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Appellate Division, First Department, recognizes an exception to New York City's sovereign immunity

A municipality, generally, has no affirmative duty to provide police protection¹ absent a special relationship between it and the claimant.² Thus, the New York City Transit Authority ("TA"), absent such special relationship, generally may not be held liable for its failure to provide adequate police protection.³ This "immunity

¹ *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); see Gerald P. Krause, Comment, *Municipal Liability: The Failure to Provide Adequate Police Protection — The Special Duty Doctrine Should Be Discarded*, 1984 Wis. L. Rev. 499 (reviewing lack of municipal liability for failure to provide adequate police protection). The "purpose of the special duty rule [is] to rationally limit [the] class of citizens to whom the municipality owes [a] duty of protection." *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 258, 543 N.E.2d 443, 447, 544 N.Y.S.2d 995, 999 (1989).

² To establish the existence of a special relationship, the plaintiff must prove (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Cuffy v. City of New York, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987) (citations omitted). "The tort law analogy on which courts often rely is that government will be charged with an affirmative duty to act only when it has first placed an individual in a condition of helplessness or otherwise invited reliance on its protection." Susan Bandes, *The Negative Constitution: A Critique*, 88 Mich. L. Rev. 2271, 2293 (1990); see Joseph T. Bockrath, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection*, 46 A.L.R. 1084, 1091 (1972 & Supp. 1994) (recognizing exception to general rule of no liability where special relationship is established).

³ *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 433 N.E.2d 124, 448 N.Y.S.2d 141 (1982). In *Weiner*, the plaintiffs were assaulted in subway stations where there had been evidence of previous attacks. *Id.* at 179-80, 433 N.E.2d at 126, 448 N.Y.S.2d at 143. During the approximately six months prior to the plaintiffs' attacks, 13 separate incidents of robbery and assault occurred, eight of which were at knife point. *Id.* at 179, 433 N.E.2d at 126, 448 N.Y.S.2d at 143. Plaintiffs argued that the defendant was engaged in a proprietary function, similar to an owner of real property whose duty it is to protect the public from foreseeable harmful acts. *Id.* at 180, 433 N.E.2d at 126, 448 N.Y.S.2d at 143. The defendant maintained that it exercised a governmental function for which it is immune from liability absent the existence of a special relationship. *Id.* The *Weiner* court rejected the analysis of both litigants, and held that liability must be determined by:

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 or is in control of the location in which the injury occurred.

. . . rests upon the same considerations as the immunity of a municipality or other governmental body from liability for failure to provide adequate police protection."⁴ The amount of police protec-

Id. at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144 (citations omitted). The court then determined that the plaintiffs' injuries arose out of an activity governmental in nature: an allocation of police resources and a legislative-executive decision. *Id.* Accordingly, the plaintiffs could not recover.

Two years later, however, the court in *Miller v. State*, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829 (1984), applied the *Weiner* standard and held that the failure to keep a dormitory locked fell within the state's proprietary function as landlord. *Id.* The court then pronounced that "[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions." *Id.* at 511-12, 467 N.E.2d at 496, 478 N.Y.S.2d at 832. See Harry H. Lipsig, *Victims of Subway Crime and the Walls of Immunity*, N.Y. L.J., May 31, 1990, at 3 (discussing how *Weiner* "established boundaries of this policy-based governmental immunity").

Subsequent cases have utilized the test established in *Weiner* to determine the scope of a municipality's immunity. See *Kircher*, 74 N.Y.2d at 255-56, 543 N.E.2d at 445, 544 N.Y.S.2d at 997 (requiring special relationship between municipality and plaintiff before former may be held liable to latter for negligent exercise of governmental function as established in *Weiner*); *Cuffy*, 69 N.Y.2d at 260, 505 N.E.2d at 939, 513 N.Y.S.2d at 374 (citing *Weiner* as general rule governing municipal liability); *Crosland v. New York City Transit Auth.*, 68 N.Y.2d 165, 170, 498 N.E.2d 143, 145, 506 N.Y.S.2d 670, 672 (1986) (concluding TA's liability for negligence depends upon whether its act falls within scope of governmental immunity established in *Weiner*); *Miller*, 62 N.Y.2d at 513, 467 N.E.2d at 497, 478 N.Y.S.2d at 833 (stating court should apply *Weiner* when "the liability of a governmental entity is at issue"); *Bardavid v. New York City Transit Auth.*, 61 N.Y.2d 986, 987, 463 N.E.2d 1216, 1217, 475 N.Y.S.2d 364, 365 (1984) (quoting *Weiner* to support holding TA immune from liability absent special relationship between it and claimant); *Belle v. New York City Transit Auth.*, 157 Misc. 2d 76, 80, 595 N.Y.S.2d 856, 859 (Sup. Ct. N.Y. County 1993) (indicating that *Weiner* established standard under which municipality may be held liable where no special relationship exists); *Popplestone v. New York City Transit Auth.*, N.Y. L.J., Mar. 6, 1990, at 22, col. 5 (Sup. Ct. N.Y. County Mar. 5, 1990) (citing *Weiner* in suit against TA for TA's failure to provide adequate police protection).

⁴ *Weiner*, 55 N.Y.2d at 179, 433 N.E.2d at 125, 448 N.Y.S.2d at 142. Furthermore, "[t]hat a nongovernmental common carrier would be liable under the same factual circumstances is not determinative of the authority's liability." *Id.* at 178-79, 433 N.E.2d at 125, 448 N.Y.S.2d at 142. The TA performs a governmental function in carrying out its corporate purposes and is authorized to maintain a transit police force. N.Y. PUB. AUTH. LAW §§ 1202(2), 1204(16) (McKinney 1982).

The doctrine of sovereign immunity "preclud[es] the institution of a suit against the sovereign [government] without the sovereign's consent." BARRON'S LAW DICTIONARY 457 (3d ed. 1991). "[O]riginally based on the maxim 'the King can do no wrong,'" *id.*, the doctrine prevails today on the rationale that "[the] sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907); see Sharon J. Kronish, Comment, *Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act*, 1981 DUKE L.J. 116 (discussing historical and modern rationales for sovereign immunity doctrine). The immunity of the central government was extended to municipalities in the landmark case of *Russell v. Men of Devon*, 100 Eng. Rep. 359

tion a municipality should provide is a legislative-executive determination involving an allocation of a limited amount of resources.⁵ Municipalities would potentially be exposed to unlimited liability if the negligent failure to provide police protection gave rise to a cause of action.⁶ To prevent the anticipated explosion of municipal liability, a large majority of courts have typically construed the exception narrowly,⁷ and denied recovery, concluding that no such relationship existed between the TA and the victim.⁸ In a few instances, however, courts have held the municipality liable

(K.B. 1788). The court concluded that it is "better that an individual should sustain an injury than that the public should suffer an inconvenience." *Id.* at 362.

⁵ *Riss*, 22 N.Y.2d at 581-82, 240 N.E.2d at 860-61, 293 N.Y.S.2d at 898. "[A] municipality cannot be held liable solely for its failure to provide adequate public services. The extent of public services afforded by a municipality is . . . limited by the resources of the community. Deployment of these resources remains, as it must, a legislative-executive decision . . ." *Florence v. Goldberg*, 44 N.Y.2d 189, 197-98, 375 N.E.2d 763, 767-68, 404 N.Y.S.2d 583, 588 (1978); see *Krause*, *supra* note 1, at 501-04 (discussing public policy arguments against permitting individuals to maintain claims against municipalities for their failure to provide adequate police protection).

⁶ *Riss*, 22 N.Y.2d at 581-82, 240 N.E.2d at 861, 293 N.Y.S.2d at 898-99; see *Bockrath*, *supra* note 2. The courts established a rule of municipality immunity, fearing that a contrary rule would result in a "staggering potential liability." *Id.* at 1088 (quoting *Massengill v. Yuma County*, 456 P.2d 376 (Ariz. 1969)). Statutes imposing a police duty to protect citizens are not generally enforceable by individual citizens. *Id.* at 1091. "Neglect in the performance of [police] requirements creates no civil liability to individuals." *Id.* (citing *King v. New York*, 3 Misc. 2d 241, 245, 152 N.Y.S.2d 110, 114 (Sup. Ct. Kings County 1956)).

This doctrine, also known as the public duty rule, dictates that the government owes a duty to the public at large, rather than to specific individuals. See *Riss*, 22 N.Y.2d at 585, 240 N.E.2d at 862, 293 N.Y.S.2d at 901 (Keating, J., dissenting) (summarizing city's logic for immunity as: "Because we owe a duty to everybody, we owe it to nobody."). This rule is based on the principle that a duty owed to the general public should be enforceable only at the polls, not in the courts. *Bandes*, *supra* note 2, at 2328; cf. *Elizabeth Kunderling Hocking, Federal Facility Violations of the Resource Conservation and Recovery Act and the Questionable Role of Sovereign Immunity*, 5 ADMIN. L.J. 203 (1991) (comparing conflicting policies concerning use of sovereign immunity to protect public treasury); *Krause*, *supra* note 1, at 499 (arguing that special duty doctrine has historically been applied to limit liability and that doctrine should be discarded and replaced by ordinary tort principles) (authored by former police officer).

⁷ See *Cuffy*, 69 N.Y.2d at 260, 505 N.E.2d at 940, 513 N.Y.S.2d at 375 (indicating that existence of requisite special relationship is rarely found); *Bardavid v. New York City Transit Auth.*, 61 N.Y.2d 986, 463 N.E.2d 1216, 475 N.Y.S.2d 364 (1984) (holding that failure of electric sign normally used to instruct passengers to remain on public thoroughfare until elevator arrives does not create special relationship). *But see Bockrath*, *supra* note 2, at 1091-94 (providing examples of relationships that fall within ambit of recognized exception to statutory immunity); see also *infra* note 10 (citing examples of governmental-proprietor distinction).

⁸ See *Bockrath*, *supra* note 2, at 1091-94 (listing examples of cases applying exception).

for the assault of a passenger, despite the absence of a special relationship between the parties.⁹ In such cases, the claimants successfully established that the municipality's act was of a proprietary, rather than governmental, nature, thereby prohibiting the assertion of the immunity defense.¹⁰ This distinction, however,

⁹ See, e.g., *Belle v. New York City Transit Auth.*, 157 Misc. 2d 76, 595 N.Y.S.2d 856 (Sup. Ct. N.Y. County 1993) (holding Metropolitan Transportation Authority liable for criminal assault of passenger by third person despite absence of special relationship between parties).

¹⁰ See Lipsig, *supra* note 3, at 3. Dissatisfied with the "inequitable effects of sovereign immunity, [the judiciary] created exceptions to the general immunity rule . . . which permitted the imposition of tort liability for failure of a municipality adequately to perform its 'proprietary' functions." Krause, *supra* note 1, at 504; see also Laraine Pacheco, Comment, *The New York State Court of Appeals Flunks the Governmental-Proprietary Immunity Test in Denying Recovery to Teachers in Marilyn S. v. City of New York and Bonner v. City of New York*, 56 BROOK. L. REV. 265, 266 n.6 (1990) ("A municipality is immune from tort liability when exercising a governmental function, but subject to the same degree of liability as a private corporation . . . when engaged in proprietary functions."). Historically, functions which could only be performed by a municipality were denoted governmental functions, while activities that could be performed by either a private corporation or the municipality were classified as proprietary functions. See *Lloyd v. City of New York*, 5 N.Y. 369 (1851). "The governmental-proprietary distinction owe[s] its existence to the dual nature of the municipal corporation." *Owens v. City of Independence*, 445 U.S. 622, 644 (1980).

The first municipal tort liability case to distinguish between a public entity's exercise of governmental and proprietary functions was *Bailey v. Mayor of New York*, 3 Hill 531 (N.Y. 1842), which held the city liable for its negligent construction of a dam, categorizing it as a proprietary function. For a detailed account of the municipal corporation law, see generally HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 (1983). A different rule of general liability for negligence is applied when the enterprise acts for its own corporate benefit. *Owens*, 445 U.S. at 645 n.27; *Popplestone v. New York City Transit Auth.*, N.Y. L.J., Mar. 6, 1990, at 22, col. 5 (Sup. Ct. N.Y. County Mar. 5, 1990). In *Popplestone*, the court found that the TA was acting in its proprietary capacity when it locked an exit gate that led to the street from the subway platform stairway, causing the plaintiff to be trapped in the exit. *Id.* Thus, the TA was not shielded from immunity under the governmental immunity doctrine. *Id.*; see also *Belle*, 157 Misc. 2d at 81, 595 N.Y.S.2d at 859-60 (holding TA liable for assault of passenger by third person, absent special relationship, because TA's failure to lock subway gate leading to inoperable entrance involved proprietary function). These cases successfully distinguished a public entity's act as occurring in a proprietary capacity rather than in a governmental capacity.

When advanced, however, the governmental-proprietary distinction has seldom prevailed because the scope of governmental action entitled to immunity has often been interpreted broadly. See *Lennon v. Long Island R.R.*, N.Y. L.J., Mar. 5, 1993, at 31, col. 1 (Sup. Ct. Queens County Mar. 5, 1993) (finding that lapses of proper maintenance implicates governmental function); see also *Bonner v. City of New York*, 73 N.Y.2d 930, 536 N.E.2d 1147, 539 N.Y.S.2d 728 (1989) (concluding duty to repair broken gate and provide adequate levels of security in schoolyard is governmental function); *Rivera v. New York City Transit Auth.*, 184 A.D.2d 417, 585 N.Y.S.2d 367 (1st Dep't 1992) (holding duty to provide proper lighting does not involve proprietary func-

has been widely criticized for lacking a feasible standard to use in classifying municipal functions into either unprotected or immune activities.¹¹

Recently, in *Clinger v. New York City Transit Authority*,¹² the Appellate Division, First Department, held that the TA may be found liable for the assault of a passenger by a third party, despite the absence of a special relationship between it and the claimant.¹³ The court concluded that summary judgment is inappropriate when the claimant has shown that the TA's negligence was a substantial cause of the events which resulted in injury.¹⁴ Applying the governmental-proprietary distinction, Justice Tom, writing for the court, ruled that the trial court erred in granting summary judgment in favor of the TA, because a governmental entity may be held liable in negligence if it affirmatively facilitates the commission of a crime while acting in its proprietary capacity.¹⁵ In *Clinger*, despite knowing that an attack was likely to occur, the TA negligently positioned construction material in the tunnel connecting the PATH station in a manner that invited and facilitated the assault of a passenger.¹⁶ While walking through the six-block

tion); *Calero v. New York City Transit Auth.*, 168 A.D.2d 659, 563 N.Y.S.2d 109 (2d Dep't 1990), *appeal denied*, 78 N.Y.2d 864, 586 N.E.2d 61, 578 N.Y.S.2d 878 (1991) (determining TA's duty to lock subway platform gate did not comprise proprietary function).

¹¹ Thus, "[i]n a period marked by a constant expansion of governmental activities . . . it is perhaps too much to expect that the judicial pronouncements marking the boundaries of state immunity should present a completely logical pattern." *Helvering v. Gerhardt*, 304 U.S. 405, 419 (1938); see Ruth Cook, Comment, *Postscript: Tracing the Governmental Proprietary Test*, 53 U. CIN. L. REV. 561, 584 (1984) (reviewing status of governmental-proprietary system of classification and indicating courts' reluctance to abandon test despite criticism of standard); see also Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (discussing what legal distinction must be possessed to be successful); Elizabeth Mensch, *Hartog's New York and the Ideology of Public and Private*, 1986 WIS. L. REV. 571, 578 (book review) ("It has now become relatively commonplace to demonstrate the incoherence of the distinction between public and private . . . [it] is like beating a dead horse.").

¹² 201 A.D.2d 236, 615 N.Y.S.2d 369 (1st Dep't), *leave to appeal granted*, 208 A.D.2d 1182, 618 N.Y.S.2d 526 (1st Dep't 1994).

¹³ *Id.*

¹⁴ *Id.* at 240, 615 N.Y.S.2d at 372.

¹⁵ *Id.* at 239-40, 615 N.Y.S.2d at 371; see *Popplestone v. New York City Transit Auth.*, N.Y. L.J., Mar. 6, 1990, at 22, col. 5 (Sup. Ct. N.Y. County Mar. 5, 1990) (finding that "allegation of an affirmative act of negligence states a viable cause of action" because, as enunciated in *Weiner*, creating dangerous condition is proprietary act beyond scope of immunity).

¹⁶ *Clinger v. New York City Transit Auth.*, 201 A.D.2d at 238, 615 N.Y.S.2d at 371. The plaintiff initially alleged that the TA failed to maintain proper security, per-

long pedestrian tunnel leading to the subway station, the claimant was grabbed from behind by an unknown male assailant and dragged into seclusion behind a large metal plate positioned vertically against the tunnel wall.¹⁷ At the height of rush hour, the plaintiff was robbed, brutally raped, and beaten behind the plate which shielded the attack from the view of passersby.¹⁸ Consequently, the claimant sued the TA claiming it negligently stored the construction material in an area of the tunnel that was known as a location of continuous, violent criminal activity.¹⁹ The court held that "[t]he [TA's] act of placing the construction material, debris and the metal plate at the site of the attack was purely a routine act integrally related to the renovation project undertaken by the Authority in the capacity of a proprietary function."²⁰

The First Department implicitly refused to extend the TA's grant of governmental immunity to a situation in which the TA, acting in its proprietary capacity, affirmatively facilitated an assault on a passenger.²¹ In this instance, although the TA generally engaged in governmental activity, the plaintiff's injury arose

mitted or allowed dangerous persons to use the Sixth Avenue Tunnel, and neglected to take the appropriate measures to protect passengers. *Id.* She later explained her allegations in a bill of particulars, asserting that the TA, by storing the construction materials in such a manner, affirmatively created a dangerous condition which allowed her to be assaulted without detection. *Id.*; see *infra* note 19 (discussing history of criminal activity in tunnel).

¹⁷ *Clinger*, 201 A.D.2d at 237, 615 N.Y.S.2d at 370. While undertaking renovations, the TA stored construction materials, including the vertically positioned metal plate, in this secluded passageway. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 238, 615 N.Y.S.2d at 370. There had been over 30 felonies, including two rapes, committed in that same tunnel during the year prior to the claimant's attack. *Id.* In fact, the Transit Police recommended closing the tunnel immediately after the two rapes occurred, but the TA neglected to act upon this recommendation. *Id.*

²⁰ *Id.* at 239, 615 N.Y.S.2d at 371; cf. *Miller v. State*, 62 N.Y.2d 506, 467 N.E.2d 493, 478 N.Y.S.2d 829 (1984) (noting difficulty delineating municipality's function as governmental or proprietary).

²¹ *Clinger*, 201 A.D.2d at 239, 615 N.Y.S.2d at 371. See generally *Cook*, *supra* note 11, at 561 (noting that court decisions have "advocated a policy of judicial noninterference with the traditionally accepted role of local government and imposed liability only when it was perceived that the local government had entered the private sector sphere of activity"). The critical issue in determining whether a municipality is immune is whether the injury occurs while it is acting in a governmental or proprietary capacity. *Owen v. City of Independence*, 445 U.S. 622, 644-48 (1980). Absent a statutory waiver, a municipality is immune from suit for its exercise of a governmental function, but is held to the same standard of liability as a private entity for its proprietary acts. *Id.* at 644-45.

out of its performance of a proprietary function.²² Proprietary acts are not immune from liability because they do not involve a legislative-executive function:

It is 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 which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred.²³

The TA's "control, maintenance and repair of [its] premises" involved proprietary functions and thus were not subject to governmental immunity.²⁴ Justice Sullivan, in his dissenting opinion, argued that, absent a special relationship, there is no such rule stripping the TA of its immunity when it acts in a proprietary rather than a governmental capacity.²⁵ It is submitted, however, that the First Department was correct in holding that the TA may be found liable for the attack on plaintiff because "*Weiner v. Metropolitan Transportation Authority*] did not . . . absolve publicly owned common carriers from liability for assaults on their passengers by third parties in all cases."²⁶ Rather, *Weiner* held that the scope of the TA's immunity from liability rests upon consideration of both the specific act or omission allegedly giving rise to the injury and the capacity in which the act or failure to act occurred.²⁷

²² *Clinger*, 201 A.D.2d at 239, 615 N.Y.S.2d at 371. A critical factor in determining municipal liability appears to be whether the injury occurred during the municipality's exercise of a governmental or a proprietary act. See Bockrath, *supra* note 2, at 1088.

²³ *Weiner v. Metropolitan Transp. Auth.*, 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 144 (1982) (citations omitted).

²⁴ *Clinger*, 201 A.D.2d at 239, 615 N.Y.S.2d at 371. The court's determination that the TA's maintenance and repair of the subway comprised a proprietary act is consistent with prior case law. See, e.g., Krause, *supra* note 1, at 505 (labelling construction and maintenance of municipal water and light plants as proprietary acts).

²⁵ *Clinger*, 201 A.D.2d at 243, 615 N.Y.S.2d at 373 (Sullivan, J., dissenting). Justice Sullivan maintained that, in the absence of a special relationship, the TA is immune for its failure to provide adequate police protection. *Id.* He further stated that "[i]n any event, [Clinger's] 'premises defect' claim is no more than an argument that the passageway would have been a much safer place had there been no construction material . . . [which] is, in effect, . . . [a] disguised police protection argument." *Id.* Ultimately, he contended the argument "fails on the issue of proximate cause as being too speculative as a matter of law." *Id.*

²⁶ *Crosland v. New York City Transit Auth.*, 68 N.Y.2d 165, 169, 498 N.E.2d 143, 145, 506 N.Y.S.2d 670, 672 (1986).

²⁷ *Weiner*, 55 N.Y.2d at 182, 433 N.E.2d at 127, 448 N.Y.S.2d at 144. Distinguishing an act as either a proprietary or governmental act is far from a simple task. See *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (classifying governmental-proprietary distinction as "a quagmire that has long plagued the law"); Janice C. Grif-

Although "the allocation of police resources implicates a governmental function for which a publicly owned carrier cannot be liable,"²⁸ the plaintiff in *Clinger* alleged claims arising out of an act other than the mere failure to allocate police resources²⁹ — the TA's affirmative negligent act of positioning the metal plate in the tunnel in such a manner that facilitated the commission of a crime, despite knowing that one was virtually certain to occur.³⁰ Affirmative acts of negligence have been held to be beyond the scope of *Weiner* and, thus, not protected by governmental immunity.³¹ Since the TA created an unreasonable risk of harm to its passengers,³² it may be held liable for any natural and foreseeable consequences of the dangerous condition it created.³³

When a municipal defendant acts in a proprietary capacity as landlord, it may be held liable for injuries resulting from its negligence.³⁴ Similarly, as a landowner, the TA had a duty to "maintain[] [its] property in a reasonably safe condition in view of all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."³⁵ Although the public may derive a common benefit from the TA's

fith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990) (bisecting governmental-proprietary test); see also Cook, *supra* note 11 (discussing incoherence of distinction between entity's governmental and proprietary functions); Krause, *supra* note 1, at 505-06 (arguing governmental-proprietary test often results in "artificial and inconsistent judicial distinctions"); cf. *In re County of Monroe's Compliance*, 72 N.Y.2d 338, 341, 530 N.E.2d 202, 203, 533 N.Y.S.2d 702, 703 (1988) (declining to use governmental-proprietary test in land use cases in favor of "balancing of public interests").

²⁸ *Crosland*, 68 N.Y.2d at 169, 498 N.E.2d at 144, 506 N.Y.S.2d at 672.

²⁹ See *supra* notes 16-19 and accompanying text (discussing plaintiff's allegations).

³⁰ *Clinger*, 201 A.D.2d at 240, 615 N.Y.S.2d at 371.

³¹ See *Popplestone v. New York Transit Auth.*, N.Y. L.J., Mar. 6, 1990, at 22, col. 5 (Sup. Ct. N.Y. County Mar. 5, 1990) (finding that affirmative act of negligence, such as creating dangerous condition, is proprietary act beyond scope of *Weiner* immunity); see also *Belle v. New York City Transit Auth.*, 157 Misc. 2d 76, 595 N.Y.S.2d 856 (Sup. Ct. N.Y. County 1993) (holding TA liable for affirmative negligent act of misrepresenting closed subway entrance as open because it facilitated attack on plaintiff).

³² *Clinger*, 201 A.D.2d at 240, 615 N.Y.S.2d at 371.

³³ *Id.*; see also *Kush v. City of Buffalo*, 59 N.Y.2d 26, 33, 449 N.E.2d 725, 729, 462 N.Y.S.2d 831, 835, (1983) (holding defendant liable if intervening act by third party is natural foreseeable consequence of defendant's negligent act).

³⁴ *Miller v. State*, 62 N.Y.2d 506, 511, 467 N.E.2d 493, 496, 478 N.Y.S.2d 829, 832 (1984).

³⁵ *Basso v. Miller*, 40 N.Y.2d 233, 241, 352 N.E.2d 868, 872, 386 N.Y.S.2d 564, 568 (1976) (quoting *Smith v. Arbaugh's Restaurant*, 469 F.2d 97, 100 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973)).

renovation work, the construction may be classified as a proprietary act since "[a] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions."³⁶ *Clinger* correctly found that the TA's acts did not involve a governmental function because there was no sophisticated policy decision involved in the allocation of limited resources. Instead, the TA's specific affirmative act clearly fell on the proprietary end of the continuum.

It is asserted that although the *Clinger* court appropriately found that the TA's "control, maintenance and repair of [its] premises"³⁷ involved a proprietary function, it failed to delineate what made these acts "proprietary."³⁸ Instead, the court merely stated that "[p]roprietary functions would include the control, maintenance and repair of the premises of the Authority in its capacity as owner."³⁹ It should have elaborated. Although judicial approval of the plaintiff's right to redress for injuries incurred as a result of municipal misconduct is commendable, *Clinger* will probably provide little assistance to the practitioner since it is quite likely the holding, if upheld on appeal,⁴⁰ will be confined to the specific facts of the case. One possible solution, as advocated by many critics of the governmental-proprietary test, is the implementation of uniform legislation in the area of municipal liability.⁴¹ Such legislative action could equalize the inequities that plague this area of the law while addressing conflicting public pol-

³⁶ *Miller v. State*, 62 N.Y.2d at 511-12, 467 N.E.2d at 496, 478 N.Y.S.2d at 832 (holding municipal defendant liable in its capacity as landlord because its failure to keep dormitory door locked was proprietary function).

³⁷ *Clinger*, 201 A.D.2d at 240, 615 N.Y.S.2d at 371.

³⁸ The court merely states that the distinction is "relevant to liability for negligence claims," without indicating why it classifies the TA's act as a proprietary function. *Id.* at 239, 615 N.Y.S.2d at 371. Since the Appellate Division, First Department, was merely revising an order for summary judgment, it should have provided the trial court with more guidance.

³⁹ *Id.*

⁴⁰ The New York Court of Appeals granted the TA leave to appeal the First Department's opinion. *Clinger v. New York City Transit Auth.*, 208 A.D.2d 1182, 618 N.Y.S.2d 526 (1994).

⁴¹ See *Cook*, *supra* note 11, at 584 (suggesting proposed legislation in area of municipal liability evidences progress towards resolution of blurred governmental-proprietary standard); *Pacheco*, *supra* note 10, at 269 (advocating reformulation and clarification of legal standard used in determining when governmental immunity rule may be invoked).

icies in determining whether an act is "governmental" or "proprietary."

Pamela McCormack

Editor's Note: Before this issue went to print, the New York Court of Appeals in Clinger v. New York City Transit Authority, N.Y. L.J., May 5, 1995, at 28, col. 3 (May 4, 1995) (mem.), reversed the First Department's holding and granted summary judgment for the Transit Authority. The court found the TA's act to be predominantly governmental, and stated that the plaintiff failed to establish that the location of the metal plate, rather than inadequate police protection, was the proximate cause of her injuries.