

1955

## Storekeepers, Sidewalks, and Invitees

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### Recommended Citation

Urban A. Lester, *Storekeepers, Sidewalks, and Invitees*, 5 Cath. U. L. Rev. 173 (1955).  
Available at: <https://scholarship.law.edu/lawreview/vol5/iss2/5>

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## *Storekeepers, Sidewalks, and Invitees*

The Municipal Court of Appeals for the District of Columbia recently spotlighted a complex and far-reaching problem, that is, the extent of a storekeeper's duty to protect and warn persons entering and leaving his store. The particular case was *Viands v. Safeway Stores, Inc.*,<sup>1</sup> involving an action for injuries sustained by a customer when she tripped over a boy's wagon on the sidewalk in front of the store's exit. The trial court rendered judgment on the verdict in favor of the defendant. Plaintiffs appealed, and obtained a reversal on the ground that the instructions given by the trial judge did not accurately state the law applicable to the situation, especially with regard to the matter of control:

. . . there can be no duty in this or any other case of this type with respect to space over which the defendant has no legal control and no legal opportunity for control. . . . The defendant . . . could not lawfully have exercised any dominion over the public street.<sup>2</sup>

This distinction seems to be the essential point of divergence in the varying decisions affecting the storekeeper's liability in regard to his sidewalk. Basically all the courts agree on the degree of care owed to an invitee. The difference, however, seems to stem from the court's concept of the degree of control the storekeeper may legally exercise over his sidewalk. Where a court would hold a storekeeper liable the ultimate basis would be the assumption that he can exercise legal control over strangers using the sidewalk; while a court denying liability does so on the assumption that he cannot legally control the sidewalk.

### *Cases Extending Liability*

In an old English case, *Mersey Docks v. Gibbs*,<sup>3</sup> the court allowed recovery against a defendant who negligently allowed mud to accumulate in and around the entrance to its dock and failed to warn an entering ship, thereby allowing it to become imbedded in a large mass of mud. As early as 1881 we find that the Supreme Court of the United States, speaking through Mr. Justice Harlan, states that an owner of land is liable to an invitee:

. . . for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public or to those who were likely to act upon such an invitation.<sup>4</sup>

Another facet of the problem concerning the extent of a store owner's duty to protect an invitee was brought out in *O'Dwyer v. Northern Market Company*.<sup>5</sup>

<sup>1</sup> 107 A. 2d 118 (1954), *cert. denied* (1954).

<sup>2</sup> *Id.* at 119.

<sup>3</sup> 11 H.L. Cas., 686, 11 Eng. Rep. 1500 (1866).

<sup>4</sup> *Bennett v. Louisville and N.R.R.*, 102 U.S. 577, 580 (1881).

<sup>5</sup> 24 App. D.C. 81 (1904).

This case involved a market company which had exercised unlawful dominion over the public sidewalk by establishing a market on the sidewalk. The court held that the liability of the market should have been submitted to the jury. It further stated that it was the market company's ". . . duty to keep the sidewalk clean and safely passable at all times so far as obstruction might be occasioned by the purposes to which it sought to devote the street."<sup>6</sup>

The court, in the case of *Cannon v. S. S. Kresge Co.*,<sup>7</sup> indicated that even where the defendant had no control over the parking lot located behind his retail store he would be liable for injuries sustained by a customer who fell from a step at the rear of the store onto the parking lot.<sup>8</sup>

In the *Cannon* case, upon leaving defendant's store the woman's foot slipped in a parking lot which was maintained in a poor condition by a third party. Her plight was aggravated by the fact that the defendant maintained a backstep with an unlighted fourteen-inch stepoff. The injured woman had previously recovered from the parking lot owner for her injuries and this was an action by her husband to recover damages for the alleged loss of his wife's society, service and consortium. The court stated:

Neither do the cases cited by the defendant in its brief to the effect that liability for the condition of real property is ordinarily dependent upon ownership or possession and control thereof, so far as such conditions relate to the parking station or lot in question, have any application to this case.<sup>9</sup>

In 1944, the Supreme Court of Missouri indicated that it would go even further in imposing liability on an invitor than any of the cases so far considered. In *Atterbury v. Temple Stephens Co.*,<sup>10</sup> there was an action for personal injuries sustained when the plaintiff after leaving the store tripped, stumbled and fell over a length of woven wire mesh stretched on the sidewalk in front of defendant's store. The wire had been placed there by the store manager while plaintiff was in the store. The court declared that:

The corporate defendant would have been liable, even if a stranger had placed the wire, as did Hawkins, provided it had reasonable time in which to ascertain and warn, and failed to do so.<sup>11</sup>

Indeed, a recent case in Pennsylvania would seem to agree with the dicta of the *Atterbury* case, because in *Horner v. Penn. Fruit Co.*,<sup>12</sup> the Superior Court of Pennsylvania dealt with an analogous situation to the one mentioned by the Missouri Court. The *Horner* case, was an action in trespass against the fruit company for injuries sustained by a customer. Small boys with wagons were in the habit of congregating on the sidewalk in front of the defendant's store. The plaintiff

<sup>6</sup> *Id.* at 90.

<sup>7</sup> 233 Mo. App. 173, 116 S.W. 2d 559 (1938).

<sup>8</sup> *Id.* at 190, 568.

<sup>9</sup> *Id.* at 191, 572.

<sup>10</sup> 353 Mo. 5, 181 S.W. 2d 659 (1944).

<sup>11</sup> *Id.* at 13, 662-663.

<sup>12</sup> 169 Pa. Super. 473, 82 A. 2d 313 (1951).

was knocked down by a small express wagon pulled by one of the boys on the sidewalk directly in front of the store. The court held that the case came within the rule of law in the RESTATEMENT OF TORTS,<sup>13</sup> in that appellant permitted this condition to continue; a condition which involved a reasonable probability that an accident was likely to occur and did occur.

It is interesting to note that the United States Court of Appeals, District of Columbia, quoted from its decision in *O'Dwyer v. Northern Market Co.*,<sup>14</sup> delivered 50 years earlier. The court explained its application to a set of modern day facts. In *Watford v. Evening Star Newspaper Co.*,<sup>15</sup> there was an action for injuries sustained by a minor spectator who was struck by a racer at a soap box derby which was held in a public street and sponsored by the newspaper. In determining the defendant's liability the court proclaimed:

The public character of the property does not alter the private character of the invitor's purpose or benefit. Nor does it detract in any way from the representation implicit in the issuance of the invitation—one which holds out to the public that the invitor has both the authority to use the property and the concomitant ability to discharge an invitor's duty of providing a reasonably safe place for invitees to watch the race.<sup>16</sup>

The court also pointed out, quoting *Frear v. Manchester Traction, Light & Power Co.*,<sup>17</sup> that:

Liability to invitees is not imposed merely because of ownership, but because of the invitation. If the invitation includes a representation of ownership or control, justice and reason require that the invitor may be taken at his word in that aspect of the case as well as in others. This he is bound to know when he extends the invitation. . . . The holding out to the public created a relation. The relation gave rise to a duty to use some care. The measure of that duty is the obligation imposed by law upon one whose position the party had assumed.<sup>18</sup>

The court indicates also in the case of *Watford v. Evening Star Newspaper Co.*, that appellee would have been charged with the same duty if the exhibition had been on private property.<sup>19</sup>

### *Cases Limiting Liability*

An early case in the District of Columbia, that of *Barnes v. District of Columbia*,<sup>20</sup> indicated that the District of Columbia's right of exclusive control over the streets and alleys carried with it the obligation to keep those free from obstruction. Indeed, another interesting aspect of the *O'Dwyer* case was its comments on this very problem. The corporation counsel contended that the

<sup>13</sup> RESTATEMENT, TORTS, § 318 (1934).

<sup>14</sup> 24 App. D.C. 81 (1904).

<sup>15</sup> 211 F. 2d 31 (D.C. Cir. 1954).

<sup>16</sup> *Id.* at 33, 34.

<sup>17</sup> 83 N.H. 64, 139 Atl. 86 (1927).

<sup>18</sup> 211 F. 2d 31, 34 (D.C. Cir. 1954).

<sup>19</sup> *Id.* at 33.

<sup>20</sup> 91 U.S. 540 (1875).

sole question respecting the District of Columbia was whether it was liable for failure to exercise its police power, pointing out further that a municipal corporation generally is not liable in damages for failure to enact an ordinance with reference to subjects in the municipal corporation jurisdiction, or failure to enforce such an enacted ordinance. Mr. Justice Morris, answering this contention said:

. . . there is no question whatever here of failure to make municipal ordinances or failure to enforce them, but of failure to perform a plain duty imposed upon it by the charter of its creation. . . . The duty in either case is upon the municipality to see that the sidewalks are in a reasonably safe condition for pedestrians to pass thereon. The neighborhood of a market, whether it has been established by express municipal ordinance or it has been permitted to continue by tacit acquiescence on the part of the municipality, is notice that more than usual care should be taken to keep the streets free from the encumbrance of vegetable or other matter which is a source of danger to those who have occasion to use the street. There is no difference in principle between a dangerous obstruction in the street resulting from a hole or excavation and an equally dangerous obstruction resulting from matter thereon which is liable to cause one to slip and to be injured.<sup>21</sup>

Mr. Justice Morris also pointed out that it made no difference whether the market was public or private, and he concluded by stating: ". . . we fail to see under what theory of the law the municipality is to be exempted from liability."<sup>22</sup>

The next question that arises regarding the liability of an abutting landowner is whether he owes any greater duty to an invitee once he is on the sidewalk than an invitor owes to any other traveler on the sidewalk. In *McGrath v. Misch*,<sup>23</sup> the Supreme Court of Rhode Island sustained a demurrer to a declaration which alleged a duty of a shopkeeper to keep the sidewalk in front of his shop safe for his customers by removing ice therefrom. The court commented that it was an "imaginary duty" and said:

The law imposes no such obligation. When the customer leaves the shop and slips upon the highway, the shopkeeper ceases to owe any duty to him in distinction from other travelers . . .<sup>24</sup>

A more recent case dealing with this same problem was *Norville v. Hub Furniture Co.*,<sup>25</sup> which involved an action by a person injured because of the alleged failure of the defendant to keep its store entrances and also public sidewalk in front of the store in safe condition for the ingress and egress of invitees. The trial court, in deciding the case, observed that where appellant's counsel expressly stated at the trial below that his client's claim was not based on the *snow law* of the District of Columbia, the client's claim would be judged according to principles of the common law. The court, quoting from Ruling Case Law, commented:

In the absence of a statutory provision to the contrary, the owner or occupant of property owes no duty to pedestrians to keep the sidewalk in front of it free from ice and snow coming thereon from natural causes . . . nor does the

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<sup>21</sup> 24 App. D.C. 81, 87 (1904).

<sup>22</sup> *Id.* at 88.

<sup>23</sup> 29 R.I. 49, 69 Atl. 8 (1908).

<sup>24</sup> *Ibid.*

<sup>25</sup> 32 F. 2d 420, (D.C. Cir. 1929).

storekeeper owe any greater duty in this regard to customers leaving the store than he owes to ordinary pedestrians.<sup>26</sup>

In the *Norville* case, the testimony indicated that there had been a severe snow storm the day before the accident; and that wind was blowing the snow from defendant's awnings and canopy on to sidewalk.<sup>27</sup>

A recent New Jersey case, *Brandt v. Great Atlantic & Pacific Tea Co.*,<sup>28</sup> involved an action for injuries due to a fall in the public street adjoining the side of defendant's building. The plaintiff maintained that defendant was negligent in the maintenance of a parking area adjacent to its store. The court said:

The fact that some of defendant's customers may have used that street for parking while shopping, and even to its knowledge, did not impose any duty upon defendant to maintain that area of the street in reasonable safe condition, nor did it create with such persons the relationship of invitees. Maintenance of the street was a municipal responsibility.<sup>29</sup>

Another recent New Jersey case, *Bango v. Carteret Lions Club*,<sup>30</sup> involved a suit by a public officer who was on duty at a public highway where there was a "Soap Box Derby" being "sponsored" by defendant. The plaintiff was hit by a contestant's vehicle which was out of control. The court, in affirming judgment of dismissal of the lower court, admitted that a person inducing others to come upon his premises has a duty to exercise reasonable care for their protection which applied also to dangers created by independent contractors. A person might also be liable for accidents taking place on public property if he asserted and maintained control thereof. The court felt in the case at bar that there was no evidence that the defendant controlled the race. And even if defendant did, no failure on the part of the police and fire departments to provide the precautions necessary was shown, and the defendant fully performed its duty upon persuading police and fire departments to take charge of safety arrangements.<sup>31</sup>

#### *Discussion of Principal Case*

It is important to compare the holding and reasoning of the *Viands* case, with that of the *Horner* and *Brandt* cases. The facts of the *Viands* and *Horner* cases are remarkably similar, only in the former case the injured party still had one foot in the doorway. The defenses offered in both cases were also similar. In both cases it was shown the boys were not agents of the store nor were they servants, and further that store owners had no control over actions of the boys at any time. The only recourse the store owner had was to call the police.

<sup>26</sup> *Id.* at 421, 13 R.C.L. 415 § 341.

<sup>27</sup> 32 F. 2d 420, (D.C. Cir. 1929). See also *Davis v. U.S.* 208 F. 2d 863 (D.C. Cir. 1953).

<sup>28</sup> 11 N.J. Super. 528, 78 A. 2d 598 (1951).

<sup>29</sup> *Id.* at 531, 599-600.

<sup>30</sup> 12 N.J. Super. 52, 79 Atl. 2d 57 (1951), *cert. denied*, 195, 7 N.J. 347, 81 A.2d 522 (1951).

<sup>31</sup> *Id.* at 56-57, 58-59.

In reaching their decision, the court in the *Viands* case cited the dictum of Mr. Justice Harlan found in the *Bennett* case.<sup>32</sup> The court then cited the *Cannon* case and commented that it had been specifically held that the duty to maintain approaches to an invitor's property is not to be determined by exact boundaries of premises.<sup>33</sup> The court then commented on the *Horner* case and the *Atterbury* case, pointing out that in the former case the Pennsylvania court had cited the RESTATEMENT OF TORTS, § 318.<sup>34</sup> The court also pointed out that in the *Atterbury* case it was held to be the duty of a store owner to warn of danger and also that failure to warn was as important as the placing of an obstruction.<sup>35</sup>

The Municipal Court of Appeals cited the RESTATEMENT OF TORTS, § 348,<sup>36</sup> in reference to liability of an invitor to protect invitee from the activities of third persons. The court would not allow appellee to rely on the *Norville* case because, in that case, the fall was occasioned by conditions caused by a severe snow, not from any default in appellee's conduct. The court in conclusion said:

A group of agile, scurrying and troublesome boys equipped with wagons were known to be assembled at the very front of the store. They were also known to have maneuvered themselves in front of appellee's customers intent on the privilege of hauling bundles. One of such wagons was actually maneuvered in such a position as to trip a customer before she had even left the store. We cannot agree with appellee that a store owner has no duty of care in such a situation.<sup>37</sup>

The Pennsylvania Court in the *Horner* case had extended the duty even further, however, for there the person injured was knocked down by a wagon on the sidewalk in front of store. The defendant brought out very pointedly the fact that he had called the police on more than one occasion, but the court felt that the store authorities knew boys were continually going past the limit (which it appeared the police had set, namely the curbstone) with the wagons; and that the store made no persistent effort to keep the activities of the boys within the limit or in an orderly fashion. The court further said that the case came within the RESTATEMENT, TORTS § 318.<sup>38</sup>

The court here conceded that failure to notice an obviously dangerous condition on the sidewalk makes one injured thereby contributorily negligent as a matter of law but this, the court pointed out, applied only to *stationary* obstructions, which was a question for the jury's determination.

On the other hand, we find in the *Brandt* case, the Superior Court of New Jersey, in upholding a motion for judgment for the defendant, held that although some of defendant's customers used the street for parking while shopping, this:

. . . did not impose any duty upon defendant to maintain that area of the

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<sup>32</sup> 107 A. 2d 118, 120 (1954), *cert. denied*.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Id.* at 120, RESTATEMENT, TORTS § 348 (1934).

street in reasonable safe condition, nor did it create with such persons the relationship of invitees. Maintenance of the street was a municipal responsibility.<sup>39</sup>

In this case the injury was caused by plaintiff's fall due to a defective sidewalk in front of defendant's store. The court in thwarting what appeared to be an attempt in the lower court by the plaintiff to set up an invitee-invitor relationship with the defendant, said:

Whether defendant's employees carried packages from the store for customers with cars parking in the public street . . . was immaterial to any issue in the case and questioning thereon was properly overruled when submitted to show that defendant knew of and encouraged such parking.<sup>40</sup>

The dictum of the Bennett case, namely that the owner or occupant of land is liable to invitee: ". . . for injuries occasioned by the unsafe condition of the land and its approaches, if such condition was known to him and not to them . . ." <sup>41</sup> is capable of only limited application when we include in "approaches" land not on the premises of invitor. Indeed the RESTATEMENT OF TORTS § 318, *Duty of Owner of Land or Chattels to Control Conduct of Licensee*, quoted by the Pennsylvania Court in the *Horner* case, makes no mention of any duty imposed upon a landowner for conditions existing on land which was not in his possession. It is interesting to note that the RESTATEMENT OF TORTS § 349<sup>42</sup> indicates a view seemingly contradictory to the Pennsylvania view. In illustration 2 of this section we find that if A, abutting property owner, sees B about to walk on a dangerous icy sidewalk in front of his premises, even though B is obviously ignorant of his danger and even though A might easily warn him, if A fails to warn he is not liable to B.

The *Johnson* case points to a clear indication of what an invitor's duty may be with respect to land which an invitor does not own. Quoting from the *Frear* case:

Liability to invitees is not imposed merely because of ownership but because of the invitation. If the invitation includes a representation of ownership or control, justice and reason require that the invitor may be taken at his word in that aspect of the case as well as in others. This he is bound to know when he extends the invitation . . .<sup>43</sup>

Thus the court felt that the holding out of an invitation to the public created a relation and this relation gave rise to a duty. It would seem to us that the quoted statement above would expound a sound view with respect to invitor's duty to control dangerous conditions, and the conduct of third parties threatening the safety of invitee. Indeed, such a view seems to be in general agreement with the holdings of the majority of cases we have considered, certainly it does not however seem to be in agreement with the *Horner* and the *Viands* cases.

<sup>37</sup> *Ibid.*

<sup>38</sup> 169 Pa. Super. 473, 475, 82 A 2d 313, 314 (1951) RESTATEMENT, TORTS § 318 (1934).

<sup>39</sup> 11 N.J. Super. 528, 531, 78 A. 2d 598, 599-600 (1951).

<sup>40</sup> *Id.* at 532, 600.

<sup>41</sup> 102 U.S. 577, 580 (1881).

<sup>42</sup> RESTATEMENT, TORTS § 349 (1934).

<sup>43</sup> 211 F. 2d 31, 34 (D.C. Cir. 1954), quoting from 83 N.H. 64, 69, 139 Atl. 86, 89-90 (1927).



A possible basis for the view expressed in the *Horner* case might be found in the theory underlying the Pennsylvania laws regarding the general relationship between the abutting landowner and municipality with respect to the duties of maintaining the sidewalks and clearing them of obstructions. A Pennsylvania statute provides that: ". . . municipal authorities may require sidewalks . . . to be laid, set and kept in repair . . ." by abutting landowners (P. L. 75, § 11, 1891).<sup>44</sup> Another Pennsylvania statute provides that:

The owner of the abutting property shall keep the sidewalk together with any portion of his property paved and used as a sidewalk or public walk, immediately in front of his property in good order and repair and, at all times, free and clear of all obstructions to safe and convenient passage. . . .<sup>45</sup>

*Briggs v. City of Philadelphia*,<sup>46</sup> declared that the: "Duty imposed on property owners to keep the sidewalk in repair is a police regulation which is non-delegable."<sup>47</sup> And in *Salemsky v. City of Witherton*,<sup>48</sup> it appears that a municipality is only secondarily liable for injuries occasioned by an icy or dangerous sidewalk.

The laws of the District of Columbia, however, provide no such basis because the municipal authorities build and repair the sidewalks with the abutting owner, at most, merely paying half the cost.<sup>49</sup> So far as the duty to clear the sidewalk of obstructions the case of *Smith v. District of Columbia*,<sup>50</sup> illustrates the lack of such a possible basis as exists in Pennsylvania. In the *Smith* case the court indicated that the law requiring abutting owners or occupants to remove snow from the sidewalk did not alter or add to the basic liability of the District Government with respect to safe condition of public streets.

We feel that clearly in the District of Columbia the primary duty of the municipality to keep its streets and sidewalks in repair and free from obstruction was recognized in the *O'Dwyer* case. This rule is in accord with the general common law rule expressed in *Caviness v. City of Vale*.<sup>51</sup>

There is no legal obligation resting on a city to build sidewalks in the first instance. It may leave its streets in a state of nature and not be responsible for having improved them, but if it chooses to improve them and thereby extends to the public an invitation to walk upon them, it must use reasonable diligence to keep them in repair. It cannot shift responsibility having once assumed it without giving persons who may be injured by defective walks some reasonable adequate remedy for injury.<sup>52</sup>

<sup>44</sup> PURDON'S PENNA. STATUTES ANNOTATED PERMANENT ED. tit 53 § 771.

<sup>45</sup> *Id.* § 19092-2304.

<sup>46</sup> 112 Pa. Super. 506, 170 Atl. 871 (1934), *reversed on other grounds*, 316 Pa. Super. 506, 170 Atl. 316 (1934).

<sup>47</sup> *Id.* at 59, 874.

<sup>48</sup> 375 Pa. 87, 99 A. 2d 570 (1953).

<sup>49</sup> D.C. CODE, tit. 7, §§ 606, 608 (1953).

<sup>50</sup> 189 F. 2d 671 (D.C. Cir. 1951).

<sup>51</sup> 86 Ore. 554, 169 Pac. 95 (1917).

<sup>52</sup> *Id.* at 564, 98. For a discussion of various jurisdictions views on this subject see 19 MCQUILLAN, MUNICIPAL CORPORATIONS §§ 54:01, 54:02, 54:08, 54:35, 54:36 (3d ed. 1950).

There is a possible extenuating circumstance in the *Viands* case, namely the fact that the injured party had one foot still within the store entrance. This might well lead to a lessening of the importance that the obstruction was placed by a stranger on the public sidewalk. A recognition that this is an exception if possible at all under the general rules of tort law would be incapable of any further extension and such an extension would certainly not be found in the *Horner* case.

#### *A Subsequent Case On Point*

Significantly, after the *Viands* decision a United States District Court was presented with a case in which a customer was suing for personal injuries which she suffered when she tripped and fell over a coaster wagon left in front of the exit door. In the case of *Great Atlantic and Pacific Tea Co.*,<sup>53</sup> the court was limited to Maryland precedents, which were substantially the same as those existing in the District of Columbia prior to the *Viands* decision. Applying the Maryland precedents to the unique problem the court directly rejected the plaintiff's contention that a storekeeper is required to keep the approaches to his store, including the pavement outside of it, free from obstructions. The presence of the boys on the sidewalk:

. . . was a proper subject for police action and did not require or indeed permit the defendant's agents to take the law into their own hands by driving the boys away over whom they had no control.<sup>54</sup>

The plaintiff here was denied recovery for the injury occurring on the sidewalk because she failed to show that the obstruction was caused by the fault of the owner, and because she further failed to prove that the particular wagon over which she tripped had been in front of the door any length of time, or that the employees had any knowledge of the wagon being there prior to or at the time of the accident. This decision appears to be in accord with the majority common law rules of tort liability.

#### *Conclusion*

A storekeeper's general invitation to the public to trade with him does not place him in the category of a newspaper roping off a public thoroughfare for a soap-box derby. In the latter case the public way has lost, temporarily, its public character; hence, there is an invitation plus actual or apparent ability to control the persons within that restricted area. In the former, the storekeeper's invitation is not of such a sweeping nature as to rob the sidewalk of its public character, because the municipality extends to the general public an invitation to use the sidewalk. Thus, the municipality has the primary obligation to keep the

<sup>53</sup> 128 F. Supp. 169 (1955).

<sup>54</sup> *Id.* at 173.

sidewalks in proper condition and thereby reserves to itself the right of control over the sidewalk.<sup>55</sup>

An abutting owner certainly has some extra benefits from the sidewalk, as it constitutes an approach to his premises, beyond the benefits enjoyed by the general public. This might well impose upon him the duty of calling the police to alert them of a nuisance which falls within his peculiar knowledge. He might even have the duty, depending upon the particular character of the nuisance, to give a general warning to invitees. But, the extension of a further duty by directing that he go out on the public sidewalk and there direct and control the activities of strangers is too severe a burden.<sup>56</sup> To do this is to give the storekeeper an extra duty for the performance of which he has not the legal authority, leaving him with legal liability when he fails to perform an impossible task.

URBAN A. LESTER

## *Defense of Insanity—A Weapon of Oppression*

In line with recent decisions concerned with *Insanity as a Defense to Criminal Punishability*<sup>1</sup> the Court of Appeals of the District of Columbia, once again, invites controversy and confusion; "poses serious complications to law enforcement in the District of Columbia;"<sup>2</sup> and "throws more mud into already muddy waters."<sup>3</sup> In the case *Taylor v. United States*,<sup>4</sup> the court, announcing through a majority opinion a judicial construction of the District of Columbia Doctor-Patient Privilege Statute<sup>5</sup> and the Federal Privilege Statute,<sup>6</sup> ruled that a defendant pleading insanity as a defense may invoke privilege to prevent testimony concern-

<sup>55</sup> For a discussion of the constitutionality of statutes which limit the municipality's liability for defects in sidewalks see Note, 83 A.L.R. 288 (1933).

<sup>56</sup> But see *Tushbani v. Greenfield's Inc.*, 308 Mich. 626, 14 N.W. 2d 520. In this case the court granted an injunction which required abutting restaurant proprietor to supervise people on a public sidewalk. The dissenting opinion, however, forcefully argues: "The police have exclusive charge of the matter of conduct of persons on the streets. It is erroneous to order a private party to assume any control of persons on the streets whatsoever." p. 631, 522. See Note, 2 A.L.R. 2d 437 (1948).

<sup>1</sup> *Gunther v. United States*, 215 F. 2d 493 (1952); *Durham v. United States*, 214 F. 2d 862 (1954).

<sup>2</sup> Petition for Rehearing *en banc*, page 2 (No. 12,034 1955)—United States Court of Appeals in *Taylor v. United States*. N.B. As of the date of this publication, petition for rehearing has not been granted.

<sup>3</sup> See: Letter of Dr. John R. Cavanagh to Gerard J. O'Brien, Assistant United States Attorney, which appears in the appendix of the Petition for Rehearing.

<sup>4</sup> Slip Opinion, United States Court of Appeals—No. 12034 (Mar. 14, 1955).

<sup>5</sup> Title 14, § 308 of the District of Columbia Code (1951).

<sup>6</sup> 18 U.S.C. § 4244.