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Municipal Liability for Paving Disrepair in Wisconsin

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MUNICIPAL LIABILITY FOR PAVING DISREPAIR IN WISCONSIN

Liability of a town or county under Section 81.15 of the Wisconsin Statutes has been determined through a long history of judicial decisions. By this statute,[1] the municipality, not ordinarily liable for its negligence,[2] opens itself to liability on account of injuries received, if such injuries happen by reason of the "insufficiency or want of repairs of a highway" which the municipality is bound to keep in repair. Previous to 1953, the decisions had not been consolidated in a clear-cut manner to show precisely what condition had to exist in order for a rut or hole in a highway to be an "insufficiency or want of repair" within the meaning of the statute. Now, due to four recent decisions,[3] this matter is well-defined.

By insufficiency or want of repair, as referring to ruts, holes and

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[1] 81.15. *Damages Caused by Highway Defects; Liability of Town and County.* If damages happen to any person or his property by reason of the insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair, the person sustaining such damages shall have a right to recover the same from such town, city or village, but no action shall be maintained by a husband on account of injuries received by the wife, or by a parent on account of injuries received by a minor child. If such damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county shall be liable therefor and the claim for damages shall be against the county. If the damages happen by reason of the insufficiency or want of repairs of a bridge erected or maintained at the expense of two or more towns the action shall be brought against all the towns liable for the repairs of the bridge and upon recovery of judgment the damages and costs shall be paid by such towns in the proportion in which they are liable for such repairs; and the court may direct the judgment to be collected from each town for its proportion only. No such action shall be maintained unless within 30 days after the happening of the event causing such damages, notice in writing signed by the party, his agent or attorney shall be given to the county clerk of the county, a supervisor of the town, one of the trustees of the village or mayor or city clerk of the city against which damages are claimed, stating the place where such damages occurred, and describing generally the insufficiency or want of repair which occasioned it and that satisfaction therefor is claimed of such county, town, city or village. No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damages for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby. The amount recoverable by any person for any damages so sustained shall in no case exceed $5,000. No action shall be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless such accumulation existed for 3 weeks.

[2] Wisconsin municipalities are not liable for negligence while engaged in governmental functions where they have not created a nuisance in fact nor are they liable when the relation of governor and governed exists even if there is a nuisance in fact. Flamingo v. Waukesha, 262 Wis. 219, 55 N.W. 2d 24 (1952).

[3] Trobaugh v. Milwaukee, 265 Wis. 475, 61 N.W. 2d 475 (1953); First Nat. Bank & Trust Co. v. S. C. Johnson & Sons, 264 Wis. 404, 55 N.W. 2d 455 (1953); Pias v. Racine, 263 Wis. 504, 58 N.W. 2d 67 (1953); Jacobson v. Milwaukee, 262 Wis. 256, 55 N.W. 2d 1 (1953).

depressions, is meant depth in inches or changes in elevation, necessarily considering other conditions and surrounding circumstances.[4] In *Jacobson v. Milwaukee,*[5] the Supreme Court affirmed the trial court's action setting aside a special verdict for the plaintiff as not supported by the evidence where the plaintiff testified the hole was about 4 inches deep, yet by actual measurement there were many holes, none over 1½ inches deep.[6] The 70 year old woman plaintiff couldn't remember just where she fell or if she slipped on the ice. The *Jacobson* case relied heavily on *McCormick v. Racine*[7] where a 2⅜ inch elevation of a sidewalk slab was held not actionable "in the absence of other conditions or surrounding circumstances." *McCormick v. Racine* was distinguished, however, in *Pias v. Racine,*[8] where the depression in the sidewalk was only 1⅞ inches; yet, in view of the fact that two sidewalk slabs were cracked and there was a 20% slope, the Supreme Court reversed the trial court's directed verdict for defendant, saying these circumstances constituted an actionable defect for want of repair within Section 81.15.

In *First Nat. Bank & Trust Co. v. S. C. Johnson & Sons,*[9] the City of Racine was found primarily liable when plaintiff's decedent went to his parked auto, and, in stepping down from the curb, caught his foot in an opening where the curb disintegrated. Here it was said,

> "It is common knowledge that on busy streets the area from the curb to the sidewalk used by automobilists for leaving or reaching parked cars is in constant use, and evidence of its use was sufficient for support of the jury finding that such area was unsafe."

Icy ruts 3 to 5 inches deep by 6 inches wide were held actionable in *Trobaugh v. Milwaukee,*[10] reversing the trial court and reinstating a plaintiff's verdict which had been set aside.[11]

Many other defects have been held to be actionable: a crack, 2 to 7 years old, between two sidewalk slabs in a highly traveled residential section, big enough to admit a foot;[12] a hole in a street 1½ feet by 2 feet and 6 inches deep causing deceased to be thrown from a wagon;[13] a walk slanted 3¾ inches in 2 feet with a hole in a plank 12 inches long

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[4] Pias v. Racine, note 3, *supra,* citing Johnson v. Eau Claire, 149 Wis. 194, 135 N.W. 481 (1912), where striking a 3 inch plank causing deceased to be thrown from wagon was held actionable; 63 C.J.S. 136, 137; 1939 WIS. L. REV. 67.
[5] Note 3, *supra.*
[6] It should be established by actual measurement just how deep the hole is. Burroughs v. Milwaukee, 110 Wis. 478, 86 N.W. 159 (1901).
[7] 227 Wis. 33, 277 N.W. 646 (1938).
[8] Note 3, *supra.*
[9] 264 Wis. 404, 55 N.W. 2d 455 (1953).
[10] Note 3, *supra.*
[11] §331.045 of the Wisconsin Statutes as to contributory negligence held applicable.
[12] Hansen v. Green Bay, 218 Wis. 644, 261 N.W. 746 (1935).
[13] Wanta v. Milwaukee Elec. Railway & Light Co., 148 Wis. 295, 134 N.W. 133 (1912).

by 4 inches wide in which plaintiff's foot had lodged;[14] a hole in the shape of a half moon caused by surface water, 2 feet long and 15 inches wide, immediately adjacent to the sidewalk;[15] a hole 6 to 14 inches deep in a path;[16] a hole large enough to admit a foot;[17] a 4 inch difference in grade in a sidewalk causing a child's tricycle to overturn;[18] a hatchway through which a lady fell;[19] a rut in a wood bridge 3 feet long by 3½ inches deep, causing a load to shift on a wagon, pitching deceased off his wagon;[20] a rut 5 to 7 inches deep, 14 to 18 inches wide, 200 feet long, causing a farmer to fall off a wagon;[21] a culvert without guards.[22]

Some conditions which have been held not to be defects are: a hole 11 inches long, 3 feet wide, 1 inch deep in a sidewalk caused by installing a trapdoor in the walk, as was the common custom;[23] holes in a well-traveled street near a street car stop, none over 1½ inches deep.[24]

It has been noted that under Section 331.045 of the Wisconsin Statutes, the defense of contributory negligence applies.[25] So where the injured party knows that such a condition existed, a rebuttable presumption arises, which, however, gives way so readily to explanatory circumstances that any reasonable excuse for the forgetfulness is sufficient to carry the case to the jury.[26] Also, if there are many holes, the injured party will ordinarily not be held guilty of contributory negligence simply because he was too inept to negotiate the perilous passage without mishap.[27]

Because Section 81.15 conditions liability upon the giving of notice of injury within 30 days, and because some highway defects do not fall within the statute, as has been illustrated,[28] lawyers have unavailingly sought an alternative remedy in nuisance where the condition is

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[14] Sibroth v. Prescott, 63 Wis. 652, 22 N.W. 755 (1885).
[15] Rhyner v. Menasha, 107 Wis. 201, 83 N.W. 303 (1900).
[16] Rheinschmidt v. Tomah, 162 Wis. 242, 155 N.W. 122 (1916).
[17] Collins v. Janesville, 111 Wis. 348, 87 N.W. 241 (1901).
[18] LaMay v. Oconto, 229 Wis. 65, 281 N.W. 688 (1938).
[19] McClure v. Sparta, 84 Wis. 269, 54 N.W. 337 (1893).
[20] Koenig v. Arcadia, 75 Wis..62, 43 N.W. 734 (1889).
[21] Blaschke v. Watertown, 226 Wis. 1, 275 N.W. 528 (1937).
[22] Prahl v. Waupaca, 109 Wis. 299, 85 N.W. 350 (1901), saying that the matter is for the jury unless conditions are so clear and convincing as to leave no room for controversy.
[23] Reynolds v. Ashland, 237 Wis. 233, 296 N.W. 601 (1941) where it was said one traveling on a walk cannot recover on a mischance.
[24] Note 6, *supra*
[25] Note 11, *supra.*
[26] Note 16, *supra,* where plaintiff knew of the danger but stepped off a path into a hole in letting an oncoming person pass by.
[27] Note 13, *supra.* Also, the best jury charge is found in cases and briefs of Pias v. Racine, note 3, *supra;* which can be supported by Koch v. Ashland, 88 Wis. 603, 60 N.W. 990 (1894) involving a 14 inch accumulated mound of snow; McClure v. Sparta, note 19, *supra;* possibility as to contributory negligence in Rheinschmidt v. Tomah, note 16, *supra;* and Wanta v. Milwaukee Elec. Railway & Light Co., note 13, *supra.*
[28] Notes 3 and 6, *supra.*

sufficient to be a defect within the statute, but no 30 day notice was given, or where there is an insufficiency not severe enough to constitute the judicially defined want of repair.

In *Lindemeyer v. Milwaukee*,[29] plaintiff's attorney, evidently familiar with the *McCormick* decision,[30] where a 2⅜ inch difference in elevation did not constitute an insufficiency or want of repair, proceeded on the theory of nuisance where his client tripped on a 2¼ inch projecting water stop box. No 30 day notice was given. The court said:

> "To hold that the obstruction in the street does not amount to an insufficiency and want of repair and therefore that the street is reasonably safe for public travel and then to hold that the obstruction amounts to a nuisance is a contradiction in terms. The conduct of the city was neither improper nor unlawful. It had discharged its full statutory duty with respect to the maintenance of the street and therefore is not liable for the plaintiff's injury."
> "The 'nuisance doctrine' has so far developed as to indicate that there is a growing belief that any wrong committed by a municipality may be redressed on the theory that it is a nuisance, thus avoiding provisions of the law requiring prompt notice of injury and otherwise delaying action against municipalities at a time when the municipality may prepare an adequate defense. This is not a condition peculiar to Wisconsin but exists in many other jurisdictions."

So it seems the only remedy for damages occasioned by street defects, in the nature of ruts, holes, depressions and projections, is fixed under the statute. Failure to give the statutory notice is fatal.

A different case appears to be presented, however, by the situation where the municipality itself was guilty of the act (as opposed to the mere neglect) creating a condition which "unnecessarily incommodes or impedes the lawful use of the highway by the public."[31] A city may not create a nuisance even while performing a governmental function,[32] and is liable to the person injured thereby wherever the relationship of governor and governed did not exist between the municipality and the injured person at the time of injury.[33] This corollary rule, however,

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[29] 241 Wis. 637, 6 N.W. 2d 653 (1942). This case follows on "all fours" with Morrison v. Eau Claire, 115 Wis. 538, 92 N.W. 280 (1902) where plaintiff filed a claim under Section 81.15, but did not appeal from disallowance of claim as required by the City Charter. In a circuit court action alleging the accumulation of stone, brick, cement, and ice on sidewalk constituted a nuisance; it was held that failure to show compliance with City Charter resulted in no cause of action being stated by plaintiff.

[30] Note 7, *supra*.

[31] Hughes v. Fond du Lac, 73 Wis. 380, 41 N.W. 407 (1889).

[32] Harper v. Milwaukee, 30 Wis. 365 (1872); Gilluly v. Madison, 63 Wis. 518, 24 N.W. 137 (1885); Hughes v. Fond du Lac, 73 Wis. 380, 41 N.W. 407 (1889); Folk v. Milwaukee, 180 Wis. 359, 84 N.W. 420 (1900).

[33] Robb v. Milwaukee, 241 Wis. 432, 6 N.W. 2d 222 (1942). Here the relationship did not exist and recovery was allowed where a pedestrian using the sidewalk was struck by a baseball hit from a city park. In Virovatz v. Cudahy,

is of little assistance to one injured by the usual street or sidewalk defect, because (1) the condition is ordinarily caused by the elements or by the impact of heavy traffic over a period of time, and the municipality's only part in the situation is a failure to repair, (2) the relationship of governor and governed ordinarily exists between the pedestrian or motorist injured and the municipality at the time of injury, since the injured person is ordinarily enjoying the product of the same governmental activity claimed to be responsible for the injury.

The court has, on several occasions of late,[34] called for legislative intervention in altering or avoiding the rule of municipal nonliability for negligence, characterizing the rule as archaic and unsound on principle. A general abrogation of that rule by legislative action would involve, conceivably, a considerable extension of municipal liability in the "insufficiency or want of repair" cases. There is no necessary conclusion that a defect not sufficiently substantial to constitute an "insufficiency" within the present Section 81.15 would also be non-actionable under the doctrines of common-law negligence. Even the familiar expansion-crack in a city sidewalk might conceivably constitute a negligent act or omission, while it could not be made the basis of liability under present law.

Considerable care is therefore indicated in any attempt to broaden the basis of municipal liability for such conditions, lest the performance of ordinary and necessary municipal functions be made excessively risky.

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211 Wis. 357, 247 N.W. 341 (1933) recovery was denied where a boy drowned in a city pool. The governor-governed relationship exists when the person injured is making use of the facility which causes the harm.

[34] Britten v. Eau Claire, 260 Wis. 382, 51 N.W. 2d 30 (1952); cited also in Carlson v. Marinette County, 264 Wis. 423, 59 N.W. 2d 486 (1953); Lindemeyer v. Milwaukee, note 29, *supra*.