THE EVOLUTION OF THE MODE OF OPERATION

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Last year I tried a case in Morris County before a retired judge on recall, involving an older female plaintiff who fell on a rubber mat while leaving a store. The incident was captured by a security camera, so there was no question as to how the incident occurred. 30 seconds before the plaintiff fell, a customer had walked over the mat, slightly upturning one corner on the previously flat surface. This was not noticed by store personnel, who were behind a nearby counter. The plaintiff, exiting the store, then tripped on the upturned corner, fracturing her shoulder and eventually undergoing a total reverse arthroplasty.

The plaintiff asked for and received a "mode-of-operation" charge. The Court modified slightly the standard Model Jury Charge 5.20 F(11), and eventually the jury returned a no cause verdict. Frankly, I was stunned when the plaintiff asked for the mode-of-operation charge, but floored when the Court granted it over objection. The case was really nothing more than a standard fall down case inside a business premise. Since then, the Appellate Division has weighed in on two cases that hopefully put this issue to rest, or at least put it in its proper perspective.

The mode-of-operation charge is familiar to all personal injury practitioners. The charge states, in pertinent part, the proprietor of a business has the duty to provide a reasonably safe business premise and if the jury should find that the hazardous condition was either caused by defendant or customers and if the jury finds that the condition was likely to result from the particular manner in which the defendant conducted business and that the defendant failed to take reasonable precautions to prevent the hazard, then defendants are liable. This liability would hold even if the defendant did not have actual or constructive notice of the particular unsafe condition.

From one perspective, the key issue is determination of exactly what type of business is being conducted in order to give rise to the charge. In my case, my client was operating nothing but a local drug store and while certainly self-service is part of the business model, the fall had nothing to do with self-service of goods from a shelf.

The first case to recognize what evolved into mode-of-operation can be debated, but generally Courts point to Francois v. American Stores Company, a 1957 Appellate Division case. In that case, cans of merchandise fell off stacks, tumbled under a customer's feet, throwing her off balance. This case and following cases never used the term "mode-of-operation", and actually the case was decided under res ipsa loquitur. The case seems to be more of a result looking for a rationale, since clearly the facts did not fit squarely into res ipsa loquitur, but nonetheless the Court took judicial notice that in self-service stores a customer is invited to handle and examine articles of merchandise and, if deciding not to make the purchase, to put them back. The defendant, having established a business of that nature, was found to be under a duty to take reasonable measures to guard against injuries to customers due to falling or stacked merchandise.

The mode-of-operation train really got its momentum in 1964, when the New Jersey Supreme Court decided Bozza v. Vornado Incorporated. The defendant operated a self-service cafeteria. Plaintiff slipped on a slippery floor. Although she could not identify the exact substance, her familiarity with the store allowed her to state that the store cafeteria sold sodas, hotdogs, hamburgers, and the like. Food was carried away from the counter with or without trays to nearby tables and beverages were served in paper cups without lids. Justice Schettino approached the case as one of notice, again not using the term "mode-of-operation", holding that plaintiff had shown circumstances such as to create a reasonable probability that a dangerous condition would occur, therefore relieving the plaintiff from proof of actual or constructive notice of a specific condition. Factors bearing on the existence of such reasonable probability would include the nature of the business, the general condition of the premises, and a pattern of conduct or recurring incidents. In essence, the case shifted the burden, after an examination of such factors, to the defendant.

The other well known early case on this subject, Wollerman v. Grand Union, decided in 1966 by the Supreme Court, Chief Justice Weintraub, held that when a customer slipped on a string bean in the vegetable aisle and submitted proper proofs, the store operator then had the burden of explaining what reasonable measures were taken commensurate with the risk of a bean falling from an open bin. If the burden was not met by the defendant, the jury could infer fault. The Chief Justice held that a customer's carelessness could be anticipated and therefore no notice of the specific condition nor constructive notice would be required. Indeed, Ms. Wollerman could not show how the bean fell to the floor or how long it was there, prompting the trial Court to dismiss the case.

These two similar cases, decided in a similar timeframe, show that the term "mode-of-operation" was not used, but instead the cases act as a springboard for later cases to confuse mode-of-operation with notice or the business mode of operation; indeed, some Courts have tried to extend the theory to any type of self-service operation, although no Court has gone as far as my trial Court in extending the concept to an incident that has nothing to do with customer service.

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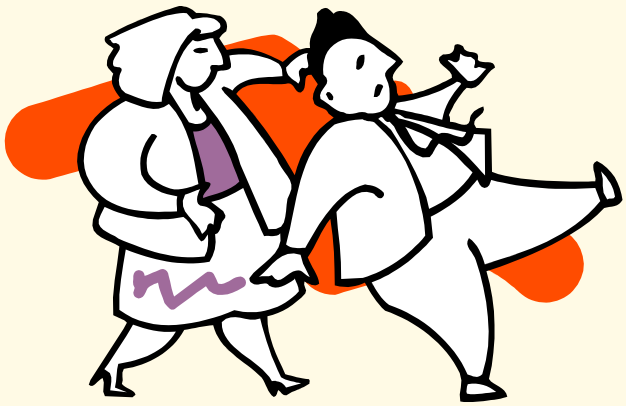
Mode-of-operation generally sat dormant until these three recent cases, Nisivoccia, Arroyo, and Prioleau.

Nisivoccia, decided by a unanimous Supreme Court in 2003, held that plaintiff, who slipped and fell on some loose grapes approaching a supermarket checkout, was entitled to the mode-of-operation charge even though she could not show how long the grapes were on the floor or how they had come to be there. It was undisputed that in the produce section of the store grapes were displayed in open top vented plastic bags that permitted spillage. The specific question before the Court, Justice LaVecchia, is whether plaintiff would be entitled to an inference of negligence because the store should have anticipated that careless handling of grapes was reasonably likely during customer checkout. The trial Court did not allow such inference, the Appellate Division affirmed, and the Supreme Court reversed.

In 2013 the Appellate Division had occasioned to consider the theory again in Arroyo v. Durling Realty. The Appellate Division, Judge Sabatino, affirmed the trial Court's grant of summary judgment to a convenience store sued by a patron who slipped on a discarded telephone calling card on the sidewalk near the store entrance.

The Court held that the sale of telephone calling cards was not an integral feature of the retail stores operation; that the phone card was not found inside the store but instead outside; the facts did not fit an appropriate case for imposition of the mode-of-operation charge; that the plaintiff could not prove actual or constructive notice; and that mere existence of an alleged dangerous condition is not constructive notice of it. This case can be seen as standing for the modern trend, that merely because a customer slips on an object that is for sale, even a self-service item, constructive notice must still be shown. Judge Sabatino stated that the necessary nexus between the self-service rack and eventual presence of the card on the sidewalk was extremely attenuated and what the purchaser chose to do with the card after leaving the store (and even on the assumption that it was a card bought at the store) was not an integral feature of the method of operation. Indeed, a customer buying a card would have to interact with a store employee to present it for payment. Although this may seem to be a distinction without a difference to some people, I would submit that the case really stands for the proposition that the tide of "mode-of-operation" had to be stemmed somewhere or the exception would swallow up the rule. The key, then, was really a subjective examination of the defendant's business model ("an appropriate case").

That may seem to be the ultimate lesson of Prioleau v Kentucky Fried Chicken, a 2014 Appellate Division case. Plaintiff slipped on a slippery substance outside the restroom at a fast food restaurant. The trial Court charged mode-of-operation and the Appellate Division, Judge Lihotz reversed. Again, this case may be seen as an instance where the Court simply was not going to allow the trend of the exclusion swallowing up the rule. The Court held that the mere existence of a dangerous condition did not in and of itself establish actual or constructive notice. Although the premises liability rule for self-service operations in proper cases may relieve the plaintiff of notice proofs, just because a business is a fast food restaurant or had self-service facilities does not prompt the mode-of-operation charge. Instead, the patron was left with the burden to show a causal nexus between the fast food or other type of business operation and the harm. In this particular case, the fact that the fast food restaurant used cooking oils and grease which conceivably could have been tracked to the front of the restroom did not prompt a shifting of the burden of proof. The Court states at least three times in its opinion that the concept of mode-of-operation is an exception and is not one of broad application. Indeed, the focus of a Court should be on the business model that encourages self-service, not merely the type of business which may be cafeteria, fast food, shelf, display, etc.



Since one judge dissented in Prioleau, there is a right of automatic appeal to the Supreme Court, where the matter now lies. Stay tuned.

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