

A Slippery Slope

Retailers and Personal Injury Lawsuits

By ROBERT MURPHY

The phone rings. It is the manager of a small grocery store that you own.

In a distressed tone the manager informs you that a woman who was perusing the aisles of your store claims to have slipped on mayonnaise that was spilled on the floor when a jar fell off of a shelf and shattered. Fortunately the woman is not complaining about any serious injuries, but her shoulder is sore and she tore what she claims to be a brand new pair of pants. Your manager insists that the floor was clear and the woman is trying to set you up for a lawsuit. What should you do?

Virtually all shopkeepers will face a similar fact pattern, but the outcomes will vary based on how the business owners handle the situations. The manner in which the situation is handled can lead to either a lawsuit or a satisfied customer. This article addresses the liability of a small retail establishment for injuries which occur on the premises of the business and how the liability may be limited through: (1) reducing exposure to hazards, (2) preventing an injured patron from resorting to the courts, and (3) providing yourself with a defense when all else fails and you're faced with a lawsuit.

Due for a Fall?

Under Massachusetts law, a business must act reasonably to detect and remedy any on-premises hazards that a patron may face. If the business acted reasonably then the business will not be liable for any injuries that occur, because for a business to be liable there must be proof of negligence.

Such negligence will be found when there was a legal duty by the shopkeeper to the plaintiff and a breach of this duty led to injury. Every shopkeeper owes a

legal duty to maintain their shop in a condition that is reasonably safe for everyone who sets foot on the premises, with the exception of trespassers. However, since proof of negligence requires that the business must both owe a duty and act unreasonably, a business is not liable for every injury that occurs on the premises. A property owner, fortunately, is not required to insure the safety of the patrons or visitors, but rather to act reasonably under the circumstances.

The key word in any definition of negligence is always

reasonable.

Reasonableness for a small shop may be having the employee who is sweeping the aisles in the morning keep an active eye out for any possible hazards, while it might be reasonable for a large superstore to hire an employee whose sole job is to continuously patrol the aisles. The test used to determine whether the business is acting reasonably to detect and remedy exposure to possible hazards is based on the totality of the circumstances including: the likelihood of injury, the seriousness of

act reasonably. An offer to pay for repair, cleaning, or replacement of damaged garments can go a long way toward avoiding a costly claim. Explain to the injured party that you would like to do everything possible to prevent similar incidents from recurring and this requires you to memorialize the circumstances surrounding the accident and any injuries she suffered. Obtain a phone number where you can reach her. It is even a good idea to call her the next day and once again express your concern over her injuries and determine what her out-of-pocket expenses for minor medical treatment are.

An offer to pay such bills may, in the right case, be a worthwhile investment. A claim, frivolous or otherwise, can be a serious drain on your time and resources if litigation ensues.

An astute business person may be concerned that his kindness will later be used against him, but paying minor expenses and being sympathetic may be a sound investment. Paying minor bills often leaves the injured patron feeling satisfied instead of slighted and less likely to resort to lawyers or the courts. Yes, sometimes the story may be a complete fabrication and the money will be wasted, but like many business decisions there is some chance involved. The risk offering to pay bills that will prevent exposure to litigation must be weighed against the chance that the story is a complete fabrication and any assistance will be distorted into an admission of liability.

Many lawsuits can be avoided through active policing of the business premises for possible hazards and expressing sympathy toward any patrons who claim injury, but some incidents may still evolve into lawsuits. Of course, it is important to promptly notify your insurance carrier of any report of injury.

The test used to determine whether the business is acting reasonably to detect and remedy exposure to possible hazards is based on the totality of the circumstances.

some form of 'reasonable.' The small grocery store in the aforementioned fact pattern may be found to have not been negligent because it operates in a reasonably safe manner and the mayonnaise just happened to have fallen to the floor the moment before the woman turned to walk down the aisle. A store does not have to protect its patrons from every possible hazard; it must merely act reasonably to prevent exposure to foreseeable hazards. The length of time a hazard exists is often relevant to determining whether a store owner acted reasonably.

Just as young people are taught defensive driving, shopkeepers must be taught to defensively patrol their aisles. All businesses should have clearly defined and routinely practiced procedures for inspecting the business premises in search of possible hazards. The extent of the business's resources will dictate the extent of policing that is

potential injury, and the burden on the business for preventing exposure to the possible hazard.

What is reasonable for a mom and pop shop may not be reasonable for a superstore.

Even a business that actively patrols the premises for possible hazards may miss a hazard that later injures a patron, but, if handled properly, not all injured patrons will become plaintiffs.

The manner in which the injured patron is treated is often determinative of whether a claim is made. Treating the woman who alleges that she slipped on the mayonnaise as a scam artist is sure to aggravate her. She does not believe that she is a villain and does not expect to be treated as one. She properly sees herself as a customer who should be treated with courtesy and sympathy.

The property owner should tailor his behavior to ensure that the patron is aware of his concern for her well being and is willing to

However, in these days of high insurance deductibles, be aware that the first several thousand dollars of a claim may eventually come out of your pocket.

The plaintiff can only collect when she shows that the shopkeeper is negligent based on his unreasonable policing of the premises. Proving a vigilant eye for hazards and preserving evidence is paramount. It is frequently not enough to say the store was properly policed. Documentation of periodic inspection and maintenance of public areas of the premises is key to a successful defense.

Increasingly in this day and age of video monitoring, juries want to "see the videotape."

If your business utilizes such technology, it is essential to properly locate and preserve videotape evidence once you are notified of a claim. Photographing the scene of the accident is also useful to the defense of a frivolous claim.

On-premises accidents are a fact of life for all shopkeepers, but the legal and financial risks associated with them may be minimized through establishing a routine and documented system of inspecting the business

premises for possible hazards. Regardless of the thoroughness

The manner in which the injured patron is treated is often determinative of whether a claim is made.

of the inspection, a hazard may be overlooked and an injury may occur. If a patron is injured, don't automatically assume either that you are at fault or the patron is fabricating the story.

Chart a middle course.

Treat the injured patron with respect and sympathy; gather and record the patron's side of the story; and, preserve evidence of your reasonable efforts to keep a safe premises. A few dollars or minutes spent now may prevent later exposure to the financial and emotional costs associated with a lawsuit.

Robert S. Murphy Jr., Esq., is an experienced trial attorney with Bacon & Wilson, P.C., handling all types of litigation in both state and federal courts; (413)781-0560; rmurphy@bacon-wilson.com.