

Failure to Provide Police Protection And Special Relationship Exception

In New York State a municipality cannot be held liable for injuries resulting from a failure to provide police protection unless a special relationship exists between the municipality and the injured party. This rule is based on the principle, as stated by the Court of Appeals in *Cuffy v. City of New York*, that "a municipality's duty to provide police protection is ordinarily one owed to the public at large and not to any particular individual or class of individuals."¹

Although it seems reasonable that those employed to protect us from harm will do so, in reality this cannot always be accomplished. For example, the New York City Police Department is comprised of approximately 34,500 officers² and is responsible for the protection and safety of more than eight million inhabitants.³ It would be impossible to protect all.

A Special Relationship

A municipality owes a duty to injured persons with whom it shares a special relationship. When police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to risks that cause them harm, then liability may follow.⁴ This exception is a narrow one and the New York courts require a plaintiff to prove four elements to determine whether or not a special relationship exists between the police and the injured person.

In *Cuffy*, the leading Court of Appeals case concerning the liability of a municipality in this area, the Court determined that the City of New York should not be held liable for injuries plaintiff wife and son suffered when assaulted by their neighbors, whom plaintiffs had requested police protection against almost 24-hours before. The Court held that there was no special relationship between the



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injured parties and the municipality because the plaintiff did not satisfy the four elements of a special relationship.

The first element a plaintiff must prove is an assumption by the municipality, through promise or action, of an affirmative duty to act on behalf of the injured party. Second, it must be shown that the municipality's agents knew "inaction could lead to harm."⁵ For

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example, in the Fourth Department case of *Thomas v. City of Auburn*,⁶ the police had assumed an affirmative duty when two officers responded to a call concerning an altercation at a bar where one patron made a death threat against two others. The officers assured the bartender and the two patrons that they would remain at the scene and escort the men home once the bar closed. Despite their promises, the police officers left the scene without advising them and the man who made the threat returned with a gun, injuring one man and killing another. In this instance, the court found that the police officers were aware that a death threat was made and knew, or should have known, that their inaction could lead to harm.

In *Cuffy*, the Court of Appeals determined that the plaintiffs satisfied the first two elements. The

plaintiffs requested police protection from their neighbors after one of their many arguments turned physical. A police officer assured the plaintiffs that something would be done first thing in the morning, which constituted an affirmative undertaking by the municipality. Furthermore, based on the history of conflict between the neighbors and the most recent physical assault on the plaintiffs, the police should have known that inaction could lead to harm.

In many cases, orders of protection issued under the Family Court Act will satisfy these first two elements.⁷ Family Court Act §168 provides authority for an officer to arrest a person charged with violating the terms of such order of protection.⁸ Since a protective order is usually issued in response to violent or threatening behavior, it is presumed that failure to provide police protection would lead to harm.

In the Court of Appeals case of *Sorichetti v. City of New York*, the Court found that "when police are made aware of a possible violation, they are obligated to respond and investigate, and their actions will be subject to a reasonableness review."⁹

Josephine Sorichetti had an order of protection for herself and her daughter against her husband; the order also provided Ms. Sorichetti's husband with visitation rights for their daughter, Dina. When Dina was not brought home at the designated time, her mother begged the police to pick her up. The police were aware of Ms. Sorichetti's husband's violent behavior, but failed to take him into custody after being informed that he may have violated the order. In fact, Ms. Sorichetti's husband had violently attacked their daughter one hour after he was supposed to return her back.

Direct Contact

The third requirement is some form of direct contact between the injured person and the municipality. The Court in *Cuffy* determined that the element of direct contact is necessary. Page 7

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Liability

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where an injured person's relationship with the police went beyond that which the police had with the general public. This requirement "limit[s] the class of citizens" who may claim a special relationship in the event of the police failing to provide protection.¹⁰

This element was not satisfied by the plaintiff son in *Cuffy*, who was assaulted by the plaintiffs' neighbor the day after the police told the plaintiffs that "something would be done" about their neighbor. The plaintiff son did not live in his parents' house, making his connection to the officer's assurances too remote to be considered direct contact. The assurances made by the officer were to the plaintiff husband and on his wife's behalf, which were sufficient to show direct contact between the police and the plaintiff wife, but not the son.

Direct contact can also take the form of a simple phone call to the police by the injured party to express his or her fears and concerns.¹¹ For example, in the Fourth Department case *DeLong v. County of Erie*, the court held that a 14-second phone call between the injured person and a 911-dispatcher was enough to constitute a special relationship.¹²

Justifiable Reliance

The last element established by the Court in *Cuffy* is that the individual must have justifiably relied on the municipality's affirmative undertaking. This fourth element has been the most difficult for a plaintiff to prove. The individual's reliance must be based on something more than the mere hope or expectation that protection would be provided. To establish the individual's justifiable reliance, the plaintiff must show

that the municipality's actions lulled the individual into a false sense of security and induced him to either relax his own vigilance or forego other avenues of protection, thereby placing the individual in a worse position than he would have been had the municipality never assumed the duty.¹³ The courts have also emphasized the causal link between the duty assumed and the injury.

Justifiable reliance was demonstrated in the Third Department case of *Hanna v. St. Lawrence County*. In *Hanna*, the plaintiff sued the St. Lawrence County Police Department for failing to provide police protection. In affirming the denial of defendant's summary judgment motion, the Appellate Division, Third Department, reasoned that when the police told Ms. Jennifer Hanna that she was safe and that her boyfriend's guns had been removed from his grandmother's house, she was induced to forego alternative means of protection. The police also informed plaintiff that her boyfriend could not leave his grandmother's house because of an electronic monitoring device, which lulled her into a false sense of security. Based on the police department's assurances of her safety, the plaintiff, who had been staying with a friend, returned to her home. A week later the plaintiff's boyfriend broke into her home and shot her twice.¹⁴

In *Clark v. Town of Ticonderoga*, the Third Department held that the Town of Ticonderoga Police Department was not liable for injuries a woman sustained when she was stabbed by her estranged husband because the plaintiff did not satisfy her burden of proving that the police department's actions "lulled her into a false sense of security...and thereby placed her in a worse position than she would have been had they never assumed the duty."¹⁵

Aware of the fact that her ex-husband was at large in her community but that the police could not take action unless he violated the order of protection, the plaintiff carried through on her plan of moving into her own apartment, where she was attacked. The plaintiff knew the police could not continuously watch her husband unless he had violated his order of protection so she did not call police when she saw her husband's truck parked near her home. This precluded any finding that she had relied at all on the police to provide her protection at the time that her husband broke into her home and repeat-

Returning to *Cuffy*, the Court of Appeals held that the plaintiffs did not justifiably rely on the police department's assurances that something would be done the next morning in response to the conflict plaintiffs had with their neighbors. Throughout the afternoon of the next day, plaintiffs had not seen any police activity in front of their house and were aware that the police had not arrested or restrained their neighbor. This lack of police presence, coupled with a significant lapse of time between the officer's assurances and the eventual assault on plaintiffs by their neighbors the next evening, precluded a finding

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edly stabbed her. Plaintiff did not show that she had any hope or expectation that the police would protect her.

Similarly, the Supreme Court, Cattaraugus County, in *Pearson v. County of Cattaraugus* granted the defendant's motion for summary judgment finding that the plaintiff did not satisfy the element of justifiable reliance. The plaintiff had a temporary order of protection against her husband directing that he stay away from their son and surrender all of his fire arms. More than three months after the order was issued, the plaintiff's husband shot and killed their son. The plaintiff was aware that her husband possessed guns and that he took their son shooting. The court reasoned that this knowledge broke the causal link between the police department's alleged inaction and the plaintiff's son's death because she has not relied on the police to take the guns away from her husband.¹⁶

of justifiable reliance. The Court stated that plaintiffs "knew or should have know by midday that the promised police action would not be forthcoming," making any further reliance on those assurances unjustified.¹⁷

Pending Litigation

In *Valdez v. City of New York*, the First Department recently reversed a jury verdict in favor of a plaintiff who was shot by an ex-boyfriend against whom she had an order of protection. The court in *Valdez* found that the plaintiff had not sufficiently proved she justifiably relied on the police department's affirmative undertaking. This case will soon be heard by the Court of Appeals to determine the issue of plaintiff's justifiable reliance.

In *Valdez*, the plaintiff testified that a police officer told her that her ex-boyfriend would be arrested immediately and that she believed the police had acted

on this promise. The First Department held that verbal assurances alone do not constitute a sufficient basis for plaintiff's justifiable reliance. Plaintiff was not aware of any police conduct after she was assured that her ex-boyfriend would be arrested; nor did the police dispatch or promise to provide plaintiff protection until the arrest. The court distinguished the Court of Appeals case *Mastroianni v. County of Suffolk*, in which the decedent's justifiable reliance was based on a verbal assurance followed by visible police protection of the decedent.¹⁶

In *Mastroianni*, police officers assured the decedent they would help if she had any further problems with her estranged husband and then remained in front of decedent's house for over an hour before leaving for a meal break. Minutes after the officers left they were called back and found decedent fatally stabbed.¹⁷ Unlike *Valdez*, in which the plaintiff remained in her home in order to protect herself, the plaintiff in *Mastroianni* remained in her home because the police assured her that it was safe to do so.

Vital to the element of justifiable reliance is that the plaintiff was placed in a worse position than she would have been had the municipality never assumed the duty. In *Valdez*, the plaintiff remained in her home for a 24-hour period, leaving only to take out the garbage. The court reasoned that plaintiff's actions did not convey that she had been "lulled into a false sense of security, and...thereby induced either to relax her own vigilance or to forego other available avenues of protection."²⁰

It does appear that the *Valdez* plaintiff was taking extra precaution by remaining in her home until she believed enough time had passed for the police to have apprehended her ex-boyfriend.

However, it also appears that the plaintiff merely "expected" the police to make the arrest; she never attempted to verify that they had. The First Department pointed to the factual similarities between *Valdez* and *Cuffy*, where the Court held that the plaintiffs had not justifiably relied on assurances made by the police in response to their request for police protection against their neighbors.

The plaintiff in *Cuffy* was told that something would be done "first thing in the morning," but had not seen any police activity by the next afternoon. The plaintiff wife and son were injured by their neighbor the next evening, thereby extinguishing the validity of the police officer's promise. The passage of time from when the police assurances were made until the time of the injury and the absence of police activity could be detrimental to the plaintiff in the *Valdez* case when it is heard before the Court of Appeals:

1. *Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (N.Y. 1987).

2. http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml

3. <http://quickfacts.census.gov/qfd/states/26/3631000.html>

4. *Riss v. City of New York*, 22 N.Y.2d 579, 583 (N.Y. 1968).

5. *Cuffy*, supra, at 260.

6. *Thomas v. City of Auburn*, 217 A.D.2d 934, 935 (4th Dept. 1995).

7. *Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 204 (N.Y. 1997).

8. N.Y. Family Ct Act §168 (2010).

9. *Sarchetti v. City of New York*, 65 N.Y.2d 461, 470 (N.Y. 1985).

10. *Cuffy*, supra, at 261.

11. *Hanna v. St. Lawrence County*, 825 N.Y.S.2d 799 (3d Dept. 2006).

12. *DeLong v. County of Erie*, 89 A.D.2d 376 (4th Dept. 1992).

13. *Clark v. Town of Ticonderoga*, 291 A.D.2d 597, 599 (3d Dept. 2002).

14. *Hanna*, supra, at 801.

15. *Clark*, supra, at 599.

16. *Pearson v. County of Cattaraugus*, 6 Misc.3d 1034(A), 800 N.Y.S.2d 352 (Sup. Ct. Cattaraugus Co. 2005).

17. *Cuffy* supra, at 262.

18. *Valdez v. City of New York*, 2010 NY Slip Op 3495 (1st Dept. 2010).

19. *Mastroianni*, supra at 205.

20. *Valdez*, supra at 5, citing *Cuffy*, 69 N.Y.2d at 261.