PERSPECTIVES ON THE LAW

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Sidewalks, Snowstorms and Slip and Falls

— *by* **Rudy Lachenmeier**

For those of us that grew up in this area, it seems like snowstorms were much more frequent in the 1960s than they are today. This winter's storms, however, remind us all how ill prepared most of us who live in the valley are for dealing with inclement weather. Now as the slip and fall claims begin to roll in, it is an appropriate time to review the status of slip and fall cases on the sidewalks of the cities of Oregon. Somewhat surprisingly, what we find is that every city is different. What follows is a quick look at Portland, Hillsboro and Oregon City.

Historical Perspective

The traditional common law held that an owner of adjacent property was not responsible when someone slipped and fell on a public sidewalk. Early on, municipalities attempting to both protect themselves financially from lawsuits and also as a means of stretching their budgets further, began passing laws, making the landowners adjacent to sidewalks responsible for its maintenance. When that happened, plaintiff lawyers alleged that the existence of the ordinances requiring landowners to maintain sidewalks or to deal with snow, or leaves, were enacted for the benefit for people using the sidewalks and therefore supported a claim by anyone who fell. In several cases, including Fitzwater v. Sunset Empire, Inc., 263 Or 276 (1972), the Court made it very clear that not only was there was no common law duty of adjacent landowners to pedestrians to keep public sidewalks free from ice or snow or leaves but that a municipal ordinance that does not specifically provide for civil liability to pedestrians would be construed to be for the benefit of the City, not for the benefit of a third-party.

Harris v. Sanders, 142 Or App 126 (1996) stands for the proposition that an ordinance certainly can provide for civil liability but that you should read the ordinances very carefully to determine if it does and, if so, on what basis.

City Ordinances

With that background in mind, I took a look at the current ordinance in the City of Oregon City. There, Health and Safety Code, Chapter 8 declares a variety of things a nuisance, including:

> "K. The allowing of rain water, ice or snow to fall from any building or structure upon any street or sidewalk or to flow across any sidewalk."

Chapter 12, specifically 12.04.030, says:

> "The owner of land abutting the street where a sidewalk has been constructed shall be responsible for maintaining said sidewalk and abutting curb, if any, in good repair."

Other provisions make it a nuisance to fail to maintain the sidewalk and provide for penalties. These provisions, however, do not specifically authorize a civil claim by someone who falls on a sidewalk as a result of its condition. Thus, in Oregon City, it would appear that Fitzwater v. Sunset Empire, Inc., is still good law and that there is no claim against an adjacent landowner for

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failing to remove snow or ice from a public sidewalk. Be sure to check, however, because there is a draft ordinance available through the City's website, draft ordinance 12.04.031, which reads as follows:

> "(1) The owner or occupant of real property responsible for maintaining the adjacent sidewalk shall be liable to any person injured because of negligence of such owner or occupant in failing to maintain the sidewalk in good condition."

Two keys in that proposed ordinance. One is "shall" be liable and the other is because of "negligence." We will come back to that in a minute.

Contrast Oregon City's non-liability with the approach of the City of Hillsboro whose snow and ice removal ordinance is 8.20.080 and reads as follows:

> "A. No person owning or controlling any premises, improved or unimproved, abutting upon any public sidewalk with the city shall permit:
>
> 1. Any snow to remain on such sidewalk for a period of longer than the first eight hours of daylight after the snow has fallen.
>
> 2. Any such sidewalks to be covered with ice. It shall be the duty of any such person within the first eight hours of daylight after the ice has formed to remove any ice accumulating on such sidewalk or to properly cover it with sand, ashes, or other suitable material to assure safe travel.
>
> B. Any such person who neglects to promptly comply with the provisions of this section may be liable to any person injured by such negligence and shall also be liable to the city for any costs, expenses and/or attorney's fees incurred in defending the city against a claim by an injured person and against any judgment the city is required to pay to an injured person."

Note in this scenario the City of Hillsboro says that the owner or person "controlling" adjacent land may be liable to others for negligence. This would take it out of the Fitzwater rule, but requires negligence. What is not clear is whether simply taking longer than eight hours would support a negligence per se instruction or would just be evidentiary.

Contrast that with the City of Portland which has way more ordinances on a wide variety of things than most cities. The ordinance effective July 5, 2002, says:

> "A. The owner(s) and/or occupant(s) of land adjacent to any street in the City shall be responsible for snow and ice removal from sidewalks abutting or immediately adjacent to such land, notwithstanding any time limitations.
>
> B. Property owner(s) and/or occupant(s) shall be liable for any and all damages to any person who is injured or otherwise suffers damage resulting from failure to remove snow and/or ice accumulations.
>
> C. Property owner(s) and/or occupant(s) shall be liable to the City of Portland for any amounts paid or incurred consequent from claims, judgment or settlement, and for all reasonable investigation costs and attorney fees, resulting from the responsible property owner's or occupant's failure to remove snow and ice accumulations from such sidewalks as imposed by this Code."

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Note that this provision is mandatory and does not talk about negligence. Arguably this creates a statutory tort where proof of violation and a fall is enough to trigger liability.

Thus, the same conduct in Oregon City, Hillsboro and Portland can mean no liability, negligent liability or perhaps statutory tort or negligence per se liability. The analysis of the difference between a negligence per se and a statutory tort is beyond the scope of this article, but suffice it to say that essentially the jury instructions get stronger in terms of finding the defendant at fault as you go from negligence, to negligence per se, to statutory tort. On the other hand, all slip and falls involve comparative fault, so let's take a look at the practical factors involved in analyzing a slip and fall on a sidewalk claim.

Practical Factors

First of all, why was the plaintiff there? Is this someone who has come out to play, or someone who has to go to work and is taking the most direct route. Are there alternative walkways available to accomplish the same task without putting the plaintiff/claimant at risk at all? If so, why were they not pursued? What is the reason that the defendant did not shovel the snow? Is the defendant too infirm, was the storm too overwhelming, and what did most of the other neighbors do? Was it simply a matter of not being able to get to it soon enough? What is the nature of the defendant? Is the defendant a sympathetic person or the mean owner of a multi-national corporation? Finally, there is the issue of how severe is the injury? For severe injuries a finding of fault at 50/50 may be the jury's way of paying for medical bills.

On balance, defendant's win a large percentage of slip and falls. However, the stronger the ordinance, the stronger the chance of at least a 50/50 finding, which allows plaintiff to recover under our comparative fault scheme. Of course a plaintiff 51% at fault gets nothing.

The bottom line is that these cases are not scary, but they do require some homework. Find out what a jury would like to know about the factual background and then find out what your attorney wants to know, i.e., what ordinance was in effect at the time. Armed with both you can decide whether to defend or settle the case.

Beyond The Sidewalk

So far, we have been talking about public sidewalks adjacent to streets. It is beyond the scope of this article to discuss at length slip and falls in general. Nonetheless, since snow and ice claims against businesses are likely in the pipeline and because of a general lack of snow removal by businesses in the Portland Metropolitan area, a brief comment is in order.

First of all, anyone who attempted to walk to and from a store or business establishment during the recent inclement weather knows that the thawing and freezing again of snow and ice in parking lots and private sidewalks in front of businesses made walking extremely difficult even with proper shoes and due care. The duty under the common law in the State of Oregon owed to business invitees, i.e., anyone coming to a business at the invitation of or for the benefit of the owner is quite high. As discussed in Rich v. Tite-Knot Pine Mill, 245 Or 185 (1966) "the occupier not only has the duty to warn of latent effects, but also has an affirmative duty to protect an invitee against those dangers and the condition of the premises of which he knows or should have known by the exercise of reasonable care."

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Accordingly, I believe that any business that did not take precautions to protect customers coming to their store during the recent snow and ice storms was negligent under that standard. Further, because it is a business, attempting to make a profit on people coming and going, I also think a jury would have no problem in finding a business defendant that took no precaution primarily at fault. This is particularly true with businesses that involve life's necessities like grocery stores. Also, I think that a certain health club in my neighborhood that made zero attempts to clean its very slippery parking lot and private sidewalks, despite having numerous extra sales people standing around showing off their muscles and bragging about being open during the inclement weather, was asking to get sued.

Finally, for those of you who like to read cases, Eleanor Glorioso v. Greg and Terry Ness, handed down by the Court of Appeals January 28th is a great read. It held that, as a matter of law, a step down in the middle of a deck, allegedly hard to see because of the uniformity of the surfaces, was not an unreasonable risk of harm even to an invitee. Not a snow and ice case, but nonetheless a breath of fresh air in the slip and fall arena. ❖

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