

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DIANE MILLER,)	
)	
Plaintiff)	
)	
v.)	Civil No. 89-0316 P
)	
UNITED STATES OF AMERICA,)	
)	
Defendant)	

MEMORANDUM DECISION¹

I. INTRODUCTION

This is a Federal Tort Claims Act case, 28 U.S.C. ' ' 2671-80. Jurisdiction is based on 28 U.S.C. ' 1346(b). The plaintiff seeks recovery for personal injuries allegedly sustained when she slipped and fell down the outside steps of the United States Post Office at Brunswick, Maine.

A bench trial was held on March 11, 1991. Presented at that time was all evidence on liability and a portion of the plaintiff's damages evidence. At the urging of the parties, I agreed to decide liability first.²

II. FINDINGS OF FACT

¹ Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

² If the plaintiff prevails on liability, the parties will proceed to take the depositions of Donald D. Kalvoda, M.D., a treating physician, and Daniel Sullivan, a treating physical therapist, and file with the court transcripts of those depositions to complete the record. The matter will then be in order for decision on damages.

I find the following facts bearing on the issue of liability. The United States Post Office at Brunswick, Maine is located on Pleasant Street, a one-way street. To the right of the building is a driveway which is often used by patrons for temporary parking. A dirt path has been created over a portion of the lawn area between the driveway and the front steps to the building from foot traffic generated by those who park in the driveway and walk across the lawn to the stairs. The main entrance to the building, and the only one accessible to the public, consists of two sets of double doors each of which is a step up from a landing which itself is the fifth step up from the pavement which connects to a municipal sidewalk. The stairs are constructed of stone and granite and those between the pavement and the landing are approximately ten feet in width. Affixed to each end of the steps is a metal handrailing. On the curbside of the sidewalk to the right of the driveway are located two post office collection boxes which may be approached either by foot or by car.

On the morning of January 2, 1988, a Saturday, the weather was clear and cold, the temperature ranging between 10° and 29°F. The Brunswick Post Office was customarily very busy on Saturday mornings, typically serving approximately 300 customers between 7:00 a.m. when the lobby was opened for Post Office box patrons and 12:30 p.m. when it was closed.³ The busiest time was between 11:30 a.m. and 12:30 p.m.

³ Customer service windows located off the lobby opened at 8:30 a.m. on Saturdays.

Between 11:30 a.m. and noon the plaintiff, then 33 years old, parked in the driveway next to the Post Office so that she could retrieve her mail from her box inside the lobby.⁴ With her in her car were her mother and two children. Their destination after the stop was the Maine Mall in South Portland. Because the footpath across the lawn was muddy that day, the plaintiff used the sidewalk to access the Post Office stairs. By her observation, even though the lawn area was wet the pavement was quite dry. When she uneventfully ascended the stairs she observed nothing unusual. She did not notice any debris on the steps, nor did she consider them to be in a dangerous condition. She was wearing black leather slip-on shoes with flat leather soles. Thinking it unnecessary, she did not use either handrailing. Instead, she went up the middle of the steps, as was her habit. She was carrying only her car keys.

The plaintiff noticed that the Post Office was very busy with lots of foot traffic on the exterior steps and in the lobby. She recovered her mail and, rather than review it, placed it all in her left hand with her car keys. She then proceeded, unhurried, to leave the building and return to her car. She descended the first step to the fifth-step landing without incident. As she was about to step from the landing down the remaining steps, again without the assistance of a handrail, she felt her right foot slip out from under her, fell backwards and bounced on each lower step landing on the bottom step. In looking around to determine what caused her fall, she noticed a thin layer of rocks and gravel scattered all over the steps, a condition she had not observed on her way out of the building. The stairs were dry and free of all ice and snow.

⁴ The plaintiff, then a 20-year resident of the Brunswick area, had had a box at this Post Office for some years and regularly picked up her mail either during weekday evenings or Saturday mornings.

The Brunswick Post Office usually had two regular maintenance employees on its staff, one of whom worked Thursday through Saturday of each week. Their responsibilities included inspecting the stairs at regular intervals and, on an as-needed basis, sweeping them clear of sand and gravel and other debris that could cause a problem. Recognizing that sand and gravel were problematic, maintenance personnel used calcium chloride flakes exclusively to clear snow and ice.

Post Office personnel were well aware that the path frequented by patrons could get muddy and that in winter people often tracked sand onto the steps regardless of the access route they used.⁵ The Post Office was also aware that it served a large elderly population. In brief, maintenance of the steps was a high priority of the Post Office during the winter season.

At the time of the plaintiff's accident, the regular Thursday through Saturday maintenance position was vacant. This did not mean, however, that the condition of the exterior stairs on those days was ignored. Robert Ney, as manager of mails and delivery for the Post Office and as such third in rank, was in charge of all Post Office operations on Saturdays, a day his two superiors did not work. It was Ney's practice to arrive at the Post Office on Saturdays between 5:00 and 6:00 a.m. At 7:00 a.m., when the lobby was opened for Post Office box patrons, Ney or another employee would negotiate the steps in order to raise the flag at the front of the building. He would at the same time inspect the lobby, steps and sidewalk. If the steps needed to be swept, Ney or another employee would do so. No problem was observed at the time of the 7:00 a.m. inspection on the day of the

⁵ The Town of Brunswick was responsible for maintaining the sidewalk in front of the Post Office. In doing so, it never laid down sand. Despite the Town's maintenance responsibility, Post Office personnel often cleared the sidewalk in front of the building to and including the curbside mail collection boxes to the right of the driveway.

plaintiff's accident. Ney made another visual inspection of the steps at 8:30 a.m. when the customer service windows opened in the lobby. Again, he observed no problem. Ney also testified that Post Office patrons, many of whom were regulars of longstanding, were not at all reticent about notifying a window clerk of any observed problems, including the condition of the steps. Window clerks were instructed to page Ney if any such reports involving the stairs were received whereupon Ney would make a visual inspection. No such reports were received on January 2, 1988. The condition of the steps was also observed by Post Office personnel who traversed them at 8:00 a.m. and two or three additional times during a Saturday morning prior to noon when they emptied the curbside collection boxes. No reports of any dangerous condition involving the stairs was made by such personnel on January 2, 1988. The Post Office received no reports of any slip and fall accidents on that date, or, for that matter, of any such accidents involving the condition of the steps in the two-year period prior to the accident.

III. LIABILITY

Maine substantive law concerning the liability of possessors of land governs this Federal Tort Claims Act case. 28 U.S.C. § 2674; *Everett v. United States*, 717 F. Supp. 917, 921 (D. Me. 1989). Under Maine law, a possessor of land owes a duty of reasonable care to all persons lawfully on the premises. *Erickson v. Brennan*, 513 A.2d 288, 289 (Me. 1986); *Everett v. United States*, 717 F. Supp. at 921. The plaintiff is undisputably such a person.

The Maine Law Court in *Isaacson v. Husson College*, 297 A.2d 98 (Me. 1972), has adopted the analysis in sections 343 and 343(A)(1) of the *Restatement (Second) of Torts* (1965) which provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, ' 343 (1965).

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Id. at ' 343A(1). The possessor of land is thus ``under legal obligation to use ordinary care to insure that the premises are reasonably safe for invitees in the light of the totality of the existing circumstances." *Isacson*, 297 A.2d at 103. The plaintiff has the burden of establishing ``that the condition of which [s]he complains and which exposed [her] to an unreasonable risk of harm was present for a time of sufficient duration prior to the accident to enable the reasonably prudent person to discover and remedy it." *Id.* at 105.

The plaintiff asserts that the government's failure to have removed the rocks and gravel, which accumulated and were present on the Post Office steps when she slipped and fell, caused her accident and her resulting alleged injuries. I conclude that the plaintiff has not sustained her burden of proof under the *Isacson* analysis.

In order for liability to attach, the plaintiff must first establish that a dangerous condition existed at the time of her accident. I find that she has done so. She stated that, from her fallen position on the bottom step, she observed a thin layer of rocks and gravel scattered all over the steps. It appears from photographs of the steps (Govt. Exh. 18) that, in making this statement, the plaintiff

was able to see not only the lower steps but also the landing and the portion of it where she lost her footing. I infer from her testimony that her reported observation included the landing where she slipped.

The plaintiff negotiates the next two hurdles with ease. It is clear from the testimony that the Post Office knew that rocks and gravel or similar debris accumulated on the steps during the winter, even on clear dry days, and concluded that such materials posed an unreasonable risk of harm to its patrons. Likewise, it is apparent the Post Office expected that its patrons either would not discover or realize the danger or would fail to protect themselves against it. No other inferences may be drawn from the facts that the Post Office itself avoided the use of sand and gravel, even to deal with snow and ice, and that it specifically assigned to its maintenance personnel responsibility for making regular inspections of the steps and sweeping them clean of any such material.

I conclude, however, that the plaintiff has failed to establish that the Post Office failed to exercise reasonable care to protect her from the assumed danger. Even though the regular maintenance position which provided for Saturday coverage was vacant at the time of the plaintiff's accident, I find that the procedures in effect for monitoring the condition of the steps that day were adequate to satisfy the defendant's duty of reasonable care. The steps were inspected on the day of the accident at 7:00 a.m. when the main doors were opened for Post Office box patrons and the flag was raised, and again at 8:30 a.m. when the service windows were opened. They were also traversed by Post Office personnel at 8:00 a.m. and on at least two or three other occasions between then and noon when the curbside mail collection boxes were emptied. Those personnel were charged with reporting to Ney, or themselves removing, any dangerous condition they observed on the stairs. In fact, no such condition was either observed by Ney himself or reported by any Post Office employee or patron and no other incident was reported despite the heavy foot traffic at the Post Office that morning.

The Law Court observed in *Isacson* that

[t]he discharge of the duty resting upon the owner or occupier of land to exercise reasonable care for the safety of his business invitees carries with it the necessary implication that the owner or occupier shall have reasonable notice of the need for, and a reasonable opportunity to take, corrective action for the safety of his invitees.

Isacson, 297 A.2d at 105. Even if a sufficient quantity of rocks and gravel had accumulated on the steps, including the landing, at the time the plaintiff used them to pose a hazard, the plaintiff has failed to establish that this condition was present for a sufficiently long time prior to her slip and fall to enable the Post Office to discover and remedy it. Between 7:00 a.m. and the time of the plaintiff's arrival at the Post Office, the steps had been visually inspected by Post Office personnel at least three and more likely four or five times. Understanding Ney's testimony to reveal that the curbside boxes were first emptied at 8:00 a.m. and last emptied just before noon, as well as one or two times in between, and that traffic was heaviest between 11:30 a.m. and 12:30 p.m., I infer that Post Office personnel traversed and inspected the stairs within an hour and a half of the plaintiff's visit. Having done so, I conclude that the Post Office did not have reasonable notice of the need for and a reasonable opportunity to take corrective action to remove debris which accumulated between the last inspection and the plaintiff's accident.

Assuming *arguendo*, in order to complete the *Isacson* analysis, see *Everett v. United States*, 717 F. Supp. at 923, that the plaintiff has satisfied her entire *Isacson* burden, there remains the issue of her comparative fault for her alleged injuries. As the *Isacson* court made clear, a plaintiff "` cannot rely blindly on the presumption of the discharge of one's duty, but must at all times exercise ordinary care for [her] own safety." *Id.* at 103. In asserting a comparative negligence defense, the defendant has the burden of proving, by a preponderance of the evidence, that the plaintiff was causally negligent. *Poulin v. Colby College*, 402 A.2d 846, 851 (Me. 1979).

The plaintiff was, as of the date of the accident, a 20-year resident of the Brunswick area. She also had had a box at the Brunswick Post Office for several years and was a frequent patron. As such she was necessarily familiar with local weather, including typical winter conditions, even on a dry and sunny January day, and with such conditions at and near the Brunswick Post Office. The presence on the steps of a thin layer of rock and gravel was an observable condition both at the time she ascended the stairs and when she exited the Post Office after picking up her mail. A reasonable person in these circumstances would know that the kind of footwear the plaintiff was wearing --slip-on shoes with smooth leather bottoms offering no traction -- was not suited to such conditions. I find that the plaintiff did not act in a reasonably prudent manner either in not noticing the condition of the steps or in attempting to negotiate them in her flats, especially without availing herself of either handrail, and that her own negligence was more responsible for her slip and fall and any resulting injuries than the condition of the steps themselves might have been. Thus, the plaintiff may not recover in this action.

14 M.R.S.A. ' 156.

IV. ORDER

For the foregoing reasons, it is ORDERED that judgment is GRANTED in favor of the defendant.

Dated at Portland, Maine this 13th day of March, 1991.

David M. Cohen
United States Magistrate Judge