

***SIDEWALKS AFTER RIVETT: A DISCUSSION OF TORT LIABILITY,  
PREVENTIVE ORDINANCES AND OTHER STRATEGIES<sup>1</sup>***

In Rivett v. Tacoma, 123 Wn.2d 573, 870 P.2d 299 (1994), the Washington Supreme Court invalidated a Tacoma ordinance making landowners who failed to notify the City of hazardous sidewalk conditions liable for all amounts paid to any person suffering injury on account of the sidewalk defect. The Court obviously took exception to the breadth of the ordinance, which it felt would render a wholly innocent adjoining owner liable even for unreasonable tort settlements, without notice or opportunity to be heard. The Court concluded that the ordinance exceeded Tacoma's police powers and deprived abutting owners of substantive due process.

The Rivett Court provided a list of the reasons why it believed the ordinance exceeded Tacoma's police powers. Read literally, the opinion could invalidate any municipal effort to control its sweeping potential liability exposure for sidewalk-related injuries. However, in the context of sidewalk liability cases, it may not be necessary to read Rivett so broadly; some forms of liability-shifting ordinances may pass muster.

It is therefore necessary to study the Rivett holding, its underlying rationale, and the alternative reasons stated for invalidating the Tacoma ordinance, in order to determine whether any preventive measures would pass muster under Rivett. In addition, this paper will summarize the law of public and private

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liability for sidewalk injuries generally, and conclude that the Rivett case was designed by its author to maintain the *status quo* until some more compelling reason to render private citizens liable for sidewalk defects is identified, and a more sensitive set of procedures is created to adjudicate private liability.

**A. Facts of Rivett and the Tacoma Ordinance.**

In 1967, Tacoma adopted an ordinance declaring that every person who owned property abutting a public right of way owed a duty to the public not "to construct, place, cause, maintain or permit to remain" a hazardous condition on any sidewalk. This duty extended to a duty to report "defective sidewalk surfaces." Breach of the duty created by this ordinance, T.M.C. 9.17.010, rendered the abutting owner liable if any personal injury or property damage was proximately caused by the breach. T.M.C. 9.17.020.

The scope of the abutting owner's liability was stated in absolute terms--if there is an injury related to a sidewalk defect, the abutting owner is liable:

[The abutting owner] shall be liable to the City for all damages or injuries, costs and disbursements which the City may be required to pay to the person injured or damages...

T.M.C. 9.17.020. A proviso to the ordinance allowed the abutting owner to escape liability "if, prior to the date of injury, a notice in writing was given to the Director of Public Works" setting forth the location and nature of the defect.

Thus Tacoma attempted to shift the burden of paying damages to persons hurt by a sidewalk defect from the public sector to

private, abutting landowners. The form of the liability shift was the creation of a new tort duty, the duty to notify the City of any sidewalk defect.

Helen Rivett suffered a broken arm when she tripped over a 1 3/8 inch rise at a sidewalk joint abutting property owned by the Gundermanns. The Gundermanns were New York residents. Rivett sued the City of Tacoma and the Gundermanns; the City cross-claimed against the Gundermanns, pursuant to the ordinance. Ms. Rivett's claim against the Gundermanns was dismissed by agreement, and Tacoma's cross-claim against them was dismissed for reasons not entirely clear on appeal. Tacoma appealed that order of dismissal.

On appeal, a unanimous Supreme Court affirmed. Writing for the Court, Justice Smith stated that the Tacoma ordinance was for a legitimate purpose, preventing sidewalk injuries, and used means reasonably necessary to accomplish the goal, requiring "persons in the best position to discover a sidewalk defect (the abutting property owners) to act to protect the public." 123 Wn.2d at 581.

However, the Court held that the ordinance violated substantive due process rights of abutting owners because the ordinance was "unduly oppressive." The "undue oppressiveness" was identified as follows:

The requirement of indemnification is "unduly oppressive". Under the ordinance, indemnification is not based upon a final judgment against the City, nor is it based upon a finding of fault against the abutting landowner. The plain language of the ordinance indicates it would penalize without limit an abutting landowner simply for failure to notify the City of defects in a public sidewalk by requiring the property owner to indemnify the City for "all damages or injuries,

costs and disbursements" the City may be required to pay to an injured person whenever there is an *injury*, rather than whenever there is a *judgment*.

123 Wn.2d at 581-582 (emphasis in original).

The Court also held that the ordinance was beyond the scope of the police powers of first class cities in Washington for several reasons:

*First*, it is primarily the City's duty to maintain public rights of way in a safe condition. Here the ordinance, TMC 9.17.010, purports to place that primary duty upon the abutting landowner. *Second*, it is clear that under RCW 35.22.280(30) a first class city may "declare what shall be a nuisance", may abate the nuisance and may "impose fines upon parties who create, continue, or suffer nuisances to exist". However, the words "impose fines" cannot be read to mean that the City may impose upon an abutting property owner a requirement for indemnification to the City "for all damages or injuries, costs and disbursements which the City may be required to pay to the person injured or damaged" under TMC 9.17.020. *Third*, the ordinance purports to require indemnification without adjudication of fault against the abutting landowner. *Fourth*, the requirement of indemnification is in violation of the abolition of governmental immunity under RCW 4.96.010 because it purports to immunize the City from payment for damages caused by its own negligence.

Rivett, 123 Wn.2d at 582-583 (emphasis added).

While there is no doubt that a unanimous Court deeply disapproved of the ordinance, at least two potentially critical points which remain unclear. First, at least two of the four enumerated defects in the ordinance would not appear to be unduly oppressive and thus violative of substantive due process rights of abutting owners. These are conflict-preemption-police power issues, not substantive due process issues.

Creating a new duty for a landowner to provide notice to the city of a defective sidewalk would not seem unduly harsh. On the other hand, a municipality may lack authority to create a new tort duty, or tort liability, at least if doing so falls wholly outside the scope of past practice. This is a police power issue, not a substantive due process issue, and should be analyzed as such.

Similarly, it does not follow from Justice Smith's conclusion that a liability-shifting ordinance violates the abolition of governmental immunity (apparently by creating immunity by passing on liability in an area traditionally within the scope of municipal liability, see Employco Personnel Serv. v. Seattle, 117 Wn.2d 606, 817 P.2d 1373 (1991)) that the ordinance is also unduly oppressive and therefore violates substantive due process rights of affected landowners. It appears that this issue is more properly considered a conflict-preemption issue, and that analysis should be applied to any examination of Rivett.

An open-ended fine for the maintenance of a nuisance and a requirement of indemnification without adjudication of fault, the other two enumerated defects in Tacoma's ordinance, would appear to be unduly oppressive, given the Court's apparent philosophy, and thus give rise to substantive due process issues. These points must be considered as due process problems in any future preventive law efforts.

Second, it is not clear whether Justice Smith's list of reasons is cumulative or alternative, or even whether the reasons must be read in light of the holding that the ordinance is "unduly

oppressive" for failure to require either proof of fault or a judgment against the city. If, for example, a new ordinance required an adjudication of fault of some kind before liability could shift to an abutting owner, thus eliminating the third objection to the Tacoma ordinance, it is unclear whether the ordinance would remain invalid for the other three stated reasons.

For purposes of this paper, it will be assumed that each of the reasons enumerated by Justice Smith for holding the Tacoma scheme invalid are alternative, and would alone defeat the ordinance. Accordingly, sidewalk liability generally, judicial limits upon the police power, and the Rivett grounds for invalidating Tacoma's ordinance, will be examined to determine whether any attempt to shift liability would withstand scrutiny.

#### **B. Municipal Sidewalk Liability Generally.**

In Kennedy v. Everett, 2 Wn.2d 650, 653, 99 P.2d 614, amended, 4 Wn.2d 729, 103 P.2d 371 (1940), the court stated that:

[W]hile a city must use all reasonable care in keeping its sidewalks reasonably safe for travel, it is not an insurer. That test which is sometimes applied as to whether a city has performed its duty, is whether a reasonably cautious man, having a duty to observe and repair the sidewalks, would or would not consider a defect as one where pedestrians might be injured. Each case must rest upon its own facts, and be determined accordingly.

If a defect in a sidewalk is insignificant, the city is not liable for injuries sustained by reason of such defect. Lewis v. City of Spokane, 124 Wash. 684, 215 P. 36 (1923).

The care required depends upon the circumstances, and it has been held that a city is under a greater duty to repair defects in downtown or other heavily-used portions of the city than in other areas. Morehouse v. City of Everett, 141 Wash. 399, 252 P. 157 (1926); see also Johnson v. City of Ilwaco, 38 Wn.2d 408, 229 P.2d 878 (1951). On the other hand, when an accident happens by reason of some defect in a public walk which was not reasonably to be anticipated and which, according to common experience, was not likely to happen, the city is not chargeable with negligence. Fritsche v. City of Seattle, 10 Wn.2d 357, 116 P.2d 562 (1941).

The extent to which a defect in a sidewalk would ordinarily be seen or observed by travelers on the sidewalk, as well as all other surrounding circumstances, must be considered in determining whether the City's conduct constituted negligence. Johnson v. City of Ilwaco, supra. It has been held that a City owes a duty of due care only to those using the sidewalk with due care for their own safety, and the court has reversed a jury award where a conflicting instruction may have confused the jury on this point. Smith v. City of Aberdeen, 7 Wn.App. 664, 502 P.2d 1034 (1972).

If the city does not itself cause the defect, the city is not chargeable with negligence for a sidewalk defect causing injury until the city receives actual or constructive notice of the defect, and after having received such notice, the city fails to make the necessary repairs. Russell v. City of Grandview, 39 Wn.2d 551, 236 P.2d 1061 (1951). A city is not chargeable with notice of a defect in a sidewalk merely because a subordinate employee having

no supervision of the streets may have known of it. Owen v. City of Seattle, 64 Wash. 10, 116 P. 261 (1911). On the other hand, a city which grants a property owner a permit to reconstruct the sidewalk abutting his property is charged with the duty of determining that the work is properly done, and the city has notice of a defective condition of the sidewalk resulting from the property owner's undertaking of the work. Colquhon v. City of Hoquiam, 120 Wash. 391, 207 P. 664 (1922). However, when the city is liable to an injured person for the conduct of a third party which rendered a sidewalk unsafe, the city is entitled to recover over against the wrongdoer. City of Seattle v. Shorrock, 100 Wash. 234, 170 P. 590 (1918).

It is sometimes stated that in order for a city to be liable to defects in a street or sidewalk, the city must have a reasonable period in which it could have discovered the defect. See, e.g., Georges v. Tudor, 16 Wn.App. 407, 556 P.2d 564 (1976); Wright v. City of Kennewick, 62 Wn.2d 163, 381 P.2d 620 (1963). It has been held that evidence that a sidewalk had been defective for three or four months preceding the injury will be sufficient to charge the city with constructive notice of the defect. Lorence v. City of Ellensburg, 13 Wash. 341, 43 P. 20 (1895). The court later held that the time frame sufficient to constitute constructive notice to a municipality must be determined from the circumstances of each particular case. Skaggs v. General Electric Co., 52 Wn.2d 787, 328 P.2d 871 (1958). Evidence of prior injuries at the same location



is admissible to establish notice of the defect. Turner v. City of Tacoma, 72 Wn.2d 1029, 435 P.2d 927 (1967).

Cities have no duty to keep streets reasonably safe in mid-block for jaywalkers. McKee v. City of Edmonds, 54 Wn.App. 265, 773 P.2d 434 (1989). While the city's duty only extends to persons using the sidewalk with due care, pedestrians have no duty to keep their eyes fixed on the sidewalk. Blasick v. City of Yakima, 45 Wn.2d 309, 274 P.2d 122 (1954). A pedestrian has the right to assume that the city has kept the right of way in a reasonably safe condition. Clevenger v. City of Seattle, 29 Wn.2d 167, 186 P.2d 87 (1947).

The courts have been especially protective of abutting property owners. It has been held repeatedly that abutting owners have no duty to take action, of any kind, with respect to the adjacent sidewalk, unless the abutting owner's use of that sidewalk itself creates the hazard to passing pedestrians. See, e.g., Groves v. City of Tacoma, 55 Wn.App. 330, 777 P.2d 566 (1989); Blodgett v. Olympic Savings and Loan Association, 32 Wn.App. 116, 646 P.2d 139 (1982); City of Seattle v. Shorrocks, 100 Wash. 234, 170 P. 590 (1918). It is the abutting owner's use of the property, and not use of the sidewalk, and not the mere ownership of abutting property, that gives rise to liability. James v. Burchett, 15 Wn.2d 119, 129 P.2d 790 (1942); Stone v. City of Seattle, 64 Wn.2d 166, 391 P.2d 179 (1964); Groves v. City of Tacoma, supra.

Where an abutting owner causes the dangerous condition by a special use of the property, such owner is directly liable to the

injured person. James v. Burchett, 15 Wn.2d 119, 129 P.2d 790 (1942). The city is also directly liable to the injured claimant, assuming the city was on notice of the defect, but may recover over against the at-fault abutting owner, originally under a "passive-active" theory of primary and secondary liability. See Cle Elum v. Yeaman, 145 Wash. 157, 160-61, 259 P. 35 (1927); Turner v. City of Tacoma, 72 Wn.2d 1029, 435 P.2d 927 (1967).

Much the same rationale applied to "stub toe" sidewalks applies to natural accumulations of ice and snow. The general rule is that the city has no duty to remove natural accumulations which are "merely" slippery; however, if the roughness of ice and accumulation of snow has become an obstruction to travel, the city may be held negligent and liable to injured third parties. Holland v. City of Auburn, 161 Wash. 594, 596-98, 297 P. 769 (1931).

However, a city has a reasonable time after the snowfall before it may be charged with negligence for failing to clear the natural accumulations away. Holland v. Auburn, supra, 161 Wash. at 598. It has been held that where an ordinance requires a property owner to clear the sidewalks crossing its property, a city is entitled to wait a reasonable time to see if the abutting property owner will remove snow and ice, before the burden is placed upon the city to remove the same. Hartley v. Tacoma School District No. 10, 56 Wn.2d 600, 354 P.2d 897 (1960).

A claimant in a snow and ice case is required to watch his/her step, and it is reversible error in such a case to instruct the

jury that a pedestrian need not keep his eyes fixed upon the sidewalk. Quinn v. McPherson, 73 Wn.2d 194, 437 P.2d 393 (1968).

The owner or occupant of abutting property is under no legal obligation to remove snow and ice from a sidewalk in front of the premises, absent proof of an act by the landowner to create or increase dangers associated with the accumulations. Ainey v. Rialto Amusement Co., 135 Wash. 56, 236 P.2d 801 (1925); Bennett v. McGoldrick-Sanderson Co., 15 Wn.2d 130, 129 P.2d 795 (1942).

In Gardner v. Kendrick, 7 Wn.App. 852, 503 P.2d 134 (1972), the Court held that a Yakima ordinance requiring abutting owners to remove natural accumulations of snow and ice did not inure to the benefit of injured third parties, who could state no private right of action by reason of the ordinance. Gardner held that violation of the ordinance is remediable only at the instance of the municipality; no duty is owed to third parties as a result of such an ordinance. Interestingly, Gardner distinguished a case in which such a duty to third parties was held to exist, based upon differences in language between the ordinances. Id. at 854, citing Gillespie v. Charleston, 177 S.E.2d 354 (W.Va. 1970).

Two type of ordinances had never been litigated before Rivett: an ordinance creating a duty directly running to the injured claimant against an at-fault abutting owner, and an ordinance rendering the abutting owner liable over to the city for acts or omissions giving rise to injury, for which the city is also liable in damages. In City of Seattle v. Shorrock, 100 Wash. 234, 244-45, 170 P. 590 (1918), the court declined to hold that an ordinance

requiring abutting owners to remove snow and ice gave rise to third party liability, stating that "the third person's liability over to the city depends upon his original liability to the person injured, and the ordinance does not purport to create any such liability. Whether an ordinance creating such a liability would be valid or not we do not decide."

The issue was first addressed in Rivett.

### C. The Rivett Holdings.

#### 1. Indemnification Without Limitation.

The primary holding of the Rivett case is that it is improper to require an abutting owner to "indemnify the City without limitation for any sum paid to a person injured on a public sidewalk in order to enforce an ordinance requirement that the abutting landowner maintain the public sidewalk free of defects." 123 Wn.2d at 582. The limitations to which the Court makes repeated allusion are fault and monetary limitations. Id.

However, the Court expressly held that the basic idea of the Tacoma ordinance, reducing sidewalk injuries by placing the burden of notifying the city of defects on the abutting owner (who is in the best position to notice them) is a proper police power objective. Accordingly, it is suggested that any liability-shifting ordinance contain the following limitations:

1. The City must notify the abutting owner of any claim for damages, and invite the owner to appear and defend

the claim, that is, the ordinance must provide for tender of defense;

2. The City must invite the abutting owner to establish (a) the sidewalk in question was not "defective," or (b) the owner notified the appropriate City department in writing of the defect more than 14 days before the injury occurred, and (c) the sidewalk defect was not caused by any act or omission of the abutting owner;

3. The City must notify the abutting owner of any pending settlement, or that trial or arbitration to adjudicate fault and damages, at least 30 days before any amount is paid or trial/arbitration conducted, and invite the abutting owner to participate therein; and

4. The landowner is only liable for amounts paid where the injury was proximately caused by a sidewalk defect which (a) existed for a sufficiently long period of time that a reasonable landowner would have been aware of it, and (b) was of such a nature that a reasonably prudent landowner would consider it a hazard to pedestrians.

These four substantive and procedural steps would place discrete limitations upon the abutting landowner's potential exposure. If there is a settlement, as opposed to a judgment against the city, the abutting owner would have had two opportunities to contest the amount paid.

In addition, because the question whether a given sidewalk condition constituted a "defect" can be highly debatable, these

procedural steps assure that only a landowner who failed to notify a city of a defect of which a reasonable person would have been aware can be liable.

## 2. The City As Primarily Liable For Sidewalk Condition.

Rivett held that a City has the primary duty to maintain public rights of way in a safe condition, and that the Tacoma ordinance was invalid for purporting "to place that primary duty upon the abutting landowner." 123 Wn.2d at 582. This statement is technically accurate, because the Tacoma ordinance allowed a landowner to "opt out" of civil liability by proving that he or she notified the appropriate department of the defect. However, the Court appeared to recognize that the purpose of the ordinance was to require notification by those in the best position to observe defects, and the placement of a "primary duty" on abutting owners was in form only, and not in substance.

If the Court meant that any indemnification ordinance, which could have the effect of shifting liability for sidewalk defects in any circumstances, exceeds the police powers of first class cities, then obviously no such ordinance will pass muster. It has been held that a city's police powers do not permit it to create new bases of civil liability. See 6 McQuillin, Municipal Corporations, Sec. 22.01, 22.11.

Rivett does not appear to go that far. There is no suggestion in the holding or the various rationales advanced that a city may not create a duty to notify it of dangerous sidewalk conditions.

Rather, the reverse is true. The Court's concerns were rather with the absence of any judgment and the lack of any limitation upon liability. The limitations set forth above may satisfy those concerns.

### 3. Indemnification As An Impermissible "Fine".

Rivett held that the power conferred upon first class cities to "impose fines upon parties who create, continue, or suffer nuisances to exist" does not allow a city to require indemnification "for all damages or injuries...the City may be required to pay" to an injured person. Again, it is not entirely clear what the Court meant by this statement. If the city's power to require indemnification is only a function of its power to declare and abate nuisances, then the Tacoma ordinance must be analyzed as an imposition of a "fine." If a first class city may require indemnification upon an adjudication of fault and damages, then the police power limitations upon civil fines are not relevant.

There is surprisingly little law in this state regarding the power to impose civil fines. It has been held that a fine must be reasonable, taking into account the nature of the offense and all other relevant circumstances. 5 McQuillin, Municipal Corporations, Sec. 17.13 (3rd ed. 1989). It has also been held that a civil fine must prescribe a maximum amount. City of Las Vegas v. Nevada Industries, Inc., 772 P.2d 1275 (Nev. 1989).

The Rivett Court provided no guidance on this issue. If the issue of civil fines was of paramount importance to the Court, there would have been no reason to address the constitutional

issues in the case. It is hoped that the Court would have sent a more clear signal if the civil fines issue was anything more than a response to a post-hoc justification for the ordinance.

4. Indemnification Without Adjudication of Fault.

Rivett was concerned with the apparent lack of any fault requirement in the Tacoma ordinance. A wholly innocent abutting owner, who never observed the property (the Gundermanns lived in New York, and may not have even visited the property) would be just as liable as an abutting owner who had herself stumbled over a defective sidewalk numerous times before the injury at issue occurred.

The suggested ordinance provides for fault, that is, failure to warn of a condition which a reasonable person would consider a defect.

5. Abolition of Governmental Immunity.

Rivett held that "the requirement of indemnification is in violation of governmental immunity...because it purports to immunize the City from payment for damages caused by its own negligence."<sup>123</sup> Wn.2d at 583. This statement is somewhat perplexing, because municipal liability for injuries caused by defective sidewalks was not affected by the abolition of immunity. Further, RCW 4.96.010 only renders cities liable "to the same extent as if they were a private person or corporation," and private persons are not primarily liable for sidewalk defects which they did not cause.



To address this issue, it is suggested that a city council hold a hearing and enter fact findings on the inability of a city with hundreds or even thousands of miles of sidewalk which may be subject to seasonal or other influences to inspect all of it, and that in order to protect the public it is essential for abutting owners to report defects to the city. It is also suggested that a city utilize the openings provided by McCluskey v. Handorff-Sherman, 125 Wn.2d 1 (1994), and Bailey v. Forks, 108 Wn.2d 262, 271, 737 P.2d 1257 (1987), and adopt a plan for sidewalk repairs, based upon citizen complaints and budget constraints. Finally, the requirement in any proposed ordinance that the abutting owner be liable only for those damages which would have been avoided had the owner reported the defective condition, may satisfy the Court's concern on the immunity issue.

#### CONCLUSION

A liability shift like that attempted by Tacoma is unprecedented in this State. Rivett identified the Court's chief concerns with the ordinance, liability without fault and damages exposure without limitation. If the proposed ordinance is adopted, it will meet the concerns addressed in Rivett, and will only be overturned if the Court makes new law by extending Rivett. It should be noted, however, that the Rivett Court provided little guidance on the issue of unlimited civil fines, and that question will have to await another case.

## PROPOSED ORDINANCE

[Findings regarding amount of sidewalk, unavailability of resources to inspect, frequency of injuries which could be prevented by citizen reporting, necessity of regular plan of action to correct identified sidewalk hazards.]

1. All property owners within the City shall report, in writing, to the Department [of Public Works] any pedestrian hazards within the public right of way abutting or adjacent to their property. A "pedestrian hazard" is a defect or obstruction which a reasonable person in the position of the property owner would believe to constitute a danger of injury to persons using the public right of way with due regard for their own safety and well being.

2. The Department shall create and maintain, on an ongoing basis, a list of pedestrian hazards reported or otherwise known to the Department, and shall abate such hazards as soon as reasonably practicable, given the nature of the pedestrian hazard and available resources. The Department shall prioritize its efforts to abate pedestrian hazards, according to available resources and the nature of the pedestrian hazard, on [an annual] basis.

3. The Department, or its delegated representative, shall notify all record owners of abutting property of any claim for injury proximately caused by a pedestrian hazard within sixty days of the receipt of such claim. Such notification shall advise the abutting owner of the nature of the claim, and shall provide a copy of the notice of claim filed by the claimant pursuant to RCW 4.96.020, and shall, in addition, offer the said owner the opportunity to defend, adjust, or pay the claim.

4. More than thirty days prior to trial or arbitration, or more than fourteen days prior to payment of any claim for damages, proximately caused by a pedestrian hazard, the Department shall notify the abutting owner of the pendency of trial, arbitration, or

payment. Such notification shall advise the abutting owner of the right to attend and participate in such trial or arbitration, and the right to prevent the Department from making payment to an injured person by agreeing, in writing, fourteen days in advance of trial or arbitration, or three days in advance of the date of payment, to assume the entire defense of the claim.

5. If the City makes payment, by reason of judgment or settlement, for any claim for damages proximately caused by a pedestrian hazard, the City has the right to indemnification by and from any abutting property owner who had actual knowledge of the condition constituting the pedestrian hazard, if (1) the said abutting owner failed to notify the Department, as provided herein, of the pedestrian hazard at least fourteen days prior to the injury for which claim is made, and (2) such failure to notify proximately caused the injuries complained of, and (3) the City did not cause or create the defect, or have actual knowledge of the defect.