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Easel Not 'Obvious' Danger; Jury Comes Back With $800K

Hazard Viewed Subjectively In Case Vs. Eatery

BY JASON M. SCALLY

A lawyer who garnered a slip-and-fall verdict that topped $800,000 says that the case shows how an "open and obvious" danger to one person may *not* be open and obvious to another because of the surrounding circumstances.

Verdict Spotlight

The plaintiff, a 35-year-old woman, suffered severe injuries to her foot when she tripped over an easel displaying menu items near the entrance in a family restaurant. The accident allegedly happened while she was attempting to track down a small child who was running towards the door.

E. Steven Coren of Newton, the plaintiff's attorney, said that although the easel was in plain view when patrons walked into the restaurant, once they were seated it was hidden by a decorative wall that separated the seating area from the entrance area.

As a result, he said, the plaintiff never saw one of the legs of the easel — which only stuck out a few inches into the walkway — because she was focused on keeping the child from running out onto the busy street in front of the restaurant.

The injuries she suffered to her foot required numerous surgeries and has rendered the plaintiff unable to do almost any kind of work, plaintiff's experts testified.

The Norfolk County jury — sitting in a county not known for its generous plaintiffs' verdicts, according to Coren — awarded over $800,000 in damages (more than $1.3 million with interest), mostly for future lost wages, and did not find any comparative negligence on the part of the plaintiff.

Despite the Superior Court jury's verdict, however, the case may not be finished just yet. Attorneys for the defendant told Lawyers Weekly that they plan to file post-trial motions with Judge Robert A. Mulligan to overturn the verdict.

"We don't think there is any basis for the jury concluding what it did in light of self-contradictory testimony," said Steven L. Schreckinger of Boston, an attorney brought in by the defendant to handle the post-trial motions and appeal, if necessary.

"If you accept her testimony, she tripped over an easel that was in plain sight in a restaurant because she wasn't looking where she was going."

A Verdict & Settlement report on the case appears on page B4.

Easel-y Injured

The plaintiff, Kelly Shanahan, was employed as a heavy equipment operator on Boston's Big Dig at the time of her accident.

The accident occurred at a Friendly's restaurant in Weymouth on Route 53, where the plaintiff was eating with her boyfriend and his grandchildren. While seated at the restaurant, one of the grandchildren, a 4-year-old boy, started running towards the entrance of the restaurant.

Apparently fearing for the child's safety since there was a busy highway outside the front door, the plaintiff ran after the child in an attempt to catch him. In the process, she allegedly fell over the leg of an easel that had been set up near the entrance of the restaurant.

Coren said that his client "immediately felt pain," but did not seek medical treatment until the next morning. Once she went to the hospital, however, she learned she had torn ligaments and a foot fracture.

According to Coren, the plaintiff ultimately developed dystonia of the posterior tibialis tendon — a condition where a spasmodic tendon causes the foot to "drop down" and look "pigeon-toed."

The dystonia caused the plaintiff considerable pain, Coren said, and made her prone to subsequent falls and ankle sprains.

She underwent eight years of treatment, which included unsuccessful botulism treatments that attempted to freeze the muscle.

Although the defendants apparently tried to highlight a roughly two-year period where the plaintiff did not seek treatment for her foot, Coren explained that the plaintiff had been diagnosed with cancer and was seeking treatment for the cancer during that time.

The treatment for her foot injury, however, ultimately included a tendon transfer operation, and a subsequent procedure that required taking a skin graft from her thigh to put on the back of her calf.

The plaintiff in the case tripped over a leg of the restaurant easel pictured above.

Coren said that the operations have left the plaintiff's foot deformed and that she anticipates future surgeries.

According to the plaintiff's vocational experts, the plaintiff will never be able to work at her job, or any other job requiring the use of her foot, again.

Coren said that "at most" she might someday be able to work a minimum-wage job.

The plaintiff sued the Friendly Ice Cream Corp., the only defendant in the case, in Norfolk County Superior Court.

The jury trial was before Mulligan, and lasted two days. The jury was out for a total of nine hours over two days before it came back with a verdict.

The jury found the defendant totally responsible — no comparative negligence was found on the part of the plaintiff — and awarded the plaintiff $834,000.

Most of the award covered loss of future wages, but it also included $141,717 for medical bills. With interest, Coren said the

gross verdict proceeds totaled $1,334,400.

Edward J. Cummings III of Boston represented the defendant during the trial.

Eye Of The Beholder

The main dispute in this case, apparently, was whether the easel was in plain sight. The defendant said it was.

"I can't think of anything more open and obvious than an easel in the middle of the restaurant," said Schreckinger, who added that he thought it was even more "open and obvious" than a swimming pool where someone can't see the bottom.

In 2000, the Supreme Judicial Court, in its landmark ruling of *O'Sullivan v. Shaw*, found that a man could not sue property owners for injuries sustained after diving into a pool because the risks were "open and obvious."

Aaron B. Parker of Wilbraham, the vice president, general counsel and secretary of Friendly's, said that the easel was a "marketing message vehicle" that was purposely put in the restaurant to be seen.

"If it's not in plain view, it's not accomplishing what it was designed to do," said Parker.

But the plaintiff's attorney said that the issue was not whether the easel was in plain view generally. In fact, he said that he agreed that it was easily viewable by patrons as they walked in the restaurant.

Rather, Coren said, the issue was whether the plaintiff, in the attendant circumstances, was able to see it.

He said that this case was more like cases involving "optical illusion or inadequate illumination" rather than the type where someone gets injured in a pool.

The pool is usually the direct focus of the diver, he explained, whereas in this case there was apparently no direct visual danger to the plaintiff at the time of the accident, since the easel was hidden.

Coren said his job was to convince the jury that the plaintiff had not seen the easel, so he tried to put them in her shoes.

Coren argued that once seated, the plaintiff could not see the easel since it was obstructed by a privacy wall that divided the seating area from the entranceway.

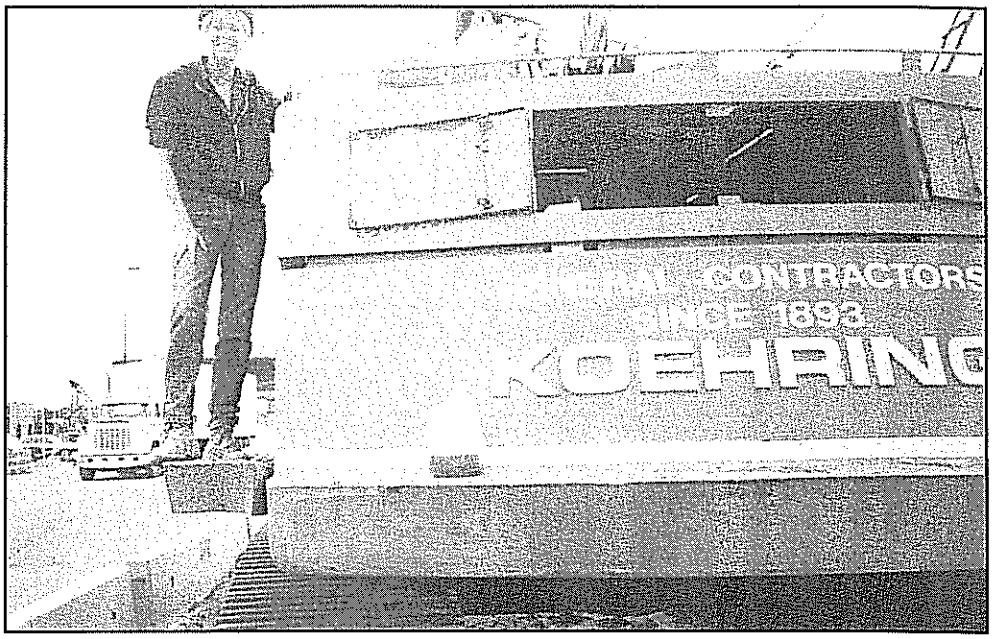
Coren used enlarged pictures showing the location of the easel and the privacy wall to demonstrate that a seated patron could not see the easel, which was almost totally blocked by the wall. Only a few inches of the easel's leg stuck out beyond the wall, he noted.

Adding to the situation, Coren said, was the fact that the plaintiff was focused on the running child.

"What person's heart doesn't go into their throat when a child in their care runs away?" he asked. "Their attention is not drawn to an area; it's focused on the well being of the child."

The plaintiff's attorney also argued that the risk posed by the easel was foreseeable.

"My client testified having seen children running [in Friendly's] before," said Coren. "Friendly's should have known that it was a foreseeable risk that several inches of an easel leg, without anything else drawing attention to it, in those circumstances was a hidden defect and a dangerous defect."



The plaintiff, Kelly Shanahan, was a 35-year-old woman employed as a heavy equipment operator on the Big Dig, but could not return to work after her accident.

He said that the key to getting a successful outcome for his client was having the jury take into account all of the circumstances surrounding the easel — not just the fact that it sat prominently at the entrance to the restaurant.

Although the judge refused to give an emergency instruction that Coren had requested, Mulligan did tell jurors they were to consider "all of the circumstances."

Based on the outcome, it looks like they did, Coren said.

E. Steven Coren, counsel for the plaintiff, said it was significant that his client was focused on tracking down a child running through the restaurant when she fell.

Damages Not Surprising

Coren said that although he was somewhat surprised by the award, it was not because the damages had not been proven.

"Normally, it's an injury you think would heal," said Coren. "But here she developed dystonia and there was nothing for the doctors to do other than operate."

He said a medical expert testified about her medical condition and a vocational expert testified about her inability to work at anything other than possibly a minimum-wage job.

The damages reportedly were relatively easy to calculate because, as a union employee, her union contract spelled out her hourly wages, her expected future raises and her defined benefits through the age of 62.

What surprised Coren, however, was the fact that the defendant had apparently placed so little value on the case.

The plaintiff's attorney said that the only settlement offer his client received was $40,000 on the day of the trial. The parties had met in mediation prior to trial, but no settlement had been reached.

But the defense attorneys defended their actions, noting that much of the evidence suggested there were problems with the plaintiff's claim.

Schreckinger said the plaintiff acknowledged in her testimony that she ran into the easel simply because she wasn't looking where she was going.

He also noted that there were questions raised over why apparently no witnesses saw her fall, and why she did not report the injury until the next day.

"These are the kinds of cases that should be defended," said Schreckinger.

But Coren said that the extent of his client's injuries should have been too much for Friendly's to ignore.

Coren said he was also delighted to see his client receive such a large verdict in Norfolk County — not known for being plaintiff-friendly, in his view. He said he considered the venue for the trial an obstacle in itself, but it was the "courage of [the plaintiff's] convictions" that won out in the end.

The verdict "sends a message to defendant companies to please consider the fairness in settling these cases because, otherwise, each side takes the same risk," he remarked.

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