MONTHLY LUNCHTIME SEMINAR SERIES

56TH Session:

ANATOMY OF A PREMISES LIABILITY CASE

Judge Lynn M. Egan
Judge Thomas M. Donnelly
Ms. Kirsten M. Dunne

September 28, 2017

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 21 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 275 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court-ordered medical exams, attorney-client/work product privileges, sanctions, special interrogatories, examination of experts and damages. She also serves as a mentor for new judges and currently serves on the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 13,000 hours of free CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

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About

Tom serves as an Associate Judge of the Circuit Court of Cook County. He is assigned to the First Municipal District. Sworn in as a judge in 2000, he currently hears civil jury trials, after having presided over criminal jury trials from 2008 to 2009. He has presided over several hundred jury trials. Prior to hearing jury trials, he served in several civil and criminal assignments. In September 2012, he authored an opinion in a highly publicized First Amendment case involving the Occupy Chicago protests: City of Chicago v. Alexander. He has spearheaded the development of three court programs to assist self-represented litigants: CBA Summary Suspension Volunteer Program, the CARPLS Consumer Collection Self-Help Desk, and the CBA Municipal Court Pro Bono Panel program.

He chairs the Illinois Supreme Court's Judicial Education Committee, which conducts all judicial education for both trial and appellate judges in Illinois. He chaired the Advanced Judicial Academy at the University of Illinois Law School for June 2013. He chaired the editorial board for Illinois Judicial Benchbook for Civil Law and Procedure for four years. He served on the Illinois Supreme Court Committee on Criminal Jury Instructions for eight years.

Before becoming a judge, he clerked for the Honorable Mary Ann G. McMorrow (Loyola Law '53) and served as an assistant public defender for thirteen years. He serves on the Illinois Judicial Ethics Committee. He has chaired both the CBA Chicago

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Bar Association (CBA) Professional Responsibility Committee and the Illinois State Bar Association (ISBA) Standing Committee on Professional Conduct. He coauthored a leading annotation on Illinois Legal Ethics for Cornell Law School. He is also a past member of the ISBA Civil Practice Section Counsel. He served as the Reporter for the Illinois Supreme Court Committee on Professional Responsibility (1996-2000).

Tom has taught at Loyola Law School since 1987, and has directed the Philip H. Corboy Trial Advocacy Fellowship since 1995. He currently teaches Illinois Litigation at Loyola. He has taught Illinois Tax Litigation and Procedure, Professional Responsibility, Professional Responsibility Seminar, and Criminal Procedure at Loyola. He is a past recipient of the St. Robert Bellarmine Award for a distinguished young alumnus and is an honorary member of Loyola's Circle of Advocates.

He has taught trial advocacy at the University of Chicago Law School in the Mandel Legal Aid Clinic. He has lectured at Washington and Lee Law School, Marquette Law School, and DePaul Law School. Additionally Tom teaches for State Appellate Defender, the Cook County State's Attorney, Cook County Public Defender, IICLE, the Chicago Daily Law Bulletin, the Chicago Bar Association, Illinois State Bar Association, and the Decalogue Society.

He authored Survey of Illinois Law: Enforcement of Judgment, 31 S.IU.L.J. 819 (2006) (coauthored with Judge Sanjay Tailor) and, responding to an article by Loyola Professor John Breen, The Leaven of the World: Serving the Poor is Neither the Air in the Balloon nor the Cherry on the Sundae, 43 Gonz.L.Rev. 607 (2007-2008). Recently, he has authored "New Supreme Court Rule: Help for self-represented litigants" *ISBA Bench & Bar Newsletter*, Vol. 45, pp. 1-3 (September 2014); "New Illinois Rule of Evidence: Business record certification," *Trial Briefs*, Vol. 57, no. 8, (March 2012) "Respecting Religious Freedom Without Sacrificing Justice: The Right to Wear Religious Garb in Court Proceedings," *ISBA Bench & Bar Newsletter*, Vol. 42, pp. 9-10 (October 2011). As part of Loyola's Law & Religion program, Tom interviewed Rabbi Jacob Neusner on the topic of Interreligious Dialogue and the Law: https://webapps.luc.edu/ignation/video-detail.cfm?id=1434040812

Tom serves on the Advisory Board of Loyola's Joan and Bill Hank Center for the Catholic Intellectual Heritage. He has spoken at many Hank Center presentations at both the Lakeshore and Water Tower campuses. At the 2011 Loyola Hank Center conference, "Revelation and Convergence: Flannery O'Connor Among the Philosophers and Theologians," Tom presented a paper on O'Connor's story "The Displaced Person." In 2014, at the University of Illinois Chicago John Paul II Newman Center, he presented a talk entitled: "Flannery O'Connor's Transfiguring Vision."

Tom is active in the Lumen Christi Institute at the University of Chicago; he moderated a 2014 panel discussion on Jewish & Catholic Approaches to Property & Social Justice

featuring Eduardo Peñalver (Cornell Law School) and Joseph William Singer (Harvard Law School).

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Recipient of the Catholic Lawyers Guild of Chicago 2014 Catholic Lawyer of the Year Award, he has served on the Guild's board since 1988. He is the past chair of the John Howard Association and the current vice-chair of the National Center for the Laity. He is the father of four boys and married to Anne Wicker. They live in Queen of Angels Parish in the Lincoln Square Neighborhood of Chicago.

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KIRSTEN M. DUNNE

Kirsten Dunne is an attorney at Goldberg Weisman Cairo (GWC), a prominent Chicago firm that represents plaintiffs in personal injury, wrongful death and workers' compensation cases. She handles all appellate matters for the firm and is also frequently involved in briefing potentially dispositive motions at the circuit court level, such as motions for summary judgment.

Kirsten graduated from the University of Notre Dame with high honors in 1992, and received her law degree from Notre Dame Law School in 1995. In addition to her Illinois licensure, Kirsten is licensed to practice before the United States District Court for the Northern District of Illinois, the Seventh Circuit Court of Appeals and the United States Supreme Court. She is an active member of the Illinois Trial Lawyers' Association (ITLA) and serves on its *Amicus Curiae* Committee, in which capacity she has filed "Friend of the Court" briefs in multiple Illinois Supreme Court cases. Most recently, Kirsten filed an Amicus brief on ITLA's behalf in *Carney v. Union Pacific Railroad Company*, 2016 IL 118984.

While Kirsten handles cases involving many different aspects of tort liability, the bulk of her practice pertains to construction negligence and premises liability.

SECTION A

- ***"Anatomy of a Premises Liability Case," by Judge Lynn M. Egan, August 2017.***

ANATOMY OF A PREMISES LIABILITY CASE

by
Judge Lynn M. Egan
August 2017

Regardless of the primary focus of a lawyer's practice, it is prudent to fully understand the law governing premises liability because virtually every lawyer will be presented with such a case at some point. Given the fact that people face property conditions on a daily basis, this area of tort law generates thousands of lawsuits every year in Illinois. In fact, the number of premises liability cases currently pending in Cook County rivals the number of auto accident cases.

I. In Order to Begin, Look to the End

Although the Premises Liability Act (*740 ILCS 130/1 et seq.)(West 2015)* is an obvious starting point, a clear understanding of the applicable jury instructions is quite helpful from a practical perspective for both plaintiffs and defendants because the concepts within the instructions inform the pleadings, discovery, motion practice and ultimate trial. In fact, the legal concepts detailed in the jury instructions dictate whether a premises liability case ever progresses to trial; and if it progresses to trial, those legal concepts shape the strategies, defenses and proofs.

There are several IPI chapters that are frequently utilized in premises liability cases, including 120.00 (Premises), 125.00 (Liability For Falls On Snow And Ice), 130.00 (Landlord And Tenant), and 135.01 (Owner of Property Abutting Sidewalk). Review of these instructions before drafting a complaint or responsive pleading can be quite helpful and either decrease motion practice or increase the odds of success on a dispositive motion.

NOTE: While virtually all lawyers understand that the legal status of the plaintiff is important in a premises case, and many remember the case law distinction between an invitee and licensee, the Premises Liability Act (effective in 1984) abolished this distinction. Instead, the same duty of reasonable care is owed to both categories of plaintiffs. *740 ILCS 130/2 (West 2015).* Importantly, as noted below, other distinctions based on legal status remain intact. *See, Lee v. Chicago Transit Authority, 152 Ill.2d 432, 499 (1992)("society yet finds some benefit in retaining the trespasser classification.").*

A. IPI – Civil, Chapter 120.00: Premises

Chapter 120.00 addresses the liability of an owner or occupier of land for conditions on the premises.[1] Unlike the distinction between invitees and licensees, the Premises Liability Act did not abolish the distinction between trespassers and those lawfully on the premises or adults and children so Chapter 120.00 provides separate instructions for

[1] *Not surprisingly, these instructions are frequently used with instructions from Chapter 125.00 for falls on snow and ice.*

these different categories of plaintiffs. As a result, lawyers should know the details of these instructions.

- IPI 120.01 Trespasser – Definition. "A trespasser is a person who goes upon the premises of another without express or implied right. [A person can become a trespasser by going (beyond an area where he/she was invited)(into an area where he/she was not invited).] The duty to a trespasser is merely "to refrain from willful and wanton conduct which would endanger the safety of (a) trespasser(s) on the property." IPI 120.03. However, there is an exception to this limited duty. If the defendant knew, or reasonably should have anticipated, the presence of the trespasser and knew that a condition on the property presented a "risk of death or serious bodily injury" that the trespasser would not discovery or realize, then the duty is one of ordinary care to warn of the condition. IPI 120.03.

CAUTION: Be aware of case law dealing with the "frequent trespass doctrine." *See, Vega v. Northeast Illinois Regional R.R. Corp., 371 Ill.App.3d 572 (1st Dist., 2007).*

- 120.02 Adult Lawfully on the Property. Such a person is owed a duty of "ordinary care to see that the property was reasonably safe for the use."

- 120.06 Scope of Invitation. The duty of ordinary care owed to those lawfully on the premises "extends only to the portion of the premises onto which the person has either expressly or impliedly" been invited or authorized to use or which the owner/occupier might reasonably expect him to use in connection with the invitation/permission and "only to that manner of use which the (owner)(occupier) might reasonably expect in connection with the express or implied (invitation)(or)(permission)]. If the plaintiff was injured in an area that exceeded the scope of invitation, the duty of care is merely "to refrain from willful and wanton conduct which would endanger the safety of the plaintiff.]"

NOTE: As revealed by the language in IPI 120.01 and 120.06, a person's status in relation to the premises can change. A person lawfully on the property can become a trespasser if he goes to an area where he was not invited. For instance, if a store customer enters an area marked "employees only" or "keep out." As a result, lawyers should carefully investigate the available facts before filing responsive pleadings because the duty owed is different. Notably, the dispositive time for evaluating a person's status is at the time of injury, not entry onto the premises; this can be a question of fact for the jury to decide. *Rhodes v. Illinois Central Gulf Railroad, 172 Ill.2d 213, 241 (1996).*[2]

- 120.04 Children Lawfully on Property. The duty is to exercise ordinary care so the property is "reasonably safe for the use of children." Notably, the duty is the same for adults lawfully on the property.

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[2] *The scope of invitation is not exceeded because the plaintiff enters the premises in an intoxicated state or starts an altercation. Green v. Jackson, 289 Ill.App.3d 1001, 1011 (1st Dist., 1997).*

- 120.05 Trespassing Children. Although Illinois has abandoned the concept of "attractive nuisance" as it relates to trespassing children in premises cases, aspects of it are incorporated into the duty instruction. Thus, IPI 120.05 imposes a duty to protect children or remedy property conditions that present a risk of injury which children would not appreciate and where the burden of doing so is slight in relation to the risk if the owner/occupier "should have anticipated" the presence of children.

In addition to changes generated by the Premises Liability Act, the IPI Committee revised the premises liability instructions in recent years so that issues and burden of proof instructions are now combined. The Committee did so in an effort to "streamline" and reduce "redundancy" in the instructions. *IPI – Civil, Ch. 120.00, Introduction, pg. 444 (West 2015-2016).* These instructions are well worth reviewing at the outset of litigation because they directly address the necessary proofs.

- 120.08 Issue/Burden of Proof Premises/Condition/Distraction. Not only does this instruction combine the issues and burden of proof instruction, but it can also be used when plaintiff relies on the distraction exception to the open and obvious rule and cases involving children lawfully on the property. Plaintiff's burden includes proof of the following:

    a) Presence of a condition that presented an unreasonable risk of harm;
    b) Defendant knew or should have known of the condition and the risk;
    c) Defendant could expect that people/children would not discover or realize the risk or would fail to protect themselves against it;
    d) Defendant was negligent in specific ways;
    e) Plaintiff was injured;
    f) Defendant's negligence was a proximate cause of plaintiff's injury.

NOTE: When faced with facts that implicate the distraction exception, practitioners are wise to review the Supreme Court decision in *Ward v. Kmart Corp., 136 Ill.2d 132 (1990),* as it is the touchstone decision for this concept. However, it is important to understand that merely alleging plaintiff was distracted is not a talisman. If the plaintiff's attention is diverted by his "own independent acts for which the defendant has no direct responsibility, the distraction exception does not apply." *Sandoval v. City of Chicago, 357 Ill.App.3d 1023 (1st Dist., 2005).* Instead, the exception applies when "the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition..." *Id.*

If a plaintiff relies on the deliberate encounter exception to the open and obvious rule, he must also demonstrate that defendant could reasonably expect a person in plaintiff's position to encounter the condition because the risk of doing so outweighed the apparent risk. IPI 120.09.

- 120.10 Issue/Burden of Proof – Trespassing Children. When trespassing children are involved, plaintiff must demonstrate a number of facts, including defendant's knowledge of the following:

    a) That defendant knew or should have known that children frequented the property;
    b) That there was a condition on the property that presented a risk of harm to children that they would not appreciate due to their immaturity;
    c) That the expense or inconvenience to defendant in protecting children against the condition would be slight compared to the risk of harm to them;
    d) That defendant was negligent in specific ways;
    e) The minor was injured;
    f) The minor's injury was proximately caused by the condition of the property.

NOTE: The Illinois Supreme Court has already held that children are capable of appreciating the risk of certain property conditions, such as those presented by a pool (*Mt. Zion State Bank & Trust v. Consol. Comm, Inc., 169 Ill.2d 110, 117 (1995)*), thin ice on a pond (*Cope v. Doe, 102 Ill.2d 278, 286 (1984)*), climbing a tree (*Logan v. Old Enter.Farms, Ltd., 139 Ill.2d 229, 241 (1990)*) and diving into water under certain circumstances (*Bucheleres v. Chicago Park District, 171 Ill.2d 435, 455 (1996)*).

- 120.00 Issue/Burden of Proof – Willful and Wanton. When the issue is willful and wanton behavior, plaintiff must establish the following:

    a) A condition on the property that presented an unreasonable risk of harm;
    b) That defendant know or was willful and wanton in failing to discover both the condition and the risk;
    c) That defendant could reasonably expect people on the property would not discover or realize the danger;
    d) That defendant was willful and wanton in specific ways;
    e) Plaintiff was injured;
    f) Defendant's willful and wanton conduct proximately caused plaintiff's injury.

NOTE: A plaintiff's contributory negligence will serve to reduce damages if defendant's conduct was merely reckless, but not if it was intentional. *IPI 120.11, Notes on Use, pg. 469.*

B. IPI – Civil, Chapter 125.00: Liability For Falls On Snow And Ice

Because there is no common law duty in Illinois to remove natural accumulations of snow or ice, a plaintiff's only chance of recovery in such a case is dependent on proving the snow or ice resulted from negligence that created an unnatural accumulation. See IPI 125.01: "The [owner][occupant] of property is under no duty to remove ice or snow

which has resulted from natural accumulations." Of course, contractual language that requires snow or ice removal or a voluntary undertaking may provide alternative bases for imposition of a duty.

A significant amount of discovery in these types of cases is devoted to the dispute over whether an accumulation of snow or ice was natural or unnatural. Therefore, practitioners are wise to familiarize themselves with the jury instruction that defines this concept.

- IPI 125.04 Natural Accumulation Defined. "The [snow][ice] involved in this case was a natural accumulation if it resulted from [(fill in appropriate language determined by the court to define the disputed issue in the case, e.g., moisture which is tracked into a building; the normal effects of pedestrian or vehicular traffic on snowfall; normal freezing and thawing; the effects of normal snow removal, etc.)]
  On the other hand, the [snow][ice] involved in this case was an unnatural accumulation if it resulted from [(fill in appropriate language by the court to define the disputed issue in the case, e.g., impaired or altered drainage of the premises; negligent maintenance of the underlying sidewalk/parking lot by the property owner; negligence of the property owner in leaving spilled liquid in a high traffic area, etc.)]
  Whether the [snow][ice] which plaintiff claims proximately caused injury was a natural accumulation or was an unnatural accumulation is for you to decide.

Obviously, the IPI above will be given in conjunction with IPI 125.02, the combined issue/burden of proof instruction, which requires that plaintiff prove the following in order to recover:

a) That there was an unnatural accumulation of ice or snow on the property which created an unreasonable risk of harm;
b) That defendant knew or in the exercise of ordinary care should have known of both the condition and the risk;
c) That defendant could reasonably expect that people would not discovery or realize the danger or fail to protect against it;
d) That defendant was negligent in specific ways;
e) That plaintiff was injured;
f) That defendant's negligence proximately caused plaintiff's injury.

C. IPI – Civil, Chapter 130.00: Landlord And Tenant.

As a general proposition, a landlord's duty is limited to exercising ordinary care in maintaining the common areas of the property reasonably safe, unless he knows of an existing latent defect. Of course, lease language may modify this duty so as to extend beyond common areas. The applicable instructions are as follows:

- IPI 130.02 Accident on Premises Reserved for Common Use. In such a case, the defendant bears the burden of using "ordinary care to keep the [stairs, hallway, etc.] in a reasonably safe condition [for the purpose for which]" they were reasonably intended.

- IPI 130.01 Accident on Leased Premises—Latent Defect. This instruction is used when the injury occurs within the leased premises (as opposed to the common areas) and imposes a duty to warn the tenant "if a landlord either knows about an existing defect...which is not readily apparent, or knows of facts and circumstances which would indicate that there is such a defect." Notably, this duty is not triggered if the defect could have been discovered by the tenant through "a reasonable inspection."

- IPI 130.03 Landlord Undertakes Repairs. When a landlord makes repairs or improvements to leased premises, a duty of ordinary care applies in doing so, even if the landlord had no legal obligation to make the repairs.

II. Bases for Liability

Even though the most obvious basis for liability in this context is the Premises Liability Act, *740 ILCS 130/2 (West 2015)*, there are numerous bases upon which premises liability may be imposed and lawyers should be familiar with the following:

A. Premises Liability Act, 740 ILCS 130/1, *et seq.*

This Act specifically sets forth the duty owed by an owner or occupier of property in most circumstances as one of reasonable care under the circumstances.

B. Restatement (Second) of Torts – sections 343 & 414

"Section 343 of the Restatement (Second) of Torts has been adopted by our supreme court and governs premises liability in Illinois. ...[T]he standard of care imposed under section 343 of the Restatement is identical to the standard of care imposed under the amended Premises Liability Act – that of reasonable care..." *Mazin v. Chicago White Sox, Ltd., 358 Ill.App.3d 856 (1st Dist., 2005).*

Similarly, Section 414 of the Restatement (Second) of Torts is "a recognized expression of Illinois law." *Bieruta v. Klein Creek Corp., 331 Ill.App.3d 269 (1st Dist., 2002).*

ALERT: A must-read case is the recently decided, *Carney v. Union Pacific Railroad Co., 2016 IL 118984.*

C. Statutes

- Americans with Disabilities Act, 42 U.S.C., section 12101
- Occupational Safety & Health Act, 29 U.S.C., section 651
- Snow & Ice Removal Act (745 ILCS 75/1 et seq.)

- Local Governmental & Governmental Employees Tort Immunity Act (*745 ILCS 10/30102(a)(West 2012)*)
- Municipal Codes or ordinances

III. Selected Issues

A. Notice

Landowners have no liability for dangerous or defective conditions on their property unless they created the condition or possess actual or constructive knowledge of it. "If the gist of a complaint is that the landowner did not create the condition, the plaintiff must be required to establish that the landowner knew or should have known of the defect." *Tomczak v. Planetsphere, Inc., 315 Ill.App.3d 1033 (1st Dist., 2000).* Not only is this concept a constant theme in the case law, but it is also incorporated into Section 343 of the Restatement. *(Restatement (Second) of Torts), Section 343 (1965).*

Actual notice does not generate nearly the amount of discovery or motion practice, as does constructive notice. As a result, it is important that lawyers have a thorough understanding of the case law governing constructive notice and the ways in which it can be established. In practice, "constructive notice can only be shown where the dangerous condition is shown to exist for a sufficient length of time to impute knowledge of its existence to the defendants." *Ishoo v. General Growth Properties, Inc., 2012 IL App (1st) 110919, ¶ 28.* This will obviously be case specific so lawyers must be alert to discovery opportunities to develop or refute the presence of constructive notice.

Thus, it is essential for both plaintiffs and defendants to thoroughly investigate and document facts that relate to this issue. This can be done through incident reports, photographs, measurements, maintenance records, defendant's own inspection policies, government inspection reports, weather reports, and interviews of accident witnesses, employees or neighbors. Lawyers need to think of all possible sources of information about notice before discovery begins because many cases are lost due to the lack of evidence demonstrating notice or the inability to refute reasonable inferences about it. *See e.g., Dahn v. Regal Chateaux Condominium Assoc., 2017 IL App (1st) 152343-U; Krivokuca v. City of Chicago, 2017 IL App (1st) 152397; Hanna v. Creative Designers, Inc., 2016 IL App (1st) 143727.*

CAUTION: Although defendants frequently do not become aware of an incident until after suit is filed, defense counsel should advise commercial clients of the importance of maintaining and safeguarding videotape of known occurrences so as to assist in the defense and avoid a spoliation claim or adverse jury instruction. Even though there is no general duty to preserve evidence, such a duty may arise through an agreement, contract, statute or other special circumstance, including voluntarily assuming the duty to do so through affirmative action. *Martin v. Keely & Sons, Inc., 2011 IL App (5th) 100117, ¶ 19, citing Boyd v. Travelers Insurance Co., 166 Ill.2d 188, 195 (1995). See also, IPI 5.01—Failure to Produce Evidence or a Witness.*

B. Open & obvious/de minimus

The open and obvious rule is an exception to the duty of care set forth in Section 343 of the Restatement. *Wilfong v. L.J. Dodd Construction, 401 Ill.App.3d 1044, 1052 (2d Dist., 2010).* It has two exceptions: distraction and deliberate encounter. *See generally, Metke v. Harlem Irving Cos., 2015 IL App (1st) 143388-U; DeLaTorre v. Lake Effect Dev. III, LLC., 2015 IL App (2d) 140596-U.* Because it is so closely tied to the issue of duty, arguments about open and obvious are extremely common during motion practice. *See e.g., Contreras v. Harvestime Foods, Inc., 2017 IL App (1st) 160878-U.* Therefore, it is yet another area where attorneys need to fully understand the case law.

A condition is open and obvious when a reasonable person in the plaintiff's position exercising ordinary perception, intelligence and judgment would recognize both the condition and the risk involved. *Algadhi v. Standard Parking, Inc., 405 Ill.App.3d 14, 17 (1st Dist., 2010).* Although this determination is frequently decided as a matter of law, it becomes a fact question for the jury to decide when there is a dispute about the condition's physical nature, such as its visibility. *Id. at 18. Accord, Hubert v. Randolph City Fair, Inc., 2013 IL App (5th) 110557-U.*

NOTE: Whether a condition is open and obvious is evaluated on an objective standard. *Duffy v. Togher, 382 Ill.App.3d 1 (1st Dist., 2008).* As a result, a plaintiff's intoxication does not affect the court's analysis. *Id.*

Arguments about a condition being nonactionable because the alleged defect is *de minimus* most commonly involve sidewalks or other walking surfaces; and even though there are some appellate decisions pronouncing certain levels of height differential to be *de minimus,* lawyers are well advised to develop a case-specific record that accounts for the entire factual context of their specific case rather than relying on measurements from an unrelated appellate decision. Indeed, it is axiomatic that "...there is no bright-line test for determining the point at which a defect becomes actionable. Rather, it is well-settled that each case must be decided on its own particular facts and circumstances." *Rios v. City of Chicago, 331 Ill.App.3d 763 (1st Dist., 2002).*

C. Natural/unnatural accumulation

It is well established in Illinois that a property owner has no common law duty to remove natural accumulations of snow or ice. *Gallagher v. Union Square Condo Homeowner's Assoc., 397 Ill.App.3d 1037, 1043 (2d Dist., 2010). See also, Bilek v. Wal-Mart Stores, Inc., 2017 IL App (1st) 163110-U (summary judgment for defendant was affirmed due to conclusion that fall caused by natural accumulation, rending analysis of Premises Liability Act claim unnecessary.)* Indeed, "even common carriers, which owe the highest duty to individuals, are not required to protect people from natural accumulations of ice or snow." *Fillpot v. Midway Airlines, Inc., 261 Ill.App.3d 237, 242 (4th Dist., 1994).* Similarly, if the accumulation is deemed to be natural, "the carrier also has no duty to warn of the condition created by that accumulation." *Sheffer v. Springfield Airport Authority, 261 Ill.App.3d 151 (4th Dist., 1994).* However, liability may

be imposed where a property owner causes an unnatural accumulation, aggravates a natural accumulation or voluntarily elects to remove snow or ice from the premises and does so negligently. Gallagher, *supra.* Although duty through voluntary undertaking in this context is usually pursuant to contract, it is important to remember that this concept is strictly construed, meaning that the scope of a voluntarily assumed duty is strictly limited to "the extent of [the owner's] undertaking." *Reed v. Galaxy Holdings, Inc., 394 Ill.App.3d 39, 47 (1st Dist., 2009).*[3]

NOTE: The voluntary removal of snow, which leaves a natural ice formation underneath, does not constitute negligence and will not serve as a basis for liability. *Tzakis v. Dominick's Finer Foods, Inc., 356 Ill.App.3d 740 (1st Dist., 2005).*

D. Criminal attacks of third parties

"Illinois law is very limited in imposing a duty upon a landowner to protect individuals from criminal attacks by third parties. This is true even where some condition of the property or element inherent therein may foster a condition conducive to criminal activities." *Salazar v. Crown Enterprises, Inc., 328 Ill.App.3d 735 (1st Dist., 2001).* Despite criticism of this law, the Illinois Supreme Court rejected the invitation to abandon it in *Iseberg v. Gross, 227 Ill.2d 78 (2007)("we reject plaintiffs' claim that the 'special relationship doctrine has been eroded in Illinois" and "we will continue to adhere to its principles.").*

According to this doctrine, a property owner "has no duty to protect individuals upon his property from criminal activity unless a special relationship exists, e.g., that of carrier-passenger, innkeeper-guest, business invitor and invitee, or 'one who voluntarily takes custody of another in such a manner that it deprives the person of his normal opportunities for protection.' Even if a special relationship exists, a landowner is not liable for criminal conduct unless the incident is reasonably foreseeable. To be reasonably foreseeable, the conduct must be 'objectively reasonable to expect, not merely what might conceivably occur." *Salazar, supra.*

There are actually four exceptions to this doctrine. They are as follows: 1) where there is a special relationship and the harm is foreseeable; 2) an employee is in imminent danger that is known to the employer; 3) the principal fails to warn the agent of an unreasonable risk of harm involved in the agency; and 4) a voluntary or contractual assumption of the duty to protect. *Iseberg, supra. See also, Restatement (Second) of Torts, § 314 (1965).*

NOTE: Generalized allegations of crime are not enough to establish the element of foreseeability. However, an owner may voluntarily assume a duty to protect people from third-party attacks by providing security services. However, the scope of duty under

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[3] *Of course, a landowner's duty to provide a reasonable means of ingress and egress "is not abrogated by the presence of a natural accumulation of ice, snow, or water. When the landowner prescribes a means of ingress and egress, it has a duty to illuminate properly and give adequate warning of a known, dangerous condition, or it must repair the condition."*

such circumstances is strictly limited to the language of the contract or agreement. *See, Aidroos v. Vance Uniformed Protection Services, Inc., 386 Ill.App.3d 167, 172 (1st Dist., 2008).*

E. Evidentiary Issues: Post-Remedial Measures, Lack of Prior Falls/Complaints

Evidence of post-accident remedial measures is inadmissible to prove negligence. *Bulger v. Chicago Transit Authority, 345 Ill.App.3d 103, 111 (1st Dist., 2003).* The reasons for this general rule are easily understood. Public policy favors improvements that enhance public safety, subsequent measures are not necessarily relevant to prior negligence and jurors may erroneously consider such measures as an admission of negligence. *Id.* However, there are several exceptions to the prohibition against this type of evidence, including the following:

- To prove ownership or control if disputed by the defendant;
- To prove the feasibility of precautionary measures if disputed by defendant;
- To prove notice;
- To prove defendant did not act voluntarily, but was required to do so by an outside government authority.
- To impeach. *Id. Accord, Taake v. WHGK, Inc., 228 Ill.App.3d 692, 706-707 (5th Dist., 1992).*

Similarly, a defendant in a premises liability case may introduce evidence of lack of prior accidents in order to show lack of notice. *See, Dahn v. Regal Chateaux Condo Assoc., 2017 IL App (1st) 152343-U; Hanna v. Creative Designers, Inc., 2016 IL App (1st) 143727; Schmid v. Fairmont Hotel Co.—Chicago, 345 Ill.App.3d 475 (1st Dist., 2003).*

F. Comparative fault

A plaintiff's comparative fault is a consideration is every premises liability case and attorneys for all parties are wise to explore it because a defendant "is not required to anticipate the specific plaintiff's own negligence or make his premises injury-proof." *Sandoval v. City of Chicago, 357 Ill.App.3d 1023 (1st Dist., 2005).*

SECTION B

- ***"Premises Liability," by Ms. Kirsten M. Dunne, August 2017.***

- ***"Construction Negligence," by Ms. Kirsten M. Dunne, August 2017.***

PREMISES LIABILITY

Premises liability actions in Illinois are governed by the common-law negligence principles set forth in the Restatement (Second) of Torts, Sections 343 and 343A (1965). Section 343 reads:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, Section 343 (1965). Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of a public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

Restatement (Second) of Torts, Section 343A (1965).

The following are the most frequently contested issues in premises liability cases.

1. Whether the defendant is a "possessor of land." A defendant need not own the property in order to qualify as a "possessor," but must have occupied the premises with the intent to control it. See, *e.g.*, *Jackson v. TLC Assoc., Inc.*, 185 Ill.2d 418, 425 (1998); and *Williams v. Sebert Landscape Co.*, 407 Ill.App.3d 753, 756 (1 Dist. 2011). One example of possession is the power to alter "what [is] built where" on the property. *O'Connell v. Turner Const. Co.*, 409 Ill.App.3d 819, 824-25 (1 Dist. 2011).

2. Whether a "condition on the land" is at issue in the case. In order for Section 343 to provide a basis for potential recovery, the plaintiff must have been injured by some feature of the property. "[C]ondition[s] on the land" to which the courts have found Section 343 applicable include, *e.g.*, a tire rut in the ground (*Deibert v. Bauer Bros. Const. Co., Inc.*, 141 Ill.2d 430 (1990)); a concrete post installed outside a door to a retail store (*Ward v. K Mart Corp.*, 136 Ill.2d 132 (1990)); and a street barricade (*Waters v. City of Chicago*, 2012 IL App (1st) 100759).

3. Whether the defendant had adequate notice of both the condition and the risk it posed to invitees on the property. Possessors of land owe a duty of exercising reasonable care to discover dangerous conditions on their land, and are deemed to have constructive notice of all conditions that are discoverable by a reasonable inspection of the premises. *Lombardo v. Reliance Elevator Co.*, 315 Ill.App.3d 111, 119-20 (1 Dist. 2000). The longer the condition has existed, the easier it will be for a plaintiff to show the requisite notice. *Cf. Lombardo*, 315 Ill.App.3d at 120 (fact that condition had remained uncorrected for more than a year prior to accident supported finding that defendant had constructive notice); and *Cochran v. George Sollitt Const. Co.*, 358 Ill.App.3d 865, 873 (1 Dist. 2005) (upholding summary judgment for defendant where the condition "existed for an hour at the most" before the plaintiff was injured and no other evidence supported finding that defendant had reason to discover it within that time frame).

4. Whether the defendant should have anticipated that invitees would either fail to discover the condition or fail to protect themselves against the danger associated with it. Under Section 343A, a defendant who shows that a condition was "open and obvious" generally will not be held liable because, in such scenarios, they can reasonably expect their invitees to independently discover, and protect themselves against the dangers associated with, the condition. The "open and obvious rule" effectively acts as an exception to the general rule of liability set forth in Section 343.

However, litigants must appreciate that there are also "exceptions to the exception." The most common scenarios are those in which (a) the defendant had reason to expect the plaintiff to be distracted, and thus fail to discover the condition (the "distraction exception") (see, *e.g.*, *Deibert, supra*); or (b) it was foreseeable that the plaintiff would discover the condition but nonetheless proceed to encounter it because, *e.g.*, it was within the scope of his job (the "deliberate encounter" exception) (see, *e.g.*, *LaFever v. Kemlite Co.*, 185 Ill.2d 380 (1998)).

In addition to the above, just as in any negligence case, premises liability claims may involve issues as to whether the defendant's conduct constituted a breach of its duty and whether there was a causal connection between the defendant's conduct and the plaintiff's injury.

CONSTRUCTION NEGLIGENCE

Construction negligence actions in Illinois are governed by the common-law negligence principles set forth in the Restatement (Second) of Torts, Section 414 (1965), and its explanatory comments. This theory is distinct from premises liability, but is related in the sense that the two theories are often jointly raised in cases involving injured construction workers. See, *e.g.*, *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771; and *Cain v. Joe Contarino, Inc.*, 2014 IL App (2nd) 130482.

Section 414 states:

> One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Restatement (Second) of Torts, Section 414 (1965).

Many of the cases construing Section 414 include heavy emphasis on the comments, which provide as follows:

> *a.* If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.
>
> *b.* The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts part of the work to subcontractors, but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the

details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition, and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so.

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.

Restatement (Second) of Torts, Section 414 (1965), comments *a*, *b* and *c*.

Disputes specific to Section 414 cases typically involve one or both of the following issues:

1. Whether the level of control retained by the defendant was sufficient to warrant the imposition of a Section 414 duty. In line with comment *c*, the defendant must be shown to have retained "a right of supervision [such] that the contractor [was] not entirely free to do the work in his own way." Section 414, comment *c*. Defendants are therefore exposed to Section 414 liability if they retained the power to direct the "means" as well as the "ends" of a subcontractor's work – in other words, authority over both what the subcontractor does and how the subcontractor does it. *Rangel v. Brookhaven Constructors, Inc.*, 307 Ill.App.3d 835, 839 (1 Dist. 1999).

Where contracts exist, they are generally viewed as the best evidence of control (*Joyce v. Mastri*, 371 Ill.App.3d 64, 74 (1 Dist. 2007)), but the fact-finder (or the court, in the scenario of a motion for summary judgment) should also consider whatever other evidence is presented by the parties, including jobsite correspondence (*Wilkerson v. Paul H. Schwendener, Inc.*, 379 Ill.App.3d 491, 494-95, 497 (1 Dist. 2008)); corporate safety manuals (*Lederer v. Executive Const., Inc.*, 2014

IL App (1st) 123170, ¶¶6-12, 56-60); and testimony about safety measures the defendant took after the accident (*Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶56).

2. Whether the defendant had notice of a dangerous work method. The analysis of notice in the Section 414 context is very similar to the analysis that takes place in a Section 343 premises liability claim. The key difference pertains to the subject of the defendant's notice.

Whereas Section 343 requires a showing that the defendant had constructive notice of the complained-of *"condition on the land"* (see above discussion), the pertinent inquiry under Section 414 is whether the defendant knew or could reasonably be expected to have discovered that its subcontractor was using an *unsafe work method* (see Section 414, comment *b*).

Comparable to premises liability cases, the length of time that elapsed between the first time the unsafe work method was used and the plaintiff's injury carries significant weight. See *Cochran, supra*, 358 Ill.App.3d at 879-80; and *Shaughnessy v. Skender Const. Co.*, 342 Ill.App.3d 730, 739-40 (1 Dist. 2003). However, the level of the defendant's involvement in the project/presence at the jobsite, as well as the location on the site where the work was taking place, must also be evaluated. See, *e.g.*, *Bokodi v. Foster Wheeler Robbins, Inc.*, 312 Ill.App.3d 1051, 1063 (1 Dist. 2000) (notice could properly be attributed to defendants who were "constantly monitoring this work site"); and *Lederer, supra*, 2014 IL App (1st) 123170 at ¶65 (noting that the plaintiff was working in a "highly trafficked, visible area of the jobsite").

Because Section 414 reflects common-law negligence principles, these cases may present the same sorts of issues of breach and proximate cause that arise in negligence cases generally.

Course Evaluation Form

Title of Course: **"ANATOMY OF A PREMISES LIABILITY CASE"**

Date of Course: September 28, 2017 Location: James R. Thompson Center Assembly Hall Auditorium

Directions: On a scale of 1 to 5, (5 being the highest or best and 1 being the lowest or worst), please rate the program:

Rate how well this course satisfied your personal objectives 5 4 3 2 1
Comments:_____

Rate how well the environment contributed to the learning experience 5 4 3 2 1
Comments:_____

Rate how well the written materials contributed to the learning experience 5 4 3 2 1
Comments:_____

Rate the level of significant intellectual, educational or practical content 5 4 3 2 1
Comments:_____

Please rate the faculty using the same 1 – 5 scale:

	Overall Teaching Effectiveness					Effectiveness of Teaching Methods					Significant Current Intellectual or Practical Content				
Name: JUDGE LYNN M. EGAN	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															
Name: JUDGE THOMAS M. DONNELLY	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															
Name: Ms. KIRSTEN M. DUNNE	5	4	3	2	1	5	4	3	2	1	5	4	3	2	1
Comments:															

SUGGESTIONS FOR FUTURE SEMINARS:

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