LIABILITY FOR SIDEWALK DEFECTS (adapted from "Maine Townsman, January 2015, MMA)

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Summary: *a municipality is immune for any claim arising out of defects in a sidewalk under the Maine Tort Claims Act, unless the injury was caused by, and arose during, construction, cleaning or repair operations on the sidewalk. A municipality is not immune for claims brought under 23 M.R.S.A § 3655 for injuries caused by defects in sidewalks, but a recovery under that statute requires that a municipality have:*

- *24 hours' advance notice of the defect,*
- *a notice of claim within 180 days of injury,*
- *a suit commenced within one year, and*
- *is then still subject to the damages limitation discussed above.*

While the Maine Tort Claims Act did entirely replace the common law doctrine of sovereign immunity as it existed at the time of its enactment in 1978, it is important to recognize that the legislature had for over 100 years prior to that time already abrogated sovereign immunity on an ad hoc basis with statutes targeting very specific government activities, such as defects in town ways, including sidewalks. Such statutes still control in their discrete areas, and operate totally outside of the immunity/liability scheme found in the Maine Tort Claims Act.

Like liability for road defects, liability arising from defects in sidewalks is governed by several provisions of Maine law. On their face, some of these statutes appear entirely inconsistent with one another, with one imposing liability on a municipality for a defect while another provides a seemingly unlimited grant of immunity for defects. Despite the apparent contradiction, however, the Law Court has held them to be compatible, with each controlling in a specific set of circumstances. This article will try to delineate which laws apply to the different factual situations with which municipalities are commonly faced.

Our state courts often declare that the common law doctrine of sovereign immunity for governmental entities was entirely displaced by the enactment of the Maine Tort Claims Act in 1978. This is not entirely accurate, however, as the enacting legislation for the MTCA carved out an exception for those specific statutes that had previously been enacted over the years to abrogate sovereign immunity for specific government activities. In those particular situations, the MTCA did not supplant the previously enacted laws. See 14 M.R.S.A. § 8113(2). Examples include the sewer statute, the culvert statute, and, most germane to this discussion, the so-called highway defect, or pothole, statute. Statues governing liability for damages under the Local Highway Law, 23 M.R.S.A. § 3651, et seq., pre-date the enactment of the Maine Tort Claims Act, and thus offer a remedy entirely outside the MTCA for injuries caused by defects in town ways.

The MTCA provides a general grant of immunity to municipalities. See 14 M.R.S.A. § 8103. This general grant of immunity is subject to specific exceptions, though those exceptions are narrowly construed by the courts. See § 8104-A, as modified by § 8104-B (the exceptions to the exceptions). § 8104- A provides an exception to governmental immunity for a governmental entity's *"negligent acts or omissions arising out of and occurring during the performance of construction, street cleaning or repair operations on any highway, townway, sidewalk, parking area … including appurtenances necessary for the control of those ways …."* This exception to immunity for construction, street cleaning, or repair operations has been interpreted by the Law Court a number of times in which roads have been at issue, but not sidewalks. These cases hold

that a two-part test must be applied to any particular injury case to determine whether the exception to immunity applies. First, the injury must be caused by a condition or defect that stems from the construction, cleaning or repair operation. Second, the injury must arise during the course of those activities. At the Law Court, cases have more commonly involved disputes over whether or not the activity was still ongoing at the time of injury rather than whether the activity was the actual cause of the injury. See, e.g., *Dubail v. Maine Dep't of Transportation*, 711 A.2d 1301(Me. 1998); *Paschal v. City of Bangor*, 747 A.2d 1194 (Me. 2000). Because construction or repair activities, whether on a road or on a sidewalk, can take weeks or even months to complete, a municipality can be exposed to potential liability for a lengthy period of time during such projects.

The very same section of the MTCA that confers municipal liability for negligent conduct during construction, street cleaning or repair operations also provides immunity for any "*defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area … or in any appurtenance thereto"* when such activity is not taking place. See 14 M.R.S.A. § 8104-A(4). As a result, an injury caused by a defect in a sidewalk, such as a person injured by tripping over a misplaced brick, will not cause liability to be imposed on the municipality unless the injury occurs during the performance of construction, cleaning or repair operations on the sidewalk. This is only the case, however, for claims that are brought under the MTCA.

As noted above, the MTCA is not the only provision in Maine law that can provide a basis for municipal liability for injuries caused by defective sidewalks. Despite the MTCA's blanket immunity for latent defects, 23 M.R.S.A. § 3655 provides: *"Whoever receives any bodily injury or suffers damage in his property through any defect or want of repair or sufficient railing in any highway, townway, … may recover for the same in a civil action …."* Because the enactment of the MTCA did not affect the continued viability of this previously enacted provision of the Local Highway Law, § 3655 presents entirely independent authority for the recovery for injuries caused by latent defects in sidewalks. Liability under § 3655, however, has its own pre-conditions and damages limitations that are also totally unrelated to those found in the MTCA. Any claim brought under § 3655 must be brought within a one year statute of limitations, compared with the two-year statute of limitations that governs claims brought under the MTCA. In the case of a town, damages recovered under § 3655 cannot exceed $6,000. In the case of fatalities, that damage limitation under § 3655 is raised to $25,000 per individual claim, and $300,000 in total for a single occurrence. While multiple fatalities are obviously more likely to be encountered in a road defect case rather than a sidewalk defect case, a serious fall caused by a defect in a sidewalk certainly has the potential to cause someone's death. This damage limitation of §3655 contrasts with the MTCA's limitation of $10,000 in recoverable damages against any individual government employee and $400,000 against the governmental entity as a combined single limit for one occurrence.

Finally, § 3655 may only be used to impose liability where the municipality had 24 hours' actual notice of the defect or want of repair, and failed to correct it. There is no such specific advance notice requirement for sidewalk cases brought under the MTCA, presumably because the fact that the defect was caused by the entity's own construction, cleaning or repair activities should provide such notice to the one performing the activities. The notice required by § 3655 in the case of a municipality requires that the notice be given municipal officials or the road commissioner of the town, or any person authorized to act as a substitute for either the municipal officials or road commissioner. If the injured person had notice of the defective condition prior to the time of the injury, however, that person cannot recover against the

municipality unless he/she has personally notified one of the municipal officials of the defective condition in the town way. Any person seeking to use § 3655 as a means to recovery must also provide the municipality with notice of their claim within 180 days of the injury, just as in a MTCA case.

The scant case law that addresses sidewalk claims brought under § 3655 sheds almost no light on what comprises an actionable "defect" in a sidewalk. Slippery conditions caused by snow and ice, a commonly encountered condition, cannot be the basis of an action against a municipality. See 23 M.R.S.A. § 3658. Poor lighting has been raised in a few cases where people have fallen at night on sidewalks outside public buildings. Such cases have been argued both as defects of the sidewalk itself or as defects of the municipal building where the outdoor lighting was affixed to the building. Neither approach has been successful. For purposes of the MTCA, the courts have held that insufficient lighting is not going to be considered beyond that needed to illuminate external stairs, porches, etc., which qualify as appurtenances to the municipal building itself, and have refused to extend liability for defective lighting beyond the appurtenance to the adjacent sidewalk areas. See *Swallow v. City of Lewiston*, 534 A.2d 975 (Me. 1987). They have also held that a defect in lighting over a sidewalk is not a defect in the sidewalk itself, presumably dooming any effort to use § 3655 to avoid the limitation of MTCA-based claims. See *Donovan v. City of Portland*, 850 A.2d 319 (Me. 2004).

In the most notable case for § 3655 before the Law Court, the majority of the case is concerned with the determination of the type of evidence that may be used to circumstantially prove that a defect existed. In *Simon v. Town of Kennebunkport*, 417 A.2d 982 (Me. 1980), plaintiff alleged that he fell on a sidewalk that was uneven and inclined. Plaintiff also contended this location had been the scene of approximately 100 prior falls in the three years from the date of construction of the sidewalk to the date of plaintiff's fall. The plaintiff sought to introduce evidence from two merchants, in front of whose store the sidewalk passed, who were prepared to testify that they observed a person fall on that area of the sidewalk nearly every single day. The trial court refused to allow that testimony, saying it was irrelevant because it was not probative of the condition of the sidewalk at the time of plaintiff's fall. That ruling is hard to understand, given that the court was not concerned with something transient like a patch of ice that would not have been the same at the time of two different falls, but was based instead on the unevenness and steep incline which presumably did not change from the time of one fall to the next.

In Simon the Law Court found that the trial court had committed error by excluding that evidence, finding that testimony about the other accidents would have shown that they occurred under circumstances that were "substantially similar" to those of the case at hand, and should have been admitted. It appears from the decision that the town filed its own cross-appeal regarding the sufficiency of the notice it had under § 3655, but it dismissed that appeal without explanation prior to the Law Court's decision. As a result, it is not possible to determine what the town had initially raised as a lack of notice issue, which it later abandoned. But one might speculate that if there truly were more than 100 prior falls at that same location, the odds are pretty good that the town received at least one prior complaint about the alleged defect and thus was on notice of it.