

# LITIGATING A SLIP, TRIP AND FALL CASE IN NEW YORK STATE

## *A Guide for the Practitioner*

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A person or entity “in control” of property has a duty, under New York law:

“to use reasonable care to keep the premises in a reasonably safe condition for the protection of all persons whose presence is reasonably foreseeable.”

The foregoing is embodied in *New York Pattern Jury Instruction 2:90*, which is the general instruction involving the standard of care to an individual who comes upon the premises of another.

In the seminal case of *Basso v. Miller*, 40 N.Y.2d 233 (1976), the Court of Appeals held that the landowner owes a duty of care, regardless of the “status” of the injured person, to maintain their property in a safe condition. *Whether* there is a duty involves “the reasonable expectations of the parties and society generally. The scope of any such duty of care varies with the foreseeability of the possible harm” (*Tagle v. Jakob*, 97 N.Y.2d 165, 168).

The landowner owes people on their property a duty of reasonable care under the circumstances to maintain the property in a safe condition (*Maheshwari v. City of New York*, 2 N.Y.3d 288 [2004]).

“The use to which one’s property is put, and the frequency of that use by others, weighs heavily in determining the likelihood of injury, the

seriousness of the injury and the burden of avoiding the risk” (*Peralta v. Henriquez*, 100 N.Y.2d 139 [2003]).

However, the possessor of land is not an “insurer” of the safety of persons using the premises (*Florman v. City of New York*, 293 A.D.2d 120 [1st Dep’t 2002]).

Potential liability of the property owner, conduct of the injured person, and proof of the claim will be addressed in four (4) parts:

1. **Is There a “Defective Condition?”;**
2. **Who or What Entity is Responsible for the “Defective Condition?”;**
3. **Conditions to Imposing Liability and Conduct of the Injured Person; and**
4. **Use of Experts.**

1. **Is There a “Defective Condition?”**

The issue of whether there was a “defective” or “unsafe condition” is almost always a fact based determination. There is no “bright-line rule.” There are thousands of cases that can be used as guidance to the practitioner, with the right search term queries. A few examples:

- electric cable not taped or secured to the floor (*Stevenson v. Saratoga Performing Arts Ctr.*, 115 A.D.3d 1086 [3rd Dep’t 2014]);
- puddle of liquid detergent on supermarket floor (*Navedo v. 250 Willis Ave. Supermarket*, 290 A.D.2d 246 [1st Dep’t 2002]);
- accumulated debris or garbage in stairwell (*Bido v. 876-882 Realty, LLC*, 41 A.D.3d 311 [1st Dep’t 2007]);

- wet napkins on floor (*Mullin v. 100 Church LLC*, 12 A.D.3d 263 [1st Dep’t 2004]);
- patch of ice on sidewalk (*Rosenblatt v. City of New York*, 160 A.D.2d 927 (2d Dep’t 1990));
- box containing merchandise placed on the floor at the end of an aisle (*Carpenter v. 130 W. Merrick, Inc.*, 71 A.D.3d 715 [2d Dep’t 2010]); and
- a “u-Boat” dollie in the middle of a supermarket aisle was “dangerous” in *Flaim v. Hex Food*, 79 A.D.3d 797 (2d Dep’t 2010) but not dangerous in *Gradwohl v. Stop & Shop*, 70 A.D.3d 624 (2d Dep’t 2010).

#### A. Trivial Defect

To constitute a legally cognizable “defect,” the condition must not be “trivial.” The leading case on this issue is *Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997), in which the Court of Appeals held:

There is no rule that municipal liability in a case involving minor defects in the pavement “turns upon whether the hole or depression, causing the pedestrian to fall, is four inches -- or any other number of inches in depth . . . Instead, whether a dangerous or defective condition exists on the property of another so as to create liability ‘depends on the peculiar facts and circumstances of each case’ and is generally a question for the jury.” . . . Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevator brick or slab need be submitted to a jury . . . However, a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable. After examination of the facts presented, including the

width, depth, elevation, irregularity and appearance of the defect, along with the “time, place and circumstance” of the injury . . . , the Court correctly concluded that no issue of fact was presented (90 N.Y.2d at 977-78, citations omitted).

Some examples from cases in which some courts held the “defect” to be “trivial” while others did not:

- rubberized mat covering broken flagstone and creating small depression was a trivial defect (*Marinaccio v. Chambard Restaurant*, 246 A.D.2d 514 [2d Dep’t 1998]);
- 3/4" high elevated metal strip use as foul line for a dart game was a trivial defect (*Guerrieri v. Summa*, 193 A.D.2d 647 [2d Dep’t 1993]);
- 3/4" door saddle was held to be a trivial defect (*Hargrove v. Baltic Estates*, 278 A.D.2d 278 [2d Dep’t 2000]); and
- darker than normal parking lot where plaintiff stepped into a puddle where she could not see the bottom was sufficient to create an issue of fact as to whether the condition was a trivial defect (*Tesoriero v. Brinckerhoff Park, LLC*, 126 A.D.3d 782 [2d Dep’t 2015]).

#### B. “Open and Obvious” Condition

While the issue of whether the defect was, in essence, too small to be legally actionable (i.e. “trivial”) lies on one side of the coin, perhaps the flip side of that coin is whether the “defect” is so “open and obvious” to limit or negate potential liability of the landowner.

The law in each of the four (4) judicial departments is now settled: while the “open and obvious” nature of a condition negates any duty to warn of it, it does not negate the duty to maintain the premises in a “reasonably safe condition (First Department – *Westbrook v. WR Activities-Cabrera Markets*, 5 A.D.3d 69 [2004]; Second Department – *Cupo v. Karfunkel*, 1 A.D.3d 48 [2003]; Third Department – *MacDonald v. City of*

*Schenectady*, 308 A.D.2d 125 [2003]; *Barley v. Robert J. Wilkins, Inc.*, 122 A.D.3d 1116 [2014]; Fourth Department – *Holl v. Holl*, 270 A.D.2d 864 [2007]).

The “open and obvious” nature of the condition is still relevant to the issue of comparative fault of the plaintiff, an issue that will be discussed below.

Typically, the issue of whether a condition is “open and obvious” is fact-specific, and therefore a question for the jury (*Shah v. Mercy Medical Center*, 71 A.D.3d 1120 [2d Dep’t 2010]).

### C. Case Assessment

Proper assessment of a potential slip and fall case requires a face-to-face meeting with the potential client in order to have a detailed discussion about the facts and circumstances surrounding the accident and analysis of those facts under each of the key legal requirements of New York law relating to duty, causation, injury and the defenses that may be raised by the defendant’s attorney. The following checklist, though not exhaustive, provides some guidance to the practitioner to the factual and legal issues that should be considered at the time of intake and assessment:

- Description of the accident in detail – what happened? If it was ice, where was it. Parking lot? Sidewalk? How big was it? How thick was it? What did it look like? (i.e., black ice, thick, uneven texture?). If a fall involving a different surface such as pavement, carpeting or interior floor surface – what was its appearance? If it was a pothole, how big was it? How deep was it? Was there more than one?
- Did the accident happen during the day or at night? If during the day, where was the injured person looking at the time it occurred? Had he already traversed that surface previously, whether on that day or another day? If at night, what were the lighting conditions? Is there an issue as to sufficient lighting? What was he wearing on his feet? “Appropriate” footwear for the surface and weather conditions? What was the tread? How worn?
- Was he talking, texting, on a cell phone or otherwise distracted?

- Was he walking, running?
- Whether ice, pothole or interior floor defect – was it photographed?
- Was the accident witnessed?
- Was there surveillance video?
- Was it reported? (e.g. accident report, investigation by property manager/owner).
- Did emergency personnel or police come to the scene? What did they see and record as to the conditions and how the injured person reported what happened.
- What does the emergency department record document by way of history of the accident?
- Did the injured person provide a recorded statement to an insurance adjuster or someone else?
- Did the injured person or anyone on his behalf photograph the condition?

This information is essential to enable consideration of whether further time and expense in the form of investigation and most likely retention of an expert makes sense. In addition to analyzing the facts and circumstances of the accident in light of prevailing statutory and case law requirements, the practitioner should acquire as much information as possible about the extent of the person's injuries. The economics of these cases, though not as expensive to litigate as a medical negligence or products liability case, nevertheless involve a significant commitment of time and money. Consideration of prior injury to the same part of the body, as well as information about the individual's health history, including underlying medical conditions, disability and other issues that may affect both causation of the claimed injury to the fall and defect, as well as

mitigation of recoverable damages with respect to disability and resultant economic loss; must all be carefully considered.

Critical to success in the slip, trip and fall case is early and thorough investigation of the scene in order to document, as thoroughly as possible, the condition that caused the fall. The goal is to be able to show the jury the condition as it existed at the time of the fall. The evidentiary burden is to show that the condition as documented (photographs, videotape, etc.) is “substantially similar” to the condition that the injured person testifies caused him to fall.

a. Photographs

Photographs of the “defect” are probably the single most valuable piece of evidence to establish a viable claim in this type of case. Without at least a photograph (and absent independent eyewitness testimony) to establish, for example, the physical characteristics of the ice upon which the plaintiff fell (size, texture, thickness, location, etc.) or to show the rotten wood within the step that collapsed beneath the plaintiff as he descended the stairs, or the size of the crack in the macadam in the commercial defendant’s parking lot that plaintiff claims caused him to fall – it is sometimes difficult, and on occasion impossible, for a jury to appreciate why the plaintiff slipped or tripped and fell. The old adage that a “picture is worth a thousand words” unquestionably applies on the liability side of the equation, where it is claimed that a property “defect” caused a person’s injury.

Measurements become critically important where the size, shape and location of the claimed defect is such that a good defense lawyer will raise the issue of “trivial defect” in an effort to obtain summary judgment dismissing the claim. The sooner the measurements can be taken, preferably by an expert, the better opportunity exists to defeat this defense.

b. Video Surveillance

As we now live in a time in which cameras and video equipment have proliferated, surveillance equipment is virtually everywhere,

particularly on the commercial premises. The key is to assume that it exists, and to request that the events it may have captured be preserved immediately. Send a letter, certified, return receipt requested, to the appropriate person who is in charge of defendant's premises, requesting that all video surveillance files (digital or analog) be preserved and advising that failure to preserve such information will constitute spoliation. Send the letter to the property manager, grocery store manager, corporate owner, managing agent or other responsible individual to ensure preservation of such information.

c. Witness Statements

The importance of obtaining statements from witnesses cannot be over emphasized. The earlier the recollection of individuals can be recorded, the better. Utilize a competent, reliable investigation firm and attempt to obtain notarized statements. The best possible statement is one in the witness' own handwriting, if this can be obtained.

d. Internet

The Internet offers much in the way of valuable information in this type of case. Google Maps is a valuable photographic record that can be useful in defining the exact location of a fall with a prospective client and also to document the surrounding area and in some situations, the existence of the defect itself.

**2. Who or What Entity is Responsible for the “Defective Condition?”**

In general, liability for the condition is predicated upon ownership, occupancy, control or “special use” of the property (*Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956 [3d Dep't 1992]).

*New York Pattern Jury Instructions 2:90* through *2:91 SV-I* provide the jury instructions setting forth the legal principles to be applied to the facts

of the accident to the owner or possessor of the property upon which the condition exists.

A. Liability for Conditions Outside the Land

*New York Pattern Jury Instructions 2:110 – 2:118* provide the jury instructions setting forth the legal principles to be applied where the injury occurs as the result of a condition outside, or adjacent to, the owner’s or possessor’s property.

Essentially, it provides that if there is an unsafe condition (or activity) on the owned property, of which the owner knew, or should have known, and which caused injury to someone on adjacent property, the owner will be liable. For example, if the owner allows water to flow from his property onto adjacent property, which then freezes – forming ice, and results in a fall and injury, the owner will be liable (*Sellnow v. O’Donnell*, 84 A.D.2d 589 [3d Dep’t 1981]; *Roark v. Hunting*, 24 N.Y.2d 470 [1969]).

*PJI 2:111* speaks to the owner’s “special use” of adjacent property, such as a sidewalk. For example, if the owner installs a trapdoor for entry into his basement, he assumes responsibility for that portion of the sidewalk put to this “special use.” The injured person must prove that a dangerous condition existed, that the “special use” created or contributed to that condition, that the owner either knew or in the use of reasonable care should have discovered the condition and had a reasonable opportunity to correct it, and that the condition was a substantial factor in causing injury. This principle has also been called the “special benefit” rule.

*PJI 2:111A* provides that if an owner undertakes to remove snow or ice from an adjacent sidewalk (despite any legal duty to do so), he must use reasonable care. If he makes it “more dangerous” in doing so, he will be liable for resulting injury.

With respect to public sidewalks (adjacent to the street), a municipality is responsible to remove snow and ice. However, most municipalities have enacted ordinances that require the adjoining landowner to remove snow and ice from the sidewalk. To enable liability to be imposed, the ordinance must specifically provide that tort liability will be imposed on the adjoining

owner for its failure to maintain the sidewalk (*Smalley v. Bemben*, 12 N.Y.2d 751 [2009]). The practitioner should closely analyze the ordinance to see specifically what is covered. For example, if the ordinance imposes liability for failing to maintain the sidewalk, this probably will not impose liability for failing to maintain a curb separated from the sidewalk by a grass strip (*Dimaio v. Pozefsky*, 35 A.D.3d 1136 [3d Dep't 2006]). *See also* "E" as to municipal liability.

## B. Out-of-Possession Landlord

An "out of possession" landlord who has turned over complete control of the premises to the tenant will not be held liable for conditions which arise after transfer of the premises. As articulated in *PJI 2:100*:

A landlord who rents property to a tenant is required to tell the tenant about any dangerous condition on the property that exists when the tenant takes possession, if the landlord knows or has reason to know of the dangerous condition and the tenant would not be able to discover it upon a reasonable inspection.

A dangerous condition is one that creates a risk of . . . personal injury . . . to such an extent that a reasonable person would give warning.

In *Wayman v. Roy Stanley, Inc.*, 122 A.D.3d 1119 (3d Dep't 2014), the Court affirmed the lower court's granting of summary judgment to the out-of-possession landlord building owner as the lease divested the owner of any obligation to maintain the premises; and there was no showing that an exception to that general rule applied. The exceptions, as stated by the Court are:

1. that the landlord has a non-delegable duty to provide the public with a reasonably safe premises and a safe means of ingress and

egress (*Reynolds v. Sead Dev Group*, 257 A.D.2d 940 [3d Dep't 1999]);

2. where the out-of-possession landlord has contracted to repair or maintain the premises and affirmatively created the condition (*Stickles v. Fuller*, 9 A.D.3d 599 [2004] [3d Dep't 1999]); and
3. that the landlord has retained a right to reenter the premises for inspection or repairs and the injury arises from a structural defect or specific statutory violation (*Brown v. BT-Newyo, LLC*, 93 A.D.3d 1138 [3d Dep't 2012]).

#### C. Common Area

With respect to a common area, such as an interior hallway in a mall or parking spaces in a parking lot, in general the landlord will be responsible and the tenant will not (*Bridgham v. Fairview Plaza, Inc.*, 257 A.D.2d 914 [3d Dep't 1999]).

#### D. Independent Contractor

In general, a property owner is not liable for the negligent acts of his independent contractor (*Richardson v. Simeone*, 275 A.D.2d 576 [3d Dep't 2000]). However, there are exceptions, the most significant of which is where there is a non-delegable duty, as referred to by the Court in *Reynolds, supra*. For example, the owner of a commercial establishment has a non-delegable duty to provide the public with a reasonable means of ingress and egress and therefore could be held liable for the negligence of an independent contractor who constructed it (*Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.*, 58 A.D.3d 825 [2d Dep't 2009]). It is axiomatic, however, that the accident must occur in a place open to the general public (*Pulliam v. Dean's Management of N.Y. Inc.*, 61 A.D.3d 519 [1st Dep't 2009]).

An independent contractor may be held directly liable to the plaintiff if it created the dangerous condition, had an exclusive and comprehensive maintenance agreement with the owner, or if the plaintiff can demonstrate “detrimental reliance” on the contractor’s continuing performance of the work (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 [2002]).

For example, if the independent contractor improperly piled snow in an area where it would melt and then form ice in a “freeze and thaw cycle,” it might be held directly liable (*Sanmarco v. Village/Town of Mt. Kisco*, 16 N.Y.3d 796 [2010]).

#### E. Municipalities

With respect to bringing suit against a public entity (village, town, city, county, etc.), what the practitioner must know is that virtually every municipality has a statute (i.e., local law) requiring prior written notice of the alleged defect, in order to be sued, except where the municipality can be shown to have created the “defective condition.” For example, the Administrative Code of the City of New York (§ 7-201[c][2]) requires such prior written notice (*De La Reguera v. City of Mount Vernon*, 74 A.D.3d 1127 [2d Dep’t 2010]). Many attorneys in the City utilize information contained within documents available through the Big Apple Pothole & Sidewalk Corporation, which, since 1982, has provided evidence of the legally required written notice of sidewalk, curb and crosswalk defects in the five (5) boroughs. The Big Apple Pothole & Sidewalk Protection Committee was created by the New York State Trial Lawyers’ Association to map the sidewalks of the City for defects capable of causing personal injury. The maps, delivered to the Department of Transportation, were effective in providing prior written notice that had previously effectively barred actions against the City.

However, in 2003 a law was enacted to shift liability to adjacent property owners, but this applies only to sidewalks. *New York City Administrative Code* § 7-210 is the provision, but importantly, does not apply to one, two or three family residential property that is at least partially owner occupied and used exclusively for residential purposes (*see PJI 2:111A.1* and Comment).

The City remains liable for hazards in the streets. In 2008 the New York Court of Appeals (*D’Onofrio v. City of New York*, 11 N.Y.3d 581), significantly limited the ability of plaintiffs to utilize the information contained in the “Big Apple” maps to prove the defect. However, in some cases the courts have held that where there are disputes regarding the precise location of the defect and whether it is designated on the map, the question should be resolved by the jury (*Cassuto v. City of New York*, 23 A.D.3d 423 [2d Dep’t 2005]).

### **3. Conditions to Imposing Liability and Conduct of the Injured Person**

Unless it can be shown that the property owner created the “defective condition,” the injured person must show that the owner had either actual knowledge or constructive notice of the claimed defect (*Rivera v. 2160 Realty Co., LLC*, 4 N.Y.3d 837 [2005]; *Gordon v. Museum of Natural History*, 67 N.Y.2d 836 [1986]).

#### **A. Creation of the Defective Condition**

While a relatively small number of cases fall into this category, as compared to those involving constructive notice, situations involving structural defects in buildings or an improperly designed or constructed sidewalk curb provide good examples.

In *Ritchie v. Felix Assoc., LLC*, 60 A.D.3d 402 [1st Dep’t 2009], the plaintiff tripped and fell as he stepped off an allegedly improperly constructed sidewalk curb. Similarly, where the plaintiff alleged, and the defendant failed to submit evidence otherwise, that an allegedly defective step caused her fall, a question of fact was found (*Barley v. Robert J. Wilkins, Inc.*, 122 A.D.3d 116 [3d Dep’t 2014]).

However, the proof that the owner created the condition must be based on more than “mere speculation” (*Ginsberg v. Waldbaum, Inc.*, 228 A.D.2d 410 [2d Dep’t 1996]).

#### **B. Actual Notice or Knowledge of the Defective Condition**

*Black's Law Dictionary* defines notice as the “knowledge of facts which would naturally lead an honest and prudent person to make inquiry, and does not necessarily mean knowledge of all the facts.”

Sometimes actual knowledge of a condition can be established. The best of all worlds is to be able to prove that the property owner had actual notice of a legally cognizable defect or hazardous condition, and failed to correct it in a timely manner. The starting point to proving this lies with the initial interview of your prospective client and exploring any statement that might have been made on the part of an apartment complex property manager at the scene following the accident, or perhaps during preparation of an incident report. Witnesses whose statements are taken through investigation, with names often provided by your client, may recall having discussed the condition with the property manager or landlord prior to your client's accident.

Occasionally, the defendant's employee or representative will acknowledge the condition at deposition.

Proof that a property owner recently inspected the area that included a permanent or continuing “defective condition” may give rise to an inference of actual notice (*Burnham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319 [1st Dep't 2006], aff'd 8 N.Y.3d 931 [2007]).

### C. Constructive Notice of the Defective Condition

Most of the time the battle in a slip and fall case involves the issue of constructive notice, which is the requirement that the defect be visible and apparent and exist for a sufficient length of time prior to the accident to have enabled the owner's employees or agents to discover and remedy it. In *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986), the plaintiff was injured when he fell on defendant museum's front steps. He testified he slipped on the third step, observing “in midair” a piece of white, waxy paper next to his left foot. Alleging the paper came from a concession stand that defendant had contracted to have present and that defendant was negligent as its employees had failed to discover and remove the paper, the jury found against defendant. At trial the plaintiff alleged that defendant had either actual or constructive notice of the

dangerous condition. The Court of Appeals articulated the plaintiff's burden of proof:

“. . . to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it" (67 N.Y.2d at 837, citations omitted).

While the Appellate Division affirmed the jury's verdict in plaintiff's favor, the Court of Appeals reversed, holding that:

The record contains no evidence that anyone, including plaintiff, observed the piece of white paper prior to the accident. Nor did he describe the paper as being dirty or worn, which would have provided some indication that it had been present from some period of time.

Thus, on the evidence presented, the piece of paper that caused plaintiff's fall could have been deposited there only minutes or seconds before the accident and any other conclusion would be pure speculation.

Contrary to plaintiff's contentions, 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 (citations omitted; 67 N.Y. 2d pp. 837, 838).

The substance upon which the injured person claims to have fallen must be identified for liability to be imposed (*Segrette v. Shorenstein Co. East LP*, 256 A.D.2d 234 [1st Dep't 1998]).

a. “Recurring Condition”

Constructive notice may be established by proof of a “recurring condition.” The property owner who has actual knowledge of an ongoing “defective condition” that is unaddressed can be charged with constructive notice for each specific reoccurrence – including the one that caused the injured person’s fall (*Bush v. Mechanicville Warehouse Corp.*, 69 A.D.3d 1207 [3d Dep’t 2010]; *Petri v. Halfoff Cards, Inc.*, 284 A.D. 444 [2d Dep’t 2001]). In *Petri, supra*, the Court held that defendant’s “practice” of leaving debris – such as wrapping material – on the floor while cartons were unpacked was sufficient proof of a recurring condition.

However, a “general awareness” by the property owner of a condition is insufficient to establish constructive notice (*Gordon v. American Museum of Natural History, supra*).

Additionally, to establish a recurring condition, there must be proof that it existed in a specific location, namely, in the area where plaintiff’s accident occurred. In *Carpenter v. J. Giardino, LLC*, 81 A.D.3d 1231 (3d Dep’t 2011), motion for leave to appeal denied 17 N.Y.3d 710 (2001), the plaintiff claimed he slipped on ice on a sidewalk that was formed from a faulty drainpipe. While the proof showed that the drainpipe had allowed water to flow, prior to the incident, on a section of the blacktop walkway around the corner from the concrete sidewalk where the plaintiff fell, the Court held this was insufficient proof to establish constructive notice of the presence of ice at the location where plaintiff fell.

b. “Storm in Progress” Defense

Weather related events claimed to cause a “defective condition” such as ice or snow must be carefully analyzed to determine whether the injured person can establish, as a threshold requirement, that a duty to remedy a “defective condition” by the landowner even existed. The so-called “storm in progress” defense involves the requirement that in order for the duty to arise, two (2) burdens must be met:

1. that the precipitation ended – a “lull” in the storm is not enough (*Mazzella v. City of New York*, 72 A.D. 3d 755 [2d Dep’t 2010]).
2. that a “reasonable time” has elapsed after the storm ended or temperature change (creating an ice condition) has occurred (*Boynton v. Eaves*, 66 A.D.3d 1281 [3d Dep’t 2009]).

As the Court stated in *Hussein v. New York City Transit Auth.*, 266 A.D.2d 146 [1st Dep’t 1999]:

Just as landowners have no duty to clear outdoor public spaces while precipitation is still falling . . . , they are not required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm.

Furthermore, the evidence proffered by plaintiff gives no indication that the damp condition was of such an appearance that defendant should have noticed it. Nor is there any indication that the damp condition at the spot where plaintiff fell was present long enough for defendant to have had constructive notice of it (citations omitted; 266 A.D.2d at pp. 146, 147).

The storm in progress defense also applies to fluctuations in temperature. The property owner is given a “reasonable amount of time” after the temperature fluctuation turns water to ice to correct it (*Ronconi v. Denzel Associates*, 20 A.D.3d 559 [2d Dep’t 2005]; *Robinson v. Albany Housing Authority*, 301 A.D.2d 997 [3d Dep’t 2003]).

The defense generally does not apply to rainwater tracked into premises (*Hilsman v. Sarwil Associates, L.P.*, 13 A.D.3d 692 [3d Dep’t 2004]).

#### D. Conduct of the Injured Person

As in any other type of negligence claim, the conduct of the injured individual will be at issue in the slip, trip and fall case (*see New York Pattern Jury Instructions 2:36*). Under *Civil Practice Law and Rules § 1411*, the “culpable conduct” of the injured person, including contributory negligence and assumption of risk, may be considered by the jury. Any damages awarded to the plaintiff will be diminished by “apportioning” the percentage of plaintiff’s culpable conduct, if any, with the percentage of negligence assigned to the defendant.

For the defense attorney, if he is unable to obtain dismissal of the plaintiff’s case on one or more other grounds (e.g. failure to establish prior written notice, constructive notice, existence of the defect, etc.), the focus will then be upon why the plaintiff “knowingly” encountered a condition that he now claims the defendant property owner knew or should have known was present – and slipped upon or tripped over and fell, sustaining injury.

#### **4. Use of Experts**

Proof of the slip, trip and fall case sometimes involves only Common law negligence principles, such as an accident involving a large patch of ice in a poorly maintained parking lot or on an unsalted sidewalk. You probably won’t need an expert in this scenario. Other times, municipal and/or state building codes become involved, such as with a municipal sidewalk or a claimed structural defect (e.g. stairway, lighting, sunken storm water grate). Some cases will require experts and some won’t. If the issues involve “special skill, training or experience” and the conclusions to be drawn by a jury “depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject . . . or when the conclusions to be drawn from the facts as stated, as well as the knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence;” an expert may express an opinion on the issue at hand (*Trial Handbook for New York Lawyers*, Aaron J. Broder, *Second Edition*, 1986).

Type of experts that may be useful:

## A. Professional Engineers and Architects

Undoubtedly more so than any other specialist, the professional engineer and architect are two types of experts whose specialties lend themselves to providing necessary proof in the slip, trip and fall case.

A professional engineer is an individual who has graduated from an accredited four year college or university with a degree in engineering (e.g. bachelor of engineering, bachelor in science and engineering, master of science in engineering, etc.), or who completed a combination of education and experiential requirements, at least in New York State. The individual must then successfully complete a written examination and obtain a license.

Beyond the title, the experience of this type of engineer becomes critically important. To apply the experience to the “slip and trip” case, look for an extensive background and experience in buildings and structures. Consideration of local codes, the state building code, the state property maintenance code and application of the code to real world residential and commercial settings to determine code compliance through inspection is useful experience. As with any expert “over involvement” in litigation as a disproportionate share of the expert’s background is not helpful.

Similarly, architects are highly educated, licensed professionals with vast experience in the design and construction of buildings and other structures and who typically have a wealth of experience with state and local codes, and inspection and analysis of problems in this type of environment. Good design and construction practice is a valuable form of proof that an architect can provide.

## B. Biomechanists

Biomechanists, who are engineers with a background in medicine, particularly anatomy and physiology, analyze the forces involved in causing injury to the human body. In the “slip and trip” case, biomechanists can be useful where one of the battlegrounds is whether the incident in question caused the claimed injury. This often arises in a case where there is pre-existing pathology – degenerative changes in the lumbar or cervical spine,

shoulder or knee joint – and the plaintiff’s attorney claims that the slip, trip and fall caused either an aggravation or exacerbation of the pre-existing condition, or a new injury (e.g. herniated disc with spinal cord or nerve root involvement).

The need to retain a biomechanist also arises in cases where a seemingly simple, low impact incident is claimed to cause very serious or catastrophic injury. The biomechanist can analyze the direction, magnitude and predictable effect of those variables on the human spine, shoulder or knee joint, as well as other structures in the human anatomy.

### C. Meteorologists

While it is commonly accepted that “weathermen” are not able to “predict” the weather and many would argue that Meteorology is anything but a “science,” nevertheless meteorologists have found gainful employment in the litigation arena. What they can tell us, with some degree of accuracy is the past – that a weather event occurred, how long it occurred and where it occurred. That ability provides valuable information to establish constructive notice – the longevity of a condition that is claimed to have caused the plaintiff’s accident. Of course, issues of exactly when the precipitation ended, what the temperatures were during and/or following that precipitation, what effect the precipitation had on a ground surface and other issues remain as the battleground between the plaintiff’s meteorologist and the defendant’s meteorologist.

Some examples of cases in which I have utilized experts:

- a fall on a stairway where the person loses his balance and falls while descending – the engineer inspected the stairway and determined that the depth of tread (stair surface itself) as well as the height of riser (the vertical surface connecting each tread) was several inches different than the treads and risers above and below where the person tripped and in violation of applicable Code;
- in a slip and fall on an icy exterior stairway where part of the concrete tread was covered by ice and part was not – the engineer

inspected the premises and determined that the “outboard” portion of each step was not protected by the metal overhang extending from the building and photographed discoloration and unique wear patterns on each concrete step to support his opinion that this was a longstanding and recurring condition (*see Alexander v. St. Mary’s Inst.*, 78 A.D.3d 1475 [3d Dep’t 2010]);

- person tripped and fell while stepping from parking lot onto sidewalk in area of handicap ramp – expert concluded that the flared transition curb connecting the ramp to the standard curb was too short, in violation of Code, creating a tripping hazard;
- person sustained spinal cord injury when he took one step onto a handicap ramp, his right foot slipped forward and he fell backwards, his head hitting the concrete sidewalk – expert with background in “slip resistance” and as board certified safety professional concluded the building maintenance company created a defective condition when it failed to mix abrasive with paint and made a previously slip resistant concrete surface no longer slip resistant when wet.

With respect to finding the “right” expert, without exception, my best resource over the years has been other attorneys – sometimes in my own firm, sometimes other local colleagues, and sometimes colleagues in other cities who have handled similar cases.

I begin my search through my colleagues, both within my firm and locally. I then turn to organizations that support my efforts as an advocate—the plaintiffs’ bar (AAJ, NYSTLA, etc.) and organizations that provide support to plaintiffs attorneys. There are just as good resources available to the defense lawyer, from Defense Research Institute to the defendant company itself; to the carrier who insures the defendant and has been involved in similar litigation before.

In addition, the Internet has given birth to a host of expert search websites and services. Some are excellent and others not worth your time, as with most web based resources.

Look to former government, industry and safety organizations (e.g. ASTM) as well.

Legal verdict and settlement publications are also a good source of names (e.g., jury verdict reporters such as Verdictsearch).

Some websites to look at to confirm whether an expert's testimony has been excluded:

- [dauberttracker.com](http://dauberttracker.com)
- [lexis.com](http://lexis.com)
- [westlaw.com](http://westlaw.com)