Allegation of Negligent Operating Procedures in Slip and Fall Actions after Corvin v. Safeway Stores.Allegation of Negligent Operating Procedures in Slip and Fall Actions after Corvin v. Safeway Stores.

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Allegations of Negligent Operating Procedures in Slip and Fall Actions After *Corbin v. Safeway Stores*

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I. INTRODUCTION

General principles of negligence have long imposed on a premises owner or occupier a duty to provide a safe environment to persons entering at his invitation.[1] This duty was severely restricted, however, by the development of a black letter rule requiring a premises occupier's knowledge of the particular hazard causing the fall in order to render him liable for injuries sustained in slip and fall accidents.[2] The purpose of this comment is to

1. *See, e.g.,* Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 221, 152 S.W.2d 1073, 1074 (1941) (failure to keep premises safe for invitees will result in liability for injuries caused thereby); Johnson v. Atlas Supply Co., 183 S.W. 31, 32-33 (Tex. Civ. App.—Fort Worth 1916, no writ) (injury reasonably contemplated must be avoided by owner's duty of care); Indermaur v. Dames, [1861-73] All E.R. 15 (Ex. Ch. 1866) (occupier should use reasonable care to protect invitees from dangers of which he is aware); *see also* W. PROSSER, LAW OF TORTS § 61 (4th ed. 1971) (duty limited to elimination of unreasonable risk).

2. *See, e.g.,* Great Atl. & Pac. Tea Co. v. Giles, 354 S.W.2d 410, 412-13 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.) (requirement of actual or constructive knowledge of grape on floor); H.E. Butt Grocery Co. v. Johnson, 226 S.W.2d 501, 502 (Tex. Civ. App.—San Antonio 1949, writ ref'd n.r.e.) (liability established by proof of defendant's knowledge of presence of Coca Cola); Graham v. F.W. Woolworth Co., 277 S.W. 223, 224 (Tex. Civ.

interpret the current Texas law on the issue of premises liability of business proprietors for injuries sustained by their invitees from falls due to the presence of a foreign substance on the floor. Particular emphasis is to be placed on the recent decision of the Texas Supreme Court in *Corbin v. Safeway Stores,*[3] and the liability for inherent dangers in the self-service displays of today's supermarkets.

II. HISTORICAL BACKGROUND

The duty of care owed by an owner or occupier to persons entering his premises is determined by the role of the party injured.[4] Texas courts have traditionally imposed upon a business proprietor the duty to use reasonable care to maintain his premises in a safe condition for business invitees.[5] This duty requires affirmative action to eliminate or warn of known dangers and to inspect for unknown dangers.[6] In slip and fall cases the courts interpreted the notice requirement as necessitating evidence of actual or constructive knowledge of the presence on the floor of the specific foreign substance which caused the fall, in order to establish an owner's breach of duty.[7] Constructive knowledge was established by evidence that

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App.—El Paso 1925, writ dism'd) (notice of broken glass on floor required to show breach of duty).

3. 648 S.W.2d 292 (Tex. 1983).

4. *See* Rosas v. Buddies Food Store, 518 S.W.2d 534, 536 (Tex. 1975); *see also* Rowland v. City of Corpus Christi, 620 S.W.2d 930, 933 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (differentiating licensee and invitee by benefit inuring to landowner). The duty of care owed to an invitee is greater than that owed either the licensee or the trespasser. *Compare* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 454-55 (Tex. 1972) (duty to inspect and make safe or warn invitee of known danger) *with* Lower Neches Valley Auth. v. Murphy, 536 S.W.2d 561, 563 (Tex. 1976) (duty to make safe or warn licensee of known dangers of which licensee unaware and refrain from wilfull, wanton, or gross negligence) *and* Burton Constr. & Shipbuilding Co. v. Broussard, 273 S.W.2d 598, 603 (Tex. 1954) (duty to trespasser only to avoid wilfull, wanton, or gross negligence). *See generally* Note, *Premises Liability: A Critical Survey Of Indiana Law,* 7 IND. L. REV. 1001 (1974) (detailed description of common law categorical distinctions provided).

5. *See, e.g.,* Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 754 (Tex. 1970) (ordinary care fundamental concept of duty); Henderson v. Pipkin Grocery Co., 268 S.W.2d 703, 705 (Tex. Civ. App.—El Paso 1954, writ dism'd) (storekeeper owes invitees ordinary care); St. Louis Southwestern Ry. Co. v. Rea, 202 S.W. 812, 813 (Tex. Civ. App.—Texarkana 1918, no writ) (owner of business premises obligated to use reasonable care). This duty, however, does not make the premises occupier an insurer of the safety of his patrons. *See* W. PROSSER, LAW OF TORTS § 61 (4th ed. 1971).

6. *See, e.g.,* Rosas v. Buddies Food Store, 518 S.W.2d 534, 537 (Tex. 1975) (no duty to warn or make safe absent discovery of existing danger); Smith v. Henger, 148 Tex. 456, 464, 226 S.W.2d 425, 431 (1950) (inspection included in duty to maintain safe premises); Green v. Kimbell, Inc., 647 S.W.2d 110, 113 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (duty to discover danger by inspection included in exercise of ordinary care).

7. *See, e.g.,* Green v. Kimbell, Inc., 647 S.W.2d 110, 112 (Tex. App.—Fort Worth 1983,

the substance had been on the floor for such a period of time that the proprietor should have known of its presence.[8] Such proof generally necessitated the introduction of evidence as to frequency of inspection,[9] routine maintenance procedures,[10] and elaborate descriptions of the condition of the substance causing the fall[11] in an attempt to provide an inference as to how long the substance had remained on the floor.[12] Section 343 of the

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writ ref'd n.r.e.) (requisite knowledge includes evidence that owner placed substance on floor); Newton v. General Manager of Scurlock's Supermarket, 546 S.W.2d 76, 78 (Tex. Civ. App.—Corpus Christi 1976, no writ) (storeowner failed to remove substance known to be present); H.E. Butt Co. v. Dillingham, 417 S.W.2d 373, 374 (Tex. Civ. App.—Corpus Christi 1967, no writ) (defendant placed substance, knew of its presence, or should have known). The requirement of actual or constructive knowledge was first acknowledged in Texas in 1925. *See* Graham v. F.W. Woolworth Co., 277 S.W. 223, 224 (Tex. Civ. App.—El Paso 1925, writ dism'd) (citing only foreign authority for knowledge requirement).

8. *See, e.g.,* Green v. Kimbell, Inc., 647 S.W.2d 110, 112 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (proof must show substance on floor long enough to be discovered in exercise of ordinary care); Newton v. General Manager of Scurlock's Supermarket, 546 S.W.2d 76, 78 (Tex. Civ. App.—Corpus Christi 1976, no writ) (length of time must show defendant would have discovered substance in exercise of ordinary care); Henderson v. Pipkin Grocery Co., 268 S.W.2d 703, 705 (Tex. Civ. App.—El Paso 1954, writ dism'd) (condition must exist long enough for discovery in exercise of reasonable care).

9. *See, e.g.,* Johnson v. Kroger, Inc., 623 S.W.2d 479, 481 (Tex. App.—Corpus Christi 1981, no writ) (employees working in aisle fifteen minutes prior to fall did not see beans on floor); J.C. Penney Co. v. Chavez, 618 S.W.2d 399, 401-02 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) ("floorman" periodically inspected aisles); J. Weingarten, Inc. v. Bradshaw, 438 S.W.2d 435, 437 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (testimony by employee of constant attention to floors unfavorable to plaintiff's case). Evidence as to frequency of inspection is immaterial unless evidence is also available to show proper inspection would have revealed the danger. *See* F.W. Woolworth Co. v. Goldston, 155 S.W.2d 830, 833 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.).

10. *See, e.g.,* J. Weingarten, Inc. v. Bradshaw, 438 S.W.2d 435, 437 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (evidence that plaintiff slipped on wet floor two hours after store employee mopped not sufficient to support inference); H.E. Butt Grocery Co. v. Russell, 391 S.W.2d 571, 572 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.) (evidence floor not swept hour prior to fall not sufficient to infer constructive notice of lettuce leaf); Henderson v. Pipkin Grocery Co., 268 S.W.2d 703, 705 (Tex. Civ. App.—El Paso 1954, writ dism'd) (negligent cleaning procedures alone insufficient to prove knowledge).

11. *See, e.g.,* J.C. Penney Co. v. Chavez, 618 S.W.2d 399, 401 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (colored condition of banana peel evidence on issue of constructive notice); Kroger Stores v. Hernandez, 549 S.W.2d 16, 17 (Tex. Civ. App.—Dallas 1977, no writ) (drying, caked appearance of regurgitated food sufficient as inference of time substance on floor); H.E. Butt Grocery Co. v. Russell, 391 S.W.2d 571, 572 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.) (bruised condition of lettuce leaf not sufficient evidence of constructive notice); *see also* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (condition by which plaintiff attempted to prove knowledge of presence of grape could have occurred prior to grape reaching floor).

12. *See* J.C. Penney Co. v. Chavez, 618 S.W.2d 399, 406-07 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.). A combination of many factors is necessary to prove constructive notice. The type of business, traffic flow, location of the dangerous object, and

Restatement (Second) of Torts,[13] adopted in Texas in 1972, requires actual or constructive knowledge of a dangerous condition in order to establish an owner's breach of duty.[14]

III. APPLICATION OF PRIOR LAW

A. *Typical Slip and Fall Actions*

The rule requiring actual or constructive knowledge of the specific hazard was necessary in the typical slip and fall case, in which the plaintiff's allegations of negligence were based on the presence of a specific substance on the floor, to avoid imposition of liability on the storeowner for the undiscovered acts of his customers.[15] The only obligation the proprietor had in safeguarding his customers from such hazards was to remove the dan-

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other such factors contribute to establish notice, no single factor alone being sufficient. *See id.* at 406-07; *see also* J. Weingarten, Inc. v. Bradshaw, 438 S.W.2d 435, 438 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.) (evidence must raise more than mere suspicion to infer constructive notice). *See generally* Note, *Supermarket Liability: Problems In Proving The Slip-And-Fall Case In Florida,* 18 U. FLA. L. REV. 440, 443-44 (1965) (difficulty of proof heightened by lack of distinterested witnesses).

13. RESTATEMENT (SECOND) OF TORTS § 343 (1965). Section 343 provides in pertinent part:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees,and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.

Id.

14. *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 454-55 (Tex. 1972) (acknowledging duty to invitees as that summarized in Restatement (Second)). Both the common law and the Restatement (Second) of Torts limited an owner's liability to injuries sustained from latent dangers, extinguishing his duty to eliminate or warn of a condition open and obvious to the invitee. *See* Halapeska v. Callihan Interests, 371 S.W.2d 368, 378 (Tex. 1963). The no-duty doctrine and its accompanying defense of *volenti non fit injuria* were abolished as unnecessary and unworkable with the advent of comparative negligence in Texas. *See* Parker v. Highland Park, Inc., 565 S.W.2d 512, 517, 521 (Tex. 1978) (obvious darkness of stairway does not relieve landowner of duty of ordinary care); Farley v. M.M. Cattle Co., 529 S.W.2d 751, 758 (Tex. 1975) (voluntary assumption of risk does not relieve defendant of liability for injuries to worker riding horse known to have bad disposition).

15. *See* Coffee v. F.W. Woolworth Co., 536 S.W.2d 539, 541 (Tex. 1976). In *Coffee,* the plaintiff sustained injuries when she tripped over an empty display platform which was only a few inches above the floor and similar in color. *See id.* at 540. A judgment notwithstanding the verdict for the defendant was reversed on finding allowable an inference that the storeowner knew of the existence of the empty display platform because the probable explanation for the empty platform was that the defendant's employees were changing the display. *See id.* at 540.

gerous substance from the floor once he had notice of its presence.[16] The effect of the appellate courts' strict interpretation of the notice requirement is best illustrated by the few cases which alleged negligence in a storeowner's method of operation rather than a specific instance of a breach of duty.[17]

B. *Allegations of Negligent Operating Procedures Before Corbin*

In *Swan v. Kroger Co.*,[18] the injured plaintiff's allegations of breach centered around the defendant's negligence in displaying green beans in a slanted bin without providing a guard rail on the bin or a warning.[19] The absence of proof that *the bean* on which the plaintiff slipped was on the floor as a result of the defendant's negligent method of operation, and not the intervening act of a customer, resulted in failure of the plaintiff's case on the issue of proximate cause.[20] Under a similar fact situation a judgment notwithstanding the verdict was upheld in favor of the defendant in *Cooper v. Brookshire Grocery Co.*[21] In *Cooper,* the plaintiff argued that actual or constructive knowledge of the presence of the specific substance

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16. *See, e.g.,* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (acknowledging risks involved in merchandising grapes, Safeway argued preventive measures in anticipation of foreseeable negligence of customers not duty of storeowner); Bosquez v. H.E. Butt Grocery Co., 586 S.W.2d 680, 683 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (potential danger of baby food falling to floor did not create duty to warn of dangers not in existence); J. Weingarten, Inc. v. Tripplett, 530 S.W.2d 653, 658 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (recovery denied on new allegation of negligence in failure to provide doormat, but allowed on proof of constructive notice of mud).

17. *See* Bouyer v. Buddies' Supermarkets, 580 S.W.2d 917, 918 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (negligence in display of tomatoes); Cooper v. Brookshire Grocery Co., 551 S.W.2d 175, 176 (Tex. Civ. App.—Texarkana 1977, no writ) (continuing danger in strawberry display); Swan v. Kroger Co., 452 S.W.2d 793, 794 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (stacking beans too high negligent). In a single case, the Texarkana court allowed recovery by a slip and fall plaintiff absent proof of the storeowner's knowledge of the presence of silt on the sidewalk in front of an outdoor plant display. *See* J. Weingarten, Inc. v. Razey, 414 S.W.2d 532, 533-34 (Tex. Civ. App.—Texarkana 1967), *rev'd,* 426 S.W.2d 538 (1968). It was found that by "common knowledge" the defendant should have known that mud would be deposited on the walkway and render it dangerous. *See id.* at 534. The supreme court, unpersuaded by the "common knowledge" argument, was quick to reverse the decision. *See* J. Weingarten, Inc. v. Razey, 426 S.W.2d 538, 540-41 (Tex. 1968).

18. 452 S.W.2d 793 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.).

19. *See id.* at 794.

20. *See id.* at 796. *But see* Pabst v. Hillman's, 13 N.E.2d 77, 80 (Ill. App. Ct. 1938) (early case finding storeowner liable based on knowledge that manner in which beans were displayed would result in some falling to floor foreseeably injuring customer). Both cause-in-fact and foreseeability must be established for a finding of proximate cause. *See* McClure v. Allied Stores, 608 S.W.2d 901, 903 (Tex. 1980).

21. 551 S.W.2d 175, 177 (Tex. Civ. App.—Texarkana 1977, no writ).

causing the fall was unnecessary in that liability should be predicated on foreseeability of harm resulting from the method by which the store displayed strawberries, not the harm foreseeable from the presence of a particular strawberry on the floor.[22] The court, however, found the evidence insufficient to prove the resulting danger foreseeable.[23] Again, failure of proof on the issue of proximate cause was the basis of a directed verdict for the defendant storeowner in *Bouyer v. Buddies' Supermarkets.*[24] An allegation that the arrangement of tomatoes for display would likely result in some of the product rolling to the floor was insufficient to confer liability without evidence that this negligent act of stacking the tomatoes was the "cause in fact"[25] of the plaintiff's fall.[26] The harshness of this rigid adherence to the black letter law[27] appears to have been alleviated by the recent decision in *Corbin v. Safeway Stores.*[28]

IV. *CORBIN V. SAFEWAY STORES*

Gary Corbin sustained injuries when he slipped and fell on a grape lying in the produce aisle of a local supermarket.[29] Corbin sued Safeway Stores, Inc., alleging three instances of negligence: (1) defendant's constructive knowledge of the presence of the specific grape on the floor, (2) improper maintenance allowing excessive accumulation of litter, and (3) a dangerous method of operation creating an unreasonable risk of harm to the store's patrons.[30] The trial court granted Safeway's motion for directed

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22. *See id.* at 176.

23. *See id.* at 177. A former employee in defendant's produce department testified as an expert witness that stacking of strawberry containers results in spills. *See id.* at 176-77. Defendant's display of open containers, a practice eliminated by the subsequent use of lids, was found only to be a single level, and therefore not foreseeably dangerous under the expert's testimony of the hazard of stacking "over one level high." *See id.* at 177.

24. 580 S.W.2d 917, 919 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.).

25. *See id.* at 919. In an earlier case, the court defined proximate cause to require proof of "(1) . . . cause in fact, - a cause which produces an event and without which the events would not have occurred; *and* (2) foreseeability." *See* Baumler v. Hazelwood, 162 Tex. 361, 367, 347 S.W.2d 560, 564 (1961).

26. *See* Bouyer v. Buddies' Supermarkets, 580 S.W.2d 917, 919 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

27. *See, e.g.,* Bouyer v. Buddies' Supermarkets, 580 S.W.2d 917, 919 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.) (trial court's motion for directed verdict in favor of defendant affirmed on appeal due to lack of evidence on proximate cause); Cooper v. Brookshire Grocery Co., 551 S.W.2d 175, 177 (Tex. Civ. App.—Texarkana 1970, no writ) (judgment notwithstanding the verdict affirmed absent forseeability on which to predicate liability); Swan v. Kroger Co., 452 S.W.2d 793, 796 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (directed verdict affirmed on absence of proof of cause-in-fact).

28. 648 S.W.2d 292 (Tex. 1983).

29. *See id.* at 294.

30. *See id.* at 296. Corbin declined submission to the jury on the issue of constructive

verdict on the absence of evidence establishing Safeway's knowledge of the presence of *the grape* on the floor.[31] The court of appeals affirmed,[32] and Corbin perfected appeal to the Texas Supreme Court.[33]

In *Corbin,* the Texas Supreme Court confronted the disparity between the storeowner's duty of reasonable care and the rule developed to determine a breach of that duty.[34] The court held that notice of the presence of the particular substance on the floor is not necessary to establish a storeowner's failure to exercise ordinary care in regard to risks involved in self-service merchandising as the proximate cause of a slip and fall injury.[35] Justice Spears concluded that liability stems from a storeowner's knowledge that operational methods foreseeably result in harmful consequences,[36] and failure to act reasonably in response to these known risks is a breach of the proprietor's duty under the general rules of negligence.[37]

The *Corbin* court found that the plaintiff had presented evidence sufficient for a jury determination on each of the standard issues involved in a slip and fall cause of action.[38] Safeway acknowledged the risks involved and its policy for elimination of the risks, but conflicting testimony was presented on the presence of floor mats as required by the store policy at the time of the accident.[39] If a floor mat was the means chosen by Safeway to protect its customers from the risks posed by the grape display, failure to have such a mat present could satisfy the requirement of proximate cause.[40] This was not an imposition of liability for the acts of someone

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knowledge. *See id.* at 196. The condition of the grape was found to be insufficient as evidence of constructive knowledge. *See id.* at 296. Additionally, the generally littered condition of the store was found insufficient to support a finding of negligence as it was a grape, not litter, which was alleged to be the proximate cause of the fall. *See id.* at 296.

31. *See* Corbin v. Safeway Stores, No. 05-81-01344-CV (Tex. App.—Dallas July 6, 1982), *rev'd,* 648 S.W.2d 292 (1983).

32. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 294 (Tex. 1983).

33. *See id.* at 294.

34. *See id.* at 296.

35. *See id.* at 295.

36. *See id.* at 296.

37. *See id.* at 295. Section 343 of the Restatement (Second) of Torts was cited as the test to determine compliance with the rule. *See id.* at 295.

38. *See id.* at 296. A similar suggestion of the appropriate issues in a plaintiff's slip and fall case was noted by the supreme court in *Adam Dante Corp. v. Sharpe* as requiring proof: (1) of a defendant's knowledge, (2) of a condition dangerous to his customers, (3) which he neither warns of nor eliminates, and (4) which proximately causes injuries to the plaintiff. *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 458 n.2 (Tex. 1972).

39. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).

40. *See id.* at 297. The court, however, acknowledged that it is the jury who determines if precautions taken by the storeowner are in fact adequate. *See id.* at 297.

over whom the proprietor has no control, as Safeway contended.[41] The court reasoned that because Safeway was responsible for compliance with company policy requiring mats in front of the grape display,[42] a failure to have the mats in place would satisfy the requirement of notice of the premises condition on which the claim was based.[43]

V. IMPACT OF *CORBIN*

A. *Typical Slip and Fall Actions*

The significance of *Corbin* lies in the court's recognition that liability is not predicated solely upon a premises owner's or occupier's actual or constructive knowledge of the precise object causing a fall, but rather upon knowledge of an unreasonable risk of harm to which his invitees are exposed.[44] Though abandoning the restrictive method of ascertaining a storeowner's breach in causes based on negligent operating procedures, a defendant storeowner's knowledge of the presence of a dangerous substance on the floor will give rise to an allegation of breach of a duty independent from that arising from knowledge of a continuing hazardous condition.[45] The policy behind the requirement of actual or constructive knowledge of the specific substance causing the fall remains viable when allegations of breach are predicated on this knowledge,[46] but the duty of reasonable care justifies the extension of the scope of inquiry beyond the

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41. *See id.* at 297; *see also* Coffee v. F.W. Woolworth Co., 536 S.W.2d 539, 541 (Tex. 1975) (buying of merchandise by customers is controllable consequence of doing business).

42. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 294 (Tex. 1983) (Safeway knew of risk and chose mats as protection).

43. *See id.* at 297. Thus the court's decision is in agreement with the holding in Coffee v. F.W. Woolworth Co., 536 S.W.2d 539 (Tex. 1976) that responsibility of the store's employees for the displays imputes actual knowledge of the condition, the absence of mats or the empty display platform, causing the fall. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).

44. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983). Numerous other decisions of foreign jurisdictions were cited by the court as consistent with the rule adopted in *Corbin*. *See id.* at 298 & n.2.

45. *See id.* at 297-98 (recovery denied under allegations of knowledge of grape, but remanded on issue of negligent operational procedures); Cooper v. Brookshire Grocery Co., 551 S.W.2d 175, 175-76 (Tex. Civ. App.—Texarkana 1977, no writ) (plaintiff brought error on sufficiency of evidence of notice of condition of floor *and* separately on evidence of danger in merchandising method).

46. *See, e.g.,* Jasko v. F.W. Woolworth Co., 494 P.2d 839, 840 (Colo. 1972) (unusual occurrence of transitory danger basis of notice requirement); Wiegand v. Mars Nat'l Bank, 454 A.2d 99, 101-02 (Pa. Super. Ct. 1982) (condition caused by person not accountable to owner results in liability only if owner had actual or constructive notice); Coffee v. F.W. Woolworth Co., 536 S.W.2d 539, 541 (Tex. 1976) (proprietor not liable for presence of dangerous object if not responsible for presence or if opportunity to discover absent).

specific substance to any condition of foreseeable harm.[47]

B. *Allegations of Negligent Operating Procedures*

The extension of a proprietor's liability to negligence in operational methods has had little effect on the statement of the issues of proof required of a plaintiff bringing a slip and fall action,[48] though greatly affecting the evidence required to establish such proof.[49] The evidence must show: (1) that the storeowner had knowledge, either actual or constructive, of some condition on his premises; (2) that the plaintiff was exposed to an unreasonable risk of injury as a result of this condition; (3) that the storeowner failed to eliminate or warn of the risk by use of reasonable care; and (4) that the storeowner's failure to exercise such care was the proximate cause of the plaintiff's injuries.[50] The *Corbin* decision has its greatest effect on the first element of proof by abandoning the method of inquiry on the issue of notice without abandoning the notice requirement itself.[51] Knowledge on the part of the defendant can now be made self-evident by steps taken to correct an existing condition.[52] The focus has shifted away from

47. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983); *see also* Moultrey v. Great A & P Tea Co., 422 A.2d 593, 596 (Pa. Super. Ct. 1980) (actual notice may be found in owner's knowledge of condition frequently recurring).

48. *Compare* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (Corbin's burden of proving failure to correct known condition posing unreasonble risk of harm proximately causing injuries) *with* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 458, 458 & n.2 (Tex. 1972) (evidence must show defendant's known creation or maintenance of dangerous condition proximately causing injury). *See generally* Note, *Supermarket Liability: Problems In Proving The Slip And Fall Case In Florida,* 18 U. FLA. L. REV. 440, 443 (1965) (plaintiff must prove existence of condition, dangerous nature, and causation before establishing in addition defendant's knowledge).

49. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 295 (Tex. 1983) (jury determination allowable in absence of showing actual or constructive knowledge of specific substance causing fall).

50. *See id.* at 296.

51. *See id.* at 296 (inference of notice established by defendant's employees' responsibility for presence or absence of mat); *see also* Garcia v. Barber's Super Markets, 463 P.2d 516, 518-19 (N.M. 1969) (recurrence of incidents of water spills for period of six weeks inferred knowledge of storeowner); Jefferis v. Arden-Mayfair, Inc., 592 P.2d 271, 273 (Or. Ct. App. 1979) (statement that grapes had previously been seen on floor and were known to "scatter" tantamount to knowledge of storeowner).

52. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983) (store policy requiring mats would allow jury to infer that slippery condition of floor was result of Safeway's employees' failure to provide mat; thus Safeway knew of condition); *see also* Piggly Wiggly S., Inc. v. Erfourth, 263 S.E.2d 249, 250 (Ga. Ct. App. 1979) (heightened attention to produce aisle with policy of full-time attendant satisfied notice requirement); F.W. Woolworth Co. v. Stokes, 191 So. 2d 411, 416 (Miss. 1966) (defendants provided receptacle for umbrellas near door and provided mops to remove water tracked in door thereby acknowledging continued presence of water).

the bean,[53] strawberry,[54] or tomato[55] to the foreseeability of harm resulting from any hazardous condition on the defendant's premises.[56]

Secondly, a plaintiff must prove that the condition known to the defendant posed an unreasonable risk of harm to the customers.[57] A premises condition is dangerous if it would be foreseen as such by the ordinary prudent person.[58] Evidence that the same condition has been the cause of prior accidents, though not conclusive, is probative evidence of unreasonable risk.[59] Additionally, the third issue of a storeowner's response to a known risk is to be examined through the eyes of the ordinary prudent person.[60] Adequacy of this response is a function of reasonableness.[61] Safeway's response to the risks inherent in the merchandising of grapes was the use of floor mats.[62] The court also included the absence of other

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53. *See* Swan v. Kroger Co., 452 S.W.2d 793, 796 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (plaintiff denied recovery absent evidence that defendant had notice of bean on which she slipped).

54. *See* Cooper v. Brookshire Grocery Co., 551 S.W.2d 175, 177 (Tex. Civ. App.—Texarkana 1977, no writ) (plaintiff unable to show how strawberries got to floor denied recovery).

55. *See* Bouyer v. Buddies' Supermarkets, 580 S.W.2d 917, 919 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.) (possibility that display caused tomato, on which plaintiff slipped, to be on floor insufficient evidence without more).

56. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 294 (Tex. 1983) (defendant recognized customers cause loose grapes to fall to floor); *see also* F.W. Woolworth v. Stokes, 191 So. 2d 411, 416 (Miss. 1966) (storeowner's knowledge of continuing hazard of slippery floors from water from clothing of customers coming in from rain relieves plaintiff from proving knowledge of specific puddle on which she slipped); Ciminski v. Finn Corp., 537 P.2d 850, 853 (Wash. Ct. App. 1975) (self-service operator has actual knowledge of continuing risks of spillage from replenishing supplies and customer handling of goods).

57. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983). The *Corbin* court found the evidence necessary for a jury determination in the testimony of two of Safeway's employees as to the risk posed by the combination of grapes and the green linoleum floor. *See id.* at 296.

58. *See* Rosas v. Buddies Food Store, 518 S.W.2d 534, 537 (Tex. 1975); *see also* Coffee v. F.W. Woolworth Co., 536 S.W.2d 539, 540 (Tex. 1976) (empty display platform same color as floor and only six inches high could be confused for aisle, therefore dangerous); J.C. Penney Co. v. Chavez, 618 S.W.2d 399, 403 (Tex. Civ. App.—Corpus Christi 1981, no writ) (selling of foodstuffs to be consumed on premises indisputedly dangerous).

59. *See* Rosas v. Buddies Food Store, 518 S.W.2d 534, 538 (Tex. 1975) (store manager testified prior falls had occurred on entrance floor when wet); Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 754 (Tex. 1970) (rug on which plaintiff tripped not dangerous absent evidence of other falls on same rug); Bosquez v. H.E. Butt Grocery Co., 586 S.W.2d 680, 683 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (plaintiff presented statistical evidence of accident frequency from foreign substances on grocery store floors).

60. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).

61. *See id.* at 297; *see also* Elrod v. Walls, 473 P.2d 12, 16 (Kan. 1970) (protection provided must be commensurate with risk generated by operational method).

62. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983); *see also* Shiflett v. M. Timberlake, Inc., 137 S.E.2d 908, 911-12 (Va. 1964) (storeowner's liability turns upon

preventive measures with the possible absence of a mat at the time of the accident as factors to be considered in the determination of Safeway's negligence.[63] This further consideration negates any interpretation that merely providing walk-off mats in front of a produce display relieves a storeowner of liability as a matter of law.[64]

The plaintiff's final burden of proving that the defendant's negligence was the proximate cause of injuries sustained in the fall has been altered with the court's decision in *Corbin.*[65] Absence of a storeowner's reasonable care in response to a condition foreseeably resulting in a floor hazard may be found a cause-in-fact of the plaintiff's injuries without proof that the storeowner knew of the particular object causing the fall.[66] Proof that the injury occurred within the realm of foreseeable harm will establish the defendant's liability.[67] As the distance from the display increases, however, the proof of proximate cause is not automatically more difficult since cause-in-fact may now be established by the storeowner's control over the display itself.[68] The loose display of produce may foreseeably result in particles being strewn throughout the store absent efforts by the storeowner to prevent this from occurring.[69] Thus the issues have remained un-

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whether jury finds defendant should have mopped and provided mats in inclement weather and whether he did so).

63. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983). Other precautions which may be considered reasonable in view of the particular display are warnings, frequent inspections, and bagging of grapes prior to display. *See id.* at 297. *But see* Food Fair Stores v. Moroni, 113 So. 2d 275, 278-79 (Fla. Dist. Ct. App. 1959) (procedure whereby vegetables were bagged and stapled in produce department aided in inference that store employee was responsible for spinach found en route from trim area to display).

64. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).

65. *Compare* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983) (proximate cause established by absence of preventive measures in view of foreseeable harm caused by display) *with* Swan v. Kroger Co., 452 S.W.2d 793, 796 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.) (proximate cause not established on proof of negligent operational methods without proof that display method and not customer was cause of bean on floor).

66. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).

67. *See id.* at 297. The absence of the required mat as the cause-in-fact of Corbin's fall is inferrable from the fact that his fall was within close proximity of the grape display. *See id.* at 297.

68. *Cf.* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983) (failure to take precaution against unreasonable risk can be found cause-in-fact of injury due to foreseeability); Dillon v. Wallace, 306 P.2d 1044, 1046 (Cal. Dist. Ct. App. 1957) (requirement of more frequent inspection due to sale of loose vegetables not confined to produce area as fall occurred in grocery section).

69. *See* Dillon v. Wallace, 306 P.2d 1044, 1046 (Cal. Dist. Ct. App. 1957). *See generally* Note, *Supermarket Liability: Problems In Proving The Slip And Fall Case In Florida,* 18 U. FLA. L. REV. 440, 445-47 (1965) (sale of loose vegetables poses continuing danger of particles falling through shopping carts throughout store).

changed with only the method of proof in flux.[70]

C. *Defense of Reasonable Care*

The strength of a premises owner's defense lies in his ability to prove reasonable care in response to a dangerous premises condition about which he should be aware.[71] The method required to protect invitees from the risks involved is influenced by the circumstances of the self-service operation.[72] An important aspect of reasonble care is evidence of general housekeeping procedures such as routine inspection, cleaning, and possible assignment of a particular employee to patrol areas susceptible to recur-

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70. *See* 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 61.02 (1982). The liability issues suggested for slip and fall cases prior to *Corbin* were:

QUESTION 1

On the occasion in question, was there a *banana peel* on the floor of *Davis'* premises?

Answer: _____

If you have answered Question 1 "Yes," and only in that event, then answer Question 2.

QUESTION 2

Did *Davis* know, or in the exercise of ordinary care should he have known, that the *banana peel* was on the floor?

Answer: _____

If you have answered Question 2 "Yes," and only in that event, then answer Question 3.

QUESTION 3

Was *Davis'* failure to *remove* the *banana peel* negligence?

Answer: _____

If you have answered Question 3 "Yes," and only in that event, then answer Question 4.

QUESTION 4

Was that negligence a proximate cause of the occurrence in question?

Answer: _____

Id. After *Corbin* these issues should remain unchanged in causes based on a storeowner's knowledge of the presence of a dangerous substance on the floor. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983). Causes based on a storeowner's negligent operating procedures, as a result of *Corbin* should result in submission of the same issues altered as follows: 1. Were the floor mats (or preventive measure in question) in place when the accident occurred?, 2. Did the failure to have the mats (or other preventive measure) in place create an unreasonable risk of harm?, 3. Was this failure negligent?, and 4. Was this a proximate cause of the plaintiff's injuries?

71. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 295 (Tex. 1983); *see also* Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486, 488 (La. 1976) (storeowner must prove reasonableness of protective measures due to likelihood that customers in self-service stores drop items).

72. *See* Ciminski v. Finn Corp., 537 P.2d 850, 854 (Wash. Ct. App. 1975). "The circumstances that determine the reasonableness of protective measures include the type and volume of merchandise, the type of display, the floor space utilized for customer service, the nature of customer service, and the volume of business." Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486, 488 (La. 1976).

ring hazards.[73] Additional preventive measures can be evidenced by the manner in which goods are packaged for sale,[74] the use of floor coverings designed to prevent falls,[75] or warnings to be cautious of a dangerous area.[76] As *Corbin* allows a finding of lack of reasonble care without evidence as to how long a particular foreign substance has been on the floor, preventive measures taken will be examined by the jury for reasonableness.[77]

D. *Possible Extended Liability*

Though the decision in *Corbin* distributes a portion of the risk of self-service shopping to the storeowner, the slip and fall plaintiff still must bear the burden of proving the defendant's negligence.[78] There are notable extensions of this liability in foreign jurisdictions.[79] In *Wollerman v. Grand Union Stores,*[80] the New Jersey court shifted the burden of proof requiring the defendant to exculpate himself with evidence of reasonable care once the plaintiff proved an injury resulting from a hazardous condition on the premises.[81] The court reasoned that the probability that the defendant did less than was required to protect his invitees from dangerous conditions made it unjust to require proof by the party with the least opportunity to know of the causative circumstances.[82]

Similar reasoning was the basis for a shifting the burden of proof to the

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73. *See* Ciminski v. Finn Corp., 537 P.2d 850, 854 (Wash. Ct. App. 1975); *see also* H.E. Butt Grocery Co. v. Navarro, No. 13-83-105-CV (Tex. App.—Corpus Christi Sept. 22, 1983, no writ) (not yet reported) (available October 29, 1983, on LEXIS, States library, Tex. file) (reversing overruling of defendant's plea of privilege upon finding policy of checking floor every ten to fifteen minutes and assignment of four persons to monitor area of accident reasonable preventive measures).

74. *See* Jefferis v. Arden-Mayfair, Inc., 592 P.2d 271, 272 (Or. Ct. App. 1979) (usual manner of packaging grapes in plastic webbing not in use at time of accident); Cooper v. Brookshire Grocery Co., 551 S.W.2d 175, 177 (Tex. Civ. App.—Texarkana 1977, no writ) (after accident, store policy required lids on strawberry containers previously displayed open).

75. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 298 (Tex. 1983); *see also* Ciminski v. Finn Corp., 537 P.2d 850, 854 (Wash. Ct. App. 1975) (selection of floor covering with awareness food handled over it).

76. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 298 (Tex. 1983).

77. *See id.* at 297.

78. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 296 (Tex. 1983); *see also* Glover v. Montgomery Ward & Co., 536 P.2d 401, 408 (Okla. Ct. App. 1974).

79. *See* Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486, 489 (La. 1976) (knowledge not element of cause of action); Wollerman v. Grand Union Stores, 221 A.2d 513, 515 (N.J. 1966) (defendant's burden to produce evidence of reasonable care).

80. 221 A.2d 513 (N.J. 1966).

81. *See id.* at 515.

82. *See id.* at 515.

defendant in the Louisiana courts.[83] Of significance is the court's reference to *res ipsa loquitur* as not "necessarily" applicable.[84] Absolving the plaintiff of the necessity of proving notice and lack of reasonable care infers the control on the part of the defendant which should enable the doctrine of *res ipta loquitur* to be applied.[85] The *Corbin* decision, however, explicitly recognizes proof of a storeowner's negligence as one of the plaintiff's burdens.[86]

VI. CONCLUSION

As a result of the Texas Supreme Court's decision in *Corbin,* a slip and fall plaintiff no longer must prove actual or constructive knowledge of the particular hazard causing the fall when alleging negligence in a storeowner's method of operation as a proximate cause of injury. Foreseeability that objects from a display will create a floor hazard is the basis of the storeowner's liability regardless of the means by which the items from the display reach the floor if reasonable precautions are not taken to eliminate the risk of harm. As a result of the abandonment of the restrictive test of breach, the law has become more responsive to the dangers it was designed to prevent.

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83. *See* Gonzales v. Winn-Dixie La., Inc., 326 So. 2d 486, 488 (La. 1976); Kavlich v. Kramer, 315 So. 2d 282, 285 (La. 1975).

84. *See* Gonzales v. Winn-Dixie La., Inc. 326 So. 2d 486, 489 (La. 1976). *Res ipsa loquitur* is a theory of proof by inference when circumstantial evidence indicates the accident is one which does not ordinarily occur without negligence, and this negligence is more likely than not that of the defendant. *See* W. PROSSER, LAW OF TORTS § 39 (4th ed. 1971).

85. *Cf.* Owen v. Brown, 447 S.W.2d 883, 886 (Tex. 1969) (delineating defendant's control of instrumentality causing damage and injury of type not ordinarily occurring without negligence as two tests for applying *res ipsa loquitur);* Franklin v. Safeway Stores, 504 S.W.2d 514, 518 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (plaintiff's failure to prove actual or constructive notice of substance causing fall indicates defendant did not have control of instrumentality causing plaintiff's injuries). *See generally* Note, *The Game's Afoot: The Storekeeper's Heightened Responsibility For Slip And Fall Accidents,* 37 LA. L. REV. 634, 637-39 (1977) (shifting burden to defendant to exculpate himself allowed because of storeowner's control over display which causes injury).

86. *See* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983).