Leveling the Playing Field between Merchants and Customers in Pennsylvania Slip and Fall Negligence Cases

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INTRODUCTION

A customer injured in a slip and fall incident in a supermarket in Pennsylvania will have to address a number of hurdles before he wins a recovery for his injuries. The toughest hurdle will most likely be the requirement of the Pennsylvania courts that the customer establish that the merchant had notice before the incident took place of the specific hazard which caused the plaintiff's fall, and that the merchant then failed to take reasonable steps to correct it. This "notice" hurdle is often insurmountable and its existence unduly tilts the table in favor of the merchant. This author submits that the Pennsylvania courts need to either apply the existing law in this area in a more even-handed fashion or change the law to eliminate the bias against the consumer. Unless the courtroom playing field is leveled to give the injured customer a fighting chance, slip and fall plaintiffs in Pennsylvania will continue to suffer defeat before the court.

The basic tenet underlying negligence law in Pennsylvania, as well as in the nation generally, is the notion that every individual has a responsibility to see that the activities in which he or she engages do not expose others to unreasonable risks of harm. This concept is defined and limited in the area of civil tort litigation through the application of two elements: (1) a supposedly liable actor must first be found to have a duty to protect another from the foreseeable results of the actor's conduct and (2) the actor must fail to pursue reasonable efforts to fulfill that duty.

In applying these general propositions, the courts and those practicing therein have found it useful to create verbal definitions and explanations of these general propositions as they apply to specific situations. Such definitions and explanations serve a useful purpose to the extent that they help to lead to similar results in

similar cases and serve to guide those responsible for evaluating individuals’ conduct and the merits of a given case. When, however, these verbal guidelines are transposed from a means to an end into ends in and of themselves, then the ultimate goal of fair and substantial justice is not furthered, but instead becomes obscured by such definitions. Stated otherwise, when the courts become more concerned with applying verbal tests than with determining the central issue which the tests are intended to illuminate, the system has gone awry.

One area of the law in which such a transposition of focus has occurred is that area which concerns the liability of possessors of land, and specifically the cases involving slip-and-fall accidents in modern supermarkets. One recalls from law school the traditional common law distinctions between the duties a landowner or possessor of land owes to a trespasser, a licensee, and a business invitee. Over time, however, the distinction between a licensee and a business invitee has faded, and typically both are now entitled to the protection traditionally accorded solely to the business invitee. In Pennsylvania, an invitee is entitled to have the highest degree of care exercised toward her by a possessor of land. According to Dean Prosser, this means that a land possessor “is under an affirmative duty to protect them [invitees], not only against dangers of which he knows, but also against those which with reasonable care he may discover.” Thus, a possessor of land must not only warn of or remedy known dangers, he must also, under the common law rule, make a reasonable inspection to discover such dangers.

In reaching this conclusion regarding the general duty of a landowner, Prosser referred back to the English case of *Indermaur v Dames.* *Indermaur* was decided in England over 125 years ago, at a time when cars did not exist, mail was delivered by horse drawn carts, and groceries and supplies in the United States were purchased at the General Store on Main Street owned by a local resident. Since that time, however, merchandising and marketing have

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4. *Lonsdale v Joseph Horne Co.,* 403 Pa Super 12, 587 A2d 810, 813 (1991). The business invitee is owed a duty by the merchant to maintain the premises in a reasonably safe condition for the contemplated uses thereof and the purpose for which the invitation was extended. *Borsa,* 215 A2d at 292.
7. *Crotty,* 345 A2d at 262.
undergone enormous changes. For example, in 1962, S.S. Kresge Co. opened the first Kmart in Garden City, Michigan, carrying a broad-based inventory of consumer products. More recently, in the last decade we have seen the emergence of the supermarket super-store from what used to be simply a grocery store. These super-stores, operated in the Western Pennsylvania area by companies such as Giant Eagle, Inc., Foodland, and Super Valu Stores, Inc., offer the customer the convenience of one-stop shopping. Moreover, they offer the merchant the reward of reaping a profit, not only upon the grocery purchases which the consumer makes, but also upon numerous other non-traditional items such as bakery goods, flowers, salad bar dishes, pharmaceuticals, hardware and so forth which are available at the store daily.

There are two fundamental questions which must be answered for the purposes of this discussion. First, is the standard of care to be required of such modern-day merchants to their customers the same as the standard utilized in London in the 1800's? If so, the second inquiry must focus upon what level of strictness or liberality should be utilized in applying such a standard.

While the determination of whether a given standard is "liberal" or not depends fundamentally upon the shoes in which one is standing, it would appear logical that any standard should liberally favor the consumer who is present to purchase the merchant's wares and provide him with a tidy profit. Pennsylvania, however, has not taken such an approach, and instead has maintained a legal analysis in this area of the law which is more favorable to business and commerce. While the Pennsylvania courts are certainly capable of being on the cutting edge of legal analysis, they consistently refrain from expanding the boundaries of liability in the area of torts until the new path is not only discovered by others, but virtually beaten into an unmistakable roadway toward the ends of justice. This author submits that today the trial and appellate courts in Pennsylvania are applying an incorrect and outdated standard of care which unduly hampers the ability of the injured slip and fall plaintiff to recover from the merchant-land possessor. Moreover, this restrictive standard is being unnecessarily strictly construed by the courts against the consumer and in favor of the

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9. For example, to the injured plaintiff, a liberal standard expands the scope of the merchant's liability, while to the merchant a liberal standard encourages the interests of commerce.
Suppose that Jane Smith, 36 years old and a mother of two, enters a SuperGroceries, Inc. supermarket to buy her weekly groceries. It is mid-day and the store is busy but not crowded. After getting a grocery cart, she begins her trek through the produce aisle located near the entrance to the store. After selecting several items, she approaches the back of the produce area, where she nears a self-service salad bar which SuperGroceries has recently installed. The salad bar contains a number of salad “fixin’s,” including lettuce, grated cheese, sliced cucumbers, sliced peppers, green peas, croutons, bacon bits, mixed fruit pieces, and salad dressings. The salad bar is in the middle of a white linoleum floor area. There is room to pass on either side of the salad bar to the rest of the store beyond. At one end of the salad bar there are foam plates. The plastic plate covers to keep the salad contained after it is made are at the other end. The salad bar itself is a freestanding island where the customer must hold the plate in one hand while moving around the salad bar to select from the salad items available. It is intended by SuperGroceries that the customer prepare his or her own salad, cover it, and take it to the checkout registers at the front of the store where it will be weighed and paid for by the customer.

As Mrs. Smith nears the salad bar, pushing her cart with one child in the child seat and one child walking along beside her, she suddenly slips and falls to the ground. Her elbow and head strike the floor in the fall. A customer in the produce area behind Mrs. Smith rushes up to help her to her feet and to see if she is injured. Both Mrs. Smith and the other customer look at the floor and see a small puddle of what appears to be white cucumber seed salad dressing with a heelmark through it, as well as several small crushed green peas. Mrs. Smith looks at her shoe and notices several more peas and traces of a white sauce clinging to the bottom of her shoe. It is her determination that she slipped on one, or both, of these materials.

By this time, the manager of the store has been called over. He directs a stockboy to clean up the floor, and takes an accident report from Mrs. Smith. It is the stockboy’s duty to regularly clean the floor in the produce and salad areas, as food items are often dropped to the floor by employees and customers. The witness tells the manager what she saw and gives her name and address.
Smith asks the stockboy if he knew that the material was on the floor; he indicates that he did not notice the material twenty-five minutes before, the last time he had swept the floor. No one else indicates that they had witnessed the fall.

It turns out that Mrs. Smith fractured her elbow in the fall. Furthermore, she has suffered severe headaches for several years afterwards. Mrs. Smith ultimately brings a suit against SuperGroceries, Inc. alleging negligence in failing to maintain the floor in a safe condition for a business patron. Her case in chief contains the facts set forth above and her counsel has rested. Counsel for SuperGroceries moves that the case be dismissed and an order of nonsuit entered. What result can be anticipated and what result can be considered just?

**The Pennsylvania Approach**

The last time the Supreme Court of Pennsylvania addressed this issue of landowner liability was in 1965 in the case of *Martino v Great Atlantic & Pacific Tea Company.* In *Martino,* the plaintiff was shopping at a self-service A&P supermarket. As she was walking down the produce aisle with her cart, she slipped on a grape on the floor and fell, suffering injuries. The evidence revealed that the grapes were piled in a bin on one side of the aisle, the bags for containing them were located in the middle of the aisle, and the scale for weighing the grapes was located on the opposite side of the aisle. An A&P employee further testified that: (1) grapes and other produce items often fell on the floor; (2) customers often walked upon and over such fallen items; and (3) one of his duties was to keep the area free of debris. The plaintiff did not offer any evidence regarding the length of time during which the grape was on the floor.

At the close of the plaintiff's case, the trial court granted A&P's motion for a nonsuit upon the basis that the plaintiff's evidence, viewed in the light most favorable to the plaintiff and allowing her every reasonable inference of fact therefrom, did not establish that A&P knew or should have known of the presence of the grape on the floor. In affirming the order of the trial court, the supreme court's plurality opinion began with general statements to the effect that the plaintiff was required to establish A&P's negligence and that the mere occurrence of an accident was not evidence of

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The court thereafter stated that the case was governed by section 343 of the *Restatement (Second) of Torts*, which provides:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them.  

Under this standard, the plaintiff was required to establish that A&P knew or reasonably should have known of the presence of the grape. Since A&P obviously denied knowledge of the presence of that particular grape being on the floor at that particular time and, in the court’s opinion, the plaintiff had not introduced evidence from which the jury could reach any conclusion about the cause of the presence of the grape on the floor, the nonsuit was held to be proper.

Since the supreme court’s decision in *Martino*, the superior court has continually held onto the talismanic charm of the “notice” requirement of section 343. The superior court case in this area which is most often cited as controlling is *Moultrey v The Great A & P Company*. In *Moultrey*, the plaintiff slipped on a cherry on the floor in the produce aisle at an A&P. Ms. Moultrey could not say how the cherry got to the floor or how long it had been there; nor did she offer evidence regarding how long it had been since the floor was last cleaned. Based upon this evidence, A&P was granted a compulsory nonsuit. In affirming the trial court’s order, the superior court’s opinion highlighted several im-

11. *Martino*, 213 A2d at 610. This case was argued before Justices Bell, C.J., and Musmanno, Jones, Cohen, Eagen, O’Brien and Roberts, JJ. The plurality opinion written by Justice O’Brien was joined by Chief Justice Bell and Justice Eagen. Justice Roberts concurred with the outcome upon the basis that the plaintiffs failed to establish that A&P didn’t exercise due care to ascertain the existence of the grape and in warning or correcting the condition. Id. His terse opinion did not include the “notice” discussion of the plurality. Justice Musmanno filed a typically eloquent and descriptive dissenting opinion which was joined by Justices Jones and Cohen. Id at 610. Interestingly, none of these Justices are still sitting on the Pennsylvania Supreme Court.

12. Id at 610 citing Restatement (Second) of Torts, section 343 (1965).

13. *Martino*, 213 A2d at 610. The court further reasoned that the act of displaying unpackaged grapes seven feet across an aisle from the weighing scale was not negligence since “every reasonable effort was made to keep the passageway clean.” Id. Such a holding, however, seems to clearly invade the province of the jury. This topic is more fully discussed herein.

14. 281 Pa Super 525, 422 A2d 593 (1980). Interestingly, during the research conducted for this commentary, it was observed that The Great Atlantic and Pacific Tea company was the defendant in a large number of the slip and fall cases in many jurisdictions.
important principles in the area of slip and fall liability law which were subsequently therein and everafter ignored by the Pennsylvania courts. First, the court reiterated that it remained Pennsylvania law that the plaintiff's evidence must tend to prove that the proprietor either knew, or in the exercise of reasonable care ought to have known, of the existence of the harm-causing condition. If the harmful transitory condition was traceable to the possessor, then the plaintiff need not show further notice, since the possessor was certainly on notice of his own acts. Further, the court stated that where the condition was one which frequently recurred, the jury could find that the owner had actual notice of the condition, thereby obviating the need to establish constructive notice via evidence that the condition existed uncorrected for such a length of time that the owner, if exercising reasonable care, should have known of it.

Most recently, these principles were stated but misapplied by the superior court in Kotora v Giant Eagle Markets, Inc. and Myers v The Penn Traffic Company. In Kotora, the plaintiff slipped on red salad dressing which had fallen from Giant Eagle's self-service salad bar onto the red tile surrounding the salad bar. The trial court entered summary judgment in favor of Giant Eagle, finding no evidence that it either knew of the presence of the sauce on the floor or that the sauce had remained on the floor for such an extended period of time that constructive notice could be inferred. The superior court affirmed this order, dismissing as "absurd" the plaintiff's argument that the possessor's negligence could be found in its selection of a floor covering the same color as its dressing (thereby disguising the presence of any spills according to the plaintiff) and refused to place upon the merchant "the onerous burden of maintaining constant vigil over the salad bar to en-

15. Moutrey, 422 A2d at 594-96. As is discussed herein, while the superior court stated that conditions which are either recurrent or traceable to the proprietor are chargeable to the proprietor without further evidence of notice of the precise occurrence of the hazardous condition in suit, the court has not applied these principles when presented with obvious opportunities to do so. Compare the superior court's statements in Moutrey, 422 A2d at 596, with the courts' holdings in Kotora v Giant Eagle Markets, Inc. and Myers v The Penn Traffic Company, cited at notes 19 and 20.

16. Moutrey, 422 A2d at 596.
17. Id.
18. Id.
20. 414 Pa Super 181, 606 A2d 926.
sure that nothing ever spilled on the floor."  

Similarly, in Myers, after the plaintiff slipped on a grape in the Riverside Market, the superior court affirmed the entry of summary judgment in favor of the defendant because the plaintiff could not establish the period of time for which the grape had been on the floor. The court rejected the plaintiff’s argument that the recurrent presence of grapes on the floor could constitute actual notice, and refused to find constructive notice from the defendant’s actions of stacking the grapes and selling them in unpackaged bunches.

Under the superior court’s current analysis, Mrs. Smith is destined to suffer a nonsuit at the point in her case where we left her. She has no evidence that a store employee dropped the sauce and peas on the floor, though one might have while stocking the salad bar. Nor does she have evidence that the store, through its employees, actually knew of the materials on the floor. Finally, she does not have any evidence regarding how long the materials had remained on the floor such that constructive notice could be found. As the foregoing cases illustrate, under such circumstances, the superior court has uniformly affirmed judgment against the plaintiff. Mrs. Smith will therefore have to bear the costs of her injuries herself.

I. The Pennsylvania Courts Must Recognize That a Recurring Danger Can Be Sufficient Notice to a Possessor of Land of the Occurrence of a Particular Instance of the Danger

In the Moultrey case, the superior court stated that Pennsylvania law recognizes that where a possessor knows that a dangerous transitory condition frequently recurs, the jury may find actual notice therefrom. This principle expresses recognition of the fact

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22. Kotora, slip op at 5-6. For a contrary view, see Ciminski v Finn Corporation, Inc., 13 Wash App 815, 537 P2d 850, 854 (1975), wherein the court stated that “The different circumstances presented in the self-service operation may require the owner to take different methods to protect his invitees. For example, the flooring substance should be chosen with the fact in mind that customers handling food will be passing over it.”

23. Myers, 606 A2d at 929.

24. Id at 930.

25. See generally the discussion of Kotura, Myers, and Moultrey above.

26. See discussion in Myers, 606 A2d at 930, and the cases cited therein.

27. This knowledge is required by Kotura, slip op at 4, as well as Moultrey, 422 A2d at 596.

28. Moultrey, 422 A2d at 596.
that a merchant cannot simply walk blindly through his store, avoiding direct eye contact with areas in which problems have arisen in the past, and then claim that he did not know of a particular problem at a particular time. Instead, when a merchant knows that a particular hazard is occurring repeatedly, then it is reasonable to say that when it continues to occur, the merchant should be charged with notice of the condition. What this principle impliedly recognizes (though the courts refuse to abandon their “notice” analysis) is that where a condition frequently recurs, the merchant’s act of negligence consists of allowing the environment to continue to exist in a manner that fosters the recurrence of the condition.

If, instead of correcting the cause of the recurring condition, the merchant simply cleans it up each time, then it is foreseeable that the condition will at some point recur when the merchant is not immediately present. It is further foreseeable that during the period of time between when the condition again occurs and when the merchant finds it and cleans it up, a patron will be exposed to the risk. If the patron then is injured as a result of the condition, that clearly should be viewed as a foreseeable risk arising from the merchant’s continued employment of a method of doing business which causes such a risk. This is, in itself, negligence. Any at-

29. See F. W. Woolworth Co v Stokes, 186 Miss 621, 191 S2d 411, 417 (1966) citing Shiflett v M. Timberlake, Inc, 205 Va 406, 137 SE2d 908, 911-12 (1964), stating that “many courts take the opposite, and what we think is the better, view that a storekeeper is not exempt from liability to an invitee who falls on a floor made wet and slippery by moisture tracked in by customers during inclement weather. In our view, the liability of a storekeeper in this type of case does not turn on whether the water on or dampness of the floor was tracked in by other customers. It turns on whether, under the circumstances, the storekeeper has exercised ordinary care to prevent a hazardous condition on his premises.” Woolworth, 191 S2d at 417. Applying this principle, the court in F.W. Woolworth Co. held that it is not necessary to show actual knowledge of the condition at the time of the plaintiff’s injury in a case alleging a recurring condition, as the store owner has knowledge of the general hazardous condition of the floor as evidenced by his prior efforts to resolve the situation. Id at 416.

30. See Maugeri v Great Atlantic and Pacific Tea Co., 357 F2d 202 (3d Cir 1966), wherein the plaintiff alleged injury after slipping on produce in the defendant’s store, and the court held that “[w]here the intervening act [of a customer dropping produce to the floor from an open bin] is foreseeable, the defendant remains liable even if he does not have notice of the condition created by it.” Maugeri, 357 F2d at 203. See also Strack v Great Atlantic and Pacific Tea Co., 35 Wis 2d 51, 150 NW2d 361, 364 (1967), where the court held that in the self-service supermarket context, “[w]hile we do not go so far as to change the burden of proof, we think that in circumstances where there is a reasonable probability that an unsafe condition will occur because of the nature of the business and the manner in which it is conducted, then constructive notice of the existence of such an unsafe condition may be charged to the operator.” Strack, 150 NW2d at 364.
tempt to superimpose a “notice” requirement over this straightforward analysis is nothing other than an attempt to narrow the limits of the merchant’s liability.\textsuperscript{31} While such protection of commerce may be within the power of the court, it should not be undertaken by the present approach whereby reasoned statements of the law are followed by inconsistent application of the law to the case before the court.

In the Myers case, however, the court refused to apply this principle.\textsuperscript{32} The plaintiff’s evidence included testimony by the store’s employees that produce on the floor in the area where Ms. Myers fell was a constant problem.\textsuperscript{33} Certainly, at the summary judgment stage, it can be argued convincingly that this evidence created an issue of fact regarding whether the merchant was, under the doctrine discussed in Moultrie, on actual notice of the condition by virtue of its recurring nature.\textsuperscript{34} Instead, however, the court entered summary judgment in favor of the merchant.

In a case such as Kotura, such a recurring danger should also have been submitted to the jury for a determination of whether or not negligence existed. The Giant Eagle store in Kotura was utilizing a self-service salad bar. Common experience teaches us that these salad bars contain numerous loose produce items and sauces which are dripped onto the salad by the customer. The merchant expects the customer to handle his own food.\textsuperscript{35} In fact, that is the very reason for which these salad bars are used. In an earlier time, such a salad would have been prepared by one of the store’s employees and handed to the customer packaged. The modern merchant, however, lets his customers do the work in order to cut down on labor costs. As a result, the danger caused by food drop-

\textsuperscript{31} In Jasko v F. W. Woolworth, 177 Colo 418, 494 P2d 839, 840 (1972), the court correctly held that “when the operating methods of a proprietor are such that dangerous conditions are continuous or easily foreseeable, the logical basis for the notice requirement dissolves.” Jasko, 494 P2d at 840.

\textsuperscript{32} Myers, 606 A2d at 928.

\textsuperscript{33} Id at 929.

\textsuperscript{34} Moultrie, 422 A2d at 596. “Where the condition is one which the owner knows has frequently recurred, the jury may properly find that the owner had actual notice of the condition, obviating additional proof by the invitee that the owner had constructive notice of it.” Id.

\textsuperscript{35} In Rhodes v El Rancho Markets, 4 Ariz App 183, 418 P2d 613 (1966), the court took judicial notice of the merchant’s expectation that the customer handle the food displayed in an open bin, and held that such a display requires the merchant to take reasonable protective measures for the benefit of customers who might slip and fall on dropped materials. Rhodes, 418 P2d at 615. The plaintiff therein was required only to establish that the merchant’s display could lead to a risk of harm, and that reasonable protective measures were not taken by the merchant. On this basis the jury could infer negligence. Id.
ping, which used to be caused by the merchant’s employees dropping food, is now caused by the customers. The risk, however, remains the same, and the merchant should have to bear the risk of his business.  

In Mrs. Smith’s case, the evidence could be found by a jury to establish that the store was aware of the fact that food items fell to the floor on a recurrent basis, posing a risk of harm to patrons. Where SuperGroceries is aware of such a recurring danger, the plaintiff should not be required to establish constructive or actual notice by any other evidence, and the issue of SuperGroceries’ negligence in failing to keep the premises safe should go to the jury. Based upon the holdings of past cases, however, the superior court would in all likelihood ultimately ignore this principle and Mrs. Smith will be without a remedy.

Where a condition can reasonably be expected to recur, the plaintiff should not be required to show that the merchant knew of the particular spill of dressing, grape or leaf of lettuce which caused the fall. The merchant has elected to utilize a self-service manner of merchandising in order the cut his costs, increase volume, and advance his own interests. Thus, it is fair for him to bear the burdens of the increased risks created thereby. Notably, such a requirement does not make the merchant an insurer of the premises safety. If the merchant can establish that he acted reasona-

36. In Ciminski v Finn Corporation, Inc., 13 Wash App 815, 537 P2d 850 (1975), where the plaintiff slipped on juice allegedly dripping on the floor from a self service cafeteria food bar, the court noted that “[i]n a self-service operation, an owner has for his pecuniary benefit required customers to perform tasks previously carried out by employees. Thus, the risk of items being dangerously located on the floor, which previously was created by the employees, is now created by the customers. but it is the very same risk and the risk has been created by the owner by his choice of mode of operations.” Ciminski, 537 P2d at 853.

37. For another case supporting liability based upon recurring conditions, see Mahoney v J. C. Penney Co., 71 NM 244, 377 P2d 663 (1963) (Plaintiff slipped on stairs, alleging recurring sticky substance).

38. Mahoney, 377 P2d at 673 (“If the jury or the trier of the facts should find an absence of due care, and should further find that defendant could or should have reasonably foreseen that his negligence could combine with that of a third person, then in such event it is no longer necessary for a plaintiff to prove how long the specific piece of gum, food, etc., forming part of the dangerous general condition was present . . . Defendant then had the affirmative duty of exercising ordinary care to keep the stairway in a safe condition.”)

39. Applying this standard in Ciminski v Finn Corporation Inc., cited at note 36, the court stated that “This rule does not create a higher standard of care for self-service operations. It is axiomatic that a property owner or occupier is required to use reasonable care towards his business invitees.” Ciminski, 537 P2d at 850. See also Bozza v Vornado, Inc., 42 NJ 354, 200 A2d 777 (1964) where the court stated “[o]nce plaintiff introduces evidence which raises an inference of negligence, defendant may then negate the inference by submitting evidence of due care. Thus, it could not be said that this makes the proprietor an
ibly in response to the recurring condition, either by attempting to correct the condition or by policing the premises with a degree of vigilance which a jury finds to be reasonable, then the plaintiff's action should and will fail. If the merchant has not acted reasonably in response to a known source of recurrent danger, however, then liability for this failure should properly attach. Thus, to the extent that the courts are refusing to recognize this proposition and are not permitting the jury to make the determination of the reasonableness of the merchant's response to a recurring threat, the courts are improperly limiting the plaintiff's right to recovery.

II. THE MERCHANT'S ACT OF CREATING THE CONDITION WHICH LEADS TO THE RISK OF HARM IS NEGLIGENCE

Moultrey also restated the well-established principle that when a harmful transitory condition is traceable to the merchant, the plaintiff does not need to establish notice.40 "Where one creates a dangerous condition by his own antecedent active conduct, it is unnecessary to prove that he had notice of such condition."41 Where, however, the evidence indicates that the transitory condition is traceable to persons other than those for whom the owner is, strictly speaking, ordinarily accountable, the jury may not consider the owner's liability without evidence of notice.42 Thus, the focus of this test centers upon when a condition is to be considered "traceable" to a merchant. When an employee has thrown or dropped the item onto the floor, then the condition has been held to be traceable.43 In the open-produce or self-service salad bar cases, however, the Pennsylvania courts have not found the condition of the floor to be traceable to the merchant, though without satisfactory explanation.44

In Martino, the grapes were stored across the aisle from the...
scale used to weigh them. This placement of the grapes and the scale was planned and established by the merchant. If the focus of negligence law is upon the avoidance of foreseeable unreasonable risks of harm, then it does not require any contortion of logical analysis to say that when a grape falls from a patron’s grape cluster while passing from the counter to the distant scale, then the grape’s presence on the floor is traceable to the merchant’s decision to separate the two. To illustrate this point, contemplate a scenario where a stockboy piles jars of mayonnaise precariously high into the air, and as a result of a patron’s attempt to select a jar, one jar from the top of the pile falls onto the head of a customer. In such a situation the courts would certainly hold that the injury could be found to have been caused by the merchant’s negligence in so stacking the jars.

Where the jar misses the customer and instead falls to the floor after being jostled by the customer, spreading its white slippery contents across the linoleum, the same foreseeable event has occurred: the jar has fallen from its precarious perch. The Martino court, however, would apparently not find the latter event to be negligence on the part of the merchant until the merchant knew or should have known that the jar had fallen. The difficulty presented by such a conclusion is that if it was foreseeable that the jar would fall onto a customer, then it is equally, if not more, likely that the jar would fall onto the floor. The dictates of logical consistency, therefore, require the court to allow the jury to find the foreseeability of this risk. If it was foreseeable that the jar (or loose cherries, grapes or peas) would fall from the spot where they were initially placed by the merchant, then when that very event occurs, its occurrence is directly traceable to the merchant’s act of displaying the items in the chosen manner.

Applying this analysis to Mrs. Smith’s case, it was the merchant who decided to install a salad bar in his store. The merchant has

45. Martino, 213 A2d at 611 (Mussmanno dissenting).
46. Martino, 213 A2d at 610.
47. In Little v Butner, 186 Kan 75, 348 P2d 1022, 1030 (1960), where the plaintiff slipped on meat particles in a store distributing free samples, the court held that “[t]he dangerous condition here alleged was created and negligently maintained by the defendants in agreeing to, and carrying on, the demonstration in a manner which they knew, or with the exercise of reasonable care should have known, would render the premises unsafe . . . [I]t is not unreasonable to assume that parts of such samples will be dropped to the floor and stepped upon by customers and patrons making the floor slick, slippery and dangerous to walk upon . . . The over-all condition was created by the defendants in carrying on the demonstration without taking the precautions.” Little, 348 P2d at 1030.
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encouraged his customers to handle the loose food items sitting in the salad bar, including spoonfuls of peas and ladles of salad dressing. A customer may reasonably be expected to drop some items onto the floor even if acting with the highest degree of care. In addition, the merchant can reasonably expect that not all of his customers will act with the highest concern for their fellow shoppers' safety, so that such spills may be common. The ultimate presence of the sauce and peas on the floor is, therefore, a foreseeable result of SuperGroceries' election to utilize a self-service salad bar with loose produce items. The presence of the salad bar items on the floor is therefore traceable to SuperGroceries, and Mrs. Smith's injuries may properly be found to be the result of SuperGroceries' creation of an environment which caused the dangerous condition to occur.

III. THE COURTS MUST BE WILLING TO APPLY SECTION 344 OF THE RESTATEMENT (SECOND) OF TORTS TO SUPERMARKETS

Despite the oft repeated language in the Pennsylvania cases to the effect that the duty of a landowner in Pennsylvania is defined by section 343 of the Restatement (Second) of Torts, that section is only one formulation of the landowner's general duty of care. Section 344 further defines this general duty as it applies to a merchant utilizing his land for a place of business. This section reads as follows:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to
(a) discover that such acts are being done or are likely to be done, or
(b) give a warning adequate to enable the visitors to avoid the harm or otherwise to protect them against it.

Moreover, comment f to section 344 indicates that this section includes a duty on the part of the merchant to look for dangerous conditions, even if they are caused by customers rather than employees, and even though they may not be present for a sufficient period of time that the merchant should know of their precise existence. Comment f states, in pertinent part, that:

49. Restatement (Second) of Torts, section 344.
He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

Section 344 therefore imposes a duty upon the merchant to search for dangerous conditions which his customers may have caused if the merchant reasonably should suspect these dangerous conditions may occur from time to time. It is not enough for the merchant to say that the condition was not present for a long enough period of time that he should have discovered it with a reasonable inspection. Instead, Comment f to section 344 indicates that the land possessor must: (1) actively search for such dangers when they can be expected to occasionally occur, (2) protect the customer from such dangers, and (3) provide sufficient staff to carry out these duties.

Applying section 344's analysis in the area of supermarket slip and falls, the merchant is plainly on notice that the self service “character of his business” results in a risk of food items being carelessly or accidently dropped on the floor by customers. Further, “his past experience” teaches him that such conduct will in fact occur. The merchant must therefore employ sufficient staff to inspect the premises in a reasonable fashion and/or present his products in a manner which will mitigate such risks. The questions of whether staff levels are reasonable and whether the precautions taken by the merchant are reasonable would appear to be issues best left to the jury to decide upon the basis of their experience.

In the Moultrey case, the superior court refused to hold that section 344 applied to supermarkets, finding no Pennsylvania appellate case indicating that supermarkets were within the scope of the section, although this section had been applied to other landowners. Recently however, the superior court did hold that section

50. Restatement (Second) of Torts, section 344, comment f.
52. Regarding product presentation, the merchant could elect to wrap all of the produce items in cellophane, package them in advance, or employ workers to handle the produce for the customers.
53. Compare Moultrey, 422 A2d at 597 n 8, with Carswell v. Southeastern Pa Trans-
344 applied to a supermarket. Nevertheless, the courts have not since uniformly recognized its application. For example, in the case of Myers v The Penn Traffic Company, the superior court declined to apply a section 344 analysis to a slip and fall case where the plaintiff had slipped on red salad dressing on the floor near a salad bar in a supermarket. The court, affirming summary judgment in favor of the merchant, held that the plaintiff's failure to specifically invoke section 344 as a basis of recovery prevented the court from considering its applicability. As noted in Judge Wieand's dissent, however, the plaintiff's primary duty is only to introduce evidence, while it is the role of the court to apply the law to the facts found on the basis of the plaintiff's evidence. In Myers, the plaintiff had produced evidence that the merchant knew that debris and produce regularly fell to the floor in the area of the plaintiff's fall. This condition was recognized by the merchant to present a risk which required frequent attention and cleaning. At the time of plaintiff's fall, all of the attendants were on a break. Plaintiff testified that she slipped on a grape on the floor in the produce area. Plaintiff's argument was essentially that the store failed to police the premises sufficiently. Thus, while section 344 was not expressly cited in the plaintiff's brief on appeal, the issue of negligence evidenced by improper inspection was clearly raised. Since "it is the duty of [the] reviewing court to examine the entire [factual] record and determine whether the facts there appearing will support a recovery under any theory, whether or not that theory has been argued by the plaintiff-appellant," Judge Wieand, in his dissent, would have applied the principles of law contained within section 344 to the facts presented by the plain-
If the court was genuine in its prior expression that section 344 was to be applied in Pennsylvania, then it should not have been reluctant to do so in an obviously appropriate case such as Myers.

IV. It is More Equitable to Place the Burden upon the Possessor to Establish that He Has Exercised Reasonable Care under the Circumstances

Under traditional negligence analysis, the plaintiff bears the burden of proving that the defendant-possessor's conduct failed to satisfy his duty of care owed to the plaintiff. Using the typical notice requirement adhered to by the courts, this requires the plaintiff to show either that: (a) the merchant knew that there was a substance on the floor or (b) that the condition existed for such an extended period of time that a reasonable inspection would have disclosed its existence, such that it may be said that the merchant had constructive notice of the danger. Oftentimes, the plaintiff is unable to satisfy either of these requirements and his or her case is therefore dismissed. This failure on the part of the plaintiff to "make the case," however, is not due to a lack of diligence on his own part. (Instead, it is frequently a natural result of the fact that the information required to satisfy the burden, if any such information exists, is held by the merchant).

When a court is determining who bears the burden of proof regarding a particular issue, it would appear just to place the burden upon the party who is in a position to have superior knowledge or access to knowledge to prove or disprove the point. Yet, for the slip and fall plaintiff to establish constructive notice of a dangerous transitory condition, he or she must produce a witness who can state that they observed the offending material on the floor at a time significantly prior to the plaintiff encountering it. This is a

65. Id.
68. In Wollerman v Grand Union Stores, Inc., 47 NJ 431, 221 A2d 513 (1966), where the court shifted the burden to the merchant to show due care, the court noted that "[t]he customer is hardly in a position to know precisely which was the neglect. Overall the fair probability is that defendant did less than its duty demanded in one respect or another . . . It is just, therefore, to place the onus of producing evidence on upon the party who is possessed of superior knowledge or opportunity for explanation of the causative circumstances." Wollerman, 221 A2d at 514-15.
69. In most cases, such a witness to the prior existence of the transitory condition will be the only manner to establish that the condition existed the requisite length of time
particularly difficult burden for the plaintiff because in most supermarkets, the store is set up in a series of aisles through which customers move in a predictable pattern. It is certainly not intended by the merchant that its customers will repeatedly retrace their steps while shopping, such that a potential witness would first witness the unsafe condition of the floor, and then later return to the area after the accident and come forward as a witness. While the appearance of such a witness is not unheard of, it is not an event which can reasonably be expected to result in the production of a constructive notice witness in the vast majority of cases. As a result, unless the plaintiff is fortunate enough to find a customer who had been down the aisle previously and spotted the harmful substance on the floor, her case will fail.70

Conversely, the merchant is in an excellent position to establish that it has met its duty of care. Such proof by the merchant requires only that he establish that a reasonable inspection of the premises was made prior to the accident.71 Moreover, this is not an onerous duty to place upon the merchant. The merchant already has a duty to act reasonably to protect his customers from these risks of harm.72 All that this analysis does is shift the burden from the ignorant plaintiff to the merchant with access to the information necessary to satisfy this burden.73 The fiction of “constructive knowledge” of the condition could then be eliminated and the inquiry again focused upon the true issue: whether the merchant

before the plaintiff’s injury. There are few other practical alternatives in the majority of cases by which the plaintiff can establish that a reasonable merchant would have detected the danger.

70. Obviously, if the plaintiff can find that one of the merchant’s employees was aware of the condition, actual notice will have been shown, and constructive notice would only become relevant if the merchant had acted reasonably after learning of the spill. In such a case, constructive notice via a previous customer would still be necessary to establish that the condition was present for a period of time before the merchant discovered it, such that it should reasonably have been discovered earlier, even though the merchant did act with all due haste to remedy the condition once it was discovered.

71. Bozza v Vornado, Inc., 42 NJ 354, 200 A2d 777, 780 (1964) (“Once plaintiff introduces evidence which raises an inference of negligence, defendant may then negate the inference by submitting evidence of due care.”).

72. As stated in Borsa, “Mrs. Borsa, a business visitor, was owed by appellant the affirmative duty of keeping its premises reasonably safe for business visitors and of warning of any failure to maintain them in that condition, and she was entitled to rely on appellant’s performance of this duty.” Borsa, 215 A2d at 292.

73. In Kavlich v Kramer, 315 So2d 282 (La 1975), the court adopted a standard whereby once the victim has proven that a substance on the floor caused her to slip, the store operator has the burden of going forward with “evidence to exculpate itself from the presumption that it was negligent.” Kavlich, 315 So2d at 285
took reasonable steps to protect his customers from foreseeable risks of harm. That is the question which is ultimately to be decided and it can be more fairly determined by requiring the merchant to show the exercise of due care.

Mrs. Smith, under such an analysis, would still be required to establish that a dangerous condition existed on the floor and that the existence of this danger caused her to suffer injury. After she has satisfied this burden, however, the burden of proof would then shift to SuperGroceries to establish that it exercised due care for the safety of its customers. If SuperGroceries can then show due care, it has a complete affirmative defense to the plaintiff's case. Conversely, if the merchant cannot show due care, then the jury may properly enter an award in favor of Mrs. Smith for the damages caused by SuperGroceries' failure to exercise due care.

**Conclusion**

The modern supermarket and its increasingly self-service nature is fraught with perils for its customers. Antiquitous notions of encouraging commerce at the expense of the consumer no longer rule the nation as they did during the Industrial Revolution, and yet, the Pennsylvania courts continue to be reluctant to apply the present law to favor the customer who is injured as a result of food items dropping to the floor. Moreover, the courts are not willing to expand the scope of the law any further. As a result, in many cases the jury is not allowed to consider the very issue which it is most able to decide, namely, whether particular conduct by a merchant satisfies the community's understanding of the standard of reasonable care. To properly resolve the conflicts which are continually arising between injured customers and supermarket operators, the Pennsylvania courts must be willing to invoke one or more of the analyses discussed herein: (1) finding actual notice of a dangerous condition from the recurring nature of the condition; (2) finding actual notice through the merchant's antecedent conduct in creating the self-service environment which fostered the development of the hazardous condition; (3) finding a duty to maintain and police the supermarket premises as a result of the merchant's past experience with produce debris and the character of the self-service supermarket; and (4) shifting the burden of proof regarding the period of time which the hazardous condition existed from the plaintiff to the defendant. To the extent that the court is continuing to decide that the general condition of a self-service grocery store can not be sufficient evidence of negligence without notice to
the merchant of a specific instance constituting a hazardous condition, it is unnecessarily usurping a power from the jury which is properly within their dominion, and it is stripping the plaintiff of something which is rightfully his or hers: a remedy under the law.

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