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will pay no more than the amount required to insure these fixed payments according to actuarial tables as they existed when the contract was entered into.

Plaintiff's other contention, that he should not have to pay for the probationary period, was rejected on the ground that in computing the deficiencies some mathematical inconsistancies must occur, but since plaintiff was given credit for that period when his appointment was back dated to September of 1942 he was not prejudiced.

The Court in the instant case reached a result which is not only logical and reasonable, but undoubtedly conforms with the legislative intent. Dunn was not forced to pay any more than he would have paid had he actually became a fireman in September of 1942, and contributed for twenty years. In fact, the city has paid his contribution for the four years while he was in service. Plaintiff received four years credit and was in no way prejudiced by being required to make up the deficiency necessary to keep the pension fund actuarially sound.

JUDGMENT OF JURY NOT TO BE SUBSTITUTED FOR DETERMINATION OF CITY'S BOARD OF SAFETY

In the consolidated cases, *Weiss v. Fote* and *Alexander v. Fote*,[16] actions to recover damages for personal injuries resulting from a collision between two automobiles at an intersection, the plaintiff Weiss, a pedestrian, sued the drivers of both cars, Alexander and Fote, and also the City of Buffalo. The driver, Alexander, sued Fote and the City of Buffalo. Both the Supreme Court of Erie County and the Appellate Division found for the plaintiffs,[17] but only against the defendant City of Buffalo and not against the allegedly negligent automobile operators.

The negligence liability of the defendant City was predicated on the theory that at the intersection where the accident occurred, the traffic signal designed by the Board of Safety of the City of Buffalo did not have a sufficient "clearance interval." Allegedly the four second interval of time between the end of the green signal for east-west traffic and the beginning of the green signal for north-south traffic was too short to allow the intersection to be safely cleared of cars from one direction before inviting cars to procede from the other direction and hence the *design* or *plan* of the traffic light was a proximate cause of the accident.

The Court of Appeals reversed the judgments against the City of Buffalo and dismissed the complaints,[18] holding that in the absence of some indication that due care was not exercised in the preparation of the design, or that no reasonable official could have accepted it, a jury verdict as to the reasonableness of the time interval involved may not be substituted for the previous determination of that question by the legally authorized Board of Safety.

16. 7 N.Y.2d 579, 200 N.Y.S.2d 409 (1960).
17. 8 A.D.2d 692, 186 N.Y.S.2d 233 (4th Dep't 1959).
18. Supra note 16.

In a vigorous dissenting opinion, Chief Judge Desmond characterized the decision as ". . . a long and surprising step backward into the old, abandoned area of governmental immunity."[19]

New York has waived its "sovereign immunity" from suit to a greater extent than any other State or the United States itself.[20] Section 8 of the New York Court of Claims Act reads:

> The state hereby waives its immunity from 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.

A problem arises when the State is sued for activity in which no *individual* or *corporation* other than the State or its agents can engage. The broad waiver of immunity in Section 8 has never been read to apply to acts of the Legislature in making a law which results in harm to someone, nor to the Chief Executive or a judge exercising his discretion, no matter what the negligently inflicted harm may be. Nor is their any question that the State *is* liable for the negligence of its employees on the purely operational level, as when a garbage truck negligently driven by a city employee is involved in a collision.

On the one hand, public policy and our division of government into three branches demand that not every action by an inferior official and agency be subject to judicial review and the possible substitution of the judge's or jury's decision for that of the official. On the other hand, public servants are neither infallible nor impeccable, and it is the business of the court to redress injuries tortiously caused.

In attempting to formulate rules which will adequately take care of both considerations, which will include the State's liability for an auto accident and its immunity for a judge's magisterial decision, which will take care of the cases which fall in between the two extremes, which will take care of acts which are quasi-judicial, or semi-discretionary, or partly operational, or mainly administrative, the work of commissions, committees, boards, experts, minor officials, in short, as the Court attempts to deal with government's interaction with people on a day to day personal level, the distinctions drawn by the courts in fixing or denying liability have up to this point broken down when extended beyond the fact situation of the case in which they were articulated.

Mr. Justice Frankfurter commented in *India Towing Co. v. United States*, ". . . the Government . . . would thus push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the

19. Id. at 589, 200 N.Y.S.2d 416.
20. Herzog, Liability of the State of New York For "Purely Governmental" Functions, 10 Syracuse L. Rev. 30 (1958).

States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."[21]

The instant case does little to preserve us from the "quagmire" referred to by Frankfurter. Both Fuld in the majority opinion and Desmond in the dissent are able to cite a multitude of cases as controlling.

According to the majority, the leading case in this area is *Urquart v. City of Ogdensburg* which says:

> The rule is well settled that where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained.[22]

This case, and the cases which follow it, rest immunity of the State on the policy of maintaining the administration of municipal affairs in the hands of state or municipal executive officers as against the incursion of courts and juries. This line of cases does not rest the immunity of the State on the *sovereign* character of its governmental function and consequently the waiver by the State of its *sovereign* immunity does not thereby waive any immunity which it might derive from another source.

How do we distinguish sovereign immunity from some other type of governmental immunity? No definitive pattern has yet emerged, however two cases decided by the United States Supreme Court, *Dalehite v. United States*[23] as modified by *India Towing Co. v. United States*,[24] together with the instant case, seem to establish that even where the State has waived its *sovereign* immunity it may not be held culpable for decisions made at the planning level rather than at the operational level.

The State or municipality in circumstances like the instant case would be liable if the accident were caused by improper maintenance of the traffic light.[25]

Perhaps the whole area is better approached in terms of "duty." A municipality owes the public a duty of keeping its streets in a reasonably safe condition for travel. Included in this duty is the subordinate duty to plan intersections and for failure to plan or to review a plan when it is shown to be unsafe, the municipality may be liable.[26] The duty to plan, however, is not a duty to plan correctly or wisely, but only a duty to try to plan correctly or wisely.

Perhaps, again, the real rationale behind the instant case, and those like

21. 350 U.S. 61, 65 (1955).
22. 91 N.Y. 67, 71 (1883).
23. 346 U.S. 15 (1953).
24. Supra note 21.
25. Murphy v. De Revere, 304 N.Y. 922, 110 N.E.2d 740 (1953).
26. Eastman v. State of New York, 303 N.Y. 691, 103 N.E.2d 56 (1951).

it, is none of the lofty and nebulous considerations given above, but simply a refusal of the Court to prefer a jury verdict as to the reasonableness of a traffic plan to the considered decision of an expert government body which, under the evidence adduced at the trial, carefully executed a traffic safety plan which operated without a hitch for over three years previous to the accident which it allegedly caused.

Whatever the reasoning behind the decision in the instant case, the chaos in this section of the law should give one pause before relying on it as binding precedent in any but an identical fact situation.

PROPERTY

Requirements for Covenants Running With the Land

In *Nicholson v. 300 Broadway Realty Corp.*,[1] the plaintiff and defendant's predecessor in title entered into an agreement whereby the latter was to supply steam heat to a building on the plaintiff's property and to furnish and maintain pipes for that purpose. Plaintiff agreed to pay $50.00 yearly and allow the defendant's predecessor to build a spur track across his land. The agreement provided that it applied to the heirs and assignees of the parties. For twenty-seven years, the defendant's predecessor provided the heat in fulfillment of its covenant. In 1956, a series of conveyances took place which formed the basis of the present action. The plaintiff alleged in his complaint that the original covenantor, The Embossing Co. (defendant's predecessor in title), had contracted to sell its land to an agent of the defendant, who agreed to assume the obligation to supply heat. He, in turn, assigned the contract of sale to another agent of defendant, who also assumed the burden of the covenant to provide heat, and to whom the land was deeded as grantee. Subsequently, the land was reconveyed, this time to the defendant, in an agreement making no mention of the obligation to provide heat. Upon the defendant's refusal to perform the covenant, the plaintiff brought an action for specific performance and damages. The defendant contended that the action had become academic, since the plaintiff had sold his own land to the defendant. The Court of Appeals, although agreeing that the question of specific performance was moot, held that the plaintiff might properly litigate the question of damages.

The Appellate Division affirmed an order of the Supreme Court dismissing the plaintiff's complaint, holding that the covenant to supply heat was not one which may run with the land, since it was affirmative in nature.[2] The Court of Appeals reversed, holding that the covenant ran with the land and so was enforceable against a subsequent grantee. In addition, the Court held that the assumption agreement between The Embossing Co. and defendant's alleged

1. 7 N.Y.2d 240, 196 N.Y.S.2d 945 (1959).
2. 6 A.D.2d 627, 180 N.Y.S.2d 535 (3d Dep't 1958).