Marquette Law Review

Volume 33
Issue 1 *May 1949*

Article 13

Torts: Duty of Municipality to Erect Warning Signs at Curve in Highway

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Arthur H. Seidel, *Torts: Duty of Municipality to Erect Warning Signs at Curve in Highway*, 33 Marq. L. Rev. 74 (1949).
Available at: http://scholarship.law.marquette.edu/mulr/vol33/iss1/13

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"Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. When duly made, tender entitles the seller to acceptance and to payment according to the contract."[15] "Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due."[16]

The other leading case on self-service stores corroborates this contention quite succinctly:

> "It is true that customers were invited to take possession of the goods that they intended to purchase and, if such possession may be considered the equivalent of delivery of the bottle, such delivery was conditional and was made only for the purpose of permitting the customer to take it to the cashier. Possession alone was not in these circumstances sufficient to pass title.[17]

The quesion of privity of warranty was not raised in the principal case. There is authority to the effect that manufacturers and bottlers of beverages may be held liable to consumers who purchased from intermediate dealers.[18]

HARRY E. FRYATT

Torts — Duty of Municipality to Erect Warning Signs at Curve in Highway — Plaintiff passenger in a car driven by one Schreck was proceeding eastward at 3:30 A.M. on a July morning over a street on which residences were within five hundred feet of one another. It was foggy and the car proceeded at between twenty and thirty-five miles per hour. The eighteen foot wide macadam street with one and one half foot gravel shoulders made a right angle turn to the North; a series of twelve three foot white topped guard posts five feet apart marked the outside of the curve. At the curve the travelled way, i.e. the macadam and gravel shoulders, increased to a twenty-two foot width. Schreck, when he perceived the white topped posts in front of him, applied his brakes and after skidding fifty-one feet around the curve collided with a tree at a point twenty-three inches east of the traveled way. The tree was fourteen inches in diameter and over twenty feet high. Plaintiff alleged liability under section 81.15 of the statutes for an insufficiency and want of repair of a public highway due to an absence of warning signs to indicate existence of the curve and the proximity of the tree to the traveled way. There was no allegation of insufficiency in construction or repair of the macadam surface. *Held:*

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[15] *Ibid,* sec. 76(1).
[16] *Ibid,* sec. 76(2).
[17] *Supra,* note 5.
[18] 17 A.L.R. 696.

the mere existence of a right angle turn is not *per se* an insufficiency and there was no duty to give any warning of road conditions which in and of themselves provide ample and timely notice to one using the highway with due care under the circumstances. Neither the proximity of the tree nor increased road width at the turn constituted a proximate cause of the accident. *Loehe v. Village of Fox Point, 253 Wis. 375, 34 N.W. (2d) 126 (1948).*

In early English history the government maintained and constructed the highways and nonliability of the sovereign attended this governmental function at common law. In this country the majority of states do not hold with this rule. Instead, liability for lack of a reasonably safe construction, repair, and adjoining way is imposed even without a statutory duty upon the municipality.[1] Wisconsin, following the English view, requires a statutory duty to give a right of recovery for any insufficiency or want of repair of a highway.[2] Section 81.15 of the statutes[3] creates such a duty. It was in existence as early as 1849[4] and it is questionable whether the legislative intent at such an early date was to extend the scope of the statute to reflectors and warning devices for approaching curves. There is no other statutory provision regarding a municipality's duty to place warning signs at curves, but a lack of a barrier or warning device for a new curve at a reconstructed T-section has previously been held an insufficiency.[5] Other cases considering whether or not a lack of warning devices creates an insufficiency show that a freshly oiled highway is in itself sufficient notice thereof to a traveler and no duty devolves upon a highway commissioner to erect signs as to such conditions,[6] and similarly a barrier across a bridge approach constitutes ample warning of road conditions when it can be observed at a point three hundred feet away, notwithstanding icy road conditions from which plaintiff may slide into the river.[7] These cases follow the general interpretation of section 81.15 that negatives any insufficiency or want of repair of a street so long as it is, under

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[1] McQuillan, The Law of Municipal Corporations, 2nd Ed., sec. 2900-2904.
[2] Hogan v. Beloit, 175 Wis. 199, 184 N.W. 687 (1921); McCoy v. Kenosha County, 195 Wis. 273, 218 N.W. 348 (1928).
[3] Wis. Stats. (1947) sec. 81.15, "If any damage happens 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 . . . shall have a right to recover the same from such town, city or village. . . . If such damages happen by reason of the insufficiency or want of repair of a highway which any county . . . is bound to . . . repair . . . the county shall be liable. . . ."
[4] Wis. Stats. (1849) sec. 103 c. 16.
[5] Martinson v. Polk County, 227 Wis. 444, 279 N.W. 60 (1938).
[6] Raymond v. Sauk County, 167 Wis. 125, 166 N.W. 29 (1918).
[7] Butcher v. City of Racine, 189 Wis. 541, 208 N.W. 244 (1926), also see Buckley v. County of Washington, 189 Wis. 176, 207 N.W. 558 (1926); Lindgren v. La Crosse County, 231 Wis. 347, 285 N.W. 772 (1939).

the circumstances of place, time, nature and amount of travel, reasonably safe for public use by persons in the exercise of ordinary care.[8]

It now appears as a rule that no warning of road conditions are required if, under the conditions of the road coupled with due care of the driver, it can be said the road itself gives ample warning and notice of its condition. The *Loehe* case crystallizes this rule for curves in residential districts by upholding the governmental function of road construction with the attending nonliability to the extent that a curve in itself produces no insufficiency. There being no statutory requirement for warning devices the court indicated that the only basis for alleging an insufficiency under sec. 81.15 may be an impairment of view other than ordinary darkness or fog. Such an impairment appears extremely unlikely at lawful speeds. California has arrived at a like conclusion in interpretation of a similar statute.[9] It remains undecided whether an open highway attended with higher speeds and fewer curves may present greater deception to the motorist under unusual conditions such that a lack of a warning device may be an insufficiency. New York holds it should be the duty of the municipality to foresee such conditions and failure to do so is a lack of good engineering principles.[10]

It has been held that a telephone pole one foot from a highway evidences negligence upon which a passenger can recover regardless of the driver's negligence.[11] That the distance of the pole from the highway was of utmost importance was borne out in a later case in which a guy wire was struck by deceased at a point approximately eight feet from the highway and no recovery was allowed.[12] In situations of this nature it is well to keep in mind that static conditions which a driver should take into consideration as a matter of look out, are not a proximate cause of an accident. Thus where a driver turned out to avoid a truck parked on the highway in contravention of the statutes, and being startled by a car passing him swerved into the truck, plain-

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[8] Byington v. Merrill, 112 Wis. 211, 88 N.W. 26 (1901).

[9] Waldorf v. City of Alhambra, 3 Cal.(2d) 635, 45 P.(2d) 207 (1935) where the Court said, "To the prudent operator of a motor vehicle, acting within the scope of the law governing his own conduct in traversing a public street in the nighttime, the pavement, curb, sidewalk, and the parkway with the trees or poles therein constitute a barrier or warning sufficient to avert disaster and as readily visible to the alert driver as a sign informing him of the condition."

[10] Vande Walker v. State, 278 N.Y. 454, 17 N.E.(2d) 128 (1938); Le Boenf v. State, 7 N.Y.S.(2d) 621 (1938).

[11] Druska v. Western Wisconsin Telephone Co., 177 Wis. 621, 189 N.W. 152 (1922).

[12] Phelps v. Wisconsin Telephone Co., 224 Wis. 57, 271 N.W. 369 (1943) where the Court said, "Druska v. Western Wisconsin Telephone Co. . . . is distinguishable. There the pole was within a few inches of the traveled path and a very slight variance in course would cause a collision with it."

tiff passenger had no recovery.[13] Similarly, a party who collided with guard posts when attempting to pass a bus negligently operated to the left of the center line had no recovery, the moving bus being a condition rather than a cause.[14] The *Loehe* case follows the pattern of these decisions and since the Court pointed out that the proximate cause was the inability to negotiate the curve with a resultant fifty-one foot skid preceding the collision the proximity of the tree to the right of way was not a proximate cause of the accident as a matter of law

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[13] Collar v. Meyer, 251 Wis. 292, 29 N.W.(2d) 31 (1947) the Court stated, "The driver's sudden loss of control was due to a cause disassociated from and in no way connected with the position of the standing truck. The accident here was caused by the host's failure to exercise ordinary care under the circumstances and not by the condition then existing with relation to the truck."

[14] Swinkels v. Wisconsin Michigan Power Co., 221 Wis. 280, 267 N.W 1 (1936).