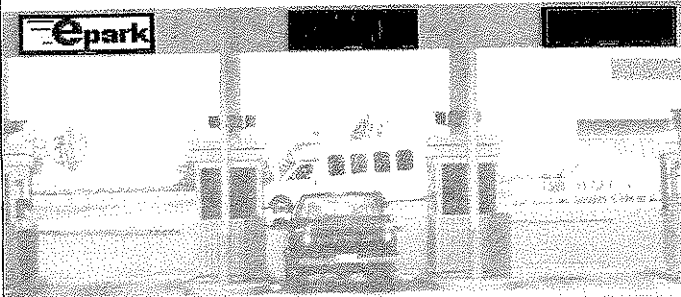


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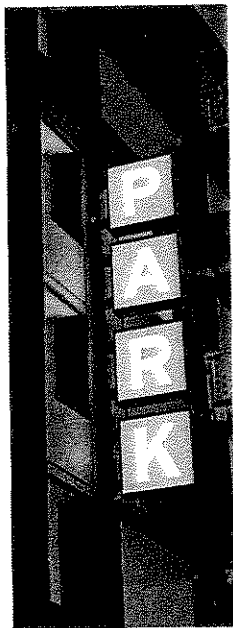
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PT And The Law

A Thing Called Negligence

BY ANDREW J. MARTON

I thought it would make sense to explain the most common form of a lawsuit. It is typically called negligence. To most people, negligence means that you did something below the expected standard of care. But it is not that simple.

To be actionable (i.e., survive as a lawsuit), you must meet several other elements. The generic (universal) elements are (1) that you must owe a duty of care to the injured party; (2) that you breached the duty of care; (3) that the breach was a direct cause of the alleged injury; and (4) that there is in fact an injury.

The Duty of Care

The plaintiff has the burden to establish the applicable duty of care. This generally is referred to as the "reasonable person" standard of care. The analysis goes something like this: What would a reasonable person under similar circumstances have done? The answer can actually be different

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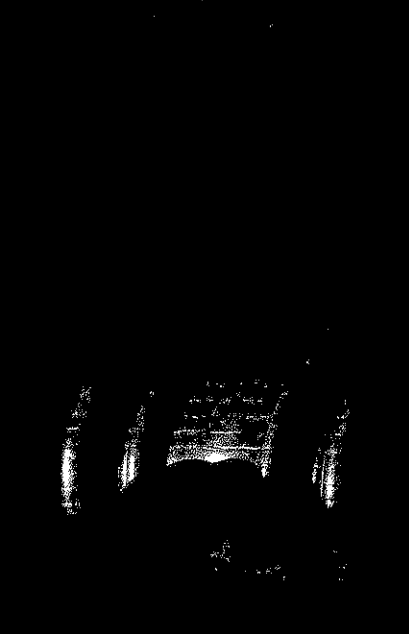


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depending on where the incident occurred, so locality is a factor. Also, in some instances, the minimum standard is established by law via published cases, federal, state or local codes / statutes. In other cases, it is established by so-called experts (hired guns) or by a jury if there are competing theories. My typical game plan is to lower the standard of care attributable to my client. By doing so, we can put on a

strong argument that the duty was not breached.

If you violate a law, then the duty-of-care analysis is somewhat different. In such cases, the legal principle is called "negligence per se," which means there is a rebuttable presumption that you are negligent. This is not good, because you are no longer innocent until proven guilty. You are now probably guilty until proven innocent.

What this means procedurally is that the plaintiff does not need to establish your negligent conduct – it is presumed so and it

is now your burden to show that you were not negligent. This is a great situation for the plaintiff's attorney. One example of such a situation involves a bailment. In a bailment situation, all the plaintiff has to show is that a bailment existed and the item in your possession was lost or destroyed. That may not seem like a big deal, but I tried a case where a big-rig (with cargo) was stolen from a lot

Let's assume that someone slips on some oily substance in a multilevel parking structure.

and the fact that my client had to show that it was not negligence versus the plaintiff showing that we were negligent was a big issue. (Fortunately, we successfully challenged the bailment allegation and won the case.)

Breach of the Duty of Care

Once the duty is established, the next battle is whether you breached it. You can actually win this fight with a little effort. For example, let's assume that someone slips on some oily substance in a walkway in a multilevel parking structure. The duty of care would be to keep the area free of any such hazards. No one disputes this fact. So your first impression is that things do not look good for you.

But if you can show that you have an adequate number of

Continued on Page 52



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A Thing Called Negligence

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roving employees who do nothing but walk around and clean up the walking surface all day long, then you have a good chance of winning this issue. "Sweep sheets" would add credibility to your defense as they would show the frequency of visits to the area and reduce the jury's natural suspicion of manufactured facts. Add the testimony of an expert (regarding the adequacy of your roving staff), and you may be golden. On the flip side, if the involved area is subject to high traffic with people carrying food, then you may need to do more.

Causation

Causation is an element that people gloss over. Nine out of 10 plaintiff's attorneys assume that this element is a "given" and will not put much effort into establishing it. However, I find that many times there is a legitimate issue as to whether the breach of a duty actually caused the injury in question. For example, I had a taxi case where an elderly fare fell out of the cab as she was exiting it. The issue was whether my client owed a duty of care in opening the door for her. We argued successfully that she would have still fallen out of the cab, so my client's failure to open the door for the elderly fare was not the cause of her fall. The lesson here is to fight hard on each element.

Damages

At this point, we are in the fourth quarter, but there is still time to salvage a bad situation. The important factor here is not to lose

credibility with the jury. The concept is to legitimately argue that the plaintiff is embellishing his or her complaints, malingering and/or over treating for profit. This is neither an easy nor inexpensive task as it requires the testimony of a medical expert. The strategy is to look for inconsistencies between the plaintiff's testimony and his or her medical history.

For example, doctor's notes reflect the plaintiff's complaints and general progress. So we are looking for information about whether his or her condition is improving. If the condition is improving, then why is there more treatment or referrals to other medical practitioners? If the condition is not improving, then why is there continued treatment? At some point, the doctor is obligated to phase out treatment if there is no benefit. Also, if some one is in extreme pain, you look for prescriptions and whether they were actually filled.

The devil is in the details, and a lot of plaintiffs are too lazy or just plain careless in whether they follow through and play the game. You can really score some points if you can undermine the plaintiff's credibility in the eyes of the jury. I have had jurors come back with defense verdicts in cases where we should have paid some money just because the jurors were upset with the plaintiff.

Conclusion

As you can see, being negligent does not necessarily mean that you have to open up your wallet and ask "how much?" With a skillful attorney, you can successfully defend a less than favorable case or reduce the value of the injury.

Andrew J. Marton is a partner at Millard, Holweger, Child and Marton. He can be reached at ajmarton@millardlaw.net

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