

To: New Jersey Law Revision Commission
From: Erik Topp
Re: Sidewalk Tort Liability
Date: April 9, 2018

MEMORANDUM

Executive Summary

In June 2016, the Commission authorized staff to conduct additional research and outreach on a project examining sidewalk tort liability. This project was designed to focus on the “gray area” wherein properties have a hybrid form of ownership (i.e. a condominium association, which can be considered residential or commercial property). However, the nature of the issue is so inherently subjective that it may be almost impossible to craft a non-arbitrary statutory standard; accordingly, the best approach at the present time may be to leave the standards as they are.

Background

The underlying Presentation Memorandum for this project by Jayne Johnson reflected on a line of cases from *Stewart v. 104 Wallace Street, Inc.*¹ through the more recent *Luchejko v. City of Hoboken*² and *Qian v. Toll Bros.*³, each of which undermined the historical common law rule that insulated property owners from liability for injuries occurring on adjacent sidewalks “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.”⁴ Essentially, the common law rule meant that property owners were not liable for injuries on abutting sidewalks unless they had actively increased the danger to passersby by “contribut[ing] to a defective condition or voluntarily undertak[ing] to make a repair and then do[ing] so negligently.”⁵

Over time, this baseline rule has been unraveled, splitting liability for unsafe conditions into five categories: (1) commercial, (2) residential, (3) religious or charitable, (4) public, and (5) mixed-use.

¹ 87 N.J. 146 (1981).

² 207 N.J. 191 (2011).

³ 223 N.J. 124 (2015).

⁴ *Sacco v. Hall*, 1 N.J. 377, 381 (1949).

⁵ Donald F. Burke, *Slipping Through the Cracks: The Shoddy State of New Jersey Sidewalk Liability Law Cries Out for Repair*, 36 SETON HALL LEGIS. J. 225, 228 (2012). Burke’s article, also cited in the presentation memo, takes a comprehensive look at sidewalk tort liability law in New Jersey and serves as the basis for most of the position taken in this memo. Also reviewed were the New Jersey cases found in 88 A.L.R.2d 331 (“liability of abutting owner or occupant for condition of sidewalk”).

Starting with *Stewart*, the New Jersey Supreme Court imposed an affirmative duty on commercial property owners to maintain safe conditions for passersby on abutting sidewalks, an obligation deemed fair in light of the benefit that these owners derive from having public thoroughfares next to their businesses.⁶ Residential property owners, meanwhile, continue to operate under the common law rule that refuses to impose liability absent conduct by the property owner (or her predecessor in title) that intentionally, recklessly, or negligently increases the danger of the sidewalk to pedestrians.⁷ Private property owners have no tort duty to clear snow or ice from their abutting sidewalks; though they can be subject to municipal ordinances that require ice and snow to be cleared.⁸ Public entities are governed by similarly uncomplicated rules—the state’s Tort Claims Act provides guidance on the matter.⁹

Owners of religious/charitable or mixed-use property face a less clear legal framework. These cases are generally treated as fact-sensitive, hinging on whether the property was used for business-like activities.¹⁰ For religious/charitable entities, this is considered independent of the nature of the property owners, instead considering the nature of the property’s use: for instance, in *Brown v. Saint Venantius School*,¹¹ the Supreme Court rejected the notion that commercial-style liability could not be imposed on church organized as a religious nonprofit entity, in light of the facts that the church would be able to absorb the damages assessed against it and that it already engaged in substantial property maintenance (suggesting that it was capable of keeping its abutting sidewalks clear).¹² For mixed-use entities, a similar balancing test is used: courts apply a “predominant use” test, considering among other things “extent of income and extent of non-owner occupancy in terms of time and space to determine whether the owner’s residential occupancy preponderates.”¹³ This creates high variance, sometimes leading to classifications of two-family homes, large apartment buildings, and fraternity houses as more commercial than residential,¹⁴ and sometimes leading to classifications of three-family homes, two-family homes, and condominium associations as more residential than commercial.¹⁵

Courts have conceded that making these distinctions has proved exceedingly difficult over time. As Justice Long’s dissent in *Luchejko* states, there should ideally be no “bright-line

⁶ *Id.* at 228–30.

⁷ *Id.* at 231.

⁸ *Id.* at 233.

⁹ *Id.* at 238–40.

¹⁰ *Id.* For religious and charitable entities, this balancing test is imposed without regard for the Charitable Immunity Act. *Id.*

¹¹ 111 N.J. 325 (1988); Burke, 36 SETON HALL LEGIS. J. at 234–35.

¹² 111 N.J. 325 (1988); Burke, 36 SETON HALL LEGIS. J. at 234–35. *St. Venantius School* is only one of several cases imposing commercial-style liability on religious/charitable entities. *Id.* at 233–37.

¹³ *Id.* at 240.

¹⁴ *Id.* at 240–42 (discussing *Hambricht v. Yglesias*, 200 N.J. Super. 392 (App. Div. 1985); *Gilhooly v. Zeta Psi Fraternity*, 243 N.J. Super. 201 (Law Div. 1990)).

¹⁵ *Id.* at 242–49 (discussing *Borges v. Hamed*, 247 N.J. Super. 295 (App. Div. 1991); *Smith v. Young*, 300 N.J. Super. 82 (App. Div. 1997); *Luchejko v. City of Hoboken*, 207 N.J. 191 (2011)).

application of a commercial-residential distinction” because a more fact-sensitive balancing test that weighs the myriad factors surrounding the injury itself, the ability of the property owner to pay, the nature of the conditions, the foreseeability of the accident, and the allocation of risk ought to be used.¹⁶ However, attempts to codify such a balancing test (as suggested at the June 2016 meeting) would likely omit potentially important factors, leading to the undesirable outcome of increased litigation over the issue. Further, the balancing is already encapsulated in the consideration of the commercial/residential distinction used in mixed-use cases.

Short of creating an agency to classify properties as commercial or residential *ex ante* (another suggestion from the meeting) or creating a bright-line rule that resets the law to a pre-*Stewart* system (as Burke’s article suggests,¹⁷ which would re-raise the problems of fairness inherent in the system and likely end up suffering the same fate as the pre-*Stewart* common law rule) it seems there is no immediate practicable solution to this problem.

Conclusion

It appears that there are two major options if the Commission chooses to move forward in this area of the law at this time: (1) proposing a statutory scheme that identifies statutory factors based on the existing case law balancing tests, which would codify the status quo with its inherent limitations and potentially result in new litigation; or (2) roll back the rules to remove liability for private owners, which would run counter to a line of cases determining that to be unfair to pedestrians.

Since it has been some time since the Commission last considered this issue, Staff wished to bring it to the attention of the Commission before undertaking additional research and drafting to see if the Commission wished to provide guidance or direction.

¹⁶ *Luchejko*, 207 N.J. at 215, 223–24.

¹⁷ Burke, 36 SETON HALL LEGIS. J. at 269.