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COURT OF APPEALS

STATE OF NEW YORK

METZ, et al.,

Respondents,

-against-

No. 208

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
October 18, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Metz v. State of New
2 York.

3 Counselor, would you like any rebuttal
4 time?

5 MR. BING: Yes, Your Honor. May I have
6 three minutes for rebuttal, please?

7 CHIEF JUDGE LIPPMAN: Sure, go ahead.

8 MR. BING: Good afternoon, Your Honors, and
9 may it please the court. This court's decisions in
10 O'Connor and Valdez mandate dismissal of the claims
11 in this case. The vessel safety inspection here was
12 a classic governmental function, and exercise of the
13 police power to protect the public, and thus the
14 State, under settled law, is not liable for
15 negligence in the performance of that inspection,
16 except in the very narrow circumstance - - -

17 CHIEF JUDGE LIPPMAN: Why don't you have a
18 duty to these passengers?

19 MR. BING: Two reasons, Your Honor. First,
20 it would follow from the categorization of this as a
21 public duty case. This is a situation, as I said, in
22 the O'Connor case, where the state is performing a
23 police power function to protect the public. And
24 under this court's settled precedents, the only way
25 the special duty can - - -

1 CHIEF JUDGE LIPPMAN: But these - - - the
2 argument - - - these people are depending on you in
3 your licensing capacity, to do what you're supposed
4 to do under the statute. Why can't you have a
5 separate private cause of action?

6 MR. BING: Because, Your Honor - - -

7 CHIEF JUDGE LIPPMAN: What's their remedy?

8 MR. BING: The Navigation Law - - -

9 CHIEF JUDGE LIPPMAN: Assuming that you
10 didn't handle it perfectly.

11 MR. BING: Your Honor, the Navigation Law
12 is designed to create a civil administrative
13 regulatory and criminal enforcement proceedings and
14 actions against vessel owners and operators, not
15 against - - -

16 CHIEF JUDGE LIPPMAN: Right. But what's -
17 - -

18 MR. BING: - - - the State.

19 CHIEF JUDGE LIPPMAN: - - - what are these
20 people's remedy when this happens, the people who
21 were hurt or killed?

22 MR. BING: Well, there are civil actions,
23 Your Honor, against vessel - - - the vessel owner,
24 the vessel operator - - -

25 JUDGE SMITH: But your - - -

1 MR. BING: - - - and other parties.

2 JUDGE SMITH: - - - your argument is they
3 have no remedy against the State, correct?

4 MR. BING: They have no remedy against the
5 State under the public duty rule, as this court has
6 articulated.

7 JUDGE SMITH: No. But no matter - - - no
8 matter how bad the - - - even if the State is the
9 only person at fault and completely at fault for all
10 these deaths?

11 MR. BING: Well, Your Honor, the predicate
12 of this is that the State has no obligation to
13 protect people against - - -

14 JUDGE SMITH: You mean, that's a yes?

15 MR. BING: - - - external hazards. In this
16 case, the - - -

17 JUDGE GRAFFEO: Why doesn't the Navigation
18 Law provide the basis of the duty?

19 MR. BING: Because the Navigation Law, as I
20 said, it creates a scheme of enforcement which is
21 civil and regulatory with respect to vessel owners
22 and operators. It's the same in this respect as the
23 civil - - - as the statutory scheme in McLean and in
24 Pelaez, where the scheme was - - -

25 JUDGE GRAFFEO: But are there penalties

1 under the Navigation Law?

2 MR. BING: Yes, there are. There are civil

3 - - -

4 JUDGE GRAFFEO: Do they - - -

5 MR. BING: - - - penalties - - -

6 JUDGE GRAFFEO: - - - do they go to the - -

7 -

8 MR. BING: - - - and civil enforcement - -

9 -

10 JUDGE GRAFFEO: - - - is it for the injured

11 party, or I mean, how are we supposed to look at - -

12 -

13 MR. BING: There's state enfor - - -

14 JUDGE GRAFFEO: - - - those penalties?

15 MR. BING: - - - there's state enforcement

16 of Navigation Law provisions. There's also, under

17 Section 48, a cause of action in negligence against

18 owners and operators. There is no similar cause of

19 action against the State for failing in its

20 inspection duties. Again - - -

21 JUDGE CIPARICK: Are these proceedings

22 pending? Are there any pending proceedings against

23 any of these other parties?

24 MR. BING: Your Honor, I think I'll have to

25 defer to Mr. Hacker on the status of the plaintiffs'

1 other causes of action. I believe that there was a
2 claim against the owners that was settled. But as I
3 said, I believe Mr. Hacker is better positioned to
4 answer the question about the other causes of action
5 in this case.

6 CHIEF JUDGE LIPPMAN: This would be
7 different than a situation where the State or its
8 representative proactively caused something to
9 happen, like if you have a police officer who shoots
10 somebody directly and let's say, mistakenly, without
11 cause. What's different about that situation than
12 this one?

13 MR. BING: Your Honor, in this case, the
14 State didn't own, operate, or maintain the vessel.
15 The State was, the inspectors as part of a safety
16 inspection, certified the ship as safe - - -

17 JUDGE SMITH: But I thought - - -

18 MR. BING: - - - when operating it - - -

19 JUDGE SMITH: I think the Chief is trying
20 to get you to talk about the distinction between the
21 case of a police officer who shoots someone
22 negligently or drives a car negligently into someone,
23 and a case like this.

24 MR. BING: Well, this is - - - again, it's
25 a function of the State's police power to protect

1 people. And Pelaez distinguished the case you're
2 talking about.

3 JUDGE SMITH: So your point, then, is that
4 a - - - shooting a gun, driving a car, something you
5 or I could be sued for; not failing to inspect a
6 vessel, is something only the government can do?

7 MR. BING: That's correct. And there's no
8 - - - and this case is no different from O'Connor in
9 that respect. The State, unlike the situation
10 posited by the Chief Judge, the State didn't create
11 the hazard here. As I said, the inspectors here do
12 what safety inspectors do. They certified this
13 particular vessel as safe when operated in a
14 particular way by a third party.

15 JUDGE PIGOTT: The Third Department, I
16 think, if I read them right, they - - - their
17 decision turned on the fact - - - they said okay,
18 we'll - - - even if we concede everything you're now
19 saying, the fact that they did not - - - did not
20 exercise discretion - - - if they exercise
21 discretion, you can't - - - but if they're supposed
22 to do something and they don't, if they - - - if they
23 should have inspected in some fashion to know that
24 the ship should not have had forty-seven people on
25 it, it should have had only fourteen, and never did

1 anything - - - never exercised that discretion, it's
2 conceivable that the State could be liable. Is that
3 your understanding of what they ruled?

4 MR. BING: The Third Department, in
5 essence, found the failure to exercise discretion
6 meant that our governmental immunity defense had to
7 be dismissed.

8 JUDGE PIGOTT: And that - - - and that
9 preceded, I think, our Valdez decision.

10 MR. BING: It did. And Valdez clarified
11 this in a very important way, because it made clear -
12 - - it removed what the court called the lingering
13 confusion on this issue, that the public duty rule -
14 - - that the question of the existence of a duty is
15 an element of the claimant's cause of action. It's a
16 case of negligence. And that has to be satisfied,
17 and you don't even get to the question - - -

18 CHIEF JUDGE LIPPMAN: So that's a threshold
19 issue - - -

20 MR. BING: - - - of discretion here.

21 CHIEF JUDGE LIPPMAN: - - - is that what
22 you're saying?

23 MR. BING: Yes. It's part of the
24 affirmative case of the plaintiffs.

25 CHIEF JUDGE LIPPMAN: Before we get into

1 any of the other?

2 MR. BING: Yes. And if discretion is
3 relevant with respect to the governmental immunity
4 defense, but you don't even get to that if you can't
5 show that there's a duty. And on these facts, on
6 this record, we established that there was no duty
7 owed, no special relationship giving rise to a duty
8 in this case.

9 I mean, the Third Department correctly
10 found that this was a classic governmental function.
11 And it also correctly found that there was no special
12 relationship here under any theory. And given those
13 findings, under Valdez and under O'Connor, the Third
14 Department, then, should have granted our cross-
15 motion for summary judgment dismissing the claims.
16 And it mistakenly did not, because - - - I think
17 probably because it didn't have the benefit of the
18 Valdez decision, which cleared this up.

19 But I think with those findings that the
20 Third Department made, dismissal of the claims
21 follows under O'Connor and the many other decisions
22 of this court on the public duty rule.

23 CHIEF JUDGE LIPPMAN: Counselor, you've
24 made changes since this accident to the way you
25 handle this function, this governmental function?

1 MR. BING: It's a good point, Your Honor.
2 In 2007, the legislature amended the law. They
3 didn't create a cause of action against the State;
4 they tightened the existing regulatory and
5 administrative enforcement mechanisms. In
6 particular, they amended, I believe, it's Section 61
7 of the Navigation Law - - -

8 CHIEF JUDGE LIPPMAN: Could they have
9 created a private right of action?

10 MR. BING: I think it's certainly possible
11 that they could have. But they chose not to. And I
12 think, in light of that especially, it would be error
13 to imply or to infer that the legislature intended,
14 nevertheless, that there be such an action when - - -

15 JUDGE SMITH: But what would be the - - -
16 if we uphold - - - if we affirm here, are there going
17 to be a lot of consequences in - - - my - - - I have
18 a feeling, too, there must be a lot of safety
19 inspections going on. And if every one - - - if
20 every one's the basis for a lawsuit, there might be a
21 lot of lawsuits.

22 MR. BING: That's correct, Judge Smith.
23 And as in McLean, I mean, where the court emphasized
24 the impact not only on the fist of the state and
25 local governments, but also the fact that that impact

1 would very likely deter the state and local
2 governments from carrying out safety inspections that
3 are for the benefit of the public as a whole, and
4 that make the lives of all of us - - -

5 JUDGE SMITH: Well, the problem here - - -

6 MR. BING: - - - safer.

7 JUDGE SMITH: - - - was that - - - the
8 problem here was that you didn't carry it out. I
9 mean, the - - - it's - - - they didn't - - -
10 something apparently did deter them from figuring out
11 how many people were supposed to be on that vessel.

12 MR. BING: Your Honor, I think that's the
13 problem in all of these cases, that there is arguably
14 a failure on the part of the government to carry out
15 its protective function. If you look at the line of
16 cases - - -

17 JUDGE SMITH: In this case, it's hard even
18 to say "arguably", isn't it?

19 MR. BING: Your Honor, we are assuming, I
20 think, for purposes of our public duty rule argument,
21 that even if negligence is established, that does not
22 establish the duty part of the cause of action.

23 JUDGE READ: Well, I guess here, what the
24 Coast Guard had estimated in order to come with a
25 capacity, based on an average weight of 140 pounds,

1 or something like that?

2 MR. BING: It was an earlier standard that
3 the Coast Guard had set that the State relied on at
4 that point.

5 JUDGE READ: And Americans, unfortunately,
6 that's not like an average weight anymore.

7 MR. BING: Yes. I mean, Your Honor, I
8 think all these points are relevant, perhaps more so
9 to the governmental immunity point which is our
10 alternative argument, that the Appellate Division
11 wrongly introduced that defense.

12 CHIEF JUDGE LIPPMAN: Counselor, your - - -
13 the bottom line of your argument is, it doesn't
14 matter how much the State were to be negligent here
15 or to neglect their duty and - - - the bottom line
16 is, it doesn't matter; this isn't a remedy?

17 MR. BING: Your Honor - - -

18 CHIEF JUDGE LIPPMAN: That's your argument?

19 MR. BING: - - - that's correct.

20 CHIEF JUDGE LIPPMAN: I don't say that in a
21 judgmental way. But that's - - -

22 MR. BING: I - - -

23 CHIEF JUDGE LIPPMAN: - - - that's your
24 argument?

25 MR. BING: The ar - - - yes, Your Honor.

1 I'll frame it in terms of the absence of a duty.
2 There is no special duty under the public duty rule.
3 There could be - - -

4 CHIEF JUDGE LIPPMAN: Right. So - - -

5 MR. BING: - - - no recovery because - - -

6 CHIEF JUDGE LIPPMAN: - - - though, even if
7 you totally botch it, in terms of what you should
8 have been doing to safeguard the public, under the
9 law there's no - - -

10 MR. BING: Yes, we don't concede that that
11 occurred, but - - -

12 CHIEF JUDGE LIPPMAN: Well, no, no. But
13 I'm not saying that; in the worst-case scenario - - -

14 MR. BING: Yes, that's our argument, Your
15 Honor.

16 CHIEF JUDGE LIPPMAN: - - - that's the
17 heart of your argument?

18 MR. BING: That this goes to a separate
19 element of the plaintiff's prima facie case of
20 negligence; not the negligence part, but the
21 existence of a duty. And in this case, there simply
22 was no enforceable duty in tort that could give rise
23 to a cause of action.

24 JUDGE CIPARICK: Is there a duty to the
25 owner of the vessel, if the owner of the vessel

1 should be found liable?

2 MR. BING: Your Honor, I would - - - I'm
3 not - - -

4 JUDGE CIPARICK: Listening to - - -

5 MR. BING: I don't believe that there's a
6 basis in the Navigation Law to infer the existence of
7 such an obligation. There's no express statutory
8 obligation. I don't think the Garrett case can be
9 broadly read to establish that point. And I - - - as
10 I said, under this statutory scheme, there is no - -
11 - there's no affirmative cause of action against the
12 State on the - - - from the operators - - -

13 JUDGE GRAFFEO: To bring you back to the
14 first point, I believe the claimants initially
15 claimed that this was proprietary, not governmental.
16 Do you want to address that point?

17 MR. BING: Your Honor, this has been a part
18 of the Navigation Law, as a state obligation, since
19 the late nineteenth century. The fixing of the
20 capacity of a public vessel has been a state
21 inspection obligation.

22 This is quintessentially what state safety
23 inspectors and local safety inspectors do. I mean,
24 they set capacities, whether it's for places of
25 public assembly or buses or elevators.

1 JUDGE GRAFFEO: Why is it not a proprietary
2 function?

3 MR. BING: Because it's a function
4 undertaken by - - -

5 JUDGE GRAFFEO: Or akin to a - - -

6 MR. BING: - - - the state - - -

7 JUDGE GRAFFEO: - - - proprietary function?

8 MR. BING: - - - in its police paper. It's
9 an exercise of the police power, as in O'Connor and
10 as in the cases like Sanchez, which dealt with fire
11 codes, to protect the public from external hazards,
12 from harm; in this case a vessel accident, in other
13 cases to protect them from criminal acts, or fires,
14 or gas explosions. This is, as the Third Department
15 correctly found, a classic governmental function.

16 CHIEF JUDGE LIPPMAN: Okay.

17 MR. BING: There's no question as to which
18 side of the - - - as to which end of the continuum
19 this one lies on. The fact that DMV does automobile
20 inspections is not relevant to this - - - to this
21 finding. As I said, this has been a part of the
22 Navigation Law - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 MR. BING: - - - since the 1890s.

25 CHIEF JUDGE LIPPMAN: You'll have your

1 rebuttal time.

2 Counsel?

3 MR. HACKER: Good afternoon, Your Honors.

4 CHIEF JUDGE LIPPMAN: Counselor, do you
5 dispute that this is a quintessential government
6 function?

7 MR. HACKER: Your Honor, this is a
8 statutory duty case. This is a statutory duty. This
9 is mandated - - -

10 JUDGE READ: Well, I think the question is,
11 are you still arguing that it's proprietary?

12 MR. HACKER: No. It's a statutory duty.
13 The claimants in this case pled one - - -

14 CHIEF JUDGE LIPPMAN: Where's the private -
15 - - where's the private cause of action come from?

16 MR. HACKER: The private cause of action
17 comes from two spots. It comes from the Navigation
18 Law itself. The cause of action - - -

19 CHIEF JUDGE LIPPMAN: Where does it say in
20 the Navigation Law itself?

21 MR. HACKER: It defines public vessel at
22 2.6 as a vessel which is carrying passengers for a
23 fee. It speaks of the passengers in Section 13 - - -

24 JUDGE SMITH: Well, it's obviously designed
25 to protect the passengers. But isn't that just

1 essentially a - - - to protect us all. I mean, we
2 all could be passengers on a vessel. Isn't that for
3 the protection of the general public, not for some
4 narrow class?

5 MR. HACKER: No, Your Honor. For the
6 reasons that - - - it's specifically for the
7 passengers on the Ethan Allen, because the state
8 inspectors have to certify each boat, every year,
9 safe to carry a certain amount of passengers. In
10 fact, the inspectors in this case all admitted - - -
11 Mr. Fallon admitted at 879; Mr. Watt admitted it at
12 643; Mr. Gionet admitted it at 801 - - -

13 CHIEF JUDGE LIPPMAN: Is there something
14 unusual about Ethan Allen? Does this apply to every
15 boat that's on the waters in our state?

16 MR. HACKER: This applies to all public
17 vessels - - -

18 CHIEF JUDGE LIPPMAN: That's what I'm
19 saying.

20 MR. HACKER: - - - that carry a passenger
21 for a fee.

22 CHIEF JUDGE LIPPMAN: This isn't just - - -
23 this isn't just the unusual - - - from your
24 perspective - - - amount of neglect or negligence on
25 the part of the State. Every boat, when there is an

1 accident, because it's, whatever, overloaded or
2 whatever the reason is, there may be a private right
3 of action against the State?

4 MR. HACKER: If the - - -

5 CHIEF JUDGE LIPPMAN: And what are the
6 implications of that, if we agree with you?

7 MR. HACKER: All right. If you agree with
8 me, it is not going to open the floodgates of
9 litigation.

10 CHIEF JUDGE LIPPMAN: Why not?

11 MR. HACKER: Well, no more than the
12 floodgates of litigation were opened in the
13 VanGaasbeck case, where the bus driver failed to turn
14 the lights on to allow the person to cross in front
15 of the bus.

16 JUDGE CIPARICK: What happened with the
17 Staten Island Ferry case?

18 MR. HACKER: Pardon me?

19 JUDGE CIPARICK: Do you remember the Staten
20 Island Ferry case?

21 MR. HACKER: Sure I do.

22 JUDGE CIPARICK: What happened there?

23 MR. HACKER: In the Staten Island - - - and
24 I'm not really too familiar with the Staten Island
25 Ferry case, Your Honor. But in this - - - in that

1 case, that vessel, as far as I know, was not
2 overloaded. That wasn't the reason for the accident.
3 I think the reason was the speed - - -

4 JUDGE CIPARICK: Who owned it? Who owned
5 it?

6 MR. HACKER: - - - was the speed. In this
7 case, in the Ethan Allen, the State, under Navigation
8 Law Section 13, had the duty to determine the safe
9 number of passengers.

10 CHIEF JUDGE LIPPMAN: Counselor, but your
11 analogy about the bus driver who specifically does
12 something wrong, isn't that different than what we
13 have here?

14 MR. HACKER: In this case, these inspectors
15 specifically did something wrong.

16 CHIEF JUDGE LIPPMAN: Like a - - - like a
17 policeman who negligently shoots somebody? Is - - -

18 MR. HACKER: Absolutely.

19 CHIEF JUDGE LIPPMAN: - - - is it the
20 equivalent?

21 MR. HACKER: They were the main actors.

22 CHIEF JUDGE LIPPMAN: It is the equivalent?

23 MR. HACKER: It is the equivalent. All the
24 cases that the State cites are all where the injury
25 is caused by a third party, not by the state actor.

1 Here, it's the state actors that had the duty by the
2 Navigation Law. They knew they had the duty. They
3 admitted they had the duty. They knew the duty ran
4 to the passengers.

5 They said in their testimony that the duty
6 was for the safety of the passengers, and they knew
7 that the modification was obvious. They testified
8 that this was a modification that was obvious.

9 JUDGE SMITH: Well, why is this - - - why
10 is it different from, say, a building inspector, who
11 inspects a boiler or is supposed to inspect a boiler,
12 and doesn't?

13 MR. HACKER: Because the building inspector
14 doesn't have to affirmatively do anything. The
15 building inspector doesn't affirmatively put the cap
16 on the boiler. Here, the state inspectors were
17 entrusted by the legislature to certify what this
18 boat could handle.

19 JUDGE SMITH: Well, doesn't it - - - I
20 mean, their job was to write down a number. Isn't
21 the building inspector's job to write down "boiler
22 cap missing"?

23 MR. HACKER: No. The duty in the
24 Navigation Law under 13 is that the inspector has to
25 fix the number; has to determine the number. The

1 State, in 12, actually says what qualifications these
2 inspectors have to have. They have to be graduates
3 of a maritime academy. They have to have the
4 expertise to determine what the stability of the boat
5 is. It's not entrusted to the owner of the boat,
6 because the owner of the boat doesn't have that
7 expertise. And there's no penalty against the owner
8 of the boat - - -

9 JUDGE SMITH: Well, we don't - - - we don't
10 let owners of buildings inspect their own buildings
11 either. It's not just a matter of expertise. It's
12 we feel a little better if somebody independent is
13 inspecting. But I'm still not quite seeing the
14 distinction.

15 MR. HACKER: To determine what the boat
16 could carry, a stability test has to be performed.
17 You have to be trained - - -

18 JUDGE PIGOTT: Let's assume - - - let's
19 assume for a minute that - - - and I think it's true
20 - - - that the State has to inspect carnival rides.

21 MR. HACKER: Correct.

22 JUDGE PIGOTT: And they're all over the
23 state all summer long.

24 MR. HACKER: Correct.

25 JUDGE PIGOTT: And somebody falls off - - -

1 MR. HACKER: The Gonzalez case.

2 JUDGE PIGOTT: - - - somebody falls off a
3 Ferris wheel, is the State responsible?

4 MR. HACKER: Not in the situation you're
5 talking about. In the Gonzalez case, it's different,
6 because in the Gonzalez case, the person that owns
7 the Ferris wheel has to come forward to the State,
8 show the maintenance records, and in that particular
9 statute, the owner of the Ferris wheel actually has
10 to have an insurance policy in place, which takes the
11 duty off the State in that particular case.

12 But getting back to your point, Your Honor,
13 as far as the penalty goes. There is no penalty to
14 the boat owner. The only penalty to the boat owner
15 is if he puts more people on than the State mandates
16 is safe and - - -

17 CHIEF JUDGE LIPPMAN: Well, the penalty's
18 someone can sue the boat owner, right?

19 MR. HACKER: Sure the penalty - - - but not
20 for that particular reason, because the boat owner is
21 relying on the State.

22 JUDGE SMITH: What if - - - I don't know
23 what your allegation - - - you sued the boat owner in
24 this case, didn't you?

25 MR. HACKER: Yes, we did, Your Honor.

1 JUDGE SMITH: Didn't you suggest that maybe
2 he should have known not to put that many people on?

3 MR. HACKER: Your Honor, what we suggested
4 was that the operator was negligent by turning into
5 another boat's wake, and it was the stabi - - -

6 CHIEF JUDGE LIPPMAN: What's the - - -
7 what's the status of that?

8 MR. HACKER: In the Ethan Allen case in the
9 federal courts, the court dismissed the case against
10 the person who put this top on, because the Church
11 decision, that there was no duty from these
12 passengers to the person that actually modified the
13 boat. The case against the boat owner was settled.
14 The boat owner had no liability insurance. And I
15 would note that the legislature recommended - - - the
16 legislature chose not to have a requirement of
17 liability insurance in this particular case.

18 CHIEF JUDGE LIPPMAN: Didn't the
19 legislature, after this whole thing was over, didn't
20 they take certain steps, but not others? Couldn't
21 they have specifically created the private cause of
22 action here?

23 MR. HACKER: They could have specifically
24 created one, Your Honor, but one is implied.

25 CHIEF JUDGE LIPPMAN: But they chose - - -

1 say again?

2 MR. HACKER: But one is implied. And they
3 specifically did not put the onus on the owner,
4 because they specifically did not pass the statute
5 that requires the boat owners to carry the liability
6 insurance. There's still no liability - - -

7 JUDGE SMITH: Are you inferring from that
8 that the legislature's thought process was, we don't
9 - - - we don't need to insure - - - we don't need to
10 require liability insurance, because the State is
11 good for the money; they can always sue the State?

12 MR. HACKER: In very limited - - -

13 JUDGE SMITH: That doesn't sound to me like
14 the way the State usually operates.

15 MR. HACKER: Hard to believe they would
16 think that, Your Honor. But in this particular case,
17 this function is a function of duty with respect to
18 determining the safe number of passengers this boat
19 could have. They specifically chose that they would
20 have a state inspector who was trained and had the
21 qualifications to make this determination, because
22 you can't leave it up to the boat owner.

23 The boat owner wants to put as many people
24 as they possibly can on that boat, because they want
25 to make enough money.

1 JUDGE SMITH: But aren't there a lot of
2 things that government does because government has to
3 do it and because you can't leave it up to private
4 citizens for a variety of reasons? But every - - -
5 but in very, very few of those cases, does a failure
6 by the government generate a private right of action.

7 MR. HACKER: You're right, Your Honor. In
8 very few of those cases - - - that's correct. And
9 that's why this is not going to open the floodgates
10 of litigation, because this is a spec - - -

11 JUDGE SMITH: Well, then why - - - why is
12 this so different from all the others?

13 MR. HACKER: Because you have a statutory
14 cause of action that falls under the three prongs of
15 the Sheehy cases that fits this particular case with
16 this particular fact set.

17 JUDGE SMITH: You say the legislature
18 intended, when it enacted these sections of the
19 Navigation Law, to create a private right of action
20 in favor of injured people against the State?

21 MR. HACKER: Yes, Your Honor. I'm saying
22 there's an implied private - - -

23 JUDGE GRAFFEO: It would have to be - - -

24 MR. HACKER: - - - right of action.

25 JUDGE GRAFFEO: - - - an implied private

1 right of action - - -

2 MR. HACKER: It's an implied right - - -

3 JUDGE GRAFFEO: - - - right?

4 MR. HACKER: - - - to private right of
5 action. It's not specific; it's implied.

6 JUDGE GRAFFEO: Have we ever implied a
7 private right of action in any other arena?

8 MR. HACKER: I think the court, as far as
9 an implied cause of action, I think, Judge, in your
10 Elliott case, you said that a violation of a state
11 statute is negligence per se. And in this particular
12 case, this violation of this statute, the State had
13 the obligation to fix the safe number of passengers,
14 did not do it. It's negligence per se against the
15 State.

16 In the other inspection cases - - -

17 JUDGE SMITH: Can you think of a case in
18 which the legislature's been held to create a private
19 right of action against the State?

20 MR. HACKER: Against the State? Well, in
21 the Pelaez case it came close. The last part of the
22 Pelaez case, the last prong, it fell short on the
23 legislature's scheme, only because the duty was on
24 the owners of the property to actually abate the
25 lead.

1 CHIEF JUDGE LIPPMAN: You think the
2 statutory scheme here is so different than all the
3 other similar licensing-type situation?

4 MR. HACKER: Your Honor, I think - - -

5 CHIEF JUDGE LIPPMAN: I mean - - -

6 MR. HACKER: - - - the statutory scheme
7 combined with the facts in this particular case makes
8 this case different - - - that makes this case
9 different. This fits within the Sheehy three-prong
10 test. The private cause of action is inferred. This
11 - - - these passengers are members of a class for
12 whom the benefit is enacted. The safety - - -

13 CHIEF JUDGE LIPPMAN: Has anyone ever had a
14 successful private cause of action under the
15 Navigation Law - - -

16 MR. HACKER: No, Your Honor.

17 CHIEF JUDGE LIPPMAN: - - - along the line
18 - - -

19 MR. HACKER: There's never been another
20 case like this. And that's another reason why this
21 is not going to open up the floodgates of litigation.
22 This is a very unusual case where the Ethan Allen
23 came in and there was no capacity plate. And the
24 state inspectors knew they had the responsibility to
25 fix the safe number of passengers and never did so.

1 All they did was rubber-stamp on a pre-printed form,
2 what the previous year said.

3 CHIEF JUDGE LIPPMAN: Counselor, but don't
4 those arguments go to after you get past the
5 threshold issue as to whether or not - - -

6 MR. HACKER: Absolutely. The question - -
7 -

8 CHIEF JUDGE LIPPMAN: - - - there's a
9 special duty?

10 MR. HACKER: Your Honor, I'm not arguing
11 that. The duty here is a statutory duty under
12 Section 13 of the Navigation Law. There's nothing -
13 - - there's no other reason.

14 If I could just make a couple of points?

15 CHIEF JUDGE LIPPMAN: Sure.

16 MR. HACKER: The thing that the legislature
17 is trying to accomplish is the legislature's trying
18 to accomplish by this statute, the Navigation Law, is
19 to bring tourism into New York State. They want a
20 safe - - -

21 CHIEF JUDGE LIPPMAN: Any legislative
22 history that supports your position?

23 MR. HACKER: The legislative history; the
24 statutes are from 1962. So the legislative history's
25 a little scant. But when you look at the statute and

1 you see where the money goes for the fees that the
2 boat owner pays, the boat owner pays twenty dollars.
3 And under Section 65 of the Navigation Law, that fee
4 goes into the I Love New York Waterway Boating Safety
5 Fund. And that is used to promote tourism in New
6 York.

7 And if you look on their Web site, it even
8 says, "Come to Lake George, ride our tour boats", and
9 they even mention the tour boats by name. This is an
10 invitation to people outside the state to come into
11 the state and ensuring those people that this is safe
12 to recreate on state-owned waterways. These are
13 public vessels that are certified for state-owned
14 waterways.

15 JUDGE PIGOTT: Do you know how many vessels
16 of this type there are?

17 MR. HACKER: Your Honor, the record only
18 shows there's 365 public vessels, but that includes
19 commercial vessels as well as tour boats. The
20 question was never answered as to how many of these
21 are private - - - are tour-carrying - - - passenger-
22 carrying vessels. But rest assured, it pales in
23 comparison with the number of inspections done in the
24 city with the fire inspections and otherwise. This
25 is a very specific thing that these inspectors, hired

1 by the state, for their specific qualifications, had
2 a job to do.

3 Every one of them said that they knew they
4 had to do it. Every one of them said that they knew
5 it was for the safety of the passengers. Every one
6 of them said it was an obvious modification. Every
7 one said they knew it would affect stability. And
8 every one said we didn't do it because we relied on
9 the previous year. They never exercised discretion.
10 Once you get through the duty - - -

11 JUDGE READ: Well, isn't that exercising
12 discretion to say we don't think we have to do
13 anything different; we can - - -

14 MR. HACKER: Not doing your job - - -

15 JUDGE READ: - - - rely on the Coast Guard.

16 MR. HACKER: Would we want to live in a
17 world where someone - - - a state actor could say I
18 didn't do my civic requirements - - -

19 JUDGE READ: Well, they made a mistake.
20 But what's the difference between a failure to
21 exercise discretion and just making a bad decision?

22 MR. HACKER: Well - - -

23 JUDGE READ: I mean, you're just saying
24 they made a bad decision. They should have realized
25 that the capacity was based on an average weight that

1 was probably pretty out-of-date.

2 MR. HACKER: They made no decision. As a
3 matter of fact, Inspector Kempf - - -

4 JUDGE SMITH: Well, didn't they make the
5 decision that last year's number is good enough?

6 JUDGE READ: Yes.

7 JUDGE SMITH: It may be a stupid decision,
8 but it's a decision, isn't it?

9 JUDGE READ: Right.

10 MR. HACKER: No. They actually said that
11 they never exercised - - - or they never exercised
12 any reasoned judgment under Tango as to why they were
13 relying on last year's decision.

14 JUDGE SMITH: Well, but when Tango uses the
15 words "reasoned judgment", they - - - you know, it's
16 - - - they don't mean that it has to be good
17 reasoning, do they? I mean, stupid reasoning - - -

18 MR. HACKER: No, but they have to have - -
19 -

20 JUDGE SMITH: - - - still counts.

21 MR. HACKER: - - - reasoned judgment that
22 can offer two acceptable results.

23 JUDGE PIGOTT: Your point is that they can
24 rubber-stamp this as long as they want until there's
25 a substantial modification, which may have had an

1 effect on numbers and ballast and everything else,
2 and they didn't even bother to look?

3 MR. HACKER: Correct. Once they saw there
4 was a substantial modification and they all agreed
5 that it could affect stability, well, then, then they
6 should have done their job and certified the boat.

7 Your Honor, all the cases that the State is
8 relying on are cases where the court was asked to
9 impose liability on the government because it failed
10 to prevent the acts of a third party who were the
11 primary wrongdoers. In this particular case, it's
12 the state actors who are - - -

13 CHIEF JUDGE LIPPMAN: Your argument is that
14 - - -

15 MR. HACKER: - - - the primary wrongdoers.

16 CHIEF JUDGE LIPPMAN: - - - they're the
17 primary wrongdoer?

18 MR. HACKER: Without a doubt. They're the
19 primary wrongdoers.

20 CHIEF JUDGE LIPPMAN: Yes.

21 MR. HACKER: They're the only ones that had
22 the ability and the training to fix the safe number
23 of capacity. And there's no penalty to the owner of
24 the boat for having people on this boat where the
25 safe capacity is different.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks
2 counsel.

3 MR. HACKER: Thank you.

4 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

5 MR. BING: Thank you, Your Honor. As I - -
6 - the inspectors are not the primary wrongdoers here.
7 The State is not the primary wrongdoers. As I said
8 earlier - - -

9 CHIEF JUDGE LIPPMAN: Is there a situation
10 in this particular - - - under this particular
11 statute, where the State could be the primary
12 wrongdoer?

13 MR. BING: I don't believe so, Your Honor.
14 This is a - - - this is a regulatory enforcement
15 scheme to regulate and enforce rules and regulations
16 against third parties, in this case owners and
17 operators of public vessels.

18 CHIEF JUDGE LIPPMAN: It goes back to the
19 question you were asked earlier that no matter what,
20 no matter how directly responsible you might be, if
21 it results from a licensing - - - for lack of a
22 better word - - - function, it doesn't matter?

23 MR. BING: If it arises out of a public
24 safety inspection for the benefit of the general
25 public against external hazards, third parties, then

1 that's - - - then that rule applies, the public duty
2 rule applies, and there's no liability in the absence
3 of a professional relationship.

4 JUDGE GRAFFEO: It is rather strange that
5 the Navigation Law didn't require some minimum extent
6 of liability coverage, isn't it?

7 MR. BING: You know - - -

8 JUDGE GRAFFEO: The intent was - - -

9 MR. BING: - - - the - - -

10 JUDGE GRAFFEO: - - - as you stated?

11 MR. BING: - - - the legislature, in 2007,
12 didn't adopt that particular provision. It did make
13 other changes that it thought was relevant - - - were
14 relevant and necessary. But there's no basis in that
15 action for inter - - - for implying or inferring that
16 the legislature intended an implied cause of action
17 against the State. I mean, again, this is what ves -
18 - - this is what safety inspectors do.

19 And the City of New York, in its brief,
20 pointed out there are hundreds of thousands of safety
21 inspections that they do every year. Safety
22 inspectors routinely set standards, including
23 occupancy and capacity numbers for buildings and
24 buses. And this is the type of thing that is exactly
25 within the police power.

1 And on the idea, again, that somehow this
2 is different from what happened in O'Connor; the
3 court's cases dealing with safety or safety-related
4 programs, have found that the public duty rule
5 applied, and that there was no duty and no liability,
6 even in cases where the inspector or the governmental
7 employee was potentially guilty of some kind of more
8 affirmative act.

9 In Pelaez, the officers told the mother
10 that the lead paint hazard had been abated when it
11 hadn't been. In McLean, the employee told the mother
12 that there were no complaints against the day care
13 when there had been.

14 JUDGE PIGOTT: Those are tough, and there's
15 a lot of people. If there's a limited number of
16 boats, you know, and you have a certain number of
17 inspectors, could you, for example, within your
18 administrative authority, require liability
19 insurance?

20 MR. BING: I believe the State could do
21 that. Certain - - - administrative authority, I'm
22 not sure. If the statute doesn't provide for it, I
23 think the legislature could do it. I'm not sure, you
24 know, where the line would be there between
25 enforcement of the existing statutory - - -

1 JUDGE PIGOTT: Well, as a condition of - -
2 -

3 MR. BING: - - - scheme and policy
4 judgment.

5 JUDGE PIGOTT: - - - if you have to license
6 them every year, as a condition of your licensure,
7 could you require them to have security for the
8 passengers that they're going to be - - -

9 MR. BING: Your Honor, I mean, there's a
10 question about whether the administrative body could
11 do that on its own without legislative authorization.

12 CHIEF JUDGE LIPPMAN: Why do you think the
13 legislature didn't do it in this case?

14 MR. BING: Your Honor, I don't know the
15 answer to that question.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.
17 Thanks.

18 Thank you both. Appreciate it.

19 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Metz v. State of New York, No. 208 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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