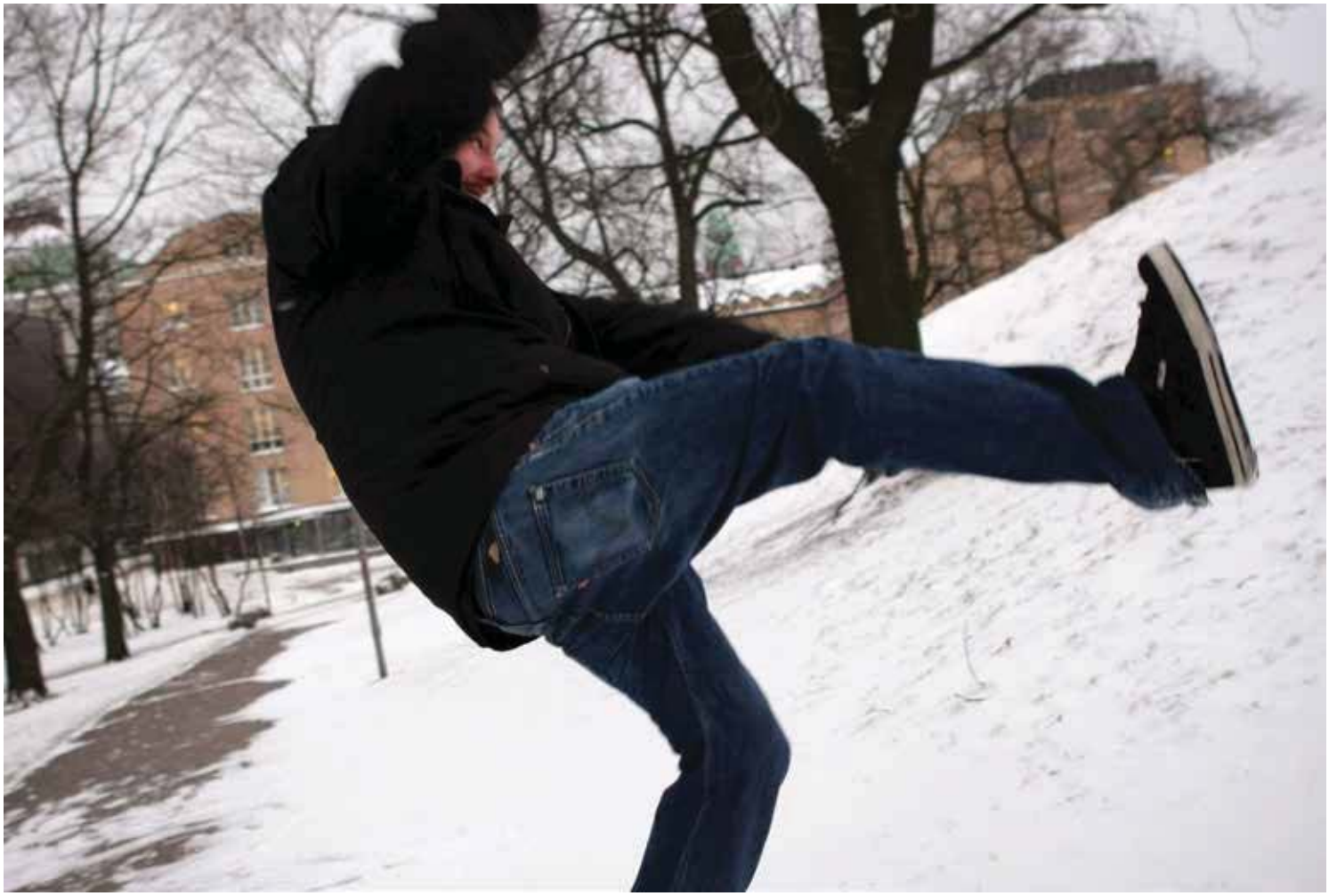
Containing the Claim Costs of Slip and Falls

Risk Engineering – Your Business Insurance Specialists



What if someone slips and falls at your business?

Did you know that slips and falls are one of the most common exposures facing your business? When someone slips and falls at your place of business, they're likely to make a claim against you for premises liability.

It's more likely that your business can be defended against such a claim if the investigation and evidence are handled properly. And there is usually only one chance to get it right – immediately after the accident happens.

Here's what we'll need your help to do right away if someone falls on your premises:

- Secure photos and videotape of the scene. Use media that records date and time. Place an object in the scene that will indicate size or dimensions for perspective.
- Canvass the areas around your business for witnesses. Get and preserve signed statements, employee interviews and a statement from the claimant.
- Secure the most recent maintenance and inspection records for the accident scene.
- Complete a detailed accident report with emphasis on the type of shoes worn by the claimant and the condition of and the type of surface allegedly slipped on.

Helping with these immediate actions may make it more difficult for the claimant to recover against you.

During the preliminary investigation, know that the claimant must establish the following elements to recover damages against you:

- you have a duty of care
- you breach that duty
- your breach is the proximate cause of the accident and resulting injury
- the claimant sustains damages because of the injury.

If the person cannot prove any one of these elements, your ultimate liability is doubtful and there can be a defensible denial of the claim.

What “duty of care” means for your business

If a person is lawfully on your premises, a duty of reasonable care will be owed to that person.

You owe a duty of reasonable care if you:

- know, or by the exercise of reasonable care would discover, the dangerous condition and/or activity
- realize that it involves an unreasonable risk of harm
- should expect that your customers or guests will not discover or realize the danger, or will fail to protect themselves against it.

However, there’s good chance that liability does not exist (or is significantly reduced) if the dangerous activity or condition is known or openly obvious. The expected risk of harm is reduced when a person should appreciate and avoid the danger.

What is a “known condition”?

A condition is usually “known” if and when the person would have known of the condition or activity itself – and understands the danger it involves.

If the claimant observed the defective condition before the occurrence and failed to avoid it, there may be an opportunity to at least significantly reduce any damages.

Important: This potential must be addressed when taking the claimant’s statement.

What are “obvious conditions”?

Whether a condition is “obvious” will usually be up to a judge or jury to decide.

The physical nature of the condition is critical – especially how visible it is. Whether or not the condition is obvious will take into account the size of the defect, the color contrast between the defect and the surrounding area, and the length of time the claimant had to observe the defect.

Two exceptions to the open and obvious doctrine:

1. **“Distraction” Exception:** You have a duty to protect visitors if you suspect they might not appreciate the danger because they’re distracted or preoccupied. Because claimant’s attorneys frequently use the “distraction exception” to circumvent the open and obvious doctrine, claimants may be coached to state that the reason they did not avoid the open and obvious danger is because they were distracted. If you can obtain a statement immediately after the accident, you should be able to establish that the claimant was indeed distracted or was simply being careless.
2. **“Deliberate Encounter” Exception:** You probably have a duty to warn of an open and obvious danger when you reasonably expect the person to encounter the danger and the advantages of them proceeding outweigh their apparent risk. This exception is often applied when claimants are injured in the course and scope of their employment.

When you have a breach of duty

You may have breached your “duty of care” if you know of a danger on your premises and do not take reasonable care to protect someone lawfully on your premises.

The notice requirement

You must have either “actual” or “constructive” notice of the danger before liability can be imposed against you. Without evidence that you knew or should have discovered the condition, the claimant may have failed to show you breached your duty. If not already in place, institute a routine timely “sweep” of your premises to look for hazards. This tends to defeat claims that you were on constructive notice of any foreign substance on the floor or other hazard on the premises.

A danger created by you

A danger exists if the condition arises from your acts or as part of your business. If you or any employee knew about it, “actual” notice will be shown. Your employees have a responsibility to correct an unsafe condition or report the problem to you.

Actual notice established by a statement by an employee

You’re potentially on notice of a danger when statements about knowledge of the condition or defect prior to the time of the accident are made by one of your employees, even if the statement was not specifically authorized by you. If the claimant and/or any potential witness admit that they did not have or overhear any conversations with an employee establishing knowledge of the danger prior to the accident, it is critical to document that in their statements.

Constructive notice of the condition

Constructive notice can often be established under two alternative theories:

1. the dangerous condition existed for a sufficient amount of time so that it would have been discovered by the exercise of ordinary care; or
2. the dangerous condition was part of a pattern of conduct or a recurring incident.

Period of time to constitute constructive notice

The dangerous condition must exist for a sufficient amount of time so that it should have been discovered. The claimant must establish that the dangerous condition existed long enough to constitute constructive notice to you.

Pattern or practice to constitute constructive notice

A pattern of dangerous conditions which were not attended to within a reasonable period of time may establish liability against you. Constructive notice can be established by showing that the dangerous condition was part of a pattern of conduct or recurring incidents involving your failure to correct dangerous conditions.

Constructive notice will be established by taking into account:

- the length of time the condition existed
- whether the condition existed in a high traffic area where it would be easily discovered, or
- in an area where constant patrols would be needed to discover and correct the condition.

What is the proximate cause of the fall, injury and damages?

The claimant must come forward with some evidence and/or testimony that the danger was encountered by the claimant during the fall. Proximate cause is established when there is a reasonable certainty that your acts caused the accident. Liability would not normally be based upon surmise or conjecture as to the cause.

Likewise, the claimant must come forward with some evidence and/or testimony that the injury resulted from the fall.

If the claimant admits that they didn't sustain an injury at the time of the fall, it's critical to document that in a statement. Witness statements confirming the claimant's statement would further enhance the defensibility of the claim.

And finally, the claimant must come forward with some evidence and/or testimony that he or she incurred damages as a result of the injury.

The claimant statement must include questions concerning his intention to seek medical treatment as well as his employment status and whether or not others (spouse and/or children) are dependent on his support.

It's often to your advantage to use an expert to review and comment on the condition and proximate cause issues. Keep in mind the following:

- Always obtain experts through the assistance of counsel to protect their confidentiality.
- Have the expert review the original scene prior to any substantive changes.

Important – before performing any remodeling in the area of the accident, it's critical that either a report has already been completed by an expert or engineer, or the need for these reports have been completely eliminated.

Conclusion

The best defenses to an accident are taking proactive measures to avoid them and keeping records. However, when a slip and fall accident is claimed, remember to:

- Immediately investigate the circumstances surrounding the accident.
- Obtain and preserve all accident scene photos and videotape.
- Locate a copy of the accident report.
- Obtain a statement from the claimant and any witnesses as soon as possible.

With these steps, the claimant's chances of recovering damages against you may be eliminated or at least substantially reduced.

The risks are real

Liability for waxed floors
The mere fact that a floor is waxed may not necessarily establish negligence. The claimant may need to show that the waxing was done improperly. Testimony that a floor was polished or slick does not itself establish negligence. The claimant will need testimony either from the employees that applied the wax or from a retained expert that the wax was improperly applied.

When taking a statement from the claimant, inquire specifically as to what about the waxed floor made the floor slippery.

Liability for tracked-in snow, water or ice
You may not have duty to continuously remove tracks of snow, ice or water left by customers who have walked through natural accumulations before entering your building. There may not be a duty to remove all tracked-in water when mats are placed near an entrance, nor does a mat that becomes soaked with tracked-in water become an unnatural accumulation or aggravate a natural accumulation of water. Your duty is to maintain the mats installed, with reasonable care.

If the claim involves tracked-in water, ice or snow, the claim may be deniable, especially if the accident occurs in close proximity to the exterior of the premises.

Liability based on failure to preserve evidence
Often the best evidence to demonstrate there was no danger at the time of the accident can be photos of the scene taken immediately after the occurrence, as well as videotape from security cameras. Problems arise when the evidence is lost. You have a duty to preserve evidence.

Secure and preserve all videotape and accident scene photos.

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