

1953

## Michael V. Maloney v. Salt Lake City : Brief of Respondent

Utah Supreme Court

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E. R. Christensen; Homer Holmgren; A. Pratt Kesler;

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Case No. 7926

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**IN THE SUPREME COURT**

**of the  
STATE OF UTAH**

**FILED**  
FEB 26 1953

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Clerk, Supreme Court, Utah

**MICHAEL V. MALONEY,**  
*Plaintiff and Appellant,*

— vs. —

**SALT LAKE CITY, a corporation,**  
*Defendant and Respondent.*

\_\_\_\_\_  
**RESPONDENT'S BRIEF**  
\_\_\_\_\_

**E. R. CHRISTENSEN,**  
City Attorney

**HOMER HOLMGREN,**  
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Assistant City Attorneys  
*Attorneys for Respondent*

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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MICHAEL V. MALONEY,  
*Plaintiff and Appellant,*

vs.

SALT LAKE CITY, a corporation,  
*Defendant and Respondent.*

Case No.  
7926

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**RESPONDENT'S BRIEF**

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**STATEMENT OF FACTS**

Since plaintiff has made only a general statement of facts and deferred a discussion of the details of the evidence to an appropriate place in his argument, we shall adopt the same procedure. We wish it understood, however, that we are not conceding the correctness of all that is stated by plaintiff in his statement of facts. Any differences will be apparent as we give our version of the evidence.

**POINTS RELIED ON**

**POINT NO. I. THE EVIDENCE WAS INSUFFICIENT  
TO SUSTAIN THE JURY'S VERDICT.**

(a) THE UNDISPUTED TESTIMONY AS TO THE CONDITION OF THE SIDEWALK EXISTING PRIOR TO THE ACCIDENT REVEALS NO ACTIONABLE DEFECT.

(b) THE EVIDENCE OF THE CONDITION EXISTING AFTER THE ACCIDENT DID NOT SHOW THAT AN ACTIONABLE DEFECT EXISTED PRIOR TO ACCIDENT.

POINT NO. II. MERE PROOF OF NEGLIGENCE WILL NOT SUPPORT A JUDGMENT. THE NEGLIGENCE PLEADED AND PROVED MUST HAVE BEEN A PROXIMATE CAUSE IN PRODUCING THE INJURY.

POINT NO. III. THE CITY IS NOT LIABLE FOR INJURIES ARISING FROM A LATENT DEFECT IN THE SIDEWALK.

POINT NO. IV. THE VERDICT, THOUGH AWARDED DAMAGES AS SPECIAL DAMAGES, SHOULD BE CONSTRUED AS A GENERAL VERDICT IN THE SUM OF \$1000 AND IS NO GROUNDS FOR A NEW TRIAL.

## ARGUMENT

POINT NO. I. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE JURY'S VERDICT.

(a) THE UNDISPUTED TESTIMONY AS TO THE CONDITION OF THE SIDEWALK EXISTING PRIOR TO THE ACCIDENT REVEALS NO ACTIONABLE DEFECT.

We feel that a proper presentation of the facts on this, and the succeeding subdivision, cannot be done by simply stating our conclusions of what the evidence shows. To say that the sidewalk was cracked, fissured, and weakened does not give a true picture of conditions nor does it reflect the actual testimony or evidence in the case. We trust, therefore, that the court will bear with us while we give in detail the testimony and evidence on these crucial and determinative points.

From plaintiff's testimony it appears that on November 21, 1951, at about 7 minutes to 9 o'clock A.M., he was walking west on the north side of South Temple. As he arrived at a point immediately in front of the Bransford Apartments, to use his language:

"Well, I just went through the sidewalk real quickly and fell." (R. 17) "A hole broke out of the sidewalk about 4 inches wide and about 14 inches long and 14 inches deep," and his right foot went into the hole. (R. 18)

In his direct testimony, he gives no description of the condition of sidewalk as it existed prior to the time of the accident. The accident happened on Wednesday. He visited the scene of the accident on the following Monday. (R. 21) Before detailing what he saw on Monday, some 4 or 5 days after the accident, we shall refer to his testimony on cross examination insofar as it relates to what he saw prior to the accident, and shall also refer to the testimony of other witnesses on the same subject.

He had walked over the same sidewalk over a considerable period of time in walking to work each morning. At these times he had not noticed anything wrong with the sidewalk. "I never gave it a thought." There wasn't anything there that attracted his attention at all as to being defective. On the morning of the accident he did not notice anything that indicated the sidewalk was defective. (R. 30)

Q. And as you walked along there you put your foot on this particular part of the sidewalk and it went down. Is that right?

A. That's right.

- Q. And prior to that time you had not seen anything that would indicate that was dangerous?
- A. No.
- Q. Had you noticed these cracks?
- A. Well, I have noticed a lot of cracks. I didn't notice those particular ones. I didn't take particular notice at that time.
- Q. As you walk down the sidewalk there are cracks in different places, aren't there?
- A. Yes.
- Q. There was nothing that you saw in the condition of the sidewalk that indicated to you any hazard?
- A. No. (R. 31-32)

On redirect examination he testified he did not go along the sidewalk looking for defects. (R. 36)

The foregoing constituted all of plaintiff's testimony as to condition of sidewalk before the accident.

Catherine Cartwright, witness for plaintiff and defendant, testified that she was walking on her way to work behind plaintiff. She did not see him fall, but did see him on the sidewalk, his foot in the hole. She had frequently walked that way to work. (R. 39-42)

- Q. Had you at any time noticed anything particularly hazardous about this particular place?
- A. No.
- Q. Did it appear to have any difference in elevation one slab over another?
- A. Insofar as I have been able to observe since then even checking along there, there didn't seem to be any difference. (R. 42) "The only raise that I have noticed is since it was re-



paired. It is higher now. There is a bump there." (R. 43)

On cross examination by plaintiff.

Q. Did you particularly look for difference in elevation?

A. No.

Q. And your testimony that you haven't noticed it is based upon the fact that you haven't tried to notice or observe?

A. That's right. I never paid any attention.

On redirect, she testified.

Q. Did you give it, as you passed along there, the same ordinary inspection as you would anywhere else?

A. That's right. Just glanced to be sure where I walked.

Q. In other words, you walked along there with the same attention to the sidewalk as you ordinarily use?

A. That's right.

The defendant produced as witnesses E. Wesley Smith, Manager of the Eagle Gate Apartments, which is the present name of the Bransford Apartments, George A. Turner, gardener for said apartments, and Joseph Jongejan, elevator operator for said apartments.

Mr. Smith testified he had been manager of the apartments for 21½ years; that as part of his employment he has made it a practice each morning to walk around all the buildings and make observation and the sidewalk in

front of the apartments is included in that inspection. On the day of the accident, he arrived at the apartment at 8 A.M. At that time he was in front of the building and passed over the sidewalk.

- Q. Did you see anything there that would present a hazard to pedestrians?
- A. Nothing — nothing.
- Q. And had you seen any there prior to that time?
- A. No sir, I had not.
- Q. Had there been something there that would present a hazard, would you have been likely to have seen it?
- A. I am sure I would.
- Q. That was your purpose in making the examination?
- A. That was my purpose in going around through the buildings. (R. 61-62)

Mr. Smith further testified that in addition to making inspections, he had occasion to assist in shoveling snow from the sidewalk. Also, he would have the gardener hose off the sidewalk and keep it clean.

- Q. Did you at any time notice, Mr. Smith, that there were depressions there?
- A. I never noticed depressions there except the cracks. There was quite a number of cracks that were apparent in the concrete but no evidence of any projection you could stumble over.
- Q. And no evidence of any appreciable depression?
- A. No sir. (R. 63-64)

On cross examination he testified that the cracks had been there for years. "They were there when I first took over the management."

Q. Have you noticed any essential change in the cracks from the time you first took over the management to date of this accident? (R. 63-64)

A. No sir. (R. 64)

George A. Turner, gardener for the apartments, testified that he had occasion to be out on the sidewalk in front of the apartment about every day. (R. 65) He noticed there was sort of a wide crack one half inch or so in the pavement separating one row of cement blocks from the other.

Q. Did you at any time notice any unevenness, any raises over which people might stumble?

A. No, there wasn't any. There wasn't any unevenness that I could see in it.

Q. So far as you could see, the condition of the sidewalk presented no hazard to people on the street?

A. No, I could not see any.

He testified that he had cleaned the snow off, swept the walk once in awhile and hosed it off once in awhile. At those times he discovered nothing that would indicate any hazard to pedestrians. (R. 66-67)

On cross examination he testified he had been with the apartment six years. During that time he did not

notice any essential change in the sidewalk and he had not examined the sidewalks for defects, not being particularly concerned with that. He could not describe where the cracks are as he had not paid too much attention to it. (R. 67-68)

Joseph Jongejan, elevator operator for 33 years, testified that he had been in front of the building on his way to and from work each day. Prior to the time of the accident he didn't notice anything wrong at all. If he had, "that is the first thing I would have notified Mr. Smith as soon as I came in." At the time of the accident, "I thought it was pretty well fixed for a long while. Very nice."

Q. Did you see any depression over which people might stumble or lose their balance?

A. Not recently, no sir.

Q. Or differences in elevations?

A. Not in the time since the church took the building over. No sir. (8 or 10 years). (R. 69-70)

When asked the particularity with which he has made his observation as to condition of sidewalk, he testified, "Well, I always noticed if there was any paper laying on the sidewalk and sticks so people won't fall over them and I usually pick it up and take it inside and put it in the garbage; otherwise, the sidewalk is always nice and clean. I didn't never notice anything. There might be a few, oh, little cracks that have been there ever so long, but I didn't pay any attention to them."

On cross examination he testified that he did not know that there were cracks in the vicinity of where that hole is now.

- Q. You don't know of any particular crack anywhere on the sidewalk?
- A. No, just a few old cracks is all I know — every day cracks — just a few on the outside by the steps a little ways.

He did not know there is a crack immediately adjacent to the cement patch.

- Q. In other words, your observation has just been a casual observation of someone going in and out of the building.
- A. That's all. The sidewalk was in the same condition on November 21, 1951 as it had been for 6 or 8 years prior thereto. (R. 71-2)

The foregoing constitutes all of the evidence as to the condition of the sidewalk prior to the date of the accident by witnesses who had seen the sidewalk prior to the accident. We submit that such evidence wholly fails to establish any actionable defect. On the contrary, it affirmatively establishes there was no such defect, but only some "every day cracks."

(b) THE EVIDENCE OF THE CONDITION EXISTING AFTER THE ACCIDENT DID NOT SHOW THAT AN ACTIONABLE DEFECT EXISTED PRIOR TO ACCIDENT.

The plaintiff testified that on Monday following Wednesday, the date of the accident, he returned to the scene. (R. 21) Exhibits A, B & C, photos taken of the

scene, were identified by plaintiff as accurately reflecting the condition of the scene of the accident as it appeared to him on Monday. These exhibits were admitted in evidence over defendant's objection that no proper foundation had been laid for their reception, there being no evidence to show the pictures reflected the condition of the hole immediately after the accident. (R. 22-23)

Using Exhibit A, and directing plaintiff's attention to the line diagonally across the picture and against which the ruler is leaning, he testified: That there was a difference in elevation between the cement to the north (right) of this line and the cement to the south of this line at the point where the ruler is, of about  $\frac{1}{2}$  inch, the north being higher than the south. This is at the west end of the hole. At the opposite, east, end of the hole, at the round black object revealed in Exhibit A, he observed the difference in elevation of an inch, the north cement being higher than the south. (R. 24-25)

This is the same line or crack referred to by Mr. Turner. (R. 66) It marks the separation between the City's walk on the south and the property walk on the north. There actually is no crack at all. As shown by defendant's Exhibit 3, it separates the north and south concrete.

Plaintiff also testified that the slab of cement enclosed by the crack running along the left edge of Exhibit A and then to the north, tipped down toward the hole. Also the piece at the east end of the hole tipped slightly down. (R. 25) There is absolutely no testimony, however, as to the degree of dipping or tipping.

Referring to Exhibit B and to the line marked XX, which runs from the top of the picture down to the east and west line already referred to, he testified he did not notice much difference in elevation between the sides of that crack. (R. 26) On cross examination he testified that he couldn't see any difference in elevation and if it had been noticeable he would have seen it. (R. 34)

He testified he did not obtain the yardstick shown in Exhibits A, B & C; he doesn't know whose it is; and it was not there on Monday. He had no ruler to measure with. His estimate here is simply based upon a casual observation. (R. 32-33)

Explaining further the difference in elevation between the north and south slabs at the west end of the hole by the ruler, he testified there was no difference in elevation 6 or 8 inches west of the hole, but from that point east to the hole it sloped somewhat toward the hole. Any slope of the rest of the pavement was not noticeable. (R. 28)

The difference in elevation of 1 inch between the north and south slabs at the east of the hole went east about 6 or 8 inches. As to this difference in elevation it is perfectly apparent from all the photos that there was a small triangular chip in the surface of the south cement strip extending easterly about 6 or 8 inches. The topping had chipped off leaving the aggregate underneath exposed. The small stones of this aggregate are visible in Exhibit A and also in defendant's Exhibit 2. Naturally this loss of topping would cause the top of the cement where that occurred to be somewhat lower than the sur-

face of the adjoining cement. But there is no testimony that this topping was missing before the accident. The presence of this chip would account for at least a substantial part, if not all, of the difference in elevation of 1 inch testified to by plaintiff. For aught that appears this chip came out when the sidewalk collapsed under plaintiff's weight, and the testimony of all the witnesses who testified as to the condition of the walk prior to the accident, including plaintiff, sustains that conclusion.

Joseph Novak, a graduate engineer, examined the scene of the accident the day before the trial, which would be September 29, 1952, about 10 months after the event and also after the hole had been repaired. (R. 46) He testified that there was a difference in the appearance of an old crack in cement and a new one, the former being discolored and the faces of concrete being smoother due to erosion. He made measurements along the crack shown in Exhibit C, marked at the right edge of the photo by an X. This is the crack that runs north and south from the north edge of the City's walk through the entrance walk leading to the apartment entrance. At a point 3 inches north of the City walk, the west portion of the entrance walk was  $\frac{1}{2}$  inch lower than the portion east of the crack. Eleven inches north of the City walk the west side of the crack was  $\frac{3}{4}$  inches lower than the east side. Thirty inches north of the City walk the west side of the crack was  $\frac{3}{4}$  inch lower than the east. (R. 46-48)

The court permitted him to testify over objection, that when the hole was repaired, the surface of the patch sloped up toward the east to meet the elevation of the ori-



ginal cement. The joinder being at the crack marked X, Exhibit C. The original cement at that point was  $\frac{1}{4}$  inch higher than the surface of the patch at a point 3 inches to the west. (R. 49)

The cracks appearing on Exhibit C to the left of the ruler were not visible to him, the patch having covered them. The crack that extends to the west is visible a short distance. (R. 50) "The concrete where the sidewalk is in the immediate area of the patch, not being the patch, its adjacent area, the general slope of the concrete was in the direction of the patch." (R. 51) The difference in the elevation of the cement bordering the crack running north towards the building, marked X, was due to the west side subsiding, it had sunk. (R. 52)

The crack, still visible and outside the patch, is the crack that extends west from the letter "O" on Exhibit C. The crack extending east to the other "O" is covered by the patch. The crack that is visible is at least 4 years old. He saw a very faint crack in the cement west of the hole, indicated by the letter "A" on Exhibit B, being about 6 inches west of the patch. The sidewalk sloped from the crack towards the patch. (R. 55) He observed no difference in elevation between the north slab and the south slab between Point A and the patch. (R. 57)

It will be noticed that nowhere does the witness attempt to give the rate or degree of slope or any testimony to indicate even any substantial slope. He admitted he had no opinion as to how long the difference in elevation had existed along the crack running north from the City sidewalk to the building.

The foregoing testimony of plaintiff and Mr. Novak, together with the photos to which they referred, constitutes all of the evidence submitted by plaintiff in his attempt to show the existence of an actionable defect in the walk at the time of the accident. Plaintiff's testimony concerns what he saw by a casual glance five days after the accident. He says the north strip of cement, the strip leading into the apartment entrance, as shown by defendant's Exhibit 1, was about  $\frac{1}{2}$  inch higher at the northwest corner of the hole than the south, or City sidewalk, the difference in elevation sloping up from that point west 6 inches to become even on both sides of the line. Over on the east edge of the hole, where the topping is chipped off, he said the north side was an inch above the south side. No evidence is given that the triangular chip in the topping was missing before the accident, so there is absolutely no evidence that the difference in elevation between the north and south sides of the line existed at the time the accident happened. As to the crack running north through the apartment entrance approach, he saw no difference in elevation between the east and west side of the crack.

Mr. Novak, about ten months later, measured the differences in elevation between the east and west sides of this north and south crack and found difference in elevation of  $\frac{1}{2}$  and  $\frac{3}{4}$  inches. But this crack, concededly is not on the city sidewalk. Furthermore, Novak admits he has no opinion as to how long that elevation had existed; that the difference in elevation would tend to increase with passage of time. As to the condition in the vicinity

of the hole, he merely testifies as to certain small cracks as being 4 or 5 years old; that the sidewalk slopes up to meet the patch put in by the City at some places. The only description of the degree of the slope was at one place the slope was slight, at another place, the east side of the patch sloped up  $\frac{1}{4}$  inch to meet the pavement. Such a slope is no indication as to what the condition was before the accident. It only indicates the persons putting in the patch put it in in that fashion. Nowhere does he give an opinion that these slopes indicated any kind of depression in the original sidewalk, or any condition of hazard to pedestrians, or any indication that the sidewalk was weakened or that such sloping gave any warning that a condition existed that would put the City on notice that a hazard existed.

We submit that plaintiff's evidence wholly failed to prove the existence of an actionable defect in the walk at the time of the accident. But any inferences that the conditions testified to by plaintiff existed on the day of the accident are completely dispelled by defendant's evidence. Furthermore, plaintiff's evidence as to conditions after the accident was not competent to prove conditions on the date of the accident, without a showing that no change in the conditions had occurred in the meantime. No such showing was made.

In *Winkler vs. City of Columbus*, Ohio App. — 71 N.E. 2d 729, the plaintiff sought to testify as to her observations of the sidewalk the day following the accident. The court held this testimony was not competent "for the

reason that it did not appear that there had not been any change in the condition of the walk."

First of all, there is undisputed evidence that the condition at the hole did change between the time of the accident and the following Monday, when plaintiff was there making observations. This is made clearly manifest by comparing plaintiff's photo Exhibit A and defendant's photo Exhibit 2. It was stipulated that Exhibit 2, as well as 1 and 3, were taken by the police photographer at the time the ambulance came for plaintiff immediately after the accident. (R. 75) Exhibit A was taken looking northwest, Exhibit 2 was taken looking north, north being indicated by a small blue "N" at the top margin. Exhibit 2 shows that a large part of the concrete along the north edge of the break was still in place and the broken off part appears in the hole close to the surface. In Exhibit A, nearly all of this cement along the north of the hole is gone, leaving only a little sliver, running to the black spot referred to in plaintiff's testimony at the east edge of the hole. Somehow that cement was knocked off and the hole beneath is revealed in Exhibit A, but not in Exhibit 2. The broken piece is not in the same position in the hole in Exhibit A compared with Exhibit 2. Likewise, the piece of cement intact along the south and west sides of the hole is less in Exhibit A than in Exhibit 2, showing a further breaking off and displacement occurred between the day of the accident and the following Monday. These same differences in the conditions can be seen by comparing Exhibit 2 with Exhibits B and C. It is evident that someone broke off the ledges of the cement and moved the

broken piece in the hole. This breaking would undoubtedly disturb the remaining cement at the edges, if any appreciable pressure was applied to break off these pieces, as the cavity extends to the east and to the west of the hole. This disturbance could easily account for the difference in elevation testified to by plaintiff.

That such is the real explanation of the differences in elevation at the time plaintiff made his observation on Monday is established without dispute by the testimony of defendant's witnesses, W. L. Gardner and W. Y. Tipton.

Mr. Gardner, claim agent for the City, testified that he went up to the scene first about 10 A.M. and again at 11 A.M. the day of the accident. (R. 87) He examined the slabs adjoining the hole and found them level. Exhibit 3 is a photo looking east up the sidewalk. It shows a heavy line separating the north concrete from the city sidewalk. This is the same line against which the ruler is leaning in plaintiff's Exhibit C. In the vicinity of the hole, there was no difference in elevation between the concrete north and south of the line. There was no sloping at the point "A" on plaintiff's Exhibit B. (Mr. Novak testified there was a slight slope toward the patch at that part.) (R. 86) The piece of cement on the east side of the hole, shown on Exhibit "B" which is separated by a crack mark, was also level. As to the crack running toward the building marked X, on Exhibit C, there was a difference in elevation between the concrete on each side of not more than  $\frac{1}{4}$  inch. Along the main sidewalk he saw nothing over which people might stumble. (R. 87) The cement in

the area of the hole did not tip toward the hole. Most of the cavity was north of the hole. (R. 88) The cavity was 2 or 3 feet wide east and west, and  $2\frac{1}{2}$  feet north of the hole, measured north and south, and about 6 inches south of the hole. (R. 90) None of the sidewalk dipped toward the hole. (R. 91) It was stipulated that the north side of the hole is the north side of the City walk.

Mr. Tipton, a licensed civil engineer and surveyor and chief draftsman in the City Engineer's office, testified on the date of the accident he visited the scene shortly before noon. He made measurements and prepared a sketch in evidence as Exhibit 4. The City sidewalk is 8 feet wide. The cement to the north is 4 feet 3 inches wide. (R. 93) He measured the height of the one slab above the other along the crack marked "y", Exhibit 4, being the crack XX on Exhibit B that Novak testified he measured. At the point of greatest departure the difference in elevation was four-tenths inch, the east slab being higher than the west side. The difference is not quite as much against the north side of the City walk and the upper third next to the steps the slabs were practically flush, not more than one-tenth in variation. (R. 96)

He outlined on Exhibit 4, the perimeter of the cavity as he determined it. The north and south diameter of the cavity is about 4 feet, 3 feet being north of the center of the hole in the cement walk and 1 foot being south thereof. The cavity extends 2 feet east of the center of the hole in the walk and about 3 feet to the west thereof. (R. 97-98)

He observed the condition of the sidewalk immediately around the hole and found it flat, no protuberances or raises, the pieces of concrete separated by cracks, as shown in Exhibit 2, were flush with each other. They were practically flush, the whole area around the hole. There wasn't any difference in elevation between the concrete on the north, and the concrete on the south constituting the main sidewalk in the immediate vicinity of the hole. "There might have been an  $\frac{1}{8}$  of an inch, or something like that, but I mean for all practical purposes, it is practically flat." He saw no hazard except the hole itself.

E. L. Kinsman, repaired the hole April 8, 1952. He had to enlarge the opening in the sidewalk to fill the cavity. He saw no difference in elevation between the City sidewalk and the cement entrance to the apartment on the north. (R. 74) He saw no difference in elevation between these cement rows at the line which separated them. (R. 76) The cement around the hole was not protruding anywhere. It was perfectly flat with nothing to make a hazard if the hole was not there. (R. 77) Before he repaired the hole there was a difference in elevation in the triangle at the east end of the hole of approximately  $\frac{1}{2}$  inch. This is the dark spot on Exhibit A, at the northeast corner of the hole. (R. 79) On cross examination, Kinsman testified that the little triangular dark place on the east side of the hole on Exhibit A is where the topping had come off, and it gave down a little bit, and at that place the City walk was from  $\frac{1}{4}$  to  $\frac{1}{2}$  inch lower than the cement to the north. (R. 78-79) He also testified that the City sidewalk and cement to the north

were separated by a felt strip. So the line shown on Exhibit A and the other photos running between the two strips of cement is not a crack at all. It is merely a felt strip separating the two rows of cement. This is explained by the fact that the City sidewalk was put in before the walk to the north. (R. 95)

Lynn Glines, repair foreman, testified he was at the scene the day repairs were made. As to the difference in elevation between the City sidewalk and the walk to the north, he first testified there was a slight difference, and then on cross examination admitted he had no clear memory about it and paid no attention to it.

We think the foregoing analysis of the evidence completely meets and refutes the conclusions and general statements of counsel as to the facts, without repeating counsel's assertions and then give the answering facts from the record. Counsel asserts that the photos show a difference in elevation between the City walk and the cement to the north. Take Exhibit B. It is admitted by Novak that at point A there was no difference in elevation. It was admitted by plaintiff that on the east side of the hole, 6 or 8 inches beyond the hole, there was no difference in elevation. Looking at the line west and east of Point A and west and east of the crack at point X, east of the hole, we submit there is absolutely nothing revealed there that shows any difference in elevation between the two cement strips east or west. Exhibits 1 and 3 show perfect evenness.

The authorities generally support the rule stated in 7 *McQuillan, Municipal Corporation*, p. 125, sec. 2956:



“To be actionable, the obstruction must be dangerous, and the danger must be such as a reasonably prudent person would have anticipated as a natural result.”

In *Pollari vs. Salt Lake City*, 111 Ut. 25, 176 P. 2d 111, the court approved an instruction that the city would be liable if the defect “was of such a character as to constitute a *hazard* to pedestrians using the sidewalk while exercising due care for their own safety.”

In that case no question was raised as to whether a defect was of a character to be actionable or not. But in addition to there being a hole 5 x 3 inches and 1½ inches deep, there was an abrupt raise of 2 to 2½ inches in the slab next to the sidewalk and it was because of this combination the accident happened.

*Davidson v. City of New York*, 117 NYS 185:

“It is impossible to free a city from such slight defects and unreasonable to say or permit a jury to say, that they are ‘obvious dangers’ which is the test of the city’s liability. We know that they are not. If they were, thousands and thousands would be hurt by them hourly. That it is ‘possible’ for someone out of many, out of millions, as it may be, to trip on such a defect does not make it dangerous. Probability, not possibility governs.”

*Forrester v. City of Nashville*, 179 Tenn. 682, 169 S.W. 2d 860: The court quotes from McQuillin above and states:

“Probability, not possibility governs; that it is ‘possible’ for someone out of many to trip on so

slight a projection in a sidewalk as is here involved does not make it dangerous."

*City of Dayton v. Fox*, 254 Ky. 51, 70 S.W. 2d, 961:

"It is well settled that the liability of the city is not that of a guarantor or insurer of the safety of the pedestrian. The city is only bound to use reasonable care in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide against everything that may happen upon them, but only for such things as ordinarily exist or such as may be reasonably expected to occur to the users thereof when in the exercise of ordinary care for their own safety. Mere unevenness of the surface of the sidewalk is not such obvious dangerous or unsafe condition as to impress the mind of a reasonably prudent person as unsafe. Dangerous or unsafe conditions will not be presumed from the accident alone and the mere fact that a pedestrian slipped and fell upon the sidewalk is insufficient to warrant a recovery, unless it is shown that the condition of the walk at the place was necessarily dangerous or unsafe for pedestrians where in the exercise of ordinary care for their own safety, *and the unsafe condition was the proximate cause of the injury.*"

Under the rule above stated, it is clear that there was no proof of an actionable defect existing at the time the accident happened or even at the time the plaintiff visited the hole five days later, not considering, of course, the hole itself.

**POINT NO. II. MERE PROOF OF NEGLIGENCE WILL NOT SUPPORT A JUDGMENT. THE NEGLIGENCE**

PLEADED AND PROVED MUST HAVE BEEN A PROXIMATE CAUSE IN PRODUCING THE INJURY.

It is clear from plaintiff's own testimony that his fall was not in any wise caused by the differences in elevation between the City sidewalk and the property walk to the north, even assuming the evidence tended to show some difference in elevation existed at the time of the accident. Likewise, it is also clear that the difference in elevation between the east and west sides of the crack running north through the property entrance walk did not cause him to fall. He did not stumble, or turn his ankle, or slip, or in any other manner experience anything untoward because of either of these differences in elevation. His fall was occasioned by the collapsing of the piece of sidewalk which gave way under his weight because of the lack of support underneath due to the cavity.

Counsel assumes that because plaintiff testified there was a difference of  $\frac{1}{2}$  inch in elevation of the north cement over the City walk at the west end of the hole and one inch difference in elevation at the east end of the hole, this is proof there was a difference in elevation between the two slabs of cement running the entire length of the hole. There is absolutely no evidence on which to base such an assumption, nor is there any evidence as to what difference in elevation, if any, there may have been, assuming there was a difference. For aught that appears in plaintiff's evidence the difference in elevation was confined to the two places to the west and east ends of the hole. The two slabs of cement may have been absolutely

level all of the rest of the way along the north edge of the hole.

It is without dispute that the claimed difference in elevation to the east and west of the hole did not cause or permit any collapse at those places for no collapse actually occurred there, even though these two places were actually over the cavity. The photographs show these places to be perfectly intact.

Furthermore, the line between the two slabs of cement was not a crack, in the sense contended for by counsel. It was simply the separation, or expansion, joint between the two rows of cement put in at different times. Whether one was higher than the other when put in does not appear. Nor does such difference in elevation indicate a weakness or any element which would contribute to the collapse. There is no evidence there was a difference in elevation along the south side of the hole, and yet, the sidewalk gave way there as well as along the north side.

The all important fact in this case is that the sidewalk was not supported underneath. Had there been sustaining earth, the presence of the crack, such as counsel has created out of assumptions and speculations, would have caused no collapse and no accident. Yet he disclaims any attempt to impute notice of the presence of the cavity from notice of the presence of the crack. He asserts the crack weakened the sidewalk thus permitting it to collapse, so the crack became a contributing cause of the collapse and the attending accident, even though the

crack referred to was there from the time the sidewalk to the north was laid.

First he talks about a difference in elevation as being the defect of which the City had notice claiming such defect constituted a hazard. Then he abandons the element of elevation and says there was a crack and the crack was what caused the weakening. But the crack was not caused by the one side subsiding as in the case of the crack running north to the apartment entrance. There had always been a crack there as the city walk was put in first and a felt strip separated it from the cement later laid by the property owners. The subsiding of the city's walk, if any, did not create a crack so as to weaken the carrying power of the sidewalk to span the cavity underneath as the separation was already there before any subsidence. There had always been two separate strips of cement, the city sidewalk and the apartment entrance walk. The presence of a difference in elevation to the west and east of the hole does not indicate that the sidewalk there was weakened in a longitudinal direction so that it would not hold up as a span over a cavity existing underneath. This same crack, the separation of the city sidewalk from the owner's walk, runs the entire length of the two strips of cement as shown on Exhibit 3. The presence of this so called crack, elsewhere than at the hole, presents no reason for assuming that the sidewalk is actually weakened all along this course. The same conclusion must likewise follow as to that part of this same crack as it passes the hole.

So it appears from the very nature of the construction that the crack referred to by counsel had always existed. Of the existence of that crack the city concededly had notice, but that does not prove that the difference in elevation testified to by plaintiff had existed before the accident or that the city had notice thereof. And that difference in elevation is the defect of which counsel says the city had notice. The evidence is undisputed there was no difference in elevation before the accident or at a time shortly after and on the day of the accident as we have already demonstrated from the testimony by plaintiff and Mr. Cartwright, Mr. Smith, Mr. Turner, Mr. Jongejan, Mr. Gardner and Mr. Tipton. *The city was not called upon to prove that the difference in elevation testified to by plaintiff was a recent condition arising only after the accident. On the contrary, the burden was on plaintiff to show that the difference in elevation had existed a sufficient length of time before the accident so that notice of its presence could be imputed to the city.*

Counsel further injects into his description of the sidewalk, as a part of a visible defect of which he said the city had notice, the phrase "general fissured and cracked condition" of the sidewalk. By this he must refer to the cracks and fissures shown on Exhibit C, as being to the east and south of the hole. But those cracks and fissures cannot have had any causal connection with the collapse. They were still there after the accident, unaffected by the collapse, and having no connection with the hole in the sidewalk. These cracks and fissures constitute no hazard. The surface of the cement around them

and adjacent to them was perfectly even. The crack running north in the apartment entrance walk had no connection with the hole and remained there apart from the hole after the accident. It had no connection whatever with the hole. The repeated use of such general descriptive words and the total absence of any connection between the condition so described and the accident emphasizes the necessity we expressed in the beginning of making a thorough and detailed statement of the evidence.

The sidewalk laid by the City was not designed to span cavities underneath. It was designed and intended to rest upon supporting earth. As so designed and intended the mere presence of cracks therein would not affect its use with perfect safety. Suppose someone unknown to the city had excavated underneath the cement walk an hour before the plaintiff came along. The accident could have resulted the same as it did. Could any one say that the cracked and fissured condition would then have made the city liable for the accident? There is absolutely no distinction between such a situation and the one here involved except in the former we might know who made the excavation and when. All that the cracked and fissured condition, visible on any of the photos, could possibly do would be to furnish a condition upon which the real cause, the cavity, could operate, if it did. That the cracked and fissured condition referred to by counsel did not have even that aspect is demonstrated by the photographs themselves as there was no cave in at that location. But it must be constantly kept in mind that there is no evidence whatever that there was a fissured

and cracked condition in or immediately around the slab of sidewalk that did cave in, the only location on the sidewalk that could have any connection whatever with the cavity. The only crack shown to be in existence at the hole was the separation between the city walk and the walk to the north. How can it be said, then, that the cracked and fissured condition of the sidewalk was a contributing cause to the collapse of sidewalk?

Counsel states that: "The negligence of the city is in permitting this crack (separation between the city walk and the apartment entrance block) to go unrepaired for four years. The unrepaired crack was one of the main and direct causes of the sidewalk failure." What was unrepaired about this crack? Certainly the city had the right to install its 8 foot walk and the owner of the property install an abutting walk with a separation or expansion joint between. It would have been physically impossible not to have left some crack between the two walks. This same crack continues east and west of the cavity all along the two rows of concrete walk. (Exhibit 3) Counsel certainly does not mean that the city, to properly maintain its sidewalk, should have eliminated this crack so there would have been complete adhesion between the city walk and the apartment walk. He can only mean that the city should have repaired by eliminating the claimed difference in elevation between these rows of cement at the places testified to by plaintiff. Failure to do that is actually the only negligence that can be claimed or charged. But that negligence did not contribute to the collapsing since the same separation between the two



walks would be there regardless of whether there was a difference in elevation between the walks. The difference in elevation could have been repaired so as to eliminate it as a traffic hazard, but not, of course, to give the walk more carrying strength, either by chipping back a little on the north walk or by putting in a little black top along the city walk as Mr. Gardner testified had frequently been done. (R. 92) But the danger of collapse would have remained unabated.

We shall not attempt any protracted discussion of the question of proximate cause. Under the authorities cited by plaintiff the injury complained of must be a "direct", to use the language of the English case cited, or an "actual", to use the language of *Stone v. Railroad*, result of the negligence relied on.

In *Harrstrich v. O.S.L.R. Co.*, 70 Utah 552, 262 P. 100, where the negligence relied on was the failure to ring the bell or give proper warning before the train started across the highway, the court said:

"The controlling question, however, is, was the negligence of defendant the proximate cause of the injury sustained by plaintiff? It is a fundamental principle of law that no matter how gross the negligence complained of may be, it creates no liability unless it is the proximate cause of the injury."

In *Kawaguchi v. Bennett*, ..... Utah 189, P. 2d 109, this court quotes approvingly an instruction defining proximate cause as that cause which in natural continuous sequence, unbroken by any active intervening cause,

produces the injury, and without which the result would not have occurred.

In *Sumsion v. Streator Smith, Inc.*, 103 Utah 44, 132 P. 2d 680, the court says:

“It is a fundamental principle of the law of negligence that the person complaining has the burden of showing a causal connection between the negligent conduct complained of and the injury to plaintiff. . . .

“While deductions may be based on probabilities, the evidence must do more than merely raise a conjecture or show a probability. Where there are probabilities the other way equally or more potent the deductions are mere guesses and the jury should not be permitted to speculate. The rule is well established in this jurisdiction that where the proximate cause of injury is left to conjecture, plaintiff must fail as a matter of law.”

In *Hansen v. Clyde*, 89 Utah 31, 56 P. 2d 1366, 104 A.L.R. 943, in his dissenting opinion Judge Wolfe discusses the question of causal connection between the negligence relied on and the injury sustained. We refer particularly to his discussion of the 8th class, covering the omission class, where he stated in part:

“By the very nature of this type of alleged negligence it is often times difficult to say whether the accident would probably not have happened but for the omission, or, put in another way, that the omission contributed to the accident. It will be found in those cases where it is said such alleged cause is too remote, the true reason is that there is not sufficient probability that a supplying

of the omission would have avoided the accident."

2 *Restatement Law of Torts*, Sec. 431, the rule is stated thus:

"(a) In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. Except as stated in Sec. 432 (2), this is necessary but it is not of itself sufficient. The negligence must also be a substantial factor as well as an actual factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in the popular sense in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes."

"(b) It is only where the evidence permits a reasonable finding that the defendant's conduct had some effect that the question whether the effect was substantial rather than negligible becomes important."

This is the same rule advocated by Professor Smith in the *Harvard Law Review* referred to in plaintiff's brief. A very interesting and instructive discussion of the various rules for determining proximate cause is con-

tained in the majority and minority opinions in *Mahoney v. Beatman*, 110 Conn. 184, 147 A. 762, 66 A.L.R. 1121, where the views of the various authorities in texts and articles are discussed. The dissenting opinion continued to uphold the rule that a "wrong doer, though not guilty of intentional wrong should be held for all the harmful results caused by his wrong doing. I think the limitation of liability for wrong doing to those results which follow in a natural sequence accords with an innate sense of justice in the ordinary man." Foreseeability of the resulting harm as the text is rejected by both opinions. And, yet, after the accident, in determining whether the results can be traced in natural sequence back to the negligence charged, the foreseeability of resulting harm would in all probability be demonstrated.

*New Orleans & N.E.R. Co. v. Burge*, 191 Miss. 303, 2 So. 2d 825, follows the rule in Reinstatement of Torts above quoted and says:

"An actor's negligent conduct is not a substantial factor in bringing about harm to another if it would have sustained even if the actor had not been guilty of the particular negligence charged."

In *Peterson v. Fulton*, 192 Minn. 360, 256 N.W. 901, the court refers to 16 Minn. Law Review 829, and states:

"The rule there advocated is that one's negligence should be a material element in causing another's injury before it can be said to be the proximate cause thereof. It is very interesting to note that A.L. Institute Restatement of Torts, has

abandoned altogether the words 'proximate cause' thereof and substituted therefor the words 'substantial factor'."

Without citing further authorities on the question of proximate cause, we assert that no matter what test is applied to this case there is no causal connection between the accident and the claimed difference in elevation of the city walk and the adjoining walk. Under the conditions shown by the evidence the accident would have happened if there had been no difference in elevation. The presence of the so-called crack could have no effect in weakening the sidewalk as there had never been any adhesion between the two walks.

We cite the following cases to illustrate the necessity for causal connection between the defects complained of and the resulting injury.

*Davis v. Potter*, 340 Pa. 485, 17 A. 2d 338. Here a part of the sidewalk was raised from  $\frac{3}{4}$  inch to 1 and  $\frac{1}{8}$  inch above the rest of the walk by paving what had formerly been a grating over a light well. Plaintiff said her foot went over the incline, it went off like a slant. "What was complained of is the slight elevation of part of the sidewalk, but she did not stumble or trip over it; and whether it was actually the cause of her fall is far from clear. Negligence is not a ground for recovery unless the causative factor of the accident."

The case is followed in *Harrison v. City of Pittsburg*, 253 Pa. 22, 44 A. 2d 273, where plaintiff slipped on the metal rim of the man hole in the sidewalk covered

with snow. The court points out that the depression around the manhole had nothing to do with her fall.

*Thurbron v. Dravo Contracting Co.*, 238 Pa. 443, 86 A. 292, 44 L.R.A. NS 699. A team of horses ran away and because no barriers were erected across the street, the bridge being then in the process of being removed, the team plunged into the river. The court says:

“The defendant’s negligence in failing to erect barriers on the embankments may be conceded, but liability for plaintiff’s loss does not result therefrom, except as such negligence was the proximate cause. The mere concurrence of one’s negligence with the proximate and efficient cause of the disaster will not create liability. But for the escape of horses from the control of the party in charge the accident would not have happened. For that escape defendants, of course, were not liable.”

POINT NO. III. THE CITY IS NOT LIABLE FOR INJURIES ARISING FROM A LATENT DEFECT IN THE SIDEWALK.

While the plaintiff seeks to avoid the effect of the proposition above stated by saying he is relying on the “fissured, cracked, weakened condition of the sidewalk at the point where collapse occurred,” we submit that the cavity is the sole proximate cause of the accident and that, since the city had no notice of its presence, it is not liable in this case as a matter of law. We refer the court to the following cases:

*Mathews v. City of Richmond*, 291 Ky. 387, 164 S.W. 2d 968. Here the concrete walk broke under plaintiff

and he dropped into a hole 18 inches deep, the base of the walk had disintegrated, leaving only a thin top layer. *There was a crack in the concrete 12 feet long*, but no hole was visible. Photographs were introduced in evidence. The court held the crack was not sufficient to put the city on notice, saying:

“The defect was latent. The crack in the concrete as described in the evidence and shown by the photograph, was insufficient to put the city on notice . . . .

“There was no proof that the city had actual notice of the defective condition of the sidewalk, and the proof relied upon to show that the condition existed for such length of time as to impute knowledge thereof to the municipal authorities was insufficient to warrant a submission of that question to the jury.”

*German v. City of McKeesport*, 137 Pa. Super 41, 8 A. 2d 437. Here there was a hole 16 inches long and 2 inches wide that was filled with dirt. It appeared to be of the same material as the sidewalk and no hole appeared to the casual observer. Plaintiff’s heel sank into the hole and she was thrown. The court says:

“She (Plaintiff) relied upon constructive notice of the alleged defect, for none other was alleged or proved. Before a municipality may be charged with constructive notice of the existence of a defect (in a sidewalk), it must appear that the dangerous condition is apparent upon reasonable inspection. In *Emery v. Pittsburg*, 275, Pa. 551, P. 553, 119 A. 603, p. 604, it is said:

‘A municipality can be charged with constructive notice of a defect in a sidewalk only when it is of such a character as to be generally observable by pedestrians; that is, such as could and naturally would be seen by people using the walk.’

“This means that the dangerous condition must be such as to be observed and apprehended by the ordinary pedestrian. If it is of a nature to require very close examination before its dangerous character appears, the municipality is not chargeable with constructive notice of it.”

*Baustian v. Young*, 152 Mo. 317, 53 S.W. 921. As plaintiff walked on a board sidewalk, a plank gave way causing him to fall. The soil underneath the plank had washed out, leaving a hollow underneath the plank. The plank itself was decayed, but would not have given way except for the hollow under it. In holding for the city, the court says:

“... It was really the hollow in the ground that permitted the plank to go down. There is no testimony tending to show actual notice to the city of the condition of the sidewalk, and no testimony tending to show how long it had remained in that condition. Besides, the testimony of plaintiff shows that the real cause of the yielding of the plank under the plaintiff’s weight was the hollow beneath, caused by the ground being washed out. When that occurred is not shown. That the defect was not so obvious as to impute notice is shown by the plaintiff’s testimony. The plaintiff, himself, had passed along the road frequently about the time, — not over the sidewalk, — but in the road,



and had never observed such condition, and the five witnesses for defendant used the sidewalk daily several times, and did not observe it. The evidence fails to show any knowledge on the part of the city, or any circumstance from which notice could be implied, or that the city had neglected a reasonable opportunity to repair the defect. Under such evidence there could have been no verdict for the plaintiff."

*City of Omaha v. Kochen*, 74 Neb. 718, 105 N.W. 182.

The court says:

"Where the defect is latent, not visible to ordinary inspection, implied notice of the defect will not be presumed and will not be charged against the city until something occurs from which notice may be presumed or implied."

*Wakeham v. Township of St. Clair*, 91 Mich. 15, 51 N.W. 696. The township had constructed a break water along the edge of the river with an earth fill behind it. The road ran along within 13 feet of the breakwater. The river became high and near the bridge two large holes appeared in the road. Plaintiff while riding his horse turned it toward the break water to avoid a mud puddle in the road. There was a dispute whether the horse in so turning had stepped into one of the existing holes or broken through farther on where the water had undermined the road. The court says:

"If, however, the accident occurred at the point five or six rods north of the bridge, and the injury was occasioned by the horse breaking

through what, upon the surface, appeared to be solid earth, defendant could not be chargeable with negligence. The court below assumed that the township was bound to know that this particular spot in the road way was weak, and that it should have repaired it, and laid down one rule whereby to test plaintiff's negligence, and another to measure the defendant's. If the road appeared safe to plaintiff, why not to defendant's officers? This is not a structure like a bridge, where decay inevitably exhibits itself, and where opportunity is had to foresee and avoid that danger. Here were some 60 or 80 rods of this breakwater. Two holes appeared within 30 feet of this bridge, and one 20 or 30 rods north of the bridge. Prior to this accident, but 3 or 4 feet of the entire line had give way. If the accident occurred at the point claimed by defendant, this very horse had probably traversed at a gallop some 3 rods of this line, and had not broken through. This defect was latent. The most that was known by the township authorities was that these breaks were liable to occur, but just where there was no means of discovering, except, perhaps, as was said by one witness, by digging down and finding out, and this very course would make them more liable to occur. There was nothing so suggestive of danger at that point as to make the township liable for the injury. Not only were the surface indications all right, but the horse broke through 13 or 14 feet east of the traveled way. It is probable occurrences, rather than possible happenings, that municipalities are required to guard against. Cavities occur over waterpipes, gas-pipes, and sewer pipes in the traveled parts of the streets of our densely populous cities, but a cave at one point does not indicate that the street will cave for the

whole length of the conduit, and does not impose the duty of testing the entire length of the street. Defendant was entitled to an instruction that, if the accident occurred at the point five or six rods north of the bridge, and the hole made by plaintiff's horse did not exist before the accident, but was made at the time of the accident by plaintiff's horse, and there was nothing upon the surface of the road at that point to give notice or knowledge that a hole was being eaten away underneath by the water, the plaintiff cannot recover."

*Taylor v. Town of Sterling*, 250 Mass. 123, 145 N.E.

40. The driver of a wagon turned out into a gutter to pass another vehicle. The surface of the gutter gave way, letting the wheel down about 18 inches, throwing plaintiff to the ground. The three occupants of the wagon testified that the surface of the gutter looked alright; that the surface looked perfectly safe; the same as it had looked when they passed over the street. After the accident it appeared that the sub-surface had been washed out, and where the wheel went down there was a hole 3 feet long. The court reversed the judgment for the plaintiff saying:

"Although one witness testified that the place where the wagon wheel went down looked as if it had been in that condition for some time, there was no evidence as to how long such condition had existed. It appears from the testimony of all the witnesses who were in the wagon at the time of the accident that there was nothing from the appearance of the surface of the gutter where the wheel broke through to show that it had been gullied out underneath or that it was in any way defective, but

that so far as could be seen it was safe and in good condition, and there was no evidence to the contrary.

“In these circumstances it is impossible to see how any reasonable inspection of the way by the town or its officers, in the exercise of reasonable diligence, could have discovered the hidden defective condition. If the officers of the town charged with the duty of keeping its ways in repair had inspected this road immediately preceding the accident, there was nothing so far as the evidence discloses to give them any knowledge of the defect which resulted in the injuries received by the plaintiffs.”

*Silva v. City of Somerville*, 253 Mass. 545, 149 N.E. 410.

“PER CURIAM. The testimony of the plaintiff was in substance that while walking across a public street in the defendant city she stepped on a hollow about eighteen inches across and three or four inches lower than the street level. It did not drop down abruptly. It looked like it had rained and had sunk in. It was near a manhole raised about three or four inches above the street level. The earth gave way under her step making a hole about as big as a manhole. Other witnesses described the resulting hole as being as big as a flour barrel, and three or four feet deep, and as being an irregular opening in the street and larger in circumference underneath than on the surface. One witness testified that about a week prior to the accident he ‘had observed a sort of a round hole in the street as though the street had sunk in five or six inches; that it was a graduated hole. Shortly after he first noticed it he noticed there was a

cover over it — his impression being that it was some sort of a stick, something as though to give warning that there was a hole; and that he noticed that a day or two before the accident.’

“It is manifest, that the cause of the injury to the plaintiff was the giving way of the earth when the plaintiff stepped on it and the very considerable cavity underneath the surface of the street. There is nothing in the evidence fairly to indicate any warning to the defendant of this defective condition, or any breach of obligation on the part of the defendant in not discovering it. The liability of the defendant is not established. The case is governed on this point by *Taylor v. Sterling*, 250 Mass. 123, 145 N.E. 40, and the cases there reviewed.

“There was no evidence to warrant a finding of neglect of duty by the defendant.

“Verdict ordered to be entered for defendant to stand.”

*Bello v. City of Cleveland*, 106 Ohio St. 94, 138 N.E. 526. An adjoining property owner maintained a steam pipe running under the sidewalk to the gutter. Plaintiff stepped off the sidewalk on to the area between the property and the sidewalk. It looked natural, but when he stepped on it, it gave way letting him sink into boiling water and steam. A directed verdict for the city was affirmed. The court said:

“but the testimony of plaintiff’s witnesses very clearly establishes the fact that there were no surface indications of a nuisance at that point, and that when plaintiff stepped off the sidewalk the surface, which appeared to be safe and free from

even the appearance of danger, suddenly gave way, thereby permitting his leg to sink into the boiling substance, and causing the injury and damage. Inasmuch as there was no open defect, in the nature of things the city's agents could not have notice or knowledge of such non-existent situation.

"Notice, either actual or imputed, is just as necessary to be proven as the existence of the nuisance itself. This must necessarily mean notice or knowledge of the actual present existence of a condition, and not notice or knowledge of some probable or possible acts of some third person from which it may be inferred that, if those acts are in future committed, a nuisance may be caused."

*Smith v. Krebs*, 166 Kan. 586, 203 P. 2d 215. Krebs maintained an area way in the sidewalk covered by 2 x 2 planks resting on 2 x 4 cross pieces. When plaintiff stepped on one of the planks it gave way letting her foot and leg into the hole. Examination after the accident disclosed the board was rotted on the under side, A demurrer to plaintiff's evidence was sustained. The court says:

"The general rule is that when a street or sidewalk is once constructed so that it is reasonably safe for use of travelers or pedestrians and later becomes defective the city cannot be said to be negligent so as to be liable in tort resulting from the use of such defective street until the city has knowledge or notice of such defect and has a reasonable opportunity to repair it.

"In this case it is conceded the city did not have knowledge of the defect, and there is no

claim that it was patent. The board plaintiff stepped on looked as sound as any of the others. There was nothing in the appearance of the covering over the hole in the sidewalk which would cause anyone looking at it to think it was otherwise than sound.

“Therefore, under the authority of the cases above cited, it is clear that no negligence of the city was shown.”

*Sherman v. City of Pittsburgh*, 155 Pa. Super 560, 39 A. 2d 156. Plaintiff was injured when a portion of the sidewalk gave way under him in front of the old post office. The court says:

“In the present case the injuries suffered by plaintiff were the result of a defective condition in the sidewalk, but the liability of the city arises only if it had notice, actual or constructive, of the existence of such condition at the place where the accident occurred. *Good et al v. Philadelphia et al*, 355 Pa. 13, 16, 6 A. 2d 101. To have charged the city with constructive notice, it must have appeared that the dangerous condition was apparent upon reasonable inspection.

“We are of the opinion that the record in this case fails to disclose any negligence upon the part of the city, or any notice, actual or constructive, to the city of any danger in the condition of the sidewalk at the place where plaintiff sustained his accident.

“The defect in the sidewalk was latent and not observable. Neither the plaintiff nor his witnesses testified that there was anything about the sidewalk to indicate that it was in a dangerous condition. Plaintiff testified that he used the sidewalk

where the accident happened, almost every day. It appears, as told by himself, that, at the time, 'I was looking where I was walking.' He said there was 'nothing unusual with the sidewalk. Well, I would say there was a few cracks in the sidewalk; that is about all.' "

*Dow v. Town of D'Lo*, 152 So. 475 Miss.

"The fact that mere passers-by did not observe or discover a dangerous defect is not sufficient to relieve a municipality of constructive notice; but if the defect or danger be such as not to be observable by those who constantly pass day by day or who for years have lived and labored at the location in question, constructive notice cannot be charged upon the municipality unless the danger was the result of faulty work by the municipality itself. As to danger of this nature, the town cannot be charged with the neglect of ordinary care to discover what other persons constantly thereabout, including the nearest neighbors, had not discovered in all these years."

POINT NO. IV. THE VERDICT, THOUGH AWARDED DAMAGES AS SPECIAL DAMAGES, SHOULD BE CONSTRUED AS A GENERAL VERDICT IN THE SUM OF \$1000 AND IS NO GROUNDS FOR A NEW TRIAL.

The form of verdict submitted to the jury, in the event they found for the plaintiff was in form calling for stating separately the amount of general damage and the amount of special damage. Opposite the words "general damage \$.....", the jury wrote the words "no." After the words "special damages" they placed the figure \$1000 after the dollar sign.



Having granted defendant's motion for judgment notwithstanding the verdict the trial court's overruling the motion for a new trial on the ground that the verdict was improperly rendered would follow as a matter of course. We have been unable to find any authority directly in point. However, Oregon and Minnesota courts have passed on the validity of a verdict reading as follows:

“We find for plaintiff and assess damage in the sum of \$......, no damage,”

and came to opposite conclusions.

In *Royal Indemnity Co. v. Island Lake Township*, 177 Minn. 408, 225 N.W. 291, the court held that such a verdict was valid and was in reality a verdict for defendant. In *Kline v. Miller*, ..... Or. ...., 77 P. 2d 1103, 116 A.L.R. 820, the Oregon Court held the verdict not sufficient to support a judgment for defendant and sustained an order for a new trial. A strong dissenting opinion follows the Minnesota ruling and relied upon the following statement from *Lew v. Lucas*, 37 Or. 208, 61 P. 344:

“A verdict should be construed liberally . . . If the meaning of the jury can be ascertained and the point in issue can be concluded from its verdict, the court will, however informally it may be expressed, mold it into form, and make it serve.”

In *Clark v. McClurg*, 215 Cal. 279, 9 P. 2d 505, 81 A.L.R. 908, the plaintiff sued for actual and punitive damages in an action for libel and slander. The words charged

were actionable per se. The jury found for plaintiff and assessed no amount for actual damages and \$5,000 as punitive damages. The court held the verdict valid saying:

“The fact that the jury inadvertently or by some mischance assessed the entire damages as exemplary instead of segregating them constitutes an error of form rather than of sustenance.”

While on the surface there appears to be an inconsistency in the jury's verdict, we think the intention appears to find generally for the plaintiff in a total sum of \$1,000. The jury, apparently, decided plaintiff was entitled to recover and instead of trying to make a separate finding of general and special damages they simply awarded the sum of \$1,000 as being the total amount to which plaintiff was entitled. We submit, therefore, that there was no error in overruling plaintiff's motion for a new trial.

## CONCLUSION

The order granting defendant's motion to dismiss should be sustained. First, there was no proof of negligence on the part of defendant. There was absolutely no proof whatever that at the time the accident happened, there was any actionable defect in the sidewalk

at the place of the accident of which the city would have, or could have had, notice. That the city is not liable for a latent defect is conceded by plaintiff. The evidence offered by plaintiff of the condition of the sidewalk after the accident wholly failed to establish the existence of an actionable defect at the time of the accident. Furthermore, it was incompetent, as no proper foundation had been laid.

Second, whatever unevenness existed between the city sidewalk and the entrance walk into the apartment building, assuming some unevenness existed at the time of the accident (as to which, however, we assert there is no proof) there is no proof whatever that such unevenness was the proximate cause of the accident. Plaintiff did not stumble, slip, turn his ankle, or in any wise encounter such difference in elevation.

Third. The failure to eliminate the separation of the city walk from the adjoining walk, called a crack by plaintiff, and the other cracks did not in any wise contribute as a proximate cause of the accident. Furthermore, the existence of such cracks by themselves did not constitute any actionable defect in the sidewalk. There is no evidence, or even any assertion by plaintiff, that these cracks gave any notice of existence of the cavity.

The simple fact is that in some unexplained manner, without any notice whatever to the city, the supporting earth had been removed under the sidewalk and the concrete gave way under plaintiff's weight. The defect

thus existing was latent, not discoverable upon reasonable inspection. Therefore, the city is not liable for the unfortunate accident, and dismissal should be affirmed.

Respectfully submitted,

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----- copies of foregoing brief received this  
----- day of February, 1953.

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