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have the authority to exclude evidence of a conviction which does reflect upon credibility if, in his sound judgment, the value of the admission is heavily outweighed by the prejudicial effect it may have on the jury.

This new rule would be a great step forward in furthering a "fair trial" in both civil and criminal cases.

ALAN S. SIMS

Liability of a Municipality for Defective Sidewalks

In determining the basis of liability for a municipal corporation's torts one could readily use the proverbial divining fork, one prong of which is dubbed "sovereign immunity" and the other "corporate responsibility." The most promiscuous test is: municipalities are immune from liability for torts which arise out of so-called "governmental" functions; liability is imposed for torts which spring from "proprietary" functions.[1] This categorical classification of municipal acts, as a basis for determining liability, dates back to the eighteenth century[2] when the operation of municipal government was relatively simple and resources for paying damages were limited. Changing conditions have extended the scope of activities and the taxing powers of municipalities so that such a rule is incompatible with the present concept of the role of government in its relationships with individuals.[3]

Although immunity is still recognized in many areas of activity, it is no longer applied to injuries resulting from the defective repair and maintenance of streets and highways.[4] It is also quite generally held that a municipality is liable for injuries resulting from the defective condition of sidewalks.[5] The Ohio legislature has placed the duty of maintaining streets and sidewalks upon the city by statute.[6]

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[1] City of Hazard v. Duff, 287 Ky. 427, 154 S.W. 2d 28 (1941); Prunty v. City of Shreveport, 61 So. 2d 548 (La. App. 1952); Dilley v. City of Houston, 148 Tex. 191, 222 S.W. 2d 992 (1949); 63 C.J.S., *Municipal Corporations* § 746.

[2] Russell v. Men of Devon, 2 Term Rep. 667, 100 Eng. Rep 359 K.B. 1788.

[3] Although the courts have tenaciously held to the majority rule in principle, many decisions have reduced the immunity so long enjoyed by municipalities by straining to hold as a corporate function what might be expected to be governmental. See Annot., 156 A.L.R. 693 (1954). There is no uniform holding among the states as to what is a corporate and what is a governmental function.

[4] Hillman v. City of Anniston, 214 Ala. 522, 108 So. 539 (1926); Hanley v. Fireproof Bldg. Co., 107 Neb. 544, 186 N.W. 534 (1922). And see 63 C.J.S., *Municipal Corporations* § 782.

[5] Wehr v. Roland Park Co., 143 Md. 384, 122 Atl. 363 (1923). And see 25 AM. JUR., *Highways* § 7.

[6] OHIO REV. CODE § 723.01. "Municipal corporations shall have . . . the care, super-

The owner or tenant of the adjoining property also finds himself duty-bound by the presence of the sidewalk. In contrast to the city, the property owner is liable only if he has actively created or maintained a dangerous condition on the public streets or sidewalks.[7]

Consternation and confusion have been prevalent when the Ohio courts speak of the municipality and property owner as being either primarily or secondarily liable. The use of these terms has brought about decisions which seem to be the product of a mechanical application of a formula rather than the fruit of logic. In interpreting the Ohio statute the supreme court has contradicted itself: it has held the municipality primarily liable on one occasion,[8] and secondarily liable on another.[9] The inconsistencies become apparent in situations in which the municipality attempts to recover from the property owner the amount of damages which it has already paid to an injured party. The problem becomes even more complex when the injured party attempts to bring suit against the municipality after covenanting not to sue the property owner. A proper solution to the problem can be effectuated by holding that the liability of the municipality is separate and distinct from that of the property owner. An analysis of the city's liability to the injured party, and the property owner's liability to either the injured party or the municipality will help to clarify the picture.

MUNICIPAL LIABILITY

The municipality's liability for failure to maintain its sidewalks "open, in repair, and free from nuisance" is primary and never secondary. It is incumbent upon one who attempts to hold another secondarily liable to show facts which establish the existence of a primary liability in a third party and a relationship wherein the latter party is responsible for the failure to discharge the obligations which the primary party is unable to discharge.[10] The negligence of a third party need not be proved. To recover against the municipality a claimant need prove only the existence of a dangerous condition, that the municipality had notice of such condition, and that the defective condition was the proximate cause of the injuries.

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vision, and control of . . . streets, avenues, alleys, sidewalks, and shall cause them to be kept open, in repair, and free from nuisance."

[7] Globe Indemnity v. Schmitt, 142 Ohio St. 595, 53 N.E. 2d 790 (1944); Morris v. Woodburn, 57 Ohio St. 330, 48 N.E. 1097 (1897); Railroad Co. v. Morey, 47 Ohio St. 207, 24 N.E. 269 (1890).

[8] Wilhelm v. Defiance, 58 Ohio St. 56 (1898); Sammins v. Wilhelm, 6 Ohio C.C. 565 (1892).

[9] Hillyer v. City of East Cleveland, 155 Ohio St. 552, 99 N.E. 2d 772 (1951).

[10] 57 C.J.S., *Master and Servant* § 614 (1944).

The early line of Ohio cases recognized that the municipality incurred a "primary responsibility" to one who sustained an injury resulting from defective conditions. This responsibility was recognized by the legislature in Revised Code § 2640. In construing the statute, the court[11] determined that the liability of the city to an injured party would exist even though the property owner might also be liable.

Owner's Liability

The adjoining property owner is liable only if he has actively created or maintained a dangerous condition on the public streets or sidewalks.[12] No common law duty rested upon the owner or occupant of premises abutting on a public street to keep the sidewalks in repair. Consequently, such an abutting owner was not liable for a defect in the sidewalk in front of his premises which he did not create or maintain.[13] The municipality's right to recover against a property owner for creating a defective sidewalk is not derived by subrogation of the city to the rights of the injured person. The property owner has breached a duty, owed to the city, not to create or maintain a nuisance.[14] In contrast to the liability to an injured person, the tort against the city comes into existence immediately upon the creation of the defective condition and is not contingent upon the occurrence of an injury to a member of the public, for which the city may have to answer in damages. The amount of damages recoverable by the city would include the cost of repairs as well as the compensation for injuries to the claimant. The municipality has the authority to repair the condition immediately and recover the cost from the wrongdoer.

It is apparent that while the liability of the city is founded upon notice of the condition despite its origin, the property owner's liability is based upon active participation. Although the property owner's duty may be primary or secondary, the city's duty is always primary. A property owner may be liable to a member of the public or to the city for creating or maintaining a dangerous condition in a sidewalk in situations

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[11] City of Zanesville v. Fannan, 53 Ohio St. 605, 42 N.E. 703 (1895). The court stated that ". . . though the person who caused the nuisance may be also liable, and responsible over to the corporation for whatever damages it is compelled to pay in consequence of it, that does not affect the liability of the municipality to the party injured." (Syl. No. 1)

[12] Maryland Casualty Co. v. Frederick Co., 142 Ohio St. 605, 53 N.E.2d 795 (1944); Hawver v. Whalen, 49 Ohio St. 69, 29 N.E. 1049 (1892); Clark v. Fry, 8 Ohio St. 358 (1858).

[13] Bolles v. Hilton & Paley, 119 Cal. App. 126, 6 P.2d 335 (1931); Wright v. Louisville & N.R. Co., 240 Ky. 73, 40 S.W. 2d 1003 (1931); McCarthy v. Adams, 42 Ohio App. 455, 182 N.E. 324 (1932).

[14] Bello v. City of Cleveland, 106 Ohio St. 94, 138 N.E. 526 (1922); Morris v. Woodburn, 57 Ohio St. 330, 48 N.E. 1097 (1897).

in which the municipality would not be liable because of lack of notice and opportunity to remove or repair the defective condition. On the other hand the municipality might be liable to a plaintiff for a defective condition for which the property owner would not be responsible because he did not actively create the condition.[15] Therefore it becomes apparent that the facts giving rise to a cause of action against a municipality and one against an adjoining property owner are not always the same.

CONFUSION SPRINGING FROM SETTLEMENTS

In *Morris v. Woodburn,*[16] the courts abandoned the independence of the city's liability. The rule which propounded the continuation of primary liability despite the property owner's settlement vanished. An injured party brought an action against the adjoining owner. Recovery was permitted because the owner actively created the defective condition. In dictum, the court went on to say that "primary liability is upon him who actively creates the nuisance." Much reliance was placed upon the New York case of *Rochester v. Campbell.*[17] The court inferred that when the property owner was primarily liable, the city, of necessity, was secondarily liable rather than the perpetrator of an independent wrong. This fallacy engendered no adverse effects in cases in which the action was instituted solely against the municipality for damages. However, where the claimant first made a compromise settlement with the property owner and subsequently attempted to recover the remaining damages from the municipality, the injustice of such erroneous reasoning became manifest. In *Bello v. Cleveland*[18] the claimant and the property owner settled a pending suit for a portion of the damages and entered into a covenant not to sue. The claimant did not expressly reserve his right to bring an action against the municipality. The court denied recovery from the city, proceeding on the theory that the covenant not to sue could not be of any value to the property owners unless it was also a complete release of any claim against the city. It is possible to argue that an unconditional settlement with the property owner would impliedly release the city as well. But no such implication can reasonably be drawn from the execution of a covenant not to sue. Manifestly this was not the intent of the claimant when he executed the instrument. Nevertheless the court maintained that the municipality's right of action against the adjoining property owners was one of indemnity only. Justification for the decision was found by construing the compromise settlement contract in a manner which was patently not in accord with the real intent of the parties.

[15] City of Cleveland v. Hanson, 15 Ohio App. 409 (1921).
[16] 57 Ohio St. 330, 48 N.E. 1097 (1897).
[17] 123 N.Y. 405, 25 N.E. 937 (1890).
[18] 106 Ohio St. 94, 138 N.E. 526 (1922).

Even more inequitable decisions can be found where there has been an express reservation of the right to proceed against the city in a compromise settlement with the property owner. In *Herron v. Youngstown*[19] the agreement between the parties contained the clause "... claimant does hereby remise, release, and forever discharge the lessee of and from any and all actions, claims, and demands whatsoever which claimant now has or may hereafter have on account of or arising out of the accident. . . ." Despite an express reservation of the claimant's right to proceed against the municipality, the court decided that settlement by the claimant with the lessee absolved the city. The court construed the clause to mean that the claimant covenanted that no action would be brought by the city against the lessees. The conclusion was based upon the premise that the right of the city was based upon subrogation to the claimant's cause of action. Further, since the claimant agreed to release all actions arising from the tort, the covenant then barred any right of recovery by the city against the property owner because the right of subrogation had been destroyed. The court determined that ultimate loss should not fall on the municipality on the theory that the city was merely secondarily liable. Hence claimant was not permitted to recover damages from the city. The case was subsequently followed and approved.[20] Consequently, a substantial part of the inducement for the claimant's settlement contract with the property owner was overlooked. The reservation of the claimant's right to proceed against the municipality was rendered nugatory. The clear intent of the parties was thwarted. Words of condemnation could be found anachronistically in *Adams Express Co. v. Beckwith:* "It is an odd species of legerdemain whereby a court can destroy that reservation, that plain provision in the agreement of the parties."[21]

An application of the correct principles would avoid this difficulty. As previously stated, the liability of the municipality is not secondary. A claimant should be permitted to recover from the municipality under the facts of the *Herron* and *Hillyer* cases independently of the city's chances of recovery from the property owner. There is sufficient ground in Ohio for so holding.[22] The court is faced with the dilemma of attempting to reconcile the release from all actions arising out of the claimant's claim with the reservation of the right of the claimant to proceed against the city. The proper solution is to permit the city to recover against the

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[19] 136 Ohio St. 190, 24 N.E. 2d 708 (1940).

[20] Hillyer v. City of East Cleveland, 155 Ohio St. 552, 99 N.E. 2d 772 (1951).

[21] 100 Ohio St. 348, 126 N.E. 300 (1919).

[22] Yackee v. Village of Napoleon, 135 Ohio St. 344, 21 N.E. 2d 111 (1939); City of Circleville v. Sohn, 59 Ohio St. 285, 52 N.E. 788 (1898); City of Steubenville v. McGill, 41 Ohio St. 235 (1884).

property owner because the latter has committed the tort of creating a defective condition. The claimant may thus recover from the municipality. The city may recover against the owner by showing that the owner has committed a tort against the city because the cause of action is predicated upon a different concept. Despite the fact that the property owner has actively created the defective condition, he could have a valid defense thereto, such as proof that the city accepted a defectively constructed sidewalk, or permitted public use for such a period as to imply acquiescence.[23]

Under this view the release and the covenant not to sue between the claimant and the property owner would be given its intended effect. The owner should not be permitted to purchase immunity for his tort against the city, especially since he is negotiating with the injured party and purporting to agree to the latter's reservation of a claim against the city. This approach would permit an injured party to receive full compensation. Loss would ultimately fall on the property owner if the facts established that this was where it ought to be placed.

The decisions reached in the *Herron*[24] and *Hillyer*[25] cases are undesirable from the standpoint of public policy. The city, by obtaining this release from liability, acquires a windfall benefit under circumstances in which its responsibility is clear.

CONCLUSION

The municipality's statutory duty to remove or repair defective conditions in sidewalks is a primary duty, not a secondary one. The fact that a property owner may owe a duty to the city and also to other members of the public should not be permitted to cloud the issue. An injured party should be entitled to recover against the municipality whether the latter can recover against the property owner or not.

Since the liability of a property owner and liability of the municipality are based upon entirely different concepts, the injured party should be allowed to recover against the municipality despite the making of a covenant not to sue with the property owner. If the property owner has committed the tort which results in damage to the city, then the city may recover damages from the property owner. This would adequately bar the property owner from purchasing immunity from the city while purportedly agreeing to permit suit against it. A full recovery to the injured party would be guaranteed by permitting suit to be brought against each wrongdoer as the facts of each predicament present themselves.

THOMAS J. MCGUIRE

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[23] Wilhelm v. City of Defiance, 58 Ohio St. 56, 50 N.E. 18 (1898).

[24] 136 Ohio St. 190, 24 N.E. 2d 708 (1940).

[25] 155 Ohio St. 552, 99 N.E.2d 772 (1951).