REAL ESTATE

Court of Appeals Clarifies Trivial Defect Doctrine

By Dennis C. Valet

The Court of Appeals in *Beltz v. City of Yonkers*[1] effectively established the Trivial Defect Doctrine in 1895, a staple in the modern defense attorney's playbook. Therein, the court recognized that no walkway could be kept so perfectly safe so as to preclude the possibility of an accident and accordingly held that "when … the defect is so slight that no careful or prudent man would reasonably anticipate any danger from its existence … the question of defendant's responsibility is one of law." Perhaps shocking to a modern practitioner, the *Beltz* court found that a two and a half inch deep, 26 inch long and seven inch wide depression in a sidewalk was not an actionable defect. Ever since, New York courts have struggled to define when a defect in a walkway is actionable.

By 1948, the Court of Appeals in *Loughran v. City of New York*[2] had firmly rejected the proposition that a defect must have a minimum measurement to be actionable and instead elected to follow an examination of the totality of the circumstances for each particular accident. The last 30 years have been dominated by the Court of Appeals case of *Trincere v. County of Suffolk*[3], which identified some factors relevant to determining whether a defect is trivial, including but not limited to width, depth, elevation, irregularity and circumstance.

The Court of Appeals in *Hutchinson v. Sheridan Hill House Corp.*[4] in 2015 revisited the Trivial Defect Doctrine and shed some much needed light onto the standards of proof required by both plaintiffs and defendants in motions for summary judgment. The Court of Appeals examined three different claims brought by three different plaintiffs and analyzed whether the Appellate Divisions had properly granted or denied summary judgment. This article focuses on the lessons from *Hutchinson* for any party seeking to win, or defeat, a motion for summary judgment based upon the Trivial Defect Doctrine.

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Relevant factors

The *Hutchinson* court cautions against examining only the defect itself in determining whether it constitutes a "trap." Instead, the totality of the circumstances surrounding the accident should be considered. That is, both the defect itself as well its context is relevant. In addition to the factors outlined in *Trincere*, courts should also consider the following: the presence of other defects in the vicinity of the subject defect, the lighting surrounding the defect, the characteristics of the surrounding walkway surface, and the location or characteristics of the area in which the defect is located. In sum, any contextual fact, which contributes or detracts from the danger the defect poses, is relevant.

The danger posed by a defect is not limited to the physical characteristics of the defect itself, but rather, is largely affected by the greater context surrounding the defect. A defect may be actionable in one location while an identical defect in a different area may not be actionable. For example, the first identical defect may be located on a crowded walkway in a dark subway station which commands pedestrians' attention away from their feet while the second identical defect may be on an open, well lit, unobstructed and uncongested walkway where pedestrians can easily observe where they are stepping.

In summary, "lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot."[5]

Questions of fact

A defendant seeking summary judgment on the basis of the Trivial Defect Doctrine must present evidence establishing that "the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses." Plaintiffs defending the same motion must create a question of fact, demonstrating that a reasonable person could find that the defect unreasonably imperils the average pedestrian. Common sense dictates that both parties should, when applicable, submit evidence relevant to each of the factors listed in the *Trincere* and *Hutchinson* decisions. The court's analysis of the three cases in the *Hutchinson* decision reinforces the benefits of submitting as much evidence as possible to understand the characteristics and circumstances of the defect.

In the first set of facts before the Court of Appeals, the defendant provided photographs of the defect, which included measurements of the dimensions of the defect. The defendant also provided evidence of the lighting at the time of the accident and evi-

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dence that the area was not crowded or congested. Finally, the defendant provided evidence that the defect was alone and not hidden or obscured in any way to prevent the plaintiff from identifying it as a hazard. The court held that the defendant had established as a matter of law that the defect was trivial and not actionable.

In the second set of facts the plaintiff, through an expert affidavit, overcame the defendant's *prima facie* showing of entitlement to summary judgment. The expert demonstrated how an otherwise seemingly insignificant defect was particularly dangerous due to its location on the nosing of a stairway. The expert placed the trivial defect into a greater context, sufficient to raise a question of fact as to whether a reasonable person would anticipate an accident occurring as a result of its existence. This set of facts demonstrates when a fact pattern can benefit from securing an expert who can analyze an individual's gait and apply the normal walking motion to the specific location of the defect within the walkway or stairway.

In the third set of facts, the defendant provided photographs of the defect, but did not submit any evidence of the dimensions of the defect. While holding that some defects may be determined to be trivial based upon photographic evidence alone, the characteristics surrounding the defect in question, which were a "clump" of raised material on a stairway, required an examination of the dimensions of the defect to make such a determination.

The role of the everyman

A defect is not actionable simply because it is capable of causing injury. The fact that the plaintiff happened to be injured does not automatically make a defect actionable. The test is whether the defect unreasonably imperils the safety of an ordinary person traveling in a manner typical of an ordinary person. As stated by the *Beltz* court, it is impossible to prevent every accident. Instead of debating what danger the defect posed to the injured plaintiff, the analysis should consider what danger the defect posed to the average pedestrian traveling the subject walkway in an average, reasonably expected manner. As analyzed in the second set of facts considered by the *Hutchinson* court, a defect under a handrail on a stairway might not be actionable despite the fact that an identical defect on the nosing of a stairway tread may be actionable.

In the same way that that a defect will not automatically be actionable because one person happened to be injured, a defect is not automatically trivial because others have managed to navigate the same walkway unharmed. The *Hutchinson* court urges lower courts to "avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere."[6]

The role of the reasonable man

The *Beltz* court in 1895 held that "when the defect is of such a character that reasonable and prudent men may reasonably differ as to whether an accident could or should have been reasonably anticipated from its existence or not, then the case is generally one for the jury."[7] This standard is still followed today with the *Hutchinson* court holding that "whether a dangerous or defective condition exists on the property of another so as to create liability is generally a question of fact for the jury."[8]

After 120 years practitioners still don't have a bright line rule for determining when a defect is actionable and the very nature of a negligence claim likely precludes the introduction of one. The standards of the reasonable man change with time, and with them, the defects that a jury can find actionable evolve.

Hutchinson may not have rewrote the field of premises liability, but at the very least it consolidated and clarified the factors to be considered when determining whether a defendant has violated the standard of care owed to pedestrians on walkways. Context is the key to victory under *Hutchinson*; the parties should be careful not to focus so intently on the defect itself in that they lose sight of the circumstances surrounding the defect and the moment that the plaintiff was injured.

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[1] 148 N.Y. 67 (1895)
[2] 298 N.Y. 320 (1948)
[3] 90 N.Y.2d 976 (1997)
[4] 26 N.Y.3d 66 (2015)
[5] *Id.* at 79.
[6] *Id.* at 84.
[7] Beltz, 148 N.Y. at 70.
[8] Hutchinson, 26 N.Y.3d at 77.

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view of the fact that the proceeding seeking its recovery was instituted in 2013, the court held that the claim for a constructive trust with respect to the shares of stock was not time-barred.

However, the court held that the statute of limitations with respect to the real properties in issue began to run when the promised payments for same were due and owing. In the case of one of those properties, the promised payments were due between 1989 and 1992, and in the case of the second, payments were due in 1994 and again in 1998. Accordingly, the court found that under any such circumstance, the proceeding for a constructive trust was untimely.

Finally, the court rejected petitioner's contention that their claim for a constructive trust could nevertheless be maintained as an equitable remedy for other causes of action, holding that an equitable remedy is not available to enforce a legal right that is, itself, barred by the statute of limitations. Additionally, the court held that petitioners claims based upon equitable estoppel lacked merit, concluding that there was no evidence that the decedents were lulled into inactivity with respect to the real property in question until after the statute of limitations had expired.

Matter of Thomas, 2015 NY Slip Op 00017 (4th Dep't).

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