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## **How to Investigate a Slip, Trip and Fall Claim**

### **I. Risk Transfer Strategy**

#### **Pre-Accident Planning**

While in the planning stages of any new project, it is critical to envision the various “what-ifs” that could create liability stemming from the use of your products, from your property, from your employees, or from your vendors and guests. One of the best preventive measures is the use of clear contractual language in dealings with tenants, contractors and suppliers. But too frequently we see a contract that the proponent has revised so many times over the years that it has inadvertently create a Frankenstein monster. Thus, the importance of reviewing, streamlining, and updating your contracts cannot be overstated.

#### **Understanding the Threats**

In the realm of insurance and indemnity, change is constant for insurance policies and the way the case law interprets those policies. So too your contracts should evolve not only to *adapt* to the new normal, but to stay ahead of it. Moreover, it is common for your risk transfer target to resist your efforts, and disagree with what you believed to be a common understanding of the contract requirements.

#### **Planning for Solutions**

Part of the solution is understanding indemnity clauses, including the use of consistent triggers, compliance with anti-indemnity statutes, and avoiding outdated language. Another part of the solution is understanding the insurance procurement issues, the ISO coverage triggers, and additional insured coverage triggers, and incorporating this knowledge into your contracts. Further, the inclusion of particular terms and language—language that may appear insignificant or address issues that appear beyond debate—can be extremely worthwhile.

### **II. Initial Investigation Strategy**

**Return on Investment is high from retention of a biomechanical expert**

Case outcomes are typically enhanced when appropriate experts are retained. Biomechanical experts are key to best outcomes on slip and fall cases, especially in a retail, restaurant or hospitality setting given the multitude of consideration factors and potentially responsible parties. An expert should be retained immediately before evidence is lost or degraded. By determining, scientifically, the most probable cause of the fall, liability can be appropriately allocated, optimizing outcomes. Early assessment by an expert can also result in early ADR which also optimizes outcomes, especially if accompanied by additional leverage (e.g. motion for summary judgment, cross-complaint, offer of judgment, etc.).

The return on investment from biomechanical expert retention is clear, especially given the high dollar amount of medical specials assessed for even minor injuries, driving up plaintiff demands and verdicts in some venues. Causation assessment of the injury can span beyond the specific cause of the fall at a location. In some cases, there is a question whether the injury occurred on premises and a biomechanical expert can assess the possibility and probability of same, precluding payment when there is no duty to indemnify and assisting in the industry's pursuit against fraudulent claims.

### **Favorable responses from viable risk transfer and an investigation cornerstone**

Many pursuits to transfer risk receive a delayed or unfavorable response, often due to a burden of proof argument. A comprehensive biomechanical expert report, allows for immediate and effective risk transfer as the standard for meeting the burden of proof of another's responsibility is much more likely to be met. Tenders may be as an additional insured, contractual, or equitable. Early tenders may transfer attorney fee responsibility at the onset of a case, allow the responsible party to avoid coverage issues by placing its carrier on immediate notice and conduct its own investigation before evidence is lost. An expert report can clarify whether a contract provision to defend, indemnify and hold harmless is invoked, whether "sole negligence" language in an additional insured endorsement applies, priority of coverage and allocation between multiple tortfeasors, etc. The breadth of responsible parties can include a tenant, an architect or builder, subcontractor such as for flooring, railing and lighting, a vendor such as snow removal, etc.

The biomechanical review is also a cornerstone investigation item. It supplements photographic and video evidence, weather reports, evidence in a smart phone or on social media posts, measurements, etc. Statements can be procured while witness memory is fresh and before potential witnesses become difficult to locate. An expert report can provide support and connect the dots between evidence regarding a fall.

### **Connection between a zealous defense and reputation**

Insureds are more likely to stay with a carrier who they feel fully supported their best interest in a claim, and particularly in a litigated claim. As a lawsuit is public records, it can impact an insured's reputation, ability to secure a loan, allow for invasive discovery, etc. Retention of a biomechanical expert can satisfy an insured that a zealous defense is being pursued, all evidence is being given its appropriate weight, and all responsible parties are being pursued. With the proliferation of "reptile theory" tactics by plaintiff counsel, the expert approach and report can also refute those non-scientific approaches and support appropriate, limiting motions in that regard.

The carrier will also enhance its reputation with plaintiff attorneys that it will investigate each claim with appropriate experts and expect all responsible parties to pay their fair share, including plaintiffs relative to comparative liability.

### **III. How to conduct a slip, trip and fall investigation**

Investigations of slip, trip and fall claims in typically address the cause of the accident and the claimed injuries. Each case must be decided upon based on the specific facts incident while taking into account the claimant's behavior. Accidents involve a number of factors related to engineering, biomechanics, human factors and the environment, such as building codes, the weather, and illumination. A comprehensive analysis of these factors can help evaluate the cause of the slip, trip or fall accident and if there is any objective evidence to support or refute the claimed injuries. If there are objective finding to support the claimed injuries, the analysis will then determine the proximate cause of the claimed injuries.

#### **Human Factors and Gait**

Understanding the manner of the fall incident is the first step in investigating a specific claim. This includes the difference between the mechanisms associated with a slip and trip as well the kinematic differences for each event. Biomechanics research shows that walking has a predictable pattern. During normal walking, a slip occurs when there is insufficient friction between heel of the leading foot and the walking surface, causing the foot to slide forward. When this happens, body's center of mass is behind the base of support and therefore the body will fall downward and rearward. When a trip occurs, the swinging leading foot is impeded by an obstruction. The body's center of mass continues to move forward past the base of support. If balance cannot be restored, the body will fall forward.

#### **Environment**

Premises can reduce the risk of slip, trip and falls as well as mitigate liability by following building codes, design standards, and maintenance practices. Specific to slips and trips are codes and standards addressing the slip resistance of walking surfaces, like ramps and stairs, and floor levelness that reduce obstructions along the travel path. As it pertains to the incident investigation, it is important to refer to codes from the year a building was built or part of a building was renovated. In addition, states or even cities may adopt codes with amendments specific to their jurisdiction. Finally, understanding the mechanism of the fall is important in identifying the particular codes that may or may not have been violated.

#### **Injury Biomechanics**

An injury mechanism is the mechanical process that causes a specific injury to occur. An injury mechanism takes into account the direction and magnitude of the load applied to cause physiological trauma. It is important to recognize the typical areas of the body that may be injured for each manner of falling. The body falls rearward when a slip occurs, therefore injuries are typically on the posterior side of the body, such as the head, wrist, elbow, and low back. When a trip occurs, the body falls forward, therefore injuries are typically seen on the anterior aspect of the body, such as the knee, elbow, shoulder, and wrist. Obtaining information in

regards to activities of daily living will establish the injured party's personal tolerance for a person specific analysis as well as identify alternative injurious activities.