MUNICIPAL SIDEWALKS

Sidewalks play a vital role in the total transportation needs of a municipality and they deserve our adequate attention. Many municipal officials face the perennial question, "What to do about the poor condition of sidewalks in our municipality?".

There is no state duty for a municipality to provide sidewalks although local ordinance may address this. In federal law, Title II of the Americans with Disabilities Act requires an accessible route be provided to all services and programs of the local government. This may create a legal responsibility to provide firm, stable and slip resistant surfaces for pedestrian conveyance to public buildings and services. Providing sidewalks throughout the city is a discretionary function of a municipality, but once installed, as a general rule municipal officials have a clear and present duty to maintain them in a reasonably safe manner. And once paving, repaving, or resurfacing is conducted on adjacent roadways, the sidewalks must then be made accessible and compliant with the ADA. This means the width of the sidewalk must be at least 36 inches and if less than 60 inches, there must be passing zones of 60 inches installed at least every 200 feet. The sidewalk cannot have a slope less than 1:20 and ramps must not slope greater than 1:12; ramps must also be yellow and equipped with dome delineators for the visually impaired. If utility poles or signal attenuators are installed in the sidewalk, there must be a 36-inch clear space of sidewalk around the poles.

The municipality is not liable simply because an injury occurs on the sidewalk but may have liability exposure if there is a defective condition that caused the injury. Slips and falls on sidewalks are one of the most common types of liability claims against a city, with an average claim cost of $10,500. Another potential liability exposure exists if a person of limited ability cannot access governmental services or programs because of the condition of the sidewalks or the absence of an accessible route. Failure to provide compliant access may not result in a cash settlement but complaints made to the Department of Justice may result in a federal demand that all facilities and services are brought into compliance within a specific time frame. This can result in a repair that is very expensive.

Every claim is evaluated on the facts and circumstances of the occurred injury.

The statute regarding the liability for sidewalks is Tennessee Governmental Tort Liability Act at T.C.A. 29-20-203. as follows:

> **Removal of immunity for injury from unsafe streets and highways – Notice required.**
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> (a) Immunity from suit of a governmental entity shall be removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. The term "street" and "highway" shall include traffic control devices thereupon.

(b) This section shall not apply unless constructive notice and/or actual notice to the governmental entity of such condition be alleged and proved in addition to the procedural notice required by 29-20302. [Acts 1973, ch. 345, section 8; T.C.A., 23-3309; Acts 1983, ch. 199, section 1.]

Constructive notice is the assumption that a city or town knows or should have known of a defective condition. Constructive notice may be established by documented reports of citizen notification of conditions or by determining city workers had recently worked in the area, should have noted the conditions, and is easily shown by the claimant. Tort and case law clarify that when any employee, agent or volunteer of the city becomes aware of a defective condition, the city is then considered to be on notice of the condition and therefore, liable for it. It may be possible to transfer maintenance to landowners, but generally the liability for injury remains with the municipality and is not worth attempting to transfer the liability. The issue of who has what degree of liability is ultimately left to local ordinance and the courts.

The goal of the risk manager should be to ensure the public safety, reduce the likelihood of claims and avoid costly litigation. Good loss control will pay for itself by reducing the frequency and severity of claims. Sidewalk hazards should be identified, the exposures evaluated and loss control measures in place with continuous monitoring. All employees and agents of the city should be educated to understand that any defective condition noted on public property must be reported to the proper authorities for correction and the public should be warned (by cones or other appropriate warning devices) until permanent repairs can be completed. The reports and warnings should be documented and dated. It does not matter if the employee or agent does not work directly in that area. The Governmental Tort Liability Act contains a one-year statute of limitations. That means a plaintiff that alleges injury was caused by a defective condition has 11 months and 29 days to file legal action for recovery. The ongoing documentation of inspections, repairs and mitigation efforts are frequently a city's best defense against legal actions alleging negligent repair. Sidewalks should hold an important place in the municipality's risk management program.

In 1998 the Tennessee Supreme Court handed down a troublesome case for Tennessee cities on the issue of sidewalk maintenance. The case can be found at Coln v. City of Savannah, 966 S.W. 2d 34, (Tenn. 1998). This case is analyzed as follows:

Facts:

In June of 1992, the City of Savannah contracted to have decorative brick placed on a bed of sand in front of the city hall building. The surface was slightly below the adjacent sidewalk leading to the city hall.

Plaintiff, Hazel Coln, 68 years of age tripped on the lip of the concrete sidewalk adjacent to the decorative brick. She sustained injuries to her wrist and arm. The designer of the sidewalk testified there was a 3/8 inch deviation between the two areas due to settling. Plaintiff alleged the city had created a dangerous condition for persons using the sidewalk system of the city.

The city testified it knew of the deviation and took no corrective action because the deviation seemed minimal and the defect was "open and obvious" to persons using the sidewalk.

Holding:

The court found the city owed a duty to the plaintiff and that a foreseeable risk of harm was posed to pedestrians entering city hall. Although the deviation may be open and obvious to some degree, it is significant that the hazard existed in an area used to access city hall. The court stated the risk of harm was unreasonable despite its open and obvious nature and the foreseeability and gravity of harm, therefore, outweighed the burden imposed in protecting that harm.

Analysis:

This case is significant in that it diminishes the "open and obvious rule" which had been a sound defense to similar claims in the past, but it does not relieve a city from liability. A strong inspection program coupled with documentation of noted conditions and the subsequent repair or mitigation to mark the condition will go a long way in helping cities defend sidewalk slip and fall claims.

Failure to comply with the Americans with Disabilities Act also creates a liability. Title II of the ADA requires all new sidewalk construction comply with the ADA standards which define width, slope and ramp accessibility. But many cities have miles of sidewalks that do not meet the ADA standards. The ADA does not grandfather older sidewalks within the corporate limits or in other words, require all sidewalks are immediately made accessible (unless it is the route to a public building), but it does require sidewalks are brought into compliance when alterations are done to the adjacent streets. This does not include a pothole patch but upgrades to compliance are required when paving and resurfacing are done on adjacent streets and roads. Another requirement of the ADA is an assessment of all existing sidewalks and a transition plan for when all sidewalks will become accessible. This can be a daunting task and does require an overall assessment of all sidewalks condition and a plan for funding and upgrades of sidewalks. Failure to complete and develop a transition plan can make a governmental entity vulnerable to lose federal and state funding for street aid and street right of way. And failure to establish a clear plan to make all sidewalks accessible for all citizens is a violation of federal law. These types of ADA complaints are heard by the Department of Justice and the subsequent investigation is not limited to the condition reported. The Department of Justice has the capacity to review all areas of operations and their compliance with the Americans with Disabilities Act. While they can charge a financial settlement to the wronged party, they more commonly establish a timeline for complete compliance with all aspects of the ADA. This can be more problematic for a city because the settlement has no insurable interest and the cost of complete implementation of the ADA is expensive. Cases can be reviewed at this link: Enforcement Activities - Cases Listed Chronologically by Document Type (ada.gov)