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Brian T. Cohen

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THE SPECIAL RELATIONSHIP RULE: IS IT CONSISTENT WITH THE WAIVER OF SOVEREIGN IMMUNITY ? -- A STUDY OF *KIRCHER v. CITY OF JAMESTOWN*

INTRODUCTION

On July 13, 1989, the New York Court of Appeals in *Kircher v. City of Jamestown*,¹ once again addressed the issue of municipal immunity as it relates to the negligence of police officers.² The court stated that the city could not be held liable for a law officer's negligence in failing to report an ongoing crime.³ The

1. 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

2. See *Cuffy v. City of New York*, 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987) (police failure to arrest tenant after assurances that they would act resulted in injuries sustained by plaintiffs); *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985) (police's negligence for failure to take infant's father into custody resulted in infant's death); *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983) (police's negligence in processing and responding to a victim's request for emergency assistance); *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978) (city held liable for failure to provide replacement school crossing guard at a busy school intersection); *Riss v. City of New York*, 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1965) (police department refused to assist after plaintiff reported of threats made on her life); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (plaintiff was killed after he assisted police in capturing a fugitive).

The issue of negligence has also been asserted against municipal fire departments. See *Messineo v. City of Amsterdam*, 17 N.Y.2d 523, 215 N.E.2d 163, 267 N.Y.S.2d 905 (1966) (fire department's negligent act of putting out a fire and failure to make a more positive inspection resulted in a second fire and total destruction of property); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965) (property damage resulted from city's failure to follow up of fire captain's knowledge of a defective heater); *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945) (plaintiff alleged that damage to property was a result of city's failure to maintain and create a fire department and water pressure and regulating valve located near property).

3. *Kircher*, 74 N.Y.2d at 259-60, 543 N.E.2d at 448, 544 N.Y.S.2d at 1000.

court reasoned that the duty to protect a citizen is not a duty owed to an individual, but rather to the general public,⁴ and because no special relationship could be established between the municipality and the victim, no causal link between the defendant's inaction and the plaintiff's injuries could be established.⁵ In an effort to fully understand why the court's reasoning led to such a conclusion, it is helpful to look at the development of municipal tort liability through both statutory⁶ and judicial interpretation.⁷

Part I of this Note discusses the historical development of sovereign immunity as it was shared by the state and its municipalities. In presenting this historical background, this Note traces the changes in court opinions in accordance with the demands and changes in society.⁸ This Note discusses the New York Court of Appeals' stance on the issue of municipal liability and its application of the current law to the issues that arise.

Part II of this Note presents the facts and majority opinions in *Kircher v. City of Jamestown*.⁹ Additional emphasis is focused on the two dissenting opinions of Judges Hancock and Bellacosa, whose individual opinions represent the opinions of this author. Part III expresses concern as to where the court currently stands on the issues discussed and offers a recommendation for a new approach to be applied by the courts.

I. HISTORICAL BACKGROUND

A. Sovereign Immunity -- In General

At common law, the state shared a sovereign immunity¹⁰ with

4. *Id.* at 256, 543 N.E.2d at 445, 544 N.Y.S.2d at 998.

5. *Id.* at 259-60, 543 N.E.2d at 448, 544 N.Y.S.2d at 1000.

6. *See* Act of April 10, 1929, ch. 467, § 1, 1929 N.Y. Laws 994, 994 (McKinney) (codified as amended at N.Y. Cr. CL. ACT § 8 (McKinney 1989)).

7. *See supra* note 2.

8. *See infra* notes 10-43 and accompanying text.

9. 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

10. *See Torts - Negligence - Duty of Municipal Corporations to Furnish*

its municipal corporations for liability from the tortious acts committed by its officers and employees.¹¹ This sovereign immunity applied as long as the state or municipality was performing governmental functions.¹² Municipalities, however, did not share in this immunity when a claim arose out of the performance of a proprietary act.¹³ A proprietary act is an act undertaken by a municipal corporation for the advantage of its own inhabitants, from which the general public might derive a benefit.¹⁴ In this situation, municipal corporations are held to the same standards of liability for their tortious acts as any private corporation.¹⁵ For example, a municipality would be liable for a negligent proprietary act when, acting as a landlord, the municipality is held re-

Police Protection, 25 BROOK. L. REV. 363 (1959) [hereinafter *Municipal Duty of Protection*]; see also, Comment, *Municipal Liability for Failure to Provide Police Protection*, 28 FORDHAM L. REV. 316 (1960) [hereinafter *Municipal Liability*]; Note, *Tort Liability of Municipal Corporations in New York*, 48 COLUM. L. REV. 84 (1943) [hereinafter *Tort Liability*]. This once shared immunity was abrogated by an amendment to the Court of Claims Act. See *supra* note 6.

11. Sovereign immunity developed from the English common law principle that "the King c[ould] do no wrong." 5 F. HARPER, F. JAMES, & O. GRAY, *THE LAW OF TORTS* § 29.2, at 599 (2d ed. 1986) [hereinafter HARPER]; see *id.* for a discussion of the origin of sovereign immunity in England and its transfer to America.

12. See *Bernardine v. City of New York*, 294 N.Y. 361, 366, 62 N.E.2d 604, 605-06 (1945); *Maxmillian v. Mayor of New York*, 62 N.Y. 160, 164-65 (1875); see also *Municipal Duty of Protection*, *supra* note 10, at 363-64. For a definition of governmental function see *infra* note 17 and accompanying text.

13. See *Bernardine*, 294 N.Y. at 366, 62 N.E.2d at 605-06; *Murray v. Wilson Line*, 270 A.D. 372, 375, 59 N.Y.S.2d 750, 753 (1st Dep't 1946), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Municipality Duty of Protection*, *supra* note 10, at 363-64; see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 131, at 1053 (5th ed. 1984) [hereinafter KEETON].

14. See *supra* note 11.

15. See *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965); *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958); *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945); *Municipal Duty of Protection*, *supra* note 10, at 363-64; *Municipal Liability*, *supra* note 10, at 318; *Tort Liability*, *supra* note 10, at 85.

sponsible for a negligently maintained building. Although it seemed clear when a municipal corporation would be liable and when it would not, problems arose in determining the distinction between a governmental function and a proprietary act.¹⁶

A governmental function is a duty that the municipal corporation performs and is one that the state owes to the general public.¹⁷ Actions against a municipality for negligent performance of police functions could not be maintained prior to the waiver of sovereign immunity, because such functions were considered governmental functions resulting in immunity.¹⁸

Traditionally, a state could not be held liable for the tortious acts of its employees.¹⁹ The sovereign immunity, that New York State had so long enjoyed, was waived by its own unconditional surrender in 1929.²⁰ This surrender was accomplished by the Court of Claims Act section 12-a (Act), which abandoned the immunity from tort liability for officers and employees of New York state.²¹ Section 12-a of the Act states:

The State hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for

16. See HARPER, *supra* note 11, at 625.

17. See *Bernardine*, 294 N.Y. at 366, 62 N.E.2d at 605-06 ("act[ion] as delegates of the State and not in behalf of any municipal master"); *Municipal Liability*, *supra* note 10, at 317; *Tort Liability*, *supra* note 10, at 85.

18. See *Sorichetti v. City of New York*, 65 N.Y.2d 461, 468, 482 N.E.2d 70, 74, 492 N.Y.S.2d 591, 595 (1985); *De Long v. County of Erie*, 60 N.Y.2d 296, 304, 457 N.E.2d 717, 720-21, 469 N.Y.S.2d 611, 615 (1983); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 138, 204 N.E.2d 635, 636, 256 N.Y.S.2d 595, 597 (1965).

19. See U.S. CONST. amend. XI (which expressly prohibits suits against a state by a citizen of another state); *Ex parte New York*, 256 U.S. 490 (1921) (where immunity was extended to suits by a citizen of the defendant's state).

20. Act of April 10, 1929, ch. 467, § 1, 1929 N.Y. Laws 994, 994 (McKinney) (codified as amended at N.Y. CT. CL. ACT § 8 (McKinney 1989)); see *Municipal Duty of Protection*, *supra* note 10, at 364; *Municipal Liability*, *supra* note 10, at 318; *Tort Liability*, *supra* note 10, at 86.

21. Act of April 10, 1929, ch. 467, § 1, 1929 N.Y. Laws 994, 994 (McKinney) (codified as amended at N.Y. CT. CL. ACT § 8 (McKinney 1989)). See *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (city held liable for failure to provide police protection to an individual aiding in law enforcement).

such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or corporation, and state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee.²²

The Act, as it presently reads, opens the door to liability for the state. However, municipal corporations still retained their own sovereign immunity in spite of the fact that they received it from the state.²³ Regardless of the state's waiver of immunity, however, courts were still reluctant to impose liability when the action was based upon the negligent performance of a governmental function.²⁴

New York courts later decided that municipal corporations would not be permitted to retain their sovereign immunity.²⁵ The courts reasoned that since the municipal corporations initially received their immunity from the state, they could not retain that which the state no longer retained for itself.²⁶ Therefore, the

22. N.Y. CT. CL. ACT § 8 (McKinney 1989).

23. *Ferrier v. City of White Plains*, 262 A.D. 94, 98, 28 N.Y.S.2d 218, 221 (2d Dep't 1941) (municipality exercising a state delegated power by designating a street for coasting was not exposed to liability for exercising such legislative power); *Engels v. City of New York*, 256 A.D. 992, 993, 10 N.Y.S.2d 641, 642 (2d Dep't 1939) (municipality not intended be liable in exercise of state delegated powers); *Parsons v. City of New York*, 248 A.D. 825, 825, 289 N.Y.S. 198, 199 (2d Dep't 1936) (city not liable for police's neglect in maintaining traffic lights), *aff'd*, 273 N.Y. 547, 7 N.E.2d 685 (1938).

24. *Murray v. Wilson Line*, 270 A.D. 372, 375, 59 N.Y.S.2d 750, 753 (1st Dep't 1946) ("municipality is not liable for its failure to exercise a governmental function, such as to provide police or fire protection"), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947); *Ferrier v. City of White Plains*, 262 A.D. 94, 96, 28 N.Y.S.2d 218, 221-22 (2d Dep't 1941) (municipality not liable for police officer's negligence that caused injury).

25. *See infra* notes 26-30 and accompanying text.

26. *See, e.g., Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945) (Court of Claims Act applied to state subdivisions in addition to the state).

judicial branch held that the municipal corporations should be exposed to the same liability as set forth under section 12-a of the Court of Claims Act.²⁷

In *Bernardine v. City of New York*,²⁸ the New York Court of Appeals stated that “[n]one of the civil divisions of the state, its counties, cities, towns [or] villages [had] any independent sovereign immunity.”²⁹ The court stated that the immunity previously enjoyed was no more “than an extension of the state’s exemption from liability[,]” and that since the state was now answerable for the torts of its officers and employees, so too should its cities, towns, villages, and counties.³⁰

Although the state and its civil divisions were no longer exempt from liability, they still shared a court-created immunity when it came to a failure to execute a governmental act.³¹ The New York Court of Appeals eventually permitted recovery from municipal corporations for negligent acts of its employees or officers involved in proprietary functions.³² It was not enough to show

27. *Bernardine*, 294 N.Y. at 365, 62 N.E.2d at 605. See also N.Y. Ct. CL. ACT § 8 (McKinney 1989).

28. 294 N.Y. 361, 62 N.E.2d 604 (1945).

29. *Id.* at 365, 62 N.E.2d at 605.

30. *Id.*

31. See *Murray v. Wilson Line*, 270 A.D. 372, 375, 59 N.Y.S.2d 750, 753 (1st Dep’t 1946) (municipality not liable for failure to exercise functions such as police and fire protection), *aff’d*, 296 N.Y. 845, 72 N.E.2d 29 (1947); see also *Municipal Liability*, *supra* note 10, at 318.

32. See *Sorichetti v. City of New York*, 65 N.Y.2d 461, 469, 482 N.E.2d 70, 75, 492 N.Y.S.2d 591, 596 (1985) (city held liable for the injuries inflicted upon a minor child by her father due to the negligent failure of the police department to respond to a request for protection where a special relationship had been created by: (1) the filing of an order of protection; (2) the police department’s knowledge of father’s violent nature; (3) previous responses to pleas for assistance; and (4) the reasonable expectation of protection); *De Long v. County of Erie*, 60 N.Y.2d 296, 305, 457 N.E.2d 717, 721, 469 N.Y.S.2d 611, 616 (1983) (creation of a special emergency telephone number and assurances of help to the victim were sufficient factors to establish a special relationship); *Schuster v. City of New York*, 5 N.Y.2d 75, 82-83, 154 N.E.2d 534, 538, 180 N.Y.S.2d 265, 271 (1958) (city held liable for the shooting death of a police informant due to its failure to exercise reasonable care in regard to foreseeable dangers wherein (1) the city had voluntarily assumed partial protection of the decedent and (2) the police were

proof of the negligence alone. The court required a showing that some “special relationship” existed between the municipality and the injured party.³³ This special relationship was necessary to the New York Court of Appeals in order to justify a finding of liability.³⁴

notified of death threats made to the decedent); *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945) (city held liable for injuries sustained by a runaway police horse under a waiver of state immunity).

33. See *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) (police assurances that they would make an arrest created no special relationship because the plaintiff did not rely on the promise of police protection); *Sorichetti*, 65 N.Y.2d at 468, 482 N.E.2d at 74, 492 N.Y.S.2d at 595 (police assurances of action to a mother to protect her child from her former husband created a special relationship between the police and the mother and child); *De Long*, 60 N.Y.2d at 304, 457 N.E.2d at 720-21, 469 N.Y.S.2d at 615 (municipal “911” operator’s assurances that police help was on the way to help burglary victim created a special relationship and a duty to the burglary victim); *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) (city gas regulations created no special relationship between the city and persons injured from a gas explosion); *Weiner v. New York City Transp. Auth.*, 55 N.Y.2d 175, 178, 433 N.E.2d 124, 125, 448 N.Y.S.2d 141, 142 (1982) (no special relationship existed between a rape victim and the city transit authority simply because the victim was on transit authority premises when the assault occurred); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 139, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 598 (1965) (no duty of care existed between a city fire department captain and a tenant of a building inspected by the captain); *Schuster*, 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269-70 (duty of care was between the police and a citizen police informant who requested police protection after aiding in the capture of a criminal).

34. See *Cuffy*, 69 N.Y.2d at 261, 505 N.E.2d at 940, 513 N.Y.S.2d at 375 (special relationship was not established due to the lack of reliance on or knowledge of the promise of protection); *Sorichetti*, 65 N.Y.2d at 468, 482 N.E.2d at 75, 492 N.Y.2d at 596 (order of protection and a police officer’s actual knowledge of the offender’s previous violent acts created a special relationship); *De Long*, 60 N.Y.2d at 304-05, 457 N.E.2d at 721, 469 N.Y.S.2d at 615-16 (assurances that help would arrive “right away” by a worker at a county run emergency response line created a special relationship); *Florence v. Goldberg*, 44 N.Y.2d 189, 195, 375 N.E.2d 763, 766, 404 N.Y.S.2d 583, 586 (1978) (presence of a crossing guard at an intersection for a period of two weeks, as observed by the infant victim’s mother, created a special relationship); *Riss v. City of New York*, 22 N.Y.2d 579, 583, 240

B. Sovereign Immunity -- Police And Fire Protection

It has long been the rule that a municipality may not be held liable for injuries resulting from a failure to provide adequate police or fire protection.³⁵ These services and duties have been recognized as a governmental function³⁶ that are rendered to the general public. An individual cannot expect these services to be rendered especially or ultimately for him or her thereby creating a duty between the municipality and the injured party.³⁷ If such a duty was created every time a negligent act resulted from a

N.E.2d 860, 861, 293 N.Y.S.2d 897, 899 (1965) (repeated requests by the victim for protection without assurances by the police of protection does not create a special relationship); *Schuster*, 5 N.Y.2d at 82-83, 154 N.E.2d at 538, 180 N.Y.S.2d at 271 (special relationship is created when a citizen collaborates in the arrest or prosecution of criminals and it reasonably appears the citizen is in danger as a result of that collaboration).

35. See *De Long*, 60 N.Y.2d at 304, 457 N.E.2d at 720-21, 469 N.Y.S.2d at 615 (municipality not held liable for negligence in performing a governmental function, including police and fire protection); *O'Connor*, 58 N.Y.2d at 190, 447 N.E.2d at 35, 460 N.Y.S.2d at 487 (general liability does not exist to the public for civil damages from a failure to provide adequate police or fire protection); *Florence*, 44 N.Y.2d at 195, 375 N.E.2d at 766, 404 N.Y.S.2d at 586 (municipality not held liable for failure to furnish adequate police protection); *Motyka*, 15 N.Y.2d at 139, 204 N.E.2d at 637, 256 N.Y.S.2d at 598 (court refrained from holding that a general liability exists to the public for civil damages in event of a failure to supply adequate police or fire protection); *Schuster*, 5 N.Y.2d at 80-81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269-70 (no liability to the general public from a failure of police or fire protection); *Steitz v. City of Beacon*, 295 N.Y. 51, 55, 64 N.E.2d 704, 706 (1945) (no liability is assumed unless imposed by agreement or by statute); *Murray v. Wilson Line*, 270 A.D. 372, 375, 59 N.Y.S.2d 750, 753 (1st Dep't 1946) (failure to provide adequate police protection does not constitute a breach of duty by the city), *aff'd*, 296 N.Y. 845, 72 N.E.2d 29 (1947).

36. See *De Long*, 60 N.Y.2d at 304, 457 N.E.2d at 720-21, 469 N.Y.S.2d at 615 (absent a special relationship, a municipality can not be held liable for negligence in the performance of police and fire protection); *Riss*, 22 N.Y.2d at 581-82, 240 N.E.2d at 860-61, 293 N.Y.S.2d at 897-98 (distinguishing a municipality's liability for negligent performance of a proprietary function from immunized negligent performance of a governmental function).

37. See generally *Bernardine v. City of New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

municipality's failure to provide adequate protection, the city would be acting as an insurer of health, rather than a provider of protection for the general public.³⁸

The court of appeals, in its attempts to explain the requirements for finding municipalities liable for tortious acts, recognized four elements necessary to establish a special relationship:

(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.³⁹

Once these elements have been established, the plaintiff would need to prove the other essential elements of the negligence cause of action.

The first element of the special relationship requirement seems to be self-explanatory. It requires that an assumption of a duty occurs when promises or actions are made by the municipality.⁴⁰ It can be implied that if the municipality gave such promises or assurances, an assumption of the duty to assist or protect has been undertaken.

The second element is a realization on the part of the municipality that a failure to take action could result in being the proximate cause of the injuries sustained by the party seeking to recover.⁴¹ This element does not require that the inaction on the part of the municipal agent necessarily lead to the harm, but only that it *could* lead to the harm.

As for the third and fourth elements, the issues arise as to what constitutes a direct contact and what constitutes a justifiable reliance. Is a communication between the agent of the municipality and the person who seeks recovery for injuries the only method

38. See *Municipal Duty of Protection*, *supra* note 10, at 365.

39. *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).

40. *Id.* at 261, 505 N.E.2d at 940, 513 N.Y.S.2d at 375.

41. *Id.* at 260, 505 N.E.2d at 940, 513 N.Y.S.2d at 375.

available, or may some other form of contact suffice for a jury or court to find that a special relationship did in fact exist? These questions and concerns raised by the author of this Note are what seem to be giving the New York Court of Appeals the most difficulty.⁴² If the court finds that all of these elements exist, then a special relationship between the municipality and the injured party has been established, thereby resulting in the finding of a duty that has “‘been enjoined or undertaken for the protection or benefit of the injured person who is seeking to recover.’”⁴³

II. KIRCHER v. CITY OF JAMESTOWN

A. Factual Background

The New York Court of Appeals, in *Kircher v. City of Jamestown*,⁴⁴ addressed the issue of municipal liability. The court held that a special relationship could not be found and, therefore, the plaintiff was denied recovery from the City of Jamestown.⁴⁵ Because no causal relationship existed and no request for assistance was made by the plaintiff, Deborah Kircher, no relationship developed between the officer and the victim.⁴⁶ This holding was reached in spite of the fact that the victim was abducted and could not request help herself, but instead, relied on two witnesses to make the necessary request for her.⁴⁷

On April 20, 1984, Deborah Kircher, the plaintiff, was abducted by Brian Blanco while entering her parked car in a parking lot adjacent to a local drug store.⁴⁸ Blanco assaulted and

42. See *Sorichetti v. City of New York*, 65 N.Y.2d 461, 471, 482 N.E.2d 70, 76-77, 492 N.Y.S.2d 591, 597-98 (1985).

43. See *Municipal Liability*, *supra* note 10, at 320 (quoting *Runkel v. City of New York*, 282 A.D. 173, 178-79, 123 N.Y.S.2d 485, 491 (2d Dep't 1953)).

44. 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

45. *Id.* at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 999.

46. *Id.* at 258-59, 543 N.E.2d at 447, 544 N.Y.S.2d at 999-1000.

47. *Id.* at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 998-99.

48. *Id.* at 253, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

pulled Kircher into her car and then sped off.⁴⁹ These events were witnessed by Karen Allen and Richard Skinner. They heard Kircher scream for help as they were entering their car, which was parked directly in front of Kircher's vehicle.⁵⁰ As Allen and Skinner witnessed Kircher's vehicle speed off, they pursued Blanco in their own vehicle.⁵¹ Skinner lost the Kircher vehicle after a block or so, but in trying to relocate it they came upon a Jamestown Police officer, Bruce Carlson.⁵² At the time, Carlson was rendering assistance to a disabled municipal vehicle. Skinner, who knew Carlson, proceeded to tell him what he and Allen had just observed and of their pursuit.⁵³ Additionally, they provided Carlson with the vehicle's license number, a description of the car and alleged assailant.⁵⁴ Skinner informed Carlson that he was unsure of the scene which he had just witnessed, but he expressed his concern "that there was something really wrong with it."⁵⁵ Carlson then assured them that he would call in the report.⁵⁶ Skinner and Allen eventually returned to the scene of the assault where they obtained Kircher's name and address from the local store.⁵⁷ They then drove past Kircher's home several times to see if her car had returned but took no further actions or filed any additional reports with the police department.⁵⁸ As was later revealed, Carlson never called in the reported incident and no further action was taken by the Jamestown Police.⁵⁹ Blanco, in the meantime, drove Kircher to the Town of Gerry, New York,⁶⁰

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 253-54, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

53. *Id.* at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* Gerry, New York is located approximately 60 miles from Jamestown. The road between Gerry and Jamestown is heavily traveled with many cars traveling in both directions. *Id.* at 264, 543 N.E.2d at 450, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting).

where she was repeatedly raped and assaulted.⁶¹ Kircher was locked in the trunk of her car, where she was rescued twelve hours later.⁶²

It was revealed through testimony and affidavits that Kircher had witnessed Skinner and Allen's attempt to rescue her⁶³ and at some point realized that they were no longer in pursuit.⁶⁴ Kircher stated that Blanco traveled on major thoroughfares with heavy traffic in order to reach his desired destination.⁶⁵

Kircher commenced an action against the City of Jamestown and Officer Carlson, alleging that Carlson was negligent in failing to render assistance at the time of her abduction and that the city was vicariously liable for Carlson's negligence.⁶⁶

B. Procedural Background

In the trial court, the City of Jamestown moved to dismiss the complaint for failure to state a cause of action or, alternatively, for summary judgment, on the ground that Kircher had not proven that a special relationship had developed sufficient to establish the required causal link between herself and the municipality.⁶⁷ The supreme court denied the city's motion.⁶⁸ Its

61. *Id.* (Bellacosa, J., dissenting). Blanco's attack upon Kircher caused her to experience various injuries, including a fractured larynx. *Id.* at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

62. *Id.* at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

63. *Id.* Kircher argued that Skinner and Allen's witnessing and subsequent pursuit satisfied the justifiable reliance element. *Id.* at 262, 543 N.E.2d at 449-50, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting). Kircher claimed that Skinner and Allen were, in a sense, acting as her surrogates and that she relied on them to seek the proper help. *Id.* at 265, 543 N.E.2d at 451, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting). *Compare Sorichetti v. City of New York*, 65 N.Y.2d 461, 471, 482 N.E.2d 70, 76-77, 492 N.Y.S.2d 591, 597-98 (1985) (court found that the communication between a mother and the police was sufficient to satisfy the reliance requirement in establishing a special relationship between the city and the infant's mother).

64. *Kircher*, 74 N.Y.2d at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 996.

65. *Id.*

66. *Id.*

67. *Id.* at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 996-97.

68. *Id.* at 254, 543 N.E.2d at 444, 544 N.Y.S.2d at 997.

decision was based on the New York Court of Appeals' decision in *Crosland v. New York City Transit Authority*.⁶⁹ The court stated that Carlson owed a duty to Kircher and that the breach of the officer's duty constituted negligence, making the city vicariously liable for any injuries.⁷⁰

The appellate division reversed the supreme court's holding and granted the City of Jamestown's motion for summary judgment.⁷¹ The court stated that the fact that one is a potential crime victim does not rise to the level of a special relationship necessary for the imposition of liability upon the municipality.⁷² The appellate court noted that the evidence presented was insufficient to show direct contact between Kircher and the City of Jamestown,⁷³ and stated that the evidence failed to establish that Kircher had "relied to her detriment on assurances provided by [Carlson], or that [the city's] affirmative conduct created a duty to act in her behalf."⁷⁴ The court concluded that no special relationship had been established and the New York Court of Appeals granted leave to appeal.⁷⁵

C. New York Court of Appeals: The Majority Opinion

In an effort to reconcile the issue of liability for the negligent execution of a governmental function, the New York Court of Appeals needed to determine whether a special relationship existed between the municipality and Kircher. The court, in

69. *Id.*; *Crosland v. New York City Transit Authority*, 68 N.Y.2d 165, 498 N.E.2d 143, 506 N.Y.S.2d 670 (1986). In *Crosland*, the New York Court of Appeals held that a publicly owned common carrier owes no special duty to provide police protection for its passengers, rather, it owes only a duty of ordinary care. *Id.* at 168-69, 498 N.E.2d at 144, 506 N.Y.S.2d at 671. The court noted that the Transit Authority would be subject to possible liability for failure of its employees to summon assistance for a passenger they witnessed being brutally assaulted. *Id.* at 170, 498 N.E.2d at 145, 506 N.Y.S.2d at 672.

70. *Kircher*, 74 N.Y.2d at 254-55, 543 N.E.2d at 444-45, 544 N.Y.S.2d at 997.

71. *Id.* at 255, 543 N.E.2d at 445, 544 N.Y.S.2d at 997.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

Kircher, stated that it has consistently required a finding of a special relationship,⁷⁶ concluding that “such a relationship rests primarily upon the commonly recognized principle that a municipality’s duty to provide police protection ordinarily is one owed to the public-at-large and not to a specific person or class.”⁷⁷ The court continued to note that the “‘municipality’s provision of police protection . . . [has been viewed as] a resource-allocating function that is better left to the discretion of the policy makers.’”⁷⁸

The court in *Kircher* relied upon *Cuffy v. City of New York*⁷⁹ to restate the necessary elements that must be satisfied for a special relationship to be found.⁸⁰ The court stated that the direct contact and reasonable reliance of assistance were not present.⁸¹ Therefore, there were no justifiable grounds for establishing a special relationship.⁸² The court noted that since *Kircher* was unable to communicate directly with the police and no direct communication was made, there was no justifiable reliance that the police would act on her behalf.⁸³ The court stated that these requirements “are rooted in policy considerations that compel the denial of recovery here.”⁸⁴ If a direct communication could not be found or made, is this the fault of the injured party? Should it be sufficient that the injured party called for assistance and relied upon a third party to obtain the proper help? Must a victim be denied recovery when a third party seeks to obtain help, and the victim’s injury or situation is aggravated by the negligence of the

76. *Id.* at 255-56, 543 N.E.2d at 445, 544 N.Y.S.2d 997; *see also supra* note 34.

77. *Kircher*, 74 N.Y.2d at 256, 543 N.E.2d at 445, 544 N.Y.S.2d at 998.

78. *Id.* at 256, 543 N.E.2d at 445-46, 544 N.Y.S.2d at 998 (quoting *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 374 (1987)).

79. 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

80. *Kircher*, 74 N.Y.2d at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 998; *see supra* notes 39-43 and accompanying text.

81. *Kircher*, 74 N.Y.2d at 257-58, 543 N.E.2d at 446-47, 544 N.Y.S.2d at 998-99.

82. *Id.* at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 998.

83. *Id.*

84. *Id.*

police especially when the victim was unable to directly communicate his or her cry for help?

In the past, the New York Court of Appeals has shown some flexibility in its application of the requirements of a direct communication.⁸⁵ The court in *Kircher* recognized this flexibility, as expressed in *Sorichetti v. City of New York*,⁸⁶ but refused to apply it. In *Sorichetti*, the court permitted recovery for Sorichetti from the city, finding that a direct communication existed between an infant and the police department, even though the communication was brought about through the infant's mother.⁸⁷ The court, however, did not permit the same flexibility to apply to Kircher, since Allen and Skinner were strangers to her.⁸⁸ The court distinguished *Sorichetti* from *Kircher* by explaining that *Sorichetti* had involved previous contacts with the municipality and an outstanding judicial order of protection.⁸⁹ In contrast, Kircher had no previous involvement with the police department, but there was no way in which she could anticipate or know that such consequences would befall her. Such reasoning by the court ultimately could lead to more suffering for victims who had no notice or control over what was about to happen to them.

In essence, the court was limiting the opinion of *Sorichetti* to a set of facts that involves both previous contacts with the municipality and reliance on a communication between one who is closely connected to the injured party and the municipality. When such a situation exists, then and only then, will the court allow flexibility in the requirement of a direct contact.

The court in *Kircher* found that there could be no reliance by Kircher (the victim) because there had been no direct contact between the municipality's agent and herself.⁹⁰ The court stated that the facts did not "demonstrate a 'clear, continuous, causal link' between the" actions of the officer and the injuries that

85. See *Sorichetti v. City of New York*, 65 N.Y.2d 461, 468-69, 482 N.E.2d 70, 75, 492 N.Y.S.2d 591, 596 (1985).

86. 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

87. *Id.* at 469, 482 N.E.2d at 75, 492 N.Y.S.2d at 596.

88. *Kircher*, 74 N.Y.2d at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 999.

89. *Id.* at 257-58, 543 N.E.2d at 446-47, 544 N.Y.S.2d at 999.

90. *Id.* at 258, 543 N.E.2d at 447, 544 N.Y.S.2d at 999.

Kircher sustained.⁹¹ The court believed that without any evidence of reliance, a finding of a special relationship would be far too speculative to allow for a finding of liability.⁹² The court noted that Kircher's claim that Allen and Skinner were her surrogates, and that she relied on them to obtain assistance from the municipality's police force, was not conclusive of a justifiable reliance.⁹³ The court concluded there was no sure way of knowing that Kircher's injuries would have been prevented if Carlson called in the report.⁹⁴

In essence, the court looked at whether the officer's alleged negligence was the proximate cause of Kircher's injuries. The New York Court of Appeals apparently believed that such a determination could not be made. This, however, is a factual question that should be decided by the trier of fact.⁹⁵ The facts seem to indicate that but-for the officer failing to call in the report, Kircher would not have been injured. Blanco had to travel quite a distance on major highways with heavy traffic, before he assaulted and raped Kircher. Such factors alone could lead the trier of fact to the conclusion that had the crime been properly reported by Officer Carlson, a patrolling police car could have located the reported vehicle and attempted to apprehend Blanco. However, in the present situation the only opportunity to prevent the unfortunate outcome was hampered by Carlson's failure to report the crime, despite his probable awareness that a crime was in progress.

The court in *Kircher* attempted to justify its conclusion that no exception to the rule should be permitted. "[S]uch reliance is consistent with the purpose of the special duty rule to place controllable limits on the scope of the municipality's duty of protection and to prevent the exception from swallowing the general rule of governmental immunity."⁹⁶ The court stated "[a]bsent

91. *Id.* (quoting *Id.* at 265, 543 N.E.2d at 452, 544 N.Y.S.2d at 1004 (Bellacosa, J., dissenting)).

92. *Id.* at 259, 543 N.E.2d at 447, 544 N.Y.S.2d at 999.

93. *Id.*

94. *Id.* at 259, 543 N.E.2d at 447, 544 N.Y.S.2d at 999-1000.

95. See KEETON, *supra* note 13, § 37, at 235.

96. *Kircher*, 74 N.Y.2d at 259, 543 N.E.2d at 447-48, 544 N.Y.S.2d at

this requirement, a municipality would be exposed to liability every time one of its citizens was victimized by crime and the municipality failed to take appropriate action although notified of the incident[;]"⁹⁷ and that it was the responsibility of the legislature to expand the boundaries of such a duty, and not the function of the judiciary.⁹⁸

The court, in its conclusion, analogized Kircher's unfortunate situation to that of a crime victim where the police department arrived too late to protect the victim.⁹⁹ The court stated that there was nothing in the facts to distinguish the two circumstances and, unfortunately, offered no explanation supporting the analogy that it drew.¹⁰⁰ Analyzing this analogy exposes irreconcilable flaws. In a situation where the police arrive too late to render assistance, there is still a possibility of rendering aid to prevent the crime or protect the victim from further injury. This example is not similar to a situation where the police do not arrive at all because, in the latter, there could not have been any assistance rendered at all, or a mitigation of the injuries. No acts of prevention could be taken because the proper individuals were not alerted to prevent it. Injury or an aggravation of the injury is therefore a direct result of a failure to communicate to other officers, who could have responded to the call for help and the possible danger the victim was in, as was the case in *Kircher*. Even if there had been a report of the crime and the officers had arrived too late to prevent the abduction, assault and rape, there is a strong possibility that Kircher's injuries may have been minimized by a quick rescue. The court unfortunately failed to find any distinguishing patterns in these two very different situations.

1000.

97. *Id.* at 259, 543 N.E.2d at 448, 544 N.Y.S.2d at 1000.

98. *Id.*

99. *Id.* at 260, 543 N.E.2d at 448, 544 N.Y.S.2d at 1000.

100. *Id.*

D. New York Court of Appeals Dissenting Opinions

1. Judge Hancock's Dissenting Opinion

Judge Hancock relied on the findings of the court in *De Long v. County of Erie*¹⁰¹ and found many similarities between the facts of *De Long* and the *Kircher* case. In *Kircher*, Judge Hancock stated that the police officer gave his assurance that he would call in the reported crime¹⁰² and negligently failed to do so, and as a result, Brian Blanco eluded apprehension and was afforded the opportunity to rape Deborah Kircher.¹⁰³ Judge Hancock disagreed with the majority's finding that recovery could not be granted because Kircher did not contact the police herself nor relied on the police assurances of help.¹⁰⁴ He argued that the would-be-rescuers, Skinner and Allen, relying on the pledge of help and therefore discontinuing their pursuit, should be sufficient to satisfy the direct communication and reliance elements.¹⁰⁵

Judge Hancock stated that in *De Long*, the police undertook to act on a report and gave assurances of their assistance.¹⁰⁶ The reliance on those promises provided the causal link between the police negligence and the harm to the plaintiff.¹⁰⁷ "How can it matter that in *De Long* it was the injured party, herself, who

101. 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983). In *De Long*, the police negligently failed to respond to a 911 call after stating that the call would be answered and, as a result, the decedent was stabbed to death by an intruder. *Id.* at 301, 457 N.E.2d at 719, 69 N.Y.S.2d at 613-14. The court affirmed judgment for the plaintiff. *Id.* at 308, 457 N.E.2d at 723, 469 N.Y.S.2d at 618.

102. *Kircher*, 74 N.Y.2d at 260, 543 N.E.2d at 448, 544 N.Y.S.2d at 1000 (Hancock, J., dissenting).

103. *Id.* (Hancock, J., dissenting).

104. *Id.* at 260, 543 N.E.2d at 448, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

105. *Id.* at 260-61, 543 N.E.2d at 448-49, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

106. *Id.* (Hancock, J., dissenting). See *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

107. *Delong*, 60 N.Y.2d at 305, 457 N.E.2d at 721, 469 N.Y.S.2d at 616.

relied on the police assurances, while here it was those who could have helped and did not? There is no logical reason for the distinction and the majority offers none."¹⁰⁸

The majority in *Kircher* found insufficient evidence to support a finding of a causal link.¹⁰⁹ It can not be ascertained whether the plaintiff would have been saved with police action. Although the majority's opinion is based on the conclusion that police involvement may not have changed the outcome in this case, the possibility of a different result is very likely. These unanswered questions present a factual question as to causation that must be decided by the trier of fact. Judge Hancock recognized that the majority was correct in finding that governmental immunity is a legislative determination and, therefore, it is the legislature who must instigate the change.¹¹⁰ However, the special relationship rule is a court-created doctrine that limits the legislative determination for governmental liability,¹¹¹ and it is up to the court to alter its own rules if the policy justifications underlying them are not furthered.

In *Kircher*, no question was presented as to the municipality's allocation of police protection. The only question presented was the failure of the police to act in spite of their assurances. Judge Hancock stated that the majority's reasoning, in distinguishing *De Long*, was that the direct contact will serve as a rational limit on the class of persons to whom the municipality's liability runs.¹¹² Judge Hancock noted that this was the only policy reason offered by the majority and the basis "for the limitation is the limitation itself."¹¹³

Judge Hancock noted that the court, in the past, applied a

108. *Kircher*, 74 N.Y.2d at 261, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

109. *Id.* at 258, 543 N.E.2d at 447, 544 N.Y.S.2d at 999.

110. *Id.* at 261-62, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

111. *See supra* note 7 and accompanying text.

112. *Kircher*, 74 N.Y.2d at 261, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

113. *Id.* (Hancock, J., dissenting).

flexible approach to the requirement for direct contact.¹¹⁴ However, Judge Hancock could not comprehend why the majority did not follow the holding and reasoning of the court in *Sorichetti v. City of New York*.¹¹⁵ He stated that the policy reasons offered by the majority for departing from the previous holding were unclear and insufficient.¹¹⁶ Judge Hancock stated, "We have repeatedly rejected '[p]redictions of dire financial consequences to municipalities' as a reason for denying liability."¹¹⁷

The majority focused on the lack of a causal link between the police and Kircher. However, the facts may support the establishment of a causal relationship. It was clear that Kircher's injuries were the reasonable and probable consequence of Carlson's negligence. If Carlson called in the crime, it is reasonable to conclude, given the long distance traveled, the major highways used with heavy traffic at the time, and the immediate report of the transpiring crime, that Kircher's injuries would have been prevented or at least minimized.

2. Judge Bellacosa's Dissenting Opinion

It is apparent from the opening paragraph of Judge Bellacosa's dissent that he was irate with the majority opinion:

Plaintiff Mrs. Kircher, the victim of a broad daylight abduction, a harrowing car ride and kidnapping in the countryside, and a brutal beating and rape, should not have her personal injury case and that of her husband thrown out of court without a trial because of the inflexible application of catechetical rules.¹¹⁸

114. *Id.* (Hancock, J., dissenting).

115. *Id.* (Hancock, J., dissenting); 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

116. *Kircher*, 74 N.Y.2d at 261-62, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting).

117. *Id.* at 262, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001 (Hancock, J., dissenting) (quoting *Schuster v. City of New York*, 5 N.Y.2d 75, 80, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958)).

118. *Id.* at 262, 543 N.E.2d at 449, 544 N.Y.S.2d at 1001-02 (Bellacosa, J., dissenting).

Judge Bellacosa noted that the majority admitted that it should not apply the rules governing a special relationship in a strict fashion.¹¹⁹ However, Judge Bellacosa stated that a less strict approach is wiser and fairer in a case “which does not involve allocation of police resources to prevent future harms or crimes, but rather failure to perform a duty as to a particular ongoing crime and rescue mission.”¹²⁰ Judge Bellacosa stated that the direct contact requirement sufficiently existed between the City of Jamestown and Kircher through the help of her rescuers at the moment of her abduction.¹²¹ Kircher’s rescuers, acted solely on her behalf when they began their chase and summoned police assistance.¹²² He noted that the victim was isolated by the nature of her abduction and, thus, could not personally or directly contact the police for help herself.¹²³ Under these circumstances, the imposition of an impossible legal duty “perverts the jural relationship of the parties and the applicable rules.”¹²⁴ Kircher did all she could under the circumstances: she cried for help; witnessed her would-be rescuers come to her aid; watched them give chase; and relied upon them to seek the help that she was unable to seek for herself.¹²⁵ “The initiation of an unbroken chain [of communication] and the propinquity and the contemporaneity of the events may be deemed legally to have fulfilled the direct contact requirement, at least for the purposes of allowing factual development and resolution at a trial”¹²⁶ Judge Bellacosa stated that the undisputed reliance that

119. *Id.* at 262, 543 N.E.2d at 449, 544 N.Y.S.2d at 1002 (Bellacosa, J., dissenting).

120. *Id.* (Bellacosa, J., dissenting).

121. *Id.* at 262, 543 N.E.2d at 450, 544 N.Y.S.2d at 1002 (Bellacosa, J., dissenting).

122. *Id.* (Bellacosa, J., dissenting).

123. *Id.* at 265, 543 N.E.2d at 451, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting).

124. *Id.* at 265, 543 N.E.2d at 451, 544 N.Y.S.2d at 1004 (Bellacosa, J., dissenting).

125. *Id.* at 265, 543 N.E.2d at 451, 544 N.Y.S.2d at 1003 (Bellacosa, J., dissenting).

126. *Id.* at 265, 543 N.E.2d at 451, 544 N.Y.S.2d at 1004 (Bellacosa, J., dissenting).

Skinner and Allen had could be transferred, as a matter of fact, to the victim's benefit because under her circumstances she had no one else to rely on.¹²⁷

This dissent relied heavily on *Cuffy v. City of New York*¹²⁸ and *Sorichetti v. City of New York*¹²⁹ to support the position that the majority should have applied a flexible approach to the direct contact requirement.¹³⁰

The essence of Judge Bellacosa's dissent is conclusively stated by the following:

Using language that could have anticipated the instant case, we expressed our reluctance to apply the direct contact requirement "in an overly rigid manner", . . . its proper application should depend on the particular circumstances of each case. . . . Thus, we stated as long as there is a means of showing "a 'special relationship' between the claimant and the municipality, beyond the relationship with government that all citizens share in common", and there is "a basis for rationally limiting the class of citizens to whom the municipality's 'special duty' extends", the direct contact requirement can be satisfied.¹³¹

In *Sorichetti v. City of New York*, a mother was permitted to act as the surrogate for her child who was in danger of injury from the infant's father.¹³² The *Sorichetti* court held that a special relationship was created between the mother and the police department when the police department gave sufficient assurances that they would render the necessary aid.¹³³ In contrast, the *Kircher* majority claimed that *Sorichetti* was dissimilar, since *Kircher* did not involve the existence of an order of protection and previous

127. *Id.* at 265, 543 N.E.2d at 451-52, 544 N.Y.S.2d at 1004 (Bellacosa, J., dissenting).

128. 69 N.Y.2d 255, 505 N.E.2d 937, 513 N.Y.S.2d 372 (1987).

129. 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

130. *Kircher*, 74 N.Y.2d at 266, 543 N.E.2d at 452, 544 N.Y.S.2d at 1004 (Bellacosa, J., dissenting).

131. *Id.* at 266-67, 543 N.E.2d at 452, 544 N.Y.S.2d at 1004-05 (Bellacosa, J., dissenting) (quoting *Cuffy v. City of New York*, 69 N.Y.2d 255, 261, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987)).

132. *Sorichetti*, 65 N.Y.2d at 463, 482 N.E.2d at 71, 492 N.Y.S.2d at 592.

133. *Id.* at 470-71, 482 N.E.2d at 76, 492 N.Y.S.2d at 597.

contacts with the police department as the *Sorichetti* case had involved.¹³⁴

It appears that the majority overlooked the fact that it was not the mother who was seeking to recover in *Sorichetti*, but her child.¹³⁵ The court applied a flexible approach to the special relationship test and permitted the police assurances to the mother to be sufficient for reliance by her child.¹³⁶ This is contrary to the application of the special relationship rule applied in *Kircher*.¹³⁷ In *Sorichetti*, the infant's mother acted as the surrogate for her child.¹³⁸ However, in *Kircher*, Skinner and Allen were not permitted to act as surrogates for Kircher to communicate her need for help to the police.¹³⁹ The facts of these two cases are not so different to achieve opposite results. The mother in *Sorichetti*¹⁴⁰ acted on behalf of her child to ensure the infant's safety from her father.¹⁴¹ The assistance sought was for the sole benefit of the child's welfare. It is reasonable to assume that a child would rely on her mother's protection and concern for her well being. Deborah Kircher was not fortunate enough to have her mother available at the scene of the assault to obtain the help she needed. Instead, Kircher relied on the actions of two concerned citizens, who while giving chase in their car placed their own safety and lives at risk, solely for her benefit.¹⁴² These two cases¹⁴³ demonstrate that the relationship

134. *Kircher*, 74 N.Y.2d at 258 n.2, 543 N.E.2d at 447 n.2, 544 N.Y.S.2d at 999 n.2.

135. *Sorichetti*, 65 N.Y.2d at 467, 482 N.E.2d at 74, 492 N.Y.S.2d at 595.

136. *Id.* at 470-71, 482 N.E.2d at 76, 492 N.Y.S.2d at 597.

137. *Kircher*, 74 N.Y.2d at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 998-99.

138. *Sorichetti*, 65 N.Y.2d at 471, 482 N.E.2d at 76, 492 N.Y.S.2d at 597.

139. *Kircher*, 74 N.Y.2d at 257, 543 N.E.2d at 446, 544 N.Y.S.2d at 999.

140. See *supra* note 6 and accompanying text.

141. *Sorichetti*, 65 N.Y.2d at 471, 482 N.E.2d at 76, 492 N.Y.S.2d at 597.

142. *Kircher*, 74 N.Y.2d at 262, 543 N.E.2d at 450, 544 N.Y.S.2d at 1002 (Bellacosa, J., dissenting).

143. *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989); *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482

between the individual or individuals who come to one's aid and the individual in trouble plays only a small role in developing a foundation for surrogate relationships. The risks Skinner and Allen took to rescue Kircher demonstrated the same concern a mother would have for her child when in danger of injury.¹⁴⁴ Skinner and Allen have proven that their actions can be equated to the concerns or actions a mother would take for her child in danger, without the need of the existence of a close relationship. Since opposite results were reached in *Kircher* and *Sorichetti*, it is obvious that a grave miscarriage of justice has occurred, one that must be rectified in order to prevent the unfortunate outcome in *Kircher*¹⁴⁵ from happening again.

III. CURRENT TREND AND RECOMMENDATION FOR A NEW APPROACH

The sovereign immunity waiver¹⁴⁶ served to provide the public with relief, when an injury was caused as a result of state or municipal negligence. The Act's purpose was not to shield the state and the municipality from liability as in *Kircher*, in which the New York Court of Appeals denied recovery. The court's basis for this conclusion rested on the failure to find the existence of a special relationship between Kircher and the City of Jamestown, a test which evolved from a court created doctrine.¹⁴⁷ The court held that no causal link or direct communication could be established between the parties.¹⁴⁸ In the past, the court has applied a flexible approach to these rules, ultimately permitting recovery.¹⁴⁹ There is no logical reason why

N.E.2d 70, 492 N.Y.S.2d 591 (1985).

144. Compare *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989) with *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 591 (1985).

145. 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

146. See *supra* note 6 and accompanying text.

147. *Kircher v. City of Jamestown*, 74 N.Y.2d 251, 543 N.E.2d 443, 544 N.Y.S.2d 995 (1989).

148. *Id.* at 257-58, 543 N.E.2d at 446-47, 544 N.Y.S.2d at 998-99.

149. See *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70,

the court did not apply the same flexibility to the *Kircher* case, given the circumstances and the clear negligence of Officer Carlson. To insure that no further injustice occurs, the court should analyze the direct communication and reliance factors of the special relationship rule on a case by case basis, applying a flexible approach when the circumstances dictate. A municipality should not be held liable when making policy decisions regarding the operation of a police department.¹⁵⁰ However, no question was presented in *Kircher* that concerned the liability of the City of Jamestown for policy decisions it made about its police department. *Kircher* did not raise issues that concerned the manner in which the police department allocated its resources toward one matter over another, thereby effectuating a deprivation. More specifically, the Jamestown Police Department did not decide to allocate its staff or resources toward the prevention of some other incident, rather than assisting Kircher. Ironically, Officer Carlson's failure to call in the report was the reason that decision was never reached. The decision to address other concerns first would clearly be a protected governmental function. Carlson's failure to report the crime was not a resource allocation decision, but in fact a negligent failure to properly perform his job. The question therefore, was whether the municipality was liable for the negligence of its police officer, not in the performance of the aid he was to render, but in his blatant failure to render any assistance at all. In order to make this determination, the court needed to decide if a special relationship existed between the parties, a test which the court applied too strictly. The court has come to recognize that when a special relationship exists, that is, when a municipality acts on behalf of a particular citizen who detrimentally relies on an illusory promise of protection offered by the municipality, liability would be imposed.¹⁵¹ The New York Court of Appeals

492 N.Y.S.2d 591 (1985).

150. See *supra* note 35.

151. See *Kircher*, 74 N.Y.2d at 251, 543 N.E.2d at 443, 544 N.Y.S.2d at 995. See also *Sorichetti v. City of New York*, 65 N.Y.2d 461, 482 N.E.2d 70, 492 N.Y.S.2d 611 (1985); *De Long v. County of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983); *Schuster v. City of New York*, 5

has noted that "in such cases the municipality has by its own conduct determined how its resources are to be allocated with respect to that circumstance and has thereby created a 'special relationship' with the individual seeking protection."¹⁵² This approach to finding liability on the part of the municipality is a limit itself on the class of persons the municipality ultimately owes a duty.

What needs to be distinguished in cases involving municipal liability is the degree in which services are rendered for the benefit of the general public. Under most circumstances, the determination of whether the police department was negligent in providing protection should require a strict approach to the special relationship rule. However, as in *Kircher*, where the police assistance was never rendered from the outset because of the negligence of an agent of the municipality to properly place the call for help in the first place, then flexibility in the special relationship test is necessary to ensure recovery. The latter situation becomes an issue of negligent failure to render assistance, rather than negligence in rendering the actual assistance.

CONCLUSION

As a result of the *Kircher* opinion, only those individuals who have advance knowledge that they are going to be a victim of a crime and have enough time to contact the police will be permitted to recover under the court's requirement of a direct communication.¹⁵³ However, this situation is probably not typical of the

N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

152. *Kircher*, 74 N.Y.2d at 256, 543 N.E.2d at 446, 544 N.Y.S.2d at 998.

153. See *Merced v. City of New York*, 75 N.Y.2d 798, 551 N.E.2d 589, 552 N.Y.S.2d 96 (1990) (the court relying on *Kircher*, found that absent direct contact by decedent with the municipality's agents the municipality's conduct did not deprive him of reasonably expected assistance); *Herman v. County of Orange*, 154 A.D.2d 342, 545 N.Y.S.2d 820 (2d Dep't 1989) (special relationship did not exist where fire dispatcher failed to report that decedent was at the scene); *Falzo v. Colonie*, 149 Misc. 2d 205, 564 N.Y.S.2d 988 (N.Y. Sup. Ct.) (special relationship did not exist where plaintiff relied upon his employee's notification to the police that the store's alarm was inoperative), *aff'd*, 575 N.Y.S.2d 596 (3d Dep't 1991).

crimes that occur. Most individuals cannot foresee a potential crime, as Kircher could not foresee her abduction, assault, and rape. Under these circumstances, the potential victim must react and rely on anyone in the vicinity to obtain the necessary help. Those who could not foresee their harm should not be denied recovery for the negligence of the municipality, even when it is clear that the injury could have been prevented or minimized had proper attention and care been exercised. The purpose of the sovereign immunity waiver was to allow recovery for those whose injuries were foreseeable enough to establish a direct communication with the municipality. It appears to this author that the court is defying the intention of the sovereign immunity waiver. Further, it is unclear why the court is proceeding in such a strict manner that results in a harsh outcome when in the past they have shown leniency in its application. The only purpose that seems to be served is to limit the already limited class of people who may seek recovery from a municipality for its negligence.

Brian T. Cohen

