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Municipal Corporations: Liability of Municipality for Defects in Sidewalks and Streets

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The statute begins to run when the breach of duty occurs. When the injury is complete at the time of the act, the period commences to run at that time. When however, the injurious consequences arise from a course of treatment, the statute of limitations does not begin to run until the treatment is terminated. *Giambozi* v. *Peters,* 16 Atl. (2d) 833 (Conn. 1940).

Where the treatment of the doctor continued in an attempt to cure burns caused by negligent use of X-ray on the plaintiff, the statute was held to run from the time of the X-ray treatment. *McCoy* v. *Stevens,* 182 Wash. 55, 44 Pac. (2d) 797 (1935).

Negligence sufficient to give a cause of action may occur either in the treatment of the patient's injury or in the preceding diagnosis. The Vermont court explains this in *Dominiz* v. *Pratt,* 13 Atl. (2d) 198 (1940). The standard of the degree of care and skill that is ordinarily possessed and exercised in like cases by physicians in the same general line of practice who follow their profession in the same neighborhood applys not only to physical treatment of the patient's injury but as well to his diagnosis of the malady and hence negligence may exist in a failure to apply a proper remedy upon correct determination of existing physical conditions or it may precede that and result from a failure properly to inform himself of these conditions. Wisconsin follows the rule that malpractice may consist in a lack of skill or care in diagnosis as well as in treatment. *Kuechler* v. *Volgmann,* 180 Wis. 238, 192 N.W. 1015 (1923); *Jaeger* v. *Stratton,* 170 Wis. 579, 176 N.W. 61 (1920).

In *Lottin* v. *O'Brien,* 146 Wis. 258, 131 N.W. 361 (1911), where the last treatment of the patient was over one year before the suit was started, the Wisconsin court held the mere fact that there was no discharge of the defendant on that day would not prevent the statute from running. The statute of limitations began to run when the cause of action accrued and this accrued when the negligent acts were committed without reference to discharge. The negligent omission to discover the improper setting occurred at such dates and times as the defendant undertook to examine, treat, and care for the disabled arm. If there was negligence in treating the arm after negligently setting of the bones, this latter negligence occurred not later than the date when treatments by the defendant ceased. The fact that there was no official discharge of the patient was considered immaterial.

The Minnesota court, in deciding that the statute of limitations begins to run at the end of treatments, commented on language used in the *Lotten case, supra,* as follows: "This language appears to express the thought that, so long as the doctor continues the treatment so unskillfully and negligently that he fails to discover the condition brought about by a prior unskillful and negligent act, he is not in a position to urge that the statute of limitations has started to run." *Schmitt* v. *Esser,* 193 Minn. 354, 226 N.W. 196 (1929).

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Municipal Corporations—Liability of Municipality for Defects in Sidewalks and Streets.—The defendant, Hosmer, obtained access to the basement of his building by means of a trapdoor on the sidewalk. The hinges of the trapdoor were about ¾ inches high. In the sidewalk, about a foot and a half from the trapdoor, there was a crack which led into the center expansion joint of the walk, and which had broken away forming an irregular hole, triangular in shape. The hole, was about 11 inches long and 3 inches wide at one end, and tapered to a blunt point at the other end. Its depth was about one inch at the

deepest part. Plaintiff, while walking along the sidewalk about 8 o'clock in the evening of a rainy November day, caught her left foot in the triangular shaped hole. When she attempted to regain her balance her right foot came in contact with the hinge of the metal trapdoor placed in the sidewalk. She fell and broke the femur bone in her right leg. She brings this action against the city of Ashland and the defendant, Hosmer, alleging that although the hinge by itself does not constitute an actionable defect and the hole by itself is non-actionable as a matter of law, the relation of one to the other in combination amounts to an insufficiency in want of repair. The lower court granted defendants' motion for a non-suit. On appeal, *held,* judgment affirmed. Where there are non-actionable defects or imperfections by a chance combination near each other, the combination does not constitute "insufficiency or want of repair" within the meaning of section 81.15 of the Wisconsin Statutes. This section provides that a right of action shall accrue "to any person . . . sustaining damages . . . by reason of insufficiency or want of repair . . . of any bridge, sluiceway or road." It is to be noted that the statute expressly provides that "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 shall have existed for three weeks." Those responsible for maintaining walks are required to keep them only reasonably safe, not absolutely safe at all times. The placing in the sidewalk of trapdoors, which conform to reasonable standards, is reasonable as a matter of law. The hinge 3 inches high, by itself, and the hole 1 inch high as a matter of law were not unreasonable. *Reynolds* v. *City of Ashland,* 237 Wis. 233, 296 N.W. 601 (1941).

The rule seems to be well settled that the liability of a municipality for injuries due to defects or obstructions in streets is for negligence and negligence only. The municipality is not an "insurer" for the safety of travelers, but is only required to exercise reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel for those using them in a proper manner. *Gettys* v. *Town of Marion,* 215 N.C. 261, 10 S.E. (2d) 799 (1940); *Croner* v. *Village of Monticello,* 261 App. Div. 360, 26 N.Y.S. (2d) 63 (1941); *Davis* v. *Potter,* 340 Pa. 485, 17 A. (2d) 338 (1941); *Storen* v. *City of Chicago,* 373 Ill. 530, 27 N.E. (2d) 53 (1940); *Freer* v. *City of Eugene,* 111 P. (2d) 85 (Ore. 1941); 43 C.P.J. 1010.

The adoption of the above rule apparently has made the courts reluctant to hold a municipality liable. The general tone is expressed in 43 Corpus Juris at page 1010. "The municipality will not be liable for every defect or obstruction, however slight or trivial, or little likely to cause injury, or for every mere inequality or irregularity in the surface of the way; it is only against danger which can or ought to be anticipated, in the exercise of reasonable care and prudence, that the municipality is bound to guard." The language is more explicit in *Fitzgerald* v. *City of Concord,* 140 N.C. 110, 52 S.E. 309 (1905); "To establish liability it is not sufficient to show that the defect existed, it must be shown that the officers of the town knew or should have discovered the defect from which injuries to travelers might have been expected." Accordingly, no recovery was allowed when a pedestrian slipped on a lid of a water meter box which was located in a grass plot between paved portion of sidewalk and curb. *Gettys* v. *Town of Marion, supra.* Nor where a woman tripped over a curb rising 6 inches from the roadway, *Croner* v. *Village of Monticello, supra,* or where a pedestrian slipped over an elevation in the pavement of the sidewalk, ¾ to 1⅛ inches in height, *Davis* v. *Potter, supra.* The court allowed no recovery in an action for injuries suffered when the plaintiff's car skidded on loose stone

or gravel and crashed into a pole. *Clapham* v. *City of Huntington,* 32 N.E. (2d) 118 (Ind. 1941). The court reasoned that the findings of the lower court for the defendant were sustained by legitimate inferences that could be drawn from the testimony in the case. The testimony revealed that many automobiles passed along the street safely and the plaintiff himself testified he skidded partly because he "got the jitters and lost control of the car."

Most courts feel that the accumulation of ice and snow is an act of God rather than the responsibility of the municipality. The city was held not liable, where the plaintiff sued for injuries suffered when his automobile slid down an icy incline into the path of a railroad train. *Adams* v. *Penn. R. R. Co.,* 117 F. (2d) 649 (C.C.A. 7th, 1941). It has been held that the duty to keep streets reasonably free from defects does not extend to hazards due to natural accumulations of ice. *McQueen* v. *City of Elkhart,* 15 Ind. App. 671, 43 N.E. 460 (1896); *Johnson* v. *City of Eansville,* 95 Ind. App. 417, 180 N.E. 600 (1932); *Michigan City* v. *Rudolph,* 104 Ind. App. 643, 12 N.E. (2d) 970 (1938).

Apparently following the doctrine that the "king can do no wrong," some courts seem to seize upon various circumstances to avoid holding the city liable for street defects. Naturally the words "reasonable care," "due care," and "ordinary care" give the courts a wide leeway in construction and application. In *City of Ada* v. *Burrow,* 171 Okla. 142, 42 P. (2d) 111 (1935), the court said: "In determining whether a municipal corporation is exercising reasonable care in the performance of its duty to make and maintain its streets reasonably safe, each case must depend upon its own surrounding circumstances. The care must be reasonable and commensurate with the danger, but in the performance of this duty the municipality has a wide discretion with which the court will not interfere in the absence of gross abuse. In each case involing negligence of the municipality in constructing and maintaining its streets and passageways, the way is to be pronounced sufficient or insufficient, as it is or is not reasonably safe for the ordinary purposes of travel under the particular case, considering the nature of the place, and such reasonable limitations as may be put upon the use of the way for travel by virtue of other public necessities, convenience and safety."

In accordance with the above rule, in a case where the pedestrian fell because of a defective condition consisting of an improvised step of three or four flat rocks in the middle of a ditch, presumably erected by some pedestrian to facilitate passageway over the ditch, there was held to be no liability. The ditch was located in an outlying section of the town. *City of Stroud* v. *Evans,* 187 Okla. 350, 104 P. (2d) 241 (1940). The Texas court, in *City of Waco* v. *Diamond,* 65 S.W. (2d) 272 (Tex. 1933), held that what is reasonable and what constitutes due care depends upon all the circumstances including normal climatic conditions. Here an unusual snowfall of 12 to 14 inches occurred in a section where climatic conditions are normally mild, and the city was not prepared to clean off its streets rapidly. The city was held not liable for injuries to plaintiff resulting from the icy condition of the sidewalk.

Whether a municipality exercised reasonable care in the maintenance of its streets is ordinarily a question of fact for the jury. *Botts* v. *City of Nashville,* 22 Tenn. App. 418, 12 S.W. (2d) 1099 (1938); *City of Birmingham* v. *Smith,* 200 So. 880 (Ala. 1941). For example, in a case where a pedestrian slipped on an icy sidewalk and fell on an iron statute located four inches from the sidewalk in a grass plot between the walk and the curb, the court held that it was for the jury to say whether the municipality should have forseen that the statue probably would be a cause of injury to the users of the sidewalk. *Schaut*

v. *Borough of St. Marys,* 141 Pa. Super. 388, 14 A. (2d) 583 (1940). In *Radford* v. *City of Asheville,* 219 N.C. 185, 13 S.E. (2d) 256 (1941), where the plaintiff slipped due to the warped, rusted and hingeless condition of a coal chute which reared up, when he placed his foot on one end, the jury's finding of negligence was undisturbed, the court saying that the existence of the duty of keeping streets and sidewalks in a reasonably safe condition, required a reasonable inspection of the streets from time to time, in order that dangerous obstructions, holes or surfaces may be discovered and the dangers removed. This duty applies to manhole covers, unloading chutes, and coal chutes or any other device forming an integral part of the sidewalk. Recovery was allowed in a case where the plaintiff pedestrian stepped into a hole in a sidewalk which had been in existence for five or six weeks, for the purpose of excavating dirt. The court sustained a jury verdict to the effect that to leave such a condition in a public thoroughfare was "marked carelessness." *Cox* v. *City of Coffeyville,* 153 Kan. 392, 110 P. (2d) 772 (1941). Where a complaint alleged that the defect consisted of the slick kind of brick with which the public way was paved and that the plaintiff was caused to fall by reason of the slick, slanting uneven defect, the Alabama court said; "The duty of the city is not to make such places level nor on a uniform plane of decline, nor to use the most approved material, nor to make them free from all danger, but it is its duty to use due care to construct and maintain them in a reasonably safe condition as to such persons as may be expected to use them in the exercise of due care. So that if the percentage of decline was such that the material used was when constructed dangerously slick or had become so by use known to the city (or which ought to have been known by it), when used with due care by those who would probably use it, and such a one is injured thereby in such use, there is said to be liability for it." Judgment was for the plaintiff and the court added: "This rule does not prohibit the use of smooth surfaced paving material, nor a construction with a slope suited to the situation, but does prohibit a combination of those conditions if they create a situation not reasonably safe for the use of people for whom it is designed. . . ." *City of Birmingham* v. *Monette,* 1 So. (2d) 1 (Ala. 1941). It is to be noted that the city does not violate the above quoted principle by maintaining a sloping or uneven place in the sidewalk where the contour of the layout reasonably suggests such a condition is proper or is to be anticipated by pedestrians, no other defect being known to exist. *Hesse* v. *City of N. Y.,* 185 App. Div. 707, 173 N.Y.S. 827 (1919); *City of De Pere* v. *Hibbard,* 104 Wis. 666, 80 N.W. 933 (1899); *Cook* v. *Milwaukee, 27* Wis. 191 (1870); *City of Pikeville* v. *Williams,* 213 Ky. 52, 280 S.W. 467 (1926).

The wide flexibility with which several courts construe the term "reasonable care" is manifested in a decision by the Massachusetts court, *Sears* v. *Inhabitants of Greenfield, 287* Mass. 445, 192 N.E. 1 (1934), which seems to summarize the different interpretations which can be placed upon the term. In this case, recovery was allowed when the plaintiff tripped because a block of the sidewalk projected from three-fourths to one and one-half inches above an adjacent block. The court said: "What is reasonable care is never a fixed or inflexible thing, it varies with the circumstances calling for its exercise. Manifestly an extent or character of a projection or depression in a highway which under one set of attendant circumstances would amount to actionable defect by reason of the statute would not necessarily under other and different conditions constitute such a defect. A certain extent of a projection above the surface of a little used highway in a remote part of town might not amount to such a defect as the statute contemplates."

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