

How a Safety Engineer Can Help the Slip and Fall Case

The recent Kentucky Supreme Court decision of *Lanier v. Wal-Mart Stores, Inc.* has enhanced the Kentucky trial attorney's ability to obtain justice for injured people. Clients suffering injury from slipping and falling on a foreign substance in a business establishment are more likely to get their case before a jury as a result of the *Lanier* decision.¹ Even with the recent pronouncement in the law

from *Lanier*, however, fall cases remain tough to bring. This is true whether the facts of the fall support a theory that it was caused by a foreign substance on the floor, or by an otherwise dangerously slippery surface. A safety engineer may be able to help your case succeed in either scenario.

Why use a professional safety engineer?

Claims from falls occur frequently.

Injuries from falling are often life altering and permanent. Substantial falls often result in broken bones or death, especially in the elderly victim.² Astoundingly, falls reportedly caused or led to 15,400 deaths in America in 2001 alone.³ Given the frequency of falls and gravity of the injuries they can produce, fall cases are generally vigorously contested.

Educate your jury through testimony of a safety engineer.

With specialized education, training, and experience, a professional safety engineer should be able to educate your jury as to why the fall occurred. Surprisingly, some flooring surfaces are less slippery when wet than when dry. Conversely, some

flooring materials routinely used in commercial structures, such as polished marble, are incredibly slippery when wet, or when a foreign substance, such as paper or a leaf, rests on the surface. Discussion of the flooring surface involved, and any foreign substance working in combination with it, will likely be critical testimony on causation.

The safety engineer should be able to conduct or supervise testing of the flooring and/or foreign substance

Testing and analysis of how slippery a surface is will require specific tools. The coefficient of friction involved will be measured. The coefficient of friction is defined as the ratio of the force that maintains contact between an object and a surface and the frictional force that resists the motion of the object. Standards are promulgated both as to the manner in which testing of the coefficient of friction of a surface should be conducted, as well as to what materials are appropriate for particular flooring applications based upon the coefficient of friction of the material. The American Society for Testing and Materials (ASTM) has multiple methods for testing coefficients of friction for floors and floor coatings.⁴ The safety engineer should be familiar with the varying standards for each, and competent in testing procedures. Laboratory testing of particular substances or surfaces also requires the location of a reputable laboratory and the preservation of the chain of custody of the substance involved.

The safety engineer can assist in the documentation of the scene or site of the fall.

Perhaps the most important component of the successful slip and fall case is documentation of the scene of the injury. Many commercial establishments train staff to clean or remove any spill or foreign substance immediately after a fall. Once a spill is cleaned, the best evidence in the case may be lost. Unfortunately, few seriously injured clients will likely have the opportunity, ability, and pres-



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ence of mind to photograph and preserve evidence from the scene of the injury, or to have someone else, counsel included, do it for them immediately. You may, however, find that an incident response team assembled after the occurrence, photographing and documenting the matter. Beware that this documentation may be self-serving for the commercial establishment, and privilege will likely be asserted when you attempt to obtain it. Be certain to request all photographs depicting the scene of the fall.

If the client retains clothing or other property damaged in the fall, or which may have preserved any substance involved in the fall, preserve the property and document the chain of custody of that evidence. Counsel will simply have to utilize the best evidence that is available, which simply means capturing what is left of the evidence when the case originates through photographing, interview, or other investigatory techniques. Once the evidence is gathered, the safety engineer may then be able to assist in computer modeling and the creation of simulations pertaining to the fall. Assistance in the generation of an animation depicting the fall that can both explain the mechanism of injury and of causation for the fall is also a valuable function that a safety engineer can contribute to the case, if the case budget will permit the expenditure.

What will the safety engineer consider when evaluating causation of the fall?

A host of factors can combine to create the specific danger confronted by the client. These factors have bearing on the relative degree of liability that the jury may impose under a potential instruction on comparative negligence.

Consider the totality of the circumstances of the fall; anticipate the comparative negligence argument.

Testing of the specific characteristics of the flooring at the scene of the fall should be conducted. Flooring that has been improperly maintained can lose slip resistance. Slip resistance varies amongst flooring materials. Different flooring materials react differently when specific cleaning products are applied to them. Discovery of the cleaning methods employed on the flooring will likely be very important in this analysis. Footwear is also a primary consideration in these cases—preservation of the shoes worn by the client when the fall occurred should be requested. Given *Daubert* and its progeny, failure to consider the impact of one’s footwear on causation may result in the court striking an expert’s opinion.

One must also consider the likely assertion of the “open and obvious” defense. Will a wet condition be obvious on a rainy day? Consider the location of the water involved. Water in the rear of the store from a roof leak may be less obvious than that by the door. Often, falls occur in supermarkets near produce displays, or in restaurants near self-service beverage centers. These areas, where fall injuries are known to frequently occur, should be routinely monitored by the commercial establishment for the presence of foreign substances that could result in a fall. On some flooring surfaces, slip resistant safety mats may also be required, given any history of incidents of slipping with the particular flooring material involved. Warnings, or the lack thereof, to the customer may also be pertinent to this analysis, as will be lighting and any obstructions or distractions. This is not intended as an all-inclusive list of considerations.

Consider the policies and procedures of the defendant—did they follow their own rules?

Your expert should review the policies and procedures of a particular business as to facility maintenance and inspection. Risks of injury in the

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conduction of commerce are as old as commerce itself. These policies may have aged as well. A business may have established and abandoned good policies and procedures for policing its facility and conducting maintenance. Logs are sometimes required as to cleaning, and those logs can be helpful in establishing that the facility failed to abide by its stated policy. A careful review of applicable policies and procedures of one's defendant, coupled and compared with standards promulgated by OSHA or other public entities or professional societies, may be rewarding.

How do you find a professional safety engineer?

Expert witness referral services abound. Many colleges and universities across the country offer courses of study pertinent to safety engineering. The American Society of Safety Engineers is a solid, and admittedly obvious, place to start looking for a credentialed expert.⁵ As always, in your selection of the appropriate expert, be advised to seek references from fellow KATA members or other counsel having previously employed the person under consideration—join the KATA ListServ! Request references and background information on any expert with whom you are interested in working. Find out, prior to engagement, whether your potential expert's testimony has been excluded by a successful *Daubert* challenge. Confirm the expert's schedule of fees and document pertinent terms concerning

payment and billing before engagement. Conduct as significant a background check as your resources permit. Last, consider requiring a confidentiality agreement from the expert. Remember, your experts can make or break your case. Choose wisely!

¹*Lanier v. Wal-Mart Stores, Inc.*, 99 S.W.3 431 (Ky 2003). The *Lanier* court stated: "We hold that the existence of a foreign substance on the floor of a business premises that causes a customer to fall and be injured is not a safe condition and the existence of that unsafe condition creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition. Thus, once the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances. The circumstances could include the nature of the specific

hazard and the nature of the defendant's business."

Id. at 331.

²The Center for Disease Control has published a paper declaring that "[f]all-related injuries are the leading cause of injury deaths and disabilities among older adults (i.e., persons aged >65 years). The most serious fall injury is hip fracture; one half of all older adults hospitalized for hip fracture never regain their former level of function." *Reducing Falls and Resulting Hip Fractures Among Older Women*, Judy A. Stevens, Ph.D., and Sarah Olson, M.S., National Center for Injury Prevention and Control, Division of Unintentional Injury Prevention. <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr4902a2.htm>.

³ Per Bobby Jackson, Vice President for National Programs of the National Safety Council, in remarks published in an editorial carried in the *Chicago Tribune* on March 29, 2002.

⁴ Go to: <http://www.astm.org> for a searchable database of standards.

⁵The American Society of Safety Engineers can be contacted at <http://www.asse.org>.





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