Flip the defense script

"Your client should have seen it – it is your client's fault"

By Brandon C. Gannon

When litigating a premises liability case, a defense attorney's main line of attack will be to argue that your client's injuries and damages were caused by his or her own comparative fault. This argument can often be flipped on its head. Don't play their game. You must properly frame the case from the beginning *and prosecute the case* in the following way:

- *This case is about the failure of defendant and its employees to meet their duty to ensure that the premises are safe. They had the duty to ensure it was safe – not plaintiff! They failed to meet their burden, and plaintiff thus suffered serious injury as a result.*

When you drive the litigation in this manner, you can begin to establish the case theme that it was *defendant* (and the employees) who failed to ensure that the premises was safe from dangerous conditions that were likely to cause an injury. It is the defendant's failure to take reasonable precautions to eliminate obvious hazards that will confuse the average person encountering the hazard.

Retaining an expert early to ensure that your discovery is on point and complete will help you stay on theme and make certain that you have the foundational evidence to prove your case. Your expert(s) will know the industry standards and rules that will guide your discovery and questions of witnesses. You will likely only get one shot at deposing the employees and the witnesses, so speaking with your expert(s) beforehand is imperative.

This article is intended to describe the ways and means through which you can develop this theme and combat the defense's main argument – that your client's comparative negligence undermines the value of the claim. Finally, pay no heed to the defense's likely assertion that "it's just a slip and fall case," or that these kinds of cases are not of great value. The truth is that premises liability negligence can sometimes result in the most devastating of injuries to your clients, and so you should maintain strength in your position. And as in any case, make sure to develop your client's damages so that all medical care is necessary and appropriate.

Elements of premises liability

When litigating a premises-liability case, it is necessary to know the elements of the cause of action. Per CACI 1000, the elements of premises liability are as follows: (1) that defendant owned/leased/occupied/controlled the property; (2) that defendant was negligent in the use or maintenance of the property; (3) that plaintiff was harmed; (4) that defendant's negligence was a substantial factor in causing plaintiff's harm.

Defeating comparative fault

Thoroughly interview your client

The first step in the process of defeating the defense's comparative fault argument is to thoroughly (and objectively) interview your client about the facts of the accident, and especially what occurred before and after the accident. The pre-incident facts are particularly important here, because your client might be able to provide information tending to show that the property owner knew, or should have known, of the dangerous condition on the property before the incident involving your client even occurred. In this regard, ask your client questions like:

- Have you been to the property before?
- Who was working there at the time of the accident?
- How many people were working there at the time of the accident?
- Did you see the dangerous condition before the accident occurred?
- Was the dangerous condition open and obvious?
- Was the dangerous condition obscured?
- Have you seen the dangerous condition before?
- Did any employees know of/acknowledge the dangerous condition?
- Do you know if the dangerous condition has ever occurred before?
- Do you know if there have been any prior accidents on the property such as your accident?
- Were there any witnesses? Did anyone speak to you after the accident?

By asking these questions and others of this nature, you will collect information that you need to answer in the case: (1) the extent of defendant's level of knowledge of the dangerous condition, and (2) the extent of your client's level of knowledge of the dangerous condition.

In addition, you must determine why your client failed to see the hazard. The explanation that your client provides can likely form the basis for what the property owner should have anticipated as reasonable use of the property and conduct that the property owner should have anticipated when inspecting their property for potential hazards that could cause harm to those invited onto the property.

Collect evidence and ensure that evidence is preserved

As soon as your client is signed up, you should immediately send "Preservation of Evidence" letters to the property owner *and* any persons or entities that may be in possession of evidence related to the incident. Your letters should undoubtedly ask for production of these materials directly to your office within seven days. Follow up with phone calls and more letters if the property owner's investigation documents are not produced to your office within seven days.

Feel free to let the property owner know that the materials *have to* be preserved, that you will have a right to discover them in litigation anyway, and that producing the materials now will only assist in your evaluation of the merits of the claims. Your preservation of evidence letters should also advise the property owner not to manipulate the scene of the accident in any way because

you'll be conducting a site inspection (more on that later).

In our firm's experience, if the property owner outright refuses to provide any of its investigation documents/materials/recordings, then it is possible (if not likely) that said materials contain evidence and information that is not good for the property owner. Accordingly, keep pressing for those materials in pre-litigation, and if the property owner refuses to produce, then make sure to send multiple letters to the property owner informing them that in no uncertain terms you will seek monetary, issue and evidentiary sanctions in the lawsuit should spoliation of any evidence occur.

Additionally, and as we all know, cell phones with video cameras are ubiquitous nowadays, and your client's accident may well have been recorded by a witness who was in the vicinity. Additionally, while a witness may have not recorded the actual event, there is a strong possibility that a witness recorded the event's aftermath, which will show the pain and suffering that your client was going through at the time of the incident, and it may also include employee and/or witness statements regarding what occurred.

Collecting the on-scene evidence from the property owner, the witnesses and your client can help you establish through discovery, or even pre-litigation investigation, that the "comparative fault" argument will hold no water for the defense. Moreover, conducting this factual discovery will help you establish the extent to which the employees created/had notice of the dangerous condition and thereby violated industry standards. But you can only establish these facts by acting very diligently from the day that your premises liability case is first signed up.

Conduct a site inspection with your expert(s)

Under Code of Civil Procedure section 2031.010(a), any party may "obtain discovery . . . by inspecting documents, tangible things, and land or other property that are in the possession, custody, or control of any other party to the action." (Code Civ. Proc., § 2031.0101, subd. (a).) This is the specific section of the code that permits you to conduct an inspection of the site where the incident occurred.

Again, based on the cases that our firm has litigated, when a property owner does not want you to conduct a site inspection, then it is possible (if not likely) that the site inspection will itself unearth some evidence or information that is not helpful to the property owner.

As stated above, your "Preservation of Evidence" letters should also include a demand for a site inspection. The goal here is to get your site inspection done as soon as possible because the defendant property owner may well do things to the property to undermine the evidentiary value and quality of the scene. If the incident occurred in a store aisle, the property owner may alter the width or length of the aisle; if the incident occurred in a restaurant, the property owner may quickly change the layout of the dining room tables and/or the floor materials, markings, warning signs, etc. Long story, short is that you want to get to that scene as quickly as you can. As with the investigation documents, you may be denied access to the information in pre-litigation, but again, feel free to let the other side know that you'll be conducting your inspection in litigation anyway – so argue that they might as well let you in now so that you can evaluate the merits of the claim.

Witness depositions

Your client, the incident reports, and persons who were at the location at the time of the incident should be able to provide you with the information that you need to get started with your efforts to contact witnesses and obtain statements. When reaching out to the witnesses, be kind to them, and let them know that you'd just like to get a statement regarding what they saw, and nothing else, to ensure that you do not waste their time.

When speaking with these witnesses (in person or via phone) you should *always* have another person in attendance for the meeting or on the call so that you are not the only witness with regard to what was stated. Try to get a licensed investigator to conduct the interview and at a minimum sit in on the meeting or call.

Remember your ultimate goal as you move through these processes: Showing that it was the employees and the property owner that allowed the dangerous condition to persist on the property, which had *nothing* to do with your client's reasonable conduct on the day of the incident. Stick to your guns and keep developing the evidence you need to support your theme and theory.

Conclusion

If you have properly gathered and/or preserved evidence, then your case should proceed in a relatively favorable fashion. If you have elicited testimony and evidence showing that the property owner and its employees failed in their duty to ensure a safe premises, then you are well situated to mediate or try the case from a strong position.

When you conduct these tasks early and confidently, and when you thoroughly prepare your premises-liability case, you will be able to get the result your client deserves.

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