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dismissed the complaint;[41] the Appellate Division reversed;[42] and the Court of Appeals in a four-three decision reversed the Appellate Division and held that the complaint did not state a cause of action.[43]

In order for a publication to be actionable without proof of special damages it must be libelous *per se, i.e.* it must on its face subject the plaintiff to public aversion, contempt, hatred or disgrace, cause the public to form unsavory opinion of plaintiff, or damage him in his trade or business.[44] *Innuendo* pleaded in a libel complaint is merely for the purpose of explaining the defamatory meaning which the plaintiff would give to the publication; it cannot expand, extend or change a publication so as to give it a defamatory meaning.[45] In this case the Court split on the question of whether the publication was capable of an actionable meaning. It has been generally held that it is for the court and not the jury to decide whether an admittedly published statement is capable of a defamatory meaning.[46] If the court decides that the publication is capable of a defamatory meaning and a non-defamatory meaning, it is then for the jury to decide which meaning the publication actually imparted and in addition whether the publication related to the plaintiff.[47]

The majority in the *Tracy* case held that the publication in question was incapable of any defamatory meaning. The dissenting minority on the other hand, felt that it might be construed as defamatory and for that reason the issue should have been submitted to the jury. It has been said of the judicial function in this area—"A court, it is fundamental, should never take from a jury doubtful questions of fact, but it is equally basic that a court shirks its duty if it creates an issue where none exists."[48] It does not seem that a publication such as this, which on its face tends to rebutt the libelous meaning urged in the *innuendo,* can be said to be libelous *per se.* The majority opinion reached a wise result holding it was not, and thereby, denying plaintiff recovery unless he could prove special damages.

MUNICIPAL LIABILITY FOR FAILURE TO PROVIDE POLICE PROTECTION

On an appeal, testing the sufficiency of the complaint, a holding by the

41. — Misc. —, 160 N.Y.S.2d 152 (1957).

42. 5 A.D.2d 865, 171 N.Y.S. 2d 717 (1958).

43. Tracy v. Newsday, Inc., *supra* note 40.

44. Katopolis v. Brooklyn Spectator, Inc., 287 N.Y. 17, 38 N.E.2d 112 (1941); Nichols v. Item Publishers, 309 N.Y. 596, 132 N.E.2d 860 (1956); Balabanoff v. Hearst Consolidated Publications, Inc., 294 N.Y. 351, 62 N.E.2d 599 (1945); Mencher v. Chesley, 297 N.Y. 94, 75 N.E.2d 257 (1947).

45. Fray v. Bennett, 5 Sandf. 65 (1851) *aff'd* 6 N.Y. 209 (1852); Fleishmann v. Bennett, 87 N.Y. 231 (1881); O'Connell v. The Press Publishing Co., 214 N.Y. 352, 108 N.E.2d 556 (1915); Hayes v. American Defense Society, 252 N.Y. 266, 169 N.E. 380 (1929).

46. Moore v. Francis, 121 N.Y. 199, 23 N.E. 1127 (1890); O'Connell v. The Press Publishing Co., *supra* note 45.

47. Sanderson v. Caldwell, 45 N.Y. 398 (1871); First National Bank v. Winters, 225 N.Y. 47, 121 N.E. 459 (1918); Julian v. American Business Consultants, 2 N.Y.2d 1, 155 N.Y.S.2d 1 (1956).

48. Crane v. N.Y. World Telegram Corp., 308 N.Y. 470, 479-480, 126 N.E.2d 753, 759 (1955).

Special Term,[49] affirmed by the Appellate Division,[50] that there is no liability to the general public for negligently failing to provide police protection, was reversed by the Court of Appeals,[51] in *Shuster v. City of New York*.[52] The Court held that the public ". . . owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration."[53]

Shuster, whose death was the subject of this wrongful death action, had, in response to publicized requests by the New York City Police Department, supplied information leading to the arrest of Willie Sutton. Three weeks later, Shuster, after having informed the police of the threats on his life due to his collaboration, was shot and killed. The death was caused, contended the plaintiff, by the failure of the police to provide special protection, thereby recklessly exposing the deceased to danger.[54]

Although the courts have consistently held municipalities liable for negligently performing their statutory duties where the malfeasance has resulted in injury,[55] they have steadfastly refused to impose liability for negligently failing to perform their statutory duties.[56] This refusal to impose liability is generally based on the rationale that the statutory duties run to the public as a whole, and not to the benefit of an individual.

In the instant case the Court was able to find that the deceased's act of informing had been an act in response to his civic duty to aid in law enforcement. The fulfillment of his duty created a reciprocal duty on the part of the city to reasonably protect one who so assists. Although the dissenting opinions rejected the existence of any legal duty to inform,[57] the majority was able to support its premise on the basis of section 1848 of the Penal Code of New York.[58] While this Section, which makes it a misdemeanor to refuse to aid a policeman at his command, and provides absolute liability for injury to a citizen while so assisting, is not directly applicable to this case, it does manifest a recognition of some duty to aid in law enforcement as well as pointing the

49. 207 Misc. 2d 1102, 121 N.Y.S.2d 735 (1953).
50. 286 App. Div. 389, 143 N.Y.S.2d 778 (1955).
51. Dissenting opinions by Chief Judge Conway and Judges Desmond and Froessel.
52. 5 N.Y.2d 75, 180 N.Y.S.2d 265 (1958).
53. *Id.* at 80, 81; 180 N.Y.S.2d 265, 269.
54. Two other causes of action, not here considered, rested on allegations of reliance and misrepresentation, since the police had initially undertaken to provide special protection, which was soon withdrawn, and conveyed to the deceased a false sense of security.
55. Wilkes v. City of New York, 308 N.Y. 726, 124 N.E.2d 338 (1954); Lubelfeld v. City of New York, 4 N.Y.2d 455, 176 N.Y.S.2d 302 (1958).
56. Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Murrain v. Wilson Line, 270 App. Div. 372, 59 N.Y.S.2d 750 (1946), *aff'd* 296 N.Y. 845, 72 N.E.2d 29 (1947); Rocco v. City of New York, 282 App. Div. 1012, 126 N.Y.S.2d 198 (1953). But see McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947); Meistinsky v. City of New York, 285 App. Div. 1153, 140 N.Y.S.2d 212 (1955), *aff'd* 309 N.Y. 998, 132 N.E.2d 900 (1956).
57. The dissent, although no reward was offered in the present case, considered the offer of a reward as an inducement to inform rather than recognizing any duty to do so.
58. The Court also cited *In re Quarles*, 158 U.S. 532, (1895) which contained an opinion regarding the rights and duties of a citizen to inform.

finger of public policy in the direction of more, not less, care to those who so assist the government. Further, the Court felt that the role of the Police Department was far from passive, since they had not only requested aid, but after having received it, acted on it, thereby establishing a special relationship requiring further affirmative action.

In principle, this extension of municipal liability appears just. The informer, in shedding his protective cloak of public anonymity, exerts special efforts in support of the public interest. It seems no more than proper to expect special consideration for thus exposing himself to possible danger. The added liability will prove a burden, but standards of reasonableness should prevent the burden from becoming oppressive, and the burden may well become illusory when considering the relative effects of encouraging further aid by the citizen.

CONSPIRACY TO DEPRIVE BROKER OF REAL ESTATE COMMISSIONS

The plaintiff in the case of *Bereswill v. Yablon*,[59] on receiving his real estate broker's license, succeeded to his brother-in-law's (one Thill) real estate business, the latter having been contacted by Yablon to look into the purchase of certain real estate owned by the Glennon Realty Corporation, without revealing defendant's interest to Glennon. Thill was then employed by Glennon to provide a purchaser at the usual rate of commission. As a result of his succession in interest, plaintiff then negotiated with Glennon who finally agreed to a price of $90,000. Plaintiff quoted Yablon a price of $94,750 which included his commission. Since this price was too high, negotiations between plaintiff and defendant ceased. Thereupon Yablon formed the Esbar Realty Corporation for the purpose of purchasing this land, with himself as the sole stockholder. Shortly thereafter, Yablon, in the name of Esbar, purchased the property for $92,000 through another broker, one Fisher. Fisher did not know of plaintiff's previous efforts, neither did Glennon know that Fisher was acting for the same principal as was the plaintiff. In the City Court the plaintiff sued Esbar, Yablon and Fisher for conspiring to deprive him of his commission. The Court there found for the plaintiff against all defendants. The Appellate Division affirmed as to Yablon and Esbar but reversed at to Fisher because of his lack of knowledge concerning plaintiff's activities. On the defendant's appeal to the Court of Appeals, the plaintiff sought to argue that the gravamen of his complaint was the depriving of the plaintiff of his commission, the conspiracy language in the complaint serving only to tie the acts of the defendants together.

The Court of Appeals viewing the case as it was considered below, *i.e.*, one of conspiracy, ruled that the complaint against Fisher was properly dismissed for his lack of knowledge, and that the charge against Yablon and Esbar must also be since after Fisher's dismissal, the only defendants remaining were the Esbar Corporation and Yablon, its sole stockholder. Thus, a conspiracy be-

59. 6 N.Y.2d 301, 189 N.Y.S.2d 661 (1959).