PREMISES LIABILITY

Evidence and Experts

EDWARD STEINBRECHER, ESQ.
Encino, California

Introduction

Premises Liability cases occur under a wide variety of circumstances. Most often these cases are tried on the principle of negligence and under the BAJI Jury Instructions contained in the 8.00 section. Premises liability cases have a better than fifty-fifty chance of producing a plaintiff's verdict, and in the hands of an expert trial lawyer the percentage would be above eighty percent. Built into the premises liability case are several factors that have jury appeal, including identification with the victim and the duty on the part of the premises' owner to practice "accident prevention." Another important anchor is the fact that "people do not fall for no reason." This article will explore the types of evidence that should be assembled and various uses that can be made of experts to sell your case to the jury.

Elements of a Premises Liability Cause of Action

Plaintiff must prove that a defendant is the owner, occupier or lessor of the property. This becomes a major issue in many cases where the property is leased on

a triple net basis and the owner is out of possession and control which are the key elements. The evidence to fully explore this issue consists of the lease or agreement which might show that the defendant had an opportunity to take back possession at any time during the lease, or to perform an inspection or manage any areas in common to the lessee or user. If the property is rented or leased and the injury causing mechanism consists of a latent defect, the owner or lessor could nonetheless be liable if the dangerous condition existed at the time of the lease. The key is that the owner or lessor had an obligation to do what was reasonable under the circumstances and failed to perform in accordance with their duty.

Defendant's Negligence in the Use, Maintenance and Management of the Property

There are two related items of proof that need to be established. They include a dangerous condition, either natural or artificial, and a condition that presents an unreasonable risk of harm. Proof of the dangerous condition itself can be relatively straight-forward where the plaintiff knows what caused him to fall, or it can be established by circumstantial evidence. Usually the plaintiff's testimony establishes what the dangerous condition was or it can be established by a witness to the accident or a bystander who came to the scene shortly thereafter. Physical evidence may show what the dangerous condition itself was or it may be shown by inference that a dangerous condition presented an unreasonable risk of harm. It is important to gather

testimony regarding the general characteristics of the surface where the fall occurred. A description such as the floor was wet, oily, slick, sticky, muddy, etc., establishes a dangerous condition. Evidence regarding the plaintiff's clothing that it was soiled, wet, spotted or caked with wax is circumstantial evidence of the dangerous condition. Evidence of markings at the scene such as skid marks or shoe marks also provide circumstantial evidence of a dangerous condition. Evidence that a condition existed before or after the accident provides circumstantial evidence of the dangerous condition. For example, if a hole or indentation was present a few days before or after the accident, it would provide circumstantial evidence of a dangerous condition.

Always look for evidence of prior falls or accidents in the same area or an area that is substantially similar. Prior accidents and falls constitute dynamite proof that a dangerous condition did exist which created an unreasonable risk of harm.

Whether or not a dangerous condition presents an unreasonable risk of harm is usually a matter of discussion by the defense interests. They will claim that the dangerous condition was open and obvious and should have been avoided by the plaintiff. Evidence needs to be gathered regarding the ambient circumstances of the fall. Certain dangerous conditions will be more or less dangerous depending upon the lighting, the displays, crowds and other distractions. The degree of the alleged dangerous condition will make a difference as to whether that condition constituted an unreasonable risk of harm. Many premises liability cases are dependent upon a hole, depression, worn surfaces, defective steps, unevenness, etc. These evidentiary items

need to be appropriately documented with photographs and measurements. Where the surface appears relatively normal in the area where the fall occurs, nonetheless, additional factors may make the condition dangerous. There may be a change of floor level where the floor surfaces are the same color. Evidence of a level floor must be documented, as does the ambient circumstances including the lighting, vision obstructions, eye catching displays and anticipated activity.

The flooring material itself is sometimes the dangerous condition that caused the fall. Different flooring surfaces provide different levels of traction. When certain surfaces such as linoleum and terrazzo are involved it's wise to look for over waxing, improper waxing or an improper application. The presence of water on certain floor surfaces can create a dangerous condition. Carpeting can constitute a dangerous condition where the carpeting is loose, uplifted, worn, or improperly installed.

Other evidence of a dangerous condition presenting an unreasonable risk of harm can be shown by a violation of a standard of care by the defendant in the management of the premises. For example, on a rainy day various people will track water into a store. The standard of care may require a mat. Without a mat there is at least an inference of an unreasonable risk of harm.

The key to presenting the dangerous condition concept is to explore all of the evidence, direct and circumstantial, and its inferences. The key to presenting the owners duty to avoid exposing persons to an unreasonable risk of harm is "accident prevention." Thus, a premises liability case is nothing more than the law imposing a

duty on the premises owner to practice "accident prevention" to avoid injury. The question of whether or not a defendant practiced "accident prevention" will relate to the dangerous condition, as well as, whether the defendant is charged with notice, either actual or constructive, of the dangerous condition.

Proof of Notice of a Condition Presenting an Unreasonable Risk of Harm

The defense will try to posture its case so that notice becomes a major obstacle to plaintiff's recovery. BAJI §8.20 requires proof of actual knowledge or constructive knowledge in order to hold a premises owner liable for a dangerous condition. Most often the plaintiff is confronted with an absence of direct evidence as to how long the condition existed. Resort must be made to circumstantial evidence such as the length of time the condition most likely existed, the general condition of the area, prior falls and injuries, subsequent falls and injuries, or a problem of a recurring nature. The length of time a condition existed can be determined by the physical condition of the offending substance on the floor, as to whether it has turned to a different color, rotted, thawed, is dirty, wilted, sticky, etc. These observations provide circumstantial evidence that the condition existed long enough for the defendant to have found it if it had conducted an inspection. The fact that a defendant does not conduct an inspection of an area prior to an accident is also evidence regarding whether or not the defendant could have discovered the dangerous condition. Notice can also be inferred by defendant's employees working in and around the area of the fall.

Other factors showing circumstantial notice to the defendant include the size and nature of the premises, the volume of use, defendant's number of employees, the nature and location of the danger, and the length of time the danger existed. Sometimes the nature of the business itself provides constructive notice by virtue of the manner of display which creates a likelihood of a substance on the floor. This would be true in a produce area where fruits and vegetables are piled high without any prebagging. Evidence of the type and volume of merchandise, the type of displays, the floor space, and foot traffic presents evidence that the dangerous condition is continuous and that the defendant knew or should have known of it.

In cases where the defendants or their agents created the dangerous condition, notice is presumed. Likewise if an employee of the defendant is aware of a dangerous condition notice is imputed to the employer.

The Dangerous Condition Must Be a Legal Cause Of The Injury

Usually plaintiff's testimony is enough to establish causation. Sometimes a plaintiff does not know what caused the fall. It can be proved by circumstantial evidence, for example, prior falls in the same area on a slippery surface which creates the inference that the plaintiff's fall was caused by a slippery surface. Evidence of slipperiness itself creates the inference that it caused the fall. Some conditions speak for themselves in terms of causation, such as oil, grease, liquid, produce, ice, etc.

Key Evidentiary Themes To The Jury

1. Defendant has the duty to practice "accident prevention." Defendant has the best opportunity to avoid a premises accident because of the number of hours that it has been in possession of the premises. It has the best opportunity to inspect, find, discover and remedy any dangerous condition. The accident would not have happened if "accident prevention" had been practiced. Defendant has managers, supervisors, employees, policy manuals, procedures, equipment, signs, warnings, and independent contractors to remedy the dangerous condition. All these factors should be contrasted with the plaintiff who has no opportunity to practice accident prevention.

2. The plaintiff has the right to assume that the premises are safe and that the defendant is paying attention to the condition of the premises.

3. The dangerous condition is not open and obvious as defendant claims. If it was, the defendant had a much better opportunity to discover it.

4. The defendant has a duty to inspect, make the premises safe and to warn of the danger. The plaintiff has no such duty.

5. Plaintiff has a right to assume that those who own and operate the premises have taken proper precautions for safety and are exercising reasonable care. The plaintiff is not required to make inspections or discover defects.

6. Even if a condition is somewhat obvious to the plaintiff, nonetheless, the "consequences" of encountering the condition were not obvious to the plaintiff.

7. A warning is never enough if the defendant could do better by remedying

the dangerous condition..

8. People do not fall for no reason.

Use of Experts in Premises Liability Cases

An expert witness can be used to present all of the elements of the plaintiff's burden of proof and to diffuse defenses. In order for an expert to be of maximum value to the plaintiff's trial lawyer, it is important that the right evidence be obtained initially. In a slip and fall case, it is important to get the shoes that the plaintiff was wearing as well as the clothes. An examination by the expert can show a build up of wax or the nature of the substance causing the fall. It is important to take good photographs of the scene or the defective condition that the expert can use for the basis of his opinion. Photographs should be of the overall scene as well as close ups. There should be measurements or a measuring device used where possible. Witness statements need to be obtained. Basic information such as the time and place the fall occurred, the type of surface and adjacent surfaces need to be determined. If there is a design or construction defect, the year of construction must be obtained so that the expert can focus in on the appropriate building code by date. Where there is an issue of possession and control, leases, agreements and contracts need to be obtained. During discovery it is important to obtain the store policy manual, any written safety memos, the sweep sheets, evidence of prior and subsequent similar events. These are the types of material, in general, that an expert will need to look at.

An expert should examine the scene as soon as possible before changes occur. Sometimes the plaintiff does not know what the cause of the fall is and it takes an expert to decipher the injury causing potential of certain conditions. An expert witness can document the slipperiness of surfaces where the plaintiff may feel uncertain about what caused the fall. The expert can document secondary factors such as the absence of lighting, handrails, variations in the run and risers of steps, the significance of floor materials, ramps and slopes. The expert has to look at all of these factors. The expert may employ certain types of tests such as a coefficient of friction test to measure the frictional properties of the floor surface. The expert can test ambient lighting to see if it complies with the building codes. The lighting may not in and of itself be dangerous, but the failure to illuminate may add to the dangerous condition and will provide a reasonable excuse for the plaintiff not seeing it. The expert should be able to ferret out deceptive conditions such as uneven surfaces. The expert is also needed to explain to the jury how human beings behave in certain environments such as a market. The jury needs to know how the sophisticated displays draw the attention of a plaintiff away from the floor. The jury needs to know about the mechanics of human locomotion and how the feet interact with the ground in a very fragile relationship.

The expert witness can testify in regard to the defendant's policies and procedures as to whether or not they are adequate or inadequate. The fact that the defendant has a policy does not mean that it is a good policy. This is particularly true

in the area of warnings. The type of warning the defendant used may be totally inadequate taking into account all the other factors. The expert may testify in regard to more productive warnings or the fact that a warning was inadequate when compared to the risk of injury. The expert can also testify that the conduct of the defendant whether subject to a policy or not, was inadequate when compared to the standard that exists in the industry. For example, many markets use mats at doorways on rainy days, in the produce department for the purpose of safeguarding the public. The admissibility of this type of evidence will depend on the strength of the expert, his knowledge in the field and the judge.

Certainly the expert can help to sell the highlights of the case involving a dangerous condition. He can explain the significance of prior accidents, which provide evidence of defect, dangerous condition, negligence, notice and causation. Experts can be used to diffuse defense contentions such as the claimed absence of a notice or a condition being open and obvious. The expert can testify to any opinion for which he has skill, knowledge or experience providing there is a proper foundation based upon his knowledge or hypothetical questions as long as it will assist the trier of fact. An expert witness in a premises liability case should resist getting overly technical or scientific with a jury. Whether warning signs or devices are adequate, or whether there is proper construction, or whether the frequency of inspections was reasonable are areas that an expert can be very helpful with.

Conclusion

Premises liability cases start with gathering and documenting the evidence to be used with the expert witness. These cases can produce satisfying results if handled competently.