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Torts - Municipal Corporations - Notice of Defects in Sidewalks Created by Municipal Employees

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nearly a century and the continued existence of the tavern business in those states having such statutes. This risk can be calculated in advance, insured against, and distributed among the consuming public, through prices, as a cost of the business. Tavern keepers, who operate their business by way of privilege rather than right, can always avoid liability by observing their statutory obligations.

Wellborn Jack, Jr.

TORTS — MUNICIPAL CORPORATIONS — NOTICE OF DEFECTS IN SIDEWALKS CREATED BY MUNICIPAL EMPLOYEES

Plaintiff sued the City of New Orleans to recover for injuries sustained when she stepped on a defective water meter cover located on a portion of the sidewalk. The cover had been broken approximately twenty-two days earlier by employees of the city's park commission engaged in trimming a tree, and this defect had been pointed out to the employees doing the work. The trial court allowed recovery on the ground that the city had failed to repair a dangerous condition in the sidewalk within a reasonable time after gaining knowledge of the condition. On appeal to the Louisiana court of appeal, *held*, affirmed. Notice of the defect to the agency creating it is sufficient to impose upon the city the duty of repairing the defect within a reasonable time. *Haindel v. Sewerage & Water Board*, 115 So.2d 871 (La. App. 1959).[1]

As a general rule, municipal corporations are considered immune from tort liability in performance of governmental functions, but are not immune when performing proprietary functions.[2] Municipalities have generally been held liable on several theories for failure to use reasonable care in maintaining streets

1. Dismissal of the suit as against the sewerage and water board was not appealed by the plaintiff; so the court of appeal was concerned only with the appeal by the city.

2. Barber Laboratories v. New Orleans, 227 La. 104, 78 So.2d 525 (1955); Howard v. New Orleans, 159 La. 443, 105 So. 443 (1925); McSheridan v. Talladega, 243 Ala. 162, 8 So.2d 831 (1942); Peavey v. Miami, 146 Fla. 629, 1 So.2d 614 (1941); Gullikson v. McDonald, 62 Minn. 278, 64 N.W. 812 (1895). See 63 C.J.S., *Municipal Corporations* § 746 (1950); Notes, 18 LOUISIANA LAW REVIEW 756 (1958), 16 LOUISIANA LAW REVIEW 812 (1956); Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 721-31 (1941).

The distinction between governmental, as compared with proprietary, functions is not entirely clear. Generally a governmental function is one traditionally performed by the state for the health, safety, and welfare of citizens, and not for profit; such as fire and police protection, free garbage service, and maintenance of public parks. Proprietary functions may or may not be profitable, but they are usually paid for by the users and are not considered as traditionally performed

and sidewalks.[3] Many jurisdictions classify street maintenance as a proprietary function, thus imposing liability.[4] Louisiana and other states recognize that street maintenance is a governmental function and treat liability in this area as an exception to the general immunity rule.[5] The courts require either actual or constructive notice to the municipality of the dangerous condition before liability can be imposed.[6] A municipal corporation is considered as having actual notice of a street or sidewalk defect whenever the condition is known by an officer or employee having a responsibility toward keeping streets and sidewalks in good repair, or having a duty to report such defects to the proper authorities.[7] A municipality has constructive notice of a defect

solely by governmental units. Examples are operation of public utilities and transportation systems.

3. Weinhardt v. New Orleans, 125 La. 351, 51 So. 286 (1910); Gueble v. Town of Lafayette, 121 La. 909, 46 So. 917 (1908); Lorenz v. New Orleans, 114 La. 802, 38 So. 566 (1905); Aucoin v. New Orleans, 105 La. 271, 29 So. 502 (1901); O'Neill v. New Orleans, 30 La. Ann. 220 (1878); White v. City of Alexandria, 35 So.2d 810 (La. App. 1948); Hebert v. New Orleans, 163 So. 425 (La. App. 1935); Miller v. New Orleans, 152 So. 141 (La. App. 1934); Geismar v. City of Alexandria, 142 So. 367 (La. App. 1932); City of Bessemer v. Brantley, 258 Ala. 675, 65 So.2d 160 (1953); Glasgow v. City of St. Joseph, 353 Mo. 740, 184 S.W.2d 412 (1945); Owens v. Seattle, 49 Wash.2d 187, 299 P.2d 560 (1956). See also 2 HARPER & JAMES, TORTS § 29.7 (1956); 63 C.J.S., *Municipal Corporations* § 782 (1950); Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 731 (1941).

4. Johnson v. Opelika, 260 Ala. 551, 71 So.2d 793 (1954); Dorminey v. City of Montgomery, 232 Ala. 47, 166 So. 689 (1936); Pardini v. City of Reno, 50 Nev. 392, 263 Pac. 768 (1928); Shepherd v. City of Chattanooga, 168 Tenn. 153, 76 S.W.2d 322 (1934); City of Port Arthur v. Wallace, 141 Tex. 201, 171 S.W.2d 480 (1943). See 63 C.J.S., *Municipal Corporations* § 782, n. 24 (1950); 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.03, n. 21 (3d ed. 1950).

5. Carlisle v. Parish of East Baton Rouge, 114 So.2d 62 (La. App. 1959); Carsey v. New Orleans, 181 So. 819 (La. App. 1938); Miller v. New Orleans, 152 So. 141 (La. App. 1934); Klingenberg v. City of Raleigh, 212 N.C. 549, 194 S.E. 297 (1937); Hagerman v. City of Seattle, 189 Wash. 694, 66 P.2d 1152 (1937). See 2 HARPER & JAMES, TORTS § 29.7, n. 9 (1956); 63 C.J.S., *Municipal Corporations* § 782, n. 25 (1950); 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.03, n. 19 (3d ed. 1950); Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 731 (1941).

6. District of Columbia v. Chessin, 73 F.2d 663 (D.C. Cir. 1934); Hudgens v. New Orleans, 54 So.2d 536 (La. App. 1951); Cobb v. Town of Winnsboro, 49 So.2d 625 (La. App. 1950); Parker v. New Orleans, 1 So.2d 123 (La. App. 1941); Carsey v. New Orleans, 181 So. 819 (La. App. 1938). See 2 HARPER & JAMES, TORTS § 29.7(2) (1956); 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.102 (1950).

7. See Weinhardt v. New Orleans, 125 La. 351, 51 So. 286 (1910) (notice to city councilman constituted actual notice to the city); Miller v. New Orleans, 152 So. 141 (La. App. 1934) (notice to department of public property held proper notice; dicta indicated that notice to city street repair engineer, or to complaint clerk in municipal repair plant would have been sufficient); Landry v. New Orleans Public Service, 149 So. 136 (La. App. 1933); Geismar v. City of Alexandria, 142 So. 367 (La. App. 1932) (dicta indicated that knowledge by policeman of dangerous condition on beat would be actual notice to the city); Collins v. Lyons, 120 So. 418 (La. App. 1929) (notice to policeman of defect not on his beat not notice to the city because he had no duty toward repairing or reporting the defect); Barnes v. New Orleans, 4 La. App. 503, 505 (1926) ("Of course, it was necessary that her communication would have reached some official charged

when it has existed for such a period of time that it would have been discovered and repaired had the city exercised reasonable care.[8] In reality, liability in such cases is based on breach of the duty of reasonable inspection of sidewalks and streets for defects and dangers,[9] but the courts still retain notice terminology by labeling these circumstances as constructive notice.

Prior notice is not necessary where municipal employees do work necessarily involving the creation of a condition dangerous to street and sidewalk users.[10] Thus a city may be liable without prior notice when it creates an excavation or other dangerous condition in or near a street or sidewalk.[11] Liability under such circumstances is apparently based on the fact that the city is a peril-maker,[12] although some courts say that liability is imposed because the municipality is considered as having knowledge of its own acts.[13]

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with the duty of making repairs to sidewalks"). See also 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.106-54.107 (3d ed. 1950); Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 736 (1941); 13 R.C.L., *Highways* § 283 (1916), cited with approval in Miller v. New Orleans, 152 So. 141, 144 (La. App. 1934).

8. Smith v. District of Columbia, 189 F.2d 671 (D.C. Cir. 1951); Smith v. New Orleans, 135 La. 980, 66 So. 319 (1914); Gueble v. Town of Lafayette, 121 La. 909, 46 So. 917 (1908); Lorenz v. New Orleans, 114 La. 802, 38 So. 566 (1905); White v. City of Alexandria, 35 So.2d 810 (La. App. 1948); McQuillan v. New Orleans, 18 So.2d 218 (La. App. 1944); Robinson v. City of Alexandria, 174 So. 681 (La. App. 1937); Hebert v. New Orleans, 163 So. 425 (La. App. 1935); Geismar v. City of Alexandria, 142 So. 367 (La. App. 1932); City of Hattiesburg v. Hillman, 222 Miss. 443, 76 So.2d 368 (1954); City of Lincoln v. Smith, 28 Neb. 762, 45 N.W. 41 (1890). See 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.109 (3d ed. 1950).

9. See Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720, 737 (1941). Constructive notice has been analogized to the duty of reasonable inspection owed invitees by owners and occupiers of land. See Hebert v. New Orleans, 163 So. 425, 426 (La. App. 1935).

10. City of Covington v. DeMolay, 248 Ky. 814, 60 S.W.2d 123 (1933); Ledbetter v. City of Great Falls, 123 Mont. 270, 213 P.2d 246 (1949); City of Lincoln v. Calvert, 39 Neb. 305, 58 N.W. 115 (1894); Crandall v. City of Amsterdam, 254 App. Div. 39, 4 N.Y.S.2d 372 (1938); Elrod v. Franklin, 140 Tenn. 228, 204 S.W. 298 (1918). See 2 HARPER & JAMES, TORTS § 29.7(2) (1956); 19 McQUILLIN, MUNICIPAL CORPORATIONS § 54.104 (3d ed. 1950).

11. See Lemoine v. City of Alexandria, 151 La. 562, 92 So. 58 (1922) (city ordered employees to place cross-ties on sidewalk); Nessen v. New Orleans, 134 La. 455, 64 So. 286 (1914) (municipality had wires strung along sidewalk to keep people off the streets during Mardi Gras); Carlisle v. Parish of East Baton Rouge, 114 So.2d 62 (La. App. 1959) (dangerous condition in surface of street caused by street repairs); Weil v. City of Alexandria, 7 La. App. 387 (1928) (city employees dug excavation between street and sidewalk).

12. Nevala v. City of Ironwood, 232 Mich. 316, 320, 205 N.W. 93, 94 (1925) ("When, however, the dangerous condition is caused by agents of the city in the prosecution of their employment, the rule of liability is not based on notice and failure to repair, but upon the creation of a dangerous condition by the city.").

13. City of Birmingham v. Andrews, 27 Ala. App. 377, 172 So. 681 (1937); City of Covington v. DeMolay, 248 Ky. 814, 60 S.W.2d 123 (1933); Ledbetter v. City of Great Falls, 123 Mont. 270, 213 P.2d 246 (1949). See 63 C.J.S., *Municipal Corporations* § 825 (1950).

The instant case presents an interesting combination of both actual notice and peril-maker situations. Recovery was not based upon creation of a dangerous condition by city employees, presumably because the nature of the work did not necessarily involve creation of the defect causing the injury.[14] Rather, the city was found negligent for failure to repair within a reasonable time a dangerous sidewalk condition of which it was considered as having actual notice. The court said that knowledge of the defect by the employees here involved would not have been sufficient had they not created the defect because they were not charged with repairing such conditions.[15] However, the fact that they had caused the condition was used to justify a finding of actual notice.[16]

It might be inferred that the court is recognizing a duty on the part of municipal employees to report to the proper authorities all street and sidewalk dangers known to and created by them as an unnecessary incident to their work. Whatever the interpretation may be, it is submitted that granting recovery under the circumstances of the instant case at least indicates that municipal liability for defects in streets and sidewalks will not be construed narrowly in Louisiana.

The instant case represents a diminution of governmental tort immunity by broadening the street and sidewalk exception. It should be noted that the doctrine of governmental tort immunity has been unpopular for many years and has been almost continuously criticized.[17] So unpopular has it become in recent

14. See LaGroue v. New Orleans, 114 La. 253, 38 So. 160 (1905) (city not liable for injuries from defect created by independent contractor engaged by the city because creation of the defect was not necessary in performing the work). If the rule in this case applies to municipal employees also, creation of the defect must be necessary in accomplishing the work authorized, ordered, or permitted by the municipality before it can be held liable without notice.

It should be noted that where injury was caused by negligence of municipal employees performing street maintenance, as distinguished from injury from defects, cities are not liable in jurisdictions which consider street maintenance a governmental function. Prunty v. Shreveport, 223 La. 475, 66 So.2d 3 (1953); Mardis v. Des Moines, 240 Iowa 105, 34 N.W.2d 620 (1948); Parker v. Wichita, 150 Kan. 249, 92 P.2d 86 (1939). *Contra*, Ronaldson & Puckett v. Baton Rouge, 3 La. App. 509 (1925) (city liable for negligent operation of a street sprinkling truck resulting in collision with another vehicle); but in Norred v. Shreveport, 90 So.2d 571 (La. App. 1956), the *Ronaldson* case is criticized as being out of line. The *Norred* case held a municipality not liable for negligent operation of a street sweeping machine because a health measure, thus a governmental function.

15. Haindel v. Sewerage & Water Board, 115 So.2d 871, 877 (La. App. 1959).

16. *Id.* at 878.

17. See Borchard, *Governmental Liability in Tort*, 34 YALE L.J. 129 (1924); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LOUISIANA LAW REVIEW 476, 494 (1953); 2 HARPER & JAMES, TORTS § 29.1, n. 2 (1956); Annot., 60 A.L.R.2d 1198, 1199, n. 4 (1958); Note, 71 HARV. L. REV. 744, 745, n. 6 (1958).

years that some jurisdictions have abandoned the whole immunity doctrine.[18]

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TORTS — PRENATAL INJURIES — CHARACTERIZATION OF UNBORN CHILD AS A "PERSON" IMMATERIAL TO RECOVERY

Action was brought by an infant plaintiff for injuries sustained while in the womb of his mother, resulting from an automobile collision due to defendants' negligence. Plaintiff was born seventy-five days after the accident with deformities of his legs and feet. The trial court granted defendants' motion to dismiss on the ground that New Jersey recognized no cause of action for prenatal injuries. On appeal to the Supreme Court of New Jersey, *held,* reversed and remanded for trial. An infant has a legally protected interest in beginning life with a healthy body. If another's wrongful conduct causes him to be born deformed, the infant may recover damages. Though not at issue, the court indicated that the infant need not have been viable at the moment of injury in order to state a cause of action. *Smith v. Brennan,* 157 A.2d 497 (N.J. 1960).

For fifty years after the first unsuccessful attempt to recover for prenatal injuries,[1] most such actions were dismissed on the ground that the common law did not recognize the unborn child as an entity capable of being wronged by another's tortious conduct.[2] Recently however, judicial thinking on this subject

18. See, e.g., Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), noted in 18 LOUISIANA LAW REVIEW 756 (1958), 71 HARV. L. REV. 744 (1958); Ragans v. Jacksonville, 106 So.2d 860 (Fla. App. 1958); Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958), noted in 19 LOUISIANA LAW REVIEW 910 (1959), 59 COLUM. L. REV. 487 (1959); 72 HARV. L. REV. 1386 (1959); 33 TUL. L. REV. 723 (1959).

Louisiana might possibly abandon or modify the doctrine of sovereign immunity in the near future. The cases of Duree v. Maryland Casualty Co., 238 La. 166, 114 So.2d 594 (1959), and Stephens v. Natchitoches Parish School Board, 238 La. 388, 115 So.2d 793 (1959), decided within a few months of the instant case (November 30, 1959), have created quite a furor. See McMahon & Miller, *The Crain Myth — A Criticism of the Duree and Stephens Cases,* 20 LOUISIANA LAW REVIEW 449 (1960), which treats these cases as a temporary set-back in the increasing decay of governmental tort immunity and suggests enactment of laws to overrule the *Duree* and *Stephens* cases and to modify the sovereign immunity doctrine in Louisiana.

1. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

2. See *ibid.*; Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921). A common law view of the unborn child is found in 1 BLACKSTONE, COMMENTARIES 129-30. Perhaps this position was fortified in the minds of some judges by grave doubts that dependable proof of causal connection could be produced. For example, "What field would be opened to extravagance of testimony already great enough — if Science could carry her lamp, not over certain in its light where