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Public Officers--Liability for Failure to Perform Duty Owed to Individual

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employer the insurer of the employee.¹⁶ It would seem that the principal case is contrary to the weight of authority¹⁷ and to the purpose and express language of the statute.¹⁸

HERBERT B. LEVINE

PUBLIC OFFICERS — LIABILITY FOR FAILURE TO PERFORM DUTY OWED TO INDIVIDUAL

The defendant, an employee of the Louisiana State Society for the Prevention of Cruelty to Animals, refused in violation of a statutory duty¹ to destroy a rabid dog when requested by a third person. Subsequently, the plaintiff's minor son was bitten by the dog and died. The Supreme Court of Louisiana, in an action for wrongful death, held that the father had a right of action against the employee and his insurer.²

The question of a public officer's liability in a case of this nature, depends on whether the statute created a duty to the particular plaintiff as well as to the general public.³ If the duty is merely to the public, a failure to perform the duty is a public rather than an individual injury and can only be redressed by a public prosecution.⁴ If the plaintiff can prove he was owed a duty and was injured by the nonperformance of that duty, the courts have said he was "specially and peculiarly injured"⁵ and have allowed recovery against the negligent officer.⁶

Failures to make an entry in a bank record,⁷ remove an infectious vault,⁸ inspect playground facilities,⁹ maintain and repair bridges,¹⁰ publish names of election nominees,¹¹ accept the lowest bid on a paving contract¹² and protect private property against rioters¹³ have been held to involve only a duty to the public as a whole. For this reason, officers have escaped liability even where their nonfeasance has resulted in grave injury to the plaintiff.¹⁴ Courts often have taken the position that if relief were granted in such cases, there would be a wrongful diversion of public funds for every failure to stop a fire or suppress a riot.¹⁵

In cases in which a public officer has been held liable to an individual plaintiff for his failure to act in accordance with a statutory mandate, the courts have considered the duty owed to the plaintiff as a direct rather than an incidental purpose of the statute. Thus, failures to inspect a road near the home of a plaintiff specially assessed for that road,¹⁶ to remove flushboards from a dam which overlooked the lands of the plaintiff¹⁷ and to ascertain the absence of personal property before levying taxes upon real

¹⁶ See *Livingston v. Henry and Hall*, 59 So.2d 892, 896 (La. App. 1952) (dissenting opinion). PROSSER, TORTS 533 (1941).

¹⁷ PROSSER, TORTS 538 (1941)

¹⁸ *Brookhaven Steam Laundry v. Watts*, 59 So.2d 294 (Miss. Sup. Ct. 1952), *reversing* 55 So.2d 381 (Miss. Sup. Ct. 1951).

property¹⁸ were held to involve a special duty to the individual injured and recovery against the negligent officer was granted.

It would seem that in the principal case the statute involved did not create a special duty to the plaintiff, and, therefore, in allowing recovery the court did not follow the rule requiring a special duty to a particular plaintiff in order to create liability.¹⁹ However, since the defendant in the principal case was insured, the courts holding may not be a rejection of the requirement of the showing of a special duty in light of the fact that Louisiana law has placed greater responsibility for tortious injury upon defendants who are protected by insurance than upon those not insured.²⁰

GERALD S. GOLD

¹ "The Louisiana State Society for the Prevention of Cruelty to Animals through its agents shall destroy any vicious dogs found in violation of this ordinance which cannot be safely taken up or impounded. " New Orleans Ordinance No. 14578 C.C.S. § 17-18 (1937) authorized by LA. REV. STAT. tit. 3:2735 § 1 (1926 as amended in 1948).

² *Serpas v. Margiotta*, 59 So.2d 492 (La. Sup. Ct. 1952).

³ *E.g.*, *Stevens v. North State Motor, Inc.* 161 Minn. 345, 201 N.W. 435 (1925).

⁴ 2 COOLEY, TORTS 389 (4th ed. 1932).

⁵ *Gage v. Springer*, 211 Ill. 200, 203, 71 N.E. 860, 862 (1904).

⁶ *Raynsford v. Phelps*, 43 Mich. 342, 5 N.W. 403 (1880); *Wright v. Shanahan*, 149 N.Y. 495, 44 N.E. 74 (1896).

⁷ *Svenson v. Brix*, 156 Ore. 236, 64 P.2d. 830 (1937).

⁸ *Bryant v. City of St. Paul*, 33 Minn. 289, 23 N.W. 220 (1885).

⁹ *Smith v. Iowa City*, 23 Iowa 391, 239 N.W. 29 (1931).

¹⁰ *Strahan v. Fussel*, 218 La. 682, 50 So.2d. 805 (1951).

¹¹ *People for the use of Lamar Publishing Co. v. Hoag*, 54 Colo. 542, 131 Pac. 400 (1913).

¹² *Colorado Paving Co. v. Murphy*, 78 Fed. 28 (8th Cir. 1897).

¹³ *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861).

¹⁴ *Miller v. Ouray Electric Light and Power Co.*, 18 Colo. App. 131, 70 Pac. 447 (1902); *Ogg v. City of Lansing*, 35 Iowa 495 (1872).

¹⁵ *Gage v. Springer*, 211 Ill. 200, 71 N.E. 860 (1904); *Coolidge v. Brookline*, 114 Mass. 572 (1874); *Riddle v. Merrimack River Locks*, 7 Mass. 169 (1810); *Board of Commissioners of Hamilton County v. Mighels*, 7 Ohio St. 111 (1857)

¹⁶ *Gage v. Springer*, 211 Ill. 200, 71 N.E. 860 (1904).

¹⁷ *Wright v. Shanahan*, 149 N.Y. 495, 44 N.E. 74 (1896).

¹⁸ *Raynsford v. Phelps*, 43 Mich. 342, 5 N.W. 403 (1880).

¹⁹ A special duty is one owed an individual who has a peculiar private interest as distinguished from that which he has in common with other members of the community. In the present case the plaintiff's decedent was owed no duty other than the general duty owed to the public. The fact that he was injured does not create a special duty. *Cf.* *Miller v. Ouray Light and Power Co.*, 18 Colo. App. 131, 70 Pac. 447 (1902); *Ogg v. City of Lansing*, 35 Iowa 495 (1872); *Western College of Homeopathic Medicine v. City of Cleveland*, 12 Ohio St. 375 (1861).

²⁰ *Cf.* *Rome v. London and Lancashire Indemnity Co. of America*, 181 La. 630; 169 So. 132 (1936).