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Non-Third Party Safe Place Cases

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NON-THIRD PARTY SAFE PLACE CASES

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Basically the application of the safe-place statute to non-third party claimants is the same as in third party cases.

The application of the safe place statute to persons other than employees is based upon the definition of frequenter as found in Section 101.01(5) of the Wisconsin Statute. That is broad enough to cover anybody who is in or about a public building as defined by the statute or a place of employment who is other than a trespasser.

I. SAFE-PLACE STATUTE V. COMMON LAW

The importance of the statute to non-third party claimants is in opening up of heretofore non-liability fields of litigation. We are all familiar with the "falling-down" cases which, on common law principles, are usually sure losers. It is in such cases that it is important to dig deep to try to find some application of the safe-place statute. Here is where a searching interview together with detailed investigation to begin with, to determine what elements would bring the place where the accident happened under the safe-place statute, is very important. To begin with, the mere fact that in your initial investigation you determine that there might be plain common law negligence involved should not rule out your search for a safe-place violation. The two are not mutually exclusive and as our Supreme Court has pointed out, they are not even separate causes of action where they both exist in a case. Both a common law violation and safe-place violation should be pleaded as one cause of action. The latter is fundamentally an allegation of the violation of a standard of care which is set by statute and it becomes part and parcel of the overall negligence to be proven against the defendant. So we get back to the original proposition that where ordinary negligence is present in a case, it is nevertheless important to look for a concurrent violation of the safe-place statute. Conversely, having found a violation of the safe-place statute, one should also look for, allege, and try to prove the common law negligence aspect if it is present. There is no need to elect remedies.

II. PUBLIC BUILDINGS V. PLACE OF EMPLOYMENT

The fine distinction to look for in these cases is whether there has been a violation of that part of the safe-place statute dealing with place of employment or that part dealing with a public building. The question might immediately come to one's mind, what difference does it make, just so there is a violation of the safe-place statute? The difference arises

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in the proving of a violation of the safe-place statute. The extent of liability proveable as a violation of the public building aspect of the statute is much more confining than that covered by violations of the place of employment aspect. The distinction is best pointed up by consideration of one of the classic cases in this field: *Bersch v. Holton Street State Bank.*[1] That case involved a person who was injured while using the entry of the *Holton Street State Bank.* The slippery condition of the entry was caused by people tracking in water on their snowy shoes. The action was brought on the basis of failure of the owner of the public premises to make it as safe as reasonably could be expected by failing to use a rubber mat. The Court held that the owner of a public building was under no duty to use a mat and failure to use one was not a structural defect; that since it is to be expected that water will constantly be tracked in and out by people entering such a public place, it would be asking too much to expect the owner to keep it absolutely dry. Thus, under the public building part of the safe-place statute, it was impossible to establish a case.

Let us examine the evolution of the problem launched in *Bersch.*[2] The problem of a snowy, slippery entry to a business place was involved again in *Sturm v Simpson's Garment Company.*[3] There the case was decided in favor of the plaintiff and interestingly enough, on two grounds: first, on the question of common-law negligence, and secondly, on the basis of the "place of employment" aspect of the safe-place statute. The court distinguished the *Sturm*[4] case from the *Holton Street State Bank*[5] case because it was shown that the store owner in *Sturm*[6] did have a rubber mat which he could have used and he neglected to do so. But, moreover, it was held that even absent the fact that this owner had a rubber mat, it became a jury question as to whether or not he should not have provided one. The distinction, of course, is that for a public building to be unsafe within the statute, there must be a structural defect, and a slippery floor created by transitory conditions is not a structural defect. But, when one considers the standard of safety for a place of employment, the fact that the condition is non-structural is not controlling. By statutory definition, to be safe, there must be such freedom from danger to the property or the place of employment as the nature of the employment, place of employment or public building will reasonably permit. On its face it would appear the same rule applies to public buildings as to places of employment. Yet as stated above the application to public buildings is strictly structural. So in the *Sturm*[7]

[1] 247 Wis. 261, 19 N.W. 2d 175 (1945).
[2] Bersch v. Holton Street State Bank, 247 Wis. 261, 19 N.W. 2d 175 (1945).
[3] 271 Wis. 587, 74 N.W. 2d 137 (1956).
[4] Strum v. Simpson's Garment Co., 271 Wis. 587, 74 N.W. 2d 137 (1956).
[5] *Supra* note 2.
[6] *Supra* note 4.
[7] Strum v. Simpson Garment Co., 271 Wis. 587, 74 N.W. 2d 137 (1956).

case, the Supreme Court held that, because the slippery wet place was a place of employment, a jury could find that the nature of that place of employment could reasonably permit constant and effective means of preventing it from getting slippery by placing down a mat. Thus the distinction was clearly drawn. If plaintiff's only theory of liability for slippery business premises is as a public building—no mat necessary; as a place of employment a mat could be a necessity.

III. New Hope in Sidewalk-Fall Cases

Furthermore, the Court in *Sturm*[8] pointed out that while the accumulation of snow and ice in a public building would not be a structural defect to constitute a violation of the safe-place statute, a like natural accumulation of snow and ice might be the basis for holding an employer or owner of a place of employment liable for violating the safe-place statute in not providing a safe place of employment. Note how far this takes us in ice and snow slipping cases. Going back to common law, the mere natural accumulation of snow and ice in any place, including a public building, is an act of God and is not actionable negligence. This is also the result under the public building aspect of the safe place statute. But when it comes to a "place of employment," it does not matter whether it is an act of God or a natural accumulation; the duty is set by the statute for an employer to provide a place of employment, as reasonably safe as the nature of the employment will permit and it now becomes the duty of the maintainer of the place of employment to somehow neutralize this danger caused by a natural accumulation of snow and ice. This is a very important development in cases of falls by the non-employed public. Most lawyers in general practice can point to some case early in his career where someone fell on a parking lot or on a sidewalk adjacent to a place of business or on steps leading from a place of business in which he told the client that these are acts of God and there really is no recourse for the injured person. Then came the series of cases wherein our Supreme Court opened up the door to make these actionable by finding, sometimes quite tenuously, that these are places of employment. For instance, in *Werner v. Gimbel Bros.*,[9] the sidewalk which led to a parking lot was held to be a place of employment for those employees of Gimbels who would have to use the parking lot. When a customer fell on this sidewalk, it was held that she could base her claim on the safe-place statute, this being a place of employment and the customer being a frequenter. Similarly, there is a recent case in which a woman was walking away from a funeral parlor and fell on its icy steps. *Filipiak v. Plombon.*[10] Again it was held that this was a place of employment and therefore there was an action based thereupon. The final evolution has extended this to the sidewalk in front

[8] *Id.*
[9] 8 Wis. 2d 491, 99 N.W. 2d 708 (1959).

of the place of employment. In *Schwenn v. Loraine Hotel Company*,[11] the Court extended this principal almost to its limit. I say almost because it has not gone so far as to say that just because there is a sidewalk in front of a place over which an employee walks, it therefore is a place of employment and an employer has the duty to keep this as safe as the nature of the premises would reasonably permit. There must be some usurpation of the sidewalk by the employer as an adjunct of his business and in *Loraine Hotel*,[12] that nexus was supplied by the fact that the employer had taken over this one section of the public sidewalk as a regular cab loading and unloading area, practically to the exclusion of the public. Here bellboys had to constantly move around and it was easily observable that a dangerous icy condition could cause harm to a bellboy in the regular course of his employment. This suggests that in every case where there are some employees of the employer who carry on some of the employer's activities, the public sidewalk will be considered a place of employment (for instance, the starter at a night club who opens and closes cabs or calls cabs, or the package boy at a supermarket who will carry packages out to the front of the store to load cars). That, of course, could raise question as to how far down the street would this extend. What if the package boy has to carry it to a store four or five premises away from the main store? These are some suggested extensions of liability.

How far does one go on the sidewalk as a place of employment; could the mere fact that there is a public sidewalk in front of a place of business on which an employee might fall make it a place of employment? Section 102.03(1)(c)1 states that every employee going to and from his employment in the ordinary and usual way while on the premises of his employer or while in the immediate vicinity thereof, if the injury results from an occurrence on the premises, shall be deemed to be performing service growing out of and incidental to his employment. Doesn't the language "while in the immediate vicinity thereof," bring the public sidewalk in front of the place in as the place of employment of the workers therein? If so, anybody falling on that public sidewalk is falling on a place of employment which has not been rendered reasonably safe.

IV. Sidewalks as Places of Employment

But the sidewalk cases have not been confined to the slip and fall cases. The question has arisen quite frequently where someone has been injured due to temporary conditions, not structural in nature, either in the road or in the sidewalk, where a contractor has been doing either public or private work. Invoking the place of employment rules of the

[10] 15 Wis. 2d 484, 113 N.W. 2d 365 (1962).
[11] 14 Wis. 2d 601, 111 N.W. 2d 495 (1961).
[12] Schwenn v. Loraine Hotel Co., 14 Wis. 2d 601, 111 N.W. 2d 495 (1961).

safe-place statute can establish a claim which might not be actionable under common law negligence. A dramatic case pointing up the problem is *Thiel v. Bohr Construction Company.*[13] There a little boy was burned when he passed near a flare placed on a sidewalk. It was held that though this was a public street, it was a place of employment for the employees of the contractor, and therefore an unguarded flare constituted a failure of the employer to provide employment as safe as the nature of the premises would permit. Everybody knows that that employer could have put a glass shield around that flare.

Other cases have involved a situation in which the public was required to leave the traveled part of the sidewalk because of the preempting of that sidewalk by a contractor and thus were required to walk on roughened or unsafe road or parkway between the sidewalk and the road. A person being injured because of the failure of the employer to properly prepare that area for walking could establish a cause of action.

V. Non-Profit Non-Places-of-Employment

There is one area of frustration in applying these doctrines that ordinarily make a safe-place case so promising under place of employment criteria, and that is where the person is injured on the premises of either a governmental or an eleemosynary institution. Here the usual rules as to place of employment do not pertain, and only failure in structural defects are actionable as violations of the safe-place statute. The reason is that in Section 101.01(1) the definition of a "place of employment" has been limited to premises which are being used for profit making enterprises; non-profit or charitable hospitals and governmental institutions have been excluded.

Yet, here is where a little searching might establish a claim upon authority of *Gupton v. Wauwatosa.*[14] For instance, St. Joseph's Hospital has a contract with a private firm to have an electrician at all times assigned to the hospital to be sure that their electrical system is working. Doesn't the whole hospital now become a place of employment for a profit making enterprise? If so, any other such hospital, any other non-profit or eleemosynary organization, or governmental organization which would have such a situation prevailing, would become the owner or maintainer of a place of employment and would have the duty of seeing that its premises were as safe as the nature of the employment would reasonably permit. The fact is that hospitals have successfully barred actions by the plea that they are not places of employment. Investigation might prove that many of them in some respect are a place of employment for someone. Moreover, some hospitals permit their doctors to operate as independent contractors on their premises. This is

[13] 13 Wis. 2d 196, 108 N.W. 2d 573 (1961).
[14] 9 Wis. 2d 217, 101 N.W. 2d 104 (1960).

often the case with the X-ray men or the anesthetists; and these X-ray men or anesthetists might have assistants who are paid directly by them and not by the hospital. In other words, they are employees of these specialists. Does not this, therefore, make the hospital a place of employment because of these specific profit making enterprises?

VI. Scope of Safe-Place Statute

A. *In Buildings.*

One of the big problems posed in this whole field has been raised by a couple of decisions which the Supreme Court has rendered which seem to contradict each other in regard to which part of a public building the statute applies. Assume that an overall structure is a public building by statutory definition. If a person is hurt in some remote part of it, is he necessarily covered by the safe-place statute? Apparently this is a yes and no question determined by the circumstances. Under some circumstances the injury would have to happen in a part of a building which is commonly used by the public or three or more tenants. This would be the result in those cases where there is a failure of maintenance, as distinguished from a structural defect. See *Frion v. Coren.*[15] But then we run head on into the case of *Hanlon v. St. Francis Seminary.*[16] There the court seemed to rule out any liability for a structural defect or a failure of maintenance if the accident occurred in a part of the structure not commonly used by the public or by three or more tenants, or where the employer had not maintained jurisdiction over the premises. The Supreme Court has apparently now laid this question to rest in the case of *Lealiou v. Quatso,*[17] and has re-established definitely the distinction between structural defects and maintenance defects. The court distinguished the *Hanlon*[18] case, on the ground that it was not squarely in point to begin with because what was involved there was a brick wall which, in its very character, could not be considered a public building, and therefore whatever was said in that case about structural defects was *obiter dicta.* This of course leaves in dispute the holdings in *Grossenbach v. Devonshire Realty Co.,*[19] *Flynn v. Chippewa County,*[20] and *Delaney v. Supreme Investment Co.*[21] In a final analysis, the *Lealiou*[22] case distinguishes these other cases by practically overruling the *Flynn*[23] case, limiting the language of *Delaney*[24] and by redefining the holding in *Grossenbach*[25] to the effect that now,

[15] 13 Wis. 2d 300, 108 N.W. 2d 563 (1961).
[16] 264 Wis. 603, 60 N.W. 2d 381 (1953).
[17] 15 Wis. 2d 128, 112 N.W. 2d 193 (1961).
[18] Hanlon v. St. Francis Seminary, 264 Wis. 603, 60 N.W. 2d 381 (1953).
[19] 218 Wis. 633, 261 N.W. 742 (1935).
[20] 244 Wis. 455, 12 N.W. 2d 683 (1944).
[21] 251 Wis. 374, 29 N.W. 2d 754 (1947).
[22] Lealiou v. Quatso, 15 Wis. 2d 128, 112 N.W. 2d 193 (1961).
[23] Flynn v. Chippewa County, 244 Wis. 455, 12 N.W. 2d 683 (1944).
[24] Delaney v. Supreme Investment Co., 251 Wis. 374, 29 N.W. 2d 754 (1947).
[25] Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935).

examination will not be made as to whether or not the part of the building where the injury occurred comes within the definition of a public building (i.e., used by the public or three or more tenants), but whether there was any duty owed to the person who was injured in that part of the building. In other words, if it was used by only two tenants and yet the person injured had a right to be there, there still would be a duty. To sum up, one should first determine whether the building as a whole or any part of it qualifies as a public building. If it does, the whole building will so qualify. The second determination is whether the party who is injured in some out of the way part is there for an authorized purpose, or whether he is a trespasser in that part of the building.

B. *Around Buildings.*

The application of the statute to the peripheral parts of a public building has also been extended, but by recent legislative action rather than by court interpretation. In 1957, Section 101.01(12) was amended to make a porch, steps or an approach to a building a part of the structure of that building. Prior to that our Court had held in *Moore v. City of Milwaukee,*[26] that a woman who was hurt when she stepped out of a temporary voting building which had an unattached step that led into the structure, and this step tilted or teetered causing her to fall, that this was not an integral part of the structure. It was held to be just an approach to a public building, but not actually the public building. This motivated the aforementioned amendment. As one can see this can have a practical effect in bringing into play steps or entry structures which othterwise might have been considered too remote.

VIII. Picking Defendants

Finally, there is the problem of deciding who to bring the action against. Broadly speaking, the answer is to include anybody and everybody who is the owner, maintainer or controller of a public building or place of employment. This raises the problem of co-extensive responsibility. The duty to provide a safe place of employment or to maintain a safe public building is a non-delegable duty. There can be multiple owners or maintainers of a place of employment or a public building and each one individually and separately has a duty to provide a safe place of employment or a safe public building. *Singleton v. Kubiak & Schmitt, Inc.*[27] This is a hard concept for even judges to understand. In practical application this can be very important, especially when faced with an uninsured or non-responsible defendant. A typical case could be an injury on the premises of an individual home owner who has no public liability insurance. If it could be shown that someone else was

[26] 267 Wis. 166, 65 N.W. 2d 3 (1954).
[27] 9 Wis. 2d 472, 101 N.W. 2d 619 (1960).

engaged on the premises as an employer at the time the injury was suffered, he could sue that party.

An interesting problem arose in a train crossing case against a railroad. Generally, these are very difficult cases to win under the common-law. Yet in the case of *Bembinster v. Aero Auto Parts*,[28] the railroad crossing was held to be a place of employment because the railroad was located on private property. There was an access road that crossed the railroad which was unguarded and thus it became the duty of all maintaining or controlling that crossing to provide a place of employment which was as safe as the nature of the premises would reasonably permit. Thus, a much stricter standard was applied to that crossing than would be at common law, and the railroad had liability which it might not have had under common-law.

Therefore, it is incumbent on the plaintiff's attorney to make a thorough examination of the facts of his case, because often times the statute allows recovery where a common law action would be unsuccessful.

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[28] 7 Wis. 2d 54, 95 N.W. 2d 778 (1959).