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Torts--Municipal Corporations--City Held Not Liable for Failure to Enforce Multiple Residence Law (Motyka v. Amsterdam, 15 N.Y.2d 134 (1965))

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quiring the taxpayer to produce the records. This assumption is predicated on the fact that it would be almost impossible for the taxpayer to otherwise obtain evidence of harassment or irrelevancy.

Thus, as a practical matter, it appears that the Service can inquire into closed years without considering the expiration of the statute of limitations. If, however, an investigation into such a year revealed a tax deficiency which was not fraudulent, the taxpayer would still be protected against additional assessment because of the statute.[22]

In addition, tax investigations are limited by several pragmatic considerations. The Service cannot afford to investigate indiscriminately because its heavy workload prohibits additional examinations unless there is a valid reason for suspecting fraudulent conduct. Thus, it would appear that the Court recognized that the earlier fears of Congress concerning harassment of taxpayers by unnecessary and repetitive examinations have not materialized and that the internal procedures of the Service are sufficient to prevent excessive abuses.

Since this decision is directly supported by legislative intent, by direct analogy to the requirements of other administrative agencies, and by certain practical safeguards, the majority appears to be justified in its elimination of the often burdensome probable cause requirement. Certainly, if the Service were to attempt to use this decision as a spring board for various "fishing expeditions" into the taxpayer's closed years, the courts could prevent such excesses by recourse to the abuse of process limitation. Therefore, this decision should have a beneficial effect upon the investigatory power of the Service while providing sufficient protection to the taxpayer.

TORTS — MUNICIPAL CORPORATIONS — CITY HELD NOT LIABLE FOR FAILURE TO ENFORCE MULTIPLE RESIDENCE LAW. — Following a fire in a multiple residence, a fire captain verbally ordered that the use of a defective oil heater be discontinued. No further action was taken by the city. Subsequently a fire caused by the defective heater occurred in the same building, and plaintiff, a resident of the building, brought a negligence action against the city alleging that the fire captain failed to report the defective heater as required by Section 303 of the Multiple Residence Law. In affirming the trial court's dismissal of the complaint, the Court of Appeals *held* that the Multiple Residence Law creates no liability for damage resulting from failure to comply with its provisions.

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[22] INT. REV. CODE OF 1954, §§ 6501(a), (c). See generally 5 RABKIN & JOHNSON, *op. cit. supra* note 1, § 76.01.

Motyka v. Amsterdam, 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965).

The common-law rule of sovereign immunity was modified in New York in 1842 when the court of appeals distinguished between "proprietary" and "governmental" acts.[1] While the state would not be liable for purely governmental acts, liability would be imposed for the negligent performance of proprietary acts.[2]

New York further liberalized the provisions for suit by waiving its sovereign immunity in 1929 with the enactment of Section 12-a (now Section 8) of the Court of Claims Act. Although the statute employed only the word "state," it was subsequently held that the immunity of the political subdivisions of the state had also been waived.[3] This was predicated upon the fact that these lower governmental bodies derived their immunity from the state, and therefore the state could revoke it. Thereafter, cities, towns, villages, and counties were answerable to the same degree as the state.[4]

Subsequent to the waiver of immunity, liability of a governmental organization for negligence depended upon whether a duty existed, and if found to exist, to whom it was owed. The duty could be imposed based upon a common-law obligation similar to that owed by a corporation or individual. In addition, a duty could be imposed by statutory enactment.

Once it is ascertained that a duty exists, it is necessary to determine to whom the duty is owed. If owed to the community at large no right resides in an individual to sue for a breach of that duty. If, however, the duty is found to be owed to an individual citizen, a cause of action lies for its breach.

It was soon established that as to police and fire protection, there was no common-law duty owing to the individual, and therefore no liability.[5] Thus in *Moch Co. v. Rensselaer Water Co.,*[6] the court refused to hold defendant water works company liable (under either common-law tort liability or third-party beneficiary contract theory) for failure to supply adequate water pressure to fight a fire. Likewise, if an individual is injured, no liability is imposed upon the city for having failed to provide such person with adequate police protection.[7]

It is difficult to determine to whom a statutory duty is owed; to the individual or to the community. Certain statutes expressly

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[1] Bailey v. City of New York, 3 Hill 531 (N.Y. 1842).

[2] Antieau, *Tort Liability of American Municipalities,* 40 KY. L.J. 131, 133 (1951).

[3] Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945).

[4] *Ibid.*

[5] Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945).

[6] 247 N.Y. 160, 159 N.E. 896 (1928).

[7] Murrain v. Wilson Line, Inc., 270 App. Div. 372, 59 N.Y.S.2d 750 (1st Dep't 1946), *aff'd,* 296 N.Y. 845, 72 N.E.2d 29 (1947).

state that a duty owed to the individual does exist, and thus, failure to perform the act will create a liability.[8] However, there are other statutes which do not expressly declare to whom the duty is owed.[9] It is therefore left to the courts to determine whether the duty is owed to the individual or to the public.

An example of such a judicial determination can be found in *Runkel v. Homelsky.*[10] There the City of New York was held to be negligent for failing to remove a building which later collapsed, killing several children. Although the city had knowledge of the dangerous condition of the building, it failed to take prompt action to remove it.

The Multiple Dwelling Law provides that "whatever is dangerous to human life or detrimental to health" is a nuisance.[11] Thus the building in *Runkel,* being in a state of disrepair and in danger of collapse, constituted a nuisance under the statute. The city, although empowered to remove such nuisance, did not do so. The court of appeals held that the statute created a duty owing to the individual on the part of the city, and that the breach of this duty created a cause of action in favor of the party injured.

In the instant case, the Court was confronted with the problem of whether the Multiple Residence Law created a duty, the breach of which would result in liability. Here the plaintiff claimed that the defective oil heater constituted a nuisance under Section 305 of the Multiple Residence Law and that a duty to abate such dangerous condition was imposed by section 303. However, the Court held that the defendant was not liable because neither at common law nor by statute was a duty owed to him individually. The Court analogized the duty to inspect multiple residences and to abate dangerous conditions therein, to the general duty to provide police and fire protection. The Multiple Residence Law was deemed enacted for the protection of the general public. Thus, since there was no individual or group of individuals for

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[8] See, *e.g.,* N.Y. MUNIC. LAW §§ 50-a, 50-b, 50-c (municipal liability for negligent operation of government vehicles); N.Y. EDUC. LAW §§ 3023, 6211 (liability of a board of education for the wrongful acts of its employees); N.Y. MUNIC. LAW § 50-d (municipal liability for malpractice of physicians in institutions maintained by a municipality). The wording of these statutes (to the effect that the governmental unit "shall be liable") indicates a clear legislative intent that the duty is owed to the individual.

[9] See, *e.g.,* N.Y. MULT. RESID. LAW § 305(3)(a) (provision for abatement of nuisance in multiple residence); N.Y. EDUC. LAW § 807(a) (provision for fire inspection of school buildings); N.Y. H'WAY LAW § 231 (inspection of bridges). In these statutes, although the wording "*shall* inspect" appears mandatory, it is unclear whether the duty is owed to the individual or to the community at large.

[10] 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957).

[11] N.Y. MULT. DWELL. LAW § 309(1)(a).

whose benefit the statute was enacted, no duty was owed to the plaintiff.

In a vigorous dissent, Chief Judge Desmond reasoned that the *Runkel* decision, a case summarily dismissed as not controlling by the majority, was decisive of the issue. His conclusion was based upon the fact that many similarities exist in the phraseology of the Multiple Dwelling Law and the Multiple Residence Law, and the facts in *Runkel* are similar to those of the instant case. Furthermore, both statutes are concerned with the regulation of multiple dwellings.[12] The definition of nuisance in each is practically the same,[13] and enforcement provisions are almost identical.[14]

Thus, the cases would hardly seem distinguishable, except for the fact that the instant case involved a fire, while *Runkel* did not. This controlling distinction, therefore, must be based on policy grounds. Underlying the policy of non-liability in the fire and police protection areas is the fear, expressed in *Moch,* that to impose liability in these areas would be financially ruinous to a municipality, *e.g.,* where a fire breaks out, a *whole* city may be destroyed. Thus, the potential multiple liability would be beyond the financial capacity of the municipality. Furthermore, the loss suffered by the individual property owner is minimized by the widespread use of fire insurance.

In general, the trend has been to increase liability of municipalities,[15] and where practical, to impose liability under rules applicable to individuals and private corporations. But as to those acts which are governmental in nature, as opposed to proprietary, the trend is less clear. Generally, where liability has been imposed, the breach of duty would create a potential liability to a limited number of individuals.

An example of the former rule is found in *Foley v. State,*[16] where plaintiff recovered in negligence for the state's failure to keep a traffic signal in repair. Although it was shown at the trial that the state had no knowledge of the defective condition of the light, and that the condition had existed for less than twenty-four hours, the court found the state to be negligent.

However, to impose liability upon a municipality for failure to provide adequate fire protection would obviously subject it to unlimited liability. Were a city to be destroyed by fire through

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[12] See N.Y. MULT. RESID. LAW § 3(1); N.Y. MULT. DWELL. LAW § 3(1).

[13] *Compare* N.Y. MULT. RESID. LAW § 305(1), *with* N.Y. MULT. DWELL. LAW § 309(1)(a).

[14] *Compare* N.Y. MULT. RESID. LAW § 303, *with* N.Y. MULT. DWELL. LAW § 303.

[15] Joint Leg. Comm. on Municipal Tort Liability, N.Y. LEG. DOC. No. 13, at 67-68 (1964).

[16] 294 N.Y. 275, 62 N.E.2d 69 (1945).

the failure of the city to provide adequate fire protection, such city would be liable to the owner of every building so destroyed, and to every individual injured. No city could absorb such financial disaster. On this policy basis, the instant case is closer to *Moch,* and distinguishable from *Runkel,* since the former involved the possible consequence of unlimited liability, whereas the latter did not.

Thus in the instant case, the Court reaffirmed the position taken in *Moch,* and, it is assumed, for the same policy reasons. The decision has underscored the doctrine favoring non-liability in those situations where the crushing burden of multiple liability is probable.

There is, in addition, a basic difference in approach between the majority and the dissent. The majority indicates its unwillingness to extend the *Runkel* rationale in a doubtful situation. Where it is unclear whether the duty is owed to the public or to the individual, and the effect of reaching the conclusion that a duty is owed to the individual would be financially disastrous, the majority would hold that no liability exists.

On the other hand, the dissent advocates abandoning "any court-created tort-immunity rule." [17] The Chief Judge would hold that there is but one kind of statutory duty, and such duty is owed to the individual, reasoning "that municipal non-liability for injury-causing breaches of duty is archaic and unjust." [18]

Although the rule of non-liability, reaffirmed by the instant case, places the burden of municipal negligence upon the individual, it is probably a necessary evil since imposition of liability in this area may be financially disastrous to a municipality.

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[17] Motyka v. Amsterdam, 15 N.Y.2d 134, 140, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 599 (1965) (dissenting opinion).

[18] *Id.* at 141, 204 N.E.2d at 638, 256 N.Y.S.2d at 600.