5.20B LIABILITY FOR DEFECTS IN PUBLIC STREETS AND SIDEWALKS (Approved 11/99; Revised 01/2025)

A. Liability of Municipality

NOTE TO JUDGE

See Model Civil Charge 5.20A, Dangerous Conditions of Public Property and *N.J.S.A.* 59:1-1, *et seq*., the New Jersey Tort Claims Act.

B. Liability of Abutting Owner or Occupant[1]

1. In General

a. As to Construction or Other Activity

The owner [occupant] of residential premises abutting a public sidewalk is not responsible for defects therein caused by the action of the elements or by the wear and tear incident to public use. If, however, you find that the defective condition of the sidewalk was the result of the negligent construction thereof by the owner [occupant] or that it resulted from an activity, commercial or

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[1] *See Stewart v. 104 Wallace St., Inc.*, 87 *N.J.* 146 (1981); *Mirza v. Filmore Corp.*, 92 *N.J.* 390 (1983); *Lombardi v. First United Methodist Church*, 200 *N.J. Super.* 646 (App. Div. 1985); *Brown v. St. Venatius School*, 111 *N.J.* 325 (1988); *Christmas v. City of Newark*, 216 *N.J. Super.* 393, 400 (App. Div. 1987) (holding that *Stewart*, *supra*, establishes an absolute municipal immunity for deteriorated sidewalks); *but cf. Levin v. DeVoe*, 221 *N.J. Super.* 61, 64 n.1 (App. Div. 1987) and *Roman v. City of Plainfield*, 388 *N.J. Super.* 527, 536 (App. Div. 2006) (disagreeing with the holding in *Christmas* that *Stewart* established an absolute municipal immunity for deteriorated sidewalks); *Luchejko v. City of Hoboken*, 207 *N.J.* 191 (2011); *Qian v. Toll Bros. Inc.*, 223 *N.J.* 124 (2015); *Pareja v. Princeton Int'l Properties*, 246 *N.J.* 546, 550, *reconsideration denied*, 247 *N.J.* 406 (2021).

otherwise, which was carried on by the owner [occupant], the plaintiff may recover for the injuries proximately resulting from such defective condition.

Cases:

Hayden v. Curley, 34 *N.J.* 420 (1961); *Krug v. Wanner*, 28 *N.J.* 174 (1958); *Moskowitz v. Herman*, 16 *N.J.* 223, 225 (1954); *Volke v. Otway*, 115 *N.J.L.* 553 (E. & A. 1935); *Prange v. McLaughlin*, 115 *N.J.L.* 116 (E. & A. 1935); *Braelow v. Klein*, 100 *N.J.L.* 156 (E. & A. 1924); *Rupp v. Burgess*, 70 *N.J.L.* 7 (Sup. Ct. 1903).

b. As to Repairs

A residential property owner owes no duty to the public to repair a sidewalk which is in a state of disrepair by reason of normal wear and tear or by reason of the elements such as rain, snow, frost, and the like. Nor is mere failure fully to correct the old condition a sufficient basis for liability.

Where, however, the owner attempts to make repairs to correct some defect therein for which the owner is not responsible, the owner becomes responsible if the owner makes the repairs negligently and thereby causes the sidewalk, after the repairs, to be more dangerous than before or if the owner causes a new hazard, different from the old.

Cases:

Nash v. Lerner, 157 *N.J.* 535 (1999), adopting dissent 311 *N.J. Super.* 183, 193 (App. Div. 1998); *Tierney v. Gilde*, 235 *N.J. Super.* 61 (App. Div. 1989); *Snidman v. Dorfman*, 7 *N.J. Super*. 207 (App. Div. 1950); *Halloway v. Goldenberg*, 4 *N.J. Super*. 488 (App. Div.

1949); *Braelow v. Klein*, 100 *N.J.L.* 156 (E.& A. 1924); *Istvan v. Engelhardt*, 131 *N.J.L.* 9 (Sup. Ct. 1943).

Absent some affirmative act, residential owner has no duty to maintain sidewalk at base of residential driveway where the deterioration occurred over time merely due to long-term residential traffic. *Nash v. Lerner*, 157 *N.J.* 535 (1999), adopting dissent 311 *N.J. Super.* 183, 193 (App. Div. 1998). The existence of a shade tree commission immunizes property owners, without distinction as to the nature of ownership, from liability for injuries stemming from defective sidewalks caused by shade tree roots. *Tierney v. Gilde*, 235 *N.J. Super.* 61, 65 (App. Div. 1989).

Where the abutting owner, although not obligated to construct a sidewalk, does so in such a manner that it is hazardous to pedestrians, it is a public nuisance, and the owner is liable. *Braelow v. Klein*, 100 *N.J.L.* 156 (E. & A. 1924). An owner, attempting to repair an existing sidewalk or to correct some defect therein, may create a nuisance and be responsible if the sidewalk, after the attempt to repair or correct is more dangerous than before, or the new hazard is different from the old. *Istvan v. Engelhardt*, 131 *N.J.L.* 9 (Sup. Ct. 1943).

2. Snow and Ice

a. Liability of Owner [Occupant] Who Undertakes to Clear Sidewalk

The owner [occupant] of a residential property has no duty to maintain the sidewalks adjacent to their land so long as they do not affirmatively create a hazardous condition.[2]

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[2] *See Stewart v. 104 Wallace St., Inc.*, 87 *N.J.* 146 (1981) (holding that the duty to maintain sidewalks is confined to commercial property owners); *Lodato v. Evesham Township*, 388 *N.J. Super.* 501, 507 (App. Div. 2006) (holding that residential landowners remain protected by common-law public sidewalk immunity).

The owner [occupant] of residential premises abutting a public sidewalk is not required to clear or keep the sidewalk free from the natural accumulation of ice and snow.[3] But the owner [occupant] is liable if, in clearing the sidewalk of ice and snow[4], the owner [occupant], through the owner's [occupant's] negligence, adds a new element of danger or hazard, other than that caused by the natural elements, to the use of the sidewalk by a pedestrian. In other words, while an abutting owner [occupant] is under no duty to clear the owner's [occupant's] sidewalk of ice and snow, the owner [occupant] may become liable where the owner [occupant] undertakes to clear the sidewalk and does so in a manner which creates a new element of danger which increases the natural hazard already there.

Therefore, should you find that the defendant, in undertaking to remove the ice and snow from defendant's sidewalk, created a new hazard or increased

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[3] *See Brown v. Kelly*, 42 *N.J.* 362, 363 (1964); *Briglia v. Mondrian Mortg. Corp.*, 304 *N.J. Super.* 77, 80 (App. Div.), *certif. den.* 152 *N.J.* 13 (1997) ("[o]wners of residential property are not liable for injuries to pedestrians for failure to remove accumulated snow on an abutting public sidewalk."); *Luchejko v. City of Hoboken*, 207 *N.J.* 191, 210 (2011) ("Residential homeowners can safely rely on the fact that they will not be liable unless they create or exacerbate a dangerous sidewalk condition; commercial owners, defined in reference to their use of the property and its capacity to generate income, know that clearing their abutting sidewalks is a cost of doing business and that failure to do so can lead to liability.")

[4] *Liptak v. Frank*, 206 *N.J. Super.* 336 (App. Div. 1985) (holding that residential landowners owed no duty to pedestrians, under either common law or municipal ordinance, to remove ice and snow from their abutting sidewalk).

the existing hazard and that this new or increased hazard proximately caused or concurred with the natural hazard to cause plaintiff's injuries, then you must find for the plaintiff.

Should you find, however, that the defendant did not increase the natural hazard or create a new element of danger which proximately caused or concurred in causing plaintiff's injuries, you must find for the defendant.

Cases:

Taggert v. Bouldin, 111 *N.J.L.* 464, 467 (E. & A. 1933); *Saco v. Hall*, 1 *N.J.* 377, 381 (1949); *MacGregor v. Tinker Realty Co.*, 37 *N.J. Super.* 112, 115 (App. Div. 1955); *Gentile v. National Newark and Essex Bkg. Co.*, 53 *N.J. Super.* 35, 38 (App. Div. 1958); *Sewall v. Fox*, 98 *N.J.L.* 819 (E. & A. 1923) (existence of a municipal ordinance obligating landowner to clear sidewalk of ice and snow does not create rights in favor of private individual on defendant's failure to comply with the ordinance); *cf. Gellenthin v. J & D. Inc.*, 38 *N.J.* 341 (1962); *Luchejko v. City of Hoboken*, 207 *N.J.* 191 (2011) (extending residential sidewalk immunity to a condominium complex for a public sidewalk abutting the condominium property because the condominium complex was a residential property rather than a commercial one); *Qian v. Toll Bros. Inc.*, 223 *N.J.* 124 (2015) ("Residential public-sidewalk immunity does not apply in the case of a sidewalk privately owned by a common-interest community.").

b. Liability of Owner of Commercial Property for Defects, Snow and Ice Accumulation and Other Dangerous Conditions in Abutting Sidewalks

The law imposes upon the owner of commercial or business property the duty to use reasonable care to see to it that the sidewalks abutting the property

are maintained in reasonably good condition.[5] In other words, the law says that the owner of commercial property must exercise reasonable care to see to it that the condition of the abutting sidewalk is reasonably safe and does not subject pedestrians to an unreasonable risk of harm. The concept of reasonable care requires the owner of commercial property to take action with regard to conditions within a reasonable period of time after the owner becomes aware of the dangerous condition or, in the exercise of reasonable care, should have become aware of it.[6] If, therefore, you find that there was a condition of this sidewalk that was dangerous in that it created an unreasonable risk of harm for pedestrians, and if you find that the owner knew of that condition or should have known of it but failed to take such reasonable action to correct or remedy the situation within a reasonable period of time thereafter as a reasonably prudent commercial or business owner would have done under the circumstances, then the owner is negligent.

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[5] This includes all commercial property owners including owners of a vacant commercial lot abutting a sidewalk pursuant to *Padilla v. Young Il An*, 257 *N.J.* 540 (2024). *See also Stewart v. 104 Wallace St., Inc.*, 87 *N.J.* 146, 150 (1981) ("Commercial property owners are henceforth liable for injuries on the sidewalks abutting their property that are caused by their negligent failure to maintain the sidewalks in reasonably good condition.").

[6] If the unsafe condition is alleged to be snow and ice, *N.J.S.A.* 40:64-12 and any ordinance adopted by the municipality might be charged as a factor, the jury should consider the reasonableness of the time the defendant(s) has/have waited to remove or reduce a snow or ice condition from the sidewalk.

A commercial property owner may have a duty to clear public sidewalks abutting their properties of snow and ice for the safe travel of pedestrians. Maintaining a public sidewalk in a reasonably good condition may require removal of snow or ice or reduction of the risk, depending upon the circumstances. The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition.

[When there was an ongoing storm or a dispute as to whether there was an ongoing storm, add the following language:] However, a commercial property owner does not have a duty to keep sidewalks on its property free from snow or ice during an ongoing storm.[7] A commercial property owner's duty to remove snow and ice hazards arises not during a storm, but rather within a reasonable time after the storm. There are two exceptions that may give rise to a duty before then. First, a commercial property owner may be liable if its actions increase the risk to pedestrians and invitees on their property. Second, a commercial property owner may be liable where there was a pre-existing risk on the premises before the storm.

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[7] *Pareja v. Princeton Int'l Props*, 246 *N.J.* 546, 549, *reconsideration den.*, 247 *N.J.* 406 (2021).

NOTE TO JUDGE

Include the following where notice of the condition is an issue.

But in this case, the property owner contends that the property owner had no notice or knowledge of the alleged dangerous condition, and therefore cannot be held responsible for it. In that connection, I must make you aware of this rule: The owner of commercial or business property is chargeable with a duty of making reasonable observations of the owner's property, including the abutting sidewalk, in order to discover any dangerous condition that might develop or occur. The owner must make observations of the owner's property, including the sidewalk, with the frequency that a reasonably prudent commercial property owner would in the circumstances. If you find that such a reasonable observation would have revealed the dangerous condition alleged in this case, then the property owner is chargeable with notice of the condition although the property owner did not actually know about it; that is, the property owner is as much responsible for the condition as if the property owner had actual knowledge of its existence.

NOTE TO JUDGE

Include the following where the owner has taken some action with regard to the condition and the adequacy of the action is in question.

What actions must the owner of commercial property take with regard to defects/snow/ice accumulation/dangerous conditions? The action required by the law is action which a reasonably prudent person would take or should have taken in the circumstances present to correct the defect/snow/ice accumulation/ dangerous condition, to repair it/remove it or to take other actions to minimize the danger to pedestrians (for example, to give warning of it) within a reasonable period of time after notice thereof. The test is: did the commercial property owner take the action that a reasonably prudent person who knows or should have known of the condition would have taken in that circumstance? If the commercial property owner did, the commercial property owner is not negligent. If the commercial property owner did not, the commercial property owner is negligent.[8]

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[8] *See Stewart v. 104 Wallace St., Inc*., 87 *N.J.* 146 (1981); *Mirza v. Filmore Corp*., 92 *N.J.* 390 (1983) (responsibility of commercial landowner for removal of snow or ice from public sidewalk). *Stewart* imposes liability on commercial landowners only.

See Christmas v. City of Newark, 216 *N.J. Super.* 393, 400 (App. Div. 1987) (holding that *Stewart, supra*, establishes an absolute municipal immunity for deteriorated sidewalks); *but cf. Levin v. DeVoe*, 221 *N.J. Super.* 61, 64 n.1 (App. Div. 1987) and *Roman v. City of*

NOTE TO JUDGE

Where there is both a commercial and residential use of the property, the predominant use will determine the status of the property. *Avalone v. Mortimer,* 252 *N.J. Super.* 434 (App. Div. 1991), *Wasserman v. W. R. Grace Co.,* 281 *N.J. Super.* 34 (App. Div. 1995), *Hambright v. Yglesias*, 200 *N.J. Super.* 392, 395 (App. Div. 1985) (two-family home utilized as apartment building in commercial property so as to impose duty upon owner to remove the ice from abutting sidewalk), *Borges v. Hamad,* 247 *N.J. Super* 353 (Law Div. 1990), *aff'd*, 247 *N.J. Super.* 295 (App. Div. 1990) (owner-occupied three-family house in a residential zone, with two rental units occupied solely by family members, is residential property). There is no affirmative duty on a charitable or religious institution to maintain public sidewalks abutting their properties. *Lombardi v. First United Methodist Church,* 200 *N.J. Super.* 646 (App. Div. 1985). *But see Brown v. St. Venatius School*, 111 *N.J.* 325 (1998) (school deemed commercial); *Restivo v. Church of St. Joseph*, 306 *N.J. Super.* 456 (App. Div. 1997) (leasing apartments even at below fair market value deemed commercial); *Gilhooly v. Zeta Psi Fraternity,* 243 *N.J. Super.* 201 (Law Div. 1990) (fraternity deemed commercial property owner). Owner of a vacant lot is not a commercial landowner for purposes of imposing sidewalk liability irrespective of the commercial status of the owner or the zoning. *Briglia v. Mondrian Mortgage Corporation,* 304 *N.J. Super.* 77 (App. Div. 1997); *Abraham v. City of Perth Amboy,* 281 *N.J. Super.* 81 (App. Div. 1995).

Plainfield, 388 *N.J.* Super. 527, 536 (App. Div. 2006) (disagreeing with the holding in *Christmas).* Shade Tree Commissions created by municipalities are granted absolute immunity pursuant to statute. *Petrocelli v. Sayreville Shade Tree Commission,* 297 *N.J. Super.* 544 (App. Div. 1997). *But see Learn v. City of Perth Amboy,* 245 *N.J. Super.* 577 (App. Div. 1991) (where the Shade Tree Commission was merely advisory).

3. Nuisance, Sidewalk

A street and every part of it is so far dedicated to the public that any act or obstruction which unnecessarily incommodes or impedes its lawful use is a nuisance.

One who constructs a drain, grating or a coal hole or similar structure in the sidewalk does it subject to the right of safe passage of the public over and along every part of the sidewalk. In making such use of the sidewalk, one is required to do so by a method of construction which does not create a nuisance and, having done so, is under a further duty of exercising reasonable care to keep the structure safe for the use of the public.

Cases:

Saco v. Hall, 1 *N.J.* 377 (1949); *Weller v. McCormack*, 52 *N.J.L.* 470 (Sup. Ct. 1890) (tree); *Rupp v. Burgess*, 70 *N.J.L.* 7 (Sup. Ct. 1903) (drain); *Kelly v. Lembeck & Betz Brewing Co*., 86 *N.J.L.* 471 (Sup. Ct. 1914), *aff'd*, 87 *N.J.L.* 696 (E. & A. 1915) (cellar door); *Braelow v. Klein*, 100 *N.J.L.* 156 (E. & A. 1924) (difference in level).

4. Adoption of Nuisance by Subsequent Owner

Where, through the action of a prior owner of premises abutting a public sidewalk, a condition amounting to a nuisance has been created, one who takes title from the original creator of the condition and continues to maintain it may

be held liable in damages to a user of the sidewalk who suffers injury by reason of such condition.

Cases:

Murray v. Michalak, 114 *N.J. Super.* 417 (App. Div. 1970), *aff'd*, 58 *N.J.* 220 (1971); *Krup v. Wanner,* 28 *N.J.* 174 (1958).