1395 DUTY OF PUBLIC UTILITY: HIGHWAY OBSTRUCTIONS: NONENERGIZED FACILITIES

Public highways are constructed primarily for the use of the public in traveling upon them. In addition to this use, public utilities are permitted to construct within the highway right-of-way facilities, such as poles, wires, and necessary supporting devices and guy wires.

A safety statute provides that the original construction of such facilities must be done in such a manner that the public use of any highway, bridge, stream, or body of water will not thereby be obstructed or incommoded. The original construction must be of such design and the materials used must be of such quality as to withstand the outside forces or deterioration, which would be reasonably anticipated by a person exercising ordinary care.

After the facilities have been constructed, it is the duty of the public utility to exercise ordinary care to maintain the facilities in a reasonably safe state of repair in order to avoid obstructing or incommoding the public use of the highway. The utility has a further duty to exercise ordinary care to make inspections from time to time to learn of any defects that may cause an obstruction or incommode the public use of the highway. The frequency of such inspections is determined by what a person of ordinary intelligence and prudence would do in view of the type and usual life span of the materials used in the constructions and the likelihood or unlikelihood of damage by outside persons or forces.

If a highway obstruction by a utility facility is caused by a force occurrence, such as fire, storm, or vandalism, for which the company was not responsible, then you cannot find the utility negligent unless the utility had notice of the obstruction, or, unless this condition occurred such a length of time prior to the accident that the utility, in the exercise of ordinary care, ought to have discovered the obstruction and repaired it. It is the duty of a utility upon

receiving notice of damage to its facilities which causes, or is likely to cause, a highway obstruction to repair the facility as soon as is reasonable.

COMMENT

The instruction and comment were originally published in 1967. The comment was updated in 1980 and was reviewed without change in 1989.

Although Wis. Stat. § 182.017 provides that no utility facility "shall at any time obstruct or incommode. . .," the supreme court decided in Gray v. Wisconsin Tel. Co., 30 Wis.2d 237, 140 N.W.2d 203 (1966), that negligence per se was limited to the initial construction and not to inspection and maintenance.

As to the second paragraph regarding ordinary care in original construction, see 74 Am. Jur.2d Telecommunications § 38 (1974); 97 A.L.R.2d 664, 668 (1964); 86 C.J.S. Tel. & Tel., Radio & Television § 46 (1954).

As to the third paragraph, see Gray v. Wisconsin Tel. Co., supra; 86 C.J.S. Tel. & Tel., Radio & Television § 48 (1954); 97 A.L.R.2d 664, 671 (1964).

In Weiss v. Holman, 58 Wis.2d 608, 207 N.W.2d 660 (1973), the court noted that Wis. Stat. § 182.017(2) which describes the duty of a utility is supplemented by the definition of "highway" set forth in Wis. Stat. § 340.01(22).

> We conclude that the precise definition of "highway" found in the Vehicle Code applies to sec. 182.017(2), and defines the usage of "highway" therein. "Highway" includes the "roadway," which is that portion of the road usually used for vehicular travel, and the shoulder of such improved surface where one exists.

The court, in Weiss, also reviewed earlier Wisconsin case law on the issue of utility negligence and noted three legal principles:

> Three principles can thus be drawn from our Wisconsin decisions: First, public utilities as well as municipalities have been held liable in this state on a common-law theory of liability for the improper construction of poles and appurtenances which cause injury to sojourners. Second, while the early cases restricted recovery for injury to those who stayed within the confines of the traveled portion of the highway, the majority of cases since the last third of the 19th century have permitted recovery to sojourners who deviate from the highway proper. Third, although the cases involving nonutilities stress the foreseeability of the deviation rather than distance, the utility cases, especially the early ones, emphasize greatly the distance of the plaintiff's deviation from the highway. In one case, however, four feet was not regarded as too great.

For a case involving negligence of a power company in failing to adequately stabilize a utility pole located near excavation activity, see Jorgenson v. Northern State Power Co., 60 Wis.2d 29, 33, 208 N.W.2d 323 (1973).