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James H. Stethem

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## *Abutting Owner's Liability for Special Use of Sidewalk*

James H. Stethem\*

**T**HIS ARTICLE EXAMINES the liability of an abutting land owner or possessor, making special use of a public sidewalk, for injuries received by persons while on the sidewalk. An abutting owner is defined as "an owner of land which abuts, adjoins or is in close proximity."<sup>1</sup> The definition includes the owner or possessor of property which abuts or adjoins land which legally constitutes a public right of way.<sup>2</sup>

An abutting owner is generally not liable for the defective condition of a public sidewalk abutting his property where the defect which resulted in injury to the plaintiff cannot be traced to the defendant abutting owner.<sup>3</sup> The rule has been long established and followed that there exists no duty on the part of the abutting owner to construct, maintain, clean or otherwise care for the public sidewalk, absent any statute or ordinance imposing a duty.<sup>4</sup>

The abutting owner is, however, under a duty to maintain his own premises so that nothing originating on said premises operates to cause a defect in the adjoining public sidewalk.<sup>5</sup> The duty does not imply an obligation to keep the public sidewalk free from other defects.<sup>6</sup> The duty is imposed by reason of the assumption that the abutting owner has the control of and consequently the responsibility for instrumentalities and activities on his own premises.<sup>7</sup> In the broad sense, any person or corporation creating defects or obstructions in or on a public sidewalk which wrongfully cause injury to members of the public may be held liable under the doctrine of nuisance.<sup>8</sup>

### **Injuries Resulting from the Accumulation of Ice and Snow—in General**

An abutting owner may be held liable at common law to persons injured as a result of his wrongful act in accumulating snow or ice on the public sidewalk.<sup>9</sup> Thus, an abutting owner is liable if he constructs

\* B.S., Miami University; Cost Accountant, Ford Motor Co.; Fourth-year student at Cleveland-Marshall Law School of Baldwin-Wallace College.

<sup>1</sup> Black's Law Dictionary, 26 (4th ed., 1951).

<sup>2</sup> Annot., 73 A. L. R. 2d 652 (1960).

<sup>3</sup> Massey v. Worth, 39 Del. 211, 197 A. 673 (1938); Le Barre v. Pac. Paper Materials Co. Inc., 175 Ore. 614, 154 P. 2d 985 (1945).

<sup>4</sup> Moore v. City of Columbus, 74 Ohio L. Abs. 136, 139 N. E. 2d 656 (1956).

<sup>5</sup> Galiano v. Pac. & Elec. Co., 20 Cal. App. 2d 534, 67 P. 2d 388 (1937).

<sup>6</sup> *Ibid.*

<sup>7</sup> Muratori v. Stiles & Reynolds Brick Co., 128 Conn. 674, 25 A. 2d 58 (1942); Steeno v. Wolff, 14 Wis. 2d 68, 109 N. W. 2d 452 (1961).

<sup>8</sup> Greenberg v. F. W. Woolworth Co., 195 App. Div. 509, 186 N. Y. S. 2d 303 (1959).

<sup>9</sup> Massey v. Worth, *supra* n. 2.

or maintains a structure upon his premises causing an artificial discharge or accumulation of water upon a public sidewalk which subsequently freezes and becomes the proximate cause of injury to one lawfully upon the sidewalk.<sup>10</sup>

An abutting owner will not be held liable, at common law, for persons injured as a result of *natural* accumulations of ice and snow.<sup>11</sup> The general rule of no liability in the absence of negligence by the abutting owner is founded on the reasoning that it is the duty of the municipality to keep the public sidewalk free from ice and snow.<sup>12</sup>

Liability will not be thrust upon an abutting owner who has violated an ordinance or statute through his failure to remove ice and snow from a sidewalk abutting his premises where said ice and snow accumulated by natural forces.<sup>13</sup> The ordinance or statute is to be viewed as being in the nature of a public duty and thus will not lend itself to the bringing of a civil action in tort by an individual against the abutting owner.<sup>14</sup> The municipality cannot relieve itself of its primary duty with regard to the safety of a public sidewalk.<sup>15</sup>

### Right to Special Use of a Public Sidewalk

Does an abutting owner have any right under the law to make a special use of a public sidewalk? Generally, the abutting owner has a right to a special use, which amounts to an encroachment on the primary rights of the public, for a limited extent and for a purpose which is temporary in duration.<sup>16</sup> The abutting owner's right to a special use of a public sidewalk is an incident of ownership not to be denied unless adequate compensation is received by him.<sup>17</sup>

The measure of the right of an abutting owner to use the public sidewalk for his own convenience or benefit<sup>18</sup> is that of reasonable in-

<sup>10</sup> 25 Am. Jur., Highways § 523 (1940).

<sup>11</sup> Massey v. Worth, *supra* n. 2.

<sup>12</sup> McGrath v. Misch, 29 R. I. 49, 69 A. 8 (1908); Therrien v. First Nat'l. Stores, Inc., 63 R. I. 44, 6 A. 2d 731 (1939).

<sup>13</sup> Sewall v. D. Alvin Fox, 98 N. J. L. 819, 121 A. 669 (1923); Swenson v. Lashell, 118 Colo. 333, 195 P. 2d 385 (1948); Donovan v. Kane, 190 Misc. 473, 75 N. Y. S. 2d 462 (1947); Olm v. State of New York, 207 Misc. 610, 139 N. Y. S. 2d 701 (1955); Walley v. Patake, 271 Wis. 530, 74 N. W. 2d 130 (1956).

<sup>14</sup> Annot., 28 A. L. R. 1360 (1924).

<sup>15</sup> Steinbeck v. John Hauck Brewing Co., 7 Ohio App. 18, 30 Ohio C. C. Dec. 328 (1916).

<sup>16</sup> Brey v. Rosenfeld, 72 R. I. 28, 48 A. 2d 177 (1946), *aff'd.* on appeal 72 R. I. 316, 50 A. 2d 911 (1947); Lanca v. Central Engineering & Constr. Co., 75 R. I. 365, 66 A. 2d 638 (1949); Barrett v. Union Bridge Co., 117 Ore. 220, 243 P. 93 (1926); Oregon Inv. Co. v. Schrunck, 81 Ore. 575, 408 P. 2d 89 (1965).

<sup>17</sup> Pearsall v. Bd. of Supervisors of Eaton County, 74 Mich. 558, 42 N. W. 77 (1889); Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108 (1905); Cushing-Wetmore v. Gray, 152 Cal. 118, 92 P. 70 (1907).

<sup>18</sup> R. L. Sabbath v. City of Chicago, 56 Ill. App. 2d 307, 206 N. E. 2d 286 (1965).

gress and egress under the prevailing circumstances.<sup>19</sup> The right must be exercised with proper and reasonable care not inconsistent with the paramount right of the public.<sup>20</sup> The test to be applied is that of reasonableness of use which must balance the public safety with the benefit to be derived from such use by the abutting owner,<sup>21</sup> or, more specifically, it may require a balancing of a legitimate business interest with the hazards to the general public using the sidewalk.<sup>22</sup> Because of the property right concept favoring the abutting owner as to the special use of a public sidewalk, the courts oppose any denial of the right by a state or municipality; unless, as previously mentioned, adequate compensation is given.<sup>23</sup> An abutting owner was denied the use of a public sidewalk for the purpose of ingress and egress to his property because the facts revealed that the exercise of such right would create "a real traffic hazard."<sup>24</sup> In the opinion of this writer, the better view taken when a balancing of the interests is involved is to refrain from denying a special use by the abutting owner merely because such use increases the possibility of danger.<sup>25</sup> The special use is not to be upheld solely on the basis that it is essential to the profitable operation of a business enterprise.<sup>26</sup> The test of reasonableness of the special use should include all relevant factors with due consideration being given to each.

A special use of a public sidewalk by an abutting owner in direct conjunction with his business enterprise, as a driveway for delivery trucks, was found to be within the general rule of the right of ingress and egress.<sup>27</sup> The circumstance of a filling station operator using the public sidewalk as a means of ingress and egress for his patrons was found to be proper and reasonable.<sup>28</sup> The right to a special use of a public sidewalk, thus, extends to the patrons, clients and customers of an abutting owner.<sup>29</sup>

The abutting owner should keep uppermost in mind, when using a public sidewalk for any private or public purpose, that the primary

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<sup>19</sup> *Deaconess Hospital v. Washington State Highway Commission*, 66 Wash. 2d 378, 403 P. 2d 54 (1965); *Salem Nat'l. Bank v. City of Salem*, 47 Ill. App. 2d 279, 198 N. E. 2d 137 (1964).

<sup>20</sup> *City of Elmhurst v. Buettgen*, 394 Ill. 248, 68 N. E. 2d 278 (1946).

<sup>21</sup> *R. L. Sabbath v. City of Chicago*, *supra* n. 18.

<sup>22</sup> *Annot.*, 73 A. L. R. 2d 652 (1960).

<sup>23</sup> *Pearsall v. Bd. of Supervisors of Eaton County*, *supra* n. 17; *Northern Boiler Co. v. David*, 157 Ohio St. 564, 105 N. E. 2d 451 (1951), *aff'd* 157 Ohio St. 564, 106 N. E. 2d 620 (1952); *Thomas v. Jultak*, 68 Wyo. 198, 231 P. 2d 974 (1951).

<sup>24</sup> *Alexander v. City of Owatonna*, 222 Minn. 312, 24 N. W. 2d 244 (1946).

<sup>25</sup> *Tilton v. Sharpe*, 84 N. H. 43, 146 A. 159 (1929).

<sup>26</sup> *City of San Antonio v. Pigeonhole Parking of Texas, Inc.*, 158 Tex. 318, 311 S. W. 2d 218 (1958).

<sup>27</sup> *City of Evansville v. Cunningham*, 202 N. E. 2d 284 (Ind. App. 1964).

<sup>28</sup> *Brownlow v. O'Donoghue*, 276 Fed. 636 (C. A., D. C., 1921).

<sup>29</sup> *Tilton v. Sharpe*, *supra* n. 25.

function or reason for the sidewalk is for public travel and the right of special use is secondary or subordinate.<sup>30</sup>

### Duty and Care Imposed by Special Use

The abutting owner is under no common law duty to keep the public sidewalk in repair in absence of his negligence.<sup>31</sup> When a special use is involved, the general rule is that the abutting owner is under a duty to maintain that part of the sidewalk put to his use in a reasonably safe condition for public use, and the abutting owner is liable for injuries received by persons as the proximate result of his failure to use reasonable care to prevent injury to persons lawfully upon the sidewalk.<sup>32</sup>

The fact of the special use itself takes the case from the general rule of no liability of an abutting owner and creates the exception to the general rule.<sup>33</sup> Where the primary action is against the abutting owner and a special use is not established, there will not be a recovery from the abutting owner.<sup>34</sup> The courts have held as a general rule that an abutting owner who has a special use in a public sidewalk may become liable where the abutting owner has created the defective condition or where his special use has produced the defective condition.<sup>35</sup> The abutting owner's liability is not changed where the defect, for which the abutting owner is being charged, was created by an independent contractor hired by the abutting owner.<sup>36</sup> Liability will also attach to the present property owner although the defect was brought about by the activities of the previous owner of the property.<sup>37</sup> The court held the test of liability to be the "capability of the appurtenance"<sup>38</sup> and that the duty was a covenant that ran with the land.<sup>39</sup>

The degree of care required of an abutting owner having a special use in a public sidewalk has been held to be that of the highest vigilance

<sup>30</sup> 3 Cooley, Torts 452 (4th Ed. 1932); Hickey v. Riley, 177 Ore. 321, 162 P. 2d 371 (1945).

<sup>31</sup> Louis Pizitz Dry Goods Co. v. Harris, 270 Ala. 390, 118 So. 2d 727 (1959).

<sup>32</sup> Fortmeyer v. National Biscuit Co., 116 Minn. 158, 133 N. W. 461 (1911); Granucci v. Claasen, 204 Cal. 509, 269 P. 437 (1928); Texas Co. v. Williams, 228 Ala. 30, 152 So. 47 (1934); 63 C. J. S. 225 (1950); Annot., 88 A. L. R. 2d 331 (1963); Lee v. City of Baton Rouge, 141 So. 2d 125 (La. App. 1962), the appellate court reversed as to co-defendant municipality; municipality was secondarily liable, 243 La. 850, 147 So. 2d 868 (1963).

<sup>33</sup> Kopfinger v. Grand Cent. Public Market, 37 Cal. Rptr. 65, 389 P. 2d 529 (1964); Lee v. Ashizawa, 37 Cal. Rptr. 71, 389 P. 2d 535 (1964).

<sup>34</sup> Goldner v. Wiener, 36 Misc. 2d 741, 236 N. Y. S. 2d 160 (1956).

<sup>35</sup> Braithwaite v. Grand Union Co., 22 App. Div. 2d 941, 255 N. Y. S. 2d 924 (1964).

<sup>36</sup> Brown v. Gustafson, 264 Minn. 126, 117 N. W. 2d 763 (1962).

<sup>37</sup> Hughes v. City of New York, 236 N. Y. S. 2d 446 (Sup. Ct. 1963), aff'd 268 N. Y. S. 2d 985.

<sup>38</sup> *Ibid.*

<sup>39</sup> Nickelsburg v. City of New York, 263 App. Div. 625, 34 N. Y. S. 2d 1 (1942); Heron v. City of Youngstown, 136 Ohio St. 190, 24 N. E. 2d 708 (1940).

and care necessary to keep the sidewalk safe for the public,<sup>40</sup> although this does not mean to keep the sidewalk in perfect condition.<sup>41</sup> The minimum duty of care to which an abutting owner will be held is that of reasonable care and reasonable prudence to discover any defective condition in the sidewalk but there will be no liability where the reasonably prudent man would not have anticipated injury to others<sup>42</sup> or where those who use the sidewalk have knowledge of the defective condition.<sup>43</sup>

### **Establishing a Special Use Sufficient for Liability to Attach**

The elements necessary to constitute or establish a special use of a public sidewalk, in the view of the law, are by no means settled or certain. The most definite situation of a special use arises where the sidewalk has been specifically altered to meet a particular purpose of the abutting owner.<sup>44</sup> The liability for injuries received as the proximate result of the special use must rest with either the municipality owning the sidewalk or with the abutting owner having the special use. The question of liability revolves around the issue of for whose benefit the alteration was made.<sup>45</sup> When an abutting owner constructs any opening or makes any other alteration in a public sidewalk for his own benefit or convenience he owes a duty to the public.<sup>46</sup> The duty of the abutting owner is created only where he has made the construction or alteration and not where the municipality has done so, although the abutting owner may derive a secondary benefit therefrom.<sup>47</sup>

The showing or establishment of a special use is more difficult in situations void of a specific construction or alteration. The plaintiff in a leading California case alleged that the defendant abutting owner had made a special use of the public sidewalk in that the sidewalk was being used as a driveway for the benefit of the defendant, but not for a business enterprise of the defendant.<sup>48</sup> The court ruled in favor of the defendant abutting owner by finding that the facts of the case did not bring it within the exception to the general rule and therefore found no liability of abutting owner to plaintiff.<sup>49</sup> The gist of the decision is that as

<sup>40</sup> *Cool v. Rohrbach*, 21 S. W. 2d 919 (Mo. App. 1929).

<sup>41</sup> *Degheri v. Brooklyn Daily Eagle*, 136 Misc. 600, 240 N. Y. S. 304 (1930).

<sup>42</sup> *City of Grand Forks v. Paulsness*, 19 N. D. 293, 123 N. W. 878 (1909); *Belk-Matthews Co. of Macon v. Thompson*, 94 Ga. App. 331, 94 S. E. 2d 516 (1956).

<sup>43</sup> *Lacy v. Uganda Inv. Corp.*, 7 Ohio App. 2d 237, 220 N. E. 2d 130 (1964).

<sup>44</sup> *Monroe, Liability for Sidewalk Structures Placed There by Abutting Owner or Occupier*, 6 Mo. L. Rev. 122 (1941).

<sup>45</sup> *Ibid.*

<sup>46</sup> 2 Restatement of Torts 230 (1965); *Bergley v. Manis*, 99 N. W. 2d 849 (Sup. Ct. N. D. 1959).

<sup>47</sup> *Watts v. R. A. Long Bldg. Corp.*, 142 S. W. 2d 98 (Mo. App. 1940).

<sup>48</sup> *Winston v. Hansell*, 160 Cal. App. 2d 570, 325 P. 2d 569 (1958).

<sup>49</sup> *Ibid.*

a general rule the use of a public sidewalk as a driveway was found to be an ordinary use and not a special use of the sidewalk.<sup>50</sup> An apparent distinction has been made between a use for a private purpose and a use for a commercial purpose. The distinction is that it is more probable that a special use and the concomitant liability and duty will be found as to abutting owners operating a commercial establishment as opposed to a private residence.<sup>51</sup> This poses the unresolved question of whether any use of a public sidewalk by an abutting owner for a commercial purpose is therefore a special use.

An abutting owner was found not liable where it was clearly shown that he was using the public sidewalk as a driveway for customers of his automobile agency. The rationale of the court was that the public created the defective condition of the sidewalk and only the municipality had a duty to take the necessary corrective action.<sup>52</sup> Liability of an abutting owner has also been denied where the defective condition complained of was caused by a special use, but was either trivial, not inherently dangerous, or was not the proximate cause of the injury.<sup>53</sup>

The abutting owner must be found to have done sufficient acts of affirmative negligence to warrant a finding of liability.<sup>54</sup> The abutting owner will not be found liable where plaintiff has failed to establish an act or series of acts showing affirmative negligence.<sup>55</sup> Liability of the abutting owner was not established where no acts of affirmative negligence were shown, although the abutting owner had been notified of the defect and had been requested to make the necessary repairs but had failed to do so.<sup>56</sup> A mere affirmative act will not establish liability such as an abutting owner, having a special use in the sidewalk, who attempts to remove ice and snow from the sidewalk, unless he was negligent in so doing.<sup>57</sup> This principle was applied to a case of an abutting owner who operated a filling station and used the public sidewalk as a driveway. The surface of the sidewalk became corrugated due to the traffic of the abutting owner's customers, but no liability was found because the corrugation was caused naturally as opposed to any acts of affirmative negli-

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<sup>50</sup> *Citizens Sav. Bank of Baltimore v. Covington*, 174 Md. 633, 199 A. 849 (1938); *City of Bessemer v. Brantley*, 258 Ala. 675, 65 So. 2d 160 (1953); *Breuer v. Mataloni*, 133 N. W. 2d 114 (Sup. Ct. Iowa 1965).

<sup>51</sup> *Breuer v. Mataloni*, *supra* n. 50; *Franzen v. Dimock Gould & Co.*, 251 Iowa 742, 101 N. W. 2d 4 (1960).

<sup>52</sup> *Adams v. Grapotte*, 69 S. W. 2d 460 (Tex. Civ. App. 1934), *aff'd*. 130 Tex. 587, 111 S. W. 2d 690 (1938).

<sup>53</sup> *Annot.*, 88 A. L. R. 2d 331 (1963).

<sup>54</sup> *Note, Negligence—Liability of an Abutting Owner*, 18 Wash. L. Rev. 41 (1943).

<sup>55</sup> *Bennett v. McGoldrick-Sanderson Inc.*, 15 Wash. 2d 130, 129 P. 2d 795 (1942); *Den Braven v. Public Service Elec. & Gas Co.*, 115 N. J. L. 543, 181 A. 46 (1935).

<sup>56</sup> *Gossler v. Miller*, 221 A. 2d 249 (Sup. Ct. N. H. 1966).

<sup>57</sup> *Abar v. Ramsey Motor Service Inc.*, 195 Minn. 597, 263 N. W. 917 (1935); *Rosenblum v. Economy Grocery Stores Corp.*, 300 Mass. 264, 15 N. E. 2d 189 (1938).

gence being the causation.<sup>58</sup> An accumulation of snow, natural in origin, will not be transformed into an artificial accumulation merely by people walking upon it, causing it to become compressed.<sup>59</sup> An intervening act of the abutting owner does not necessarily change a natural accumulation into an artificial accumulation. The court held it to be a natural accumulation where the abutting owner shoveled snow from his property onto piles of snow created by municipal snowplows.<sup>60</sup>

Affirmative negligence was established by proof that the trucks of an abutting owner who used a public sidewalk as a driveway, had deposited loose gravel on the sidewalk resulting in injury to plaintiff.<sup>61</sup> The affirmative negligence coupled with a use resulted in the finding of a special use and corresponding liability.<sup>62</sup> Time was an important element in establishing affirmative negligence where the trucks of the abutting owner had passed over the public sidewalk almost daily for twenty years.<sup>63</sup> Mere ordinary wear and tear causing a defect in a sidewalk is not sufficient to hold an abutting owner liable even though the abutting owner's use of the sidewalk was shown to have been strenuous and "accelerated" ordinary wear and tear.<sup>64</sup>

The courts will generally view the issue of a special use of a public sidewalk by an abutting owner, using the following criteria:<sup>65</sup>

- (1) a special use of the sidewalk by the defendant abutting owner,
- (2) an allegation of facts showing a defect or hazard in the sidewalk,
- (3) the hazard or defect created by an act or omission of the defendant abutting owner in relation to his special use of the sidewalk,
- (4) knowledge of said hazard or defect by defendant abutting owner,
- (5) injury to plaintiff as a proximate result of the above.

The question of negligence is always for the jury to decide, unless reasonable men would not differ, and a myriad of factors must be considered to establish a probability and not a mere possibility of harm.<sup>66</sup>

- (1) the condition of other sidewalks in the area and surrounding areas,

<sup>58</sup> *Bennett v. McGoldrick-Sanderson Inc.*, *supra* n. 55.

<sup>59</sup> *Rainey v. Harshbarger*, 7 Ohio App. 2d 260, 220 N. E. 2d 359 (1963); *Debie v. Cochran Pharmacy-Berwick Inc.*, 8 Ohio App. 2d 275 (decided Nov. 22, 1966).

<sup>60</sup> *Riccitelli v. Sternfeld*, 1 Ill. 2d 133, 115 N. E. 2d 288 (1953); *Kelley v. Park View Apts. Inc.*, 215 Ore. 198, 330 P. 2d 1057 (1958).

<sup>61</sup> *James v. Burchett*, 15 Wash. 2d 119, 129 P. 2d 790 (1942).

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ford v. City of Shreveport*, 165 So. 2d 325 (La. App. 1964).

<sup>64</sup> *Purdum v. Sapadin*, 111 Ohio App. 488, 168 N. E. 2d 558 (1960).

<sup>65</sup> *Weinberg v. Wing*, 16 App. Div. 2d 900, 228 N. Y. S. 2d 740 (1962); *Annot.*, 88 A. L. R. 2d 331 (1963).

<sup>66</sup> *Note, Sidewalk Defects—Question for Jury*, 29 Tenn. L. Rev. 592 (1962).

- (2) the cost of maintaining the sidewalk in better condition,
- (3) abutting owner's knowledge or notice of the defect in the sidewalk,
- (4) weather conditions,
- (5) volume of traffic under normal circumstances,
- (6) likelihood that the person will traverse the defect by selecting an alternate route.

### **Effect of Statute Attempting to Impose Liability for Failure to Maintain the Sidewalk**

The practical result of imposing liability on an abutting owner for special use of a public sidewalk is to impose liability where it ordinarily does not exist except for the special use.<sup>67</sup> Any statute or ordinance purporting to impose on an abutting owner the duty of maintaining a public sidewalk, in which he has a special use, is in derogation of the common law and will be strictly construed.<sup>68</sup>

Pennsylvania is the exception to the general rule and holds that an owner or possessor of abutting property is liable to persons injured as a result of his failure to maintain the sidewalk.<sup>69</sup> The Pennsylvania law proceeds to develop decisions from the standpoint of primary liability with respect to the abutting owner and secondary liability with respect to the municipality.<sup>70</sup>

### **Licensee or Invitee Owed Any Higher Duty by Abutting Owner?**

The law is well settled that the main duty owed to a licensee by a possessor of land is that of using reasonable care in warning the licensee upon discovery of any dangerous conditions.<sup>71</sup>

The law is also well settled that the duty owed by a possessor of land to an invitee is to use reasonable care to make the premises safe for him or to warn him of those dangers known to the possessor.<sup>72</sup> The duty exists only while the invitee is upon a part of the premises to which the invitation extends.<sup>73</sup>

<sup>67</sup> *Kopfinger v. Grand Cent. Public Market*, *supra* n. 33.

<sup>68</sup> *Texas Co v. Grant*, 143 Tex. 145, 182 S. W. 2d 996 (1944); *Dennison v. Buckeye Parking Corp.*, 94 Ohio App. 379, 115 N. E. 2d 187 (1953); *Sternitzke v. Donahue's Jewelers*, 249 Minn. 514, 83 N. W. 2d 96 (1957).

<sup>69</sup> *Lohr v. Borough of Philipsburgh*, 156 Pa. 246, 27 A. 133 (1893); *City of Pittsburgh v. U. S.*, 359 F. 2d 564 (3rd Cir. 1966).

<sup>70</sup> *Koerth v. Borough of Turtle Creek*, 355 Pa. 121, 49 A. 2d 398 (1946); Pa. Stat. Ann. tit. 53 § 1891.

<sup>71</sup> *Prosser, Law of Torts* 445 (1955).

<sup>72</sup> *Nunley v. Pettway Oil Co.*, 346 F. 2d 95 (6th Cir. 1965); *York v. Murphy*, 264 N. C. 453, 141 S. E. 2d 867 (1965); *Lorraine v. E. M. Harris Bldg. Co.*, 391 S. W. 2d 939 (Mo. App. 1965).

<sup>73</sup> *Clement v. Bohning*, 159 So. 2d 495 (La. App. 1963).

An issue that is not so well settled is whether a public sidewalk in which the abutting owner has a special use is within the scope of the invitation so as to constitute a part of the premises.

One view is that an abutting owner is not liable as an invitor to his invitee for injury sustained by the invitee on a public sidewalk. The rationale employed in such view is that the municipality has the duty to the public of exercising reasonable care with respect to persons using the sidewalk.<sup>74</sup> This was held to be the law where an abutting owner had a special use in a public sidewalk for patrons of his theatre. The court found that the sidewalk was not a part of the business premises and hence not within the scope of the invitation.<sup>75</sup> Based on this view it can thus be stated that situations involving an invitee do not impose any higher degree of care than is owed to the general public.<sup>76</sup>

The opposing view is that an invitation by an abutting owner carries with it the duty to provide reasonably safe means of ingress and egress.<sup>77</sup> The general theory states that an abutting owner must keep the approaches to his building safe for his invitees because these approaches are within his control.<sup>78</sup> The rule is conditioned by the requirement of notice by the abutting owner of any hazard or defective condition.<sup>79</sup> A bank was held not liable to the plaintiff where proof was given that the bank had no notice, either actual or constructive, of the defect resulting in injury to the plaintiff.<sup>80</sup>

### The Possibility of a New Trend

The reported cases do not indicate the presence of any major changes in the established rules governing the liability of an abutting owner as to a special use of a public sidewalk. When an abutting owner has been found to have a special use of a public sidewalk to further a commercial purpose it may be advanced that the business proprietor or operator should bear liability as a risk of doing business, as the cost of this risk would be passed on to his customers. Such a theory was put

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<sup>74</sup> *Davis v. West Shore Co.*, 55 Cal. App. 2d 220, 130 P. 2d 459 (1942); Annot., 81 A. L. R. 2d 750 (1962). In Ohio, the municipality has a statutory duty to keep its public sidewalks open, in repair, and free from nuisance. Anyone on a sidewalk has the right to assume that the municipality has performed its statutory duty, unless the person has notice to the contrary, as held in *Darst v. City of Columbus*, 25 Ohio L. Abs. 397 (1937); *Moore v. Geiger*, 6 Ohio App. 2d 14 (1966).

<sup>75</sup> *Miller v. Welworth Theatres of Wisconsin*, 272 Wis. 355, 75 N. W. 2d 286 (1956).

<sup>76</sup> *Fallon v. Zara Contracting Co. Inc.*, 204 Misc. 895, 125 N. Y. S. 2d 731 (1953).

<sup>77</sup> *Parsons v. Sears, Roebuck & Co.*, 69 Ga. 11, 24 S. E. 2d 717 (1943); *Flint River Cotton Mills v. Colley*, 71 Ga. 288, 30 S. E. 2d 426 (1944); *Rainey v. Harshbarger*, 7 Ohio App. 2d 260, 220 N. E. 2d 359 (1963).

<sup>78</sup> Note, *Liability of Storekeeper to Customer*, 24 Geo. L. J. 1043 (1936); *Gilroy v. U. S.*, 112 F. Supp. 664 (D. C., D. C. 1953); *Blaine v. U. S.*, 102 F. Supp. 161 (N. D. Tenn. 1951).

<sup>79</sup> *Gabriel v. Bank of Italy*, 204 Cal. 244, 267 P. 544 (1928).

<sup>80</sup> *Ibid.*

forth in a case where the attorney for the plaintiff realized that no duty existed between the plaintiff and the defendant as to the special use, because the defect had been naturally caused and the plaintiff did not allege any wrongful or illegal use of the sidewalk by the defendant.<sup>81</sup> The plaintiff reasoned that the law of sidewalks and their use by the abutting owners must be viewed in the light of modern selling methods and business operations. Although the court found for the defendant in that case, the theory advanced by the plaintiff is important in that it attempts to assert a form of strict liability where the special use involved concerns a commercial purpose. The theory appears to have a fiber of rationality based upon the "deep-pocket" concept, but this would, in effect, attach an even higher duty on an abutting owner to the public than that which he owes to others, such as business invitees. It can thus be realized that the courts will continue to require affirmative negligence by the abutting owner before rendering a finding of liability.

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<sup>81</sup> Daley v. Sears, Roebuck & Co., 90 F. Supp. 562 (N. D. Ohio 1950).