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VALDEZ V. CITY OF NEW YORK: THE "DEATH KNELL" OF MUNICIPAL TORT LIABILITY?

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INTRODUCTION

In 1929, the State of New York purportedly waived its right to sovereign immunity from tort liability.[1] But, in 2011, the New York State Court of Appeals handed down a ruling that essentially "tolls the death knell" for tort actions brought against a municipality by an individual.[2] Despite the passionate criticism that the decision has elicited, the judiciary has been incapable of either remedying or reducing the decision's impact on this area of law.

Carmen Valdez, a mother of two young sons, had obtained an order of protection against her abusive ex-boyfriend, Felix Perez.[3] A week after taking out the order of protection, Ms. Valdez received a telephone call from Perez, in which he threatened to kill her.[4] Although this was by no means the first threat that Ms. Valdez had received from Perez, this escalation of hostility prompted her to leave her apartment with her sons in order to seek safety at her grandmother's house.[5] Ms. Valdez stopped at a pay phone to contact the Domestic Violence Unit at her local police precinct, where she had filed for the order of protection, in order to alert the unit to this latest threat by Perez.[6] Officer

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[1] N.Y. CT. CL. ACT § 8 (McKinney 2015).

[2] Valdez v. City of New York, 18 N.Y.3d 69, 92, 960 N.E.2d 356, 373, 936 N.Y.S.2d 587, 604 (2011) (Lippman, C.J., dissenting).

[3] *Id.* at 72, 960 N.E.2d at 359, 936 N.Y.S.2d at 590 (majority opinion).

[4] *Id.*

[5] *Id.* at 72–73, 960 N.E.2d at 359, 936 N.Y.S.2d at 590.

[6] *Id.* at 73, 960 N.E.2d at 359, 936 N.Y.S.2d at 590.

Torres told Ms. Valdez to return to her apartment because Perez would be arrested "immediately."[7] Relying upon Officer Torres's promise, she returned to her apartment with her sons.[8] The next evening, while operating under the mistaken belief that the Domestic Violence Unit completed the promised arrest, Ms. Valdez took out the garbage.[9] Unbeknownst to her, Perez lay in wait outside of her door.[10] As Ms. Valdez's children watched helplessly, Perez shot their mother in her face and arm before taking his own life.[11]

In Ms. Valdez's negligence suit against the City of New York, the jury found in her favor,[12] but the Court of Appeals ruled that her reliance on Officer Torres's promise was not "justifiable."[13] The court stressed that Perez first had to be located before the promise to arrest him could be fulfilled and that the Domestic Violence Unit had not confirmed an arrest at the time of the attack.[14] The court thus concluded that she had not been provided any reason to "relax her vigilance indefinitely."[15] The court stated:

> Although, in a colloquial sense, we should be able to depend on the police to do what they say they are going to do[,] . . . it does not follow that a plaintiff injured by a third party is always entitled to pursue a claim against a municipality in every situation where the police fall short of that aspiration.[16]

This Note contends that the Court of Appeals erred in narrowing the scope of municipal tort liability in *Valdez*. Focus is on the Court of Appeals' affirmation of its regressive analysis in *McLean v. City of New York*[17] and mistaken reliance upon its earlier decision in *Cuffy v. City of New York*.[18] To illustrate the

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[7] *Id.* (internal quotation marks omitted).

[8] *Id.* at 73, 960 N.E.2d at 360, 936 N.Y.S.2d at 591.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Valdez v. City of New York, No. 16507/1997, 21 Misc. 3d 1107(A), 2008 WL 4489934, at *6 (Sup. Ct. Bronx Cnty. Mar. 12, 2008), *rev'd*, 74 A.D.3d 76, 901 N.Y.S.2d 166 (1st Dep't 2010), *aff'd*, 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587.

[13] *Valdez*, 18 N.Y.3d at 81–82, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.

[14] *Id.*

[15] *Id.* at 81, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.

[16] *Id.* at 84, 960 N.E.2d at 368, 936 N.Y.S.2d at 599.

[17] 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009).

[18] 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

Court of Appeals' unwavering adherence to *Valdez*, this Note examines the court's decisions in *Metz v. State*[19] and *Coleson v. City of New York*.[20] Part I discusses the history and purpose of sovereign immunity from tort liability, New York's waiver thereof, and court-imposed limitations upon that waiver. Part II examines *Valdez* and the lasting repercussions of the decision on the area of municipal tort liability. Part III suggests the necessity of legislative action, through which the injustice perpetuated by the Court of Appeals can be comprehensively rectified.

I. HISTORY AND PURPOSE

A. History and Purpose of Sovereign Immunity from Liability and New York's Waiver

The concept of sovereign immunity can best be described as a vestige of early common law, with roots in an era in which it was firmly believed that "the King c[ould] do no wrong."[21] The rationale for maintaining sovereign immunity in the modern era, however, is "the principle which holds that it is better for the individual to suffer than for the public to be inconvenienced."[22] The right of each state to raise the defense of sovereign immunity is preserved by the Eleventh Amendment to the United States Constitution.[23] Despite the broad grant of immunity contained within the Constitution, each state retains the right to "assert, waive, or condition [its immunity from suit] at will."[24] If a state chooses to waive its immunity from liability, such waiver "must be clearly expressed."[25]

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[19] 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).

[20] 24 N.Y.3d 476, 24 N.E.3d 1074, 999 N.Y.S.2d 810 (2014).

[21] Brown v. State, 89 N.Y.2d 172, 179, 674 N.E.2d 1129, 1133, 652 N.Y.S.2d 223, 227 (1996); *see also* Evans v. Berry, 262 N.Y. 61, 68, 186 N.E. 203, 205 (1933) (citing Augustine v. Town of Brant, 249 N.Y. 198, 204, 163 N.E. 732, 734 (1928); Maxmilian v. Mayor of New York, 62 N.Y. 160, 164 (1875)).

[22] 62 N.Y. JUR.2D *Government Tort Liability* § 1 (2010).

[23] The pertinent text reads, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." U.S. CONST. amend. XI.

[24] Easley v. N.Y. State Thruway Auth., 1 N.Y.2d 374, 376, 135 N.E.2d 572, 573, 153 N.Y.S.2d 28, 29 (1956) (citing Brown v. Bd. of Trs., 303 N.Y. 484, 489, 104 N.E.2d 866, 868 (1952)).

[25] Maloney v. State, 3 N.Y.2d 356, 359, 144 N.E.2d 364, 365, 165 N.Y.S.2d 465, 467 (1957) (citing Goldstein v. State, 281 N.Y. 396, 403, 24 N.E.2d 97, 100 (1939);

The State of New York "clearly expressed"[26] its waiver of sovereign immunity in the Court of Claims Act.[27] Through the Act, the State waived immunity from liability and consented to have its liability "determined in accordance with the same rules of law as appl[y] to actions in the supreme court against individuals or corporations."[28] Following the enactment of the Act, the Court of Appeals proclaimed that the State would no longer "use the mantle of sovereignty to protect itself from such consequences as follow negligent acts of individuals."[29] The court did not view this waiver by the State as an act of magnanimity, but, rather, as "a recognition and acknowledgment of a moral duty demanded by the principles of equity and justice."[30]

B. Court-Imposed Limitations on New York's Waiver of Sovereign Immunity

Limitations have accompanied New York's waiver of immunity since it was first declared in the Court of Claims Act. An initial limitation is contained within the language of the Court of Claims Act itself, in which waiver is conditioned on the claimant's compliance "with the limitations of this article."[31] However, additional limitations have come from the judiciary. The Court of Appeals' rationale for imposing immunity where the legislature ostensibly has waived it derives, to a great extent, from the court's fear of imposing "potentially limitless liability" upon the State and thereby depleting state treasury funds through tort litigation.[32] This Note focuses on two critical limitations: the distinction between a public duty, where there can be no liability, and a private undertaking, where there may

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Smith v. State, 227 N.Y. 405, 410, 125 N.E. 841, 842 (1920), *superseded by statute*, N.Y. CT. CL. ACT § 8 (McKinney 2015)).

[26] *Id.* at 359, 144 N.E.2d at 365, 165 N.Y.S.2d at 467.

[27] N.Y. CT. CL. ACT § 8.

[28] *Id.*

[29] Jackson v. State, 261 N.Y. 134, 138, 184 N.E. 735, 736 (1933).

[30] *Id.* at 138, 184 N.E. at 736.

[31] N.Y. CT. CL. ACT § 8. For example, section 9 of the Act provides that actions against the State must be brought in the Court of Claims and section 12 makes clear that actions brought in the Court of Claims are to be tried without a jury. *See id.* §§ 9, 12. *See generally id.* §§ 8-A–12 (detailing limitations upon the State's waiver).

[32] Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 233, 750 N.E.2d 1055, 1061, 727 N.Y.S.2d 7, 13 (2001).

be liability, and the distinction between acts that are discretionary, where there can be no liability, and acts that are ministerial, where there may be liability.

1. Public Duty or Private Undertaking?

One of the earliest court-imposed limitations upon the waiver of sovereign immunity consists of the distinction between a public duty and a private undertaking.[33] The Court of Appeals ruled on the basis of this distinction as early as 1945, in *Steitz v. City of Beacon*.[34] In *Steitz*, a flow control valve located near the plaintiffs' property, which the City of Beacon had neglected to keep in good repair, failed to supply an adequate amount of water pressure to extinguish a fire on the property.[35] The plaintiffs sought to hold the city liable for damages to their property based on section 24 of the city's charter, which stated that the city would "construct and operate a system of waterworks" and "maintain fire . . . departments."[36] Rather than holding the city liable, the Court of Appeals instead distinguished between the public duties that the city had undertaken through its charter and any duty allegedly owed to the plaintiffs in an individual capacity.[37] Because the city's charter created only a public duty to maintain a fire department, the court did not hold the city liable for damages suffered by the plaintiffs.[38]

Although the line drawn by the Court of Appeals between public duty and private undertaking produced criticism and inequitable results for the negligently injured plaintiff,[39] the court reaffirmed the distinction in *O'Connor v. City of New*

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[33] *See generally* Stewart F. Hancock, Jr., *Municipal Liability Through a Judge's Eyes*, 44 SYRACUSE L. REV. 925 (1993) (discussing the origin and development of the distinction).

[34] 295 N.Y. 51, 64 N.E.2d 704 (1945).

[35] *Id.* at 54, 64 N.E.2d at 705.

[36] *Id.*

[37] *Id.* at 55, 64 N.E.2d at 706.

[38] *Id.* at 57, 64 N.E.2d at 707.

[39] *See, e.g.*, 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) (holding that the city was not liable for serious injuries suffered by the plaintiff following the police department's refusal to protect her from a rejected suitor); Motyka v. City of Amsterdam, 15 N.Y.2d 134, 141, 204 N.E.2d 635, 638, 256 N.Y.S.2d 595, 600 (1965) (Desmond, C.J., dissenting) ("[M]unicipal nonliability for injury-causing breaches of duty is archaic and unjust.").

York.[40] There, a city inspector's negligent failure to observe defects in a newly installed gas system, or to insist upon their correction, led to the deaths of twelve people, injury to many others, and the complete destruction of a commercial building.[41] The court acknowledged the "substantial hardship" that individuals will suffer "as a result of their inability to recover for their injuries from a municipality that negligently fails to enforce its own regulations."[42] However, the court found that this potential hardship was outweighed by "[t]he deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers."[43] Although it acknowledged the city inspector's negligence, the court held that the gas piping regulations were intended to "benefit the plaintiffs as members of the community, . . . not [to] create a duty to the plaintiffs as individuals."[44]

2. The Governmental Function Immunity Defense: Discretionary or Ministerial Action?

Since the nineteenth century, the Court of Appeals has referred to a distinction between acts that are quasi-judicial, or discretionary, in nature and acts that are ministerial.[45] Despite a brief lull in the wake of the Court of Claims Act, the distinction reemerged in 1960. In *Weiss v. Fote*,[46] the court held that where the State had waived its sovereign immunity prior to the enactment of the Court of Claims Act, the scope of liability so assumed could not be broadened by the Act.[47] The decision was "a long and surprising step backward into the old, abandoned area of governmental immunity."[48] However, the judiciary continued to maintain this vestige of sovereign immunity due to its reluctance to "second-guess" the government's "discretionary

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[40] 58 N.Y.2d 184, 192, 447 N.E.2d 33, 36, 460 N.Y.S.2d 485, 488 (1983).

[41] *Id.* at 187–89, 447 N.E.2d at 33–34, 460 N.Y.S.2d at 485–86.

[42] *Id.* at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

[43] *Id.*

[44] *Id.* at 191, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

[45] *See, e.g.*, Urquhart v. City of Ogdensburg, 91 N.Y. 67, 71 (1883) (distinguishing discretionary acts from the ministerial duties that arise once such discretion has been exercised).

[46] 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

[47] *Id.* at 585, 167 N.E.2d at 65, 200 N.Y.S.2d at 412–13.

[48] *Id.* at 589, 167 N.E.2d at 68, 200 N.Y.S.2d at 416 (Desmond, C.J., dissenting).

decisions on how to best allocate limited public resources for the provision of public services."[49] It wants to avoid hampering the free exercise of judgment and discretion by government employees, whose decision-making abilities might be impaired by fear of retaliatory lawsuits.[50]

The Court of Appeals attempted to enunciate a clear distinction between discretionary and ministerial acts in *Tango v. Tulevech*.[51] Mr. Tango, the plaintiff, had divorced the mother of his two daughters, Ms. Childs, in 1974.[52] Originally, Childs retained permanent custody of their daughters.[53] In 1977, however, the two voluntarily entered into a new custody arrangement whereby Tango would have exclusive custody of their daughters for a year.[54] When he commenced a proceeding seeking to have this modified custody arrangement made permanent, Childs went to her daughters' school, removed them from their school bus, and drove away with them.[55] The school's principal alerted local police of the incident, and they were able to intercept Childs's vehicle.[56] Childs and her daughters were taken to the In-take Unit of the Rockland County Family Court's Probation Department, where she presented the department supervisor, Ms. Tulevech, with the original divorce decree awarding Childs custody.[57] Tango arrived at the courthouse and informed Tulevech of Childs's physical abuse of his daughters.[58] Despite this information, Tulevech released the girls into Childs's custody.[59] After Tango regained custody of his daughters, he brought an action for damages against Tulevech and the County of Rockland for endangering his daughters' welfare.[60]

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[49] Michael G. Bersani, *The "Governmental Function Immunity" Defense in Personal Injury Cases in the Post-*McLean *World*, N.Y. ST. B.J., June 2013, at 37.

[50] *See* Haddock v. City of New York, 75 N.Y.2d 478, 484, 553 N.E.2d 987, 991, 554 N.Y.S.2d 439, 443 (1990).

[51] 61 N.Y.2d 34, 459 N.E.2d 182, 471 N.Y.S.2d 73 (1983).

[52] *Id.* at 37, 459 N.E.2d at 184, 471 N.Y.S.2d at 75.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 38, 459 N.E.2d at 184, 471 N.Y.S.2d at 75.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 38–39, 459 N.E.2d at 184, 471 N.Y.S.2d at 75.

[60] *Id.* at 39, 459 N.E.2d at 184, 471 N.Y.S.2d at 75.

Although Tango prevailed at trial, the Court of Appeals affirmed the Appellate Division's dismissal of his complaint under the governmental function immunity defense.[61] In its analysis, the court attempted to harmonize an array of previous inconsistent decisions concerning the distinction between discretionary and ministerial acts.[62] The court explained that discretionary acts are those "involv[ing] the exercise of reasoned judgment which could typically produce different acceptable results," while ministerial acts are those involving "direct adherence to a governing rule or standard with a compulsory result."[63] Where an official action is discretionary, a municipality will not be held "liable for the injurious consequences of that action."[64] In contrast, where an official act is ministerial, a municipality may be held liable for any harm so caused "if it is otherwise tortious and not justifiable pursuant to statutory command."[65] The court emphasized the need for case-by-case analysis, instructing courts to look to the context in which the action arose, the nature of the duty to be fulfilled, and the actor's responsibility and position within the municipality.[66] Thus, because Tulevech had acted within the scope of her discretionary authority as supervisor of the In-take Unit of the Probation Department, neither she nor the County of Rockland could be held liable for her errors in judgment.[67]

The court expanded the governmental function immunity defense even further in *Lauer v. City of New York*.[68] There, Mr. Lauer's three-year-old son died suddenly.[69] After an autopsy, the city's medical examiner issued a death certificate stating that the child's death was the result of a homicide, spawning a murder investigation focused primarily on the father.[70] Although a more detailed study revealed that the child had died of a ruptured

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[61] *Id.* at 43, 459 N.E.2d at 187, 471 N.Y.S.2d at 78.
[62] *See id.* at 40–41, 459 N.E.2d at 185–86, 471 N.Y.S.2d at 76–77.
[63] *Id.* at 41, 459 N.E.2d at 186, 471 N.Y.S.2d at 77.
[64] *Id.* at 40, 459 N.E.2d at 185, 471 N.Y.S.2d at 76.
[65] *Id.* (citing E. River Gas-Light Co. v. Donnelly, 93 N.Y. 557, 559 (1883)).
[66] *Id.*
[67] *Id.* at 41–42, 459 N.E.2d at 186, 471 N.Y.S.2d at 77.
[68] 95 N.Y.2d 95, 733 N.E.2d 184, 711 N.Y.S.2d 112 (2000).
[69] *Id.* at 97, 733 N.E.2d at 186, 711 N.Y.S.2d at 114.
[70] *Id.* at 98, 733 N.E.2d at 186, 711 N.Y.S.2d at 114.

brain aneurysm, the medical examiner did not correct the autopsy report or death certificate, and he did not notify law enforcement authorities.[71]

Lauer sued the city for "both negligent and intentional infliction of emotional distress."[72] The Court of Appeals found it indisputable that the medical examiner's failure to correct the autopsy report and death certificate was ministerial in nature.[73] The court reiterated its prior analysis in *Tango*, adding that where there has been a breach of a ministerial duty, the plaintiff still must prove that there was "a duty running directly to the injured person."[74] Because Lauer could not "point to a duty owed to him by the Office of the Chief Medical Examiner," the court held that he could not recover damages from the city or its actors.[75]

Despite its restrictive holdings in *Tango* and *Lauer*, the court later appeared to adopt a more plaintiff-friendly approach. In *Pelaez v. Seide*,[76] it restated that "[a] public employee's discretionary acts . . . may not result in the municipality's liability even when the conduct is negligent."[77] However, the court immediately noted that a municipality can still be held liable in such cases where "a duty . . . runs from the municipality to the plaintiff."[78] The court clarified this exception to the governmental function immunity defense in *Kovit v. Estate of Hallums*.[79] There, the court stated that, under *Pelaez*, municipalities will not be held liable for discretionary acts "except when plaintiffs establish a 'special relationship' with the municipality."[80] Therefore, under the approach articulated in

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[71] *Id.*

[72] *Id.* Lauer also brought this action against the medical examiner who performed his son's autopsy, the Office of the Chief Medical Examiner, and the police department, and the action included claims for defamation and violations of Lauer's civil rights. *Id.*

[73] *Id.* at 99, 733 N.E.2d at 187, 711 N.Y.S.2d at 115.

[74] *Id.* at 99–100, 733 N.E.2d at 187, 711 N.Y.S.2d at 115.

[75] *Id.* at 101, 733 N.E.2d at 188, 711 N.Y.S.2d at 116.

[76] 2 N.Y.3d 186, 810 N.E.2d 393, 778 N.Y.S.2d 111 (2004).

[77] *Id.* at 198, 810 N.E.2d at 399, 778 N.Y.S.2d at 117 (alteration in original) (quoting Lauer v. City of New York, 95 N.Y.2d 95, 99, 733 N.E.2d 184, 187, 711 N.Y.S.2d 112, 115 (2000)) (internal quotation marks omitted).

[78] *Id.*

[79] 4 N.Y.3d 499, 829 N.E.2d 1188, 797 N.Y.S.2d 20 (2005), *overruled in part by* McLean v. City of New York, 12 N.Y.3d 24, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009).

[80] *Id.* at 505, 829 N.E.2d at 1189, 797 N.Y.S.2d at 21.

Pelaez and *Kovit*, a plaintiff injured by a municipality's tortious performance of a discretionary act could recover for injuries by establishing "a special relationship between the plaintiff and the governmental entity."[81]

The Court of Appeals has articulated how a special relationship between a municipality and an individual citizen can be formed:

> A special relationship can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation.[82]

A claim cannot be asserted on either of the first two bases unless the plaintiff satisfies certain elements.[83] To establish a violation of a statutory duty, a plaintiff must prove the following: "(1) [T]he plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme."[84] To establish a special relationship under the second basis, voluntary assumption of a duty, a plaintiff must prove four elements:

> The elements of this "special relationship" are: (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.[85]

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[81] *Pelaez*, 2 N.Y.3d at 198–99, 810 N.E.2d at 399, 778 N.Y.S.2d at 117; *see also Kovit*, 4 N.Y.3d at 505, 829 N.E.2d at 1189, 797 N.Y.S.2d at 21.

[82] *Pelaez*, 2 N.Y.3d at 199–200, 810 N.E.2d at 400, 778 N.Y.S.2d at 118 (citing Garrett v. Holiday Inns, Inc., 58 N.Y.2d 253, 261–62, 447 N.E.2d 717, 721, 460 N.Y.S.2d 774, 778 (1983)).

[83] *See id.* at 200–02, 810 N.E.2d at 400–01, 778 N.Y.S.2d at 118–19.

[84] *Id.* (citation omitted) (citing Sheehy v. Big Flats Cmty. Day, Inc., 73 N.Y.2d 629, 633, 541 N.E.2d 18, 20, 543 N.Y.S.2d 18, 20 (1989)).

[85] 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) (citing Shinder v. State, 62 N.Y.2d 945, 946, 468 N.E.2d 27, 27, 479 N.Y.S.2d 189, 189 (1984)); *see also* De Long v. Cnty. of Erie, 60 N.Y.2d 296,

A plaintiff's failure to establish each element, in either scenario, will result in the plaintiff's inability to recover damages from the municipality.

While *Pelaez* and *Kovit* would have limited the necessity of such proof to cases involving discretionary acts by the municipality, the Court of Appeals took a radically different approach in *McLean v. City of New York*.[86] Ms. McLean's daughter suffered a brain injury while in the care of Ms. Theroulde, who ran a "family day care home" registered by the New York City Department of Health[87] ("DOH"). McLean brought an action against the city, asserting that the city should be held liable for her daughter's injuries because the DOH had permitted Theroulde's registration to be renewed following substantiated complaints concerning her home.[88] The court found that McLean had failed to prove the existence of a "special relationship" between the city and her daughter.[89] However, McLean argued that the establishment of a "special relationship" is not necessary unless a municipality's actions are discretionary.[90]

Rather than accepting McLean's argument, a ruling that would have been in accordance with its recent decisions in *Pelaez* and *Kovit*, the Court of Appeals chose instead to limit the scope of municipal tort liability drastically. The court compared its past holdings in *Tango* and *Lauer* to its more recent holdings in *Pelaez*

305, 457 N.E.2d 717, 721, 469 N.Y.S.2d 611, 616 (1983) ("If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward." (quoting H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928)) (internal quotation marks omitted)); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (finding that a special relationship exists where police fail to adequately protect an individual who supplies information leading directly to a widely publicized arrest and who was killed in retaliation).

[86] 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009).

[87] *Id.* at 197–99, 905 N.E.2d at 1169–70, 878 N.Y.S.2d at 240–41 (internal quotation marks omitted).

[88] *Id.* at 198–99, 905 N.E.2d at 1170–71, 878 N.Y.S.2d at 241–42. The Administration for Children's Services cannot renew the registration of a family day care home unless it has received no complaints about the home or, having received complaints, has determined that the home is being "operated in compliance with applicable statutory and regulatory requirements." N.Y. SOC. SERV. LAW § 390 (2)(d)(ii)(B)(4) (McKinney 2015).

[89] *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

[90] *Id.*

and *Kovit*.[91] The court chose to resolve the inconsistency between the two sets of cases in favor of the less forgiving alternative. In the words of the court:

> *Tango* and *Lauer* are right, and any contrary inference that may be drawn from . . . *Pelaez* and *Kovit* is wrong. Government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general.[92]

Thus, the court found that the city could not be held liable for McLean's daughter's injuries, regardless of whether the city's actions had been discretionary or ministerial, because McLean had failed to establish the existence of a special relationship between her daughter and the city.[93]

II. *VALDEZ V. CITY OF NEW YORK*

McLean made clear the court's new rule regarding the governmental function immunity defense: Where a municipal act is discretionary, it can never be a basis for liability to an individual, and where a municipal act is ministerial, it can only be a basis for liability to an individual if the individual establishes the existence of a special relationship.[94] However, the court in *Valdez* further altered the scope of municipal tort liability in two distinct and critical ways.[95] First, *Valdez* made clear that under *McLean*, the special duty doctrine is no longer an exception to the governmental function immunity defense.[96] Second, where a plaintiff seeks to prove the existence of a special relationship formed by the voluntary assumption of a duty, "a promise by police that certain action will be forthcoming within a specified time period generally will not justify reliance long after a reasonable time period has passed without any indication that the action has occurred."[97]

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[91] *Id.* at 202–03, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45.

[92] *Id.* at 203, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45.

[93] *Id.* at 203, 905 N.E.2d at 1174, 878 N.Y.S.2d at 245.

[94] *See id.* at 203, 905 N.E.2d at 1173–74, 878 N.Y.S.2d at 244–45.

[95] Valdez v. City of New York, 18 N.Y.3d 69, 960 N.E.2d 356, 936 N.Y.S.2d 587 (2011).

[96] *See id.* at 80, 960 N.E.2d at 365, 936 N.Y.S.2d at 596.

[97] *Id.* at 82, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.

A. The Eradication of the Special Duty Doctrine as an Exception to the Governmental Function Immunity Defense

Following *Valdez*, the special duty doctrine is no longer an exception to the otherwise impenetrable protection afforded a municipality by the governmental function immunity defense.[98] The *Valdez* court declared that the establishment of a special relationship is the "threshold burden" that a plaintiff must overcome before liability will be imposed upon a municipality for its ministerial functions.[99] The court's analysis in such cases now consists primarily of a determination concerning the satisfaction of this "threshold burden."[100] Where a plaintiff is unable to establish the existence of a special relationship, the distinction between discretionary and ministerial acts becomes irrelevant, for the court will refuse to impose liability upon the municipality.[101] Only when a plaintiff has established the existence of a special relationship will the court proceed to determine whether the action falls within the governmental function immunity defense.[102] Although the special duty doctrine originally permitted plaintiffs to hold a municipality liable for the tortious conduct of its agents when liability ordinarily would not attach, the court transformed the doctrine into an initial obstacle plaintiffs must overcome before facing the subsequent obstacle posed by the governmental function immunity defense.

Chief Judge Jonathan Lippman's fervent dissenting opinion in *Valdez* supports the contention that *Valdez* has dangerously narrowed the scope of municipal tort liability. The Chief Judge first acknowledged that, under *McLean*, governmental immunity has become "impregnable where the government conduct sued upon involves the exercise of discretion."[103] Based on *McLean*'s interpretation of the governmental function immunity defense, the city was correct in asserting that the case could be dismissed without addressing the issue of justifiable reliance, as an arrest "necessarily entail[s] the exercise of professional judgment and

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[98] *See* John C. Cherundolo, *Tort Law*, 63 SYRACUSE L. REV. 923, 940 (2013).

[99] *Valdez*, 18 N.Y.3d at 80, 960 N.E.2d at 365, 936 N.Y.S.2d at 596.

[100] *See, e.g.*, Metz v. State, 20 N.Y.3d 175, 181, 982 N.E.2d 76, 80, 958 N.Y.S.2d 314, 318 (2012).

[101] *See Valdez*, 18 N.Y.3d at 84, 960 N.E.2d at 368, 936 N.Y.S.2d at 599.

[102] *See id*.

[103] *Id.* at 90, 960 N.E.2d at 372, 936 N.Y.S.2d at 603 (Lippman, C.J., dissenting).

discretion in the manner and timing of its execution."[104] Even if Ms. Valdez had proven each element of a special relationship, which Lippman believed she had, she would have been "barred from recovering because the promised undertaking involved some exercise of official discretion."[105]

However, this concession merely served as a platform for Chief Judge Lippman's larger argument that "[t]he special duty doctrine was conceived precisely to avoid such an inequitable and, frankly, regressive outcome."[106] Lippman explained that the special duty doctrine originally had been intended "as an extremely narrow and difficult-to-establish exception to the rule of nonliability where" an injury-causing action is discretionary in nature.[107] Lippman considered *McLean* a "significant departure" from preexisting law because, rather than permitting causes of action that otherwise would be barred, as was intended, *McLean* limited claims that previously were allowed.[108] However, Lippman believed that, by reducing the special duty doctrine "to a vestige," *Valdez* "complete[d] the neutering first announced in *McLean*."[109] *Valdez*, in the words of Chief Judge Lippman, "effectively tolls the death knell for these actions."[110]

The detrimental impact of *Valdez* on the future of municipal tort liability can be illustrated best by one of the first cases to reach the Court of Appeals in its wake, *Metz v. State*.[111] In *Metz*, a tour boat capsized on Lake George, killing twenty passengers and injuring several others.[112] Because the tour boat, the Ethan Allen, was a public vessel, it fell within New York's regulatory powers over the use of public vessels under New York's Navigation Law.[113] Under that statute, the owner of a public vessel who intends to operate the vessel upon state waters must notify an inspector of the intention to do so and request an inspection of the vessel.[114] Thereafter, the vessel is "subject to

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[104] *Id.* at 90–91, 960 N.E.2d at 372–73, 936 N.Y.S.2d at 603–04.
[105] *Id.* at 91, 960 N.E.2d at 373, 936 N.Y.S.2d at 604.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 91–92, 960 N.E.2d at 373, 936 N.Y.S.2d at 604.
[109] *Id.* at 93, 960 N.E.2d at 374, 936 N.Y.S.2d at 605.
[110] *Id.* at 92, 960 N.E.2d at 373, 936 N.Y.S.2d at 604.
[111] 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).
[112] *Id.* at 177, 982 N.E.2d at 77, 958 N.Y.S.2d at 315.
[113] *Id.* at 177–78, 982 N.E.2d at 77–78, 958 N.Y.S.2d at 315–16.
[114] N.Y. NAV. LAW § 50 (McKinney 2015).

yearly state inspections, at which an inspector appointed by the Commissioner of the New York State Office of Parks, Recreation and Historic Preservation (OPRHP) would issue a certificate indicating, among other things, the vessel's maximum passenger capacity."[115]

Although the Ethan Allen was carrying forty-seven passengers and one crew member when it capsized, which was within the forty-eight-passenger maximum indicated in the certificate of inspection, it was soon determined that the maximum indicated was much higher than what the vessel should have been permitted to carry.[116] This discrepancy was the result of several factors, including "outdated passenger weight criteria," failure to conduct a "stability assessment" following significant modifications to the vessel, and a policy of relying on the passenger capacity certified the previous year rather than on independent inspection.[117] Those injured in the capsizing, and the personal representatives of the decedents, brought a negligence action against the State.[118]

Notwithstanding the debate at the trial and appellate levels concerning whether the inspections of the Ethan Allen constituted discretionary or ministerial acts,[119] the Court of Appeals refused to address the issue. As it did in *Valdez*, the court turned first to the issue of whether the claimants had established the existence of a special relationship with the State.[120] Since *Metz* involved a statutory duty, the claimants could only establish the existence of a special relationship if they could prove that they were "of the class for whose particular benefit the [Navigation Law] was enacted," that "recognition of a private right of action would promote the legislative purpose of the [Navigation Law]," and that "to do so would be consistent with the legislative scheme."[121] The Court of Appeals, quoting

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[115] *Metz*, 20 N.Y.3d at 177, 982 N.E.2d at 77–78, 958 N.Y.S.2d at 315–16.

[116] *Id.* at 177–78, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

[117] *Id.* at 178–79, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

[118] *Id.* at 177–79, 982 N.E.2d at 77–78, 958 N.Y.S.2d at 315–16.

[119] *See generally* Metz v. State, No. 113310, 27 Misc. 3d 1209(A), 2010 WL 1463139 (N.Y. Ct. Cl. Mar. 4, 2010), *aff'd*, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3d Dep't 2011), *rev'd*, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012); Metz v. State, 86 A.D.3d 748, 927 N.Y.S.2d 201 (3d Dep't 2011), *rev'd*, 20 N.Y.3d 175, 982 N.E.2d 76, 958 N.Y.S.2d 314 (2012).

[120] *Metz*, 20 N.Y.3d at 179, 982 N.E.2d at 79, 958 N.Y.S.2d at 317.

[121] Pelaez v. Seide, 2 N.Y.3d 186, 200, 810 N.E.2d 393, 400, 778 N.Y.S.2d 111, 118 (2004), *overruled in part by* McLean v. City of New York, 12 N.Y.3d 24, 905

O'Connor, held that the Navigation Law was intended for the benefit of those injured only "in the broad sense of protecting all members of the general public similarly situated."[122] Further, "recognizing a private right of action would be incompatible with the legislative design" because the Navigation Law provides only for fines and criminal penalties against owners of vessels, rather than for municipal tort liability.[123] Because the claimants had failed to establish that the State owed them a special duty, the court would not hold the State liable for the Office of Parks, Recreation and Historic Preservation's negligence and "the victims of this disastrous wreck [were] essentially left without an adequate remedy."[124]

Before *Valdez* and *McLean*, the claimants in *Metz* would first have had the opportunity to contend that the actions of the inspector had been ministerial. If the claimants had succeeded in this argument, the State likely would have been held liable for the injuries caused by the inspector's negligence in certifying a maximum passenger capacity without performing the requisite inspections.[125] However, under *Valdez* and *McLean*, the debate over whether the inspections were ministerial or discretionary became inconsequential when the claimants failed to prove the existence of a special relationship with the State.[126] Those injured in the capsizing, and those representing their deceased loved ones, were left without recourse.[127]

B. The Insurmountable Burden of Proving Justifiable Reliance

In addition to amplifying the significance of the special duty doctrine, the *Valdez* court increased the burden that a plaintiff must satisfy in order to establish a special relationship on the basis of a voluntary assumption of a duty. *Valdez* involved

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N.E.2d 1167, 878 N.Y.S.2d 238 (2009) (citing Sheehy v. Big Flats Cmty. Day, Inc., 73 N.Y.2d 629, 633, 541 N.E.2d 18, 20, 543 N.Y.S.2d 18, 20 (1989)).

[122] *Metz*, 20 N.Y.3d at 180, 982 N.E.2d at 80, 958 N.Y.S.2d at 318 (quoting O'Connor v. City of New York, 58 N.Y.2d 184, 190, 447 N.E.2d 33, 35, 460 N.Y.S.2d 485, 487 (1983)) (internal quotation mark omitted).

[123] *Id.* at 180–81, 982 N.E.2d at 80, 958 N.Y.S.2d at 318.

[124] *Id.* at 180–81, 982 N.E.2d at 79–80, 958 N.Y.S.2d at 317–18.

[125] *See id.* at 178, 982 N.E.2d at 78, 958 N.Y.S.2d at 316.

[126] *Id.* at 180, 982 N.E.2d at 79, 958 N.Y.S.2d at 317.

[127] *Id.* at 181, 982 N.E.2d at 80, 958 N.Y.S.2d at 318.

Officer Torres's voluntary assumption of a duty to arrest Perez, Ms. Valdez's ex-boyfriend, "immediately."[128] Therefore, in order to prove the existence of a special relationship, the court stated:

> The elements [Ms. Valdez would have to prove] are: (1) an assumption by the [city], through promises or actions, of an affirmative duty to act on behalf of [Ms. Valdez]; (2) knowledge on the part of the [officers of the Domestic Violence Unit] that inaction could lead to harm; (3) some form of direct contact between the [officers of the Domestic Violence Unit] and [Ms. Valdez]; and (4) [Ms. Valdez]'s justifiable reliance on the [city]'s affirmative undertaking.[129]

Valdez contains limited reference to the first three elements of a special relationship, focusing instead on the fourth element of justifiable reliance.[130] The court described justifiable reliance as a " 'critical' [factor] because it 'provides the essential causative link between the special duty assumed by the municipality and the alleged injury.' "[131]

The court found that Ms. Valdez had failed to establish the existence of a special relationship with the city because "[i]t was not reasonable for [her] to conclude, based on nothing more than [Officer Torres's] statement that the police were going to arrest Perez 'immediately,' that she could relax her vigilance indefinitely."[132] Since Ms. Valdez had not communicated any information concerning Perez's whereabouts to the police, "it would not have been reasonable for [her] to have relied on the police promise to arrest Perez 'immediately' in a literal sense since his location had to be discovered."[133] Further, because Ms. Valdez testified that she expected to receive a call from Officer Torres confirming the arrest, and had not received any such call at the time of her attack, the court found it "difficult to reconcile her contention that she was nonetheless justified in relaxing her vigilance when more than a day passed with no word of the

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[128] Valdez v. City of New York, 18 N.Y.3d 69, 73, 960 N.E.2d 356, 359, 936 N.Y.S.2d 587, 590 (2011) (internal quotation marks omitted).

[129] 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) (citing Shinder v. State, 62 N.Y.2d 945, 946, 468 N.E.2d 27, 27, 479 N.Y.S.2d 189, 189 (1984)).

[130] *See Valdez*, 18 N.Y.3d at 80–81, 960 N.E.2d at 365, 936 N.Y.S.2d at 596.

[131] *Id.* at 81, 960 N.E.2d at 365, 936 N.Y.S.2d at 596 (quoting *Cuffy*, 69 N.Y.2d at 261, 505 N.E.2d at 940, 513 N.Y.S.2d at 375).

[132] *Id.* at 81, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.

[133] *Id.*

expected arrest."[134] However, in what at first glance appears to be an innocuous restatement of law, the court imposed an additional obstacle that a plaintiff must overcome in order to prove justifiable reliance. According to the court, "[a]s is evident from the analysis in *Cuffy*, a promise by police that certain action will be forthcoming within a specified time period generally will not justify reliance long after a reasonable time period has passed without any indication that the action has occurred."[135]

In *Cuffy v. City of New York*, Joseph and Eleanor Cuffy owned a two-family house, the ground floor of which they leased to Joel and Barbara Aitkins while they and their son occupied the upper floor.[136] The Cuffys and the Aitkins had a hostile relationship and required police intervention on numerous occasions.[137] Following an incident in which Mr. Aitkins physically attacked Mrs. Cuffy, Mr. Cuffy sought police protection for his family.[138] The lieutenant at the police precinct told Mr. Cuffy not to worry and that "an arrest would be made or something else would be done about the situation 'first thing in the morning.' "[139] The police failed to take any further action, and the following evening, the Cuffys were attacked by both Mr. and Mrs. Aitkins.[140] The Cuffy family sustained serious injuries as a result of the attack.[141]

The court rejected the Cuffys' claims against the city because the Cuffys failed to establish each of the four elements of a special relationship.[142] The court held that the Cuffys had not justifiably relied upon the lieutenant's promise that "[Mr.] Aitkins would be arrested or something else would be done 'first thing in the morning' " because, by the next day, the Cuffys "knew or should have known . . . that the promised police action would not be forthcoming."[143] Therefore, despite the court's

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[134] *Id.* at 82, 960 N.E.2d at 366, 936 N.Y.S.2d at 597.
[135] *Id.*
[136] *Cuffy*, 69 N.Y.2d at 258, 505 N.E.2d at 939, 513 N.Y.S.2d at 373.
[137] *Id.*
[138] *Id.* at 259, 505 N.E.2d at 939, 513 N.Y.S.2d at 374.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 259–60, 505 N.E.2d at 939, 513 N.Y.S.2d at 374.
[142] *Id.* at 258, 505 N.E.2d at 938, 513 N.Y.S.2d at 373.
[143] *Id.* at 263, 505 N.E.2d at 941–42, 513 N.Y.S.2d at 376.

recognition that "[i]t may well be that the police were negligent in misjudging the seriousness of the threat to the Cuffys," the court rejected the Cuffys' claims for their injuries.[144]

Contrary to the Court of Appeals' later statement in *Valdez*, the holding in *Cuffy* does not make it "evident" that "a promise by police that certain action will be forthcoming within a specified time period generally will not justify reliance long after a reasonable time period has passed without any indication that the action has occurred."[145] In *Cuffy*, the plaintiffs lived in the same house as their attackers.[146] Mrs. Cuffy's own testimony indicated "that she had periodically looked out her front window throughout the day of the incident and had not seen any police cars pull up in front of her house."[147] The court based its decision concerning the Cuffys' justifiable reliance on the plaintiffs' own testimony that they were aware that the police had not arrested or restrained Mr. Aitkins by the time promised.[148] Any evidence that the court intended to make the general pronouncement attributed to it in *Valdez* is conspicuously absent.[149]

In his dissenting opinion in *Valdez*, Chief Judge Lippman claimed that the majority's analysis of justifiable reliance was based on a misinterpretation or overextension of the opinion in *Cuffy*.[150] According to the Chief Judge:

> [A]ll *Cuffy* establishes is that knowledge that the police have not acted in accordance with an assurance will defeat a claim of reasonable reliance on the assurance; it does not stand for the very different proposition . . . that absent objective confirmation that the police have made good upon a promise of protection their promise may not be reasonably relied on.[151]

Chief Judge Lippman distinguished *Cuffy* from *Valdez*, indicating that, "unlike the *Cuffy* plaintiffs, [Ms. Valdez] was not in a position visually to confirm whether the promised arrest had been made."[152] Lippman was of the opinion "that the jury could

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[144] *Id.* at 264, 505 N.E.2d at 942, 513 N.Y.S.2d at 377.

[145] Valdez v. City of New York, 18 N.Y.3d 69, 82, 960 N.E.2d 356, 366, 936 N.Y.S.2d 587, 597 (2011).

[146] *Cuffy*, 69 N.Y.2d at 258, 505 N.E.2d at 939, 513 N.Y.S.2d at 373.

[147] *Id.* at 263, 505 N.E.2d at 941, 513 N.Y.S.2d at 376.

[148] *Id.* at 263, 505 N.E.2d at 942, 513 N.Y.S.2d at 376.

[149] *See generally Cuffy*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372.

[150] *See Valdez*, 18 N.Y.3d at 86–87, 960 N.E.2d at 369–70, 936 N.Y.S.2d at 600–01 (2011) (Lippman, C.J., dissenting).

[151] *Id.* at 86, 960 N.E.2d at 369, 936 N.Y.S.2d at 600.

[152] *Id.*

have reasonably concluded that Ms. Valdez justifiably relied upon Officer Torres and the Domestic Violence Unit expeditiously to arrest Perez, or, failing the attainment of that objective, to advise her that the promised action had not been taken and that Perez remained at large."[153] The majority's holding that Ms. Valdez was unreasonable in relying on Officer Torres's promise based solely on the passage of time is, according to Lippman, both "incorrect" and "from an equitable and policy perspective devastatingly wrong."[154] The Court of Appeals had "raise[d] the reasonable reliance bar to a practically insurmountable height by holding, as a matter of law, that a plaintiff may not justifiably rely upon government to do both what it has specifically promised and what it must under the law."[155]

The Court of Appeals has made clear that it does not intend to modify the reinterpretation of "justifiable reliance" set forth in *Valdez*.[156] In *Coleson v. City of New York*, Mrs. Coleson had suffered verbal and physical abuse at the hands of her husband since 2000.[157] In May 2004, she told Mr. Coleson to leave their apartment because of his drug abuse.[158] On June 23, 2004, Mrs. Coleson requested police assistance when Mr. Coleson returned to their apartment and attempted to stab her with a screwdriver.[159] The police informed Mrs. Coleson that her husband had been arrested.[160] An officer told Mrs. Coleson that her husband was "going to be in prison for a while, [and that she should not] worry, [she] was going to be given protection."[161] Later that evening, another officer told Mrs. Coleson that Mr. Coleson was before a judge for sentencing and that "everything was in process."[162] The next day, Mr. Coleson was released on his

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[153] *Id.* at 87, 960 N.E.2d at 370, 936 N.Y.S.2d at 601.

[154] *Id.* at 88, 960 N.E.2d at 371, 936 N.Y.S.2d at 602.

[155] *Id.* at 92, 960 N.E.2d at 374, 936 N.Y.S.2d at 605.

[156] *See id.* at at 84, 960 N.E.2d 368, 936 N.Y.S.2d at 599.

[157] Coleson v. City of New York (*Coleson II*), 24 N.Y.3d 476, 479, 24 N.E.3d 1074, 1075, 999 N.Y.S.2d 810, 811 (2014).

[158] *Id.* at 479, 24 N.E.3d at 1076, 999 N.Y.S.2d at 812.

[159] *Id.*

[160] *Id.*

[161] *Id.* (internal quotation mark omitted) (alteration in original).

[162] *Id.* (ellipsis omitted).

own recognizance following arraignment.[163] Unaware of her husband's release, Mrs. Coleson went to pick up her seven-year-old son from school, where Mr. Coleson stabbed her in her son's presence.[164] The Appellate Division, in accordance with *Valdez*, found that the city owed no special duty of care to Mrs. Coleson or to her son.[165] The court found that the statements made by the officers concerning Mr. Coleson's arrest were "too vague to constitute promises giving rise to a duty of care" and granted defendants' motion for summary judgment.[166] Mrs. Coleson appealed this harsh result,[167] presenting the Court of Appeals with the opportunity to undo the steps it had taken toward making "justifiable reliance" a nearly insurmountable burden for a plaintiff seeking to hold a municipality liable in tort.

The Court of Appeals rejected this opportunity. Rather than modify the rule set forth in *Valdez*, a rule that has proven both difficult to apply and, as was demonstrated in *Metz v. State*, unjust in its application,[168] the court merely distinguished the facts in *Valdez* from the facts in *Coleson*.[169] According to the court, "[t]he conduct of the police [in *Coleson*] was more substantial, involved, and interactive than the police conduct in *Valdez*."[170] The court opined that the police officer's statement "that Coleson was going to be in prison for a while" was so much less "vague" than the statement in *Valdez* that Perez would be arrested "immediately" that the former could create "justifiable reliance" while the latter could not.[171] The court therefore held that Mrs. Coleson "raised a triable issue of fact" regarding the existence of a special relationship.[172] The holdings in *Valdez* and *Coleson* are difficult to harmonize and are likely to cause confusion for lower courts that seek to apply these decisions.

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[163] Coleson v. City of New York (*Coleson I*), 106 A.D.3d 474, 476, 964 N.Y.S.2d 419, 420 (1st Dep't 2013) (Moskowitz, J., concurring), *aff'd in part*, *rev'd in part*, 24 N.Y.3d 476, 24 N.E.2d 1074, 999 N.Y.S.2d 810 (2014).

[164] *Coleson II*, 24 N.Y.3d at 479, 24 N.E.3d at 1076, 999 N.Y.S.2d at 812.

[165] *Coleson I*, 106 A.D.3d at 474–75, 964 N.Y.S.2d at 419 (majority opinion).

[166] *Id.*

[167] *See Coleson II*, 24 N.Y.3d 476, 24 N.E.3d 1074, 999 N.Y.S.2d 810.

[168] *See supra* Part II.A.

[169] *See Coleson II*, 24 N.Y.3d at 482, 24 N.E.3d at 1078, 999 N.Y.S.2d at 814.

[170] *Id.*

[171] *Id.* at 482–83, 24 N.E.3d at 1078–79, 999 N.Y.S.2d at 814–15 (citing Valdez v. City of New York, 18 N.Y.3d 69, 81, 960 N.E.2d 356, 366, 936 N.Y.S.2d at 587, 597 (2011)) (internal quotation marks omitted).

[172] *Id.* at 483, 24 N.E.3d at 1079, 999 N.Y.S.2d at 815.

What *Coleson* has made clear, however, is that the Court of Appeals does not intend to retreat from its holding in *Valdez*—of its own accord.

III. THE NEED FOR LEGISLATIVE ACTION

As is demonstrated by *Valdez* and its progeny, the Court of Appeals has reduced New York State's waiver of sovereign immunity to little more than words on a page. Even when the court has recognized the inequity of its policies and the "substantial hardship" that "some individuals will suffer . . . as a result of their inability to recover for their injuries," it has consigned to itself a passive role in the belief that "[t]he deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers, . . . demands continued adherence to the existing rule."[173] Although "special status requirements created by the courts can be abolished by the courts when experience has shown they are unworkable and unfair," the court has, in effect, ceded any responsibility to address this inequitable situation to the legislature.[174]

As a result, the Court of Appeals has stood firm regarding its allocation to the legislature of any and all responsibility for altering the unavailability of municipal tort liability. The court's rationale stems from its professed inability to answer "questions that require judgments concerning the types of positions and the nature of the governmental actions that should receive immunity" and to "balanc[e] . . . interests of injured parties against the competing financial interests of municipalities."[175] The court views such endeavors as "foolhardy indeed and an assumption of judicial wisdom and power not possessed by the courts."[176] Because the ability of a municipality to provide public services is limited by the availability of resources, the court says that "[d]eployment of these resources [must] remain . . . a

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[173] 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).

[174] *Id.* at 194, 447 N.E.2d at 37, 460 N.Y.S.2d at 489 (Wachtler, J., dissenting) (citing Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976)).

[175] Hancock, *supra* note 33, at 928.

[176] Riss v. City of New York, 22 N.Y.2d 579, 582, 240 N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1968).

legislative-executive decision."[177] The court insists that the legislature must determine the scope of municipal tort liability, as the legislature is responsible for the provision of governmental services and the allocation of public resources.[178] The "empirical analysis" and "arbitrary line-drawing" called for by the court's recent decisions in *Valdez*, *Metz*, and *Coleson* must, therefore, be performed by the legislature.[179]

New York would not be the first state to use legislation "to balance the inequities perpetrated through the application of sovereign immunity with the severe economic burden which total abrogation of that doctrine would impose upon public entities."[180] The State of New Jersey overruled long-existing case law by enacting the New Jersey Tort Claims Act, in which the New Jersey legislature provided that "public entitles shall only be liable for their negligence within the limitations of th[e] act and in accordance with the fair and uniform principles established [t]herein."[181] Similarly, the State of California abolished judicially declared forms of liability for public entities,[182] and the State of Illinois replaced the doctrine of sovereign immunity for local municipalities,[183] through the enactment of legislation. The scope of New York's legislation would differ from that of New Jersey, California, and Illinois, since the limitations upon New York's waiver of immunity are what have become unworkable, rather than the waiver itself. However, the way has been paved for New York to enact legislation that comprehensively rectifies nearly a century of increasingly broad and judicially imposed limitations upon the State's waiver of sovereign immunity.

First, the legislature must undo the rule in *McLean* concerning the application of the special duty doctrine. As Chief Judge Lippman expounded in his dissent in *Valdez*, the special duty doctrine was intended as "an extremely narrow and difficult-to-establish exception to the rule of nonliability where

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[177] Florence v. Goldberg, 44 N.Y.2d 189, 198, 375 N.E.2d 763, 768, 404 N.Y.S.2d 583, 588 (1978).

[178] *See O'Connor*, 58 N.Y.2d at 192, 447 N.E.2d at 36, 460 N.Y.S.2d at 488.

[179] Hancock, *supra* note 33, at 928.

[180] Cancel v. Watson, 329 A.2d 596, 597 (N.J. Super. Ct. Law Div. 1974), *overruled on other grounds by* D'Annunzio v. Borough of Wildwood Crest, 410 A.D.2d 1180 (N.J. Super. Ct. App. Div. 1980).

[181] N.J. STAT. ANN. § 59:1-2 (West 2015).

[182] CAL. GOV'T CODE § 815 (West 2014).

[183] *See* 745 ILL. COMP. STAT. 10/2-103–10/2-109 (West 2014).

discretionary government conduct was alleged to have resulted in injury[,] . . . permit[ting] otherwise barred causes [of action] . . . in relation to claims based on discretionary acts."[184] The legislature must set forth a rule clearly stating that the special duty doctrine is an exception only in cases involving the discretionary acts of municipal agents, in keeping with the special duty doctrine's original intention. Municipal liability for negligently performed ministerial acts should be based simply on traditional tort principles.

Second, the legislature must set out a new rule concerning the formation of a special relationship, particularly in the case of a voluntary assumption of a duty. Although the four elements of such a special relationship[185] have not, in themselves, proved overly burdensome, the Court of Appeals' current interpretation of the fourth element of justifiable reliance is so arbitrary in application as to be unworkable.[186] Rather than permit the nearly "insurmountable" burden erected by the court in *Valdez* to stand, [187] the legislature should redefine "justifiable reliance" in a way that acknowledges the beliefs typically held by a reasonable municipal citizen, rather than what the court alone deems justifiable. No single factor should be determinative in the case of justifiable reliance, as what is justifiable will differ according to the circumstances of each case. Therefore, justifiable reliance should be determined from the perspective of a reasonable municipal citizen in the plaintiff's circumstances.

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[184] Valdez v. City of New York, 18 N.Y.3d 69, 91, 960 N.E.2d 356, 373, 936 N.Y.S.2d 587, 604 (2011) (Lippman, C.J., dissenting); *see supra* Part II.A.

[185] The court in *Cuffy v. City of New York* articulated four elements:

> The elements of this "special relationship" are: (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.

69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987) (citing Shinder v. State, 62 N.Y.2d 945, 946, 468 N.E.2d 27, 27, 479 N.Y.S.2d 189, 189 (1984)).

[186] *See, e.g.*, Coleson v. City of New York, 24 N.Y.3d 476, 24 N.E.3d 1074, 999 N.Y.S.2d 810 (2014).

[187] *Valdez*, 18 N.Y.3d at 92, 960 N.E.2d at 374, 936 N.Y.S.2d at 605 (Lippman, C.J., dissenting).

An additional legislative action, suggested by Judge Theodore Jones in his dissenting opinion in *Valdez*, is the creation of an exception to the governmental function immunity defense when a municipality "negligent[ly] fail[s] to provide police protection."[188] The exception would arise only in the narrow set of circumstances "where a promise of protection was made to a particular citizen and, as a consequence, a 'special duty' to that citizen arose."[189] Such an exception "is supported by a long line of decisions concerning the narrowly-recognized claim against a municipality 'for its negligent failure to provide police protection.' "[190] The legislature could, therefore, set forth a rule definitively excluding the distinction between discretionary and ministerial acts in cases where a promise of police protection is made to an individual citizen. It is in more than a "colloquial sense" that citizens of a municipality "should be able to depend on the police to do what they say they are going to do."[191] Where the police have promised to provide protection to an individual citizen, a special duty to that citizen should arise regardless of whether the subsequent police action is discretionary or ministerial.

CONCLUSION

In *Valdez v. City of New York*, the Court of Appeals drastically and unnecessarily narrowed the right of a plaintiff to hold a municipality liable for injuries caused by the tortious conduct of a municipal agent. Although the State of New York purported to waive its right to sovereign immunity in the Court of Claims Act, the Court of Appeals has relegated the Court of Claims Act waiver to insignificance through various judicially imposed exceptions to and exclusions from that waiver. Despite the inequities brought about as a result of these court-imposed limitations, the Court of Appeals has determined that it is the responsibility of the New York State legislature, rather than the

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[188] *Id.* at 93, 960 N.E.2d at 375, 936 N.Y.S.2d at 606 (Jones, J., dissenting) (quoting *Cuffy*, 69 N.Y.2d at 258, 505 N.E.2d at 938, 513 N.Y.S.2d at 373).

[189] *Id.* (quoting *Cuffy*, 69 N.Y.2d at 258, 505 N.E.2d at 938, 513 N.Y.S.2d at 373) (internal quotation mark omitted).

[190] *Id.* at 94, 960 N.E.2d at 375, 936 N.Y.S.2d at 606 (quoting *Cuffy*, 69 N.Y.2d at 258, 505 N.E.2d at 938, 513 N.Y.S.2d at 373); *see, e.g.*, Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); De Long v. Cty. of Erie, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

[191] *Valdez*, 18 N.Y.3d at 84, 960 N.E.2d at 368, 936 N.Y.S.2d at 599.

court, to extend the scope of municipal tort liability in a manner that will properly account for these injustices. Thus, it is clear that legislation alone can remedy the injustice perpetuated by the Court of Appeals and restore the State's waiver of sovereign immunity in those instances where fairness so demands.