

# **GARDEN STATE CLE LESSON PLAN**

**A 1.0 credit course**

**FREE DOWNLOAD  
LESSON PLAN AND EVALUATION**

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## **WATCH OUT: REPRESENTING A SLIP AND FALL CLIENT**

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**Featuring**

**Robert Ramsey  
Garden State CLE Senior Instructor**

**And**

**Robert W. Rubinstein  
Certified Civil Trial Attorney**

### **Program description**

With all those slick surfaces out there it is only a matter of time before a client comes into your office and says, "I slipped and fell. Now I'm hurt." This 1 credit CLE will teach you what to expect when representing a slip and fall client.

## **I. Introduction**

- **Robert W. Rubinstein, Certified Civil Trial Attorney**
- **Author of 1 published book – New Jersey Practice Series Automobile Law and Practice Forms; 1 book in the works - New Jersey Personal Injury Law**
- **Slip and fall issues**

## **II. Basic Negligence Law and What You Need to Prove at Trial**

### **A. Duty of Care**

- **Duty of care depends on the circumstances of why the person is where they are – as in why the person is injured**
- **“slip and fall” – someone who slips on an icy sidewalk or on the boardwalk in Atlantic City or in a hotel or other public accommodation; premises liability is not just slipping and falling**
- **Duty of care based on circumstances**
  - **Different settings where someone can slip and fall, i.e. trespasser where duty of care is reduced, or business invitee where there is a greater burden because of nature of relationship**
  - **Greater duty of care to insure that the premises are safe to an invitee**
  - **In NJ – the court has hit a point where the circumstances have been grouped together, an invitee or business invitee or trespasser are all “invitees”**
    - **Trespasser is always going to be different**
    - **There used to be a lot of effort characterizing the plaintiff to determine duty of care – but lately the trend is toward treating them all similarly**
- **Duty of reasonable care, duty to maintain premises, duty to warn of defects**
- **Business invitee gets the greatest duty of care because the premises owner is getting a benefit from the person being there v. social invitee v. trespasser**
- **Hypothetical**

- **Air conditioning man comes to home to fix AC before a party and slips**
- **He is a business invitee**
- **A guest comes to the party and the guest slips and falls – same duty to this person as the AC repair man**
- **Uninvited child comes and slips by the pool – this person is a trespasser but “attractive nuisance” of the pool**
- **Business premises – everyone who comes into a business establishment is considered a business invitee and therefore highest standard of care owed to plaintiff coming in**
- **People outside the business – on sidewalks – not a “business invitee” if not getting the benefit of being in the premises but still considered an “invitee”**

#### **B. Breach of Duty of Care**

- **Breach of duty is based on what negligent act is**
- **In a home the condition may be different than in a business premise**
- **The hardest part of a premises liability case is that the simple act of falling does not mean you win – you must show actual or constructive notice by the supermarket or the premises owner of the defect**
- **Does the premises owner have notice of the defect to make them liable?**
- **In NJ – mode of operation – comes into play to help plaintiff prove notice issues**
- **How reasonable is it for business to have someone checking the floors to make sure they are safe**
  - **Should have someone at regular intervals checking to insure there are no hazards**
  - **Have a log that keeps track of employee looking for hazards**
  - **Have something on the ground where there are known issues to protect against someone slipping – some safety precaution**
- **If business owner knows or should have known that there was a hazard – that is notice**

### **C. Res Ipsa Loquitor**

- **A way to establish an inference of negligence**
- **NJ case (Jerista v. Murray, 185 NJ 175 (2005)) – electronic doors shut on a person and you must show that the defendant had exclusive control of the item, that the actions that happened could only have happened through negligence, and the plaintiff did not contribute to the event itself**
- **Escalator cases – must be able to demonstrate that the escalator stopped suddenly without any cause for it to stop suddenly and your client was on the escalator, and that it was in the exclusive control of the defendants and that your client did not do anything wrong**
  - **Defense argued that plaintiff caused injury because client was smoking a cigarette and not holding the railing while holding a suitcase**
  - **Lost case because a video showed that another patron walked onto escalator with a suitcase and hit the stop button – therefore no longer res ipsa case because no negligence on behalf of premises owner – is it straight negligence? Is it product liability case?**

### **D. Tort Claim Notice – Suing Public Entities**

- **Tort Claim Notice, or the like – must evaluate whether there is a notice requirement for filing a claim**
- **Under Tort Claims Act, etc. – within 90 days of incident the public entity or park must be put on formal notice of the claim, types of injuries and type of claim – if don't do that then absolute bar to proceeding with your client**
- **For Tort Claims there is an exception for exceptional circumstances to file a late notice outside of the 90 days but must be filed within 1 year of date of incident and must establish exceptional circumstances – must show something really out of the ordinary, i.e. someone out of state and badly injured in NJ, hospitalized for significant period of time, unknown entity**
- **Need to immediately send notice to all known entities and check with tax collector, look at site and investigate to insure what entity you need to file against – be sure to name everyone and then let the entities write back that**

- they are not responsible – maybe get letter from city engineer about who owns**
- **Unless injuries are really significant, pass on those cases**
- **Jogging trails – no way of knowing who owns – name everyone and let them show why not them**
- **531 municipalities in NJ; 600+ boards of education – many entities that may own sidewalk or other premises**
- **SOL on slip and fall is 2 years**
- **Water Park – still 2 years because an injury claim; same as hockey game, football game**
- **Port Authority – 1 year SOL; same notice of Tort Claim**

#### **E. Damages**

- **Amount of damages depends on a lot of things to determine whether it is worth taking the case – injuries, experts needed**
- **Walmart and Home Depot will always go to trial; same with casinos because they are self insured – must go to court for everything – try to remove to federal court**
  - **In federal court discovery rules are slanted toward defense – limited interrogatories, experts is more favorable to defense because cannot collaborate with your expert, costs are more; more briefing required, more conferences where you must go to court – limiting plaintiff’s ability to get information from defense – magistrate can help you to get discovery – case moves faster – jury pools differ because they are broader**
  - **In order to keep the case in state court – destroy diversity – find NJ defendant to keep it in state court**
  - **So unless injuries are significant then many firms won’t take cases against Walmart, etc. because of the costs and going to federal court**
    - **Not soft tissue injury**
    - **Unless convinced that the injuries are going to pierce the threshold then not going to take it**
    - **Nature of cases are they are not easy to prove (slip and fall) – some level of comparative negligence, almost always going to have experts**

- **Different assessment if homeowners policy as opposed to business premise owners and car insurance**
- **Look at nature of the entity**
- **Slip and fall on sidewalk in front of business establishment – may take case without significant injury because it is more likely to be a commercial policy/general liability policy – not going to federal court – more likely to get resolved in a favorable way**
- **Pain and suffering is based on nature of injuries**
- **Damages includes medical bills – in auto case you have no fault so auto insurance is paying medical bills, in slip and fall defendant does not pay medical bills so you either have medical insurance or you are out of luck – many insurance policies have “med pay” which is \$5K that is available to pay medical bills but you don’t have to prove fault but carriers don’t tender that and many times attorneys will not ask for this – *don’t take that because you are entitled to that anyway!***
- **No civil obligation to clear snow from the sidewalk but may have a local ordinance that you must clear sidewalk; ordinance does not create a duty of care for negligence purposes**
- **No obligation to clear your walkways but if you clear it and make it worse – then you have an obligation**
- **Anything on your property is where your liability lies and you have a duty**
- **If you are inviting someone onto your property then you have an obligation to clear your walkways leading to your house**
- **Also consider “notice” of the hazard**

### **III. Types of injuries**

- **Bad knee injuries – more of these than other types of injuries**
- **Head injuries**
- **Back injuries**
- **Full range of potential injuries**
- **Need an expert to discuss injuries**
- **Economist expert would depend on what the person does and the injuries, loss of wages, etc.**

#### **IV. Pain and suffering**

- **Look at nature of injury**
- **Impact of injury on that person**
- **How injury has impacted daily activities**
- **Talk to neighbors, friends, co-workers and how has this impacted them**
- **There is not chart to assess**
- **Must assess each person and their injuries and their life**
- **Most important and best way to present pain and suffering is not through plaintiff but through “before and after” witnesses**
- **Most compelling testimony is your neighbor who used to see you all the time but now does not – more objective and believable than plaintiff or plaintiff’s family saying it – describe before and after accident**

## **V. Additional insights**

- **When case first comes in – visit the site yourself because what you are hearing from the client is different from what the facts are – conditions change**
- **Take photographs of area**
- **Spoliation letter to preserve video tape, etc. – form letter to premises owners**
- **Casinos will not turn over videos pre-suit and won't let you see it pre-suit; won't give you the video absent a court order before plaintiff's deposition**
- **For every personal injury case you need:**
  - **Liability**
  - **Damages**
  - **Someone to recover money from**
- **NJ is one of a few states that does not have a law that requires insurance companies to disclose their coverage – don't know if insurance coverage is enough to determine if you should take the case**
- **Take as many witness statements as you can**
- **Be sure you have proper defendants – check tax rolls**
- **Do the work early to find out who all the defendants are**
- **Get experts lined up**
- **Tort claims – pull permits to see if any private contractors**
- **Snow and ice – premises owner, snow removal company (may be multiple layers)**
- **If you learn a new name, then you must amend asap**
- **Most cases settle – having reasonable attorneys and reasonable client**
- **Set client expectations early in the process and then meet or exceed expectations – that is the trick to being successful in these types of cases**