

**To: New Jersey Law Revision Commission**  
**From: Jayne Johnson**  
**Re: Sidewalk Tort Liability**  
**Date: June 6, 2016**

## MEMORANDUM

### Executive Summary

This memorandum discusses sidewalk tort liability in New Jersey, where judicial precedent overturned the common law rule and established a distinction between commercial and residential property owners to maintain abutting sidewalks. Cases involving properties with a hybrid form of ownership emerged over the three decades following the Supreme Court decision, which imposed liability for commercial property owners who fail to maintain abutting sidewalks. The Appellate Division called on the Supreme Court or the Legislature to clarify this “gray area” concerning the classification of properties with mixed use or a hybrid form of ownership. Staff seeks approval from the Commission to further identify through outreach whether statutory revisions will best address the concerns raised in this area of the law.

### Background

Historically, property owners had no duty to maintain abutting sidewalks.<sup>1</sup> Liability was not imposed for failure to clear the snow and ice from public sidewalks abutting from private or commercial property.”<sup>2</sup> At common law, even when a property owner removed snow or ice from a public sidewalk, the owner was not liable to a person who was injured on the sidewalk “unless through negligence a new element of danger or hazard, other than one caused by natural forces, added to the safe use of the sidewalk by a pedestrian.”<sup>3</sup>

The Supreme Court, in *Stewart v. 104 Wallace Street*, considered the liability of a tavern owner for the injuries sustained by a pedestrian who fell on a “dilapidated sidewalk” abutting from the establishment.<sup>4</sup> The Court observed that “sidewalks provide commercial owners with easy access to their premises and increase the value of their property,” and unlike residential homeowners, commercial property owners may spread the costs of liability as “one of the necessary costs of doing business.”<sup>5</sup> In accord, the Court overturned the common law rule, and held that commercial property owners are liable for injuries on the sidewalks abutting their property when the injury results from the owner’s negligent failure to maintain the sidewalks.<sup>6</sup>

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<sup>1</sup> *Davis v. Pecorino*, 69 N.J. 1, 4 (1975).

<sup>2</sup> *Id.*

<sup>3</sup> *Saco v. Hall*, 1 N.J. 377, 381 (1949); *see also Yanko v. Fane*, 70 N.J. 528, 534-37 (1976)

<sup>4</sup> *Stewart v. 104 Wallace Street, Inc.*, 87 N.J. 146, 151 (1981).

<sup>5</sup> *Luchejko v. Cty of Hoboken*, 207 N.J. 191, 216 (2011) (Long, J., dissenting).

<sup>6</sup> *Id.* at 149-50.

The Court established this new standard, which is often called the *Stewart* rule, to ensure the public’s “right to safe and unimpeded passage” on abutting sidewalks.<sup>7</sup> In subsequent decisions, the Court held that the *Stewart* rule carries with it a duty to remove ice and snow if failure to do so would be considered negligent under the circumstances.<sup>8</sup> The Supreme Court, in *Luchejko*, stated that:

[t]he commercial/resident dichotomy represents a fundamental choice to not to impose sidewalk liability on homeowners that was established nearly three decades ago. Stare decisis thus casts a long shadow over these proceedings. We should not lightly break with a line of decisions that has promoted settled expectations on the part of residential property owners.<sup>9</sup>

The Supreme Court acknowledged that in the decades since *Stewart*, certain cases required the Court to “grapple with” determining whether a property should be classified as residential or commercial.<sup>10</sup> The Court examines the following when considering “the use of the abutting land, not the nature” of the entity owning the property:

- (1) the nature of the ownership of the property, including whether it is owned for business or investment purposes;
- (2) the predominant use of the property, including the amount of space occupied by the owner to determine whether it used in whole or in substantial part as a place of residence;
- (3) whether the property has the capacity to generate income, including whether the owner is realizing a profit; and
- (4) any other relevant factor when applying commonly accepted definitions of ‘commercial’ and ‘residential’ property.

In addition, the ability of the entity to spread costs is also considered.<sup>11</sup> “Cost spreading is not limited merely to businesses passing costs by charging higher prices; rather it is focused on the landowner’s ability to bear the risk of loss better than the injured pedestrian.”<sup>12</sup>

The Court, in *Luchejko v. Cty. of Hoboken*, considered whether a common-interest community was “residential” or “commercial.”<sup>13</sup> The Court determined that the condominium

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<sup>7</sup> *Stewart*, 87 N.J. 146, 151-52 (1981).

<sup>8</sup> *Mirza v. Filmore Corp.*, 92 N.J. 390, 395-96 (1983).

<sup>9</sup> *Luchejko*, 207 N.J. at 208.

<sup>10</sup> *Id.* at 217 (Long, J., dissenting).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 217 (Long, J., dissenting).

<sup>13</sup> *Id.* at 195.

complex was residential and the owner was not liable for the slip and fall of a pedestrian, departing from the bright-line application of the commercial-residential distinction.<sup>14</sup>

The Court did not extend the application under *Luchejko*, when considering a similar common-interest community in *Qian v. Toll Bros.*, where the private sidewalk fell within the common elements of the property.<sup>15</sup> Instead, the Court decided that the homeowners' association was a commercial property owner with a duty to keep its private sidewalk reasonably safe.<sup>16</sup>

The Appellate Division, in *Zheng v. Santos*, called on the Legislature or the Supreme Court to clarify this area of the law.<sup>17</sup> The Court noted that:

The law would be more predictable if either the Legislature or the Supreme Court specified which owner-occupied residential properties are immune from sidewalk tort liability. By analogy, the Legislature provided such a specification in designating rental properties that are not subject to the Anti-Eviction Act.

The court identified the structure of the Anti-Eviction Act as an example for possible statutory revisions in this area of the law.<sup>18</sup> Under N.J.S. 2A:18-61.1, the statute identifies the rental properties that are subject to the Act and those which are not:

No lessee or tenant or the assigns, under-tenants or legal representatives of such lessee or tenant may be removed by the Superior Court from any house, building, mobile home or land in a mobile home park or tenement leased for residential purposes, other than (1) owner-occupied premises with not more than two rental units or a hotel, motel or other guest house or part thereof rented to a transient guest or seasonal tenant; (2) a dwelling unit which is held in trust on behalf of a member of the immediate family of the person or persons establishing the trust, provided that the member of the immediate family on whose behalf the trust is established permanently occupies the unit; and (3) a dwelling unit which is permanently occupied by a member of the immediate family of the owner of that unit, provided, however, that exception (2) or (3) shall apply only in cases in which the member of the immediate family has a developmental disability, except upon establishment of one of the following grounds as good cause.<sup>19</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Qian v. Toll Bros.*, 223 N.J. 124, 141-42 (2015).

<sup>16</sup> *Id.* at 142.

<sup>17</sup> *Zheng v. Santos*, 2014 WL 7896546 (App. Div. Feb. 23, 2015); *see also Smith v. Young*, 300 N.J. Super. 82 (App. Div. 1997) (calling for clarification of the statute).

<sup>18</sup> N.J. STAT. ANN. 2A:18-61.1 to -.12 (West 2016).

<sup>19</sup> *Id.*

Another approach calls for a return to the common law rule, “in the interest of fairness, uniformity and predictability[, judicial precedent] should be replaced by a uniform standard irrespective of the status of the property owner or the unsafe condition.”<sup>20</sup> While this proposal restores the predictability of the common law rule, the direction proposed by the Appellate Division is in keeping with the judicial precedent to maintain a distinction between commercial and residential property owners to ensure the public’s “right to safe and unimpeded passage” on abutting sidewalks.

### **Conclusion**

While the New Jersey Supreme Court established a bright-line distinction between the liability imposed on commercial and residential property owners, a line of cases identifies a “gray area” concerning the classification of properties with a hybrid form of ownership or mixed use. Clarifying the statutes governing sidewalk tort liability may guide interpretation and provide notice to property owners. Statutory revisions may also foster public awareness of and reliance on the statutory requirements for determining whether a cause of action emanates from an injury resulting from the conditions of an abutting sidewalk.

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<sup>20</sup> Burke, Donald, Jr., *SLIPPING THROUGH THE CRACKS: THE SHODDY STATE OF NEW JERSEY SIDEWALK AND LIABILITY LAW CRIES OUT FOR REPAIR*, 36 Seton Hall Legis. J. 226, 267 (2012).