Street and Sidewalk Safety: The Scope of the Municipal Duty in Minnesota

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In this Article Professor Casad, by an analysis of current applications of general negligence principles in cases dealing with the nonfeasance of municipalities, seeks to determine the standard of care required of a municipality. He concludes that these principles are unsatisfactory when so applied and that, as a result, the actual duty of a municipality in nonfeasance cases is generally greater than the ordinary duty of care expressed by the traditional doctrines of negligence. Recognizing that the standard of care that should be required of a municipality is a policy question that may validly be resolved in a number of ways, the author emphasizes that if municipalities are to perform their functions properly and to allocate expenditures economically, the standard of care that will be applied to that performance must be clarified. Only with such clarification will it be possible for a municipality to anticipate the extent of its duties and to adopt the precautions required in order to remedy dangerous situations for which it is likely to be held liable.

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INTRODUCTION

The Minnesota law pertaining to the duty of municipalities to maintain safe streets and sidewalks is usually phrased by the courts in the terms of the general negligence doctrine—the duty

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1. The most comprehensive statement of the operative principles ever attempted by the Supreme Court of Minnesota appears in Mr. Justice Matson's opinion in Paul v. Faricy, 228 Minn. 264, 37 N.W.2d 427 (1949). It may be noted that Mr. Justice Matson phrased the basic rule as a principle of immunity rather than liability.

In the use of its highways, streets, and sidewalks, a municipal corporation as a general rule is not liable for injuries to persons or property resulting from its adoption of an improper plan of a highway, street or sidewalk construction when the defects in the plan are due to a mere error in the exercise of a bona fide judgment, even though
to use reasonable care to keep the streets and sidewalks reasonably safe. This doctrine has served the purposes of the courts well enough by providing a framework for the decision of liability cases, but it is unsatisfactory in other respects, particularly in those cases in which negligence is predicated upon nonfeasance rather than misfeasance. Referring specifically to Minnesota law, three interrelated reasons may be given for this conclusion.

reasonable men might differ as to which plan should have been adopted, subject, however, to:

(a) A liability for damages resulting from a defect in the original plan for which there is no reasonable necessity and which is so obviously and palpably dangerous that no reasonable prudent man would approve its adoption. . . .

(b) A liability for damages resulting from a defect in the original plan where such defect is embodied in the construction work and is permitted to remain after the municipality, while still in control of its streets and sidewalks, has reasonable notice that it is a source of danger.

(c) A liability for damages resulting from its negligence in the execution of the plan where the construction work is under the supervision of the city. . . .

(d) A liability for damages resulting from negligence in the maintenance and repair of the highway, street, or sidewalk after the construction work has been completed if such highway, street, or sidewalk is then under the municipality's control. It has long been the established rule in this state that a city is under a legal obligation to exercise reasonable care to keep and maintain its streets in a safe condition for public use.

Id. at 272–74, 37 N.W.2d at 433–34.

A careful reading of this "general rule" with its four exceptions, in the light of the doctrine of constructive notice, will show that the rule is effectively nullified by its exceptions. The "rule" can cover only a very few situations: (1) cases involving a defect in a planned condition or object for which reasonable necessity exists (the burden of establishing reasonable necessity is on the city, Fitzgerald v. Village of Bovey, 174 Minn. 450, 219 N.W. 774 (1928)); and (2) planned conditions which involve defects that are not obvious; and (3) defects attributable to nonfeasance which have been in the street for so short a time that the city could not be said to have constructive notice of them. Since the "immunity" applies in so few cases the emphasis in Mr. Justice Matson's statement seems to be misplaced.

2. See Tracey v. City of Minneapolis, 185 Minn. 380, 241 N.W. 390 (1932); Spiering v. City of Hutchinson, 150 Minn. 305, 185 N.W. 375 (1921). See also Peterson, Governmental Responsibility for Torts in Minnesota, 26 Minn. L. Rev. 293, 480 (at 485), 613, 700, 854 (1941–1942).

In some of the early cases the court found the basis of the duty in the language of the municipal charter or ordinances. Lindholm v. City of St. Paul, 19 Minn. 204 (Gil. 204) (1872); Cleveland v. City of St. Paul, 18 Minn. 279 (Gil. 255) (1872). But a charter requirement that a city keep its streets "in safe condition" meant that the city must take reasonable precautions to this end. See Bohen v. City of Waseca, 32 Minn. 176, 19 N.W. 730 (1884). This practice of seeking the municipal duty in the words of the charter effectively ceased after 1885 when the court held, in Kellogg v. Village of Janesville, 34 Minn. 132, 24 N.W. 359 (1885), that a city could be held liable for negligent street maintenance despite the fact that no duty to repair streets was specifically imposed by the charter. Cf. Miller v. City of St. Paul, 38 Minn. 134, 36 N.W. 271 (1888).
A. THE DUTY OF A MUNICIPALITY TO ANTICIPATE DANGEROUS CONDITIONS

In most of the decided cases the fault charged is some form of nonfeasance—for example, failure to inspect a street so as to discover a defect, failure to repair a known condition or failure to erect a railing or barrier at a dangerous place. Under the general negligence doctrine liability for negligent omissions or nonfeasance is imposed only where there has been a failure to perform some positive primary duty. However, negligence law, being primarily concerned with the remedy rather than with the right, does not define this positive duty except in the traditional terms of "foreseeable injury" and "reasonable care." The standard of "reasonable care," as applied to municipalities, is meaningful enough in cases of negligent misfeasance such as faulty construction or repair work. It informs a city that the acts it does perform in connection with the streets and sidewalks must be performed with reasonable care and skill. But the concept of reasonable care is not sufficiently definite to inform a city before the occurrence of an accident that it should do something that it has not done to avoid foreseeable injury. The standard of care to which it is obligated should be sufficiently clear that a city can know in advance of any accident just what it must do to avoid liability. Ideally, perhaps, this should be true in all cases, not just those involving a city—all potential defendants should know just what they must do to avoid liability. But a city's need to know accurately the limits of the municipal duty is, in some respects, more pressing than that of the ordinary person. A city needs this knowledge in order to allocate properly the expenditure of public funds between street maintenance, liability insurance, and other public requirements.

But apart from the fiscal problems, a city should be able to ascertain the extent of its duty so that it can perform that duty rather than remedy injuries sustained by breaches of duty. Under the negligence principles that are applied in street and sidewalk

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3. Of course, the dividing line between nonfeasance and misfeasance is always an elusive one. But whether the fault element be called one or the other is not so important. The fact is that in most of the cases the condition which caused injury was not created by the city. The fault charged against the city in such cases is that it failed to take the steps it should have taken to remove the danger.


5. In public law [as contrasted with private law], public policy and efficient administration demand that the limits of official duty be spelled out, and that the bases of taxation and expenditure be precise . . . If there is to be liability for nonfeasance or misfeasance of public duties . . . there is a need to have its elements spelled out. David, Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit, 6 U.C.L.A.L. REV. 1, 38 (1959).
liability cases a city can never know until after a jury’s verdict whether it has done all that it has a duty to do in making the streets and sidewalks safe for travel.⁶

The traditional objective standard of reasonable care—the care that would have been exercised under the circumstances by an ordinarily prudent man—cannot be applied realistically by juries to cases involving negligent nonfeasance on the part of municipalities in matters of street and sidewalk safety. However, no ordinarily prudent man has ever been a municipality. There may be a meaningful objective standard of individual behavior which can be described in terms of “reasonable care” and which the jury can comprehend. Thus, the objective standard may be meaningful enough to determine the care owed, for instance, by a shopkeeper to his business invitees—a situation commonly involving negligent nonfeasance. And it seems reasonable enough to require servants of the municipality to conform to this objective standard of individual behavior in performing the acts that they do perform. But can there really be an objective standard of reasonable care by which to determine that city officials or servants should have done something that they did not do? If there is such a standard it must be predicated upon the care that an ordinary municipality would exercise under the circumstances, since ordinary men simply do not do the things a municipality does in determining how a street is to be constructed or repaired or how often it is to be inspected, swept or scraped. What an ordinary municipality would do under given circumstances must depend in part upon what financial resources are available to the municipality and what other public needs must be considered in allocating those resources. The amount of revenue that a city can raise is ordinarily limited by law,⁷

⁶ The following quotation from a trial court’s instructions to the jury, which were approved by the Minnesota Supreme Court in Heidemann v. City of Sleepy Eye, 195 Minn. 611, 264 N.W. 212 (1935), is indicative of the typical principles applied in such cases:

There is no rule I can give you as to when or how often a city must make inspection of its streets and sidewalks. Some may need frequent inspection, depending upon conditions and construction and others may not need any inspection. Whether or not a duty rested upon the city in this particular case to make an inspection . . . is a question that, I think, is entirely . . . for the jury. The question you must ask yourselves in this case is: Whether or not the city was negligent in failing to discover the defect in question? Did the city exercise ordinary care? Could it, by the exercise of ordinary care, have discovered this defect? This presents a question of fact; a question of negligence which is purely a question for the jury to determine.

Id. at 615–16, 264 N.W. at 214.

⁷ Specific limitations upon the amount of tax revenue which can be raised by municipalities operating under home rule charters are ordinarily included in the charters. General limitations on other municipalities are imposed by Minn. Stat. §§ 412.251 (villages) and 426.04 (cities of the third and fourth class, with some exceptions) (1957). All first class cities
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a reasonably careful municipality must consider things in addition to streets and sidewalks in determining how revenue is to be spent. The law provides for the election of presumably reasonable and responsible men to make these decisions for the city. Their decisions as to what streets are to be paved or repaired, how it is to be done, and how often the streets are to be inspected, graded or cleaned supposedly are based upon due consideration of all other municipal functions. It is doubtful that anyone unfamiliar with the problems of municipal administration could make a sensible determination as to just what an ordinary municipality would do in close cases. It does not seem realistic to expect a jury of twelve citizens selected at random from the community, relying solely upon such evidence as might be admitted at a trial, to reach a better decision as to what care an ordinary municipality would exercise than the duly elected city officials who are charged with the duty to make this decision. Therefore, if there is an objective standard of care to which a city is obliged to conform, it does not seem to be aptly described by the term "reasonable care" since the jury simply is not capable of making a meaningful determination of this question in most cases of nonfeasance. If the jury's role were limited to those cases in which the city's servants allegedly failed to perform in accordance with the care the officials decided to exercise, or to cases in which the city officials failed to make any decision at all, an objective standard of this sort might be appropriate. But the cases clearly show that the jury's province is not so limited.

The logical difficulties in permitting the jury to second-guess city officials has received some recognition in the cases. It has occasionally been said that where a defective condition—such as a step or slope—results from the execution by the city of a defective plan, the jury cannot find the city negligent unless the condition was obviously dangerous and there was no reasonable necessity for its existence. However, this immunity principle has not

and all second class cities except Winona have home rule charters. Limitations on the amount of indebtedness a municipality can lawfully incur are treated in Minn. Stat. § 475.53 (1957). Some charters provide for the assessment of some repair expenses to the abutting owners. Cf. the provisions applicable to cities organized under Minn. Laws 1870, ch. 31, at 56, as amended, 24 Minn. Stat. Ann., ch. 410, app. 1, subch. VIII, § 3, at 322.

8. See, e.g., the powers and duties of the common council for fourth class cities as enumerated in Minn. Stat. § 411.40 (1957).

9. See Mr. Justice Matson's statement, quoted supra note 1. This principle was first articulated in Mr. Justice Canty's concurring opinion in Blyhl v. Village of Waterville, 57 Minn. 115, 58 N.W. 817 (1894). Later Mr. Justice Canty developed the principle further in the majority opinion in Conlon v. City of St. Paul, 70 Minn. 216, 72 N.W. 1073 (1897). See Mr. Justice Matson's explanation of the principle in Paul v. Faricy, 228 Minn.
been carried over to cases in which city officials purposely refrained from erecting some safety device such as a guardrail or barrier, and it has not been applied in cases involving failure to inspect or repair, despite the fact that the city may have assiduously followed its adopted plan for inspection and repair. Moreover, in actual practice this immunity principle seems to be treated as a matter of affirmative defense. The courts do not generally presume that the municipality acted reasonably, nor that a "reasonable necessity" for a planned but hazardous condition may have existed. To avail itself of this exemption from liability the city must bear the burden of proving that such reasonable necessity does exist.

B. ACTUAL DUTY OF CARE REQUIRED OF MUNICIPALITIES

The holdings in the reported cases show that the standard of care to which a city actually is held is much higher than is usually signified by the term "reasonable care." The courts hold cities to an extremely high degree of care in most cases—in some cases to an impossible degree of care. One would ordinarily suppose that "reasonable care" in street maintenance would require the city to repair carefully any "unreasonably hazardous" condition of which it had actual notice or which reasonable inspection would disclose. However, in Minnesota a municipality can be found liable when a virtually undetectible imperfection causes injury. The rea-
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son given by the courts to justify imposing liability in these cases is that such a condition is dangerous *precisely because it cannot be discovered* by a traveler exercising ordinary care.\(^a\) Thus, if a city is to perform its duty so as to avoid liability, the street inspector must exercise more than ordinary human perception to discover hidden defects.

One would also assume that a city must have notice of the existence of the defect before it can be said to have a duty to repair it, unless liability is to be imposed without fault. But this element of notice is ordinarily supplied by the fiction of "constructive notice." If the defective condition has existed for any appreciable time at all, the city can be liable for failure to repair it even if it had no actual knowledge of the existence of the defect.\(^b\) To be absolutely sure of avoiding liability the city would have to inspect all of its streets, with extraordinary perception, within the minimum period of time allowed by the courts for a jury to find constructive notice. That period may be very brief.\(^c\) Does this not seem an extreme measure of caution—more than just reasonable care?

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\(^a\) Between two paving blocks; see also Kowal v. City of Minneapolis, 230 Minn. 361, 41 N.W.2d 580 (1950).

\(^b\) Mockler v. City of Stillwater, 246 Minn. 39, 43-44, 74 N.W.2d 118, 122 (1955); Leystrom v. City of Ada, 110 Minn. 340, 344, 125 N.W. 507, 508 (1910).

\(^c\) See Ljungberg v. City of North Mankato, 87 Minn. 484, 92 N.W. 401 (1902); Cleveland v. City of St. Paul, 18 Minn. 279 (Gil. 255) (1872). There must be some evidence that the defect existed prior to the time of the injury. See Callahan v. City of Duluth, 197 Minn. 403, 267 N.W. 361 (1936); Barrett v. City of Virginia, 179 Minn. 118, 228 N.W. 350 (1929); Piscor v. Village of Hibbing, 169 Minn. 478, 211 N.W. 952 (1927); Miller v. City of St. Paul, 38 Minn. 134, 36 N.W. 271 (1888). The fact of prior existence can be shown by evidence that others had been injured at the same place, Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N.W. 745 (1895); that the sidewalk at the place of injury presented a "neglected appearance," Weide v. City of St. Paul, 126 Minn. 491, 148 N.W. 304 (1914); or that grass was growing around the ends of the planks in a board sidewalk, Brant v. City of Duluth, 158 Minn. 104, 196 N.W. 932 (1924). Evidence of a general awareness that a bridge contractor had been obstructing the street was sufficient to charge the city with constructive notice of a particular defect in Hufman v. City of Crookston, 113 Minn. 232, 129 N.W. 219 (1911). The fact that the city had actually inspected the place of the defect without discovering it does not prevent a finding of constructive notice. See Baker v. City of South St. Paul, 198 Minn. 437, 270 N.W. 154 (1936); Kennedy v. City of St. Cloud, 90 Minn. 523, 97 N.W. 417 (1903).

\(^d\) In Cleveland v. City of St. Paul, *supra* note 16, the defect apparently existed less than six hours. However, in another case, while the court reversed a judgment for the plaintiff on other grounds, it stated that the question of whether evidence which showed the existence of the condition for about nine hours before the injury was sufficient to support a finding of constructive notice, should have been left to the jury. See Stellwagen v. City of Winona, 54 Minn. 460, 56 N.W. 51 (1893) (dictum). *But see* Stanke v. City of St. Paul, 71 Minn. 51, 73 N.W. 629 (1898) (fifteen hours held insufficient for constructive notice).
The courts often say—and juries are usually instructed—that a city can be liable for only those street or sidewalk conditions that are "unreasonably hazardous." But there is little real substance in the concept of "unreasonable hazard." In actual practice the fact that a person was injured by the condition virtually establishes that the condition was unreasonably hazardous.18 If the condition caused injury, the jury can infer from that fact alone that the condition was unreasonably hazardous. No imperfection is too slight for the jury to consider.19 And it has been recognized that if the jury is permitted to infer this, it will probably do so.20

In practice, the fault element seems to be all but removed from these negligent nonfeasance cases. From the fact of injury the jury can infer that the condition was hazardous. From the fact that the condition existed for a period of time—perhaps a very brief period—the jury can infer that the city had notice of the condition, and therefore failed to exercise reasonable care in not remedying it. True, the courts always carefully instruct the juries in terms of general negligence principles, but the juries seem to disregard the factor of "reasonableness" in the instructions. Furthermore, the Supreme Court of Minnesota has exhibited a great reluctance to rule that a particular condition is reasonably safe as a matter of law.21

It should be noted at this point that some cities in Minnesota have charter provisions that prescribe that the city must have received actual notice of the existence of the condition causing injury

19. See cases cited in connection with surface irregularities at notes 115–18 infra.
20. Mr. Justice Holt in Emmons v. City of Virginia, 152 Minn. 295, 188 N.W. 561 (1922), acknowledged that the court knew "how prone juries are to . . . find in favor of the injured where a defendant has means at command." Id. at 299, 188 N.W. at 563. Out of approximately 150 of the street and sidewalk liability cases in the Minnesota Reports that were decided on the jury's verdict, in only eleven cases was the verdict for the defendant. In three of the eleven cases the only fact issue was whether the city had been given notice of the injury in accordance with a statute or charter provision. In three other cases the judgment for the defendant on the verdict was reversed on appeal because of erroneous instructions or admissibility of evidence. It is interesting to note that only three of these eleven cases were decided since 1920, and of these three only one, decided in 1935, was not reversed on appeal.
before the plaintiff's accident as a condition precedent to liability.\textsuperscript{22} Such provisions have been upheld as lawful and constitutional.\textsuperscript{23} In these cities, of course, the doctrine of constructive notice has no application, and so a real showing of fault is necessary to bind the city. In practice, these notice provisions probably remove almost all possibility of liability for negligent nonfeasance. Whether or not this restricts the city's duty too much is a question that the legislature should consider and decide.\textsuperscript{24} Other cities have provisions requiring that in the absence of actual notice the defect be shown to have existed for a certain period of time.\textsuperscript{25} Such a requirement limits the application of the constructive notice principle but does not entirely abolish it.

If the standard of reasonable care imposed upon cities requires something other than the usual duty of care, what is the nature of the duty imposed? To answer this question, in the absence of any statement of legislative policy, we can look only to the facts of the cases. Assuming the reported cases to be representative of all street and sidewalk liability cases, it may be possible to draw from them some conclusions as to (1) what factual situations do or do not involve a breach of the municipal duty, (2) when in point of time the duty arises and how long it lasts, and (3) what areas of the public right of way are or are not areas in which the city is obligated to perform this duty.

I. SCOPE OF THE DUTY OF A MUNICIPALITY: SPATIAL AND TEMPORAL EXTENT OF THE DUTY

A. Spatial Limits of the Duty

The cases reflect some confusion as to the spatial limits of the municipal duty. Some cases tend to regard the duty as limited to the "right of way" of a "dedicated street."\textsuperscript{26} Others expressly declare that a city is not obligated to improve and keep in repair a platted street to its full width, and that a city is not liable for de-

\begin{itemize}
\item \textsuperscript{22} See Fuller v. City of Mankato, 248 Minn. 342, 80 N.W.2d 9 (1956); Peterson, \textit{supra} note 2, at 860.
\item \textsuperscript{23} Schigley v. City of Waseca, 106 Minn. 94, 118 N.W. 259 (1908). Such notice provisions were not superseded by the enactment of the statutory notice of injury requirement. \textit{Minn. Stat.} \textsection 465.09 (1957). Fuller v. City of Mankato, \textit{supra} note 22.
\item \textsuperscript{24} The court expressed doubt as to the wisdom of such provisions in Fuller v. City of Mankato, 248 Minn. 342, 80 N.W.2d 9 (1956), but noted that the legislature is the appropriate forum for consideration of the question.
\item \textsuperscript{25} See Hall v. City of Anoka, 256 Minn. 134, 97 N.W.2d 380 (1959); Peterson, \textit{supra} note 2, at 861.
\item \textsuperscript{26} See, \textit{e.g.}, Estelle v. Village of Lake Crystal, 27 Minn. 243, 6 N.W. 775 (1880).
\end{itemize}
ffects outside the improved area. However, it is clear from the holdings that the scope of the duty is not so limited as to exclude all but the traveled roadbed or sidewalk—a city does have some duty with respect to the area between the sidewalk and the traveled street. The city may also have some duty with respect to the area, usually a narrow strip which is purposely left unimproved, between the sidewalk or street and the abutting owner's lot line, although this is not at all clear. In addition, conditions in unopened streets, or in abandoned or vacated streets may be a source of liability. Cities have been held liable for creating defective conditions outside and remote from the platted street. In one case a city was held liable for an injury caused by a dangerous condition which it did not create and which existed outside of the city limits.

Foreseeability of injury is the basic determinant of the existence of duty in negligence law. Therefore, because the duty of municipalities with respect to streets and sidewalks is at least as extensive as that imposed by general negligence doctrine, it can be accepted as a general proposition that a city must have a duty in those areas of the public right of way where travelers foreseeably may be found. More specifically, it may be said that the spatial scope of the municipal duty must include the roadway, sidewalk and parking—all of the area of an opened, dedicated street with the possible exception of the narrow strip left unimproved on the abutting owner's side. And the duty may extend to some other areas as well.

This does not mean, of course, that the standard of care is the same in all of these areas.

27. See, e.g., Henderson v. City of St. Paul, 216 Minn. 122, 11 N.W.2d 791 (1943); Miller v. City of Duluth, 134 Minn. 418, 159 N.W. 960 (1916).
28. Bowen v. City of St. Paul, 152 Minn. 123, 188 N.W. 544 (1922); Palm v. City of Minneapolis, 143 Minn. 477, 172 N.W. 692 (1919); McDonald v. City of St. Paul, 82 Minn. 308, 84 N.W. 1022 (1901). See also Brittain v. City of Minneapolis, 250 Minn. 376, 84 N.W.2d 646 (1957).
30. See Collins v. Dodge, 37 Minn. 503, 35 N.W. 368 (1887); Treise v. City of St. Paul, 36 Minn. 526, 32 N.W. 857 (1887); City of St. Paul v. Seitz, 3 Minn. 297 (Gil. 205) (1859). But see Nutting v. City of St. Paul, 73 Minn. 371, 76 N.W. 61 (1898).
31. Olgaard v. City of Marshall, 208 Minn. 384, 294 N.W. 228 (1940); Campbell v. City of Stillwater, 32 Minn. 308, 20 N.W. 320 (1884); O'Leary v. City of Mankato, 21 Minn. 65 (1874).
B. Temporal Limits of the Duty

1. Commencement of the Duty

The very first reported case dealing with street and sidewalk liability, *City of St. Paul v. Seitz*, involved a defect in a street that had been dedicated but had not yet been officially opened for public use. While grading the street preparatory to its opening, the contractor excavated a large hole in the area which was to become the roadway. No barrier or light was placed at the excavation, and the plaintiff fell into the excavation and was injured. Plaintiff recovered judgment in the trial court. On appeal the supreme court affirmed. In the course of the opinion the court stated that as a general rule cities are not liable for injuries caused by dangerous conditions in platted but unopened streets. Once it undertakes to improve the street, however, the city is liable for such damages as may arise as a consequence of the improvement work. The implication of the opinion is that the city cannot be held accountable for dangerous conditions existing naturally in the unopened street merely because of “nonfeasance” in failing to grade and improve the street immediately after its dedication. “Such a rule would place the city very much at the mercy of individuals [who dedicate streets].” The city was held liable, however, for injuries which proximately resulted from dangerous conditions actively created in the unopened street once the city had undertaken the task of improving it. Whether, after once commencing improvement, a city also has a duty to remove natural obstacles from the unopened street is not clear from the cases. It has such a duty with respect to that portion that is actually graded or improved, but one case suggests that a city is obligated to protect travelers only against actively created defects or pitfalls in the unimproved portion.

Is a city bound to protect a traveler against a condition actively created in an unopened street when improvement of the street has not yet been commenced? One case suggests that it would be, since “the traveler has the right to suppose that he has to meet and overcome the natural obstacles and irregularities of surface only” when he goes upon even a totally unimproved street. However, another case held that a city could not be liable, even for an actively created hazard in the platted right of

34. 3 Minn. 297 (Gil. 205) (1859).
35. Id. at 304 (Gil. at 210).
36. Treise v. City of St. Paul, 36 Minn. 526, 32 N.W. 857 (1887). See also Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204) (1872).
37. See Collins v. Dodge, 37 Minn. 503, 504, 35 N.W. 368, 369 (1887) (dictum).
38. Id. at 504, 35 N.W. at 369.
It is not clear what the court meant by the term “opened” in this case. It probably should not be interpreted to mean the act of formally accepting the improved street from the contractor for public use, since other cases clearly indicate that no formal action on the part of a city is necessary to give rise to the duty. On the other hand, it is difficult to say that the court meant the word “opened” to mean the same thing as “commencement of improvement.” The facts, as reported in the opinion, give the impression that grading or similar work had been commenced near the place of the injury, but that little progress had been made. The court made no finding that this work was not undertaken preparatory to improving the street, and the opinion did not even discuss the possible effect of this work. Probably the work was not incident to the commencement of improvement in that case, and if this be so, the case can perhaps be reconciled with the proposition of the Seitz case on its facts. If so, it stands as authority for the principle that a city has no duty, even with respect to an actively created hazard in the platted street, unless some steps have been taken toward the commencement of work on improvements.

In some of the cases the incident upon which a city’s duty arises is said to be the “invitation” or permission extended to the traveler by the appearance of the street. If this, rather than the fact of land ownership or control, is the incident that gives rise to the duty, “commencement of improvement” is a factor of special significance. Land ownership or control may determine the maximum spatial limits of a city’s duty, but before some changes are made in the natural appearance of the land platted as the public right of way, the ordinary traveler going upon it would have no reason to know that he was in the zone of the city’s protection. He would be there because of his own volition, not because of any implied municipal invitation. When the improvement of the street starts, however, the land comprising the public right of way will no

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40. See Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204) (1872). Cf. Graham v. City of Albert Lea, 48 Minn. 201, 50 N.W. 1108 (1892); Estelle v. Village of Lake Crystal, 27 Minn. 243, 6 N.W. 775 (1880).

41. Where a city has graded or improved any portion of a street for the purpose and with the result of inviting and inducing public travel thereon, the duty to keep such portion in repair, and the consequent liability for failing to do so, arises.

Treise v. City of St. Paul, 36 Minn. 526, 527, 32 N.W. 857 (1887). See also Mix v. City of Minneapolis, 219 Minn. 389, 18 N.W.2d 130 (1945); Moran v. Village of Hibbing, 173 Minn. 458, 217 N.W. 495 (1928); Miller v. City of Duluth, 134 Minn. 418, 159 N.W. 960 (1916); Graham v. City of Albert Lea, supra note 40; Collins v. Dodge, 37 Minn. 503, 35 N.W. 368 (1887).
longer be indistinguishable from its surroundings. At this time the traveler may infer that the land which is being graded or otherwise improved is public land and that he may go upon it without committing a trespass. However, commencement of improvement by a city is not the only way in which the appearance of the right of way could be changed so as to carry the implication of permission or invitation to travelers. If the street appears to be used for public travel, even if the city has taken no positive steps toward improving and opening it, the traveler might assume it to be public property. It also seems clear that the city's duty will arise even if the commencement of improvement was undertaken by a private citizen. 42

If "invitation" is the basis of the duty, a city should be able to postpone the incidence of the duty until completion of the improvement work by erecting barriers or warning devices clearly negating any permission or invitation to travelers to go upon the way. There are no cases on this point, but other cases involving the effectiveness of barriers to suspend or terminate the duty suggest that barriers and warning devices may be of little avail. 43 There remain, however, the possible defenses of contributory negligence or assumption of risk. Where barriers or warnings have been erected, a city may invoke these doctrines to avoid liability even if warning devices did not prevent the duty from arising. 44

It is possible that the emphasis which some of the cases seem to place on "invitation" is merely a way of referring to the traditional concept of foreseeability of injury in negligence law. So applied, the foreseeability concept entails both foreseeability that a traveler would be at the place where the injury occurred and foreseeability that any particular defective condition would cause injury to a traveler at that place. Of course, if a city improves land for travel, the increased likelihood that travelers will go upon it makes injury by any given defect more readily foreseeable. However, if foreseeability—apart from any implied invitation—is the test, it

42. See Graham v. City of Albert Lea, 48 Minn. 201, 50 N.W. 1108 (1892).
43. See McDonald v. Western Union Tel. Co., 250 Minn. 406, 84 N.W. 2d 630 (1957); Palm v. City of Minneapolis, 143 Minn. 477, 172 N.W. 692 (1919); Ihlen v. Village of Edgerton, 140 Minn. 322, 168 N.W. 12 (1918); Kleopfert v. City of Minneapolis, 90 Minn. 158, 95 N.W. 908 (1903); Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284) (1871). Cf. Schmit v. Village of Cold Spring, 216 Minn. 465, 13 N.W.2d 382 (1944). But see Petrich v. Village of Chisholm, 180 Minn. 407, 231 N.W. 14 (1930); Johnson v. City of Willmar, 111 Minn. 38, 126 N.W. 397 (1910).
would seem that the city should be liable for failure to remedy even natural conditions in a totally unimproved street if it has actual notice that travelers go upon the land at that place. There are no cases on this point, and there is no indication which result the Minnesota court might reach. The quotation from the *Seitz* case suggests that a city has no duty until improvement work has commenced; even if it does have actual knowledge of the use of the place by travelers, the city is not obliged to “foresee” injury to such travelers before it takes some steps to improve the street for travel. On the other hand, if the place is so extensively used for travel that the city could be said to have actual notice of that fact, the chances are that the ground would not appear to be wholly unimproved; and even if private individuals rather than the city initiated the use of the ground for travel, the city may have a duty of care with respect to that place.

Until there is some better indication than the “commencement of improvement” rule of the *Seitz* case, it must be assumed that that rule represents the law. Thus, the duty arises only when improvement is commenced. However, it is uncertain whether this is because commencement of improvement is an “invitation” to travelers or because it is not foreseeable that travelers will go upon the street before that time.

It has been noted previously that some cases contain dicta to the effect that a city need not improve a dedicated street to its full platted width. However, a question remains. If a city improves a portion of the platted right of way and opens it for travel, does the city have any duty with respect to the unimproved portion? The answer to this must be yes, but the standard of care to which the duty obligates the city with regard to the unimproved portion will depend upon factors to be discussed presently.

2. Termination of the Duty

Although a city’s duty probably arises when it commences the improvement of a street for travel, it is obvious that the duty does not cease when the city ceases to exercise care to keep the street in an improved state. Moreover, the city’s duty clearly does not terminate with the act of formally vacating a street or otherwise abandoning it as a thoroughfare.

45. *Cf.* Stadtherr v. City of Sauk Centre, 180 Minn. 496, 231 N.W. 210 (1930).
46. See Graham v. City of Albert Lea, 48 Minn. 201, 50 N.W. 1108 (1892).
47. See cases cited note 27 *supra*.
48. See Graham v. City of Albert Lea, 48 Minn. 201, 50 N.W. 1108 (1892)
Even if the city may abandon the maintenance of a public street, the dedication of which it has accepted by actual opening of the same . . . it still has some duty in respect to not leaving the abandoned part in the shape of a pitfall or trap to wayfarers.49

This apparently does not mean that the city necessarily must continue maintenance activities in abandoned streets to prevent the formation of "pitfalls or traps." But if the city is not going to continue maintenance it must take some positive steps to guard travelers against dangerous conditions in the street. If the street appears to be open, a continuing "invitation" to use the street will be extended to travelers, and it will be foreseeable that travelers will use it, though the city may have formally abandoned the street. The erection of adequate warning signs or barriers would probably be sufficient to terminate the city's duty, although it is not certain that this is the law. It is certain, however, that in all four of the Minnesota cases involving liability of a city for dangerous conditions in abandoned streets, neither warning devices nor barricades had been employed, and in each case the city was held liable.50 In any event, formally abandoning or vacating a street is not enough to terminate the city's duty. So long as the street retains an appearance of being open that is sufficient to mislead travelers—even night travelers—the city has some duty with respect to that street. In one case a city was held liable for an injury on a street that had been abandoned for 25 years.51

Can a city temporarily terminate or suspend its duty by barricading the street without abandoning it? It would seem that some method should be available by which the city could suspend its duty for a time. However, the reported cases show that the use of barricades to keep travelers off an improved street has usually failed to protect the city from liability.52 In Shartle v. City of Minneapolis,53 the fact that the city had fenced off a rickety bridge to prevent its use was not sufficient as a matter of law to terminate the city's duty with respect to keeping the bridge railing in repair, nor did it establish contributory negligence or assumption of risk as a matter of law on the part of the plaintiff. In McDonald v. Western Union Tel. Co.,54 the fact that a city had blocked off a street preparatory to resurfacing did not prevent the

50. Mix v. City of Minneapolis, 219 Minn. 389, 18 N.W.2d 130 (1945); Olgaard v. City of Marshall, 208 Minn. 384, 294 N.W. 228 (1940); Campbell v. City of Stillwater, 32 Minn. 308, 20 N.W. 320 (1884); O'Leary v. City of Mankato, 21 Minn. 65 (1874).
52. See cases cited note 43 supra.
53. 17 Minn. 308 (Gil. 284) (1871).
54. 250 Minn. 406, 84 N.W.2d 630 (1957).
city's being held liable for an injury caused by a raised manhole. In both of these cases the jury was permitted to determine whether or not the city had acted "reasonably" under all the circumstances. As usual, under such instructions, the jury found for the plaintiff.

One factor tending to make it difficult for a city to terminate its duty by removing its implied invitation to use the street is the fact that a warning device or barricade placed in the street may itself be a hazardous condition for which the city can be held liable. If the public is allowed to use the street up to the barricade, then the barricade itself is a condition against which the city must guard or warn travelers. In one case a city was held liable to a bicycle rider who swerved into a wagon while trying to avoid a rope barrier that the city had stretched across the street. In another case a city was liable when the plaintiff drove into a rope barrier, even though the rope had banners and flags hung upon it to attract attention. In Schmit v. Village of Cold Spring, the village was found liable for burns received by a child who entered a barricaded street which had a sign that read "Road Closed." There were also flare pots around an excavation in the closed street, and it was while playing with one of these that the child was injured.

One case suggests that a municipality has no general power to exclude traffic from its streets unless such power is expressly granted by the legislature, although the temporary closing of the street may be authorized as a valid exercise of the police power. But even in situations where the power does exist, as where temporary closing is necessary for maintenance purposes or where the street runs between a school and playground and it is desired to keep traffic off the street during school hours, it is still a question for the jury whether the means adopted for closing the street are "reasonable."

None of the cases involving accidents directly attributable to barricades or warning devices even discusses the fact that the erection of the barrier or other warning device was purposely planned.

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55. Kleopfert v. City of Minneapolis, 90 Minn. 158, 95 N.W. 908 (1903).
Cf. Palm v. City of Minneapolis, 143 Minn. 477, 172 N.W. 692 (1919).
57. 216 Minn. 465, 13 N.W.2d 382 (1944).
58. But cf. Brown v. City of Minneapolis, 136 Minn. 177, 161 N.W. 503 (1917), where the city was held not liable on facts essentially like those of the Schmit case, except that an ordinary glass-enclosed lantern had been used instead of an open flare pot. The Schmit decision virtually makes the city an insurer for injuries to children from open flare pots.
by the city and as such might come within the supposed immunity of the city for injuries resulting from planned conditions.  

Logic tells us that there must be some way for a city to terminate its duty with respect to the care of streets, but the cases indicate that this will be very difficult to do, so long as the street retains the appearance of a street. As a practical matter, most people will stay off a street that is clearly closed, but this does not entirely terminate the city's duty. The difficulty of terminating the city's duty gives support to the contention that the real factor that gives rise to the duty is the invitation doctrine.

II. DUTY OF CARE OF A MUNICIPALITY: SPATIAL AND TEMPORAL VARIATIONS OF THE DUTY

In discussing the spatial scope of the duty of a municipality, it was noted that the duty extends to areas other than the improved street or sidewalk proper. However, this does not mean that the standard of care which the duty imposes upon a city is the same for all areas.

A. DUTY IN THE PARKING AREA

The standard of care with respect to the parking (or boulevard)—that portion of the platted street located between the sidewalk and the traveled street—was first discussed in Collins v. Dodge. The case concerned the liability of the abutting landowner, and the city was not even made a party to the action. However, the court's discussion of the standard of care has often been cited in subsequent opinions in connection with the liability of a city. The defect that caused the injury in the Collins case was an unguarded sewer excavation between the sidewalk and the gutter line. In holding the abutting owner liable to a pedestrian who fell into the excavation, the supreme court apparently treated the case as resting upon principles similar to those governing defects in unopened streets on which improvement had been commenced.

It is worth noting that the standard of care which the court elaborated in the opinion was phrased not in terms of the owner's duty but in terms of the traveler's right or expectancy, thus adding support to the "invitation" theory discussed previously.

[A] traveller has the right to suppose that he has to meet and overcome the natural obstacles and irregularities of surface only, and that

60. See Mr. Justice Matson's statement of the immunity principle, quoted in note 1 supra. See also note 10 supra.
61. 37 Minn. 503, 35 N.W. 368 (1887).
62. Compare the Collins case, supra note 61, with City of St. Paul v. Seitz, 3 Minn. 297 (Gil. 205) (1859).
no one has prepared a pit in his way without a railing to prevent his walking into it, or a light to warn him of its existence. No distinction in this respect can be made between the completely worked and improved thoroughfare and one in its natural condition. The traveller by day or night is entitled to protection from dangerous excavations in either.63

This dictum suggests that a city has no duty to remove natural obstacles or to correct irregularities of surface in the parking. But a city does have a duty, either to refrain from excavating in the parking, or to erect some railing or warning light to protect travelers. Here again, the problem is inherent in the fact that the barrier erected to prevent the traveler from falling into the pit is itself an impediment to travel. There are as many cases involving liability for injuries received by a traveler falling on a barrier placed in the parking to prevent travel as there are dealing with liability to travelers who had fallen into excavations.64 And so it would not be safe to conclude that the city has fully discharged its duty with respect to an excavation in the parking by erecting a barrier around it. The fact of erecting the barrier—itself an impediment to travel—may impose a further duty upon the city, despite the fact that the barrier may have been purposely planned.

An examination of the facts in the cases involving injuries to a pedestrian caused by defects in the parking reveals that in every case in which recovery was allowed the defect that caused the injury was an artificial obstruction of some kind—an excavation,65 a thin wire strung either as a barrier or to support a tree,66 or a piece of cement slab.67 However, an ordinary natural obstruction, such as a tree, does not pose a liability hazard;68 and not every artificial obstruction will necessarily be a source of liability. In each of the cases in which a city was held liable, the condition that caused the injury was difficult to discover. A hole in the ground,

63. Collins v. Dodge, 37 Minn. 503, 504, 35 N.W. 368, 369 (1887).
64. E.g., Brittain v. City of Minneapolis, 250 Minn. 376, 84 N.W.2d 646 (1957) (depression); Palm v. City of Minneapolis, 143 Minn. 477, 172 N.W. 692 (1919) (barrier); McDonald v. City of St. Paul, 82 Minn. 308, 84 N.W. 1022 (1901) (barrier).
65. See Lamb v. South Unit Jehovah's Witnesses, 232 Minn. 259, 45 N.W.2d 403 (1950); Collins v. Dodge, 37 Minn. 503, 35 N.W. 368 (1887). Both cases actually involved the liability of the abutting land owner; the city was not a party.
66. Palm v. City of Minneapolis, 143 Minn. 477, 172 N.W. 692 (1919); McDonald v. City of St. Paul, 82 Minn. 308, 84 N.W. 1022 (1901).
67. Brittain v. City of Minneapolis, 250 Minn. 376, 84 N.W.2d 646 (1957).
68. Henderson v. City of St. Paul, 216 Minn. 122, 11 N.W.2d 791 (1943). There are no cases on the question of whether a natural pit would be a liability hazard. In Johnson v. City of Willmar, 111 Minn. 58, 126 N.W. 397 (1910), the city was held not liable as a matter of law when plaintiff fell into an artificially created pit, but the decision was based upon a finding that plaintiff was guilty of contributory negligence.
a thin wire, or a two inch rise between the surrounding ground and a cement block is a hazard that is not easily detectible, especially at night. A lamp post, a fireplug, or some similar obstruction that protrudes a sufficient distance above the ground and is large enough to be readily observed by travelers probably would not be a potential source of liability. The words "pitfall" or "trap" which are frequently used in these cases to describe the type of defect that will be actionable if found in the parking connote at least the concealment or non-obviousness of the dangerous condition. If obvious non-natural obstructions are clearly visible, the traveler does not have the right "to suppose that he has to meet and overcome the natural obstacles and irregularities of the surface only." From this the conclusion may be drawn that a city has no duty to remove obvious obstructions from the parking. A city does have a duty to remove or correct nonobvious artificial obstructions or pitfalls. The duty may, perhaps, be discharged by erecting warning lights or protective barriers; but this alternative may give rise to a duty to guard the traveler against the barrier itself.

B. DUTY IN THE NARROW STRIP BETWEEN THE TRAVELED WAY AND THE ABUTTING OWNER’S LOT LINE

It seems to be customary for municipalities to leave unimproved a portion of the platted right of way between the inner line of the sidewalk and the abutting owner’s lot line—at least in residential areas. This portion, usually a very narrow strip one or two feet wide, is purposely left unpaved so that no encroachments or trespasses upon the abutting owner’s property will be necessary in constructing or repairing the walk. Since the strip is so narrow, there is little room for defects or obstructions which might cause injury; and for this reason, no doubt, there have been very few cases dealing with a city’s liability for injuries sustained upon such a strip. The cases which have arisen usually involve a defect or obstruction placed somewhere between the traveled way and the lot line by the abutting owner, not by the city. The Minnesota courts have not treated these cases as involving any unique theo-

69. See Ryther v. City of Austin, 72 Minn. 24, 74 N.W. 1017 (1898).
70. This merely states the converse of the proposition from Collins v. Dodge, 37 Minn. 503, 504, 35 N.W. 368, 369 (1887), quoted in text accompanying note 63 supra.
71. This conclusion may sometimes be treated, as in Johnson v. City of Willmar, 111 Minn. 58, 126 N.W. 397 (1910), as an application of the doctrine of contributory negligence, but it may be noted that the contribu-
tory negligence was found by the court there as a matter of law, reversing a contrary finding by the jury.
terical problems. Rather, they have applied, without distinction, authorities from two analogous types of cases—those cases involving the city's liability for defects or obstructions placed in the traveled walkway by the abutting owner, and cases dealing with the city's liability for defects or obstructions in the parking.

From a practical standpoint, perhaps, the question of a city's duty with respect to this strip is rather insignificant, owing to the infrequency with which cases arise in this area. But to one who is concerned about the theoretical basis of municipal liability for street and sidewalk injuries, the question of a city's duty in this area is very important. Some cases involving other areas of the "street" seem to treat the city's duty as arising out of the city's property right in the dedicated right of way—the city has a duty because it owns the land. Other cases look primarily to the "invitation" or implied representation of the degree of safety that the traveler can expect in a particular area of the street. So far as the traveled roadway or sidewalk is concerned, the city stands in the position both of land owner and "inviter." Even in the case of streets not yet formally "opened" the public is informed, once "improvement" is commenced, that the land has been set aside for public use, and that no trespass will be committed by a traveler going upon it. Some public use of such a street must be anticipated by the city. Public use is "permitted" and foreseeable if not actually invited. Similarly, the location of the parking, between the sidewalk and roadway, informs the traveler that the land has been set aside for a public purpose, albeit not primarily for travel. Pedestrians often have occasion to walk upon the parking, and again, such use is permitted if not positively invited. And so, in these other areas a city not only stands as landowner, but it also extends to travelers an invitation, or at least permission, to go upon the area. Such use is clearly foreseeable.

The same cannot always be said with respect to the strip of land on the abutter's side, however. Most travelers have no reason to believe that the public right of way extends farther than the inside edge of the sidewalk. If a suitable sidewalk is provided, the bounds of the walk itself would seem to mark the limits of the implied invitation or permission extended to the pedestrian. Unless the sidewalk is extremely narrow, it is hardly foreseeable that pedestrians would depart from the traveled walkway on the owner's side without consciously realizing that in doing so they were leaving the public right of way. There would seem to be no basis for implying that the city had extended any kind of invitation,
permission or representation as to the absence of pitfalls with respect to that strip. If the city has any special duty to perform in that area it must be attributable to land ownership rather than to invitation or representation or even foreseeability of injury, unless there are special factors present suggesting that travelers might tend to deviate from the traveled way at that point.

Further efforts to determine whether or not a duty exists with respect to this area are hindered because there are no Minnesota cases that are directly authoritative on this question. There are a few closely analogous cases, however, that must be considered.

In *Estelle v. Village of Lake Crystal*, the village had laid out a very wide street running east and west, but only the south half of the street was actually traveled. The south half was graded up, but the north half remained at a considerably lower level. A store was built on the north side of the street; the front of the store bordered the north boundary of the platted street. Access to the store from the south or traveled portion of the street was had by means of a driveway built up to the level of the south half of the street. The store owner had built a porch or platform in front of his store. This platform, about five feet high, was entirely within the dedicated street, but was some twenty feet north of the traveled portion of the street. No steps were provided at the ends of the platform and apparently only patrons of the store used the platform. Plaintiff fell off the platform after leaving the store. He sued the village, and recovered for his injuries.

In a confused opinion the supreme court upheld the plaintiff's recovery. The real basis of the decision is obscure. Apparently the court found as a matter of fact, that (1) the platform "could not be used for the purpose of passing along the side of the street," and (2) that the platform was "placed in the street to be used by the public as a part of it," and that the city "permitting it to remain and to be so used" had a duty "to see that it is in safe condition for the public to use . . . as a part of the street." The court announced, as a principle of law, that:

[A] municipal corporation which knowingly permits a structure to be made or to remain in a public street, is liable to one who, without his fault, and while in the proper use of the street, sustains injury from the presence of such structure in the street.

Since the court seemed to treat as facts both that the platform could not be used as a part of the street and that it was used as part of the street, there is no certainty that the quoted statement represents the holding of the case. But a duty of some sort was

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75. 27 Minn. 243, 6 N.W. 775 (1880).
76. *Id.* at 244, 6 N.W. at 775.
found—that much is clear. If the true fact was, as it seems, that
the platform was not used as a part of the street, then the actual
holding of *Estelle v. Village of Lake Crystal* must be a strict one
indeed. It must impose upon cities a general duty to see that any-
thing resembling a walkway placed within the bounds of the plat-
ted street by an abutting owner is safe for pedestrian use. If this
be the duty, then the *Estelle* case seems to be an authority sup-
porting the proposition that the basis of the municipal duty is the
fact of ownership of the right of way. We should not jump to this
conclusion, however. Subsequent cases have interpreted the *Es-
telle* case as resting upon a factual holding that the platform was
used as a part of the street. If it was so used, then the duty found
to exist could well be based upon an implied invitation, just as in
other areas of the “street.” This was the explanation of the *Estelle*
case given in *Graham v. City of Albert Lea*,\(^77\) which likewise
involved a defect in a structure placed by the abutting owner within
the bounds of the platted street, between the traveled roadway
and the owner’s lot line. In the *Graham* case the structure was ob-
viously a sidewalk, intended by the owner for use as a sidewalk,
and it had been so used by the public for about four years prior
to the plaintiff’s accident. The city was held to a duty with respect
to that privately constructed sidewalk just as though it had been
constructed by the city. The court in the *Graham* case expressly
predicated its decision upon the fact that the city had, in effect,
invited the public to use the private sidewalk as a thoroughfare
and thereby had 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 condi-
tion for such use.”\(^78\) The court treated the case as being governed
by the *Estelle* decision, implying that the general proposition of
both cases is: “[W]here a municipality permits a private citizen
to build a sidewalk in front of his premises, and the same to be
used by the public, the duty devolves upon the corporation to see
that it is kept in proper repair.”\(^79\)

What about connecting walks constructed by the abutting own-
ers to join their houses with the public sidewalk—do they fall
within the duty of the city as described by the *Estelle* and *Graham*

\(77\) 48 Minn. 201, 50 N.W. 1108 (1892).
\(78\) Id. at 205, 50 N.W. at 1109.
\(79\) Id. at 206, 50 N.W. at 1109. The North Dakota Supreme Court, in
Ellingson v. City of Leeds, 40 N.D. 415, 169 N.W. 85 (1918), likewise
interpreted the *Estelle* case as holding that the platform in front of the
store was in fact used as part of the public street and that the village
therefore had the same duty with respect to it as it has in other, more
orthodox, sidewalks.
cases? It could be said that that part of the connecting walk within
the boundaries of the dedicated street is within the duty described
in these cases, since the walk is constructed by the owner for mem-
ers of the public who may desire to come upon his premises.

If the basis for the duty of a city is the fact of land ownership,
this conclusion would be tenable. If the basis of the duty is actual
foreseeability of injury, it is plausible that the duty should extend
to such places for the city would surely have to foresee persons
going upon the public right of way at that point. But if the duty
is based upon the “invitation” principle, as has been discussed
previously, a distinction can be drawn between the private owner's
connecting walk that joins the sidewalk at right angles and pri-
vately constructed walks that run parallel to and wholly within
the platted street lines. If the private walkway runs along the same
place a public walk would run if there were one, the invitation to
the traveler implicit in the existence of the walk is the invitation
of the city, not of the private owner. The traveler would not sus-
pect that the walk had been provided by a benevolent private
owner rather than by the city. But if the walkway runs from the
public sidewalk to a private house, the traveler would normally
think that the walk had been provided by the owner, not by the
city. Any invitation implicit in the appearance of such a connect-
ing walk is the invitation of the owner, not of the city. And so the
city could not be held to a duty, on the basis of any implied in-
vitation, with respect to the connecting walk—not even as to that
portion which might lie within the narrow strip of public right of
way. All in all, one hesitates to conclude that the Estelle case is
strong authority for the proposition that a city has a duty of care
with respect to the narrow strip on the abutter's side of the side-
walk or street as an incident of land ownership alone. The Estelle
case, as explained in the Graham case, seems more consistent with
the “invitation” theory.

In O'Keefe v. Dietz the abutting owner had placed a large
stone at the corner of his lot where two sidewalks intersected to
keep pedestrians from cutting across his lot. The stone overhung
the sidewalk by one-half inch about four or five inches above the
ground. It is probable that the rest of the stone was also upon the
public right of way, but the point was not discussed in the court's
opinion. Plaintiff tripped on the stone and sued both the city

80. On the other hand, the city might be liable, under the invitation
analysis, for defects in a walkway entirely on private land if the city some-
how held it out as a public walk and assumed responsibility for it. Marsh
v. Minneapolis Brewing Co., 92 Minn. 182, 183, 99 N.W. 630, 631 (1904)
(dictum). But see Holmwood v. City of Duluth, 134 Minn. 137, 158
N.W. 827 (1916).
81. 142 Minn. 445, 172 N.W. 696 (1919).
and the abutting land owner for damages. The supreme court affirmed a directed verdict for the city.

The basis for the decision is not entirely clear. There is language in the opinion indicating that the court felt that the likelihood of injury from this stone was so remote that no negligence could be predicated upon it, suggesting that there was no duty on either the city or the owner to remove the stone even though it did overhang the sidewalk. This would indicate that a city has no duty with respect to this narrow strip under either the ownership theory or under the foreseeability or the "invitation" theory, for if there is any place along the street other than at connecting walks where pedestrians might be expected to stray from the sidewalk on the abutter's side, it would be at a corner where two sidewalks intersect. There is, however, other language in the court's opinion which indicates that the court did not believe that the part of the stone in the public right of way was the part on which the plaintiff tripped. Apparently this particular injury would have occurred, even if the stone had not overhung the sidewalk. And so, as far as the city is concerned, the result in the case may actually be based upon the theory that even if the city had been guilty of a breach of duty in permitting the stone to overhang the walk, that breach of duty was not the cause of the plaintiff's injury. Thus, the O'Keefe case provides no clear guide to a city's duty with respect to the narrow strip on the owner's side.

There are two other Minnesota cases which involve defects within the platted street, but on the abutting owner's side of the walk. In neither of these cases, however, was the city a party. These cases, of course, are not direct authorities on the question of a city's duty, but under the principle expressed in one of these cases, City of Wabasha v. Southworth, it would seem that if the abutting owner who placed the obstruction in the public way for his own convenience has breached no duty, the city has breached none either. In both of these cases the abutting owner was held not liable. If these cases throw any light on the question

82. 54 Minn. 79, 55 N.W. 818 (1893). The case seems to require indemnification of the city by the abutting owner, not just contribution. 83. Such structures having been placed in the street for the convenience of the abutting property, it stands to reason that, as between the property owner and the city, the duty of maintaining them in a safe condition devolves upon the former. 84. It should be noted that both cases may have been erroneously decided. See Palmer v. Rydlum, 219 N.W. 161 (Minn. 1928). (No liability as a matter of law to meddling child who fell into a light well on a building under construction. The light well was within the platted street lines but on the owner's side of the improved street.) The opinion was withdrawn after reargument. Palmer v. Rydlum, 221 N.W. 22 (Minn. 1928).
of the duty that arises with respect to the strip on the abutting owner’s side, they tend to indicate that a city has no duty in this area.

Before giving up in despair on this question, attention should be drawn to the decisions of other state courts that have ruled upon the character of a city’s duty with respect to the strip. These cases may be helpful in predicting the decisions in the most common type of case—the case where the plaintiff is injured on a private connecting sidewalk. In *Ellingson v. City of Leeds* the plaintiff fell on steps leading from the door of a building down to the sidewalk. The steps were within the public way. The Supreme Court of North Dakota held that the city had no duty to maintain the steps. The court noted that the city might have a duty to a night traveler along the walk who should stumble against the steps if they were within the walkway proper; but plaintiff was not passing along the walk at the time of his injury—he was entering or leaving the building. Plaintiff had left the zone of the city’s duty when he turned off the walk to go into the building. He was no longer a pedestrian to whom the city owed a duty. This principle would seem to apply equally to a connecting walkway.

In *Fitzgerald v. City of Berlin*, the abutting owners had built a cellar stairway along their building. This stairway was within the platted street lines but about four feet distant from the sidewalk laid out by the city. The owner, however, had laid a continuous plank walk of even grade with the city sidewalk, and so it was not easy for a pedestrian to tell where the city’s walk stopped and the private walk began. The plaintiff fell down the stairs and sued the city. A judgment for the plaintiff was reversed by the Wisconsin Supreme Court. In the course of its opinion the court said:

> [W]e are not prepared to hold that a city is responsible for the existence of a private structure made by a lot-owner on his own land entirely outside of the traveled portion of the sidewalk, and not connected therewith in such a way as to endanger the safety of those traveling thereon, even though such structure happens to be within the line of the street as originally surveyed. *To so hold would subject*

Also see *Kooreny v. Dampier-Baird Mortuary, Inc.*, 207 Minn. 367, 291 N.W. 611 (1940). (Blind man fell over a low retaining wall placed by defendant within the platted street lines at the edge of the sidewalk. There was a moat ranging in depth from two to eight feet on the other side of the wall. The court held the defendant not liable in a poorly reasoned opinion in which the court confused the question of foreseeability of injury as an element in finding the existence of a duty with the foreseeability required for establishing proximate cause. The decision is probably erroneous, and so it is not much of an authority one way or the other for the purposes of this study.)

85. 40 N.D. 15, 169 N.W. 85 (1918).
86. 64 Wis. 203, 24 N.W. 879 (1885).
Reasoning from these authorities, it may be conjectured that Minnesota municipalities have no general duty to the traveler with respect to the narrow strip on the abutter's side arising solely from the fact of land ownership or legal right to control. In both *Estelle* and *Graham*—the Minnesota cases in which a city was held liable—there was found to be an "invitation" or at least foreseeability that the traveling public would go upon the place where the defect was situated. If a city permits private owners to construct upon that strip a walk which is used by the public as a thoroughfare, the city will have to assume the duty of maintenance and repair with respect to that walk just as though the walk had been constructed by the city in the first instance. 8

Whether the same duty applies to privately constructed connecting walks is uncertain, but the North Dakota case suggests that it does not. And if, as suggested by the Wisconsin case, there is something in that narrow strip—such as a precipitous declivity—that renders travel on the sidewalk or street proper hazardous, then the city must take steps to protect the traveling public and it will be liable to travelers who may be injured by reason of inadequate protective measures. 89 However, this duty exists whether the hazardous declivity or other condition be within or without the right of way. 90

C. STREET AND SIDEWALK PROPER

The vast majority of cases concerned with municipal liability involve accidents on the traveled street and sidewalk proper; that is, on those areas of the platted right of way which have been improved for the primary purpose of facilitating travel. The cases indicate that different standards of care may be applied in different areas of the improved right of way. For example, a condition may be reasonably safe if found in the middle of an avenue but not reasonably safe if found in a sidewalk or crosswalk.
1. Sidewalk Defects

(a) Defects in Wooden Sidewalks

There are a large number of reported cases in Minnesota involving injuries to pedestrians caused by defective wooden sidewalks. Since wooden sidewalks are seldom found today, perhaps these cases are not as important as they once were. However, since they are still relied upon as authorities in cases involving cement, stone or brick sidewalks, they are not altogether obsolete. These cases show that a city must conform to a very high standard of care with respect to imperfections in wooden sidewalks. The required standard is so high, in fact, that it would not be unrealistic to conclude that a city is strictly liable for injuries sustained as a result of such imperfections.

All of the cases are decided, theoretically, on negligence principles, but an examination of the cases shows that the fault element on which this negligence is predicated may be very slight indeed. As has been noted before, the fact that the condition was unreasonably hazardous can be established—almost conclusively when the tendencies of juries are considered—by inference from the fact of injury. Thus, a city can be liable for failing to discover and repair a very slight defect—a loose plank, or a very slight depression in the surface of the walk. The notice element, which theoretically is a requisite to charging a city with a positive duty to repair a particular defect, is supplied in most cases by “constructive notice.” There is even less real substance in the notion of constructive notice in cases involving defects of wooden sidewalks than in most other cases. In other situations the plaintiff must at least show that the particular defect existed for some period of time. Failure to make some showing of the time the condition existed would result in the plaintiff’s losing the case on motion. But in cases involving wooden sidewalks—at least where the defect is attributable, as most are, to rotting wood—the court has said that the very condition of the wood is evidence that the defective condition has existed for a long time. The rationale is that there is a sufficient notice period between the time when the rotting is first detectible and the time when it so weakens the

91. See text accompanying note 18 supra.
92. Hebert v. Village of Hibbing, 170 Minn. 211, 212 N.W. 186 (1927); Maki v. City of Cloquet, 116 Minn. 17, 133 N.W. 80 (1911); Kennedy v. City of St. Cloud, 90 Minn. 523, 97 N.W. 417 (1903); Holm v. Village of Carver, 55 Minn. 199, 56 N.W. 826 (1893); Furnell v. City of St. Paul, 20 Minn. 117 (Gil. 101) (1873).
94. See note 16 supra.
board as to make it hazardous. Consequently, notice is often found by the court, exercising a bit of sophistry, from the fact a city is "bound to take notice of the certain tendency of wooden sidewalks to decay." 96

If the fact of injury is enough to show unreasonable hazard, and the fact of rottenness of the board is enough to establish "notice," it is difficult to see how a city could possibly do its "duty" so as to avoid liability with respect to wooden sidewalks. Even if a city periodically tears up and inspects every board in every sidewalk in the city—including the "sleepers" or "stringers" upon which the plank walk is laid 97—within the period in which wood can rot, and replaces every board in which there is any appearance of decay, it is doubtful that liability could be avoided. Even this unrealistically high standard of care would apparently be insufficient if a board in fact rots through and causes injury. Thus, the fact that the city inspected the sidewalk two days before the plaintiff's accident, repaired two boards which it found loose, and found the rest of the boards firm and sound, was held not to constitute a performance of the municipal duty as a matter of law, but to create an issue for the jury. 98

Since all of these matters are left to the jury, and since the jury nearly always finds for the plaintiff on these mixed questions of law and fact, a city that has wooden sidewalks may as well face the fact that it cannot perform its duty so as to avoid liability. Its duty is much the same in actual practice, as that of an insurer. Even though the defense of contributory negligence is often raised, it enabled a city to avoid liability in only one reported case. 99

In that case, the plaintiff apparently had purposely jumped on a board he knew was loose. Probably the only way a city can avoid liability for an injury sustained by a pedestrian on a wooden sidewalk, other than by disproving the fact of injury or that it occurred on the sidewalk, 100 is for the pedestrian to fail to give notice of the injury as required by statute. 101

96. Peterson v. Village of Cokato, supra note 95, at 209. See also Hall v. City of Austin, 73 Minn. 134, 75 N.W. 1121 (1898).

97. For a description of sidewalk construction, see Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N.W. 745 (1895); Furnell v. City of St. Paul, 20 Minn. 117 (Gil. 101) (1873).

98. Kennedy v. City of St. Cloud, 90 Minn. 523, 97 N.W. 417 (1903); see also Smunor v. City of Northfield, 96 Minn. 107, 104 N.W. 686 (1905).


100. See Holmwood v. City of Duluth, 134 Minn. 137, 158 N.W. 827 (1916).

(b) Coalholes, Manholes and Trapdoors

A city also has a duty to protect pedestrians from injuries caused by coalholes, manholes or trapdoors in the sidewalk. These devices are almost always installed in the sidewalk by the abutting owner for his convenience, and they impose a duty on him. However, the city remains responsible because the condition is in the public sidewalk.

There are two ways in which a pedestrian normally suffers injury from one of these devices. The pedestrian may step or fall into the hole or he may be tripped by a protruding edge or hinge on the trapdoor or hole cover. Apparently a city has no duty to see that such a hole is kept closed, or that a barrier is placed around it as soon as it is opened, unless the city rather than the abutting owner has control of the condition. It would indeed be onerous to impose upon cities a duty to take positive protective measures every time a business firm opens such a trapdoor or hole. Of course, if a city had actual notice that such a hole in the sidewalk had been left uncovered and unattended, or if it was left uncovered or unattended for a period of time, a duty probably would arise. But in none of the reported cases has a city been held liable for an injury suffered by a pedestrian by falling into a private coalhole or trapdoor. The hazard caused by opening a hole in the sidewalk, unlike most sidewalk hazards, is of sudden origin. There is virtually no colorable basis for charging a city with constructive notice in this situation unless the hole is left open and unattended for a time or overnight.

If a pedestrian is injured because of some physical defect in the cover itself, a different situation is presented. Unless the defect is of sudden origin, it is a permanent part of the sidewalk against which the city must protect travelers. If the cover is so


103. See Reid v. Village of Aitkin, 182 Minn. 87, 233 N.W. 826 (1930).

104. Actually the city was not a party in either of the two cases which involved this situation. See Fandel v. Parish of St. John the Evangelist, 225 Minn. 77, 29 N.W.2d 817 (1947); Ray v. Jones & Adams Co., 92 Minn. 101, 99 N.W. 782 (1904).

105. Cf. McCartney v. City of St. Paul, 181 Minn. 555, 233 N.W. 465 (1930). The argument could be made, as rationally here as in some other situations, that the city should be charged with constructive notice that these holes are hazardous because they are likely to be opened sometime. But so far as the reported cases show, this argument has never been made.
weak that it breaks when stepped on,\textsuperscript{106} or if it is so loose and fits so badly that it tilts or tips when one side of the cover is stepped on,\textsuperscript{107} or if the edge or hinge protrudes above the surface of the walk\textsuperscript{108}—even if no more than an inch—the city may be liable to a pedestrian who suffers injury as a result of the condition. The duty with respect to these conditions apparently is the same as that owed with respect to other sidewalk surface irregularities.\textsuperscript{109}

(c) Surface Irregularities Attributable to Attrition, Subsidence or Similar "Natural" Causes

It is a well-known fact that over a period of time the surface of a sidewalk can change as a result of such factors as subsidence of the land on which the sidewalk is laid, tree roots growing under the walkway,\textsuperscript{110} freezing and thawing, and wear and tear from use. These natural factors can, with time, cause even cement or stone slab walks to crack, sink or bulge. When this happens, edges of the slab often protrude above the level of the rest of the walk, and may cause pedestrians to stumble and injure themselves. Since defects of this nature are so common and difficult to discover and guard against, and since the burden of repairing all of them is so great, some states have declared that a city cannot be held liable for an injury caused by such a surface irregularity unless it is of a certain minimum height.\textsuperscript{111} Another method of restricting liability for defects of this nature was recently adopted in Mobile, Alabama after it was discovered that most of the sidewalk accidents caused by these relatively slight surface defects happened to wo-


\textsuperscript{107} L'Herault v. City of Minneapolis, 69 Minn. 261, 72 N.W. 73 (1897). Cf. Mix v. Downing, 176 Minn. 156, 222 N.W. 913 (1929).

\textsuperscript{108} Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N.W. 461 (1911).

\textsuperscript{109} The constructive notice doctrine applies in these cases. \textit{Ibid}. Although it is impossible to establish a minimum period of time for constructive notice, where the defect existed for less than nine hours, the city was able to defeat the finding of notice in Stellwagen v. City of Winona, 54 Minn. 460, 56 N.W. 51 (1893).

\textsuperscript{110} See Sand v. City of Little Falls, 237 Minn. 233, 55 N.W.2d 49 (1952).

men—usually wearing high-heeled shoes. An ordinance was passed forbidding the wearing of shoes with heels higher than one-and-one-half inches and less than one inch in diameter on the streets of the city unless a permit to do so was first obtained. The permit could be obtained by signing an agreement releasing the city from any liability for injuries caused by falling on the streets of the city while wearing such shoes. The effectiveness of this ordinance and the waiver which it requires have not yet been tested, but it does represent a novel attempt to solve the problems raised by municipal liability for minor surface irregularities.

Minnesota is committed to the proposition that no defect is too small to be actionable. The Minnesota Supreme Court has said that an undetectable defect may be more dangerous than an obvious one, and, therefore, it is error for a trial court to refuse to allow the jury to consider the "unreasonableness" of a street condition just because the defect is very slight. Specifically, the court has held that it is error to charge the jury that a city is not liable for "every . . . slight depression or raise . . . ." There are twelve reported cases in Minnesota involving defects resulting from natural causes, and in every case in which the defect was one inch or more in height, it was held that the city could be liable. In one case the defect was so slight that it amounted merely to a difference in texture: the flagstone paving had worn smoother at the place of plaintiff's fall than elsewhere in the sidewalk. In another case in which the defect was only three-fourths of an inch high, the city was found not liable by the jury.

112. The reported Minnesota cases also support this conclusion. In all of the Minnesota cases involving surface defects in the sidewalk attributable to natural causes other than rotting wood, except where the condition was aggravated by the presence of snow or ice, the injured plaintiff was a woman.


114. Since Alabama, like Minnesota and most other states, decides questions of municipal liability for sidewalk injuries under negligence doctrine, the city would have to overcome the argument that it cannot by contract absolve itself prospectively from liability for negligence.


116. Rudd v. Village of Bovey, 252 Minn. 151, 89 N.W.2d 689 (1958) (1½ inches); Mockler v. City of Minneapolis, 250 Minn. 376, 84 N.W.2d 646 (1957) (2 inches); Sand v. City of Little Falls, 237 Minn. 233, 55 N.W.2d 49 (1952) ("ridge"); Molis v. City of Duluth, 226 Minn. 79, 32 N.W.2d 147 (1948) ("uneven place"); McGandy v. City of Marshall, 178 Minn. 326, 227 N.W. 177 (1929) (1–2 inches); Brandt v. City of Duluth, 158 Minn. 104, 196 N.W. 932 (1924) (2 inches); Murphy v. City of St. Paul, 130 Minn. 410, 153 N.W. 619 (1915) ("several inches"); Bieber v. City of St. Paul, 87 Minn. 35, 91 N.W. 20 (1902) (1½ inches).

117. O'Brien v. City of St. Paul, 116 Minn. 249, 133 N.W. 981 (1911). There was evidence of prior accidents on this smooth patch which helped plaintiff establish both the hazardous condition and the factor of notice.

118. Ryan v. City of Crookston, 225 Minn. 129, 30 N.W.2d 351 (1947).
To say that a city has a duty to discover and remove all these "naturally" developed surface irregularities, or at least all those which exceed one inch in height, seems a bit unreasonable. However, as a practical matter, owing again to the doctrine of constructive notice and the recognized tendencies of juries, it must be concluded from the reported cases that this is the type of care which a city is obligated to exercise if it is to avoid liability. Of course, we do not know how many cases are won by cities at the trial level and are never appealed by the plaintiffs, but there is no apparent reason to suppose that the reported cases do not reflect the general trends of litigation in this area. The financial burden of actually performing this duty probably is too much for most cities to undertake. The injuries resulting from such slight defects are too infrequent to warrant devoting so much of the municipal money and energy to the task of clearing the streets of every slight irregularity. Since the incidence of such accidents must be actuarially predictable, it should be possible for a city to establish some optimum standards for repairing defects, the city taking a calculated risk of liability on the defects not repaired. But this probably is just what cities generally do indirectly—they establish standards for street maintenance with reference to factors other than potential liability for injuries, and let an insurance carrier worry about accident probabilities.

(d) Hazardous Condition Resulting from Defects in a Municipal Plan

If the condition that causes the plaintiff's injury is a planned feature of the sidewalk, such as a step or slope between portions of the walk at different grade levels, the rule of immunity for defective plans would seem to be applicable. Under the theory of the rule, if the condition is not patently dangerous, and reasonable necessity for it exists, then a city should not be liable for injuries caused by it. However, the cases have held cities liable for injuries attributable to steps constructed in sidewalks, except at the intersection of the sidewalk and street. On the other hand, it was held that a planned slope from the sidewalk to an alley was not actionable as a matter of law in Conlon v. City of St. Paul, and the same result was reached in a recent case in which the hazard of the slope was aggravated by ice and snow. In several cases cities were held liable for accidents on sloping side-
walks that were covered with ice, but the breach of duty in those cases was found not in the fact of the planned slope but in the failure to remove snow and ice.\textsuperscript{124}

Despite the theoretical immunity that a city is given for planned hazards, the decision in \textit{Fitzgerald v. Village of Bovey}\textsuperscript{125} indicates that a city should not depend too heavily upon that immunity. The cases suggest that a city breaches no duty by planning a slope in a sidewalk, but it must be recognized that in a climate like that of Minnesota these slopes are likely to be dangerous during the winter. The city probably does have a duty not to plan steps in the walk except where the sidewalk intersects the street. It should be noted, however, that in each of the "step" cases the accident for which the city was held liable occurred at night. Whether or not a city's duty with respect to these steps could be discharged by lighting them is uncertain, for there are no cases involving lighted steps.

(e) Crosswalks

The portion of the "street" in which a city's duty imposes the highest degree of care is in a designated crosswalk. It is quite probable that a city is an insurer of pedestrian safety from injuries resulting from surface defects in crosswalks. Although all of the crosswalk cases were decided on negligence principles, cities have been unable to avoid liability in any of these cases. The standard of care applied seems to be so high that there is no possibility of a city discharging it so as to avoid liability. A very slight defect may be actionable. For example in \textit{Estabrook v. City of Duluth},\textsuperscript{126} the plaintiff claimed to have tripped on a one-half inch depression in a creosote block crosswalk. The trial court ordered judgment for the city notwithstanding the verdict on the ground that the defect was too slight to support a finding of negligence. The Minnesota Supreme Court reversed and held that the jury should be permitted to find negligence from the existence of any defect that in fact causes injury.\textsuperscript{127} The fact that

\textsuperscript{124} Woodring v. City of Duluth, 224 Minn. 580, 29 N.W.2d 484 (1947); Slindee v. City of St. Paul, 219 Minn. 428, 18 N.W.2d 128 (1945); McClain v. City of Duluth, 163 Minn. 198, 203 N.W. 776 (1925); Genereau v. City of Duluth, 131 Minn. 92, 154 N.W. 664 (1915); \textit{Cf.} Graalum v. Radisson Ramp, Inc., 245 Minn. 54, 71 N.W.2d 904 (1955).

\textsuperscript{125} 174 Minn. 450, 219 N.W. 774 (1928).

\textsuperscript{126} 142 Minn. 318, 172 N.W. 123 (1919).

\textsuperscript{127} See also Leystrom v. City of Ada, 110 Minn. 340, 125 N.W. 507 (1910); Sumner v. City of Northfield, 96 Minn. 107, 104 N.W. 686 (1905); Bieber v. City of St. Paul, 87 Minn. 35, 91 N.W. 20 (1902).
the city had inspected the crosswalk less than a week before the accident and had found no defect warranting repair was not a sufficient performance of its duty. In Paul v. Faricy and its companion case, Cowling v. City of St. Paul, the city was held negligent as a matter of law for an injury attributable to a planned safety island in the crosswalk.

Examination of various other areas of the streets has revealed that very slight defects are actionable and that inspection will not enable the city to avoid liability. The even higher standard of care imposed with respect to the crosswalks is emphasized by the cases involving snow and ice defects. Although this Article does not purport to treat the duty with respect to snow and ice generally, a brief reference to it in the context of the crosswalks may be illuminating. Minnesota purports to follow what is often called the "smooth surface" or "mere slipperiness" doctrine in determining municipal liability for street and sidewalk injuries attributable to accumulations of ice and snow. Under this doctrine the theory is that a city is not liable if the condition which caused the plaintiff's injury was nothing other than slipperiness caused by the natural accumulation of ice and snow. However, if the icy surface of the walk develops "ridges or hummocks" a city may be liable for an injury if the ridge or hummock existed long enough to charge the city with constructive notice of the defect. Actually, most of the cases fall within this exception to the mere slipperiness doctrine, for ridges usually will develop in a traveled street or sidewalk. In most of these cases there is some substance, however slight, in the notion of constructive notice. The plaintiff must show that the condition existed for some time—long enough for the city to have had a reasonable opportunity to clean the street or walk. It need not be shown, however, that any particular configuration of ridges and hummocks existed for any period of time—it is enough if the plaintiff can show that ridges and hummocks were characteristic of the general condition existing for a period of time around the place where the plaintiff was injured.

In the case of crosswalks, these ridges are bound to form very

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128. 228 Minn. 264, 37 N.W.2d 427 (1949).
129. 234 Minn. 374, 48 N.W.2d 430 (1951).
130. See Peterson, supra note 2, at 507; see also Henkes v. City of Minneapolis, 42 Minn. 530, 44 N.W. 1026 (1890); Note, 21 MINN. L. REV. 703 (1937).
quickly, and the ridges and hummocks found there will be deeper and rougher than those found elsewhere in the sidewalk. As a practical matter, since ridges and hummocks are inevitable at crosswalks, the "mere slipperiness" doctrine will never be applicable where the plaintiff has slipped on snow or ice at a crosswalk. Moreover, it may be that no significant period of time is necessary to charge a city with constructive notice of the condition of the crosswalk.\textsuperscript{134} Sanding the crosswalk on the day of the accident does not discharge the city's duty as a matter of law.\textsuperscript{135} Perhaps the only way a city could perform its duty and protect itself from liability would be to scrape the crosswalk bare of snow so that no ridges could form, and to keep it that way all winter. This, obviously, is impractical. Moreover, by keeping the crosswalk bare of snow all winter while snow and ice accumulate to a considerable depth in the rest of the vehicular roadway, a city might be creating a rough spot in the road which would expose it to liability for vehicle accidents. As a practical matter, since there is no reasonable way to avoid liability, it seems that a city is virtually an insurer of the safety of pedestrians in its crosswalks.

There is good reason, perhaps, why a city should be held to a higher standard of care in crosswalks than elsewhere. While crossing the street the pedestrian must devote much of his attention to avoiding vehicles, and he is therefore less able to protect himself\textsuperscript{136} against surface irregularities. It has been held that a pedestrian is not guilty of contributory negligence as a matter of law for failing to avoid an obvious defect in the curb at a street intersection. In \textit{Bowen v. City of St. Paul}\textsuperscript{137} the trial court granted judgment notwithstanding the verdict for the city on the ground that the plaintiff was contributorily negligent in failing to avoid a V-shaped chink four inches wide in the curb. In reversing, the court said:

\begin{quote}
She could have seen the particular defect had she been on the alert for dangers of this kind. But the rule of ordinary care does not impose upon the pedestrian in the use of the public streets a constant vigilance to discover and guard against defects therein; \textit{he may assume that they are in safe condition for use}, and direct his attention in part at least to guarding against other dangers naturally to be anticipated—from the automobile, the motorcycle, and other vehicles.
\end{quote}

\textsuperscript{134} See Barrett v. City of Virginia, 179 Minn. 118, 228 N.W. 350 \textsuperscript{135} (1929). It should be noted, however, that the ridges involved in this case were caused by the city's own snow plow. \textit{Cf. Rasmusen v. City of Duluth}, 133 Minn. 134, 157 N.W. 1088 (1916).

\textsuperscript{135} See Mathieson v. City of Duluth, 201 Minn. 290, 292, 276 N.W. 222, 223 (1937).

\textsuperscript{136} Perhaps the word should be "herself" rather than "himself," for in nearly all of the reported crosswalk cases the plaintiff was a woman.

\textsuperscript{137} 132 Minn. 123, 188 N.W. 554 (1922).
and agencies often recklessly operated thereon, and does not expose himself to the charge of negligence in doing so.138

2. Defects in Improved Streets

(a) Duty Owed Pedestrians in the Street

One does not ordinarily think of pedestrians as the users of improved street roadways. However, it appears that a city does have some duty to keep the traveled street—even outside the crosswalk—safe for pedestrian travel as well as vehicular travel. Whether the scope of the duty owed pedestrians is different from that owed the owners of vehicles is a difficult question to answer. The leading case on the subject is Thoorsell v. City of Virginia.139 In that case the city had allowed a strip of bituminous pavement to be removed to permit work on water pipes under the street. When the work was finished the hole was filled with sand and gravel but the bituminous pavement was temporarily not replaced in order to permit the fill to settle. The sand and gravel was constantly being displaced by passing vehicles, but it was replaced from time to time by the city. The evidence indicated that the hole was about four inches deep at the time plaintiff stepped into it and was injured. The city argued that since the hole was some 40 feet from the nearest intersection and since there were good sidewalks on both sides of the street, the city had no reason to foresee the use of that part of the street by pedestrians and, therefore, was under no duty toward plaintiff. In rejecting this contention of "no duty" the court said:

This assumes that pedestrians have no right to use the street outside of the sidewalks except at crossings. We are unable to hold this. It is not in accord with the authorities or with common sense. As said by the trial court in its charge to the jury, it is true that the use of the street outside of the sidewalk is primarily for traffic by teams and other vehicles, and the use of the sidewalk primarily for pedestrians, but pedestrians still have the right to use the street when the necessity arises. It has never been held, to our knowledge, that they have not such right, or that the duty of a municipality to use reasonable care to keep the streets in a safe condition does not extend to making them reasonably safe for pedestrians who have occasion to be upon that portion of the street ordinarily traveled by vehicles. The question has been generally one of whether it was contributory negligence per se for a pedestrian to cross a street at a place other than a regular crossing, and it has quite uniformly been held that it was not. The same authorities are conclusive on the question of whether the city owes any duty to the pedestrian except to keep its sidewalk and crossings safe.140

138. Id. at 125, 188 N.W. at 555. (Emphasis added.)
139. 138 Minn. 55, 163 N.W. 976 (1917).
140. Id. at 58, 163 N.W. at 977.
What is the standard of care to which this duty obligates a city? If the foreseeability of injury test for the existence of duty is the appropriate one, the necessary conclusion must be that the standard of care is the same as that which a city must observe with respect to sidewalks. The Thoorsell case held that pedestrians have a right to use the street. There were no facts in the case indicating that pedestrians were any more likely to be in the street at the place of the plaintiff's accident than at any other place in the street. Accordingly, it would seem that a city is bound to foresee the presence of pedestrians in the street. Of course, foreseeability of injury entails a recognition both that a pedestrian will be in the street and that injury to such a pedestrian may occur.

A surface defect of the type likely to cause injury by upsetting a pedestrian would be equally likely to cause him injury whether it exists in a sidewalk or a street. Therefore, if a city's duty is predicated upon foreseeability of injury, the standard of care for streets would seem to be the same as that required for sidewalks, or perhaps, crosswalks.

There are not enough Minnesota cases to justify fully the conclusion that the standard of care is the same with respect to both streets and sidewalks. One case, Squillace v. Village of Mountain Iron, does contain language that would support this proposition. In that case, however, the defective condition was an accumulation of ice and snow which the village had plowed up along the roadway, completely covering the sidewalk, and forcing the pedestrian to walk in the plowed street. The court considered the necessity of walking in the street to be a factor of great importance in holding the village to the same degree of care with respect to the street as to the sidewalk. The actual holding of the Squillace case, then, is that if a sidewalk is impassable, the city is required to exercise the same degree of care with respect to the street as it must ordinarily exercise with respect to the sidewalk.

However, as has been noted previously, it is not at all certain that the basis of a city's duty toward a pedestrian in the street is foreseeability of injury. If the implied invitation theory be the true basis of the duty, it would be possible for the city to be held to a

141. 223 Minn. 8, 26 N.W. 2d 197 (1946).
142. Cf. Phelion v. Duluth-Superior Transit Co., 202 Minn. 224, 277 N.W. 552 (1938). That case, like the Squillace case, involved a snow and ice condition which caused injury to a pedestrian who was walking in the street, presumably because the sidewalks were impassable. While the city was not a party in that case, the court did offer the opinion that the city had breached no duty to the plaintiff. The plaintiff, as a pedestrian, "had a right to use any part of the street; but at the same time he cannot expect of the city that care in protecting against ruts and ridges due to snow anywhere along the street as at an ordinary crosswalk." Id. at 229, 277 N.W. at 555.
different standard of care with respect to the street than with respect to the sidewalk. This invitation notion, which rests upon the traveler's understanding or expectancy, would still require some duty on the part of the city, for an improved street impliedly represents to the traveler that the natural hazards to travel have been removed, and that steps are taken by the city to keep other hazards from forming in the street. However, since the street is improved primarily for use by vehicles, it would seem that any representation that hazards had been removed would extend only to those hazards that would endanger vehicles—at least if a sidewalk is provided along the street. This theory is not inconsistent with the holding in the Thoorsell case, since the defect there was four inches high—a defect that would be hazardous to vehicles as well as to pedestrians. In addition, the invitation theory seems a better explanation than the foreseeability of injury theory for some of the other cases that do not seem to support the proposition that the duty is the same with respect to both streets and sidewalks. Consider, for example, Fleming v. City of Minneapolis. In that case the city had spread oil over a creosote block street, thus making the street very slippery. Plaintiff fell in the street and injured herself. The trial court held that the city was entitled to a directed verdict. Such an injury would clearly be foreseeable if the city were bound to anticipate the presence of pedestrians in the street at that point—and the Thoorsell case says that it is so bound. If the city had spread oil on a sidewalk it is probable that it would have been held liable to a pedestrian who had slipped and fallen. There are no sidewalk cases directly on this point but there are some which involve slipperiness caused by ice on the sidewalk and which indicate this conclusion. If a city were to hose down a sidewalk in freezing weather it would probably be liable to a pedestrian who falls on the ice—at least this opinion was offered obiter by the court in one case. The "mere slipperiness" doctrine, referred to previously, would not apply in such a case since the accumulation of ice would not be attributable to natural causes. Hosing down the sidewalk under such conditions would be comparable to the street oiling involved in the Fleming case; but in that case, in spite of the city's obligation to foresee the presence of pedestrians in the street, there was no liability to the

143. Automobiles could perhaps manage this defect, but bicycles or motorcycles might well be thrown over by it.
144. 168 Minn. 80, 209 N.W. 902 (1926).
145. See Muggenburg v. Fink, 166 Minn. 411, 412, 208 N.W. 134, 135 (1926) (dictum); Nichols v. Village of Buhl, 152 Minn. 494, 189 N.W. 407 (1922); Isham v. Broderick, 89 Minn. 397, 95 N.W. 224 (1903).
146. See text accompanying notes 130 & 131 supra.
injured pedestrian as a matter of law. Thus, the Fleming case would seem to support the "invitation" theory better than the foreseeability of injury theory, since—by law—the presence of the pedestrian was foreseeable.

The Fleming case might be explained, consistently with the ordinary negligence doctrine which the court has traditionally followed, under the recognized immunity for conditions created pursuant to a defective plan. The oiling of creosote streets is reasonably necessary; but hosing down sidewalks in freezing weather is not reasonably necessary. However, the Fleming case was not argued on this theory, and as previously discussed, this immunity principle may have little real significance.

We hesitate to conclude that the standard of care owed to pedestrians in the street is the same as that owed to pedestrians on the sidewalk, despite the language in the Thoorsell case. There is too much evidence that the actual basis of municipal liability is not to be found in traditional principles of ordinary negligence. It may or may not be significant that in all of the cases in which a city was held liable to a pedestrian injured in the street, the defective condition was one that would have made the street hazardous for vehicles as well and was not obvious to the traveler. And in the one case in which a city was held not liable, the defect, while possibly dangerous to some vehicles, was at least obvious to the pedestrian. These cases seem to support the idea that the duty is predicated upon the invitation extended to the pedestrian and the standard of care determined by the degree of safety represented. This representation would seemingly cover only such defects as would be hazardous to vehicles—at least if a passable sidewalk is available for pedestrian travel.

(b) Duty Owed Drivers of Vehicles

The cases indicate that a city can, by the exercise of reasonable care, avoid liability for vehicle accidents attributable to street defects. The duty in this area does not seem to impose the all but impossible standard of care which is required with respect to sidewalks or crosswalks. True, the fact of injury is regarded as almost conclusive evidence of a hazardous condition in the street as well as in the sidewalk, and the fact that the condition existed for a period of time is sufficient to charge the city with notice of its existence. But a defect which causes damage to a vehicle must be of a more obvious character than defects which can upset a pedestrian. These defects, unlike many actionable sidewalk defects, can, unless of sudden origin, be discovered by inspection before they are of sufficient magnitude to cause damage to a vehicle.

147. See text accompanying note 9 supra.
To perform its duty so as to avoid liability, a city must prevent the formation or creation, other than by sudden causes,\textsuperscript{148} of any ridges, humps, holes, or other obstacles likely to cause damage to a vehicle in the street.\textsuperscript{149} And the city must avoid faulty construction or repair work in the street which might, by the operation of natural forces and the use of the street, produce a hazardous condition.\textsuperscript{150}

Despite the often cited rule of immunity for hazards created by the execution of a defective plan, the cases indicate that a city cannot count on avoiding liability on this basis. In \textit{Fitzgerald v. Village of Bovey},\textsuperscript{151} the city was found liable for an injury caused when a vehicle hit a "traffic dummy" eighteen inches in diameter and six inches high, purposely erected by the village at an intersection. The dummy was placed in the street to serve a particular function in traffic control. In spite of this, the court found that the village had not sufficiently established a "reasonable necessity" for use of the dummy. The court has said that if reasonable men could differ on the advisability of the plan the city should not be liable.\textsuperscript{152} That reasonable men could differ on the advisability of the defective plan in the \textit{Fitzgerald} case was rather conclusively shown by the fact that two justices of the supreme court dissented on the ground that the dummy was quite appropriate since other cities used the same type of device for the same purpose.

The cases indicate that it is very difficult for the city to suspend its duty with respect to the safety of streets by closing off the street. In \textit{McDonald v. Western Union Tel. Co.},\textsuperscript{153} the city was liable when plaintiff hit a manhole that had been raised three inches in accordance with a plan for the resurfacing of the street. The street had been blocked off during the resurfacing project, although there was no policeman constantly on duty to prevent the passage of traffic. In some cases, the barrier that a city puts up to stop the flow of traffic may itself be an obstacle for which

\textsuperscript{148} Cf. \textit{Hamilton v. Vare}, 184 Minn. 580, 239 N.W. 659 (1931). If the city has actual notice, it can be liable for a condition of sudden origin. \textit{Engel v. City of Minneapolis}, 138 Minn. 438, 165 N.W. 278 (1917).

\textsuperscript{149} Hoffman v. City of St. Paul, 187 Minn. 320, 245 N.W. 373 (1932); McKnight v. \textit{City of Duluth}, 181 Minn. 450, 232 N.W. 795 (1930); Killeen v. \textit{City of St. Cloud}, 136 Minn. 66, 161 N.W. 260 (1917); Miller v. \textit{City of Duluth}, 134 Minn. 418, 159 N.W. 960 (1916); Koplitz v. \textit{City of St. Paul}, 86 Minn. 373, 90 N.W. 794 (1902); Cunningham v. \textit{City of Thief River Falls}, 84 Minn. 21, 86 N.W. 763 (1901); Treise v. \textit{City of St. Paul}, 36 Minn. 526, 32 N.W. 857 (1887).


\textsuperscript{151} 174 Minn. 450, 219 N.W. 774 (1928). See also \textit{O'Gorman v. Morris}, 26 Minn. 267 (1879).

\textsuperscript{152} \textit{Conlon v. City of St. Paul}, 70 Minn. 216, 218, 72 N.W. 1073 (1897).

\textsuperscript{153} 250 Minn. 406, 84 N.W.2d 630 (1957).
the city may be liable. In two cases cities were held liable when a plaintiff ran into a rope barrier placed across the street for the express purpose of preventing traffic.\textsuperscript{154} Apparently a city must warn travelers that it is going to block off a street—the barricade itself may be insufficient to inform the traveler that the "invitation" to use the street has been revoked.\textsuperscript{155}

Some of the cases suggest that a city may avoid liability where it can show that the plaintiff was contributorily negligent,\textsuperscript{156} but one case, \textit{Wilson v. City of Montevideo},\textsuperscript{157} limits the utility of the contributory negligence doctrine in the matter of absolving a city from liability. In \textit{Wilson}, plaintiff drove into an excavation in broad daylight while city employees were working in it. The employees yelled at plaintiff to stop, but he failed or was unable to do so. It was established that plaintiff was exceeding the speed limit at the time, but the city was held liable.

Although the standard of care is rigorous—greater perhaps than one would normally expect under the "reasonableness" standard of general negligence doctrine—the standard is not impossible. A city can, and should, discover defects in the street serious enough to cause vehicle accidents. Automobiles and motorcycles are such dangerous instrumentalities when they go out of control that it would seem to be advisable for a city to take all possible precautions to prevent defective conditions from forming in the streets. Even apart from any question of potential liability to the vehicle operator, this obligation seems almost imperative.

**D. Duty Arising From Other Hazards Related to Use of the Sidewalks and Streets**

1. \textit{Precipitous Declivity Near the Street or Sidewalk}

   In addition to surface hazards, there is another type of defect which has been a frequent source of litigation—a city is often held liable where vehicles or pedestrians are impelled into a precipitous declivity near but not in the traveled roadway. Sometimes the declivity is not within the platted street at all, not even in the unimproved portion, and in one case it was outside the city lim-


\textsuperscript{155} Of course, much would depend upon the size, shape, color, and position of the barricade. However, in Ihlen v. Village of Edgerton, \textit{supra} note 154, the fact that the rope barricade was strung with flags and streamers did not prevent liability.

\textsuperscript{156} See Johnson v. City of Willmar, 111 Minn. 58, 126 N.W. 397 (1910); Friday v. City of Moorhead, 84 Minn. 273, 87 N.W. 780 (1901).

\textsuperscript{157} 196 Minn. 532, 265 N.W. 438 (1936).
The problem involved in most of these cases is whether the city is liable for failing to erect a barrier that would prevent the plaintiff from leaving the road at the point of the declivity. In a few of the cases the problem is whether the city may be liable when the street or sidewalk gives way owing to the lack of lateral support. Cases involving such defects may be grouped in three separate categories according to the type of declivity involved—cases involving bridges, ditches, and cliffs and graded embankments.

(a) Bridges

In this category, only those cases in which the accident was attributable to a defective railing will be considered. Cases involving injuries caused by persons or vehicles falling into the ditch or stream after a bridge had been weakened or removed are more properly treated as "surface defect" cases, since the hazard in such cases is directly in the roadway proper.\(^{158}\)

It has been almost 30 years since the last "bridge railing" case was decided by the Minnesota Supreme Court. Perhaps the reason is that Minnesota bridges have been so well constructed that even with the increased flow of traffic there have been fewer accidents. But the reason may also be the fact that the last bridge railing case decided by the court, Tracey v. City of Minneapolis,\(^{160}\) held that the city has practically no duty to prevent automobiles from falling off the bridge. There is no way of knowing how many suits attributable to faulty bridge railings have been lost by the plaintiffs on directed verdicts at the trial level on the authority of this case.

Actually, one may wonder whether Tracey would survive as an authority if it were directly challenged in the supreme court today. The case represents an inexplicable departure from previous authorities, and it has resulted in cities being held to a lesser degree of care in these bridge cases than that required for other types of declivities. Perhaps the explanation of the Tracey case lies in the fact that it was decided at a time when the impact of the automobile on the American way of life had not yet been fully appreciated.

Prior to Tracey, the only cases to come before the court concerning vehicles falling off bridges had involved horse drawn vehicles. In the first of these cases, Shartle v. City of Minneapolis,\(^{161}\) the jury was permitted to find for the plaintiff who suffered a mis-
carriage when one horse of a team she was driving became fright-
ened and backed up, forcing the back wheels of her wagon
through the wooden bridge railing. The jury found that the railing
was not of sufficient strength and that this was the proximate
cause of plaintiff's miscarriage. The case contained no reference
to the cause of the animal's fright, nor did the court regard the
accident as an unusual one. Later the court held, in Grant v. City
of Brainerd,\textsuperscript{162} that the city's duty to provide a suitable bridge
railing extended to bridge approaches as well as to the bridge
proper when the approaches were graded up to a level higher
than the natural level of the surrounding terrain. In that case the
horse was frightened by a passing bicycle and backed off the
bridge approach. A directed verdict for the city was reversed on
appeal—the jury could find both breach of duty and proximate
cause.

In the Shartle case there was evidence that the city had permit-
ted the wood railing to decay. In the Grant case the city had failed
to erect any barrier on the bridge approach. But what should be
the result in a case where a city has erected a barrier or railing
and where there is no evidence of disrepair? If the city purposely
erected a barrier which was not in fact sufficient to prevent injury
to travelers, we might expect the rule of immunity for defective
plans to be invoked, and for the city to avoid liability if reasonable
minds could differ on the safety of the plan.\textsuperscript{163} However, this
immunity has not usually been applied to cases where the planned
hazard is the intentional omission of an accident-preventing de-
vice as opposed to an accident causing device purposely placed in
the roadway. In any event, the immunity rule was not applied in
Klaseus v. Village of Kasota.\textsuperscript{164} In Klaseus, the plaintiff's claim
was based, not upon disrepair, decay or negligent construction of
the railing, but upon negligent failure to erect a railing of suffi-
cient height. There was no contention that the railing was too
weak—it was just too low. Plaintiff's horse was frightened by an
automobile and crowded off the bridge—falling over the two-and-
one-half-foot railing. Without discussing the question of whether
reasonable minds could differ on the adequacy of the railing, the
court held that a jury could find negligence in the plan and that
this was the proximate cause of the plaintiff's damages.

The Tracey case seems to be directly contrary to these earlier
authorities. In Tracey the court held as a matter of law that the
city was not liable for the death of plaintiff's husband, whose car
had gone out of control and crashed through a flimsy bridge rail-

\textsuperscript{162} 86 Minn. 126, 90 N.W. 307 (1902).
\textsuperscript{163} See text accompanying note 9 \textit{supra}.
\textsuperscript{164} 128 Minn. 47, 150 N.W. 221 (1914).
ing after his left front hubcap collided with that of a car going the opposite direction on the bridge. It was conceded that the railing could not have stopped a car skidding into it, and so the only effective barrier was a seven inch curb between the roadbed and the sidewalk. There was no evidence that the railing was deteriorated or poorly constructed. The city had planned a flimsy railing. The court did not treat the case as one involving a defective plan, however. Rather, the case was analyzed as one involving negligent "maintenance." In purporting to hold that the city breached no duty, the court said:

It is the duty of municipalities to use ordinary care in the maintenance of highways and to erect guard rails or barriers where their absence would leave the highway unsafe for ordinary travel. They must prepare for and anticipate ordinary use, not extraordinary and unanticipated use. Obviously this bridge as maintained was adequate for ordinary use, the usual use. It was not so maintained as to prevent an automobile under the circumstances climbing over the curbing and breaking through the railing. To guard against such would have necessitated the construction of a wall of iron or concrete which would be a very onerous burden to the taxpayers. Few bridges built even under modern methods would withstand such strain. The authorities cannot be expected to anticipate or guard against such emergency. Indeed, it is not the purpose of a curb, curb rail, or an outside rail to protect against such an assault. The purpose is to guard against ordinary contingencies or those which may be reasonably anticipated. The law does not demand a perfect highway under all circumstances. To do so would make the municipality an insurer. This the law does not do. [Citations omitted.] 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. We are of the opinion that the claims of plaintiff cannot constitute negligence on the part of the city.

The court's language leaves one guessing as to what it might consider to be "ordinary" use which can be "reasonably anticipated." Apparently it means that a city need not anticipate a car jumping the curb and skidding into the bridge railing. This seems

165. In one other case before this, the court had avoided coming to grips with the supposed doctrine of immunity for hazards resulting from a defective plan by playing upon the ambiguity of the word "maintenance." In McKnight v. City of Duluth, 181 Minn. 450, 232 N.W. 795 (1930), the court treated an "unguarded gutter" as a defect within the rule relating to negligent "maintenance." There was no evidence of disrepair or deterioration in the McKnight case, but the court said "negligence in maintaining the street in a defective and dangerous condition is clearly charged . . . ." This was true in one sense of the word "maintaining," since the city had kept the defective condition in existence. But when applied to "maintenance" of streets the word usually means keeping the streets in repair or order or preventing deterioration.

166. Tracey v. City of Minneapolis, 185 Minn. 380, 382, 241 N.W. 390, 391 (1932).
a strange holding in the light of the previous cases which had held that the city may be required to anticipate that a horse may become frightened and leave a bridge. Mr. Justice Holt, dissenting in the Tracey case, pointed out that in the Minnesota climate, where ice, sleet, and snow cover the road surfaces, it is more reasonable to anticipate that an automobile would skid off the bridge than it is to anticipate that a horse, which has the instinct of self-preservation, would jump or back off the bridge.

In Tracey the court also ruled, without discussion, that the inadequacy of the bridge railing was not the proximate cause of the accident. Why should a jury not be permitted to find the weakness of the railing to be the proximate cause if a car leaves the bridge, when it is permitted to find the weak or low railing to be the cause when a frightened horse leaves the bridge? The court suggested no answer to this question.

Few persons today would insist, as did Chief Justice Wilson in Tracey, that the construction of iron or concrete barriers on the sides of bridges would entail too onerous a burden on the taxpayers. Accordingly, it cannot safely be assumed that the Tracey case is a strong authority today. Nevertheless, it held that, as a matter of law, the city had no duty to erect bridge railings strong enough to stop skidding automobiles, and the case has never been overruled.

So far as the duty of a city to guard pedestrians from falling off bridges is concerned, it should be noted that the railing must be strong enough to prevent children from pushing it off if the city really wants to be on the safe side.

(b) Ditches

There are not enough cases to justify any really satisfactory generalizations with respect to a city's duty to prevent travelers from straying into ditches. Some cases suggest that a city does have some duty to erect guardrails, or at least warning lights to protect night travelers, but what few cases there are do not go against the city as consistently as do the surface defect cases. For example, in Piscor v. Village of Hibbing, the court ruled that there was no actionable negligence as a matter of law where a pedestrian

167. See cases discussed in text accompanying notes 161, 162 & 164 supra. See also Neidhardt v. City of Minneapolis, 112 Minn. 149, 127 N.W. 484 (1910), where the court permitted the jury to find it reasonably to be anticipated that a pedestrian would be forced by an approaching car to leave the roadway at the point of the accident.
168. See McDonald v. City of Duluth, 93 Minn. 206, 100 N.W. 1102 (1904).
169. See, e.g., Clark v. City of Austin, 38 Minn. 487, 38 N.W. 615 (1888).
170. 169 Minn. 478, 211 N.W. 952 (1927).
fell into a ten inch ditch which crossed the sidewalk. The sidewalk had no guardrail at that spot. The sidewalk and ditch were obscured by snow and slush and it was impossible for the plaintiff to discern the edge of the walk. In arriving at its conclusion the court took judicial notice of the fact that "no municipality erects guards or barriers for the openings where these drains pass in and out under the walks."171 The case may rest upon an alternative holding of assumption of risk or contributory negligence, but the court purported to decide the case primarily on the fact that the city was not negligent as a matter of law. It is strange that the court, which is so extremely reluctant to take a case involving a surface defect away from the jury, would reach this result in the Piscor case, and especially strange that they did so on the basis of judicial notice of a somewhat questionable fact.172 The fact that no municipality ever repairs surface irregularities less than an inch in magnitude has never deterred the court from permitting the jury to find negligence in a particular city's failure to do so.

The cases involving vehicle accidents in ditches are not much more helpful. In Johnson v. City of Willmar,173 the plaintiff was found guilty of contributory negligence as a matter of law. In Johnson, the city had erected red warning lights near a ditch, and the plaintiff admittedly knew about the ditch and tried to avoid it. The accident occurred when his horse jumped into the ditch after becoming frightened when the wheel of the buggy scraped a large stone. It is difficult to see how the plaintiff could have been guilty of contributory negligence unless he knew or should have known he was going to drive against the stone, and knew or should have known that the result of this would be that the horse would take fright and jump into the ditch. The fact that the plaintiff purposely drove close to the ditch to get into his driveway could hardly be called contributory negligence—assumption of risk, perhaps, but not negligence. But the court found negligence as a matter of law, reversing a verdict of the jury for the plaintiff. If the court had ruled that the city had performed its duty as a matter of law when it placed the red warning lights around the ditch, the decision would have been helpful. It would have suggested that a city has no duty to erect a barrier around such a ditch—that the appearance of the ditch in the daytime, and the red warning lights at

171. Id. at 483, 211 N.W. at 954.
172. The court that took judicial notice of this fact contained the same personnel, with one exception, as the court that later refused to notice the fact that other municipalities employed traffic guide dummies such as the one involved in Fitzgerald v. Village of Bovey. See text accompanying note 151 supra. However, two of the majority judges in Fitzgerald had dissented in Piscor.
173. 111 Minn. 58, 126 N.W. 397 (1910).
night, sufficiently protect the traveler. But the court did not rule on this basis, and so the explanation of the case is indeterminable. In any event it was a ruling of no liability as a matter of law in the face of a jury's verdict for the plaintiff.

In *Christenson v. Village of Hibbing*, the plaintiff recovered from the city for injuries received when he drove into an unguarded ditch at night. The case was decided in the trial court on instructions as to the city's duty which the supreme court seemed to recognize were erroneous. Since the instructions were not objected to on the appeal they represented the "law of the case," and so the judgment for the plaintiff was upheld.

It can only be concluded from the cases that a city's duty to erect warning devices and barriers or railings around ditches is unclear. The potential danger to travelers posed by a ditch is not as great as that posed by a bridge without a railing, since the declivity of a ditch is usually small. But a relatively small depression can be the cause of considerable damage when it is hit by an automobile traveling at today's high speeds. Cities should probably be advised that ditches represent a potential source of liability, and that some barrier or warning device should be erected wherever the ditch represents a real hazard to traffic on the road or sidewalk because of the depth of the ditch, its proximity to the road, or the narrowness of the roadway itself. Whether or not a "real hazard" is presented is a difficult question, and the cases offer no assurance that the jury will not be allowed to "second-guess" the city's determination on this point.

(c) Cliffs and Graded Embankments

This category includes those cases in which the traveler has fallen over a cliff or graded embankment near the roadway or sidewalk. The cliff cases include those in which the street at the point of the accident runs along a hill or bluff, the side of which has been taken away either by natural erosion or by excavation. The graded embankment cases include those in which the roadway has been purposely graded up to a level higher than that of the surrounding terrain on at least one side of the road. In this category we will consider cases involving lack of lateral support as well as cases dealing with the absence of effective railings or barriers.

The cases do not, in terms, treat the question of a city's duty to erect a railing as a question distinct from that relating to the duty to maintain the street surface free from hazards. This fact may account for some apparent confusion in the cases. The courts, especially in earlier years, seemed to be very reluctant to hold that

174. 219 Minn. 141, 16 N.W.2d 881 (1944).
a city had any positive duty to protect travelers against hazards outside the roadway. However, if the court could reason from the facts that travel on the sidewalk or roadway itself was rendered unsafe because of the nearness of some precipitous declivity it would hold the city liable for failure to erect a barrier sufficient to prevent injury to travelers. This principle permitted recovery in some cases in which the injured person was a pedestrian, but it ordinarily did not where the injured person had driven a vehicle over the cliff or embankment. The reason for the difference probably lay in the fact that the vehicle usually had to pass over some other space after leaving the roadway before reaching the precipice, whereas the sidewalks often were laid right at the edge of the cliff. Thus, in McHugh v. City of St. Paul a directed verdict for the city was upheld on appeal. The plaintiff drove his horse off the street and fell down an eleven foot embankment on a very dark night. The street was 34 feet wide at the place of the accident and was bordered by a three-and-one-half foot gutter and a ten-foot sidewalk. The embankment sloped off steeply from the outer edge of the sidewalk. After ruling that the city had no obligation to light its streets, the court said:

Nor are towns necessarily bound to fence, or erect barriers, to prevent travelers from getting outside of the road or way. . . . Considering the fact that Burgess street, in its entire width of 60 feet, was graded, and in good condition; that plaintiff was well acquainted with the neighborhood; that he . . . allowed [his horse] to turn, at right angles to the street, and had to pass over the gutter and sidewalk before reaching the embankment, . . . we are of the opinion that the trial court was fully justified in directing a verdict for the defendant, and denying the motion for a new trial.

The quoted statement contains a hint that the court suspected the plaintiff of some contributory negligence, but this is not the basis for the ruling. The court seemed to hold that there was simply no duty to erect a barrier at that point—at least, no duty to the plaintiff. The court did not consider the question whether the city might have owed a duty to a pedestrian to erect a barrier at that point. Undoubtedly, it did have such a duty. But a barrier sufficient to protect the pedestrian need not have been strong enough to have prevented the plaintiff's accident in the

175. See Watson v. City of Duluth, 128 Minn. 446, 151 N.W. 143 (1915); City of St. Paul v. Kuby, 8 Minn. 125 (1862). But see Lineburg v. City of St. Paul, 71 Minn. 245, 73 N.W. 723 (1898).

176. See Briglia v. City of St. Paul, 134 Minn. 97, 158 N.W. 794 (1916); Tarras v. City of Winona, 71 Minn. 22, 73 N.W. 505 (1897); McHugh v. City of St. Paul, 67 Minn. 441, 70 N.W. 5 (1897).

177. 67 Minn. 441, 70 N.W. 5 (1897).

178. Id. at 443–44, 70 N.W. at 5–6.

179. See cases cited note 175 supra.
McHugh case. It is, nevertheless, strange that the court would find no jury question in the case when, as has been seen, the courts are so reluctant to remove from the jury the question of a city's duty in cases involving surface defects. By ruling as it did in McHugh, the court held, in effect, that the thirteen-foot space between the roadway and the precipice was sufficient protection for the driver of a vehicle.

In Tarras v. City of Winona, the court tried to clarify further the question of a city's duty, stating that:

It cannot be held that the public authorities are negligent in failing to fence off such a place by such a barrier, 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.

In the Tarras case the roadway was 33 feet wide and the embankment was seven feet deep. In both the McHugh and Tarras cases the place of the accident was in a straight, wide road, and the drop was not so great as to be likely to kill the occupant of any vehicle falling over the embankment. Moreover, the rule announced in both cases rested on the assumption that the vehicles using the road would be horse-drawn. But what if an automobile instead of a horse-drawn carriage were involved? An automobile traveling at ordinary speeds might not be stopped in a distance of thirteen feet, as the horse-drawn wagon could have been in McHugh. And what if the drop were so high that a fall would inevitably be fatal to the occupant of any vehicle that should plunge over, instead of merely causing injuries as in McHugh and Tarras? We might expect these differences in circumstances to lead to a different conclusion as to a city's duty—automobile travel on a roadway just thirteen feet from the brow of a very high cliff might not be reasonably safe unless some form of protective barrier were erected and maintained. Nonetheless, as late as 1932 the court felt that maintaining barriers of concrete and iron on the sides of bridges was too onerous a burden to impose upon the municipal taxpayers. And any lesser barrier would probably prove inadequate to stop a skidding car. If a city has no duty to erect such a barrier on a bridge, is the court likely to hold that it has a duty to erect one along a cliff?

In the first reported Minnesota case involving an automobile plunging over a high cliff, the court ruled as a matter of law

180. 71 Minn. 22, 73 N.W. 505 (1897).
181. Id., at 24, 73 N.W. at 506.
182. See text accompanying note 166 supra.
that the city of St. Paul had no duty to erect a fence or barrier along a street which ran along the top of a bluff just six feet from the brow at the point where it intersected another street. In this case, *Briglia v. City of St. Paul*, 183 the decedent’s car had turned away from the bluff at the intersection. Suddenly the car started backing up and it went over the edge of the bluff. In deciding the case the court recited the rule that a city is not generally bound to keep travelers from straying off the street except “where the roadway is narrow and the declivity so near that it may reasonably be anticipated that . . . some . . . incident of traffic, may cause some traveler to deviate from the traveled way, and to go over the edge. . . .”184 The court found, however, that the decedent’s accident was so extraordinary that it was not reasonably to be anticipated, and held as a matter of law that the city had breached no duty. The decision seems wrong in the light of our present day knowledge of the behavior of automobiles. It does not seem unreasonable to foresee that cars might, under some road conditions, skid across a 26 foot roadway and a six foot patch of ground and go over a bluff. The decision also seems wrong in that it apparently rested upon the view that for the city to have any duty toward the decedent to erect a fence or barrier an accident of the very type that actually occurred must have been reasonably foreseeable. The test of duty in negligence law does not usually require such perfect prescience. It is ordinarily enough to impose a duty if the defendant could have foreseen that injury of the type the plaintiff received might be the result of its act or omission, regardless of the extent or how the particular injury occurred.185

In a later case, practically indistinguishable from *Briglia*, the court held that the jury should be permitted to find negligence for failure to erect a barrier. In this case, *Nelson v. City of Duluth*, 186 the jury was permitted to find the road unsafe and the city negligent in failing to erect a “warning or barrier” where the decedent’s car went off the road on a sharp “S” curve in Duluth’s Lincoln Park. No reference was made to the *Briglia* case, and so we do not know how or whether the court distinguished between the perpendicular intersection on a heavily traveled thoroughfare (*Briglia*) and a sharp “S” curve in a park road. There was a surface defect in the road near the place of the accident in the *Nelson* case, but it was not shown that this was a factor contributing to the accident at all. Perhaps the *Nelson* case did not over-

183. 134 Minn. 97, 158 N.W. 794 (1916).
184. *Id.* at 99, 100, 158 N.W. at 795.
186. 172 Minn. 76, 214 N.W. 774 (1927).
rule the *Briglia* case, but it surely must be said to have impaired its authority.187

It is probably important to distinguish between the duty owed to vehicle operators with respect to railings, fences, or barriers, and that owed to pedestrians. A type of barrier different from that required for the protection of pedestrians may be necessary for the protection of vehicles. A vehicle barrier must be strong, but may be relatively low. A pedestrian barrier need not be very strong but must be high enough to keep a person from toppling over it and low enough to keep him from slipping under it. For example, a railing consisting of one two-by-four strung on top of posts two-and-one-half feet above the level of the sidewalk may be found inadequate to keep children from falling off the walk.188 But a city has no duty to build a fence that a child cannot possibly circumvent. A three-and-one-half-foot high fence with slats one foot apart was found adequate in *Lineburg v. City of St. Paul*.189

How deep must the declivity be to impose upon a city a duty to erect a barrier next to the sidewalk? In *Watson v. City of Duluth*,190 it was held that a city could be guilty of negligence in failing to erect a railing at a point where the sidewalk was fourteen inches higher than the ground immediately adjoining it, and where the ground sloped away to a somewhat greater depth a few feet from the place adjoining the walk. The city argued that it could not be liable for negligence for failure to erect a railing there because the city had proceeded in accordance with a plan not to "guardrail" the sidewalk where the immediate drop was less than two feet. The court rejected this argument, saying that the "defective plan" immunity191 did not apply to negligent failure to erect a guardrail. It gave no reasons in support of this conclusion.

Besides the potential duty to erect guardrails, fences or barriers, a city must be aware of another duty if the street or sidewalk is very near the edge of a cliff or embankment—the duty to provide lateral support to the street or sidewalk. An unsupported street or walk may give way and cast the traveler over the cliff or em-
Ordinarily, a culpable failure of lateral support produces a surface defect—a crack, depression, or transverse slope—in the road or walk, although this is not necessarily the result. The duty to provide lateral support is considered here as separate from the duty to maintain the surface, because in some instances it can be conceived of as an alternative to the duty to provide a guardrail or barrier. Thus, in *Kimball v. City of St. Paul,* where the city was held liable when a curb gave way and permitted the decedent's wagon to roll off the road, the city probably could have avoided liability if it had provided either an adequate guardrail along the top of the bluff or adequate lateral support to the curb.

It may be noted that the duty to provide lateral support to the road or sidewalk necessitates, as a practical matter, some maintenance activity in the land outside the public right of way. Although a city may not actually have to invade the adjoining land, it must inspect and consider the effect of activities of the abutting occupant upon the support of the road or sidewalk. It is clear that a city may be liable to a traveler injured as a result of a failure of lateral support attributable to the actions of the abutting occupant as well as to natural erosion.

There is one other type of case that should be discussed in connection with a city's duty to prevent injury to travelers resulting from the proximity of a cliff, embankment or other declivity. In cases of this type the declivity is not so near to the traveled road that the traveler could injure himself by falling off the road. Instead, in these cases the city is liable because it has somehow invited or led the traveler off the road to the place of his injury. In *Ray v. City of St. Paul,* the city had permitted snow and ice to be dumped into a river at the end of a street. The snow and ice had been to the same level as that of the street, which was itself covered with snow and ice. This gave the appearance that the street continued out over the river. Plaintiff walked out onto the pile of snow and ice, thinking it was part of the street, and fell into the river. The city was held liable for the injury. Subsequently, in *Dehanitz v. City of St. Paul,* a case somewhat simi-
lar on its facts, the court reversed a judgment for the plaintiff whose daughter had drowned in a pond next to a platted street. Garbage and other refuse had been dumped into the pond and a crust had formed on the surface of the pond which was practically indistinguishable from the abutting land. The court did not discuss the reasons for its opinion very carefully, but it may be noted that while the pond surface resembled the surrounding land, it did not appear to be part of an improved street. Thus, the fact that there was no “invitation” in Dehanitz may serve adequately to distinguish it from Ray.

Since a city’s liability in these cases depends not so much on the proximity of the hazard to the roadway but upon the apparent “invitation” by the city, a condition which would not be a potential source of liability to daytime travelers may be such at night. This “invitation” is predicated upon the conditions apparent to the traveler, and conditions will appear differently at night than in the daytime. Thus, a box culvert leading to a ravine may appear to be a sidewalk to a night traveler, and if so, the city will be liable for the injury to which the traveler is subjected by relying upon that appearance, even though the place of the injury is a considerable distance from the street. Similarly, if the dangerous declivity is concealed from the traveler by some feature of the terrain the city may be liable to the traveler who is “invited” to embark upon a path leading to the hazard, even in broad daylight, and even though the hazard itself may be outside the city limits. A city probably is not bound to correct the hazard outside the city limits, nor to erect a railing or barrier there. But it does have a duty not to permit the existence of conditions in the street which give the appearance of an invitation to the traveler to leave the city street if in so doing the traveler will be exposed to foreseeable injury.

2. Hazards Overhead

A municipality’s maintenance responsibility is not limited by the length and breadth of the public right of way. The third dimension must be considered as well. Sometimes a street or sidewalk may be found unsafe for travel because of some condition above the surface that renders travel hazardous. A city has been held liable for a defect in a storm sewer 14 feet below the street surface which

198. See Miller v. City of Duluth, 134 Minn. 418, 159 N.W. 960 (1916). See also O'Leary v. City of Mankato, 21 Minn. 65 (1874).
200. Mix v. City of Minneapolis, 219 Minn. 389, 18 N.W.2d 130 (1945).
201. Cf. Baker v. City of St. Paul, 198 Minn. 437, 270 N.W. 154 (1936), 202 Minn. 491, 279 N.W. 211 (1938), where the city was held liable for a defect in a storm sewer 14 feet below the street surface which
liable to a pedestrian injured when a wooden awning overhanging
the sidewalk rotted and fell. However, if the city does not own
the building or other structure on which the overhead defect
exists, and if the city had no reason to suspect that the over-
hanging wooden structure was rotten, it can avoid liability.

Earlier cases involving rotten wooden sidewalks had held that a
city must know that wood rots, and so must inspect for rotten
wood. However, this doctrine was held not to apply to a case
in which a wooden cornice of a building abutting upon the side-
walk rotted and fell off in an ordinary windstorm. Although
the court said that the city was bound to anticipate wood rotting
only in sidewalks, it may be that a city must anticipate rotting
wood in overhead defects if the city owns or controls the structure.

Rotting wood is not the only cause of objects falling and hitting
pedestrians. In Moore v. Townsend, a city was held liable
when a ladder leaning against a building abutting the sidewalk
was blown over, injuring a pedestrian. The ladder had been stand-
ing on the sidewalk for several days before the injury. In Nichols
v. City of St. Paul, a pedestrian was hit by a stump and dirt
that fell from an embankment beside the walkway. In this case
the embankment did not overhang the right of way, and the
stump fell because private persons had undermined the embank-
ment by removing dirt from its base. It was held, however, that
the city was liable for the injury.

In Neumann v. Interstate Power Co., the injury was not
caused by a falling object; rather, two persons were electrocuted
because an iron pipe with which they were working came in con-
tact with an uninsulated power line nineteen feet above the ground.
The power lines were strung on poles placed within the public
alley easement. The injured parties, however, were not in the
street or alley but were standing on private land at the time of
caused a hole to appear suddenly in the street surface during an excep-
tionally heavy rain.

203. See Heidemann v. City of Sleepy Eye, 195 Minn. 611, 264 N.W.
212 (1935).
204. See text accompanying note 96 supra.
205. Heidemann v. City of Sleepy Eye, 195 Minn. 611, 264 N.W. 212
(1935).
206. Hillstrom v. City of St. Paul, 134 Minn. 451, 159 N.W. 1076
(1916).
207. 76 Minn. 64, 78 N.W. 880 (1899).
208. 44 Minn. 494, 47 N.W. 168 (1890).
209. 179 Minn. 46, 228 N.W. 342 (1929).
the accident. The court rejected the contention of "no liability as a matter of law" and permitted the village to be found liable by the jury.

Drawing from these decisions it may be concluded that a city has some duty to inspect objects that overhang the street or sidewalk. If an overhanging object is erected by a city, there apparently needs to be no showing of actual notice concerning a defective condition to establish the duty to inspect. But if the object is part of a private building, the city's duty to inspect arises only when it knows or should know of some fact raising a suspicion of the defective condition. The duty to inspect apparently applies to conditions outside the public right of way if close enough to cause injury by falling upon a traveler on the right of way. And it also imposes upon the city the duty to guard persons outside the right of way from hazards existing within the right of way.

CONCLUSION

The cases tend to show that in some areas of the public right of way a city's effective duty is not the duty to exercise reasonable care to prevent unreasonably hazardous conditions from forming, as has been assumed by the courts. Rather, the duty is to prevent injurious accidents, whether this requires reasonable care or extraordinary care, and whether the conditions causing the injury were unreasonably hazardous or not. This means, of course, that the basis of a city's liability for injuries occurring in these areas is not negligence, as negligence is commonly understood, but something close to strict liability. Except for those conditions that form suddenly and exist only very briefly before an accident, a city can be found liable for any street or sidewalk condition that in fact causes injury. And the results in the reported cases show that in most instances, if the jury is permitted to find that the city is liable, it will do so. Since we are trying to ascertain the minimum scope of the municipal duty—what a city must do as a minimum if it is to avoid liability for nonfeasance—we can at least say that a city has not clearly performed its duty in any case where a jury would be permitted to find the city liable. And this includes nearly every case in which the condition causing the injury was in the street or sidewalk itself. In areas outside the travel-

211. See Bohen v. City of Waseca, 32 Minn. 176, 19 N.W. 730 (1884); Heidemann v. City of Sleepy Eye, 195 Minn. 611, 264 N.W. 212 (1935).
213. See cases cited note 20 supra.
ed street or sidewalk—the parking, the strip on the abutter's side or precipitous declivities on adjoining land—the standard of care is not so rigorous. Whether it is good policy to hold cities to such a high standard of care for street and sidewalk conditions is a question the legislature should decide.

This almost strict liability for street and sidewalk conditions can be relaxed by charter provisions specifying that some form of actual notice of the existence of a defective condition must be received by the city before any duty will arise with respect to that condition. However, it has been suggested that such provisions limit a city's duty too much. By denying application of the doctrine of constructive notice, such provisions practically prevent any possibility of liability for nonfeasance except in the probably rare situation in which a city would fail or refuse to repair the condition after actual notice. The legislature should consider whether such charter provisions are good as a matter of policy, and should also consider whether this is not a matter on which a state-wide policy should be adopted. Such provisions apparently are not contained in most Minnesota municipal charters at the present time, and so some cities are able to avoid liability for nonfeasance almost entirely while others are virtually insurers of the safety of their streets.

The New York legislature has recently studied this whole problem of municipal street and sidewalk liability. The result of the investigation was the adoption of a state-wide policy requiring that prior written notice of the existence of defective street and sidewalk conditions be given before villages could be held liable. This policy was enacted into law in 1957. The legislature of New York left the question of whether prior written notice requirements should be placed in the charters up to the individual cities, but it did enact a statute prescribing a state-wide procedure for recording the written notices actually received by the city officials in those cities that did adopt such notice requirements.

New York gave the question of municipal liability serious study. Minnesota should do likewise, as was suggested by Orville Peterson eighteen years ago. Perhaps the conclusion drawn from such

214. See cases cited notes 22 & 23 supra.
215. See cases cited note 24 supra.
217. N.Y. VILLAGE LAWS § 341(a).
218. N.Y.MUNIC. LAW § 50(g).
219. See Peterson, supra note 2, at 872-79. Most writers on this subject seem to agree that legislative reform of the entire area of municipal tort liability is necessary. See Borchard, State and Municipal Liability in Tort: Proposed Statutory Reform, 20 A.B.A.J. 747 (1934); David, Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit, 6 U.C.L.A.L. REV. 1 (1959); Fuller & Casner, Municipal Tort Lia-
a study would be that the almost strict liability now imposed for sidewalk defects is entirely proper. There may be good reasons, apart from any fault or lack thereof on a city's part, why cities rather than the injured individual should bear the burden of these predictable costs of urban travel. Perhaps the legislature would conclude that snow and ice defects, which were not covered in this Article, are significant enough to receive special or different treatment. But even if the decision of the legislature should be that the law should remain exactly as it stands today, much would be gained by having some clear-cut legislative statement of what that law is. Much of the present confusion could be eliminated from the law. Municipalities would be better able to allocate the expenditure of public funds, and much of the judicial effort that is currently expended in litigating street and sidewalk liability cases under the negligence principles presently followed by the courts could be saved.