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OPINION

SLIPPERY SLOPE

Club Patron Wins Protections From SJC

SJC Rules Dance Club Should Have Anticipated Slip-And-Fall Injury

BY MICHAEL T. SULLIVAN
SPECIAL TO BANKER & TRADESMAN

In the recent case of *Sarkisian v. Concept Restaurants*, the Massachusetts Supreme Judicial Court affirmatively answered the question of whether the "mode of operation" approach to personal-injury liability, first adopted in the self-service food operations context in *Sheehan v. Roche Brothers Supermarkets* (2007), extends to dance club operations. The question was necessitated by the Massachusetts District Court's dismissal of plaintiff Angela Sarkisian's lawsuit on the grounds that the mode of operation approach did not extend beyond self-service food operations. The District Court's Appellate Division and the Massachusetts Appeals Court both agreed with this decision. However, the SJC decided to review the Appeals Court's decision, which it rarely does, and proceeded to agree with the thrice-unsuccessful plaintiff that mode of operation liability does in fact extend beyond self-service food operations, and applies to a dance club operation like the one that allegedly caused the plaintiff slip on a spilled drink and seriously injure herself.

MICHAEL SULLIVAN

Until recently, in order to establish a business owner's liability, a slip-and-fall plaintiff has had to prove that the defendant business owner knew or should have known of the dangerous condition that caused the plaintiff's injury. In *Sheehan*, the SJC found this law to be outmoded, at least in the context of modern self-service food establishments. There, the SJC believed, a business owner should be held to a higher standard. The SJC adopted the mode of operations approach, which previously had been adopted in other jurisdictions, saying that "under [this] approach, the plaintiff's burden to prove notice is not eliminated. Instead, the plaintiff establishes the requirement if … an injury was attributable to a reasonably foreseeable dangerous condition on the owner's premises that is related to the owner's self-service mode of operation." Effectively, this meant that a self-service establishment would have to anticipate the possibility of food and drink spills, and associated injuries, and take greater precautions against these incidents than before.

Expanded Application

It is not entirely clear from the *Sheehan* decision whether the SJC specifically intended to have the mode of operations approach apply to contexts other than self-service food operations. Soon thereafter, in the *Sarkisian* case, three lower courts answered this question in the negative, before the SJC declared that the *Sheehan* should have been read to answer this question in the affirmative, and concluded that a dance club operation is sufficiently like a self-service food establishment to warrant the mode of operation approach – drinks get jostled, people do not (or cannot) pay attention to where they are stepping, and so on.

Writing for the court, Justice Robert Cordy disagreed with the dance club that, by not limiting the mode of operation approach to self-service food establishments, the SJC greatly would expand the potential liability of many different kinds of business establishments. While Cordy did not refute this notion, he predicted that no "parade of horribles" would result, and that "reasonable care, not perfection" should be enough to guard business owners against liability. But in the end, the court believed, coming down on the side of business owners who are capable of taking efforts to prevent injuries was less important than protecting often-unsuspecting customers who might not be in the same position to do so.

The dance club had a point. One easily can envision many businesses that might find themselves subject to this new form of liability. Sports arenas (e.g., food/drink/containers on the floor); nurseries (e.g.,

water, plant materials); hardware stores (e.g., sand/seed/mulch); and food and drink establishments other than dance clubs, where jostling and spillage are frequent, all come to mind. In order to avoid lawsuits and liability, these and other similar establishments may have to be more aggressive in preventing slips and falls, and their business costs may increase as a result. This extends to insurance costs. Whether or not there is a parade of "horribles," there is likely to be a larger parade of plaintiffs who are able to bring lawsuits and withstand summary judgment motions, which leads to insurance settlements in the vast majority of cases. ■

Michael T. Sullivan is a litigation partner in the Boston law firm of Conn Kavanaugh Rosenthal Peisch & Ford, LLP. He handles a variety of commercial real estate disputes and can be reached at MSullivan@ConnKavanaugh.com.