How to take a tough slip-and-fall case and get big results

These cases demand careful client screening, prompt investigation, preservation of evidence and a thorough discovery plan

By Elise R. Sanguinetti

Slip-and-fall cases usually present problems similar to what is encountered in a low-impact automobile case. Defense counsel, insurance adjusters and, most importantly, potential jurors are doubtful of your case as soon as they hear it involves a slip-and-fall. These cases are hard-fought and usually undervalued for the injuries sustained. Your client's credibility is always at issue in a slip-and-fall case because he or she is usually the only one who fell in the location. It is true that anyone who takes on a slip-and-fall case is facing a daunting challenge in this day of skeptical and sometimes hostile juries. Nonetheless, these cases are worthy of your representation, and there are plenty of deserving clients that need your help. Most slip-and-fall cases that are unsuccessfully concluded can be blamed on poor case selection, witness credibility issues or improper preparation. The good news is that these cases can be won if approached in the proper manner.

Screening the slip-and-fall case

• ***The client***

During your initial intake of the client, you must consider the consistency, credibility and candor of the potential

client. The personality of a client must be carefully analyzed. Is she likeable and believable? Of course, these questions are important in any kind of case, but they are especially important in slip-and-fall cases where her credibility will be questioned from the very beginning of the action.

Preserve all evidence in the client's possession immediately. You should request and retain the client's shoes in any slip-and-fall case. In some cases it may also be important to ask for the clothes the client was wearing at the time of the fall. For example, if the client was wearing a long dress, it would be good for you to know whether the dress played any part in the incident. And, if the client fell on a substance, there may be remnants of the substance still on their clothes that can be helpful to your case.

• ***The defendant***

Carefully consider the potential defendants during the initial intake. Is the primary defendant a large corporation with thousands of business locations or an elderly, small-business owner with one store? The larger the defendant, the more likely a jury will be unwilling to accept their unsafe practices – especially if those practices could affect them or their loved ones in the future.

Also, start thinking at the initial intake about who else may be responsible for the potential client's injuries. For example, are there subcontractors hired to perform maintenance or paid to keep the area clean? Was a contractor used to install the stairwell where your client fell? Think early and often about the proper parties. Getting all the proper parties in at the initial filing will move your case along at a much faster pace.

• ***Applicable codes and jury instructions***

Violations of safety codes and applicable building codes are great indicators of liability. For example, falls involving stairways can involve differences in the height of the risers in the stair, the failure to install railings, etc.. These code violations can be the basis of a negligence-per-se claim in the event that the applicable safety codes have been made into ordinances which must be complied with by the builder or contractor. You should know the potential codes that may have been violated by the defendants and have those in mind during your initial visit with the client. You should also be familiar with the jury instructions involving premises liability. (See CACI, Series 1000 and 1100 (2012 Ed., Dec. 13, 2011).) You need to know your burden of proof at trial and should always start thinking about the law at the outset of the case.

With respect to dangerous conditions, as a general rule, the plaintiff must establish that the owner or occupier had notice, actual or constructive, of the dangerous condition. (See CACI, No. 1001 (2012 Ed., Dec. 13, 2011).)

The owner or occupier of the premises must take reasonable steps to remove or correct the dangerous condition which he knows or should know would pose an unreasonable risk of harm to a passerby. (*Ibid.*) If the condition is open and obvious, this may preclude liability if the plaintiff saw or should have seen and appreciated the dangerous condition. (See CACI, No. 1004 (2012 Ed., Dec. 13, 2011).) Many times the issue of conspicuity will come into play. For example, in the case of parking stripes in a parking lot, the question might be whether the barriers are sufficiently distinguishable in color and in conspicuity from the surrounding pavement to alert a reasonably observant pedestrian.

Investigation

• ***Preserving evidence at the scene***

An investigation of the case needs to be undertaken immediately following the initial intake. The location where the fall took place needs to be visited informally and photographed. It may also be appropriate to take video of the premises in case the location changes, which often occurs. You should personally visit the site yourself, preferably with an expert or an investigator. Preservation of the evidence scene is critical, and you cannot always anticipate what might need to be photographed until you have visited the site. If you send someone in your place and they miss something, it may be lost forever, harming your client's chances of a successful outcome.

Having an expert or investigator with you during the initial visit to the scene is important because he can take measurements or readings regarding coefficients of friction at the site and later use that information at deposition and trial. Collecting the evidence on your own can be troublesome because it could lead to a request for your deposition or testimony at trial. Avoid collecting your own evidence whenever possible.

As soon as the client leaves your office after the initial intake, it is usually best to send a preservation of evidence letter to the potential defendants. The letter should demand that the defendant "please retain any and all evidence and communications relating to this incident, specifically including, but not limited to the [name the instrument of injury] involved in [client's name] injury, and any moving pictures or still images of the area in which the incident occurred."

• ***Preserving witness accounts***

If there are witnesses to the fall or to the conditions of the location of the fall, they need to be located and interviewed immediately. Oftentimes it seems that there was no one at the scene that witnessed your client's fall with the exception of the plaintiff. In those situations, there are still multiple "witnesses" that may be helpful to your case. Current employees of the defendant are usually not helpful to your case and often not accessible to you until you notice their deposition, but other witnesses may exist that you can interview after the intake. The best witnesses are often the emergency personnel that attended to your client's injuries the day of the fall. Request your client's medical records immediately and identify who the paramedics were that treated your client on the day of the fall. While the emergency treatment report may not state in it that a slippery substance was on the floor while the first

responders were there, you'll often find upon interviewing the medical providers that they noticed and remembered something on the floor. But, of course, if you do not interview them immediately they will forget about your client and the circumstances of his or her fall since they treat many patients in similar circumstances. Oftentimes, emergency room personnel can also attest to wet clothing on your client that would prove the floor was wet. For this reason, you should attempt to locate and interview "day of incident" medical providers as soon as possible. Do not wait to depose them and ask them only about the damages portion of your case.

• ***Search public records***

If your client fell on a sidewalk or at a public facility maintained by a city, county or state, you should send a Freedom of Information Act request to the appropriate public entity for information on your client's fall and previous falls in the same location. You should also check applicable public records to see what past construction permits have been issued for the particular facility. You should also do a search for any previous lawsuits that have been filed against the entity in the local trial court. Even conducting a Google or other Internet search on the potential defendant can be useful early in your case. It may be possible to find the company's policies and procedures online through a simple search. There are also reviews available on the Internet through Yelp, Trip Advisor, and even the company's own social networking page that might contain information about prior incidents.

Discovery

As soon as you are permitted by code, initial requests for production of documents should be sent that include, at a minimum, a request for any of the agreements between the owner of the business and the management company, the management company and its franchisor, and the management company and its subcontracting cleaning company. These agreements will help you identify defendants, as discussed above. These agreements may also reveal who has responsibility for the safety of the premises between the companies identified. Such agreements can be useful in deposition where even upper level management of your defendants is unaware of the exact boundaries of their company's responsibilities.

Manuals and handbooks on operations, safety, loss prevention and cleaning should also be requested in initial discovery. Every retail establishment either has or should have such a handbook. If it does not, your expert can use the absence of a manual against the defendant as evidence that its practices fall below the standard of care in that industry. The handbooks usually set forth the method of cleaning, which, if violated by an employee, can be used as evidence of negligence. These handbooks also usually set forth the dangers of unsafe practices and state that failure to follow the manual may result in an unreasonable risk of injury. These statements can be used against the defendant as a party admission at trial.

Training handbooks and videos for employees should also be requested. These handbooks and videos will describe to the employee the risks inherent in the business and can also be used as a party admission. The content of these videos can provide material for deposition questions of the manager of the business. Obtain all videos on training, safety, accident prevention, and cleaning and maintenance. Also request time records of employees on duty at the time of the accident. The roster of employees will provide you with a list of whom you need to depose.

In the initial discovery phase, it is also necessary to request all materials related to your client's fall, including all video, photographs, incident reports and interviews.

After receiving the initial discovery responses and taking employee and management depositions, send requests for admission regarding the defendants' negligence. Make sure to include judicial council form 17.1 form interrogatory requests with the requests for admission. While it is unlikely that the defendants will admit anything of substance, the 17.1 responses generally include useful information regarding the anticipated arguments at trial. In addition, if it is found that the defendant unreasonably denied a request for admission, and the fact is proven at trial, the defendant may be ordered to pay attorney's fees and costs incurred by the plaintiff in proving the matter. (Code Civ. Proc., § 2033.420, subd. (b).)

Developing a theme

As with any case, a theme should be developed early, fostered during discovery and used at trial. In most slip-and-fall cases, the theme will likely revolve around public safety. The theme should never revolve around your client, but instead should remind the jury that someone else could be harmed in the future if the defendant is not held responsible. Even in cases where the danger is no longer at issue, jurors understand and appreciate the theme of personal and corporate responsibility. Whatever the circumstances of your slip-and-fall case, the theme does not have to be fancy. Identify the rules that were broken by the defendants with the help of the codes, regulations, ordinances and common law. Ask your expert witness to explain why those rules exist and what they are meant to protect. And, finally, remind the jury in closing that the defendants did not follow those rules and need to be held accountable for not doing so. Use the theme in voir dire, opening, and with each witness on the stand. Finally, sum it all up in closing.

Damages

The damages suffered by the plaintiff, like the theme, should be a part of every aspect of your trial – during voir dire, opening, with each witness on the stand – and summed up with compassion during your closing. Even in cases where

surgery is not indicated, it is possible to obtain a fair and just verdict on your client's behalf in a slip-and-fall case. My most recent trial against a national restaurant chain in a very conservative venue was very successful for my client who was diagnosed with "back pain" after falling on a mopped floor when he was 13 years old. Despite years of treatment for back pain and spasms, no doctor could identify where the back pain was coming from. The defense expert called my client a liar and said that none of the treatment he received over eight years of his young life was related. Some of the challenges in the case that needed to be addressed at trial included delayed symptoms, changing symptoms, lack of specific diagnosis (other than back sprain), subsequent car accident and treatment, likability of the plaintiff and delay in bringing the lawsuit. Addressing each of these challenges during the presentation of the plaintiff's case was critical. Making a list of the problems with your case and developing a plan on how to address each of them affirmatively is necessary.

Our job is to make vivid the harm or loss that has been suffered or sustained by the plaintiff. In order to do so properly, it is important to get to know your client well. Get to know your client's family. Hear from each of them about how the injury has changed your client's life, and then go and tell his or her story in a compelling way.

Conclusion

Slip-and-fall cases are not easy. They must be screened carefully, investigated thoroughly, themed appropriately and argued with a great understanding of the loss suffered by the client. If you are interested in learning more about how you can best represent your client in a slip-and-fall case, I suggest you look at the Premises Liability Litigation Packets available through the American Association of Justice (AAJ) (formerly ATLA) Web site. Each litigation packet includes over 2,000 pages of material on how to handle a slip-and-fall case. The packets have sample complaints, discovery, depositions and trial materials. There are specific packets tailored to Wal-Mart slip-and-fall cases that include the corporate policies and procedures, corporate depositions, and much more. For more information on the litigation packets available for slip-and-fall cases, visit www.justice.org. The value of the packets far exceeds the expense and is extremely helpful in preparing your next slip-and-fall case.


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