NOVEMBER 2012

Notice in premises-liability actions

If you can't prove actual or constructive notice, you likely don't have a case

By Martin I. Aarons

Ignorance is bliss? Not quite. The defense of "we didn't know the dangerous condition existed, so we can't be responsible for the harm" is not actually a defense. This is because a landowner has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205). Thus, plaintiff still needs to show that defendant had some sort of notice of the dangerous condition – actual or constructive.

While commercial property owners are not insurers of the safety of their patrons, they do owe their patrons a duty "to exercise reasonable care in keeping the premises reasonably safe." (*Ortega,*

supra, 26 Cal.4th at p. 1205; *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477). An owner is liable for harm caused by a dangerous condition, of which the owner had actual or constructive knowledge. (*Ortega, supra*, 26 Cal.4th at p. 1206.)

This article will briefly review the basics of notice and will also discuss the recent case of *Howard v. Omni Hotels* (2012) 203 Cal.App.4th 403, which tried to establish notice through prior incidents.

Actual notice

Plaintiff can establish actual notice in situations where the owner, or its employee in the course of employment, created the dangerous condition. "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment," notice is imputed. (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806; see also CACI Nos. 1003 & 1012 (2012 Ed., Dec. 13, 2011).)

For example, in the cases of boxes left out by a store owner in the middle of an aisle, a spill by an employee, or where an owner removes a fixture but leaves part of it, or debris, behind, the owner cannot claim it did not have notice of the situation. In those situations, actual notice exists.

Constructive notice

Plaintiff can also establish the owner's notice through "constructive notice." (*Ortega, supra*, 26 Cal.4th at p. 1205.) One way to establish constructive notice is to argue that the owner failed to make reasonably regular inspections, which thus raises an inference that the hazardous condition existed long enough for the owner to have discovered and remedied the situation. (*Id.* at p. 477.)

The duty to inspect is continuous, and inspections should be conducted frequently. (*Ortega, supra*, 26 Cal.4th at pp. 1206-07.) To exercise a degree of care that is commensurate with the risks involved, the owner must make reasonable inspections of the portions of the premises open to customers. (*Id.* at p. 1205; *Moore*, *supra*, 111 Cal.App.4th at p. 476.) Thus, in these cases, plaintiffs should continually seek documents and depositions to discover when and how inspections were done. This includes not just sweep sheets, but also policies, procedures, and manuals on safety and inspections, as well as video of the area of the incident for any number of hours before the incident. These documents will provide a roadmap showing how defendant failed to follow its policies and procedures and how, had it simply followed its own rules, the dangerous condition would have been discovered and plaintiff would have never been injured.

The seminal case to know for notice is *Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200. In *Ortega*, a man slipped and fell in a puddle of milk next to a refrigerator and suffered serious injuries. (*Id*. 26 Cal.4th at p. 1205.) The plaintiff in *Ortega* alleged that the milk had been on the floor long enough to give Kmart constructive notice of it, and of the need to clean it up. (*Ibid*.) In *Ortega*, plaintiff also presented evidence that the supermarket had not inspected the aisle where the patron slipped on the puddle of milk for at least 15 to 30 minutes, and also that the milk could have been on the floor for as long as two hours. (*Id.* at p. 1210.) The California Supreme Court held that although a plaintiff has the burden to prove the owner had actual or constructive notice of the defect in sufficient time to correct it, evidence of defendant's failure to inspect the premises within a reasonable period of time was sufficient to allow an inference that the milk was on the floor long enough to give defendant the opportunity to discover and remedy it, which was a question of fact for the jury. (*Ibid*.) This essentially relieves the plaintiff of his "burden of showing how long a substance was on the floor if he can demonstrate that the site has not been inspected within a reasonable time." (*Ibid*.)

Thus, obtaining inspection logs, sweep sheets, policy and procedure manuals, video surveillance evidence, and deposition testimony about the regular inspections is crucial to establishing notice.

Mode of operation to establish notice

In *Moore v. Wal-Mart Stores, Inc*. (2003) 111 Cal.App.4th 472, the plaintiff slipped on a French fry in one of the store's main aisles and fell down. The plaintiff alleged Wal-Mart should be responsible based on its "mode of operation." (*Id*. at p. 478.) The mode-of-operation theory was used because a McDonald's restaurant operated inside the Wal-Mart. Wal-Mart was aware that their customers would take fries out of the McDonald's and eat them while shopping. Wal-Mart's mode of operation consisted of having signs up telling customers not to eat in the store; also, there was an announcement over the intercom every hour providing the same reminder. Additionally, Wal-Mart employees, if they saw a customer eating while shopping, would do nothing about it. Thus, plaintiff argued, by this mode of operation, Wal-Mart made the aisles unsafe because it was aware that dangerous conditions were more likely to occur.

The court found that "under current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident. Moreover, it would not be prudent to hold otherwise." (*Moore*, *supra*, 111 Cal.App.4th at p. 179.)

> The court observed that, without this knowledge requirement, certain store owners would essentially incur strict liability for slip-and-fall injuries, i.e., they would be insurers of the safety of their patrons. For example, whether the French fry was dropped 10 seconds or 10 hours before the accident would be of no consequence to the liability finding. However, this is not to say that

> a store owner's business choices do not impact the negligence analysis. If the store owner's practices create a higher risk that dangerous conditions will exist, ordinary care will require a corresponding increase in precautions.

(*Moore*, *supra*, 111 Cal.App.4th at p. 179.)

While a mode of operation does not relieve the plaintiff of showing notice – actual or constructive – a landowner's/store's mode of operation is relevant evidence in determining the frequency of and need for regular inspections, which would be useful in establishing constructive notice. Thus, during discovery, the store's/owner's mode of operation when dealing with situations that are more likely to create dangerous conditions must be explored. This can lead to evidence that can be presented to the jury on how frequently inspections should be conducted.

Notice through prior incidents

Notice of a dangerous condition can also be established through prior incidents. Prior accidents may, when relevant, be admitted for the purpose of proving notice. However, it must be established that the circumstances of the accidents are the same or similar to the one at issue in the case. (*Simmons v. Southern Pac. Transportation Co.* (1976) 62 Cal.App.3d 341.)

Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances. (*Simmons*, *supra,* 62 Cal.App.3d at pp. 363-64; *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 557.)

In the recent case of *Howard v. Omni Hotels* (2012) 203 Cal.App.4th 403, a hotel guest was injured when he slipped and fell in a bathtub. Plaintiff alleged both strict liability against the manufacturer of the bath tub and premises liability against Omni Hotel. Omni Hotel filed a motion for summary judgment, contending it did not have actual or constructive notice, and thus was not liable in the premises-liability action. (*Id*. at p. 412.)

In opposition to the summary-judgment motion, plaintiff presented evidence that "out of the 38 Omni owned/managed hotels, there were six hotels that had Kohler tubs, and one of them had had a slipping incident or two." Plaintiff also argued that the inquiry conducted after his injury into other incidents should have been done earlier, because the reports of two different people slipping in bath tubs at the New Haven Omni Hotel were generated in 2004 and 2005, and those injured persons told Omni personnel their tubs were not safe without a rubber bathmat. Plaintiff also provided evidence in opposition to the MSJ derived from discovery materials, showing that Kohler (the tub manufacturer) had institutional knowledge of four other such hotel-tub accidents and, had the hotel investigated, it would have learned of these from Kohler.

At summary judgment, the trial court ruled that the two instances of actual notice to Omni of accidents in Kohler's tubs did not amount to adequate notice of unreasonable danger because they occurred in out-of-state Omni hotels, and because not enough was known about the factual circumstances of those other accidents, or the condition of those bath tubs, to determine if they were substantially similar in nature to those at issue in the case. (*Id*, 203 Cal.App.4th at p. 434.)

Plaintiff then filed a motion for a new trial, arguing that the order granting summary judgment for Omni was erroneous as a matter of law. Plaintiff contended he had successfully raised triable issues of fact about the extent of actual or constructive notice, from the New Haven incidents, that Omni had notice of the dangers generally presented by the tubs. The trial court granted plaintiff's new-trial motion, finding that triable issues of fact existed about Omni's duty to take corrective action based on the information it had obtained. (*Id*, 203 Cal.App.4th at p. 418.)

On appeal, Omni argued that the "prior incidents were not shown to be substantially similar, and they therefore amounted to an inadequate showing, as a matter of law, to support any grant of a new trial based on the theory that Omni should have exercised more reasonable care to discover and correct the condition of the bathtub. [Citation.]" (*Id*, 203 Cal.App.4th at pp. 433-34.) Plaintiff argued that the Omni, armed with the prior information, could have taken corrective action, such as providing bathmats, grab bars, or an after-market anti-slip treatment.

The Court of Appeal ruled that, as a matter of law, there was no triable issue as to Omni's actual notice.

> We disagree with the trial court that Howard's evidence raises a triable issue of fact on Omni's actual notice of a dangerous condition of its property. We do not need to rely on any legal conclusions about the Kohler product safety criteria to reach that conclusion, although we do not ignore the commonsense factors that bathtubs can be slippery, or that Omni purchased a widely used brand name tub in furnishing its hotel. First, the incident reports do not show substantially similar accidents, regarding any detail about the conditions of or in the bathtubs, or the circumstances or medical conditions of the guests before they fell in the bathtubs. The reports do not provide such evidence of sufficient facts or circumstances to support an inference of Omni's breach of duty, but support only speculation or conjecture that Omni should have recognized earlier that Kohler tubs presented a dangerous condition of its property, if they did. [Citation.]

(*Howard, supra*, 203 Cal.App.4th at p. 434.)

Howard opens up the door to more expansive discovery on prior incidents, accidents, and slips-and-falls in all premises-liability cases. This is because the court needs to be able to make an individualized inquiry, based on the facts and circumstances of the prior incidents, to determine whether they are admissible at trial. All of these prior incidents should now be discoverable; if the plaintiff cannot obtain information about the prior

instances in discovery, then how can the Court conduct the individualized inquiry to determine admissibility?

What to do? Send out requests for production of documents, requesting reports of prior incidents that have occurred in the store, going back three to five years. Ask for all incident reports of slips and falls in that department where your client fell, going back three to five years. Seek documents and propound special interrogatories regarding the nature and extent of the injuries sustained by the victims in each of the incidents identified. Perhaps there are so many incidents at a certain area of the store that the owner needs to put up a permanent warning or leave a permanent carpet at that location. From this information, plaintiffs may be able to locate patterns and practices of past incidents, past cures, and past warnings. Plaintiffs can use this information to see what occurred in the past and to determine if the past instances gave notice of a dangerous condition at the location.

Conclusion

Ignorance is not bliss. A landowner has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition. The landowner/store is not going to simply admit it had notice. Thus, plaintiffs must make concerted efforts in discovery to obtain inspection logs, sweep sheets, video, policy and procedure manuals, and evidence of mode of operation and past incidents to make the issue of notice – actual or constructive – clear.


Aarons

Martin I. Aarons is the principal in The Aarons Law Firm, APC, *located in Sherman Oaks where his practice focuses on representing employees in employment matters, including discrimination, harassment, and retaliation cases. Martin can be reached at maarons@aaronslawfirm.com.*