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Voluntary Assumption of Duty: Civil Liability of Adjacent Property Owner for Condition of Sidewalk: *Stewart v. Standard Publishing Co.*

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No attempt has here been made to decide between the majority or New York rule and the minority or Minnesota rule, as a matter of policy and reason. The query is raised however, whether the Montana court would be free, if the case ever arises, to adopt the Restatement view. R. C. M. (1935) 7741 does not precisely cover the situation of a covenant to repair. If it is held to apply to that situation, would it also limit recovery in the case of common passageways, a dangerous concealed defect, or the other exceptions to the general rule mentioned at the first of this article? While this may still be an open question, it is submitted that, even irrespective of the more widely accepted majority view, in the light of the California and Oklahoma cases under statutes identical or similar to ours our court could not consistently adopt the Restatement view. In this state the code offers the tenant relief from the harsh common law rule, and this relief is apparently exclusive. If a change is desired, it would seem to be for the legislature, not the judiciary, to bring it about.

Orville Gray.

VOLUNTARY ASSUMPTION OF DUTY; CIVIL LIABILITY OF ADJACENT PROPERTY OWNER FOR CONDITION OF SIDEWALK. STEWART v. STANDARD PUBLISHING CO.¹

This was a case in which the plaintiff sought to recover damages for personal injuries suffered by her in a fall on a sidewalk adjacent to defendant's place of business as a result of the accumulation of ice and snow thereon. The sidewalk had been constructed by defendant and had been maintained by defendant since its construction. The sidewalk was defective in that the stones had become uneven so that water could collect and freeze. The ice was covered with a light fall of snow. Defendant had been in the practice of cleaning the sidewalk of ice and snow and employed janitors for this purpose. This was ordinarily done about 7:30 in the morning, but on the morning of the accident was not done until 10:00, the accident occurring about 8:30 in the morning. The Montana Supreme Court, affirming the District Court, held that plaintiff should recover because the defendant had constructed the sidewalk, had assumed the duty of maintenance thereof, and had undertaken the duty of removing the accumulation of

¹(1936) 102 Mont. 43, 55 P. (2d) 694.

ice and snow therefrom. This places the decision upon the doctrine of voluntary assumption of duty.

The history of the question of liability of adjacent property owners for defective sidewalks and accumulations of ice and snow thereon is a long and interesting one. Thus, said the Court:

"In this state the fee to the street is in the state. The city is but a trustee thereof (*City of Butte v. Mikosowitz* 39 Mont. 350, 120 P. 593); a sidewalk is but a part of the street (*Kipp v. Davis-Daly Copper Co.* 41 Mont. 509, 110 P. 237, 21 Ann. Cas. 1372, 36 L. R. A. (N. S.) 666; *Mitchell v. Thomas* 91 Mont. 370, 8 P. (2d) 638). The city has the same control over, and duties with reference to, the sidewalk as it has respecting any other part of the street. 6 *McQuillin on Municipal Corporations*, 2796. Primarily the city is charged with the duty of keeping its streets, including the sidewalks, in a reasonably safe condition for travel."

Generally the city may delegate this duty to the abutting landowner by ordinance⁸ but as the fee to the sidewalks of a city is in the city, at common law, and generally in the absence of a statute to the contrary, the abutting owner owes no duty to the travelling public to keep his premises free from ice and snow.⁴ The mere fact that there is an ordinance is not enough to make the abutting landowner liable to the person injured.⁵ It is uniformly held that an ordinance, which is penal in character, requiring abutting landowners to keep the sidewalks free from ice and snow, does not, in the absence of statute, relieve the municipality of this primary duty with respect to the safety of its public streets and does not impose a civil liability on the abutting landowner in favor of a third person injured by reason of its violation.⁶ But where the injury is caused by the negligence of the abutting landowner in not removing ice and snow which creates a dangerous condition, then he is liable if he knows or should have known of the dangerous condition of the sidewalk. Thus in *Childers v. Deschamps*⁷ where the de-

⁸*Nord v. Butte Water Co.* (1934) 96 Mont. 311, 30 P. (2d) 809, cited with approval in *Headley v. Hammond Bldg Inc.* (1934) 97 Mont. 243, 33 P. (2d) 574, and in the principal case.

⁴*R. C. M.* 1935, Sec. 5039.7. *City of Helena v. Kent* (1905) 32 Mont. 279, 80 P. 258, 4 Ann. Cas. 235.

⁵*Childers v. Deschamps* (1930) 87 Mont. 505, 290 P. 261.

⁶*id.*

⁷*Hanley v. Fireproof Bldg. Co.* (1922) 107 Nebr. 505, 186 N. W. 543, 24 A. L. R. 387; 13 R. C. L. 415 and cases cited; 24 A. L. R. 387 and cases cited.

⁸*Supra* note 4.

defendants, abutting landowners, maintained a pipe or spout to convey water from the roof of their building to the ground, recovery was based on defendants' negligence in allowing the water pipe to become defective thus permitting water to fall on the sidewalk and form an icy condition there. It was shown in this case that the ice had been there for four or five days—long enough to give notice.

In 1923⁸ the legislature passed a law which was re-enacted in 1929⁹ and which is now embodied in R. C. M. 1935, Sec. 5080.1. This section provided that

“No city or town in this state shall be liable in damages for any negligence or mis-management on its part, or for any negligence or mis-management on the part of any officer, agent, servant, or employee of such city or town in causing, permitting or allowing snow or ice to remain or accumulate on or in any road, street, alley, sidewalk, cross walk, public way, or gutter within said city or town.”

This section of the Revised Codes relieves the city or town of all liability caused by negligence or failure to remove ice or snow. But it must be remembered that for this section to apply, the negligence or failure to so remove the ice and snow must be the proximate cause of the injury. Thus in *Bensley v. Miles City*,¹⁰ where the gravamen of the complaint in a personal injury action against the city was its negligence in permitting the obstruction of a sidewalk compelling the plaintiff to go into the street where she fell on an accumulation of ice and snow, the court, through Mr. Justice Galen, held the defendant city could not rely upon this section. Massachusetts has a similar statute.¹¹ The Massachusetts court has interpreted this statute as not applicable to abutting property owners.¹²

Taking up the principal case once more we find that the Montana Supreme Court based its decision upon the voluntary assumption by the defendant of the duty of cleaning the walk. To use the words of the Court:

“Here the defendant constructed the sidewalk, assumed the duty of maintaining it, and in particular undertook the duty of removing accumulations of ice and snow

⁸Ch. 45, Sec. 1, LAWS OF MONTANA 1923.

⁹Ch. 132, Sec. 1, LAWS OF MONTANA 1929.

¹⁰(1932) 91 Mont. 561, 9 P. (2d) 168.

¹¹Ann. Laws of Mass. vol. 3, Ch. 84, Sec. 17.

¹²*Shipley v. Proctor* (1901) 177 Mass. 498, 59 N. E. 119, cited in notes, 51 L. R. A. (N. S.) 310, 34 A. L. R. 410, 420.

from it. We think that the defendant, under the facts in this case, was liable to the plaintiff under the rule mentioned *supra*.'"¹³

The rule mentioned in the above excerpt was taken from *Corpus Juris*¹⁴ and is stated as follows:

"The governing rule is that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it,"

The rule as stated is a well known rule of law and has been applied in many cases,¹⁵ has been adopted by the *RESTATEMENT*,¹⁶ and has been stated by many text-writers.¹⁷ But in order that this rule of law be applicable, it must be shown that at the time of the accident the defendant had assumed the duty and further that the plaintiff relied upon this assumption of duty by the defendant, but there must be a reliance thereon by the plaintiff. This is shown by the wording of the rule as given in *Corpus Juris*¹⁸ ". . . He is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it," and in *PROSSER*¹⁹ "In many cases the

¹³*Supra* note 1, 102 Mont. at p. 51, 55 P. (2d) at p. 696.

¹⁴*Negligence*, 45 C. J. p. 650.

¹⁵*Cummings v. Henninger* (1925) 28 Ariz. 207, 236 P. 701, 41 A. L. R. 207; *O'Brien v. American Bridge Co.* (1910) 110 Minn. 364, 125 N. W. 1012, 32 L. R. A. (N. S.) 980, 136 Am. St. Rep. 503, and cases cited; *Harriman v. New York, C. & St. L. R. Co.* (1930) 253 N. Y. 398, 171 N. E. 686.

¹⁶*TORTS*, Sec. 325, *FAILURE TO PERFORM GRATUITOUS UNDERTAKING TO PERFORM SERVICES*: One who gratuitously undertakes with another to do an act or to render services which he should recognize as necessary to the other's bodily safety and thereby leads the other in reasonable reliance upon the performance of such undertaking

(a) to refrain from himself taking the necessary steps to secure his safety or from securing the then available protective action by third persons, or

(b) to enter into a course of conduct which is dangerous unless the undertaking is carried out, is subject to liability to the other for bodily harm resulting from the actor's failure to exercise reasonable care to carry out his undertaking.

¹⁷*PROSSER, TORTS*, (1941) p. 196; 2 *WHARTON, NEGLIGENCE*, (2nd ed. 1878) p. 365; 1 *STREET, FOUNDATIONS OF LEGAL LIABILITY*, (1906) p. 187.

¹⁸*Supra* note 14.

¹⁹*Supra* note 17.

court has laid stress upon the fact that the plaintiff has relied on the conduct of the defendant to his damage and has indicated that this is essential to liability" (Citing Cases). In the report of the case the Montana Supreme Court never mentioned or even considered the question as to whether or not the plaintiff relied upon the assumption of duty by the defendant. The accident occurred about 8:30 in the morning. It must have been light at this time. The plaintiff could have seen that the light covering of snow had not been removed. She should have known that the duty which defendant had allegedly assumed had not been performed. There could have been no reliance here. In *Cummings v. Henninger*²⁰ cited by the Court in support of the rule in the principal case, the defendant had constructed a board sidewalk and had gratuitously assumed the duty of repairing it. Later the defendant negligently repaired it, as a result of which plaintiff was injured. The court held for the plaintiff stating the rule of the principal case. But in the Arizona case there was reliance by the plaintiff upon the assumption of duty by the defendant. So also in *Dapolito v. Morrison*,²¹ where defendant landlord was held liable having gratuitously made repairs but so negligently that tenant was injured, he having placed full reliance thereon; and in *Kirschenbaum v. General Outdoor Advertising Co.*²² the same rule was followed where defendant gratuitously and negligently assumed a duty to repair upon which the plaintiff relied.²³ But in *Kuchynsky v. Ukryn*²⁴ where landlord repaired a staircase and the tenant was injured thereon, the court held for defendant landlord because there was no reliance upon the landlords assumption of duty.

In conclusion, it may be said that at common law there was no liability on an abutting property owner for failure to remove ice and snow from his adjacent sidewalk, and that ordinances penal in character requiring such removal were not construed as imposing civil liability upon the property owner, but only as in aid of the city in its fulfillment of its duty. The abolition in Montana of the liability of cities and towns for accumulation of ice and snow on sidewalks would appear to leave the liability of adjacent property owners untouched, and since the prevailing American rule is that voluntary assumption of a duty entails liability only where the other party re-

²⁰(1925) 28 Ariz. 207, 236 P. 701, 41 A. L. R. 207.

²¹(1938) 166 Misc. 849, 2 N. Y. S. (2d) 765.

²²(1932) 258 N. Y. 489, 180 N. E. 245, 84 A. L. R. 645.

²³See *supra* notes 14, 15, and 17 for cases in accord.

²⁴(1938) 89 N. H. 400, 200 A. 416.

lies upon continued performance and fails to do what he otherwise would have done to protect himself, it is submitted that the decision in the principal case is open to serious question since the court does not go into the question of reliance and it is not probable that reliance could be shown in this type of case were the court to consider it from that standpoint.

R. Bruce Gilbert.

THE "ATTRACTIVE NUISANCE DOCTRINE" IN MONTANA

It is not the writer's purpose to attempt to cover the vast materials and cases on the "turntable" or "attractive nuisance" doctrines in its entirety. But a short discussion of its treatment in the courts of Montana and the merits of the doctrine will be attempted.

As to the liability of land occupiers for injuries to small children who have come upon their land to play, *Sioux City & Pacific R. R. Co. v. Stout*¹ has been the leading case. This is the first "turntable" case in the United States. There was an earlier case imposing similar liability,² but there it was not decided whether plaintiff was a trespasser.

In the case of *Sioux City & Pacific R. R. Co. v. Stout* the defendant railway company maintained, unlocked, a turntable on which it knew that children trespassed to play. Plaintiff, a child of tender years, was injured when a companion turned the table as he was getting on to ride. The Supreme Court held not error a charge that defendant was liable if the jury found that the unlocked turntable was a danger to children, and that the defendant could reasonably expect children to play on it.

From this decision the growth of the doctrine in the United States was quite rapid. At this writing, twenty-three states impose liability; seven, including Montana, distinguish, and thirteen deny liability in the turntable cases.³ But the extent to which it has been allowed to be applied under the various factual situations has caused the courts no end of difficulty. It seems that after its first flourish in this country the trend in the United States Courts seems to be to limit rather than

¹17 Wall (U. S.) 657 (1873), 21 L. Ed. 745.

²*Birge v. Gardiner* 19 Conn. 507 (1849), 50 Am. Dec. 413.

³For list of states and cases applying, not applying, and distinguishing the "turntable cases" see 36 Harvard Law Review 826.