*, the decendent was killed while descending into an improperly shored trench. 28 N.Y.2d at 68, 268 N.E.2d at 764, 320 N.Y.S.2d at 20. A city inspector, who was present at the time, had assured the decedent that the trench was safe. *Id.* at 68-69, 268 N.E.2d at 764, 320 N.Y.S.2d at 20. The city was found liable for the inspector's negligence since regulations required the walls to be shored. *Id.* at 71-73, 268 N.E.2d at 766-67, 320 N.Y.S.2d at 23-25. Notably, the *Smullen* Court has been criticized for placing undue emphasis on the inspector's presence and approval as justifying liability. *See* Loyola Comment, *supra* note 68, at 476. It has been argued that the *Smullen* distinction is arbitrary and inappropriate, since an inspector's authorization implicitly represents that the building is free from the particular hazard. *Id.*

Sanchez involved an action against the city for failure to enforce certain fire and safety regulations. 49 App. Div. 2d 507, 508-09, 375 N.Y.S.2d 901, 903 (3d Dep't 1975), *modified*, 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977). As a result, many occupants of a motel were killed in a fire. *Id.* The Court of Appeals dismissed the action, holding that the applicable regulations were intended for the benefit of the general public. 42 N.Y.2d at 878, 366 N.E.2d at 871, 397 N.Y.S.2d at 783.

Finally, in *Whitney*, a wrongful death action was brought against the city for negligently failing to inspect a boiler which subsequently exploded. 27 App. Div. 2d at 529, 275 N.Y.S.2d at 784. The court dismissed the complaint, determining that the inspection regulation was enacted for "the benefit of the common good." *Id.* at 529, 275 N.Y.S.2d at 785.

It has been suggested that the outcomes in these cases were affected by the size of the potential liability. *See* Loyola Comment, *supra* note 68, at 475. For example, in *Runkel*, the building involved was not a public one, and the class of prospective litigants was small. *See id.* at 474. Similarly, in *Smullen*, liability was limited to only one plaintiff, and was conditioned on the facts peculiar to the case. *See id.* at 476. Finally, *Sanchez*, which involved a public motel, could easily subject a municipality to extensive liability, since the potential number of litigants could be quite high. *See id.* at 474. It is suggested that although *Whitney* involved a private building, the case was decided with extreme caution, because of the presence of boilers in most public buildings.

[105] *See* SIEGEL § 155, at 197-98 (1978). In an impleader action, the third-party is brought into the action by a claim instituted by the defendant. *Id.* If the third-party is assessed liability, such liability may properly encompass all or part of what the defendant may ultimately be responsible for in his action with the plaintiff. Therefore, if the city is found to be 99% liable, and the building owner satisfies the judgment in full, the city will be forced to compensate the owner to the extent of the city's percentage of liability.

the city if the owner is found even fractionally liable. Pursuant to *O'Connor*, however, if no liability is assessed against the building owner, plaintiffs will be completely precluded from recovery against the city.[106] It is submitted that no logical rationale can support this inequitable outcome. More importantly it is suggested that as concurrent decisions, *O'Connor* and *Garrett* have frustrated this area of the law and have rendered prospective liability unpredictable.

Although the courts consistently assert that abrogation of the special duty rule lies within the legislative domain, they should be mindful that the judiciary was the exponent of this rule. Indeed, it is hoped that the Court will exercise its rightful role and rectify the inconsistencies plaguing the law of municipal liability.

Jill A. Abramow

CRIMINAL PROCEDURE LAW

CPL § 270.25: Unrestricted use of peremptory challenges held constitutional if venire consists of a representative cross section of community

The peremptory challenge[107] enables litigants to remove pro-

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[106] Under *Garrett*, a plaintiff may bring a suit against the owner of a building or premises upon which the negligent event occurred. If that party is found liable to any degree he may properly implead the city and satisfy the plaintiff's judgment against him through contribution from the city. *See* SIEGEL § 169, at 209.

An important aspect of impleader actions is the outcome of the independent suit between the plaintiff and the original defendant. If no liability can be assessed against the defendant in the suit brought by the plaintiff, then the impleader action must fail irrespective of the third party's liability. With these principles in mind, the effect of *Garrett* may be summarized as follows. If the owner is found to be 1% liable, and the city 99% or any fraction thereof, the owner may implead the city for contribution and receive a percentage of the judgment. However, if the city is found to be 100% liable, no impleader action will lie because liability cannot be assessed against the owner. Thus, plaintiffs will be completely precluded from recovery.

[107] Challenges are available during jury selection to enable both prosecutors and defense counsel to screen out jurors who may be prejudiced against either position. J. VAN DYKE, JURY SELECTION PROCEDURES 139 (1977). Either party may use "challenges for cause" without limit to screen out openly biased jurors, provided the court is satisfied that the juror is biased. *Id.* at 140. "Peremptory challenges," however, since they are not subject to control by the court, may be utilized to screen out jurors for no apparent reason; that is, it is not necessary for the attorney to show any biases harbored by the juror. *Id.* at 139-40. Prosecutors enjoyed unlimited use of peremptory challenges at common law. *Id.* at 147. In 1305, the English Parliament curtailed the use of peremptory challenges by the Crown, but sustained