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GOVERNMENTAL RESPONSIBILITY FOR TORTS IN MINNESOTA*

By Orville C. Peterson†

G. THE MINNESOTA CLASSIFICATION OF FUNCTIONS: EXCEPTIONAL CASES

1. SEWERS AND DRAINS

It is firmly established that a municipal corporation is liable for damages resulting from the negligent maintenance of its sewer system; but the ground of that liability has not been clearly stated. Consequently, the problem of classification of the function of maintaining municipal sewerage is somewhat difficult. The injuries sustained by the plaintiff in cases involving defective sewers or drains have been due almost entirely to the maintenance of a nuisance by the municipality or the invasion of plaintiff's property by surface water, somewhat similar to a trespass. Negligence may or may not be a significant element in the latter type of tort although it has frequently been treated as a sine qua non of recovery. In any event, the court never has seemed to consider the governmental-proprietary test of any significance in its application to torts resulting from the municipal corporation's operation of a system of sewers and drains. It is difficult to see how the function can be viewed as a proprietary one by the application of any of the rules for determining the governmental or proprietary nature of a municipal activity. Hence, in so far as a tort consists of negligence in the maintenance of a sewer system, the fact that liability attaches suggests that the rule imposing liability should be considered an exception to the applica-

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348 This type of action is considered in detail later in this study. Infra, text at footnote 724. Occasionally someone is injured because a defective sewer causes a hole in the street, but liability attaches in such case because of negligence in the maintenance of the street, not the sewer. See Baker v. City of South St. Paul, (1938) 198 Minn. 437, 270 N. W. 154; cf. Piscor v. Village of Hibbing, (1927) 169 Minn. 478, 211 N. W. 952. The same rule supplies to an improperly covered water main. Ogren v. City of Minneapolis, (1913) 121 Minn. 243, 141 N. W. 120.

349 Infra, text at footnotes 687-698.
tion of the governmental-proprietary test. In this respect, sewers are to be considered in the same category as streets; as a matter of fact, a municipal corporation in constructing and maintaining a system for the drainage of surface waters, incident to the construction of a street, is subject to exactly the same liability as in the maintenance of its sanitary sewer system. In some cases the construction and maintenance of sewers have been considered merely as part of the construction and maintenance of streets.

In Minnesota, as in perhaps all other states, a municipal corporation is given the power to establish and maintain a system of sewerage, but there is no duty to execute this power. It is thus a "discretionary" (or, more properly, "optional") power, for failure to carry out which no liability is imposed upon it. Likewise, since there is no continuing duty to maintain a sewer, a municipal corporation is not liable for damages resulting from its abandonment of a sewer or drain if the injured property is left in no worse condition than it was before the sewer or drain was constructed. The liability of the municipal corporation in such a case begins only when it assumes to exercise its power to construct sewers.

It is a rule in general that a municipal corporation is not liable for any error in judgment on the part of its officers in deciding upon a particular plan of sewerage resulting in consequential damages to property. The formulation of plans for a

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850 One early Minnesota case spoke of the duty of constructing sewers as "a corporate ministerial duty," Simmer v. City of St. Paul, (1877) 23 Minn. 408; but there was no indication from the language that "corporate" was used in a sense antithetical to "governmental."

851 In exercising its former activity, it does not as often maintain a nuisance as it does when it discharges sewage on private property, but the principles of law applicable are the same nevertheless.

852 See Welter v. City of St. Paul, (1889) 40 Minn. 460, 42 N. W. 392. The syllabus of that case states that where a municipal corporation has under its charter the care and control of the public streets and has general authority to make or cause to be made improvements therein, such as sewers or drains, it is liable for injuries to its employees or others resulting from the negligence of its officers or agents.

853 McClure v. City of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767; Henderson v. City of Minneapolis, (1884) 32 Minn. 319, 120 N. W. 322; Pye v. City of Mankato, (1887) 36 Minn. 373, 31 N. W. 863. This principle is well established throughout the country. 6 McQuillin, Municipal Corporations (2d ed. rev. 1936) sec. 2364; Slaymaker, Liability for Injuries Resulting from Defective or Inadequate Sewerage, (1905) 60 Cent. L. J. 224-229.


sewer improvement involves the exercise of a legislative or discretionary act, and immunity is granted in accordance with the usual principle that there is no liability for damages resulting from the exercise of a discretionary act. As the court said in one case:

"To determine when and upon what plan a public improvement shall be made is, unless the charter otherwise provides, left to the judgment of the proper municipal authorities, and is, in its nature, legislative. And, although the power is vested in the municipality for the benefit and relief of property, error of judgment as to when or upon what plan the improvement shall be made, resulting only in incidental injury to the property, will not be ground of action."

Yet it is questionable how much difference this rule makes in actual practice. The manner of executing a plan, as distinct from the making of the plan, is "ministerial," and hence for damages resulting from the wrongful action of the municipal authorities in this regard, the municipal corporation is liable. Furthermore, no matter how well-justified the plan and how skillfully it is formulated, a city or village is liable when as a result of carrying out that plan, surface water or sewage is cast on private property. This, says the court, is a positive invasion of property, a tort which it will not countenance without redress. This is true even though the direct invasion of property is contemplated by and necessarily results from the plan adopted. Doubtless the same is true where the damage is considered a nuisance rather than a trespass. Since practically all the cases involving damages from sewer or drain construction have been based on the maintenance of a nuisance or a positive invasion of private property in the nature of a trespass, there is in practical effect no essential difference between damages resulting from defects in

350McClure v. City of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767; Pye v. City of Mankato, (1887) 36 Minn. 373, 31 N. W. 863. This subject is treated elsewhere in this study. See infra, text at footnote 685 et seq.


the plan and defects in the execution of the plan or after construc-
tion. As a matter of fact, it is difficult to draw a distinc-
tion between the making of a plan and its execution for pur-
poses of tort liability, since the damages do not occur until the
plan is carried out; a property owner suffers no damage from a
blue print.

Since there is no obligation on the part of the city or village
to construct sewers, it would seem to follow that there is no lia-
iability for damage resulting from insufficient sewers, at least
when the property injured is in no worse a condition than if the
sewer were never constructed—in other words, if the insufficiency
does not cause a direct invasion of property which would not have
occurred at all if no sewer were constructed. This appears to be
the law. For the same reason, a municipal corporation is not
liable for damages resulting from unusual or unprecedented
storms; it is not an insurer against damage.

It has been said earlier that practically all cases involving torts

363Several of the courts have adopted another modification of the rule
that there is no liability for damages resulting from defective plans. In
Indiana and possibly other states, for example, it is held that if there is
actual negligence as distinct from a mere error in judgment, the municipal
corporation is liable. City of North Vernon v. Voegler, (1883) 103 Ind. 314,
2 N. E. 821; City of Birmingham v. Greer, (1930) 220 Ala. 678, 126 So.
859; see also Herring v. District of Columbia, (1882) 2 Mackey (D.C.) 87,
holding that carelessness in selecting the plan is actionable. McQuillin
states that this modification does not seem to be distinctly repudiated in
states which have not expressly adopted it: "It is based on common sense
principles and should be followed." 6 McQuillin, Municipal Corporations
(2d ed. rev. 1936) sec. 2867, p. 1220. In Wisconsin the doctrine has been
applied where there has not been sufficient care used by the municipality in
adopting the plan to justify believing that any legal discretion was actually
exercised in the matter. Hart v. Neillsville, (1905) 125 Wis. 546, 104 N. W.
699, 1 L. R. A. (N.S.) 952. In our own state, a hint of the same qualifica-
tion of the rule extending immunity for defective plans has been given in
the case of Taubert v. City of St. Paul, (1897) 68 Minn. 519, 71 N. W.
664, where the court said that there would be no liability if the city "in
the exercise of an honest judgment, constructed a box of such capacity that
they were reasonably justified in believing . . . it would be sufficient to
carry off this water."

364See David, Municipal Liability for Tortious Acts and Omission
(1936) 61 et seq. See also infra, pp. 531-533 for a discussion of this ques-
tion in street cases.

365Henderson v. City of Minneapolis, (1884) 32 Minn. 319, 120 N. W.
322; Alden v. City of Minneapolis, (1877) 24 Minn. 254; McClure v. City
of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767; Pye v. City of Mankato,
(1887) 36 Minn. 373, 31 N. W. 863; Taubert v. City of St. Paul, (1897)
68 Minn. 519, 71 N. W. 664; Dudley v. Village of Buffalo, (1898) 73
Minn. 347, 76 N. W. 44. See also 6 McQuillin, Municipal Corporations (2d
ed rev. 1936) sec. 2868; Slaymaker, Liability for Injuries Resulting from
Defective and Inadequate Sewerage, (1905) 60 Cent. L. J. 224.

366Taubert v. City of St. Paul, (1897) 68 Minn. 519, 71 N. W. 664;
Power v. Village of Hibbing, (1930) 182 Minn. 66, 233 N. W. 597; Hanson
v. City of Montevideo, (1933) 189 Minn. 268, 249 N. W. 46.
incident to sewer construction concern either nuisance, or an
invasion of property similar to trespass, in neither of which is
negligence always a necessary factor.\textsuperscript{667} At least one case has
arisen in which negligence was directly involved. In \textit{Simner v. City of St. Paul},\textsuperscript{688} the owner of a grocery store brought an
action to recover damages for defendant's alleged negligence in
constructing a sewer, as a result of which access to his premises
was obstructed. The court recognized the principle that "a munici-
pal corporation is liable for damages resulting to a person from
its want of proper care, skill, or diligence in the performance
of a corporate ministerial duty, such as the duty of constructing
sewers," but sustained the defendant's demurrer because the only
damages alleged were gains and profits which might have been
made in the absence of the defendant's negligence, damages so
speculative that they did not aid the plaintiff in stating a cause of
action. Similarly in \textit{Welter v. City of St. Paul},\textsuperscript{809} a municipal
employee was allowed to recover for injuries suffered by a cave-
in due to negligent bracing of a sewer excavation. The court indi-
cated the city would have been subjected to the same liability if
a third person had been injured.

The question of the necessity for a notice of defects occa-
sionally arises in connection with sewers, though it is a much
more common problem in connection with street defects.\textsuperscript{870} Ap-
parently the same principles apply.\textsuperscript{871} In so far as negligence is
involved, it is essential that the municipal corporation have actual
or constructive notice of the defect where that defect is not its
own creation, since otherwise there can hardly be said to be
negligence.\textsuperscript{872}

It appears to be an open question whether or not lack of
funds is a defense to an action for damages from negligence in
the maintenance of a sewer. In \textit{Netzer v. Crookston City},\textsuperscript{873} the
defendant assigned as error the refusal of the court to allow it
to prove that the city did not have funds to repair and that it
was in such financial condition that its charter prohibited it from

\begin{footnotes}
\item[667] But see, infra, text at footnotes 687-698.
\item[688] (1877) 23 Minn. 408.
\item[689] (1889) 40 Minn. 460, 42 N. W. 392.
\item[870] See infra, pp. 518-524. This is not to be confused with the statutory
notice of claim.
\item[871] 6 McQuillin, Municipal Corporations (2d ed. rev. 1936) sec. 2870.
\item[872] Tate v. City of St. Paul, (1894) 56 Minn. 527, 58 N. W. 158; see
Pottner v. City of Minneapolis, (1889) 41 Minn. 73, 42 N. W. 784; Joyce
\item[873] (1894) 59 Minn. 244, 61 N. W. 21.
\end{footnotes}
making any contract incurring a liability for repairing the sewer. However, the court found it unnecessary to consider the effect of these facts, if proved, on liability because no such defense was pleaded.\[374\]

2. Streets and Sidewalks

a. General Rule.—It has long been the established rule in this state that a municipal corporation is under legal obligation to exercise reasonable care to keep its streets in a safe condition for public use, and that even though by the usual test of the distinction between governmental and proprietary functions, this duty is owed to the public, it is liable for damages resulting from its neglect.\[375\] That rule has become so well established as to be fundamental in our jurisprudence.\[376\] The obligation extends not only to the street proper but to bridges within municipal limits,\[377\] to sidewalks \[378\] and to crosswalks.\[379\] This subjection to liability has been stated to follow from defects in all public places,\[380\] but in view of the court's attitude toward such functions as public parks, this statement must be considered too broad to be accurate.

The rule imposing upon municipal corporations liability for failure to maintain streets in suitable condition for travel has no application to counties and towns, which are exempt from liability for their negligence in this respect.\[381\] So far as their

\[\text{374} \text{Cf. Watson v. City of Duluth, (1915) 128 Minn. 446, 151 N. W. 143.} \]

\[\text{375} \text{City of St. Paul v. Kuby, (1863) 8 Minn. 154 (Gil. 125); Shartle v. City of Minneapolis, (1871) 17 Minn. 308 (Gil. 284); Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307; Bieber v. City of St. Paul, (1902). 87 Minn. 35, 91 N. W. 20; Sundell v. Village of Tintah, (1912) 117 Minn. 170, 134 N. W. 639; McGandy v. City of Marshall, (1929) 178 Minn. 326, 227 N. W. 177; Heidemann v. City of Sleepy Eye, (1935) 195 Minn. 611, 264 N. W. 212; Callahan v. City of Duluth, (1938) 197 Minn. 403, 267 N. W. 361. The rule has been stated in a number of other cases.} \]

\[\text{376} \text{McCarthy v. City of St. Paul, (1937) 201 Minn. 276; 276 N. W. 1.} \]

The rule has been applied in more than two hundred cases.

\[\text{377} \text{Shartle v. City of Minneapolis, (1871) 17 Minn. 308 (Gil. 284); Anderson v. City of St. Cloud, (1900) 79 Minn. 88, 81 N. W. 746; Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307; see Hoppe v. City of Winona, (1911) 113 Minn. 252, 129 N. W. 577.} \]

\[\text{378} \text{Furnell v. City of St. Paul, (1873) 20 Minn. 117, (Gil. 101); Bohen v. City of Waseca, (1884) 32 Minn. 176, 19 N. W. 730; Noonan v. City of Stillwater, (1885) 33 Minn. 198, 22 N. W. 444; Mathieson v. City of Duluth, (1937) 201 Minn. 290, 276 N. W. 222.} \]

\[\text{379} \text{Barrett v. City of Virginia, (1929) 179 Minn. 118, 228 N. W. 350.} \]

\[\text{380} \text{Sundell v. Village of Tintah, (1912) 117 Minn. 170, 134 N. W. 639; Peterson v. Village of Cokato, (1901) 84 Minn. 205, 87 N. W. 615.} \]

\[\text{381} \text{Altnow v. Town of Sibley, (1883) 30 Minn. 186, 14 N. W. 377. See Nickelsen v. Minneapolis, N. & S. Ry., (1926) 168 Minn. 118, 209 N. W. 646. Liability to travelers for damages resulting from defective streets should not be confused with liability to abutting landowners resulting from street construction or maintenance. As has been mentioned, a political sub-} \]
liability is concerned, there is no distinction between misfeasance and nonfeasance; but that distinction is material in determining the liability of county or town officers. A town officer is liable for damages resulting from his affirmative misconduct in repairing a road, although he is not in the case of mere failure to repair. Doubtless the same is true of the officer of a municipal corporation, since liability does not depend upon the liability of his superior.

Recently the court has applied the principle of municipal responsibility for street defects to the negligence of a street repair crew. In *McCarthy v. City of Ct. Paul*, a boy had been injured when a city employee backed a road-blading machine into him while repairing streets. The city was held liable. The court said:

"It would be a very tenuous distinction to hold the city to such liability [for unsafe streets] and free it from liability in connection with the negligence of its agents in the repair of the streets which it is bound to use reasonable care in maintaining in a safe condition."

Previously the same principle had been applied to an action for damages to a plaintiff injured through negligent street flushing but that action had been treated exactly as if it had been for damages resulting from a defective street, no mention being made of any possible distinction between liability for street defects and liability for the negligence of street crews. In the *McCarthy*

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Footnotes:


Incidentally, an error occurred in the application of this rule in the first paragraph of the initial installment of this study, (1942) 26 MINNESOTA LAW REVIEW 293. The first of four illustrative cases there mentioned to show the anomalous applications of the doctrine of governmental tort responsibility was based on *McLeod v. City of Duluth*. It was intended to show that a city may be held responsible for negligent operation of a street flusher but not for that of a street sprinkler; actually, because of an unfortunate reversal of names given the hypothetical victims, what was stated was exactly the opposite. A further discussion of the *McLeod* Case appears in a subsequent chapter devoted to torts involving mixed functions.
Case the court said that it considered the doctrine of the earlier McLeod Case sound, and that it "would adopt it were the case at bar one of first impression."

b. Explanation for the Rule of Liability.—There is hardly a function which is any more "governmental" than street maintenance, so by the usual test of liability for public torts, a municipal corporation should not be liable for injuries arising out of its negligence in discharging this function. Assuming the soundness of the distinction between governmental and proprietary powers, the exemption from liability of quasi municipal corporations is logical, the responsibility of cities and villages in such cases is not. The difference in liability between the two types of governmental units has not been satisfactorily explained, although some courts have tried to rationalize their imposition of liability upon municipal corporations. Generally speaking, this has not been true of the Minnesota court, which has recognized that liability for defective streets is an exception to the general rule "which we think the courts would do better to rest either upon certain special considerations of public policy or upon the doctrine of stare decisis than to attempt to find some strictly legal principle to justify the distinction."

On other occasions the doctrine of liability for defective streets has been termed anomalous, an exception, even "an illogical exception" to the general rule, and it is recognized that the duty to provide streets is a governmental one. Mostly the imposition of liability has been taken for granted even in the earliest cases. In only a very few is there any attempt to explain or justify it. It has been stated that the liability arises out of the fact that the municipal corporation has the exclusive control of the streets and has the power to provide the means

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389 New England and a few other states deny all liability unless imposed by statute, because failure to maintain streets properly is regarded as merely the neglect of a public duty imposed upon the municipal corporation by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage. McQuillin, Reason and Scope of Municipal Liability for Defective Highways, (1901) 53 Cent. L. J. 123; White, Negligence of Municipal Corporations (1920) sec. 199. 390 McQuillin, Municipal Corporations, (2d ed. 1928) sec. 2902; see cases cited in the extensive annotation in 20 L. R. A. (N.S.) 513.
391 Snider v. City of St. Paul, (1892) 51 Minn. 466, 472, 53 N. W. 763.
392 Gaare v. Board of County Commissioners of Clay County, (1903) 90 Minn. 530, 97 N. W. 422.
394 Lane v. Minnesota State Agricultural Society, (1895) 62 Minn. 175, 64 N. W. 382.
395 Ackeret v. City of Minneapolis, (1915) 129 Minn. 190, 151 N. W. 976.
for the proper performance of the duty of keeping them in safe
c condition.\textsuperscript{398} Obviously this is an unsatisfactory reason, since it
applies equally to towns and counties and to municipal parks, as
to which liability is not imposed. Occasionally the rule appears to
be treated as not exceptional. Thus in \textit{Hall v. City of Austin},\textsuperscript{997}
in which the defendant was held liable for injuries resulting from
a defective sidewalk, the court said:\textsuperscript{398}

"In claiming that the city is not liable for the negligence of its
officers such as the street commissioner, counsel for the city fail
to distinguish between cases where the duty rests upon a munici-
pal corporation as such, and those where the duty rests upon it as
an agency of the state in the exercise of police powers in which
the corporation as such has no interest. Police officers in preserv-
ing public order, firemen in extinguishing or preventing fires,
health officers in taking measures to preserve the public health,
fall under the latter head, while the duty of keeping public streets
in repair falls under the former head, and the doctrine of re-
pondeat superior applies."

It is true, of course, that a municipal corporation is not exercising
police power in maintaining its streets, but it is acting as the
agency of the state if the ordinary distinction between govern-
mental and proprietary functions is to be observed. That fact has
been emphasized in all the cases in which defects in county or
town roads have been involved. It is much more desirable to
recognize municipal liability for street defects as an exception to
the general rule.\textsuperscript{399}

c. Streets and Sidewalks to Which Liability Extends.—A city
is not usually bound to improve and make fit for travel all platted
streets within its limits. Yet if an ungraded street is used for
travel, and the city has notice of that fact, it must keep the street
in a "reasonably safe" condition for travel.\textsuperscript{400} No liability attaches
where a platted street has never been graded or opened for travel;\textsuperscript{401}
but when a city has graded or improved any portion of

\textsuperscript{398} Schigley v. City of Waseca, (1908) 106 Minn. 94, 118 N. W. 259; see Peterson v. Village of Cokato, (1901) 84 Minn. 205, 87 N. W. 615.

\textsuperscript{397} (1898) 73 Minn. 134, 137, 75 N. W. 1121.

\textsuperscript{398} (1898) 73 Minn. 134, 137, 75 N. W. 1121.

\textsuperscript{399} As a matter of fact, Mr. Justice Mitchell, who wrote the opinion in
Hall v. City of Austin, also was the judge who had suggested earlier in
Snider v. City of St. Paul, (1892) 51 Minn. 466, 472, 53 N. W. 763, that
municipal liability for failure to keep streets in repair is best considered
an exception to the general rule. See State ex rel. Wharton v. Babcock,
(1930) 181 Minn. 409, 412, 232 N. W. 718: " . . . a change in our laws, if
that could be made, imposing liability on the state and its subdivisions to
the same extent as now imposed on cities and villages for defects in high-
ways, would seem meritorious."

\textsuperscript{400} Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960.

\textsuperscript{401} Nutting v. City of St. Paul, (1898) 73 Minn. 371, 76 N. W. 61.
a street for purposes of travel, the duty to keep this portion in repair and the liability for failure to repair arises. Furthermore, even if the city abandons a public street, it still may not leave the abandoned part in the shape of a pitfall or trap to motorists or pedestrians.

Liability is not affected by the type of materials used in the construction of the street or sidewalk. Thus, a city has been held liable for injuries suffered on a gravel walk, since it can make no possible difference to the public, nor can it affect the rights of individuals, that the materials more generally used in sidewalk construction were not used. The court pointed out:

"The city authorities so acted in reference to this walk as to hold it out to the people as a public thoroughfare, and therefore assumed the duty of keeping it in repair. It was placed in the street to be used by the public as a part of it, and thereupon, it became incumbent upon the corporation permitting it to remain, and to be so used to see that it was in a safe condition for such use."

On the same principle the court has held a municipality liable for injuries suffered at a corner where there were sidewalks at both sides of the crossing but no crosswalks. The court said that the building of a sidewalk on both sides of the crossing in the usual location of a sidewalk was an invitation to pedestrians to cross the street on the line of the sidewalks and imposed on the village the duty to use reasonable care to maintain the crossing in a safe condition for public travel.

Where public ground is not maintained for public travel and no invitation is extended to the public to use it for such purpose, a municipality is not liable for injuries resulting from its use for travel. Dehnitz v. City of St. Paul involved a situation of this sort. A slough in the Mississippi River had a basin in it which was used as a public dumping ground for garbage and refuse. During high water it formed a crust on top of the water, on which vegetation grew to make it look like surrounding land. There were paths around it. A ten year old girl left the path and walked into the crust when the watchman usually there was absent. She was drowned when the crust broke through. The city was held not liable. The court pointed out that it did not appear that there

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403 Ollgaard v. City of Marshall, (1940) 208 Minn. 384, 294 N. W. 228.
404 Graham v. City of Albert Lea, (1892) 48 Minn. 201, 50 N. W. 1108.
405 (1892) 48 Minn. 201, 205, 50 N. W. 1108.
407 (1898) 73 Minn. 385, 76 N. W. 48.
was any invitation to go upon the crust, the nature of the ground and the offensive character of the dump indicating it was not so intended to be used by the public. Consequently the city owed no duty of protection to the girls in going there as a traveler.408

While a municipality is responsible for the proper maintenance of all its streets and sidewalks within the corporate limits, the amount of care required of it may depend on the location of the street. The standard of care is the same—reasonable care in view of all the circumstances; but since the circumstances differ, a municipal corporation may be not required to do at some places what it must do at others. A highly traveled highway requires a greater amount of care than one little used.409 The number of miles of streets and sidewalks may also be a factor, since in determining whether due care is being used, a city's facility to cope with the situation will depend upon the number of miles it has to maintain.410

The requirement that municipal corporations are obliged to keep their streets safe for travel applies to all streets within their borders, whether in the settled or platted portion or in the outskirts; but the same diligence is not required in maintaining streets remote from the settled portion as is necessary in the congested area of the city.411 There is no obligation to improve and make fit for travel the whole width of an outlying street. It is sufficient if a city improves and keeps in condition a roadway of sufficient width for the ordinary demands of travel.412 But whether a street is improved or in its natural condition, a traveler is entitled to protection from dangerous excavations or pitfalls.413

So far as concerns the municipality's duty to maintain streets and sidewalks in safe condition, it is immaterial how the street or sidewalk became such. The liability is the same whether the street was acquired by formal official action in accepting its dedication or by acceptance by user on the part of the public.414 Furthermore, where acceptance by the city is important, it need not in-

408 The city was held immune from liability on the ground that in removing garbage and manure it was protecting the public against disease, a governmental function.
409 Tarras v. City of St. Paul, (1899) 77 Minn. 57, 79 N. W. 649.
411 Neidhardt v. City of Minneapolis, (1910) 112 Minn. 149, 127 N. W. 484; Sundell v. Village of Tintah, (1912) 117 Minn. 170, 134 N. W. 639.
412 Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960.
413 Collins v. Dodge, (1887) 37 Minn. 503, 35 N. W. 368; Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960.
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volve any formal action by the council. If the city expends money in repair of the street and exercises control over it, it is liable for injuries resulting from its defective condition.\(^4\)

Since acceptance by user on the part of the public is sufficient to create the duty to repair and consequent liability for failure to repair, it necessarily follows that the fact that a street or sidewalk was constructed by a private individual and not by the municipality does not relieve the municipality from responsibility for defects.\(^4\)

On the other hand, the court has held that there can be no liability on the part of a city for a sidewalk defect unless the public authorities have rightfully taken charge of a privately-built walk and have treated it as part of a general sidewalk.\(^4\)

The case in which this rule was established involved a walk built to connect the public sidewalk with a store four feet back from the street. There was no evidence sufficient to justify a finding that the city ever assumed control of or attempted to repair that portion of the walk between the lot line and the building. It is to be doubted whether it could have made any difference even if the city had attempted to keep the walk in question in repair in that case, since this would have involved an ultra vires act for which apparently the city is not liable.\(^4\)

Since a city or village is not bound to improve the full width of its streets for travel, it may set apart a portion for boulevard purposes if it can do so without substantial impairment of the primary use of the street for travel; but in doing so, it has no right to maintain anything on the boulevards, especially at the street corners, in the nature of "a dangerous pitfall, or trap, or snare, or like obstruction, whereby the traveler may be injured."\(^4\)

Apparently a pedestrian may cross a boulevard without forfeiting his rights as a traveler. Likewise he may cross streets at places other than crossings, the city being obliged to keep the streets as well as the sidewalks and crossings safe for pedestrians.\(^4\)

The duty to maintain streets in a safe condition for travel applies to roads and paths in parks as well as streets generally.\(^4\)

\(^{415}\)Shartle v. City of Minneapolis, (1871) 17 Minn. 308 (Gil. 284).

\(^{416}\)Furnell v. City of St. Paul, (1873) 20 Minn. 117 (Gil. 101); Graham v. City of Albert Lea, (1892) 46 Minn. 201, 50 N. W. 1108.

\(^{417}\)Holmwood v. City of Duluth, (1916) 134 Minn. 137, 158 N. W. 827.

\(^{418}\)See (1942) 26 MINNESOTA LAW REVIEW 299.

\(^{419}\)McDonald v. City of Duluth, (1901) 82 Minn. 308, 84 N. W. 1022.

\(^{420}\)Thorsell v. City of Virginia, (1917) 138 Minn. 55, 163 N. W. 976.

\(^{421}\)Kleopfert v. City of Minneapolis, (1903) 90 Minn. 158, 95 N. W. 908; Ackeret v. City of Minneapolis, (1915) 129 Minn. 190, 151 N. W. 976; Nelson v. City of Duluth, (1927) 172 Minn. 76, 214 N. W. 774.
No case appears to have arisen involving the liability of a municipal corporation for defects in streets it lawfully maintains outside its boundaries. It has been held that where it is without authority to maintain such a street (forming the approach to a ferry), it is not liable for a death resulting from its alleged negligence. In the case of second class cities, the same rule is adopted by statute as to highways outside the boundaries of the state, which such cities are precluded from maintaining.

There is somewhat limited authority for cities and villages to maintain roads outside municipal limits. Where defects occur in roads so maintained, the rules of liability for resulting damages are probably the same as if the highways were within the municipal corporation, in spite of the fact that there would be no liability were the same roads to be maintained by the county or town. Of course, if the roads later are brought within the municipal limits through the annexation of adjacent territory, the obligation to repair those roads is no different from that which it has toward other municipal streets.

An interesting problem, mentioned earlier, is presented with regard to streets whose maintenance responsibility is primarily or exclusively on some unit of government other than the municipal corporation within which they are located. Trunk highways are the most numerous class of such streets. These highways, established under article 16 of the Minnesota constitution, run through cities and villages as well as in the unincorporated areas of the state. Where the trunk highway covers the full width of the municipal street, the municipal corporation is not responsible for defects in the highway. It may not spend funds for its mainte-


Mason's 1927 Minn. Stats., sec. 1657.

Mason's 1927 Minn. Stats., sec. 1656. These statutes were undoubtedly intended for Winona, for which a good deal of legislation general in form but special in application has been passed.

Mason's 1927 Minn. Stats., sec. 2578.

It is no more anomalous that streets within municipal limits may be designated as trunk highways, in which case there is no liability for defects.


Supra, (1942) 26 MINNESOTA LAW REVIEW 319.

There seems no question, however, but that it is still obliged to maintain the rest of the street in good condition where the highway department takes over only a portion of the street as a trunk highway; and consequently it is liable for damages resulting from its negligence in meeting that obligation. No case appears to have arisen involving an accident in the municipally-maintained portion of the street, possibly because accidents are more likely to occur in the center lanes where vehicles ordinarily travel. In view of the fact that the injured driver or pedestrian has no recourse against the state if the accident happens in the trunk highway proper, it is likely that doubts about the respective jurisdiction of the state and the municipal corporation will be resolved against the latter. This tendency is perhaps reflected in the case of Crist v. Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., though a railroad rather than a municipal corporation was the defendant there. The plaintiff was injured when his car crashed through a railing of a bridge over the defendant railroad. He attempted to show that the accident was due to a defect in the approach to a bridge which had been taken over and maintained as a part of the Wisconsin trunk highway system. The defendant sought to escape liability on the ground that the approach and the bridge were part of the trunk highway system. The fact that public officials assumed that it was their duty to care for and maintain the highway up to the end of the bridge was clearly established. The court held the defendant liable, nevertheless; the maintenance of the highway by public officials did not relieve the defendant of legal liability resting upon it. Public officials, even by contract, could not make the defendant immune from claims for damage resulting from negligence in the maintenance of the bridge and its approaches. "From the liability resulting from a nonperformance of this uncompensated duty there is no escape. It is definite, certain and imperative." Two justices dissented, however, pointing out that the charge of negligence was not put upon a defect of construction but one of inspection and maintenance, and the primary duty of inspection and maintenance is on the state.

431(1925) 162 Minn. 1, 202 N. W. 57.
432(1925) 162 Minn. 1, 7, 202 N. W. 57.
433"It is enough that the railway must repair or reconstruct when called upon. It is too much, at least as a matter of common sense and sound economy, and another useless and expensive duplication of effort for which
A similar problem, never adjudicated, is raised when a county or town maintains a road within municipal limits. State aid roads, maintained by the counties from the proceeds of the state one-mill road and bridge levy, may be designated within the corporate limits of any borough, village, or city of the fourth class, and may then be improved by the county like other state aid roads. County aid roads, constructed and maintained by the county from its share of the gasoline tax may be designated in the unplatted portion of any village or in any portion of villages in certain counties. If any village included within a town neglects to keep its streets in repair, the town board of the town may make repairs and improvements. In the last case, the primary responsibility for maintenance is upon the village, so there should be little doubt that the village is responsible in case of defects even though the town board has attempted to make repairs. In the case of state aid roads, and possibly county aid roads within municipal limits, however, the primary responsibility may be upon the county, until the designation of the street as a state or county aid road is revoked; but whether or not this fact results in relieving the city or village from liability is uncertain. The language of the dissent in the Crist Case suggests that the municipal corporation would not be liable; the decision itself can hardly be considered as in conflict with that view.

Two other cases involve remotely similar situations, though they are far from conclusive on this point. Austin v. Village of Tonka Bay was an action for damages to plaintiff's land in the end the people must pay, for the law to leave upon the railroad any duty of inspection and any primary duty of maintenance, when the state, as the sovereign, has assumed the whole duty of inspection and the primary duty of maintenance, leaving the railway only the secondary duty to repair or reconstruct when so ordered by competent government authority. The quotation is from Justice Stone's dissenting opinion, p. 8.

The 1941 legislature, however, abolished the one-mill levy and provided for the maintenance of this system of roads from the proceeds of the gasoline tax. Minn. Laws 1941, chs. 60, 61.

In both cases, the duty of maintenance is placed on the county. Mason's 1927 Minn. Stats., secs. 2560, 2561; Mason's 1927 Minn. Stats., 1940 Supp., sec. 2720-92c.

Mason's 1927 Minn. Stats., sec. 1052.

Mason's 1927 Minn. Stats., 1940 Supp., sec. 2720-93. At present this authority extends only to Cook and Lake of the Woods Counties.

Mason's 1927 Minn. Stats., sec. 2560, subdiv. 5.

1 Mason's 1927 Minn. Stats., sec. 2560, subdiv. 5.

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5 Mason's 1927 Minn. Stats., sec. 2560, subdiv. 5.

6 Mason's 1927 Minn. Stats., 1940 Supp., sec. 2720-92c.

7 Mason's 1927 Minn. Stats., 1940 Supp., sec. 2720-93. At present this authority extends only to Cook and Lake of the Woods Counties.

8 Mason's 1927 Minn. Stats., sec. 1052.


resulting from the construction by the county of a road within the village limits under a law giving Hennepin County authority to construct bridges and roads within villages without receiving their consent. In holding the village not liable, the court said,

"It may be conceded that where a village is incorporated and includes within its territory part of a county road, the portion of the road within the village as a general rule becomes a village street and subject to village control; but it is entirely competent for the legislature to give a county control over such highways to any extent it sees fit. . . . Of course, it is the duty of the village to keep its streets safe for travel, but no failure to perform such duty is involved in the present case."

In that case, however, maintenance responsibilities were not placed on the county, so the dictum in the last sentence can hardly be considered determinative of the question of liability of a city or village for defects in a state aid or county aid road within its limits.

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involved a personal injury action resulting from a defect in a bridge which was outside of the city limits when constructed by the county under an act providing that the bridge was to be kept in good repair by the county. The east end of the bridge was in a township which had been taken into the city limits by the time the accident occurred. The court found the defendant city liable, pointing out,

"The obligation of the city with respect to the law did not provide that the county should keep the same in repair. There may be a concurrent liability on the part of the city and county, but the city cannot escape its responsibility on the claim that the county is also liable. . . . The provisions of the charter above referred to must be considered as placing upon the city the obligation to keep every highway and bridge within its limits in good repair for public use, without regard to what the law may have required in that respect prior to the time such highways and bridges came within the jurisdiction of the city."

The parallel to state aid and county aid roads within municipal limits is only partial. The law contemplates that such roads should be maintained by the county. The trunk highway law has been construed as making illegal any expenditures by cities and villages for the maintenance of trunk highways within their limits; but it is questionable whether the state aid and county aid road laws go that far. Certainly there is no express provision relieving the city or village of "duties and responsibilities" in the

\[442(1915)\] 130 Minn. 359, 364, 153 N. W. 738.

\[443(1901)\] 130 Minn. 359, 364, 153 N. W. 738.

\[444(1901)\] 82 Minn. 494, 85 N. W. 163.

maintenance of state aid and county aid roads within city or village limits, as there is in the case of trunk highways. It seems unlikely that a municipal corporation would be held immune from liability for damages resulting from defects in state aid or county aid roads within municipal limits.

d. Defects for Which Liability Attaches.—Cases in which a municipal corporation has been sought to be charged with liability for negligence in the maintenance of its streets and sidewalks have displayed a wide assortment of alleged defects. All have, of course, involved applications of the general principles of negligence as they affect municipal corporations. It frequently has been stated that a city is required to exercise reasonable care to keep its streets reasonably safe for public use, but it is not required to anticipate and guard against improbable dangers. The court has said that it is not inclined to hold municipalities to the exercise of more than reasonable care in the maintenance of streets and sidewalks or to impose on them the duty of making anything like a microscopic inspection. In other words a city is not an insurer of the safety of its streets; but many of the cases hold the municipality to such a high degree of care that there is frequently displayed a tendency to make the safety of the traveler assured. This tendency is due partly to the fact that the negligence of the municipal corporation is ordinarily a question for the jury which the court usually is reluctant to take from them by finding an absence of negligence as a matter of law. The degree of duty is measured by the likelihood of accident and is commensurate with the risks and dangers incurred; no inflexible rule can be laid down.

446 As a matter of fact, it was not originally contemplated when the counties were first given a share of the gasoline tax for the construction and maintenance of roads that these roads would extend within municipal limits. This has been provided for since by sets of very limited application which make no attempt to clarify the question of responsibility that might thus be created. In the case of towns the question could never be of more than academic interest in view of the immunity of towns from liability for negligence in maintaining town roads.

447 1 Mason's 1927 Minn. Stats., sec. 2554, subdiv. 4a.

448 Spiering v. City of Hutchinson, (1921) 150 Minn. 305, 185 N. W. 375; Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390.

449 Sumner v. City of Northfield, (1905) 96 Minn. 107, 104 N. W. 686.


451 This fact has been noted by David, Municipal Liability for Tortious Acts and Omissions, (1935) 54.


"The conditions are liable to be so different in relation to different walks, or different portions of the same walk, and so many contingencies are
GOVERNMENTAL RESPONSIBILITY FOR TORTS

It is obviously a lack of due care, for the consequences of which the municipal corporation is responsible, to allow an un-guarded and unlighted excavation to exist in a street. A city or village can usually avoid liability resulting from excavations made in connection with construction projects by erecting proper barriers and lighting the excavation at night.

A hole need not be so large as to be classed as an excavation or a pit to make a municipal corporation responsible for resulting damages. A V-shaped hole in a sidewalk just large enough to permit a pedestrian’s foot to be caught in it has been held sufficient to justify a jury’s finding of negligence.

"Neither the dimensions of the hole nor the depth of the depression are necessarily the exclusive test of danger. A small V-shaped hole may contain many of the elements of hazard to which a railway frog exposes. It could easily become covered by leaves and the like, so as to more readily escape observation. It could, indeed, become more perilous than a much larger and more conspicuous depression." A missing plank in a wooden sidewalk may also subject a city to liability for negligence. So may an open drain at the side of a highway. In the latter case a pedestrian jumped to the side of the road to avoid being hit by a speeding car, and was injured when she fell into the drain. The court found the incident which caused her to leave the highway, while unusual, "not so extraordinary or unknown as to be without the range of possibilities which may reasonably be anticipated."

Mere depressions, or differences in grade in two different portions of streets or sidewalks, may be sufficient to constitute negligence likely to arise, that it can only be determined from the situation and circumstances of each case whether reasonable care has been exercised in the premises.”

454 Cleveland v. City of St. Paul, (1871) 18 Minn. 279 (Gil. 255); Collins v. Dodge, (1887) 37 Minn. 503, 35 N. W. 368; Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960.
458 See Collins v. Dodge, (1887) 37 Minn. 503, 35 N. W. 368; Miller v. City of Duluth, (1916) 134 Minn. 418, 159 N. W. 960; Thorsell v. City of Virginia, (1917) 138 Minn. 55, 163 N. W. 976; Wilson v. City of Montevideo, (1936) 196 Minn. 352, 265 N. W. 438.
460 Sumner v. City of Northfield, (1905) 96 Minn. 107, 104 N. W. 686;
461 Sumner v. City of Northfield, (1905) 96 Minn. 107, 104 N. W. 686.
457 Taylor v. City of Mankato, (1900) 81 Minn. 276, 83 N. W. 1084.
462 Neidhardt v. City of Minneapolis, (1910) 112 Minn. 149, 127 N. W. 484.
gence. In *McGandy v. City of Marshall*, the plaintiff was allowed recovery for injuries sustained when she stumbled on a sidewalk block 1\(\frac{3}{4}\) inches above the level of the next block. Recovery also has been permitted for an injury resulting from a sidewalk on one street being six to nine inches higher than that on a cross street, thus making a perpendicular drop of this amount.

However, the existence of a step properly constructed from a sidewalk to a street crossing is not a defect, nor is a slant or slope between two portions of sidewalk when it is occasioned by the fact that one property owner has cleaned his sidewalk of snow and ice while another has not.

Cases involving negligence in the maintenance of wooden sidewalks are now largely of historical interest, but this subject was once a frequent source of litigation. A municipal corporation is bound to take notice of the certain tendency of wooden sidewalks to decay and become in an unsafe condition. Holes or other defects resulting from decay have been held to justify a finding of liability. A loose board in a sidewalk may give rise to liability.

Projections as well as holes may be classed as defects causing liability. Allowing protruding hinges on iron shutters in a sidewalk opening over an areaway evidently may constitute negligence. So may a post in the line of travel at an intersection of two streets. On the other hand, a large stone at the corner of a

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401(1929) 178 Minn. 326, 227 N. W. 177.
402Tabor v. City of St. Paul, (1886) 36 Minn. 188, 30 N. W. 765.
404Kelleher v. City of West St. Paul, (1935) 193 Minn. 487, 258 N. W. 834. While the majority of the court said that to hold the municipality liable in such a situation would virtually make it an insurer against all accidents, two justices dissented on the ground that a fact question was presented. The verdict had been for the plaintiff.
405Kennedy v. City of St. Paul, (1903) 90 Minn. 523, 97 N. W. 419; Murphy v. City of South St. Paul, (1907) 101 Minn. 341, 112 N. W. 259.
406Johnson v. City of St. Paul, (1893) 52 Minn. 364, 54 N. W. 735; Burrows v. Village of Lake Crystal, (1895) 51 Minn. 357, 63 N. W. 745; Murphy v. City of South St. Paul, (1907) 101 Minn. 341, 112 N. W. 259; Estabrook v. City of Duluth, (1919) 142 Minn. 318, 172 N. W. 123. The latter case involved a defective creosote block in a crosswalk pavement.
407Lenz v. City of St. Paul, (1902) 87 Minn. 85, 91 N. W. 256; Kennedy v. City of St. Paul, (1903) 90 Minn. 523, 97 N. W. 419. Cf. Spiering v. City of Hutchinson, (1921) 150 Minn. 305, 185 N. W. 375, where the city was held not chargeable with negligence in failing to foresee and guard against the occurrence which gave rise to the action. A plank had been removed by city employees from a defective culvert and laid in the bottom of the ditch at the side of the street. A child playing in the street had lifted one end of the plank and let it fall in such a way that a nail in the plank pierced his foot, causing lockjaw from which he died.
409Phelps v. City of Mankato, (1877) 23 Minn. 276.
lot at the intersection of two sidewalks is not a defect when the rounded portion projects beyond the lot line at a height of four or five inches.\textsuperscript{470} An iron pipe stretched across a sidewalk in connection with a paving project may give rise to municipal liability.\textsuperscript{471} A manhole with sloping sides may also justify a finding of negligence on the part of the municipal corporation.\textsuperscript{472} So may a manhole which tips when stepped on.\textsuperscript{473} A clock standard maintained on a sidewalk with the knowledge of municipal authorities may give rise to liability.\textsuperscript{474} A deposit of rock, dirt, or building material, while a legitimate use of the street when made temporarily in connection with building, may constitute a defective condition if left unguarded and unlighted.\textsuperscript{475}

A projection, such as a light pole, in a street may involve negligence in connection with certain accidents but not with others. \textit{Ryther v. City of Austin}\textsuperscript{476} is an example. There an electric light company pole stood in the gutter of a street about five inches from the curb. A horse hitched to the pole could not get his foot fast in the space next to him between the pole and the curbstone but could get his foot caught by raising it over the curb and putting it into the space on the opposite side of the pole. The plaintiff's horse stepped up on the curb, caught his foot on the other side and broke his leg trying to get loose. The court held as a matter of law that the maintenance of the pole in this location did not constitute negligence resulting in liability for this injury. It was conceded that an entirely different case would have been presented if the plaintiff had been driving at night and collided with the pole in the dark.

Whether the lack of barriers at the side of a street to guard against falling into ditches or down embankments constitutes negligence depends on a number of factors such as the location, the frequency of use of the street, the safety of the street itself in the absence of barriers, and the like. The general principle has been stated thus:

\textit{“It is undoubtedly true that a municipal corporation, having

\textsuperscript{470}\textsuperscript{470}O’Keefe v. Dietz v. City of St. Paul, (1919) 142 Minn. 445, 172 N. W. 696. \textsuperscript{471}\textsuperscript{471}Dougherty v. Garrick, (1931) 184 Minn. 436, 239 N. W. 153. \textsuperscript{472}\textsuperscript{472}Rasmussen v. City of Duluth, (1916) 133 Minn. 134, 157 N. W. 1088. \textsuperscript{473}\textsuperscript{473}L’Herault v. City of Minneapolis, (1897) 69 Minn. 261, 72 N. W. 73. \textsuperscript{474}\textsuperscript{474}See Mueller v. City of Duluth, (1922) 152 Minn. 159, 188 N. W. 205. \textsuperscript{475}\textsuperscript{475}Grant v. City of Stillwater, (1888) 35 Minn. 242, 28 N. W. 660; cf. Nye v. Dibley, (1903) 88 Minn. 465, 93 N. W. 524, involving liability of the person responsible for the pile of material. Analogous cases involving excavations rather than deposits are cited in note 454, supra. \textsuperscript{476}\textsuperscript{476}(1898) 72 Minn. 24, 74 N. W. 1017.
the duty of keeping public streets in repair and safe condition, is not bound to go beyond their limits for the purpose, nor is it generally bound to erect railings to prevent travellers straying off the street to adjoining land upon which there may be dangerous places; but it is bound to provide such guards where the street itself is unsafe for travel by reason of the close proximity of excavations, embankments, deep water, etc.\textsuperscript{477}

Seldom is the question of negligence in failing to maintain guard rails determinable as a matter of law.\textsuperscript{478} Ordinarily it cannot be held that a municipal corporation is negligent in failing to fence off an embankment at the edge of a country road

"unless the place is peculiarly dangerous, as where the roadway is narrow and the sides precipitous or where there is something along the side of the highway which it should be foreseen is ordinarily likely to frighten horses, and result in precipitating them or the vehicle over the dangerous place, as, for instance, passing railroad trains."\textsuperscript{479}

It makes no difference in the principles controlling that the dangerous place is at the end instead of alongside the street.\textsuperscript{480}

It seems clearly established that barriers are required on bridges to protect travelers against falling off the bridge,\textsuperscript{481} the only question of negligence in such case being the adequacy of the barrier. In \textit{Klasens v. Village of Kasota},\textsuperscript{482} the negligence claimed was that the two feet-six inch railing was not high enough, and the court sustained a verdict for the plaintiff. In \textit{Tracey v. City of Minneapolis},\textsuperscript{483} however, the court sustained a directed verdict for the defendant. Two automobiles had collided on a bridge in the city, the force of the impact deflecting them, throwing one over the sidewalk, through the iron rail and into the river, killing the plaintiff's intestate. The negligence claimed was that the wheel guard was not high enough and the railing on the outer edge of the bridge was not strong enough. The court said that to guard against such an occurrence

"would have necessitated the construction of a wall of iron or concrete, which would be a very onerous burden to the taxpayers... it is not the purpose of a curb, curb rail, or an out-

\textsuperscript{477}Ray v. City of St. Paul, (1889) 40 Minn. 458, 459, 42 N. W. 297, citing City of St. Paul v. Kuby, (1863) 8 Minn. 125 (Gil. 154).
\textsuperscript{478}Watson v. City of Duluth, (1915) 128 Minn. 446, 151 N. W. 143.
\textsuperscript{479}Tarras v. City of Winona, (1897) 71 Minn. 22, 24, 73 N. W. 505.
\textsuperscript{480}Ray v. City of St. Paul, (1889) 40 Minn. 458, 459, 42 N. W. 297.
\textsuperscript{481}Klasens v. Village of Kasota, (1914) 128 Minn. 47, 150 N. W. 221; Tracey v. City of Minneapolis, (1932) 185 Minn. 380, 241 N. W. 390; see Tarras v. City of Winona, (1897) 71 Minn. 22, 73 N. W. 505; Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307.
\textsuperscript{482}(1914) 128 Minn. 47, 150 N. W. 221.
\textsuperscript{483}(1932) 185 Minn. 380, 241 N. W. 390.
side rail to protect against such an assault. The purpose is to
guard against ordinary contingencies or those which may be rea-
sonably anticipated. The law does not demand a perfect high-
way under all circumstances. . . . Accidents of this character are
of such remote and improbable occurrence that negligence cannot
be founded upon failure to maintain a barrier to adequately resist
the applied force.”

Two justices, however, felt that the adequacy of the barrier was
for the jury.

The case of Lineburg v. City of St. Paul was decided on
somewhat similar reasoning. There a child of five and a half had
crawled over or through a three and one-half foot fence of two
railings and fell over a precipice which skirted the edge of the
sidewalk. Conceding that the place in question was peculiarly
dangerous and needed suitable barriers to protect against injuries,
the court found as a matter of law that the city’s duty had been
fulfilled in this case. “No such extraordinary duty should be im-
posed on the city,” said the court, “as that of maintaining a barrier
so high and so close that children cannot find ways or means to
surmount it.” City of St. Paul v. Kuby, involving a some-
what similar accident, was distinguished on the ground that there
the barrier was only a single rail which would not prevent a child
from falling out over the precipice. Later the court refused to
find absence of negligence as a matter of law when a small girl
fell over an embankment along a well-traveled sidewalk in
Duluth where there was no guard rail at all. The court said that
the expense incident to the city’s performance of its duty was
not available as an excuse for nonperformance, safety of life and
limb being the paramount consideration.

Since there is a duty to provide barriers only where the street
itself is unsafe for travel if there are no guard rails, there is no
negligence as a matter of law where no barrier is provided at
the edge of a gravel path about six feet wide and an automobile
is precipitated down a slope when it is backed over the gutter and
the path.

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484 (1932) 185 Minn. 380, 382, 241 N. W. 390.
485 (1898) 71 Minn. 245, 73 N. W. 723.
486 (1898) 71 Minn. 245, 247, 73 N. W. 723.
487 (1863) 8 Minn. 154. (Gil. 125).
488 Watson v. City of Duluth, (1915) 128 Minn. 446, 151 N. W. 143.
489 Briglia v. City of St. Paul, (1916) 134 Minn. 97, 158 N. W. 794; cf.
Grant v. City of Brainerd, (1902) 86 Minn. 126, 90 N. W. 307. In the
last cited case the plaintiff’s horse was frightened by a bicycle and backed
over an embankment on the side of a bridge approach. Negligence was held
a question for the jury.
The duty to provide barriers exists more commonly in the case of excavations in the street. Excavations are frequently necessary in connection with construction projects—the street itself, or the installation or repair of sewer and water mains—but unless travelers rightfully on the street are protected by barriers and lights against falling into them, the duty of the municipality to maintain its streets in safe condition has not been met.\textsuperscript{490}

Liability may exist in a converse situation when a barrier is maintained where there should be none. In \textit{Ihlen v. Village of Edgerton}\textsuperscript{491} a village had roped off its main street during a celebration. The plaintiff failed to see the rope and drove into it. The question of defendant's negligence was held to be for the jury, its verdict for the plaintiff being upheld on appeal. \textit{Klopfert v. City of Minneapolis}\textsuperscript{492} involved a bicycle accident occurring as the result of a rope placed across a boulevard. A judgment for the plaintiff was sustained on appeal. A guy wire strung across the street has been held to subject the city to liability.\textsuperscript{493}

A barrier maintained under somewhat different circumstances was involved in \textit{Petrich v. Village of Chisholm}\textsuperscript{494} where the court again held that the question of negligence was for the jury. In that case, the village had passed an ordinance permitting the school district to bar traffic on a street between a playground and a school. This was held not to be actionable negligence as a matter of law.

"The exclusion of vehicles . . . is so obviously dictated by what due care demands to protect the children attending the schools that those responsible therefor should not be held guilty of negligence unless the means adopted to divert the vehicles are such as the ordinarily prudent person would not use."\textsuperscript{495}

If a barrier, a hole, or a post may constitute such defect as to result in municipal liability, a building in the street is even less defensible. \textit{McDowell v. Village of Preston}\textsuperscript{496} was a case of this kind. A merchant in Preston built and maintained a structure in the street in which to conduct his business while his permanent building was being erected on his lot. The plaintiff was injured

\textsuperscript{490}See, for example, O'Leary v. City of Mankato, (1874) 21 Minn. 65; Weiser v. City of St. Paul, (1902) 86 Minn. 26, 90 N. W. 8; and cases cited in note 454, supra.
\textsuperscript{491}(1918) 140 Minn. 322, 168 N. W. 12.
\textsuperscript{492}(1904) 93 Minn. 118, 100 N. W. 669.
\textsuperscript{493}Larson v. Ring, (1890) 43 Minn. 88, 44 N. W. 1078.
\textsuperscript{494}(1930) 180 Minn. 407, 231 N. W. 14.
\textsuperscript{495}(1930) 180 Minn. 407, 410, 231 N. W. 14.
\textsuperscript{496}(1908) 104 Minn. 263, 116 N. W. 470.
when her horse ran away and the buggy came in contact with the building. The court held that a building or similar structure maintained in a public street by a third party for his private use is a nuisance although sufficient space is left for the passage of vehicles and pedestrians, and the municipal corporation is guilty of negligence if it knowingly permits the street so to be obstructed.

If a municipal corporation allows in a public street a structure such as a platform to be used by the public as a part of the street even though placed there by a private person, it is its duty to see that it is in a safe condition to be used by the public as a part of the street. This is so although the structure is not in the most usually travelled portion of the street.497

The curb is a part of the street, and a city is bound to maintain it in a safe and usable condition. If the support for the curb is so weakened that it gives way when an automobile backs against it, a jury is entitled to find that the city has been guilty of negligence for the consequences of which it is responsible.498

Occasionally mere slipperiness, when not caused by ice or snow,499 may give rise to liability. In one case liability was imposed for an injury occasioned when plaintiff slipped on a sidewalk where limestone blocks or flagging sidewalk had been worn smooth.500 The court cited, apparently with approval, cases from Indiana and Massachusetts holding that a municipal corporation may be liable for damages from a smooth and slippery sidewalk constructed of different material from the surrounding walk. In another case where the plaintiff had been injured in slipping on a manhole, the abutting property owner and the city were both held liable.501 The court said it did not seem unreasonable to compel property owners who are permitted to place these covers in their sidewalks to keep the surface rough as provided by city ordinance. The city was liable because it ought to have known of the existence of the danger. On the other hand it has been held as a matter of law not to be negligence for a city to treat creosote paving with petroleum oil, leaving the pavement slippery.502

As has been mentioned before, failure to light streets is not

497 Estelle v. Village of Lake Crystal, (1880) 27 Minn. 243, 6 N. W. 775.
498 Kimball v. City of St. Paul, (1914) 128 Minn. 95, 150 N. W. 379.
499 Negligence in the removal of ice and snow is discussed, infra, pp. 507-511.
501 Latell v. Cunningham, (1913) 122 Minn. 144, 142 N. W. 141.
502 Fleming v. City of Minneapolis, (1926) 168 Minn. 80, 209 N. W. 902.
ordinarily actionable negligence, though it may make a partially obstructed street or one out of repair unsafe for travel when it might be safe for travel if the light were adequate.\textsuperscript{503} There is, however, a duty to call attention to temporary obstructions or excavations by means of lights.\textsuperscript{504} A kerosene lantern on a plank set on a pile of sand to warn travelers of an excavation is not such an attraction to children or such an inherent danger as to constitute an "attractive nuisance" within the doctrine of the turntable cases. "The city could not be required to place or secure such lights so that children could not reach or disturb them. It is not easy to see how the city could do so and still have them serve their purpose."\textsuperscript{505}

An unusual street condition occasioned liability in \textit{Svendsen v. Village of Alden}.\textsuperscript{506} The three and one-half year old daughter of the plaintiff in that case fell into a pool of hot water collected in a sag hole in a village street adjacent to a sidewalk. The water came through a drain from the steam heating plant of the local school district and had its outlet in the street, the drain having been built with the village's consent. Action against the school district was dismissed, but the village was held liable both in the lower court and on appeal. It was held that the evidence was sufficient to sustain the jury's finding that the defendant was negligent in not keeping the street in good condition.\textsuperscript{507}

A ladder standing in such a position that a wind can blow it down and injure pedestrians or travelers in a street may be such a defect as to subject to liability a city or village which permits it to stand there.\textsuperscript{508} Authorities responsible for the maintenance of streets or roads have the duty of protecting against dangers from falling trees and branches. Consequently it would appear that as with ladders, a municipal corporation may be liable for injuries from a falling tree which it should have anticipated might be a menace to travelers.\textsuperscript{509}

\textsuperscript{503}Miller v. City of St. Paul, (1888) 38 Minn. 134, 36 N. W. 271.
\textsuperscript{504}See Collins v. Dodge, (1887) 37 Minn. 503, 35 N. W. 368 and cases cited in notes 454 and 490, supra.
\textsuperscript{505}Brown v. City of Minneapolis, (1917) 136 Minn. 177, 179, 161 N. W. 503.
\textsuperscript{506}(1907) 101 Minn. 158, 112 N. W. 10.
\textsuperscript{507}Cf. the memorandum decision in Korpi v. Oliver Iron Mining Co., (1911) 114 Minn. 525, 131 N. W. 372, where the defendant maintained an unprotected vat in a Hibbing street into which hot water was discharged from a pipe connection with defendant's steam boiler in an adjoining building. The company was held liable for injuries suffered when a child fell into the vat. The village appears not to have been involved in that case.
\textsuperscript{508}Moore v. Townsend, (1899) 76 Minn. 64, 78 N. W. 880.
\textsuperscript{509}See Zacharias v. Nesbitt, (1921) 150 Minn. 368, 185 N. W. 295.
An interesting question is whether or not a traffic control device can constitute a street defect so that a municipal corporation may be held liable for injuries resulting from a collision with it. In one case, the court has held that it may.\textsuperscript{510}

In \textit{Lamont v. Stavanaugh},\textsuperscript{511} the plaintiff sought to argue that the presence of a policeman with a known violent temper on the municipal streets armed with a policeman's club constituted a defective or dangerous condition of the streets which would impose a liability on the municipality for his tortious actions. The court refused, however, to countenance this ingenious argument.

It is not always a defense that the defect complained of is not on the street itself, for there may be liability for permitting things to be maintained near the street which make the street itself unsafe for travel. For example, in \textit{Ray v. City of St. Paul},\textsuperscript{512} the city was held liable when someone fell off the end of a street and broke his leg, the city having deposited snow and refuse at the foot of the street in such a way as to make it difficult to tell the terminal line of the street. The street was held to be in a defective condition under these circumstances.

Similarly a city has been held liable when it grades a street, leaving a body of earth on a private lot overhanging the street so that the embankment later caves in on a boy using the street.\textsuperscript{513} The court said the city could not "unnecessarily and unreasonably endanger the lives and limbs of the passers-by upon the sidewalk," which it had done in this case.

\textit{Neidhardt v. City of Minneapolis}\textsuperscript{514} applied the same principle where the defect complained of was off the street proper though within the street lines. The city was there held liable for an injury resulting when a pedestrian fell into an open drain at the edge of a covered culvert at the side of the road when she jumped to avoid being hit by a speeding car.

It would be unreasonable, of course, to extend this principle to cover all kinds of alleged "defects" allowed to exist near roads and streets, and the court on several occasions has refused to hold the municipal corporation liable in cases of this kind. In one case,\textsuperscript{515} a contractor was operating a concrete mixer next to an alley in Waseca. Someone drove his team into the alley near the

\textsuperscript{510} Fitzgerald \textit{v. Village of Bovey}, (1928) 174 Minn. 450, 219 N. W. 774. This case is discussed later. See text at footnote 649.

\textsuperscript{511} (1915) 129 Minn. 321, 152 N. W. 720.

\textsuperscript{512} (1890) 44 Minn. 340, 46 N. W. 675.

\textsuperscript{513} Nichols \textit{v. City of St. Paul}, (1899) 44 Minn. 494, 47 N. W. 168.

\textsuperscript{514} (1910) 112 Minn. 149, 127 N. W. 484.

\textsuperscript{515} Seewald \textit{v. Schmidt}, (1914) 127 Minn. 375, 149 N. W. 655.
mixer, and the horses became frightened by the noise of the gasoline engine, ran away and injured another horse. In an action joining the city, the driver of the team, and the contractor as defendants, the court permitted a verdict for the plaintiff to stand only against the contractor. It was pointed out that the concrete mixer was not in the alley, and was not a nuisance which could be abated by the city.

Some of the cases involving a failure to erect barriers to protect against a traveler's falling over an embankment are of the same type. It has been held that there is no negligence in leaving an embankment off the street unguarded when it is far enough away so that travel on the street is not made unsafe on that account.\textsuperscript{516}

A street may be negligently maintained if overhanging objects fall down and injure travelers. Thus if an awning in a condition dangerous and unsafe to passers beneath it is permitted to overhang a public street, the street is not in a safe condition and the municipal corporation may be liable to one hit when it falls.\textsuperscript{517} Similarly it may be liable if a crossbar from a pole used in connection with a municipal fire alarm system is allowed to become rotten and fall,\textsuperscript{518} or a painter's ladder, after standing in a street for several days, is allowed to fall during a wind,\textsuperscript{519} as a result of which a passerby is injured. But while the duty to keep streets and sidewalks in a safe condition for public use includes the duty to protect from falling objects as well as from defects and obstacles underfoot, this is not an absolute duty. Consequently where a wooden cornice fell from a building during an ordinary windstorm and injured a pedestrian, the jury was permitted to find that the city was not negligent in failing to find that it had decayed. The decay, of which there had been no evidence, could not have been determined without tearing off some of the boards and tin with which the header and plate were enclosed. Under the circumstances, the duty of inspection was held not to be a positive one, the lower court having correctly charged that whether or not there was a duty to make inspection was a question entirely for the jury.\textsuperscript{520}

\textsuperscript{516}McHugh v. City of St. Paul, (1897) 67 Minn. 441, 70 N. W. 5; Briglia v. City of St. Paul, (1916) 134 Minn. 97, 158 N. W. 794.
\textsuperscript{517}Bohen v. City of Waseca, (1884) 32 Minn. 176, 19 N. W. 730, 50 Am. Rep. 564.
\textsuperscript{518}Hillstrom v. City of St. Paul, (1916) 134 Minn. 451, 159 N. W. 1076.
\textsuperscript{519}Moore v. Townsend, (1899) 76 Minn. 64, 78 N. W. 880.
\textsuperscript{520}Heidemann v. City of Sleepy Eye, (1935) 195 Minn. 611, 264 N. W. 212. One judge felt that the plaintiff had no case as a matter of law.
GOVERNMENTAL RESPONSIBILITY FOR TORTS

Like projections, obstructions, holes and similar menaces to travel, snow or ice on sidewalks or streets may subject the municipal corporation to liability for injuries resulting from them, but the principle adopted by the courts in such cases has imposed on the city or village less of a duty to remove than if the defect were an obstruction or an excavation in the street. It is well settled that mere slipperiness of streets and sidewalks, caused by an accumulation of ice and snow, creates no liability for injuries to persons resulting from that condition. However, where ice and snow are permitted to accumulate to such an extent and for so long a time that ridges and hummocks are formed as a result of which travel is made unsafe, the municipality may be liable if this condition is brought about by its neglect. The rule has been stated in several cases and applied in numerous other cases. In exempting municipal corporations from damages resulting from mere slipperiness due to ice and snow, the court has recognized the impossibility in this climate of keeping the sidewalks clear of snow and ice. As Mr. Justice Mitchell put it in one case,

"In this climate, and in this new state, the duty of cities with respect to ice and snow must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in a milder climate or in an older country, where cities are more completely built, might be too high a standard in this climate, for new cities, often em-

521 Henkes v. City of Minneapolis, (1890) 42 Minn. 530, 44 N. W. 1026; Wright v. City of St. Cloud, (1893) 54 Minn. 94, 55 N. W. 819; Smith v. City of Cloquet, (1912) 120 Minn. 50, 139 N. W. 141; McManus v. City of Duluth, (1920) 147 Minn. 200, 179 N. W. 906; Callahan v. City of Duluth, (1936) 197 Minn. 403, 267 N. W. 361. The rule is often stated so as to imply-a distinction ipso facto between slippery and rough accumula-
tions; it is often forgotten that the essential question is negligence, of which an accumulation of ridges may be evidence while a slippery condi-
tion may not. See note, (1937) 21 MINNESOTA LAW REVIEW 703, 706.

522 See the cases cited in the previous note.

523 Boyd v. City of Duluth, (1925) 164 Minn. 19, 204 N. W. 562; Freeman v. Village of Hibbing, (1926) 169 Minn. 353, 211 N. W. 819; Niemi v. Village of Hibbing, (1928) 175 N. W. 366, 221 N. W. 241; Barrett v. City of Virginia, (1929) 179 Minn. 118, 228 N. W. 350; Bracke v. Lepinski, (1933) 187 Minn. 585, 246 N. W. 249; Mathieson v. City of Duluth, (1937) 201 Minn. 290, 276 N. W. 222. The applicable principles are dis-
cussed generally in a note, Liability of Municipality and Abutting Owner for Injuries Resulting from Ice and Snow, (1937) 21 MINNESOTA LAW REVIEW 703. See also the annotations in 13 A. L. R. 17, 80 A. L. R. 1151.

524 Of course, the same rule applies to streets, but most of the ice and snow cases have involved sidewalks because pedestrians, who are the chief and almost the only recipients of injuries on this account, ordinarily keep to the sidewalks except in crossing streets.

525 Wright v. City of St. Cloud, (1893) 54 Minn. 94, 97, 55 N. W. 819.
bracing within their limits much territory that is more rural than urban. All that is required is reasonable care under all the circumstances, and, in determining whether a defect is actionable, consideration must be had, not only to the danger to be apprehended from it, but also to the practicability of remediying it. No inflexible rule can be laid down as to the condition in which reasonable care requires a city to keep its streets and sidewalks, with respect to ice and snow. This must depend, in a measure, on climate, amount of travel, means at command for making repairs, and other varying circumstances."

It has been held that the digging of a trench from six to ten feet long and three feet wide at the top in snow and ice along the curb in a public street during the spring break-up and leaving it unguarded did not, at least under the particular facts of that case, constitute negligence. Washing slush and dirt from a sidewalk in thawing weather has been considered not careless under ordinary circumstances, though the court said that it doubtless may constitute negligence to flood a sidewalk with water in freezing weather, as a result of which it is coated with a glaze of ice.

While mere slipperiness ordinarily does not give rise to liability on the part of the municipal corporation, the court has drawn a distinction between slipperiness due to natural causes and that of artificial creation. In Nichols v. Village of Buhl, people living near the village hall had been permitted to take their water supply from a water tap in the building. In the process some of the water was spilled on the sidewalk and froze in small patches of ice. The plaintiff slipped on the ice and was injured. He recovered a verdict against the village, which was sustained on appeal. The court said that if the ice was of artificial creation, it was immaterial whether the result sprang from acts or omissions of officers of the village or from acts of third persons of which the village should have had knowledge. "It is quite clear," said the court, "that small patches of ice upon a sidewalk are far more treacherous and deceptive than rough and uneven frozen ice and snow covering the entire walk and the case cannot be distinguished from those conditions where negligence is shown. Both are created by artificial means, and not from natural causes."

Muggenburg v. Fink, (1926) 166 Minn. 411, 208 N. W. 134.
(1922) 152 Minn. 494, 189 N. W. 407, 193 N. W. 28.
(1922) 152 Minn. 494, 498, 189 N. W. 407, 193 N. W. 28.
The same village was shortly afterwards involved in another case in which the same principle was applied. At an alley corner the village had installed iron covers over the curb gutter in line with the sidewalk. It operated a V-shaped snow plow piling snow along the sides of the walk. During a thaw the snow melted and the water passing under the iron aprons froze. The gutter became clogged and the irons at the point of contact with the walk and curb heaved about an inch and a half. The water overflowed and became smooth, slippery ice, as a result of which the plaintiff was injured. Her verdict, too, was sustained by the supreme court. Failure to keep the apparatus clean and not the action of the elements was considered the principal cause of the dangerous condition. The court said:

"The law is not unreasonable in requiring a municipality to incur the slight expense incident to the cleaning out of the gutter under such iron aprons in order to avoid subjecting the pedestrians to unsuspected dangers. Obviously the facts in this case do not bring it within the smooth surface doctrine. The ice here was the result of the piling of the snow with the snow plow, the construction and installation of the gutter covered with the iron aprons and the failure to keep the gutter clean. It was of artificial creation."  

The Nichols Case is somewhat difficult to distinguish from one decided thirty years earlier. The plaintiff in the earlier case had slipped on an icy sidewalk which was smooth at the point of his fall but somewhat thicker than elsewhere, because water had escaped from a hose used in fighting fire a week before. The court dismissed the action and the plaintiff lost his appeal. It was said that the fact that this ice was in part due to an artificial cause made no difference.

"The liability of the city must rest upon some ground of fault or neglect on the part of its officers who have charge of the streets, and such fault or neglect is no more involved in removing ice formed by water from hose than ice formed by rain from the clouds."  

Any decision to the contrary would have imposed on the municipality an impossible burden; yet it may be argued that under the doctrine adopted later in Nichols v. Village of Buhl the question of negligence should have been submitted to the jury. The only

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531 (1924) 160 Minn. 398, 400, 200 N. W. 354.
532 Henkes v. City of Minneapolis, (1890) 42 Minn. 530, 44 N. W. 1026.
533 (1890) 42 Minn. 530, 531, 44 N. W. 1026. Italics are the present writer's. The court cited a Massachusetts case, Nason v. City of Boston, (1867) 14 Allen 508, in support of its position.
possible ground of distinction seems to be that in the Henkes Case the slipperiness would have been there (in the form of a thinner coat of ice) regardless of the action of the fire department in putting out the fire, while in Nichols v. Village of Buhl the treacherous spots of ice were entirely of artificial creation. As will be seen later, no significance can be attached to the fact that in the Henkes Case, the fire department was engaged in the performance of a governmental function in extinguishing fires; nor can any distinction be drawn between the two cases because in the earlier one, the acts of servants of the municipality created the unsafe condition while in the later case, third persons were responsible.

Where an accident occurs as a result of an accumulation of ice and snow but the ice and snow would not have accumulated where it did were it not for a defect in street construction, the municipality may be liable for resulting accidents. Thus if a city unnecessarily constructs a manhole above street level with sloping sides, and the sloping sides tend to increase the danger of slipping when the crossing is covered with smooth ice, the city may be liable for an injury occurring as a result of the slippery sloping sides. Negligence has been held to be for the jury in such a case. Similarly when a city places or permits an unnecessary jog and slant at an unexpected place along a walk that is otherwise level, it is placed under greater obligations to take precautions against danger from ice accumulations than if the walk were upon a somewhat uniform slope where a pedestrian would be more able to realize the danger if ice happened to exist.

Attempting to capitalize on the distinction between mere slipperiness and ridges of ice and snow in an action resulting from a fall on ice between two ruts, the city of St. Paul in one case claimed that its negligence was not the proximate cause of the accident because the plaintiff slipped on the smooth icy surface between the ruts while attempting to step over the second rut. It argued that for this there was no liability, since a city is not responsible for an accident which results from mere slipperiness due to ice and snow. The court held, however, that this claim had

534 In the latter case, the Henkes decision was treated as though it involved a natural accumulation of ice and snow.
535 This is specifically held in Nichols v. Village of Buhl, (1922) 152 Minn. 494, 189 N. W. 407, 193 N. W. 28.
536 L'Herault v. City of Minneapolis, (1897) 69 Minn. 261, 72 N. W. 73.
537 Rasmussen v. City of Duluth, (1916) 133 Minn. 134, 157 N. W. 1068.
538 Genereau v. City of Duluth, (1915) 131 Minn. 92, 154 N. W. 664.
no merit because the accident was directly attributable to the broken, irregular and dangerous condition of the surface of the walk caused by the wheels of vehicles and the feet of pedestrians.\footnote{McDonough v. City of St. Paul, (1930) 179 Minn. 553, 230 N. W. 89.}

e. Liability to Persons Other Than Travelers.—In some states, where liability for street defects is purely statutory, it is held that there is no liability to those who suffer accidents as a result of street defects when they are using the street for purposes other than travel.\footnote{Ibid.} In most other states, however, the duty to keep streets in repair extends to any persons making a legitimate use of the street.\footnote{(1916) 135 Minn. 56, 160 N. W. 190.} The question appears not to have been directly litigated in this state, but the conclusion reached in at least one case suggests that proof that the injured party was traveling over the street at the time the accident took place is not essential to recovery. In Barrett v. Village of Princeton,\footnote{Ibid.} two seven-year-old boys were killed by the caving in of a sewer trench which the village was constructing through the center of one of its principal streets. The boys were playing in the street and the adjacent court house yard at the time the accident occurred. Although a dismissal was held proper because of the absence of negligence on the part of the village, it was said that there is a legitimate use of streets for recreation and play. Such use is "not at all in the nature of a trespass" and the municipality owes a duty of due care to persons so using them.\footnote{Ibid.}

It is fairly common for municipal ordinances to ban playing in the streets. The effect of such an ordinance on the municipality's duty to use due care in its maintenance of streets toward those who play in the streets in violation of the ordinance has never been determined in Minnesota. Elsewhere it has been held that if a person uses a part of the street for a purpose not intended as a proper use he cannot ordinarily recover.\footnote{McQuillin, Municipal Corporations (2d ed. rev. 1936), sec. 2954.} On the other hand, the fact that the injury occurred while the person injured was violating an ordinance does not preclude a recovery unless violation was the proximate cause of the injury. Idem, sec, 2951. Some cases seem to suggest that there might be liability in such situations if the defect which caused the accident would be sufficient to render the street unsafe for those using it legitimately. Molway v. Chicago, (1909) 239 Ill. 486, 88 N. E. 485, 23 L. R. A. (N.S.) 543; Kohlhof v. Chicago, (1901) 192 Ill. 249, 61 N. E. 446, 85 Am. St. Rep. 335. With the conclusion of Barrett v. Village of Princeton, that recovery is not limited to those using the streets for purposes of travel, compare Minn. Op. Atty. Gen., 1922, No. 58, in which the attorney general ruled that where a piece of gravel on a street was thrown by a wheel of an automobile through a plate glass window, the village was not liable, not only because there probably was not negligence, but because the duty to keep streets in safe condition is owed to travelers only and does not extend to the owner of an abutting building.
One other case may be pertinent here although the ground of liability is so obscure that it is difficult to determine where a discussion of the decision properly belongs. This case, Neumann v. Interstate Power Co.\(^{544}\) involved an action against a utility company and the village of Lewiston for wrongful death which occurred when two men were electrocuted when a long pipe they were lifting touched a 2,300-volt bare electric wire hanging down with two others to a height of 19 feet in the alley in the rear of the premises where the men were working. The lack of insulation, too low elevation of the wires and the lack of adequate warning were held sufficient to justify the jury in finding the company negligent and hence liable. Most of the opinion centered around the company's liability, but in holding the village also liable, the court said:

"The village cannot as a matter of law be held free of negligence. As already stated, it realized the need of warning. It had granted the right to the power company to string its wires in the alley and had knowledge of the way in which they were maintained, the high voltage ones uninsulated. It also knew how inadequate was the warning the power company had given. The village was not entitled to judgment non obstante.\(^{111}\)

It is difficult to understand the basis for holding the village liable in such a case. If it is because of a violation of its duty to keep its street in safe condition, the village becomes virtually an insurer against accidents.\(^{546}\) It can scarcely be because of a failure of the village to exercise its police power to see that utility wires were not a menace to public safety (apart from its duty to see that its streets were safe for travel) for on that basis the case could not be reconciled with the accepted principle that no liability attaches for a failure to pass ordinances or exercise governmental powers. At any rate, if the basis for recovery was a failure to keep its streets in safe condition, the case must definitely be considered as authority for the proposition that this duty extends to other persons than travelers, even to those who do not use the surface of the street at all.\(^{547}\)

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544 (1929) 179 Minn. 46, 228 N. W. 342.
545 (1929) 179 Minn. 46, 51, 228 N. W. 342.
546 Cf. Boyd v. City of Duluth, (1914) 126 Minn. 33, 147 N. W. 710, in which the court held the city not liable for injuries suffered by plaintiff's minor son when struck by a timber which fell from the supports of the bridge under which he was playing. The court based its conclusion in that case on the principle that it was unreasonable to require the city to anticipate this unusual occurrence.
547 The only allusion to this fact was in the court's ruling that the provision of 2 Mason's Minn. Stat., 1927, sec. 7536, that any power company may use public roads to maintain lines and appurtenances if done in
f. Contributory Negligence.—There is, of course, no difference in principle between actions against municipal corporations and those against private individuals so far as the doctrine of contributory negligence is concerned. To the extent that the application of the rule that a plaintiff whose negligence contributes to his injury cannot recover from a negligent defendant is the same in the two cases, contributory negligence cases must be considered beyond the scope of this study. Some of the cases, however, present unusual applications of the doctrine and are mentioned here.

The general rule was stated in an early case:

"The question . . . in all cases of negligence, is one of ordinary and reasonable care and caution, such as a prudent man under like circumstances would be likely to exercise, having reference to the degree and kind of danger to be apprehended, and the means of avoiding it. A greater degree of care would be required in avoiding an apparently imminent and reasonably certain danger than one of a less certain, or doubtful, character. Hence the degree of care necessary to constitute ordinary care in any given case necessarily depends upon the peculiar facts and circumstances of that case; and whenever these facts and circumstances are fairly open to doubt or controversy . . . the question of negligence is one for the jury. . . ." 548

In few cases has the court considered the question of contributory negligence one determinable by it as a matter of law; and because juries appear to have been prone in this state as well as elsewhere to favor the plaintiff against a public defendant, most of its decisions on this point have resulted in affirmances for the plaintiff.

It is not ordinarily conclusive against the plaintiff that he could have seen the defect had he been on the alert for danger of that kind. One using the public streets is not required by the rule of ordinary care to exercise a constant vigilance to discover or guard against dangers; he may assume that the municipal corporation has done its duty and that the street is in a safe condition for his use. 549

such a way as not to interfere with the safety and convenience of ordinary travel along or over them was no defense, since it had no reference to persons not travelers who were engaged in their own pursuits adjacent to high voltage lines.

548Erd v. City of St. Paul, (1876) 22 Minn. 443, 446.
549Bowen v. City of St. Paul, (1922) 152 Minn. 123, 188 N. W. 544; Nichols v. Village of Buhl, (1922) 152 Minn. 494, 189 N. W. 407, 193 N. W. 28; McGandy v. City of Marshall, (1929) 178 Minn. 326, 227 N. W. 177. On the other hand, the municipal corporation may not make the assumption that those who use the streets will not create an unsafe condition in them. See Svendsen v. Village of Alden, (1907) 101 Minn. 158, 112 N. W. 10.
If number of cases can be taken as any criterion, the most perplexing problem of contributory negligence in cases of torts by municipal corporations has been the determination of the circumstances under which previous knowledge by the plaintiff of a defect precludes his recovery. The general rule stated in the early case of *Kelly v. Southern Minnesota Railway Co.*, may still serve as a guide:

"The fact that a person attempts to travel on a highway after he has notice that it is unsafe or out of repair is not necessarily negligence. This depends on circumstances. He cannot, of course, heedlessly or recklessly run into danger. But when he knows that a highway is out of repair, whether he ought absolutely to refrain from attempting to pass over it, or whether he would be justified in making the attempt, using such a degree of care in so doing as would be adequate and commensurate with the condition of the road, is a question of fact to be determined from all the circumstances of the case. . . . If the risk was such that men of ordinary prudence having knowledge of the defect would not under the circumstances have attempted to pass over it at their own risk, then plaintiff's servant had no right to attempt to pass it at the risk of the defendant. But if such person would have believed it reasonably safe to attempt the passage in the manner adopted by plaintiff's servants in this case, plaintiff could recover, notwithstanding such previous knowledge of the condition of the crossing."

Since the determination of whether or not the use of a street with previous knowledge of a defect constitutes contributory negligence "depends on circumstances," it is not surprising to find that in reaching its subjective conclusion, the court has not always been consistent. The rule that previous knowledge of an unsafe condition is not conclusive evidence of contributory negligence was repeated and applied in two cases decided not long after it was first stated. Then, confronted with a situation in which it seemed unfair to allow recovery, the court introduced a modification into the doctrine, holding that if a person with full and present knowledge of the defective condition of a sidewalk or streets, and of the risks incident to its use, voluntarily attempts to travel upon it, *when the defect could easily, and without appreciable inconvenience, have been avoided by going around it*, he is not in the exercise of reasonable care, but must be presumed to have taken his chances. The earlier cases were dis-

550 (1881) 28 Minn. 98, 9 N. W. 588.
551 *McKenzie v. City of Northfield*, (1883) 30 Minn. 456, 16 N. W. 264; *Nichols v. City of Minneapolis*, (1885) 33 Minn. 430, 23 N. W. 868.
552 *Wright v. City of St. Cloud*, (1893) 54 Minn. 94, 55 N. W. 819.
tungished on the ground that in all of them the traveler either had no other practicable route, had no previous knowledge of the particular defect, or the accident occurred in the dark and the traveler, although having previous knowledge of the situation, did not have presently in mind the existence of the defect or the consequent risk.

Subsequent decisions have attempted rather to differentiate Wright v. City of St. Cloud than to follow it. In Maloy v. City of St. Paul the plaintiff was allowed to recover notwithstanding her previous knowledge of the defect. The Wright Case was distinguished because the defect in the Maloy Case "was not such as should have turned a prudent traveler off the walk," the accident happened in the evening when the snow was falling and the wind was blowing; vision was obscured and the hole in the sidewalk was partially filled with loose snow. In several cases the court felt justified in reaching a different conclusion from that reached in Wright v. St. Cloud on the ground that there was no other way that could be taken without appreciable inconvenience.

The fact that the plaintiff knew that the sidewalk on the opposite side of the street was in dangerous condition also has been held to rebut the inference of contributory negligence arising from the use of a sidewalk with knowledge of a defect in it. A number of other cases have followed the general principle of the first case on the subject to the effect that the use of a street or sidewalk with previous knowledge of the defect is not conclusive on the question of contributory negligence. In such a case, the burden of proving availability of a safer route is on the defendant municipal corporation.

In at least two other cases involving travelers who used a street with knowledge of its unsafe condition, the court, following Wright v. City of St. Cloud, has held the plaintiff guilty of contributory negligence as a matter of law. In Friday v. City of Moorhead the plaintiff had driven his wagon loaded heavily with flax down a street sloping from the center to the outside on

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553 (1893) 54 Minn. 398, 56 N. W. 94.
555 Burrows v. Village of Lake Crystal, (1895) 61 Minn. 357, 63 N. W. 745.
556 Murphy v. City of South St. Paul, (1907) 101 Minn. 341, 112 N. W. 259; Maki v. City of Cloquet, (1911) 116 Minn. 17, 133 N. W. 80; Campion v. City of Rochester, (1938) 202 Minn. 136, 277 N. W. 422.
557 Campion v. City of Rochester, (1938) 202 Minn. 136, 277 N. W. 422.
558 Murphy v. City of South St. Paul, (1901) 84 Minn. 273, 87 N. W. 780.
an occasion when the street was covered with ice. The wagon slipped to the side, hit the curb, turned over, and the plaintiff was injured. Testimony showed that plaintiff knew of the condition of the street and that he could have gone on another street with safety. The court said the plaintiff must be deemed, as a matter of law, to have assumed the risks incident to passing over the icy street.

This decision was followed a short time later in Johnson v. City of Willmar, involving somewhat different circumstances. There the plaintiff had removed certain tile, planks and debris left by a contractor on the side of a tile ditch and had piled it along the curb in order to get in and out of his stable. This left a driveway ten or twelve feet wide next to the ditch. The plaintiff drove his team and buggy up this driveway at night and the right wheel of the buggy grated against a large stone, startling one of the horses as a result of which both fell into the ditch. Here again the plaintiff was held negligent as a matter of law. The court concluded that the decision in Friday v. City of Moorhead governed this case. The fact that there the driver might have traveled on another street to reach his destination was held not a significant difference between the two cases.

One point of inconsistency in these cases involving use of a street with prior knowledge of a defect, perhaps more verbal than real, may be found in the court's statement of the standard of care required of the plaintiff in view of his previous knowledge. Generally it has been said that the standard is still that of ordinary care in view of all the circumstances, one of the circumstances being plaintiff's familiarity with the defect; but in one case the court may have looked with approval on a charge that if the plaintiff knew that the sidewalk was in a dangerous condition it was her duty, in passing over it, to use more than ordinary care and caution to avoid injury. The case cannot be considered of any real significance on that point, however, because, since the defendant village was appealing the case, the charge was as favorable to it as it could have wished.

It is not negligence per se for a pedestrian to cross a street at places other than intersections. The city owes a duty to keep the streets as well as the sidewalks and crossings safe for pedes-

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559 (1910) 111 Minn. 58, 126 N. W. 397.
560 Lyons v. City of Red Wing, (1899) 76 Minn. 20, 78 N. W. 868; Taylor v. City of Mankato, (1900) 81 Minn. 276, 83 N. W. 1084.
trians. Consequently a pedestrian who is injured as a result of a street defect is not precluded from recovery simply because he crossed the street in the middle of a block. 562

Several other cases illustrate the application of contributory negligence doctrines to actions resulting from street and sidewalk defects. In *Anderson v. City of St. Cloud* 563 the plaintiff was hauling a nine-ton granite block by teams across a city bridge when the wheels on one side broke through the plank flooring, the stone slipped from place, fell into the river below and was practically ruined. The plaintiff had investigated the capacity of the bridge before using it, and the teamsters proceeded 400 feet over it after the planking commenced to crack; the wagon could have been turned over to the other side of the bridge where the flooring was stronger. Under these circumstances the plaintiff was held guilty of contributory negligence as a matter of law since the result might have been obviously expected and avoided by reasonable care.

In *Hudson v. City of Little Falls*, 564 the plaintiff was held precluded from recovery because, in walking along the edge of a wooden sidewalk beyond the stringers as a result of which a loose board tipped up and injured him, "he must have been using the sidewalk as a plaything, or as an instrument by which to test his skill in walking on dangerous projections and in difficult places." The evidence disclosed that he had noticed before that the plank was loose, so the case probably falls within the principle of *Wright v. City of St. Cloud*, 565 and *Friday v. City of Moorhead*. 566

*Stoker v. City of Minneapolis* 567 involved an accident in a street which had been graded up with sand later washed out by water used in extinguishing a fire near the scene of the accident. The plaintiff was crossing the street in the dark and came to the ditch created by the washout. She tried the planks crossing it but, being heavy, thought they would not hold her weight; so she walked a few steps along the side of the ditch until the bank gave way and injured her. She had no previous knowledge of the condition of the street. The court held that on the question of contributory negligence the evidence made the case a close one.

562 Collins v. Dodge, (1887) 37 Minn. 503, 35 N. W. 368; Thorsell v. City of Virginia, (1917) 138 Minn. 55, 163 N. W. 976.
563 (1900) 79 Minn. 83, 81 N. W. 746.
564 (1897) 68 Minn. 463, 71 N. W. 678.
565 (1893) 54 Minn. 94, 55 N. W. 819.
566 (1901) 84 Minn. 273, 87 N. W. 780.
567 (1884) 32 Minn. 478, 21 N. W. 557.
but decided that different minds might reasonably arrive at different conclusions and that the case was properly left to the jury, which had found for the plaintiff.

**g. Notice of Defect.**—If a street or sidewalk is properly constructed in the first instance, the city or village is not liable for damages suffered as a result of defects which develop in the street or sidewalk unless its officers had actual notice of the defect or unless it is proved that the defect existed for such a length of time that the city authorities, if exercising reasonable diligence or supervision, would or should have discovered it.\(^{68}\)

In other words, the city must have "actual" or "constructive" notice.\(^{69}\) No notice need be proved, however, where the defective condition of the street is directly caused by the officers or employees of the municipal corporation.\(^{70}\) Perhaps this is not so much an exception to the requirement of notice as an application of it, since the city must be presumed to have notice of that which it itself does.

Actual notice means notice to an officer or employee of the municipality, since a city can act only through agents; but notice to any officer or employee does not necessarily constitute actual notice. Because of the general powers and duties of the mayor as chief magistrate of the city, it has been held that notice to him is actual notice to the city.\(^{71}\) In Minneapolis, the mayor had control of the police under charter, and a rule for many years required the police to report street defects. A report of a defect in a street was made to a policeman but was not acted upon before an accident occurred as a result of the defect. In a case arising out of the accident,\(^{72}\) it was contended that the mayor could not impose the duty of reporting street defects on policemen, but the court said, after citing the *Cunningham Case*,

"This may not be very important in this case except as it indicates that notice may be good though not given to one charged by the council with any duty respecting streets. . . . As modern

\(^{68}\)Miller v. City of St. Paul, (1888) 38 Minn. 134, 36 N. W. 271. The principle has been stated in numerous cases, many of which are cited subsequently in this discussion.

\(^{69}\)See Lindholm v. City of St. Paul, (1872) 19 Minn. 245 (Gil. 204).

\(^{70}\)McDonald v. City of Duluth, (1904) 93 Minn. 206, 100 N. W. 1102; Kleopfert v. City of Minneapolis, (1904) 93 Minn. 118, 100 N. W. 669; Ogren v. City of Minneapolis, (1913) 121 Minn. 243, 141 N. W. 120. The rule had been stated as dictum in Cleveland v. City of St. Paul, (1871) 18 Minn. 279 (Gil. 255).

\(^{71}\)Cunningham v. City of Thief River Falls, (1901) 84 Minn. 21, 86 N. W. 763.

\(^{72}\)Engel v. City of Minneapolis, (1917) 138 Minn. 438, 165 N. W. 278.
cities are constituted and managed, it is important that there be some quick and ready means of discovering defects in streets and some one in authority to whom such defects may be expeditiously reported. This seems to be a very appropriate function to impose on the police department, and we are of the opinion that the mayor as chief magistrate of the city, having 'control and supervision of its police force' may very properly be regarded as vested with power to impose this duty upon the police by rules and regulations looking to that end. In fact, where, as in this case, such rules have been in force and have been notoriously acted upon for 30 years, they must be deemed to have the sanction and approval of every branch of the city government.\textsuperscript{573}

The case of \textit{Engel v. City of Minneapolis}\textsuperscript{574} is authority for the proposition that notice of defect in a street to an officer or agent of the city is notice to the city if the officer is charged with the duty of repairing the defect or reporting it to another officer or department which is to make repairs.

In actual effect there is so little difference between express and constructive notice that a plaintiff has been permitted to prove constructive notice on an allegation of actual notice. "Constructive notice is included within actual notice, and in a case of this kind is sufficient under a pleading charging the latter. In other words the greater includes the less."\textsuperscript{575}

When constructive notice is relied upon, the nature and extent of the use of the walk and the length of time the defect has existed become important. As in so many phases of the law of negligence, no rule of thumb can determine when there has been constructive notice; each case must depend on its own facts. As the court once put it:

"We cannot lay down any rule to determine the time a defect must continue to constitute such notice that will be absolute. . . . The negligence of a municipality in allowing defects in sidewalks to continue is relative, and, of necessity, its location, the extent to which it is travelled; its appearance, suggesting the probable discovery of the defect; and the difficulty or ease with which its imperfections will be remedied by the authorities charged with the duty to repair,—are essential, and affect this question."\textsuperscript{576}

\textsuperscript{573}(1917) 138 Minn. 438, 440, 165 N. W. 278. Earlier the court in a St. Paul case had left undecided the question whether the fact that day and night police officers were aware of the obstruction in the street, would, under all the circumstances of that case, constitute actual notice of the defect to the city. Cleveland v. City of St. Paul, (1871) 18 Minn. 279 (Gil. 255).

\textsuperscript{574}(1917) 138 Minn. 438, 165 N. W. 278.

\textsuperscript{575}Maki v. City of Cloquet, (1911) 116 Minn. 17, 18; 133 N. W. 80.

\textsuperscript{576}Lundberg v. Village of North Mankato, (1902) 87 Minn. 484, 485. 92 N. W. 401.
The duty to keep streets in repair includes the duty to find out when they are in disrepair. It is for this reason that proof of the existence of a defect for a considerable period of time is competent since it tends to show negligence.\textsuperscript{577}

By and large it is up to the jury to determine whether or not the defect existed for such a time as to charge the defendant with constructive notice. In very few cases has the court felt justified in saying that as a matter of law the city did not have notice. The existence of a defect for several years, of course, constitutes constructive notice;\textsuperscript{578} and it has been held that where no witness knew how long a particular defect had been in existence, one witness testifying that the walk looked as if it had been in the same condition for several years, the street foreman saying that he did not know, the jury was justified in concluding that it had existed long enough to charge the city with notice.\textsuperscript{579} But far shorter times have been held sufficient. Two months,\textsuperscript{580} several weeks,\textsuperscript{582} one month,\textsuperscript{583} and twenty days\textsuperscript{585} have been held long enough to justify a jury in finding constructive notice. In one case the court sanctioned an instruction that if the jury found that the defect in question was open, notorious, and dangerous and existed from December 20th to January 31st, it would be presumed that the city had notice.\textsuperscript{584} Two or three weeks,\textsuperscript{585} ten days or two weeks,\textsuperscript{586} and one to two weeks\textsuperscript{587} have been held long enough for a defect to exist to justify the jury in imputing constructive notice to the city; and the existence of a defect for eight days in one case "amply justified" a finding of negligence.\textsuperscript{588} That an obstruction was left unguarded for several nights has been held sufficient to make notice a question for the jury.\textsuperscript{589} Perhaps the shortest time which it has been held might

\textsuperscript{577}Gude v. City of Mankato, (1883) 30 Minn. 256, 15 N. W. 175.
\textsuperscript{578}Maki v. City of Cloquet, (1911) 116 Minn. 17, 133 N. W. 80.
\textsuperscript{579}Brandt v. City of Duluth, (1924) 158 Minn. 104, 196 N. W. 932.
\textsuperscript{580}Tabor v. City of St. Paul, (1886) 36 Minn. 188, 30 N. W. 765; see also Moore v. City of Minneapolis, (1872) 19 Minn. 300; Weide v. City of St. Paul, (1914) 126 Minn. 491, 148 N. W. 304.
\textsuperscript{581}Waldron v. City of St. Paul, (1885) 33 Minn. 87, 22 N. W. 4.
\textsuperscript{582}Baker v. City of South St. Paul, (1938) 202 Minn. 491, 279 N. W. 211.
\textsuperscript{583}Ljundberg v. Village of North Mankato, (1902) 87 Minn. 484, 485; 92 N. W. 401.
\textsuperscript{584}Dory v. City of Duluth, (1908) 103 Minn. 154, 114 N. W. 465.
\textsuperscript{585}Boyd v. City of Duluth, (1925) 164 Minn. 19, 204 N. W. 562.
\textsuperscript{586}Callahan v. City of Duluth, (1936) 197 Minn. 403, 267 N. W. 361.
\textsuperscript{587}Mathieson v. City of Duluth, (1937) 201 Minn. 290, 276 N. W. 222.
\textsuperscript{588}Nichols v. City of Minneapolis, (1885) 33 Minn. 430, 23 N. W. 868.
\textsuperscript{589}Killeen v. City of St. Paul, (1917) 136 Minn. 66, 161 N. W. 260.
constitute notice is nine hours. In *Stellwagon v. City of Winona*\(^5^9^9\) the court concluded that under the circumstances it was a question for the jury whether the failure of the city to discover and remedy a defective iron grating over a coal hole on a much traveled street for nine hours was negligence.

Whether or not the city might be held to have constructive notice of a newly-formed patch of ice because such patches had formed at the same spot for a long period of time was an open question in this state until recently. At least one case had intimated that this might be sufficient on which to predicate constructive notice. In *Stanke v. City of St. Paul*,\(^5^9^1\) an action arising out of a fall on a piece of ice formed on a sidewalk because a gutter became obstructed and overflowed the sidewalk, the court said that in the absence of notice, actual or constructive, to the municipality, that ice usually formed at that place, or at least, in the absence of notice that ice might so form and cause the walk to become dangerous, the plaintiff could not recover. Relying on dicta to this effect, the plaintiff in a later case sought to introduce evidence that the ice patch on which he fell, formed from water dripping from a building cornice, was similar to others which had formed at the same spot regularly for a number of years, thus proving constructive notice. However, the court said that since the particular patch of ice which caused the accident apparently had been in existence for only a few hours, a city could not be said to have constructive notice in such circumstances. If the plaintiff's theory were to be followed, the court reasoned, every city would be liable in hundreds of similar cases. The rule of constructive notice, in the court's judgment, could not be extended this far.\(^5^9^2\) This decision was later followed in a case involving a patch of ice which was in existence in the afternoon of the day of the accident but not the same morning.\(^5^9^3\)

It will be seen from the foregoing review of the Minnesota cases that no general rule can be deduced as to the length of time required to give the city implied notice of a defective condition in its streets. A few hours normally cannot be considered enough, but under some circumstances on a heavily traveled street, anything more than a few hours may make the question one for the jury. The court is much more likely to say as a mat-

\(^{5^9^0}(1893)~5^4~\text{Minn.}~4^6^0,~5^6~\text{N. W.}~5^1.\)

\(^{5^9^1}(1898)~7^1~\text{Minn.}~5^1,~7^3~\text{N. W.}~6^2^9.\)

\(^{5^9^2}\text{Mesberg v. City of Duluth, (1934) 1^9^1~\text{Minn.}~3^9^3,~2^5^4~\text{N. W.}~5^9^7.}\)

\(^{5^9^3}\text{Johnson v. City of Redwood Falls, (1938) 2^0^4~\text{Minn.}~1^1^5,~2^8^2~\text{N. W.}~6^9^3.}\)
ter of law that the city had constructive notice than that it had not.

Since wooden sidewalks are bound to decay and since this decay takes a considerable period of time, the mere fact that such a sidewalk is rotten in such a way that the defect could have been discovered by inspection may be sufficient to charge the city with constructive notice. In the nature of things, the process of decay must have continued for so great a length of time that the city is chargeable with notice of it; at least the question of negligence in such a case is for the jury. Since decay is a gradual process, it is competent to show that a sidewalk was in bad condition some time after the accident when a worn-out and rotten condition of the sidewalk is relied on as the cause of the accident.

At least for the purpose of proving notice to the city, evidence that prior to the plaintiff's injury other similar accidents had occurred to other pedestrians at the same place because of a defect in the sidewalk has been held admissible. The court commented, however:

"Wagon wheels, locomotive wheels, and other machinery act with more uniformity and certainty than do different people's legs, and whether such experiments with the latter are competent to prove the existence of a defect in a sidewalk we need not decide."

Evidently it may not be necessary in some cases for a city to have notice of a particular defect if it knows of a general defective condition. In Huffman v. City of Crookston, a contractor constructing a bridge had placed a plank across the walk, as a result of which the plaintiff claimed to have been injured. The city officials knew for some time prior to the accident that the street and sidewalk at this point were being obstructed by the company. The court held that since the city authorities were informed generally of obstructions to travel although they had no notice of the particular plank and made no effort to prevent the obstruction, the question of their negligence was for the jury.

594 Peterson v. Village of Cokato, (1901) 84 Minn. 205, 87 N. W. 615; Ritschdorf v. City of St. Paul, (1905) 95 Minn. 370, 104 N. W. 129.
595 Murphy v. City of South St. Paul, (1907) 101 Minn. 341, 112 N. W. 259; Estabrook v. City of Duluth, (1919) 142 Minn. 318, 172 N. W. 123.
597 Burrows v. Village of Lake Crystal, (1895) 61 Minn. 357, 63 N. W. 745.
598 (1911) 113 Minn. 232, 129 N. W. 219.
On the other hand, knowledge of another defect near the place of the accident would not be constructive notice if it were not of such a character as to put the city on guard against the defect which caused the accident. For example, in *Baker v. City of South St. Paul*, where the plaintiff was injured when an automobile in which she was riding struck a hole in the street caused by a leak in a sewer, there was evidence that there had been a previous break in or near the same place, which the city repaired. The court held, however, that the evidence as it stood was not sufficient to show that these two holes were caused by breaks in the same tile line and hence that the city could not be charged with constructive notice. It was intimated that had there been proof that the earlier break was in the same line, the city would have had constructive notice.

The rule that constructive notice may be inferred from the existence of a defect for some time assumes a requirement that the municipal corporation must use reasonable care to ascertain that an unsafe condition exists. As to the necessity for inspection which this requirement suggests, the court has found it impossible to establish any general rule. In one case the defendant asked an instruction to the effect that inspection of sidewalks once in two weeks followed by repairs found necessary as a result of the inspection was reasonable diligence. In holding that this instruction was properly refused, the court said that no inflexible rule could be laid down in such case.

"The conditions are liable to be so different in relation to different walks, or different portions of the same walk, and so many contingencies are likely to arise, that it can only be determined from the situation and circumstances of each case whether reasonable care has been exercised in the premises."

Since constructive notice cannot be considered as commencing from any particular moment, the question of whether or not there was time to make repairs after notice was given cannot arise in such a case; but this conceivably may be an important element of the case where actual notice is relied on. Certainly the municipal corporation cannot be held negligent if actual notice is given to its officials in charge of street repair but injury occurs as a result of the defect before it is physically possible to get street crews to the scene. This point has not been raised in the cases as often

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599 (1936) 198 Minn. 437, 270 N. W. 154.

600 *Kellogg v. Village of Janesville*, (1885) 34 Minn. 132, 24 N. W. 359.
as might be expected. Apparently only a short time is necessary after notice when the city is chargeable with negligence for failure to make repairs. In one case five and a half hours elapsed between the time when notice was made to a police officer and the time the accident occurred. While the case turned on the question of whether this was notice to the city, there was no suggestion that the shortness of the time between notice and the injury would have taken the question from the jury as a matter of law.\footnote{Engel v. City of Minneapolis, (1917) 138 Minn. 438, 165 N. W. 278.}

h. Liability of Abutting Landowners.—The municipal corporation, because of its obligation to keep its streets and sidewalks in a safe condition for travel, is liable for its neglect in performing that duty regardless of the source of the defect; and frequently it is joined as defendant with an abutting landowner who has caused the unsafe condition.\footnote{See, for example, L’Herault v. City of Minneapolis, (1897) 69 Minn. 261, 72 N. W. 73; Fortmeyer v. National Biscuit Co., (1911) 116 Minn. 158, 133 N. W. 461; Latell v. Cunningham, (1913) 122 Minn. 144, 142 N. W. 141; Williams v. Stees, (1927) 172 Minn. 35, 214 N. W. 671.}

The landowner’s liability is not, however, so extensive as the city’s. He is liable where the defect is the result of his affirmative misconduct,\footnote{See, for example, Fortmeyer v. National Biscuit Co., (1911) 116 Minn. 158, 133 N. W. 461; and Williams v. Stees, (1927) 172 Minn. 35, 214 N. W. 671.} and he is liable also for mere neglect in caring for such things as coal holes, vaults, and passageways which he has placed in the sidewalk for his own convenience.\footnote{Landru v. Lund, (1888) 38 Minn. 538, 38 N. W. 621; City of Wabasha v. Southworth, (1893) 54 Minn. 79, 55 N. W. 818; Ray v. Jones & Adams Co., (1904) 92 Minn. 101, 99 N. W. 782; Latell v. Cunningham, (1913) 122 Minn. 144, 142 N. W. 141; Williams v. Stees, (1927) 172 Minn. 35, 214 N. W. 671. See Kooreny v. Dampier-Baird Mortuary, Inc., (1940) 207 Minn. 367, 291 N. W. 611.}

Most of the cases involve things of this character erected by the landowner to provide access to his basement for goods or persons; but in\footnote{Johnson v. Elmhorg, (1925) 165 Minn. 67, 205 N. W. 628. See also Isham v. Broderick, (1903) 89 Minn. 397, 95 N. W. 224.} Williams v. Stees,\footnote{(1927) 172 Minn. 35, 214 N. W. 671.} the rule was applied to a case of an injury resulting from tripping over a sidewalk made uneven when the defendant razed an adjoining building and removed the material supporting the sidewalk so that it sagged. The same principle has been held to impose liability on a property owner who allowed a drain pipe on his premises to become clogged, as a result of which water ran on the walk until it formed a mound of ice on which plaintiff fell.\footnote{(1927) 172 Minn. 34, 214 N. W. 671.}
a sidewalk for the convenience of the abutting owner, as between the owner and the city, the duty of maintaining it in safe condition devolves upon the owner. He cannot relieve himself of this duty merely by abandoning the use of the structure but can do so only through its removal and the restoration of the sidewalk to its original condition. If the structure becomes unsafe through the negligence of the property owner and injury results for which the city is liable because of the neglect of its duty to keep its streets safe for travel, it may, upon payment of damages to the persons injured, recover from the owner. The city need not wait for a suit before paying the damages.

While lot owners are liable for injuries resulting from a defective condition which they themselves have created, they are not liable to pedestrians for injuries sustained as a result of slipping on ridges or hummocks of snow and ice which form from natural causes on adjacent sidewalks. The court has even allowed a recovery from the city for an injury sustained by slipping on an icy sidewalk in front of premises of the injured woman's husband. Possibly the owner himself might be barred from recovery on the ground that he was contributorily negligent, particularly where, as in the case just mentioned, an ordinance imposed the duty of keeping the sidewalk free of snow and ice on the occupant of the abutting property. But even though owners are assessed for sidewalks and street paving, they are not obliged to keep the street free from snow and ice.

That there is a driveway over the sidewalk into the abutting premises does not change the obligations of the abutting owner; he is no more required to keep the driveway clear of snow or ice than the part of the sidewalk where there is no driveway. The fact that ruts are caused solely by the traffic coming into his premises does not make him liable under the rule that an abutting

607City of Wabasha v. Southworth, (1893) 54 Minn. 79, 55 N. W. 818.
608Ibid.
612Burke v. O'Neil, (1934) 192 Minn. 492, 257 N. W. 81.
owner is liable for the negligent maintenance of an object main-
tained in the sidewalk for his own convenience.\textsuperscript{614}

Since the landowner’s fee extends to the center of the street
subject only to the public easement and he may make use of his
property for a purpose compatible with the free use of the pub-
lic, he is not liable to persons injured simply because he builds
a retaining wall extending into the dedicated portion of the street
when the portion occupied by the wall is not needed or used for
sidewalk or street purposes.\textsuperscript{615}

A contractor who builds a temporary sidewalk while erecting
a building is liable to the same extent—and only to the same
extent—as an abutting property owner. He is not responsible,
therefore, for injuries caused by stumbling and falling on ac-
cumulations of snow and ice deposited on the temporary walk by
the elements and then trampled into ridges and irregularities by
passing pedestrians.\textsuperscript{616}

Not only is an abutter not liable for defects on the sidewalk
created by natural causes, but he is also not answerable for in-
juries resulting from an unsafe condition created by the acts of
third persons. An unusual case of this kind is \textit{O’Hara v. Morris
Fruit and Produce Co.}\textsuperscript{617} The injury which gave rise to that
action occurred when the plaintiff got her foot entangled in a
cap which either fell off or was thrown by a customer of the
defendant unloading a truckload of crated eggs in front of the
defendant’s premises. Officials and employees noticed the cap but
did not remove it. The accident occurred fifteen minutes later.
In directing the entry of judgment for the defendant, the court
said that “the defendant owed no duty to travelers to remove
from the sidewalk in front of its place of business matters in the
nature of obstructions to safe passage or a nuisance if the same
were not placed there or created by it or its servants.” Exem-

\textsuperscript{614}See McDonough v. City of St. Paul, (1930) 179 Minn. 553, 230
N. W. 89.

\textsuperscript{615}Kooreny v. Dampier-Baird Mortuary, Inc. (1940) 207 Minn. 367,
291 N. W. 611. “The sidewalk and the remainder of the street are equally
for public use,—the rights of the public are the same in each. The rights
as far as the center of the street, of the owner of an abutting lot, are the
same in each. That one is reserved for passers on foot, and the other is
for the use of vehicles, is only a regulation of the public use for the public
good, the public authorities determining how much shall be reserved for
sidewalk.” Noonan v. City of Stillwater, (1885) 33 Minn. 198, 200, 22

\textsuperscript{617}Boecher v. City of St. Paul, (1921) 149 Minn. 69, 182 N. W. 908.

\textsuperscript{616}(1936) 203 Minn. 541, 282 N. W. 274.
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resulting from the removal of a coal hole cover in the sidewalk by coal men while the premises were in the possession of his tenant.618

Where a property owner constructs a private sidewalk outside the street lines and holds it out as a thoroughfare to the public, he must use ordinary care in keeping it in proper condition.619 Apparently he has the same duties here as the city has with respect to city sidewalks.620

i. Liability of Other Persons Causing Defects.—One who negligently creates a danger to a traveler on a public street may be liable for the consequences regardless of whether or not he owns or occupies the abutting property.621 Thus a contractor who fails to erect proper barriers in the street when he makes an excavation or piles building materials there has been held liable to someone injured as a result of his negligence.622 Of course, the fact that the contractor is primarily responsible does not relieve the municipal corporation of liability if it had actual or constructive notice of the unsafe condition of the street.623 On the same principle the court has held liable one who leaves a coal hole in a sidewalk open and unguarded.624 One who has a guy wire strung across the street and attached to a derrick has been held responsible for injuries resulting.625 That the custom among other contractors is to take no more precautions against injuries from excavations has been held incompetent evidence. A failure to erect barriers was held in that case negligence as a matter of law.626

619Marsh v. Minneapolis Brewing Co., (1904) 92 Minn. 182, 99 N. W. 630.
620Cf. Burke v. O'Neil, (1934) 192 Minn. 492, 257 N. W. 81, where an apartment owner was held not liable for damages occurring to the plaintiff when she slipped on an icy sidewalk constructed by the defendant across a boulevard between a city sidewalk and the curb. The slipperiness was caused by water flowing over the sidewalk as a result of the clogging of a catch basin some little distance away.
623Killeen v. City of St. Cloud, (1917) 136 Minn. 66, 161 N. W. 260; see also Grant v. City of Stillwater, (1886) 35 Minn. 242, 28 N. W. 660; Moore v. Townsend, (1895) 76 Minn. 64, 78 N. W. 880; Hoffman v. City of St. Paul, (1932) 187 Minn. 320, 245 N. W. 373.
625Larson v. Ring, (1890) 43 Minn. 88, 44 N. W. 1078.
j. Efforts of Municipal Corporation to Shift Responsibility.— In *Boecher v. City of St. Paul*, a contractor erecting a building was granted a permit by the city to maintain a temporary wooden sidewalk in the street next to which the building was being constructed. After a snowstorm when a hummock of ice and snow was formed, the plaintiff slipped on the snow and was injured. The permit contained a clause under which the contractor agreed to maintain a clear walk four feet wide and to save the city harmless for any damages sustained as a result of the walk’s maintenance. These conditions were accepted. The plaintiff recovered a verdict against the depot company and the contractor, but the court subsequently rendered judgment in their favor notwithstanding the verdict. In affirming this judgment on appeal, the court relied on the rule that lot owners are not liable to pedestrians for injuries resulting from dangerous conditions in the walk abutting their property unless they created the dangerous condition. The court concluded that under such circumstances the law imposed on a contractor or builder no other or greater responsibility in respect to such temporary passageways than it imposes on an adjacent property owner in respect to a permanent sidewalk. Two justices dissented, however, on the ground that the contractors accepted the regulatory control imposed by the city and were bound by it. The defect complained of was the result of negligence in the failure of the defendants to maintain the substitute walk in safe repair for public use as they had agreed to do.

The decision in the *Boecher Case* may be contrasted with that in *City of St. Paul v. St. Paul City Railway Co.*, decided some seventeen years earlier. The latter case involved an action to recover the amount of a judgment obtained against the city for an injury received by the driver of a carriage on a bridge due to an alleged defect in the portion of the bridge occupied by the street car company. The ordinance authorizing the company to operate the car line over this bridge contained a clause binding the company to indemnify the city for all damages recovered or arising out of the passage of the ordinance. In holding for the plaintiff city, the court said that the obligations were contractual, for the failure to repair, to the extent of the amount of the judgment recovered.

*627(1921) 149 Minn. 69, 182 N. W. 908.*
*628(1904) 92 Minn. 516, 100 N. W. 472.*
GOVERNMENTAL RESPONSIBILITY FOR TORTS

"The street car company had adapted itself in its use of the streets, to the conditions imposed by the city, and, under the clear terms of the provisions of the ordinance referred to, was bound to keep the place of the accident in repair."

It may be possible to distinguish the facts of Boecher v. City of St. Paul from those of City of St. Paul v. St. Paul City Ry. Co. on the ground that in the former case the rights of the city against the permittee were not involved; but that point does not appear to be crucial in the decision of the case. So far as the language of the opinion is concerned, there is nothing to suggest that the result would not have been the same had the suit been one by the city against the depot company. If this is implied in the decision, however, the principle seems difficult to defend. Why one whose use of a sidewalk for his own purposes necessitates the construction of a temporary passageway for pedestrians should be able to escape a burden which its use by the public automatically imposes upon the city is not easy to comprehend, particularly when, as in most cases of this kind, the city would be unable to use the ordinary means at its disposal to plow it free of snow and ice. The city should not be relieved from liability to the injured pedestrian in such cases any more than in the usual instances of snow and ice ridges on sidewalks; but the relation of the permittee to the city is quite another matter.

629 The jury apparently found for the city in the Boecher Case, but the defect complained of was the kind of ice and snow accumulation which may subject a city to liability if the failure to remove it constitutes negligence.

630 Compare Baumgartner v. City of Mankato, (1895) 60 Minn. 244, 62 N. W. 127, where the street railway company was held liable for an injury resulting from a defect in the portion of the street which it agreed by franchise to maintain. It was conceded by the court that when a city grants to a private corporation the right to use part of a street, it may attach to the grant a condition that a portion of the street adjacent to the tracks should be maintained by the franchise holder accepting such grant and enjoying its benefits. The two cases are not entirely parallel, since the defect in the Mankato case was one which might possibly have subjected the company to liability irrespective of the agreement; however, the court clearly based its decision on the violation of the duty to maintain which had been assumed by the corporation in the franchise ordinance. If a corporation granted a right to use a street may be required to assume the obligation assumed in the Mankato case, it is difficult to see why it may not be compelled in accepting the grant to assume the somewhat different one assumed in the St. Paul case. The type of privilege granted in the two cases should make no difference, and recovery by an injured third person should be permitted as much in one case as in the other. Cf. the recent case of La Mourea v. Rhude, (1940) 209 Minn. 53, 295 N. W. 304, where it was held that a person whose property was injured by blasting in connection with sewer construction could sue the sewer contractor directly when the contract with the city made the contractor "liable for any damages done to the work or other structure or public or private property and injuries sustained by persons" in the construction of the sewer.
While it may be possible to impose liability on one who secures a franchise for the use of the streets for injuries resulting from the unsafe condition of the streets due to the negligence of the franchise holder, the municipal responsibility to travelers probably cannot be shifted by franchise.\textsuperscript{631} Mere permission to a street railway company to lay tracks along its streets does not relieve the municipal corporation of liability.\textsuperscript{632}

It is firmly established that the city cannot shift its responsibility to the abutting owner either by charter\textsuperscript{633} or by ordinance.\textsuperscript{634} In an action against the abutting owner by a pedestrian injured by an object on the sidewalk, the plaintiff introduced an ordinance prohibiting any person from placing or dropping any material or substance on any street or sidewalk. On appeal the supreme court found that the ordinance had been improperly introduced because

"It is clear that this ordinance is directed against the transgressor, and not against the owner or occupier of abutting property who neither by his own act or omission nor by that of his servants violates the ordinance. The city and not the owners or tenants of premises abutting public sidewalks is responsible for the latter's safe condition for travel. It cannot shift this responsibility to the shoulders of others by ordinance."\textsuperscript{635}

The possible effect of a city ordinance in relieving the person creating an unsafe condition of the streets from liability for injuries resulting from it was involved in \textit{Larson v. Ring}.

There the defendant had strung a guy wire across a street and attached it to a derrick and the plaintiff was injured by it when traveling down the street in a wagon. At the trial a Minneapolis ordinance was introduced which contained provisions authorizing the placing of guy lines at least ten feet above the streets opposite a derrick. The ordinance was held improperly received since undisputed evidence showed that there was no attempt to comply with it, the ordinance being introduced solely in an attempt to show what the city considered safe. Of more general interest was this statement of the court:

"The city authorities could not absolve the city nor could they release the contractors from the charge of negligence, if

\textsuperscript{631}See the cases cited in 7 McQuillin, Municipal Corporations (2d ed. 1928) sec. 2915.
\textsuperscript{632}Campbell v. City of Stillwater, (1884) 32 Minn. 308, 20 N. W. 320.
\textsuperscript{633}Noonan v. City of Stillwater, (1885) 33 Minn. 198, 22 N. W. 444.
\textsuperscript{634}See O'Hara v. Morris Fruit and Produce Co., (1938) 203 Minn. 541, 282 N. W. 274.
\textsuperscript{635}(1938) 203 Minn. 541, 542, 282 N. W. 274.
\textsuperscript{636}(1890) 43 Minn. 88, 44 N. W. 1078.
the guy rope was not put high enough. A grant of power and privileges by a city council to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of such powers and privileges.\textsuperscript{637}

k. Construction of Streets and Other Public Works.—An application of the distinction between discretionary and ministerial acts is found in the rule, generally applied throughout the country, that a municipal corporation is not liable for a defective plan for the construction of streets or other public works but it is liable for the defective execution of that plan.\textsuperscript{638} However, this principle has been so qualified in this state, as in some others, that it might better be frankly abandoned. It was early held that a direct invasion of property was not excused by the fact that it necessarily resulted from the plan adopted,\textsuperscript{639} a limitation very sweeping in its effect in the case of sewers. Other cases justify the conclusion that the rule actually applied is not so much one distinguishing between defective plans and defective execution of a plan as it is one of reasonableness.\textsuperscript{640} It has been said that there is no liability for injuries from defects in the plans for public work because in most cases it would be unreasonable to impose liability in such cases. On the other hand a reasonable man would not permit defects in the execution of the plan; therefore, it can generally be said that liability is imposed for defects resulting from the negligent execution of a plan. Several cases suggest that the court has supplanted the usually-recognized distinction between discretionary and ministerial acts with a rule of reason. In Conlon v. City of St. Paul\textsuperscript{641} the defendant was held not liable for an injury suffered by plaintiff when she slipped and fell on a sloping sidewalk. The court said that if reasonable minds might differ as to whether the plan adopted or some other plan is the better, the decision of the city authorities on the question is conclusive and cannot be reviewed by the courts, but if in adopting the plan, there is such a gross error of judgment as to show that in fact no intelligent judgment at all was ever exercised,

\textsuperscript{637}(1890) 43 Minn. 88, 44 N. W. 1078.
\textsuperscript{638}McClure v. City of Red Wing, (1881) 28 Minn. 186, 9 N. W. 767; White, Negligence of Municipal Corporations (1920), 47, sec. 31; 6 McQuillin, Municipal Corporations (2d ed. rev. 1939) sec. 2804; McQuillin, Liability of Municipal Corporations for Damages Resulting from Defective Plans of Construction, (1900) 51 Cent. L. J. 185-190.
\textsuperscript{639}Tate v. City of St. Paul, (1894) 56 Minn. 527, 58 N. W. 158, 45 Am. St. Rep. 501.
\textsuperscript{640}See the discussion of this question in connection with sewer construction, supra, pp. 481-483.
\textsuperscript{641}(1897) 70 Minn. 216, 72 N. W. 1073.
as where there were no obstacles to be overcome which would furnish any reason or excuse for the dangerous condition complained of, the city is liable for constructing and maintaining a sidewalk on such a defective plan. Since the court found there was such a reason in that case, the defendant was relieved of liability.

The opposite conclusion was reached in *McDonald v. City of Duluth*,[4] involving a suit for damages for an injury sustained by the plaintiff when a bridge railing gave way because it was not properly fastened in construction. It was said that where there are obstacles to overcome in the construction of any public work and reasonable minds might differ as to whether the plan adopted therefor by the municipality was the best and safest, the decision of the municipality on the question cannot be reviewed by the courts; but a municipality is liable for an injury caused by an unsafe public structure, although the defect exists in the plan adopted for its construction, if there is no reasonable necessity for having the defect.

In *Klasens v. Village of Kasota*,[6] in holding the defendant liable for negligence in building a bridge guard rail too low, it was recognized again that a municipality may be liable because of an unnecessary defect in the plan of construction. Likewise, in *Genereau v. City of Duluth*,[7] it was held that the trial court was right in submitting to the jury the issue of negligence arising out of the method adopted in joining a new portion of the sidewalk to the old. The short and steep slant which caused the injury was not called for by any grade or contour or by any necessary construction, said the court.

What these cases seem to mean is that there is actually no distinction, except in the frequency with which liability is imposed, between the making of plans and their execution. Instead, the general test of reasonable care is applied here as in the case of maintenance of streets and other public works where the municipal corporation is not immune from liability.[8] Indeed, as

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642(1904) 93 Minn. 206, 100 N. W. 1102.
643(1914) 128 Minn. 47, 150 N. W. 221.
644(1915) 131 Minn. 92, 154 N. W. 664.
645A number of decisions in other states also appear to support this view. See, for example, Hitchins Bros. v. Mayor and Council of Frostburg, (1887) 68 Md. 100, 6 Am. St. Rep. 422: "Any particular plan that may be adopted must be a reasonable one, and the manner of its execution thence becomes, with respect to the right of the citizens a mere ministerial duty." City of Terre Haute v. Hudnut, (1887) 112 Ind. 542, 13 N. E. 686: "It is the duty of the municipal corporation to exercise reasonable care in providing a plan, as well as in doing the work." White, in speaking of the distinction between defects in plan and defects in execution of public
has been pointed out, this seems to be the case with respect to
the whole general distinction between discretionary and minis-
terial acts. Most discretionary acts, if arbitrary enough or re-
fecting such poor judgment as to amount to no judgment at all,
may result in liability.646

(To be Continued)

works, has said, "This distinction, unless carefully guarded and qualified,
seems repugnant to reason and justice. It has been questioned by one
authoritative court, disregarded by others, denied by still others, qualified
by another as not applicable to errors in the plan of works erected by a
city for its private profit or emolument; and it has previously received at
the hands of the same court, an application so extraordinary as not to
throw the doctrine itself into a favorable light." White, Negligence of
Municipal Corporations (1920) p. 49, sec. 32.

646This idea has been expressed more articulately and more completely
by Professor Jennings in his article, Tort Liability of Administrative
Officers, (1937) 21 MINNESOTA LAW REVIEW 263, with reference to the
discretionary-ministerial distinction in determining the liability of officers.