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Municipal Corporations--Liability for Maintenance of Streets and Sidewalks--Meaning of Statute A Jury Question

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unreasonable removal of the surface even under the terms of a grant as broad as the one interpreted in the instant case.

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MUNICIPAL CORPORATIONS—LIABILITY FOR MAINTENANCE OF STREETS AND SIDEWALKS—MEANING OF STATUTE A JURY QUESTION.—Action against defendant city to recover damages for personal injuries alleged to have been sustained by reason of a defect in a sidewalk which made the sidewalk "out of repair" within the meaning of W. VA. CODE c. 17, art. 10, §17 (Michie, 1949), which gives a right of action to "any person who sustains an injury to his person or property by reason of . . . any street or sidewalk or alley of any incorporated city, town or village, being out of repair." Defendant contends that the defect described, a difference in elevation between two concrete sidewalk sections of one and a quarter inches, did not render the sidewalk out of repair within the meaning of the statute, as a matter of law. *Held,* that whether the defect rendered the sidewalk out of repair in the sense of the statute was a question for the jury, since it is such that a jury may reasonably infer that it was not safe for travel with ordinary care, in the ordinary modes, by day or by night. *Smith v. Bluefield,* 55 S.E.2d 392 (W. Va. 1949). Affirmed. (3-2 decision).

Liability under the statute does not depend on negligence of the city in keeping the sidewalk in repair, but is absolute. *Chapman v. Milton,* 31 W. Va. 384, 7 S.E. 22 (1888). But the absoluteness referred to is not insurance liability for any slight defects. The street or sidewalk must first be found to be out of repair within the meaning of the statute. *Yeager v. Bluefield,* 40 W. Va. 484, 21 S.E. 752 (1895). The rule formerly was that where there is no conflict in the evidence as to the existence and extent of the obstruction, it is a question of law as to whether the obstruction was such as to render the street not in a reasonably safe condition within the meaning of the statute. *Taylor v. Huntington,* 126 W. Va. 732, 30 S.E.2d 14 (1944).

A raised place in a sidewalk one and a half inches high in the center was held not sufficient to render a city liable for injuries received by a pedestrian who fell thereon when the place was rendered slippery by snow and ice and children coasting thereon.

Holsberry v. Elkins, 86 W. Va. 487, 103 S.E. 271 (1920). A raised place of three to four inches between sidewalk sections was held to come within the statutory meaning in *Roth v. Moundsville,* 118 W. Va. 283, 190 S.E. 332 (1937). But in *Van Pelt v. Clarksburg,* 42 W. Va. 221, 24 S.E. 878 (1896), a "chuck hole" in the street, which was sixteen to eighteen inches deep and two and a half feet across, was held not to be such a defect as would make the city liable for injuries caused to a driver when he was thrown from his wagon after hitting the hole. The standards which brought the court to the results reached in *Roth v. Moundsville* and in *Van Pelt v. Clarksburg, supra,* were practical standards, taking into consideration climate, state of repair of similar streets and sidewalks throughout the state, and the degree of urbanization reached by the state at the period in question. But in any case perfection was not to be expected. As said by Brannon, J., in *Yeager v. Bluefield, supra,* "Before imposing this liability, we must first determine whether the street is out of repair in the sense of the statute. When is it so out of repair? Is it to be absolutely free from stones, mud, or inequalities, like the floor of your own home, or like the paths, walks and drives in the grounds of a royal palace or beautiful park? Where shall we find this perfection? Is it to furnish absolute immunity from accident and injury? What city or town in the country might not be bankrupted if this is to be the construction of the statute? There is no city, however well ordered, complying with this standard. None could do so with the means at its command, short of confiscatory taxation." In *Van Pelt v. Clarksburg, supra,* Brannon, J., repeated his warning against the effect of any other rule. "If this construction of the statute is not given, then our counties and towns must keep watchmen always on their streets and roads to discover every deterioration in them, from weather and wear, and instantly repair them at all seasons; in short, keep them in that high state of repair which would tax most of the counties and towns of the state beyond their capacity to bear. Such a construction would beget innumerable suits. Such a construction would make counties and towns insurers against all accidents befalling travelers."

By departing from the rule of *Yeager v. Bluefield,* and *Taylor v. Huntington, supra,* the court seems to be instituting a rule of insurance liability for injuries resulting from any defect, however slight, in sidewalks and streets. It is to be hoped that the predictions of Judge Brannon do not come true.

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