Liability of a Municipal Corporation for Defective Streets and Sidewalks

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Court should uphold the doctrine expressed in *State v. Aus.*, and *State v. Keerl* and limit the doctrine of double jeopardy so as to forbid a trial only in a new and independent case after the defendant or the State has exhausted its rights to further proceedings in the original case.\(^8\)

O. Louise Replogle.

\(^8\)Although stating in the commentaries thereto that, at present, the State can appeal from a general acquittal only in Connecticut, it is of interest to note that the American Law Institute has proposed that the State should have a right to a new trial after general acquittal where "... in the course of the trial a material error has been made to the prejudice of the State." AMERICAN LAW INSTITUTE, ADMINISTRATION OF THE CRIMINAL LAW: DOUBLE JEOPARDY, Proposed Final Draft (1935) Sec. 13, comments, page 111 ff. It also recognizes that a new trial is only a continuation of the original proceedings in all cases. Ibid, Sec. 14, comments page 116 ff.

Though R. C. M. 1935, §12108 does not expressly provide for such new trial for the State, and although R. C. M. 1935, §11612 provides that no person can be tried a second time after he is once acquitted, the doctrine of the *Keerl* and the *Aus* cases, that a new trial is only a continuation of the original prosecution will support the granting of a new trial to the State following a general acquittal. Cf.: *State v. Peck* (1928) 83 Mont. 327, 271 P. 707.

**LIABILITY OF A MUNICIPAL CORPORATION FOR DEFECTIVE STREETS AND SIDEWALKS**

From the beginning, apart from statute, thirty-four (34) states have held municipal corporations liable to private action for injuries resulting from defects or obstructions in streets or sidewalks based upon the common law right of recovery against a city for actionable negligence.\(^1\) The contrary rule prevails in the New England States and a few others. But statutes now impose liability in most of the latter class of states.\(^2\)

Montana decisions have consistently recognized the doctrine of municipal liability for damages to persons or property by reason of any negligently maintained defects or obstructions in streets and sidewalks. In one of the earliest cases, *Snook v. City*

\(^1\)MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1945) §2901 p. 8.

\(^2\)MCQUILLAN CORPORATIONS (2d ed. 1945) §2901 p. 12.

Generally concerning a public way, the judicial decisions have established and imposed obligations upon municipal corporations for the following reasons: (1) Streets must be constructed in a reasonably safe manner, and to this end ordinary care must be exercised. (2) They must at all times be kept in proper repair or in a reasonably safe condition by the exercise of ordinary diligence and continuous supervision. (3) Reasonably safe condition or proper repair implies that bridges, dangerous embankments, walls and declivities near the way must be safeguarded by adequate railings, barriers or appropriate signals.
of Anaconda the plaintiff was injured when he was precipitated into a dry stream at night after a bridge had been washed out. The court in holding the city liable said:

"The power to repair coupled with the exclusive control of the streets, made it the ministerial duty of the city to exercise ordinary care to the end that the streets might be reasonably safe for travel. The duty thus imposed is not legislative or judicial in character, but ministerial."

The city's duty to maintain sidewalks in a reasonably safe condition is not affected by a city ordinance requiring an abutting owner to keep sidewalks in repair. Thus, in Headley v. Hammond Building, Inc., the court said:

"The ordinance merely makes the abutting owner joint agent with city officials for the performance of the city's duties and does not affect the primary duty of the city to keep its streets, including the sidewalks in a reasonably safe condition for travel."

In the majority of jurisdictions a distinction is drawn between the liability of municipal corporations and that of quasi-municipal corporations. The latter, such as counties, towns and the like, are held not liable at common law for injuries resulting from defective highways even in those states which hold that there is common law liability imposed on municipal corporations proper. But even as to such quasi-corporations, liability in most jurisdictions, including Montana, is imposed by statute on counties and towns. In Johnson v. City of Billings, a county and a city were engaged in a joint enterprise of constructing a waste ditch benefiting both; the court held both liable, saying that:

"Under the statutes of Montana with respect to the care of highways and liability for injury thereon, counties and cities stand in the same relation to the traveling public in so far, at least, as injury results from some act of an agent of either while engaged in by either in its proprietary, as distinguished from its governmental capacity."

Superscript:
1(1901) 26 Mont. 128, 66 P. 756.
2(1934) 97 Mont. 243, 33 P. 2d 574.
3McQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1945) §2900 p. 7.
4The legislature has specifically granted to counties the power to "sue and be sued" (R. C. M. 1921, §4444) and has provided that a suit against a county must be brought in that county (R. C. M. 1935, §9095.10). This section is held to permit suits generally against a county and a county is responsible for inspecting and keeping roads in repair. (R. C. M. 1935, §§1627 and 1632).
5(1836) 101 Mont. 463, 54 P. (2d) 579.
However, this doctrine was not extended to hold the State Highway Commission liable for the death of a passenger in an automobile accident allegedly caused by the defective, rough and slippery condition of the state highway.\footnote{Coldwater v. State Highway Commission (1945) \ldots Mont... 162 P. (2d) 772.} While a city must keep its sidewalks in a reasonably safe condition for public travel, minor defects or obstructions are generally not actionable. Thus in \textit{Sullivan v. City of Butte}\footnote{\textit{Sullivan v. City of Butte}} the plaintiff, while traveling on a cement sidewalk constructed on a $6\frac{1}{2}$ percent grade, free from ice and snow, slipped on the iron rim or collar of a coal-hole extending about a quarter of an inch above the level of the walk. The majority of the court held as a matter of law that the defect was not such as would have caused reasonable men to conclude that an accident was likely to occur as a result of the defect.

As a general rule, actual or constructive notice to a municipality of the particular defect is essential, unless the public way has been rendered unsafe by the direct act, order or authority of the city or town.\footnote{\textit{Sweeney v. City of Butte.}} Montana has, at an early date, recognized this distinction between cases which require notice and those where notice is unnecessary. The point was covered in the case of \textit{Sweeney v. City of Butte}.\footnote{\textit{Sweeney v. City of Butte.}} Defendant city had issued a permit for construction of a cellar under the sidewalk, covered by double trap doors. The doors were made to open and lie back flat on the sidewalk. The night of the accident the doors were lying on the walk. The city authorities knew of the manner in which they were ordinarily used, but did not know that they were open at the particular time of the accident. The court in holding for the plaintiff, declared:

\begin{quote}
"If the dangerous thing exists for such use, the city must presume that it will be so used. These trap doors and this opening, in this case, were for a given use, and the city certainly cannot avoid liability by demanding that it be notified every time the dangerous thing is put to the use\footnote{\textit{Hagen: Liability of a Municipal Corporation for Defective Streets and Sidewalks}. Published by The Scholarly Forum @ Montana Law, 1946}.
\end{quote}
intended and contemplated by its existence and construc-

The first reported case to adopt the constructive notice
technique in Montana, was the case of Leonard v. City of Butte." In that case there were four blocks in a cement sidewalk which differed from the others and were so slippery that one hundred (100) people had fallen there within a year, and twenty-five (25) within two months—one of them being seriously hurt, another being helped up by a policeman. The place had grown so notorious that it caused amusement among the passers when persons fell there.

The court on the question of notice declared:

"Evidence showing that a policeman observed an acci-
dent on one occasion, and lent his assistance to aid a woman who had fallen, tends to show actual notice to the city. But even without this evidence since the defect existed for such a length of time and under such circumstances that the city or its officers, in the exercise of proper care and diligence ought to have obtained knowledge of the defect, notice there-
of will be presumed."

A reasonable time to make repairs or remove obstructions, after the municipality has, or should have, knowledge of the defect or obstruction, must elapse before it can be held liable for injuries resulting from such defects or obstructions. The Montana court in McEnaney v. City of Butte" stated, "an icy obstruction must have existed for a sufficient length of time to give the city constructive notice, or that the city had actual notice of the obstruction for a sufficient length of time to have enabled it to remove the same."

Shortly after the Leonard case, the legislature enacted Code Section 5080" commonly known as the "notice" statute. The courts under the above section did not hesitate to adopt the rule in the Leonard case in regard to constructive notice, despite the code provision. In Pullen v. City of Butte," the plaintiff sustained injuries on a sidewalk where a difference of from four (4) to six (6) inches in the height of the abutting sidewalks existed. Over the objection of the defendant, the plaintiff was permitted to show that other persons had stumbled at the point where she was alleged to have received injuries. The court in overruling these objections stated, "The testimony is admis-

"(1901) 25 Mont. 410, 65 P. 140.
"(1911) 43 Mont. 526, 117 P. 893.
"R. C. M. 1935, §5080.
"(1911) 45 Mont. 46, 121 P. 878.
sible . . . not only for the purpose of showing the dangerous character of the place, but as bearing upon the question of constructive notice to the city."

Conceding that Montana had adopted both the actual and the constructive notice theories, yet the legislature in 1937, seemingly unsatisfied with past legislation and decisions, amended Section 5080 and expressly provided for actual notice." The amendment reads as follows:

"Before any city or town in this State shall be liable for damages to person and/or property for, or on account of, any injury or loss alleged to have been received or suffered by reason of any defect or obstructions in any bridge, street, road, sidewalk, culvert, park, public ground, ferry-boat, or public works of any kind in said city or town, it must first be shown that said city or town had actual notice of such defect or obstruction and reasonable opportunity to repair such defect or remove such obstruction before such injury or damage was received; the city clerk must make a permanent record of all such reported defects and shall report to the city street commissioner immediately upon notice of such defect or obstruction; and the person alleged to have suffered such injury or damage, or someone in his behalf, shall give to the city or town council, commission, manager, or other governing body of such city or town, within sixty days after such injury is alleged to have been received or suffered, written notice thereof, which notice shall state the time when and the place where such injury alleged to have occurred. Provided, however, that this section shall not exempt cities and towns from liability for negligence because of failure to properly place signs, markers or signals to warn persons of excavations or other obstructions existing and caused by said city or town, upon any bridge, street, alley, road, sidewalk, pavement, culvert, park, public ground, ferry-boat or public works of any kind."

The first case to be reported under the amended section was *Maring v. City of Billings.* The plaintiff brought an action against the City of Billings to recover for personal injuries sustained in a fall into an excavation. The excavation was directly in front of a lot on which a new house was under construction and the excavation had been made in laying a water pipe in order to make a connection with the city water

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Hagen: Liability of a Municipal Corporation for Defective Streets and Sidewalks

66 MONTANA LAW REVIEW

Ch. 122, LAWS OF MONTANA (1937).

(1943) 115 Mont. 249, 142 P. (2d) 361.
main. The court held in effect that the city had not received actual notice even though a building permit was issued.

Chief Justice Johnson (Specially Concurring) pointed out that "the amendment to section 5080 completely covers the field in question and constitutes an enactment that unless actual notice, not constructive or substituted notice, is had, the city shall not be liable.'" The decision in *Maring v. City of Billings* was affirmed in the recent case of *Lazich v. City of Butte*. In that case a boy was injured by a fall over some building material placed on the sidewalk by a person who held a building permit from the city. The court in denying relief stated: "The granting of the building permit by the city did not give the city notice of the obstruction required by statute.'"

It is generally held that if the defective condition is due to the act of the city itself or to negligence in connection with acts of others such as contractors or employees, no notice of any kind, either actual or constructive is necessary." In other words, where an agent of the city creates the defect by an authorized act, the law imputes notice to the city. The Montana court followed the general rule in *Barry v. City of Butte*. In that case the plaintiff brought an action for injuries sustained when the ground gave way beneath her as the result of the city's negligence in construction of a catch basin. The court held:

"The rule is that if as here the defective condition is due to the act of the municipality itself or to its negligence, no notice of such condition is necessary, even where actual notice is expressly required by statute. It is only when the defect or danger arises from other means than the act of the city that the city is excused until notice is received.'"

The amendment to section 5080 expressly provides that cities and towns shall not be exempt from liability for negligence because of failure to properly place signs, markers or signals to warn persons of excavations or other obstructions exist-

"(1945) 67 Mont. 224, 142 P. (2d) 571.

"Mr. Justice Adair (dissenting) stated: "Actual notice of the defect is not required where as here alleged the city had issued a permit or otherwise authorized another to tear up a public street for its private use.'" 


"(1945) 115 Mont. 224, 142 P. (2d) 571.

"Justice Adair ably points out that when the dangerous condition is caused by agents of the city in the prosecution of their employment, the rule of liability is not based upon notice and failure to repair, but upon the creation of a dangerous condition by the city."
ing and caused by the city. The Montana court has held that if such conditions prevail, neither actual notice of defects nor written notice of resulting injury need be given to the city. In *Maynard v. City of Helena* a minor was killed when he rode a bicycle over an embankment on a sharp curve in one of the streets of Helena. The court held that the city was negligent in its failure to erect a barrier at the point in question and in failure to warn the deceased of the dangerous condition of the corner. Under such conditions notice to the city was not necessary.

In conclusion it may be stated that from 1901 to 1925 Montana decisions held municipal corporations liable for negligently maintained defects and obstructions in streets or sidewalks, providing the city had either actual or constructive notice. If constructive notice was imputed to the city, a reasonable length of time after such constructive notice must be given the city to enable the city to correct the defect or remove the obstruction. In 1925 the legislature passed a statute which necessitated giving notice of defects to the city within sixty (60) days after the alleged injury as a condition precedent to recovery. However this notice was not necessary if the defective condition was due to the fault of the municipality itself. In the same year, the legislature abolished the liability of cities and towns for accumulations of ice and snow on sidewalks and in streets. From 1937 to the present date the Montana decisions have held municipalities are not liable for any damage to persons or property for defects or any property or structure under control of the municipality unless it first be shown that the municipality had actual notice of the defect causing the injury. However, no notice is necessary if the defective condition was due to the act of the municipality itself or to its negligence, or if the city or town was negligent because of failure properly to place signs, markers, or signals to warn persons of excavations or obstructions.

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*(1945) Mont..... 160 P. (2d) 484.*