

1940

## M. E. Hamilton v. Salt Lake City : Brief of Respondent

Utah Supreme Court

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E. R. Christensen; City Attorney; Gerald Irvine; Marion Romney; Assistants;

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# In the Supreme Court of the State of Utah

MRS. M. E. HAMILTON,

*Appellant,*

VS.

SALT LAKE CITY, a municipal corporation,

*Respondent.*

APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH, HON. M. J. BRONSON, JUDGE.

## RESPONDENT'S BRIEF

E. R. CHRISTENSEN,  
*City Attorney.*

GERALD IRVINE,  
MARION ROMNEY,  
*Assistants.*

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# In the Supreme Court of the State of Utah

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MRS. M. E. HAMILTON,

*Appellant,*

vs.

SALT LAKE CITY, a municipal corporation,

*Respondent.*

No. 6215

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APPEAL FROM THE DISTRICT COURT OF SALT LAKE COUNTY,  
STATE OF UTAH, HON. M. J. BRONSON, JUDGE.

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## RESPONDENT'S BRIEF

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### STATEMENT OF THE CASE.

Appellant alleged in her complaint (paragraph III Complaint, Tr. 1), “- - - at a point immediately west of that place known as No. 114 East Second South, there existed a certain hole or cavity endangering and constituting a hazard to the safety of persons passing along and upon said sidewalk.”

(Paragraph IV complaint, Tr. 2) “- - - the defendant negligently and carelessly permitted said hole or cavity to remain open and unrepaired and in a dangerous condition in and upon said sidewalk,” (paragraph V complaint, Tr. 2) “without fault on her part said plaintiff stepped and fell into said hole or cavity and by means thereof was thrown to and upon the pavement with great force and violence.”

The above states the substance of the complaint. Nowhere in the pleading is there a description of the alleged hole or cavity nor does it appear that the defendant city knew or in the exercise of reasonable care ought to have known that said hole or cavity existed upon said walk.

The evidence shows that on March 23rd, at 9:30 A. M. (Tr. 26) plaintiff was walking west on Second South and the first thing she knew (Tr. 27) she had fallen down having caught her foot in a hole. It seemed to be a pretty big hole. That she had passed there once in a while before. (Tr. 36)

One, William Perry Sturges, testified on behalf of plaintiff (Tr. 38) that he was walking 7 or 8 feet behind her. There was a hole in the pavement (Tr. 39). He picked her up and her legs were laying right beside the hole. There were two little holes there. There is a manhole on the south side and a water drain (Tr. 40) on the north side. The manhole had “city engineer” marked on it. The hole Mrs. Hamilton fell in was about 10 or 12 feet from the manhole on the north side in the alley there—on the sidewalk in the alley on a line 12



or 14 inches wide, 12 or 14 feet long extending from one hole to the other. There is a seam on each side of the line. (Tr. 41)

The above is all of the testimony relating to the alleged defect. There is no description of the hole, its depth, width or character, nor its exact location with reference to the sidewalk. Nor is there any evidence as to the defendant's knowledge of the existence of such a hole. Nor does it appear how the hole come to be there or how long it had existed prior to the alleged accident.

We are left entirely to conjecture as to the nature of the claimed defect. No evidence was offered or received showing that the defendant city knew or ought in the exercise of reasonable care to have known of the existence of said defect.

The District Court granted defendant's motion for a directed verdict, the first two paragraphs of which read (Tr. 44):

1. That from all of the evidence and from the pleadings it does not appear that there is a cause of action against Salt Lake City.

2. That there has not been established by the evidence any negligence on the part of Salt Lake City.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO  
CONSTITUTE A CAUSE OF ACTION.

Stripping the complaint of its conclusions and considering only the allegations of fact we have the follow-

ing: That at all times herein mentioned there existed a certain hole or cavity at 114 East Second South and on March 23rd, 1938, (the only time mentioned) plaintiff stepped and fell into said hole. There is no allegation that the city had actual or constructive notice. Likewise before a complaint of this kind can be said to state a cause of action it must show the size, kind, location and character of the defect. A slight defect is not actionable. Certain defects might be permissible.

“It may be laid down as a general rule that the complaint must contain all the facts which upon a general denial the plaintiff will be called upon to prove in the first instance to protect himself from a nonsuit, and show himself entitled to a judgment. And this statement must be made in ordinary and concise language and without unnecessary repetition. The code provisions in this respect are only declaratory of the common law and are applicable to all pleadings whether in law or equity.

Under the rule just stated, it is evident that a complaint is materially defective if, to lay the foundation for a recovery, the proof must go further than the allegations contained in the pleadings. It must be so framed as to raise upon its face the question whether, admitting the facts stated to be true, the plaintiff is entitled to judgment, instead of leaving that question to be raised or determined upon the trial. For where a complaint shows no legal cause of action upon its face, a judgment by default can no more be taken than it can over a general demurrer.”

Vol. 1, Sutherland Code Pleading, Sec. 188,  
page 122.



“Legal conclusions in a pleading are stillborn for all purposes, where they are stated in the place of ultimate facts.”

*Chesney vs. Chesney*,  
33 Utah 503 at p. 511, 94 Pac. 989.

THE EVIDENCE FAILS TO SHOW NEGLIGENCE  
ON PART OF CITY.

Summarizing the evidence we have the following:

It was daylight and 9:30 o'clock a. m. The place was at 114 East Second South on the sidewalk in the alley. The hole or cavity was located on a line marked by seams on either side which line was 12 to 14 inches wide and 12 to 14 feet long extending from a manhole to a water drain. The plaintiff fell as she passed it.

The city is not an insurer. Its duty is to *use ordinary care and diligence* to keep its streets and sidewalks in a reasonably safe condition for the ordinary uses to which they are subjected.

*Ray vs. Salt Lake City*,  
92 Utah 412, 69 Pac. (2nd) 256.

There is no rule requiring the city to keep its streets reasonably safe for travel.

*Gage vs. City of Vienna*, 196 Ill. App. 585.

Have any facts been established by the evidence from which negligence may be reasonably inferred? The jury would be required to speculate as to the alleged

defect, its depth, width, length, location, the length of time it existed, whether it resulted from wear or was constructed as a part of the walk and served some useful purpose, whether the city knew or ought to have known of its existence or its location with respect to the use made of the street.

The defect was apparently so small that plaintiff could not see it as she walked along. It was at a place in an alley where she should expect to encounter a change in the surface of the way and was made obvious by being located in a line 12 to 14 inches wide marked by two seams extending from a water drain 12 to 14 feet to a manhole. Appellant's view was not obstructed nor her attention otherwise attracted. It was 9:30 o'clock in the morning. No evidence was offered as to how said defect came to be there or how long it had existed. There is neither allegation nor proof that the city created the alleged defect. On the contrary it is alleged that the city "permitted said hole or cavity to remain open and unrepaired and in a dangerous condition." (Ab. p. 3, complaint paragraph IV).

Plaintiff failed to prove that the city knew that the alleged hole existed.

Plaintiff also failed to prove that the alleged hole existed prior to the time of the injury.

The general rule is that a city is not liable for injuries caused by defects in a sidewalk or street in the absence of actual knowledge thereof or evidence that the defect existed in the walk for a length of time suffi-

cient to give the city a reasonable opportunity in the supervision and inspection of its streets and walks as a whole to discover and repair it. In determining whether or not the city had a reasonable opportunity to discover and repair the defect the jury may consider the use of the walk, the location and character of the defect, the amount of travel and other attending facts and circumstances. However such facts are not material unless it is shown that the defect did in fact exist *prior* to the injury.

*Rogers vs. City of Meriden*, 1929 (Conn.)  
146 Atl. 735, 71 A. L. R. 748, at 752.

In the above case the court points out clearly that the placing of a drain and manhole in a street is not actionable. Quoting from the opinion the court said:

“The placing and maintenance of a catch basin and cover is a governmental function, and does not of itself constitute a defect in the highway, or give the traveler a right of action against the city. It is the duty of the city to place and supervise it with reasonable care, but no breach of that duty subjects the city to the statutory penalty, unless and until the highway has been rendered defective. The liability does not even then attach, unless the city has failed either to use reasonable care to discover the defect, or, after actual or constructive notice, to use reasonable care in curing it.”

In the case of *Mablo vs. City of Lansing*, (Mich.), 1928, 220 N. W. 890, the court held that a plank with a nail or spike in it placed on newly laid cement as a path within 48 hours of the injury did not give sufficient lapse

of time to cause the city to be charged with constructive notice of the unsafe condition.

The city is not negligent unless it knew of the defect or was careless in not discovering and repairing it.

In the case of *City of Danville vs. Vanarsdale*, (Ky.) 1932, 48 S. W. (2nd) 5, at p. 7:

“To render a city liable for dangerous conditions for travel of its streets and sidewalks, some officer or agency of the city having in charge their maintenance must have knowledge of the unsafe condition, or it must have existed for such a length of time as that knowledge of it could have been obtained by the exercise of ordinary care.

Such requirements are conditions precedent to liability and are as old as the exception imposing liability. \* \* \*

*City of Georgetown vs. Red Fox Oil Co.*,  
Ky. 1929, 15 S. W. (2nd) 489;

*Gordon vs. City of New York*,  
1930, 239 N. Y. S. 284;

*Oklahoma City vs. Burns*, 1935, (Okla.),  
50 Pac. (2nd) 1101.

A failure to show that the city knew of the defect or that it was careless in discovering and repairing it is a failure to prove negligence.

In the case of *Dress vs. City of Harrisburg*, 1926, (Pa.) 134 Atl. 400 at 401:

“A fatal defect in plaintiff’s case is the entire absence of any proof tending to show the exist-

ence of such a depression at any time prior to the accident. \* \* \* The city cannot be visited with constructive notice of an alleged defect which so far as appears did not exist, and in any event was not discovered before the accident. \* \* \*

To infer the prior existence of the defect and from that infer the city had notice thereof would be basing one presumption upon another which cannot be done.”

*Malone vs. Union Paving Co., et al.*, 1932 (Pa.) 159 Atl. 21.

In the case of *Meallady vs. City of New London*, (Conn. 1933), 164 Atl. 391 at P. 392, the court observed:

“The city is not required to keep its streets and sidewalks in a reasonably safe condition, but it is sufficient if it uses reasonable care to keep them in such condition. The question in such a case is not whether the condition was in fact dangerous, but ‘whether it had been there long enough and is so conspicuous that it would attract the attention of the city in the exercise of a reasonable supervision of the streets.’ ”

It is not sufficient to show that the city knew a drain existed in the street at which point there was a defect.

In the case of *Jainchill vs. Schwartz*, (Conn.) 1933, 165 Atl. 689, the court observed:

“The notice which a municipality must receive as a condition precedent of liability for injuries received by reason of a defective highway must be notice of the defect itself which occasioned the injury and not merely of conditions

naturally productive of that defect and subsequently in fact producing it.”

*City of Phoenix vs. Clem*, (Ariz.) 1925, 237 Pac. 168, at page 172:

“Where a city improvement is not defective when made, but later becomes so, the rule is that the city must have actual notice of a defect, or the defect must have existed a sufficient length of time to imply notice, before it is guilty of actionable negligence.”

*Gregoire vs. City of Lowell*, (Mass. 1925), 148 N. E. 376, the court observed:

“There can be no recovery for injuries resulting from a defective condition of a street unless the municipality knew or in the exercise of proper care and diligence might have known of the defect and have remedied it.”

See also *City of Hattiesburg vs. Reynolds*, 86 So. 853, (Miss. 1921).

In this case appellant has not shown the existence of a defect in the sidewalk. Assuming there was a defect as was observed in *Parker vs. City of Boston*, (Mass. 1900), 56 N. E. 569, the plaintiff was bound to show either that the defendant knew it, or, in the exercise of reasonable care and diligence ought to have known it, *in season* to remedy it. There was no evidence that the defendant knew of the defect, if there was one; and, in the absence of evidence to show how long it had been there, it cannot be said that the defendant ought, in the



exercise of reasonable care and diligence, to have known of it, and remedied it.

The Rule of Constructive Notice is very well stated in the case of *Nicholson vs. City of Los Angeles*, (Calif. 1936), 54 Pac. (2nd) 725, where the court quoting from *Taylor vs. Manson*, (Calif.) 99 P. 410, 415 said at p. 727 of the opinion:

“While a municipality is required to exercise vigilance in keeping its streets and sidewalks in a reasonably safe condition for public travel, it is by no means an insurer against accidents, nor can it be expected to keep the surface of its sidewalks free from all irregularities.”

The court further observed that:

“The doctrine of constructive notice cannot be so applied as to effect a change in the substantive obligations of the city.”

Also at page 728:

“There is no evidence of any prior event which would put the city on inquiry as to the existence of a dangerous break at this point, and aside from the testimony that it had existed for several months, that it was about an inch and one-half high, and that the plaintiff thought it was caused by the root of a tree growing in the parking beside it, there is no testimony with regard to the defect itself. This, we think, is insufficient to sustain a finding that, had the city fulfilled its duty of reasonable inspection and supervision of the streets of the city as a whole, it would have had actual knowledge of the break.

There is a complete absence of proof as to the method or period of inspection or the nature of the neighborhood in which defect existed or the character of the use made of the walks in this neighborhood. Because of the plaintiff's failure to bring home to the defendant city a neglect of its duty of inspection or knowledge of facts which would have put it upon inquiry, the city cannot be held to have had constructive notice of the defect."

With like effect in the case of *Meyer vs. City of San Rafael*, (Calif. 1937), 70 P. (2nd) 533, at p. 534 the court said considering an act declaratory of the general law:

"It is not enough to show a dangerous condition of the property. The municipality must have had notice and have failed to exercise its opportunity to remedy the condition, \* \* \*."

also at page 535:

"\* \* \* Constructive notice ordinarily involves as an essential element actual notice of facts and circumstances which are sufficient to put a prudent person on inquiry as to the existence of the facts with respect to which he is charged with constructive notice; that therefore, in order to charge a city with constructive notice there must be some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character \* \* \*."

It is not alone sufficient to show prior existence of a defect. Some event must appear to put the city on inquiry or it must be shown that the city was negligent in its inspection of the walks, or that it failed to repair

the same after inspection and discovery of a defect. Cities are not and ought not to be held liable on evidence alone that a defect existed at the time of the accident or even prior thereto unless some occurrence has brought the defect to their attention. Their carelessness is a failure to reasonably inspect streets. That duty implies the employment of inspectors, the regular inspection of streets and that the inspection be performed with some regularity. In order to determine whether or not a city is or is not careless in that regard the court must know how many streets and walks there are, the use made of the streets, the location, the frequency of the inspection and many other things material to such duty. If the court should permit the plaintiff to recover merely on a showing that a defect existed at the time of the accident, cities would become insurers of the safety of persons using the streets.

It is common knowledge that defects are occurring constantly in streets. If we were to apply our doctrine of constructive notice so that cities may become liable for any defect found in its streets the subject should be submitted to the legislature to provide the money to pay the cost of cities insuring the streets. Cities face a hazardous problem with sidewalk maintenance. If the walks are kept too smooth they may become slippery and dangerous. Roughness is necessary to make them safe. Joints must be provided for expansion approximately every fifty feet and joints for contraction every twelve or fifteen feet. The walk must be marked in squares to provide weaker places where cracks might develop

without effecting the surface. Many miles of walks require cities to shoulder great burdens of inspection and maintenance. Heavy use together with weather conditions increase the problem.

To require cities to respond in damages when it is shown that a person steps into a hole or cavity is to require them to insure the safety of the person. To require the city to keep its streets in a reasonably safe condition for travel is to require the impossible. To require a city to inspect its streets and use reasonable diligence to discover and repair defects is a reasonable requirement. The rule however should be given a meaning that is reasonable and not so applied as to effect a change of the substantive obligation of the city. The words "reasonable diligence" should be given a practical application, considering the facts. The question should be "did the city inspect its walks as a whole and if so was it negligent in discovering the defect."

In the instant case there was no evidence that the city could have found the defect had it inspected the walk. Neither is there any evidence that the city failed in its duty to inspect the walk or that it failed in its duty to inspect the streets and walks as a whole or that any event had occurred which would attract the cities' attention or that it knew the walk was defective. As was said in the case of *Carsey vs. City of New Orleans*, 181 So. 819 at p. 820 (1938 La.):

"It is also to be borne in mind that, while the courts have permitted recovery against a municipality for injuries sustained because of de-

fective streets or sidewalks (as an exception to the general rule that the sovereign is not responsible for the torts committed by it in the exercise of a governmental function) they have, nevertheless, imposed certain limitations upon the rights afforded to plaintiffs in these cases which are founded upon equitable principles. In other words, the courts have readily realized that it is impossible for a municipality to police each and every street within its confines with such vigilance as to detect all slight defects which might be brought about through conditions of the soil, or by exterior forces and that it would be unjust to permit recovery except in cases where it has plainly neglected to perform the obligation required of it by law.”

We submit that no evidence was offered to show negligence on the part of the city and the motion was properly granted.

#### THE NOTICE OF CLAIM IS INSUFFICIENT.

The third paragraph of Respondent’s Motion for Directed Verdict reads:

“3. That it does not appear from the evidence that a claim in the form required by Section 15-7-76, Revised Statutes of Utah, 1933, was filed with Salt Lake City, the defendant, within the time and in the manner required by the provisions of said statute, and, therefore, the alleged action of the plaintiff is barred by the provisions of Sections 15-7-76 and 15-7-77, Revised Statutes of Utah, 1933.” (Tr. 44)

The plaintiff introduced in evidence a copy of a letter (Exhibit A, Tr. 31, 44, 45) which reads as follows:

“Salt Lake City, Utah.

April 13, 1938.

Honorable Board of City Commissioners,  
City and County Building,  
Salt Lake City, Utah.

Gentlemen:

On March 23rd at 9:30 A. M. while walking just west of 114 East 2nd South, through a defect in the sidewalk at that location I was injured by falling and having certain bones fractured near my ankle to such an extent that I have had to have same in a cast, and move about on crutches since said injury. In view of the fact, that since said date I have been confined at my residence and have suffered extreme pain I feel that I should be compensated for such injury to the extent of not less than \$500.

Respectfully submitted for your  
immediate consideration,

-----”

She testified that she signed the original (Tr. 31) and filed it with the defendant on April 19, 1938. (Tr. 45).

Section 15-7-76, Revised Statutes of Utah, 1933, (quoted p. 14 appellant's brief) provides in part:

“Every claim against a city \* \* \* for damages \* \* \* shall \* \* \* be presented to the Board of Commissioners \* \* \* in writing signed by the claimant \* \* \* and properly verified, stating the particular time at which the injury happened,



and designating and describing the particular place in which it occurred, and also particularly describing the cause and circumstances of the injury or damages, and stating, if known to claimant, the name of the person, firm or corporation, who created, brought about or maintained the defect, obstruction or condition causing such accident or injury, and the nature and probable extent of such injury, and the amount of damages claimed on account of the same; such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry, and no action shall be maintained against any city or town for damages or injury to person or property, unless it appears that the claim for which the action was brought was presented as aforesaid, and that such governing body did not within ninety days thereafter audit and allow the same. \* \* \*

The right to institute an action in this class of cases is purely statutory. It did not exist as common law, and therefore the conditions precedent fixed by the statute which confers the right must be complied with, or the action fails.

*Hurley vs. Bingham,*  
63 Utah 589, 228 Pac. 213.

It is within the power of the legislature to impose such conditions upon the right to sue cities and towns, which are merely arms of the state government, as in its judgment may seem wise and proper, and the conditions which are thus imposed are conditions precedent, and cannot be ignored either by the claimants or by the

courts. In determining the effect of the above cited statute upon this subject it is of utmost importance to keep in mind its terms and provisions. An examination of the cases will disclose that the terms of the statute in the different cases cited by appellant vary to a considerable extent, which fact is overlooked by appellant in citing cases in support of his view.

*Berger vs. Salt Lake City,*  
56 Utah 403, at 408, 191 Pac. 233.

The purpose of our statute is very clear, which is to require every claimant to clearly state all of the elements of his claim to the city for allowance as a condition precedent to his right to sue the city. That the state through its law making power has an absolute right to impose such conditions, all courts agree.

*Sweet vs. Salt Lake City,*  
43 Utah 306, at p. 315, 134 Pac. 1167.

THE LETTER FILED BY PLAINTIFF DID NOT  
PURPORT TO BE A CLAIM.

The letter was not verified. It stated the time to be "March 23rd at 9:30 A. M." The place is described as "while walking just west of 114 East 2nd South." The cause of the injury was described "through a defect in the sidewalk at that location." The circumstances of the injury was stated: "I was injured by falling."

The statute (15-7-76 supra) requires "such notice shall be sufficient in the particulars above specified to

enable the officers of such city \* \* \* to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry \* \* \*."

The time stated in the letter does not refer to the year of the occurrence. The place "just west of 114 East Second South" is indefinite and uncertain. The cause of the injury "through a defect" is most uncertain. No one could tell whether it was a depression, a protuberance or some temporary obstruction or excavation placed there by a third person. No information at all is given by the word "defect". The circumstances "by falling" do not help us in determining the nature of the defect or cause of the injury. It would be just as reasonable to suppose that plaintiff stumbled over a temporary obstruction or fell into a hole as to suppose that she stepped into a depression. It would be impossible to determine the place and cause of such injury from the notice itself without extraneous inquiry. It would likewise be just as impossible to determine the place and cause of such injury by an examination of the place mentioned in the notice.

The plaintiff could under the statement in the letter claim that the injury occurred at one place just as well as another. Without extraneous inquiry, yes without interrogation of plaintiff herself, the letter was wholly valueless to the city. Not one of the many conditions required by the statute was complied with. The letter did not have any characteristics of a notice required by the statute. Under it any kind of a claim could be successfully made. The city was not afforded an oppor-

tunity to examine the alleged defect and determine for itself what the facts were. It was solely at the mercy of the plaintiff and must rely upon her to point out the "defect" in a complaint or by evidence.

The notice was served April 19, 1938. Must one assume the accident referred to happened in 1938? With hundreds of miles of sidewalks to supervise and keep in repair, all situated upon ground that is subjected to the moisture and extreme cold of the Winter as well as the dryness and extreme heat of the Summer, together with the heavy use at driveways, alleys and intersections by motor vehicles, and the added hazard caused by growing trees and constant excavation in and around the same for furnishing the services of utilities to residents, a valid reason is observed why the legislature should require such conditions before a city may be subjected to suit.

Appellant contending that the letter is a valid claim cited and relies upon the case of *Connor vs. Salt Lake City*, 28 Utah 248, 78 Pac. 479. The claim in that case was filed in 1902 pursuant to the provisions of Section 312, Chapter 20, Revised Statutes of Utah 1898, which required claims to be filed:

"describing the time, place, cause, and extent of the damage or injury."

Section 15-7-76, Revised Statutes of Utah, 1933, required claims to be filed:

"stating the particular time at which the injury happened, and designating and describing

the particular place in which it occurred, and also particularly describing the cause and circumstances of the injury \* \* \* such notice shall be sufficient in the particulars above specified to enable the officers of such city or town to find the place and cause of such injury from the description thereof given in the notice itself without extraneous inquiry \* \* \*.”

The Connor case (supra) cited by appellant was decided Nov. 11, 1904, and the said section 312 of the 1898 Laws under which the Connor claim was filed was amended by the next legislature by an act known as Ch. 5, Laws of Utah 1905, approved Feb. 15, 1905 which act was adopted expressly to avoid the effect of the rule in the said Connor case. It will therefore be observed that the Connor case was by legislative enactment overruled and is not now the law in this state. This illustrates the importance of checking the statute under which the claim is filed.

We have considered the letter as a whole. Let us now separate it and consider its parts.

#### THE PLACE.

“Just west of 114 East Second South.” We submit that this description does not meet the statutory requirement “and designating and describing the particular place in which it occurred” especially when we consider the evidence. It appears that appellant fell at 114 East 2nd South (Ab. 9-17) and not west of it. The hole or cavity was in a strip of cement marked by a seam that extended from a manhole to a drain.



According to the evidence a proper designation and description could have been given. There seems to be an alley referred to in the evidence that could have been used to aid in the designation and description. Without some outside inquiry one could not find the alleged "defect" from the designation or description given.

#### THE CIRCUMSTANCES OF THE INJURY.

"I was injured by falling and having certain bones fractured near my ankle." Again we submit that the statutory requirement is not met. "And also particularly describing the \* \* \* circumstances of the injury." The city is entitled to know what appellant claims in this regard. She testified that she stepped into a hole or cavity. Such information could not have been obtained from the notice. An examination of the place referred to in the notice could not reveal any information as to the circumstances. The only inquiry that could reveal the fact testified to would be one made of appellant. If the statute means anything it certainly means that claimant should describe the circumstances as she claims the same to be. To permit a claim as indefinite and uncertain as the above letter to stand would be to open the door to fraud. To disregard the requirement that the circumstances be described would be the equivalent of disregarding the requirement of filing a notice. It seems to us that one of the most important conditions required as a condition precedent to filing an action is



that claimant give notice of the circumstances because they can only be learned by the statement of the claimant.

### THE CAUSE OF THE INJURY.

“Through a defect in the sidewalk” does not meet the requirement “and also particularly describing the cause \* \* \* of the injury.” Here again evidence was offered that the cause of the injury was a hole or cavity. Could one suspect that a depression, or hole or cavity caused the injury described from the notice itself without “extraneous inquiry?” The word “defect” means “want or absence of something necessary for completeness or perfection,” Webster’s New International Dictionary. The city is entitled to know what the claimant claims the defect to be as well as to be advised where it is so that they may see for themselves. If this were the only failure to comply with the statute, it would invalidate the notice.

In the case of *Van Loan vs. Village of Lake Mills*, (Wis. 1894), 60 N. W. 710, the notice was very similar to the one at bar. It fixed the place of injury and described the cause as “while walking home on the sidewalk on Madison Street opposite the Moravian church, in company with Prof. Terry, owing to a defective sidewalk which caused me to fall. The court said:

“ ‘owing to a defective sidewalk on Madison Street opposite the Moravian church,’ might possibly answer for ‘the place where the damages occurred,’ if the defect itself was described so that the place could be found from the defect. But

there is no attempt to describe the defect. What was it? The question is not answered. This notice is a condition precedent to maintaining the suit, and it must have reasonable certainty to be of any use whatever. \* \* \* This notice is a blank, so far as any description of the defect is concerned, and that is the very thing the Village authorities wished, and had the right to be informed of. \* \* \*,”

In the case of *Nicholaus vs. City of Bridgeport*, (Conn. 1933) 167 Atl. 826, the assistant clerk of the city made out the notice and told plaintiff to sign it which he did without reading or learning its contents, and which notice read in part:

“For injuries the result of a fall on Chopsey Hill road about 500 feet from Fairview Avenue going east on December 24th at 3 p. m. \* \* \*,”

The conditions required by the Connecticut statute were far more general than those required by the Utah law. The law of Connecticut required a notice “of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence” and also providing that no notice shall be held invalid or insufficient “by reason of an inaccuracy in \* \* \* stating the time, place or cause of its occurrence,” if there was no intention to deceive the city.

The court held at page 827:

“the giving of such notice as the statute requires is a condition precedent to the maintenance of the action, the obligation to comply (p. 828) with the statute rests upon the plaintiff, \* \* \* The

assistant city clerk could not waive compliance with the statute by accepting a defective notice or thereby stop the city from taking advantage of a failure to meet the statutory requirements.”

The cause of the injury was held to mean the defect or defective condition of the way which brought about the injury. The court held further that the above notice entirely failed to state the cause of the fall and hence the injury. Our statute reads “and also particularly describing the cause” as well as the circumstances of the injury. The particularity of the description must be sufficient to enable the city to find the “cause of such injury from the description thereof given in the notice itself without extraneous inquiry.” ,

In the case of *Merrill vs. City of Springfield*, (Mass. 1933) 187 N. E. 551, in considering a notice which referred to the cause of the injury thus: “My injuries were due to a defective, dangerous condition of said crosswalk in which snow and ice accumulated as a result of which I fell,” the court held:

“This notice was insufficient since the cause is not specific and ‘is equally consistent with an excavation in the way, and obstruction upon the way, an original mal-construction of the way, a worn, uneven and irregular condition of the surface of the earth, an accumulation of snow or ice or both, or any of the many varieties of defect which may exist in a way.’ ”

## THE TIME.

“On March 23rd at 9:30 A. M.” does not fulfill the condition “and stating the particular time at which the injury happened.” No year was specified. The notice must show that the injury happened within 30 days prior to the date of its proper filing with the city.

In the case of *Luke vs. City of Keokuk*, (Iowa 1926) 211 N. W. 583, the court considering a claim where the time was thus: “the evening of March 22nd”, the year of the alleged injury not being inserted in the notice, said at Page 585:

“In this case the notice that was served on the city contained no statement of the year in which the accident happened. It may have been the present year, or any year in the past. The statement is defective in this respect, and being a condition precedent to bringing of the action, we are of the opinion that it does not comply with the requirements of the statute, and hence was no notice.”

The notice in the instant case did not specify the year. As the above court observed, quoting from *White vs. Town of Stowe*, 54 Vt. 510, “so, if the notice does not state that the injury happened within 30 days next preceding its receipt, they (the city officials) might as well say that the injured party had no claim against the town.” Parol evidence is not permissible to supply the legal requirements of the notice. The claim is fatally defective.

## THE CLAIM WAS NOT VERIFIED.

The plaintiff concedes that the claim is defective in this regard and cites the case of *White vs. Heber City*, 82 Utah 547, 26 P. (2nd) 333, and also other authorities. The authorities almost unanimously hold defective claims that are not verified as required by the statute.

Appellant says at page 30 (Appellant's brief) that plaintiff's claim "was handled by respondent by the usual method adopted for the disposition of such claims." No evidence was offered in support of this assertion. Appellant further says that the reference of the plaintiff's alleged notice to a city department "together with the negotiations had between the (p. 31) respondent and the city attorney's office show conclusively that respondent had notice of the claim and took some action thereon." The author of this statement has not read the record. Nowhere is there any evidence of negotiations between the city attorney and the appellant or the city and any city department in relation to said notice or any other matter.

Again appellant says: (Appellant's brief, page 32) "The respondent's silence, together with the action taken regarding the claim, including the offer to pay appellant \$25.00 in settlement of respondent's liability, constitute a plain representation to appellant respecting the validity of her claim." Again appellant has failed to read the record. No evidence can be found respecting an offer in compromise. The only competent evidence

in the record is the silence of respondent and its failure and refusal to consider the letter as a claim.

Appellant was asked by her attorney if she had ever been notified that her claim had been allowed and she answered: (Tr. p. 32, Ab. p. 11) "A. No, excepting I went to see Mr. Irvine, and he said they wouldn't accept it, but he offered me \$25.00 to settle the case." Motion was made by respondent to strike the answer, (Tr. p. 32, Ab. p. 11-12) and the court ruled that the portion (Tr. p. 32, Ab. p. 11 and 12) "of the witness' answer where she said 'Mr. Irvine offered her \$25.00' is stricken from the record."

The only evidence then in the record is that "Mr. Irvine" told the appellant that the city would not accept her claim.

It is evident that "Mr. Irvine" could not act for the city without some authority to do so and no attempt was made to show that the city offered to make a compromise or did anything but refuse to accept the appellant's claim. "Mr. Irvine" is a stranger to this case and to the respondent in the action. The motion was properly granted.

The appellant urges that the city was not misled to its injury by the defective notice. (Appellant's brief p. 31) "It was not shown at the trial that the respondent was prejudiced in any way by any alleged insufficiency of the claim." The burden of proof rested on appellant. However no notice was given by the exhibit. In the case of *Rauber v. Wellsville*, (N. Y. 1903), 82



N. Y. S. 9, 11, the court in answering the argument that the city was not misled to its injury by a defective notice, said:

“It would be permissible for a claimant in the same manner to escape the consequences of failure to comply with the provisions of the statute in not stating the time of his alleged accident or the nature of his claim, and in fact we see no reason why he might not invoke the same doctrine to relieve him when he had failed to verify his claim, or had given verbal instead of written notice thereof, or had filed his claim 11 instead of 6 months after the accident happened. In each of these cases, in the place of compliance with the absolute statutory requirement, he might substitute evidence, no matter how loose and inaccurate, provided only a jury might be permitted to say therefrom that the municipality had somehow learned of the details of the accident, and therefore had not suffered any determinable injury from the omission \* \* \*.”

Claims must be verified as required by the statute before an action against the city can be maintained.

*Clawson vs. City of Ithica*, 212 N. Y. S. 433;

*Cole vs. City of Seattle*,  
(Wash. 1911) 116 Pac. 257.

In the case of *Spencer vs. City of Calipatria*, (Calif. 1935) 49 Pac. (2nd) 320 the court states at p. 321:

“No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure and conditions under which it may be exercised. That such a claim must be verified is a

reasonable provision which should not be held to be ineffectual and meaningless.”

NO WAIVER RESULTED FROM A FAILURE OF CITY'S  
GOVERNING BODY TO POINT OUT DEFECTS IN LETTER  
FILED BY APPELLANT.

Appellant claims that a duty rests upon the city to point out the lack of verification of appellant's letter to the appellant if the city intended to rely upon it and failing to do so a waiver resulted.

In the case of *Chamberlain vs. City of Saginaw*, (Mich. 1903) 97 N. W. 156 where the silence of the city's governing body was urged as a waiver at p. 157 the court said:

“The council took no action whatever, except to receive the communication and refer it to a committee. There was no waiver, unless it was the duty of the council to notify the claimant that such notice was void, point out wherein it was void, and give her an opportunity to present a valid one. Public rights are not, in my judgment, to be thus waived. The liability of municipal corporations for defective streets and sidewalks is purely statutory, and he who attempts to fasten that liability upon the municipality is bound to strictly comply with the statute. A waiver can only be predicated upon some duty of the corporation to act. No such duty is imposed by the statute, expressly or impliedly. After giving the notice, both parties may rest, if they choose, and as they did in this case, without further action until the claimant sees fit to plant his suit.”

“To waive means in law, ‘to relinquish intentionally a known right, or intentionally to do an act inconsistent with claiming it’.”

*Ridgeway vs. City of Escanaba*, (Mich. 1908) 117 N. W. 550.

Appellant urges that the latter part of the claims statute supports his contention that the city should point out to appellant the failure to verify her claim if the city is to rely upon it. In this contention the appellant is entirely in error and has not carefully read the statute and cases cited to support the contention. Let us now analyze this argument.

Section 15-7-76, Revised Statutes of Utah 1933, provides at the end thereof:

“Every claim, other than claims above mentioned, against any city or town must be presented, properly itemized or described and verified as to correctness by the claimant or his agent, to the governing body within one year after the last item of such account or claim accrued, and if such account or claim is not properly or sufficiently itemized or described or verified, the governing body may require the same to be made more specific as to itemization or description, or to be corrected as to the verification thereof.”

The first part of the statute refers solely to claims for injuries alleged to have been caused by defective streets and sidewalks.

Section 15-7-77, Revised Statutes of Utah 1933, provides:

“It shall be a sufficient bar and answer to any action or proceeding against a city or town

in any court for the collection of any claim mentioned in Section 15-7-76, that such claim had not been presented to the governing body of such city or town in the manner and within the time specified in Section 15-7-76; provided, that in case an account or claim, *other than a claim made for damages on account of the unsafe, defective, dangerous, or obstructed condition of any street, alley, crosswalk, way, sidewalk, culvert or bridge*, is required by the governing body to be made more specific as to itemization or description, or to be properly verified, sufficient time shall be allowed the claimant to comply with such requirement.” (Italics ours).

It will be noted that claims other than for streets and sidewalk injuries a year is allowed for filing and in the event such claims are not properly verified the city may require a corrected verification. This does not apply to claims relating to streets or sidewalks. *Dahl vs. S. L. C.*, 45 U. 544, 147 P. 622. The provision as to verification of claims relating to sidewalks and streets is absolute and unconditional, and reads; claims must be “properly verified”.

Appellant cites the following cases to support his contention that the city waived verification of his alleged notice of claim by its silence and failure to call the defects to the attention of the appellant.

*Bowman vs. Ogden City*,  
33 U. 196, 93 P. 561;

*Burton vs. Salt Lake City*,  
69 U. 186, 253 P. 443, 51 A. L. R. 364;

*Husbands vs. Salt Lake City*,  
92 U. 449, 69 P. (2nd) 491, at 499;

*Moran vs. Salt Lake City,*  
53 U. 407, 173 P. 702.

In the Bowman case (*supra*) a written notice was filed with the city December 21, 1903, claiming injury December 10, 1903. The notice was unverified. The city investigated the claim, considered it on its merits and adopted a report recommending payment of the same and \$5.00 was paid to and received by Bowman in satisfaction of the same. The court observed that, at page 204 (Utah), Chapter 19, p. 12, Sess. Laws 1903, the statute under which the notice of claim was filed, provided:

“that claims of this character must be presented to the city council in writing, signed by the claimant or his agent, properly verified, and describing the time, place, cause, and extent of the damage or injury, and if the city council *shall refuse to hear or consider a claim because not properly made out, notice thereof must be given the plaintiff and sufficient time allowed him to have the claim properly itemized and verified.* The plaintiff’s claim was not properly made out as provided by the statute in several particulars, principally because it was not verified, and the extent of this injury or damage not sufficiently described. The city council, however, did not decline to consider it, nor to investigate the facts, because the claim was not properly made out. On the contrary it treated the claim, and acted upon it, as though it had been in full compliance with the statute. In such case the *defects* of the claim presented were *waived*, and were not thereafter available as a defense to the action but on the ground that the settlement and payment were in satisfaction of plaintiff’s claim, a verdict ought to have been directed for the defendant.” (Italics ours).



The statute under which the said claim was filed was later amended to read substantially as it does now. (February 15, 1905.) See Chap. 5, Laws of Utah, 1905, page 5.

The rule in the Bowman case as applied to claims relating to sidewalks and streets of cities is not now the law in Utah and the case is not in point. The rule may have some application as to claims under the second part of the statute, that is claims other than those relating to sidewalks because of the provision in our present statute above noted relating to the second class of claims to the effect that the city may require correction as to a defective verification. But even there it is doubtful that such rule would apply if there is a total absence of verification. How could a verification be corrected if there was none especially after the one year period had expired?

This court has heretofore observed that claims under our statute are divided into two classes: one consists of claims for damages or injury alleged to have been caused by unsafe streets or sidewalks and the other consists of every claim other than claims above mentioned. The important question to decide is does the claim at bar come within the first or second class. *Dahl vs. Salt Lake City*, 45 Utah 544 (548), 147 Pac. 622.

In the Burton case (*supra*) the claim was made to recover damages for death of a girl by drowning in a city owned and operated bath house, the said claim being made under the second class of cases. The court ob-



served at page 193 (Utah): “The statute requires that in case a claim is deemed insufficient or defective in certain particulars, the insufficiency or defect *must* be pointed out by the city. The city not having done so it cannot now be heard to say that the claim is insufficient.” Our statute now under consideration does not so provide. Nevertheless the claim in that case was filed under the second part of the statute which now provides that the city *may* require correction as to verification where defective. The Burton case, considering a claim under the second class of claims as the Bowman case, did not hold that the entire absence of verification could be corrected. The case is not in point and has no reference to claims for sidewalks or streets, where particularization and verifications are required as a condition precedent.

In the Husbands case (*supra*) the claim was filed in March, 1934, claiming an injury by reason of a sprinkling wagon running over a boy on July 8, 1933, nearly eight months prior. This claim likewise was filed under the second class of cases where the city may require a verification to be made more specific. The court observed that, at page 465 (Utah: “The claim here involved must come under the latter portion of said section (15-7-76, Rev. Stat. U. 1933) above quoted, referring to claims other than those mentioned in the first part of said section,” and again at page 466: “It must be remembered that this claim falls under the second division of section 15-7-76, which apparently does not require the same particularly as is required by the first part of

that section.” This case is not an authority for the contention that the city waived a compliance with the statute but on the contrary could well be cited by respondent to illustrate that claims filed under the first part of the claims statute, claimant must particularize and the claims be verified in the manner required by the statute, whereas such is not required of claims under the second part of said section. The Husbands claim was verified and the only question there was whether it was sufficient in other particulars, which the court held were not required under the second part of the claims statute.

The city is under no duty to examine claims for defects therein where they relate to injuries upon sidewalks and streets. It may take such advantage of such claims filed as it chooses. As to “every claim, other than claims” for streets and sidewalks described in the first class of claims, if the claim “is not *properly or sufficiently itemized or described or verified*” the city “*may*” require it to be made “*more specific as to itemization or description, or to be corrected as to the verification thereof.*”

The cases cited by appellant relate to the second part of the statute where there is a discretion which might be construed as an implied direction to examine the claim for defects and point the same out to claimant if the city intends to take advantage of such defect. The citation of such cases brings again before us rather forceably the necessity of examination of the statute under which the claim is filed.

Appellant cites the Moran case *supra* (p. 53 appellant's brief) with the comment that Moran failed to prove the giving of notice of any kind to the city. The evidence shows that a letter was sent to the Mayor and City Council claiming payment for damage by overflow of water into a conduit then being constructed for the city, which claim was made under the second class of claims under the statute and the court observed at page 411 (Utah):

“We are clearly of the opinion that under the clear language of the statute the action of the plaintiff did not meet the requirements of section 312, *supra*. Accepting the statement of Mr. Moran as to the contents of the communication sent to the Mayor and city council, it does not appear that that claim was verified as to its correctness, or that it was itemized, or described, or that it contained any of the facts required by the provisions of the section. To hold that the communication claimed to have been sent to the city was a compliance with the statutes, without some action on the part of the city waiving such requirements, would be, in effect, to nullify the provisions of the statute and to bind cities, regardless of whether claimants had advised them in any particulars as to the nature of the claim, and to that extent at least would effect the repeal or repudiation of what the Legislature considered to be a prerequisite to the right to maintain a suit against municipalities.”

Appellant cites further the case of *Hurley vs. Bingham*, 63 Utah 589, 228 P. 213 (App. brief p. 57) and quotes an extract from the opinion urging that a “proper application” of the statute would suggest that a waiver

had resulted because the city failed to call attention to defects in the claim. In that case a minor, eight years of age, was injured on a street and his guardian ad litem commenced an action without the filing of the claim required by the first part of the statute relating to streets and sidewalks. The plaintiff cited the case of *Sweet vs. Salt Lake City*, 43 Utah 306, 134 Pac. 1167, and *Berger vs. Salt Lake City*, 56 Utah 403, 191 P. 233, where claims were presented to the city under the first part of the statute and actions commenced for damages additional to the sums claimed in the notice filed. The plaintiff in the Hurley case urged that the rule permitting recovery for purely consequential damage arising out of injuries described in the notice of claim but which consequential damages were not claimed in the notice was an authority for the proposition that a minor child not capable of filing a notice should not be prevented from bringing his action. The court held that a minor child if he expects to recover must file a claim and further pointed out that the court in the cited cases held that damages may be recovered only for the injuries described in the claims. That consequential damages not known at the filing of the claim may if properly pleaded be recovered for *only those injuries described in the claim*. The court in further considering the cited cases then observed at p. 593 (63 Utah):

“After all, as we conceive the purpose of the law, when the injured party has presented his claim stating the time, place, cause, and circumstances of his injury and the extent of his damages as far as known to (p. 594) him, he has fairly

and fully complied with the spirit and intent of the statute. But this is far from excusing the failure to present any claim at all within the limit fixed by law. *There is a wide distinction between presenting a defective claim which at least names the time, place, and circumstances of the injury and in presenting no claim at all.* In the first supposed case the municipality is at least notified sufficiently to investigate the merits of the claim, which, evidently, is the main purpose of the statute. In the second supposed case the city received no notice at all, and the very purpose of the statute is defeated. By this we do not mean, however, that if the municipality has notice otherwise than by presenting a claim, presentation of the claim is thereby rendered unnecessary or immaterial. By the great weight of authority as we read and interpret the adjudicated cases, the presentation of a claim within the time fixed by law is a condition precedent to the bringing of an action in cases of this kind. The right to institute an action in this class of cases is purely statutory. It did not exist at common law, and therefore the conditions precedent fixed by the statute which confers the right must be complied with, or the action fails.” *Berger v. Salt Lake City, supra.* (Italics ours).

The court in the Dahl case (*supra*) above quoted observed at p. 549 (45 Utah):

“That the Legislature may, by statute, *prescribe conditions upon which suits may be brought and maintained against a municipality is conceded.*”

The examination of the decisions considering the first part of the statute relating to streets and sidewalks reveals that the court consistently requires the claimant

to comply with the conditions set out in the statute or as said in the Hurley and the Berger cases (*supra*) the conditions precedent fixed by the statute which confers the right of action *must* be complied with, or the action fails. This same rule applies to the claims under the second subdivision of the statute. As an analogy it was observed by the court in the Hurley case (*supra*) quoted at page 57 of appellant's brief, there is a wide distinction between a defective verification and no verification at all. This was considered by the court in the case of *White vs. Heber City*, 82 Utah 547, 26 P. 2nd 333 where the court held that the verification though defective, p. 555 (Utah) "yet, in substance stated enough to comply with the statute and to invoke consideration and action." A total absence of verification would not invoke consideration and action by the court.

Respectfully submitted,

E. R. CHRISTENSEN,  
*City Attorney.*

GERALD IRVINE,  
MARION ROMNEY,  
*Assistants.*



