

## NEW YORK COURT OF APPEALS ROUNDUP

### MUNICIPALITY OWES SPECIAL DUTY WHEN EXECUTING NO-KNOCK SEARCH WARRANT

WILLIAM T. RUSSELL, JR. AND LINTON MANN III  
SIMPSON THACHER & BARTLETT LLP

April 19, 2022

In *Ferreira v. City of Binghamton*, the New York Court of Appeals answered a certified question from the U.S. Court of Appeals for the Second Circuit concerning the showing that a plaintiff must make in order to hold a municipality liable when its police force negligently plans and executes a no-knock search warrant. In a majority opinion written by Judge Madeline Singas and joined by Chief Judge DiFiore and Judges Garcia, Cannataro and Troutman, the court held that the plaintiff must establish that a municipality owes him a special duty as opposed to an ordinary duty, but that a special duty always exists where a municipality's police force plans and executes a no-knock search warrant and that duty runs to all individuals within the targeted premises at the time the warrant is executed.

In August 2011, the Binghamton Police Department obtained a no-knock search warrant for the residence of an alleged armed and dangerous felony suspect. Before executing the warrant, the police observed the residence and saw the suspect leave the premises. The police never saw the suspect return. Early the next morning, despite not knowing whether the suspect was in the residence, a heavily-armed SWAT team initiated a dynamic entry into the residence. The SWAT team encountered the plaintiff—who was not the suspect and was not accused of wrongdoing—on the couch near the front door and shot him resulting in serious injuries. The plaintiff was unarmed.

The plaintiff commenced an action in the U.S. District Court for the Northern District of New York against the police officer who shot him, the police department, and the City of Binghamton (the City) asserting a negligence claim (among others) and contending that the City breached a special duty it owed to the plaintiff. 975 F.3d 255, 261 (2d. Cir. 2020). At trial, the plaintiff argued that the City was liable under a respondeat superior theory for the officer's negligence in shooting plaintiff, as well as for the negligence of the police department in planning the raid. *Id.* at 262. The jury found that the officer did not act negligently, but found that the City was liable for the police department's negligence and awarded the plaintiff \$3 million in damages. *Id.* The City moved for judgment as a matter of law or, alternatively, a new trial arguing that there was no evidence establishing that it owed the plaintiff a special duty and it could not be held liable due to the governmental function immunity defense. *Id.* The District Court granted the City's motion for judgment as a matter of law, concluding that New York law required the plaintiff to demonstrate that the City owed him a special duty and that he failed to do so. *Id.* Additionally, the court held that the governmental function immunity defense barred the plaintiff's claim against the City. *Id.*

On appeal, the U.S. Court of Appeals for the Second Circuit determined that the governmental function immunity defense did not preclude liability because the plaintiff "elicited sufficient evidence to support a jury finding that the City, through the actions of its employees in the police department and SWAT unit,

violated established police procedures and acceptable police practice by, first, failing to conduct adequate pre-raid surveillance of the residence or gather other intelligence.” Id. at 271. With respect to the issue of whether a plaintiff must show a “special duty” in order to establish negligence against a municipality, the Second Circuit observed that there was a conflict in New York law and certified the following question to the Court of Appeals:

“Does the ‘special duty’ requirement—that, to sustain liability in negligence against a municipality, the plaintiff must show that the duty breached is greater than that owed to the public generally—apply to claims of injury inflicted through municipal negligence, or does it apply only when the municipality’s negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee?”

Id. at 291. The Court of Appeals accepted the question.

The majority opinion began by reiterating that New York and its municipalities waived absolute immunity when the Court of Claims Act was enacted in 1929, thereby making municipal actors potentially liable for negligence claims. However, the court noted that government defendants continue to enjoy a significant measure of immunity. The court acknowledged that the clash of these two concepts has led to “confusion” and a “complex area of law.” When evaluating a negligence claim against a municipality, “a court must first decide whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose.” The court defined proprietary functions as activities that substitute for or supplement traditionally private enterprises such as when a government entity acts as a landlord. On the other hand, governmental functions are undertaken for the protection and safety of the public pursuant to the municipality’s general police powers such as “fire protection services, the oversight of juvenile delinquents, the issuance of building permits or certificates of occupancy, garbage collection, and the provision of front-line emergency medical services.”

According to the majority, the distinction between proprietary vs. governmental functions has important ramifications with respect to establishing a negligence claim. When a plaintiff’s harm was caused by a municipality’s proprietary function, “the State is held to the same duty of care as private individuals and institutions engaging in the same activity.” When the harm was caused by a municipality’s governmental functions, “the duty question is more complicated, with the next inquiry focusing on the extent to which the municipality owed a special duty to the injured party.” The court “has recognized that a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition.” It is the plaintiff’s burden to establish the existence of a special duty when the municipality’s negligence was caused as a result of one of its government functions.

Guided by these principals, the majority rejected the plaintiff’s attempt to limit the application of a special duty to cases where the municipality allegedly fails to protect a plaintiff from or respond adequately to injury inflicted by a non-governmental third party. According to the majority, such a rule “is belied by our precedent, unworkable, and contrary to the public policies upon which the special duty requirement is founded.” The majority clarified that the special duty requirement applies to all negligence actions against a government defendant for acts occurring when the defendant was engaged in a governmental function.

Having held that a plaintiff must establish a special duty anytime they sue a municipality for negligently performing governmental functions, the court turned to the specific issue of the circumstances in which a

special duty could be recognized in the context of no-knock warrants. The majority concluded that a special duty may be established anytime the police plan and execute a no-knock search warrant on a targeted residence.

“In a no-knock warrant situation, the police exercise extraordinary governmental power to intrude upon the sanctity of the home and take temporary control of the premises and its occupants. In such circumstances, the police direct and control a known and dangerous condition, effectively taking command of the premises and temporarily detaining occupants of the targeted location. As a result, the municipality’s duty to the individuals in the targeted premises, a limited class of potential plaintiffs, exceeds the duty the municipality owes to the members of the general public. A special duty therefore arises when the police plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed. In other words, in those circumstances, the police take positive control of a known and dangerous condition, creating a special duty under the third situation recognized by this Court.”

The court also noted that “plaintiffs alleging injuries caused by police shootings often assert other state law tort claims, such as battery, and federal claims of excessive force, that do not require a showing of duty.”

Judge Rowan Wilson, joined by Judge Rivera, dissented. While the dissent agreed with the majority that officers who plan and execute a no-knock search warrant owe a duty to all individuals in the targeted premises, the dissent characterized that duty as an ordinary duty to conduct themselves in a manner reasonable under the circumstances to avoid foreseeable harm rather than a “special duty.” The dissent interpreted the court’s precedents as instructing courts to first evaluate negligence claims against governmental actors by asking whether an ordinary duty exists because the dissent’s view is that no special duty is required when the government directly causes the harm. According to the dissent, the special duty doctrine only comes into play when a plaintiff cannot demonstrate the existence of an ordinary duty. This typically occurs in instances where the municipality failed to protect a plaintiff from harm caused by a third party. In the instant case, however, the plaintiff did not need to allege a special duty because his injury was caused directly by the police department.

In addition to interpreting the court’s precedents differently, the majority and dissent also disagree about the public policy goals animating municipal liability jurisprudence. According to the majority, “the special duty rule is grounded in separation of powers concerns and a recognition that executive agencies, not the courts and juries, have the primary responsibility to determine the proper allocation of government resources and services.” Requiring plaintiffs to establish a special duty when seeking to hold municipalities responsible for negligence “minimizes a municipality’s exposure to open-ended liability of enormous proportions and with no clear outer limits, which could otherwise discourage municipalities from undertaking activities to promote the general welfare that may expose them to liability.” The dissent responds by arguing that “holding the government liable in negligence for its own acts that directly cause injury serves the same socially beneficial purpose as with private actors: placing an economic incentive to take reasonable steps to avoid unnecessary harm on the party able to avoid it ... . The scope of ordinary duty in negligence is ours to define, and must embody whatever the needs of life in a developing civilization require them to be.”

Despite these disagreements between the majority and the dissent, the court is unanimous that municipalities may be held liable for negligently planning and executing no-knock warrants provided the remaining elements of a negligence claim are proven.

**Linton Mann III and William T. Russell Jr.** are partners at Simpson Thacher & Bartlett.

---

*This article is reprinted with permission from the April 19, 2022 issue of New York Law Journal. © 2022 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.*