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***Garrett v. Holiday Inns, Inc.*: Expanding the Right of Apportionment and Municipal Tort Liability**

I. Introduction

Garrett v. Holiday Inns, Inc.,¹ decided by a sharply divided New York Court of Appeals,² represents a modification of the requirements for a defendant's claim of apportionment from third parties. *Garrett* announced that a town may be held proportionately liable to defendants for economic damages those parties may sustain if a judgment against them is awarded to motel guests who were injured in a serious fire.³ A claim for apportionment was permitted, despite the absence of any actionable duty owed by the town to the plaintiffs, because defendants alleged the town had breached an independent duty it owed to the defendants.⁴ Although the court explicitly denied defendants' indemnification claim,⁵ it avoided calling defendants' action contribution. Thus, it is unclear on which theory the court based its decision.

Garrett also marks a clear expansion of municipal tort liability for negligent enforcement of statutes governing multiple dwellings.⁶ The court endorsed defendants' argument that the Town of Greece had violated a special duty owed to them when officials negligently enforced these statutes.⁷

Part II of this Note explores the legal background of third

1. 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983), *modifying* 86 A.D.2d 469, 450 N.Y.S.2d 619 (4th Dep't 1982).

2. Judge Wachtler wrote for the majority and was joined by Judges Jones, Fuchsberg, and Meyer. Chief Judge Cooke and Judge Jasen dissented in part and voted to affirm the decision of the appellate division. Judge Simons took no part in the decision of the New York Court of Appeals as he had written the unanimous opinion of the appellate division.

3. *Garrett*, 58 N.Y.2d at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 779.

4. *Id.* See *infra* notes 177-210 and accompanying text.

5. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

6. See *infra* notes 211-36 and accompanying text.

7. *Garrett*, 58 N.Y.2d at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 779.

party claims for contribution and indemnity and the evolution of municipal tort liability for negligent performance of statutory duties. Part III presents the facts and procedural history of *Garrett* and the decision of the New York Court of Appeals. Part IV analyzes the reasoning and results of the decision of the court of appeals. Part V concludes that a majority of New York's highest court expanded municipal tort liability, at least to the extent of avoiding patently inequitable results. In so doing, it changed the requirements for a contribution claim and the special duty rule which limits municipal tort liability.

II. Background

A. Contribution and Indemnity

Contribution and indemnity are analytically distinct concepts.⁸ Contribution allows two or more tortfeasors who are liable to the same plaintiff for the same injury to compel each other to pay a pro rata share of the judgment.⁹ For example, an attorney sued by a former client for malpractice may compel a second attorney to pay a portion of the damages awarded to the plaintiff if it is proven that the second attorney's negligence aggravated the loss sustained by the plaintiff.¹⁰ Contribution is

8. See *D'Ambrosio v. City of New York*, 55 N.Y.2d 454, 435 N.E.2d 366, 450 N.Y.S.2d 149 (1982). The court discussed the history of contribution, indemnity, and apportionment, holding that the "special benefit" rule permits a municipality to seek apportionment of damages from a joint tortfeasor because each has breached a duty owed to an injured plaintiff. The plaintiff was injured when she tripped on a metal disk which had been placed in a public sidewalk by a former owner of an abutting premise for the enhancement of his property. The city had had actual knowledge of this unsafe condition and had failed to correct it. *Id.* See also *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 460, 428 N.Y.S.2d 643 (1980); 2A WEINSTEIN-KORN-MILLER, *NEW YORK CIVIL PRACTICE* ¶ 1401.10 (1983); W. PROSSER, *LAW OF TORTS* §§ 50-52 (4th ed. 1971). But see 23 N.Y. JUR. 2D *Contribution, Indemnity, Subrogation* § 84 (1982) (stating that the right of apportionment has had the practical effect of eliminating the distinction between these two concepts).

9. See *Smith v. Sapienza*, 52 N.Y.2d 82, 87, 417 N.E.2d 530, 532, 436 N.Y.S.2d 236, 238 (1981). See also *RESTATEMENT (SECOND) OF TORTS* § 886A (Tent. Draft No. 16, 1970) ("[W]here two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them, even though the judgment has not been recovered against any or all of them."); 23 N.Y. JUR. 2D, *supra* note 8, § 1 ("Contribution has been defined as the equalization of a burden as between persons under a common liability.").

10. See *Schauer v. Joyce*, 54 N.Y.2d 1, 429 N.E.2d 83, 444 N.Y.S.2d 564 (1981).

based on the equitable principle "that those who voluntarily assume a common burden shall bear it in equal proportions."¹¹ Indemnity, by contrast, requires a party who ought to be responsible in damages to an injured party to pay the individual who has been held legally liable.¹² Therefore, an employer held liable to an injured person solely on the basis of respondeat superior for the negligent conduct of an employee may seek reimbursement from the employee for any judgment paid on his account.¹³ Indemnity is a concept which rests on contract principles —express or implied.¹⁴ Although the differences between indemnity and contribution are not always clearly discernable, indemnity involves the situation where the third party is called on to reimburse the defendant for everything he has paid, rather than for only a portion of the judgment.¹⁵

Indemnification allows the party who has been legally compelled to pay for the wrong committed by another to recover damages paid to the injured plaintiff from the wrongdoer.¹⁶ The duty to indemnify is recognized

where community opinion would consider that in justice the responsibility should rest upon one rather than the other. This may be because of the relation of the parties to one another, and the consequent duty owed; or it may be because of a significant difference in the kind or quality of their conduct.¹⁷

11. 23 N.Y. JUR. 2D, *supra* note 8, § 10.

12. See D'Ambrosio v. City of New York, 55 N.Y.2d at 460-61, 435 N.E.2d at 368-69, 450 N.Y.S.2d at 151.

[Indemnity] may be defined as an obligation or duty resting on one person to make good or to make reimbursement for any loss or damage another has incurred while acting at his request or for his benefit, or any loss or damage resulting from the conduct of one of the parties or of some other person or from a specified contingency.

23 N.Y. JUR. 2D, *supra* note 8, § 2 (footnote omitted).

"[Indemnity] shifts the entire loss from one tortfeasor who has been compelled to pay for it to the shoulders of another who should bear it instead." W. PROSSER, *supra* note 8, § 51 (footnote omitted).

13. 23 N.Y. JUR. 2D, *supra* note 8, § 64.

14. See Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 567 (1938); 23 N.Y. JUR. 2D, *supra* note 8, § 2. Indemnity is a branch of contract law. The right to indemnity rests on either an express or implied contract. *Id.*

15. See 2A WEINSTEIN-KORN-MILLER, *supra* note 8, ¶ 1401.09; 23 N.Y. JUR. 2D, *supra* note 8, § 2; W. PROSSER, *supra* note 8, § 51.

16. See *supra* note 12.

17. W. PROSSER, *supra* note 8, § 51.

Thus, a claim for indemnification *must* involve an analysis of the relationship of the defendant to the third party from whom damages are sought.¹⁸ Contribution, on the other hand, involves an analysis of the relationship of the defendant and of a third party to the plaintiff to determine whether both have caused the plaintiff an injury through breach of a duty each owes the plaintiff, and, if so, whether one tortfeasor has paid more than his fair share.¹⁹

The common law prohibition against contribution²⁰ among joint tortfeasors was eliminated in New York by statute in 1928.²¹ Nevertheless, this legislation provided only for distribution of loss on a pro rata basis among defendants against whom the plaintiff had actually recovered a judgment.²² Therefore, if the plaintiff chose to sue only one tortfeasor, that tortfeasor had no right to contribution from the others.²³ Although the defendant was bound by this rigid rule of contribution, the common law cause of action for indemnification, in modified form, was used to afford relief to the judgment debtor in a case where he

18. See 2A WEINSTEIN-KORN-MILLER, *supra* note 8, ¶ 1401.10.

19. See *Schauer v. Joyce*, 54 N.Y.2d at 5, 429 N.E.2d at 84, 444 N.Y.S.2d at 565; 2A WEINSTEIN-KORN-MILLER, *supra* note 8, ¶ 1401.10.

20. See *D'Ambrosio v. City of New York*, 55 N.Y.2d at 460, 435 N.E.2d at 368, 450 N.Y.S.2d at 151; W. PROSSER, *supra* note 8, § 50 (tracing the history and rationale of the prohibition against contribution among tortfeasors).

21. Act of Mar. 28, 1928, ch. 714, § 211-a, 1928 N.Y. Laws 1549 (repealed 1962). Section 211-a provided:

Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payments; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice.

Id.

22. In *D'Ambrosio v. City of New York*, 55 N.Y.2d at 460, 435 N.E.2d at 368, 450 N.Y.S.2d at 151, the court explained that the contribution law enacted in 1928 only permitted a defendant to claim from another who had actually been adjudicated as liable in the same action.

23. *Id.*

alone had been sued.²⁴

To modify the harsh results of the statutory right of contribution, which permitted a defendant who had paid more than his fair share to recover only from another judgment debtor,²⁵ the courts recognized a right of implied indemnity.²⁶ Implied indemnity permitted a defendant to recover from a third party in two circumstances. First, the defendant may have been held responsible to the plaintiff solely by imputation of law, though he was personally free of fault.²⁷ Such imputation of liability could occur where the defendant was vicariously liable, an innocent partner, or one who was induced to do wrong by the misrepresentation of another.²⁸ Second, implied indemnity could be used by a judgment debtor who, though not entirely free of personal fault, had been only passively or secondarily negligent.²⁹ In both situations, a right to indemnity has been implied by law to achieve equitable results.³⁰

As the concept of implied indemnity evolved, courts permitted its use as a basis for a claim against a third party who owed a duty to an injured plaintiff but who for some reason was shielded from liability to the plaintiff.³¹ *Schubert v. Schubert Wagon Co.*³² illustrates this concept in circumstances where the defendant was free from personal fault but had been held vicariously liable. In *Schubert*, a husband, while acting in the course of his employment, injured his wife. Although the husband owed a duty of care to his wife, her direct action against him was barred by interspousal immunity from tort liability.³³ This im-

24. *Id.* at 460-61, 435 N.E.2d at 368-69, 450 N.Y.S.2d at 151.

25. See *supra* text accompanying notes 22-23.

26. See *D'Ambrosio v. City of New York*, 55 N.Y.2d at 461, 435 N.E.2d at 368-69, 450 N.Y.S.2d at 152. Implied indemnity involved determining relative degrees of culpability and in practice, such determinations were often difficult to make; moreover, damages were not ratable but were shifted entirely to the active tortfeasor. *Id.*

27. See *W. PROSSER*, *supra* note 8, § 51.

28. *Id.*

29. See *D'Ambrosio v. City of New York*, 55 N.Y.2d at 461, 435 N.E.2d at 369, 450 N.Y.S.2d at 152.

30. See *W. PROSSER*, *supra* note 8, § 51.

31. See *Schubert v. Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928); *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938).

32. 249 N.Y. 253, 255-56, 164 N.E. 42, 42 (1928).

33. *Id.* at 256-57, 164 N.E. at 43.

munity did not bar the wife's suit directly against the employer on the theory of respondeat superior.³⁴ The court recognized in dicta that the husband might be called upon to indemnify his employer for damages the employer paid as a result of the husband's negligence, although no suit could have been brought directly against the husband.³⁵

By contrast, *Westchester Lighting Co. v. Westchester County Small Estates Corp.*³⁶ involved a claim based on implied indemnity by a defendant who was only passively or secondarily liable. There a utility company, which had been held liable for a worker's death, was permitted to seek indemnification from the worker's employer, although a direct suit by the worker against the employer would have been barred by the workers' compensation law.³⁷ The court recognized an independent duty of the employer to the utility company which justified a claim for indemnity.³⁸

Clearly, allowing a right of action based on implied indemnification addressed situations in which both the defendant and the third party had wronged the plaintiff and ought to have been held responsible for payment of damages. Use of indemnification instead of contribution, however, had the unfortunate result of shifting all liability for damages to the more culpable of the tortfeasors, rather than of apportioning it between them on the basis of their relative degrees of fault.³⁹

Recognizing the injustice of this result, the New York Court of Appeals in *Dole v. Dow Chemical Co.*⁴⁰ provided for a right of apportionment and eliminated the requirement of a joint judgment.⁴¹ It permitted the sharing of loss among tortfeasors regardless of the nature or degree of their culpability.⁴² This flex-

34. *Id.* at 255-56, 164 N.E. at 42.

35. *Id.* at 257, 164 N.E. at 43.

36. 278 N.Y. 175, 15 N.E.2d 567 (1938).

37. *Id.* at 177-80, 15 N.E.2d 566-69.

38. *Id.* at 180, 15 N.E.2d at 568-69.

39. See *D'Ambrosio v. City of New York*, 55 N.Y.2d at 461, 435 N.E.2d at 369, 450 N.Y.S.2d at 152.

40. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

41. *Id.* at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387-88. See 23 N.Y. JUR. 2d, *supra* note 8, § 81 (summarizing judicial interpretation and commentary about the purpose and scope of *Dole*).

42. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382

ible rule of apportionment was soon codified as CPLR article 14,⁴³ amending New York's contribution statute.⁴⁴ This article⁴⁵ specifically allows apportionment among parties subject to claims for contribution, thus eliminating the need for a concept

(1972). See *Kelly v. Long Island Lighting*, 31 N.Y.2d 25, 29, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 854 (1972). The court stated:

Prior to our recent decision in *Dole v. Dow Chem. Co.* . . . , it had been held to be the rule that a defendant found guilty of "active" negligence could not recover over against another guilty of "active" tort negligence. The rule as stated in *Dole* now permits apportionment of damages among joint or concurrent tortfeasors regardless of the degree or nature of the concurring fault. We believe the new rule of apportionment to be pragmatically sound, as well as realistically fair. To require a joint tort-feasor who is, for instance, 10% causally negligent to pay the same amount as a co-tort-feasor who is 90% causally negligent seems inequitable and unjust. The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault.

Id. (citation omitted).

43. N.Y. CIV. PRAC. LAW §§ 1401-1404 (McKinney 1976). This article provides: Section 1401.

Except as provided in section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Section 1402.

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for the contribution.

Section 1403.

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third party claims in a pending action.

Section 1404.

(a) Nothing contained in this article shall impair the rights of any person entitled to damages under existing law.

(b) Nothing contained in this article shall impair any right of indemnity as subrogation under existing law.

Id.

The Judicial Conference which recommended this legislation and drafted its language clarified that "a central premise of [the] Article [CPLR 1401] is that *Dole v. Dow Chemical Co.* and its progeny should be viewed as modifying the doctrine of contribution in New York, rather than completely revamping the law of indemnity." TWENTIETH ANNUAL REPORT OF THE JUDICIAL CONFERENCE AND THE OFFICE OF COURT ADMINISTRATION, N.Y. LEGIS. DOC. NO. 90, at 216 (1975) [hereinafter cited as JUDICIAL CONFERENCE].

44. Act of Mar. 28, 1928, ch. 714, § 211-a, 1929 N.Y. Laws 1549 (repealed 1962).

45. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976). See *supra* note 43.

of implied indemnification.⁴⁶ Therefore, an examination of the legal relationship among tortfeasors is unnecessary.

Under pre-*Garrett* cases interpreting the statute, a legally sufficient claim for contribution had to allege that the defendant and the party from whom contribution was sought shared a common liability for the injury the plaintiff had sustained.⁴⁷ The operation of this prerequisite in the context of municipal tort liability is illustrated by *Barry v. Niagara Frontier Transit System, Inc.*⁴⁸ There a defendant company, which had negligently allowed a passenger to exit from a bus at a hazardous location, sought proportionate damages from the village, which had failed to properly maintain the street and sidewalk at the location.⁴⁹ Village law recognized liability for injuries caused by the dangerous condition of a sidewalk if, among other things, notice of the condition had been received by the village before the plaintiff sustained an injury.⁵⁰ In *Barry*, the required notice had not been given; thus, a duty to repair the sidewalk had not arisen.⁵¹ Absent a duty to repair the sidewalk, no liability arose.⁵² Absent liability, a claim for apportionment was insufficient.⁵³

An important development in the law of contribution was the modification of the threshold requirement of common liability to the extent of allowing apportionment so long as the party

46. See 2A WEINSTEIN-KORN-MILLER, *supra* note 8, ¶ 1401.10.

47. See, e.g., *Schauer v. Joyce*, 54 N.Y.2d at 5, 429 N.E.2d at 84, 444 N.Y.S.2d at 565 (explicitly noting that the relevant question for a claim of contribution under *Dole* and CPLR § 1401 is whether the defendant and the party he wishes to implead both owed duties to the plaintiff which each breached, thus contributing to the plaintiff's injury). The drafters of CPLR § 1401 stated: "[I]t can be simply stated that there shall be no right to contribution unless each of the parties from whom it is sought is or was subject to liability for damages for the same harm to the injured party." JUDICIAL CONFERENCE, *supra* note 43, at 216. The practice commentary to CPLR § 1401 indicates that the essential requirement for contribution is common liability to the injured party. N.Y. CIV. PRAC. LAW §§ 1401-1404 *prac. commentary* at 363 (McKinney 1976).

48. 35 N.Y.2d 629, 324 N.E.2d 312, 364 N.Y.S.2d 823 (1974).

49. *Id.* at 632, 324 N.E.2d at 313, 364 N.Y.S.2d at 824.

50. *Id.* at 632-33, 324 N.E.2d at 313, 364 N.Y.S.2d at 825.

51. *Id.* at 633-34, 324 N.E.2d at 313-14, 364 N.Y.S.2d at 825-26.

52. *Id.* at 634, 324 N.E.2d at 314, 364 N.Y.S.2d at 826.

53. *Id.* See also Farrell, *Civil Practice*, 27 SYRACUSE L. REV. 425, 444-45 (1976) (in this survey of civil practice cases, *Barry* is mentioned as illustrating the principle that a claim for apportionment will only be permitted if it is shown that the party was liable to the injured plaintiff).

from whom contribution is sought owes a duty to the injured party.⁵⁴ Thus, although a party might have been free of liability for his breach of duty to the injured party because of a special defense, he may still be subject to a claim for contribution.⁵⁵ In *Klinger v. Dudley*,⁵⁶ the court of appeals identified several circumstances in which the court would be willing to allow contribution on the basis of a common duty rather than a common liability to the plaintiff: (1) plaintiff has failed to sue the contribution defendant but could have done so;⁵⁷ (2) plaintiff is unable to sue the contribution defendant because of a special preclusion;⁵⁸ and (3) plaintiff may not sue the contribution defendant because a statute prescribes an exclusive remedy.⁵⁹

In *Nolechek v. Gesuale*,⁶⁰ however, the New York Court of Appeals required a showing of neither a common liability nor a common duty to the injured plaintiff, permitting contribution from a party who had violated an independent duty owed to the defendant. The court's reasoning, however, apparently was influenced by the special circumstances of the case.⁶¹ In *Nolechek*,

54. See *Rogers v. Dorchester Ass'n*, 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973). The following statement in *Rogers* is often cited as giving the correct rule for contribution. "The rule of apportionment applies when two or more tortfeasors have shared, albeit in various degrees, in the responsibility by their conduct or omissions in causing an accident, in violation of the duties they respectively owe the injured person." *Id.* (emphasis added). Plaintiff in *Rogers* obtained a judgment against a building owner, its manager, and an elevator company. The court denied the elevator company contribution from the owner and manager because the elevator company had assumed the exclusive duty to maintain the elevators. *Id.* at 563, 300 N.E.2d at 408, 347 N.Y.S.2d at 30.

55. See *Klinger v. Dudley*, 41 N.Y.2d 362, 368, 361 N.E.2d 974, 978, 393 N.Y.S.2d 323, 328 (1977).

56. 41 N.Y.2d 362, 361 N.E.2d 974, 393 N.Y.S.2d 323 (1977).

57. *Id.* at 368, 361 N.E.2d at 978, 393 N.Y.S.2d at 328.

58. See *id.* at 365, 371, 361 N.E.2d at 976, 980, 393 N.Y.S.2d at 326, 330. The court of appeals noted in dicta that if a special preclusion order denying a plaintiff's right to sue one of several joint tortfeasors were granted (citing *Klinger v. Dudley*, 40 A.D.2d 1078, 339 N.Y.S.2d 223 (4th Dep't 1972)), and if the defendant who was a party to the suit paid more than his pro rata share, such defendant would not be similarly precluded from action against the joint tortfeasor whom plaintiff could not sue. *Klinger v. Dudley*, 41 N.Y.2d at 371, 361 N.E.2d at 980, 393 N.Y.S.2d at 330.

59. See *Klinger v. Dudley*, 41 N.Y.2d at 368, 361 N.E.2d at 978, 393 N.Y.S.2d at 328 (discussing a case in which the workers' compensation law prescribes an exclusive remedy for a plaintiff but does not bar a defendant who has paid more than his pro rata share from seeking contribution).

60. 46 N.Y.2d 332, 340-41, 385 N.E.2d 1268, 1273, 413 N.Y.S.2d 340, 345-46 (1978).

61. See *infra* notes 204-08 and accompanying text. See also Note, *The Missing*

plaintiff's son had been killed when he drove a motorcycle into a steel cable suspended across defendant's land.⁶² Plaintiff sued the landowner who in turn impleaded the plaintiff, alleging that the plaintiff's negligence in allowing his vision-impaired, unlicensed son to operate a motorcycle had contributed to the accident.⁶³ Under New York law, a parent owed no duty of adequate supervision to his child.⁶⁴ Therefore, contribution could not be based on a breach of duty the third party defendant (father) owed to the plaintiff (his child).⁶⁵ Instead, *Nolechek* permitted contribution from a party who had violated an independent duty to the defendant not to entrust a dangerous instrument to his child.⁶⁶ The court looked to "the nexus between the breach of that duty and the liability of the defendant to the primary plaintiff."⁶⁷ In a later case, *Smith v. Sapienza*,⁶⁸ however, the court of appeals cautioned that *Nolechek* allowed contribution because of its unique facts⁶⁹ and reiterated that contribution generally "exists only when two or more tort-feasors share in the responsibility for an injury, in violation of the duties they respectively owe to the injured person."⁷⁰

Link—Contribution Without Common Liability: Nolechek v. Gesuale, 1 PACE L. REV. 453 (1981).

62. *Nolechek v. Gesuale*, 46 N.Y.2d at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

63. *Id.*

64. *See Holodook v. Spencer*, 36 N.Y.2d 35, 50-51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871-72 (1974) (a minor could not maintain a cause of action against his parent for inadequate supervision).

65. One of the important, unique aspects of *Nolechek* is that Walter L. Nolechek sued the defendant individually and as administrator of the estate of his deceased son. This parent/plaintiff was the third party defendant from whom the defendant sought contribution. *Nolechek v. Gesuale*, 46 N.Y.2d at 332, 385 N.E.2d at 1268, 413 N.Y.S.2d at 340.

66. *See id.* at 340-42, 385 N.E.2d at 1273-74, 413 N.Y.S.2d at 345-46.

67. Brief for Third Party Plaintiff Respondent-Appellant Comparato at 9, *Garrett*, 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

68. 52 N.Y.2d 82, 417 N.E.2d 530, 436 N.Y.S.2d 236 (1981).

69. *Id.* at 86-87, 417 N.E.2d at 532, 436 N.Y.S.2d at 238. "That case [*Nolechek*] merely applied, in rather unique circumstances, the established rule that an injured third party possesses a cause of action against a parent who has negligently entrusted a dangerous instrument to his child." *Id.* (citations omitted).

70. *Id.* at 87, 417 N.E.2d at 532-33, 436 N.Y.S.2d at 238 (citations omitted). *See also* Tymann, *The Torts Opinions of Judge Domenick L. Gabrielli*, 47 ALB. L. REV. 323 (1983). This commentator suggests that post-*Nolechek* decisions such as *Smith* reaffirmed the requirement of a duty running from the contribution defendant to the plaintiff. He suggests that the apparent inconsistency of *Nolechek* with these cases was har-

B. *Municipal Tort Immunity*

At common law, the state, because of its favored status, was immune⁷¹ from liability for the negligent acts or omissions of its agents.⁷² In 1929, the New York State Legislature passed the Court of Claims Act,⁷³ waiving sovereign immunity. As a result, the state is held to the same standard of liability as private citizens.⁷⁴ The waiver is qualified, however, in that it merely withdraws the defense of immunity for acts for which a private individual would be responsible. It does not subject the government to damages for acts a private person would not perform,⁷⁵ such as providing police and fire protection. Applying this qualified waiver of sovereign immunity to municipal corporations has posed special problems. A municipality has, simultaneously, the characteristics of a governmental entity and of a private individual.⁷⁶ Thus, it may be unclear for which acts a municipality may

monized on the basis of the reasoning of Judge Gabrielli who wrote a concurrence in *Nolechek*. Judge Gabrielli stated that the plaintiff/father did commit a tort on his child by virtue of conduct that was so egregious as to no longer fall within the category of "parental supervision." Thus, on this reasoning the requirement of common duty was met. *Id.* at 324-26.

71. See *Augustine v. Town of Brant*, 249 N.Y. 198, 204, 163 N.E. 732, 734 (1928); W. PROSSER, *supra* note 8, § 131.

72. See *Lockwood v. Village of Buchanan*, 18 Misc. 2d 862, 182 N.Y.S.2d 754 (Westchester County Ct. 1959) (discussing the concept of sovereign immunity which provides the rationale for the court's holding denying municipal liability for improper revocation of a building permit even though the owner had relied on the continuing validity of the permit). See also W. PROSSER, *supra* note 8, § 131.

73. N.Y. Ct. Cl. Act § 8 (McKinney 1963). Section 8 provides:

Waiver of immunity from liability

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

Id.

74. See *Steitz v. City of Beacon*, 295 N.Y. 51, 54, 64 N.E.2d 704, 705 (1945).

75. See *id.* at 55, 64 N.E.2d at 706. The court underscored that waiver of tort immunity does not subject a municipality to damages for acts a private person would not perform, such as providing fire protection. Where conduct is of the type an individual would not undertake, the only source of a cause of action is a statute which is enacted for the special benefit of particular persons. *Id.* See *infra* notes 90-98 and accompanying text.

76. See W. PROSSER, *supra* note 8, § 131 (noting that municipalities derive their governmental characteristics from being subdivisions of the state but resemble private

be held liable.⁷⁷ In an effort to resolve this issue, a distinction has been drawn between the proprietary or ministerial functions of a municipal corporation and its governmental acts.⁷⁸ The municipality enjoys tort immunity, as a subdivision of the state, for only its governmental acts.⁷⁹ Though the practical application of this distinction produces confusing results,⁸⁰ it is generally accepted that negligent performance of a statutory duty will not result in municipal tort liability, because performance of a statutory duty is a governmental act.⁸¹

*Reid v. City of Niagara Falls*⁸² illustrates the application of this principle to the negligent enforcement of the Multiple Residence Law.⁸³ The court in *Reid* would not allow suit against Niagara Falls although its inspector had issued a building permit which allowed the construction of a blatantly unsafe addition to

individuals because they are corporate entities).

77. See *id.* See generally 18 E. McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.04a (rev. 3d ed. 1977) (general discussion of municipal legislative functions and discretionary acts).

78. See 18 E. McQUILLIN, *supra* note 77, § 53.04a.

79. See *Rottkamp v. Young*, 21 A.D.2d 373, 249 N.Y.S.2d 330 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965). The rationale for granting immunity for governmental acts is explained in *Rottkamp*: "[I]n weighing the balance between the effects of oppressive official action and vindictive or retaliatory damage suits against the officer, we think that the public interest in prompt and fearless determinations by the officer, based on his interpretation of the law and the facts before him, must take precedence." *Id.* at 376, 249 N.Y.S.2d at 334. See generally 18 E. McQUILLIN, *supra* note 77, §§ 53.01-59. Discretionary acts (also labeled judicial, quasi-judicial or legislative) are distinguishable from ministerial acts which are "absolute, certain and imperative, involving merely the execution of a set task." *Id.* § 53.22a. The rationale for immunizing discretionary acts is to maintain separation of powers which precludes the courts' passing judgment on other branches of government. *Id.* § 53.04a.

80. W. PROSSER, *supra* note 8, § 131. "It has been said that the 'rules which courts have sought to establish in solving this problem [classifying acts as governmental or proprietary] are as logical as those governing French irregular verbs.'" *Id.* (quoting *Weeks v. City of Newark*, 62 N.J. Super. 166, 162 A.2d 314 (1960), *aff'd*, 34 N.J. 250, 168 A.2d 11 (1961)).

81. See *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965) (reviewing authority supporting the proposition that failure to perform a statutory duty created for the benefit of the general public will not give rise to tort liability and, on the basis of this principle, denying municipal tort liability even though a fire marshall negligently failed to require corrections of a dangerous oil stove which violated the Multiple Residence Law).

82. *Reid v. City of Niagara Falls*, 29 Misc. 2d 855, 216 N.Y.S.2d 850 (Sup. Ct. Niagara County 1961).

83. N.Y. MULT. RESID. LAW §§ 301-305 (McKinney 1952).

a multiple dwelling.⁸⁴ While the negligence of the building inspector led to the death and injury of others, the *Reid* court applied the settled law that enforcement of the Multiple Residence Law involves the use of discretion.⁸⁵ Thus, the city was immune from liability for the negligence of its building inspector.⁸⁶ In *Rottkamp v. Young*,⁸⁷ a New York appellate court suggested that discretion exists in a given case if the municipal official has the power to grant or deny a building permit according to his own view of the circumstances. Having ascertained that a municipal officer has to exercise personal judgment to fulfill his duty, the court need go no further.⁸⁸ It should not apply a subjective standard, making immunity depend upon the officer's motives or the quality of his judgment.⁸⁹

Nevertheless, violation of a statutory duty may, in certain circumstances, subject a municipality to liability for damages.⁹⁰ If the statute has been enacted to benefit a special group, negligent performance of the obligation it imposes may result in municipal tort liability.⁹¹ This is so because any person may be liable in damages for violation of a statutory duty created to protect a particular group of individuals.⁹² A statute of this type

84. See *Reid v. City of Niagara Falls*, 29 Misc. 2d at 860, 216 N.Y.S.2d at 856.

85. *Id.* at 860, 216 N.Y.S.2d at 855 "It would seem to be the settled law in our jurisdiction, if not the universal rule, that a governmental unit incurs no liability to individuals for its failure to prevent violations of law or to take action to abate a nuisance arising therefrom." *Id.*

86. *Id.*

87. 21 A.D.2d 373, 376, 249 N.Y.S.2d 330, 334 (2d Dep't 1964), *aff'd*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965).

88. See *id.* at 376-77, 249 N.Y.S.2d at 334-35 (noting that New York grants tort immunity to public officials acting in their official capacities and stating that the interpretation of a zoning ordinance is a discretionary governmental act).

89. See *id.* at 375, 249 N.Y.S.2d at 334. The court quotes with approval an 1883 decision which states the rule that "no public officer is responsible in a civil suit for a judicial determination, however erroneous or wrong it may be, or however malicious even the motive which produced it." *Id.* (quoting *East River Gas-Light Co. v. Donnelly*, 93 N.Y. 557, 559 (1883)).

90. See *Motyka v. City of Amsterdam*, 15 N.Y.2d at 139, 204 N.E.2d at 637, 256 N.Y.S.2d at 598; *Florence v. Goldberg*, 44 N.Y.2d 189, 194-95, 375 N.E.2d 763, 766, 404 N.Y.S.2d 583, 586 (1978).

91. See *Motyka v. City of Amsterdam*, 15 N.Y.2d at 139, 204 N.E.2d at 637, 256 N.Y.S.2d at 598 (citing *Amberg v. Kinley*, 214 N.Y. 531, 108 N.E. 830 (1915); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 286, 200 N.E. 824 (1936); *RESTATEMENT OF TORTS* § 286).

92. See *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. at 303-06, 200 N.E.

is said to impose an absolute duty.⁹³ Violation of its commands establishes negligence as a matter of law.⁹⁴ In *Schmidt v. Merchants Despatch Transp. Co.*,⁹⁵ a labor law prescribing the specifications of dust-generating equipment was found to be this type of law because it was specially intended to protect workers exposed to such machines. At the same time, *Schmidt* clarified that statutes do not create liability merely because they impose new duties or higher standards of care.⁹⁶ Laws of a general character enacted for the benefit of the community as a whole do not automatically create liability.⁹⁷ It must be shown that the purpose of the statute is to impose liability for violation of its precepts which would not arise if the law were not in force.⁹⁸

The conduct of a government official can also narrow a general duty in such a way that a special duty arises and liability for negligence will result.⁹⁹ For instance, if an official has stepped beyond his general statutory duty to the public by actively assuming a special duty to a specific individual, liability may follow.¹⁰⁰ In *Schuster v. City of New York*, the court applied this standard, reasoning that negligent action by police in protecting a citizen, whose aid they had actively solicited, could lead to municipal liability.¹⁰¹ The police had publicized the individual's role in apprehending a fugitive mobster, and as a result of inadequate police protection, he was subsequently murdered by the captured criminal's associates.¹⁰² The court noted that the police were not merely negligent in failing to provide police protection, a duty owed the general public, but had actively brought about an injury to a specific individual.¹⁰³

By contrast, despite allegations of reckless conduct on the

at 828-30.

93. See *id.* at 304, 200 N.E. at 829.

94. *Id.*

95. 270 N.Y. 287, 303-06, 200 N.E. 824, 828-30 (1936).

96. *Id.* at 304-05, 200 N.E. at 829.

97. *Id.*

98. See *id.* at 305, 200 N.E. at 829.

99. See 18 E. McQUILLIN, *supra* note 77, § 53.04a.

100. *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

101. *Id.* at 79-86, 154 N.E.2d at 536-40, 180 N.Y.S.2d at 268-74.

102. See *id.* at 87, 154 N.E.2d at 541, 180 N.Y.S.2d at 275.

103. See *id.* at 82, 154 N.E.2d at 538, 180 N.Y.S.2d at 271.

part of officials acting pursuant to a general statutory duty, the court in *Sanchez v. Village of Liberty*¹⁰⁴ found no municipal liability. There village officials were said to have knowingly hired an incompetent building inspector.¹⁰⁵ The village and its inspector were also accused of having failed to enforce safety laws despite actual knowledge that a particular multiple dwelling violated statutory standards.¹⁰⁶ Although a disastrous fire killed several people, the court refused to recognize municipal tort liability, because the officials were acting pursuant to their statutory duty.¹⁰⁷

*Florence v. Goldberg*¹⁰⁸ illustrates another way in which the conduct of government officials can create a special duty. Liability may follow negligent performance of a voluntarily accepted duty which is beyond any obligation imposed for the benefit of the general public.¹⁰⁹ In that case, New York City was held liable for failure to protect a child who was injured by a car while crossing a busy intersection on his way to school.¹¹⁰ The court carefully pointed out that a crucial factor in imposing liability was the police department's voluntary assumption of the duty to monitor school crossings when civilian guards were absent.¹¹¹ This task was not part of the routine control of pedestrian or vehicular traffic.¹¹² The court relied on the principle that "[t]he hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all."¹¹³

The reasoning of *Florence* was specifically applied in *Gordon v. Holt*¹¹⁴ to a municipality's negligent issuance of a cer-

104. 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977), *modifying* 49 A.D.2d 507, 375 N.Y.S.2d 901 (3d Dep't 1975).

105. *Sanchez v. Village of Liberty*, 49 A.D.2d 507, 375 N.Y.S.2d 901, 904 (3d Dep't 1975), *modified*, 42 N.Y.2d 876, 366 N.E.2d 870, 397 N.Y.S.2d 782 (1977).

106. *Sanchez v. Village of Liberty*, 49 A.D.2d at 509, 375 N.Y.S.2d at 903-04.

107. *Sanchez v. Village of Liberty*, 42 N.Y.2d at 877-78, 366 N.E.2d at 871, 397 N.Y.S.2d at 783.

108. 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978).

109. *Id.* at 196-97, 375 N.E.2d at 767, 404 N.Y.S.2d at 587.

110. *Id.* at 193, 197, 375 N.E.2d at 764, 767, 404 N.Y.S.2d at 584-85, 587.

111. *Id.* at 196-97, 375 N.E.2d at 767-68, 404 N.Y.S.2d at 587-88.

112. *Id.*

113. *Id.* at 196, 375 N.E.2d at 766, 404 N.Y.S.2d at 587 (quoting *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928)).

114. 65 A.D.2d 344, 350-51, 412 N.Y.S.2d 534, 538 (4th Dep't), *motion for leave to*

tificate of occupancy. The owner of the premises involved requested a new certificate of occupancy.¹¹⁵ Although the city did not have a duty to issue a new certificate upon request of the property owner, an official voluntarily complied, albeit in a negligent fashion.¹¹⁶ Since he was not acting pursuant to a statutory duty, immunity was not available to the municipality.¹¹⁷

A special duty may also arise if a public employee in the face of blatant safety violations acts negligently after having taken authoritative control of a situation which poses imminent peril.¹¹⁸ In *Smullen v. City of New York*,¹¹⁹ a city inspector was present at the scene of the construction of a sewer trench which the court found to have been seriously defective. The court acknowledged that an inspector's negligent failure to discover a safety violation would not alone have given rise to tort liability.¹²⁰ In the absence of the private construction company's foreman, this official took control just as a worker was about to descend into the trench, affirmatively assuring the worker that it was safe to enter.¹²¹ The employee was killed when the trench collapsed.¹²² The *Smullen* court found that the inspector had not exercised discretion, because the violations were so blatant.¹²³ One may conclude that the court found a special duty creating liability, since the inspector's act was an affirmative exercise of control rather than a judgment about safety as prescribed by statute.¹²⁴

appeal denied, 47 N.Y.2d 710 (1979) (not reported in unofficial reporters).

115. *Id.* at 348, 412 N.Y.S.2d at 536.

116. *Id.* at 350, 412 N.Y.S.2d at 536.

117. *Id.* at 350-51, 412 N.Y.S.2d at 538.

118. *Smullen v. City of New York*, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971).

119. *Id.* at 70-71, 268 N.E.2d at 765, 320 N.Y.S.2d at 22.

120. *Id.*

121. *Id.* at 68-69, 268 N.E.2d at 764, 320 N.Y.S.2d at 20.

122. *Id.*

123. *Id.* at 73, 268 N.E.2d at 767, 320 N.Y.S.2d at 24.

This, therefore, is not a case where the municipality has been found by a jury to be liable for a mere error of judgment on the part of an employee. All the evidence produced indicates that the inspector really had no occasion to make a judgment, so open and obvious were the violations. The inspector's utterances, given these conditions, cannot be viewed as representing a calculated judgment as to safety.

Id.

124. See *id.* The court noted that the inspector's act was "more than acquiescence in decedent's descent . . . [, rather it was] an exercise of control by the only person in

Finally, in at least one instance, a municipality's failure to act has led to the imposition of tort liability. In *Runkel v. Homelsky*,¹²⁵ the City of New York was accused of failing to take down an abandoned building when it had actual knowledge that the building was a dangerous structure.¹²⁶ The court, relying on a statute giving the city power to abate a nuisance, found it liable for injuries sustained by infant trespassers because the building was inherently dangerous and in imminent danger of collapse.¹²⁷ The court apparently found that a special duty arose when the city, having the power to act, did not do so despite actual knowledge of a perilous situation.

III. *Garrett v. Holiday Inns, Inc.*

A. *Facts and Procedural History*

A tragic motel fire in the Town of Greece claimed the lives of several people and resulted in extensive personal injury and property loss.¹²⁸ Suits were brought by or on behalf of the motel guests, naming as defendants the Town of Greece, the motel developers, the lessee/operator, and the owner of the dwelling.¹²⁹ Complaints against the town were dismissed as insufficient to state a cause of action because plaintiffs alleged no more than a breach of a general duty for which municipalities have tort immunity.¹³⁰ The remaining defendants then sought to implead the town for contribution and indemnity, asserting that the town ought to be found liable for apportionment because it had been negligent in causing or exacerbating the plaintiffs' injuries.¹³¹ The alleged tortious conduct of the town included approval of

authority then present." *Id.* See also Rossi, *Torts*, 23 SYRACUSE L. REV. 711, 712 (1972) (noting that the *Smullen* court recognized that the situation was so dangerous as to warrant the conclusion that the inspector had not merely made an error in judgment but had positively assumed control).

125. 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957).

126. *Id.* at 858 (text of official reporter not reprinted in unofficial reporters).

127. *Id.* at 859 (text of official reporter not reprinted in unofficial reporters).

128. *Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d 253, 257, 447 N.E.2d 717, 718, 460 N.Y.S.2d 774, 776 (1983).

129. *Id.* at 257, 447 N.E.2d at 718-19, 460 N.Y.S.2d at 776.

130. *Id.* (citing *Garrett v. Town of Greece*, 78 A.D.2d 773, 433 N.Y.S.2d 637 (4th Dep't 1980), *aff'd on opinion below*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981)).

131. *Garrett*, 58 N.Y.2d at 257, 447 N.E.2d at 719, 460 N.Y.S.2d at 776.

construction plans which did not comply with safety laws, issuance of a certificate of occupancy despite blatant safety violations, and failure to uncover these dangerous conditions during subsequent building inspections.¹³² On the strength of these assertions, defendants claimed that *Nolecheck v. Gesuale*¹³³ entitled them to seek contribution from a concurrent tortfeasor.¹³⁴ Special term denied the town's motion to dismiss the third party complaint.¹³⁵

The appellate division unanimously reversed, holding that the third party complaints were insufficient at law.¹³⁶ After considering the differences between contribution and indemnity,¹³⁷ the court concluded that both causes of action require that the party from whom apportionment is sought owe a duty of care to the injured plaintiff.¹³⁸ Based on this analysis, the court was compelled to dismiss defendants' complaint because, in an earlier decision, it had ruled that the Town of Greece owed no duty to the primary plaintiffs.¹³⁹

B. *Opinion of the Court of Appeals*

1. *The majority*

The New York Court of Appeals modified the decision of the appellate division and held that the defendants could state a cause of action against the Town of Greece even though the town owed no duty to the injured parties.¹⁴⁰ Writing for the court, Judge Wachtler explained that the objective of *Dole* apportionment¹⁴¹ is to require a party responsible for injury to a plaintiff to pay a share of the damages in proportion to his de-

132. *Id.* at 257-58, 447 N.E.2d at 719, 460 N.Y.S.2d at 776.

133. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). *See supra* notes 60-70 and accompanying text.

134. *Garrett v. Holiday Inns, Inc.*, 86 A.D.2d 469, 472, 450 N.Y.S.2d 619, 622 (3d Dep't 1982), *modified*, 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

135. *Garrett*, 58 N.Y.2d at 258, 447 N.E.2d at 719, 460 N.Y.S.2d at 776.

136. *Garrett v. Holiday Inns, Inc.*, 86 A.D.2d at 475, 450 N.Y.S.2d at 623.

137. *See supra* notes 8-19 and accompanying text.

138. *Garrett v. Holiday Inns, Inc.*, 86 A.D.2d at 471, 450 N.Y.S.2d at 621.

139. *Garrett v. Town of Greece*, 78 A.D.2d 773, 443 N.Y.S.2d 637 (4th Dep't 1980).

140. *Garrett*, 58 N.Y.2d at 261, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

141. *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). *See supra* notes 40-42 and accompanying text.

gree of fault.¹⁴² Although acknowledging the general rule that to be held proportionately liable a wrongdoer must owe a duty directly to the injured person,¹⁴³ the court observed "that proportionate liability rights among joint tort-feasors are analytically distinct from the rights and obligations of the parties to the injured person and that the nexus of duty between wrongdoers may exist independently of the respective duties owing a plaintiff."¹⁴⁴ The court explained that New York case law supported this proposition, citing two indemnification cases as authority:¹⁴⁵ *Schubert v. Schubert Wagon Co.*¹⁴⁶ and *Westchester Lighting Co. v. Westchester County Small Estates Corp.*¹⁴⁷ Each case allowed indemnification from parties who were immune from direct suit by the plaintiff, but who owed the defendants an independent duty.¹⁴⁸

While denying defendants' claim for implied indemnification, the court ultimately approved the third party claim for apportionment relying on its holding in *Nolechek*.¹⁴⁹ The court considered the defendants' claim in *Garrett v. Holiday Inns, Inc.* to be in harmony with the principle which requires a wrongdoer to be responsible for the injury he causes.¹⁵⁰ The court concluded that

if the town owed a duty to appellants to protect them from foreseeable risks of harm, the breach of which has combined with appellants' own negligence to render them answerable in damages to the injured motel guests, the town should be required to bear responsibility for the injury its negligence has caused appellants, in proportion to its own degree of fault.¹⁵¹

The court next concluded that the Town of Greece had breached an actionable special duty when it negligently ap-

142. *Garrett*, 58 N.Y.2d at 258, 447 N.E.2d at 719, 460 N.Y.S.2d at 777.

143. *Id.* at 258, 447 N.E.2d at 719, 460 N.Y.S.2d at 776.

144. *Id.* at 259, 447 N.E.2d at 720, 460 N.Y.S.2d at 777 (footnote omitted).

145. *Id.* at 259 n.3, 447 N.E.2d at 720 n.3, 460 N.Y.S.2d at 777 n.3.

146. 249 N.Y. 253, 164 N.E. 42 (1928). *See supra* notes 32-35 and accompanying text.

147. 278 N.Y. 175, 15 N.E.2d 567 (1938). *See supra* notes 36-38 and accompanying text.

148. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

149. *Id.* *See supra* notes 60-70 and accompanying text.

150. *See Garrett*, 58 N.Y.2d at 261, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

151. *Id.*

proved changes in the motel's construction plans which were in conflict with fire safety laws and when it improperly issued a certificate of occupancy.¹⁵² The court rejected the town's contention that these acts were discretionary.¹⁵³ While issuance of a certificate of occupancy is usually deemed a discretionary act, the court found the facts of the instant case distinguishable and, as such, found a special duty.¹⁵⁴ The Town of Greece "had a duty, in the face of the alleged blatant and dangerous code violations, to refuse to issue a certificate of occupancy."¹⁵⁵ Therefore, the court concluded that the issuance of a certificate of occupancy did not involve any exercise of judgment.¹⁵⁶

Furthermore, the court noted additional grounds which, if proven, would establish the existence of a special duty¹⁵⁷ owed to the defendants by the town.¹⁵⁸ The complaints accused Greece officials of actual knowledge of severe safety violations.¹⁵⁹ The court characterized the act of certifying that the premises were free of safety violations as an affirmative misrepresentation.¹⁶⁰ Furthermore, the court indicated in a footnote that it interpreted the language of section 302(5) of the Multiple Residence Law¹⁶¹ as contemplating a special relationship between municipalities issuing certificates of occupancy and purchasers of multiple residences.¹⁶²

The court stated that the town may be held proportionately

152. *See id.* at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

153. *Id.*

154. *Id.* at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79. *See supra* notes 82-89.

155. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779 (footnote omitted).

156. *Id.*

157. *See supra* notes 90-124 and accompanying text.

158. *Garrett*, 58 N.Y.2d at 261-64, 447 N.E.2d at 721-23, 460 N.Y.S.2d at 778-80.

159. *Id.* at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

160. *Id.* at 263 n.5, 447 N.E.2d at 722 n.5, 460 N.Y.S.2d at 779 n.5.

161. N.Y. MULT. RESID. LAW § 302(5) (McKinney 1952).

162. *Garrett*, 58 N.Y.2d at 622 n.4, 447 N.E.2d at 722 n.4, 460 N.Y.S.2d at 779 n.4.

The court specifically pointed to the following language:

[W]henever any person [a good faith purchaser of a multiple dwelling] has so relied upon such a certificate [of occupancy], no claim that such dwelling had not, prior to the issuance of such certificate, conformed in all respects to the provisions of this chapter shall be made against such person . . . with respect to such multiple dwelling.

Id.

liable to the defendants.¹⁶³ The court's conclusion was predicated on its findings that apportionment may be based on the breach of an independent duty owed by the town to the defendants¹⁶⁴ and that defendants had alleged the facts which, if proven, would be sufficient to establish the existence of such a special duty.¹⁶⁵

2. *The dissent*

Judge Jasen,¹⁶⁶ dissenting in part, agreed that the town may be held proportionately liable for a breach of an independent duty owed to the defendants.¹⁶⁷ On the basis of precedent, however, he believed that no actionable duty existed in this case.¹⁶⁸ Citing cases he considered factually indistinguishable, where no special duty had been recognized, he urged that stare decisis be observed.¹⁶⁹ Municipalities, he reasoned, had relied on immunity in the absence of a special duty for purposes of fiscal planning.¹⁷⁰

The dissent also pointed to *O'Connor v. City of New York*,¹⁷¹ decided on the same day as *Garrett*, where the court reached an opposite result about the existence of a special duty

163. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. The defendants characterized the injury they sustained as a result of the tortious conduct as exposure to "economic damages they may suffer as a result of judgment against them in favor of the motel guests." *Id.* at 262, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

164. *See id.* at 261, 447 N.E.2d at 721, 460 N.Y.S.2d at 778. *See supra* notes 140-51 and accompanying text.

165. *Garrett*, 58 N.Y.2d at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778-79. *See supra* notes 152-62 and accompanying text.

166. Chief Judge Cooke dissented in part and voted to affirm for the reasons stated in the opinion of the appellate division. *Garrett*, 58 N.Y.2d at 266, 447 N.E.2d at 724, 460 N.Y.S.2d at 781 (Cooke, C.J., dissenting in part). *See supra* notes 136-39, and accompanying text. Judge Jasen dissented in part and voted to affirm in a separate opinion. *Garrett*, 58 N.Y.2d at 264-66, 447 N.E.2d at 723-24, 460 N.Y.S.2d at 780-81 (Jasen, J., dissenting in part).

167. *Garrett*, 58 N.Y.2d at 264, 447 N.E.2d at 723, 460 N.Y.S.2d at 780 (Jasen, J., dissenting in part).

168. *Id.* at 264-65, 447 N.E.2d at 723-24, 460 N.Y.S.2d at 780 (Jasen, J., dissenting in part).

169. *Id.* at 266, 447 N.E.2d at 724, 460 N.Y.S.2d at 781 (Jasen, J., dissenting in part).

170. *Id.* (Jasen, J., dissenting in part).

171. 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

in factually similar circumstances.¹⁷² *O'Connor* involved the negligence of a city inspector, who not only failed to discover a blatant violation in a system of gas pipes being installed, but issued a "blue card" certifying that the pipes conformed to regulations.¹⁷³ When gas service was restored, an explosion occurred, killing twelve people and injuring many more.¹⁷⁴ Judge Jasen viewed the inspector's conduct as "active misrepresentation" and indistinguishable from the town's acts in *Garrett*, and yet the court in *O'Connor* found no special duty.¹⁷⁵

IV. Analysis

Although the court may have reached an equitable result in *Garrett v. Holiday Inns, Inc.*,¹⁷⁶ it did so by changing the requirement for contribution and by announcing a new interpretation of the special duty rule which departs substantially from precedent. The court did not state that its decision in *Garrett* presented new rules of law. Rather, it attempted to harmonize decisions which are inconsistent and factually distinguishable.

A. Contribution, Indemnity, or Apportionment?

The court in *Garrett* found that the Town of Greece could be held proportionately liable to defendants for its breach of an independent duty owed to them.¹⁷⁷ In so doing, the court concluded that the defendants had stated no basis for liability based on implied indemnification.¹⁷⁸ To have permitted a claim for indemnity would have meant that the defendants, "if held liable to the plaintiff [were] being cast in damages solely for the negligence of the town or on the basis of vicarious or imputed

172. *Garrett*, 58 N.Y.2d at 265-66, 447 N.E.2d at 723-24, 460 N.Y.S.2d at 780-81 (Jasen, J., dissenting in part).

173. *O'Connor v. City of New York*, 58 N.Y.2d at 188-89, 447 N.E.2d at 33-34, 460 N.Y.S.2d at 485-86.

174. *Id.*

175. *Garrett*, 58 N.Y.2d at 265, 447 N.E.2d at 723-24, 460 N.Y.S.2d at 780 (Jasen, J., dissenting in part). See *supra* note 160 and accompanying text.

176. 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 744 (1983).

177. *Id.* at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. See *supra* notes 140-51 and accompanying text.

178. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. See *supra* notes 26-39 and accompanying text.

liability."¹⁷⁹ Clearly, the court could not permit such a claim in view of its earlier decision that the town owed no duty to the original plaintiff.¹⁸⁰ The majority, however, avoided directly labeling defendants' successful claim as one for contribution. Rather, its analysis blurred the distinction between contribution and indemnity.

The rule of apportionment announced in *Dole v. Dow Chemical Co.*,¹⁸¹ addresses the scope of liability for damages and how such damages are to be shared among joint tortfeasors.¹⁸² It is not intended to vary the tortfeasors' substantive duties.¹⁸³ Clearly, equitable apportionment does not encompass allocating damages to parties who owe no duty of care to an injured plaintiff.¹⁸⁴ Having conclusively determined that the town had no duty to the injured plaintiffs¹⁸⁵ and, therefore, no obligation to indemnify the defendants, the court nevertheless permitted a claim for apportionment¹⁸⁶ without presenting a persuasive case for contribution.

The court began with the proposition that proportionate liability rights flow from the breach of duty owed to a defendant by the party from whom he seeks a share of the damages.¹⁸⁷ The substantial weight of authority is to the contrary.¹⁸⁸ Clearly, the law of New York State has required that contribution rights follow only where both the defendant and the party from whom contribution is sought are liable to the injured plaintiff.¹⁸⁹ With the exception of *Nolechek v. Gesuale*,¹⁹⁰ cases which allowed

179. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. See *supra* notes 16-19 and accompanying text.

180. *Garrett v. Town of Greece*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981). See *supra* note 130 and accompanying text.

181. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). See *supra* notes 40-46 and accompanying text.

182. See *Rogers v. Dorchester Ass'n*, 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973).

183. *Id.*

184. *Id.*

185. *Garrett v. Town of Greece*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981). See *supra* note 130 and accompanying text.

186. *Garrett*, 58 N.Y.2d at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 779.

187. *Garrett*, 58 N.Y.2d at 261, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

188. See *supra* notes 47-70 and accompanying text.

189. *Id.*

190. 46 N.Y.2d 332, 385 N.E.2d 268, 413 N.Y.S.2d 340 (1978). See *supra* notes 60-70

contribution absent common liability did so because of the existence of a common duty to the plaintiff.¹⁹¹ The court explicitly took note of its earlier opinion in *Garrett v. Town of Greece*,¹⁹² which held that the town owed no duty to the injured plaintiffs.¹⁹³ Thus, the decision to allow defendants in this case to seek contribution from the town is inconsistent with prior tort liability cases which required at least the showing of a duty, if not liability, running from the contribution defendant to the injured plaintiff.¹⁹⁴

Noting that under current law contribution would likely be denied, the court merely repeated its proposition that proportionate liability rights among joint tortfeasors may be analyzed as distinct from the duties owed to the plaintiff.¹⁹⁵ In a footnote,¹⁹⁶ it sought to provide support for this idea by citing *Schubert v. Schubert Wagon Co.*¹⁹⁷ and *Westchester Lighting Co. v. Westchester County Small Estates Corp.*¹⁹⁸ These, of course, are indemnification cases, and the court had soundly rejected defendants' claim for indemnity from Greece.¹⁹⁹ Additionally, the reasoning of *Schubert* underscores the flaws of the *Garrett* opinion, rather than strengthening its argument. In *Schubert* the court recognized that the wrongdoer from whom the defendant might seek indemnification also owed a duty of care, albeit a

and accompanying text.

191. See *supra* notes 54-59 and accompanying text.

192. 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981).

193. 58 N.Y.2d at 257, 447 N.E.2d at 719, 460 N.Y.S.2d at 776.

194. See *supra* notes 47-70 and accompanying text.

195. See *Garrett*, 58 N.Y. at 259, 447 N.E.2d at 720, 460 N.Y.S.2d at 777. The court stated:

Of course, the holdings in such cases do not resolve the precise question raised on the present appeal, for those cases involved circumstances in which the third party had no liability to the injured person, in contrast to the absence of a duty owed him. Nevertheless, these cases demonstrate that proportionate liability rights among joint tortfeasors are analytically distinct from the rights and obligations of the parties to the injured person and that the nexus of duty between wrongdoers may exist independently of the respective duties owing a plaintiff.

Id. (footnote omitted).

196. *Id.* at 259 n.3, 447 N.E.2d at 720 n.3, 460 N.Y.S.2d at 777 n.3.

197. 249 N.Y. 253, 164 N.E. 42 (1928). See *supra* notes 32-35 and accompanying text.

198. 278 N.Y. 175, 15 N.E.2d 567 (1938). See *supra* notes 36-38 and accompanying text.

199. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

non-actionable one, to the plaintiff.²⁰⁰ The court of appeals had recognized earlier, however, that the Town of Greece owed no duty of care to the injured plaintiffs.²⁰¹ Therefore, it cannot be said that the defendants would be paying damages rightfully attributable to the town — the crux of indemnity. *Westchester Lighting Co.* similarly adds nothing to the court's argument, for it merely stands for the now unremarkable proposition that an employer may not, on the basis of the workers' compensation law, evade the obligation to pay damages to a defendant who has paid more than his fair share to the employer's worker where both the defendant and employer have violated duties owed to the worker.²⁰² The reasoning of this case is unpersuasive in the context of *Garrett*, because the New York Court of Appeals had authoritatively stated that the Town of Greece owed no duty to the injured plaintiffs.²⁰³

*Nolechek v. Gesuale*²⁰⁴ is the only precedent on which the majority can colorably rest its decision, for it alone allowed contribution from a third party defendant based solely on the breach of his duty to the third party plaintiff, absent a duty to the plaintiff. Nevertheless, because *Garrett* lacks the special circumstances present in *Nolechek*,²⁰⁵ one must conclude that when taken together these cases change the rules of contribution. In *Nolechek*, the third party defendant from whom contribution was sought was the plaintiff, who sought full compensation from the defendant.²⁰⁶ At the same time, this plaintiff had seriously breached an independent duty to the defendant by conduct which clearly contributed to the injury giving rise to

200. See *Schubert v. Schubert Wagon Co.*, 249 N.Y. at 256-57, 164 N.E. at 43. See *supra* notes 32-35.

201. *Garrett v. Town of Greece*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981). See *supra* note 130 and accompanying text.

202. See *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 180, 15 N.E.2d 567, 568-69 (1938). See *supra* notes 36-38 and accompanying text.

203. *Garrett v. Town of Greece*, 55 N.Y.2d 774, 431 N.E.2d 971, 447 N.Y.S.2d 246 (1981). See *supra* note 130 and accompanying text.

204. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). See *supra* notes 60-70 and accompanying text.

205. See *supra* notes 60-70 and accompanying text.

206. *Nolechek v. Gesuale*, 46 N.Y.2d at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

plaintiff's suit.²⁰⁷ The *Nolechek* plaintiff/third party defendant would have unfairly avoided his obligation of contribution only because New York State does not recognize that a parent owes a duty of care to his child.²⁰⁸ Clearly, none of the special equitable considerations in *Nolechek* were present in *Garrett*. The Town of Greece did not initiate the suit and certainly had not sought to recover damages for harm which occurred in part because of its own negligence.

The court forthrightly rejected defendants' indemnification claim,²⁰⁹ but failed to present a persuasive case for allowing a contribution claim. Moreover, the majority finds liability without explicitly calling the defendants' claim one of contribution. Perhaps the court has developed a new cause of action for "apportionment" from a third party defendant who need not have breached a duty owed to the injured plaintiff.²¹⁰

B. Expanding Tort Liability

1. Failure to enforce the Multiple Residence Law — a non-discretionary act

The court determined that the town's acts were not discretionary and consequently were not protected by immunity.²¹¹ In doing so, the majority failed to take into account the precedent which recognized that issuing building permits, granting certifi-

207. *Id.* at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345-46.

208. *Id.* at 342-43, 385 N.E.2d at 1273-74, 413 N.Y.S.2d at 346. *See supra* note 64 and accompanying text.

209. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

210. The *Garrett* majority never discussed the alternative of sustaining defendants' contribution claim based on the existence of a non-actionable general duty of care running from the town to the injured plaintiffs. The court of appeals had pointed out in *Schuster* that a duty to protect the public existed before waiver of immunity, which only shielded a municipality against liability for its negligence. *See Schuster v. City of New York*, 5 N.Y.2d 75, 83, 154 N.E.2d 534, 538-39, 180 N.Y.S.2d 265, 271-72 (1958). Courts have, of course, allowed contribution where a party owes a duty to a plaintiff but cannot be held directly liable in damages. *See supra* notes 54-59 and accompanying text.

See Municipality Issuing Certificate of Occupancy, Though Not Liable to Guests Injured by Fire, May Have to Contribute to Owners Who Are, No. 280 N.Y. St. B.A. N.Y. St. L. Dig. (Apr. 1983) (commenting that although the court denies a claim for indemnification, its decision allowing apportionment permits defendants to state a complaint which resembles indemnification in almost every sense).

211. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779. *See supra* notes 153-56 and accompanying text.

cates of occupancy, and conducting continuing building inspections are discretionary acts, however poorly performed.²¹² The court reasoned that the existence of blatant code violations removed the need to exercise judgment in evaluating the application for a certificate of occupancy.²¹³ In finding the acts to be nondiscretionary, the court apparently considered the degree of error committed by the officials. In the past, however, this consideration had rarely influenced judicial determinations of municipal liability.²¹⁴

Even in the limited circumstances where the court had recognized blatant errors as giving rise to municipal liability, it based its determination on factors not present in *Garrett*. All the official acts in *Garrett* — issuing building permits, granting certificates of occupancy, and conducting building inspections — were routine functions performed pursuant to a statutory duty and involved the exercise of judgment.²¹⁵ In finding municipal liability in *Runkel v. Homelsky*,²¹⁶ the court focused on official inaction in abating a nuisance which posed imminent danger and the threat of immediate injury to the public. In *Smullen v. City of New York*,²¹⁷ it was the official's authoritative assumption of control at the moment of imminent peril that prompted the court to recognize municipal liability. In contrast, the *Garrett* court did not point to the existence of an imminent public hazard or to official acts that would constitute an authoritative assumption of control in a perilous situation. While the judgments made by officials in Greece were arguably improper, they were routine and discretionary. The policy reasons for protecting municipal officials from civil suit for the exercise of discretion

212. *Rottkamp v. Young*, 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965), *aff'g* 21 A.D.2d 373, 249 N.Y.S.2d 330 (2d Dep't 1964); *Reid v. Niagara Falls*, 29 Misc. 2d 855, 216 N.Y.S.2d 850 (Sup. Ct. Niagara County 1961). *See supra* notes 82-89 and accompanying text.

213. *Garrett*, 58 N.Y.2d at 263, 447 N.E.2d at 722, 460 N.Y.S.2d at 779.

214. *Rottkamp v. Young*, 21 A.D.2d at 375, 249 N.Y.S.2d at 334. *See supra* notes 84-89, 119-24 and accompanying text.

215. *See generally* N.Y. MULT. RESID. LAW §§ 301-307 (McKinney 1952) (describing enforcement duties of officials).

216. 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957). *See supra* notes 125-27 and accompanying text.

217. 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971). *See supra* notes 119-24 and accompanying text.

would be undermined if immunity were granted only when *good* judgment had been exercised.

2. *Finding a special duty*

Defendants may, according to the majority in *Garrett*, state a claim for proportionate liability against the town, if the town has breached an independent duty owed to the defendants and that conduct bears a sufficiently close relation to that which injured the plaintiff.²¹⁸ The court permitted the claim to stand based on a finding that the town owed a special duty to the defendants.²¹⁹ Though the court in *Garrett* did not present a detailed discussion of the nexus between the town's negligence and that of the defendants, one may conclude that defendants' exposure to potential tort liability, for which the court considered the town at least partially responsible, provides that link.²²⁰

The *Garrett* analysis is flawed because the facts of the case do not support the existence of a special duty to the defendants. First, the court suggested that a special duty exists because the town has failed to enforce a statute designed for the special benefit of defendants.²²¹ The court, in a footnote, suggested that section 302(5) of the Multiple Residence Law²²² "appears to contemplate a special relationship between the municipality and a person relying on its certificate [of occupancy]."²²³ The statutory language at issue provides:

A certificate, a record in the department, or a statement signed by the head of the department that a certificate has been issued, may be relied upon by every person who in good faith purchases a multiple dwelling or who in good faith lends money upon the security of a mortgage covering such a dwelling. Whenever any person has so relied upon such a certificate, no claim that such dwelling had not, prior to the issuance of such certificate, conformed in all respects to the provisions of this chapter shall be made against such person or his successor in title or ownership with respect to such multiple dwelling or mortgage, or against the interest of any

218. *Garrett*, 58 N.Y.2d at 261, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

219. *See id.* at 261-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79.

220. *Id.* at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 779. *See supra* note 163.

221. *Garrett*, 58 N.Y.2d at 262-63, 447 N.E.2d at 721-22, 460 N.Y.S.2d at 778-79.

222. N.Y. MULT. RESID. LAW § 302(5) (McKinney 1952).

223. *Garrett*, 58 N.Y.2d at 262 n.4, 447 N.E.2d at 722 n.4, 460 N.Y.S.2d at 779 n.4.

such person with respect thereto.²²⁴

The court did not discuss the basis for its interpretation that this statute was enacted for the special benefit of owners of multiple residences. A fair reading of section 302(5) suggests that the legislature intended to protect purchasers of multiple residences to the limited extent of saving owners who had relied on *existing* certificates of occupancy from having the very officials who had issued the permits return with new demands for costly repairs based on findings inconsistent with the representations made in the original permits.²²⁵ However, one cannot find in the language of the statute or in its legislative history any evidence of intent to create broader municipal liability for improper issuance of certificates of occupancy. It is unlikely that the legislature would by implication alone expand municipal tort liability to include responsibility for damages that an owner of an unsafe multiple dwelling might incur merely because it issued a certificate which should have been withheld.²²⁶ In fact, the overall purpose of the Multiple Residence Law is to protect persons who live in those dwellings, not to safeguard the interests of their owners.²²⁷

Next, the court stated that the issuance of the certificate of occupancy is an affirmative act which ultimately gives rise to a special duty.²²⁸ The court correctly pointed to *Florence v. Goldberg*²²⁹ as authority for the proposition that an affirmative act coupled with reliance may result in a special relationship leading to a special duty.²³⁰ It failed to recognize, however, that the facts of *Garrett* were quite different. In *Florence*, the official

224. N.Y. MULT. RESID. LAW § 302(5) (McKinney 1952).

225. The chairman of the Joint Legislative Committee which proposed the Multiple Residence Law stated that its overall aim was to protect persons living in multiple dwellings. See Mitchell, *Forward* to N.Y. MULT. RESID. LAW at v-viii (McKinney 1952). See *supra* notes 45-46 and accompanying text for a discussion of the characteristics of a statute enacted for the special benefit of a class of persons such that liability flows automatically from breach of its precepts.

226. See *supra* notes 96-98 and accompanying text.

227. See Mitchell, *supra* note 225.

228. *Garrett*, 58 N.Y.2d at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

229. 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978). See *supra* notes 108-13 and accompanying text.

230. See *Garrett*, 58 N.Y.2d at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778.

conduct was entirely voluntary,²³¹ whereas the officials in the Town of Greece were merely fulfilling obligations prescribed by the Multiple Residence Law.²³² Therefore, the affirmative conduct in *Garrett*, as opposed to that in *Florence*, was the product of carrying out a normal governmental function. Thus, in departing from precedent, the court left open the possibility that normal government duties, if negligently performed, may result in municipal tort liability.

Finally, *Garrett* erred in citing *Smullen* as authority for finding that the affirmative conduct of the town officials gave rise to a special duty.²³³ In *Smullen*, a government agent took authoritative control and direction under circumstances where a known and blatantly dangerous violation existed.²³⁴ By contrast, no such official authoritative assumption of control at the point of imminent danger was alleged in *Garrett*. It was unwarranted for the court to equate a situation in which an official merely performs his job negligently, even in the face of extremely serious violations, with a circumstance in which a government official assumes control and direction at a moment of mortal peril.

For further support that the court incorrectly applied the *Smullen* rule, one need only look to *O'Connor v. City of New York*.²³⁵ There the court reiterated its long-held position that negligent performance of statutory duties, even when the official is faced with unmistakably severe safety violations, will not give rise to a special duty resulting in liability.²³⁶

V. Conclusion

The New York Court of Appeals in *Garrett v. Holiday Inns, Inc.*²³⁷ permitted a defendant to seek apportionment from a joint tortfeasor who owed no duty of care to the injured plaintiff.

231. *Florence v. Goldberg*, 44 N.Y.2d 189, 196-97, 375 N.E.2d 763, 767-68, 404 N.Y.S.2d 583, 587-88 (1978).

232. See *supra* note 215 and accompanying text.

233. *Garrett*, 58 N.Y.2d at 262, 447 N.E.2d at 721, 460 N.Y.S.2d at 778-79.

234. *Smullen v. City of New York*, 28 N.Y.2d 66, 68-69, 268 N.E.2d 763, 764, 320 N.Y.S.2d 19, 20 (1971). See *supra* notes 119-24 and accompanying text.

235. 58 N.Y.2d 184, 447 N.E.2d 33, 460 N.Y.S.2d 485 (1983).

236. See *O'Connor v. City of New York*, 58 N.Y.2d 184, 189-90, 447 N.E.2d 33, 34-36, 460 N.Y.S.2d 485, 486-88 (1983). See *supra* notes 171-75 and accompanying text.

237. 58 N.Y.2d 253, 447 N.E.2d 717, 460 N.Y.S.2d 774 (1983).

Perhaps, as in *Nolechek v. Gesuale*,²³⁸ the majority responded primarily to the unfairness of allowing a seriously negligent party to escape all responsibility for damages. The fact that the unique equitable considerations of *Nolechek* were not present, however, suggests that *Garrett* changes the law of contribution in New York.

Even the *Garrett* court's expanded concept of contribution, however, required a finding that the town owed an actionable duty of care to the defendants. Apparently wishing to retain the special duty rule which severely circumscribes municipal tort liability, the court avoided an analysis of the continuing validity of the rule. Rather, in order to permit apportionment from the Town of Greece, the court dramatically extended the circumstances in which a special duty will arise.

Although these changes may be long overdue, the way in which the *Garrett* court effected them is unfortunate. Rather than forthrightly announcing a modification of the law of contribution and municipal tort liability, the court suggested that it was following precedent. This *sub silentio* change of the law is likely to create substantial confusion concerning the scope and application of *Garrett* apportionment.

Jean E. Burke

238. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).