Responsibility for Sidewalk Detectible Warning Surface and Handicap Ramps: At the intersection of Equity and the Law

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You have probably walked over them thousands of times and not even noticed them (unless you have slipped on one): those red, orange and sometimes black, ridged composite tiles stuck in the concrete at almost every sidewalk intersection ramp in Philadelphia and surrounding counties. These 2' by 4' tiles are known as "Detectible Warning Surfaces" ("DWS"), and are designed to aid the visually impaired detect when they have reached the corner of a sidewalk intersecting with a street.

Much like the ramp upon which they sit, the DWS is federally mandated by the Americans with Disabilities Act ("DWS") to be installed whenever construction plans warrant any rebuilding of the sidewalk and/or curb area. The handicap ramp is in place at every corner to assist individuals in wheelchairs to enter and exit the sidewalk. The ADA mandates the maximum slope of the handicap ramp to ensure that wheel chair bound individuals are able to easily enter and exit the sidewalk. That slope is 8.33%. 42 U.S.C.A. §12101 et seq. The DWS which is installed in the handicap ramp for the sight impaired is necessarily installed at the same slope. If installed at an excessive slope, not only is the purpose of making the sidewalk accessible to those in wheelchairs is frustrated, a pedestrian's ability to walk down the handicap ramp on the DWS can become slippery under certain circumstances.

In order to achieve the proper slope for the handicap ramp, it is often necessary to re-grade the sidewalk area surrounding the ramp. This can be problematic, if not completely impossible, in a City like Philadelphia that is over 300 years old. There are numerous sidewalks throughout the City that are adjacent to long-existing buildings and structures which would require relocation or substantial change to achieve the 8.33% slope required by the ADA. The ADA recognized these obstacles and provided a solution. The ADA requirements regarding slope of curb ramps are waivable if the 8.33% slope requirement is not "readily achievable" or "structurally practicable". 42 U.S.C.A. §§12181, 12183. If it is not readily achievable or structurally practicable, the 8.33% slope is considered "technically infeasible". The City must submit a Technically Infeasible Form

("TIF") to PennDOT for approval. Once the TIF is approved, the involved municipality and its contractors are allowed to install the handicap ramp and DWS at a slope greater than 8.33% given the existing conditions at the intersection.

Although new construction by private property owners does trigger the installation of DWS, the majority of the DWS have been installed by the City of Philadelphia as it contracts for the majority of the construction involving the handicap ramps. The City is usually paid by the State (PennDOT) to comply with the federally funded mandate. The City hires a general contractor who may or may not hire a subcontractor to perform the installation of the DWS during the project. All of the work is usually performed without any input from the owner of the property adjacent to the sidewalk where the construction is being performed.

So, who is responsible when a plaintiff slips and falls on the DWS? In most cases involving Plaintiffs slipping on DWS' installed in handicap ramps, Plaintiff sues the City, any contractor involved in the installation of that portion of the sidewalk, the manufacturer of the DWS, and the adjacent property owner. Currently, the law in Pennsylvania is that the adjacent property owner is primarily responsible for the condition of their sidewalk and, under certain conditions, the City can be secondarily liable. 42 Pa.C.S.A. §8541. Much like any City rebuilt sidewalk, the property owner has no involvement with the design or installation of the handicap ramp/DWS portion of the sidewalk.

The City's first defense is that they are only secondarily liable if all the right conditions are met and second, the ADA requirements are waived when the 8.33% slope was not "readily achievable", or "structurally practicable" and, therefore, not technically feasible. Ordinarily the City is the driving force behind the project, provides the engineering drawings for installing the handicap ramp and DWS, approves the work, pays the contractor(s), and is in turn paid by the PennDOT.

As a result of the City's involvement and control, the contractor can often employ the Government Contractor Defense. The Government Contractor Defense insulates a contractor from liability to third parties for work performed that complies with a government entities' plans and specifications. The evidence in the case must establish two things: 1. that the contractor complied with the technical specifications of the government contract and 2. the contractor was not negligent in completing the work. *Ference v. Booth &*

Flinn Co., 88 A.2d 413 (Pa. 1952); *Valley Forge Gardens, Inc. v. James D. Morrissey, Inc*., 123 A.2d 888 (Pa. 1956). The contractor must argue that they complied with the City's technical specifications for the handicap ramp/DWS, but that it was impossible to install it at 8.33% slope given the existing conditions. The contractor is not authorized by contract to demolish existing structures and repave entire sidewalks in order to achieve the 8.33% slope. The contractor must prove the DWS was not installed negligently but installed at the best possible slope that could be achieved given the existing conditions. Lastly, it must prove the City approved the work and paid the contractor.

Current Pennsylvania law provides little guidance on apportionment of liability in these cases, which will only grow in number as installation of the DWS' continue throughout the City and Commonwealth, especially as the need for maintenance, repair and replacement arises. Currently, no cases have been tried or at least reported which would provide precedent on this subject. The percentages of liability vary widely depending upon the parties involved, contractual issues and business relationships.

Aside from the injured Plaintiff, perhaps the second "victim" is the property owner, who must spend time defending themselves, as well as face legal fees and/or increased insurance premiums as a result of the City installing a DWS on their sidewalk without any discussion, contribution, or right to remove the non-conforming DWS and handicap ramp. Ordinarily, the property owner played no role in the creation of the alleged dangerous or defective condition. Unless the property owner undertakes construction which triggers the ADA requirement, and the property owner maintains control over the installation of the DWS and handicap ramp, the property owner should not be liable in cases involving a DWS installed by the City which triggered the ADA requirement for the installation.

The contractor should also arguably be freed from liability in these cases. The contractor should only face liability when the DWS was actually installed in a defective or negligent manner, especially when the 8.33% slope was impossible to meet. In the real world, the contractor can only do what the City instructed and paid them to do. If the City has not instructed the contractor to dig up existing structures and repave an entire sidewalk or street to achieve a certain slope, they should not be expected to incur liability later for following the City's plans, specifications and/or instructions. When the 8.33% slope cannot be achieved and the City instructs the contractor to continue working and

install the ramp at a higher slope it is the City's responsibility to obtain the TIF waiver. Exposing the contractor to liability for following the City's instructions is illogical and unfair. It also frustrates the purpose behind the Government Contractor Defense.

Perhaps the best solution, in view of current legal precedent, is for Philadelphia or Pennsylvania to adopt a similar premises liability law as that of New York City. In New York City, although liability for a defective sidewalk lies primarily with the adjacent property owner, liability for the pedestrian/handicap ramps remains with the City. Administrative Code of City of New York section 7-210; *Ortiz v. City of New York*, 67 A.D.3d 21 (N.Y. App. Div. 2009), *revd. on other grounds* 14 N.Y.3d 779. The majority of the DWS' are being installed under contract at the direction of the City. The City controls the design, the contractor, the work, the approval of the work, and the ultimate payment when work is complete. The City has the control, and therefore, should accept the liability. The buck should stop at the City when it is discovered the DWS cannot be installed at a slope lower than 8.33%; the City must make the determination of what to do in that instance and face whatever future consequences may result from that determination. If no legislation is passed, the City should contractually hold contractors harmless for installation of a non-compliant ramp or DWS at the City's direction regardless of whether or not the City obtains a Technically Infeasible waiver from PennDOT.

Brief Bios:

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