CHAPTER 84: DEFECTS IN PUBLIC WAYS

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TABLE OF CONTENTS

A. Exclusivity of Chapter 84 Remedy ........................................ 2

B. Scope of Chapter 84 Remedy .................................................. 4
   1. Harm Sustained ................................................................... 4
   2. Defect .............................................................................. 6
   3. Traveler ........................................................................... 9
   4. Public Way ........................................................................ 9

C. Elements of Chapter 84 Cause of Action ................................. 13
   1. Breach ............................................................................ 14
   2. The "Sole Cause" Rule ..................................................... 15
   3. Damages ......................................................................... 16

D. Defenses .............................................................................. 16
   1. Notice of Claim .............................................................. 16
   2. Construction or Repair ................................................ 20
   3. Weight Over Six Tons ..................................................... 21
   4. Recovery Limit and Interest ........................................... 21
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Chapter 84, Section 15 of the Massachusetts General Laws provides the exclusive remedy against a municipality for injuries or damages caused by a defect in or upon a public way. Ram v. Town of Charlton, 409 Mass. 481, 485, cert. den., 502 U.S. 822 (1991); Huff v. City of Holyoke, 386 Mass. 582, 585 (1982). The Massachusetts Tort Claims Act preserves this exclusivity. Trioli v. Town of Sudbury, 15 Mass. App. Ct. 394, 396-97 (1983). Thus, where the provisions of Chapter 84 apply, those of Chapter 258 do not. Not surprisingly, plaintiffs frequently seek to avoid the modest recovery limit available under Chapter 84 ($5,000) by attempting to pursue roadway defect claims instead under Chapter 258, where the defendant municipality may be held liable for up to $100,000. M.G.L. c. 258, § 2. Massachusetts courts, however, have consistently held that Chapter 84 cannot be circumvented in this manner. Ram, supra, 409 Mass. at 489.

A. EXCLUSIVITY OF CHAPTER 84 REMEDY

1. The Massachusetts Legislature, in enacting the Massachusetts Tort Claims Act, expressly preserved the exclusivity of the pre-existing Chapter 84 remedy by specifying that the limited abrogation of
governmental immunity set forth in Chapter 258, Section 2 "shall not be construed to supersede or repeal ... sections fifteen to twenty-five, inclusive, of chapter eighty-four of the General Laws." St. 1978, c. 512, § 18.

2. Chapter 84 controls regardless of how the alleged defect was created. Thus, plaintiff cannot defeat the exclusivity of Chapter 84 by alleging defendant was negligent in allowing a decaying tree to remain in the vicinity of a highway, Lebel v. Commonwealth, 67 Mass. App. Ct. 1108, *1 (2006) (interpreting companion statute, M.G.L. c. 81, § 18); or in failing to maintain a water pipe that burst and created an icy condition on an adjacent way, Callahan v. Town of Kingston, Plymouth Sup. Ct., C.A. No. 94-1449 (Oct. 24, 1995); or that defendant's fire department was negligent in discharging water onto a street which froze and created an icy hazard, Cronin v. Town of Norton, Bristol Sup. Ct., C.A. No. 96-0007 (July 29, 1997); or that defendant's police department was negligent in failing to respond to an emergency situation caused by an inoperative traffic signal at a busy intersection. Prindle v. Commonwealth, Middlesex Sup. Ct., C.A. No. 92-2742 (Nov. 3, 1992). But see Peters v. Haymarket Leasing, Inc., 64 Mass. App. Ct. 767, 777 (2005) (Massport’s alleged failure to enforce posted speed limit in taxi pool did not allege a “defect in the way.”)

B. SCOPE OF CHAPTER 84 REMEDY

A plaintiff's right of recovery will be controlled by the provisions of Chapter 84 if:

(1) he sustained "bodily injury or damage in his property . . .";

(2) "by reason of a defect or a want of repair or a want of sufficient railing . . .";

(3) while traveling;

(4) "in or upon a [public] way . . ."

1. Harm Sustained

Section 15 of Chapter 84 applies only to bodily injury or property damage.

a. The statute does not afford a remedy to loss of consortium


c. Finally, a claim for the wrongful death of a traveler due to a defect in or upon a way is not controlled by Chapter 84; rather, such a claim falls under Chapter 258. Gallant v. City of Worcester, 383 Mass. 707, 714 (1981). Because Section 6 of Chapter 229 (the Massachusetts Wrongful Death Statute) permits the personal representative of a decedent to recover those damages for conscious pain and suffering the decedent himself could have recovered had he survived the accident, an argument can be made that any award under Section 6 for the wrongful death of a traveler due to a roadway defect must be limited to $5,000. After all, this is the maximum amount the decedent himself could have recovered for pain and suffering had he survived the accident. This argument, however, has not yet been accepted by a Massachusetts appellate court.
2. **Defect**

a. **Defined** – A "defect or want of repair" is "anything in the state or condition of the way that renders it unsafe or inconvenient for ordinary travel." *Gallant, supra*, 383 Mass. at 711. Perfection, however, is not required. Under Chapter 84, a municipality is only obliged to exercise ordinary care and diligence in keeping its ways reasonably safe for the use of travelers. "The presence of slight imperfections in the surface of the way, even if they cause an accident, is not a breach of the statutory duty ... ." *Buskey v. City of Worcester*, 323 Mass. 342, 344 (1948). See *Green v. Town of Wilmington*, 339 Mass. 142, 145 (1959) (beginning of road surface measuring two and one-half to three inches higher than end of bridge held not a defect); *Vellante v. Town of Watertown*, 300 Mass. 207, 208 (1938) (three-quarter inch rise between two sections of sidewalk held not a defect); *Gallante v. City of Brockton*, 305 Mass. 480, 481 (1940) (no actionable defect where cement sidewalk had separated one inch from granite curbing); *Wade v. City of Boston*, 2005 WL 3627255 (Mass. Super. Ct.) (pothole in roadway one and one-half inches deep held not a defect); *Hudson v. City of Chelsea*, Chelsea Dist. Ct., C.A. No. 9414CV0764 (Sept. 10, 1997) (one and one-half
inch rise between two sections of sidewalk held not an actionable defect). Note, however, that the question of whether a particular condition constitutes a defect is ordinarily one of fact. *Duffy v. City of Boston*, 275 Mass. 13, 14 (1931); *Sasso v. Town of Groton*, 2001 WL 1334284 (Mass. Super. Ct.)

b. **Examples of Defects**

(i) stump of former signpost (*Baird, supra*, 32 Mass. App. Ct. at 497);

(ii) roadway design (*Ram, supra*, 409 Mass. at 488-89);

(iii) pothole (*Hanson v. City of Worcester*, 346 Mass. 51 (1963));


(v) non-moving vehicle (*Mulvaney v. City of Worcester*, 293 Mass. 32, 34 (1935) [distinguish from a moving vehicle, which will *not* qualify as a "defect" but may, instead, give rise to liability under Chapter 258 if the
vehicle is owned by a municipality and/or operated by a municipal employee; Stuart v. Town of Brookline, 412 Mass. 251, 256 (1992); DiBenedetto v. Commonwealth, 1995 WL 1308158 (Mass. Super. Ct.)].

c. Snow or Ice – A municipality shall not be held liable for injuries sustained upon a public way due to snow or ice if, at the time of the accident, the way was otherwise "reasonably safe and convenient for travelers." M.G.L. c. 84, § 17. Thus, a claimant who suffers injuries or damages as a result of a roadway skidding accident or a slip and fall on a public way must prove that some defect, aside from mere snow or ice, caused the accident. Absent such proof, all recovery will be denied. Johnson v. Town of Orange, 320 Mass. 336, 337 (1946); Gamere v. 236 Comm. Ave. Condominium Ass'n, 19 Mass. App. Ct. 359, 363, rev. den., 394 Mass. 1103 (1985); Clarke v. Mal Elfman's Furniture Store, 2005 WL 3623518 (Mass. App. Div.) Note that, if some underlying condition caused the accumulation of snow or ice, yet such condition cannot, by itself, be considered a defect, all recovery will still be barred. Neilson v. City of Worcester, 219 Mass. 88, 90-91 (1914).

3. **Traveler**
In order to recover under Chapter 84, plaintiff must also prove that he was a traveler on the way at the time of his accident.  MacKinnon v. City of Medford, 330 Mass. 70, 71 (1953) (plaintiff examining house from sidewalk, who stepped into hole after turning in preparation for returning to her automobile, held a traveler); Wershba, supra, 324 Mass. at 331 (plaintiff injured by broken tree limb while sitting on running board of automobile waiting for rainstorm to pass held not a traveler); Blodgett v. City of Boston, 90 Mass. 237, 240-41 (1864) (sledding child held not a traveler); McCann v. City of Boston, 31 Mass. App. Ct. 123, 124-25 (1991) (roller-skating child held not a traveler).

4. **Public Way**

The Chapter 84 remedy is available only if plaintiff sustained his bodily injury or property damage "in or upon" a public way. This element of plaintiff's proof compels inquiry into the status of the accident location.

a. **How a Way Becomes "Public"** – There are two methods by which an existing way may become a "public" way:

   (i) the way is laid out and accepted by a public authority in the manner prescribed by M.G.L. c. 82, §§ 1-32; or

   (ii) by prescription – i.e., adverse and continuous use of the way by the public for more than twenty years.

b. Public Way by Estoppel – Prior to 1846, a public way could be created by an owner's permanent and unequivocal dedication of a way to public use, coupled with an express or implied acceptance of the same by the public. This method was abolished by the Legislature's adoption of M.G.L. c. 84, § 23. Longley v. City of Worcester, 304 Mass. 580, 585 (1939).

Yet, any way opened and dedicated to the public use will still be treated as a public way for purposes of Chapter 84 if the municipality either:

(i) fails to close the way to the public, or fails to caution the public against entering thereon, whenever "public safety so requires ..." M.G.L. c. 84, § 24; or

(ii) repairs the way within six (6) years prior to the accident. M.G.L. c. 84, § 25.

In such circumstances, the municipality shall, in effect, be estopped from denying that the way is public (even though it

c.  Bounds of Public Way – Whether a defect existed in or upon a public way is ordinarily a question of fact for the factfinder. Bonner v. Town of Bellingham, 1996 WL 1186830 (Mass. Super. Ct.)  In certain instances, the precise boundaries of a particular way may remain in dispute. If a public way was laid out and accepted by a public authority pursuant to the provisions set forth in M.G.L. c. 82, §§ 1-32, then its boundaries should be relatively simple to establish. See Diamond v. City of Newton, 55 Mass. App. Ct. 372 (2002) (grass/dirt area between street and sidewalk within right of way taken and dedicated pursuant to M.G.L. c. 82, §§ 1-32, held within bounds of public way). If, on the other hand, the public way was acquired by prescription, then its scope and size could be hotly contested. A municipality is required to erect perma-
ent bounds at the termini and angles of all ways laid out.

M.G.L. c. 86, § 1. The boundaries of public ways acquired by
prescription may, in certain circumstances, be determined by
the location of long-standing buildings or fences adjacent
thereto. M.G.L. c. 86, § 2; Horne v. City of Haverhill, 110
Mass. 527, 528 (1872).

d. Not all public property used for travel will qualify as a public
way for purposes of applying the Chapter 84 remedy.

(i) Claims for bodily injury or property damage due to
defects on a sidewalk adjacent to a public way are
controlled by Chapter 84. Minasian, supra, 40 Mass.
App. Ct. 25; Weare v. Inhabitants of Fitchburg, 110
Mass. 334, 337 (1872).

(ii) Park roads and parkways are also considered the
equivalent of public ways for purposes of applying
Chapter 84. Intriligator v. City of Boston, 395 Mass.
489, 492-93 (1985); MacDonald-LeFebvre v. Town of

(iii) A public parking lot, however, will not be considered
a public way; Doherty v. Town of Belmont, 396 Mass.
366, 368 (1958); Polonsky v. Massachusetts Port Au-
(iv) ... nor will a fire station walkway; Abihider v. City of Springfield, 277 Mass. 125, 127 (1931);

(v) ... nor will the exterior stairway of a schoolhouse; McNeil v. City of Boston, 178 Mass. 326, 329 (1901);

(vi) ... nor will a schoolyard footpath. Sullivan v. City of Boston, 126 Mass. 540, 541 (1879).

C. ELEMENTS OF CHAPTER 84 CAUSE OF ACTION

Once it is determined that Chapter 84 controls a particular claim, the injured plaintiff must still establish a right of recovery. In order to do so, plaintiff must prove (1) that the municipality breached the duty to keep its public ways reasonably safe for the use of travelers; and (2) that such breach was the sole cause; (3) of injury or damage to the plaintiff.

1. Breach

Breach of duty requires proof of two elements: (1) notice; and (2) an opportunity to repair the defect.

a. First, plaintiff must show that the municipality had either actual or constructive notice of the defect or want of repair prior to the accident. Hanson v. City of Worcester, 346 Mass. 51, 52 (1963); Powers v. City of Worcester, 1992 WL 52839 (Mass. App. Div.) The standard is whether the municipality "had or, by the exercise of proper care and diligence, might
have had reasonable notice of the defect or want of repair ... ."
M.G.L. c. 84, § 15; Kelly v. City of Springfield, 328 Mass. 16, 17 (1951). Constructive notice is often established by
demonstrating the length of time for which the defect existed
prior to the accident. If, however, this length of time is left to
conjecture, the plaintiff cannot recover. LaPlant v. City of
b. Further, plaintiff must show that the municipality, upon notice
of a defect, also had a reasonable opportunity to repair the
same prior to the accident, yet failed to do so. The statute
provides for recovery only if the defect or want of repair
"might have been remedied by reasonable care and diligence ...": on the part of the responsible municipality. M.G.L. c. 84,
§ 15. Thus, if a defect exists despite the "reasonable care and
diligence" of municipal officials, there can be no recovery for
damages sustained because of such defect. Bowman v. City
of Newburyport, 310 Mass. 478, 482-83 (1941); Adams v.
Town of Bolton, 297 Mass. 459, 464-65 (1937). Also, the
level of duty imposed by Section 15 relates to the “character
of the way” and the “kind and amount of travel at the location
of the alleged defect.” MacDonald v. City of Boston, 318
Mass. 618, 619 (1945). Finally, Section 15 imposes liability
only on the entity or person “by law obliged to repair” the way. If some other entity is obligated to repair the way or that portion where the accident occurred, the municipality may not be liable. See Bedard v. City of Boston, 1998 WL 1184188 (Mass. Super. Ct.) (City of Boston held not liable for defect where separate legal entity, the Boston Water & Sewer Commission, was obligated to repair sewer cover and surrounding pavement.)

2. **The "Sole Cause" Rule**

The statutory liability of municipalities under Chapter 84 is restricted to those cases where the defect or want of repair in the way was the "sole cause" of injury or damage to the plaintiff. Tomasello v. Commonwealth, 398 Mass. 284, 286 (1986); Carroll v. City of Lowell, 321 Mass. 98, 100 (1947); Trioli, supra, 15 Mass. App. Ct. at 398; January v. Town of Marshfield, 1995 WL 669084 (Mass. App. Div.)

Thus, if a plaintiff or some third party contributes as much as one percent to the accident, all recovery shall be denied. [Note, however, that if the negligence of a third party merely creates or contributes to the defect, then the "sole cause" rule will not protect the municipality from liability. Scholl v. New England Power Service Co., 340 Mass. 267, 271 (1960)].

3. **Damages**
Consequential damages for mental suffering, medical expenses and loss of earning capacity are recoverable under Chapter 84. Whalen v. City of Boston, 304 Mass. 126, 128-29 (1939); Lewis v. City of Springfield, 261 Mass. 183, 186-88 (1927). Recovery for damage to property is limited to tangible property. Whalen, supra, at 128.

D. DEFENSES

1. Notice of Claim


a. Form and Content – The thirty-day notice must be in writing.

If notice of a claim is timely, yet fails to identify the claimant with sufficient particularity, or to identify the time, place or location of the accident, then the municipality must send to the claimant a "notice of insufficiency" within five (5) days after its receipt of claimant's notice. The municipality shall describe therein claimant's omission(s) and "request[ ] forthwith a written notice in compliance with the law ... ."

M.G.L. c. 84, § 20. If the claimant complies with the municipality's request within five (5) days after receipt of such "notice of insufficiency," the claimant's amended notice shall be considered a part of his timely original. If, on the other hand, a claimant should fail to comply with the municipality's request, then his original notice shall be deemed defective, and all recovery under the statute will be barred. King, supra, at
380-81. A municipality waives all defects in a thirty-day notice of claim not challenged by a timely "notice of insufficiency." M.G.L. c. 84, § 20; Burke v. City of Lynn, 219 Mass. 302, 304 (1914).

b. **Service** – In the case of a city, notice must be given to the mayor, or to the city clerk or treasurer. In the case of a town, notice must be given to one of the selectmen, or to the town clerk or treasurer. M.G.L. c. 84, § 19. Corlin v. City of Worcester, 1995 WL 575140 (Mass. App. Div.) (notice to City Law Department held insufficient).

c. **Receipt** – Notice sent within thirty days may not necessarily be timely; it must be received by the designated official within the statutory period. Elwell v. Town of Athol, 325 Mass. 41, 43 (1949); O'Neil v. City of Boston, 257 Mass. 414, 415 (1926).

d. **Exception** – The thirty-day notice requirement is tolled or suspended during the time notification is rendered "impossible" (not merely inconvenient or difficult) by virtue of the claimant's physical or mental incapacity. M.G.L. c. 84, § 19; Perry v. Medeiros, 369 Mass. 836, 843-44 (1976); Shapiro v. City of Chelsea, Chelsea Dist. Ct., C.A. No. 9514CV1228 (May 12, 1997). Once this impossibility is removed, the
thirty-day notice period begins to run. [Note, however, that
the notice requirement is not tolled during the claimant’s
minority.  Madden v. Springfield, 131 Mass. 441, 442 (1881),
cited in George v. Town of Saugus, 394 Mass. 40, 43 (1985)
(interpreting Chapter 258)].

E. Snow or Ice Notice – Chapter 84, Section 18 provides that the
failure to give the required notice for “injury or damage
sustained by reason of snow or ice shall not be a defense . . .
unless the defendant proves he was prejudiced thereby.” This
provision, however, does not apply to counties, cities or towns
(since they are protected from snow or ice claims under
M.G.L. c. 84, § 17), but only to other persons or entities
obliged by law to maintain or repair a way within the meaning
of M.G.L. c. 84, § 15.  See Botello v. Massachusetts Port

2. Construction or Repair

A municipality shall not be liable for injuries or damages sustained
upon a way during construction or repair operations if (1) the way is
closed to traffic; or (2) other "sufficient means" are taken to caution
the public against entering upon it. M.G.L. c. 84, § 15; Tosches v.
Town of Sherborn, 341 Mass. 360, 362 (1960); McCarthy v. City of
Boston, 266 Mass. 262, 264 (1929). Even if it is not closed or posted
with sufficient warnings, the plaintiff injured upon a way under
construction or repair will still be barred from recovery if he or she
was aware of the nature and extent of the construction or repair
operations.  Pratt v. City of Peabody, 281 Mass. 437, 440 (1933);

3.  **Weight Over Six Tons**

A municipality shall not be liable for injuries or damages if the
combined weight of claimant's vehicle and load exceeds six (6) tons.
M.G.L. c. 84, § 15; Correa v. Moncouski, Middlesex Sup. Ct., C.A.
No. 97-3155 (July 11, 1997).

4.  **Recovery Limit and Interest**

Liability under Chapter 84 is limited to $5,000.  M.G.L. c. 84, § 15.
Pre-judgment interest is not recoverable.  Edmonds v. City of