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GETTING THE LAW RIGHT: AN ESSAY IN HONOR OF AARON TWERSKI

John C. P. Goldberg* & Benjamin C. Zipursky**

ABSTRACT

Written in honor of the great torts scholar Aaron Twerski, this article critically analyzes disturbing developments in New York negligence law as it applies to police who injure innocent bystanders. With the New York Court of Appeals’ 2022 decision in Ferreira v. City of Binghamton as a focal point, it argues that Ferreira and other contemporary decisions have largely betrayed the promise of the 1929 Court of Claims Act, which waived state and municipal immunity for police torts. While courts may be warranted in recognizing certain limits on police negligence liability that do not apply to private actors, the current regime, which purports to grant municipalities immunity not only for most instances of police nonfeasance but also for most instances of misfeasance, is indefensible. That decisions from New York’s high court have reached this untenable position largely reflects, in our view, both its misapplication of basic rules of negligence law and a failure to take seriously the principle of civil recourse that animates tort law and private law more generally. As such, they serve as a stark reminder of how important it is for courts and scholars to combine doctrinal expertise with sound judgment—precisely the salutary combination embodied in Professor Twerski’s torts scholarship.

INTRODUCTION

The hallmarks of Aaron Twerski’s remarkable corpus of torts scholarship include its careful attention to doctrine, to the institutional settings in which courts develop it, and to the policy judgments that help shape it. In these respects—not to mention his long-lasting and highly productive partnership with another outstanding scholar, Jim Henderson—his work has served as something of a model for our own. It is no accident that all of us have written extensively on doctrinal topics, are co-authors of Torts casebooks, and have been active in the ALI’s Restatement projects.

Aaron’s work sets an admirable example not just because of its underlying recognition that tort law can and should address pressing problems but also because it takes seriously the role that legal doctrine plays in its doing so. It is possible to miss these aspects of Aaron’s writings because some of his most influential writings—especially in the law of products liability—emphasize limits on the capacity of judges and juries

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constructively to handle complex policy questions. But, of course, attention to these limits is part and parcel of thinking about how courts can best contribute. Moreover, a good deal of his work identifies how legal rules and principles can responsibly be developed to help ameliorate problems ranging from manufacturers’ misrepresentations about product safety to gun violence.

Having emphasized common ground, we should also acknowledge an important difference in our respective approaches. Aaron views torts primarily through a compensation-and-deterrence lens, whereas we maintain it is a law of wrongs and redress. These divergent orientations have occasionally produced friendly disagreement. Yet, they have by no means left us at loggerheads. We have benefited enormously from his scholarship. And whatever his dissatisfaction with our work, Aaron seems at some level sympathetic to our efforts to bring notions of wrongs and redress, and rights and duties, back to the fore of doctrinally oriented torts scholarship.

In this essay, we aim to honor Aaron and to draw him closer to our way of looking at things by focusing on certain aspects of an obviously important problem, namely, the responsibilities and liabilities of the police in their interactions with civilians. The problem has many dimensions, including many legal dimensions. Elsewhere, we have written about qualified immunity and its state-law counterparts, as well as rules for determining when a department can be held vicariously liable for an officer’s tortious conduct. Here, we want to tackle a different issue: In the tort law of New York and other states, it often goes under the heading of the “public duty rule.” While the rule’s name might seem to suggest an affirmative basis for liability, it is, in fact, one of limited duty—it is invoked by courts to spare governments from negligence liability they would otherwise face.

Our discussion will focus in particular upon the New York Court of Appeals’ decision in Ferreira v. City of Binghamton. In a straightforward sense, this decision was a win for the plaintiff: it left open the possibility that he could recover damages from a city police department whose officer shot him while executing a no-knock warrant. And yet, from a broader, doctrinal point of view, Ferreira was a pyrrhic victory, because the terms on which it

permitted recovery substantially expanded the immunity from liability conferred by the public duty rule. Two other Court of Appeals decisions from 2022 have further narrowed the path for victims to invoke the most prominent exception to this rule as a way of holding police accountable for injurious derelictions of duty. When combined with these other decisions, Ferreira’s extension of the rule to cover a new (and potentially vast) set of cases has the effect of pushing towards a reinstatement of the regime of sovereign immunity that (supposedly) was abrogated by the New York legislature almost a century ago.

To summarize: we find the Court of Appeals’ Ferreira opinion at once reasonable and profoundly problematic. Its resolution of the specific dispute before it was reasonable. Its legal analysis—and particularly its insistence that there is no distinction to be drawn between the rules governing cases of police misfeasance and cases of police nonfeasance—is indefensible. The majority, it seems, could not bring itself to flat-out deny relief to the victim of a mode of policing that, at the time and still today, epitomizes the sort of misconduct that has made “defund the police” a politically salient slogan. And yet it left an opening for Ferreira that, by its terms, slams the door shut behind him.

I. THE FERREIRA DECISION

In the fall of 2011, a City of Binghamton SWAT team, executing a no-knock warrant, broke through the door of an apartment to arrest a person living there named Michael Pride. Moments later, Jesse Ferreira—an unarmed guest who had spent the night sleeping on Pride’s living room couch—was shot and seriously injured by the officer leading the raid.

Ferreira brought suit in federal court against individual officers and the City, asserting claims under federal civil rights law and New York tort law. The latter provided the basis for Ferreira’s initial victory. A jury concluded that, although the officer had not acted negligently, the City was negligent in failing properly to plan and prepare for the raid, which failure contributed to the shooting. After assigning 10 percent comparative fault to Ferreira, the jury awarded him $3 million in compensatory damages.

Ferreira’s victory was short-lived. The District Court judge granted the City’s post-trial motion for judgment as a matter of law. It did so on several grounds:

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6. Ferreira v. City of Binghamton, 975 F.3d 255, 262–64 (2d Cir. 2020).
7. The jury seems to have credited the officer’s testimony that he mistakenly but reasonably believed Ferreira posed a potentially lethal threat to him. Id. at 262.
8. Id. The fault in question was failing to heed commands to lay on the ground.
1. According to the District Court, New York negligence law contains a “special duty” rule which provides that actions undertaken by a municipal employee in their official capacity cannot provide the basis for governmental liability unless, at the time of the allegedly tortious conduct, the right sort of special relationship existed between the employee and the victim. As there was no such relationship between the SWAT team and Ferreira, the court reasoned, no duty of care was owed, and hence no liability could attach.\textsuperscript{10}

2. The District Court further ruled that New York law provides governmental actors with an additional layer of protection from liability via the doctrine of “discretionary immunity.” According to this doctrine—which resembles the discretionary function exemption to the waiver of federal sovereign immunity in the Federal Tort Claims Act—a municipality cannot be held liable in negligence for discretionary, as opposed to ministerial, official actions. Planning a raid, the trial court reasoned, was discretionary and hence could not be second-guessed as negligent by a jury.\textsuperscript{11}

3. Finally, the District Court ruled that, even if a special-relationship-based duty existed and even if the planning of the raid was ministerial, the evidence did not permit a reasonable jury to conclude that the City was negligent in planning the raid.\textsuperscript{12}

On appeal, the Second Circuit rejected the trial court’s second and third grounds for reversing the jury’s verdict, finding that there was sufficient evidence that the planning of the raid was negligent and was a proximate cause of the shooting,\textsuperscript{13} and that even if planning a no-knock raid is within the general category of government acts that count as “discretionary,” the defendants’ conduct in this case fell outside the shield of discretionary immunity because it involved violations of established departmental procedures and practices.\textsuperscript{14}

As to the trial court’s first ground for overturning the verdict—the absence of a special duty owed by Binghamton police to Ferreira—the Second Circuit panel identified New York precedents in support of two opposing propositions: (i) a special duty is a prerequisite to liability in all negligence suits against a municipality; and (ii) a special duty is only required for negligence cases alleging a failure on the part of officials to protect or

\textsuperscript{10} *Id.* at *5–6.

\textsuperscript{11} *Id.* at *6 n.3.

\textsuperscript{12} *Id.* at *6.

\textsuperscript{13} Specifically, the appellate court held that the jury could reasonably have found that the SWAT team failed to conduct adequate pre-raid surveillance to determine whether other persons besides Pride were likely to be in the apartment when the raid was conducted. Ferreira v. City of Binghamton, 975 F.3d 255, 275 (2d Cir. 2020).

\textsuperscript{14} *Id.* at 272.
rescue the victim from a danger arising from an independent source (as opposed to cases alleging that officials themselves had inflicted injury on the victim). Because the first of these would seem to spell doom for Ferreira’s claim, while the second seemed to allow it, the Second Circuit panel certified to the New York Court of Appeals the question of which interpretation of New York law was correct.

The New York Court of Appeals accepted the Second Circuit’s certified question, which read as follows:

Does the “special duty” requirement . . . apply to claims of injury inflicted through municipal negligence, or does it apply only when the municipality’s negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee?

In a 5-2 decision written by Judge Singas, the Court of Appeals answered as follows. Confirming the initial ruling of the trial judge, it held that, for all negligence claims against a municipality based on official misconduct, the plaintiff must establish that a “special duty” was owed by officials to the plaintiff. Given that this rule had served as a ground on which the trial court had granted judgment for the defendant, its endorsement by the Court seemed to spell doom for Ferreira’s suit. However, at the end of its opinion, the majority provided a potential path forward by suggesting that conditions sufficient to generate such a special duty would be present in situations in which police plan and execute a no-knock search warrant. Accordingly, the Court concluded its opinion by stating, “the certified question should be answered in accordance with this opinion,” rather than ruling that Ferreira’s negligence claim failed as a matter of law.

In an opinion labeled a “dissent,” Judge Wilson (now Chief Judge) insisted that the majority had misread New York precedents. In his view, they are clear in holding that the special duty rule applies only when the plaintiff alleges a failure on the part of officials to protect or rescue the plaintiff from a danger, not when they themselves negligently cause injury. As will be clear in what follows, on this score, we think Judge Wilson had the better of the legal arguments in the case.

15. Id. at 282–90.
16. Id. at 291.
18. Id. at 249–53.
19. Id. at 252–53.
20. Id. at 253.
21. This label is perhaps misleading, given the majority’s allowance of the possibility that there was a special duty on the facts of Ferreira (and, accordingly, the possibility of agreement on whether the plaintiff was entitled to prevail). Judge Rivera concurred in Judge Wilson’s opinion.
22. Ferreira, 194 N.E.3d at 254 (Wilson, J., dissenting).
23. Id. at 255 (Wilson, J., dissenting).
II. SOVEREIGN IMMUNITY, THE RIGHT TO A REMEDY, AND SPECIAL DUTY

New York’s 1929 Court of Claims Act waived the state’s sovereign immunity, thereby rendering the state and its subdivisions subject to liability for torts committed by officials acting in their official capacity.24 For negligence claims, this meant plaintiffs suing governmental entities could proceed under the standard framework used for negligence claims against non-state actors. Put differently, they would be required to establish duty, breach, cause (including proximate cause), and injury. As the Court of Appeals explained in its 1945 Bernadine decision, with

the waiver by the State of its own sovereign dispensation, [the] extension [of immunity to its subdivisions] naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, even if no separate statute sanctions that enlarged liability in a given instance.25

Thus, the plaintiff, who had been injured by a runaway police horse, was entitled to recover from the City upon proof of negligence.26

Issued thirteen years later, Schuster v. City of New York attests to this broad understanding of the import of the Court of Claims Act.27 Arnold Schuster had provided New York City police with information that led to the arrest of notorious bank robber Willie Sutton. Schuster’s role was widely publicized, including by police, and he soon began receiving death threats, for which he sought police protection. When Schuster was later gunned down by an unknown assailant, his estate sued the City, alleging that police were negligent “in advising him that the threats upon his life were not seriously made, in failing to supply him with a bodyguard and in heedlessly imparting to him a false impression of safety. . . .”28

In a 4-3 decision written by Judge Van Voorhis, the high Court reversed the lower courts’ dismissal, which had been predicated on the alleged lack of a duty of care owed by the City to Schuster. Unmoved by the City’s “[p]redictions of dire financial consequences” that would result if a duty were recognized, and declining to follow “authorities . . . cited [by the City] for the proposition that there is no liability to the general public from failure of police of fire protection,” the majority concluded that “the public (acting in this

25. Id.
26. In fact, the plaintiff in Bernadine invoked a special statutory provision that subjected municipalities to liability for negligence of employees in the operation of a municipally owned transportation facility. As the Court made clear, however, “there was no compelling reason why this plaintiff should have taken his stand upon [the statute]” because the plaintiff was entitled to prevail by making out an ordinary claim of common-law negligence. Id.
28. Id. at 536.
instance through the City of New York) 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 they are in danger due to their collaboration.”

It then listed nine post-1929 New York decisions that had imposed negligence liability on police, including several involving accidental shootings of bystanders, as well as a case in which an arrestee was held in conditions that caused him to contract pneumonia, and another case in which the plaintiff was injured as a result of an officer negligently directing traffic.

Two dissenting judges wrote opinions focusing on pre-1929 decisions suggesting the absence of a broad legal duty on the part of government officials to protect members of the public from harm at the hands of third parties. Both relied heavily on Judge Cardozo’s famous 1928 Moch opinion for the distinction between misfeasance and nonfeasance. Judge Van Voorhis, however, sought to turn the tables on them by quoting Moch for the proposition that “‘[i]f conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.’” On this basis, his opinion maintained that Schuster’s complaint was properly characterized as claiming misfeasance, given its allegations that police had actively sought out the public’s cooperation in capturing fugitives and had exacerbated the risk Schuster was facing by falsely reassuring him that he was not in danger.

In allowing Schuster’s claim to go forward, the majority opinion described in evocative terms how the legislature’s waiver of sovereign immunity had generated liability in the numerous cases of police liability that it canvassed:

In one sense all of those causes of action grew out of the waiver of governmental immunity. But they were not created by waiver of governmental immunity, but by the common law, which

“is the legal embodiment of practical sense. It is a comprehensive enumeration of principles sufficiently elastic to meet the social development of the people. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. The capacity of common law for growth and adaptation

29. Id. at 537.
30. Id. at 537–38.
31. Id. at 542–46 (Conway, C.J., dissenting); id. at 546–49 (Froessel, J., dissenting).
32. Id. at 538 (quoting H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896, 898 (N.Y. 1928) (emphasis added)).
33. Id. at 536, 538. Judge McNally’s concurring opinion also emphasized the complaint’s allegations that the police interacted with Schuster in a way that a jury could find involved the provision and then negligent withdrawal of protection. Id. at 542 (McNally, J., concurring).
to new conditions is one of its most admirable features.” 11 Am. Jur., Common Law, s 2, pp. 154-155.

While governmental immunity remained in effect, this type of court action remained in abeyance. It remained in abeyance not on account of absence of duty on the part of a municipality to the injured or deceased person, but for the reason that where the factual basis of the claim was involved in the performance of a governmental function (such as police duty), the State had not permitted itself or its political subdivisions or municipal corporations to be sued. Where the immunity was removed, this bar no longer stood against the enforcement of civil liability arising from breach of a duty that existed before, but which could not be enforced until the immunity was waived.34

Were Schuster the last word on governmental liability under New York law, it would be tempting to say that Ferreira’s holding—along with its failure to take to heart the idea that the common law’s principle of “a remedy for all wrongs”—marked a complete doctrinal about-face. However, the real story is slightly more complicated, although it is still not supportive of Ferreira’s analysis. Shortly after Schuster, the high Court overlaid some cautionary qualifications on its openness to applying general principles of common law negligence to governmental entities. Yet even when this shift occurred, it did not involve the adoption of the strongly anti-liability stance announced in Ferreira. Instead, the Court introduced significant limits on municipal liability precisely by taking seriously, rather than effacing, the distinction between cases in which the plaintiff alleges that an official negligently injured them and cases in which the plaintiff alleges a negligent failure to protect or rescue.

The casebook staple of Riss v. City of New York epitomizes this shift. Famously, it held that a duty to protect individuals from harm at the hands of third parties is not owed by police to particular potential victims.35 Thus, Linda Riss—who had provided police with credible evidence that a man whom she had spurned was threatening her and who was later disfigured in an attack the man engineered—could not recover on a claim of negligence against the City.36 As to the scope of its ruling, the Riss Court was quite clear. It did not block liability for negligence based on officials when they act in the manner of a private enterprise (as when operating a railroad or hospital, for example) or in their provision of services or facilities for use by members of the public (such as highways and public buildings). In all such cases, “ordinary principles of tort law” continued to apply.37 Riss was different, the Court insisted, because it involved “the provision of a governmental service to protect the public generally from external hazards and particularly to

34. Id. at 538–39 (emphasis added).
36. Id. at 861.
37. Id. at 860.
control the activities of criminal wrongdoers.”

Notably, the Court concluded its analysis by making clear that it was not purporting to overrule Schuster: “Quite distinguishable, of course, is the situation where the police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses (Schuster v. City of New York . . . 154 N.E. 2d 534).”

In teaching Torts, we have tended to be critical of Riss. However, the bases for our dissatisfaction with the opinion have changed over time, as has our assessment of some of its reasoning. The Court’s unwillingness to recognize a negligence claim was not particularly surprising (especially given that it was decided amidst an unprecedented crime wave) and was not out of sync with decisions from other jurisdictions. Still, from a wrongs-and-redress perspective, its reliance on a no-duty rationale—perhaps the police department handled the matter incompetently, but it had no duty to act competently to protect Linda Riss—has always struck us as perverse. The NYPD’s professed motto has long been some version of “to protect and serve,” and Riss’s allegations identified an apparent breach of this duty. Reading an immunity into the law is one thing. Denying that police owe a legal obligation to protect potential victims from known stalkers is another. Common sense—and thirty years’ worth of consistently incredulous student reactions to Riss (particularly its implicit suggestion that police owe a legal duty of protection to the public, but not to any individual member of the public)—suggests its conflation of “immunity” with “no-duty” breeds confusion and contempt for the law. For us, Riss also served as strong evidence against Prosser’s supposition—alas, still conventional wisdom among torts scholars in the United States—that deconstructing duty into a balancing of pro- and anti-liability factors reliably leads to progressive case outcomes.

Our view of Riss today is less harshly critical. This is partly because we have a better appreciation of the interaction between New York’s Court of Claims Act and the common law as it existed at the time of its enactment. Only after World War II does one begin to see a commendable movement in the common law of tort toward the recognition of new affirmative duties of care for private actors. Representative of this period was the 1965 addition of Section 314A to the Restatement of Torts. It identifies affirmative duties to assist based on certain “special relations,” such as carrier-passenger and

38. Id.
39. Id. at 861.
41. This Section had no counterpart in the First Torts Restatement. John C. P. Goldberg, Torts in the American Law Institute, in THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 175, 180 (Andrew S. Gold & Robert W. Gordon eds., 2023).
innkeeper-guest. Appreciation of the timing of this development has implications for the interpretation of the Court of Claims Act. Specifically, there is a question as to whether the Act’s waiver of immunity should be interpreted to cover only those grounds of liability as to which it would have been correct to say: “but for governmental immunity, these would have been actionable prior to 1929.” The question implicitly raised is whether the legislative abrogation of tort immunity should be understood to extend to forms of liability that did not yet exist (or existed only as an unrealized implication of extant decisional law).

In this context, we do not think it was completely out of bounds for Riss to invoke separation of powers and institutional competence as reasons to decline to recognize actionable negligence claims grounded in allegations of police failure to protect. If some governmental (and sovereign) immunity is to be retained, perhaps the best cases for it are those alleging breaches of affirmative duty. Even on this line of reasoning, however, the Court in Riss should have followed Schuster by explaining that its decision rested on a particular interpretation of the state’s statutory waiver of immunity rather than on the plaintiff’s inability to establish the duty element of her negligence claim. Still, it is perhaps excusable (if not justifiable) that Riss used the language of “no duty.” As noted, courts and scholars in the United States have for far too long been willing to treat “duty” as an empty vessel into which just about any matter-of-law defense argument can be poured.

It is important to reiterate that, even though it is a defendant-friendly decision, Riss itself left open, at least in principle, two grounds for liability on the basis of police misconduct. First, as noted, it did not purport to overrule the many cases holding police liable for misfeasance (as in the case of an officer misdirecting traffic resulting in injury to a driver). Second, it did not completely shut down claims for negligent failure to protect the victim against injury at the hands of a third party. Instead, it reaffirmed Shuster and, in so doing, invited litigants to frame complaints about police failure to protect in terms of their negligent failure to follow through on an implicit undertaking to protect.

Two cases from the 1980s indicate that, though difficult, it was possible for persons to prevail on claims of police nonfeasance under Riss. In the first, DeLong v. Erie County, the estate of a woman killed by a burglar brought a negligence claim against Erie County on the ground that, in its response to the petrified woman’s 9-1-1 call requesting immediate help, a dispatcher sent police cars to the wrong address (indeed, in the wrong city). Because the defendant had voluntarily assumed a duty to the woman and reassured her an officer would be sent “right away,” a special relationship was created, and

42. Id. at 180–82.
there was held to be a duty of care. The horrific facts of the second case—
Sorichetti v. City of New York—in some ways combine the worst of both
DeLong and Riss. The plaintiff was a child viciously beaten by her father,
who had violated an order of protection obtained by the mother for herself
and her children. Notwithstanding the protective order and clear evidence
of explicit and specific threats by the father, police repeatedly declined to
heed her desperate, in-person requests to apprehend the father based on his
violation of the order. Instead, the officers repeatedly put her off and told
her to wait. Eventually, the father was apprehended, but by then, the six-
year-old child, Dina, was in a coma, having been beaten and stabbed by her
father, who had attempted to saw off her leg (the child survived, but was
permanently disabled). Here, too, the New York Court of Appeals found a
special relationship between the plaintiffs and the defendant in light of the
contact between them, the protective order, and the interactions in which
police department employees told the mother simply to wait. The Court,
citing Shuster and DeLong, had no trouble finding a duty of care.

As the foregoing review indicates, the law in New York concerning
police liability prior to Ferreira has at least two steps, chronologically and
conceptually. From 1929 to 1960, the Court of Appeals was focused on
implementing the legislature’s decision to hold government entities to the
same tort duties as private firms. At this time, it had little occasion to consider
whether and how to apply the principle of holding government entities to the
“same” tort duties as private firms when the duties in question were newly
recognized duties, such as affirmative duties to protect and rescue.

In the late 1960s, Riss took up this latter question, concluding that, for
several reasons, including separation-of-powers concerns, courts were
entitled to be, and should be, cautious about imposing on police departments
precise analogs to affirmative duties of the sort owed by innkeepers to their
guests, common carriers to their passengers, and businesses to their
invitees. As we have seen, in Riss and subsequent cases, the Court of
Appeals ultimately adopted a relatively narrow, reassurance-and-reliance-
based version of what counts as the requisite “special relation.” This stands
in contrast to the rule summarized in Section 314A, according to which, for
example, the requisite special relation is established merely by a person’s

44. Id. at 721.
46. Id. at 72–73.
47. Id. at 73.
48. Id.
49. Id. at 74.
50. Id. at 76–77.
51. Id. at 75–76.
52. See supra text accompanying notes 41–42.
being an invitee of a business who is present on the business’s premises and whom the business knows or should know is in need of assistance.\textsuperscript{53}

Based on the doctrinal picture just sketched, it would seem that, in \textit{Ferreira}, the City of Binghamton’s argument that no liability could attach because of the absence of a special duty owed to Ferreira was a complete non-starter. After all, the special relation/special duty idea historically operated \textit{only within the category of nonfeasance}: it is part and parcel of \textit{Riss}’s insistence that, when it comes to police failures to protect persons from third-party harm, as opposed to police actions that themselves cause injury, a special, limited duty rule is needed. The core of Ferreira’s complaint, however, was not a contention that the Binghamton police failed to protect him from a third party; it was that a police officer had negligently shot him.

Judge Wilson, in dissent, rightly emphasized this line of critique.\textsuperscript{54} Indeed, following in the footsteps of Judge Van Voorhis’s majority opinion in \textit{Schuster}, Wilson cited several cases (both pre- and post-dating \textit{Schuster}) in which government entities incurred liability because of municipal employee misfeasance.\textsuperscript{55} Included among these were three cases in which liability turned \textit{precisely on negligent shootings by police} and in which there was no suggestion of a need for the plaintiff to establish a special duty or a special relation in order to prevail.\textsuperscript{56} Tellingly (and remarkably), the majority did not respond on the merits to Judge Wilson’s invocation of these on-point precedents. Instead, it deflected and deferred. \textit{Ferreira}, it said, simply was not the appropriate occasion on which to re-examine those precedents “through the lens of our contemporary understanding of the special duty doctrine.”\textsuperscript{57} Needless to say, it is not a satisfactory response to the criticism of inconsistency with deeply entrenched precedent for a court to say, “We are not directly overruling them quite yet.”

\section*{III. HANDLING DUTY WITH CARE: WHAT LAUER HELD (AND DID NOT HOLD)}

Everything we have said so far seems to suggest that \textit{Ferreira}, without admitting as much, radically altered New York tort law on the issue of governmental actor liability. To leave things at this, however, would be unfair

\begin{itemize}
  \item \textsuperscript{53} \textit{Restatement (Second) of Torts} § 314A (Am. L. Inst. 1965).
  \item \textsuperscript{54} \textit{See supra} text accompanying notes 21–23.
  \item \textsuperscript{55} \textit{Ferreira} v. City of Binghamton, 194 N.E.3d 239, 255–56 (N.Y. 2022) (Wilson, J., dissenting).
  \item \textsuperscript{57} \textit{Ferreira}, 194 N.E.3d at 251 n.7.
\end{itemize}
to the Court of Appeals. In fact, our analysis requires two important qualifications.

First, it would be false to suggest that, pre-Ferreira, any plaintiff who could prove they had been injured by police negligent misfeasance would prevail. As we noted in our initial summary of the federal courts’ rulings in Ferreira, under New York law, conduct by officials that falls on the governmental side of the governmental/proprietary distinction triggers the separate doctrine of discretionary immunity. According to it, “[a] public employee’s discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality’s liability even when the conduct is negligent.” As noted, the federal courts that heard Ferreira disagreed on the applicability of this defense to the case, indicating that discretionary immunity is or has the potential to be a significant limit on governmental entity liability even when a plaintiff can establish the requisite special duty or special relationship.

Second, and more importantly, we have slightly overstated the doctrinal weakness of the City of Binghamton’s “special duty” argument. Notwithstanding the seemingly compelling precedential authority for the special duty argument applying only in the nonfeasance (duty to protect) context, the City pointed to language in prior New York cases that seemed to cut the other way. In particular, it mimed—and Judge Singas’s majority opinion quoted—the unqualified assertion from a case called McClean stating that: “an agency of government is not liable for the negligent performance of a governmental function unless there exist[s] a special duty to the injured person, in contrast to a general duty owed to the public.”

The majority also seized on a passage from another case, Applewhite, stating, “[O]ur precedent does not differentiate between misfeasance and nonfeasance, and such a distinction is irrelevant to the special duty analysis.”

As it turns out, these two cases do not provide an adequate basis on which to rest the position on special duty adopted in Ferreira. Indeed, in both McClean and Applewhite, the relevant language clearly was dictum, as both involved alleged breaches of affirmative duties to protect or rescue. In short, neither these cases nor any others prior to Ferreira held or even implied that

59. Ferreira, 194 N.E.3d at 250 (quoting McLean v. New York, 905 N.E.2d 1167, 1171 (N.Y. 2009)).
60. Id. at 251 (quoting Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 135 n.1 (N.Y. 2013)).
61. The alleged negligence in McLean was the inadequate diligence of a government agency in certifying and recommending registered daycare centers; the injury was inflicted by a private daycare facility, and the government was sued because of an alleged failure to protect against such inadequacies via its registration system. See McLean, 905 N.E.2d at 1170. Applewhite involved a claimed failure on the part of EMTs to heed an affirmative duty to rescue a child who have been made ill by the negligence of a third party. See Applewhite, 995 N.E.2d at 133.
police departments are entitled to a special set of limited-duty rules with respect to plain-vanilla instances of careless driving and the like.

A third case (apart from McClean and Applewhite)—the Court’s 2000 Lauer decision—seems on its face to provide greater support for Ferreira and thus, unsurprisingly, was relied on heavily by the majority. Here is the Ferreira Court’s description of it:

In Lauer, the medical examiner, a municipal employee, erroneously determined at first that a child’s death was a homicide, but later concluded that he actually died of natural causes. The medical examiner “failed to correct the autopsy report or death certificate, and failed to notify law enforcement authorities,” who were investigating the child’s father for the homicide. After the autopsy report was corrected and the police investigation ended, the father sought damages for the harm allegedly caused by the medical examiner’s negligence. We dismissed the complaint, concluding that the father failed to establish that the medical examiner owed him a special duty beyond that owed to the public at large. Thus, in Lauer, we applied the special duty rule even though it was the acts of the municipally employed medical examiner, not a third-party, that allegedly caused the father’s injury.

The final sentence of this passage aims to present Lauer as a crystal-clear example of a misfeasance case in which a special duty was required for liability. The key piece of reasoning supporting this conclusion proceeds as follows: Because the plaintiff in Lauer never asserted that the defendants owed him a duty to protect him from harm at the hands of a third party, it must have been a misfeasance case. Unfortunately, this thought contains a glaring non-sequitur. While many duty-to-protect or duty-to-rescue cases are about protecting or rescuing the plaintiff from third-party harm, not all are. Thus, the absence of a third-party injurer in Lauer cannot of itself have rendered it a misfeasance case.

Suppose, for example, a hotel guest suffers a heart attack in its lobby and later sues the hotel because its staff were present but did nothing to aid her, thereby aggravating her condition. Notwithstanding the absence of a third-party injurer, her suit would be for negligent nonfeasance. It would be for nonfeasance because the gist of her claim would not be that the employees did something to injure her but instead that they failed to take steps to assist or rescue her from a peril they did nothing to create. Likewise, the defendants

62. Lauer v. City of New York, 733 N.E.2d 184 (N.Y. 2000). We have elsewhere argued that Lauer was wrongly decided, but one need not agree with this assessment to accept the analysis offered here. See John C.P. Goldberg & Benjamin C. Zipursky, Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette, 88 Ind. L. Rev. 569, 597 (2013) (suggesting that “the court could have ruled that an official owes others a duty to take steps” to prevent or mitigate severe emotional harm that a reasonable person would realize is likely to occur to another if one fails to correct a statement one has made that one knows was erroneous and has been or will be relied upon).

63. Ferreira, 194 N.E.3d at 250 (internal citation omitted).
in *Lauer* were not sued on the theory that the medical examiner issued a report that caused injury to the father. Instead, the crucial allegation of negligence was the *failure of the examiner to later correct his own report*, which he was required by regulation to do once he determined it was erroneous.\(^\text{64}\) So, *Lauer*—like *McClean* and *Applewhite*—cannot be cast as a case in which the special duty rule was applied to a negligent misfeasance claim against a governmental actor.

There is a deeper difficulty still with Ferreira’s reliance on *Lauer*. While *Lauer* involved a suit against municipal defendants and ruled that a special duty was required for liability, the Court’s insistence on the need for a special duty did *not* rest on the defendants’ status as governmental actors. Instead, the special-duty requirement arose from the fact that the plaintiff was suing for negligent infliction of (pure) emotional distress (NIED), as opposed to negligence causing physical harm or property damage. As the *Lauer* Court noted in a footnote near the end of its opinion:

> This Court has been especially reluctant to broaden the concept of duty where, as here, the injury alleged is negligently inflicted emotional injury. The dissenting Judges would unduly expand the narrow, limited class of cases where we have permitted recovery for emotional injury based on the long-established, common-law duty to next of kin with respect to the death of close family members. Those cases, however, do not support the quite different duty urged here, which would make a municipality liable for emotional injury, to an open-ended plaintiff class of potential suspects in criminal investigations.\(^\text{65}\)

While the Court was conclusory in its assertion that the duty urged by the plaintiff in *Lauer* would make the municipality liable to “an open-ended plaintiff class of potential suspects,” it was plainly correct that the dissent was seeking to expand the class of viable cases of negligent infliction of emotional distress. Overwhelmingly, those cases have required a special relationship or a special duty.\(^\text{66}\)

In short, the *Lauer* Court was justified in requiring a special relationship or special duty to find the plaintiff’s NIED claim viable. This showing was


\(^{65}\) *Lauer*, 733 N.E.2d at 189–90 n.1.

\(^{66}\) Other parts of Chief Judge Kaye’s *Lauer* opinion also indicate that the need for a special duty showing, in that case, was driven by the fact that the key claim in the case was for NIED. In particular, two passages from a key paragraph explaining why the case required special duty analysis quote from two of New York’s most prominent NIED cases. See id. at 187 (“Fixing the orbit of duty may be a difficult task. Despite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and ‘limit the legal consequences of wrongs to a controllable degree.’”) (quoting Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)); id. at 188 (“Time and again we have required ‘that the equation be balanced; that the damaged plaintiff be able to point the finger of responsibility at a defendant owing, not a general duty to society, but a specific duty to him.’”) (quoting Johnson v. Jamaica Hosp., 467 N.E.2d 502, 503 (N.Y. 1984)).
required because, in negligence, pure emotional harm cases are structurally
and substantively the opposite of physical harm cases—while a finding of a
duty of care is possible, the default is that one has no duty to take care to
avoid bringing about pure emotional harm, and a special relationship or
special duty is normally needed to shift from the no-duty default. Riss,
governmental immunity, and the public duty rule were not the basis on which
Lauer required a special showing on duty because the case was not about a
failure to protect Lauer from others or about a government official’s
discretionary actions. Insofar as a majority of the Ferreira Court supposed
that it was simply the status of the Lauer defendants as governmental actors
is what defeated Lauer’s efforts to establish the duty element of his
negligence claim, it was mistaken.

IV. REACHING SOUND RESULTS IN AN UNSOUND WAY

What should one make of the Ferreira majority’s surprising turn, late in
its opinion, allowing for a potential recovery by the plaintiff? Below, we
advance two different perspectives and then choose between them in a
manner that will surprise no one.

From a doctrinal point of view, the characterization of no-knock warrant
cases as ones satisfying (what we regard as an inapplicable) special duty rule
seems like an example of mitigating the damage from making one
unjustifiable analytical move by making another—righting a juridical wrong
by committing a second one. The principal precedent invoked by the Court
for its ultimate conclusion is Smullen v. New York City, a manifestly
different case at almost every level. The issue in Smullen was whether the
widow of a construction worker killed by a dangerous trench could recover
from New York City on the ground that the City’s sewer inspector had
negligently told the decedent the trench was safe. In response to the City’s
argument that there is no governmental liability for the negligent failure of
regulators to protect others against dangerous conditions, the plaintiff argued
that the Schuster exception (discussed above) applied and that there was a
special duty. The Smullen Court agreed with the plaintiff, suggesting that in
the context of a worksite of which the City had taken control, a specific
negligent statement by the inspector on the spot—a statement upon which the
decedent had relied—enabled the plaintiff to satisfy Schuster’s special duty
requirement.

67. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. b
(A.M. L. INST. 2010) (noting the “general rule that an actor is not liable for negligent conduct that
causes only emotional harm” and identifying limited-duty exceptions to the rule; but see Goldberg
& Zipursky, supra note 62, at 595 (noting, with Lauer dissent, that Lauer defendant was specially
situated with regard to plaintiff).
68. Ferreira, 194 N.E.3d at 252–53.
Except for the fact that Binghamton police had complete control over how to plan and execute the no-knock warrant, Ferreira has little in common with Smullen. In particular, the Smullen Court used the City’s domination of the worksite as equivalent to prior, reliance-creating communications between the government and the defendant that set the stage for the causal role of the particular negligence of the government actor on that occasion. Nothing resembling such an equivalence is present in Ferreira (nor need it have been, in our view). It is as if the Court did not want to make bad headlines by reaching an exceptionally harsh outcome in the face of the United States Court of Appeals’ more justice-oriented (and analytically impressive) stance, but it could not find a way to do so without leaving New York’s tort law more accommodating of claims based on police misconduct than it really wished it to be.

A perhaps more charitable take on Ferreira can be offered through a legal realist lens. Judge Singas implicitly recognized the gravity of the apparent injustice suffered by Mr. Ferreira and the widespread perception (in notorious cases like that of Breonna Taylor70) that no-knock warrants are unnecessarily perilous encounters whenever they are undertaken. If New York courts are going to acknowledge at any level the importance of vigilance and rationality in policing, no-knock warrant cases would seem one of the most compelling contexts to do so. Insisting that precautions and prudence are taken in the planning of such episodes and that care is taken in executing them—this would seem to be a fair-minded and reasonable acknowledgment of what is an extraordinarily dangerous situation created by police, one that will involve a different magnitude of danger (and more readily addressable proactively by police departments) than many cases that might be brought before courts post hoc after a tragic series of events.

Non-academic judges and lawyers frequently criticize academics for refusing to see the real world and for taking legal doctrines too seriously. At least in this case, however, it would not be fair to read our criticism of the Court as merely academic. Legal doctrine makes a difference, and it is likely to do so here. If, as it appears, Judge Singas and her colleagues felt Ferreira ought to win but that the Court should not send too receptive a message to future litigants in police cases, she needed to find another way to get there. New York case law is now garbled, as Judge Wilson emphasized in his dissent. Worse, for an array of cases, Ferreira has placed police and other governmental defendants in a far stronger position than they were or should be. Indeed, it seems that any misfeasance case that does not involve a no-knock warrant—everything from accidental shootings of bystanders to instances of pedestrians being run down as a result of negligent driving by municipal employees—will require an inventive argument from the plaintiff.

as to why there is a “special duty” if the suit is not to be dismissed as a matter of law. If this legal regime comes to pass, it will be a complete repudiation of the letter and the spirit of the Court of Claims Act, the very point of which was to eliminate special treatment of tort suits against official wrongdoers and instead to subject them to standard tort rules, thus rendering them ordinary, not special. In the language of Bernadine and Schuster, the Act aimed to update the law to the point “where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees,”71 thereby applying to government actors the default principle embodied in our tort law—the principle of “a remedy for all wrongs.”72 Above all else, Ferreira fails because of its insensitivity and seeming indifference to the idea of civil recourse that sits at the core of Anglo-American private law.

CONCLUSION

For this occasion, we have come to honor Aaron Twerski, not to speak for him. We do not know if he would agree with our take on Ferreira. We do know, however, that, in his own writings, he has always combined a deeply practical orientation toward law—one concerned that law makes a positive difference in the world—with an equally deep appreciation of the need for courts to attend closely to doctrine and their institutional roles in our legal and political systems. Our view, obviously, is that the Ferreira Court fell down on both of these fronts and that it was no accident that it did so. A common law court that runs roughshod over precedents and basic tort concepts is not likely to be one that arrives at sensible solutions to important problems, such as injurious police misconduct.