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# Municipal Corporations--Absolute Liability for Disrepair of Streets

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ests of the child without ever defining what the best interests of the child are in relation to the fitness of the parent. *Stout v. Massie, supra; Conner v. Harris*, 100 W. Va. 313, 130 S.E. 281 (1925). This uncertainty makes it difficult for the parties to evaluate their positions, since each judge does not decide a case on fixed law. Such confusion raises the serious question of whether this denies equal protection as demanded by the federal constitution.

It is clear from the decision in the principal case that the Georgia court now considers the right of the parent as subordinate to the interests of the child, but they have failed, as has the West Virginia court, to define what the rights of the child are in connection with the "welfare test." In deciding the principal case the court disapproved a number of past decisions which included *Bond v. Norwood, supra*, and, although these cases were not overruled, the decision clearly implies that fitness of the contesting parties will be taken into consideration in all future custody litigations.

The fitness of the contesting parties provides an absolute rather than a relative standard. There are usually facts which can be proved or disapproved, but still there is room for arbitrary decision through discretionary power. This power of the trial judge is not to be arbitrarily applied, yet his decision will not be reversed unless he has plainly surpassed this authority. *Smith v. Smith*, 138 W. Va. 388, 76 S.E.2d 253 (1953). Even though West Virginia law may appear to be fairly well settled, there are still a great many different viewpoints in the child custody area, and the strong plea that each case be decided on fixed law may become a major issue in the future. At present, the fact that the judge must consider social as well as legal factors demands the very best from the lawyer in the trial court.

*Dennis Raymond Lewis*

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### Municipal Corporations—Absolute Liability for Disrepair of Streets

*P* instituted suit for personal injury and property damage against the City of Mannington based on a statute which placed liability on a municipality for disrepair of streets, sidewalks and alleys. Evidence indicated that *P* backed his car off a right of way owned by the city onto private property. The car was struck by a boulder that fell from a cliff approximately sixteen feet from the right of

way on the private property. *P* knew that rocks fell from this formation occasionally and was likewise aware of warning signs placed there for public benefit. Judgment was for *P* and *D* appealed. *Held*, reversed and new trial awarded. There is no actual absolute liability imposed on a municipality by W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961), and the trial court erred in not instructing the jury as to the issues of contributory negligence and assumption of the risk. *Jones v. City of Mannington*, 136 S.E.2d 882 (W. Va. 1964).

W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961) provides that an injured party may recover damages from any incorporated city required by its charter to keep its streets in repair when damages result from disrepair of its streets. This statute, if literally read, seems to place absolute liability upon West Virginia cities for damages which result from unfavorable conditions of the streets. The only problem that must be solved in order to recover damages appears to be the establishment of the disrepair. However, this literal interpretation has not been given effect in West Virginia case law. West Virginia cases have limited liability under section seventeen by holding that once the cause of action has been established within the meaning of the statute, the liability is absolute to the extent that negligence by the city need not be proved. Thus, although our court frequently uses the term "absolute liability" when referring to this code section, it is clear that the traditional meaning of the term is not intended and the true test is whether there is a cause of action within the meaning of the statute. *Morris v. City of Wheeling*, 140 W. Va. 78, 82 S.E.2d 536 (1954); *Burdick v. City of Huntington*, 133 W. Va. 724, 57 S.E.2d 885 (1950); *Taylor v. City of Huntington*, 126 W. Va. 732, 30 S.E.2d 14 (1944).

In deciding whether there is a cause of action within the meaning of the statute, the underlying approach to each case is the fundamental proposition that the municipality is not an insurer of every accident on its public ways because not every defect is actionable. *Morris v. City of Wheeling*, *supra*. Because not all defects are actionable a standard must exist for determining those that are. The West Virginia rule is set forth in *Burdick v. City of Huntington*, *supra*, requiring the city to keep its public ways "in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night." It is, of course, also necessary that the defect

be the proximate cause of the plaintiff's injuries. *Burcham v. City of Mullens*, 139 W. Va. 399, 83 S.E.2d 505 (1954).

Although section seventeen appears to impose absolute liability, case law imposes upon a plaintiff the burden of proving the street to be out of repair within the meaning of the statute and the burden of proving that the particular defect was the proximate cause of the plaintiff's injuries. The case law goes even further in weakening the absolute liability concept by making available to the city the defenses of contributory negligence and assumption of the risk. As the next two cases illustrate, the West Virginia Supreme Court of Appeals has permitted both of these defenses to be presented to the jury in further limitation on municipal liability. In the case of *Waddell v. City of Williamson*, 98 W. Va. 547, 127 S.E. 396 (1925), the court applied the test of contributory negligence to determine if the plaintiff, as administratrix, could recover under a statutory provision similar to section seventeen for the death of her husband, which resulted from an automobile accident on the streets of Williamson. The decedent was the fire chief of Williamson and while answering a call his car was thrown out of control when it went into a ditch along the street. The court held that the question of the decedent's contributory negligence was a jury question, taking into consideration that a fireman answering a call may take greater risks than a private citizen. In *Boylard v. City of Parkersburg*, 78 W. Va. 749, 90 S.E. 347 (1916), the plaintiff was injured when she fell on ice which had accumulated on the sidewalk. She recovered a judgment against the city under a statute similar to section seventeen. Upon an appeal by the defendant, the court reversed the trial court and awarded a new trial because of error in refusing to properly instruct the jury in two respects. One instruction would have established the law as to assumption of the risk by the plaintiff. Evidence showed that the plaintiff had lived in the immediate area for about four years; that she was familiar with the sidewalk in question; that she knew the sidewalks were generally slippery. In this case the court outlined quite thoroughly the case law as it had developed upon interpretation and application of this section of the code. Citing *Moore v. Huntington*, 31 W. Va. 842, 8 S.E. 512 (1888), the court said that a person who uses a public way when he should have known it to be dangerous takes the risk of resultant injuries. One who uses the more dangerous of two available ways, knowing of the condition of both, assumes the risk of any injury resulting if he takes the dangerous way.

In the principal case it was common knowledge that rocks occasionally fell from the cliff. Because of the apparent danger, warning signs had been erected and maintained since 1935. The plaintiff testified that he had knowledge of the fact that rocks fell intermittently and that he knew the situation was dangerous. From these facts it is possible that a jury might find that a person was himself negligent by driving an automobile into the area, or that a person knowingly entering into a dangerous situation has assumed the risk. It is for these reasons that the Supreme Court of Appeals of West Virginia held the trial court in error for refusing instructions as to these defenses.

Although W. VA. CODE ch. 17, art. 10, § 17 (Michie 1961) seemingly imposes absolute liability upon municipalities for disrepair of its public streets, our appellate court has held otherwise. The only way that the term "absolute liability" can properly be used when referring to the court's interpretation of section seventeen is when speaking of liability without negligence. Even when used in this sense the term is not literally correct because before liability will attach the city must fail to comply with the standard as set forth in the *Burdick* case. This suggests that the court might refrain from the use of the term completely. Nevertheless the decisions are sound. Few can doubt the inherently undesirable consequences which would result if the appellate court did not carefully govern the application of the statute. The cost of maintaining public streets would be extravagant if the statute were construed otherwise.

*Charles Ellsworth Heilmann*

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### **Property—Cancellation of Note at Payee's Death Not Testamentary Gift**

A note was given as part payment for the purchase of a restaurant. The note contained a condition which specified that if the payee, who was the maker's partner in operating the restaurant, predeceased the maker while the note was unpaid, the outstanding balance would be considered paid and cancelled. Suits by residuary legatees of the payee on the note were dismissed by the lower court. *Held*, dismissal affirmed. The court found that no liability existed on the note following the death of the maker. Since the