§ 1020. **Ground of the Liability; Notice; Contributory Negligence; Damages.** — The *ground of the action* is either *positive misfeasance* on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the streets to be out of repair, in which case no other notice to the corporation of the condition of the street is essential to its liability; or the ground of the action is the *neglect of the corporation* to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases *notice of the condition of the street*, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.[1] It is also essential to liability that *the plaintiff should have been using reasonable or ordinary care to avoid the accident*, or, in other words, he must be free of

side of a city, from which public travel is diverted by the failure of the city to keep a certain street in repair, suffers no injury other than that shared by the general public, and is not entitled to damages therefor. Prosser *v.* Ottumwa, 42 Iowa, 509 (1876).

[1] As to degree of care required of the plaintiff. Dist. of Columbia *v.* McElligott, 117 U. S. 621, where Mr. Justice *Harlan* said, "He [plaintiff] was under an obligation to exercise due care in protecting himself from personal harm while discharging duties out of which such liability might arise. If he failed to exercise such care; if he exposed himself to dangers that were threatening or so obvious as likely to cause injury at any moment, he would, notwithstanding any promises or assurances of the district supervisor of the character alleged (to place a watch over a gravel bank as requested by plaintiff), be guilty of such *contributory negligence* as would defeat his claim for injuries so received." Craig *v.* Sedalia, 63 Mo. 417 (1876); Evans *v.* Utica, 69 N. Y. 166 (1877). 'A person using a street need not be vigilant to discover dangerous obstructions, but may rely upon the assumption that the corporation has performed its duty, and he is, in that respect, exposed to no danger from its neglect. Pettengill *v.* Yonkers, 116 N. Y. 558; Albritton *v.* Huntsville, 60 Ala. 486; Fallen *v.* Boston, 3 Allen, 38; Gilman *v.* Deerfield, 15 Gray, 577; Fogg *v.* Nahant, 106 Mass. 278; Damon *v.* Scituate (travelling on wrong side of road), 119 Mass. 66 (1875); s. c. 20 Am. Rep. 315; Griffin *v.* New York, 9 N. Y. 456; Munger *v.* Tonawanda R. R. Co., 4 N. Y. 349; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 255, and cases cited; Cobb *v.* Standish (*woman* driving), 14 Me. 198; Coombs *v.* Purrington (walking in carriageway), 42 Me. 332; Centralia *v.* Krouse, 64 Ill. 19 (1872); s. c. 5 Ch. Leg. News, 123; Harper *v.* Milwaukee, 30 Wis. 365 (1872); Ripon *v.* Bittel, 30 Wis. 614; Requa *v.* Rochester, 45 N. Y. 129 (1871); Davenport *v.* Ruckman, 37 N. Y. 568; Todd *v.* Troy, 61 N. Y. 506 (1875); Diveny *v.* Elmira, 51 N. Y. 506 (1873); Beatty *v.* Gilmore, 16 Pa. St. 463; Seward *v.* Milford, 21 Wis. 485; Weisenberg *v.* Appleton, 26 Wis. 56; Murphy *v.* Dean, 101 Mass. 455 (1869); Wright *v.* Templeton, 132 Mass. 49 (partly blind horse); Norris *v.* Litchfield, 35 N. H. 271; *Ib.* 530; Winn *v.* Lowell (plaintiff with poor sight), 1 Allen, 177; Lynch *v.* Smith (injury to child), 104 Mass. 52; Hyde *v.* Jamaica, 27 Vt. 443; Minick *v.* Troy, 83 N. Y. 514; McGuire *v.* Spence, 91 N. Y. 303; Bovee *v.* Danville, 53 Vt. 183; Brennan *v.* Friendship, 67 Wis. 223; Parish *v.* Eden, 62 Wis. 272; Boulder *v.* Niles, 9 Col. 415; Peoria *v.* Simpson, 110 Ill. 294; Yahn *v.* Ottumwa, 60 Iowa, 429 (husband driving); Wilson *v.* Atlanta, 63 Ga. 291; McLaury *v.* McGregor, 54 Iowa, 717; Osborne *v.* Hamilton, 29 Kan. 1; Donoho *v.* Vulcan Iron Works, 75 Mo. 401 (infant playing in street); *infra*, sec. 1026. It is the duty of plaintiff, when he is walking at night on streets which are unusually icy, to use more than ordinary care. Rockford *v.* Hildebrand, 61 Ill. 155 (1871). See Merrill *v.* Portland, 4 Cliff. C. C. 138; Shearm. & Red. Neg. (4th ed.) sec. 375 *et seq.*

Plaintiff's knowledge of defect, effect of. *Supra*, sec. 1006; President, &c. *v.* Dusouchett, 2 Ind. 587; Farnum *v.* Concord, 2 N. H. 392; Reed *v.* Northfield, 13 Pick. 94; Wheeler *v.* Westport, 30 Wis. 392; Aurora *v.* Pulfer, 56 Ill. 270; Smith *v.* St. Joseph, 45 Mo. 449; Mahoney *v.* Metrop. R. R. Co., 104 Mass. 73; Humphreys *v.* Armstrong County, 56 Pa. St. 204 (1869); Durkin *v.* Troy, 61 Barb. 437; Weed *v.* Ballston, 76 N. Y. 329; Estelle *v.* Lake Crystal, 27 Minn. 243; McKeigue *v.* Janesville, 68 Wis. 50; Strong *v.* Stevens Point, 62 Wis. 255; Lowell *v.* Watertown, 58 Mich. 568; Loewer *v.* Sedalia, 77 Mo. 431; Dubois *v.* Kingston, 102 N. Y. 219; Bullock *v.* New York, 99 N. Y. 654; Altoona *v.* Lotz, 114 Pa. St. 238; Crescent *v.* Anderson, 114 Pa. St. 643; Gosport *v.* Evans, 112 Ind. 133; Bruker *v.* Covington, 69 Ind. 33; Munger *v.* Marshalltown, 56 Iowa, 216; Maultby *v.* Leavenworth, 28 Kan. 745; Corlett *v.* Leavenworth, 27 Kan. 673; McKenzie *v.* Northfield, 30 Minn. 456; *post*, sec. 1026, and note.

Where a city had allowed an excavation to be made in a street which had never been used as a public highway or opened for travel, and the plaintiff *with knowledge of the excavation* turned his horse loose in the vicinity, which, while running at large contrary to law, fell into the excavation and was injured, it was held that he could not recover. Gribble *v.* Sioux City, 38 Iowa, 390 (1874). Where plaintiff *knew of a defect* in a sidewalk, and that on account of the darkness it was imprudent to go over it, and that there was another safe walk which she might use, but persisted in going over it, these facts were held to establish contributory negligence. Parkhill *v.* Brighton, 61 Iowa, 103; McGinty *v.* Keokuk, 66 Iowa, 725. Further as to plaintiff's knowledge of the defect, Shearm. & Red. Neg. (4th ed.) 376.

Ordinary care is such care as is usually exercised under like circumstances by persons of average prudence. Whether it is a want of ordinary care for a *blind man* to travel upon the highway on foot, unattended, is a question of fact to be determined by the jury, in view of the circumstances of the individual case. Where a blind man in the daytime walked off the side of an unobstructed bridge sixteen feet in width, which was defective for want of a rail, and suffered an injury, which would not have happened but for his blindness, the court cannot say, as matter of law, that his fault contributed to the accident; but it is for the jury, after considering his familiarity with the road, his ability, arising from the increased acuteness, fidelity, and power of his other senses, or otherwise, and all the circumstances of the case, to say whether he was guilty of carelessness in attempting to pass the bridge without a guide. Sleeper *v.* Sandoun, 52 N. H. 244 (1872); Salem *v.* Goller, 76 Ind. 291. The fact that with *knowledge of the defect* the plaintiff voluntarily attempted to pass it, is not conclusive evidence of the want of due care, but is for the jury. Lyman *v.* Amherst, 107 Mass. 339. See also Whitaker *v.* West Boylston, 97 Mass. 273; Frost *v.* Waltham, 12 Allen, 85; Rindge *v.* Colrain, 11 Gray, 157; Pollard *v.* Woburn, 104 Mass. 84. Compare Riest *v.* Goshen, 42 Ind. 339 (1873); Rice *v.* Des Moines, 40 Iowa, 638 (1875); Emporia *v.* Schmidling, 33 Kan. 485; Nichols *v.* Minneapolis, 33 Minn. 430; Hopkins *v.* Rush River, 70 Wis. 10; Albion *v.* Hetrick, 90 Ind. 545; Hartman *v.* Muscatine, 70 Ind. 511; Ross *v.* Davenport, 66 Iowa, 548. In County Commissioners of Pr. Georges Co. *v.* Burgess, 61 Md. 29, *Irving*, J., after citing cases, said, "The doctrine to be extracted from all these cases is, that if the defect in the road or bridge be such as to make the same practically impassable, a *person takes all the hazard*, who, with such knowledge, attempts to pass over the road or bridge, and will not be redressed if he is injured. But if the defect be one which does not render the road wholly unfit for use, or

any such fault or neglect on his part as will in actions for negligence defeat a recovery. *Actual damages only* can in general be recovered.

bridge substantially impassable; and is only a defect which might result injuriously if not shunned, in such case it cannot be that a citizen, with business, must remain at his home, and may not make any attempt to use the road or bridge as his necessity requires."

Though plaintiff have *knowledge of a defect* a city cannot defend merely by showing that other streets which he could have used, were safe. Fulliam *v.* Muscatine, 70 Iowa, 436; compare Parkhill *v.* Brighton, 61 Iowa, 103, and Walker *v.* Decatur County, 67 Iowa, 307 (bridge). But see as to passing over *defective or icy sidewalk*, which might easily have been avoided, Wilson *v.* Charlestown, 8 Allen (Mass), 137; Horton *v.* Ipswich, 12 Cush. (Mass.) 488; Centralia *v.* Krouse, 64 Ill. 19 (1872); s. c. 5 Chicago Legal News, 123; Craig *v.* Sedalia, 63 Mo. 417 (1876); Albritton *v.* Huntsville, 60 Ala. 486; Higert *v.* Greencastle, 53 Ind. 574 (1873); Alline *v.* LeMars, 71 Iowa, 654; Erie *v.* Magill, 101 Pa. St. 616. Further as to liability in respect of icy sidewalks. Masters *v.* Troy, 50 Hun, 485; Corbett *v.* Troy, 53 Hun, 228; Ney *v.* Troy, 3 N. Y. Sup. 679; s. c. 20 State Rep. 321; Tobey *v.* Hudson, 2 N. Y. Sup. 180.

Negligence of the *driver of a vehicle has sometimes been imputed* to the persons riding. Otis *v.* Janesville, 47 Wis. 422; and see Prideaux *v.* Mineral Point, 43 Wis. 513. For a full discussion of this subject, see s. p. Lake Shore & M. S. R. R. Co. *v.* Miller, 25 Mich. 274. Such negligence will defeat the action. *Ib.* As to *imputed* negligence, see Thompson on Negligence, pp. 222, 1121, 1180 *et seq.*, for full discussion. In *Minnesota* the court, after reviewing the authorities, held that where the plaintiff did not participate in, and had no authority respecting, the management of the vehicle, and was not herself guilty of negligence, the negligence of the driver and owner of the vehicle *could not be imputed* to her. Follman *v.* Mankato, 35 Minn. 522. The contributory negligence of a voluntary carrier not *imputable* to a passenger. Carlisle *v.* Brisbane, 113 Pa. St. 544.

The *husband's knowledge* of the defect, and of his wife's intention to pass over it, held not to defeat an action by the husband and wife for injuries sustained by the wife in consequence of such defect. Street *v.* Holyoke, 105 Mass. 82; s. c. 7 Am. Rep. 500. The husband cannot give notice of a claim for damages for injuries to his wife. Hubbard *v.* Fayette, 70 Me. 121. Husband held entitled to recover for personal injury to wife by defective sidewalk, she not knowing of the defect and he failing to warn her, the jury finding that under the circumstances the husband was not guilty of negligence in not giving the wife notice of the danger. Nanticoke *v.* Warne, 106 Pa. St. 373 (1884).

ONUS IN RESPECT TO PROVING DUE CARE ON PART OF PLAINTIFF IS UPON HIM. Law *v.* Crombie, 12 Pick. 176; Moore *v.* Abbott, 32 Me. 46; *Ib.* 574; Murdock *v.* Warwick, 4 Gray, 178, and cases; *Ib.* 395, 397, *per Shaw*, C. J.; Rowell *v.* Lowell, 7 Gray, 100; Rusch *v.* Davenport, 6 Iowa, 443 (1858); Merrill *v.* North Yarmouth, 78 Me. 200; Peverly *v.* Boston, 136 Mass. 366, where *Devens*, J., said, "It is not necessary for the plaintiff to prove due care on his part by directly affirmative evidence; the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received." CONTRA, Beatty *v.* Gilmore, 16 Pa. St. 463 (1851), where the subject is carefully considered; Erie *v.* Schwingle, 22 Pa. St. 384. In *Maryland* the *onus* of proving contributory negligence on the part of the plaintiff rests on the defendant. Prince George's Co. Comm'rs *v.* Burgess, 61 Md. 29; Railroad Co. *v.* Gladmon, 15 Wall. 401 (1872). The United States Supreme Court in this case decided that where the question is not controlled by statute, "contributory negligence" on the part of the plaintiff, unless it appears on the plaintiff's own evidence, is a defence to be proved by the defendant. *Ante*, sec. 1007. *Post*, sec. 1026, where the subject is discussed. Shearm. & Red. Neg. (4th ed.) secs. 107, 108, and cases; 2 Thomps. Neg. 1175, 1232, 1235.

EFFECT OF PLAINTIFF'S VIOLATION OF ORDINANCES AND SUNDAY LAW ON HIS RIGHT OF RECOVERY. Davidson *v.* Portland, 69 Me. 116; Norris *v.* Litchfield, 35 N. H. 918; Baker *v.* Portland, 58 Me. 199; 10 Am. L. Reg. (N. S.) 559, and note of Judge *Redfield*, denying Heland *v.* Lowell, 3 Allen (Mass.), 407 (1862); Steele *v.* Burkhardt, 104 Mass. 59; Sutton *v.* Wauwatosa, 29 Wis. 21; Smith *v.* Boston & Me. R. R. Co., 120 Mass. 490 (1876); s. c. 21 Am. Rep. 538, and cases cited in note; Commonweath *v.* Adams, 114 Mass. 323 (1873); s. c. 19 Am. Rep. 862; Johnson *v.* Irasburgh, 47 Vt. 28 (1874); s. c. 19 Am. Rep. 111; Lyons *v.* Desotelle, 124 Mass. 387 (1878); Shearm. & Red. Neg. (4th ed.) sec. 104, and cases; Platz *v.* Cohoes, 89 N. Y. 219; Wentworth *v.* Jefferson, 60 N. H. 158, where the rule is stated to be that recovery may be had if the violation of the Sunday law does not contribute to the accident. The *mere fact* that plaintiff was *returning from a bawdy-house* when he was injured, he not being guilty of contributory negligence, will not affect his right to recover. McVoy *v.* Knoxville, 85 Tenn. (1 Pickle), 19.

Effect of INTOXICATION *of plaintiff.* Alger *v.* Lowell, 3 Allen (Mass.), 402; Hubbard *v.* Mason City, 60 Iowa, 400; Monk *v.* New Utrecht, 104 N. Y. 552; Seymer *v.* Lake, 66 Wis. 651; Cassidy *v.* Stockbridge, 21 Vt. 391; Fitzgerald *v.* Weston, 52 Wis. 354; Shearm. & Red. Neg. (4th ed.) secs. 93, 94, 110; Thomps. Neg. 388, 430, 1174, 1203.

[1] MEASURE OF DAMAGES; WHAT JURY MAY CONSIDER. Chicago *v.* Langlass, 52 Ill. 256 (1869); and Decatur *v.* Fisher, 53 Ill. 407 (1870); McGary *v.* Lafayette, 12 Rob. (La.) 668; s. c. *Ib.* 674; *Ib.* 4 La. An. 440; Chicago *v.* Martin, 49 Ill. 241; Atchison *v.* King, 9 Kan. 550 (1872); Raymond *v.* Lowell, 6 Cush. (Mass.) 524, 537 (1850); Beecher *v.* Derby Br. & F. Co., 24 Conn. 491; Masters *v.* Warren, 27 Conn. 293 (1858); Shartle *v.* Minneapolis, 17 Minn. 308 (1871), where a verdict for $4,000 was sustained; Farrelly *v.* Cincinnati, 2 Disney (Ohio), 516; Peru *v.* French (married woman), 55 Ill. 318 (1870); Pa. & O. Canal Co. *v.* Graham, 63 Pa. St. 290 (1869); Sheel *v.* Appleton, 49 Wis. 125 (bodily and mental suffering may be considered); Wylie *v.* City of Wausau, 48 Wis. 506 (decrease of physician's practice); Scott Township *v.* Montgomery, 95 Pa. St. 444; Wilson *v.* Wheeling, 19 W. Va. 324; Reed *v.* Belfast, 20 Me. 246; Nebraska City *v.* Campbell, 2 Black (U. S.), 590 (1862); Collins *v.* Council Bluffs, 32 Iowa, 324 (where a verdict for $15,000 was sustained; *Cole*, J., dissented, but dissent does not appear); Fleming *v.* Shenandoah, 71 Iowa, 456 (pain and suffering considered an element); Galveston *v.* Barbour, 62 Tex. 172 (mental suffering of parents upon death of child not an element of damages); Crete *v.* Childs, 11 Neb. 252 (damages caused by negligence of plaintiff in employing medical aid not allowed); McNamara *v.* Clintonville, 62 Wis. 207; Page *v.* Sumpter, 53 Wis. 652; Luck *v.* Ripon, 52 Wis. 196; Ripon *v.* Bittel, 30 Wis. 614; 2 Thomps. Neg. 1266–1271.

As to liability to EXEMPLARY *damages.* Chicago *v.* Langlass, 52 Ill. 256 (1869); Decatur *v.* Fisher (denying right of jury to give exemplary damages), 53 Ill. 407 (1870). It is difficult to conceive of a case which would justify exemplary damages against a municipal corporation. Chicago *v.* Martin, 49 Ill. 241; Chicago *v.* Kelly, 69 Ill. 475; Ehrgott *v.* New York, 96 N. Y. 264; Hunt *v.* Booneville, 65 Mo. 620; 2 Thomps. Neg. 1265. Text cited and approved. Richmond *v.* Courtney, 32 Gratt. 792; Centreville *v.* Woods, 57 Ind. 192. See, also, Elizabethtown, L. & B. S. R. R. Co. *v.* Combs, 10 Bush, 382 (1874); Parsons *v.* Lindsay, 26 Kan. 426; Barbour County *v.* Horn, 48 Ala. 566 (1872); Ottawa *v.* Sweely, 65 Ill. 434 (1872); Prosser *v.* Ottumwa, 47 Iowa, 509 (1876). *Annuity tables* held admissible to prove the probable length of life of deceased. McKeigue *v.* Janesville, 68 Wis. 50; Mulcairns

§ 1022.[1] **Defective Streets; Is the American Doctrine as to Implied Liability sound?** — The doctrine of the preceding sections

v. Janesville, 67 Wis. 24. The *question of the measure of damages* is one that has produced more difficulty than perhaps any other topic in the law. *Per Wilde*, B., in Gee *v.* Lancashire & Y. Ry. Co., 6 H. & N. 211. See, also, Rowley *v.* London & N. W. Ry. Co., L. R. 8 Ex. 221. "We have no means of ascertainiug by a fixed rule what shall be the limit of damages in such a case (action for negligence). There are no principles which will apply equally to animals, goods, and passengers. Damages in such a case must be left to the common sense of the jury, assisted by the presiding judge." *Per Mellor*, J., in Fair *v.* London & N. W. Ry. Co., 21 L. T. R. N. S. 326. See, also, Collins *v.* Council Bluffs, 32 Iowa, 324; 7 Am. Rep. 200; Chicago *v.* Martin, 49 Ill. 241. "It would be most unjust if, whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount that they think an equivalent for the mischief done. . . . Scarcely any sum would compensate a laboring man for the loss of a limb; yet you do not in such a case give him enough to maintain him for life." *Per Parke*, B., in Armsworth *v.* S. E. Ry. Co., 11 Jur. 760, cited in 18 Q. B. 104. "It is very true that cases sometimes occur in which a jury, being over-anxious to fully compensate a party, give damages so great as to induce the court to interfere. In the great majority of cases, however, I am satisfied with the common-sense views upon which they act." *Per Cockburn*, C. J., in Fair *v.* London & N. W. Ry. Co., 21 L. T. N. S. 327. The rule is that the damages should be such as to furnish a *reasonable compensation* for the injury sustained. Chicago *v.* Langlass, 52 Ill. 256; S. C. 4 Am. Rep. 903. See, also, Decatur *v.* Fisher, 53 Ill. 407; Joliet *v.* Conway, 119 Ill. 489. In assessing the compensation to a person injured through the negligence of a municipal corporation, the jury should take into consideration two things, — first, the pecuniary loss he sustains by the accident; second, the injury he sustains in his person, or his physical capacity for enjoying life. When they come to the consideration of pecuniary loss, they have to take into account not only his present loss, but his incapacity to earn a future improved income. Then, as to the second ground: undoubtedly health is the greatest of all physical blessings; and to say that when it is utterly shattered no compensation is to be made for it, is really perfectly extravagant. *Per Cockburn*, C. J., in Fair *v.* London & N. W. Ry. Co., 21 L. T. N. S. 327. In *Maine* a person can recover only for "bodily injury" or "damage to property." Weeks *v.* Shirley, 33 Me. 271; Verrill *v.* Minot, 31 Me. 299; Mason *v.* Ellsworth, 32 Me. 271; Brown *v.* Watson, 47 Me. 161; State *v.* Hewett, 31 Me. 396, 400; Reed *v.* Belfast, 20 Me. 246; Sanford *v.* Augusta, 32 Me. 536; Stover *v.* Bluehill, 51 Me. 439. So, in *Connecticut* and *Massachusetts*, the recovery can only be for damages "to the person or property." Chidsey *v.* Canton, 17 Conn. 475; Beecher *v.* Derby Br. & F. Co., 24 Conn. 491; Canning *v.* Williamstown, 1 Cush. (Mass.) 451; Harwood *v.* Lowell, 4 Cush. 310. In *Vermont*, however, any special damage sustained is recoverable. Bailey *v.* Fairfield, Brayt. (Vt.) 126. So, in *Wisconsin*: Weisenberg *v.* Appleton, 26 Wis. 56; 7 Am. Rep. 39. If the action be by the *personal representative*, the jury, in estimating the damages, are restricted to compensation for pecuniary loss only, and cannot take into consideration mental or bodily suffering. Armsworth *v.* S. E. Ry. Co., 11 Jur. 758; Blake *v.* Midland Ry. Co., 18 Q. B. 93; Franklin *v.* S. E. Ry. Co., 3 H. & N. 211; Ducksworth *v.* Johnson, 4 H. & N. 653; Dalton *v.* S. E. Ry. Co., 4 C. B. N. S. 296; Pym *v.* Gt. Northern Ry. Co., 2 B. & S. 759; S. C. 4 B. & S. 396; Secord *v.* Gt. Western Ry. Co., 15 Up. Can. Q. B. 631; Morley *v.* Gt. Western Ry. Co., 16 Up. Can. Q. B. 504; Pennsylvania R. R. Co. *v.* McCloskey, 23 Pa. St. 526; Quin *v.* Moore, 15 N. Y. 432; Lucas *v.* New York, 21 Barb. 245; Safford *v.* Drew, 3 Duer (N. Y.), 627; Soule *v.* N. Y. & N. H. R. R., 24 Conn. 575; Rowley *v.* London & N. W. Ry. Co., L. R. 8 Ex. 221; Johnson *v.* Hudson River R. R. Co., 6 Duer (N. Y.), 634, 648; Harris. Munic. Man. (5th ed.) p. 497, from which the foregoing references to the decisions in Canada are extracted.

[1] Sec. 1021 in previous edition is sec. 1011 in this edition.

(secs. 1017–1020) — *that there is, on the conditions therein stated, an implied civil liability on the part of municipal corporations in respect of defective streets and sidewalks* — has been learnedly and vigorously combated in a judgment of the Supreme Judicial Court of Massachusetts, delivered by the chief justice, who in his exhaustive discussion refers to nearly all of the leading English and American cases on the subject.[1] He thus sums up the result of his review of the American decisions: "There is no case in which the neglect of a duty imposed by *general law* upon all cities and towns alike has been held to sustain an action by a person injured thereby against a city, when it would not against a town. The only decisions of the State courts, in which the mere grant by the legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York, since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1. Those which arose under the peculiar terms of special charters, in the District of Columbia, as in Weightman *v.* Washington and Barnes *v.* District of Columbia, or in a Territory of the United States, as in Nebraska City *v.* Campbell. 2. Those which, as in New York *v.* Sheffield, and Chicago City *v.* Robbins, arose in New York or in Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the Constitution and statutes of a State, follows the latest decisions of the highest court of that State, even if like words have been differently construed in other States. In the absence of such binding decisions, we find it difficult to reconcile the view, that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its powers of government, — a doctrine universally recognized, and which has

[1] Hill *v.* Boston, 122 Mass. 344 (1877), opinion by *Gray*, C. J., noted *supra*, sec. 965. Subject discussed. 18 Am. Law Rev. p. 1008; Shearm. & Red. Neg. secs. 258, 288–290; *ante*, sec. 967; *post*, secs. 1023 *a*, 1023 *b*.

nowhere been more strongly asserted than by the Supreme Court of the United States.[1] But, however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty, which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation, pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone; and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

§ 1023. **Same subject.** — In reference to this subject, it may be remarked that there is undoubtedly some difficulty in defining the logical ground on which to base the doctrine of the implied liability of municipal corporations proper for defective streets, when such liability is denied as respects counties, and towns without special charters. There is also some apparent, if not real, difficulty in holding that such a liability exists on the part of municipal corporations in reference to streets, without extending it to other duties which are everywhere conceded not to give a private action for their neglect. The courts which hold the doctrine in question also differ as to the reasons on which it rests. Notwithstanding this, it will be found, we think, upon a careful examination of the cases referred to in the preceding sections, *that they do establish the rule therein laid down as respects municipal corporations proper;* and that Mr. Justice Hunt is quite right in saying that, whatever may be the true reason for the rule, "the law in this country must be deemed to be settled in accordance with them."[2] It will also be found, we are quite sure, that the doctrine of such a liability on the part of municipal corporations, organized under special charters or under general incorporation acts, exists in the States very generally, and is not confined to the States of New York and Illinois.

The doctrine works well and is just, since no stimulus to the performance of duty is more effectual than the wholesome fear of the verdict of a jury for damages. While it must be admitted to be

[1] United States *v.* Balt. & O. R. R. Co., 17 Wall. 322, 329, *per Hunt*, J.; Laramie *v.* Albany, 92 U. S. 307, 308, *per Clifford*, J.

[2] Barnes *v.* Dist. of Columbia, 91 U. S. 540, 551 (1875); noted *ante*, sec. 974, note; *ante*, sec. 967; 18 Am. Law Rev. 1008.

exceptional, the doctrine may, we think, be vindicated as resting upon the special nature of the duty itself, relating to streets in cities (which have peculiar and local uses distinct from State highways) which are under the direct and exclusive control of the municipal authorities, whose duty in respect of repairs is intrinsically ministerial, and upon the ample means which are supplied for its performance, rather than upon the ideal notion of a contract between the State and the municipality, or upon the other notion of a special consideration received for the supposed implied promise faithfully to discharge the duty imposed by the charter or constituent act of the corporation.

§ 1023 *a*. **Same subject.** — It may be that the doctrine is anomalous. Seemingly it is. But a careful consideration of the subject, particularly of the nature of streets in cities (which have local and special uses not common to State highways in general); of the great and exclusive powers over and concerning streets conferred upon chartered cities, which include the power and duty (sometimes specifically enjoined, and sometimes embraced in more general authority), of keeping them in repair fit for use (which duty is not legislative or judicial, but rather in its nature ministerial); of the adequate provision for raising the revenue or means to discharge the duty, — may, perhaps, show that the anomaly imputed to the doctrine under review is more apparent than real. It may be, and probably is true, that this doctrine is the unconscious product of judicial legislation necessarily evolved in the very work of interpreting the various parts and clauses of charters or legislative acts relating to the powers of municipalities, and the purposes for which such powers were granted. Be it so. Such a function is inherent in every jural system. It constitutes the chief work of the judge, and it is among the most important duties of the judicial office. It has been well observed that in the infinite diversity of subjects which arise for judicial determination, "judgment in most cases consists less in the application of a precise text, than in a combination of several texts, which lead to a decision rather than contain it."[1] Such decision and judgment are the result of the interpretation of various clauses and texts, with the definite purpose of ascertaining the intention and will of the legislature, in respect of a matter where it is not in terms expressed one way or the other, but is necessarily left to be collected from a consideration of all of the

[1] M. Portalis, Preliminary Discourse on the *projet* of the Code Napoleon. Amos, Science of Law, p. 63.

enactments bearing upon it. It is, therefore, no solid objection to the doctrine in question that it is the unperceived or unconscious product of judicial interpretation, or if one pleases to say so, of judicial legislation, since much of the best portions of our jurisprudence and of the jurisprudence of every country has thus originated, and will unavoidably continue thus to originate, as long as the judicial office exists and justice is administered among men. The doctrine itself, under the conditions stated in a previous section,[1] has seemed so reasonable, that it is believed never to have been legislatively repudiated, and it is certain that it has been almost universally adopted. It has in fact become, as above shown, part of the settled jurisprudence of the country.

§ 1023 *b*. **Same subject. Comments on Doctrine of implied Liability as respects Different Classes of Corporations.** — Whether the implied liability in respect of defective highways and streets rests upon the nature of the duty imposed, upon the means supplied for its performance, or upon a sense of public utility, or upon all of these grounds, it is not easy, as above stated, to see why, when the same conditions otherwise exist, the nature of the incorporated instrumentality should make a difference in the result. Whether the instrumentality be a *quasi* corporation such as a road district but with a corporate purse for its purposes, or a county charged with the like duty in respect of highways and having for the effectual discharge thereof the power to raise taxes, or a chartered municipality having like duties and powers over streets within its limits, why, under conditions otherwise the same (there being no statute giving or denying the action), should the two former classes of corporations be not liable while the latter class is liable, for neglect of duty, to an action for damages? It may be after all that there is a substantial difference not readily perceived in the greater efficiency with which the latter class of corporations as actually constituted is able to perform the duty in question. And it may be that this is only another of the many examples with which our jurisprudence abounds, — which abhors generalizations, disregards mere symmetry, and unconsciously and silently embodies the underlying notions of the local communities, — this may be, we suggest, after all only another example of the fact that logic and law are not always precisely coincident or coterminous; that law is frequently logic limited and circumscribed by a sense of expediency; and that accordingly legislators and courts declare and apply dis-

[1] *Ante*, sec. 1017.

tinctions that are oftentimes easier to feel than to unfold and define, and which do not obviously consist with an indefinite extension and inexorable application of those principles of logic that are apparently applicable to and seemingly control the subject. The foregoing considerations are applicable to all kinds of *quasi* corporations. These are primarily and distinctively State instrumentalities, and the prerogative of partaking of the State's exemption from liability in respect of the exercise of all of their public functions and duties without exception, is one which naturally grows out of the manner and objects of their creation.

§ 1024 (790). **Where City is directly in Fault.** — Where streets have been rendered *unsafe by the direct act, order, or authority of the municipal corporation* (not acting through independent contractors, the effect of which will be considered presently), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care.[1] Even

[1] Detroit *v.* Corey (*sewer excavation*), 9 Mich. 165 (1861). Compare Detroit *v.* Beckman, 34 Mich. 125, referred to in note, *infra;* Lloyd *v.* New York (*dangerous excavation*), 5 N. Y. 369 (1851); Weet *v.* Brockport, 16 N. Y. 161, note; Chicago *v.* Major (*uncovered city cistern in street*), 18 Ill. 349. Approved, but distinguished, Chicago *v.* Starr, 42 Ill. 174 (1866) (where the city was held *not liable* for *an injury caused by the fall of a counter, leaning against a fence on a sidewalk*); Dayton *v.* Pease, 4 Ohio St. 80 (1854) (in which the city was held liable for damages caused by the *fall of a bridge built upon a defective plan*, furnished by the city engineer); Cincinnati *v.* Stone, 5 Ohio St. 38 (1855); Conrad *v.* Ithaca, 16 N. Y. 158; Wendell *v.* Troy, 39 Barb. 329 (1862); New York *v.* Sheffield, 4 Wall. 189 (1866); Grant *v.* Brooklyn (*act of a city water commissioner in opening a sewer*), 41 Barb. 381 (1864); Baltimore *v.* Pennington, 15 Md. 12 (1859); Pfau *v.* Reynolds, 53 Ill. 212 (1870); *infra*, sec. 1027; Brooks *v.* Somerville, 106 Mass. 271; Covington *v.* Bryant, 7 Bush. 248. City held liable for death of plaintiff's *child by drowning in a deep unguarded ditch in the street.* Chicago *v.* Hesing, 83 Ill. 204 (1876); s. c. 25 Am. Rep. 378; Savannah *v.* Donnelly, 71 Ga. 258 (*excavation made by citizen by permission of the city*); Glantz *v.* South Bend, 106 Ind. 305 (*street crossing composed of planks raised two inches above the level of the sidewalk*). Where a borough authorized a railroad company to carry its track over a street by a bridge at a certain height and afterwards permitted the level of the street to be so raised as to render the *height of the bridge insufficient*, the borough was held liable for damages caused by the bridge being too low, and it was also held that no liability attached to the railroad. Gray *v.* Danbury Bor., 54 Conn. 574.

In Detroit *v.* Beckman, 34 Mich. 125 (1876); s. c. 22 Am. Rep. 507, an injury was caused at night to a traveller as he was driving along one of the streets of the city. An *open sewer* had, some time before, been constructed in the street by the city, which was covered only part of the way, leaving the sewer at the end of the covered portion and within the limits of the travelled portion of the street, open and unprotected. Conceding that the city had not covered the sewer to the extent that due care required, it was nevertheless held that the city was not liable. The ground of the decision was that the injury resulted from the *plan* of the work

in those States in which a municipality is not held *impliedly* liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts place obstructions on the streets or by such acts otherwise render them unsafe, whereby travellers are injured.[1] Where

adopted by the city, and that in such cases there is no liability, since the plan is the result of legislative action, and that to create a liability there must be neglect in the proper execution of the plan as distinguished from the plan itself, or the work must result in a direct injury to adjoining property. In Lansing *v.* Toolan, 37 Mich. 152, a similar decision on like grounds was made, holding the city not to be liable where a contractor under it dug a ditch across a street, bridging it only with plank sixteen feet wide, into which a traveller at night was precipitated and injured. It seems to the author, however, as he understands the facts, that these are cases where the street was rendered unsafe for travel by the direct act of the city, or its contractor, and that the city would be held liable in those States in which an implied municipal responsibility is recognized for unsafe streets, which, however, is not the case in *Michigan*. Detroit *v.* Blackeby, 21 Mich. 84; s. c. 9 Am. Law Rep. (N. S.) 670; 2 Thomps. Neg. 736. See *post*, sec. 1046. Does the principle that actionable negligence cannot be predicated of the *plan itself* (*post*, sec. 1046) go so far as to exempt from liability if that plan leaves the streets in an unsafe and dangerous condition for public use? In the author's opinion this question ought to be answered in the negative.

In Chope *v.* City of Eureka, California Supreme Court, 39 Alb. L. J. 426 (1889), it was held that a municipal corporation is not liable, in the absence of statutory provision, for personal injuries to one who fell into a sewer which was in process of construction, and was negligently left insufficiently guarded by the officers of the corporation. *McFarland*, J., said: "Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this State that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is no doubt some conflict of decisions on the questions in other States, although it is to be observed that in the New England and some other States there are statutory declarations of the liability. But in California the doctrine above stated had been clearly and continuously adopted, and if any change in the law is desirable, that change must be made by the legislature. And so far at least, the legislature has shown no disposition to make the change. Winbigler *v.* Los Angeles, 45 Cal. 36; Tranter *v.* Sacramento, 61 Cal. 275; Barnett *v.* Contra Costa County, 67 Cal. 77; Cromwell *v.* Sonoma County, 25 Cal. 315; Huffman *v.* San Joaquin County, 21 Cal. 430." Three judges concurred and two dissented. The dissenting judges referring to sec. 1024 of the text as "a correct statement of the law, and one that is supported by an overwhelming weight of authority."

[1] Hill *v.* Boston, 122 Mass. 344, 364 (1877); *ante*, secs. 965, 1022.

In Foreman *v.* Canterbury, L. R. 6 Q. B. 214, it was held that the mayor, aldermen, and burgesses of Canterbury, who were by the same act of Parliament the local board of health and surveyors of highways, were liable to an action by a traveller who suffered an *injury by driving against a heap of stones which had been broken for the purpose of mending the highway, and left in the highway at night, without light or guard*. But, at the trial of that case, it had been taken for granted that there was negligence in some one, and it had been expressly admitted that *the person who did the act was the servant of the defendants;* and the judgment of the court, delivered by *Blackburn*, J., was, says *Gray*, C. J., in Hill *v.* Boston, *supra*, "distinctly put upon the ground that the defendants would not be liable simply because they were surveyors of highways, but that they were not, merely because

the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its *neglect or omission* to keep the streets in repair,[1] as well as for those caused by defects occasioned by the *wrongful acts of others*,[2] but, as the *basis of the action*

they were surveyors, exempted from the liability which any person or corporation would incur for placing an obstruction in the highway. And in like cases since, the liability has been held to depend, not upon the defendant's relation to the highway by reason of being charged with the duty of repairing it, but upon the question whether the obstruction was placed in the highway by the defendant, or the defendant's servants." Taylor *v.* Greenhalgh, L. R. 9 Q. B. 487; Pendlebury *v.* Greenhalgh, 1 Q. B. D. 36; Palmer *v.* St. Albans, 56 Vt. 522.

[1] Hutson *v.* New York, 9 N. Y. 163 (1853); Hickok *v.* Plattsburg, 16 N. Y. 161; Davenport *v.* Ruckman, 37 N. Y. 568 (1868); Diveny *v.* Elmira, 51 N. Y. 506 (1873); Bloomington *v.* Bay, 42 Ill. 503 (1867); Atchison *v.* King, 9 Kan. 550 (1872); Higert *v.* Greencastle, 43 Ind. 574 (1873); *supra*, sec. 1017. *Contra:* Detroit *v.* Blackeby, 21 Mich. 84; s. c. with note of Judge *Redfield*, 9 Am. L. Reg. (N. S.) 670; Oliver *v.* Kansas City, 69 Mo. 79, approving text; Ironton *v.* Kelley, 38 Ohio St. 50; *supra*, sec. 981, and note. In Turner *v.* Indianapolis, 96 Ind. 51, it was held that the "fellow-servant doctrine" or the defence of "common employment" was not applicable, and therefore not available to prevent a fireman injured in the discharge of the duties of his place from recovering against the city for negligence on the part of its officers, in respect of keeping streets in a safe condition for use.

[2] *Ante*, secs. 1017–1020, notes and cases: Hickok *v.* Plattsburg, 16 N. Y. 161, note (*negligent omission* to fill up ditch which a wrong-doer had excavated in the street); Wendall *v.* Troy, 39 Barb. 329; Requa *v.* Rochester, 45 N. Y. 129 (1871); Serrot *v.* Omaha City, 1 Dillon C. C. R. 312 (1871); Griffin *v.* New York, 9 N. Y. 456 (1853); Tallahassee *v.* Fortune, 3 Fla. 19 (1850); Higert *v.* Greencastle, 43 Ind. 574, 587 (1873); Aurora *v.* Bitner, 100 Ind. 396 (gutter crossing constructed by private persons); Brennan *v.* St. Louis, 92 Mo. 482, city held liable where a child three years old was accidentally thrown, by another child, from the sidewalk into a ditch negligently left in the gutter for several months by the city. Scranton *v.* Catterson, 94 Pa. St. 202 (water plug in street). Where the municipal authorities in the repair of streets obstruct them, it is their duty to give proper warning of the same, and if by the neglect of such duty a traveller is injured, the municipality is liable. Carlisle *v.* Brisbane, 113 Pa. St. 544. In *Ohio* it is made by statute the duty of municipal corporations to keep the streets in order. The statute neither gives nor denies an action for the breach of this duty; but it is held that a person receiving injuries in consequence of its neglect in this respect, has a right of action as at common law for the damages caused thereby. A building permit by municipal authorities authorizing the occupation of part of a public street *as a depository for building materials*, and requiring proper lights at night to indicate their locality, does not relieve the municipality from the duty of exercising a reasonable diligence to prevent the holders of the permit from occupying the street in such a way as to endanger passers-by in their proper use of it. Cleveland *v.* King, 132 U. S. 295; s. c. 28 Fed. Rep. 835; Cardington *v.* Fredericks, 46 Ohio St.; Stephens *v.* Macon (notice in such case), 83 Mo. 345; *post*, secs. 1027–1035.

Dangerous holes or excavations IN OR NEAR THE TRAVELLED WAY. A religious corporation made an excavation, which was inadequately guarded, at the site of a public alley in a city for an entrance to their church. The plaintiff crossing the alley fell in at night and was injured; the city was held liable, although the excavation was not in the travelled part of the city. Niblett *v.* Nashville, 12 Heisk. 684. See Stack *v.* Portsmouth, 52 N. H. 221 (1872); McDermett *v.* Kingston, 57