

# **INDIANA SLIP, TRIP & FALL CLAIMS**

The Inside Story

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## **ABOUT THIS BOOK**

This book is a consumer guide for people who have been injured on business, private, public or federal property, and it is also intended for people who want information regarding the subject. This book is not written to provide legal advice because each and every case has its own unique set of facts. Knowledge is power. The purpose of this book is to give the reader information about premises liability claims the general law about these claims in Indiana.

This book will help you understand the basic principles of premises liability, how to get your medical bills paid, and receive compensation if the property owner was negligent. The reader will also learn to be cautious of insurance adjusters. Finally, the reader will learn how to select an attorney to assist them with their premises liability case.

The information contained within this book is not to be considered legal advice for your specific injury case. This book is for educational purposes only and does not substitute for the advice of a licensed attorney.

## **10 IMPORTANT CONCEPTS YOU MUST KNOW**

- ❖ If you are injured on another's property report the incident and get medical attention immediately.
- ❖ Insurance companies are in the business of making money for their shareholders and insurance adjusters are not your friend or on your side.
- ❖ Do not rely on Yellow Page or TV advertisements when choosing a lawyer.
- ❖ Keep the clothes and shoes you were wearing at the time of the incident.
- ❖ Always tell the truth to your doctor and attorney. If you hide information or lie; it can destroy your case.
- ❖ Evidence disappears and people's stories change as time goes on. If there is no incident report, witness statements or pictures, an injured party cannot recreate the incident scene.
- ❖ Most people now have phones with cameras; if you do not, keep a disposable camera in your car in case of an incident.
- ❖ Not all attorneys are created equal; they come in different shapes, sizes and personalities. If you have been seriously injured, immediately consult a qualified attorney with whom you are comfortable.
- ❖ In order to prove your case, the medical records must document that the injury is related to the incident.
- ❖ Even if you are injured and it isn't your fault, you still may not receive compensation for his injuries.

# 1. WHAT IS A PREMISES LIABILITY CLAIM?

The law requires people to use due care in their daily activities. If you have been injured because of another party's carelessness it is called "negligence." A premises liability claim addresses injury to a person or death that occurs because there is a dangerous condition on someone else's property.

Premises liability actions can occur from a variety of facts. Below is a list of the most common premises liability claims in no particular order:

- ❖ Slip & Fall
- ❖ Trip & Fall
- ❖ Falling items in a retail store
- ❖ Dangerous Nuisance
- ❖ Criminal Acts of Third Parties

There are a number of factual situations that may lead to a premises liability action. Here are a few:

- ❖ A customer trips and falls on water or another foreign object in a commercial establishment
- ❖ A customer trips and falls over a parking bumper or stop at a commercial establishment
- ❖ A customer is hit by a car while walking into a business
- ❖ A customer is at Wal-Mart, K-Mart, Home Depot, Lowes, any big box store or warehouse club and merchandise falls off the shelf and injures the customer
- ❖ A customer is mugged, raped, robbed or killed on a business property
- ❖ A student is sexually assaulted in her residential apartment
- ❖ A visitor to somebody's home falls over a sprinkler head or a hole in the grass
- ❖ A person falls and is injured because of poor lighting
- ❖ Kids jump a fence and are injured in a landowner's lake or pond

## **2. WHO CAN BE HELD RESPONSIBLE FOR AN INJURY ON THE PREMISES?**

The potential parties that can be held responsible for an injury on somebody's property can vary widely, which is one of the reasons why a person looking into this type of claim should at least consult with an attorney at the outset. Let me give you a short example. A person is walking through a parking lot to go to the supermarket and slips and falls because the parking lot was a sheet of ice. In this case, the potential parties could be the owner of the shopping center, the property manager, the snow removal and salting company or any other vendor that was responsible for inspecting the property.

Here are a few of the potential parties that may be responsible for injuries in a premises liability claim:

- ❖ An owner of a commercial business
- ❖ The business leasing the commercial space
- ❖ The owner of the business property
- ❖ An owner of a residential property
- ❖ A state entity including municipalities
- ❖ The federal government
- ❖ The state government
- ❖ Any vendors including maintenance, landscaping or snow removal
- ❖ Security personnel
- ❖ The injured person

### **3. WHAT IS THE DUTY THAT A PROPERTY OWNER OWES TO A PERSON ON THEIR PROPERTY?**

The duty of care depends on a number of factors in premises liability cases. The duty of care that an owner or occupier of land owes to another person depends on how the relationship is classified. In Indiana, there are three main classifications that dictate the landowner's duty: (1) invitee; (2) licensee; and (3) trespasser.

A landowner or occupier owes the lowest duty of care to a trespasser. In these situations, the landowner has the duty to refrain from willfully or wantonly injuring the trespasser after discovering his presence. The attractive nuisance doctrine, deals with times when children will trespass on someone else's property to use something on the property. As an example, children trespass on somebody's land to swim in a lake. In these situations, the landowner's duty is slightly different and discussion of this doctrine is beyond the scope of this work.

A landowner owes a slightly higher duty to licensees. The duty requires the landowner to refrain from willfully or wantonly injuring the licensee or acting in a manner that would increase the licensee's peril. Additionally, the landowner or occupier has a duty to warn the licensee of any latent dangers on the property.

A landowner or occupier of land owes the highest duty to an invitee. An invitee is somebody who enters the land either as an invited (social) guest or for some business purpose. The landowner owes the invitee a duty to exercise reasonable care for his protection while on the landowner's or occupier's property. This is the most common relationship between injured person and property owner or occupier.

#### **4. WHO WILL PAY THE INJURED PERSON'S MEDICAL BILLS OR LOST WAGES?**

Generally, medical bills and lost wages are damages that may be compensated for at the time of settlement or trial. However, it should be noted that many Commercial General Liability Insurance Policies and Homeowner's Insurance Policies have a medical payments provision that will pay a certain amount towards medical bills regardless of fault.

##### **The typical policy will read something like this:**

We will pay medical expenses for bodily injury caused by accident regardless of fault. We will pay the reasonable expense for first aid, necessary medical, dental and surgical care, and necessary hospital, professional nursing and funeral services.

These med-pay provisions of policies will pay for medical expenses if a person is physically injured on the property. Just because an insurance company pays for some or all of the medical expenses doesn't mean that it is accepting responsibility for your claim. In most policies, this medical payments provision can range from \$1,000 to \$10,000.

## **5. WHAT TYPE OF COMPENSATION IS AVAILABLE IN THESE CASES?**

If the person is injured and did not die from the injury, economic and non-economic damages are available.

### **Economic damages include:**

- ❖ Past medical and hospital bills
- ❖ Future medical and hospital bills, if any anticipated
- ❖ Past lost wages, if any
- ❖ Future loss of earning capacity, if any

### **Non-economic damages include:**

- ❖ Past physical and mental pain and suffering
- ❖ Future physical and mental pain and suffering
- ❖ Scarring, humiliation, and loss of enjoyment of life

If the injured person died because of the injuries sustained in the incident, the damages will be governed by the Wrongful Death Act.

### **Comparative Fault:**

This legal concept is always at issue in a slip, trip and fall claim. Under the law, all people are responsible to act in a careful manner and look out for their own safety. The typical position of insurance companies in slip and fall cases is that the injured person should have watched where they were going, and if they were watching, the incident would not have happened.

Indiana is a modified comparative fault jurisdiction. This means that if a jury finds the injured person more than 50% at fault for the incident, he is not entitled to any recovery. Because of these comparative fault principles, it is very important that the injured person document the reason for the incident. Unlike a car accident case where somebody can wait a period of time before hiring an attorney, in these types of cases it is best to consult with an attorney immediately to protect important evidence. As time goes by, witnesses disappear and defects on the property are corrected.

## **6. ACTION STEPS FOR THE PERSON INJURED IN A PREMISES LIABILITY INCIDENT?**

In order to protect the injured person and preserve the ability to make a successful premises liability claim, I have put together a list of action steps and things to avoid after a slip, trip and fall incident.

### **Things to do:**

- ❖ If you require emergency medical attention assist that 911 is called and you are evaluated by EMS
- ❖ If the incident occurred on a commercial property insist that an incident report is filled out
- ❖ Write down the names, addresses and phone numbers of any witnesses to the incident. If you do not have a camera phone, you should keep a disposable camera in your car. If you are able and there is a defect on the property, photograph the defect
- ❖ If are injured and choose not to be transported to the hospital by EMS, go to the hospital or doctor within 24 hours
- ❖ In writing request that the business preserve any security videos of the scene
- ❖ This needs to be done immediately because many digital recording systems record over the data every few days
- ❖ Follow your doctor's advice and treatment schedule. Do not withhold information regarding prior accidents or injuries. The insurance company will find this information in a database.
- ❖ Many patients feel rushed when they go to their doctors. In order to make the appointment effective, make a list of your injuries, symptoms or complaints before your office visit. If you forget to tell your doctor about an injury and it is not documented in your medical record, it will be difficult to prove the injury.
- ❖ If you are unable to work because of the injury, be sure to discuss this with your doctor.
- ❖ Consult an experienced personal injury attorney if you are injured. All conversations with your attorney are protected by the attorney-client privilege.
- ❖ Be honest with the lawyer, it is much better to learn of a weakness in a case at the outset as compared to the third day of trial.

- ❖ Direct all insurance company calls to your attorney.
- ❖ If you were injured in a slip & fall or trip & fall, save your clothes and your shoes.

### **Things you should not do:**

- ❖ Talk or give a statement to the property owner's insurance company before you have consulted an attorney. The other insurance company is not your friend and does not have a duty to be fair with you.
- ❖ Sign any insurance company papers, medical releases or documents without speaking to an attorney.
- ❖ Exaggerate or minimize your symptoms, complaints or injuries to your doctor.
- ❖ Stop your medical treatment too soon or against your doctor's advice.
- ❖ Hide information from your attorney. All communications are protected under the attorney-client privilege and the attorney needs to know any problems at the outset of the case so they can be handled.
- ❖ Talk to your doctor about what your lawyer said. As an example, if your lawyer recommends that you see a certain doctor or a certain condition, do not share that information with your doctor because it will waive the attorney-client privilege.

## **7. ACTIONS THE PROPERTY OWNER'S INSURANCE COMPANY WILL TAKE AFTER AN INCIDENT**

### **The Insurance Company may call you to take a recorded statement regarding the facts of the accident and your injuries.**

You have no duty to speak with the insurance company. The objective of this phone call is to get you to concede certain points that may come back to haunt you later. When we speak to our family and friends about the incident, we may say "I don't know what happened" or because we are embarrassed, we may say "I wasn't watching where I was going." I hear people say this stuff all the time. My response, is usually, if you weren't watching where you were walking or if you don't know what happened, why come see a lawyer.

In the next breath, the potential client usually says that's not what I mean. Many times when we start discussing the event, and going through the event step by step, the client remembers what happened. Now let's get back to the statement. How do you think it looks in a transcript if the injured person told the insurance company "they didn't know what happened" or "I wasn't watching where I was going"? An injured person cannot get past these types of statements.

Now let's look at statements about injuries. For instance, the injured person breaks her knee cap and injures her shoulder in the fall. The adjuster calls and asks about the injuries. Of course, the knee cap is the person's main concern and that is all she talks about.

Later, the insurance company will use the statement to argue that the only injury was to the knee cap. You see, there is no benefit in giving the insurance company a recorded statement when you're not represented by an attorney. The insurance company is not going to open up its checkbook because a statement is made. Many times, they use statements to close the checkbook and deny the claim.

### **How do you handle the phone call without being rude?**

Thank the adjuster for calling and tell him/her that you are uncomfortable speaking with them at that time. Ask for his/her contact information and tell let them know that you will call them back when you are ready. Don't be rude but be firm. If you have hired an attorney, give the adjuster the name, address and phone number of your attorney. If you have not yet retained an attorney but are planning on retaining an attorney, bring the adjuster's contact information with you when you have your consultation.

## **The insurance adjuster may tell you that you do not need an attorney.**

Remember, the insurance adjuster does not owe you a duty to act in good faith. In fact, the adjuster may offer you a settlement in exchange for releasing your claim forever. They often suggest that, if you hire an attorney, any money you receive will just go to the lawyer. I have heard that adjusters threaten to deny the claim if the injured person wants to hire a lawyer. I have also heard that other adjusters have said to prospective clients that they, "can go ahead and hire an attorney but the offer is not getting any bigger."

## **What should you do?**

In a minor case, you may decide to settle your case without retaining an attorney. For instance, if you were only bruised and scratched because of a fall, and you went to the doctor a couple of times, you probably do not need a lawyer. However, if you broke a bone or have thousands of dollars in medical treatment, you probably do need a lawyer. If you are into DIY, you should probably read all the information in this book before you settle your case so you understand the landscape and process. It is probably not the best idea to rely solely on family or friend's advice because they try to be helpful but they really don't know the landscape. Remember, that each and every case is different and if you have specific questions you should contact a lawyer of your choice.

**The insurance adjuster may call you and ask that you sign a medical authorization so they can obtain all your medical records. They will phrase the request something like this, "we really want to settle this case but we cannot until we get documentation showing all your medical treatment."**

These forms are usually drafted to allow the insurance company to obtain all of your medical information and will not be limited to your medical records regarding this accident. It allows the insurance company to go on a fishing expedition for any other past medical problems that might be completely irrelevant to the pain you are experiencing. In fact, this medical authorization form will allow them to go back and obtain private medical information even if it is 20 years old. Additionally, these releases are so broad that they allow the company to obtain psychiatry or psychology records, HIV or other communicable disease records, and personnel records.

For instance, if an injured party had a prior history of mental illness, the insurance company armed with this information may decide that the injured party could not deal with stress of trial. Accordingly, the insurance company will offer a much lower settlement based on information that they should not have had, knowing that it is likely that the case would settle because of the client's prior mental illness.

**Recommendation:**

Do not sign any medical authorization forms until you have consulted with an attorney. Do not become a victim again by having your privacy invaded. While some of your past medical records may be relevant to your premises liability case, many are not and the insurance company may not be entitled to them under the law. An experienced personal injury attorney knows what medical records are relevant to the case, and will provide this information to the insurance company at the proper time. Again, if you have any specific questions, you should contact a lawyer of your choice.

**The insurance adjuster may use delay tactics to wear you down.**

The insurance company has your potential settlement money in a loss reserve. The insurance adjuster has learned that people who have been seriously injured have additional expenses. They know that you may be feeling pressure because your doctor took you out of work and you have to pay for your medical bills out of pocket. Knowing that these psychosocial stressors push an injured person into a premature settlement, the adjuster will just wait until you give up and say, "enough!" and accept the unfair offer.

**Recommendation:**

An experienced personal injury attorney can advise you how to handle some of these issues. It may be as simple as calling your doctor's office, explaining the issue, and asking them to wait until the case is resolved for payment.

**The insurance adjuster may hire an investigator and place you under surveillance.**

Credibility is a common theme throughout this book. Insurance companies know that an injured person's credibility is what the jury will determine. Even when there is a question of the other person's fault in a case, a jury will usually bend over backwards to find for an injured person who is credible. This is why I constantly tell people not to exaggerate their injuries or hide facts.

Insurance companies are notorious for trying to dig up facts that can negatively impact an injured party's credibility. For instance, the insurance company may have learned that the injured party has severe low back pain and cannot lift over 15 pounds. In an effort to achieve this result, the insurance company may hire an investigator to follow the injured party around and videotape him for days on end. The investigator will take hours of tape and cut it down to a few minutes allegedly showing the injured party doing some type of physical activity. The investigator may not know that the party's doctor told him to try to start normal activities or placed him on a different medication. It

doesn't make a difference to the insurance company.

**Recommendation:**

Do not be paranoid but be aware of your surroundings. Look for suspicious people who may be around your house. If you see a suspicious person around your house or following you, call the police. Also, follow your doctor's advice. If your doctor tells you not to mow the lawn, ask a family member or friend. There is nothing that can ruin your case more than not following your doctor's advice regarding restrictions. If for some reason you are not able to follow your doctor's advice regarding restrictions, discuss the issue with your doctor so it is documented in your medical chart. Finally, never exaggerate you symptoms or injuries.

**The insurance adjuster may appear friendly - She is not your friend.**

When speaking with you on the phone, the adjuster may appear friendly discussing your family, your treatment and sometimes making recommendations. They are hoping that you will be comfortable with them and let down your guard. You should be cordial to the insurance adjuster but remember they do not have your best interests at heart. The insurance adjuster's job is to close the claim for the least amount of money as possible.

**Recommendation:**

Follow your doctor's - not the insurance company's advice.

## **8. DO YOU REALLY NEED AN ATTORNEY FOR A PREMISES LIABILITY CASE?**

You do not need an attorney for every small premises liability case. In fact, you may be better off not hiring a lawyer, and may even have trouble finding a reputable lawyer to take a small injury claim. For instance, if you just went to the emergency room after the incident and followed up with a family physician for a few visits, you may receive just as good a settlement by yourself.

It is important to be aware that many people do not fully realize the extent of their injuries until it is too late. These folks believe the pain in their neck or back will go away in a couple of weeks and they do not immediately seek medical care or legal advice. Sometimes, a seemingly minor injury may be much more severe than initially thought. This fact scenario is much more common with a back or neck injury because of the anatomy. If a person breaks an arm or leg in an accident, it is readily apparent and they are taken to an emergency room. On the other hand, if a person injures a disc in their neck, it usually starts as mild to moderate neck pain and gets progressively worse over days, weeks or months. It's always better to be safe than sorry. When you are injured in an accident, seek medical advice and a legal consultation. You do not have to hire the lawyer but you will learn your rights and equip yourself with valuable information.

## **9. HOW TO CHOOSE THE RIGHT ATTORNEY FOR A PREMISES LIABILITY CASE**

Choosing an attorney to represent you is an important decision. If you have looked through the Yellow Pages I'm sure you noticed page after page of lawyer advertisements. If you were to look at the ads you will notice that they pretty much all say the same thing: "Free Consultation", "No Recovery, No Fee", "Aggressive and Honest", "Experienced". Also, if you turn on your local TV station, you will hear lawyer after lawyer spouting the same information. So how do you go about determining which lawyer in your local community is the best for your case?

Below are some issues that you should consider when hiring an attorney.

**You should hire an attorney who primarily handles personal injury cases. There are two reasons for this recommendation:**

First, Indiana premises liability practice can be complex. The attorney not only needs to know the law – the attorney also has to know the medicine. In medicine, it wouldn't be prudent to go to your family doctor for knee surgery. Likewise, it wouldn't be prudent for you to retain an attorney that handles divorce, trusts, estates and an occasional premises liability case.

Second, Insurance companies know the reputation of attorneys who handle personal injury cases. The companies share information between each other and they know if an attorney takes cases to trial. You may think that all attorneys take these cases to trial but that is not true. Only a small percentage of cases go to trial and only a small percentage of attorneys actually handle the trials. When I was doing defense work, there were times when insurance companies settled cases for a higher amount than the insured's policy limits because they knew the injured person's attorney's reputation, and they were concerned of the risk of an excessive verdict at trial.

**Does the attorney have any inside knowledge of the insurance claims handling process or did they actually defend cases for insurance companies in the past?**

Attorneys who were claims adjusters or defended cases for insurance carriers know how insurance companies evaluate cases.

**Choose an attorney who knows the medical issues involved in your case.**

For example, if you have a neck injury that causes neurological problems in your hands

ask the lawyer about his knowledge of the condition. At least 50% of a personal injury case focuses on the client's injuries. An attorney can know all the law in the world, if he cannot truly understand the injury, he cannot be an effective advocate for the client. In clinical practice, I have treated 100s of injured patients.

**Get a referral from a friend, family member or attorney that they know.**

This is a good starting point, however, you should look to the other factors in this chapter. For instance, your family friend may be a probate or family law attorney and not handle these types of cases with regularity.

**A Bar Association or referral service is a paid membership and does not establish an attorney's credentials.**

Most Bar Association referral services are just like advertising. The attorney can pay to be placed on a list regarding for specific practice areas. Again, this is a place to start, however, you should look to some of the other issues discussed in this chapter.

**Choose an attorney that maintains an active premises liability practice.**

Ask the lawyer how many of these cases she has handled and if she has tried any of these cases to a jury. To put this in context, over 90% of civil cases settle before trial for a number of reasons. First, the courts are under-staffed and it is difficult to get a trial date. Second, when cases get close to trial the parties are able to negotiate a compromise. Because of these issues, an active civil trial practice may only be one trial a year.

**When interviewing the attorney find out how his/her office works.**

There are many law offices that are similar to big box stores with multiple layers of staff. In a number of these offices, the attorney doesn't even know the case exists until it settles. The cases are generally handled by case managers. Ask the attorney if he or she will actually be handling your case. It makes a difference, the only way for the attorney to actually understand the issues and medicine in the case is by reviewing the facts of the accident, the client's medical records and bills. If the attorney understands the facts of the case and injuries, he or she will be a more effective advocate on behalf of the client.

**Ask the attorney if he or she is licensed in the state where your case will be filed.**

Insurance companies know who is not licensed and therefore cannot actually try the case, so you will be at a disadvantage when it comes to negotiations. Also, laws vary from state to state.

**Ask the attorney how he communicates with the client regarding the case.**

It is my preference to communicate by email or telephone. If the client has any questions, she can send me an email or call for a telephone conference so I can answer all of her questions. I do not have an open door policy because it is not effective to the representation of my clients.

**Choose a competent lawyer who you like.**

You will be dealing with the attorney for one to three years depending on facts of your case. You wouldn't want to have to spend time with somebody that you do not like for years just because he or she is competent or has a good reputation.

## **10. DIFFERENT TYPES OF PREMISES LIABILITY CASES**

A number of factual scenarios exist in premises liability cases that require specific knowledge. When confronted with these types of cases, it is best to retain an attorney who has knowledge in the specific areas.

### **Intentional Acts and Criminal Activity of Third Persons**

This type of case originates when the victim is injured by a criminal act of a third person on another's property. Under the right factual scenario, a property owner may be liable to the injured person who was shot outside a bar or a robbed outside a grocery store.

Generally, a business owner owes a patron the duty to use reasonable care to protect them from injury caused by other customers and guests on their premises. This duty includes providing adequate staff or security to control disorderly conduct. However, the duty only extends to the harm that is reasonably foreseeable to the business owner depending on the facts of the case.

In regards to criminal activity, a business owner has the duty to take reasonable precautions to protect their customers from foreseeable criminal acts. This duty extends to an area around that property that would allow the customer safe entry and exit from the premises.

### **Injuries on State or Municipal Property**

The state or city may be liable for damages to a person who is injured on the property if the city or state is responsible for the maintenance and upkeep of the property. In this situation, the injured person is required to comply with the Indiana Tort Claims Act. This portion of the law requires specific written notice of the claim to a number of potential parties as a prerequisite to filing a lawsuit. Additionally, damages in cases against the state or cities are limited by statute.

### **Injuries on Federal Property**

If a person is injured on federally owned property, there could be a chance of recovery against the federal government. For instance, if a client slips & falls on a puddle of water in an IRS building, he is entitled to bring a claim against the government under the Federal Tort Claims Act. The FTCA is a complex statute with numerous requirements, including a notice requirement that is similar to a state action.

Under the FTCA, the injured party gives up their right to a jury trial, and any dispute will be decided by a federal court judge. Many attorneys do not handle FTCA cases because

the claims procedure is complex and the litigation has to occur in federal court.

# **11. THE LEGAL PROCESS FOR A PREMISES LIABILITY CASE**

In this chapter, I will summarize the basic steps for most typical serious injury case. The process of a premises liability case can be lengthy with many important decisions along the way. It is important to have an experienced lawyer with you on your side at every phase of the process in order to have the best chance of getting the best results possible.

## **DOES THE CLIENT HAVE A CASE?**

In order to receive compensation, the injured person has the burden of proof. In Indiana, the burden of proof in a premises liability case is the "greater weight of the evidence" or preponderance of evidence standard. For purposes of this discussion, in all personal injuries cases we have to determine whether there is (1) liability or negligence on the part of the defendant; and (2) damages (injuries).

### **Determining Liability/Fault:**

The first question that has to be answered is who caused the incident? Stated another way, are we able to prove liability against the property owner or occupier. It is important that we investigate the matter as soon as we are retained because as time goes by evidence is destroyed, altered or disappears.

In premises liability cases, it is necessary to hire an attorney promptly because defects in the property are usually fixed so other people do not suffer injury. Additionally, evidence, such as video surveillance or the scene of the incident as to be preserved before it is damaged or destroyed. Additionally, the attorney has to determine if there is an insurance policy or fund that will provide compensation for the injured person.

## **Areas of Liability Determination & Investigation**

### **Incident Scene:**

As a general rule, I visit the incident scene in person in order to photograph and inspect the area. This allows me to understand any nuances that may exist at the accident scene.

### **Incident Documentation:**

We will attempt to obtain the incident report and any prior incident reports. Additionally, if necessary, we will obtain criminal activity runs, arrest reports or EMS runs

to the property.

**Witnesses:**

All witnesses to the incident need to be interviewed immediately. As time goes on memories fade and people disappear.

**Insurance:**

We need to determine if there are any insurance policies available to compensate the client for their injuries or pay medical bills.

**Damages (injuries):**

The next area of investigation is the nature and extent of the client's injuries (harms & losses).

**Medical Documentation:**

We will obtain all medical documentation related to the accident including EMS reports, hospital records and medical records. We will also obtain past medical records if there have been prior accidents, injuries or illness to the areas of the body injured in the accident.

**Medical Bills:**

We will gather all medical bills related to the injury.

**Employment Records:**

If the client lost time from work, we will obtain all employment records.

**THE DEMAND PACKAGE**

Once we have completed our liability and damage investigation and the client has been released from treatment by their healthcare providers, we will submit a demand package to the at-fault party's insurance company. The demand package consists of a letter from the attorney setting out our position on liability and damages. Generally, we also attach the following documents to the demand: (1) incident or EMS reports; (2) liability expert reports; (3) medical records; and (3) damage expert reports. Click the link if you would like to see a sample demand letter.

**NEGOTIATION**

The insurance company is usually given 30 days to review the information in the demand

package. Once the demand package is reviewed, the insurance adjuster will make an offer in response to the demand. The attorney will consult with the client to discuss the strengths and weaknesses of the case and the best way to proceed. The final decision of whether to settle the case is ALWAYS the client's decision. The attorney will make recommendations based on his/her experience but the decision is the client's.

If an offer is fair, there are numerous advantages to settling a case without going to trial. Below is a list of settlement advantages.

### **ADVANTAGES OF SETTLEMENT BEFORE FILING A LAWSUIT**

If a case is able to be resolved before filing a lawsuit there are a number of advantages to the client, which include:

- ❖ Attorneys' fees and costs are lower
- ❖ Money is obtained immediately
- ❖ In Northwest Indiana it could take up to 5 years to get a trial date
- ❖ The client can avoid the stress of a prolonged lawsuit
- ❖ The client is in charge of the settlement not six strangers in a jury box
- ❖ Life goes on as planned
- ❖ The outcome is guaranteed

### **THE LAWSUIT**

If the parties are unable to settle the case, and the insurance company's highest offer is rejected by the client, the next step is to file a lawsuit. A lawsuit begins with the filing of the complaint. The lawyer will serve the complaint on the defendant(s) (the people legally at fault for the accident and injuries). In Indiana, more than one person can be held legally responsible, such as the owner and occupier of the property.

Once the lawsuit is filed and the defendant(s) are served with the summons and complaint; the insurance company will hire an attorney to represent the defendant(s). The defendant(s) will answer the complaint the case is off to the races. Once a lawsuit is filed, much more is expected out of the client. In order to for the case to be successful, the client must be willing and able to actively participate in the litigation process.

**The following phases occur in a lawsuit between the answer and jury trial:**

#### **Case Management Conference:**

At the case management conference, the court will set deadlines for discovery, mediation and motions. Additionally, the court will set the case for trial.

**Discovery:**

This is period of time where the parties exchange information. Written discovery includes interrogatories, request for admissions and request for production of documents. Additionally, the parties will subpoena records from healthcare providers or any other persons who have information relevant to the proceedings.

Oral discovery consists primarily of depositions. Depositions are statements that are taken under oath before a court reporter. The parties can take the deposition of all persons who have knowledge regarding liability and damages.

**Mediation:**

This is a confidential settlement conference between the parties and a non-interested third party who tries to help negotiate a resolution to the case. All trial judges will refer the case to mediation. This is usually the last chance to settle a case before trial. Things that are discussed during mediation are confidential and cannot be used at trial.

If a settlement is reached at mediation, the insurance company will issue a check within a month, and then the lawsuit is dismissed.

**Trial:**

There are two types of trials. (1) A bench trial, in which the judge hears the entire case and rules on the law and the facts. (2) A jury trial in which six members of the community will decide the case. Depending on the complexity of the case, the trial can last from a few days to weeks. A premises liability trial can cost between \$ 15,000 and \$ 30,000 to present. There is no way to predict what a jury will decide. Attorneys and insurance companies use their past experience and information gleaned from other juries who decided similar issues to make an educated guess regarding the outcome of the case. This is another reason you need to retain an experienced trial attorney.

**Post-Trial:**

A verdict following a trial is not necessarily the end of the line. For many cases, it is the beginning of a whole new round of litigation. If a party believes the court committed error during the trial, they can file a motion for a new trial or an appeal. Appeals can take years to resolve. If the Appellate Court decides there was reversible error committed during the trial, it can remand the case back to the trial court for a new trial.

The length and expense associated with the litigation process and the fact that jury verdicts can be overturned on appeal are some of the reasons that parties will attempt to settle a case short of trial.

## 12. WHAT DOES A TRIAL LAWYER DO?

Below is a complete list of tasks that may be performed in order to work up a premises liability or other serious injury case. Every case is different and presents its own set of challenges so each case may not require every task.

These tasks include the following:

- ❖ Interview the client.
- ❖ Explain the claims process with the client.
- ❖ Gather liability and damage evidence to support the client's claims.
- ❖ Start the initial investigation of the client's claim, which may include: gathering physical evidence, speaking with witnesses, photographing the incident scene.
- ❖ Analyze the legal issues involved in the case to determine if there are other parties that may be responsible for the claim or if there are facts that might diminish my client's recovery.
- ❖ Gather and review the client's medical records (past and present) and possibly talk to the client's physicians to fully understand the client's condition.
- ❖ Request reports from experts to support the client's claim.
- ❖ Review the client's health insurance or governmental benefit plan to see whether it is entitled to be reimbursed for any payments made on behalf of the client.
- ❖ Review the validity of any liens asserted against the client's settlement recovery (various healthcare providers, insurers, governmental agencies may file liens seeking reimbursement for benefits already paid to or on behalf of the client).
- ❖ Contact the adverse party's insurance company to put them on notice of the claim so they can set appropriate loss reserves.
- ❖ Negotiate with the insurance adjuster in an effort to settle the claim. Discuss negotiations with the client to determine if a lawsuit will be filed.
- ❖ Prepare and draft the summons and complaint to file in court.
- ❖ Locate the defendant(s) so they can be served with the summons and complaint.
- ❖ Draft written discovery to the defendant(s) and respond to written discovery from the defendant(s). (Interrogatories, requests for production and requests for admissions).
- ❖ Prepare the client for their deposition.
- ❖ Prepare for and take the deposition of the defendant and other witnesses to the accident.
- ❖ Meet with client's treating physicians in preparation for their depositions.
- ❖ Prepare for and take the deposition of defendant's experts.
- ❖ Hire the necessary experts to prove client's claim. This may include a safety

expert, security expert, engineer, property manager and/or medical experts.

- ❖ File all necessary documents with the court identifying witnesses and exhibits.
- ❖ Prepare for and attend mediation.
- ❖ Research and write briefs and motions regarding evidentiary issues at trial.
- ❖ Attend trial.
- ❖ Draft or respond to any post-trial motions.
- ❖ Review trial record to determine appellate issues.
- ❖ Research and draft appellate briefs if necessary.
- ❖ Negotiate subrogation claims asserted by the client's insurance company, workers compensation carrier or governmental agency that provided benefits to the client.
- ❖ Negotiate any outstanding medical bills with client's doctors.

## **13. COMMON MISTAKES THAT PEOPLE MAKE WHICH NEGATIVELY IMPACT THEIR PREMISES LIABILITY CASE**

In this chapter I will explain the biggest mistakes that I have seen destroy any chance of a meaningful recovery for a number of patients and clients over the years.

### **In slip, trip and fall cases not knowing why you fell.**

A general principle under the law is that everybody has a responsibility to look out for their own safety, and this is couple with another principle, that a property owner is not an insurer of another person's safety. With an understanding of these two principles, a person injured in a slip, trip and fall has to be able to articulate the problem that caused the incident. Saying that I do not know what happened, will not support a claim.

### **Failing to seek immediate medical attention.**

Many people do not seek medical attention at the accident scene or go to the ER because it is too big of a hassle or they think the injury will go away. Delaying medical care can destroy an injured person's premises liability case for two reasons. First, the person may have a medical condition that progresses because he did not timely treat the condition. Second, the insurance company and a jury will question the person's credibility because "everyone knows that a seriously injured person doesn't wait to go to the doctor."

### **Recommendation:**

If the victim feels pain at the scene, he should be evaluated by EMS and follow the paramedic's recommendations. If the person does not want to be transported to the hospital by EMS, he should go to the hospital or urgent care center later that day. An injured person should not try to tough out the injury; it will destroy their case.

### **Providing too much information to the insurance company.**

The adjuster from the property owner's insurance company calls the injured person right after the accident and asks for a recorded statement.

Within a week of the accident that person may be taking pain medication or have not yet started to feel the full effects of the entire injury. The adjuster is calling to lock in the victim's version of the facts regarding the accident (liability), and to discover the extent of his injuries (damages). This recorded statement will be used against the

injured person at a later date.

**Recommendation:**

The injured person should not talk to the other insurance company right after the accident. Instead, when they call, get their name, number and claim number. This information should be given to the lawyer once hired.

**Waiting Too Long Before Hiring an Attorney.**

Evidence related to the accident needs to be preserved. Once evidence gets cold, vehicles destroyed, or witnesses disappear an injured person's case can be destroyed. Many people do not get the compensation they deserve because they did not hire an attorney before evidence was destroyed and witnesses lost. For instance, after a premises liability incident the area needs to be photographed and a letter needs to be sent to the property owner to preserve any video surveillance of the event. This information could be valuable in trying to prove your case.

**Recommendation:**

Consult with a lawyer immediately following an accident to protect your rights. If you do not feel that you are ready to retain an attorney, follow the recommendations in this book. If you decide to retain an attorney, he can begin investigating the accident to preserve evidence and interview witnesses. An experienced personal injury attorney can identify potential weaknesses and issues early on and attempt to shore up the facts supporting the injured person's claim.

**Hiding Prior Accidents And Injuries From Their Doctor or Lawyer.**

This is the problem that will destroy a client's case faster than any other problem. Pursuing a personal injury claim depends solely on the client's credibility. The insurance industry has an extensive database that maintains a client's prior accidents and claims. An insurance carrier only has to put the client's name and social security number into the ISO Claim Search and all insurance claims will come up. Hiding information from your doctor or lawyer will destroy your case. Failing to give completely accurate information to your doctor can a client's case as well. The fact that a client may have been in a prior accident or injured the same part of the body can be dealt with if it is reported.

**Recommendation:**

It is important for a client to be completely honest with their doctors and lawyers at all times. They must have accurate information about any prior accidents or injuries.

## **Social Networking Sites**

The internet is a great way to interact and connect with people. Recently, social networking sites such as Facebook, Google + and Tweeter have become very popular. These sites are used by many people to vent frustrations or have conversations with their friends. The problem is that this information is discoverable by the other side in a lawsuit.

Think about it, the other side will be able to see pictures, read posts and get an idea of the profile that the injured person sets out to the public. I have seen many posts that use terrible language, racial slurs and innuendo. Imagine that post blown up to three feet by four feet in front of a jury of retired people.

How can this impact the injured person, if there are posts about skiing, mounting climbing or other injuries, it could impact credibility. Further, the author has noticed that people put up an online façade or persona that is much different than they actually are.

### **Recommendation:**

Know that this information may become available by the other side. Look at your postings with a critical eye, and under no circumstance should the injured person discuss the facts of the claim or injuries sustained.

## **14. WHAT IS A PREMISES LIABILITY CASE WORTH?**

During the initial interview prospective clients frequently want to know what their case is worth. Many times they have an idea based on conversations with family, friends or watching TV. The value of a person's case is dependent upon a number of factors and the lawyer will not have all the facts at their disposal during the initial conference. A personal injury attorney has the knowledge and experience to evaluate the factors that go into determining case worth.

### **The following factors are utilized by insurance adjusters and/or jurors in determining the value of an injured person's case:**

- ❖ The credibility of the injured party.
- ❖ The credibility of the other party.
- ❖ Who was at fault for the incident?
- ❖ The percentage of fault attributed to each party. For instance, in a slip & fall case, the injured person has some culpability in the fall.
- ❖ The nature and extent of the claimant's injuries.
- ❖ What was the cost of medical care and how much of the care was paid by insurance.
- ❖ Is the claimant required to pay back the money that her insurance company paid for her medical care?
- ❖ The amount of the claimant's out of pocket expenses.
- ❖ The amount of future medical expenses if future medical care is required.
- ❖ Did the claimant lose income, and is she expected to lose income in the future.
- ❖ Did the claimant have any prior injuries or pre-existing medical conditions that were not caused or aggravated by the accident?
- ❖ Was the claimant married or have children and how did the injuries impact her relationship with family members.

These are some of the factors that go into determining the value of a claimant's case. In addition to the factors noted above, the insurance company may employ other strategies (i.e. surveillance) in an attempt to settle cases for less than full value.

If you have a serious injury claim, it is in your best interest to speak with an attorney initially so you do not make mistakes that can negatively impact your claim.

## 15. CONCLUSION

Premises liability, and especially, slip and fall cases have a lot of moving parts, and because all the parts have to be integrated there are many areas where an unsuspecting injury victim can be tripped up. I can't tell you how many times I became involved in a case after the person tried to handle the case on their own and learned that they made concessions to the insurance company that undercut their claim. Insurance companies and lawyers do not always speak the same language as the average person.

For instance, an insurance adjuster may ask you, how many steps did you take on the walkway before the fall or were you looking down before the fall or did you see the curb or did you see the pothole, and before thinking about the question in detail, you answer saying no. Well from that time forward, you are going to have live with your answer, even if it is not correct. Based on this type of answer, the insurance company for the property owner is going to deny your claim, and your only option will have to be to file a lawsuit. In the lawsuit, you will have to contradict that prior statement because you were probably watching where you were going but the statement will certainly impact your credibility with the jury.

Hopefully, by reading this book you have gained an understanding of the existing landscape involved in premises. My hope is that you receive fair and just compensation if you've been injured. If you have any questions, you can always send me an email to [guy@dpjustice.com](mailto:guy@dpjustice.com).

## GLOSSARY

**Causation:** Is a legal concept that requires the negligent act (the dangerous condition on the property) to be the proximate cause of the injured person's injuries. Many times this legal concept is a point of contention between the injured person and the insurance company.

**Comparative Fault:** The facts of the case suggest that the injured person's action(s) or inaction caused or contributed to the accident. Any recovery is reduced by the injured person's percentage of fault. If the injured person is found more than 50% at fault, she is entitled to nothing.

**Economic Damages:** Compensation that may be available to an injured person, which include healthcare expenses, lost wages, and any other monies that are paid or owed because of the injury.

**Liability:** The determination of fault. The facts of incident are very important in determining liability or fault.

**Medical Payments Coverage:** A benefit in some homeowner's and commercial general liability policies that pays for medical and/or funeral expenses up to a contracted amount without any determination of fault or negligence.

**Negligence:** Is the legal term for fault or liability. The law requires a person to follow a standard of care that it defines as a "reasonable prudent person" under the same or similar circumstances. In premises cases the reasonable person keeps their property free of dangerous conditions.

**Non-Economic Damages:** Compensation for the injured person's human losses including physical and mental pain and suffering, and the loss of the quality of enjoyment of one's life.

**Subrogation:** Is a term that is used when a third party has a interest in a case. For instance, when medical payments are made under a client's medical payments coverage, his/her insurance carrier has a right of repayment, if the client gets money from the negligent driver.

## ABOUT THE AUTHOR



**Education:**

National University of Health Sciences - BS (1984), DC (1986)

Valparaiso University School of Law - JD, summa cum laude (1999)

**Bar Admissions:** Florida (2000), Indiana (1999), Illinois (2000, inactive); US District Courts of Appeals (11th Circuit, 7th Circuit); United States District Courts: Southern and Middle Districts of Florida; Northern and Southern Districts of Indiana; Northern and Central Districts of Illinois; and District of Colorado.

As an attorney, I have worked on both sides of the table. My trial experience has allowed me insight into how insurance companies and corporations value injury cases.

The fact is that insurance companies look at a specific number of factors in determining the amount of money to place on a case. Real money value is placed upon the reputation of the attorney representing the client and whether that attorney actually takes these types of cases to trial.

My two backgrounds, one in health care and the other in law are to your advantage. I know the anatomy and physiology of the human body and have a "hands on" understanding of your injury.

I have successfully litigated injury cases from Indiana, to the Courtrooms of Florida and Illinois. I know that people who are injured have many worries and concerns. I am available by phone to allay your fears and answer your questions.