New York Law Journal

9/7/99 N.Y.L.J. 1, (col. 1)
Volume 222, Number 48

Tuesday, September 7, 1999

Outside Counsel

TRIVIAL OR SLIGHT DEFECTS IN PERSONAL INJURY CASES: A DOCTRINE MISUNDERSTOOD

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A ONCE little known doctrine called the trivial-defect defense (the doctrine) used in slip and fall actions has been resurrected in recent years.

I have been confronted in trials and pretrial conferences lately with judges asking the question, "How big was the defect?" While in some cases such an initial inquiry may be appropriate, a more complete factual analysis of the defect and circumstances surrounding the accident must be conducted in order to properly evaluate whether the doctrine even applies.

The more concise and complete question the courts and bar must ask prior to an inquiry into defect dimensions is-When does the doctrine apply? Arguments that the doctrine's application was and is appropriate in all cases where a defect is one inch or less is simply misguided and misapplied.

No rule, statute, regulation or code has been enacted by our legislature which echoes this doctrine. Indeed, our courts have held it reversible error to charge that a depression must be a certain size in order to impose liability. [FN1] The above being our case law, the question expands from not only when, but also why, does this doctrine apply?

A careful examination of the doctrine's case law reveals an acknowledgement by courts that either actual notice was absent-or a total lack of discussion regarding actual notice replaced with constructive notice or "cause and create" theories-thus illustrating defendant(s) failure to receive actual notice of the subject defect and plaintiffs attempts at alternate theories for imposing liability. [FN2] Consequently, if actual notice can be established then the doctrine does not apply.

This position finds further support in the rationale courts have used regarding the doctrine. For example, in Trincere (supra) before reaching the New York Court of Appeals, the Second Department held; "The County did not have actual notice of a defect ... and ... municipal entities cannot possibly be expected to be on constructive notice of defects which are so trivial."

The logic behind this may be sound. The defendant is not liable for a defect which was unknown-and due to its absolute triviality could not have reasonably been discovered-and therefore was not reasonably foreseeable to cause injury. Such judicial rationale was akin to prior legislative history when the "prior written notice" law was enacted in New York to reduce a city's exposure from actually unknown dangerous conditions.

'Poirier' Case

In Poirier v. City (85 NY2d 310) the New York Court of Appeals, in discussing the prior written

notice law stated that, "This comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be." (supra at 313) Neither Poirier nor any other relevant case, rule, regulation, statute or code exists stating that once actual notice has been established regarding the subject defect, the public passageway owner will, nevertheless, not be liable for injuries flowing therefrom where the defect is under one inch. So, even absent actual notice, our courts have only occasionally reversed a finding of liability where a defect was so slight and considered so common that a municipality should have been aware and taken the proper measures to remedy same. In fact Justice John T. Casey, in Evans, (supra) reversed the lower court's finding in favor of the defendant on motion for summary judgment because the one-inch test employed below only scratched the surface of a factually meaningful evaluation of a defect and, consequently, the lower court failed to probe far enough. In other words, the lower court was reversed for judging a book by its cover, "...whether a defect is so trivial... cannot be determined merely on the basis of the depth of the particular sidewalk depression or difference in elevation."(Evans, supra at 960)

In Trincere (supra) the Court of Appeals restated the above principle this way; "... a mechanistic disposition of a case based exclusively on the dimensions of the sidewalk defect is unacceptable." (supra at 978) Moreover, "Whether a sidewalk was in a reasonably safe condition for pedestrians must be decided on the basis of the facts and circumstances of the particular case (Loughran v. City of New York, 298 NY 320)...a question of fact has been raised as to whether the defect was so trivial and slight in nature that it could not reasonably have been foreseen that an accident would happen." (Evans, supra at 960)

Fact-Sensitive Doctrine

Consequently, the doctrine is fact-sensitive and must be reviewed on a case- by-case basis. For instance, in addition to evaluating the one-inch-or-less defect itself, one must reason whether the same posed a greater risk of injury to persons such as children or the disabled or walking impaired or those who have some other challenge regarding their gait, sight, etc. Additionally, the defendant who wishes to invoke the doctrine confronts a court that should view all evidence in the light most favorable to the plaintiff. [FN3]

Another supporting example of this rationale was the First Department's language in Morales (supra at 276 citing Hecht, supra) wherein it was stated, "... differences in elevation of about one inch, without more, have been held non-actionable," which opens the door as to what "without more" means. In Foster, (supra) the Court of Appeals (1959) reversed a complaint's dismissal wherein the plaintiff contended that the one-inch defect was "broken, torn, uneven, irregular, raised and defective condition" and that the City was negligent in permitting the sidewalk to remain in said condition. The Foster court, unpersuaded by the City's contention that the plaintiff failed to establish that the defect was a trap or snare, reversed the First Department, which affirmed dismissal of the complaint by the lower court after a jury verdict in favor of the plaintiff. A notable absence from the Court of Appeal's decision was that plaintiff failed to contend that the defect was in a trap-or snare-like condition, thus, the Court recognized that trap or snare characteristics are not exclusive. Therefore, where a defect may be properly described as broken, torn, uneven, irregular, raised, trap or snare, then any of those characteristics would act to further develop what may have otherwise been considered trivial and seems to define, although not exclusively, what the "more" requires in order to overcome the doctrine's possible application. And as noted above, the term "trivial" is itself relative based upon the facts of each case.

To put it in the simplest of terms, the doctrine applies only where a landowner lacks actual knowledge of a defect on their walkway. Under those narrow circumstances the courts have not held defendants liable where the defects were limited in description to being de minimis in depth and where plaintiffs failed to establish anything further, unlike Foster, for example. And it has been where such de minimis dimensions lacked any additional factual characteristics not foreseeable to cause injury that courts drew the line and decided to hold harmless those defendants.

Special Use

As a practical matter, for the New York City venued plaintiff to establish a prima facie sidewalk case, it must be established that the City had actual written notice of the defective condition (see General Municipal Law Section 50) and failed to timely repair same, or the City created the condition complained to have caused the accident. Constructive notice may be inferred from photographs which accurately depict the condition of the defect at the time of accident. [FN4] Common law holds that an abutting property owner will not be held liable for damages for defects on public sidewalks unless the property owner affirmatively and negligently exercised some control over the sidewalk in question by, for example, creating the defect or deriving a benefit from the special use of the sidewalk unrelated to the public's use [FN5] and failing to maintain the sidewalk in a reasonably safe condition responsively. [FN6]

In one landmark case, where the abutting property owner created what was coined an "absolute nuisance" through the unlawful special use of the sidewalk, the Court of Appeals held the proper jury charge would have been one of absolute liability. [FN7] Another exception to the common law regarding an abutting property owner's liability is the dual requirement where a statute or ordinance created an obligation upon the owner to maintain the sidewalk and imposed tort liability for his failure to so comply. [FN8]

The defense bar has long argued that the line must be drawn as to what defect a reasonable person can be held to have discovered in the absence of actual notice and the courts have on few occasions seemingly responded with the doctrine. However, courts have not responded across the board. For example, as noted above, actual notice precludes use of the doctrine. The Court of Appeals has also held that special use of a sidewalk removed the burden from the plaintiff to establish notice (Poirier, supra at 314, 315). Therefore, by logical extension, if the plaintiff can establish a special use where the defect exists, then the doctrine should not apply. In Schechtman, (supra) the First Department rejected application of the doctrine in special use claims because of, "...the stringent duty to the general public of maintaining the area of the sidewalk in a safe condition." (supra at 120) The First Department, [FN9] however, recently held to the contrary because of insufficient experts' affidavits. Here we were also confronted with the distinguishing feature of a municipality versus an abutting property owner's duty to the general public.

Where the defect complained of is not upon a public passageway or walkway then the doctrine, based upon the language forwarded by the courts, is inapplicable thus acting as another exception. In the often cited case, Liebl v. Metropolitan Jockey Club (10 AD2d 1006), the Second Department held that, "The owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway...."(supra at 1006). Therefore, where the defect is in a private passageway or within a private building, stairwell or room or the defendant is not a municipality then the doctrine, by the above definition, does not extend to such fact patterns. Again, since the resurrection of the doctrine, recent decisions have expanded the Liebl language and have dismissed complaints in favor of private, nonmunicipal defendants. [FN10] The First Department, [FN11] however, recently reversed the trial court and reinstated a complaint where a nonmunicipal defendant claimed that sharp edges left from missing stair tiles were de minimis.

Finally, a claim of the doctrine's application can be challenged when a prior or subsequent accident occurred involving the same defect. Support for this is found in our evidentiary rules and case law which allow for admission into evidence the existence of prior [FN12] and subsequent [FN13] accidents to establish the existence of a dangerous condition. Of course, where the defect is a dangerous condition then the rationale as expressed by the courts, which sustained the doctrine for unforeseeable injury causing trivial defects due to their lack of dangerousness, seems not to apply.

City's Acknowledgement

Amidst the developing case law in this area can be found a useful position found in the New York City's Department of Transportation Web site, [FN14] where in answer to questions about violations issued by the City, the DOT can be quoted as, "DOT found that holes as small as 1 inch in diameter or vertical differences between sidewalk squares (or flags) of as little as 1/2 inch can cause injuries. Therefore, defects of this size will result in a violation." Such an acknowledgment by the City can be very constructive and provide guidance for parties and courts when confronted with de minimis motion practice.

Remaining Application

By logical deduction, the doctrine's remaining possible application is limited factually to where the defect complained of was not actually known by the defendant, was upon a public passageway, not the cause of other accidents and was so de minimis so as not to be discoverable and therefore not foreseeable to cause an accident to the plaintiff. Under those limited circumstances if a plaintiff has nothing further to submit into evidence to avoid having the proverbial book judged by its cover, then a court may decide as a matter of law that the defect may be trivial and, thus, hold that the defect was not actionable negligence.

On the other hand, and again under those limited facts, where a plaintiff has evidence regarding discernible characteristics which may illustrate the dangerousness of the defect's characteristics or its foreseeability and likelihood to cause injury-such as whether the defect appeared broken, torn, uneven, irregular, trap-or snare-like and in defective condition and any other relevant characteristics or facts demonstrating its likelihood to cause an accident and injury-the court may rule on the doctrine's inapplicability as an affirmative defense.

FN(1) Schechtman v. Lappin, et al., 161 AD2d 118; Smith v. City of New York, 38 AD2d 965; Taylor v. NYCTA, 63 AD2d 630; Trincere v. County of Suffolk, 232 AD2d 400, aff'd 90 NY2d 976; Wilson v. Jaybro Realty & Dev. Co., 289 NY 410.

FN(2) See Allen v. Carr and City of Corning, et al., 28 AD2d 155; Burstein v. City, et al., 1999 WL 142292, __ NYS2d __ (NYAD 2d Dept, 3/15/99); Evans v. Pyramid Company of Ithaca, et al., 184 AD2d 960; Foster v. City of New York, et al., 6 NY2d 852; Giniger v. Held, et al., 127 AD2d 562; Hecht v. City of New York, et al., 89 AD2d 524, order modified 60 NY2d 57; Keirstead v. City of New York, 24 AD2d 486, order affirmed 17 NY2d 535; Mascaro v. State, 46 AD2d 941; Morales v. Riverbay, 641 NYS2d 276; Moreno v. Pilevsky, 7/29/97 New York Law Journal 22, col. 1, Justice L. Miller, New York County; Scally v. State, 24 NY2d 747; Stanton v. Hexam Gardens Construction Company, Inc., 144 AD2d 132; Tesak v. Marine Midland Bank, N.A., __ AD2d __ , 678 NYS2d 226; Taylor v. NYCTA, supra; Trincere v. County of Suffolk, supra; Young v. City, 250 AD2d 383; and Welsh v. City, 1999 WL 90653, __ NYS2d __ (NYAD 2d Dept., 2/22/99).

FN(3) Dykstra v. Windridge Condominium One, 175 AD2d 482; Guerrieri v. Summa, 193 AD2d 647.

FN(4) See Batton v. Elghanayan, 43 NY2d 898.

FN(5) See Minott v. City, et al., 230 AD2d 719.

FN(6) See Poirier, supra; and Ryan v. Gordon L. Hayes, Inc., 17 NY2d 765.

FN(7) (By current standards), Delaney v. Philhern, 280 NY 461.

FN(8) See Alessi v. Zapolsky, et al., 288 AD2d 531.

FN(9) Figueroa v. Haven, 247 AD2d 210; and Zaritsky v. City and Davide Cenci, 248 AD2d 211.

FN(10) See Ithier v. L.I. Jewish Medical Center, 6/22/98 NYLJ 33, col. 1, Justice F. Schmidt, Queens County, aff'd __ AD2d __ , 682 NYS2d 909; Figueroa v. Haven, supra; Marinaccio v. LeChambord Restaurant, 246 AD2d 514; Richardson v. Almuldi, 238 AD2d 494; Zaritsky v. City and Davide Cenci, supra.

FN(11) See Nin v. Bernard, __ AD2d __ , 683 NYS2d 237.

FN(12) Skiff v. State, et al., 479 NYS2d 946.

FN(13) Niemann v. Luca, et al., 214 AD2d 658.

FN(14) Department of Transportation Web site: http:// www.ci.nyc.ny.us/call/html/ssss/sidewalk.html.

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