§ 1013. **Unsafe Streets and Public Places; Awnings and Falling Substances.** — In connection with the subject of streets and sidewalks may be considered the liability of a municipal corporation *for injuries to travellers by reason of falling substances*, such as awnings, cornices, snow, and ice from roofs and the like, or by reason of the fall of rotten poles or trees in the streets or public places. Municipal corporations have sometimes been held liable for personal injuries suffered by travellers on the street, sidewalks, and public squares from the fall of dangerous substances. *The ground of the liability is negligence.*[1] The courts have in some cases based the liability on statute provisions respecting keeping streets in repair or safe and convenient for travel, and in other cases on the duty of the corporation in this regard based upon general principles. On the one ground or the other, it is generally held to be a corporate duty to keep the streets of a city in such repair that they may be safely travelled. The duty is not limited to the road-bed. A permanent wooden awning or roofing, covering the sidewalk of a street, and resting for support upon wooden posts bedded in the street, if insecurely supported, so as to be dangerous to persons using street, is a defect in the street which the city is bound to repair. Such a structure made for private purposes, if unauthorized, is an encroachment upon the public street, and a nuisance, which it is the duty of the city officers, after notice, express or implied, of the danger, to remove. If such a structure exists by authority of the city, the city is liable for any defect arising from want of proper supervision or from negligence in its construction, and in such case there may be such liability, although there be no external indication of danger.[2] The power of a city

County, 40 Md. 312; s. c. 14 Am. Rep. 603; Heeney *v.* Sprague, 11 R. I. 456; Eustace *v.* Johns, 38 Cal. 3; Jansen *v.* Atchison, 16 Kan. 358; Moore *v.* Gadsden, 93 N. Y. 12; Russell *v.* Canastota, 98 N. Y. 496; Hartford *v.* Talcott, 48 Conn. 525. Charter provisions giving the city an action over against the owner of the adjacent lot. Rockford *v.* Hilderbrand, 61 Ill. 155 (1871). *Post*, secs. 1032, 1034; Shearm. & Red. Neg. (4th ed.) secs. 301, 343, 384, 701, and cases.

[1] *Infra*, sec. 1015.

[2] Hume *v.* New York, 74 N. Y. 264; s. p. Pedrick *v.* Bailey, 12 Gray, 161; Drake *v.* Lowell, 13 Met. 292; Day *v.* Milford, 5 Allen, 98; Norristown *v.* Moyor, 67 Pa. 355; s. p. New York *v.* Furze, 3 Hill (N. Y.), 612; Hutson *v.* New York, 9 N. Y. 163; Davenport *v.* Ruckman, 37 N. Y. 568; Requa *v.* Rochester, 45 N. Y. 129; Grove *v.* Fort Wayne, 45 Ind. 429 (1874). Approved. House *v.* Montgomery Co. Comm'rs, 60 Ind. 580. It is a question of negligence. If no negligence on part of city, there is no liability, as if there was good reason to suppose the awning safe and its fall was caused by a heavy weight of snow. Hume *v.* New York, *supra*. Larson *v.* Grand Forks, 3 Dak. 307; Langan *v.* Atchison, 35 Kan. 318; Bohen *v.* Waseca, 32 Minn. 176 (where the awning hung from a building; holding that the failure of a city to pass an ordinance requiring the abatement of such nuisances will not absolve it from

over its streets, as well as the corresponding right of the public to use them in safety, extends upward indefinitely for the purpose of their preservation, use, and enjoyment; and the duty of a city in this respect is commensurate with its power.[1] A close study of

liability); Duffy *v.* Dubuque, 63 Iowa, 171. *Ante*, sec. 949 *et seq.*

[1] Grove *v.* Fort Wayne (projecting cornice), 45 Ind. 429 (1874); s. c. 15 Am. Rep. 262. In this case *Worden*, C. J., says: "We have recently decided, in the case of Higert *v.* City of Greencastle, 43 Ind. 574, that cities in *Indiana*, organized under the general law, having plenary power over streets, and having the power of taxation sufficient for that purpose, are bound to keep the streets, including the sidewalks, in a reasonably safe condition for travel in the ordinary modes, and in default of doing so are liable in damages to persons injured by the neglect. We need not enter again upon the discussion of that subject. We may remark, however, that this is the established doctrine of the Supreme Court of the United States, of New York, Pennsylvania, and many other States, while in the Eastern States it is held that towns are not thus liable unless made so by statute. See collection of cases in Dillon on Municipal Corporations. [*Infra*, sec. 1017.] In the case of Detroit *v.* Blackeby, 21 Mich. 84, it was held, Judge *Cooley* dissenting, that such liability does not exist in the absence of a statute imposing it. We are disposed to follow the general current of authorities and decisions of our own court, without entering upon any critical examination of the foundation on which they rest. But we may observe that the act for the incorporation of cities, &c., provides that 'the common council shall have exclusive power over the streets, highways, alleys, and bridges within such city,' and also that they may collect an *ad valorem* tax, for general purposes, on all property within the city, &c., not exceeding a stated per centum. When cities organize under this act, thus investing themselves with exclusive power over the streets, and with ample power of taxation for general purposes, under which must be included street improvement purposes, *a duty devolves upon them to exercise the powers granted so far as to make the streets reasonably convenient and safe;* and if they fail to do so, it does not seem at all unreasonable that they should respond in damages to any one injured by their neglect of this duty." (*Infra*, sec. 1017.) The learned judge, after reviewing the leading cases in the New England States, adds: "These *decisions of the New England States*, based, as they are, upon statutes prescribing the duties and liabilities of towns, while they are valuable for their intrinsic worth, and as emanations from learned judicial tribunals, cannot be held as controlling, in the absence of such statutes, except so far as the reasoning is based upon general principles of the law, and not upon particular statutory regulations." In this case it was held by the Supreme Court of Indiana that the *cornice of a building which projects over a sidewalk in a city*, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance; that the city has power, under the statute, to abate such a structure; and if it fails to do so, after notice to the proper authorities of its dangerous character, and takes no precaution to prevent injury to parties using the sidewalk, it will be liable in damages to a person injured by its fall. In a subsequent case in *Indiana*, *Elliott*, C. J., said that the case of Grove *v.* Ft. Wayne, *supra*, "carried the principle on which it proceeds to the utmost verge, and only decides that a person travelling on a public street may recover (of the city, if it is negligent) for an injury caused by the fall of an overhanging cornice." Anderson *v.* East, 117 Ind. 126, 129 (1888), distinguishing Grove *v.* Ft. Wayne, and holding that a city is not liable for the fall of an unsafe wall causing damages to another building situate *upon private property;* there being no statute declaring the liability, and the city not being charged with the duty of protecting private property, its default was not in respect of a ministerial or corporate duty, but only in re-

the decisions, which are fully referred to in the notes, some of which rest upon statute provisions and others on general principles

spect of its public powers and duties, and hence such default was not the ground of an implied liability for damages.

Liability for falling substances further illustrated. The statute of *Massachusetts*, before cited (*ante*, sec. 1000, note), is held to extend to *injuries caused by defective awnings projected over the sidewalk*, and where the defect or want of repair in the projection is of a nature to render its continuance dangerous to the public safety. Drake *v.* Lowell, 13 Met. 292 (1847); Day *v.* Milford, 5 Allen, 98. The question is close, and is admitted to reach the utmost limit of corporate liability, and the liability is regarded as exceptional. *Per Chapman*, J., in Keith *v.* Easton, 2 Allen, 552 (1861); Barber *v.* Roxbury, 11 Allen, 318. See opinion of *Clifford*, J., in Merrill *v.* Portland, 4 Cliff. C. C. 438, as to municipal liability for falling awning; Grove *v.* Ft. Wayne, 45 Ind. 429. And it was held in Hixon *v.* Lowell, 13 Gray, 59 (1859), that a city was not liable where the only defect in the street is the *projection from the roof* of a building not owned by the city *of a mass of ice and snow* which had gradually accumulated there until it overhung the travelled way and rendered the passing beneath dangerous. Nor is a city liable for injury sustained by a traveller on a sidewalk by the falling on him of a *sign suspended over the sidewalk* by the adjoining proprietor, and insecurely fastened, although the city had notice of the position and unsafe condition of the sign. Jones *v.* Boston, 104 Mass. 75 (1870); s. p. Salisbury *v.* Herchenroder, 106 Mass. 458; compare West *v.* Lynn, 110 Mass. 514 (where city was held liable, the sign being to some extent supported on the sidewalk). Nor by the *falling of an iron weight* attached to a flag which was suspended across the street by third persons. Hewison *v.* New Haven, 34 Conn. 136. Some of the later cases cited follow Hixon *v.* Lowell, 13 Gray, 59, in preference to Drake *v.* Lowell, 13 Met. 292, and state the distinction which, in Hixon *v.* Lowell, the court thought it easier to feel than to express. 6 Am. Law Rev. 566. But is it easy either to feel or express the distinction? And does not the difficulty come from holding that the *statute* embraced a case like Drake *v.* Lowell? See Jones *v.* New Haven (falling of dead limb from tree in public square), 34 Conn. 1 (1867); Salisbury *v.* Herchenroder, 106 Mass. 458. Liability for injury by *fall of derrick* on highway. Hardy *v.* Keene, 52 N. H. 370; distinguished, Cain *v.* Syracuse, 95 N. Y. 83. *Rotten pole in street.* Norristown *v.* Moyer, 67 Pa. St. 355. *Tree in street.* Vosper *v.* New York, 49 N. Y. Superior Court, 296; Jones *v.* New Haven, *infra*. *Owner, and not tenant*, responsible for safety of awning; and if the town is held liable, it may recover over from the owner. Milford *v.* Holbrook, 9 Allen (Mass.), 17 (1864); Lowell *v.* Short, 4 Cush. (Mass.) 275; *Ib.* 277; Shipley *v.* Fifty Associates, 106 Mass. 194 (1870); *infra*, secs. 1033, 1034. In *New York:* Hume *v.* New York, 74 N. Y. 264; Taylor *v.* Peckham, 8 R. I. 349. See Garland *v.* Towne, 55 N. H. 55 (1874). When owner is not liable. Leonard *v.* Storer, 115 Mass. 86 (1874); s. c. 15 Am. Rep. 76, and note; Clancy *v.* Byrne, 56 N. Y. 129 (1874); s. c. 15 Am. Rep. 391, and note.

Liability for injuries received on a street by the fall of an unsafe wall. In *Georgia*, a city corporation, with the usual power to keep streets in repair and to remove buildings and obstructions thereon, was considered to have the power, which it was bound to exercise, to remove any nuisance which rendered the use of the street dangerous, such as a deep pit dug near the sidewalk, or an unsafe wall adjoining it; and it was held to be liable to a person injured by the fall of a high brick wall of a burnt house, on private property, at the line of the sidewalk, if it was negligent in the discharge of its duty to have the wall abated or made secure. The court admitted that if the wall was firm and had been thrown down by a tempest, there would be no liability. Parker *v.* Macon, 39 Ga. 725 (1869); Savannah *v.* Waldner, 49 Ga. 324. But, in *Louisiana*, a precisely opposite conclusion, as to the liability of a corporation for the

and in respect of which there is some want of harmony, is necessary to a thorough understanding of the subject which is discussed in this section.

§ 1015.[1] **Negligence the Basis of Liability; Runaway Horses.** — But a municipal corporation, even in those States which assert an implied liability for damages caused by a failure to keep its streets in repair, is liable in respect of *defects caused by others only on the ground of negligence*. The liability is not that of a guarantor of the safety of the traveller. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. They are under no obligation to provide for everything that *may* happen upon them, but only for such things as ordinarily exist or such as may reasonably be expected to occur.[2] They are not bound to keep the streets in such condition that a traveller thereon may with safety run his horses at

falling of an unsafe wall, was reached in Howe *v.* New Orleans, 12 La. An. 481 (1857).

In *Missouri*, a city, though required to keep its streets in a reasonably safe condition for travellers, is not liable for injuries caused by the fall of an unsafe wall, to one who was not at the time using the street for any purpose. Kiley *v.* Kansas City, 87 Mo. 103. In that State, however, the rule that a city is liable for injuries resulting from the fall of a wall rendered unsafe by fire, when its condition was known or could have been known by the exercise of ordinary care, is well settled. Kiley *v.* Kansas City, *supra*; Grogan *v.* Broadway Foundry Co., 87 Mo. 321.

In Jones *v.* New Haven, 34 Conn. 1 (1867), it was held that a city, with power to protect and regulate trees in the squares and streets, and which had by ordinance prohibited any interference by others with such trees, was liable for an *injury caused by the falling of a dead limb* which the city had *negligently* allowed to remain upon a tree in the public square. The decision, however, is rested by the court upon general principles, and not upon the duty to keep streets and ways in repair. *Supra*, secs. 986, 1003, and note. See observations of *Hoar*, J., in Hixon *v.* Lowell, 13 Gray, 63. Faulty construction of roof, causing precipitation of snow and ice on traveller. Shipley *v.* Fifty Associates, 106 Mass. 194 (1870); s. c. 8 Am. Rep. 318.

A municipality is liable for an injury caused by the *fall of a liberty pole* in a street, erected by citizens years previously, though the neglect of the corporation to remove it was not wilful, and it had no notice that the pole was insecure, and although it was in a part of the street which did not obstruct public travel. Norristown *v.* Moyer, 67 Pa. St. 355 (1871); *ante*, sec. 661. City liable for obstruction caused by *rope stretched across street* and fastened to stakes set in the street, without placing any sign of warning to travellers. Chicago *v.* Fowler, 60 Ill. 322 (1871). Where an injury was caused by the *blowing over of part of an old roof* which had been leaning against a tree, the person injured standing at the time with one foot upon the sidewalk and the other upon an adjoining lot while he was drawing water from a hydrant, it was held that he was lawfully using the street and that the city was guilty of negligence. Duffy *v.* Dubuque, 63 Iowa, 171; Shearm. & Red. Neg. (4th ed.) 354 and cases.

[1] Sec. 1014 in the previous edition is in this edition incorporated in secs. 996, 997, 1003.

[2] *Ante*, sec. 1013, and note.

a furious rate of speed or drive thereon unmanageable horses, nor are they bound to keep them in such condition that damage may not be caused thereon by horses which have escaped from the control of their driver and are running away.[1]

§ 1016. **Width to be kept in Repair.** — Nor, as already incidentally stated,[2] is a municipal corporation bound to keep *all of its streets and all parts of the street* in good repair. When it opens a street and invites public travel, it must be made reasonably safe for such use;[3] but this does not necessarily imply as a matter of law that the *whole width* of the street must be in good condition. Whether the street was wide enough to be safe; whether it was in a reasonably safe condition for public use by travellers who use

[1] Ring *v.* Cohoes, 77 N. Y. 83; where the subject is clearly presented by *Earl*, J.; Moulton *v.* Sandford, 51 Me. 127; Nichols *v.* Athens, 66 Me. 402; Perkins *v.* Fayette, 68 Me. 152; Davis *v.* Dudley, 4 Allen, 558; Titus *v.* Northbridge, 97 Mass. 258; Fogg *v.* Nahant, 98 Mass. 578; Murdock *v.* Warick, 4 Gray, 178; Dreher *v.* Fitchburg, 22 Wis. 675; Houfe *v.* Fulton, 29 Wis. 296; Rockford *v.* Hildebrand, 61 Ill. 155 (1871); Hunt *v.* New York, 109 N. Y. 134 (not liable for damages caused by an *explosion of gas* in manhole of a steam-heating company's pipe); Turner *v.* Newburgh, 109 N. Y. 301 (loose stone on cross-walk). They are not bound to keep streets passable for horses which have escaped from their owners. Moss *v.* Burlington, 60 Iowa, 438. *Infra*, secs. 1017, 1020. When a *horse by reason of fright, disease, or viciousness* becomes actually uncontrollable, so that his driver cannot stop him or direct his course, or regain control over his movements, and in this condition comes upon a defect in the highway by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horse had not been so uncontrollable. Titus *v.* Northbridge, 97 Mass. 258; Stone *v.* Hubbardston, 100 Mass. 54; *ante*, secs. 1005, 1007, note. In some of the States the rule is that when an accident occurs from a negligent defect in the highway, the fact that the horse was at the time uncontrollable, or running away, furnishes no defence to an action for the injury. Baldwin *v.* Greenwoods Turnp. Co., 40 Conn. 238; Hull *v.* Kansas City, 54 Mo. 601; Hunt *v.* Pownal, 9 Vt. 411; Winship *v.* Enfield, 42 N. H. 197; Hey *v.* Philadelphia, 81 Pa. St. 44; Sherwood *v.* Hamilton, 37 Up. Can. Q. B. 410; Ring *v.* Cohoes, 77 N. Y. 83; *ante*, secs. 1007, note, 1008.

[2] *Ante*, sec. 1008.

[3] That a *street opened for travel has not been improved and graded* is no defence in actions caused by defects in it. Murphy *v.* Indianapolis, 83 Ind. 76. As to the liability arising from the *plan* of a street creating an unsafe condition, it was said by *Valentine*, J., in Gould *v.* Topeka, 32 Kan. 485, where part of a street consisted of a high and narrow embankment not guarded by railings or barriers, and not lighted at night (see *ante*, 1005): "In our opinion, a city has no more right to plan or create an unsafe and dangerous condition of one of its public streets than it has to plan or create a public or common nuisance; and it is admitted that it has no right to do this." In such a case if the court can say as a matter of law, that the plan was dangerous and unsafe, the city should be held for damages resulting to individuals; but if different persons, upon the facts, might have different opinions as to the condition of the street for safety, the city ought to have the benefit of the doubt. The presumption is in favor of the city. Gould *v.* Topeka, *supra;* see *post*, sec. 1046 *et seq.*, as to liability for defective plan of sewers.

ordinary care to avoid injury, are almost always questions for the jury.[1]

§ 1017 (789). **Unsafe Streets; Result as to Implied Liability summed up.** — It may be fairly deduced from the many cases upon this subject referred to below and in the preceding sections and notes, that, in the absence of a statute expressly imposing the duty and declaring the liability, *municipal corporations proper*, having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them in a reasonably safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty.[2] Such duty and liability are considered to exist, without a statute giving an action, when the following conditions concur: —

1. The *place* in question, whether bridge, sidewalk, or street, must be one which it is the duty of the corporation to repair or keep in a safe condition; and this *duty* (to keep in repair), if not

[1] Bassett *v.* St. Joseph, 53 Mo. 290 (1873); Brown *v.* Glasgow, 57 Mo. 157 (1874); Fulliam *v.* Muscatine, 70 Iowa, 436; s. c. 30 N. W. Rep. 861; Wellington *v.* Gregson, 31 Kan. 99 (quoting and approving the text); Tritz *v.* Kansas City, 84 Mo. 632. In Monongahela City *v.* Fischer, 111 Pa. St. 9, *Paxson*, J. said: "In the closely built up portions of a town or city the duty of the authorities to keep the entire street and sidewalks in a safe condition may be conceded. . . . But this has never been held to be the rule as regards country roads." Duty of keeping in repair extends to a street so opened as to invite public travel thereon, whether the street has been fully brought to grade, or formally declared open or not. Lindholm *v.* St. Paul, 19 Minn. 245; followed in Treise *v.* St. Paul, 36 Minn. 526. On this general subject see *ante*, sec. 1008, and cases cited in the notes. Craig *v.* Sedalia, 63 Mo. 417 (1876).

In the case last cited, in which the *accident was ascribed to a ridge in the middle of the street* about six inches high, two feet in width, and sloping gently to the surface of the street, the rest of the street being in good repair and unobstructed, *Hough*, J., well observes: "Every defect or imperfection in the streets of a city is not actionable. It must appear that under the particular circumstances of the case, it was the duty of the city to have removed the obstruction, or repaired the defect which occasioned the injury, and that the person complaining was at the time in the exercise of ordinary care." 63 Mo. 419. There is ordinarily no liability *where the accident is caused by a hole or gully in a part of the street not travelled*, and where the travelled portion is of sufficient width, and in a safe condition. Brown *v.* Glasgow, *supra*. *Infra*, sec. 1019. In *Iowa* it is held that if a street is opened for travel its entire width the city is bound to keep it in a reasonably safe condition from sidewalk to sidewalk. Crystal *v.* Des Moines, 65 Iowa, 502; Stafford *v.* Oskaloosa, 57 Iowa, 748; Stafford *v.* Oskaloosa, 64 Iowa, 251. Compare Fulliam *v.* Muscatine, 70 Iowa, 436; s. c. 30 N. W. Rep. 861; *supra*, sec. 1008, and notes.

[2] Enforcing this duty by *mandamus:* see *ante*, sec. 836. By *indictment: ante*, secs. 931, 934. See generally Curry *v.* Mannington, 23 W. Va. 14, citing the text; Wilson *v.* Wheeling, 19 W. Va. 323; Denver *v.* Dunsmore, 7 Col. 328; Denver *v.* Dean, 10 Col. 375.

specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation.

2. This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or to rest upon the *municipal corporation, as such,* and not upon it as an agency of the State, or upon its officers as independent public officers.[1] (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large under its general enactments concerning ways.)

3. The *power to perform the duty* of maintaining the streets in a reasonably safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation.[2]

[1] Text approved. Williams *v.* Shelby Co. Tax. Dist., 16 Lea (Tenn.) 531, holding that *the Taxing District of Shelby County*, though a municipal corporation, was not liable, under the act creating it, for property injured in an accident caused by its failure to keep the streets in repair.

[2] Weightman *v.* Washington, 1 Black, (U. S.) 39 (1861) (corporate liability for unsafe bridge); distinguished from Providence *v.* Clapp, 17 How. (U. S.) 161; and from Russell *v.* Devon County, 2 D. & E. T. R. 667; and approving Henley *v.* Lyme Regis, 5 Bing. 91; s. c. 3 Barn. & Ad. 77; s. c. 2 Cl. & Fin. 331; Barnes *v.* Dist. of Columbia, 91 U. S. 540 (1877); Cleveland *v.* King, 132 U. S. 295; Omaha *v.* Olmsted (hole in sidewalk), 5 Neb. 446 (1877). Text cited and approved in Jansen *v.* Atchison, 16 Kan. 358 (1876); Campbell, Adm., *v.* Montgomery Council, 53 Ala. 527; Oliver *v.* Kansas City, 69 Mo. 79; Craig *v.* Sedalia, 63 Mo. 417; Richmond *v.* Courtney, 32 Gratt. 792; Centreville *v.* Woods, 57 Ind. 192; Albritton *v.* Huntsville, 60 Ala. 486; Rankin *v.* Buckman, 9 Oreg. 253, approving text. Weightman *v.* Washington, above cited, was followed by Nebraska City *v.* Campbell, 2 Black, 590 (1862), where a city corporation, with control over streets, and power to levy taxes to keep them in repair, which left a bridge on a street over a creek defective and unsafe for *want of side-railing*, was held liable for damages happening in consequence. See, also, Chicago *v.* Robbins, 2 Black (U. S.), 418 (1862), s. c. again, 4 Wall. 657 (1866); New York *v.* Sheffield (stump in sidewalk), 4 Wall. 189 (1866). This case, which was somewhat peculiar in its circumstances, was tried before Mr. Justice *Nelson* at the circuit. When the evidence was in, the learned judge charged the jury, whereupon the counsel for the city handed up a long series of requests to charge, which his Honor, without reading, directed to be given to the clerk and filed. His judgment was affirmed. See, also, Hutson *v.* New York, 9 N. Y. 163 (1853). *Mason*, J., admits existence of cases of contrary bearing where the means to keep in repair are limited, but regards them as not applicable, since the city of New York "is possessed of the most ample powers in this respect." *Ib.* 170. See s. c. 6 Sandf. (N. Y. Superior Court) 289, and exposition of the ground on which it was decided by *Denio*, J., 9 N. Y. 456, 458, in Griffin *v.* Mayor, &c. New York. And see, also, Lloyd *v.* New York, 5 N. Y. 369 (1851); New York *v.* Furze, 3 Hill (N. Y.), 612 (1842). Approved by *Selden*, J., 16 N. Y. 162, note; 9 N. Y. 168; *Ib.* 458. Explained, 1 Denio, 595; 32 N. Y. 165; Conrad *v.* Ithaca, 16 N. Y. 158 (1859); Weet *v.* Brockport, *Ib.* 161, and review of cases in the learned opinion of *Selden*, J.; Storrs *v.* Utica, 17 N. Y. 104, and cases cited; Davenport *v.* Ruckman, 37 N. Y. 568 (1868), in which *Hunt*, C. J., declares that the liability of the corporation of the city of New York extends to injuries arising from the *omission of the duty to repair*, as well as to those arising from some act done by it. Requa *v.* Rochester, 45 N. Y. 129 (1871); Clemence *v.* Auburn, 66 N. Y. 334 (1876); Diveny *v.* Elmira, 51 N. Y. 506 (1873); Saulsbury *v.* Ithaca, 94 N. Y. 27; Ehrgott *v.* New York, 96 N. Y. 264; Nelson *v.* Canisteo, 100 N. Y. 89; Pettengill *v.* Yonkers, 116 N. Y. 558; Erie *v.* Schwingle, 22 Pa. St. 384 (1853). The text cited and approved. Fort Wayne *v.* Dewitt, 47 Ind. 391, 397 (1874); Higert *v.* Greencastle, 43 Ind. 574 (1873); Richmond *v.* Courtney, 32 Gratt. 792; Centreville *v.* Woods, 57 Ind. 192. *Wilful* neglect not essential to liability; and as to defence of want of funds, and want of means to raise them, see remarks of *Black*, C. J., 22 Pa. 389. *As to bridges*, see *ante*, secs. 728, 729, 963, and Index, tit. *Bridge*. A city must keep in repair a bridge within its limits originally built and maintained by a county as a part of the highway, and is liable for injuries caused by its neglect in not repairing it. Goshen *v.* Myers, 119 Ind. 196 (1889). Blake *v.* St. Louis, 40 Mo. 569; Smith *v.* St. Joseph, 45 Mo. 449; St. Paul *v.* Kuby (injury to child), 8 Minn. 154; St. Paul *v.* Seitz, 3 Minn. 297; Topeka *v.* Tuttle, 5 Kan. 425; Atchison *v.* King, 9 Kan. 550; State *v.* Murfreesboro, 11 Humph. 217 (1850), *per McKinney*, J.; Smoot *v.* Wetumpka, 24 Ala. 112 (1854). See Davis *v.* Montgomery Council, 51 Ala. 139 (1874); Campbell's Adm. *v.* Montgomery Council, 53 Ala. 527 (1875); s. c. 25 Am. Rep. 656; Montgomery *v.* Wright, 72 Ala. 411; Browning *v.* Springfield, 17 Ill. 143 (1855); Joliet *v.* Verley, 35 Ill. 58; Bloomington *v.* Bay, 42 Ill. 503; Chicago *v.* Gallagher, 44 Ill. 295; Chicago *v.* Johnson, 53 Ill. 91; Decatur *v.* Fisher, *Ib.* 407. The principle is adhered to. Chicago *v.* Fowler, 60 Ill. 322 (1871), and Centralia *v.* Scott, 59 Ill. 129; Peru *v.* French, 55 Ill. 317; Rockford *v.* Hildebrand, 61 Ill. 155; *ante*, sec. 996, note; Hey *v.* Philadelphia, 81 Pa. St. 44 (1876); s. c. 22 Am. Rep. 733; Rusch *v.* Davenport (defective bridge), 6 Iowa, 443 (1858); Rowell *v.* Williams, 29 Iowa, 210 (1870); Ellis *v.* Iowa City, *Ib.* 229; *Ib.* 73; Soper *v.* Henry County, 26 Iowa, 264 (1868); McCullom *v.* County, 21 Iowa, 409; Huff *v.* Poweshiek County, 60 Iowa, 529; Pease *v.* Dayton (defective bridge), 4 Ohio St. 80 (1854); Tallahassee *v.* Fortune, 3 Fla. 19 (1850); Baltimore *v.* Mariott (ice on pavement), 9 Md. 174; Baltimore *v.* Pendleton, 15 Md. 12 (1859); Baltimore *v.* Brannan (accident in a place not public), 14 Md. 227 (1859); Shartle *v.* Minneapolis, 17 Minn. 308 (1871) (defective bridge); Cleveland *v.* St. Paul, 18 Minn. 279; Moore *v.* Minneapolis, 19 Minn. 300; Furnell *v.* St. Paul, 20 Minn. 117; O'Leary *v.* Mankato, 21 Minn. 65; Staples *v.* Canton, 69 Mo. 592, citing and approving text; McDonough *v.* Nevada City, 6 Nev. 90 (1870); Hines *v.* Lockport, 5 Lans. (N. Y.) 17; Covington *v.* Bryant, 7 Bush, 248 (1870); Wheeler *v.* Westport (what is a defect?), 30 Wis. 392; *ante*, sec. 996; Burns *v.* Elba, 32 Wis. 605; Koester *v.* Ottumwa (insufficient barricade), 34 Iowa, 41. In *Ohio*, a city is liable for negligence in not keeping its streets in a reasonably safe condition. Cleveland *v.* King, 132 U. S. 295; Cardington *v.* Fredericks, to appear in 46 Ohio, construing the legislation of that State as to the nature and extent of municipal duty and liability. A statute providing that a city should not be held liable for damages caused by obstructions in streets unless actual notice of such obstruction should have been given to the city at least twenty-four hours *previous* to the damages or injury, held not unconstitutional as depriving the injured party of his remedy; it is a lawful exercise of legislative power to impose conditions upon the liability of a city for injuries, &c. McNally *v.* Cohoes, 60 Hun, 202. The rule as to *implied* liability of municipal corporations to damages caused by their failure to keep their streets and sidewalks in a safe condition, was vigorously assailed by counsel in Jansen *v.* Atchison, 16 Kan. 358 (1876); but the court adhered to its former decisions, remarking that although

§ 1018. **Author's Comments on the Doctrine of Implied Liability.** — Where the *duty to keep streets in repair is, in terms, enjoined*

upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principles of the law without an express statute declaring the liability, to a civil action by any one specially injured by its neglect to discharge this specific duty.[1] But

the reasons given for the rule might not be entirely satisfactory, yet it had been so generally approved, and was on the whole so just, that it ought not to be overthrown. Ground of implied liability in *Indiana*, *ante*, sec. 1013, note.

The principles stated in the text find some support in the general reasons on which the judgments in several important recent cases in England rest. Foreman *v.* Canterbury, L. R. 6 Q. B. 214 (1871); Mersey Dock Cases, L. R. 1 H. L. 93; s. c. 11 H. of L. Cases, 686 (1866). *Contra.* In *New Jersey* the view is taken that the duty of a city in respect to the repair of its streets is a *public duty* (not a corporate one), and that the neglect to perform it will not give a private remedy without an express statute. Pray *v.* Jersey City, 32 N. J. L. 394 (1868), reaffirming Sussex Co. Freeh. *v.* Strader (*quasi* corporation), 3 Harr. (18 N. J. L.) 108 (1840); Condict *v.* Jersey City, 46 N. J. L. 157. Compare Durant *v.* Palmer, 29 N. J. L. 544. See also, Detroit *v.* Blackeby, 21 Mich. 84; s. c. 9 Am. L. Reg. (N. S.) 670, with note. In *Maryland*, the other extreme is held, and counties are liable without an express statute to a private action in respect of defective roads, on the ground that a public duty is enjoined with the means of performance, and that the public have a remedy for neglect by indictment, and a party specially injured by action. Anne Arundel Co. Comm'rs *v.* Duckett, 20 Md. 468 (1863); Calvert Co. Comm'rs *v.* Gibson, 36 Md. 229; Baltimore *v.* Pendleton, 15 Md. 12; *ante*, sec. 961, note. See Brown *v.* Jefferson County, 16 Iowa, 339, assuming liabilities of *counties* for defective bridges. But see Soper *v.* Henry County, 26 Iowa, 264, and Rigony *v.* Schuylkill, 103 Pa. St. 382 (1883), for discussion of question.

In *Pennsylvania* the duty and liability as to maintaining highways and bridges in repair is statutory. The statute enacts that "all roads shall be kept in repair at the expense of the township." It is the duty of the county commissioners by statute to repair all bridges. Liability in damages for neglect of such duty is held to follow as a consequence. Rigony *v.* Schuylkill County, 103 Pa. St. 382; Rapho *v.* Moore, 68 Pa. St. 404. And an action will lie to recover damages for an injury sustained by reason of the negligence of its officials to keep its roads and streets in proper repair. Pittsburgh & B. Pass. Ry. Co. *v.* Pittsburgh, 80 Pa. St. 72; McLaughlin *v.* Corry, 77 Pa. St. 109; Dean *v.* New Milford, 5 W. & S. 545; Allentown *v.* Kramer, 73 Pa. St. 406; Newlin *v.* Davis, 77 Pa. St. 317; Fritsch *v.* Allegheny City, 91 Pa. St. 226 (1879). In *Illinois* civil townships not thus liable. Russell *v.* Steuben, 57 Ill. 35; White *v.* Bond County, 58 Ill. 297 (1871).

[1] Montgomery Council *v.* Wright, 72 Ala. 411; Delger *v.* St. Paul, 14 Fed. Rep. 567. It is held in *New York* that the absence of necessary funds, or the legal means of procuring them, will excuse the performance of the duty. Hines *v.* Lockport, 50 N. Y. 236. Affirmed, Weed *v.* Ballston, 76 N. Y. 329. Want of funds as an excuse for neglect, see Shearm. & Red. Neg. sec. 277. "It has been so uniformly and frequently held by the courts of this State that a municipal corporation, having power to maintain and control streets, is bound to exercise ordinary and reasonable care and diligence to see that they are kept in a reasonably safe condition for public travel, that a general rule to that effect may now be considered as established and to be applicable, whether the act or omission complained of and causing the injury was that of the municipal corporation or some third party." *Danforth*, J., Nelson *v.* Canisteo, 100 N. Y. 89. Where the city voluntarily assumes the duty to build sidewalks, gutters, &c., it is liable, if negligent, for want of repair. Alton *v.* Hope, 68 Ill. 167 (1873). See Haskell *v.* Penn Yan, 5 Lans. (N. Y.) 43. If, by statute, a city is required to keep its streets in proper re-

where the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and the liability, if there be nothing in the charter or in legislation of the State to negative the inference, have often, and in our judgment properly, been deduced from the intrinsic nature of the special powers conferred upon the corporation to open, grade, improve, and *exclusively control* public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to discharge this duty.[1]

§ 1019. **Extent of the Liability.** — From what has already been said, that negligence is the ground of the liability,[2] it follows that a municipal corporation *is not an insurer against accidents* upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient, we think, if the streets (which include sidewalks and bridges thereon) *are in a reasonably safe condition for travel in the ordinary modes*, by night as well as by day; and whether they are so or not is a practical question, to be determined in each case by its particular circumstances.[3]

pair generally, without being limited to proper repair for *travellers* only, and it has the power and means to do so, it may be held responsible for damages sustained by persons using it for pleasure, recreation, or through mere idle curiosity, as in this case, where a child was injured while rolling a hoop. Chicago *v.* Keefe, 114 Ill. 222.

[1] Albritton *v.* Huntsville, 60 Ala. 486, citing and approving text; Denver *v.* Dunsmore, 7 Col. 328.

[2] *Ante*, sec. 1015.

[3] Blake *v.* St. Louis, 40 Mo. 569, 571, *per Wagner*, J.; Smith *v.* St. Joseph, 45 Mo. 449 (1870); Bassett *v.* St. Joseph, 53 Mo. 290; Craig *v.* Sedalia, 63 Mo. 417; Beaudean *v.* Cape Girardeau, 71 Mo. 392; Tritz *v.* Kansas City, 84 Mo. 632. *Supra*, sec. 1016. Text cited and approved. Richmond *v.* Courtney, 32 Gratt. 792; Centreville *v.* Woods, 57 Ind. 192; Seward *v.* Milford, 21 Wis. 485; Landolt *v.* Norwich, 6 Am. L. Reg. (N. S.) 383; Furnell *v.* St. Paul, 20 Minn. 117 (1873); Atchison *v.* Jansen, 21 Kan. 560; Vicksburg *v.* Hennessy, 54 Miss. 391; Leicester *v.* Pittsford, 6 Vt. 245; Rockford *v.* Hilderbrand, 61 Ill. 155 (1871); Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 534; Davenport *v.* Ruckman, 37 N. Y. 568 (1868); Johnson *v.* Haverhill, 35 N. H. 74; Ghenn *v.* Provincetown, 105 Mass. 313 (1870); Williams *v.* Clinton, 28 Conn. 264; Bacon *v.* Boston, 3 Cush. (Mass.) 174; Manderschid *v.* Dubuque, 29 Iowa, 73 (1870); Beaudean *v.* Cape Girardeau, 71 Mo. 392; s. c. 11 C. L. J. 15; Warsaw *v.* Dunlap, 112 Ind. 576; Hunt *v.* New York, 109 N. Y. 134; Massey *v.* Columbus, 75 Ga. 658; Selma *v.* Perkins, 68 Ala. 145; Gavin *v.* Chicago, 97 Ill. 66 (bridge in a city); Washington *v.* Small, 86 Ind. 462; Wilson *v.* Wheeling, 19 W. Va. 324 (quoting secs. 1017, 1018, and 1019); Emporia *v.* Schmidling, 33 Kan. 485; Wellington *v.* Gregson, 31 Kan. 99 (quoting the text); Lincoln *v.* Gillilan, 18 Neb. 114; Ehrgott *v.* New York, 96 N. Y. 264; Otto Tp. *v.* Wolf, 106 Pa. St. 608; Easton *v.* Neff, 102 Pa. St. 474, holding also that the question of the necessity for constructing crossing, rests solely in the discretion of the municipal authorities, and is not to be submitted to the jury in an action for injuries caused by a defect in it. Denver *v.* Dunsmore, 7 Col. 328; Denver *v.* Dean, 10 Col. 375. One who owns a ferry out-