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LAWYERS OF THE YEAR 2015

Karen L. Stern is one of Lawyers Weekly's ten Massachusetts Lawyers of the Year for 2015

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KAREN L. STERN

BERNSTEIN & STERN

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If Worcester attorney Karen L. Stern was somewhat taken aback by the kudos she received from the plaintiffs' bar after she obtained a landmark premises liability decision in June, it's because the point she argued in the case seemed so obvious to her.

In *Sarkisian v. Concept Restaurants, Inc.*, the Supreme Judicial Court explicitly recognized that the "mode of operation" approach can be applied to establish liability in slip and fall accidents occurring outside the context of self-service establishments.

For Stern, safety has always been at the heart of the case, which is why she takes pride in the result.

"It is gratifying to know that we now have the ability to use this law and the understanding of this law for plaintiffs who are injured because of the manner in which a business operates," Stern says.

The mode of operation approach to slip and fall liability dispenses with the requirement that a plaintiff must prove the defendant caused or had actual or constructive knowledge of the spilled liquid.

The SJC first recognized the standard in 2007 in *Sheehan v. Roche Brothers Supermarkets, Inc.*, and Stern never doubted for a moment that it was implicit in Sheehan that the principle was not limited to self-serve venues like grocery stores. Unfortunately, she was unable to convince a District Court judge and two appellate panels to extend the rule in the case of her client, Angela Sarkisian, who broke her leg when she slipped and fell on a wet dance floor at a crowded Boston nightclub in 2009.

In getting the SJC to recognize the broader application of the standard in *Sarkisian*, Stern succeeded in having the court set aside a summary judgment for the defendant nightclub in her client's case. The next step for Stern is a jury trial scheduled to begin in the spring.

Q. *Even though you felt you were right all along, you still had to overcome significant legal arguments to limit the mode of operation approach, right?*

A. Every step of the way, the defense argued that the mode of operation approach applied only to self-service operations. The trial court, the Massachusetts Appellate Division and the Massachusetts Appeals Court also found that the interpretation of *Sheehan* had evolved [such that the mode of operation approach] is solely to be used for a self-service business. But no matter how many times I read and reread the *Sheehan* case, I was frustrated because I just couldn't find where [the court] limited the mode of operation approach to a self-service business like a supermarket. I had a hard time looking my client in the eye after the summary judgment was decided and trying to explain to her that, in Massachusetts, the court was saying we had to follow the traditional approach and prove how long the liquid that caused her to fall was on the dance floor.

Q. *Why is it imperative that your client be able to avail herself of the mode of operation approach to establish liability?*

A. This case had very specific facts. My client went into a very large nightclub in Boston where there were four bars, including two right on the dance floor itself. The patrons bought drinks on the dance floor. To me, it seemed so foreseeable that injuries could occur. The [nightclub's] manager acknowledged himself: "Yes, spills are part of doing business."

Q. *Under the circumstances you describe, couldn't a club owner argue that it could never do enough to prevent a slip and fall?*

A. What happened as a result of the *Sheehan* case was that self-service establishments such as supermarkets started putting safety policies in place. In this nightclub situation, the business was unable to establish that it had any type of safety policies.

Q. *What was a key defense argument that you had to address?*

A. The big argument raised by the defense was that, if the mode of operation approach is applied to anything other than a self-service operation, we're going to have the floodgates open and every plaintiff in a slip and fall case is going to try to claim that it was the manner of operation of the business that resulted in the injury. But the SJC in its decision was quite clear that they're looking for reasonable foreseeability, not perfection.

Q. *How do you respond to the defense argument that broad application of the mode of operation approach in essence imposes a strict liability standard on business owners?*

A. There will be no strict liability. The business just has to make sure that the way they operate is reasonable. The burden is still on the plaintiff to establish by a preponderance of the evidence how that particular operation failed to exercise reasonable care and caused an unsafe condition for invitees or patrons. That's a high burden.

Q. *How powerful do you think the argument was that applying the mode of operation approach broadly forces businesses of all kinds to improve the safety of their operations?*

A. I think it was an extremely powerful argument, especially when you look at the way the *Sheehan* case affected self-service establishments. Most of them have in fact established safety policies as a result of the *Sheehan* case. Hopefully, [*Sarkisian*] is going to have a very beneficial effect on our ability to make business owners be more careful and start thinking about whether, with the way they operate, it's safe for them to invite people onto their property. We're all going to be better protected by this decision.

— Pat Murphy

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