MondayMonday

Walking On The Edge

December 2, 2013

Yes, Thanksgiving is over and Channukah too. Thank goodness for that. Other than stomach problems, the two holidays united to bring together only a perfect storm of familial disasters. Witness the crazed couples dragging over-tired children across the East-West/North-South highways of New York City, which link the "where we're from" to the "where we live," traveling between constantly warring camps of relatives. Using an arcane system explained only in a footnote to the Code of Hammurabi, the relatives tally the total time spent in their homes and multiply it against the category of time, much like degrees of difficulty in diving or ice skating. Here, one hour spent eating the main course is worth thrice the time if only sharing dessert. Arriving for the preliminary chopped liver on a Ritz, by the same token, is only worth half the time of pumpkin pie and coffee. Grandchildren are not blamed for any transgressions here, the sins of the father staying right where they belong.

In all of this we envy the drunk uncle. He never gets into fights about politics ("DeBlasio? A communist!") or morals ("We use to have things like 'living together' too.

It lasted three or four hours at a motel in Sheepshead Bay or until the quarters for the bed ran out.") or family ("Cousin Sylvia? A communist!). But to the drunk uncle, it matters not a jot. Sleep well, wise old man; you with the Crown Royal upon your head. We know just where you've gone and why.

Why is the simple trip and fall so annoying to appellate courts? What is so offensive about the most mundane of fact patterns? Surely, it's not the injuries, for we have often marveled at the amount of damage falling on an unforgiving slap of concrete can produce. There is no seatbelt to hold you fast when walking; no airbag to cushion your fall. Anyone who has experienced those seconds between the trip and the fall knows exactly what we're talking about.

After *Trincere's carte blanche* to trial by camera, appellate courts were inundated with "trivial defect" appeals, each decided not by a jury, but by four or five appellate judges examining copies of photos in records on appeal. Eegads!

Is that tide turning? Probably not, but we offer *Munasca v. Morrison Management LLC,* 2013 Slip Op 07843 (1st Dep't 11/26/13) nonetheless.

Reversing Supreme Court's grant of summary judgment to defendants, the AppDiv notes that the pictures they submitted "do not unequivocally demonstate that the complained-of defect is trivial as a matter of law[.]" After all the size is not "discernible" and the defect has an "edge." Why, it could constitute a "tripping hazard," now, couldn't it? And there's no evidence of the dimensions of the defect at the time of the accident either. While plaintiff testified the sidewalk flags were raised one inch, that was only an estimate anyway. Plaintiff's fall, of course, took place at a bus stop where "it was difficult to detect the defect." All in all, these frailties in defendants' proof raise factual questions in the AppDiv's mind, plainly requiring a jury trial.

While not even mentioning *Trincere*, the court does go back 13 years to recall *Argenio v. MTA*, 277 A.D.2d 165 (1st Dep't 2000). But the sidewalk defect in *Argenio* was 2" wide, 2" long, 1/4" deep and "of sufficient size to entrap the toe of the sneaker worn by plaintiff." So, what's up? "[T]he presence of an edge . . . poses a tripping hazard render[ing] the defect nontrivial." Where there's a will, there's a way. Edgy, huh?