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Developments In *Sheehan*'s "Mode Of Operation" Rule:

WHAT STOREKEEPERS AND THEIR INSURERS CAN DO TO MINIMIZE LIABILITY

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It has been two years since *Sheehan v. Roche Brothers Supermarkets* was decided, and several court decisions have been rendered which appear to limit the scope of the "mode of operation" rule. This article discusses the ensuing limitations, and what storekeepers and their insurers can do to minimize liability.

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Although the "mode of operation" rule assumes that customers will be careless by dropping items onto the floor, customers are still required to exercise caution for their own safety, and to avoid dangers that are open and obvious. Customer A's "foreseeably" spilling an item on the floor does not give Customer B a free pass for failing to see it.

Introduction

The 2007 decision of the Supreme Judicial Court in *Sheehan v. Roche Brothers Supermarkets, Inc.*[1] significantly altered the legal landscape for premises liability in slip and fall cases.

Under the "mode of operation" rule adopted by *Sheehan*, the plaintiff is no longer required to prove that the store owner or its employees had actual or constructive notice of the dangerous condition upon which he or she fell.[2] Instead, liability attaches if the plaintiff proves that "the owner could reasonably foresee or anticipate that a foreseeable risk stemming from the owner's mode of operation could occur," and that the owner failed to exercise "reasonable care in maintaining the premise in a safe condition commensurate with these foreseeable risks."[3]

In the Court's view, spillage and breakage caused by careless customers in self-service stores, as well as their "focus on displayed items that are arranged specifically to attract their attention, often making them unaware of what might be on the floor," mandated the adoption of a standard of reasonable foreseeability instead of constructive or actual notice.[4]

It has been two years since *Sheehan* was decided, and courts have rendered a number of decisions which appear to limit the scope of the "mode of operation" rule. What lessons can storekeepers learn?

This article examines the limitations on the "mode of operation" rule, and what storekeepers and their insurers can do to minimize liability.

Background

Under the traditional premise liability approach, where an allegedly unreasonably dangerous condition causes a business visitor to fall and sustain injuries, he or she must prove the negligence of the store by proof that: (1) the store caused the condition; (2) the store had actual knowledge of the condition; or (3) the condition was present for such a length of time that the store should have discovered and cleaned it.[5]

PRACTICE POINT

The SJC went out of its way to clarify that the "mode of operation" rule does not hold store owners strictly liable to all plaintiffs involved in slip-and-fall accidents on their premises. An owner is only liable if the owner could reasonably foresee that a dangerous condition exists and failed to take adequate steps to forestall resulting injuries. Further, a plaintiff is still required to present evidence supporting his or her case, and has the burden of persuading the judge or jury that the owner acted unreasonably in the circumstances.[10]

In *Sheehan*, a plaintiff customer was injured when he slipped and fell on a grape located on the front aisle near a service counter of the defendant grocery store, which had displayed grapes in the produce department in a manner easily accessible to patrons.[6] The Superior Court granted summary judgment for the defendant store, ruling that the plaintiff could not establish that the store had prior notice of the hazardous condition where there was no evidence as to when the grape had fallen and its appearance did not indicate its presence on the floor for such time that the store should have been put on notice.[7] Adopting the "mode of operation approach" to premises liability, the Supreme Judicial Court ("SJC") reversed the Superior Court decision.[8]

Under the new "mode of operation" rule adopted by the SJC, the Court removed the burden on the plaintiff to prove that the storekeeper had actual or constructive knowledge of the dangerous condition, if such a condition is reasonably foreseeable, and relates to the owner's self-service mode of operation. Instead, the plaintiff may still make out a *prima facie* case of negligence if the plaintiff can prove that his or her injury was attributable to a reasonably foreseeable dangerous condition on the owner's property that is related to the owner's self-service mode of operation.[9]

What Limitations Apply To The "Mode Of Operation" Rule?

Case law since *Sheehan* clarifies several important limitations on the scope of the "mode of operation" rule:

- The rule only applies to self-service grocery stores and retailers. (Condominiums and other businesses are not subject to the rule.[11])
- The rule requires careless handling or displaying of products, or other forms of third-party interference. (For example, the rule does not apply to slip and fall accidents involving snow and ice, or inclement weather.)
- The rule only applies to reasonably foreseeable and regularly occurring risks.

Rule Requires Careless Handling Or Displaying Of Products

For the "mode of operation" rule to apply, the plaintiff bears the burden of proving that the substance upon which he or she fell came to be on the floor due to the storeowners' customers' careless handling of products or containers, or the store's careless displaying of product.

In *Sheehan*, the plaintiff slipped on a small piece of grape and clear liquid, in a section of the store "where grapes were packaged in individually sealed bags, easily opened by the hand, located on a tiered display table, surrounded by mats, in the produce department."[12] The store's mode of operation, that is, the method of displaying the fruit, and its accessibility to customers, therefore created the risk of an errant grape rolling to the floor and causing a hazardous condition.

However, a slip and fall accident on puddle of water, for instance, is not sufficient to trigger the "mode of operation" rule absent a showing that the water came to be on the floor as a result of customer self-service.[13]

Nor is the "mode of operation" rule applicable to a fall on slush in a store entry vestibule. In *Tavernese v. Shaw's Supermarkets, Inc.*, the Appeals Court ruled:

> *We agree with the Superior Court judge that the instant case is not controlled by Sheehan ..., which adopted a "mode of operation" approach to premises liability, alleviating the plaintiff's burden to prove notice in instances where the dangerous condition stemmed from the self-service mode of operation of the store. The fact that the patrons of the Shaw's in question must enter the premises through the vestibule where the plaintiff fell does not transform the store's mode of operation into a "self-service" model versus any other model. Indeed, customers' ability to help themselves to goods, rather than be assisted by a store employee, did not factor into the condition at issue here, unlike the situation in Sheehan, which was the result of customer self-service.*[14]

Likewise, a slip and fall on rainwater on a grocery store floor does not create liability under the "mode of operation" rule.[15] Such conditions are simply not connected to a store's customers' careless handling of produce or containers, and have nothing to do with a store's manner of display, marketing of product, or other manner in which it conducts business.

PRACTICE POINT

Even under the "mode of operation" rule, the plaintiff retains the burden of proving that the store did not take reasonable precautions to protect invitees from foreseeable dangerous conditions. The *Sheehan* Court expressly rejected the "burden shifting" rule, leaving the burden of proof of negligence squarely upon the plaintiff.

Rule Applies Only To Foreseeable And Regularly Occuring Risks

The *Sheehan* rule applies only to reasonably foreseeable and regularly occurring risks caused by self-service actions of customers, not any conceivable danger that may happen to arise:

> *The mode-of-operation rule is of limited application because nearly every business enterprise produces some risk of customer interference. If the mode-of-operation rule applied whenever customer interference was conceivable, the rule would engulf the remainder of negligence law. A plaintiff could get to the jury in most cases simply by presenting proof that a store's customer could have conceivably produced the hazardous condition.*
>
> *For this reason, a particular mode of operation only falls within the mode-of operation rule when a business can reasonably anticipate that hazardous conditions will regularly arise.*[16]

To properly invoke the "mode of operation" rule, the plaintiff must show the substance upon which she fell should have been reasonably anticipated by the store to spill on a regularly occurring basis. Absent a showing that the risk involved is a "regularly occurring risk", the "mode of operation" rule does not apply.

How "Reasonable" Are Your Safety Procedures?

Even if the store's mode of operation makes it reasonably foreseeable that a dangerous condition will occur, the store is not liable if it takes reasonable precautions designed to eliminate accidents.

In *Shannon v. Whole Foods Market, Inc.*,[17] the plaintiff slipped on water which had spilled onto the floor in the beverage aisle of defendant's supermarket. Despite the uncontroverted evidence that minutes before plaintiff's accident there was no water on the floor, the store's motion for summary judgment ("MSJ") was still denied because the "mode of operation" permitted the case to go to a jury.

PRACTICE POINT

Sweep logs and other records which document the store's cleaning procedures should be retained.

A plaintiff cannot prevail at trial if a jury believes that the store's method of conducting business is reasonable under the circumstances.

In that case, the store manager admitted in deposition that spills frequently occurred in that aisle of the store during the course of the store's operation. The store only retained a porter services during the hours of 12 noon to 8:00 p.m., whereas the accident occurred at 11:45 a.m.

In light of these facts, the Judge denied the store's MSJ, holding that issues of fact existed as to whether "defendant's mode of operation made it foreseeable that a dangerous accident would occur," and whether defendant had failed "to take all reasonable precautions necessary to protect invitees from these foreseeable dangerous conditions."[18]

Conclusion

Judicial guidance will continue to define the precise contours of the "mode of operation" rule.

In the meantime, insurers handling slip and fall accidents should insist that plaintiffs prove that the "mode of operation" rule applies (*i.e.*, that the substance upon which the plaintiff fell is associated with a regularly occurring risk relating to the store's self-service manner of operation) and that the store was negligent (*i.e.*, that the store failed to take all necessary reasonable precautions commensurate with the risks inherent in its self-service method of operation to protect individuals from such foreseeable risks).

Storekeepers (and their insurers) need to remain vigilant so that *Sheehan*'s limited exception to traditional premise liability does not swallow the rule.

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Endnotes

1 *Sheehan v. Roche Brothers Supermarkets, Inc.*, 448 Mass. 780 (2007).

2 *Id.*, at 790.

3 *Id.*, at 791.

4 *Id.*, at 784-785.

5 *Oliveri v. Massachusetts Bay Transportation Authority*, 363 Mass. 165 (1973).

6 *Sheehan, supra*, at 781.

7 *Id.*, at 782.

8 *Id.*, at 781.

9 *Id.*, at 786.

10 *Id.*, at 790.

11 *Frank v. Westwood Associates, Inc.*, 23 Mass. L. Rep. 637 (2007) (Agostini, J.) (Worcester Superior Court) (Civil Action No. 07-1798).

12 *Sheehan, supra*, at 781.

13 *Smart v. Demoulas Supermarkets, Inc.*, 2008 Mass.App.Div. 105 (2008).

14 *Tavernese v. Shaw's Supermarkets, Inc.*, 72 Mass.App.Ct. 1107 (2008).

15 *Gurvich v. Stop & Shop Companies*, 2009 Mass. Super. LEXIS 173 (MacLeod-Mancuso, J.) (Middlesex Superior Court) (Civil Action No. 07-04774).

16 *Chiara v. Fry's Food Stores*, 152 Ariz. 398, 400-401 (1987).

17 *Shannon v. Whole Foods Market, Inc.*, 23 Mass. L. Rep. 561 (2008) (Fremont-Smith, J.) (Middlesex Superior Court) (Civil Action No. 06-2044-A).

18 *Shannon, supra*, at *4 (internal citations omitted).

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