

5.20B LIABILITY FOR DEFECTS IN PUBLIC STREETS AND SIDEWALKS (Approved 11/99)

A. Liability of Municipality

NOTE TO JUDGE

See Model Civil Charge 5.20A, Dangerous Conditions of Public Property and *N.J.S.A. 59:1-1, et seq.*, the New Jersey Tort Claims Act.

B. Liability of Abutting Owner or Occupant¹

1. In General

a. As to Construction or Other Activity

The owner (occupant) of residential premises abutting a public sidewalk is not responsible for defects therein caused by the action of the elements or by the wear and tear incident to public use. If, however, you find that the defective condition of the sidewalk was the result of the negligent construction thereof by the owner (occupant) or that it resulted from an activity, commercial or otherwise,

¹ See *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146 (1981); *Mirza v. Filmore Corp.*, 92 N.J. 390 (1983); and *Lombardi v. First United Methodist Church*, 200 N.J. Super. 646 (App. Div. 1985). *Brown v. St. Venatius School*, 111 N.J. 325 (1988). See *Christmas v. City of Newark*, 216 N.J. Super. 393, 400 (App. Div. 1987) holding that *Stewart, supra*, establishes an absolute municipal immunity for deteriorated sidewalks; but, cf. *Levin v. DeVoe*, 221 N.J. Super. 61, at 64 n.1 (App. Div. 1987) disagreeing with the holding in *Christmas*.

which was carried on by him/her, the plaintiff may recover for the injuries proximately resulting from such defective condition.

Cases:

Hayden v. Curley, 34 N.J. 420 (1961); *Krug v. Wanner*, 28 N.J. 174 (1958); *Moskowitz v. Herman*, 16 N.J. 223, 225 (1954); *Volke v. Otway*, 115 N.J.L. 553 (E. & A. 1935); *Prange v. McLaughlin*, 115 N.J.L. 116 (E. & A. 1935); *Braelow v. Klein*, 100 N.J.L. 156 (E. & A. 1924); *Rupp v. Burgess*, 70 N.J.L. 7 (Sup. Ct. 1903).

b. As to Repairs

A residential property owner owes no duty to the public to repair a sidewalk which is in a state of disrepair by reason of normal wear and tear or by reason of the elements such as rain, snow, frost, and the like. Nor is mere failure fully to correct the old condition a sufficient basis for liability.

Where, however, the owner attempts to make repairs to correct some defect therein for which he/she is not responsible, he/she becomes responsible if he/she makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if he/she causes a new hazard, different from the old.

Cases:

Nash v. Lerner, 157 N.J. 535 (1999), adopting dissent 311 N.J. Super. 183, 193 (App. Div. 1998); *Tierney v. Gilde*, 235 N.J. Super. 61 (App. Div. 1989); *Snidman v. Dorfman*, 7 N.J. Super. 207 (App. Div. 1950); *Halloway v. Goldenberg*, 4 N.J. Super. 488 (App. Div. 1949); *Braelow v. Klein*, 100 N.J.L. 156 (E.& A. 1924); *Istvan v. Engelhardt*, 131 N.J.L. 9 (Sup. Ct. 1943).

Absent some affirmative act, residential owner has no duty to maintain sidewalk at base of residential driveway where the deterioration occurred over time merely due to long-term residential traffic. *Nash v. Lerner*, 157 N.J. 535 (1999), adopting dissent 311 N.J. Super. 183, 193 (App. Div. 1998). The existence of a shade tree commission immunizes property owners, without distinction as to the nature of ownership, from liability for injuries stemming from defective sidewalks caused by shade tree roots. *Tierney v. Gilde*, 235 N.J. Super. 61, 65 (App. Div. 1989).

Where the abutting owner, although not obligated to construct a sidewalk, does so in such a manner that it is hazardous to pedestrians, it is a public nuisance and the owner is liable. *Braelow v. Klein*, 100 N.J.L. 156 (E. & A. 1924). An owner, attempting to repair an existing sidewalk, or to correct some defect therein, may create a nuisance and be responsible if the sidewalk, after the attempt to repair or correct is more dangerous than before, or the new hazard is different from the old. *Istvan v. Engelhardt*, 131 N.J.L. 9 (Sup. Ct. 1943).

2. Snow and Ice

a. Liability of Owner (Occupant) Who Undertakes to Clear Sidewalk

The owner (occupant) of residential premises abutting a public sidewalk is not required to keep the sidewalk free from the natural accumulation of ice and

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snow. But he/she is liable if, in clearing the sidewalk of ice and snow², he/she, through his/her negligence, adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other words, while an abutting owner (occupant) is under no duty to clear his sidewalk of ice and snow, he/she may become liable where he/she undertakes to clear the sidewalk and does so in a manner which creates a new element of danger which increases the natural hazard already there.

Therefore, should you find that the defendant, in undertaking to remove the ice and snow from his/her sidewalk, created a new hazard or increased the existing hazard and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.

Should you find, however, that the defendant did not increase the natural hazard or create a new element of danger which proximately caused or concurred in causing plaintiff's injuries, you must find for the defendant.

²*Liptak v. Frank*, 206 N.J. Super. 336 (App. Div. 1985) holding that residential landowners owed no duty to pedestrians, under either common law or municipal ordinance, to remove ice and snow from their abutting sidewalk.

Cases:

Taggart v. Bouldin, 111 N.J.L. 464, 467 (E. & A. 1933); *Saco v. Hall*, 1 N.J. 377, 381 (1949); *MacGregor v. Tinker Realty Co.*, 37 N.J. Super. 112, 115 (App. Div. 1955); *Gentile v. National Newark and Essex Bkg. Co.*, 53 N.J. Super. 35, 38 (App. Div. 1958); *Seggal v. Fox*, 98 N.J.L. 819 (E. & A. 1923) (existence of a municipal ordinance obligating landowner to clear sidewalk of ice and snow does not create rights in favor of private individual on defendant's failure to comply with the ordinance); cf. *Gellenthin v. J & D. Inc.*, 35 N.J. 341 (1962).

b. Liability of Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks

The law imposes upon the owner of commercial or business property the duty to use reasonable care to see to it that the sidewalks abutting the property are reasonably safe for members of the public who are using them. In other words, the law says that the owner of commercial property must exercise reasonable care to see to it that the condition of the abutting sidewalk is reasonably safe and does not subject pedestrians to an unreasonable risk of harm. The concept of reasonable care requires the owner of commercial property to take action with regard to conditions within a reasonable period of time after the owner becomes aware of the dangerous condition or, in the exercise of reasonable care, should have become

aware of it.³ If, therefore, you find that there was a condition of this sidewalk that was dangerous in that it created an unreasonable risk of harm for pedestrians, and if you find that the owner knew of that condition or should have known of it but failed to take such reasonable action to correct or remedy the situation within a reasonable period of time thereafter as a reasonably prudent commercial or business owner would have done under the circumstances, then the owner is negligent.

NOTE TO JUDGE

Include the following where notice of the condition is an issue.

But, in this case, the property owner contends that he/she had no notice or knowledge of the alleged dangerous condition and, therefore, cannot be held responsible for it. In that connection, I must make you aware of this rule: The owner of commercial or business property is chargeable with a duty of making reasonable observations of his/her property, including the abutting sidewalk, in order to discover any dangerous condition that might develop or occur. The owner must make observations of his/her property, including the sidewalk, with the

³If the unsafe condition is alleged to be snow and ice, *N.J.S.A.* 40:64-12 and any ordinance adopted by the municipality might be charged as a factor, the jury should consider the reasonableness of the time the defendant(s) has (have) waited to remove or reduce a snow or ice condition from the sidewalk.

frequency that a reasonably prudent commercial property owner would in the circumstances. If you find that such a reasonable observation would have revealed the dangerous condition alleged in this case, then the property owner is chargeable with notice of the condition although he/she did not actually know about it; that is, he/she is as much responsible for the condition as if he/she had actual knowledge of its existence.

NOTE TO JUDGE

Include the following where the owner has taken some action with regard to the condition and the adequacy of the action is in question.

What actions must the owner of commercial property take with regard to defects/snow/ice accumulation/dangerous conditions? The action required by the law is action which a reasonably prudent person would take or should have taken in the circumstances present to correct the defect/snow/ice accumulation/dangerous condition, to repair it/remove it or to take other actions to minimize the danger to pedestrians (for example, to give warning of it) within a reasonable period of time after notice thereof. The test is: did the commercial property owner take the action that a reasonably prudent person who knows or should have known

of the condition would have taken in that circumstance? If he/she did, he/she is not negligent. If he/she did not, he/she is negligent.⁴

NOTE TO JUDGE

Where there is both a commercial and residential use of the property, the predominant use will determine the status of the property. *Avalone v. Mortimer*, 252 N.J. Super. 434 (App. Div. 1991), *Wasserman v. W. R. Grace Co.*, 281 N.J. Super. 34 (App. Div. 1995). *Hambright v. Yglesias*, 200 N.J. Super. 392, 395 (App. Div. 1985), (two-family home utilized as apartment building in commercial property so as to impose duty upon owner to remove the ice from abutting sidewalk). *Borges v. Hamad*, 247 N.J. Super. 353 (Law Div. 1990); *aff'd*, 247 N.J. Super. 295 (App. Div. 1990) (owner-occupied three-family house in a residential zone, with two rental units occupied solely by family members, is residential property). There is no affirmative duty on a charitable or religious institution to maintain public sidewalks abutting their properties. *Lombardi v. First United Methodist Church*, 200 N.J. Super. 646 (App. Div. 1985). *But see Brown v. St. Venatius School*, 111 N.J. 325 (1998) (school deemed commercial); *Restivo v. Church of St. Joseph*, 306 N.J. Super. 456 (App. Div. 1997) (leasing apartments even at below fair market value deemed commercial); *Gilhooly v. Zeta Psi Fraternity*, 243 N.J. Super. 201 (Law Div. 1990) (fraternity deemed commercial property owner). Owner of a vacant lot is not a commercial land owner for purposes of

⁴See *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146 (1981); *Mirza v. Filmore Corp.*, 92 N.J. 390 (1983). (responsibility of commercial landowner for removal of snow or ice from public sidewalk). *Stewart* imposes liability on commercial landowners only.

See *Christmas v. City of Newark*, 216 N.J. Super. 393, 400 (App. Div. 1987) holding that *Stewart, supra*, establishes an absolute municipal immunity for deteriorated sidewalks; but, cf. *Levin v. DeVoe*, 221 N.J. Super. 61, at 64 n.1 (App. Div. 1987) disagreeing with the holding in *Christmas*. Shade Tree Commissions created by municipalities are granted absolute immunity pursuant to statute. *Petrocelli v. Sayreville Shade Tree Commission*, 297 N.J. Super. 544 (App. Div. 1997). *But see Learn v. City of Perth Amboy*, 245 N.J. Super. 577 (App. Div. 1991) where the Shade Tree Commission was merely advisory.

imposing sidewalk liability irrespective of the commercial status of the owner or the zoning. *Briglia v. Mondrian Mortgage Corporation*, 304 N.J. Super. 77 (App. Div. 1997); *Abraham v. City of Perth Amboy*, 281 N.J. Super. 81 (App. Div. 1995).

3. Nuisance, Sidewalk

A street and every part of it is so far dedicated to the public that any act or obstruction which unnecessarily incommodes or impedes its lawful use is a nuisance.

One who constructs a drain, grating or a coal hole or similar structure in the sidewalk does it subject to the right of safe passage of the public over and along every part of the sidewalk. In making such use of the sidewalk, he/she is required to do so by a method of construction which does not create a nuisance and, having done so, is under a further duty of exercising reasonable care to keep the structure safe for the use of the public.

Cases:

Saco v. Hall, 1 N.J. 377 (1949); *Weller v. McCormack*, 52 N.J.L. 470 (Sup. Ct. 1890) (tree); *Rupp v. Burgess*, 70 N.J.L. 7 (Sup. Ct. 1903) (drain); *Kelly v. Lembeck & Betz Brewing Co.*, 86 N.J.L. 471 (Sup. Ct. 1914) *aff'd*, 87 N.J.L. 696 (E. & A. 1915) (cellar door); *Braelow v. Klein*, 100 N.J.L. 156 (E. & A. 1924) (difference in level).

4. Adoption of Nuisance by Subsequent Owner

Where, through the action of a prior owner of premises abutting a public sidewalk, a condition amounting to a nuisance has been created, one who takes title from the original creator of the condition and continues to maintain it may be held liable in damages to a user of the sidewalk who suffers injury by reason of such condition.

Cases:

Murray v. Michalak, 114 N.J. Super. 417 (App. Div. 1970), *aff'd*, 58 N.J. 220 (1971); *Krup v. Wanner*, 28 N.J. 174 (1958).