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PREMISES LIABILITY

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One of the most common inquiries made to personal injury attorneys concerns the liability of property owners to people who sustain an injury when they are on the premises.

A common misconception is that the property owner, especially if they are conducting a business, are automatically responsible for the injured person's injury and medical bills if they are injured on the premises.

Many property owners, including both commercial establishments and private homeowners or renters, carry liability insurance that may provide for "premises medical payments" coverage. This is a limited amount of insurance, usually for $5,000.00 or less, that will pay for the injured person's medical bills within the coverage limits. Such coverage is paid without regard to fault or legal liability, and will not cover damages for loss of earnings or non-economic damages (aka "pain and suffering" damages) that the injured person may also be claiming.

Property owners are not required by law to carry liability insurance, much less premises medical payment coverage.

In order to hold a property owner legally responsible for all of the injuries sustained by a visitor or invitee to the premises, the injured claimant has the burden of proof to establish the following: **(1)** that there was a dangerous condition of the premises; **(2)** that the condition was a cause of injury to the claimant; **(3)** that the property owner had actual or constructive notice of the condition, but failed to take reasonable steps to correct it; and **(4)** the nature and extent of the injury.

Under what is called the "subsequent repair doctrine", if the property owner repairs or corrects the condition in response to the injury incident, then evidence of the repair is ordinarily not admissible as evidence to show that the condition was dangerous or that the owner knew about it. The subsequent repair doctrine is a product of public policy intended to provide property owners an incentive to repair a dangerous condition without it being used against them as evidence by an injured claimant. Otherwise, the owner

would have less of an incentive to effectuate the repair and protect the public at large.

In order to understand the significance of these elements in further detail, it is important to classify the types of dangerous conditions or activities on the premises that the injury victim may encounter:

1. <u>The Foreign Substance Case:</u> This is something on a floor that does not belong, and is probably the source of most slip/trip and fall incidents.

Especially in commercial premises, there are any number of foreign substances that will eventually end up on the floor and present a hazard, be it water, pebbles, produce, loose merchandise, rubbish, et cetera.

Sometimes the foreign substance is supposed to be on the floor (i.e., a floor mat or moisture on a floor after it is mopped), but it isn't immediately noticeable due to lack of a warning sign or cone, or it is improperly positioned so as to pose a hazard to visitors on the premises.

While most reasonable minds would concur that such unforseen foreign objects on a floor are potentially dangerous conditions of the premises, these are generally the most difficult type of premises cases for a claimant to prevail on.

This is because of the requirement of "notice". The plaintiff (and not the defendant) has the burden of proof to show by a preponderance of the evidence (i.e., it is more likely than not) that the property owner either knew the substance was there, or should have known that the substance was there under all of the circumstances, but that they still failed to take reasonable steps to either correct or warn of the condition.

Actual notice can be difficult to prove. If the foreign substance is produced by something under the direct control of the owner, like water leaking from a store cooler or an incomplete mopping job by a store employee who has failed to set up warning signs, then proving actual notice or knowledge of the condition proves far easier.

Without actual notice, the hapless customer can only argue constructive notice.

This may be done by proving that proper or more frequent inspections (known as "sweep schedules", and which a prudent property owner will have both a written policy and maintain records thereon) would have timely located the substance so that it could be cleaned up, or by the very nature of the substance itself (i.e., large amounts of water puddling at an entrance door on a rainy day).

Notice issues provide the claimant the most daunting obstacle in many premises liability cases and

often constitute the property owner's first line of defense.

2. <u>The Construction Defect Case:</u> Many slip/trip and fall incidents commonly occur on door thresholds, stairs, porches, ramps, curbs, and other elevated surfaces.

All of these devices and structural components are subject to regulated standards under the California Building Code (CBC) for height, width, and other structural dimensions and components.

If the structure in question is not up to code and is the cause of the person's injury, then actual notice does not usually become an issue as the property owner is already under a legal duty to ensure that their property meets all legally required standards for safety in construction.

Failure to abide by a standardized safety regulation can constitute "negligence per se", which will create a rebuttable presumption of negligence against the property owner that will put them to the burden of trying to explain away.

Moreover, lack of compliance with the CBC or other construction industry accepted standards may indicate liability not just on the property owner, but also as to the developer and/or contractor who created and built the structure to begin with.

3. <u>The Negligent Employee Case:</u> An employer is always legally responsible for an injury caused to another person due to the negligence of the employer's employee. Accordingly, if the employee does not exercise due care in the scope of their employment and thereby causes injury to a person on the premises, then employer/property owner may be liable.

The negligence of the employee need not be directly solely at the particular patron who is injured, nor need the actual employee necessarily be identified. In other words, any maintenance or inspection of the premises by an employee that is inadequate and thereby exposes a patron to injury is a potential liability situation for the employer and/or property owner.

The one caveat to this is that the injury must arise out of an activity that is a normal or regular feature of the employee's job duties. For example, if an employee were to assault a customer on the premises, such an intentional act would not be part of the employee's regular job duties, unless the employee were hired as a bouncer or security officer such that the use of force was contemplated and the degree of force used was unjustified.

An intentional act by an employee against a patron will, therefore, generally not create liability against the employer unless the injured person could prove that the employer knew or should have known that the employee was likely to do something like that.

Generally speaking, the property owner cannot delegate maintenance or inspection duties to an outside service or independent contractor (i.e., the janitorial service or contract security company) and thereby avoid responsibility. The law imposes a non-delegable duty on a property owner to inspect and maintain their own business premises.

The Element of Causation: This is the connecting link between the occurrence of the fall and the creation of the injury.

The burden of proof is on the injured claimant to prove that any resulting injury was, in fact, caused by the negligent condition of the premises or the negligent employee of the property owner.

This can be complicated when the patron suffers from a prior history of similar injuries or physical conditions, or where a formerly benign or asymptomatic condition is triggered by the fall into becoming an acute or chronic condition.

Clients should always be candid with their attorney regarding their health and injury history when they are making a claim. There are usually reasonable explanations to put a past problem into proper perspective, but when the past problem is concealed or forgotten by the client, then later attempts at explanation may be perceived as less than forthright.

The property owner is not relieved from liability for the injury just because the injured party was more prone to injury due to their pre-existing condition. The old legal adage is that "the defendant takes the plaintiff as they find them".

The Element of Damages: Damages fall into three distinct categories:

1. Economic Damages: These are damages that are capable of arithmetical ascertainment, such as past or projected medical expenses, and past or projected loss of wages or loss of earning capacity.

The plaintiff has the duty to mitigate their losses and to prove that any medical expenses are both "reasonable" and "necessary". The defendant is not automatically responsible for every type of healthcare provider expense that the plaintiff may incur.

Under the current state of the law, if the plaintiff has medical insurance which is applied to the bill and the provider accepts it as payment in full, then the plaintiff cannot claim more in medical expense damages than this lesser accepted amount. If the plaintiff is a Medicare or Medi-Cal beneficiary and the provider charges are covered by those plans, then given the low amount of benefits normally paid out by those agencies, the plaintiff's actual medical expense damages that they can claim may be relatively small, even if there was a serious injury being treated.

Defendants and their insurance carriers will routinely contend that the plaintiff's medical treatment and/or incurred bills is unreasonable or unnecessary, that the medical charges are inflated or do not relate to the claimed injury, or that the loss of earnings is speculative or related to factors other than the claimed injury.

Claims for loss of earnings are easier to justify when they can be documented in writing by the plaintiff's employer. Loss of earnings claims where the plaintiff is self-employed or has a spotty earning history can be more problematic to prove and justify.

2. <u>Non-economic Damages:</u> These are damages for the human or subjective component of an injury, such as pain, suffering, inconvenience, and/or mental and emotional distress.

There is no formula to calculate such a loss, other than the jury instruction to the trier of fact that such damages are to be reasonable and not be influenced by passion or prejudice.

Unless the injury is superficial, the amount of non-economic damages is best calculated by an experienced personal injury attorney, taking into account the liability probabilities of the case, the age and appearance of the plaintiff, the amount of the reasonable economic damages, the nature of the injury, and the attorney's experience with similar cases and with what a jury is likely to do.

3. Punitive Damages: These are damages imposed to punish a defendant for "malice", "oppression" or "fraud". Each of these specific words has its own legal definition.

To prove punitive damages, the plaintiff must prove by "clear and convincing" evidence, and not just a preponderance of the evidence, that the defendant engaged in "despicable conduct" before these type of damages can be awarded.

In the routine "garden variety" premises liability case, there is not going to be a legal basis to seek

punitive damages, and furthermore, when they are sought, they are rarely awarded by a trier of fact.

The Issue of Comparative Fault: It is a rare slip/trip and fall case wherein the defendant will not also claim that if the plaintiff had been observant, that they would have readily observed the condition that caused their fall and they could have avoided being hurt if they had been more careful. This is sometimes called the "open and obvious" defense.

The plaintiff cannot claim that percentage of their damages that is due to their fault. Accordingly, if a case went to trial and the trier of fact found that the plaintiff was 50% at fault for their injury, then the plaintiff could only receive 50% of their damages.

Most premises liability claims need to take the issue of comparative fault into consideration, depending upon the individual circumstances of the case. As contrasted with a motor vehicle collision claim wherein the defendant driver may be unquestionably 100% at fault because they ran a red light or rear-ended the plaintiff's vehicle, resolution of a slip/trip and fall case, short of a full-blown trial, may require a realistic recognition of the prospects of losing the case on liability if a trial were to be had.

Probably 50% or more of all slip/trip and fall cases that go to a trial wherein liability is contested end up with a verdict for the defendant.

Conclusion: Premises liability cases present the most daunting bodily injury cases that a claimant can find themselves in. The assistance of an experienced and capable attorney is the most effective method to resolve the matter.

Inherent in every such claim is the standard defense line: "If you had been watching where you were walking, you would not have fallen."

Don't be a victim twice.