PREMISE LIABILITY:

A DEFENSE PERSPECTIVE

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It usually happens quickly. The surrounding circumstances appear fairly straightforward. But if handled improperly, it can have devastating financial consequences for your client's business. That need not be the case, however, if the defense of the ensuing premise liability lawsuit is skillfully handled.

The building blocks of an effective defense are a meticulous preparation of the facts, a complete analysis of governing law, and the early formulation of a coherent strategy for the presentation of your defense themes to a jury.

Initial Considerations:

Preserve Coverage: The first thing to do is identify all available primary and excess insurance coverages relative to the loss. Timely notice to all insurers is essential to avoid jeopardizing coverage [*Security Mut. Ins. Co. v. Acker-Fitzsimmons Corp.*, 31 N.Y.2d 436, 340 N.Y.S.2d 902 (1972); *Power Auth of the State of New York v. Westinghouse Elec Corp.*, 117 A.D.2d 336, 502 N.Y.S.2d 420; *Eveready Ins. Co. v. Chavis*, 111 A.D.2d 700, 490 N.Y.S2d 516].

The Fact Finding Process:

A defense is only as strong as the proof you have to support it. Whatever you "think" or "feel" about a case must be translated into proof which can be admitted into evidence.

Testimonial Proof:

Witnesses

Typically, plaintiff alleges that a condition (characterized as dangerous, defective, trap-like, a nuisance…) caused his accident. While plaintiff is obligated to identify all

eyewitnesses, and those who possess "material knowledge,[1]" defense counsel should independently identify and interview those who are likely to be familiar with the condition; and who can testify at trial. It is surprising how often knowledgeable witnesses are overlooked including: the (visiting) property manager, the (on-site) superintendent; the (daily) porter; the (ever present) security guard; building tenants; responding EMS technicians and police officers; and if applicable, the responding elevator, OSHA, Department of Buildings and fire department inspectors.

Documentary Proof

The police report, as well as those reports of any governmental agency which responded to the scene (i.e., Department of Buildings, Fire Department, Elevator Inspectors, OSHA…) must be obtained early on. A Freedom of Information Law request to all potentially involved agencies is recommended.

Whether your client's records help or hurt is initially irrelevant. You must identify and secure all (potentially) relevant records including: incident/accident reports, leases, complaint logs/records, maintenance logs/dispatch sheets, security logbooks/daily reports, repair records/work slips tenant files, any proposals for repair/renovation, property surveys, contractor records/contracts, payroll/timesheet records, government permits, correspondence, photographs, violations (beware of any "administratively adjudicated" citations), the Certificate of Occupancy…

From a defense perspective, it is imperative that you research the complete accident history relative to the subject condition. Although often overlooked, the absence of similar accidents involving the condition at issue is admissible and "relevant

[1] *Hughes v. Alias*, 120 A.D.2d 703, 502 N.Y.S.2d 772; *Carvache v. NYC Transit Auth*, 175 A.D.2d 41, 572 N.Y.S.2d 9.

and often persuasive on the question of whether a given condition should be classified as dangerous" [*Stein v. Trans World Airlines*, 25 A.D.2d 732, 268 N.Y.S.2d 752; *DeSalvo v. Stanley Mark Strand Corp.*, 281 N.Y. 333].

Demonstrative Proof:

Ultimately, the most persuasive proof will be what the jury actually sees, particularly if the condition is not as bad as plaintiff claims or if the theory of liability defies common sense or physical laws.

Therefore, preserve all "evidence" (whenever possible) or alternatively, ensure that the photographic evidence is a fair and accurate depiction of the condition as it existed at the time of the accident. [*Davis v. County of Nassau*, 166 A.D.2d 498, 499, 560 N.Y.S.2d 696; *Niles v. State*, 201 A.D.2d 774, 607 N.YS.2d 480; *Saks v. Yeshiva of Spring Valley*, 257 A.D.2d 615, 684 N.Y.S.2d *560*]. Also: Photographs may present circumstantial evidence of a defect [*DeGruccio v. 863 Jericho Turnpike Corp.*, 1 A.D. 3d 472, 767 N.Y.S.2d 274; *Truesdell v. Rite-Aide of New York*, 228 A.D.2d 922, 644 N.Y.S.2d 428; *Batton v. Elghanayan*, 43 N.Y.2d 898, 403 N.Y.S.2d 717].

The compelling nature of demonstrative evidence to refute plaintiff's contention as to how the accident happened and/or to bolster a defense theory, is often not capitalized on in the presentation of defendant's proof.

In addition, a site visit is recommended to gain a realistic appreciation of the circumstances involved in the happening of the accident.

Relevant Codes:

1. Buildings within New York City limits are required to comply with the New York City Building Code, which was in force (including revisions) at the time of the application for approval of construction. The Codes were established in 1900, 1916 (revision), 1938 (revision), 1968/1969 (revision).

2. Multiple dwellings in the City of New York also require compliance with The Multiple Dwelling Law and Housing Maintenance Law of the City of New York [*see* NYC Administrative Code 27-127, 27-128, Multiple Dwelling Law §78].

3. Alterations of buildings in the City of New York require compliance with §27-114 to §27-118 of The NYC Building Code (which code you use is based on the percentage of alteration of the building in question).

4. Buildings outside the City require compliance with the NY State Building Code and the applicable Code of the municipality within which the building is located.

5. International Building Code 2000 (The Model Code).

6. New York City sidewalks must comply with the NYC Department of Highways and Department of Transportation rules and regulations. New York City, however, recently enacted an ordinance holding adjoining landowners responsible for keeping sidewalks that abut their property in safe condition [NYC Code §7-210, 7-211 and §7-212] and have shifted civil liability for a sidewalk condition from the City of New York to the property owner; (but only for accidents that postdate the law's effective date of September 15, 2003).

Consult industry standards i.e. ASTM F1637-02: Standard Practice for Safe Walking Surfaces; and National Safety Council Data Sheets, i.e., "Falls on Floors, Floor Mats and Runners…"

The Court of Appeals in *Elliott v. The City of New York*, 95 N.Y.2d 730, 724 N.Y.S.2d 397 reaffirmed that a violation of the New York City Administrative Code is "only evidence of negligence," rather than negligence *per se* ("….[A]s a rule violation of a State statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability: By contrast, violation of a municipal ordinance constitutes only evidence of negligence").

Experts

Generally speaking, a prerequisite for the admission of expert testimony is that it's subject matter involves information beyond the ordinary knowledge and experience

of the trier of fact [*Mattot v. Ward*, 48 N.Y.2d 455, 423 N.Y.S.2d 645 (1979); *People v. Kenny*, 30 N.Y.2d 154, 331 N.Y.S.2d 392; *Preiste v. City of New York*, 276 A.D.2d 766, 715 N.Y.S.2d 419, *O'Leary v. Saugertis Central School District*, 277 A.D.2d 662, 716 N.Y.S.2d 424]. Opinions which invade the province of the jury will not be admitted [*Franco v. Muro*, 224 A.D.2d 579, 638 N.Y.S.2d 690; *Roman v. Vargas*, 182 A.D.2d 543, 582 N.Y.S.2d 1020; *Fortunato v. Dover Union Free School District*, 224 A.D.2d 658, 638 N.Y.S.2d 727; and *Nevins v. Great Atlantic & Pacific Tea Co.*, 164 A.D.2d 807, 559 N.Y.S.2d 539; also see: *Cohen v. Interlake & Owners, Inc.* 275 A.D. 2d 235, 712 N.Y.S.2d 513].

Similarly, opinions that are based on an unreliable methodology, are scientifically unfounded, or speculative will be excluded. [*Daubert v. Merrell-Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999): New York Standard: *Frye v. U.S.,* 54 App. D.C. 46, 293 F.1013 (1923); *Brust v. Caruga*, 287 A.D.2d 923, 731 N.Y.S.2d 542; *Campenalla v. Marsta Pizza Corp.*, 280 A.D.2d 418, 720 N.Y.S.2d 501; *Wahl v. Am. Honda Motor Co.*, 181 Misc.2d 396].

An expert cannot testify as to the interpretation of applicable laws or regulations [*Rodriguez v. NYC Housing Authority*, 209 A.D.2d 260, 618 N.Y.S.2d 352].

A BRIEF OVERVIEW OF THE LAW (OR SHORT-CIRCUITING PLAINTIFF'S PATH TO THE JURY[2])

1. Notice

(a) Generally

Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986) is the seminal case on the issue of notice; holding that to impose liability on a defendant, there must be competent evidence that the defendant had either actual or constructive notice of the alleged defective or dangerous condition. The plaintiff in *Gordon* was injured as a result of slipping and falling on the steps of the museum. Plaintiff claimed that as he slipped, he observed, in mid-air, a piece of wax paper next to his foot. There was no evidence that defendant possessed actual notice of the debris and with regard to constructive notice, the Court held that:

> A defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. [Id at 837].

The *Gordon* Court, in dismissing plaintiff's complaint, held that "neither a general awareness that litter or some other dangerous condition may be present nor the fact that plaintiff observed other papers on another portion of the steps approximately 10 minutes before his fall is legally sufficient to charge defendant with constructive notice of the paper he fell on." [Id at 837].

In *Zuppardo v. State of New York*, 186 N.Y.2d 561, 588 N.Y.S.2d 401 (2d Dept. 1992), plaintiff was injured on a New York State University campus when he slipped and fell on sand or pebbles on a sidewalk near an area where the concrete

[2] Due to the breadth of the topic, the article does not address specialized areas within premises liability such as negligent security, elevator related liability, lead-poisoning cases…

sidewalk sloped downward to accommodate wheelchair traffic from an adjacent roadway. In granting defendant's motion to dismiss, the *Zuppardo* Court held that there was no evidence that defendant created the sandy condition, witnessed its creation, or had actual or constructive notice of its existence.

In those instances where plaintiff has ample proof of notice of the generally poor condition of defendant's property, an argument should be made that the absence of notice of the specific defect alleged is fatal to plaintiff's cause of action [*Hooker v. Melton Manor Condo*, 212 A.D.2d 1049, 623 N.Y.S.2d 43; *Welles v. NYC Housing Auth*, 284 A.D.2d 327, 725 N.Y.S.2d 385; *Zavaro v. Westbury Property Inv. Co.*, 244 A.D.2d 547, 664 N.Y.S.2d 611].

For representative notice cases: See *Ginsberg v. Waldbaums*, 228 A.D.2d 910, 643 N.Y.S.2d 652; *Eddy v. Tops Friendly Markets*, 91 A.D.2d 1203, 459 N.Y.S.2d 196; *McDuffie v. Fleet Financial Group*, 269 A.D.2d 575, 703 N.Y.S.2d 510; *Segretti v. Shorenstim Co.*, 682 N.Y.S.2d 176, 256 A.D.2d 234.

Transient Condition

A notice defense is particularly lethal in those premise liability actions predicated on a transient condition (i.e., liquids, debris…) In *Kraemer v. K-Mart Corporation*, 226 A.D.2d 590, 641 N.Y.S.2d 130 (2d Dept. 1996), a customer of defendant K-Mart slipped on a small piece of cardboard or a plastic ticket which had fallen to the floor in the vicinity of the shoe department. The Court held that plaintiff failed to meet her burden because she did not notice the cardboard or ticket prior to her fall and there was no evidence as to how long they had been on the floor. The Court emphasized that it

would be speculative to infer that these items had been on the floor for any appreciable length of time.

Similarly, in *Kaufman v. Mann-Dell Food Stores, Inc.,* 203 A.D.2d 532, 611 N.Y.S.2d 230 the Second Department affirmed the grant of summary judgment to the defendant and held:

> It was incumbent upon (the plaintiff) to come forth with evidence that defendant had either created the allegedly dangerous condition or that it had actual or constructive notice of it, and the mere fact that the defendant had not cleaned the area for forty-five (45) minutes, or the fact that the flower appeared smashed and dirty after the accident were both insufficient to raise a triable issue of fact with respect to notice to the defendant.

Also see: Marjorie Puryear v. New York City Housing Authority, 255 A.D.2d 138, 680 N.Y.S.2d 9; *Stone v. L.I. Jewish Medical Center*, 302 A.D.2d 376, 754 N.Y.S.2d 352; *DeVivo v. Sparago*, 287 A.D.2d 535, 731 N.Y.S.2d 501.

Recurring Condition

The Courts have relaxed the notice requirement when the injury is caused by an "ongoing/recurring condition" which justifies charging defendants with constructive notice of each specific recurrence [*Osorio v. Wendell Terrace Corp.,* 276, A.D.2d 540, 714 N.Y.S.2d 116; *O'Connor-Miele v. Barhite*, 234 A.D.2d 106, 650 N.Y.S.2d 717; *Garcia v. U-Haul Co., Inc.*, 303 A.D.2d 453, 755 N.Y.S.2d 900 (beams on ground once or twice a month); *Uhlich v. Canada Dry*, 2003 WL 1993824 (numerous prior complaints of garbage, debris, potholes…)].

In *Gloria v. MGM Emerald Enterprises, Inc.*, 298 A.D.2d 355, 751 N.Y.S.2d 213, the Second Department defined a recurring condition as "…where a known defect on the premises is routinely left unattended and causes a recurring hazard;" citing *David v.*

NYC Hous Auth., 284 A.D.1d 169 where leaks caused rainwater to regularly accumulate in the stairwell.

However, the Court of Appeals clearly differentiated those situations in which a defendant is simply "generally aware" that a condition existed; in which case no liability will attach. In *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493, the Court of Appeals held:

> A “general awareness” that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff’s fall, and liability could be predicated only on the failure of defendants to remedy the danger presented by the condition after actual or constructive notice of the condition, “at p. 969.

Plaintiff faced similar dismissals in *Paolucci v. First National Supermarket Company, Inc.*, 178 A.D.2d 636, 578 N.Y.S.2d 212; *Anderson v. Central Valley*, 300 A.D.2d 422, 751 N.Y.S.2d 586 and *Coppolla v. City of New York*, 755 N.Y.S.2d 100.

Trivial Defect

There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises and even a trivial defect may constitute a snare or trap. [*Herrera v. City of New York*, 262 A.D.2d 120, 691 N.Y.S.2d 504, citing *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 648 N.Y.S.2d 126 (1996)].

In *Trincere, supra,* plaintiff tripped and fell over a half-inch raise of slab. The Court of Appeals addressed the issue of trivial defects holding that the owner of a walkway may not be held liable for negligent maintenance that involves trivial defects and dismissed plaintiff's complaint.

Generally, a gradual, shallow depression is considered trivial but may be rendered nontrivial by the presence of an edge which poses a tripping hazard. [*Santiago v. United Artists Communications*, 263 A.D.2d 407, 693 N.Y.S.2d 44; *Figueroa v. Haven Plaza Hous. Dev. Fund*, 247 A.D.2d 210, 668 N.Y.S.2d 203; *Nin v. Bernard*, 257 A.D.2d 417, 683 N.Y.S.2d 237]. In addition, factors which make the defect difficult to detect present a situation in which it is appropriate to assess the hazard in view of "the peculiar facts and circumstances" presented [*Schechtman v. Lappin*, 161 A.D.2d 118, 554 N.Y.S.2d 846; *Trincere v. County of Suffolk, supra*].

However, some courts have held that “differences in elevation of about one inch, without more, are non-actionable” [see *Trincere v. County of Suffolk, supra*; *Morales v. Riverbay Corp.*, 226 A.D.2d 271, 641 N.Y.S.2d 276, citing *Hecht v. City of New York*, 89 A.D.2d 524, 452 N.Y.S.2d 187; *see also, Mascaro v. State of New York*, 46 A.D.2d 941, 362 N.Y.S.2d 78 *affd.* 22 N.Y.2d 924, 295 N.Y.S.2d 52, *Guerrieri v. Summa*, 193 A.D.2d 647, 598 N.Y.S.2d 4; *Scally v. State of New York*, 26 A.D.2d 606, 271 N.Y.S.2d 386 *affd.* 24 N.Y.2d 747, 299 N.Y.S.2d 624].

Out-of-Possession Landlord

An out-of-possession landlord cannot be held liable for injuries that occur on the premises unless the landlord has retained control over the premises or over the operation of the business conducted on the property. [*Borelli v. 1051 Realty Corp.*, 242 A.D.2d 517]. A landlord may be held liable for injuries caused by a defective or dangerous condition if the landlord is under a statutory or contractual duty to maintain the premises and reserves the right to enter for inspection and repair. [*Aprea v. Carol Management Corp.*, 190 A.D.2d 838]. "In such case, only a significant structural or

design defect that is contrary to a specific statutory safety provision will support imposition of liability against the landlord" [*Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d 489; *Guzman v. Haven Plaza Housing Development Fund*, 69 N.Y.2d 559, 516 N.Y.S.2d 451].

In addition, absent competent proof of a structural defect, the Courts will dismiss plaintiff's action [*Deebs v. Ridge-Mar Realty Associates*, 248 A.D.2d 185, 670 N.Y.S.2d 16; *Varrone v. Dinaro*, 209 A.D.2d 509, 619 N.Y.S.2d 79; *Vera v . Knolls Ambulance Service, Inc.*, 160 A.D.2d 494, 554 N.Y.S.2d 158].

The Open and Obvious Doctrine

The obviousness of a condition does not, generally speaking, obviate a landowner's duty to maintain the property in a reasonably safe condition. A contrary rule of law, the Courts have reasoned, would permit a landowner to persistently ignore extremely hazardous, albeit obvious, conditions [*MacDonald v. City of Schenectady* 2003 WL 215444166].

Speculation is Not Enough

In order for plaintiff's action to succeed, there must be competent evidence, not speculation or conjecture, as to the actual cause of the accident [see *Smith v. Wisch*, 77 A.D.2d 619, 430 N.Y.S.2d 45 (quoting *Morales v. Kiamesha Concord*, 43 A.D.2d 944, 352 N.Y.S.2d 26); *Lynn v. Lynn*, 216 A.D.2d 194, 628 N.Y.S.2d 667; *Silva v. 81 Street & Ave A Corp*, 169 A.D.2d 402, 564 N.Y.S.2d 326].

In *Smith, supra*, the Second Department recognized that where "[t]he circumstances of the [accident] imply the absence of any defect as clearly as they imply its presence, a jury would be led to a speculative evaluation as to the merits of the

action" [id., there was no evidence as to how or why decedent fell from a second story sundeck].

Similarly, in *Varrone v. Dinaro*, *supra.*, plaintiff sought to recover for injuries allegedly caused when he fell on the defendant's stairs. However, the plaintiff was unable to state what caused him to slip and fall. The Second Department held that there was no evidence, in admissible form, that the stairs were structurally unsafe and dismissed the action.

On February 19, 2004, the First Department in *Kane v. Estia Greek Restaurant*, 2004 NY Slip. Op. 01109, reaffirmed this principle and – in a case where decedent was intoxicated yet claimed his fall was the result of a defective staircase – held:

> "rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact… Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing warranting summary judgment… Even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect, absent which summary judgment is appropriate.

Putting It All Together: Some Common Defense Themes at Trial

A savvy defendant will not only capitalize on plaintiff's mistakes but will also affirmatively present their own themes. Both techniques may prove fatal to plaintiff's cause. Some more common trial themes are:

- Insufficiency of plaintiff's proof: "The quality of evidence presented does not justify the money damages sought."
- What proof exists that the accident actually happened?
- The absence of a "dangerous condition:" [insignificant "hazard" ("something we all navigate everyday"), usage without incident ("thousands of people successfully traversed same condition, why did plaintiff alone have an accident?") open and obvious condition…].
- The "reasonableness" of defendant's conduct in maintaining the premise.
- Comparative negligence: Why did plaintiff not see what was there to be seen?
- Credibility attack: Inconsistent versions of the accident, i.e., hospital records, police report, EMT report… Inconsistent behavior, i.e., no report at scene, no immediate "outcry" … Plaintiff's questionable background: i.e., criminal convictions, other claims, and absence of verifiable employment history… Intoxication: check hospital record, EMT/police observations…