Texas Premises Liability Law:
Navigating Reasonableness and Foreseeability in Everyday Life

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As with most ubiquitous tort claims, the black letter elements fundamental to premises liability claims in Texas have changed little in the intervening years since we each embarked upon our first-year Torts class. Even the most derelict of first -year law students should be able to recite the four essential elements of a cause of action for premises liability brought by an invitee:

1. the condition on the premises posed an unreasonable risk of harm;
2. the defendant knew or reasonably should have known of the harm posed by the condition;
3. the defendant breached its duty of ordinary care by both
   a. failing to adequately warn the plaintiff of the condition, and
   b. failing to make the condition reasonably safe; and
4. the defendant's breach proximately caused the plaintiff's injury.[1]

As we law students quickly discovered during that first class, the study of torts constitutes more than memorizing the seemingly endless elements of any given tort claim. Rather, the study of torts forces one to grasp the malleable concept of what a "reasonable" person should do when faced with life's multitude of "foreseeable" circumstances. Only by navigating this sea of reasonableness and foreseeability may one understand the intricate play within these elements and the public's shared common experience of life.

Take premises liability claims for instance: for all their purported simplicity, these four elements must be applied to a smorgasbord of assorted premises conditions, from the indoor shopping mall, to the stairwell, to the parking lot or garage, and to the outdoor boat dock. It bends all credulity to assume that these four elements apply consistently across this spectrum of premises conditions. They don't. Applying these four elements to the phrase "premises conditions" itself dictates considerable flexibility in our legal approach to grasp (and possibly categorize) the potential "defects" (or "conditions") in any given "premises."

[1] *See Keetch v. Kroger*, 845 S.W.2d 262 (Tex. 1992) and its progeny.

The practice of premises liability law is complicated by the inflexibility of our clients relative to the malleable legal world. Clients see the world in black and white. I have yet to meet a premises liability plaintiff who lacked an honest belief that she had fallen prey to a dangerous condition that needed to be immediately remedied. Seemingly each plaintiff legitimately believes that she acted in accord with all necessary care and awareness. Premises owners are equally inflexible. It is a rare property owner willing to consider the possibility that a given condition might constitute an unreasonable hazard. And even if a condition might comprise a hazard, the property owner is loathe to believe that the injured party could not have avoided the condition had she acted appropriately. In short, this black and white nature of the real world conflicts violently with the grey nature of tort practice, causing conflicts between clients who see lawyers as acquiescent and lawyers who see clients as unyielding.

With this dichotomy in mind, we embark upon this brief overview of Texas premises liability law. Within these pages, we seek to understand each of the four elements and their interplay with our everyday notions of reasonableness and foreseeability. We will discuss the role of "common human experience" in making everyday legal decisions. In the end, we hope that you will have a fuller appreciation for the premises liability law in Texas.

I. When does a condition pose an unreasonable risk of harm?

When does a condition present an "unreasonable risk of harm?" A condition presents an unreasonable risk of harm if "there is a sufficient probability of a harmful event occurring that a *reasonably prudent person* would have foreseen it or some similar event as likely to happen."[2] Restated, "if an ordinarily prudent [person] could *foresee* that harm was the likely result of a given condition,

[2] *Seideneck v. Cal Bayreuther Assocs.,* 451 S.W.2d 752, 754 (Tex.1970).

then it is a danger."[3] Plagued by vagueness, nothing within either of these two pronouncements offers a definitive, objective test of when a given condition will present an unreasonable risk of harm.[4] Therefore, to understand when a condition poses an unreasonable risk necessarily requires that we dive headlong into the terrain of legalese known as "reasonableness" and "foreseeability."

A. Defining the reasonableness of a purported risk is a fact intensive inquiry, well-suited for jury determination.

To determine whether a condition involves an unreasonable risk, Texas courts typically focus on the factual evidence supporting the plaintiff's allegation that the condition is, in fact, unreasonably dangerous. Consider *Reliable Consultants, Inc. v. Jaquez* out of the Austin Court of Appeals.[5] After entering an adult video store, Jaquez proceeded through the main area and entered a raised room via a small ramp. When leaving the raised room, Jaquez failed to notice the five inch riser immediately adjacent to the ramp. Unaware of the five-inch drop, she fell, breaking her ankle. At trial, Jaquez's expert testified that the lack of eye level cues to warn of the impending five-inch drop presented an unreasonable hazard in that this lack unreasonably required that customers approaching the drop from the store's upper level look directly at the floor to observe the approaching drop. This expert's opinion was bolstered by the video store manager's admission that he had seen 12-15 people stumble or react with surprise at the sudden five-inch drop.

On appeal from the jury verdict in favor of Jaquez, the video store argued that the five -nch drop was not unreasonable as a matter of law. In support of this position, the store cited several cases decided in other courts with similar facts, presumably showing that a five-inch drop did not constitute a hazard as a matter of law. The Austin court disagreed, noting that questions involving

[3] *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 537 (Tex. 1975).
[4] *Seideneck,* 451 S.W.2d at 754.
[5] 25 S.W3d 336 (Tex. App.--Austin 2000, pet. denied).

the risk of harm are fact intensive and well-suited for a jury determination.[6] In other words, while premises liability cases involving similar facts may sometimes be probative of whether certain conditions present an unreasonable risk of harm, they are rarely conclusive.[7] As a result, an inquiry into whether a specific condition constitutes an unreasonable hazard will be determined by a jury.

B. A condition presents a sufficient likelihood of harm when our shared "common experience" indicates that a person should be put on notice that she might be injured as a result of the condition.

But while *Jaquez* is instructive regarding the fact intensive nature of proving a given condition an unreasonable risk, it fails to shed much light on what constitutes a "sufficient likelihood of a harmful event." Certainly, the court looked favorably upon the store manager's admission that he witnessed 12-15 other persons stumble on the same step. Yet none of these persons either fell or were injured. If nothing within the manager's experience put him on notice of a possible injury, upon what basis did the Austin Court determine the existence of a sufficient risk of harm?

The answer is simple: our shared "common experience."[8] Rather than detailed forethought into the potential incident and all the possible injuries that might result, Texas law merely requires that an individual *appreciate the general danger imposed by a given condition*, *e.g.,* the simple possibility that someone might fall and be injured, not that someone might fall and break her ankle in the same manner as Jaquez.[9] *Hall v. Sonic Drive-In of Angleton, Inc.* is illustrative.[10] Hall, a Sonic shift supervisor, severely injured her hand when she picked up a metal freezer door lying on the floor in the middle of a walkway. Earlier, the freezer door had been removed by Sonic's manager while he repaired the freezer and placed the door onto a table top. Later, a second Sonic employee removed the freezer

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[6] *Id* at 342.
[7] *Id.*
[8] *Hall v. Sonic Drive In of Angleton, Inc.*, 177 S.W.3d 636, 648 (Tex. App.--Houston [1st Dist.] 2005, pet. denied) *citing Nixon v. Mr. Prop. Mgmt. Co.,* 690 S.W.2d 546, 551 (Tex. 1985).
[9] *Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002).
[10] *Hall v. Sonic Drive In of Angleton, Inc.*, 177 S.W.3d 636 (Tex. App.--Houston[1st Dist.] 2005, pet. denied).

door from the table top and leaned it against a leg of the table. The freezer door subsequently fell into the walkway, whereupon Hall picked it up by its "razor sharp" edge, slicing her hand below her thumb, causing her to lose the use of her hand.

The trial court granted Sonic's summary judgment, holding that Hall's injuries were not the foreseeable result of someone placing the cover next to a table leg. The trial court relied upon summary judgment evidence showing that no Sonic employee (including the two handling the door immediately before Hall) had cut their hands on the freezer door. Accordingly, nothing within Sonic's practical experience created any awareness that the freezer door could actually cause a severe laceration.[11]

In overruling the trial court, the Texas Supreme Court held that the lower court unnecessarily focused upon those facts specific to Sonic's handling of the freezer cover rather than a general inquiry of what might happen when an individual unknowingly picks up a dangerous object off the floor. The correct inquiry is broader and less focused upon the defendant's actual experience with the dangerous condition. According to the high Court, it could reasonably be inferred, from our "collective experience," that a very thin metal cover, capable of slicing a hand, could slide from its position leaning upon a table leg and (given Sonic's policy requiring employees to pick up objects off the floor when not in use) that an employee might pick it up.[12] Restated, in light of our "shared common experience," an employee might unwittingly pick up an object off the floor and that the object might cause injury.[13] That no one within Sonic had actually suffered an injury by handling the cover is irrelevant, just as was the fact that no one had been injured in the video store in *Jaquez*.

[11] Note that this is essentially the argument in *Jaquez*, where the defendant argued that nothing within the video store manager's actual experience with the step put him on notice of a potential injury.
[12] *Id* at 647.
[13] *Id.*

C. What constitutes a "condition"?

Interestingly, Texas courts have readily focused upon whether a condition constitutes an unreasonable risk of harm, without defining the term "condition." While acknowledging its obvious circularity, a condition is best described as a set of circumstances at a given point in time that might constitute an unreasonable risk.[14] When will a set of circumstances constitute a "condition"? The answer necessarily depends upon the interests of the party making the argument. Consider the plaintiff who has slipped and fallen upon a piece of ice at a self-service drink station in a grocery store. Is the "condition" the ice upon the floor, or is it the fact that the grocery store installed a self-service drink station despite the inherent risk posed with ice falling to the floor? In the first circumstance, the plaintiff presumably must show that the grocery store owner knew or should have known about the ice on the floor before she can recover. In the second, the plaintiff presumably need only show that the owner knew or should have known that self-service drink stations are inherently dangerous; the knowledge of the specific condition (the ice on the floor) would therefore be imputed to the store owner.[15] Faced with these arguments, the Texas Supreme Court rejected the larger, more inclusive definition of "condition," declaring that the "unreasonably dangerous condition is a condition existing at the time and place the injury occurs, not some antecedent situation that produces the condition."[16] In short, a plaintiff falling on ice at a self-service drink station must show that the store owner knew or should have known of the ice on the floor.

But consider a plaintiff who has slipped and fallen upon water splashed upon an indoor pool deck, creating a slippery condition. Is the "condition" the water upon the pool deck or the fact that the owner painted it several times with a non-abrasive paint causing the deck to get slippery when

[14] *Brookshire Groc. Co. v. Taylor*, 222 S.W.3d 406, 407 (Tex. 2006).
[15] *Id.*
[16] *Id at* 408-409.

wet? In the first circumstance, the plaintiff presumably must show that the pool owner knew or should have known about the water on the pool deck before she can recover. In the second, the plaintiff presumably need only show that the owner knew or should have known that the negligently painted pool deck gets slippery when wet and that it is foreseeable that a pool deck might become wet. Again in the second circumstance, the knowledge of the specific condition (the water on the pool deck) would be imputed to the pool owner. Faced with this second circumstance, the Austin Court of Appeals held that a swimming pool owner and operator had a duty to ensure that the area around a pool has a surface that is not unreasonably slippery when wet.[17]

Once again, we are cast adrift in the sea of legalese known as "reasonableness" and "foreseeability." Certainly, one might argue that the Austin court incorrectly decided the latter case since in neither case did the property owner know of the specific condition existing at the time of the incident. But it does not stretch credulity to believe that the relatively insignificant costs involved with ensuring a non-slip pool deck strongly outweigh the potential of injury and death involved with an unfortunate, but foreseeable, incident on a pool deck. As a result, the second ruling makes sense, despite being logically inconsistent with the first.[18]

What does this mean? We are left with our original, albeit circular, definition of condition -- a set of circumstances at a given point in time that might constitute an unreasonable risk. To the extent a plaintiff might want to impute knowledge of a given hazard, that plaintiff will necessarily seek to broaden the concept while a corresponding defendant will want to narrow it. Given the Texas Supreme Court's pronouncement that an unreasonably dangerous condition is the specific condition existing at the time and place the injury occurs and not the larger antecedent situation

[17] *Towers of Townlake Condominium Association v. Rouhani*, 296 S.W.3d 290 (Tex. App.--Austin 2009, pet. denied).
[18] But consider the self-service drink store owner who does not place the appropriate skid proof mats around the drink station. In that circumstance, the self-service owner is arguably as negligent as the pool owner who inappropriately painted the pool deck. In that instance, under *Rouhani*, knowledge of the ice upon the floor would likely be imputed to the self-service drink store owner.

producing the condition, Texas courts will presumably err toward the more restrictive notion of a "condition." But a property owner must still act reasonably under the circumstances and take necessary preventative measures to guard against known hazards resulting from the condition.

In summary, what do we know? We know that the plaintiff's burden of proving that a condition presents an unreasonable risk is light. Once that particular condition is defined, the court will focus on the particular risk posed by the condition, and whether, in the light of common experience, that condition might cause harm. If, for instance, the facts support a possible finding that a condition on a sidewalk makes it more likely than not that someone will eventually fall and, in our common experience, that fall might result in an injury, then a jury is free to decide that condition presents an unreasonable risk of harm.

D. How do outdoor conditions differ from indoor conditions?

As one might expect, the terrain of reasonableness and foreseeability changes when considering outdoor premises conditions. While not explicitly stated, Texas generally recognizes a reduced expectation of safety when one encounters outdoor, naturally occurring conditions. For instance, Texas courts have ruled that a litany of naturally occurring outdoor conditions do not constitute an unreasonable risk as a matter of law, including dirt,[19] mud,[20] rain,[21] freezing rain,[22] and ice.[23] Consider *Brownsville Navigation Dist. v. Izaguirre*.[24] There, the Navigation District leased unimproved land upon which the tenant built and operated a warehouse. The tenant backed a trailer to the warehouse dock for loading. The trailer, which the tenant had disconnected from the truck, rested on its extendable supports, with a board placed under the front supports to keep them

[19] *Brownsville Navigation Dist. v. Izaguirre,* 829 S.W.2d 159, 160 (Tex. 1992); *Johnson Cty. Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 286 (Tex. 1996).
[20] *M.O. Dental Lab v. Rape,* 139 S.W.3d 671, 675-76 (Tex. 2004)(per curium).
[21] *Camp v. J.H. Kirkpatrick Co.,* 250 S.W.2d 413 (Tex. Civ. App.-San Antonio 1952, writ ref'd n.r.e.)
[22] *Wal-Mart Stores, Inc. v. Surratt,* 102 S.W.3d 437 (Tex. App.-Eastland 2003, no pet)
[23] *Scott & White Memorial Hosp. v. Fair*, 310 S.W.3d 411 (2010).
[24] 829 S.W.2d 159, 160 (Tex. 1992).

from sinking into the soft and muddy ground. While the trailer was being loaded, the board broke, causing the trailer to fall to one side. The interior cargo shifted, crushing and killing Izaguirre, an employee of the tenant working inside the trailer. At trial, the jury found for the plaintiff, holding the Navigation District partially responsible for failing to warn of the dangerous condition of mud. The Supreme Court reversed the judgment, holding that ground which becomes soft and muddy when wet, like any ordinary dirt, is not an unreasonably dangerous condition as a matter of law.[25]

Since 1992, Texas Courts have expanded the naturally occurring accumulations that are not considered unreasonably dangerous conditions. *Scott & White Memorial Hosp. v. Fair* is illustrative of this broadening shift. There, the Court considered the allegations of Gary Fair, who on the morning after a winter storm, drove his wife to her doctor's appointment at Scott & White Hospital.[26] After the appointment, Fair went to retrieve his car and slipped on the icy road separating the hospital from the parking lot. The trial court granted the hospital summary judgment in the ensuing action, holding that naturally accumulated ice is not an unreasonably dangerous condition.

On appeal, the Fairs argued that ice should be treated differently from other natural substances like dirt and mud because, unlike mud, icy conditions occur rarely in Texas. The Texas Supreme Court disagreed, noting that both ice and mud pose the same risk of harm and both result from conditions beyond a premises owner's control. In addition to this control issue, the Court further reasoned that, unlike typical cases where the landowner might be expected to have superior knowledge regarding the hazards on a given premises, this expectation would not apply with icy conditions; both landowners and invitees "are at least as aware as landowners of the existence of [ice] that has accumulated naturally outdoors and will often be in a better position to take immediate

[25] *Id* at 161.
[26] *Id* at 412.

precautions against injury."[27] As a result, given the inability to control the conditions and the equality of knowledge, the Court held that to require premises owners to guard against these wintry conditions would inflict a heavy burden, given the limited resources landowners likely have on hand to combat occasional ice accumulations.[28]

By comparison, however, outdoor property owners are still responsible for those conditions not totally the result of natural causes or accumulations. Consider *Furr's, Inc. v. Logan*. Logan broke her ankle when she slipped and fell on a patch of ice in a store parking lot, a condition created by leaking water from a dispensing machine and freezing temperatures. Despite knowing of the condition, Logan attempted to traverse the ice to use the leaking water dispenser. At trial, the jury held Furr's 60% responsible. On appeal, Furr's argued that the ice was a natural result of the freezing temperatures and under *Izaguirre* and its progeny could not be held to be an unreasonably dangerous condition. The El Paso court disagreed, holding that nothing within *Izaguirre* mandated that ice or water on a parking lot or sidewalk not be an unreasonably dangerous condition. While the El Paso court's opinion in *Furr's* predates the Supreme Court's opinion in *Fair*, the opinions are arguably consistent -- the condition in *Fair* resulted completely from natural accumulations brought by a winter storm whereas the condition in *Furr's* would not have occurred had there not been a leaking water dispenser.[29]

Interestingly, the exception for natural accumulations does not include natural accumulations of algae. In *Strunk v. Belt Line Road Realty*, Strunk slipped and fell in a large puddle of water

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[27] *Id.* at 414, citing *M.O. Dental,* 139 S.W.3d at 676; *see also State Dep't of Highways & Pub. Transp. v. Kitchen,* 867 S.W.2d 784, 786 (Tex.1993).
[28] *Id;* 414, citing *Surratt,* 102 S.W.3d at 443.
[29] Note, importantly, that both plaintiffs preceded despite the fact that the icy conditions were admittedly "open and obvious" and each had information with respect to the ice that was equal to or greater than the property owner. Despite these facts, the mere fact that the Furrs maintained the control over the leaking water dispenser was enough to uphold the jury's finding against it.

containing algae.[30] At trial, the plaintiff's expert opined that the defendant knew or should have known of the pooling water and the resulting algae. The expert testified that a characteristic of algae was a lower coefficient of friction which made slip and fall accidents more likely, and that the parking lot was misdesigned and misconstructed by allowing water to pool in a manner promoting algae growth. The El Paso court held that Strunk had provided enough evidence to support the jury's verdict. Again, the algae condition naturally resulted from the pooling of water in an "unnatural" parking lot. Hence, the El Paso Court held that the invitee held a reasonable expectation that a parking lot would remain algae free.

In short, Texas courts imply a reduced expectation of safety when outdoors. This reduced expectation arises primarily from our "common experience" that the outdoor property owner remains unable to control the outdoor conditions, either against natural conditions like dirt, mud, water, and ice or unnatural conditions. As a result, the plaintiff injured as a result of an outdoor condition has a heavier burden in proving that a given condition presents an unreasonable risk of harm.

II. Actual or Constructive Knowledge

To recover under a premises liability theory, not only must a specific condition constitute an unreasonable risk of harm, but also the property owner/occupier must have sufficient opportunity to remedy the condition.[31] Consequently, a plaintiff will bear the burden to show that the owner either knew or should have known of the hazardous condition.[32]

[30] *Strunk v. Belt Line Road Realty,* 225 S.W.3d 91, 100 (Tex. App.--El Paso, 2005, no pet.).
[31] *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006) (A licensee must prove this knowledge showing that the defendant held actual firsthand knowledge of the harm. An invitee, on the other hand, need only show that the defendant should have known of the harm under the circumstances.).
[32] *Id.*

A. Proving Actual Knowledge.

No definitive test exists to establish actual knowledge, but the concept is relatively simple.[33] That is, what evidence exists that the defendant knew of the condition and its potential for harm? Often that evidence consists of reports of previous accidents or injuries. Maybe the defendant has written reports warning of a potential danger posed by the condition.[34] Also, recalling *Jaquez* discussed above, testimonial admissions by the defendant showing other persons have fallen prey to the condition suffice to prove actual knowledge.[35] In short, any admissible evidence demonstrating previous problems or concerns posed by a given condition will establish actual knowledge.

Failing evidence of previous problems or concerns, Texas courts will usually find that the defendant lacked actual knowledge of the defective condition's potential harm unless the plaintiff can show that the defendant was aware of the particular condition and also aware that the condition posed an unreasonable risk of harm. Usually, this involves showing harmful incidents involving other conditions similar to the one at issue.

Christus Health Southwest v. Wilson demonstrates how a plaintiff might use harmful incidents involving other conditions to prove actual knowledge.[36] While exiting the stairwell on the second floor of a new parking garage, Wilson fell after failing to notice an unpainted landing step.[37] At trial, the hospital admitted that the initial construction contract required this step, and all similar steps, to be painted.[38] They were not painted, and despite knowing the steps were not painted, the hospital

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[33] *Texas-Pan American v. Aguilar*, 251 S.W.3d 511, 513 (Tex. 2008).
[34] *Id.*
[35] *Brockman v. J. Weingarten*, 115 S.W.2d 753 (Tex. Civ. App.--Galveston 1938, aff'd *J. Weingarten Inc v. Brockman*, 134 Tex. 451, 135 S.W2d 698 (1940)(involved π stepping off damaged curb.)
[36] 305 S.W.3d 392 (Tex. App.--Eastland 2010, no pet. h.).
[37] *Id* at 395.
[38] *Id.*

opened the garage to the public.[39] At trial, the plaintiff offered expert testimony that the unpainted step represented a hazardous condition because it did not provide sufficient notice of the elevation change.[40] Wilson also presented additional evidence that others had fallen as a result of similar conditions in the garage.[41] The Beaumont jury found for the plaintiff and awarded $795,000 in damages.[42]

On appeal, the hospital argued that despite knowing that the step was not painted, it could not be held to have known of the potential harm because no prior incidents had occurred at the specific location. The Eastland Court of Appeals disagreed. To the contrary, the hospital's knowledge of other similar incidents throughout the garage indicated that it had actual knowledge of the potentially dangerous condition posed by the second floor landing step.[43] In short, the hospital admitted that it knew the landing step remained unpainted and, through the other similar incidents in the garage, knew the unpainted step constituted an unreasonable hazard.

While the Eastland Court held that evidence of additional similar incidents was sufficient, one must take care to note the unusual circumstances involved, *i.e.* the step was supposed to have been painted, the defendant knew it was not painted, and the defendant was aware of other incidents in the specific garage as a result of the same condition.[44] Had the evidence of other incidents occurred on another property, the result likely would have been different. *Bowman v. Brookshire Grocery Co.*[45] elucidates. There, Bowman tripped over a floor mat while exiting the grocery store. In

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[39] *Id* at 396.
[40] *Id.*
[41] *Id.*
[42] *Id* at 395.
[43] *Id* at 397.
[44] See also *Crosby v. Minyard Food Stores*, 122 S.W.3d 899 (Tex. App --Tyler, no pet.) (Crosby presented evidence that Minyard was aware of the fact that the mat at the entry to the store was often buckled and caused customers to fall. Because Crosby presented evidence that the mat itself was a problem creating a frequent risk of injury, it was not necessary for her to show that Minyard was aware or should have been aware of the specific bump in the mat that caused her to fall.).
[45] 317 S.W.3d 500, (Tex. App.--Tyler 2010).

response to the grocery store's motion for summary judgment, Bowman introduced evidence that the company reported 118 injury incident reports involving floor mats over the preceding four-year period.[46] Bowman argued these reports evidenced Brookshire's actual knowledge of the risks inherent in the use of floor mats, regardless of the lack of any reported incidents involving the store at issue.[47] The Tyler Court of Appeals rejected this argument, declaring evidence of 118 incidents in other stores irrelevant and insufficient to establish actual knowledge of the specific condition in the particular store.[48]

In brief, while no definitive test exists to establish a defendant's actual knowledge of a defective condition, sufficient evidence often exists to prove the defendant knew of the condition. This evidence usually includes written reports or previous accidents, or reports warning others within the company of the potential for injury. A second method of showing actual knowledge is direct testimony admissions of the defendant that other persons have fallen prey to the condition or that the defendant knew of the condition and was attempting to resolve it.

But failing this obvious evidence, proving actual knowledge becomes significantly more difficult. This usually requires a plaintiff to develop evidence that the defendant was aware of a particular condition throughout a premises, like a parking garage, and knew that others had fallen prey to similar conditions on that particular premises. Again, this tactic is limited, as courts have not generally allowed discovery of similar conditions on other properties owned by the defendant property owner.

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[46] *Bowman*, 317 S.W.3d at 504.
[47] *Id.*
[48] *Id;* Not only is this case important for the stated holding, it may be equally important with respect to discovery. If a plaintiff may impute the company's knowledge of incidents to each individual property, then one would presume that the entire spectrum of incident reports is within the scope of discovery.

B. Constructive Knowledge.

Property Owners have a duty to inspect the premises.

Suppose, as with most premises cases, the property owner has no "actual" knowledge of a hazardous condition. Texas law requires property owners to reasonably inspect and remedy dangerous conditions. As a result, Texas courts will presume that an owner should have known of and repaired those conditions that it had sufficient time and opportunity to discover.[49] Under this "time-notice" rule, a plaintiff must demonstrate that the condition *more likely than not* existed for a long time -- long enough for the owner to have had opportunity to discover and remedy it. Only then will the property owner be deemed to have constructive knowledge of that condition.[50]

Plaintiffs bear the burden to prove that the property owner had sufficient time and opportunity to discover the condition.

Obviously, the time-notice rule necessitates that a plaintiff adduce evidence of the length of time the hazard existed. Only then can she argue that a reasonable property owner had an opportunity to discover and remedy the condition.[51] As one might expect, most cases discussing the "time-notice" rule involve slip-and-fall accidents arising from temporary conditions, like spills, rain, sludge, oil, ice, and others. With respect to these temporary conditions, the time-notice rule can be harsh as it presumes the plaintiff knows or can discover when the spill occurred -- any plaintiff that was aware of the spill and knew how long the condition had existed presumably could avoid the accident. Consequently, a plaintiff is often without witnesses to the spill, forcing the development of circumstantial evidence on how long a given condition may have existed.

Wal-Mart v. Gonzalez spotlights the difficulties inherent in using circumstantial evidence to meet the time-notice rule. While walking down a busy aisle from the cafeteria, Gonzalez slipped and

[49] *Corbin v. Safeway Stores,* 648 S.W.2d 292, 297 (Tex. 1983); *Wal-Mart v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998).
[50] *Wal-Mart v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998).
[51] *Wal-mart v. Reece*, 81 S.W.3d 812, 816 (Tex. 2002); *see also Wal-mart v. Spates*, 186 S.W.3d 566 (Tex. 2006).

fell after stepping on cooked macaroni salad originating from the Wal–Mart cafeteria.[52] Because no one had seen the actual spill, the only evidence offered concerned the nature of the salad after the fall, *i.e.* that the macaroni was "fresh," "wet," "still humid," and contaminated with "a lot of dirt."[53] Gonzalez's daughter testified that the macaroni had footprints and cart track marks in it and "seemed like it had been there a while."[54] Plaintiff contended that footprints and cart tracks indicated that the macaroni salad had been there long enough for Wal-Mart to have discovered and remedied the condition. The Texas Supreme Court disagreed, noting that the presence of footprints or cart tracks in the macaroni salad supported neither the inference that the tracks were of recent origin nor the inference that the tracks had been there a long time."[55] Consequently, Gonzalez failed to show that the condition was *more likely than not* to have existed for a long time.[56]

Texas case law is silent upon the nature and frequency of the required inspections. As a result, a reasonable inspection will vary under the circumstances.

As stated, the time-notice rule arises from the property owner's duty to periodically inspect a property.[57] Texas courts have spoken little to the nature and frequency of inspections; moreover, what constitutes a reasonable inspection varies under the circumstances. For example, a grocery store where customers are invited to inspect, remove, and replace goods from the shelves likely requires the proprietor to take greater precautions and undertake more frequent inspections than might be necessary in another venue.[58] Even within a specific store, one should likely inspect a produce area more often than the canned goods or bread aisles.

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[52] *Gonzalez*, 968 S.W2d at 936.
[53] *Id.*
[54] *Id.*
[55] *Id* at 937.
[56] *Id* at 938.
[57] *General Electric Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008), *citing Shell Oil Co. v. Khan,* 138 S.W.3d 288, 295 (Tex. 2004).
[58] *Corwin v. Safeway Stores*, 648 S.W.2d 292, 297 (Tex. 1983).

As expressed, Texas law is sparse with respect to what constitutes a reasonable inspection. In general, courts have generally held that 30 minutes or less is legally insufficient to prove constructive knowledge of a spill.[59] Thus, at least theoretically, a business proprietor should inspect for these conditions every 30 minutes. But certainly there is no requirement that a proprietor undertake inspections every half hour. Moreover, while an employee's close proximity to a given condition will not relieve the plaintiff of the burden of proving that the employer had constructive knowledge of a given condition, proximity would certainly be a factor in determining what a reasonable inspection might be under the circumstances.[60] In other words, if one has employees in the area, those employees should be on constant alert for spills in their area.

While an outdoor property owner retains a duty to inspect and remedy outdoor conditions, the duty is less severe, consistent with a lower expectation of safety with outdoor conditions.

As discussed above, Texas law implicitly recognizes a reduced expectation of safety when outside the confines of strictly climate-controlled environments, such as shopping malls. Outdoor conditions are often beyond the property owner's control, and as a result, an outdoor property owner is held to a correspondingly lesser duty to inspect and remedy temporary outdoor conditions than the indoor property owner. Examine *Joachimi v. City of Houston.*[61] Plaintiff sued after she slipped on an oil spot between cars after a concert; the oil spot had not been there when she exited her vehicle and left for the concert.[62] At trial, the City introduced evidence that it cleaned the parking lot daily.[63] Plaintiff argued that daily inspections were not sufficient to prevent this type of accident.[64] The Houston First Court of Appeals disagreed, holding that the City had no duty to

[59] *Brookshire Food Stores, L.L.C. v. Allen*, 93 S.W.3d 897, 991 (Tex. App.--Texarkana 2002, pet. denied).
[60] *Reece*, 81 S.W.3d at 817.
[61] *Joachimi v. City of Houston*, 712 S.W.2d 861, 864 (Tex. App.--Houston[1st Dist.], no writ. 1986).
[62] *Id* at 862
[63] *Id.*
[64] *Id* at 864.

employ unspecified numbers of attendants to inspect the property under these circumstances.[65]

In a nutshell, plaintiffs seeking to recover for injuries in a parking garage must still prove the condition at issue had existed for a period of time long enough to give the proprietor notice and opportunity to repair. Yet, the nature and frequency of these inspections is less severe. Moreover, many conditions in a given parking lot are outside the property owner's control; thus, it seems likely that conditions like oil spills, drink spills, food wrappers, garbage and so on, do not require immediate notification and cleaning, so long as the property owner has a reasonable lot-cleaning program.

Significantly, however, outdoor property owners are often subject to liability for more "permanent" conditions, like unseen potholes, improperly constructed ramps and curbs, sidewalks in disrepair, and poor lighting. These conditions are regularly visible on a walkthrough of a given property. Further, when these conditions exist, the time-notice rule is not as demanding; whereas a given spill might go unknown, a cracked sidewalk that creates a tripping hazard is likely to have been traversed daily by the general public. In short, when faced with these more "permanent" hazards, the plaintiff's ability to prove that a reasonable defendant had opportunity to observe and repair the hazard is easier than proving that a corresponding defendant had knowledge of a spill within a shopping center.

III. Reasonable care in reducing the risk

Once a condition is known to create an unreasonable risk of harm, the owner must take reasonable care to reduce or eliminate the risk either by adequately warning the public of the condition or by making the condition reasonably safe.[66] The owner must take whatever action is

[65] *Id* at 865.
[66] *TXI Opers. L.P. v. Perry*, 278 S.W.3d 763, 764-5 (Tex. 2009).

reasonably prudent under the circumstances to reduce or eliminate the unreasonable risk.[67] Moreover, because this duty encompasses two alternative methods of compliance--warning of the danger or eliminating the dangerous condition--a plaintiff must show that the owner did neither.[68]

A. Warning of potential hazard.

TXI Opers. L.P v. Perry exemplifies the issues related to whether a defendant tendered an adequate warning. *Perry* involved an invitee truck driver who claimed a back injury after driving over a pothole he had driven over before. Perry sued the landowner for its failure to adequately warn of the danger associated with the pothole. After a jury found Perry and the property owner equally at fault, the premises owner appealed, arguing that its 15-miles-per-hour speed limit sign posted near the pothole was an adequate warning as a matter of law. The Supreme Court disagreed, reasoning that while the posted speed limit was *some* evidence that the premises owner was not negligent, it was not conclusive.[69] The Court noted that Perry heeded the posted speed limit at the time of his injury, thus supporting Perry's contention that the sign was inadequate. Further, the Court noted, the speed limit sign neither informed Perry of the existence of road hazards generally, nor identified a specific hazard to avoid.[70]

But also think about *Bill's Dollar Store, Inc. v. Bean*.[71] While Bean checked out of the Dollar Store, a child spilled cola between the store exit and the check-out counter, only three feet from where Bean stood. A store assistant manager immediately began cleaning the spill with a wet mop and instructed the cashier to inform customers of the spill while she retrieved a dry mop.[72] The

[67] *Id.*
[68] *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996).
[69] *TXI Opers. L.P.* at 765.
[70] *Id.*
[71] 77 S.W.3d 367 (Tex. App.--Houston[14th Dist.] 2002, pet denied).
[72] *Id* at 368-9.

cashier warned Bean of the wet floor and advised her to be careful.[73] Despite the warning, Bean fell while walking over wet floor.[74] At trial, the jury found the Dollar Store negligent, awarding Bean both actual and exemplary damages.[75]

On appeal, the store argued that the manager and the cashier met their duty to warn when the cashier warned Bean of the spill.[76] Conversely, Bean argued that the cashier's warning was inadequate because it failed to both identify the danger and to describe how to avoid it.[77] The Houston Court rejected Bean's argument, finding no authority requiring a store owner to explain how to avoid a condition of which she has been directly warned.[78]

What differentiates *Perry* and *Bean?* In *Perry*, the Houston Court found the speed limit sign an inadequate warning because it failed to identify any general or specific hazard, while in *Bean* the Houston Court held that the cashier's specific identification of the hazard constituted a sufficient warning. In the first instance, the court determined that the speed limit posting did not constitute a warning at all; rather, it arguably misrepresented the potential hazard because it invited the presumption that compliance with the speed limit would prevent injury. In the second instance, the cashier both identified and warned of the specific hazard.

Bean notwithstanding, premises warning cases deal with the warning of permanent conditions, like an unexpected step,[79] unpainted curb,[80] or improperly constructed or unexpected ramp.[81] Inevitably, these cases will focus on two issues: (1) does the owner have "knowledge" of similar occurrences involving the applicable step, curb, or ramp that predate the incident, and (2)

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[73] *Id* at 369.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id* at 370.
[78] *Id.*
[79] *Renfro Drug Co. v. Lewis,* 149 Tex. 507; 235 S.W.2d 609 (1950).
[80] *Christus Health Southwest v. Wilson,* 305 S.W.3d 392 (Tex. App.--Eastland 2010).
[81] *Brinson Ford v. Alger,* 228 S.W.3d. 161 (Tex. 2007).

does the offending step, curb, or ramp comply with the Americans with Disabilities Act, all applicable building and safety codes, and the property owners' guidelines?

Often, compliance with applicable codes invokes the specter of the warnings issue. The codes incorporate a variety of requirements involving slope, paint, and texture used to focus a person's eye on an upcoming change in the walking surface. Inevitably, the plaintiff will argue that noncompliance with the code is "negligence per se," while the defendant will counter that compliance is determinative of reasonableness under the circumstances. In general, compliance or noncompliance with applicable codes is but a factor to be considered by the jury, and will not usually be determinative.[82]

B. One's duty to warn or correct is commensurate with one's control over property.

Often the deciding factor in establishing that a defendant owed a duty to use reasonable care, a plaintiff must show that the defendant maintained "control" over and responsibility for the premises.[83] Premises defendants will only be held to those duties consistent with their control over that property.[84]

Control is the exercise of power or influence over a property.

A brief pause is required before diving headlong into the swamp infested waters of the duties and obligations of Texas property owners and occupiers. We must define the concept of control. According to Black's Law Dictionary, control is the ***exercise of power or influence*** over the property.[85] Much like reasonableness and foreseeability, "control" is relatively easy to conceptualize, but is often plagued by vagueness and fraught with traps for the unwary.

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[82] *Christus Health Southwest v. Wilson,* 305 S.W.3d 392 (Tex. App.--Eastland 2010, no pet. h.).
[83] *Dukes v. Philip Johnsons/Allan Ritchie Architects, P.C.*, 252 S.W3d 586, 592 (Tex. App.--Fort Worth 2008, pet. denied); *Lloyd v. ECO Resources*, 956 S.W.2d 110, 130 (Tex. App--Houston[14th Dist.] 1997, no pet.).
[84] *Newsom v Wittington*, 953 S.W.2d 410, 414 (Tex. App.--Texarkana 1997, pet. denied).
[85] BLACK'S LAW DICTIONARY, 280 (8th Ed. Abridged 2005).

Issues of control arise when the owner leases the property to another.

Issues of control usually arise when a property owner leases the property to another who will occupy and exercise dominion over that property for the duration of the lease. In these circumstances, Texas Black Letter law recognizes that an owner relinquishes all duties to those entering its property when that owner transfers possession of the property to the lessee/tenant. Put simply: the duty of care follows possession of the property.[86] So long as the owner discloses all hidden defects upon its transfer of possession, it no longer owes any obligation under the common law to keep and maintain the property.[87]

Again, this Black Letter law that the duty of care follows possession of the property comports with our "common experience"; a property lease is a contract by which an owner conveys the right to use and occupy that property to another for consideration.[88] Only that person or entity with the right to possess, use, and occupy the property can be held to owe a duty.

Typically, an executed lease recognizes this fundamental rule by defining all or a portion of the property as the "leased premises." The lease usually requires the lessee/tenant to maintain liability insurance for all claims arising from their control and use of the leased premises and to indemnify and hold harmless the owner/lessor for all claims arising out of the use of these leased premises.

Sometimes, especially in retail properties, the owner/lessor retains control over a "common area" of the leased property, like the parking lot and walkways of a shopping center. Typically, the lease requires the owner both to maintain these common areas and to indemnify and hold harmless the tenants for any claim that might arise out of the use of these common areas.

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[86] Id. at 415; *Prestwood v. Taylor,* 726 S.W.2d 455, 460 (Tex. App.--Austin writ ref'd n.r.e.).
[87] *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 296 (Tex. 2004).
[88] BLACK'S LAW DICTIONARY, 970 (9th Ed. Abridged 2009).

While in theory the general rule and these corresponding lease agreements are relatively straight-forward, in practice they can get complicated by extraneous issues. Ponder the case where a tenant's employee is injured on the leased premises. Because an employer-possessor has no duty to warn its employee of conditions either commonly known or already appreciated by the employee, an injured employee must generally look to the Workers' Compensation system for recovery in these circumstances.[89]

Often, however, an injured employee will seek additional damages, outside the Workers' Compensation system, from the property owner. This additional recovery requires the injured employee to circumnavigate the underlying rule that duty goes with possession of the property. Usually, the injured party will argue that, despite the underlying lease agreement, the property owner retained some duty to protect the injured employee from the unreasonably dangerous condition, by either exercising actual control or retaining contractual control over some part of the transferred premises. As one might expect, however, Texas recognizes a strong presumption in favor of its fundamental rule that duty goes with possession.

For leased premises, Texas law divides owner/tenant premises defects into two distinct categories: (1) those existing when the tenant took possession of the premises, and (2) those created by the tenant's work.[90] With respect to the preexisting defect, the tenant generally takes the property "as is," and the property owner need only inspect and warn of those *concealed hazards* of which it knows or should know.[91] The owner owes no duty to warn of obvious or known hazards, and furthermore, has no responsibility to repair any defective condition existing at the time of the lease. With respect to the second category of defective conditions, those created after possession is

[89] *Brookshire Groc. Co. v. Goss*, 262 S.W.3d 793, 794 (Tex. 2008).
[90] *Id*; *citing Dow Chem. Co v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).
[91] *Shell Oil Co.*, 138 S.W.3d at 295.

transferred, the owner has no duty at all, unless it retains a right to control the work causing or creating the defect.[92]

This brings us back to the concept of control. A 2004 Texas Supreme Court case, *Shell Oil v. Kahn* helps navigate these murky waters.[93] There, Shell Oil leased some property to La Sani, Inc. to serve as a Shell gasoline station. As part of his employee obligations, at 4:15 a.m., Kahn, a La Sani employee, left the protection of his bullet proof station to clean certain outside areas before the morning rush. While cleaning, a masked man emerged from the shadows carrying a rifle. Kahn attempted to flee to the relative safety of the store, but was shot in the leg before he could make it. Kahn sued Shell, alleging several defective conditions purported to have contributed to his injuries, including improper lighting, improper surveillance, and the failure to provide perimeter fencing to the property.[94] Under its lease with La Sani, Shell retained the right to approve alterations to the premises.[95] Kahn argued that these contractual provisions amounted to both a right of and the duty to exercise control over the premises and required Shell to protect him from these defective conditions. The Texas Supreme Court rejected this argument, noting that Kahn's allegations of defects centered around the lighting, surveillance, and fencing -- all defects preexisting the lease and which remained unaltered by La Sani. As none of those defects was concealed upon transfer of possession, the Court held that Shell relinquished its duty to La Sani and its employee Kahn when it tendered possession and control over the property to La Sani.[96] Again, the Texas rule required Shell only to warn of concealed hazards; La Sani assumed all responsibility for other defects existing at the

[92] *Id.*
[93] *Id* at 288.
[94] *Id.* at 295, Kahn further alleged that the station only had bullet proof glass in the front of the store, not surrounding the store and that the station had no sign advising potential criminals that the store only had access to small amounts of cash.
[95] *Id* at 297-8.
[96] *Id* at 296.

time of the transfer of possession, regardless of whether Shell retained the right to approve of alterations.[97]

But Kahn's allegations did not stop with those conditions preexisting the lease. He further argued that Shell actively controlled several security-related activities at the station.[98] These allegations constitute the second type of alleged defective condition -- those conditions created after the owner transfers possession to the lessee. As pointed out above, with respect to these conditions Shell would have no duty at all, unless it retained a right to control the work causing or creating the defective condition.[99] In this instance, the lease agreement gave Shell the ability to demand that La Sani employ a security guard on the premises. Kahn argued that Shell's retention of this ability to insist upon the security guard created an obligation upon Shell to act in accordance with that ability.[100] Again, the Supreme Court disagreed, reasoning:

> Generally, an owner of land does not owe any duty to ensure independent contractors perform their work in a safe manner. An owner may be liable if it specifies by contract a particular safety device and then approves of operations that omit it. But the contract here made no mention of security personnel, and delegated entirely to La Sani the duty to hire "adequate and competent employees." This is not enough to show a contractual right to control hiring, or to make Shell responsible because La Sani chose not to hire security personnel.[101] (citations omitted)

Not surprisingly, the Court held firm its strong presumption in favor of the general rule that the duty to protect invitees from defective conditions runs with possession. Regardless of the rights reserved within the contract, Shell did nothing to exercise dominion over La Sani or Kahn, and as a result, retained no duty to either La Sani or Kahn.

In sum, Texas law fundamentally recognizes that an owner who tenders possession and control will usually transfer liability for the property with that possession and control, barring a

[97] *Id* at 297.
[98] Id at 292.
[99] *Id.*
[100] *Id* at 293.
[101] *Id* at 293.

failure to disclose hidden dangers prior to transfer or post-transfer conduct creating a subsequent duty. Further, the strong presumption in favor of this rule requires the injured plaintiff hoping to circumvent the rule to show that the property owner exercised power or influence in a way that directly created the defective condition.[102]

Issues of control arise also when the possessor of the property tenders possession of the property to an independent contractor for construction or repair.

Issues of control also often arise when the possessor (*e.g.,* the owner or the tenant in possession of the property) of a property hires an independent contractor to work on the premises. Again, as with lease agreements, Texas recognizes the fundamental rule that that the duty over defective premises conditions runs with control over the land. So long as the possessor of a property transfers possession of the property to the independent contractor, it has no duty with regard to defects created by an independent contractor, unless the possessor has a right to control the work creating the defective condition.[103] Again, the question of control centers around whether the possessor exercised dominion over the work creating the condition; moreover, the supervisory control must relate to the activity actually causing the injury and grant the possessor the power to direct the order in which the work is to be done or the power to forbid the work from being done in an unsafe manner.[104]

The possessor of a property cannot use its inability to control the independent contractor's work to obviate the possessor's duty to inspect its premises and remedy defective conditions.

Taken to its extreme, however, the rule allowing possessors to escape liability for defective conditions arising out of the contractors' work would allow possessors to turn a blind eye to many dangerous conditions, theoretically putting their invitees at risk. Recognizing this potential problem,

[102] *Braudrick v. Wal-Mart Stores, Inc.* 250 S.W.3d 471 (Tex. App.--El Paso 2008, no pet.);
[103] *Braudrick,* 250 S.W.3d at 476-7 (Tex. App.--El Paso 2008, no pet.).
[104] *Id at* 477.

Texas law requires that these possessors still have a duty to inspect and remedy those defective conditions of which they know or have reason to know.

This problem is best illustrated by *Koko Motel, Inc. v. Mayo*.[105] Here, the Koko Motel retained Mendoza, a plumber to repair a defective sewer line inside the motel lobby.[106] To gain access to the broken sewer line, Mendoza removed soil, debris, and pieces of concrete from the motel's foundation.[107] Each time he filled a bucket with this soil and other debris, Mendoza carried this bucket to an unenclosed utility trailer parked on the sidewalk outside an entrance to the Motel, whereupon Mendoza would dump the debris into the trailer.[108] Mendoza admitted that debris would sometimes fall off the trailer onto the ground. This work had gone on for several days when Mayo rented a room at the motel.[109] At some point, Mayo walked past Mendoza's trailer and slipped upon a piece of concrete that lay on the ground, outside the utility trailer.[110] Mayo fell, his foot striking the trailer, resulting in the fracture of a metatarsal bone.[111] When Mayo subsequently complained to the receptionist on duty, she told him that she had informed hotel maintenance and hoped to get the situation cleaned up.[112] At the time of the fall, no barriers or markers surrounded the trailer, though motel personnel did place some there at night so guests could see the area.[113] At trial, the jury found the motel responsible for Mayo's injuries -- awarding him over $1.5 million.[114]

On appeal, the motel argued that because it did not control Mendoza's work, it could not be held to have created the defective condition. In other words, the Motel argued that since Mendoza

[105] 91 S.W.3d 41 (Tex. App.--Amarillo 2002, no pet.).
[106] *Id* at 44.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id at 44*-45.

created the condition, he is responsible. The El Paso court disagreed, holding the motel's inability to exert control over Mendoza's work irrelevant. Once again, our collective "common experience" must rule the day. Regardless of who created a condition, be it a contractor, a transient, or a mischievous 3-year-old boy, a property owner who remains in possession of the property, cannot disavow its duty and obligation to inspect the premises and warn of dangerous conditions of which it knows or should know.

In short, once in possession of a premise, one must always inspect and remedy dangerous conditions, regardless of how the defective condition came to exist. If necessary, a possessor may hire an independent contractor and turn over possession of all or a part of that property to the contractor. Then, so long as the contractor retains sole possession of that part of the property, the duty to inspect and remedy will run with that possession. But if the owner/tenant retains the ability to exercise dominion over that work or dominion over the property, then that owner/tenant owes a duty to warn of or remedy defective conditions arising directly from the work.

IV. Causation

Finally, to prove an action for premises liability, the claimant must establish that the defendant's breach of a duty proximately caused claimant's injuries. Proof of causation encompasses issues universal to the practice of torts, and not specific to the study of premises defects. Consequently, while an in-depth study of the issues would vastly outstrip the scope of this paper, a brief discussion is warranted.

A. Proximate cause has two components, cause-in-fact and foreseeability.

The test for cause-in-fact, or "but for" causation, is whether the act or omission was a substantial factor in causing the injury and without the act or omission, the act would not have occurred.

As with any claim of negligence, the components of proximate cause are cause-in-fact and foreseeability.[115] The test for cause-in-fact, or "but for" causation, is whether (1) the act or omission was a substantial factor in causing the injury, and (2) without the act or omission, the act would not have occurred.

Texas law will consider a defendant's breach of duty to be the cause-in-fact of an injury if the negligent act or omission served as a "substantial factor" in bringing about the injury, without which the harm would not have occurred.[116] It is not enough that the negligence merely furnish a condition making the injury possible; the negligence must actually bring about the injury.[117]

Two cases help illustrate the concept of cause-in-fact and the necessity that the defective condition serve as a "substantial factor" in bringing about the injury. First, examine *LMB, Ltd. v. Moreno,* which involved a woman (Moreno) injured when she walked out from between two cars in a parking lot.[118] Suffering from cancer at the time, Moreno sustained numerous injuries in the incident.[119] A year following the incident, Moreno died, and her estate sued the parking lot owner. In support of its claim, the estate produced the report of Dr. Gumaro Garza, Moreno's treating physician, who testified that Moreno's death resulted from "her weakened condition caused by the accident."[120] Garza further opined generally that the conduct of LMB (the parking lot owner) substantially caused Moreno's injuries and death.

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[115] *Lieitch v. Hornsby*, 935 S.W.2d 114, 118-19 (Tex. 1996).
[116] *Doe v. Boys Club of Gtr. Dallas*, 907 S.W.2d 472, 477 (Tex. 1995).
[117] *Guevara v. Ferrer*, 247 S.W.3fd 662, 665 (Tex. 2007).
[118] 201 S.W.3d 686, 687 (Tex. 2006).
[119] *Id.*
[120] *Id at* 687.

The trial court granted the parking lot owner's motion summary judgment, finding that Garza's affidavit failed to offer any evidence that the parking lot owner committed any negligent act or omission serving as the cause-in-fact of Moreno's injuries and ultimate death. A divided 13th Court of Appeals reversed, concluding that Dr. Garza's affidavit was sufficient to raise a fact issue as to whether the lot served as the cause of Moreno's death. The Texas Supreme Court reversed and ordered that Moreno's estate take nothing. The Court reasoned that Dr. Garza's report failed to identify (1) any particular condition of the premises, (2) any conduct of LMB, or (3) any underlying facts that the parking lot caused Moreno's injuries and death.[121] In short, the Court ruled that the parking lot merely served to make the incident possible; it was not itself a "substantial factor" in her injuries and ultimate death.[122]

Moreno clarifies the problems inherent when the alleged defect is not a "substantial factor" in an incident, and thus not a cause-in-fact. We must take another look at *Hall v. Sonic Drive In of Angleton, Inc.* (supra) to illustrate how a court would determine that defective condition served as a "substantial factor" in causing an incident.[123] Recall that *Hall* involved a plaintiff injured when she picked up a sharp metal freezer door off the floor. In moving for summary judgment, Sonic argued the *plaintiff took it upon herself* to lift the door off the floor, despite repeated instructions not to do so.[124] Sonic further contended that Hall's injuries were simply "too attenuated" and that Hall handled the door differently than the other Sonic employees.[125] Put another way, Sonic argued that the door merely served to make the incident possible; it was Hall's behavior in picking up and mishandling the freezer door that served as the substantial factor in causing her injuries, not Sonic's handling of the door.

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[121] *Id* at 688.
[122] *Id.*
[123] 177 S.W.3d 636 (Tex. App.--Houston[1st Dist.] 2005, pet. denied).
[124] *Hall*, 177 S.W.3d at 648.
[125] *Id.*

The First Court of Appeals disagreed, holding that Sonic's argument neglects the simple fact that Hall picked up the freezer door because she found it lying on the floor.[126] But for Sonic's employee's decisions to take off the freezer door, place in upon the counter, and then subsequently removing from the counter to the floor, Hall would not have been injured. Thus, whereas the parking lot merely served as the locus of Moreno's injuries discussed above, Hall's injuries resulted from Sonic's negligence in leaving the freezer door on the floor and her foreseeable decision to pick it up.[127]

The test for foreseeability involves whether a person should have anticipated or foreseen the danger of the defective condition.

Causation requires a plaintiff to prove more than "but for" a specific condition, the accident would not have occurred. The plaintiff must also show that a reasonable person, knowing of the condition, should have anticipated harm resulting from the condition.

Conceptually, proof of foreseeability is not much more difficult than cause-in-fact. Where cause-in-fact focuses upon whether the incident would have occurred without the premises condition, the question of foreseeability involves whether a person should have anticipated the danger posed by the condition. To prove foreseeability, a plaintiff must establish that a "reasonable" person should have anticipated or "foreseen" the danger of defective condition.[128] It does not require the person to anticipate precisely how the injury will occur. Rather, the injury must be of a general character that might reasonably be anticipated and that the plaintiff's injuries might be reasonably foreseen.[129]

Once again we are cast adrift, afloat in the sea of reasonableness and foreseeability. To navigate this sea, one must first recall that questions of foreseeability involve a practical inquiry

[126] *Id.*
[127] *Id.*
[128] *Boys Clubs,* 907 S.W.2d at 478.
[129] *Hall* at 649.

based upon "common experience applied to human conduct."[130] Again, reconsider *Hall*. Recall that Sonic argued both that Hall acted alone and that nothing in their employees' specific handling of the freezer door might have anticipated injury. But the Supreme Court disagreed, finding Sonic's focus too restrictive to their handling of the freezer door. Instead, the Court held that a reasonable fact finder, using common experience, could infer both that a thin metal door leaning upon a table leg could easily slide from its position and that an employee might pick it up.[131] Further, in the light of the same common experience, a reasonable person could easily foresee both that an employee might later unwittingly pick up the fallen object off the floor and that the object might cause injury. As discussed above, Sonic focused too directly upon its own personal experiences with the freezer door, rather our common experience as a people. It is that shared common experience that is the focus of foreseeability.

Likewise, consider *Towers of Townlake Condominium Association v. Rouhani* briefly mentioned earlier. Recall that plaintiff slipped on a wet pool deck which had been painted without abrasive paint. Plaintiff testified that after she fell, she felt the pool deck surface and it was as slick as a marble floor or tile on a kitchen floor that has no grooves to prevent slipping. According to the Austin Court, when a layperson's common understanding and general experience enable her to determine, with reasonable probability, the causal relationship between an event and a condition will suffice to prove foreseeability.[132] A person of common human experience could reasonably determine that there was a causal link between the slick, nonabrasive pool deck surface and Rouhani's fall. From that, the jury could reasonably conclude that the pool owner should have reasonably foreseen someone slipping upon the wet enamel-painted surface of the pool deck.

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[130] *Id.; citing City of Gladewater v. Pike,* 727 S.W.2d 514, 518 (Tex. 1987).
[131] *Id.*
[132] *Towers of Townlake Condominium Association v. Rouhani*, 296 S.W.3d 290, 298-99 (Tex. App.--Austin 2009, no. pet. h.), *citing Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 583 (Tex.2006).

In conclusion, one must remember that unless the evidence on causation is undisputed or unless only one reasonable inference can be drawn from the evidence, questions of proximate cause are usually questions of fact best decided by the jury.[133] Consequently, the plaintiff's burden is relatively light. First, the plaintiff must show that "but for" the defective condition, the incident would not have occurred. Restated, the defective condition served as more than the mere location of the incident; it served as a "substantial factor" in bringing about the incident and the resulting injury. Recall that in *Moreno*, the parking lot merely served as the locus of an accident; her estate brought forth no viable evidence of either a defect in the parking lot or evidence that proved the parking lot caused her injuries and ultimate death.

Second, the plaintiff must prove that her injuries were the foreseeable result of the defective condition. Recollect *Rouhani*. There the court ruled that Rouhani's injuries were the foreseeable result of a non-slip pool deck. In short, our collective common human experience upon the use of pools mandates that a reasonable person should foresee that a pool painted with non-abrasive paint would become slippery when wet and foreseeable injuries might result.

V. Conclusion

We embarked upon this study of premises liability in an effort to understand these elements and their interplay across terrain of premises conditions, from the indoor shopping mall to the outdoor boat dock. It is hoped that this brief overview sheds some affirmative structure and discipline upon the malleable practice of law, structure sufficient to offer our clients an insight into the malleable practice of premises liability law. Clients, whether plaintiff or defendant, will likely continue to see real life in black and white terms and distrust lawyers that operate in shades of grey. But hopefully, this paper casts a bit of grey and promotes greater understanding of each of the four

[133] *Ambrosio v. Carter's Shooting Ctr., Inc.* 20 S.W.3d. 262, 266 (Tex.app.--Houston [14th Dist.] 2000, pet. denied).

elements and their interplay with our everyday, shared, common sense notions of reasonableness and foreseeability.