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# Municipal Corporations -- Duty to Keep Streets Safe by Warnings and Guards -- Proximate Cause

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### Municipal Corporations—Duty to Keep Streets Safe by Warnings and Guards—Proximate Cause.

In *Haney v. Town of Lincolnton*<sup>1</sup> plaintiff's intestate was killed when a car in which she was a passenger was driven along a city street and over an embankment opposite the point at which the street terminated by intersecting a highway at right angles. The night was dark, wet, and foggy. *Held*, by the North Carolina Supreme Court in reversing judgment for the plaintiff, that the defendant municipality's demurrer to the evidence should have been sustained, as the defendant was not negligent in failing to give warning or to place a guard at the street end, and even if negligent its conduct was insulated by the negligence of the driver of the car, which was the immediate cause of the accident.

North Carolina, in accord with most states, recognizes a duty on a municipality to exercise reasonable care to maintain its streets in a reasonably<sup>2</sup> safe condition,<sup>3</sup> which includes the provision of proper railings, barriers, or other reasonably necessary signals to warn and guard the traveller against dangerous embankments, excavations, etc., contiguous to the street.<sup>4</sup> Ordinarily the question of the municipality's negligence in failing to provide warnings or guards<sup>5</sup> is for the jury to determine from the circumstances.<sup>6</sup> In the present case, in view of

<sup>1</sup> 207 N. C. 282, 176 S. E. 573 (1934).

<sup>2</sup> A municipality is not the insurer of the absolute safety of its streets. *Reuther v. State*, 125 Misc. Rep. 773, 214 N. Y. S. 783 (1926); *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309 (1905); *Willis v. New Bern*, 191 N. C. 507, 132 S. E. 286 (1926).

<sup>3</sup> *Russell v. Monroe*, 116 N. C. 721, 21 S. E. 550 (1895) (ditch in sidewalk); *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309 (1905) (defective culvert in street); *Johnson v. Raleigh*, 156 N. C. 269, 72 S. E. 368 (1911) (hole in street); *Bailey v. Winston*, 157 N. C. 252, 72 S. E. 966 (1911) (ditch in sidewalk); *Michaux v. Rocky Mount*, 193 N. C. 550, 137 S. E. 663 (1927) (bridge washout).

<sup>4</sup> *Bunch v. Edenton*, 90 N. C. 431 (1884) (city liable where plaintiff fell into excavation near sidewalk); *Willis v. New Bern*, 191 N. C. 507, 132 S. E. 286 (1926) (city liable where plaintiff drove off end of street abruptly terminating without lights or barrier in a river).

<sup>5</sup> In some cases it is not clear whether the court is referring to the duty of notification or to the duty of fortification. *Briglia v. City of St. Paul*, 134 Minn. 97, 158 N. W. 794 (1916). Other cases clearly refer to the duty of notification, *Prather v. City of Spokane*, 29 Wash. 549, 70 Pac. 55 (1902), and others clearly to the duty of fortification, *City of Milledgeville v. Holloway*, 32 Ga. App. 734, 124 S. E. 802 (1924). *City of Phoenix v. Mayfield*, 20 P. (2d) 296 (Ariz. 1933) seems to refer to both duties, as does the principal case. *Watkin's Adm'r v. City of Catlettsburg*, 243 Ky. 197, 47 S. W. (2d) 1032 (1932) cites a number of cases in holding that where there is no concealment and the condition is obvious there is no duty on a city to maintain a barrier strong enough to keep a car from going over an embankment.

<sup>6</sup> *Horton v. McDonald*, 105 Conn. 356, 135 Atl. 442 (1926) (plaintiff's car backed over an embankment twenty feet from middle of the street when she stopped at an intersection to shift gears); *Bond v. Inhabitants of Billerica*, 235 Mass. 119, 126 N. E. 281 (1920) (evidence sufficient for jury to find city negligent where car went over embankment at curve); *Nelson v. City of Duluth*,

the "semi-dead end" street,<sup>7</sup> a sloping embankment opposite a right angle turn, a dirt shoulder between the embankment and the highway, and no lights, signs, or barriers to warn of the necessity of turning or the existence of the embankment, the lower court should have been sustained in submitting the case to the jury.<sup>8</sup>

Furthermore, the court held that even assuming that the city was inactively negligent, yet its conduct was insulated by the intervention of the active negligence of the driver of the car. North Carolina<sup>9</sup> has previously adhered to the general rule that the municipality is liable where two causes concur in producing injury, one of them being a culpable defect in the street, and the other, the active negligence of a third party.<sup>10</sup> However, the court probably means, instead of there being concurrent causes, that here the driver's negligence was the sole proximate cause of plaintiff's injury. Although approval is given to the bare statement that the interposition of independent, responsible

172 Minn. 76, 214 N. W. 774 (1927) (city liable for not providing warning or guard at a cliff near an S-curve in road); *Corcoran v. City of New York*, 188 N. Y. 131, 80 N. E. 660 (1907) (higher court reversed judgment of nonsuit and ordered new trial where car at nighttime crashed through fence at end of street and over an embankment).

<sup>7</sup> *Bean v. City of Portland*, 109 Me. 467, 84 Atl. 981 (1912) (plaintiff at night drove over an unguarded embankment at the end of a street); *Corcoran v. City of New York*, 188 N. Y. 131, 80 N. E. 660 (1907) (car crashed through fence at end of street and over an embankment); *Willis v. New Bern*, 191 N. C. 507, 132 S. E. 286 (1926) (city liable where plaintiff drove off the end of street abruptly terminating without lights or arrier in a river).

<sup>8</sup> Compare the facts in *Ivory v. Town of Deer Park*, 116 N. Y. 476, 22 N. E. 1080 (1889) where there was no ditch or barrier between a curve and an excavation within eleven feet of the beaten track. Plaintiff's horses failed to make the turn one night and fell into the excavation. The jury's finding of negligence on the city's part was not disturbed by the higher court. But cf. *Briglia v. City of St. Paul*, 134 Minn. 97, 158 N. W. 794 (1916), where, as in the principal case, a street intersected but did not cross another street and there was a bluff opposite this point of intersection. However, the distinction in the facts is that the car was driven along the boulevard and then turned into the street for some few feet, and then it began backing across the intersection, sidewalk, and over the bluff. The higher court held that the verdict was properly directed for the defendant.

<sup>9</sup> *Speas v. City of Greensboro*, 204 N. C. 239, 167 S. E. 807 (1930) (city held liable in an action by a passenger in a car which hit a "silent policeman" negligently maintained with lights off at an intersection, even though the driver also was liable for his negligence). This rule also was applied where an innocent cause or occurrence combined with the defect in the street. *Dillon v. City of Raleigh*, 124 N. C. 184, 32 S. E. 548 (1899) (Plaintiff's horse became frightened and hit railroad trestle stringers negligently left in the street. Held, the city is liable even though the defect in street combined with running of horse).

<sup>10</sup> *Whitlach v. City of Iowa Falls*, 199 Iowa 73, 201 N. W. 83 (1924); *Thomas v. City of Lexington*, 150 So. 816 (Miss. 1933); *King v. Douglas County*, 114 Neb. 477, 208 N. W. 120 (1928).

However, some states in actions arising under a statute making a city liable for injury by or through a defect in a street allow recovery where the defect combines with an innocent occurrence in causing injury, *Jennes v. City of Norwich*, 107 Conn. 79, 140 Atl. 119 (1927); but deny it where the defect combines with the negligence or fault of a third party, *Bartram v. Town of Sharon*, 71 Conn. 686, 43 Atl. 143 (1899).

human conduct between the injury and the original wrongdoer's negligence insulates the latter, it is doubtful if the court would deny the oft-stated proposition that if the intervening act and resultant injury could reasonably have been foreseen by the defendant he remains liable.<sup>11</sup> This test of foreseeability, which is a proper test for negligence, is improperly used in many cases as a test for proximate cause.<sup>12</sup> It is true that if the driver's negligence alone would have caused the injury the city is not liable,<sup>13</sup> but if the defendant had performed its duty of fortifying against danger it seems unreasonable to say that this accident would have happened anyway, if the car was being operated at a speed of only fifteen or twenty miles an hour.

Although the inquiry here is almost entirely a factual one the present decision is to be regretted as a deterrent rather than a spur to action by the new expense-wary North Carolina municipality towards maintenance of its streets in a safe condition. If the increasing tide of fatal accidents<sup>14</sup> is to be checked a higher degree of care must be exercised, both in the operation of vehicles, and in the maintenance of the streets and highways, which includes all proper warnings and guards at sharp turns and intersections. It is to be hoped that the present financial condition of most North Carolina municipalities will not lead the court to lighten the obligation of the municipality, which in terms of the safeguarding of human life is still far from being too onerous.

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<sup>11</sup> *Harton v. Telephone Co.*, 141 N. C. 455, 54 S. E. 299 (1906) (higher court reversed ruling for defendant and ordered new trial where defendant's defective telephone pole broke and fell in the road, and after being propped up by a traveler fell again killing plaintiff's intestate); *Hinnant v. Atlantic Coast Line R. Co.*, 202 N. C. 489, 163 S. E. 555 (1932) (recovery against railroad denied where engineer was negligent in failing to blow whistle, and driver of car in which plaintiff was passenger was negligent in driving too fast toward a grade crossing on a wet clay road).

<sup>12</sup> That foreseeability is a test for negligence but not proximate cause is recognized in England. *In re Polemis & Furness, Withy & Co., Ltd.* [1921], 3 K. B. 560; *BURDICK, TORTS* (1926) 21. See *GREEN, RATIONALE OF PROXIMATE CAUSE* (1927) 81, 83.

North Carolina has applied the test of foreseeability to the problem of cause in some cases. *Doggett v. Richmond & Danville R. Co.*, 78 N. C. 305 (1878) (where in an action against the railroad for destruction of plaintiff's fence by fire it appeared that plaintiff's fence was three-fourths of a mile from the fence first ignited by sparks from defendant's engine, but was connected with it by a continuous line of fences of other owners. Held, defendant's negligence is remote, and this was not such a probable consequence as should have been reasonably foreseen); *Harton v. Telephone Co.* 141 N. C. 455, 54 S. E. 299 (1906); *Herman v. Atlantic Coast Line R. Co.*, 197 N. C. 718, 150 S. E. 361 (1929) (recovery denied passenger in car which struck defendant's train as driver's negligence was the sole proximate cause, being unforeseeable); *Hinnant v. Atlantic Coast Line R. Co.*, 202 N. C. 489, 163 S. E. 555 (1932).

<sup>13</sup> *City of Douglas v. Burden*, 24 Ariz. 95, 206 Pac. 1085 (1922); *City of Hamilton v. Dilley*, 30 Ohio App. 558, 166 N. E. 147 (1923); *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548 (1899).

<sup>14</sup> See dissenting opinion by Clarkson, J. in the principal case.