By Paul V. Esposito

Instruction in a Premises Liability Case

Getting Beyond the Complaint

A plaintiff always gets the first word. He decides on what claims he will raise. He chooses the factual allegations. A plaintiff is the undisputed master of his complaint. That's how it should be. Plaintiff is the one seeking relief.

But with rare exception, cases are not decided on pleadings. A defendant has every right to challenge a plaintiff's theory of the case and to offer his own. And when supported by the law and evidence, a defendant has a right to jury instructions on it.

That is one lesson of *Mikolajczyk v. Ford Motor Co.,* 231 Ill. 2d 516, 901 N.E.2d 329 (2008). Relying on the consumer-expectation test, plaintiff claimed that a car seat was defectively designed. Ford responded that the risk-utility test applied and requested a jury instruction on it. Plaintiff argued that because plaintiffs are the "'masters of their complaint,'" it would be "'utterly absurd' for defendants to 'choose the theory plaintiff pursues at trial.'" 231 Ill. 2d at 547.

The Supreme Court sided with Ford. There is a difference between a theory of liability and a method of proof. The competing tests were methods of proving that a product was defective. Each party is entitled to instructions covering his "theory of the case," a term broadly construed:

> The expression "theory of the case" does not refer to the plaintiff's theory of liability. It refers, instead, to each party's framing of the issues and arguments in support of its position. It is, therefore, well established that while a plaintiff is entitled to an instruction setting out her own theory of the case, based on her theory of liability and her chosen method of proof, she may not unilaterally preclude the giving of a jury instruction that presents the defendant's theory of the case, so long as the defendant's instruction accurately states the law and is supported by the evidence. 231 Ill. 2d at 549-50.

The rule of law seems clear enough. But it hasn't been applied in premises liability cases.

Three appellate decisions are noteworthy. In *Wind v. Hy-Vee Stores,* Inc., 272 Ill. App. 3d 149, 650 N.E.2d 258 (3d Dist. 1995), plaintiff tripped on a mat at a store entrance. Customers had previously complained about the mat. Plaintiff argued that its placement and maintenance were activities and so IPI B21.02, the ordinary negligence burden-of-proof instruction, applied. Under it, plaintiff was only required to prove that defendant acted negligently, plaintiff was injured, and defendant's conduct caused the injury. Defendant countered that the mat was open and obvious and so IPI 120.09, the premises-liability burden instruction, applied. It required the additional proof that "(1) a condition on the property presented an unreasonable risk of harm to persons on the premises; (2) the defendant knew or should have known of this condition; and (3) the defendant should have anticipated that persons would not discover the danger or would otherwise fail to protect themselves against it." 272 Ill. App. 3d at 153. The trial court gave defendant's instruction. The jury found for defendant.

The Third District reversed. It ruled that defendant's premises-liability instruction imposed an inappropriate burden on plaintiff. It rejected defendant's argument that the mat, if defective, was an open and obvious "condition" on the floor. The court treated the case as involving defendant's "activity," and so ruled that the ordinary negligence instruction applied. Because of evidence that defendant acted negligently, plaintiff was not required to prove defendant's notice of the problem. The court treated the open-and-obvious condition of the mat as relevant only to comparative fault, not duty.

In *Reed v. Wal-Mart Stores, Inc.,* 298 Ill. App. 3d 712, 717-18, 700 N.E.2d 212 (4th Dist. 1998), a woman stepped on a rusty nail protruding from a board lying in defendant's garden section. A jury found for defendant. Relying on *Wind,* the Fourth District reversed because the trial court gave IPI 120.09 rather than B21.02. Plaintiffs "seem to allege" claims for both ordinary negligence (causing the condition) and premises liability (maintaining the condition). Because plaintiffs are "masters of their complaint" and may "proceed under whichever theory they decide," plaintiffs' ordinary negligence instruction should have been given. 298 Ill. App. 3d at 718.

In *Smart v. City of Chicago,* 2013 IL App (1st) 120901, 43 N.E.3d 532, plaintiff was injured when his bicycle tire allegedly lodged in a groove created by street resurfacing operations. Plaintiff

sued the city for negligent maintenance. Plaintiff tendered IPI 120.02, a premises liability instruction on duty. The city tendered IPI 120.08, a premises liability burden instruction. Plaintiff objected based on an IPI note stating that ordinary negligence instructions apply if plaintiff alleges an activity or a condition arising out of a defendant's business. Plaintiff argued that a resurfacing activity caused the accident. The city contended that resurfacing had paused and that any condition was open and obvious. The trial court gave plaintiff's instructions.

The First District rejected the city's "fundamental premise" that plaintiff was pursuing a premises liability claim. Plaintiff's complaint "sounded in negligence, not premises liability." Id. at ¶47. Giving IPI 120.02 "did not transform the case into a premises liability case." Id. at ¶48. Because the project was ongoing, albeit not then in motion, it was an "activity" preventing the use of IPI 120.08. Id. at ¶13. Based on Reed, the court ruled that if an activity precedes an injury, a plaintiff may claim negligence, premises liability, or both.

The court rejected the city's argument that IPI 120.08 was proper because plaintiff needed to prove that the condition was not open and obvious. The "'known or obvious risk' principle" negates a duty and is related to comparative negligence, and so the burden lied with the city.

Specific Negligence Instructions

The decisions essentially hold that cases involving activities on premises are ordinary negligence cases. But a premises liability claim is a negligence claim, just like professional liability and construction negligence claims are negligence claims. They are specific types of negligence claims, with specific standards governing them. They are not controlled by ordinary negligence instructions, regardless of how a plaintiff pleads.

Claims involving activities on land do not lose their character as premises liability claims. The Premises Liability Act, 740 ILCS 130/2, states:

> The duty owed to such entrants [on premises] is that of reasonable care under the circumstances regarding the state of the premises *or acts done or omitted on them.* (Emphasis supplied).

In *Rhodes v. Illinois Cent. Gulf R.R.,* 172 Ill. 2d 213, 665 N.E.2d 1260 (1996), an injured man was found in defendant's warming house. Defendant reported him to the police but failed to follow up. Plaintiff claimed that the delay was crucial. The case was analyzed under premises liability rules. A defendant can be liable if property is dangerous "by reason of a condition or *activity* on the premises." 172 Ill 2d at 230 (emphasis supplied). Decedent was not found "where a condition or *activity on the premises* posed a danger to him." 172 Ill. 2d at 231 (emphasis supplied). "[T]he only duty owed to him by ICG *under a premises liability theory* was the duty to refrain from willfully and wantonly injuring him." 172 Ill. 2d at 231 (emphasis supplied). *See also Sollami v. Eaton,* 201 Ill. 2d 1, 772 N.E.2d 215 (2002). (failure to supervise and warn about "rocket" jumping on trampoline treated as premises liability issue).

Restatement

Illinois premises liability law is governed by §§343 and 343A of the Restatement (Second) of Torts. *Diebert v. Bauer Bros. Constr. Co.,* 141 Ill. 2d 430, 434, 566 N.E.2d 239 (1990). Comment a to §343 states that the section must be read together with §343A, which 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 (emphasis supplied).

Accord, Bruns v. City of Centralia, 2014 IL 116998, ¶16, 21 N.E.3d 684. (affirming summary judgment for defendant). So liability for an activity on land is governed by the premises liability rules.

The appellate decisions suggest that if a dangerous condition is created by defendant, ordinary negligence rules apply. That is not the holding of *Donoho v. O'Connell's Inc.,* 13 Ill. 2d 113, 148 N.E.2d 434 (1958), cited in *Wind.* Plaintiff slipped on a greasy, grilled onion ring in a restaurant. The Supreme Court discussed the concept of notice in premises liability cases:

[W]here the foreign substance is on the premises due to the negligence of the proprietor or his servants, it is not necessary to establish their knowledge, actual or constructive *(Pabst v. Hillmans,* 293 Ill. App. 547); whereas, if the substance is on the premises through acts of third persons, the time element to establish knowledge or notice to the proprietor is a material factor. *Schmelzel v. Kroger Grocery and Baking Co.* 342 Ill. App. 501. at 118.

Pabst explains the basis for the *Donoho* rule. Plaintiff slipped on a string bean that fell out of a store container overly filled by defendant's agent. *Pabst* ruled that defendant's conduct created a reasonable inference that it knew about beans on the floor. Given defendant's knowledge, it was unnecessary to prove how long the bean had been on the floor so to establish constructive notice. Having relied on *Pabst,* the Supreme Court did not eliminate the requirement of proving notice. It ruled that proving a defendant's conduct may operate as proof of notice. In short, *Donoho* created a method of proof. The case remains as a premises liability case. After all, a person was injured by a condition on the premises. Nothing in *Donoho* states that a premises liability case changes into an ordinary negligence case based on notice issues.

Methods of Proof

Donoho is a precursor to *Mikolajczyk* as to methods of proof. *Mikolajczyk* recognizes that a product liability claim does not morph into something else based on which test is applied. The tests are merely different ways of proving that a product was unreasonably dangerous. In a premises liability case, a plaintiff also has different ways of proving notice. A plaintiff may prove the length of time a condition existed, a prior complaint about the condition, or a defendant's creation of it. Regardless of the method used, premises liability rules require proof of notice.

Perhaps the biggest problem with the appellate cases is that a plaintiff is not the "master" of the jury instructions. The giving of instructions depends on the theories offered by each party and the supporting evidence:

> "Generally speaking, litigants have the right to have the jury instructed on each theory supported by the evidence. Whether the jury would have been persuaded is not the question. All that is required to justify the giving of an instruction is that there is some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Mikolajczyk*, 231 Ill. 2d at 549 (emphasis supplied), quoting *Heastie v. Roberts,* 226 Ill. 2d 515, 543, 877 N.E.2d 1064 (2007).

Accommodating Multiple Theories

A trial court's task is to provide instructions that accommodate those theories.

It can be a difficult task, perhaps no better illustrated than in the premises liability area. After tripping on a mat at a store entrance, a patron files a one-count complaint for ordinary negligence. She contends that the owner laid down a deteriorated mat, an activity creating a dangerous condition. She introduces a deteriorated mat claimed to be involved, one of several mats produced during discovery. The owner admits that it laid down a mat but denies that the mat offered at trial was the one. Two store employees testify that the actual mat was in good condition when laid down and afterward. They testify that the mat was in a well-lit area, easily and entirely visible. The owner also contends that the patron was not looking where he was walking.

The patron's theory rests on ordinary negligence—the failure to eliminate a danger. The owner's theory rests on premises liability—the mat was open and obvious, and the owner lacked notice of any problem. Ordinary negligence instructions will not cover the owner's defenses.

But both theories can be covered in the premises liability instructions. IPI 120.02 recites the owner's duty "to exercise ordinary care to see that the property was reasonably safe for the use of those lawfully on the premises." It can be modified to include the duty to conduct reasonably safe activities.

Other instructions cover the issues and burdens. As adapted, IPI 120.08 states:

Plaintiff seeks to recover damages from defendant. In order to recover damages, the plaintiff has the burden of proving:

First, there was a condition on the property which presented an unreasonable risk of harm to people on the property.

Second, the defendant knew or in the exercise of ordinary care should have known of both the condition and the risk.

Third, the defendant could reasonably expect that people on the property would not discover or realize the danger or fail to protect themselves against it.

Fourth, the defendant was negligent in one or more or of the following ways: *(to be enumerated)*

Fifth, the plaintiff was injured.

Sixth, the defendant's negligence was a proximate cause of the plaintiff's injury.

Paragraph "Second" allows both sides to argue the issue of notice. Paragraph "Third" allows both sides to argue whether the mat was open and obvious or subject to the "distraction exceptions." *Sollami,* 201 Ill. 2d at 15-16. In fact, it may be modified to include the "deliberate encounter exception." 201 Ill. 2d at 15-16; see IPI 120.09. The open-and-obvious issue bears both on an owner's duty and on a patron's contributory negligence. 201 Ill. 2d at 15-16; *Choate v. Indiana H.B.R.R.,* 2012 IL 12948, ¶34, 980 N.E.2d 58 (moving train open and obvious to 12-year old). IPI 128.02 would instruct on comparative negligence as an affirmative defense.

Conclusion

Plaintiff *is* the master of his complaint, but that doesn't count for much once the evidence has been offered. When the evidence supports differing instructions, they must be given regardless of the complaint. The law and the facts are the ultimate masters. ■

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