

# “OPEN AND OBVIOUS” DEFENSE IN PREMISES LIABILITY CASES: STILL KICKING . . . AND TAKING NAMES

by Arthur Krinsky

## I. UNDERLYING AUTHORITY

Restatement (Second) of Torts § 343, *Dangerous Conditions Known to or Discoverable By Possessor*.

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 provides that an owner or occupant of real estate must exercise ordinary care to keep his property reasonably safe for invitees. *Konicek v. Loomis Brothers, Inc.*, 457 N.W.2d 614, 618 (Iowa 1990); *Chevraux v. Hanas*, 150 N.W.2d 78, 80 (Iowa 1967). Section 343 establishes two corresponding duties:

1. To use reasonable care to discover the condition of the premises, and
2. To use reasonable care to make the premises safe or protect others from the harm that was discovered or should have been discovered in the exercise of the first duty.

## II. LIMITATIONS ON SECTION 343:

1. Liability is not imposed unless the possessor knows or by the exercise of reasonable care would discover the condition (actual or constructive knowledge), and should realize that it involves an unreasonable risk of harm. *Benham v. King*, 700 N.W.2d 314, 317 (Iowa 2005).

2. While the law recognizes a duty to exercise reasonable care to inspect, this does not mean there is a duty to inspect for every possible defect. *Benham v. King*, 700 N.W.2d 314, 317 (Iowa 2005).
3. Because “reasonable care” is not an absolute standard, it contains the concept that a landowner does not guarantee or insure the safety of visitors. *Stover v. Lakeland Square Owners Association*, 434 N.W.2d 866, 872 (Iowa 1989); *Hanson v. Town & Country Shopping Center, Inc.*, 144 N.W.2d 870, 874 (Iowa 1966).

### III. “OPEN AND OBVIOUS” DEFENSE

Restatement (Second) of Torts § 343A, *Known Or Obvious Dangers*, provides:

(1) 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. . . .

Comment *b* to section 343A explains what known and obvious means. It provides: “The word ‘known’ denotes not only knowledge of the existence of the condition . . . , but also appreciation of the danger it involves. Thus the condition or activity must not only be known to exist, but it must also be recognized that it is dangerous . . . ‘Obvious’ means that both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.” *Chevraux*, 150 N.W.2d at 81.

Section 343A means that if an existing condition on the property of an inviter is obvious, that is, if both the condition and attendant risk are *open, visible and apparent and would be recognized by a reasonable person in the position of an invitee*, then the former would not be liable to the latter for physical harm caused him by the condition of the visited premises. *Konicek*, 457 N.W.2d at 618; *Chevraux v. Nahas*, 150 N.W.2d 78, 81 (Iowa 1967).

### IV. LIMITATIONS ON “OPEN AND OBVIOUS” DEFENSE

In some cases, a possessor of land will not be relieved of liability for injuries caused by a known and obvious danger. If the possessor “can and should anticipate that the dangerous condition will cause physical harm to the invitee [despite] its known or obvious danger,” the possessor still owes the invitee a duty. Restatement § 343A cmt. b; *Konicek*, 457 N.W.2d at 618. The possessor’s duty in these circumstances is either to warn the invitee or to make the condition reasonably safe. *Id.* For example, the possessor of land may be liable when:

1. Invitee's attention is distracted, so the invitee will not discover what is obvious;
2. Invitee will forget about the open and obvious condition that the invitee previously discovered; or
3. Invitee merely did not protect himself against the open and obvious condition.

However, the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. (See §§ 466 and 496D.) It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.

#### IV. IS "OPEN AND OBVIOUS" DEFENSE STILL ALIVE?

Recent claims and outcomes.