BREACH OF DUTY

As to the second element of the plaintiff's claim, the plaintiff claims that the defendant breached (his / her / their / its) duty of due care by negligently allowing an unsafe condition to remain on (his / her / their / its) property. If you find that an unsafe condition existed, then the plaintiff, in order to prove that the defendant was negligent, must prove by a preponderance of the evidence that the defendant, or (his / her / their / its) employee, either:

1. **Caused the condition; or**
2. **Had actual knowledge of the existence of the condition and failed to use due care to remedy it or make the premises safe; or**
3. **That the condition existed for such a length of time that the defendant reasonably should have known about it and taken steps to remedy it or make it safe.**

Negligence may consist of doing something that a reasonable person would not have done or failing to do something that a reasonable person would have done. The plaintiff bears the burden of persuading you that the defendant did not act as a reasonable person

as an owner or one in control of the premises, one of ordinary caution and prudence, in that the defendant did not take reasonable steps to prevent an injury that would foreseeably result from an unsafe condition on the premises.

SUPPLEMENTAL INSTRUCTIONS

Mode of operation. **If the nature of the defendant's business or the chosen manner or mode of operation gives rise to a foreseeable risk of injury to persons lawfully on the premises occurring from accidents, the defendant owes a duty to exercise reasonable care to maintain the premises in a safe condition commensurate with these foreseeable risks. The manner or mode of operation does not make the owner or one in control of the premises an insurer against all accidents; rather, it imposes a duty on the one in control to take reasonable measures consistent with the risks involved with that mode of operation to prevent injury to persons lawfully on the premises.**

Mode of operation: self-service store

For self-service retail stores, this would include a duty to take reasonable measures commensurate with the risks involved with that self-service mode of operation to prevent injury to persons lawfully on the premises. A self-service store mode of operation includes the risks attendant to the plaintiff walking around the interior of the premises and the plaintiff or other customers handling and selecting goods as employees restock shelves in the same areas. Since the risks attendant to a self-service mode of operation create a reasonable probability that injury to customers from a slip and fall accident will occur, that danger is foreseeable.

There is a duty for the defendant to take reasonable measures commensurate with the risks involved with the mode of operation to prevent injury to people lawfully on

the premises.

If a plaintiff proves that an unsafe condition existed on the premises, that it was reasonably foreseeable because of the defendant's mode of operation, and that the plaintiff was injured as a result of the unsafe condition, that proof will satisfy the notice requirement — the requirement that the defendant knew or should have known of the condition. However, the plaintiff would still be required to prove that the defendant failed to take all reasonable measures commensurate with the risks involved with the mode of operation to prevent injury to persons lawfully on the premises from those risks. The fact that an accident happened, by itself, is not proof of negligence.

The plaintiff bears the burden of persuading you that the defendant acted unreasonably, that is, that the defendant did not act as a reasonable owner or person in control of the premises, one of ordinary caution and prudence, in that the defendant did not take reasonable steps to prevent an injury resulting from a condition that was reasonably foreseeable, because of the defendant's

mode of operation.

You should consider whether, in view of all the circumstances, an ordinarily prudent person in the defendant's position would have taken steps, not taken by the defendant, to prevent the accident that occurred.

NOTES:

1. **Mode of operation.** *See Sheehan v. Roche Bros. Supermarkets, Inc.*, 448 Mass. 780 (2007). In *Sarkisian v. Concept Restaurants, Inc.*, 471 Mass. 679 (2015), the Supreme Judicial Court held that the instruction must be given where it was alleged that the plaintiff slipped and fell on a wet dance floor at a nightclub where it was reasonably foreseeable that the nightclub's chosen mode of operation (that is, its sale of beverages in plastic cups from bars located on the dance floor) would result in liquid in cups being jostled and jettisoned by patrons onto the floor, and where spilled liquid on a floor that was crowded with dancers in a dimly lit setting with flashing strobe lights and that was the only route of travel to and from a lounge area created an unsafe condition. The Court noted in dictum:

> At oral argument, the defendant warned of the parade of horribles that would follow such a result. According to the defendant, courts will begin applying the mode of operation approach to any establishment in which patrons are permitted to carry their own drinks, whether they are traveling, for example, from a bar to a table in a restaurant or from a concession stand to their seats at a sporting event. We dispel any such notion. A plaintiff does not get to the jury simply by showing that an establishment sells drinks to patrons who are then allowed to travel about the premises. A plaintiff may get to the jury, however, by showing that patrons who wish to travel between the bar and their seats are forced — as a recurring feature of the mode of operation — to navigate in the dark through a crowd of dancing people holding plastic cups filled with liquid over a wooden floor. Spillage is conceivable in either circumstance, but only in the latter is the regularity of such spillage tied to the mode of operation in a manner that justifies placing the business on notice of the resulting unsafe condition.

Sarkisian, 448 Mass. at 686-87 (citations omitted). A consideration of the facts in each case must therefore be undertaken to determine whether the mode of operation instruction is required. See *Bowers v. P. Wile's, Inc.*, 475 Mass. 34, 37-42 (2016) (mode of operation approach to premises liability is not limited to the way items are offered for sale; held applicable to the presence of small stones on a concrete path open to the public that had migrated from a gravel area where items were offered for sale at garden store.)

2. **Snow and ice.** The presence of a natural accumulation of snow or ice is no longer an exception to the duty of reasonable care upon the property owner and is subject to the traditional premises liability analysis. *Papadopoulos v. Target Corp.*, 457 Mass. 368, 383-84 (2010). "Under this traditional premises liability standard, a fact finder will determine what snow and ice removal efforts are reasonable in light of the expense they impose on the landowner and the probability and seriousness of the foreseeable harm

to others. The duty of reasonable care does not make a property owner an insurer of its property; 'nor does it impose unreasonable maintenance burdens.' The snow removal reasonably expected of a property owner will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared, and the burden and expense of snow and ice rem oval. Therefore, while an owner of a single-family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them." *Id.,* quoting *Mounsey v. Ellard*, 363 Mass. 693, 709 (1973) (other citations omitted).