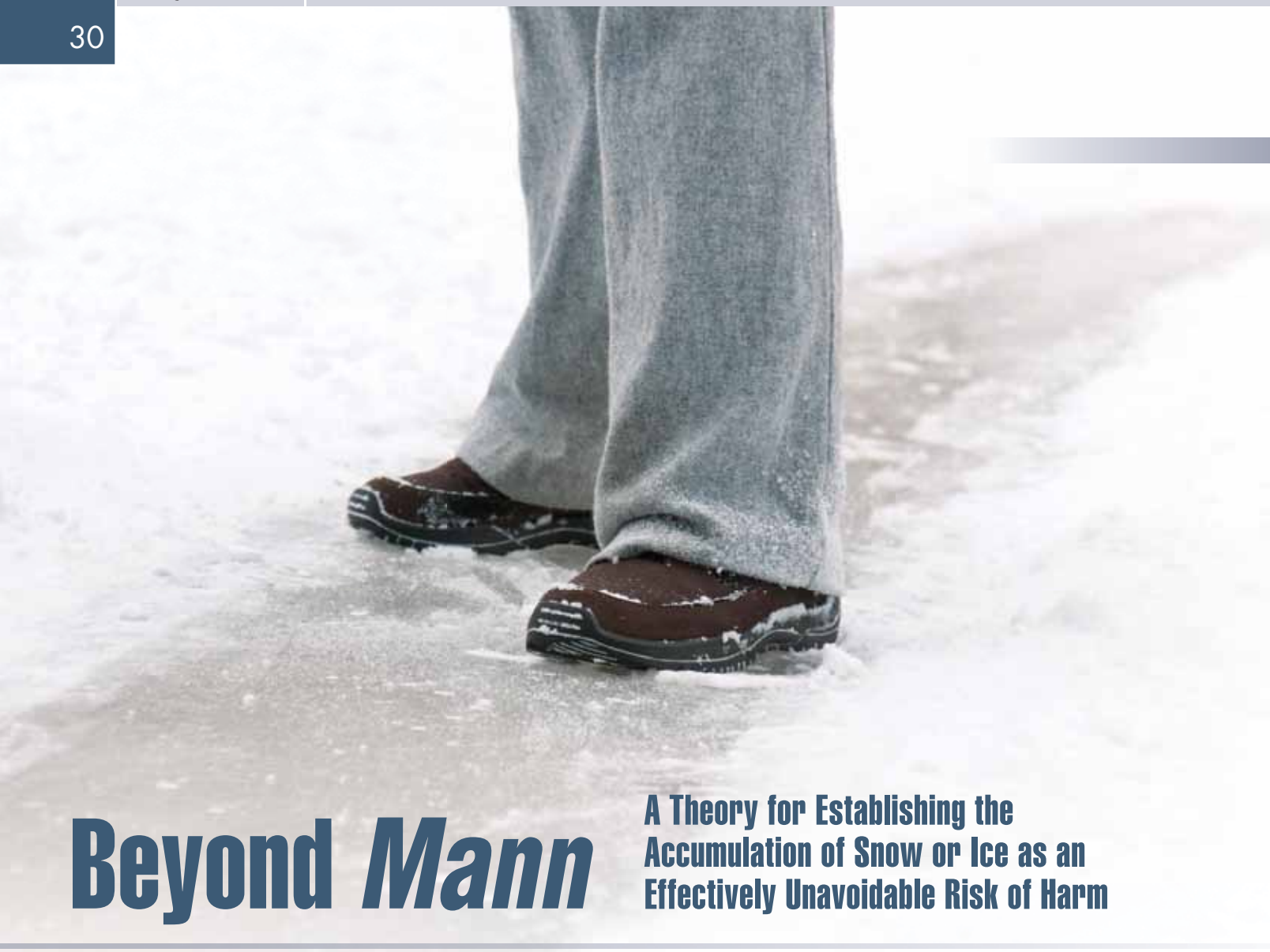

Beyond *Mann*

A Theory for Establishing the Accumulation of Snow or Ice as an Effectively Unavoidable Risk of Harm

By Robert LaBre

After the Michigan Supreme Court's decision in *Mann* to strike down Michigan Civil Jury Instruction 19.05, a blanket of snow or ice is generally considered an open and obvious danger without "special aspects" that would reinstate a landowner's duty to remove these hazards within a reasonable time.[1] As a result, invitees usually have no redress when injured from these obstacles occasioned from a slip and fall. The problem with the decision in *Mann,* however, is that its reasoning did not address whether the accumulation of snow or ice can present an "effectively unavoidable risk of harm"—a special aspect—when these hazards cover a property during accumulation. Assuming that the plaintiff is an invitee, rather than a trespasser or licensee, this article explores whether the danger presented by the accumulation of snow or ice can be analogous to *Lugo*'s standing-water illustration so as to present an effectively unavoidable risk of harm that would reinstate a landowner's duty to warn and remove (or make safe) these obstacles within a reasonable time.

Overview of Special Aspects

Generally, in a landowner liability analysis, once an obstacle is held open and obvious, the duty to warn, remove, or make it safe for an invitee will be reinstated only if "special aspects" exist, which is established if the invitee can prove by a preponderance of evidence that it either (1) is an effectively unavoidable risk of harm or (2) presents an unreasonably high risk of severe harm.[2] The "overriding public policy" for this rule is the Court's wish to "encourag[e] people to take reasonable care for their own safety…."[3] Further, "in a premises liability action, the fact-finder must consider the 'condition of the premises,' not the condition of the plaintiff."[4] Thus, "special aspects" is a two-pronged analysis that focuses solely on the objective nature of the premises and obstacle confronted, not the subjective state of the plaintiff.[5]

FAST FACTS:

The Michigan Supreme Court in *Mann* ruled that a landowner has no duty to remove a blanket of snow or ice for an invitee because they are generally open and obvious dangers without special aspects.

However, the Michigan Supreme Court in *Lugo* said that standing water blocking a landowner's only exit was an effectively unavoidable harm.

The Court in *Mann* overlooked *Lugo*'s standing-water illustration when it struck down former section 19.05 of Michigan's Civil Jury Instructions, which required snow and ice removal within a reasonable time.

When explaining the special aspects doctrine, the *Lugo* Court provided two distinct illustrations, one for each prong.[6] Addressing an "effectively unavoidable risk of harm," the Court stated:

> An illustration of such a situation might involve…a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable.[7]

As to the second category of special aspects, an "unreasonably high risk of severe harm," the Court said:

> [C]onsider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition….[8]

It's important to establish the special aspects doctrine as a disjunctive analysis because the majority in *Mann* never spoke to the effectively unavoidable risk of harm category when it concluded that a blanket of snow or ice covering a property does not present an unreasonable risk of harm. Yet the language and structure within both illustrations of *Lugo* establish that the special aspects doctrine is a disjunctive analysis.[9] *Lugo*'s description of what creates a harm that is considered effectively unavoidable refers to "*[a]n* illustration of such a situation…."[10] Webster's Dictionary defines "an" as the equivalent of the indefinite article of "a" "used as a function word before *singular* nouns when the referent is unspecified."[11] Thus, by using the word "an" the Court was clearly providing only a single example of how special aspects can be established. By contrast, within the illustration of a "risk of severe harm," the Court stated it was a danger that "one would likely be capable of avoiding…."[12] Surely, this statement distinguishes an effectively unavoidable risk of harm as distinctive. Nothing in the *Lugo* Court's discussion suggests that the two prongs were meant to be construed conjunctively, or as interchangeable by using such words as "and."

Since people usually merely bruise their bodies (and egos) after a fall caused from snow or ice rather than suffering "severe harm," the following analysis will focus solely on whether, *as a general rule,* the danger presented by a blanket of snow or ice should be considered an "effectively unavoidable risk of harm." With the common ground that the special aspects doctrine is a disjunctive analysis, the answer plainly can be yes.

Beyond *Mann*

Under *Mann,* a blanket of snow or ice generally lacks special aspects triggering a landowner's duties to either warn of, remove, make safe, or correct the condition within a reasonable time.[13] During the process of creating this rule, the Court struck down section 19.05 of Michigan's Civil Jury Instructions as an inaccurate statement of law.[14] Under section 19.05, it was "the duty of [defendant] to take reasonable measures within a reasonable period of time after the accumulation of snow and ice to diminish the hazard to [plaintiff]."[15] In striking down the jury instruction, the *Mann* Court reasoned:

> Section 19.05 ignores *Lugo*'s "unreasonably dangerous" requirement by imposing an absolute duty on a premises possessor irrespective of whether the accumulation of snow and ice creates "special aspects" making such accumulation "unreasonably dangerous." Such an absolute duty does not exist under *Lugo.*[16]

The Court provided no further reasoning.[17] Under *Lugo,* "unreasonably dangerous" is a term of art referring to both special aspects illustrations at the same time:

> [I]f special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.[18]

Since the majority referred specifically to *Lugo,* it's clear that the definition of "unreasonably dangerous" was neither expanded nor constricted to either create a third prong within the special aspects doctrine or remove the effectively unavoidable risk of harm category from the analysis. Therefore, the unavoidable conclusion is that the majority did not address the standing-water illustration before making its decision. This conclusion is reinforced by Justices Kelly and Weaver's joint, separate opinion:

> Now, unless there are "special aspects" to an accumulation of snow and ice *creating a risk of "severe harm,"* a premises possessor owes no duty to take reasonable measures within a reasonable time to protect invitees….[19]

Plainly, Justices Kelly and Weaver interpreted *Mann* to mean that the accumulation of snow or ice presents special aspects *only if* a risk of severe harm is presented. Because the Court's analysis was incomplete, this gives rise to what is called in logic a "problematic premise," which is established when an "arguer

Because snow or ice blankets a property during accumulation, Michigan residents are "effectively forced to encounter the condition."

fail[s] to present a defense for a premise offered in support of a conclusion in circumstances where there is some specific reason why the premise should not be accepted without a defense."[20] This oversight allows the ability to address this issue and expand the law beyond *Mann*'s holding because *Lugo* doesn't elaborate a rule statement on how an obstacle creates a risk that's "effectively unavoidable." Rather, the analysis is tied to *Lugo*'s standing-water illustration, which applied to a particular circumstance having nothing to do with the accumulation of snow or ice.[21] Thus, it is necessary to consider whether the accumulation of snow or ice can be analogous to *Lugo*'s standing-water illustration.

First, under *Lugo,* only the objective nature of the premises is to be observed in a landowner liability analysis once the plaintiff's status as an invitee is confirmed.[22] Therefore, the following factors previously considered by Michigan courts are irrelevant to this inquiry because they dealt with the subjective aspects of the plaintiff's presence on the property, such as (1) whether an invitee is entering or exiting the premises,[23] (2) the purposes for which the invitee was on the landowner's premises,[24] (3) the degree of care used by the invitee when crossing over the obstacle,[25] or (4) whether the invitee could have returned to the premises on a different day.[26]

Now, because the "effectively unavoidable risk of harm" prong has not been elaborated in detail, we can only draw reasonable conclusions from what the standing-water illustration fails to say just as much as from what it says. That is the same interpretive approach the Court used in *Brousseau:*

> Defendant's argument that the [obstacle] was avoidable because the plaintiff had the alternative to call his employer or asking defendant to have its employees remove the mound is misplaced. *We note that the hypothetical plaintiff in the* Lugo *example surely could have not exited the building and instead asked an employee to clean up the water.*[27]

Lugo's standing-water illustration makes apparent that the invitee must confront an obstacle to some degree. However, the illustration does not state that the standing water is present from wall to wall;[28] thus, it's not unreasonable to assume that there could be pockets of dry surface, but the obstacle itself must be confronted. Additionally, the water's depth is not provided.[29] Furthermore, the example doesn't assert if the water must be formed before or after the invitee arrived or whether the water formed due to the landowner or other natural causes.[30] All we know is that water is present on the landowner's premises, and that the invitee must confront it to some degree. Accordingly, pockets of dry surface would still create landowner liability because requiring an invitee to play hopscotch to avoid the danger is an unreasonable interpretation of the illustration. Additionally, we need not require snow or ice to reach a certain depth to establish that a danger is posed.[31] Furthermore, it's apparent that the natural accumulation of snow or ice before or after the invitee arrives on the premises is irrelevant. Finally, because snow or ice blankets a property during accumulation, Michigan residents are "effectively forced to encounter the condition."[32]

The foregoing conclusions are similar to Judge Shapiro's basis for dissent in *Walder.*[33] In *Walder,* the defendant, a church, removed snow from its front parking lot and sidewalk leading to the main entrance upon initial accumulation.[34] But later, some of the snow melted because of warmer weather, leaving standing water.[35] When the temperature dropped below freezing, the water covering the parking lot and sidewalk became a layer of ice with pockets of dry surface.[36] The defendant conceded to never salting the areas afflicted with ice.[37] The plaintiff, a 74-year-old woman on her way to play bingo, "parked in one of the parking spots reserved and marked for handicap parking on the front side of the church" because "she had health problems for which she was prescribed a handicap parking tag…."[38] "There [was] no dedicated walkway or sidewalk by which plaintiff…could avoid" crossing the icy areas.[39] The plaintiff slipped and fell on her second step toward the church's main entrance, suffering "a bimalleolar fracture of her right ankle."[40] "[S]urgery was required, and a plate and 10 screws were internally affixed to her ankle bones in order to reconstruct the joints."[41] The majority in *Walder* held that no special aspects were present because "the parking lot and the sidewalk area were [not] completely covered with ice, as was the situation in *Robertson v Blue Water Oil Co*…."[42] By contrast, Judge Shapiro in his dissent said:

> To be effectively unavoidable, a hazard is not required to make everyone, or even a high percentage of those who traverse over it,

> fall. Rather, it simply means that everyone must traverse over or though it, such that there is no way to avoid the risk of falling.
>
> ….
>
> More important, I disagree with the suggestion that, in order for ice to be actionable as an effectively unavoidable hazard, it must be continuous and completely cover the entire surface of the parking lot. I do not agree that the duty to make generally icy premises reasonably safe disappears because invitees might be able to leap from non-icy area to non-icy area through a parking lot.[43]

As stated before, *Lugo*'s standing-water illustration does not articulate whether the water is present from wall to wall so as to "completely cover" the premises. All we know is that the plaintiff must confront the obstacle to some degree. In filling this gap in the law, however, it does not appear "sensible to encourage [our society] to leap over icy stretches of parking lot rather than encourage commercial premises owners to apply salt to their lots…." as a matter of public policy.[44]

It may be said that the accumulation of snow by itself does not meet the special aspect requirement because it is not usually as slippery as ice. But this suggestion is weakened once the risk of danger presented by snow is compared to the risk of danger presented by standing water. Standing water, by itself, is not necessarily slick, but, due to its nature, it might be. Compare the previous to the holding in *Ververis:* "a snow-covered surface presents [a]… danger *because of the high probability that it may be slippery.*"[45]

Conclusion

The accumulation of snow or ice should constitute an effectively unavoidable risk of harm because these dangers usually present factual circumstances analogous to *Lugo*'s standing-water illustration when covering a property. Both dangers are open and obvious and generally don't present an unreasonable risk of severe harm. Both dangers are usually slippery, though not necessarily so. Furthermore, there's no alternate route to avoid snow and ice because it covers the property in which it accumulates. Finally, reinstating a landowner's duty to warn of, remove, or make these hazards safe within a reasonable time for an invitee is a just result because it creates *mutual* responsibility between the parties, and it's the most efficient method to prevent injury to a class historically provided the highest degree of care and respect while on the premises.[46] ■

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FOOTNOTES

1. *Mann v Shusteric Enterprises, Inc,* 470 Mich 320, 332–333; 683 NW2d 573 (2004); see also *Robertson v Blue Water Oil Co,* 268 Mich App 588, 593; 708 NW2d 749 (2005).
2. *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 518–519; 629 NW2d 384 (2001).
3. *Id.* at 522, quoting *Bertrand v Alan Ford, Inc,* 499 Mich 606, 616–617; 537 NW2d 185 (1995).
4. *Mann,* 470 Mich at 329, citing *Lugo,* 464 Mich at 518, n 2.
5. *Id.*
6. *Lugo,* 464 Mich at 518–519.
7. *Id.* at 518.
8. *Id.*
9. *Id.*
10. *Id.* (emphasis added).
11. *Id.* at 1 (emphasis added).
12. *Id.*
13. *Mann,* 470 Mich at 332–333; see also *Robertson,* 268 Mich App at 593.
14. *Mann,* 470 Mich at 332.
15. *Id.* at 325, n 4.
16. *Id.* at 332–333 (emphasis added).
17. *Id.*
18. *Lugo,* 464 Mich at 517.
19. *Mann,* 470 Mich at 345 (Kelly & Weaver, JJ, concurring in part and dissenting in part) (emphasis added).
20. Johnson & Blair, *Logical Self-Defense* (New York: Int'l Debate Ed Ass'n, 2006), p 78.
21. See *id.* (the Supreme Court has *never* elaborated a rule statement on what's considered an effectively unavoidable risk of harm).
22. *Mann,* 470 Mich at 329, citing *Lugo,* 464 Mich at 518, n 2.
23. See *Brousseau v Daykin Elec Corp,* 468 Mich 865; 657 NW2d 720 (2003) (Markman, J, dissenting) (rule defeats his argument); *Joyce v Rubin,* 249 Mich App 231, 242; 642 NW2d 360 (2002) (failed to take rule into consideration).
24. See *Eckout v Kroger Corp,* unpublished opinion per curiam of the Court of Appeals, issued March 20, 2007 (Docket No. 267102); *Brennen v CBP Fabrication, Inc,* unpublished opinion per curiam of the Court of Appeals, issued June 20, 2006 (Docket No. 267094); *Becker v Glaister,* unpublished opinion per curiam of the Court of Appeals, issued January 22, 2009 (Docket No. 281481) (these unpublished cases are incorrectly reasoned).
25. *Lugo,* 464 Mich at 524.
26. *Joyce,* 249 Mich App at 242 (failed to consider rule).
27. *Brousseau v Daykin Elec Corp,* unpublished opinion per curiam of the Court of Appeals, issued June 7, 2002 (Docket No. 225880), p 3, n 4, aff'd, 468 Mich 865; 657 NW2d 720 (2003) (emphasis added).
28. *Lugo,* 464 Mich at 518.
29. *Id.*
30. *Id.*
31. See *Allison v AEW Capital Mgmt, LLP,* 481 Mich 419, 430; 751 NW2d 8 (2008) (reasoning would be incorrect if *Lugo* applied instead of MCL 554.139); see also *Belhabib v J&B of Michigan, Inc,* unpublished opinion per curiam of the Court of Appeals, issued June 17, 2008 (Docket No. 278380), p 4 (assertion that ice is a necessary obstacle and that the ice must completely cover the premises is incorrect).
32. *Joyce,* 249 Mich App at 243.
33. *Walder v St John the Evangelist Parish,* unpublished opinion per curiam of the Court of Appeals, issued September 27, 2011 (Docket No. 298178), pp 1–4 (Shapiro, J, dissenting).
34. *Id.* at 1.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 2 (majority decision).
43. *Id.* at 3 (Shapiro, J, dissenting).
44. *Id.* at 4.
45. *Ververis v Hartfield Lanes,* 271 Mich App 61, 67; 718 NW2d 382 (2006) (emphasis added).
46. *Quinlivan v Great Atlantic & Pacific Tea Co, Inc,* 395 Mich 244, 256; 235 NW2d 732 (1975).