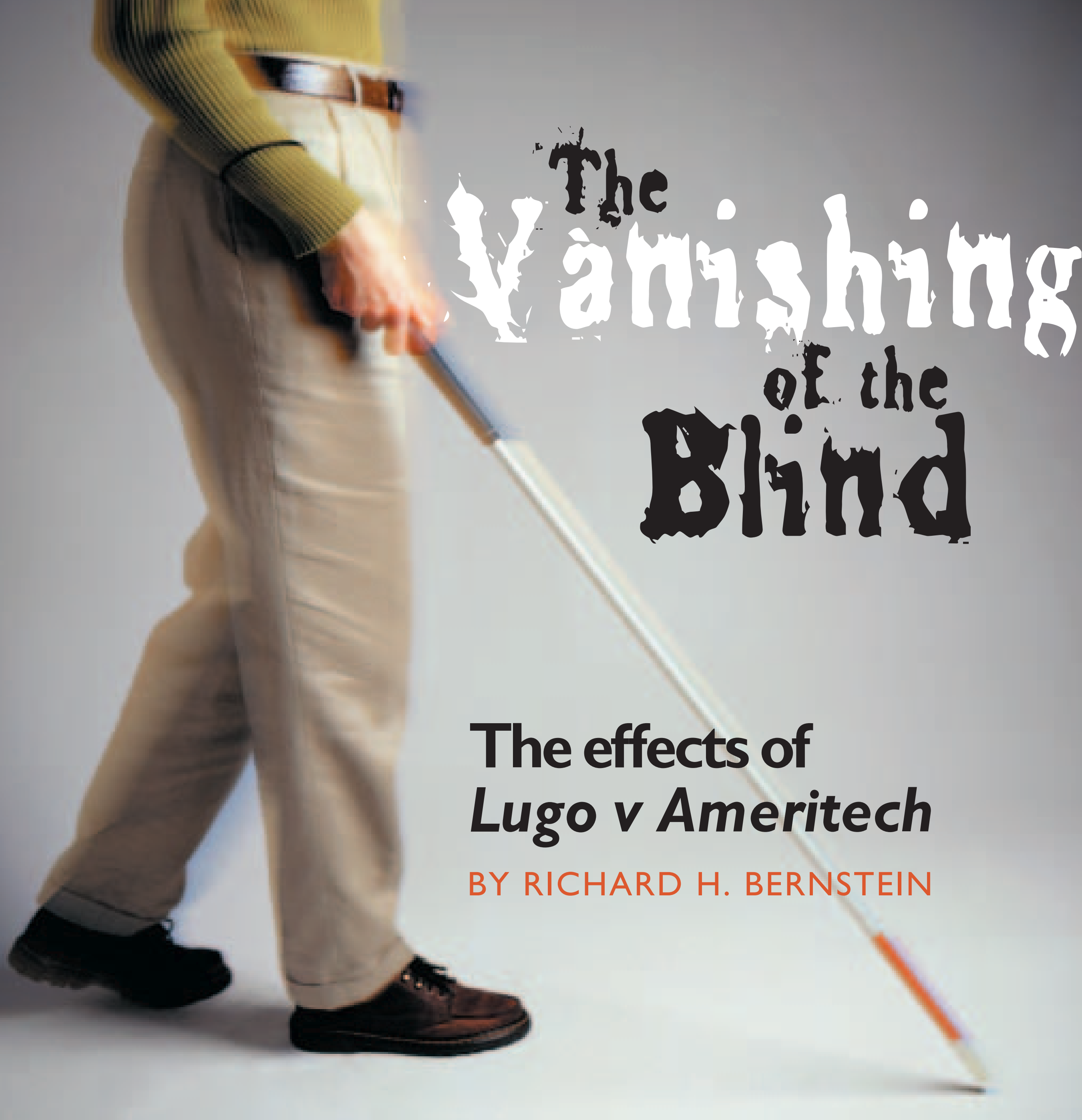

The Vanishing of the Blind

The effects of *Lugo v Ameritech*

BY RICHARD H. BERNSTEIN

"You shall not place a stumbling block in front of a blind man."[1]

In the past, Michigan jurisprudence treated disabled persons in a fair manner. In personal injury actions, a court took into account the fact that a deaf individual could not hear a warning siren, that a paraplegic could not step over a barrier, and that a blind man could not see danger in his path.

Unfortunately, recent judicial decisions effectively repudiated this common-sense approach. Drastic changes in the rights of blind injury victims who bring premises liability claims illustrate this dangerous trend.

At the outset, I should explain my personal perspective. I am a practicing attorney who concentrates on advocating for disadvantaged and disabled individuals.

I am also blind. Rather than dwelling on my limitation, I would rather be known for my capabilities and accomplishments.

This article, however, draws from both aspects of my life—as a legal practitioner and a blind individual.

Traditionally, jurists did not regard a blind person as negligent for accidentally encountering hazards that could be avoided by a sighted person.

According to a venerable legal scholar, this rule simply affirmed the ability and rights of the disabled "to live in the world."[2]

Rights

Many years ago, a New York court eloquently observed that "blindness of itself, is not negligence, any more than the obscurity of sight by the absence of light."[3]

In other words, *all* are blind when the lights are off. At times, everyone has to walk in the dark. Under these circumstances, a sighted individual is expected to exercise the same caution as one without vision.

Sadly, Michigan courts are disregarding this eminently sensible view. Instead, appellate panels have dismissed claims by injured blind persons against negligent property owners, by requiring those who lack vision to avert hazards apparent only to a hypothetical "reasonably prudent *sighted* person."

As a general rule, a plaintiff prevails in a premises liability action by proving that the defendant premises owner owed a duty to the injured victim, that the defendant breached that duty, and that the breach caused the plaintiff's injury. The defendant may escape liability, by showing that the plaintiff failed to use the caution of a reasonably prudent person, in perceiving and avoiding "open and obvious" danger.

While the "open and obvious" defense may seem conceptually sound, the following decisions show how its application has become downright absurd.

In *Lugo v Ameritech Corp, Inc*,[4] the Michigan Supreme Court denied the claim of a woman who was injured as she walked across a parking lot. The parking lot owner escaped liability, because the plaintiff was watching out for moving vehicles and did not see the pothole that caused her to trip and fall. According to the *Lugo* Court:

> *[I]t is important for courts deciding summary disposition motions in open and obvious cases to focus on the* ***objective nature of the condition of the premises*** *at issue,* ***not on the subjective care used by plaintiff.***[5]

The impact of this new standard, which focuses on the condition of the property and ignores the condition of the victim, is shown in subsequent cases.

In *Lauff v Wal-Mart*,[6] an elderly blind woman broke her hip when she slipped and fell on wet debris in the designated "handicapped" restroom stall of a Michigan department store. A federal judge dismissed her premises liability claim, after finding that Michigan case law prohibited any consideration of the fact that the woman could not see the litter on the restroom floor. The court observed:

> *Unfortunately, Plaintiff was unable to see this condition because of her blindness, but this condition would have been open and obvious to an ordinarily prudent person.*[7]

Earlier this year, the Michigan Court of Appeals also decided to hold a blind person subject to the standard of a *sighted* person. In *Sidorowicz v Chicken Shack*,[8] unpublished opinion per curium (Docket No 239627), a blind man, whose multiple sclerosis also impaired his gait, could not recover for an injury in a restaurant, when he slipped and fell on a pool of water on its floor. The *Sidorowicz* panel summarized the effect of *Lugo* on the disabled, as follows:

> *Plaintiff argues that the hazardous condition was not open and obvious to him because he was legally blind. However, the Michigan Supreme Court has rejected plaintiff's argument. . . .*
>
> ***By focusing on the unsafe condition before the plaintiff is injured, the*** **Lugo Court** ***rejected any consideration of "special aspects of the plaintiff."***[9]

In other words, if you are blind or have other physical limitations, you leave your house at your own risk. If a store, restaurant, or office building fails to promptly remove a dangerous condition, it is your fault if you get hurt when you encounter it.

This situation is not only unfair, but also undermines current statute, the Michigan Persons With Disabilities Civil Rights Act,[10] which provides the disabled with the right to freely and fully participate in our society.

Among other things, this statute requires a building owner to mark its elevator buttons with Braille, so that I can locate the right floor. At the same time, *Lugo* protects the building owner, if its elevator car stalls on another floor and I step through an open door into an empty elevator shaft.

Troubling questions also arise about other common hazards. Does a motorist still have a duty to yield to a blind person who inadvertently strays outside a crosswalk? Does a construction company have an obligation to put barricades around its work site? Will irresponsible persons see *Lugo* as an opportunity to ignore hazards they create or control? Will this ultimately increase the danger for the disabled, as well as other citizens, as they go about their daily activities in the real world?

Surely, the Michigan Supreme Court did not intend its decision to be applied to the blind in such a Draconian manner, in contradiction of long-standing legal principles and existing law. There is an urgent need to revisit this ruling, to ensure fair consideration of the individual capability of an injured victim. ✦

Fast Facts:

As a general rule, a plaintiff prevails in a premises liability action by proving that the defendant premises owner owed a duty to the injured victim, that the defendant breached that duty, and that the breach caused the plaintiff's injury.

Michigan appellate courts now hold a blind person subject to the standard of a sighted person.

This situation undermines the Michigan Persons With Disabilities Civil Rights Act and long-standing common law precedents.

Richard H. Bernstein works as an attorney at the Law Offices of Samuel I. Bernstein and serves as a member of the Wayne State University Board of Governors.

Footnotes

1. Leviticus 19:14.
2. Prosser, Torts (4th ed), § 32.
3. *Harris v Uebelhoer*, 75 NY 169 (1878).
4. 464 Mich 512; 629 NW2d 384 (2001).
5. Id. at 523–24 (emphasis added).
6. 2002 US Dist LEXIS 19080 (WD Mich).
7. Id. at *12.
8. 2003 Mich App LEXIS 107.
9. Id. at 5, 7.
10. MCL 37.1101 et seq.