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MUNICIPAL TORT LIABILITY:

NOTICE OF DEFECT — THE SIDEWALK CASES

The exodus of our citizens to the urban areas since the turn of the century has caused numerous problems concerning municipal government and its concomitant management. Included among these is the increasing number of claims against our cities for defective sidewalks or for injuries sustained due to the failure to remove snow and ice therefrom. Thus it is the purpose of this article to briefly present the law as it now stands on this subject, emphasizing recent local legislative changes affecting the rights of citizens to recover on such claims.

THEORY OF RECOVERY

At common law the maxim *the King can do no wrong* was the foundation (albeit a weak foundation) upon which the state and, in turn, its legislative creature the municipal corporation was immunized from suit.¹ A distinction existed in this regard, however, between the municipal corporation, an organ of government, and its creator, the state. With respect to the latter, immunity was complete,² but the exemption for the former extended only to activities properly denominated governmental,³ and not to those of a proprietary nature. The rationale underlying the distinction is that the municipality acts as an agent of the state only in its governmental capacity and therefore only then is derivative immunity applicable.⁴ In some instances the principle in application has been quite difficult to discern.⁵

The distinction was of no concern to the New York courts in imposing municipal liability for failure to maintain thoroughfares in a reasonably safe condition. The basis for liability however is not clear. In *Pomfrey v. Saratoga Springs*,⁶ the plaintiff commenced an action for injuries sustained by falling on a snow-covered sidewalk. Judge Earl in finding for the plaintiff justified municipal liability on the grounds that municipal corporations have conferred upon them by legislative delegation extensive powers in the management of their sidewalks and thus have

1. Borchard, *Governmental Responsibility In Tort*, 36 YALE L.J. 1 (1926).

2. *Beers v. Arkansas*, 20 How. (U.S.) 527; 529 (1857):

It is an established principle of jurisprudence in all civilized nations that the sovereign can not be sued in its own courts, or in any other . . .

3. *Baily v. New York*, 3 Hill (N.Y.) 531, 38 Am. Dec. 669 (1842).

4. Lloyd, *Local Government Conference* (unpublished manuscript on file in the University of Buffalo Law Library, 1952). Professor Lloyd suggests that the governmental v. proprietary concept is mere legal fiction and that the *real* test is whether in a given situation the imposition of liability would create a serious financial burden on the municipal treasury. The author submits this is a more practical rationalization.

5. *Compare Haynes v. New York*, 259 App. Div. 837, 19 N.Y.S.2d 164 (2d Dep't 1940) with *Williams v. New York*, 57 N.Y.S.2d 39 (Sup. Ct. 1945).

6. 104 N.Y. 459, 11 N.E. 43 (1887).

adequate means to maintain them in a reasonably safe condition.⁷ The opinion cited the case of *Conrad v. Ithaca*,⁸ which stands for the proposition that the acceptance by the municipality of its charter creates an implied contract to perform the duties therein, breach of such duty giving rise to contractual liability. A more practical rationale was proposed in *Missano v. New York*, where the court favored the proprietary concept by stating, "It is clear upon principle and authority that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign."⁹ The circle was completed some thirty years later when the Supreme Court in *Cooper v. Buffalo*¹⁰ imposed liability on the City as an exception to the rule that *the King can do no wrong*.

Whatever the legal reason may be, liability did *exist* at common law against the municipality for injury resulting from a failure to maintain the streets and public ways *safe* for ordinary travel.¹¹ It follows then that when the State of New York waived¹² by legislative consent¹³ whatever immunity it possessed it did not in any way affect or broaden the already existing right to bring suit against a municipal corporation for negligence of this type. A fortiori, the celebrated *Bernardine* case,¹⁴ rendering municipal corporations liable for their negligence in matters of governmental functions did nothing to extend the otherwise existing liability for defective sidewalks and streets imposed by the common law.¹⁵ In *Majka v. Haskell*, the Court of Appeals succinctly stated that "even before the state's waiver of sovereign immunity by Section 8 of the Court of Claims Act had rendered the defendant city liable, as are individuals and private corporations, for wrongs proven to have been done by its officers or employees, '... the city owed to the public the corporate duty of maintaining the street in a condition reasonably safe for the ordinary uses of travel'"¹⁶

7. See, BUFFALO CITY CHARTER art. 10 §§178, 188 for similar powers.

8. 16 N.Y. 158 (1857).

9. 160 N.Y. 123, 129, 54 N.E. 744, 745 (1899).

10. 157 Misc. 702, 284 N.Y. Supp. 227, *rev'd on other grounds*, 252 App. Div. 835, 299 N.Y. Supp. 173 (4th Dep't 1937).

11. The New England commonwealths take a minority position denying liability on a government basis, unless imposed by statute. See *Belheimuer v. Bristol*, 121 Conn. 475, 185 Atl. 421 (1936).

12. N.Y. COURT OF CLAIMS ACT §8.

13. *Beers v. Arkansas*, *supra* note 2 at 529:

... the sovereign ... may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals.

14. *Bernardine v. New York*, 294 N.Y. 361, 62 N.E.2d 604 (1945).

15. It is to be noted that the *Bernardine* rule was not extended to non-feasance on the part of police and fire departments in the performance of their governmental duties. The theory being that these are not the kind of duties directed to the individual but rather duties imposed by the legislature for the protection of the community. *E.g.* *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945), failure to maintain water main for fire protection.

16. 301 N.Y. 206, 209, 93 N.E.2d 641, 643 (1950).

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The author feels that to fully appreciate the substantive limitations currently being imposed in this field it was necessary to delve into the historical derivation of municipal liability. Inasmuch as each case is *sui generis*¹⁷ and must therefore stand on its own peculiar facts,¹⁸ the remainder of this writing will be devoted to recent changes in the Buffalo City Charter requiring notice of defect as a condition precedent to an action against our municipal government.

NOTICE OF DEFECT

One should distinguish at the outset between notice of defect before an accrual of injuries and notice to the city of a claim for the injuries. The former type of notice bears upon the substantive determination of *negligence* while the latter is intended to afford a modicum of protection to the municipality in its defense of tort actions.¹⁹ Thus primary purpose is to minimize fraudulent and stale claims by providing as a condition precedent to the institution of an action that the municipality be given written notice of the claim within 90 days after the happening of the accident.²⁰ It would seem that a shorter period²¹ would enable the city to make a more prompt investigation and therefore accurately distinguish the false and fraudulent claims from the just ones. As it now stands the cities have been under a substantial disadvantage due to the filing of a notice of claim 8 to 12 weeks after the accident. In such cases it has been extremely difficult to gather the facts reasonably close to the time of the alleged injury. It is partly because of this extended time that local laws were enacted providing for actual notice of defect. Unfortunately as it will be seen, this had the dual effect of shielding city governments from both *fair* and fraudulent claims.

Notice, either actual or constructive of the dangerous condition of a thoroughfare is essential to liability of a municipality for injuries sustained. Moreover, coupled with the necessity of notice to the city as a predicate of liability, is the necessity that such city has had a reasonable time thereafter to remedy the defect.

17. In *Loughran v. New York*, 298 N.Y. 320, 83 N.E.2d 138 (1948), the so called *four inch* rule which required that a sidewalk cavity must be at least four inches in depth before a claim for injuries could be sustained as a matter of law was rejected. The Court declared that a municipality's liability depends on all circumstances of *each* case to determine if there has been a failure to maintain the thoroughfares in a reasonably safe condition.

18. For an excellent resume of New York case law, See Emerson, *Tort Liability of Municipalities for Defects in Streets and Sidewalks*, MUNIC. L. REV., 434, (1953); Duffy, *Some Aspects of Snow and Ice Law*, MUNIC. L. REV., 388 (1956).

19. N.Y. GEN. MUNIC. LAW §50(e).

20. An application may be made to extend the time, if by reason of physical or mental incapacity, the claimant is unable to serve the required notice within 90 days. However in *no* case may an application be considered if one year has elapsed between the accrual date and the date of application. *Matter of Moore v. New York*, 302 N.Y. 563, 96 N.E.2d 619 (1951).

21. Originally time to bring a suit under §50(e) was 60 days. N.Y. Sess. Laws 1945, c. 694. Effective September 1, 1950 this period was increased to 90 days. N.Y. Sess. Laws 1950, c. 481.

As to constructive notice, the defects or conditions must be so open and notorious as to be observed by all. Up to 1958 this concept of imputed notice was applicable to the City of Buffalo in all claims concerning injuries incurred by defective conditions on our thoroughfares. This was not true however for the injuries incurred on sidewalks due to snow and ice.²² For the latter type claim the city required actual written notice to the Commissioner of Public Works relating to the place of injury before any civil action could be maintained for damages therein. Again in such instances there also had to be a failure to correct within a reasonable time. It should be pointed out at this time that many of the smaller municipalities in the state were likewise insulated against snow and ice claims by virtue of a provision in the Second Class Cities Law requiring written notice.²³ Buffalo, however, due to its population was never included in this classification. Thus the City Home Rule Law was exercised to provide it with the same protection enjoyed by its smaller brothers.²⁴ The effects of such a requirement has eliminated claims of this nature. For if a citizen's injury fortuitously occurs in a specific area where actual written notice was submitted, still the municipality has the principal defense of lack of sufficient time to remove the dangerous condition caused by snow and ice.²⁵

Excepting the snow and ice claims the cities were still confronted with the spiny burden of numerous claims for injuries resulting from defective conditions of their sidewalks and streets. The problem was further aggravated by the *Loughran* decision.²⁶ This decision liberalized the requirement for the making of a *prima facie* case to the point where virtually any sidewalk defect or variation in sidewalk levels presents a question of fact as to liability within the province of the jury. This coupled with the unreasonable time limit for filing a notice of claim placed the injured party in a favorable position against the municipality. The results were evidenced by an increasing number of claims some of which were fraudulent in nature.

Confronted with the problem of meeting such judgments numerous smaller cities, seeing the satisfying effects of the snow and ice claims enacted local laws requiring similar conditions for defective sidewalks. By their exercise of home rule power they escaped to this extent tort liability otherwise imposed by general state law. However, as distinguished from the snow and ice claims there was a

22. BUFFALO CITY CHARTER art. 20 §364 (prior to amend).

23. N.Y. SECOND CLASS CITIES LAW §244.

24. N.Y. CITY HOME RULE LAW §11.

25. *Reasonable time* usually is a question of fact and will not make the plaintiff's complaint susceptible to a motion to dismiss. However, a complaint without an allegation of actual written notice is defective as a matter of law. *Ruggio v. Oswego*, 4 Misc.2d 29, 148 N.Y.S.2d 82 (Sup. Ct. 1955).

26. Note 16, *supra*.

serious question as to the constitutionality of such acts.²⁷ The answer was found in *Fullerton v. Schenectady*,²⁸ wherein there was a local law requiring written notice of a defective sidewalk to be given prior to an accident as a prerequisite to maintenance of an action against the defendant city. Foster, P. J., writing for a divided court (3-2), found no conflict. The decision confined itself to the Second Class City Laws and the Constitution and refused to acknowledge that local laws of this nature are attempts to eliminate the otherwise fundamental law of this State.²⁹ The Court of Appeals affirmed per curiam.³⁰ The case settled the question that a municipality may by its charter or local laws make prior written notice of a dangerous defect a condition precedent to a civil action for damages arising from personal injuries.

It would seem that the Court paid lip service to their previous decisions³¹ liberalizing municipal liability by having that same liability vitiated through a local law under the guise of a procedural requirement. This takes on an additional significance in light of the common law zealous protection of this right to recover. Recently the Second Department³² following the *Fullerton* rationale dealt another serious blow to the citizenry by declaring valid a local law shifting this same tort liability on to the abutting property owner. Heretofore such duty was primary and non-delegable.³³

27. N.Y. CONSR. art. IX, §12 (1938):

Every city shall also have the power to adopt and amend local laws not inconsistent with this constitution and laws of the state.

28. 285 App. Div. 545, 138 N.Y.S.2d 916 (3d Dep't 1955).

29. Justice Coon writing for the dissenters specifically pointed out what this local law would achieve:

By its terms it imposes a condition precedent to liability before there is any claim. This local law must be faced headon for what it patently is, a *change* in the fundamental law of the State . . . , an *absolute immunity* for certain torts, for which others, under a like situation, are liable. (Emphasis added.) 285 App. Div. 545, 549, 138 N.Y.S.2d 916, 921 (3d Dep't 1955).

30. 309 N.Y. 701, 128 N.E.2d 413 (1955); *rearg. denied*, 309 N.Y. 855, 130 N.E.2d 909 (1955); *appeal dismissed* 350 U.S. 930 (1956).

31. Note 16, *supra*.

32. The City of Long Beach by a local law imposed tort liability on abutting property owners for personal injuries sustained due to defective sidewalks under their home rule power. *Held*: such act was not repugnant to the state constitution, statutes or public policy. *Karom v. Aitarac*, 3 A.D.2d 925, 162 N.Y.S.2d 968 (2d Dep't 1957). Motion for leave to appeal denied. 4 A.D.2d 745, 165 N.Y.S.2d 699 (2d Dep't 1957).

33. As long ago as 1890 the Court of Appeals recognized that this duty was primary and non-delegable based essentially on public policy reasons. In *Rochester v. Campbell*, 123 N.Y. 405, 25 N.E. 937 (1890) the court was confronted with a local law the purpose of which was to impose tort liability on the abutting land owner. There it was said:

Any other conclusion than that reached by us would, we think, be most unfortunate, as it would *tend to relax the vigilance* of municipal corporations in the performance of their duties in respect to the repairs of streets and highways, and impose that duty upon those who might be utterly

(Footnote continued on following page.)

It was not long before municipal corporations took advantage of such protection. This year the City of Buffalo amended its own charter with a requirement similar to that in the *Fullerton* case.³⁴ There it was restricted to a defective sidewalk and a lapse of 24 hours after notice. However, the encompassing area of our local law is much broader. One wonders if a city can validly *immunize* itself from tort liability due to a defective traffic signal. It would seem this is distinguishable from a walk out-of-repair or a cavity-filled street.

PRESENT PROCEDURE UNDER THE AMENDED CHARTER

In order to recover for injuries sustained because of the defective condition of a street or sidewalk the Buffalo City Charter now requires that the following facts be shown:

1) There must be *actual* written notice stating at least the location and nature of the defect filed with the city clerk and a failure or neglect within a reasonable time thereafter to remedy or correct the alleged condition prior to the accident. (Article 20, section 364.) The city clerk in accordance with section 50(g) of the General Municipal Law must publicly record such notices for 5 years. The exceptions when actual notice is not necessary are:

- a) where the defect is created by misfeasance of the city's employees³⁵ or,
- b) where the defect is in the nature of nuisance.

(Footnote continued from preceding page.)
unable to discharge it. It would *tend directly to demoralize the public service and lead to disorder, decay, and impassability of public highways.* (Emphasis added.) 123 N.Y. 405, 420, 25 N.E. 937, 941 (1890).

The Second Department in the *Karom v. Altarac* case, note 32, *supra* distinguished the *Rochester* decision on the grounds that the statute in question there did not by its terms impose statutory liability on the abutting land owner. Thus the policy reasons implicit in the case were not considered as the *real* basis for the decision. Unfortunately the motion for leave to appeal to the Court of Appeals was denied.

34. BUFFALO CITY CHARTER art. 20 §364 as amended:

... No civil action shall be maintained against the city for damage or injuries to person or property sustained in consequence of any street, part or portion of any street including the curb thereof and any encumbrances thereon or attachments thereto, tree, bridge, viaduct, underpass, culvert, parkway or park approach, sidewalk or crosswalk, pedestrian walk or path, or traffic control sign or signal, being defective, out of repair, unsafe, dangerous or obstructed, or in consequence of the existence or accumulation of snow or ice upon any street, bridge, viaduct, underpass, culvert, parkway or park approach, sidewalk or crosswalk, pedestrian walk or path, unless previous to the occurrence resulting in such damage or injuries written notice of such alleged condition relating to the particular place and location was actually given to the city clerk and there was a failure or neglect within a reasonable time thereafter to remedy or correct the alleged condition complained of.

35. *Sperti v. Niagara Falls*, 281 N.Y. 708, 23 N.E.2d 540 (1939). *Cinders* (Footnote continued on following page.)

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2) Notice of claim must be filed with the City Clerk within 90 days of the accrual of the injuries, stating the injury and cause thereof, in compliance with section 50(e) General Municipal Law. (Article 20, section 361.)

3) No action or proceeding may be started until after 40 days expire from the serving of such claim as required by law. (Article 20, section 365.)

4) All actions to recover damages for personal or property injuries caused by negligence must be commenced within one year after the cause of action accrues. (Article 20, section 365.)

Coupling the above four requirements with the usual substantive conditions, one can readily see formidable opposition to obtaining a favorable judgment be it legitimate or otherwise, against the city under the present amended sections.

CONCLUSION

Tort liability is a necessity for good governmental operation at all levels and departments. It is a *deterrent* as strong as the ballot box silently restricting municipal government from committing acts of which it may be held responsible.

It may be necessary to modify and limit municipal liability and certainly the pendulum is swinging in that direction. This has become a more pressing problem since the *Bernardine* and *Loughran* decisions. The writer is well aware of the fact that in many instances acts of negligence are imputed to cities upon such constructive notice and such involved duties of care that it is almost impossible for the city to avoid the taint of blame. But local laws of this nature are not the answer to the fear of municipal bankruptcy generated by those cases.

We should approach the whole problem fairly, keeping in mind the financial ability of the public treasury to meet the claims as against the right of an injured citizen to be fairly compensated for his just damages suffered. Legislative solutions carefully drafted to protect both conflicting interests should be prepared. However, legislation expressly aimed at suffocating the good with the bad is oppressive and not part of our concept of fairness.

The writer is of the opinion that perhaps it might be advisable to establish a court of claims analogous to the present State Court of Claims wherein suits against municipalities would be initiated, rather than the present method of the

(Footnote continued from preceding page.)

deposited by city on unpaved street carried into the gutter causing water to overflow onto the walk creating the dangerous condition. *Held:* if the jury found this to be an affirmative act by the defendant city, no written notice as per the charter was necessary.

Supreme Court taking jurisdiction. This would eliminate the risk of juries running wild and at the same time determine fairly the merits of a citizen's claim. As it now stands liability of the city for all practical purposes is *dead*, and the individual claimant is being denied a common law right to bring successful suit against a municipal corporation for its tortious neglect to maintain the streets and sidewalks in a reasonable safe condition for travel.

Anthony J. Colucci, Jr.

VALUATION OF PUBLIC UTILITY PROPERTY FOR TAX PURPOSES:
THE NEW YORK SPECIAL FRANCHISE TAX

*"What is a cynic? A man who knows the price of everything
and the value of nothing."*

—Oscar Wilde.

Whether the jaundiced outlook of a habitual cynic is the cause producing the regrettable imbalance noted above, or whether a prolonged struggle to discover a rational relationship between the opposed concepts might be the cause of cynicism, the fact remains that when the ineluctable exigencies of taxation require the expression of *value* in dollars and cents, which are properly the terms of *price*, problems are generated the subtlety of which may well threaten the most equable temperament.

Public utilities share with all other commercial and industrial enterprises many general problems of this character, and such problems, since they are not peculiar to public utilities, are beyond the scope of this paper.

The public utility encounters its own special brand of problem in two areas affected by property valuation: real property taxation and rate-making. This paper will concern itself mainly with the first of these areas, although some adversions to the other will be necessary with respect to the question of the evidentiary merit, in proceedings arising out of contested assessments, of valuations made by the Public Service Commission for rate-making purposes.

One of the distinguishing features of a public utility producing valuation problems peculiar to an enterprise of this kind is its statutory right to use public streets and lands in ways which, without such authority, would constitute trespass. Gas, electric, and water companies are good examples, since they clearly must run pipes and wires through streets and highways in order to serve their