N.Y. Pattern Jury Instr.--Civil 2:91 (3d ed.)

New York Pattern Jury Instructions--Civil
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Committee on Pattern Jury Instructions Association of Supreme Court Justices

Division 2. Negligence Actions
G. Specific Negligence Actions
2. Liability for Condition or Use of Land
a. To Persons on The Land
(1) Possessor's Liability

PJI 2:91 Liability for Condition or Use of Land—Possessor's Liability —Unsafe Condition—Foreign Substances--Slip and Fall Cases

As you have heard, the plaintiff AB has sued the defendant CD, claiming that CD negligently maintained the property at [*state location of property*]. The (owner, managing agent, tenant, possessor) of (land, a building) has a duty to use reasonable care to keep the property in a reasonably safe condition.

To recover, AB must prove: (1) that the property was not in a reasonably safe condition; (2) that CD was negligent in not keeping the property in a reasonably safe condition; and (3) that the unsafe condition was a substantial factor in causing AB's injury. Your verdict will be rendered by the answers you give to a series of written questions, which will be given to you.

You must first consider whether the property was not in a reasonably safe condition. AB claims that [*state AB's claims, such as*: (he, she) slipped and fell on the (floor, stairs) in CD's (store, building, apartment house) because there was (wax, grease, food, oil, water)]. CD claims [*state CD's claims, such as*: CD denies that there was any (wax, grease, food, oil, water) on the (floor, stairs) or that, if any (wax, grease, food, oil, water) was there, it did not cause an unsafe condition].

The first question you will be asked is whether or not the condition, as alleged by AB, existed. If your answer is "No," you will go no further, but report your verdict to the court. If your answer is "Yes," you will be directed to the next question: "Did the [*state claimed condition*] create an unsafe condition?"

If you decide that the [*state claimed condition*] did not create an unsafe condition, your answer will be "No," and you will proceed no further [*state where appropriate*: on this claim]. If you decide that the [*state claimed condition*] caused an unsafe condition, you must next consider whether CD was negligent.

Negligence is the lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent (owner, managing agent, tenant, possessor) of (land, a building) would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.

[*Where the claim is that defendant created the condition, the following should be charged*:]

In deciding whether CD was negligent, you must decide whether CD created the [*state claimed condition*]. The next question on the verdict sheet is "Was CD negligent in that (he, she it) created the unsafe condition?" If you find CD created the condition you will find (he, she, it) was negligent. If you find (he, she, it) did not create [*state claimed condition*], you will find that (he, she, it) is not liable for creating an unsafe condition.

[*Where the claim is that defendant did not create the condition but failed to correct it, the following should be charged*:]

If CD did not create the [*state claimed condition*] but knew or should have known about the [*state claimed condition*], you must decide whether CD had sufficient time before the accident to correct the [*state claimed condition*] or to take other suitable precautions.

You will find that CD was negligent if you decide that CD either knew, or in the use of reasonable care should have known, about the [*state claimed condition*] long enough before the accident to have allowed (him, her, it) to correct it or to take other suitable actions and if you further find that (he, she, it) failed to do so. On the other hand, if you find that CD did not know about or, in the use of reasonable care, would not have been able to discover and correct the [*state claimed condition*] before the accident occurred, or if you find that CD corrected the [*state claimed condition*] or took other suitable precautions, then you will decide that CD was not negligent.

You will decide these issues by answering the following questions: "Did CD know or, in the use of reasonable care, should CD have known that the unsafe condition existed?" "Did CD have sufficient notice of the [*state claimed condition*] before the accident to correct it or take other suitable precautions before the accident occurred?" "Did CD fail to correct the [*state condition claimed by plaintiff*] before the accident or take other suitable precautions before the accident occurred?"

[*If plaintiff's contentions include failure to warn and defendant contends that there was no duty to warn because the condition, if unsafe, was open and obvious, the following instruction should be given*:]

As you have heard, AB also claims that CD was negligent for failing to warn of [*state claimed condition*]. CD claims the condition was open and obvious. There is no duty to warn of unsafe conditions that are open and obvious. A condition is open and obvious if, under all of the circumstances, it should have been seen by any person in AB's position who was reasonably using his or her senses under all of the circumstances.

If you decide that the [*state claimed condition*] was open and obvious to a person in AB's position under all of the circumstances, you will find for CD on AB's claim that there was a failure to provide a warning. If you decide that [*state claimed condition*] was not open and obvious to a person in AB's position under all of the circumstances, you will proceed to consider whether CD was negligent in failing to give an adequate warning. The adequacy of a warning depends on both the information it provides and the way the warning is given.

The next question for you to answer will be: "Was the [state claimed condition] open and obvious to a person in AB's position?" If your answer is "Yes" you will be instructed as to the next question you should consider. If your answer is "No," you will be directed to answer the next question which is: "Did CD fail to provide an adequate warning of the [state claimed condition]?"

If, by the answers you have given to the questions presented, you find that CD was negligent, you must next consider whether that negligence was a substantial factor in causing AB's injury. An act or failure to act is a substantial factor in causing an injury if a reasonable person would regard the act or failure to act as a cause of the injury. If you find that CD's negligence was not a substantial factor in causing AB's injury, you will find for CD [*add where appropriate*: on this claim].

The next question asks you to decide if CD's actions or inactions were a substantial factor in causing AB's injuries.

[*One or both of the following questions should be given, depending on the evidence in the particular case*:]

"Was CD's failure to correct the unsafe condition or take other suitable precautions a substantial factor in causing AB's injuries?"

"Was CD's failure to adequately warn of the [state claimed condition] a substantial factor in causing AB's injuries?"

If you find that CD's negligence was a substantial factor in causing AB's injury, you will proceed to consider [*state next appropriate step, e.g., comparative fault, damages, verdict*].

[*Where there is an issue as to plaintiff's comparative fault, the following instruction should be given*:]

If you find that CD was negligent and that CD's negligence was a substantial factor in causing the (accident, injury), you must next consider whether AB was also negligent and whether AB's conduct was also a substantial factor in causing the (accident, injury). The burden is on CD to prove that AB was negligent and that AB's negligence was also a substantial factor in causing the (accident, injury). If you find that AB was not negligent, or if negligent, that (his, her) negligence was not a substantial factor in causing the (the accident, injury), you must find that AB was not at fault and you must go on to consider AB's damages, if any [*in a bifurcated trial, substitute the following for the direction to go on to consider damages*: in that event, you should go no further and report your findings to the court].

If, however, you find that AB was negligent and that (his, her) negligence was also a substantial factor in causing the (accident, injury), you must then apportion the fault between AB and CD [*or, where appropriate*: among AB, CD and EF].

Weighing all the facts and circumstances, you must consider the total fault, that is, the fault of both AB and CD [*or, where appropriate*: of AB, CD and EF] and decide what percentage of fault is chargeable to each. In your verdict, you will state the percentages you find. The total of those percentages must equal one hundred percent.

Using the same principles I outlined for you in determining whether CD was negligent you will be asked to answer the following questions:

"Was AB negligent?" If your answer is "Yes," you will then be asked: "Was AB's negligence also a substantial factor in causing (his, her) own injuries?" If your answer to this question is also "Yes," you will then be asked: "What was the percentage of fault of AB, CD [*where appropriate EF*]? Your answers must add up to 100%.

See PJI 2:36.1 *for an example that may be given to the jury to assist it to understand the process of arriving at percentages of fault. See* PJI 2:36.2 *for a charge to be given in the damages phase of a bifurcated trial before the same jury that decided liability.*

The following special verdict form should be used in conjunction with PJI 2:91. PJI 1:97 *should also be charged.*

Special Verdict FormPJI 2:91SV-I
NOTE: The following special verdict form sets forth questions concerning several theories of liability, only some of which may be at issue in a specific trial.

After each question, insert an instruction that is dependent on the answer and that directs the jurors to the next appropriate question, e.g. "If your answer is "Yes," proceed to Question No. _," or, "If your Answer is "No," proceed no further but report your verdict to the court."

1. Was there [*state claimed condition*]?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

2. Was [*state claimed condition*] an unsafe condition?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

[*Note: The special verdict form questions should be drafted to include only the specific negligence theories that the evidence in the case presents*]

3. Was CD negligent in that (he, she, it) created the unsafe condition?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

4. Was CD's negligence in creating the unsafe condition a substantial factor in causing AB's injuries?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

5. Did CD know or, in the use of reasonable care, should CD have known that the unsafe condition existed?

Yes _____ No _____

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

6. Did CD have sufficient notice of the [*state claimed condition*] before the accident to correct it or take other suitable precautions before the accident occurred?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

7. Did CD fail to correct the [*state claimed condition*] or take other suitable precautions before the accident occurred?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

8. Was CD's failure to correct the unsafe condition or take other suitable precautions a substantial factor in causing AB's injuries?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

[*Note: Where failure to warn is an issue, the following questions should be inserted*]

9. Was the [*state claimed condition*] open and obvious to a person in AB's position?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

10. Did CD fail to provide an adequate warning of the [*state claimed condition*]?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

11. Was CD's failure to adequately warn of the [*state claimed condition*] a substantial factor in causing AB's injuries?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

[*Note: Where comparative fault is an issue, the following questions should be inserted*]

12. Was plaintiff AB also negligent?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

13. Was AB's negligence also a substantial factor in causing (his, her) own injuries?

Yes _____ No _____

At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

14. What was the percentage of fault of: defendant CD, plaintiff AB [*where appropriate: and EF*]?

CD _____%
AB _____%
EF _____%
Total 100%
At least five jurors must agree on the answer to this question.

[*Insert signature lines and appropriate instruction as to the next question to answer based upon the previous answer*]

15 [*Insert appropriate damage interrogatories*]

Comment

[See also Introductory Statement to this division, supra.]

Caveat: The pattern charge has been drafted to incorporate the open-and-obvious doctrine. When applicable, this doctrine relieves a defendant of the duty to warn of an unsafe condition that is open and obvious to a reasonable person, but does not relieve the defendant of the duty to maintain the premises in reasonably safe condition, Alexander v St. Mary's Institute, 78 AD3d 1475, 912 NYS2d 153. It should be noted, however, that most of the Appellate Division decisions applying the open-and-obvious doctrine arise in contexts other than slip-and-fall cases, see Page v State, 72 AD3d 1456, 902 NYS2d 199 (trip and fall); Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 773 NYS2d 38 (trip and fall); MacDonald v Schenectady, 308 AD2d 125, 761 NYS2d 752 (trip and fall). Although there are some Appellate Division decisions that explicitly apply the open-and-obvious doctrine to slip-and-fall cases, Mei Xiao Guo v Quong Big Realty Corp., 81 AD3d 610, 916 NYS2d 155; Sullivan v RGS Energy Group, Inc., 78 AD3d 1503, 910 NYS2d 776; Headley v M & J Ltd. Partnership, 70 AD3d 1312, 894 NYS2d 804; Sewitch v LaFrese, 41 AD3d 695, 839 NYS2d 114; see Baines v G & D Ventures, Inc., 64 AD3d 528, 883 NYS2d 256; Garcia v Mack-Cali Realty Corp., 52 AD3d 420, 861 NYS2d 26 no appellate authority exists specifically analyzing the extent to which the open and obvious nature of slippery conditions on floors or steps is a valid defense to a claim based on the owner's failure to warn.

Based on cases cited in the first paragraph of the Comment to PJI 2:90.

The pattern charge is a specific application of the general principles dealt with in PJI 2:90. It integrates questions of unsafe condition, notice, opportunity to correct and adequate warning. As to foreseeability, see PJI 2:12; as to comparative fault, see PJI 2:36. As to the principles governing cases in which there is a claim that the hazardous condition was open and obvious, see Comment to PJI 2:90.

To establish a prima facie case against an owner or possessor, plaintiff must be able to demonstrate that defendant either created the condition that caused the accident or that it had actual or constructive notice of the condition, Peralta v Henriquez, 100 NY2d 139, 760 NYS2d 741, 790 NE2d 1170 (citing PJI); Eddy v Tops Friendly Markets, 91 AD2d 1203, 459 NYS2d 196, aff'd, 59 NY2d 692, 463 NYS2d 437, 450 NE2d 243; Hanley v Affronti, 278 AD2d 868, 718 NYS2d 753; Browne v Big V Supermarkets Inc., 188 AD2d 798, 591 NYS2d 223; Kane v Human Services Center, Inc., 186 AD2d 539, 588 NYS2d 361. Where defendant created the unsafe condition, the question of defendant's knowledge or notice is ordinarily irrelevant and should be omitted from the charge, see Ohanessian v Chase Manhattan Realty Leasing Corp., 193 AD2d 567, 598 NYS2d 204; Roberts v Arrow Boat Club, Inc., 46 AD2d 815, 361 NYS2d 213. The Second Department has noted, however, that there may be circumstances in which the facts support an argument that defendant created a dangerous condition without immediately realizing either the condition's existence or its danger, Walsh v Super Value, Inc., 76 AD3d 371, 904 NYS2d 121. In those situations, the court reasoned, defendant's knowledge or notice may be a factor in establishing its negligence and the knowledge element must be included in the charge even though the condition was created by defendant, id.

A. Landowner's Duty In General

The dangers to be reasonably anticipated are part of the measure the owner's duty of care and, thus, are factors in determining the frequency of inspection and the intensity of the maintenance required, Cameron v H. C. Bohack Co., 27 AD2d 362, 280 NYS2d 483. Moreover, the location of the hazard may affect the owner's duty of care. For example, in Weisenthal v Pickman, 153 AD2d 849, 545 NYS2d 369, the court declined to apply the holding in Gordon v American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774, which involved an accident that occurred on the crowded outdoor front steps of a popular museum, to a case involving a fall on a debris-strewn indoor stairwell that could have been swept clean daily. The reasoning of Weisenthal has been applied to actions involving falls at other indoor settings where debris had collected over time, Benn v Municipal Housing Authority for City of Yonkers, 275 AD2d 755, 713 NYS2d 544; Fundaro v New York, 272 AD2d 516, 708 NYS2d 149; but see Rivera v 2160 Realty Co., L.L.C., 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267 (beer bottle left overnight in stairwell of apartment building).

1. Statutes and Ordinances Affecting Standard of Care

There are instances where the applicable standard of care is set by statute. Thus, the provisions of Multiple Dwelling Law § 80(1) and (2) must be charged with respect to the duty owed by the owner of a multiple dwelling to keep the hallways clean, Labetti v Fanley Associates Inc., 27 AD2d 654, 276 NYS2d 904. However, the statute or ordinance must be one that is relevant to the occurrence involved in the case. For example, while Multiple Residence Law § 174 requires an owner to keep premises in good repair, clean and free of matter dangerous to life or health, the statute is intended to provide for sanitation but does not cover rain, snow and ice and, therefore, should not be charged in a snow and ice case, Doyle v Streifer, 34 AD2d 183, 310 NYS2d 165, or a case involving a moss-like substance on an outdoor walkway, Hamlin v McTighe, 240 AD2d 792, 658 NYS2d 150.

Since statutes concerning cleanliness of floors, stairs and yards are not construed to impose absolute liability, notice, actual or constructive, is required in an action based on such a statute, see Labetti v Fanley Associates Inc., 27 AD2d 654, 276 NYS2d 904; Zapin v Israel, 285 App Div 968, 138 NYS2d 675. Likewise, where Multiple Residence Law § 174 imposes a duty to keep the premises in good repair, clean and free of dangerous matter, liability attaches only if defendant had actual or constructive notice of the defective condition and failed to make the needed repairs within a reasonable time after acquiring such notice, Contento v Albany Medical Center Hospital, 57 AD2d 691, 394 NYS2d 74; see Hamlin v McTighe, 240 AD2d 792, 658 NYS2d 150.

For charges with respect to violations of statutes or ordinances, see PJI 2:25 and PJI 2:29.

2. Defendant's Self-Imposed Custom and Practice

Evidence of defendant's self-imposed custom and practice that exceeds the duty of reasonable care may not be used to establish a duty different from that impose by the common law, Pomahac v TrizecHahn 1065 Ave. of Americas, LLC, 65 AD3d 462, 884 NYS2d 402; see Newsome v Cservak, 130 AD2d 637, 515 NYS2d 564 (no liability for failing to follow self-imposed policy of sanding and salting mall parking lot and roads during snowfall).

For a charge on the effect of customary business practices on the standard of care, see PJI 2:16.

B. Actual or Constructive Notice Requirement

1. In General

In a common-law action based on an unsafe condition not created by defendant, notice, actual or constructive, is essential, Herman v State, 63 NY2d 822, 482 NYS2d 248, 472 NE2d 24; Bogart v F.W. Woolworth Co., 24 NY2d 936, 301 NYS2d 995, 249 NE2d 771; Appleby v Webb, 186 AD2d 1078, 588 NYS2d 228; Fischer v Battery Bldg. Maintenance Co., 135 AD2d 378, 521 NYS2d 678. A factual issue regarding actual notice may be established prima facie by evidence that a wet-floor sign was placed near the accident scene, Hilsman v Sarwil Associates, L.P., 13 AD3d 692, 786 NYS2d 225. However, the presence of such a sign will not preclude a finding that defendant lacked actual notice of the wet-floor condition in a proper case, id.

A general awareness that litter or some other unsafe condition may be present is not sufficient to place defendant on constructive notice, Gordon v American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774; Smith v May Department Store, Co., 270 AD2d 870, 705 NYS2d 153; see Piacquadio v Recine Realty Corp., 84 NY2d 967, 622 NYS2d 493, 646 NE2d 795; Stewart v Canton-Potsdam Hosp. Foundation, Inc., 79 AD3d 1406, 912 NYS2d 773 (ice condition); Boucher v Watervliet Shores Associates, 24 AD3d 855, 804 NYS2d 511; see also Solazzo v New York City Transit Authority, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 (general awareness that subway stairs and platform become wet during inclement weather insufficient to constitute constructive knowledge of specific condition of subway steps during ongoing snow, sleet and rain storm). Likewise, plaintiff's observation of a similar object at a different location shortly before the occurrence does not charge defendant with notice of the condition that caused the injury, Gordon v American Museum of Natural History, supra.

The jury may infer from the irregularity, width, depth and appearance of the defect whether the condition existed for such time that defendant, in the exercise of reasonable care, should have known of it, Taylor v New York City Transit Authority, 48 NY2d 903, 424 NYS2d 888, 400 NE2d 1340; Reardon v Benderson Development Co., Inc., 266 AD2d 869, 697 NYS2d 893; Ferlito v Great South Bay Associates, 140 AD2d 408, 528 NYS2d 111; see Hecker v New York City Housing Authority, 245 AD2d 131, 665 NYS2d 660 (plaintiff described large defect).

With respect to constructive notice, the condition must have existed for a sufficient length of time so that, in the exercise of reasonable care, defendant not only should have discovered it but also could have corrected it, Rivera v 2160 Realty Co., L.L.C., 4 NY3d 837, 797 NYS2d 369, 830 NE2d 267; Kennedy v Wegmans Food Markets, Inc., 90 NY2d 923, 664 NYS2d 259, 686 NE2d 1353, rev'g for the reasons stated in the AD dissent, 239 AD2d 898, 660 NYS2d 103; Gordon v American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646, 492 NE2d 774; Madrid v New York, 42 NY2d 1039, 399 NYS2d 205, 369 NE2d 761; Hightower v Alexander, 207 AD2d 960, 617 NYS2d 74 (issues of fact as to whether oily spot in parking lot where plaintiff fell existed long enough to permit defendants' employees to remedy defect and whether condition was visible and apparent). In the absence of any evidence of how long a substance was on a floor before plaintiff fell, plaintiff may not rely on a theory of constructive notice, Kennedy v Wegman's Food Markets, Inc., supra; Berger v ISK Manhattan, Inc., 10 AD3d 510, 781 NYS2d 648; Grimes v Golub Corp., 188 AD2d 721, 590 NYS2d 590; Torri v Big V of Kingston, Inc., 147 AD2d 743, 537 NYS2d 629; see Faricelli v TSS Seedman's, Inc., 94 NY2d 772, 698 NYS2d 588, 720 NE2d 864 (standing alone, existence of blackened banana peel on floor in housewares section of department store not sufficient to establish constructive notice); Andersen v Park Center Associates, 250 AD2d 473, 673 NYS2d 396 (existence of wet spot, in and of itself, cannot demonstrate requisite notice).

Constructive notice may be established by evidence of the long continued existence of the condition, Andersen v Park Center Associates, 250 AD2d 473, 673 NYS2d 396; Galieta v Young Men's Christian Ass'n of City of Schenectady, 32 AD2d 711, 300 NYS2d 170; Bergmann v Daino, 26 AD2d 889, 274 NYS2d 309. How much time is required to establish constructive notice depends both on the nature and location of the foreign substance or other hazard. For example, an hour is insufficient with respect to fecal matter on an apartment house stoop, Goodman v Silverman, 231 App Div 84, 246 NYS 319. In contrast, the presence of beans on a food market floor for 15 or 20 minutes, Wheeler v Deutch, 242 App Div 641, 272 NYS 161, or melted ice cream on a supermarket floor for 30 to 45 minutes presented a jury question concerning constructive notice, Greco v Acme Super Markets, Inc., 17 AD2d 899, 233 NYS2d 406. Likewise, a jury question was presented as to the presence of broken jars of baby food on a supermarket floor, which had not been cleaned or inspected for at least 50 minutes, where the trier of fact could find that a hazardous condition had been present for more than 15 to 20 minutes, Negri v Stop and Shop, Inc., 65 NY2d 625, 491 NYS2d 151, 480 NE2d 740; see Allein v Niagara Frontier Services, Inc., 209 AD2d 926, 619 NYS2d 226 (evidence that oily substance similar to salad dressing contained in bottles on nearby display had accumulated underneath and soaked rug raised factual issue whether substance had been present for length of time sufficient to place defendant on constructive notice). Notice of the danger created by water resulting from rain or snow cannot be inferred from the fact that a heavy rain began shortly before plaintiff was injured, Boccaccino v Our Lady of Pity Roman Catholic Church, 18 AD2d 1055, 238 NYS2d 911. However, such notice may be inferred from the existence of a brown and yellow ceiling stain from which water was leaking, Andersen v Park Center Associates, supra.

Where the evidence might justify an inference that the unsafe condition existed for a sufficient period of time but is equally consistent with a finding that the dangerous condition had been created shortly before plaintiff's fall, plaintiff is not entitled to recover, Anderson v Klein's Foods, Inc., 139 AD2d 904, 527 NYS2d 897, aff'd, 73 NY2d 835, 537 NYS2d 481, 534 NE2d 319; Pianforini v Kelties Bum Steer, 258 AD2d 634, 685 NYS2d 804; Young v Whitman Deli, Inc., 214 AD2d 560, 625 NYS2d 232; see Ruggiero v Waldbaums Supermarkets, Inc., 242 AD2d 268, 661 NYS2d 37. Standing alone, the fact that an item was crushed, dirty, withered, or shriveled up is normally insufficient to raise a triable issue with respect to notice, Strowman v Great Atlantic and Pacific Tea Co., Inc., 252 AD2d 384, 675 NYS2d 82; Cuddy v Waldbaum, Inc., 230 AD2d 703, 646 NYS2d 51.

The fact that defendant's employees may have been in the vicinity of the accident, standing alone, is not sufficient by itself to establish constructive notice, Strowman v Great Atlantic and Pacific Tea Co., Inc., 252 AD2d 384, 675 NYS2d 82; Benware v Big V Supermarkets, Inc., 177 AD2d 846, 576 NYS2d 461. However, constructive notice has been inferred where there is evidence that defendant's employees were in the immediate vicinity of the dangerous condition and could easily have noticed and removed it, Rose v Da Ecib USA, 259 AD2d 258, 686 NYS2d 19; see Qevani by Qevani v 1957 Bronxdale Corp., 232 AD2d 284, 649 NYS2d 11 (given that defendant employed two building maintenance people at time of accident, it could not be said, as a matter of law, that 90 minutes was insufficient time to allow for correction of visible and apparent defect). An inference of notice may also fairly be drawn from an inspection report, prepared a sufficient length of time before the accident, indicating the existence of the defective condition, and evidence that the defective condition was not repaired or inspected between the time the report was prepared and the accident, Perez v New York City Transit Authority, 289 AD2d 119, 735 NYS2d 38.

2. Notice of Recurrent Conditions

Notwithstanding that general awareness that some unsafe condition may be present is not sufficient for constructive notice, the courts have reasoned that actual knowledge of a specific recurrent dangerous condition is qualitatively different and may give rise to a finding of notice, Black v Kohl's Department Stores, Inc., 80 AD3d 958, 914 NYS2d 469; Benn v Municipal Housing Authority for City of Yonkers, 275 AD2d 755, 713 NYS2d 544; Loguidice v Fiorito, 254 AD2d 714, 678 NYS2d 225; Migli v Davenport, 249 AD2d 932, 672 NYS2d 551; see Erikson v J.I.B. Realty Corp., 12 AD3d 344, 783 NYS2d 661; Colt v Great Atlantic & Pacific Tea Co., Inc., 209 AD2d 294, 618 NYS2d 721. Thus, in Weisenthal v Pickman, 153 AD2d 849, 545 NYS2d 369, the court held that when the evidence supports a finding that a landowner has actual knowledge that a particular dangerous condition recurs, the landowner is charged with constructive notice of each specific recurrence of that condition, see Anderson v Great Eastern Mall, L.P., 74 AD3d 1760, 902 NYS2d 283; Sewitch v LaFrese, 41 AD3d 695, 839 NYS2d 114; Erikson v J.I.B. Realty Corp., supra; Uhlich v Canada Dry Bottling Co. of New York, 305 AD2d 107, 758 NYS2d 650; Lowe v Spada, 282 AD2d 815, 722 NYS2d 820; Endres v Mingles Restaurant, Ltd., 271 AD2d 207, 706 NYS2d 32; Loguidice

v Fiorito, supra (recurrent icy condition); Migli v Davenport, supra; O'Connor-Miele v Barhite & Holzinger, Inc., 234 AD2d 106, 650 NYS2d 717. Further, in Black v Kohl's Department Stores, Inc., supra, the Third Department held that knowledge of a recurring dangerous condition can give rise to constructive notice of that condition, even where there is no claim that the condition was regularly unaddressed and there is evidence that defendant's employee inspected the area less than an hour before the accident. Notably, the Black court applied the recurring-condition principle to a hazard created by store patrons, who regularly left merchandise on the floor, id.

A jury question was presented where plaintiff's evidence tended to show that defendant negligently maintained the staircase in question by failing to implement a cleanup schedule sufficiently frequent to avoid the creation of a recurrent dangerous condition of which it had constructive notice, Lopez v New York City Housing Authority, 255 AD2d 160, 679 NYS2d 398. Similarly, a question of fact existed as to defendant's notice of a dangerous wet condition on an interior stair in a subway station, where plaintiff stated that he had observed the same condition on many prior occasions and that the source of the condition was a leaky pipe, Talavera v New York City Transit Authority, 41 AD3d 135, 836 NYS2d 610. However, a defendant could not be charged with having constructive notice of drinks spilled on a dance floor on the ground that such spills were a recurring condition on the premises, Gloria v MGM Emerald Enterprises, Inc., 298 AD2d 355, 751 NYS2d 213; see Mauge v Barrow Street Ale House, 70 AD3d 1016, 895 NYS2d 499 (no recurrent condition giving rise to notice where no evidence of prior complaints and area in question given sufficient regular inspections).

C. Conditions Created by Defendant

Generally, plaintiff is not required to prove notice of the unsafe condition when the condition was created by defendant or defendant's agent or employee, McKee v State, 75 AD3d 893, 906 NYS2d 632; Schwartz v Mittelman, 220 AD2d 656, 632 NYS2d 667; Ohanessian v Chase Manhattan Realty Leasing Corp., 193 AD2d 567, 598 NYS2d 204; Cruz v New York City Transit Authority, 136 AD2d 196, 526 NYS2d 827. Thus, notice is not required if the condition is the result of a prior defective repair, Princiotto v Materdomini, 45 AD2d 883, 358 NYS2d 13. In Walsh v Super Value, Inc., 76 AD3d 371, 904 NYS2d 121, the court stated that there may be circumstances where the facts support an argument that defendant created a dangerous condition without immediately realizing either the condition's existence or its danger. In those situations, the Walsh court stated, defendant owner's knowledge or notice of the danger is an element of plaintiff's negligence claim, id.

Plaintiff does not establish prima facie that defendant created the condition that caused the accident by evidence that a greasy substance that looked like soup was on the floor of a restaurant in an area traversed by waiters going to and from the kitchen, Beutenmiller v West End Tavern, 1 NY2d 652, 150 NYS2d 21, 133 NE2d 510; Mauge v Barrow Street Ale House, 70 AD3d 1016, 895 NYS2d 499, by evidence that the small box in a supply room over which plaintiff tripped had not been there 15 minutes prior to the occurrence, Fink v Board of Educ. of City of N.Y., 117 AD2d 704, 498 NYS2d 440; or by evidence that there was a jello-like substance on the floor of a mental hospital, Pascual v State, 23 AD2d 518, 255 NYS2d 450.

D. Causation

The dangerous condition must have been a proximate cause of plaintiff's injury, Richardson-Dorn v Golub Corp., 252 AD2d 790, 676 NYS2d 260; Carlson v Rondout Nat'l Bank, 14 AD2d 644, 218 NYS2d 261; see Acunia ex rel. Salgado v New York City Department of Education, 68 AD3d 631, 891 NYS2d 700. However, where there are several unsafe conditions present, it is not necessary that plaintiff prove which condition caused the injury, as long as it is natural and reasonable to infer that the injury was caused by one of them, Gramm v State, 28 AD2d 787, 281 NYS2d 235, aff'd, 21 NY2d 1025, 291 NYS2d 7, 238 NE2d 498 (worn, dirty, littered stairs); see Kelsey v Port Authority of New York and New Jersey, 52 AD2d 801, 383 NYS2d 347 (cigarette butts, paper cups and wetness on steps). Further, where there is evidence of a spill in the area where plaintiff slipped and fell, plaintiff is not required to identify the precise substance that caused the accident or demonstrate the precise manner in which the accident occurred, Mott v Big V Supermarkets Inc., 188 AD2d 870, 591 NYS2d 581; Weisenthal v Pickman, 153 AD2d 849, 545 NYS2d 369; see Munno v State, 266 AD2d 694, 698 NYS2d 107. Nonetheless,while plaintiff bears no burden to identify the substance that caused the slip and fall, mere speculation regarding causation is inadequate to sustain a cause of action, Zanki v Cahill, 2 AD3d 197, 768 NYS2d 471, aff'd, 2 NY3d 783, 780 NYS2d 307, 812 NE2d 1257 (evidence that plaintiff's sleeve was wet after fall and allegations of recurrent condition of spilled food, drink and ice on stairs

insufficient to establish dangerous condition proximately causing accident); Segretti v Shorenstein Co., East, L.P., 256 AD2d 234, 682 NYS2d 176 (plaintiff's testimony that there was oily substance on his shoes after accident and that he saw "stuff" on lobby floor insufficient to prove causation).

If causation is undisputed, the pattern charge should be modified to delete that issue. If there is a claim of intervening or concurrent causation, further charges on those issues are required, see PJI 2:71, 2:72.

E. Comparative Fault

Slip and fall cases are subject to comparative-fault analysis, but not the doctrine of primary assumption of risk, Alexander v St. Mary's Institute, 78 AD3d 1475, 912 NYS2d 153. As is true with other premises-liability cases, the open and obvious nature of the condition may be relevant to plaintiff's comparative fault, id.

F. Common Conditions Causing Slip and Fall Accidents

Washed floors or stairs—Washing can give rise to slippery floors and stairs and may lead to unreasonably unsafe conditions in some circumstances, Sharac v Perretta, 3 AD2d 935, 163 NYS2d 138, aff'd, 3 NY2d 965, 169 NYS2d 35, 146 NE2d 792 (triable question of negligence raised where person washing stairs directed plaintiff to proceed over wet stairway and safer path was blocked by washer's pail). The time and place of the floor washing are factors in determining whether the conduct may be deemed negligent. For example, washing the floor of a railroad station, Curtiss v Lehigh Valley R.R. Co., 233 NY 554, 135 NE 915, or an apartment hall or stairway, Samuels v Terry Holding Co., 227 App Div 68, 237 NYS 99, aff'd, 253 NY 593, 171 NE 797; Wigdorowitz v Abrahams, 237 App Div 81, 260 NYS 326, is not, by itself, unreasonable. However, washing the floor of a store during business hours, rather than after closing, may present a question of fact as to negligence, Walz v Paul Helfer, Inc., 286 NY 408, 36 NE2d 640; McDonald v Louis K. Liggett Co., 241 App Div 913, 272 NYS 95.

Wet Weather—The presence of puddles, slush or mud resulting from rain or snow is not alone sufficient to impose liability, unless the construction of the entranceway or floor is inherently dangerous or the owner or possessor, with actual or constructive notice that the entranceway or floor has become so wet as to be dangerous, fails to remedy the condition in a timely manner, Miller v Gimbel Bros., 262 NY 107, 186 NE 410; Hilsman v Sarwil Associates, L.P., 13 AD3d 692, 786 NYS2d 225; Keir v State, 188 AD2d 918, 591 NYS2d 621; Wessels v Service Merchandise Inc., 187 AD2d 837, 589 NYS2d 971; see Ford v Citibank, N.A., 11 AD3d 508, 783 NYS2d 622. A factual issue regarding actual notice of a wet floor may be established prima facie by evidence that a wet-floor sign was placed near the accident scene, Hilsman v Sarwil Associates, L.P., supra. However, the presence of such a sign will not preclude a finding that defendant lacked actual notice of the condition in a proper case, id.

Under the storm-in-progress rule, a wet, slippery entranceway caused by tracked-in snow and slush is a reality of winter weather that a landowner ordinarily is not required to rectify until the underlying weather condition has abated, Zonitch v Plaza at Latham LLC, 255 AD2d 808, 680 NYS2d 304; see Solazzo v New York City Transit Authority, 6 NY3d 734, 810 NYS2d 121, 843 NE2d 748 (storm-in-progress rule applicable to subway steps that become wet during ice and snow storm). Similarly, a defendant is not obligated to provide a constant remedy to the problem of water being tracked into a building as a result of rainy weather, Gibbs v Port Authority of New York, 17 AD3d 252, 794 NYS2d 320; Ford v Citibank, N.A., 11 AD3d 508, 783 NYS2d 622. The fact that an outdoor walkway becomes wet from rainfall is insufficient by itself to establish the existence of a dangerous condition, Cavorti v Winston, 307 AD2d 1018, 763 NYS2d 777. Likewise, the fact that subway steps regularly become wet during inclement weather was held insufficient to place the Transit Authority on notice of the specific slippery condition resulting from snow and sleet that led to plaintiff's accident, Solazzo v New York City Transit Authority, supra.

Flooring material–The use of flooring material that is inherently slippery is not, by itself, actionable negligence, Cietek v Bountiful Bread of Stuyvesant Plaza, Inc., 74 AD3d 1628, 903 NYS2d 213; Sarmiento v C & E Associates, 40 AD3d 524, 837 NYS2d 57; Waiters v Northern Trust Co. of New York, 29 AD3d 325, 816 NYS2d 18; Bennett v New York City Transit Authority, 4 AD3d 265, 772 NYS2d 320, aff'd, 3 NY3d 745, 787 NYS2d 711, 821 NE2d 137; Duffy v Universal Maintenance Corp., 227 AD2d 238, 642 NYS2d 282, even where there is evidence that defendant may have had notice of the condition, Eichelbaum v Douglas Elliman, LLC, 52 AD3d 210, 859 NYS2d 145; DeMartini v Trump 767 5th Avenue, LLC, 41 AD3d

181, 837 NYS2d 137. The same is true of inherently slippery flooring that becomes more slippery when wet, Wasserstrom v New York City Transit Authority, 267 AD2d 36, 699 NYS2d 378. Thus, the fact that terrazzo is slippery when wet does not make construction with such material inherently dangerous, and the use of such flooring is not in itself negligent, Berman v H. J. Enterprises, Inc., 13 AD2d 199, 214 NYS2d 945; see Madrid v New York, 42 NY2d 1039, 399 NYS2d 205, 369 NE2d 761 (no actionable dangerous condition created by light drizzle that fell on terrazzo entrance during five minutes before opening of hospital clinic; in any event, defendant had insufficient opportunity to provide remedy). Expert evidence regarding a flooring material's unsafe coefficient of friction value may be sufficient to raise a question of fact as to negligence, but only if a specific industry standard is referenced, Sarmiento v C & E Associates, supra, and the basis for the expert's safety standard is identified, Pomahac v TrizecHahn 1065 Ave. of Americas, LLC, 65 AD3d 462, 884 NYS2d 402; see Murphy v Conner, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796. Further, in a slip-and-fall case involving an injured patron or customer, standards such as those provided by the Occupational Safety and Health Administration, which pertain only to the safety of employees, are inapplicable, Cietek v Bountiful Bread of Stuyvesant Plaza, Inc., supra.

The failure to use safety measures such as rubber mats on floors that are inherently slippery when wet may constitute negligence, Pignatelli v Gimbel Bros., Inc., 285 App Div 625, 140 NYS2d 23, aff'd, 309 NY 901, 131 NE2d 578 (jury question where evidence presented that terrazzo floor sloped ten inches downward and rubber mats not used). Expert testimony as to customary safety practices, such as the proper placement of mats, sawdust or wax on a wet slippery floor, may be used to establish a prima facie case of negligence, Fortgang v Chase Manhattan Bank, 23 NY2d 895, 298 NYS2d 92, 245 NE2d 818; Young v New York, 33 AD2d 915, 307 NYS2d 576; Berman v H. J. Enterprises, Inc., 13 AD2d 199, 214 NYS2d 945.

Slippery Substances Such as Paint, Wax and Oil Applied to Surfaces —Under the traditional rule, evidence that a floor is smooth or slippery because of wax, polish, paint or oil does not give rise to an inference of negligence; instead, there must be evidence of negligent washing or application of wax or oil, Murphy v Conner, 84 NY2d 969, 622 NYS2d 494, 646 NE2d 796; Galler v Prudential Ins. Co. of America, 63 NY2d 637, 479 NYS2d 509, 468 NE2d 691 (citing PJI); Conroy v Montgomery Ward & Co., 300 NY 540, 89 NE2d 255; Nelson v Salem Danish Lutheran Church, 296 NY 870, 72 NE2d 608; Goldin v Riverbay Corp., 67 AD3d 489, 889 NYS2d 557; Purcell v York Building Maintenance Corp., 57 AD3d 210, 869 NYS2d 32; Kudrov v Laro Services Systems, Inc., 41 AD3d 315, 837 NYS2d 153; German v Campbell Inn, 37 AD3d 405, 829 NYS2d 631; Majchrzak v Harry's Harbour Place Grille, Inc., 28 AD3d 1109, 814 NYS2d 424. However, the Second Department has stated that a person who knowingly makes a floor dangerously slippery by causing wax, polish or paint to be applied acts negligently and is not shielded by the traditional rule regardless of the manner in which the substance was applied, Walsh v Super Value, Inc., 76 AD3d 371, 904 NYS2d 121.

An inference of negligence may arise from the placement of a loose mat or runner on top of a waxed floor, Curren v O'Connor, 304 NY 515, 109 NE2d 605; Napolitano v Dhingra, 249 AD2d 523, 672 NYS2d 369; Olsen v St. Margaret of Scotland Roman Catholic Church, 21 AD2d 827, 251 NYS2d 512; but see Portanova v Trump Taj Mahal Associates, 270 AD2d 757, 704 NYS2d 380 (no recovery for hotel guest who slipped on bath mat placed on marble bathroom floor), or from evidence that there was a piece or ridge of wax on the floor, a residue of wax, a streak in the wax or oil on the floor where plaintiff slipped, or oil or wax on plaintiff's shoes, clothing or hands, Harrison v Senator-Ridge Corporation, 290 NY 770, 50 NE2d 104; Conroy v Montgomery Ward & Co., 275 App Div 980, 90 NYS2d 169, aff'd, 300 NY 540, 89 NE2d 255; Ullman v Cohn, 248 AD2d 200, 669 NYS2d 591; Garrison v Lockheed Aircraft Service-New York, Inc., 24 AD2d 998, 266 NYS2d 282; see Galler v Prudential Ins. Co. of America, 63 NY2d 637, 479 NYS2d 509, 468 NE2d 691; Budrow v Grand Union Co., 302 NY 804, 99 NE2d 559. A prima facie case of negligent application of wax may be established through testimony from a qualified expert, Pike v Sillins, 31 AD2d 805, 297 NYS2d 406.

Miscellaneous Substances and Items—The following substances and items have been found to create dangerous conditions:spilled baby food, Negri v Stop and Shop, Inc., 65 NY2d 625, 491 NYS2d 151, 480 NE2d 740; lettuce leaves, Bianchi v Loblaw Groceterias, Inc., 304 NY 886, 110 NE2d 500; Browne v Big V Supermarkets Inc., 188 AD2d 798, 591 NYS2d 223; garbage and rubbish and other debris on a stairway or parking lot, Diehl v Myron Garden Apartments, 297 NY 1021, 80 NE2d 539; Uhlich v Canada Dry Bottling Co. of New York, 305 AD2d 107, 758 NYS2d 650; Weisenthal v Pickman, 153 AD2d 849, 545 NYS2d 369; Regan v State, 19 AD2d 574, 239 NYS2d 992; wet paper towels, Fundaro v New York, 272 AD2d 516, 708

NYS2d 149; mashed fruit hidden by sawdust, Reilly v American Meat & Supply Co., 248 NY 536, 162 NE 515; paste, grease and rubbish resulting from laying stair treads, Willett v United States Rubber Co., 236 NY 546, 142 NE 277; cigarette butts and paper wrappings on worn, wet, dirty stairway, Gramm v State, 28 AD2d 787, 281 NYS2d 235, aff'd, 21 NY2d 1025, 291 NYS2d 7, 238 NE2d 498; cigarette butts and paper cups on steps, Kelsey v Port Authority of New York and New Jersey, 52 AD2d 801, 383 NYS2d 347; egg drippings on the floor of a supermarket, Bransfield v Grand Union Co., 24 AD2d 586, 261 NYS2d 1006, aff'd, 17 NY2d 474, 266 NYS2d 981, 214 NE2d 161; vegetables on supermarket floor, Imbese v First Nat. Stores, Inc., 23 AD2d 850, 259 NYS2d 178; melted ice cream, Greco v Acme Super Markets, Inc., 17 AD2d 899, 233 NYS2d 406.

G. Methods of Proof

1. Regular Inspections and Maintenance

Proof of regular inspections and maintenance of the area in which an accident occurred, including an inspection and remedial action just prior to the accident, is ordinarily sufficient to satisfy defendant's burden of showing absence of notice on a motion for summary judgment, Stewart v Canton-Potsdam Hosp. Foundation, Inc., 79 AD3d 1406, 912 NYS2d 773; Hagin v Sears, Roebuck and Co., 61 AD3d 1264, 876 NYS2d 777.

2. Defendant's Employees' Statements

Notice to defendant of a defective condition may be proved by statements made by an employee in the course of employment, but only if the making of the statement is an activity within the scope of the authority of the employee, Tyrrell v Wal-Mart Stores Inc., 97 NY2d 650, 737 NYS2d 43, 762 NE2d 921; Loschiavo v Port Authority of New York & New Jersey, 58 NY2d 1040, 462 NYS2d 440, 448 NE2d 1351; Townsend v Mid Hudson Vending, Inc., 7 AD3d 514, 775 NYS2d 596; Laguesse v Storytown U.S.A. Inc., 296 AD2d 798, 745 NYS2d 323; Fontana v Fortunoff, 246 AD2d 626, 668 NYS2d 394; Lowen v Great Atlantic & Pacific Tea Co., Inc., 223 AD2d 534, 636 NYS2d 393; see Golden v Horn & Hardart Co., 244 App Div 92, 278 NYS 385, aff'd, 270 NY 544, 200 NE 309; Cook v Great Atlantic & Pacific Tea Co., 244 App Div 63, 278 NYS 777, aff'd, 268 NY 599, 198 NE 423; Marte v New York City Transit Authority, 276 AD2d 755, 715 NYS2d 704; Johnson v Hallam Enterprises Ltd., 208 AD2d 1110, 617 NYS2d 405; Risoli v Long Island Lighting Co., 195 AD2d 543, 600 NYS2d 497; Sherman v Tamarack Lodge, 146 AD2d 767, 537 NYS2d 249.

Photographs of the accident site, if taken reasonably close to the time of the occurrence when conditions are substantially the same, are admissible on the question of constructive notice, Batton v Elghanayan, 43 NY2d 898, 403 NYS2d 717, 374 NE2d 611; see Zavaro v Westbury Property Inv. Co., 244 AD2d 547, 664 NYS2d 611. However, where the photographs were taken four years after the accident, they were not admitted in evidence for the purpose of proving constructive notice of a defect, Anis v Associated Restaurant Management Corp., 202 AD2d 459, 609 NYS2d 51. Videotapes or motion pictures of the accident scene are also admissible in the trial court's discretion if they fairly depict the conditions at the scene at the time of the accident, see Mechanick v Conradi, 139 AD2d 857, 527 NYS2d 586.

3. Prior incidents

Evidence that others had slipped at the same place on the same day is relevant to notice, as well as to the dangerousness of the condition, Hyde v Rensselaer, 73 AD2d 1021, 424 NYS2d 755, aff'd, 51 NY2d 927, 434 NYS2d 984, 415 NE2d 972; Pratt v American Stores Co., 262 App Div 931, 28 NYS2d 829, as is evidence that a witness who used the stairs shortly before plaintiff's accident observed no debris, although such evidence is not conclusive, Labetti v Fanley Associates Inc., 27 AD2d 654, 276 NYS2d 904. However, evidence of prior accidents offered as evidence of notice of a dangerous condition is admissible only upon a showing that the relevant conditions of the subject accident and the previous one were substantially the same, Bounds v Western Regional Off Track Betting Corp., 256 AD2d 1165, 684 NYS2d 105.

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