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Necesssity of Notice to a Municipal Corporation to Render It Liabile for Defects in Its Streets

Phyllis Cavender

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NOTES AND COMMENT

NECESSITY OF NOTICE TO A MUNICIPAL CORPORATION TO RENDER IT LIABLE FOR DEFECTS IN ITS STREETS. A municipal corporation is not an insurer of its streets;[1] and is not obliged to so construct and maintain them as to secure absolute immunity from any danger in using them. Generally stated, its duty is to exercise ordinary care to keep them in a reasonably safe condition for public travel;[2] this duty being in some states imposed by statute,[3] and in others, arising by mere implication. The Washington rule is well illustrated by the case of *Sutton v. Snohomish*,[4] in which the court said.

[1] *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006 (1894).

[2] *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 849 (1895) *Lorence v. Ellensburg*, 13 Wash. 341, 43 Pac. 20, 52 Am. St. Rep. 42 (1896) *Mischeke v. Seattle*, 26 Wash. 616, 67 Pac. 357 (1901).

[3] *Chapman v. Milton*, 31 W Va. 384, 7 S. E. 27 (1888). (Statute of W Va. imposes absolute liability, and proof of notice is unnecessary), *Witney v. Lowell*, 151 Mass. 212, 24 N. E. 47, 20 L. R. A. (N. S.) 692 (1890) *Lansing v. Toolan*, 37 Mich. 152 (1877) *Chape v. Eureka*, 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 327 (1889). (California recognizes no duty imposed on the city to make repairs except where expressly imposed by statute.)

> "Where a city has exclusive control and management of its streets with power to raise money for their construction and repair, a duty arises to the public from the character of the powers granted to keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and the city is liable to respond in damages to those injured by a neglect to perform such duty"

Negligence in the performance of that duty is the basis of corporate liability And where injury is the result of neglect to keep streets in repair, or remove obstructions, or remedy causes of danger occasioned by third parties, it is the general rule that the municipality will be liable, only if it has notice of such condition, such notice being either express or implied, actual or constructive.[5]

However, no notice is essential to the liability of a municipality when liability is predicated on its own or its officers' or agents' positive misfeasance in doing acts causing the streets to become out of repair and dangerous.[6] This, for the reason that a municipality is chargeable with knowledge of its own acts, or those ordered by it, as where work is done under a contract, or as some cases hold where the defect is created by persons under a license or permit from the city Thus, where injury was due to the fact that the street had been negligently constructed or defects were inherent in the plan of construction, the city was liable therefore without notice.[7] The duty to keep the streets in a safe condition rests primarily upon the municipality and can be neither delegated nor evaded.[8] The Washington court in the case of *Jefferson v. Chapman*[9] in discussing the application of the rule of respondeat superior to independent contractors, stated

> "Another exception to the general rule relieving an employer from liability for an injury occasioned by an independent contractor is where the party causing the work to be done is under a primary obligation, imposed by law, to keep the subject matter of the work in a safe condition. The principle upon which this exception is predicated is that, where a duty is so imposed, the responsibility for its faithful performance cannot be avoided, and that the party under such obligation cannot be relieved therefrom by a contract made with another for the performance of such duty"

See note 2, supra.

[5] *Boulder v. Niles*, 9 Colo. 415, 12 Pac. 632 (1886) *Doulon v. Clinton*, 33 Ia. 397 (1871).

20 L. R. A. (N. S.) 701-705.

[7] *Stone v. Seattle*, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 253 (1902).

[8] *Davis v. Wenatchee*, 86 Wash. 13, 149 Pac. 337 (1915) *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844 (1902)

[9] 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136 (1889).

The Supreme Court of Iowa in the case of *Bennett v. Mt. Vernon*,[10] expressed the general rule regarding work done by independent contractors in the following language

> "If the matter involved was one of positive duty to the plaintiff, then, of course, the town could not relieve itself by delegating the work to an independent contractor; or if the work was intrinsically dangerous, or when properly done was likely to create a nuisance, the town would be responsible for any damage resulting therefrom."

However, as is pointed out in the case of *Wilton v. Spokane*,[11] if the defect is entirely the wrongful act of the contractor and is collateral to the work contracted for, the city is not liable without notice. The injury complained of in that case was caused by an unexploded blast which had been left and covered over by the independent contractors constructing the street.

The weight of authority is to the effect that notice is not necessary where a municipality authorized by license or permit, third persons to place intrinsically dangerous obstructions in a street, or to make excavations of a dangerous character.[12] Washington is in line with this view and in the case of *Sutton v. Snohomish*[13] said.

> "The fact that a permit was granted was notice to the authorities that the work was in progress, and they were then charged with the duty of seeing it was properly conducted."

There appears to be a contrariety of opinion as to whether a municipality is chargeable with notice where it issues a permit to place building material on the street.[14] The case of *Columbus v. Penrod*[15] states the minority view

> "An examination of the cases will show that it is only when the city is the actor, or in cases of license by the city to do an intrinsically dangerous thing in the street, and not in the cases properly of mere regulation, that the city is liable without notice, or is charged with notice by the fact that it gave the permit to do the thing in the street."

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[10] 124 Ia. 537, 100 N. W 349 (1904).

[11] 73 Wash. 619, 132 Pac. 404, L. R. A. 1917 D 234 (1913).

[12] *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912 (1904, *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752 (1911) *Colquohon v. Hoquiam*, 120 Wash. 391, 207 Pac. 664 (1922).

[13] See note 2, *supra*.

[14] 46 L. R. A. (N. S.) 332.

[15] 73 Ohio St. 209, 76 N. E. 826, 3 L. R. A. (N. S.) 386. 112 Am. St. Rep. 716 (1906).

It is somewhat doubtful just what the Supreme Court of Washington would hold on this question. In the case of *Apker v. Hoquiam*,[16] it did not rule directly on the point as to whether notice was essential to liability, but said that the building materials having remained on the street for a period of thirty days, the city did have constructive notice of the dangerous condition.

As has been previously stated, notice when necessary to fix liability may be either actual or constructive. In various states statutes and city ordinances have been passed requiring actual or written notice of a defect to have been received by the city before the injury occurred. And for the most part they have been upheld as constitutional.[17] An Oregon case[18] held that the constitutional provision that "every man shall have a remedy by due course of law for injury done him," is subordinate to the doctrine that the state and its agencies cannot be sued without its consent. Washington along with Oklahoma[19] takes a contrary position. In the case of *Born v. Spokane*[20] the court ruled that an ordinance prescribing that twenty-four hours' actual notice before injury occurred must have been given to the city council or street superintendent, was unreasonable and void as an interference with the right to prosecute a claim for personal injuries.

Generally, to constitute actual notice to a city of a defect or an obstruction in a street, such defect or obstruction must have been brought to the attention of some officer charged with a duty respecting it. The Washington court in the case of *MacDermid v. Seattle*[21] held that proof of notice to an employee of park commissioners was not sufficient notice to charge the city when the control and maintenance of the streets were the duties of the board of public works. But actual knowledge on the part of a street superintendent or commissioner was held sufficient to impute notice to the city [22]

The question of constructive notice is usually one of fact for the jury, to be determined by the character and notoriety of the defect, its location with reference to the amount of travel thereon, and its duration. It is sufficient to prove that the obstruction or defect had existed such a length of time that the corporation in the exercise of proper care and diligence should have known and remedied it.[23] There is no fixed and definite rule as to what length of time is required in order to justify an inference of knowledge, although some states have attempted to control the same by statute. The Washington court points out in *Peterson v. Seattle*[24] that "the

[16] 51 Wash. 567, 99 Pac. 746 (1909)
[17] 43 C. J. 1822.
[18] *Platt v. Newburg*, 104 Ore. 148, 205 Pac. 296 (1922)
[19] *Tulsa v. Wells*, 79 Okl. 39, 191 Pac. 186 (1920).
[20] 27 Wash. 719, 68 Pac. 386 (1902).
[21] 93 Wash. 167, 160 Pac. 290 (1916).
[22] *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. (1895).
[23] *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394 (1897) *Peterson v. Seattle*, 100 Wash. 618, 171 Pac. 657 (1918)
[24] See note 23, *supra*.

question of time within which notice of a defect in a public street should be imputed to the city is determinable largely from the circumstances of each particular case." Furthermore it is stated that a much shorter time is required to charge the city with notice when the defect occurs on a busy thoroughfare than when it exists in a sparsely populated suburb of the city [25]

An essential element in the doctrine of constructive notice is that the defect must have been so apparent and patent that it could have been discovered by the use of reasonable care.[26] It was held in the case of *Short v. Spokane*[27] that a municipality could not be charged with notice of a defect unless it was so obvious as to attract the attention of people in the habit of passing there, although they need not have actually noticed it. However, the duty of a municipality in the care of its streets involves the anticipation of defects that are the natural results of use and climatic influences, and where there is a neglect of the officers to make frequent inspection of a structure, the city will not be relieved because the fact was not known or patent.[28] In the case of *Billings v. Snohomish*[29] it was held that it was the duty of city officers to take notice that constant use will gradually wear out a walk, and at best, the life of a wooden sidewalk is limited to but a few years; and that it was not enough that they might find that the surface of the walk appeared sound but they should have examined it as an entirety

Notice of general defectiveness of a street at a certain place will be sufficient to charge the municipality with negligence in not repairing a particular defect therein causing the injury if the general defect was of the same general character as the particular one, or in any way related thereto. Thus, if the city had notice of a general bad condition of a sidewalk, it is immaterial whether it knew of the actual hole causing the injury or whether such hole was caused by the plaintiff when the injury occurred.[30] It was also held in the case of *Dallas v. Moore*[31] that where there is an obvious defect so nearly and closely related to a condition which is apparently safe, but in fact defective that an investigation of the former would lead to knowledge of the latter, it may then be said that the city shall have had notice of the latter defect.

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[25] Where a fill had settled after a rain and the depression had existed for only four or five hours, it was held that this was not sufficient time from which notice might be imputed, *Chase v. Seattle*, 80 Wash. 61, 141 Pac. 180, 46 L. R. A. (N. S.) 332 (1914).

[26] *Silva v. Somerville*, 253 Mass. 545, 149 N. E. 410 (1925) *DuBois v.* Pancoast, 218 Fed. 60, 133 C. C. A. 662 (1914)

[27] 41 Wash. 257, 83 Pac. 183 (1905).

[28] 43 C. J. 1055, *Denver v. Dean*, 10 Colo. 375, 16 Pac. 30, 3 Am. St. R. 594 (1887).

[29] 51 Wash. 135, 98 Pac. 107 (1908).

[30] *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383 (1902).

[31] Tex. Civ. App. 230, 74 S. W 95 (1903).

When a city has notice of a condition from which defects proximately follow, such condition may be considered by the jury in determining whether the city might have obtained knowledge of the defects. Thus, in the case of *Hayes v. Seattle,*[32] where a person was injured by falling into an opening in the sidewalk caused by trap-doors having been raised, the court held that the city should have known that the opening was a menace to every one passing, and it was immaterial whether the city had notice of such use at the time in question. Under the same state of facts, the Montana court in the case of *Sweeny v. Butte*[33] stated

> "If the dangerous thing exists for a given use, the city permitting it to so exist for such use, the city must presume that it will be so used. These trap-doors and this opening, in this case, were for a given use, and the city certainly cannot avoid liability by demanding that it be notified every time the dangerous thing is put to the use intended and contemplated by its existence and construction."

The recent case of *Gabrielson v. Seattle*[34] also presents an interesting situation. The city permitted the partial closing of a busy thoroughfare during building operations, thus confining the street traffic at a particular point to a considerably narrowed way As a result the natural accumulation of oil and grease concentrated in this narrowed area, thus producing, as the jury found, a dangerous condition existing over the period of a month. A car skidded at that point due to this oil and grease, and caused the injury complained of. The court in holding the city liable, said

> "The city must exercise reasonable diligence in keeping its streets safe for ordinary travel, and is liable to answer for injuries arising from unusual conditions causing them to become unsafe, *whatever may be the nature of the condition which gives rise to the cause.* In this instance, therefore, if the narrowed space did cause an undue accumulation of oil and grease thereon, the city was bound to anticipate the hazards incident to the users of the streets would be increased, and is bound to answer for an injury arising thereon of which the increased hazard was the proximate cause, or one of the proximate causes, if there were more than one."

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[32] 43 Wash. 500, 86 Pac. 852, 11 Am. St. Rep. 1062, 7 L. R. A. (N. S.) 424 (1906). The same principle was again laid down in the case of *Tubb v. Seattle,* 136 Wash. 332, 239 Pac. 1009 (1925).

[33] 15 Mont. 274, 39 Pac. 286 (1895).

[34] 50 Wash. Dec. 83, 272 Pac. 723 (1928)

This decision is apparently sound upon the facts of the case, the city having permitted the partial obstruction of the street was justly held bound to anticipate a dangerous condition which might naturally follow. However, it is equally evident as the court points out that such a ruling should not be applied to a case where the injury results from an ordinary accumulation of oil and grease upon the streets, for to so hold would make the city a guarantor of conditions which are the natural incidents to the use of the streets, conditions which drivers of automobiles are bound to risk.

Another point to be considered in the doctrine of constructive notice is that evidence of prior accidents caused by the dangerous condition is competent as tending to show that proper officials had notice thereof.[35] The reason for this is that experience indicates that the publicity necessarily given these accidents is such that notice of them generally is communicated to some officer charged with a duty in respect to repairing the streets.

To summarize, it may be said generally that when an injury occurs as a proximate result of some negligent act of the city, or some one under its direction and control, i. e., independent contractors, licensees to obstruct the streets, etc., the city is chargeable with notice by reason of its own participation. Neither actual nor constructive notice is necessary But where the city is not a participant, either directly or indirectly in producing the cause of the injury, its liability can only be predicated on notice, either actual or constructive. PHYLLIS CAVENDER.

THE ADMISSIBILITY OF TESTIMONY CONCERNING TRANSACTIONS WITH DECEDENTS. This is written to supplement the article appearing in 1 WASHINGTON LAW REVIEW 21 on this subject,[1] and covers all the Washington decisions thereon from Volume 133 to and including Volume 153.

Since the former article was written the 1927 Legislature amended the statute[2] by adding the words "or in his presence" after the words "or any statement made to him." The object of this amendment was merely to make the language of the statute conform to the interpretation previously given to it by the Supreme Court in *Nicholson v. Kilbury*,[3] where it was held that although the statute did not expressly exclude testimony as to statements made by the

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[35] *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138 (1900).

[1] Under heading VIII on page 28 of the former article, "admissible" should read "inadmissible." Citations of *Olsen v. Kemoe* on page 32 is now found in 132 Wash. 250; *Perkins v. Allen*, under heading C on page 38, in 133 Wash. 459; and *Chaffee v. Morris*, under heading XIII on page 43, is now found (*In re Hebbs' Estate*) in 134 Wash. 424, 429, 235 Pac. 974. The same headings will be used herein as in the former article.

[2] Laws of 1927, chap. 84, p. 64. Rem. Comp. Stat., 1927 Sup., Sec. 1211.

[3] 80 Wash. 500, 141 Pac. 1043 (1914).