

Evaluating the Premises Liability Case

Thomas D. Penfield
Casey, Gerry, Schenk, Francavilla, Blatt, & Penfield, LLP
110 Laurel Street
San Diego, CA 92101
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Premises cases can arise in many contexts. Here we will focus on slip/trip and fall or inadequate security. Premises cases may also arise in many other contexts as well, e.g., dog bite, construction site, etc., and many of these same concepts will apply. Premises cases tend to be shunned by plaintiff lawyers. We do a lot of them because other people don't want to. I always tell clients that while they may have heard that 90-95% of civil cases settle, premises cases are the types of cases that are in the 5-10% that don't settle. In addition to the usual battle over liability, it usually has a colorable defense of comparative fault.

First, let's address the most common premises case, the Slip (or Trip) and Fall Case. Or, as Plaintiff attorneys prefer to call them, the dangerous premises case. Then, we will turn to its difficult sibling, the inadequate security case.

Slip/Trip and Fall Cases: Real problems for Real People

What is the nature of the problem? There are about 11 million falls per year, resulting in about 10-16,000 deaths, depending upon whether you look to the Center for Disease Control, the National Safety Council or Bureau of Labor statistics. No matter whose statistics you use, it's huge. For people 65 or older, falls are the leading cause of injury related death. More than one third of adults 65 or older fall each year in the U.S.

A physical therapist recently told me studies show that of those people whose fall leads to a hospital admission, 50% will never live alone again. Of the cohort who will need assisted living, 50% will be dead within one year. About 60-70% of falls are due to environmental hazards, e.g. poor design, maintenance, or contamination.

Anecdotally, I have only had two male clients in slip and fall cases, the rest have been women. The Center for Disease Control reports that women are 67% more likely than men to have a nonfatal fall injury (CDC 2005). Falls are the leading cause of non-fatal injuries for all children ages 0 to 19.

With statistics like this, what could go wrong for the plaintiff?

There is a bias inherent in premises cases. Conventional wisdom holds that the elderly and overweight people fall all of the time and all on their own. So those cases are challenging just because of the bias present. But the conventional wisdom also believes that the property owner is an insurer of the safety of individuals on their property. It is interesting that both perceptions can exist simultaneously.

I take the same approach as the experts do. Safety experts say that:

1. The first priority is to design safety into the system. Always look for this aspect, because if it is there, the case is more difficult to prosecute.

2. If safety cannot be designed in, then the second choice is to remove people from the hazard, e.g. the proprietor creates a barrier or guides the public around it.

3. If that cannot be done, then the proprietor needs to guard the public from the harm, warn them of the hazard, and train its employees to respond to the hazard.

The third choice is the easiest to criticize.

You can overcome jury bias by empowering the jury to do something important---to protect our parents, the elderly and children. Premises litigation is important because it has the power to fix dangerous conditions, as we are all but one step away from being one of the statistics. It encourages safety standards from which everyone benefits. From a plaintiff perspective, the victim can be presented as a concerned citizen willing to come forward and who deserves the jurors' help.

Many proprietors are reactive, rather than proactive. Too many proprietors fail to do anything until someone is hurt. They rely on the lack of previous incidents. They argue: How can this be a dangerous condition when so many people have passed through safely without incident? But most of these protesters have failed to put into place a reliable procedure for systematically recording whether previous incidents did occur. They are left anecdotally arguing "I don't remember anyone being hurt before." They are vulnerable when the argument is made that when a swimming pool is built down at the neighborhood park, they put a fence up right away to prevent kids from drowning. We don't wait until one child drowns before taking reasonable steps to protect from obvious danger.

Screening Cases

The screening of a case usually happens before formal discovery so investigation into the Defendant's knowledge and background is limited. However, the law allows for informal inspection if the site is open to the public.

The first general question to look at is foreseeability and the "gut check." What's the first reaction of the jury going to be when they see the condition? Are there witnesses? Are there photos of the condition? Will the absence of photos make the case impossible absent good witnesses? Did the business or owner create the condition or are they on constructive notice? Are there previous incidents? Has the condition been repaired?

Who is the victim? Personality is important. Avoid obsessive clients who are filled with anger

and whiners and complainers. Is the victim attractive, articulate, a good historian? In short, is the victim someone the jury will like and want to help? Because these cases are more likely to proceed to a jury trial, the plaintiff must be credible and trustworthy.

The client also must know why they fell, the mechanism of their injury. You may be able to make the case without it, but it is more difficult.

Are they elderly or obese? If so, the case will have to undergo closer scrutiny. Was it a place where you would foresee the elderly and infirm, e.g. geriatric facility? If so, then you may want to undertake the case.

Conduct of the victim. This really ties into foreseeability. Was the conduct expected? If it is expected then it is foreseeable, and the more expected, the stronger the case. Even if the conduct is unusual, it still may be foreseeable. When you get to the unexpected, however, it needs to be subjected to closer scrutiny.

Condition: If the condition is intrinsic to the structure itself, it is an easier case. The defect should have been noticed and corrected. Does the condition of the premises violate industry standards, codes, rules, or the proprietor's internal rules? Will you be able to get a *Negligence per se* instruction? Is it slippery by design or by contamination? What is the cleanliness of the premises? Are there maintenance issues? Is the Coefficient of Friction .5 or greater?

What is the cost or ease of correction? The problem for property owners is that maintenance is a cost that takes away from their profits. They have to balance cost versus safety. If it's a relatively inexpensive fix, has the proprietor made it easy to argue they put "profits over safety?"

What is the surface? Depending upon the surface, there may be issues of illumination and visibility. All three issues interplay with each other as the darker the area involved, the more need there may be for illumination, and to increase visibility.

How is the space designed? Sometimes the space is designed so that it creates a dangerous condition. For instance, water on a white tile floor may be invisible to the user. Or the tile pattern may create an illusion that disguises the step-down.

Did the Property owner fall back on the weakest of the responses to a dangerous condition, e.g., warnings? If he did, was it a properly constructed warning? For instance, a proper warning needs to attract attention (e.g. yellow, a signal word, placed appropriately), and it has to be in an appropriate area to give the observer time to understand and react to its message by taking corrective actions.

The warning should describe the problem, for instance, a wet surface. It should also describe the consequences of failure to heed its warning, for instance, have the symbol of a stick figure slipping. It should instruct on how to avoid the hazard.

Are there issues with the victim's behavior? For instance, what shoes was the victim wearing? Was the victim paying attention? Were they wearing the glasses they need to be able to see properly? Do they have health problems? Are they taking medications? Were they in a hurry? Or were they carrying items? These will lead you into an analysis of whether there is comparative fault.

Was there an immediate complaint? Did the person report the incident to someone at the site? Or did they report it shortly thereafter? Is there continuous medical care since the incident? Is there a gap in treatment that will make the victim vulnerable to arguments about intervening causes?

Special Issues:

Subsequent remedial repair is important. First, it can establish who had control over the site. Secondly, it may show that the alternative design suggested by plaintiff was not only possible, but has been completed to correct the dangerous condition. What was the cost of the repair?

The “*method of operation*” theory comes into play with the issue of whether the premises owner knew or should have known of the dangerous condition. Essentially, it creates an outer time boundary of when the dangerous condition could have been created and whether the proprietor created a system of cleaning that was reasonable when compared to the risk he was confronting. These are commonly called “sweep sheets.”

“*Invited attention*” doctrine arises when a storekeeper displays his wares in a manner that distracts the attention of the visitor. California case law is illustrative:

“You may consider that the attention of persons who visit business establishments ordinarily are attracted by the wares, exhibits and displays, and may be more or less absorbed by the transactions which they have in mind.”

Trivial defect or open and obvious defense causes consternation amongst plaintiff lawyers, particularly when the defense wants to have it both ways. On the one hand, they will say that the defect was so open and obvious, why didn't the visitor see it? If that doesn't work, they turn around and argue that it was such a small defect; it was trivial. This concept tends to focus on surface deviations of less than one inch, but lately courts have been more tolerant in looking at the totality of the circumstances.

“*Attractive Nuisance*” doctrine applies to dangerous conditions that are attractive to children and can help bolster a weak plaintiff's case. The premises owner must take special steps to guard against injury or death to children that are likely to be attracted to such a condition, e.g. trampoline on property. However, it can apply to any condition that is “attractive” to youth.

Experts. A “human factors” expert is commonly used and many attorneys bring them into the screening process, to help decide whether there is a viable case. Human factors experts use information about human behavior, abilities, and limitations and apply them to the design of environments for safe human use. Premises owners should consider hiring a human factors expert to evaluate their property in advance of injury, rather than waiting for an injury to occur. This proactive action will correct dangerous conditions in advance of injury, or at least provide a shield against criticism for the dangerous condition.

Other experts who might be used would be an engineer or perhaps an architect, particularly on whether the alternative design or use would be technically possible or prohibitively expensive.

Fighting on your own turf

The owner or proprietor will always say they didn’t have notice. After all, they argue, you didn’t see it either. How could we have seen it? The defense will argue the dangerous condition is the contamination that fell on the surface. If you permit the battle to be fought over that issue, the defense will always win. They will argue that had they known about it, they would have cleaned it up. The plaintiff cannot show how long the foreign material was present.

But the plaintiff needs to show that the dangerous condition is **not** the grape itself on the floor. A “dangerous condition” is one from which,

“. . . injury may reasonably be anticipated to result . . . to persons properly using the premises for the purpose intended.”

There is a duty to anticipate danger. The dangerous condition is the floor itself, in that it will be repeatedly subject to contamination throughout the day. So take the fight to the floor itself and do not focus on the particular item that by happenstance is there at the time of injury. The battle has to be over the proprietor’s conduct. The proprietor knows that there will be repeated spills---it’s inevitable. So the dangerous condition is the situation that they set up. If it’s not this grape, it’s that piece of lettuce or the coke spill by the seven year old.

For example, assume a food counter in a store in a mall. The proprietor creates the dangerous condition. They set up the food counter. They put in tables and chairs for customers. They chose the flooring upon which the customers walk by specifying the floor surface to be installed. They want it to look pretty so they chose a slick surface rather than chose the one that has the slip-resistant surface. They chose the food and beverages to serve to customers. They designate the menu items which have avocado and lettuce, which blend into the color of the floor surface. They sell the food to their customers. They specify the lighting---not very bright--- so the place will look better. They chose the containers in which the food would be served, e.g. floppy paper plate with food loose on the plate, versus a stiff plastic plate with a complete wrapper enclosing the food. They short themselves on staffing to save employee costs, so the servers race back and forth across the dining area from the kitchen to the tables, spilling as they go.

If there's a salad bar, look at the methods used to serve and contain the slippery stuff. If it's in a mall, check out the mall's own food court. Do they have maintenance people standing by? Can you compare and contrast what the other proprietors are doing?

Such a change in focus dramatically alters the equation, makes the jury look at the bigger picture, and will significantly increase the chances of a jury finding a dangerous condition.

Inadequate Security

Another major area of litigation involves whether a business has satisfied its duty to take reasonable steps to protect visitors from foreseeable criminal conduct by third parties. Usually, this takes the shape in a failure to have uniformed security, proper lighting and visibility, and control over access to the premises. Additionally, it may involve allegations of negligent hiring or supervision of employees, or even failure to determine what crimes have occurred at or near the premises. The types of premises (shopping malls, retail shops, nightclubs, apartments, etc.), that may be involved are too numerous to cover in one short session, so the discussion here is general and limited to mostly nightclub-type situations that seem to be the bulk of the calls we receive.

A good plaintiff is essential. The same characteristics we discussed in the slip and fall cases are necessary here. When the call comes in, pay special attention to the description of the facts from the plaintiff. It needs to make sense. Early in my career as a public defender I learned that what you think is most likely to have happened, is probably what really happened. And, more importantly, that is what the jury will ultimately think happened. You can avoid headaches later if you carefully inquire of the potential plaintiff regarding sensitive issues such as alcohol use, aggressive behavior, and failure to conduct oneself reasonably.

There are two basic types of cases. There are those in which there is no security at all, in which case, plaintiff has to prove it should have been provided. These are more difficult because the threshold issue of the foreseeable need to have security has to be proven. It's especially tough if you do not have any previous incidents on the specific premises. By contrast, the inadequate security case comes with the acknowledgment that security is needed. Indeed, they already have it. Both types of cases turn on the issue of foreseeability, and prior criminal activity weighs heavily on the result.

Screening Cases

In screening these cases, some of the steps outlined for the trip/slip and fall case can be used, but additional steps need to be conducted. Specifically, you probably will start your investigation with the police report. Then either request under the Public Records law or subpoena, the police records of the locale for "out of service" calls (where the officer out of service, investigating a crime call). These prior incident reports are essential. Once you file your lawsuit, you can get the proprietor's internal records. These may bolster your case and provide an interesting contrast with gaps in comparison to the police records.

If you do not have previous incidents on the premises, you are going to have to look at the surrounding area, and similar establishments. You can also look to the previous experience of the defendant. Has he owned similar businesses before, e.g. other nightclubs? How does the security he has in this club compare to what he does or did at the other club? If he has security at all, you can argue that he acknowledged the foreseeability of criminal acts by its implementation.

Experts abound in these cases. Unfortunately, many are not experts at all and you need to pay particular attention to the particular issue for which you need an expert. For instance, you may need a lighting expert for one case; a nightclub security expert for another. Or maybe you need both. Bring the expert in early, during the screening process and it pays big dividends later on. They can point you to laws, regulations, statutes and the custom and practice in the industry.

Close scrutiny should be given to the conduct of the victim, especially in the bar/nightclub situation. Alcohol and acquaintance-related incidents are problematic. Un-witnessed crimes are problematic as well. The relationships between the parties should also be examined. For instance, there may be an enhanced duty if there is a common carrier as a potential defendant.

If no security exists, it may be a difficult burden to show that there should have been security and that it would have resulted in deterrence. Motive becomes important in the civil suit, even though it is not an issue in criminal prosecutions, because it can be the key to foreseeability. Would security, if present, prevent the crime? Would it deter the criminal? Some courts seem to suggest you almost need to interview the perpetrator and ask him whether he would have been deterred!

The inadequate security case is easier to prove. The fact that there is security shows the proprietor foresaw a security problem. However, the proprietor will argue, “we had security. We can’t guarantee everyone’s safety.”

In the bar and nightclub setting, putting on an additional bartender brings in additional revenue; hiring another security guard does not. It becomes the same argument of “profits over safety” we discussed in the slip/trip and fall setting. So the reply to the proprietor is: while you had security, it was not adequate. Either you didn’t have enough, or you had the wrong kind.

Also, this industry is rife with inadequately trained and improperly screened security personnel. Efforts at professionalizing the industry have proven elusive. So another response might be that the security provided was incompetent or was not trained properly. Some states require state licensing for bar security (“bar card”). Investigate the training or licensing of security present at the time of the incident. An all too common shared characteristic is that some security people are aggressive, like to fight, are paid minimum wage, and drift from job to job. These are not trained, off-duty, law enforcement officers.

Fighting On Your Own Turf

From the plaintiff's perspective, one problem is that most courts permit the intentional criminal act by the third party perpetrator to be weighed against the negligence of the property owner. Both the criminal actor (usually judgment proof) and the business proprietor (the deep pocket with insurance) end up on the jury verdict form. In large part, most juries will assign the lion's share of the fault to the perpetrator. The danger is that your "million dollar" verdict may be turned into a \$100,000 collectable verdict when the proprietor is assigned only 10% of the fault.

To counterbalance this bias, focus on the proprietor's conduct almost to the exclusion of the perpetrator and the plaintiff. When establishing liability, the plaintiff should be the faceless victim. He was unlucky enough to be in the wrong place at the wrong time. The jury must understand that it was a quirk of fate; if not this victim, it would have been someone else because it was foreseeable that this criminal act was going to be inflicted on someone who wandered through. The only question was: Who's the unlucky guy?

Sequencing your opening statement is critical. You must make the defendant's conduct the only focus. Do not even mention the victim by name until after he appears in the opening as the victim, or the jury will be second-guessing your victim's conduct, or the perpetrator's.

Another problem that sometimes arises is the physical limits of "premises." It may be that the genesis of the incident is the premises, but its consequence (the ultimate physical injury) is not. Look for local ordinances. Many times the local ordinances will help the plaintiff, as they may extend the definition of "premises." For instance, in San Diego, a city ordinance requires that requires the proprietor of an entertainment establishment to:

“ . . . make reasonable efforts to prevent the admission of any person whose conduct is . . . [disturbing the peace] fighting, loud noise, offensive words in public place or disorderly conduct at the premises or on *any parking lot or similar facility used by the establishment*. The responsible person shall make reasonable efforts to remove persons exhibiting such conduct from the establishment.
Section 33.1506 [italics added]

Another section also extends the duty for responsibility for the premises:

The responsible person shall control the conduct of patrons so as to prevent or minimize disorderly or unlawful conduct upon the establishment *and within 100 feet of the establishment*. The 100-foot distance shall be measured in a straight line from the property line of the licensed establishment [*italics* added]. Section 33.1509

A third section makes the proprietor responsible for "the orderly dispersal of individuals *from the vicinity* of the establishment at closing time, and shall not allow them *to congregate in the vicinity* in a disorderly fashion. Section 33.1510.

Each of these ordinances expands the responsibility beyond the physical limits of the proprietor's premises.

Another way of expanding the responsibility for the premises is the entertainment permit. Local law enforcement may impose additional duties on establishments as a condition of getting an entertainment permit to operate. These are typically tailored for the particular business and based upon their history of operation. It may specify the numbers of security personnel and specify their qualifications. The permit is available through the local police department. Also, be sure to review of the liquor license and respective file through the Alcohol Beverage Control Board.

The entertainment permit puts the proprietor in a bind. On the one hand, he needs to call the police if there is a security problem. On the other, if he does, he is "punished" by additional restrictions on his entertainment permit when renewal comes around. Focus on the conflict; this is a pressure point. See whether he chose profits over safety. Most of the time you will discover he did and it will carry the day with the jury.

The law continues to expand in this area and the public policy benefits are significant. Nightclubs are safer as a result and proprietors are beginning to see that adequate security protects everyone, and their profits. These cases continue to present challenges to plaintiff attorneys but are well worth the time of investigating and prosecuting properly.