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Liability of City of Town Councilmen for Defects in Streets

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pensable. The suggestions made above for eliciting that testimony from the child fit into this trend, and they should be acceptable to trial courts once it is demonstrated that the essential reliability of the evidence is not damaged by such methods. Since the factors of necessity and trustworthiness are the basis of the presently recognized exceptions to the hearsay rule it is even within the realm of possibility that at some time in the future a special exception to the hearsay rule may arise to be applied only in cases in which the testimony of a child is sought to be introduced through another person. Even if this should not happen it is at least probable that many states will follow the lead of some of our more modern minded jurisdictions and make it much easier to qualify the child as a witness.

RICHARD V. THOMAS

LIABILITY OF CITY OR TOWN COUNCILMEN FOR DEFECTS IN STREETS

A recent case in the United States District Court for the District of Idaho has brought to the foreground a problem which has apparently lain dormant for many years: the liability of a city or town councilmen for defects in streets.

*Lemmon v. Clayton*¹ was an action in tort against the mayor and councilmen of a second class city in Idaho for injuries sustained when the automobile in which the plaintiff was riding ran through an unmarked deadend street into a drainage ditch. On a motion to dismiss, the court held that the mayor had no duty to keep the streets in a reasonably safe condition for the traveling public and could not be held personally liable, and dismissed as to him. But the court said the complaint stated a claim upon which relief could be granted as against the councilmen individually. The decision was based upon dicta from a 1926 Idaho Supreme Court decision² and an Idaho statute,³ similar to that of other states,⁴ which granted the city councilmen or board of trustees, within their respective jurisdictions, power to construct, maintain, repair and improve streets and highways. The court construed the statute as being mandatory in nature and imposing duties upon the councilmen, the negligent performance or non-performance of which created individual liability.

The personal liability of various public officers is not of recent origin and there are almost unlimited cases holding them so liable.⁵ Generally,

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1. *Lemmon v. Clayton*, 128 F. Supp. 771 (D. Idaho 1955).
 2. *Strickfaden v. Greencreek Highway District*, 42 Idaho 738, 248 Pac. 456, 49 A.L.R. 1057 (1926).
 3. Idaho Code 1947, § 40-1665, 40-1611; See also §§ 50-1141, 52-101, 18-5901.
 4. Nebraska (Neb. R. S. 1943, § 17-567); Colorado (Colo. Rev. Stat. 1953, §§ 139-15-6, 139-32-1 (2)); Montana (Rev. Code of Mont. 1947, §§ 11-906 to 11-910); Wyoming (Wyo. Comp. Stat. 1945, §§ 29-231, 29-430).
 5. *Robinson v. Chamberlain*, 34 N.Y. 389 (1866); *Cottongim v. Stewart*, 283 Ky. 615, 142 S.W.2d 171 (1940); *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938); See also 40 A.L.R. 1358 for collection of cases regarding other officers.

municipal officers are personally liable to one injured by their malfeasance or nonfeasance in office in respect to a ministerial duty, and this is true even in the absence of special statutes. However, they can be held liable for nonfeasance only on proof of an omission on their part to perform a duty devolved on them by law and which they have ability to perform, both in the means furnished them and in legal authority.⁶ Where duties are imposed upon an officer by law, and the omission to perform them is productive of injury to an individual, such officer is liable.⁷ The law gives redress to the person so injured by an action for damages.

The situation with respect to public officers in general appears analogous to the type of duties imposed upon city councilmen; that is, even though councilmen may at times exercise discretion, as to the repair and improvement of streets their duties are ministerial. The fact that a necessity may exist for the ascertainment by the councilmen of those facts which give rise to the duty does not operate to convert the act into one judicial in its nature.⁸ It has been held that knowledge of the defect and failure to act constitutes wilful neglect for which the city councilmen, the street commissioner and the mayor may be held individually liable;⁹ and that where a statute confers powers upon a public board or corporation to be exercised for the public good, the words power and authority may be construed to mean duty and obligation.¹⁰ In a case before the Supreme Court of Oregon, a charter provision exempting the city council from liability for damages to a private person resulting from a defective street, alley or highway was held unconstitutional.¹¹ The court recognized the right of a city to exempt itself or the state to exempt its cities, but maintained that if that were done, its officers were individually liable. In another case, a township highway officer was held individually liable for the negligence of a private contractor in leaving an open hole in the highway.¹² There, the contractor failed to put up barriers or warning signs when he removed a culvert from the highway. In an early case, arising in a federal court,¹³ it was said that where the council has notice, either

6. C.J.S., *Mun. Corps.* § 545 b(1).

7. *Prather v. City of Lexington*, 13 B. Mon. Ky. 559, 56 Am. Dec. 585 (1852); *Ottman v. Incorporated Village of Rockville Centre*, 275 N.Y. 270, 9 N.E.2d 862 (1937); *First National Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204, 87 A.L.R. 267 (1933).

8. *First National Bank of Key West v. Filer*, 107 Fla. 526, 145 So. 204, 87 A.L.R. 267 (1933).

9. *Bennet v. Whitney*, 94 N.Y. 302 (1884); *Balls v. Woodward*, 51 Fed. 646 (Oregon 1892).

10. *Consolidated Apartment House Company v. Mayor*, 131 Md. 523, 102 Atl. 920, L.R.A. 1918c, 1181 (1917); *Doeg v. Cook*, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171 (1899), where the plaintiff was injured as a result of falling into an open culvert. The court, in allowing plaintiff to recover, held that the duty imposed upon the trustees was derived from the charter provision giving them the power to open, light and keep in good repair the streets of the municipality, and said "where the duty is plain and certain, if it be negligently performed, or not performed at all, the officer is liable at the suit of a private individual especially injured thereby."

11. *Mattson v. City of Astoria*, 39 Ore. 577, 65 Pac. 1066 (1901).

12. *Tholkes v. Decock*, 125 Minn. 507, 147 N.W. 648 (1914).

13. *Balls v. Woodward*, 51 Fed. 646 (D. Ore. 1892).

actual or constructive (constructive notice of a defective street exists when the defect is notorious and open to common observation), of the defective condition of a street or sidewalk and omits to provide for its repair, such omission amounts to wilful neglect and the members are personally responsible to any one who is injured thereby. Thus it appears that non-feasance in regard to the repair and maintenance of streets may lead to liability on the part of city or town councilmen, when there is notice of the defective condition, the means to correct the defect, and the responsibility of correcting the defect.

There are no Wyoming cases directly in point. Although *Opitz v. Town of Newcastle*¹⁴ holds that cities themselves are liable, it is nevertheless possible that city or town councilmen could also be held personally liable for defects in streets. Wyoming statutory provisions impose upon them the responsibility of the care, supervision and control of streets within the city, and further impose the duty and responsibility of keeping the streets open and in repair and free from nuisances,¹⁵ and of preventing and removing all encroachments into and upon all streets.¹⁶ As has been stated, these statutes are similar to and for all intents and purposes, the same as those involved where city councilmen have been held individually liable. Therefore, where a street of a city is in a dangerous condition and no warning is given and the city councilmen could have ordered its repair but fail to do so, they may be charged with actual or constructive notice and may be held individually liable for damages which result therefrom without the fault of the person incurring the injuries.

It has been argued that the need of attracting capable men, able to make decisions without fear of personal liability and without being hampered by the necessity of defending lawsuits, outweighs the public interest in protecting the individual against wrongful official action or inaction, so that officers should not be liable in these situations. On the other hand, some thought and consideration should be given to the one who is injured through no fault of his own but rather through the negligence of another. Public service should not be a shield to protect a public servant from the results of his personal misconduct.¹⁷ It should be borne in mind that the councilman is burdened with possible liability only where he has actual or constructive notice of the defect and where he has the means and ability to act in regard to that defect.

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14. *Opitz v. Town of Newcastle*, 35 Wyo. 358, 249 Pac. 799 (1926).

15. Wyo. Comp. Stat. 1945, § 29-231.

16. Wyo. Comp. Stat. 1945, § 29-430.

17. *Ottman v. Incorporated Village of Rockville Centre*, 275 N.Y. 270, 9 N.E.2d 862 (1937).