

Volume 50

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About our Newsletter

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Recently, G&B was named to the Boston Business Journal's Book of Lists, ranking among the "Area's Largest Law Firms." We are truly proud of our growth and to be staffed with outstanding attorneys and support to handle most any legal issue presented to us. Yet, our core values remain the same as when we first started this business, to provide superior legal services, with a personal touch at reasonable rates. We thank all of you for your continued confidence in our firm and look forward to helping you grow in these trying times.

Daniel P. Gibson
and Scott R. Behman

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MASSACHUSETTS ATTEMPTS TO CLARIFY SNOW AND ICE LIABILITY

The Massachusetts Appeals Court in *Barrasso v. Hillview West Condominium Trust*, 2009 Mass. App. LEXIS 437 (2009), recently issued a decision that left property owners in the Bay State unclear as to their duty surrounding snow and ice removal. Prior to *Barrasso*, the law in the Commonwealth was that natural accumulation of snow and ice was not an actionable property defect. However, the law does not immunize from the requirement to take reasonable care those who, while removing snow, create conditions on their property that may be dangerous.

The Plaintiff in *Barrasso* was emptying his trash in a dumpster located in the parking lot of the condominium which he resided. A major northeaster had hit the area the day before, but on the morning of the incident, the snow had stopped and the parking lot had already been plowed. The plowing efforts left a large embankment of snow surrounding the dumpster causing the plaintiff to step over it to reach the receptacle. As he did, his foot came down upon hardened compacted snow and ice, which caused him to slip and fall fracturing his wrist. The trial court found for the defendant condominium trust and allowed its motion for summary judgment. The Appeals Court however overturned that ruling finding that a jury question is raised when naturally fallen snow is plowed into a such a pile.

This was in contradiction to the long standing precedent of *Fortin v. City of Gardner*, 347 Mass. 436 (1964), which found in a very similar fact set that a congealed mass of ice, snow, and other materials which was blocking a sidewalk was of the nature and kind that should be appreciated by persons in efforts to ensure their own safety and as such, was not an actionable defect in a negligence claim. Accordingly, the *Fortin* court directed summary judgment in the City's favor.

Interestingly, the *Barrasso* court never cited *Fortin* despite its apparent controlling authority. It is expected that *Barrasso* will be reviewed by the Supreme Judicial Court.

ELYCIA D. SOLIMENE NAMED DIRECTOR OF G&B'S CONNECTICUT OFFICE

We are extremely pleased to announce that Elycia Solimene has been designated Director of the Connecticut office. Attorney Solimene is an extraordinarily talented attorney and will be an excellent leader of our Connecticut Practice as we continue to grow.

Since joining the firm in 2004, Attorney Solimene has obtained favorable verdicts in civil litigation matters, employment and workers' compensation cases. Her practice has included the handling of matters involving insurance coverage disputes, workers' compensation matters, employment disputes, motor vehicle accidents, liquor liability actions, premises liability and declaratory judgment actions.

Attorney Solimene has extensive experience in civil litigation, employment, and workers' compensation matters through the representation of employers and insurers in Connecticut in both State and Federal Courts. Attorney Solimene is also admitted and actively practices in the Mohegan Tribal Nation Gaming Disputes Court.

We look forward to the continuing growth our Connecticut office will surely have under the supervision of Attorney Solimene.

G&B'S RHODE ISLAND OFFICE SUCCESSFUL IN COMMERCIAL REAL ESTATE DISPUTE

Brian Dougan of G&B's Providence office recently prevailed for the Defendant, Feast or Famine, Inc., in a dispute over a commercial real estate lease. The Plaintiff, owner of commercial property in Warren, Rhode Island, filed a lawsuit in 6th Division District Court in Providence, Rhode Island alleging failure to pay rent, abandonment of the property and waste and moved for Feast or Famine to be evicted. The Plaintiff was claiming more than twenty thousand (\$20,000.00) dollars in damages.

Instead of obtaining an eviction, the landlord changed the locks to the building and Feast or Famine was unable to enter its premises, causing it lost profits and/or not allowing it to sell its business, which it had been in negotiation to do.

Attorney Dougan argued that the Plaintiff violated the "self-help" provision of Rhode Island property law when he changed the locks on the defendant's restaurant and for that reason the Plaintiff was not entitled to any damages.

Under Rhode Island General Law Section 34-18.1-15 landlords are prohibited from utilizing "self help" behaviors for nonpayment of rent regardless of whether the agreement allowing this behavior was made in writing, orally or under common law. Rhode Island case law includes changing the locks on the premises as "self help" Turks Head Realty Trust v. Shearson Lehman Hutton, Inc., F. Supp. 422 (D.R.I. 1990). As a result of the Plaintiff's "self help," a counterclaim was filed against the Plaintiff for violating Rhode Island law. Feast or Famine sustained its own damages in the form of lost profits and interference with Feast or Famine's ability to sell its business as a result of the Plaintiff's actions.

At trial Feast or Famine set forth evidence, via witnesses and contract documents, showing that prior to the lockout there was a legitimate offer to buy Feast or Famine for forty thousand dollars (\$40,000.00) and that, because of the lockout, the potential buyers did not follow through with the purchase, causing Feast or Famine to lose the sale.

The Judge ruled in favor of the Defense finding that because of the Plaintiff's "self help" in changing the locks of the premises where Feast or Famine was located the Plaintiff was not entitled to any back rent and that the Plaintiff was precluded from arguing that Feast or Famine abandoned the property or committed waste since Feast or Famine was denied entry to the premises. (Note: Prior to the ruling Feast or Famine voluntarily offered to vacate the premises and therefore the eviction was not at issue).

Regarding Feast or Famine's counterclaim, the Judge ruled that, because of the statutory limit on damages in the District Court, the Defendant's counterclaims were not properly before the Court and that the counterclaim could be filed in a separate action in Superior Court.

Therefore, the Judge found for the Defense and awarded the Plaintiff zero as a result of the Plaintiff violating Rhode Island law. Feast or Famine may pursue its counterclaim in a separate action in Superior Court.

GIBSON & BEHMAN SETTLE IN KINGS COUNTY, NEW YORK

Attorneys Daniel Friedman and Bella Pevzner of G&B's New York office recently obtained an exceptional trial result in the Supreme Court of Kings County, Brooklyn, New York, which is generally considered to be a venue highly favorable to plaintiffs. The plaintiff, who had very challenging fertility problems, was pregnant after a successful in vitro fertilization procedure. In her fifth month of pregnancy, she allegedly slipped and fell on a wet floor in the ladies room of a Wendy's restaurant, suffering a traumatic miscarriage, and has been unable to conceive ever since.

Plaintiff claimed negligence by the Wendy's restaurant in creating a dangerous condition by allowing water to accumulate on the floor of the bathroom, and/or in failing to discover the danger-

ous condition and remedy or warn of same. At the Jury trial, plaintiff and her husband testified as to the alleged condition and cause of the fall, while contrary testimony of Wendy's current and former managers was presented. Our defense was primarily predicated on the issue of notice, as well as the policies and procedures regarding maintenance and cleanliness of the bathroom floors. The testimony presented by the Wendy's managers was that the restaurant policies and procedures mandated "walk through" inspections of the entire premises, including the bathrooms, every 15 minutes and that, directly after plaintiff's alleged fall, they observed that the bathroom floor was dry.

The initial demand by the plaintiff was \$500,000, and she remained firm at a half-million

dollars through several days of trial. However, capitalizing on discrepancies in the deposition and trial testimonies of plaintiff and her husband, and testimony elicited on cross-examination that plaintiff may have been coached by her husband to change her testimony after her deposition, we succeeded in damaging their credibility to the extent that plaintiff substantially lowered her demand. After extensive settlement negotiations with plaintiff's counsel, the case was resolved for \$30,000; essentially nuisance value considering the venue, circumstances and the potential exposure in such a case involving a traumatic miscarriage.

Souna Hussein v. Wendy's, et al., Supreme Court of the State of New York, County of Kings, Index No. 32696/05

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MASSACHUSETTS DEFENSE: TWO SUMMARY JUDGMENTS

Earlier this month, G&B's Burlington, Massachusetts office secured two Summary Judgments in separate slip and fall cases for a national food service provider.

The first matter involved an inmate at a local prison, who alleged to have fallen on a pool of water stemming from a leaky faucet. In attempt to catch himself, the plaintiff's hand and wrist came into contact with a large kitchen knife that required immediate medical attention. As a result of the laceration, the plaintiff alleged ongoing nerve deficiencies and decreased range of motion to the hand and wrist. The initial

demand was well in excess of six-figures.

After assuming the defense for the prison, G&B attorneys presented their motions before the Barnstable County Superior Court. In arguing, G&B successfully presented arguments to the court that the plaintiff failed to demonstrate a *prima facie* case of negligence. Specifically, arguments were made that the plaintiff was unable to articulate with any specificity the cause of his fall and his allegations that it was a pool of water were unconfirmed by the evidence on the record.

The second case involved an out of state woman who was a guest at an area hotel, which

was being operated at the time by our client. Rather than proceed down the stairway to street level, the plaintiff descended down an automobile ramp leading to the hotel's parking structure. As she descended, she slipped and fell fracturing her ankle. A negligence claim was brought on the basis that the ramp was too steep, thus constituting a defective condition, and for failure to warn.

G&B was able to persuade the court in that the landlord was the controlling party in relation to the incline of the ramp and secondly that if it was defective, such defect was open and obvious thus disposing of the duty to warn.

ANNOUNCEMENTS

- Attorney Jennifer Sadaka recently joined G&B's Connecticut office. Attorney Sadaka focuses her practice on all aspects of family matters, real estate and general litigation. She is also well versed in the United States Bankruptcy Code, and has experience in Chapter 7 filings, Chapter 13 filings and Chapter 11 filings. In this time of economic uncertainty, many people are turning to the bankruptcy court to save their homes or manage debt they simply cannot handle. With her experience in Chapter 7 and Chapter 13, she has been able to help people keep in their homes and manage debt they cannot pay.
- Attorney Barry Semel-Weinstein, currently admitted to both the New York State and New Jersey State Bars, has recently passed the Connecticut State Bar Examination and is pending admission to same.
- Attorneys Scott R. Behman and Sharmili P. Das have been admitted to practice in State of New York
- Attorney Daniel J. Gibson has been named as director of G&B's Maine office.
- Attorney Mark C. Preiss, of G&B's Massachusetts offices has passed the New York State bar exam and is awaiting admission.

**ATTORNEY WILLIAM P. ANTONOFF OBTAINS SUMMARY JUDGMENT IN
A MASSACHUSETTS PREMISES LIABILITY ACTION**

William P. Antonoff of Gibson & Behman, P.C. recently obtained summary judgment on behalf of Hermann Alexander's in a Massachusetts premises liability action with alleged special damages exceeding One Million (\$1,000,000) Dollars.

In Dolbec v. Jakelynn, Inc., the plaintiff brought suit against Jakelynn, Inc. d/b/a Hermann Alexander's as well as a realty trust and General Electric. Hermann Alexander's leased a portion of a strip mall from the realty trust. According to the plaintiff, she tripped and fell on a broken cap to a monitoring well owned by General Electric in the parking lot as she was exiting Hermann Alexander's. General Electric did not own or possess the parking lot but entered into an agreement to place monitoring wells in the parking lot. Plaintiff claimed that she could never return to work, had a loss of earning capacity exceeding \$1,000,000 and medical special damages in the vicinity of \$100,000.

The lease demonstrated that Hermann Alexander's controlled only the area inside the walls of the building even though its patrons were allowed to use the parking lot along with other common tenants of the realty trust. Through discovery, Hermann Alexander's was able to demonstrate that the realty trust had control of the parking lot and that snow removal and maintenance in the parking lot was the responsibility of the landlord/realty trust.

Hermann Alexander's then moved for summary judgment on the grounds that it was a commercial tenant that did not have possession or control of the parking lot where the alleged fall occurred. Underhill v. Shactman, 337 Mass. 730, 733 (1958). In Underhill, the plaintiff fell in a parking area controlled by a commercial landlord. The Underhill Court held that a tenant of one of the stores in a shopping center was not liable for injuries sustained by a customer in a fall caused by the condition of a common parking area available for the use of the tenant's customers where the landlord had the duty to maintain and take care of the common parking areas.

Plaintiff tried hard to keep Hermann Alexander's in the case with the doctrine established in Hopkins v. F. W. Woolworth Co., 11 Mass. App. Ct. 703 (1981). In Hopkins, the Court addressed "shared responsibility" to patrons noting that while a reservation of control will subject a landlord to liability, the tenant is not thereby automatically relieved of duty or liability to his invitees if that tenant is aware of the unsafe condition. In regard to the tenant, the Hopkins Court opined "[a]s regards [the tenant], it had a duty to keep the premises used by its patrons in a reasonably safe condition and, at the least, to warn customers of any danger of which it knew or should have known. . . . Even if a finding were warranted that [the tenant] had no control over the sidewalk on which the plaintiff fell, it would not be relieved from its duty to warn its invitees of danger." Id. at 706.

The judge in Dolbec agreed with Hermann Alexander's arguments distinguishing Hopkins and opined that this was not a case where the landlord and tenant had a shared responsibility to a person such as the plaintiff who fell in the parking lot. In Hopkins, the alleged defect was on the sidewalk directly in front of Woolworths. Id. at 704. In contrast, the allegedly broken well cap was approximately 120 feet from Hermann Alexander's entrance and closer to another business. In fact, the Hopkins court distinguished itself from Underhill, noting that the hazard in the parking lot in Underhill was "much more distant from the tenant's store and substantially less obvious, than the sidewalk defect to which [the tenant] in the instant case called eloquent and repeated attention." Hopkins, 11 Mass. App. Ct. at 706. Additionally, in Hopkins, the tenant had actual notice of defect on the sidewalk directly in its store. Id. at 704. In contrast, no evidence demonstrated that Hermann Alexander's knew or should have known of the presence of the allegedly broken well cap. Thus, no evidence demonstrated that Hermann Alexander's had a duty to the plaintiff relative to any allegedly dangerous condition in the parking lot.

This case demonstrates that insurers should not be threatened into paying premises liability claims without first investigating whether a duty of care is owed. Although plaintiffs tend to sue anyone that could possibly be liable and/or contribute to settlement, leases generally establish who has control over certain areas including but not limited to common area parking lots. Summary judgment should be considered if an insured does not have possession or control of an area where a fall occurred.

G&B'S Massachusetts Office Continues Success in Defending Discrimination Charges

Attorneys Sharmili P. Das and Matthew E. Mantalos of G&B's Massachusetts office recently obtained two exceptional results with the Massachusetts Commission Against Discrimination on behalf of a major New England restaurant group. Both cases involved former employees claiming discrimina-

tion on the basis of race for their respective terminations. Attorneys Das and Mantalos were successful in their written submissions and working with Commission investigators to unequivocally demonstrate that the employment actions were solely for the claimants' failure to adequately

perform the position free from any discriminatory motive. After reviewing the pleadings, the Commission issued lack of probable cause findings in both instances after only the initial investigation.

Massachusetts

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CLARIFYING THE RECKLESS SERVICE OF ALCOHOL STANDARD IN CONNECTICUT

The Connecticut Dram Shop Act requires that an injured person provide specific notice of a potential claim under the statute to a bar or restaurant within 120 days of the incident. The notice provision of the statute is strictly interpreted. Therefore, an injured party that fails to provide the statutory notice is prohibited from pursuing a claim under the Dram Shop. It is not unusual for a potential plaintiff to miss the notice deadline. Without legal advice, an injured person or his or her family is likely to be unaware of the statutory requirement.

An injured person, however, may still pursue an action for reckless service of alcohol even where no notice has been provided to the bar or restaurant that allegedly served the intoxicated patron. Neither the notice provisions nor the \$250,000 statutory cap of the Dram Shop Statute apply to a reckless service claim. We often see claims for reckless service made where counsel is retained after the notice deadline has expired.

Because the \$250,000 statutory cap does not apply, many defendants have significant concerns when confronted with a reckless service claim. Except in unusual circumstances, that concern is unwarranted. While the potential exposure on many liquor liability claims remains high due to significant damage claims, the burden of proof on a plaintiff alleging reckless service is extremely difficult to meet.

The Dram Shop Statute, Connecticut General Statutes § 30-102, states that a purveyor of alcohol is liable for injuries to a third party when the purveyor has served alcohol to an intoxicated person who, as a result of that intoxication, causes injury to the third party. The Connecticut courts have defined "intoxicated" to mean visible intoxication, which has been further defined as something more than to be merely under the influence of, or affected by alcohol. Rather, intoxication means "an abnormal, mental or physical condition due to the influence of intoxicating liquors" or "a visible affectation of the passions and impairment of the judgment or physical functions." Sanders v. Officers Club of Connecticut, Inc., 493 A.2d.184, (1995).

Claims of recklessness require more extensive allegations and proof than that required for a sim-

ple dram claim. The mere sale of alcohol to a visibly intoxicated individual is generally insufficient, and evidence of a more coerced or forced sale of alcohol to an intoxicated individual by the establishment is generally required. There must be exacerbating factors that do not exist in the context of a typical sale of alcohol in a bar.

Recklessness is a state of consciousness with reference to consequence of one's acts. It requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his contact involves a risk substantially greater than that which is necessary to make his conduct negligent. Recklessness is more than negligence, more than gross negligence. A state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. Mooney v. Wabrek, 129 Conn. 302, 308 (1942). As such, the plaintiff must establish that a defendant made a "conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of fact which would disclose this danger to any reasonable man." Bishop v. Kelly, 206 Conn. 608, 614-15 (1988).

The practical burden on a plaintiff is to prove that a bar or restaurant not only knew or should have known that a person was intoxicated, but that the bar or restaurant served alcohol to the intoxicated person knowing that he or she was likely to cause injury. A bartender's unreasonable acts are not enough to create liability for reckless service. The server must be shown to make a conscious choice to serve the intoxicated person knowing the likely result would be injury.

That burden is very high and difficult to prove under most circumstances. There are, of course, exceptions where a defendant may, in fact, have acted in a reckless manner. Such circumstances may include serving someone after he or she had already been shut off earlier in the evening at that establishment. Under those

circumstances, the bar or restaurant has acknowledged through its prior actions that the person was intoxicated and should not continue to drink. Service at that point would likely meet the standard for reckless service.

Even under those circumstances, the plaintiff must also prove that the reckless service was the cause of the injury. In Boehm v. Kish, the Connecticut Supreme Court addressed the causation question under what appear to be extreme circumstances.

On May 7, 1981, the plaintiff, Gregory T. Boehm, drank a quart of beer and then drove for approximately ten minutes to the Brook Cafe in Westport, a bar owned by the named defendant, Paul J. Kish. At the cafe, the plaintiff ordered a total of six large drinks of rum and orange juice from the bartender, the defendant Michael Zieff, with each drink containing three to five ounces of eighty proof rum. After his third drink, the plaintiff showed signs of being intoxicated, slumping in his chair and slurring his speech, and, before ordering his sixth, he staggered about the bar and spilled his drink and some change. About four hours after arriving at the cafe, at approximately 7 p.m., having not quite finished his last drink, he stumbled to his car and then headed for the Connecticut turnpike. The plaintiff drove to a stoplight just before the entrance to the turnpike. As he turned onto the turnpike, he reached for his sunglasses 'because the sun was real low on the horizon.' He next found himself on the floor of the car, with people staring in the window. 201 Conn. 385, 387-88 (1986). Under those circumstances, the Supreme Court upheld a directed verdict in favor of the bar, finding that the trial Court's determination that there was insufficient evidence to prove that the intoxication was the actual cause of the accident.

Reckless service claims must be taken seriously due to the lack of a statutory cap. There are often also coverage issues under many policies where allegations of recklessness are made. However, in terms of the liability assessment of these cases, it is only in unusual and fairly extreme cases that the practical exposure is significant.

CONNECTICUT

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Attorneys Melanie Kolek and Dominic Secondo of our Connecticut office are presently writing an article for the publication "Compensation Quarterly" on the issue of structured settlements, presently entitled "If the Structure Crumbles: Protecting Claimants and Respondents in Structured Settlements." "Compensation Quarterly" is an independent and non-partisan publication which tracks developments in the area of workers' compensation as practiced in the State of Connecticut. Attorneys Kolek and Secondo specifically focus on Internal Revenue Code changes, which now allow litigants to enter into structured settlements and the applicability of those revisions to Connecticut workers' compensation law and compensation settlements. They further focus on residency requirements, financial and tax concerns, and most significantly, what recourse parties have if the annuity insurer becomes insolvent. Attorneys Kolek and Secondo are hoping to explore these issues further by moderating a seminar on this unsettled area of workers' compensation law in the near future. The article is expected to be published in the Fall of 2009.



FLORIDA SEEKS TO LIMIT WORKERS' COMP ATTORNEYS FEES

On May 29, 2009 Governor Crist approved House Bill 903, which will effectively reinstate strict caps on attorneys' fees for workers' compensation claimant attorneys. Its Senate counterpart SB 2072 is still awaiting approval. A similar cap had been instituted only six years ago in 2003 by the Florida Legislature. The cap, as it stood in 2003, limited the workers' compensation claimant attorneys' fees to a percentage of recovery. However, this past fall's Florida Supreme Court decision in *Murray v. Mariner Health*, 994 So. 2d 1051 (2008) effectively nullified that statutory cap.

In *Murray*, the Florida Supreme Court unanimously sided with claimants' attorney, Brian Sutter, and ruled he was entitled to "reasonable" fees for the case. The underlying claim was brought by a health care worker who was injured while trying to lift a patient. The claimant was denied benefits and Attorney Sutter spent more than 80 hours in

litigating the matter. Eventually, it was determined that the claimant was entitled to \$3,200. Under the 2003 law, Attorney Sutter was only entitled to the statutory percentage of the recovery, or \$700. Attorney Sutter appealed the fee determination and it eventually went up to the Florida Supreme Court who awarded him \$16,000 in fees; roughly the same amount Mariner Health paid its defense attorneys. The *Murray* decision was applauded and celebrated by members of the Florida Bar's Worker's Compensation Law Section saying that it would finally level playing field that the 2003 Amendment disrupted. As worker-backed interest groups and claimant attorneys have tried to persuade upon the courts and the legislature, insurance companies have unlimited resources to fund their defense and no recourse for wrongful denial of benefits. Conversely, claimants are at the mercy of the statutory structure, which limits the amount of activity their attor-

neys can devote to a case due simply to a cost-benefit analysis. To impart on insurance companies the obligation to pay for claimant's reasonable attorneys' fees will lead to less wrongful denials and an expedited settlement for injured workers.

HB 903 and SB 2072 have reemerged to reinstitute the law as the Florida Legislature intended in 2003. It has been cited that since the 2003 Amendment, insurance rates have gone down and employers have saved over \$3 billion dollars. Florida, notoriously one of the top states in the country for the costs of workers' comp insurance, attempted in 2003 and now again is reinstating a course to reduce premiums and save employers.

Plaintiffs' attorneys argue that the cap reinstatement would have a devastating impact on workers' comp claimants who worked so hard to be entitled to "reasonable" fees. 05

FLORIDA

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INDIRECT OR NOT—MANUFACTURES HAVE POST SALE DUTY TO WARN ALL USERS

In ruling in a lawsuit over a fatal forklift accident, the Maine Supreme Judicial Court followed state law- and not §10 of the *Restatement (Third) of Torts*- to determine that manufactures have a post-sale duty to warn all users, even indirect purchasers of their products. (*Brown v. Crown*, 960 A.2d 1188 (Me. 2008).)

On August 1, 2003, Thomas Brown was working at a warehouse of Prime Tanning, his employer. He backed the forklift truck he was driving into a new type of shelf, which was slightly taller than the truck itself. Standing to operate the truck, with his upper body extending above it, Brown became trapped in the small space between the top of the truck and the shelf above. Unable to move, call for help, or breathe, Brown suffocated.

Years earlier, the forklift's maker, Crown, discovered that such new shelves, taller than the truck itself, could lead to so-called "horizontal entry" accidents like Brown's. Indeed, Crown received reports of more than 100 such accidents with its forklifts including 10 deaths.

Although the company developed a kit in 1995 to reduce the hazard, it did not send notice of the risk of these accidents until August 1999- and then only to direct customers. Because

Prime Tanning did not purchase the forklift new from Crown, It did not receive the notice.

In November 1999, Prime had a safety consultation with Crown about the forklift used by Brown on the new, taller shelves. According to the high court opinion, the Crown representative said nothing about the potential disparity between shelf height and the height of the truck or about Crown's kit for addressing the hazard.

After Brown died, his widow sued, alleging that the forklift was unreasonably dangerous when it was sold because it did not protect drivers adequately. She also claimed that Crown was negligent in failing to warn users of its risks, including notifying Prime about the kit.

A federal jury, finding that Crown failed to warn of the forklifts dangers, awarded damages, adjusted for Thomas Brown's comparative negligence and the state's mandatory caps on damages. The jury also found that the forklift was not a defective product.

Crown appealed to the First Circuit, which certified two questions to the Maine Supreme Judicial Court. One, based on Crown's appeal, was whether Maine law incorporated §10 of the *Restatement (Third) of Torts* regarding post-sale duty to warn. (The other certified question,

unrelated to the first and based on an appeal by Brown, was how Brown's comparative negligence adjustment should be accounted for when damages were reduced by mandatory caps.)

In determining whether Maine law incorporates §10- which concerns manufacturers' duty to warn indirect purchasers when a product not defective at sale later develops a hazard- Justice Warren Silver wrote for the court that the facts of the case establish a duty under Maine law.

"And", he continued, "because those facts present a straightforward negligence claim, we need not consider the more expansive product liability as described in §10."

Explaining, the justice wrote that "Crown knew of the risk to forklift operators created by new shelving arrangements, had created a (risk reduction) kit..., was in personal contact with Prime, ...and performed an evaluation of that very forklift. On these facts, we have no difficulty concluding that Crown owed a duty to Brown as a known user of that forklift. Crown breached that duty by failing to warn Brown or his employer when it had an opportunity to do so.



MAINE

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Cyber-Service: Australia OKs Facebook Service

In an interesting note, the Australian Capital Territory Supreme Court has recently approved an application to use Facebook to effectuate proper service. Although newsworthy, the use of electronic service is not something new to Australia. Various courts throughout the country have given permission in the past for people to be served via e-mail and text messages when it was not possible to serve them in person.

In the present suit, a couple had defaulted on their mortgage and the bank had initiated foreclosure proceedings. After numerous failed attempts of lien notice service on the couple, the bank attorney stumbled across the woman's Facebook profile. The idea came to him and the next day he was petitioning the court to allow this innovative approach.