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Destination Disasters: Who's at Fault?

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My calculated guess would be that nearly every family in America (and perhaps in the world) who is "on the grid" discussed premises liability during the week I wrote this article, whether they knew it or not. As I think about premises liability, the Carnival Cruise ship *Triumph* is being tugged into port in Mobile, Alabama, and will soon be subjected to what I hope will be the most thorough cleaning job ever conducted on a cruise ship or in a hotel anywhere, ever.

As we all watched the ship waddling into port that night guided by three tugboats, we listened to the endless stories of too little food, five working toilets for 4,000 passengers and crew, little to no ventilation below decks, and the plans to evacuate the disabled, elderly, and infant passengers. It was difficult not to be sickened by the plight of those involved. The night after the ship docked, the *Saturday Night Live* cast parodied the ship's plight. The actor playing the role of the "ship's comedian" wailed piteously, "There is dookey slidin' down the *walls*, man. How'd dookey get on the wall?"

And as we heard about the compensation being offered by the cruise line to the passengers—a refund of their costs for their "vacations" and a voucher for another cruise—some of us listened in astonishment, others in outrage, and those of us who have practiced in the field of premises liability shrugged our shoulders. If most passengers had read the backs of their tickets or the small print in their contract before they embarked on *any* vacation, they might never have left their homes. It was no surprise when the first lawsuits were filed the following week. But the limitations on the liability of cruise lines may come as a surprise to the litigants.

A Premises Liability Primer

Premises liability law is the body of law that has developed around the notion that the owner or person in possession of the land or "premises" is liable for certain injuries suffered by persons who are present on the premises. The cases range from so-called slip-and-fall incidents to some rather gruesome scenarios.

In my first premises liability case, I represented the insurance carrier of an "all-inclusive" tropical resort where a young vacationer was sexually assaulted during her morning run—and though she *was* on the farthest limits of the resort's property, she had complied fully with the resort's guidelines to "stay on designated pathways, run only in daylight, and never leave the grounds."

Instead of spending her week having fun in the sun, the victim spent it alone in a hospital in a foreign country recovering from a violent sexual assault. The carrier—my client—settled quickly. I was relieved that we settled and did so as quickly as we did. I didn't want to be the advocate to stand up in court to say that—after publishing guidance on when and where to exercise—the resort had no responsibility for the criminal acts of a third party and that there were supervening causes for the young victim's assault. My client may well have been legally correct, but that wouldn't have made it any more palatable.

Who doesn't remember the law school case of the baseball spectator hit by a foul ball? This well-known case was supposed to teach us about assumption of risk. In 1914, although two earlier cases had ended in defense verdicts, a baseball spectator prevailed and was awarded damages in *Edling v. Kansas City Baseball & Exhibition Co.*, 168 S.W. 908 (Mo. Ct. App. 1914). The difference in *Edling* was that a ball went through a hole in protective netting, breaking the plaintiff's nose. The court held that while facilities owners or managers were *not* required by law to protect spectators, once they undertook to erect protective netting to do so, they had undertaken a duty to see that the protective apparatus was properly maintained. In other words, a spectator taking advantage of the protected seating should be able to "assume" not the risk but that the protection he is paying for actually works. That's premises liability.

The variety of premises liability cases is wide. The issues in controversy may seem endless. Among them:

Who Is in Possession of the Premises?

Where did the accident happen? Is the landowner/landlord responsible or the department store that pays the lease? Is someone liable if you're injured on a river on public land but the "outfitter" is

a private company that supplied your canoe and the remaining gear? And whose job is it, anyway, to protect persons who are on your property?

In the context of premises liability, a person "possesses" land or premises when:

- The person occupies the land with the intent to control it;
- The person has occupied the land for a period of time with the intent to control it, while no other person has subsequently occupied it with intent to control it; or
- The person is entitled to immediate occupation of the land, if no other person is in possession.

(I promise we will tolerate no discussions of Blackacre and Whiteacre, or of who has the right to the residual estate.)

In the context of this article, the term "premises" should be read broadly to include land, premises, or places of business, and the "person in possession" is the person in possession of the premises. Keep in mind that the person in possession may not be the owner—it may well be a shopkeeper, a lessee, or a temporary occupant, such as the visiting company that operates the carnival rides at the local fairgrounds once a year.

Who Is the Injured Party?

In most jurisdictions, we must establish the status of the complainant. In other words, was the plaintiff an "invitee," a "licensee," or a "trespasser." The defendant's duty to the plaintiff is likely to vary significantly depending on the circumstance under which the complainant was visiting the premises.

An invitee. An invitee is one who is "invited" to enter or remain on the premises for a commercial benefit to the person in possession of the premises or for a purpose directly or indirectly connected with business dealings with the person in possession. An invitation may be either express or implied. For example, a customer in a store is an invitee because the store actively encourages the public to visit its premises and to purchase merchandise while there. Likewise, a visitor to a museum or sports venue (provided the visitor is a ticketholder and not an employee or a gatecrasher) or a passenger on a cruise ship (their lawyers will argue) is an invitee.

A person in possession of the premises owes the highest duty of care to an invitee (relative to the care owed to any other individuals who find themselves on the premises).

A person in possession must use ordinary care to warn or otherwise protect an invitee from risks of harm from a condition on the premises if:

1. The risk of harm is unreasonable, *and*
2. The person in possession knows, or in the exercise of ordinary care should know, about the condition and should realize that it involves an unreasonable risk of harm to an invitee.

The person in possession has a duty periodically to inspect the premises for the existence of hazards to invitees. For example, a grocery store is obligated routinely to check its floors for the presence of spilled or broken merchandise and to make sure that its products are not likely to fall from its shelves.

A recent case highlighted the need to inspect one's premises "early and often" and to encourage employees to pay attention to potential hazards. In *Timberlake v. Target,* U.S. District Court, E.D. of PA, No. 11-3051 (April 25, 2012), the plaintiff had walked into a Philadelphia Target store and slipped in a puddle of baby "spit-up," injuring her wrist, knee, and hand. She filed suit against Target, but Target asked a U.S. District Court judge in Philadelphia to dismiss the case, saying that the "spit-up" had only been there for seven minutes.

The judge denied Target's request, saying that because time-stamped video footage showed the entire seven-minute span from when the baby vomited near the door to when the plaintiff slipped and fell, it was a matter for the jury to decide. A critical fact was that the video demonstrated that a number of Target employees had been in the area near the puddle during the seven-minute period. Whether seven minutes was too short a time to expect them to clean up the floor or place a warning sign near the hazard would be decided by the fact finder.

In an earlier case, a judge refused to dismiss a case in which a hazard was on the floor for less than two minutes before the plaintiff slipped and fell, finding that the question of whether two minutes was enough time for the store to be aware of and either clean up or warn of the puddle was for the jury.

A licensee. A licensee is one who is invited to enter or remain on the premises for any purpose other than a business or commercial one with the express or implied permission of the owner or person in control of the premises. In a peculiarity of terminology, a social guest invited to one's home is a licensee, not an invitee.

Usually, a person in possession of the premises is liable for physical harm caused to a licensee by a condition on the premises if, and only if, the plaintiff establishes the following three elements:

1. The person in possession knew or should have known of the condition, should have realized that it involved an unreasonable risk of harm to the licensee, and should have expected that the licensee would not discover or realize the danger;

2. The person in possession failed to exercise reasonable care to make the condition safe or to warn the licensee of the condition and the risk involved; and

3. The licensee did not know or have reason to know of the condition and the risk involved.

If a homeowner knows, for example, that one of the steps leading to the main entrance of the home is broken (but would not appear to be broken to a reasonably observant individual), the homeowner may be liable to a guest who, without notice of the broken step, is injured when the step collapses, causing the guest to fall down the stairs.

Now, suppose that the faulty step were one to a basement or to an attic? Whether a homeowner should have foreseen that an invitee would decide to snoop in the host's attic or basement would certainly be a question of fact.

A trespasser. A trespasser is one who goes on the premises of another without an express or implied invitation, for his or her own purposes, and not in the performance of any duty to the owner. It is ordinarily not necessary for a defendant to establish that the trespasser had unlawful intent in making such an entry (but in the event that a burglar slips and falls and injures herself on the floor of the 7-Eleven, it's very unlikely that the store's operator would be liable).

Especially when persons in possession of the premises are not even aware of the presence of trespassers, they almost certainly have no duty to warn a trespasser of any dangers or to make their premises safe for the benefit of a trespasser. On the other hand, if the premises owner is aware of the presence of trespassers, the owner may be obligated to exercise ordinary care in relation to the safety of a trespasser.

Public Spaces

Homeowners or tenants are ordinarily charged with clearing public sidewalks in front of their premises and maintaining their premises so as not to pose a danger to members of the public who are passing by on a public street or sidewalk. Cities and other public entities may be protected by

sovereign immunity, but that doesn't mean one won't find lists of rules and regulations—and warning signs—at every playground and swimming pool.

Non-Delegability of Duties

The duties of a premises owner are typically nondelegable. If the defendant remains in possession, the defendant cannot escape responsibility merely because it contracted with a company to provide maintenance. For example, a business remains liable for the condition of its parking lot, even if it has hired a snowplowing enterprise to maintain the parking lot and to remove snow and ice. A landlord remains liable for the condition of the housing it owns, even if it has contracted with a management company to provide all service and maintenance in relation to the housing.

Conclusion

You must excuse me now. For quite some time there has been a plywood "step" at the side entrance to my house created for the purpose of allowing workers who were doing renovations on our home to avoid stairways when moving equipment and furniture into the remodeled space. For a period of months at least, I've known there is a hole in it big enough to allow someone of my own size and shape to slip through and be injured. I haven't fixed it because my sledgehammer and crowbar are in my shed. Also in my shed is a family of ill-tempered squirrels that has just had babies. They hiss and jump toward me whenever I open the door. Today, I must vanquish my fear of the squirrels and pull out that broken step, while I thank heaven that going on a cruise of any kind has never appealed to me. I get seasick in a bathtub.

Authors