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Premises Liability

Mode of Operation and Burden Shifting

by Brian R. Lehrer

It is the most basic of lawsuits: A person walks into a supermarket and slips on a grape. A grape should not be on a floor where a person can slip on it, so the only issue in the case is what damages the plaintiff is entitled to, right? Wrong.

Usually, a plaintiff who alleges a dangerous condition against the owner of a business premises must establish actual or constructive notice of the condition. However, there are two legal doctrines that relieve a plaintiff of this burden, and require the defendant to defeat an inference of negligence. This article will address those doctrines.

The law concerning premises liability for business owners is straightforward. Business owners owe invitees a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation.[1] The duty of care requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in a safe condition, and to avoid creating conditions that would render the premises unsafe.[2] In most cases, an injured patron asserting a breach of that duty must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident.[3] However, there are exceptions to this rule.

In *Bozza v. Vornado, Inc.*, the New Jersey Supreme Court first approved a rationale that plaintiffs are relieved of the burden of proving notice in circumstances in which, as a matter of probability, a dangerous condition is likely to occur as a result of the nature of the business, the property's condition or a demonstrable pattern of conduct.[4] In *Bozza*, the plaintiff slipped on some substance in a cafeteria. The cafeteria was a self-service operation, and the Court pointed out that spillage by customers was a hazard inherent in that type of business operation. As a result, the Court held that when it is the nature of the business that creates the hazard, the inference of negligence raised shifts the burden to the defendant to negate the inference by submitting evidence of due care.

The Court next addressed this issue in the more well known case of *Wollerman v. Grand Union Stores*.[5] In *Wollerman*, the plaintiff was shopping for green peppers in the vegetable section of the defendant's supermarket. The produce was sold from open bins on a self-service basis. She slipped and fell when she stepped on a string bean. At trial, the plaintiff's proofs did not show how the bean fell to the floor, nor how long it was there before her fall. The trial court dismissed her case and the Appellate Division affirmed. The Supreme Court reversed.

The Court noted that judgment was entered against the plaintiff because it was possible another customer dropped the bean, and dropped it so near the moment of the accident that the defendant supermarket, though diligent, could not have been aware of it. However, the Court pointed out that when greens are sold from open bins on a self-service basis, there is the likelihood that some will fall or will be dropped to the floor. If the store chooses to sell its product in this manner, the store must do what is reasonably necessary to protect the customer from the risk of injury that the mode of operation is likely to generate. The Court held that based upon the defendant's mode of operation, the probability was sufficient to permit an inference that the defendant did less than its duty demanded, and thus it was appropriate to place the onus of producing evidence upon the party who was possessed of superior knowledge or opportunity for explanation of the causative circumstances.[6]

Thus, the *Bozza* and *Wollerman* courts provided an exception to the general rule that a plaintiff is required to prove actual or constructive notice of a dangerous condition before being able to proceed with a suit. That is, where the proprietor's mode of operation creates the likelihood that either employees or customers will do something to create an unreasonable condition, the plaintiff is relieved of the burden of proving notice and the defendant has the burden of rebutting with proof that it took prudent and reasonable steps to avoid the potential hazard. The *Wollerman* charge is presently enshrined in the model jury charges.[7]

The proprietor's mode of operation is not the only basis on which New Jersey courts have found that a plaintiff is relieved of the burden of demonstrating notice of a dangerous condition. In *Smith v. First National Stores*, the Appellate Division relieved a plaintiff of proving notice where the defendant had created the dangerous condition— although not through its mode of operation.[8]

In *Smith*, the plaintiff was shopping in the defendant's supermarket. He went to the men's room and as he went up the stairwell his foot slipped on the step and he fell. The case was tried to verdict and the plaintiff lost. The Appellate Division reversed, noting there was evidence the meat department of the store was about five feet away from the foot of the stairway, and there was evidence that prior to the accident sawdust was commonly observed on the stairway, which could have come from the produce department or from the meat department. There was also evidence the stairway was used by store employees to reach restrooms.

The court noted it was inferable the presence of sawdust on the stairway was attributable to employees, and any danger that may have existed was created by the defendant's employees. The Appellate Division reversed on the basis that the plaintiff was not obligated to prove actual or constructive notice, because such notice is not required where a defendant, through its agents and employees, creates a dangerous condition. The failure of the trial court to so instruct the jury mandated reversal.

Although there are two theories of burden shifting, mode of operation cases continued to proliferate. In *Craggan v. IKEA*, the Appellate Division applied the doctrine to reverse the dismissal of a case where a contracted delivery driver became entangled on discarded string the defendant provided to customers to secure merchandise removed from the store.[9] The Appellate Division rejected the defendant's argument that the plaintiff's status as an independent contractor rather than a customer relieved it of the mode of operation burden-shifting doctrine.

In *Ryder v. Ocean County Mall*, the Appellate Division reversed a directed verdict for the defendant in the plaintiff's action for injuries suffered when she slipped on a spilled drink outside the food court area while holiday shopping.[10] The Appellate Division found the defendant did not restrict the carrying of food and drink anywhere in the common areas of the mall, and therefore became the functional equivalent of a cafeteria.

In *Nisivoccia v. Glass Gardens*, the Supreme Court again addressed the mode of operation doctrine.[11] In *Nisivoccia*, the plaintiff slipped when she stepped on a grape approximately three feet from the entry of the supermarket checkout aisle. At trial, the court refused to give a *Wollerman* charge. The trial judge reasoned the accident did not occur in the supermarket's produce aisle, nor did it occur close enough to the checkout cashier to have constituted part of the self-service operation. The defendant was granted a directed no cause verdict because the plaintiff had not produced any evidence of the store's actual or constructive notice of the dangerous condition. The Supreme Court reversed.

The Court pointed out the store manager had acknowledged that grapes may fall onto the store floor when being handled by either customers or store employees, and this tended to happen at the two locations where the grapes were handled most frequently, in the produce aisle and at the checkout area. The Court held that the trial judge took a restrictive view of what constituted the "checkout area," and failed to take into account the fact that grapes can be expected to roll if they fall to the ground. The Court thus held that the "mode of operation" here included the customer's necessary handling of goods when checking out, an employee's handling of goods during checkout and the characteristics of the goods themselves and the way in which they were packaged. While the plaintiff was entitled to an inference of negligence shifting the burden of production to the defendant, the Court reiterated that the ultimate burden of persuasion always remains with the plaintiff.

The mode of operation doctrine was most recently addressed in *Prioleau v. Kentucky Fried Chicken*.[12] In *Prioleau*, the Appellate Division distinguished mode of operation liability from liability imposed when an owner creates a dangerous condition on premises.

In *Prioleau*, the plaintiff stopped to eat in a Cherry Hill Kentucky Fried Chicken restaurant in the midst of a torrential rainstorm. She entered the premises and headed toward the restroom, where she slipped on the floor. She testified there was grease mixed with water on the floor. During trial, testimony was elicited that grease was used in the kitchen operations and that employees could get oil on their footwear and possibly track it to the same restrooms used by the customers. The case was tried to verdict. During the charge conference, the defendants objected to the inclusion of a mode of operation liability charge. The judge overruled the objection and included the doctrine in the jury's instructions. The plaintiff was awarded a damages verdict against the defendant. The Appellate Division reversed.

The court noted that proof of a fall alone is not enough to create an inference of negligence, because the mere existence of a dangerous condition does not, in and of itself, establish actual or constructive notice.[13] The proofs as a whole were sufficient to allow a rational jury to evaluate whether the condition on the floor existed for a long enough time that the defendants would have had notice had they exercised reasonable attention to inspect the floor's condition, but that did not

trigger the mode of operation doctrine.

> Our review of the authority applying mode of operation liability does not support a conclusion that the doctrine applies merely because a defendant operates a type of business. Rather, the unifying factor in reported opinions is the negligence results from the business' method of operation, which is designed to allow patrons to directly handle merchandise or handle products without intervention from business employees, and entails an expectation of customer carelessness. When mode of operation liability has been applied, courts have examined whether the defendant's identified business operations encompassed self-service facilities that led to a risk of harm to the plaintiff.[14]

The Appellate Division emphasized the parameters of mode of operation liability are extremely fact sensitive. It rejected the notion that mode of operation liability applies merely because a defendant operates a fast food restaurant. It held the plaintiff must establish a causal nexus between the fast food or other business operation and the harm causing her injury. The defendant's fast food operation had no relationship whatsoever to the plaintiff's fall. There was no link between the manner in which the business was conducted and the alleged hazard. There was no testimony that showed the alleged wet/greasy floor was the result of a patron-spilled drink or dropped food. There was no evidence the restaurant's floor was ill-kept, strewn with debris or laden with overflowing trash.

The court held that mode of operation liability is distinguishable from liability imposed when an owner creates or fails to remove a known dangerous condition on its premises, such as that found in *Smith*. To trigger mode of operation liability, a plaintiff must identify facts showing a nexus between the method or manner in which the business is operated when extending products or services to the public and the harm alleged to have caused the plaintiff's injury.

The *Prioleau* court's discussion of mode of operation liability as opposed to the defendant's conduct creating a dangerous condition is vital to an understanding that there are two separate strains of burden shifting in premises liability cases. While both theories shift the burden to the defendant, the proofs required are vastly different. Mode of operation liability requires proof of a process or practice that gives rise to the doctrine, while the creation of a dangerous condition argument requires specific proofs on the specific day of the accident. The *Prioleau* court held the plaintiff could not identify a business practice that created an implicit or inherent danger likely to cause the injury the plaintiff sustained.[15]

Fall-down accidents on commercial premises are among the most frequently litigated personal injury cases. Actual or constructive notice is always a major hurdle for a plaintiff to overcome. Where burden shifting is unavailable, the use of experts, requests for safety and cleaning manuals and specifically tailored discovery demands may help a plaintiff's lawyer vault the hurdle of the notice requirement.[16] Even with a successful burden-shifting theory, the burden of persuasion always remains with the plaintiff in fall-down cases. Nonetheless, practitioners should be aware of the mode of operation theory of *Wollerman* and the burden-shifting theory of *Smith*. The two theories require different proofs and different focuses, but both should be examined in any fall-down case.

Endnotes

1. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426 (1993).
2. *O'Shea v. K. Mart Corp.*, 304 N.J. Super. 49 (App. Div. 1997).
3. *Brown v. Racket Club of Bricktown*, 95 N.J. 280 (1984).
4. *Bozza v. Vornado, Inc.*, 42 N.J. 355 (1964).
5. *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426 (1966).
6. *Wollerman, citing Kahalili v. Rose Cliff Realty, Inc.*, 26 N.J. 595 (1958).
7. *See* Model Jury Charges (Civil) Section 5.20(F)(11).
8. *Smith v. First National Stores, Inc.*, 94 N.J. 462 (App. Div. 1967).
9. *Craggan v. IKEA*, 332 N.J. Super. 53 (App. Div. 2000).
10. *Ryder v. Ocean County Mall*, 340 N.J. Super. 504 (App. Div.), *certif. den.*, 170 N.J. 88 (2001).
11. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559 (2003).
12. *Prioleau v. Kentucky Fried Chicken, Inc.*, 434 N.J. Super. 558 (App. Div. 2014).
13. *See generally, Arroyo v. Durling Realty, LLC*, 433 N.J. Super. 238 (App. Div. 2013).
14. *Prioleau, supra*, 434 N.J. Super. at 574 (App. Div. 2014).
15. Similarly in *Znoski v. Shop Rite Supermarkets, Inc.*, 122 N.J. Super, 243 (App. Div. 1973), the Appellate Division rejected application of mode of operation liability where the plaintiff was injured by a youth who failed to control a metal shopping cart provided to customers by the defendant.
16. *See generally*, Retail Stores, Risk and *Res Ipsa*, Thomas Vesper, Esq., Bill Julio, Robert Loderstedt and Dan Fedeli, *Trial Magazine*, Premises Liability Issue, August 2013, Vol. 49 No. 8, an article that contains an extensive discussion of the use of multiple theories in prosecuting fall-down cases in retail stores and contains different tips for prosecuting these types of cases.

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