Volume 60
Issue 3 *Dickinson Law Review - Volume 60, 1955-1956*

3-1-1956

Liability of Sidewalk Obstructors

Henry J. Rutherford

LIABILITY OF SIDEWALK OBSTRUCTORS

This note analyzes the legal consequences that flow from the situation where a sidewalk obstruction forces a pedestrian into the street where he is hit by a car. Excluded are the cases where a pedestrian falls into a ditch or slips on ice, and situations other than those where the automobile has been the direct cause of the injury. Moreover, even though the automobile driver may be concurrently liable in this area, the liability of the obstructor or the one permitting the obstruction is the issue.[1]

First to be considered is the general approach to liability in terms of the traditional concepts of negligence. Second, the approach taken by the courts when the obstruction has been authorized by a governmental unit, will be developed. The dominant policy factors as to who is better able to bear the loss from the standpoint of foresight and planning will be the third point discussed. Finally, the effect to be given a justified obstruction will be examined.

Orthodox Approach to Liability

Generally, courts have followed an orthodox approach in determining the question of the obstructor's negligence. Those cases which have held an obstructor liable find a duty on his part and its breach the legal cause of the injury. These courts say that an obstructor should reasonably foresee that a pedestrian forced out into the street belongs to a class of persons who are likely to be exposed to the risk of being hit by an automobile. If the obstructor fails to give this class reasonable protection, he is responsible for the injury. The act of the automobile driver is not considered a superseding force because this is precisely the kind of injury that the obstructor should have reasonably foreseen would result from his conduct.[2]

On the other hand, where the obstructor has been found free of actionable negligence, the decision is usually based upon either the announced lack of a duty to protect pedestrians or on the lack of a legal causal connection between

---

1 Frequently a municipality has been included in these actions either as a joint tortfeasor or as the principal. The liability of the municipality in this regard will be examined on the basis of general negligence principles in light of the exception to immunity from tort liability of governmental units that exists with respect to the duty of a municipality to care for its sidewalks. See 63 C.J.S., *Municipal Corporations* § 807 (1950): " A municipal corporation is liable for defects in public ways only with respect to their construction, maintenance, and repair, and anything that may reasonably be expected to interfere with the safe use of such ways may constitute an actionable defect, as in the case of dangerous obstructions."

2 O'Neill v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694 (1930); Winsky v. DeMandel, 204 Cal. 107, 266 Pac. 534 (1928); Denison Coal & Supply Co. v. Bartelheim, 122 Ohio St. 374, 171 N.E. 835 (1930); Beltran v. Stroud, 63 Ariz. 249, 160 P.2d 765 (1945); Jones v. City of South San Francisco, 96 Cal. App. 2d 427, 216 P.2d 25 (1950); Squillace v. Village of Mountain Iron, 223 Minn. 8, 26 N.W.2d 197 (1946); Takako Inai v. Ede, 42 Cal. App.2d 521, 109 P.2d 400 (1941); Blankenship v. City of Williamson, 101 W. Va. 199, 132 S.E. 492 (1926); Daneschocky v. Sieble, 195 Mo. App. 470, 193 S.W. 966 (1917); Shafir v. Sieben, 233 S.W. 419 (1921); Lindman v. Kansas City, 308 Mo. 161, 271 S.W. 516 (1925); Shafir v. Carroll, 309 Mo. 458, 274 S.W. 755 (1925); Stollhans v. City of St. Louis, 343 Mo. 467, 121 S.W. 2d 808 (1938); Strother v. Kansas City, 316 Mo. 1067, 296 S.W. 795 (1927). See also annotation in 17 A.L.R. at 646.

the obstruction and the injury. These two theories are articulated in this manner: (1) the obstruction created only a condition upon which the independent act of the automobile driver operated,[3] or (2) even though the obstruction may have constituted negligence, this original negligence was superseded by the intervening act of the automobile driver which thus relieved the obstructor from liability.[4]

To what extent does the driver's conduct bear on the obstructor's liability? The cases do not give us much of an answer. The majority have held that even though the driver was not using due care, the obstructor is nevertheless liable because everyone should be aware of the carelessness with which automobiles are often operated; hence the obstructor is to blame either as a principal or as a joint tortfeasor for sending the pedestrian into the orbit of this foreseeable danger.[5] The few that have denied the obstructor's liability here have used the superseding cause theory.[6] On the basis of traditional negligence doctrine, it seems sensible that if the driver is not negligent, the obstructor should be liable because the risk entailed in removing one from a position of relative safety and placing him in a position of apparent peril is so great that the injury can still be anticipated. Where the driver is negligent, even though it may be arguable that the obstructor cannot anticipate the driver's lack of care, nevertheless recovery is justified on both counts on the basis of an increased risk to the pedestrian. Where, however, the driver's acts have been so extremely reckless under the circumstances that they approach what is called "wanton misconduct", then it seems equally sensible that the obstructor should not be liable for the act of another that is almost criminal in nature.

When Governmental Unit Authorizes the Obstruction

Municipal permission to obstruct a sidewalk generally has not reduced the obstructor's liability. Frequently in this regard both the city and the obstructor

[3] City of Okmulgee v. Hemphill, 183 Okla. 450, 83 P.2d 189 (1938); Smith v. Great Northern Ry. Co., 14 Wash.2d 245, 127 P.2d 712 (1942); Smith v. Mabrey, 348 Mo. 644, 154 S.W.2d 770 (1941); Winders' Adm'r v. Henry Bickel Co., 248 Ky. 4, 57 S.W.2d 1009 (1933).

[4] Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936); Jones v. City of Ft. Dodge, 185 Iowa 600, 171 N.W. 16 (1919); Mills v. City of Charlotte, 218 N.C. 564, 11 S.E.2d 566 (1940); Setter's Adm'r v. City of Maysville, 114 Ky. 60, 69 S.W. 1074 (1902); DeLuca v. Manchester Laundry & Dry Cleaning Co., 380 Pa. 484, 112 A.2d 372 (1955); Storey v. City of New York, 29 App. Div. 316, 51 N.Y. Supp. 580 (1898); Strother v. Carroll, 287 S.W. 310 (1926); City of Gary v. Struble, 18 N.E.2d 465. It is interesting to note that the *Storey* case, decided by the New York Supreme Court Appellate Division in 1898 was the earliest case to announce that an obstruction is not the proximate cause of a pedestrian's injury; and this decision has been relied upon by practically all the cases that have said that the sidewalk obstruction is not the proximate cause of the injury. In 1930 the same jurisdiction, when deciding the *O'Neill* case (note 2 *supra*) apparently ignored this holding and announced that one can reasonably foresee that the obstruction he has created will expose a pedestrian to an unreasonable risk; moreover, the *O'Neill* case has now become one of the foremost cases on the duty side of the argument.

[5] Blankenship v. City of Williamson, 101 W. Va. 199, 132 S.E. 492 (1926) ("gross" negligence); Beltran v. Stroud, 63 Ariz. 249, 160 P.2d 765 (1945); Shafir v. Sieben, 233 S.W. 419 (1921).

[6] Newell v. Darnell, 209 N.C. 254, 183 S.E. 374 (1936); Setter's Adm'r v. City of Maysville, 114 Ky. 60, 69 S.W. 1074 (1902).

are found jointly liable.[7] When only the city is sued for allowing a private person to erect an obstruction, the rationale for blaming the city for the pedestrian's injury is that a municipal corporation has a non-delegable duty to keep its sidewalks clear of any interferences with a pedestrian's right to free passage, and an authorization of an obstruction is a violation of that duty.[8]

California has advanced an interesting distinction in this governmental authorization area: an obstruction lawfully on a sidewalk is subject to a different rule from one unlawfully there. In one case[9] a city gave a contractor authority to construct a necessary public way. In the course of his work, he had to block a sidewalk, and the consequence of this was that a pedestrian was forced out and hit by an automobile. In a later case,[10] a driver, for his own convenience, obstructed a footpath used by the public, and the same kind of injury followed. In the former situation, the court held the obstructor free of negligence on the theory that one who is performing a necessary public service under the authority of the public's representative (the municipality) is not bound to foresee the careless acts of third persons; consequently, the license given him by the governmental unit lowers the standard of care to which he is subject. In the latter case, however, the obstructor had no lawful reason for blocking the footpath and was consequently held liable on the orthodox concepts of negligence. In distinguishing the former case from the latter, the court said that one is free of negligence by virtue of his performing a lawful act and that he may thereby rely on the presumption that others will use due care; but one who is negligent in the first instance is not freed from the obligation of anticipating the negligence of others. The court also pointed out that in the former situation where the obstruction was maintained lawfully, the obstructor would still not be liable even though the automobile driver was using due care. The theory here is that the pedestrian must accept his loss as part of the price an individual must pay for the community's welfare and progress. This distinction, not propounded by any other court in this particular area, suggests that when one acts to benefit society as a whole the amount of care he is required to use is less than that of those who seek primarily their own gain.

Who Is the Better Risk Bearer?

Since sidewalk obstructions are common, one of the primary considerations of the courts should be that of determining who is better able to bear the risk from the standpoint of foresight and planning. With reference to the availability of insurance coverage, the obstructor is generally the better risk bearer. For example, the standard policies covering this situation are the Owners, Landlords and Tenants, Manufacturers and Contractors, and other public liability

7 O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930); Jones v. City of South San Francisco, 96 Cal. App.2d 427, 216 P.2d 25 (1950).
8 Lindman v. Kansas City, 308 Mo. 161, 271 S.W. 516 (1925).
9 Klarquist v. Chamberlain & Proctor, 124 Cal. App. 398, 12 P.2d 664 (1932).
10 Takako Inai v. Ede, 42 Cal. App.2d 521, 109 P.2d 400 (1941).

policies. Since these policies cover so many other risks to which the insured is subject in addition to sidewalk obstructions, no harsh burden is placed on a person securing one of these policies.[11] Consequently, if a pedestrian is injured when he enters the street in order to go around a sidewalk obstruction, the loss he suffers and the judgment the obstructor pays can easily be distributed through the obstructor's insurance coverage.[12]

It is conceded that because of short-sighted original planning, most municipalities are ill-equipped to meet the needs of present-day commerce and that as a result of this, businessmen are often compelled to block sidewalks in order to move their goods. It will also be conceded that very often it becomes a necessity for contractors to block sidewalks in order to proceed with their work. In view of these factors it may be contended that if liability is imposed on these groups, the flow of commerce will be retarded, prices will rise, and the community will be deprived of the benefits derived from new constructions. But if we consider the advantages to be gained from the readily available insurance coverage outlined above, then these fears will disappear. A businessman can plan to protect himself against losses of this nature, and because of the indemnity which insurance will give for claims by pedestrians, enterprises forced to block sidewalks will not suffer any appreciable financial set-backs.

It should be emphasized at this point that it is not suggested that liability be imposed without fault for the sole reason that one party is better able to bear the risk than the other. Some commentators argue that the fault concept should be abolished in personal injury cases and that accidents should be com-

---

11 Under the insuring agreements in these policies the coverage on bodily injury liability reads as follows: [The insurer agrees] "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the hazards hereinafter defined". The principal hazards are then defined and divided as follows: (1) "Premises—Operations—Owners, Landlords and Tenants: The ownership, maintenance or use, for the purposes stated in the declarations, of premises, and all operations occurring during the policy period which are necessary or incidental to such purposes including pick-up and delivery, installation, servicing, removal or demonstration, and accidents (except accidents due to misdelivery) which occur after completion or abandonment of operations, and arise out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials"; "Premises—Operations—Manufacturers and Contractors: The ownership, maintenance or use, for the purposes stated in the declarations, of premises, and all operations occurring during the policy period which are necessary or incidental thereto, including accidents (except accidents due to misdelivery) which occur after completion or abandonment of operations, and arise out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials".

It should also be noted that these policies provide that the insurer, as respects the insurance afforded by the other terms of the policy, shall defend any suit against the insured on a risk covered by the policy, pay all premiums on bonds to release attachments, pay all costs taxed against the insured, and pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

12 It may be argued that if obstructors are held liable and that if insurance companies will thus have to indemnify them, that then the cost of premiums will go up with the consequence that the increase in rates will defeat the point of this note's contentions by discouraging businessmen from securing these policies. It is submitted that such an argument is unduly pessimistic for the reason that the great volume of insurance business transacted in this country will not warrant an undue and harsh increase in rates.

pensated by a broad scheme of social insurance. In answer to this contention, it is submitted that even though the tort of negligence generally does not deal with morally culpable conduct, the fear of a law suit nevertheless has a deterrent effect on carelessness; moreover, if fault were not necessary for compensation, false claims may deluge our judicial bodies.

Instead of the deceptive notion that liability should be imposed without fault in this sidewalk obstruction situation, it is submitted that the better-risk-bearer theory here can conform to the traditional concepts of negligence liability. Since pedestrians ordinarily use a particular sidewalk because it is the shortest route to their destination, they generally will not be inclined to turn around and walk home after being confronted with an obstruction. Furthermore, an automobile driver can reasonably assume that his primary duty is owed to other drivers in the streets and not to pedestrians who dart out from the sidewalk; i.e., because of the care he must exercise under the circumstances, his attention should not be diverted by requiring him to be on the look-out for pedestrians who are forced to use the streets instead of the sidewalks. Consequently, the obstructor should reasonably be able to foresee these two forces working in opposition because he has probably previously been both a pedestrian and a driver.[18] Since the obstructor can thus expect the natural result of his obstruction to be a collision of a car and a pedestrian, he should be under an obligation to guard against this risk; in the event of his failure to do so, he has exposed the pedestrian to an unreasonable risk and should be held responsible for the injuries suffered. Finally, even though business necessities may compel him to block the sidewalk, his liability will not be a crushing burden because the compensation he will have to pay out can be spread through the medium of insurance.

Justified Obstruction

Suppose a fire guts a building next to a sidewalk, and the sidewalk is blocked so that the weakened walls will not fall on passersby. In this situation the obstructor is in effect creating one risk in order to guard another risk. But is there any justification for an activity of this type, i.e., is there any element in conduct under these circumstances that would justify denying the obstructor's liability? Standard negligence principles tell us that if necessity compells one to shift a risk, he must act reasonably under the circumstances. "Necessity", or the pressing needs of the situation, may be the distinguishing element in this specific aspect of sidewalk obstructions. The dangers surrounding the weakened walls are imminent at every moment. The benefits to be gained from blocking the sidewalk in order to protect pedestrians from the risk of collapsing walls seem to surpass the danger of sending them out into the traffic. Here, a person is performing what may be an unlawful act in other circumstances for a worthy purpose: he is making an effort to protect others from harm. Should not such an effort be encouraged? On the other hand, however, it may be contended in reply that the discussion

18 The community standard of knowledge gives the ground for foreseeing these elements.

above which seeks to examine liability partly from the standpoint of who can better bear the loss would seem, at first sight, to say that there is no problem here, that the obstructor can make up for the loss by planning and by using the medium of insurance. It is submitted in answer to this contention that the better-risk-bearer theory is not sufficient in all cases. Tort liability should not be considered only in the light of compensation. The policy of encouraging socially desirable conduct must also be put into the balance. If one makes a reasonable effort under the circumstances to save others from harm, then the law should look upon him favorably. Tort law should not be oriented solely toward compensating others for losses, but it should also consider the policy of furthering conduct that is beneficial to society. In this situation, the obstructor acted out of necessity. He tried to save a pedestrian from one very serious type of harm and, in so doing, had to expose him to another type of harm. But one's efforts to do good are socially desirable, and because of these circumstances the obstructor who acted reasonably in this situation should be favored.[14]

Conclusion

Generally, the liability of a sidewalk obstructor depends on whether the obstruction is such an unreasonable risk of harm to a pedestrian that the latter's interests deserve protection at the hands of the obstructor. The two considerations of whether the principles of negligence apply and whether the obstructor is the better-risk-bearer should govern in the ordinary situation. It has been said over and over that tort principles should be keyed to a policy of social engineering and that they should thus be adapted to meet the needs of present day life. Since the policy of keeping the economy going must be balanced with that of giving redress to wrongs, legal rules in this area should not themselves obstruct the progress of commerce. But, as an additional consideration, since by virtue of original planning and foresight, an obstructor can easily obtain insurance coverage, it follows that his burden of making up losses to others is greatly reduced. Moreover, the traditional concepts of negligence can also lead us to this conclusion. Combining the practical advantages of obtaining indemnity with legal theory, courts should not hesitate to hold the obstructor liable.

The problem of whether the automobile driver's negligence or absence of negligence should be of prime concern may seem vexing at first sight. But in consonance with the considerations outlined above, this problem can be solved by applying the duty concept and then having the obstructor who can be the better-risk-bearer meet this loss if the test of duty is satisfied. Of course, if the driver's behavior is that of "wanton misconduct", then the loss should be laid to him, not only because his behavior may be considered an efficient superseding cause but also because the obstructor should not be blamed for the egregiously wrongful acts of another.

---

14 Of course, if the obstruction itself is unreasonable or is continued in existence after such time as additional adequate safeguards could have been provided, then the effect of this policy analysis would be justifiably diminished.

Finally, when an obstruction is created out of necessity, policy implications should be the controlling factors. Two interests conflict here: one is a pedestrian's right to free use of the sidewalk, and the other is the encouragement of efforts to protect this same pedestrian from other danger. In these "necessity" situations, the socially desirable aspects of such conduct should justify the obstruction.

HENRY J. RUTHERFORD

IMPEACHING THE CREDIBILITY OF A WITNESS BY SHOWING CONVICTION OF A CRIME

At common law the conviction of a person for an infamous crime rendered him thereafter incompetent as a witness. It rested on the theory that one who engaged in such conduct was a person without honor and wholly unworthy of belief. The incompetency also was regarded as part of the punishment. Felonies were the usual crimes considered infamous so as to render one incompetent, and it was also extended to the so-called misdemeanor crimen falsi. The term crimen falsi has not been well defined but may be said to include, generally, crimes injurious to the administration of justice by the introduction of falsehood and fraud.

Statutes were later enacted to reduce the effect of such crimes to allow evidence of them merely to attack the credibility of the witness rather than render him incompetant. These statutes did away so effectively with incompetancy that even where one was under sentence of death he was still declared a competant witness.[1]

In Pennsylvania[2] the act provided that all persons should be competant witnesses except those convicted of perjury or subornation thereof. The only time a person who has been convicted of perjury and who has not received a pardon or reversal of his judgment can be called as a witness is in an action for violence or wrong done to the witness himself or his property.

It is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses, and that in the exercise of this duty the court should not interfere with the decision of the jury. Nor is there any distinction in this respect between civil and criminal cases.[3] The reason for disbelieving a witness is his supposed readiness to lie, inferred from his general readiness to do evil which is predicated upon his former conviction of a crime. Some courts have held that evidence of such crimes should be limited to those of the crimen falsi variety, be they felonies or misdemeanors.[4] On the other hand robbery, larceny and bur-

---

1 State v. Jones, 176 N. C. 702, 97 S. E. 32 (1918).
2 PA. STAT. ANN. tit 28, § 315 (Purdons 1955).
3 JONES, EVIDENCE § 901 (3d ed. 1938).
4 3 WIGMORE, EVIDENCE, § 980 (3d ed. 1940).