

Police Protection and the “Special Relationship” Exception

By Karen M. Richards

When a municipality acts in a proprietary capacity, it is subject to the same principles of tort law as a private entity.¹ By contrast, a municipality is rarely liable for claims arising out of the performance of a governmental function.² When a municipality provides police protection, it is performing a classic governmental function requiring a legislative-executive decision as to how a municipality’s resources will be allocated.³ For example, if injuries arise from the municipality’s failure to supply adequate police protection, unless there exists a “special relationship” between the municipality and the injured party, the courts have never imposed general liability simply from the failure to supply adequate police protection.⁴ This conclusion stems from recognition that municipal resources are limited and the duty to provide police protection ordinarily is owed to the general public and not to a particular individual or class of individuals.



To establish a special relationship, a plaintiff has the burden of proving: (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) the injured party’s justifiable reliance on the municipality’s affirmative undertaking.⁵ All four elements must be proven, and if not, the claim will fail.

The First Element

The first element, an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party, usually involves a clear promise to take specific action on behalf of a specific individual. The promise must be definite enough to generate justifiable reliance by a plaintiff. Vague and ambiguous assurances are general statements that do not rise to the level of an affirmative duty to protect an individual.⁶ The following cases illustrate this principle.

In *Lance v. State*, after Anthony McIntosh was released from prison and was on parole, he allegedly threatened the life of his wife and subsequently murdered her.⁷ The claimants, co-administrators of Mrs. McIntosh’s estate, claimed that, prior to her death, Mrs. McIntosh had relayed the threats to a parole officer, and that, after receiving notice of the threat, the State of New York was negligent in failing to immediately attempt to apprehend Mr. McIntosh, in failing to take him into custody, and in failing to place Mrs. McIntosh under protection.⁸ The claimants could not demonstrate, however, that the State had an affirmative duty to act because the parole officer’s statements were not definitive promises to take actions to protect Mrs. McIntosh. The parole officer had told Mrs. McIntosh that, “if Anthony McIntosh appeared as scheduled, he would be questioned and *based upon* his responses, he *may* either be taken into custody, or given a parole condition ordering him to stay away from her residence.”⁹ The court found these statements were of a “highly contingent nature,” and therefore, that the claimants had not demonstrated the assumption of an affirmative duty to act.¹⁰

In *Damato v. City of New York*, the plaintiffs claimed the police made two statements promising to provide them with protection from gang members.¹¹ Several days before a confrontation outside his home with a gang of youths, Damato had reported to a community affairs officer at the precinct that a gang had attacked his son several times. The officer informed him that there was a shortage of manpower, but “[he] would see if [he could] get a patrol in that area.”¹² On the day of the confrontation with the gang, but before it occurred, the police responded to a 911 call placed by Damato. The responding police officer told Damato that a patrol car would be kept in the area, not to worry about it, to call 911, and they would “get there right away.”¹³ The court ruled that these statements did not create a special relationship because the police did not promise to keep watch at the plaintiffs’ home and did not specify at what time or for how long they would keep a patrol car in the area. The court opined, “At most, the police assured plaintiff that they would respond to a 911 call—an obligation that is owed to the public at large. An assurance to perform a basic police function, without more, does not amount to a promise to act affirmatively on behalf of plaintiff.”¹⁴

On the other hand, if statements by police are definite in nature, they may give rise to a justifiable reliance, which is another element the plaintiff must prove and is more fully discussed later in this article.¹⁵ For example, in *Thomas v. City of Auburn*, a bar patron, Jimmy Lee Rouse, had engaged in an altercation with two other patrons, Thomas and Tillman, and threatened to kill them.¹⁶ The bartender, Reddick, called the police, who responded to the bar and who were told of the death threat when they interviewed Reddick, Thomas, and Tillman. The officers assured the three men that they could finish boarding a window broken in the altercation and could finish closing the bar. The officers also told the men they would go around the building and then escort them home. The court found these statements were sufficient for the jury to have found that the officers assured the three men of having police protection, thus establishing justifiable reliance.¹⁷

The Second Element

A plaintiff must also prove that a municipality's agents knew their inaction could lead to harm. This essential element was missing in the following cases.

In *Swift v. City of Syracuse*, a four-year-old child, who had been left by her mother in her maternal grandmother's care for the evening, was taken from the grandmother's house by her father.¹⁸ There was no custody order in effect and the child's parents were not married and were not living together. Two police officers responded within minutes after being dispatched by 911, but one left shortly thereafter because he deemed the situation to require only one officer. The grandmother told the remaining officer that she was concerned for the child's welfare and believed the father was intoxicated. She gave three possible locations where the father may have taken the child.

The officer began checking two of the locations given to him by the grandmother, but before he could check the third location, he suspended his search to investigate an assault complaint. An hour after the grandmother's call to 911, the officer was called to a fire at the third location, where, as it turned out, the father had taken the child. The fire resulted in a fatality, and, although the father and child escaped, the child suffered serious and disfiguring burns. The Fourth Department affirmed the lower court's grant for summary judgment to the city because the plaintiff had failed to raise an issue of fact as to whether the police had knowledge that their inaction would lead to harm to the child. Significantly, the grandmother assured the officer that the father loved his daughter and would do nothing to harm her.

In *Escribano v. Town of Haverstraw*, a police officer had observed a swerving vehicle being operated by Mr. Escribano.¹⁹ The police officer stopped Mr. Escribano's vehicle and issued him a ticket for a seatbelt violation. Shortly after being stopped and ticketed, Mr. Escribano crashed the car, and his son, a passenger in the car, was killed. Plaintiffs alleged that, as a result of the investigative stop, the officer had knowledge that Mr. Escribano was experiencing diabetic shock, and thus the defendants owed a special duty of care to the plaintiffs. The court disagreed, finding there was no indication that the officer had knowledge that any inaction on his part could lead to harm because the record was devoid of any evidence that he was aware that Mr. Escribano was experiencing diabetic shock.

In *Euell v. Incorporated Village of Hempstead*, when the police responded to the home of the plaintiff's mother, she advised them that her son suffered from a mental illness and had ingested an entire bottle of pills.²⁰ After the officers unsuccessfully attempted to restrain the plaintiff by administering electroshock with a taser three times, the plaintiff escaped to his bedroom and set it on fire. The court found that the direct contact between the police and the plaintiff "was not of a kind that meaningfully alerted them to his intent to set fire to his room" and "there was no basis for the police to have realized that their failure to move more expeditiously or violently to detain the plaintiff could lead to the harm that occurred."²¹

The Third Element

The element of direct contact between the municipality's agents and the injured party serves to rationally limit the class of persons to whom the municipality owes a duty of protection.²² Generally, this contact must be between the municipality and the injured party; however, if the person who had direct contact with a police officer relays the officer's assurances to the injured party, the direct contact requirement may have been met.²³

For example, in *Thomas, supra*, there was no dispute that the police officers made assurances to the bartender, but there was conflicting testimony as to whether the officers made assurances of protection to Thomas and Tillman, who had been threatened by Rouse. When Rouse was escorted from the bar, but before leaving in a car, he threatened he would be back. The defendants contended that Thomas and Tillman were inside the bar when the assurance of protection was made to the bartender outside the bar. Thomas admitted that he did not hear the officers' assurance, but he testified that when the bartender came back inside the bar, he told Thomas that he and Tillman could remain at the bar "because we was being protected."²⁴

Without advising the men that they were leaving, the officers left the scene to search for Rouse's vehicle, and while they were searching, Rouse returned to the bar and fired a shotgun, injuring Thomas and killing Tillman.

The court found that, even assuming that both Thomas and Tillman were inside the bar when the assurance of protection was made to the bartender outside the bar, "the assurance was extended to all three men, and the circumstances were such that the officer who gave the assurance knew, or should have known, that it would be conveyed to Thomas and Tillman."²⁵ According to the majority, it was unrealistic to suggest that Thomas and Tillman:

were in no different position from any other citizen or that the City owed them no "special duty" simply because Reddick, rather than they, had been the party in direct contact when the assurance was made. This is not an instance where the plaintiff was unaware that the assurance had been made or where the police did not extend the assurance for the benefit of the victim. The police had direct contact with Thomas and Tillman, who were physically present in the area to be protected, and their interests in receiving protection were the same as that of the bartender. It would thus be wholly unrealistic to suggest that [Thomas and Tillman] were in no different position from any other citizen or that the City owed them no "special duty" simply because Reddick, rather than they, had been the party in direct contact when the assurance was made.²⁶

By contrast, not all of the defendants in *Cuffy v. City of New York* were able to establish the direct contact element. Joseph and Eleanor Cuffy had been involved in numerous disputes with their tenants, Joel and Barbara Aitkins.²⁷ When an officer declined to take action, Joseph Cuffy went to the local precinct to ask for protection for his family. He told Lieutenant Moretti that he intended to move his family immediately if an arrest was not made. Moretti told Cuffy not to worry and that something would be done "first thing in the morning."²⁸ Cuffy went back to his family and told his wife to unpack.

The following evening, Eleanor Cuffy and her sons, Ralston and Cyril, were severely injured by the Aitkins. The court found that Ralston's connection to Moretti's assurances was too remote—he did not

live with his parents and it could not be said that the assurances Lieutenant Moretti conveyed to Joseph Cuffy were obtained on Ralston's behalf.²⁹ However, although Eleanor Cuffy and Cyril Cuffy did not have direct contact with Lieutenant Moretti, they lived with Joseph Cuffy, and therefore, "the 'special duty' undertaken by the City through its agent must be deemed to have run to them. It was their safety that had prompted Joseph Cuffy to solicit the aid of the police, and it was their safety that all concerned had in mind when Lieutenant Moretti promised police assistance."³⁰

Although "the direct contact requirement has not been applied in an overly rigid manner," it is often not found to be satisfied when a third party has called the police.³¹ For example, it was not satisfied when a call to 911 was made by tenants of an apartment complex who heard the victim calling for help,³² or when a witness called the police for assistance on behalf of the victim of an abduction,³³ or when the plaintiff's friend called 911 when his friend was being assaulted,³⁴ or where the call to 911 was placed through an alarm company,³⁵ or where the decedent's employer called the police about death threats received by his employee.³⁶

In many cases the direct contact is verbal, but the requirement is "some form of direct contact," and thus this element can also be satisfied by a defendant's conduct. For example, in *Bloom v. City of New York*, the plaintiff teacher, observing what he believed to be an impending fight between two students, asked a security guard to assist him.³⁷ The security guard accompanied the teacher to the scene of the confrontation, but when a fight ensued, the security guard stood by and took no action, whereas the teacher intervened and was injured. The court, in deciding that the lower court erred in granting the defendants' motion to dismiss the complaint, found that, although there was no verbal promise to provide protection, a jury could find that a reasonable person would construe the guard's actions in accompanying the plaintiff to the scene of the confrontation as an implicit promise that aid would be forthcoming.

The Fourth Element

The fourth element, justifiable reliance on the municipality's undertaking, is clearly the most burdensome element for a plaintiff to prove. Justifiable reliance is not established by merely demonstrating the injured party had a belief in, some hope of, or an expectation of adequate police protection or assurances that help would be forthcoming.³⁸ A plaintiff has the burden of showing that a defendant's conduct actually lulled the injured party into a false sense of security, thereby inducing him to either relax his own vigilance or forgo other avenues of protection and placing himself in a worse position than he would have been had

the defendants never assumed the duty.³⁹ The Court of Appeals has described this element as “critical” because it “provides the essential causative link between the ‘special duty’ assumed by the municipality and the alleged injury.”⁴⁰

In *Hanna v. St. Lawrence County*, Andrew Longshore physically assaulted the plaintiff, his live-in girlfriend, held her hostage for several hours, and threatened to kill her.⁴¹ After the incident, the plaintiff sought refuge in friends’ houses for over a week before returning to her home. Following Longshore’s release from jail, when the plaintiff advised county deputies that there were many guns in Longshore’s grandmother’s house, where he was under house arrest, the deputies told the plaintiff that the house had been searched and all weapons had been removed. When she expressed concern that the grandmother’s house was in close proximity to her own home, she was told by the deputies that “it’s not an issue, you’re safe.”⁴² She was also repeatedly advised that there was “no way” that Longshore could come after her because of the electronic monitoring device that had been placed upon his ankle.⁴³ These statements reassured the plaintiff and eventually convinced her that she was safe. The court therefore denied the defendants’ motion for summary judgment. It found that a question of fact existed as to whether the deputies’ assurances lulled the plaintiff into a false sense of security and induced her to relax her own vigilance and forgo other avenues of protection, such as relocating to a safe house or to a different residence as she had done immediately after the attack.

This critical fourth element was missing in *Grieshaber v. City of Albany* because the decedent was already being attacked when she called 911. The 911 operator, who told the victim that “help was on the way,” could hear scuffling noises and the decedent screaming to someone in the room to get out.⁴⁴ The record “undeniably” revealed that the decedent was struggling with her assailant before, during, and after the 911 call, and, therefore, her conversation with the 911 operator “did not induce her either to relax [her] own vigilance or to forgo other available avenues of protection.”⁴⁵ The Third Department “[r]egrettably” reversed the lower court’s order and granted summary judgment in favor of the city and dismissed the complaint.⁴⁶

Conclusion

Determining whether a special relationship exists is intensively fact-based. Unless a plaintiff proves the existence of all four elements necessary to establish a special relationship, there is no recovery against a municipality for injuries sustained when a municipality fails to furnish adequate police protection.

Endnotes

1. *Miller v. State*, 62 N.Y.2d 506, 511, 478 N.Y.S.2d 829, 832 (1984).
2. *Id.*
3. *Cuffy v. City of New York*, 69 N.Y.2d 255, 260, 513 N.Y.S.2d 372, 375 (1987); *Kirchner v. City of Jamestown*, 74 N.Y.2d 251, 256, 544 N.Y.S.2d 995, 998 (1989).
4. *Lewis v. City of New York*, No. 23759/1997, 2008 WL 787243, at *7 (Sup. Ct., Bronx Co. 2008); *Valdez v. City of New York*, 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587, 592 (2011) (“Although in a colloquial sense, we should be able to depend on the police to do what they say they are going to do—and no doubt the police have an obligation to fulfill that trust—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.” Thus, the Court of Appeals has restricted the scope of duty by requiring a special relationship “because the government is not an insurer against harm suffered by its citizenry at the hands of third parties.”).
5. *Cuffy*, 69 N.Y.2d at 260.
6. *Brown v. City of New York*, 73 A.D.3d 1113, 1114, 902 N.Y.S.2d 594, 595 (2d Dep’t 2010).
7. No. 109594, 2010 WL 5022844, at *1 (N.Y. Ct. Cl. 2010).
8. *Id.* at *3.
9. *Id.*
10. *Id.* The court also found the claimants did not prove the fourth element because Mrs. McIntosh told the parole officer that she did not think her husband would report to the parole officer, and therefore, she could not have justifiably relied on any expectation of him being arrested.
11. No. 06 Civ. 3030(DC), 2008 WL 2019122, at *3 (S.D.N.Y. 2008).
12. *Id.* at *4.
13. *Id.*
14. *Id.* (stating that statements containing the qualifier “we’ll try” fall short of the firm commitment required to establish a promise to assume a special duty to plaintiff).
15. *Thomas v. City of Auburn*, 217 A.D.2d 934, 936, 629 N.Y.S.2d 585, 586 (4th Dep’t 1995), *leave to appeal denied*, 1995 WL 582125 (4th Dep’t 1995).
16. *Id.*
17. *Id.*
18. 30 A.D.3d 1089, 1090, 816 N.Y.S.2d 656, 657 (4th Dep’t 2006). While an Assistant Corporation Counsel III, Ms. Richards was involved in the defense of this case.
19. 303 A.D.2d 621, 621, 757 N.Y.S.2d 310, 311 (2d Dep’t 2003).
20. 57 A.D.3d 837, 837, 871 N.Y.S.2d 224, 225 (2d Dep’t 2008).
21. *Id.* at 838.
22. *Cuffy v. City of New York*, 69 N.Y.2d 255, 261, 513 N.Y.S.2d 372, 375 (1987).
23. *Greene v. City of New York*, 205 A.D.2d 584, 585, 613 N.Y.S.2d 418, 419 (2d Dep’t 1994), *leave to appeal denied*, 84 N.Y.2d 808 (1994).
24. *Thomas*, 217 A.D.2d at 935.
25. *Id.*
26. *Id.* One justice disagreed, opining that “[o]ne cannot deduce from the statements by the police that they were assuming an obligation to protect all persons in the area, including Thomas and Tillman, who were not even employees of the bar.” *Id.* at 937 (Lawton, J., dissenting).
27. *Cuffy*, 69 N.Y.2d at 261.
28. *Id.* at 259.

29. Unlike the plaintiffs in *Thomas*, there was no indication that Ralston Cuffy was aware of the assurances.
30. The Court of Appeals found that Eleanor and Cyril Cuffy did not justifiably rely on the assurances and dismissed the complaint. Their justifiable reliance had dissipated by midday because they were aware that the Aitkins had not been arrested or otherwise restrained as promised, and yet, despite this awareness, they remained in their home.
31. *Cuffy*, 69 N.Y.2d at 261.
32. *Merced v. City of New York*, 75 N.Y.2d 798, 800, 552 N.Y.S.2d 96, 96-97 (1990).
33. *Kirchner v. City of Jamestown*, 74 N.Y.2d 251, 256, 544 N.Y.S.2d 995, 998 (1989).
34. *Wood v. Nigro*, 81 A.D.3d 1453, 1454, 916 N.Y.S.2d 869, 869 (4th Dep't 2011).
35. *Nicolosi v. City of New York*, 224 A.D.2d 505, 505, 637 N.Y.S.2d 792, 792 (2d Dep't 1996).
36. *Greene v. City of New York*, 205 A.D.2d 584, 585, 613 N.Y.S.2d 418, 419 (2d Dep't 1994), *leave to appeal denied*, 84 N.Y.2d 808 (1994).
37. 123 A.D.2d 594, 594, 507 N.Y.S.2d 13, 14 (2d Dep't 1986).
38. *Clark v. Town of Ticonderoga*, 291 A.D.2d 597, 598, 737 N.Y.S.2d 412, 414 (3d Dep't 2002); *Grieshaber v. City of Albany*, 279 A.D.2d 232, 237-38, 720 N.Y.S.2d 214, 216 (3d Dep't 2001), *leave to appeal denied*, 96 N.Y.2d 719 (2001); *Sachanowski v. Wyoming Cnty. Sheriff's Dep't*, 244 A.D.2d 908, 908, 665 N.Y.S.2d 197, 198 (4th Dep't 1997), *leave to appeal denied*, 92 N.Y.2d 801 (1998) (where the plaintiff was only told that the deputy would come out to the plaintiff's house shortly to take the complaint).
39. *Brandes v. City of New York*, No. 7815/10, 2010 WL 5129107 at *1 (Sup. Ct., Kings Co. 2010).
40. *Cuffy*, 69 N.Y.2d at 261.
41. 34 A.D.3d 1146, 1146, 825 N.Y.S.2d 798, 799 (3d Dep't 2006).
42. *Id.* at 1148.
43. *Id.*
44. *Grieshaber*, 279 A.D.2d at 235.
45. *Id.* at 236. The police had arrived at the scene at 6:52 p.m. but waited until 7:45 p.m. to enter the victim's apartment. The delay was a result of waiting for an animal control officer to subdue the decedent's dog.
46. *Id.* at 234.

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