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Torts: Convenience Store Liability in Maine

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"Poor Joshua!" So Justice Blackman famously began the final paragraph of his dissent in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), in a case where the Supreme Court held that a state actor has no affirmative duty to protect private citizens from violence.

There is a general rule in tort law that is much the same: in Maine, as in other states, "a party does not have an affirmative duty to aid or warn another person in peril unless the party created the danger or the two people had a special relationship that society recognizes as sufficient to create the duty." *Estate of Cilley v. Lane*, 2009 ME 133, ¶ 17, 985 A.2d 481. Unlike the "general duty to provide reasonably safe premises, ... the heightened duty ... based on a special relationship" goes farther, requiring an establishment "to proactively prevent an assault on the guest if it is reasonably foreseeable." *Belyea v. Shiretown Motor Inn*, 2010 ME 75, ¶ 11, 2 A.3d 276.

That begs the question, of course: What constitutes a "special relationship" that imposes an affirmative duty to protect another from violence perpetrated by a third party?

Maine has long followed the general rule that "[t]he law requires common carriers of passengers to do all that human care, vigilance and foresight can under the circumstances, considering the character and mode of conveyance, to prevent accident to passengers. To require anything less would be to leave the lives of persons in the hands of the reckless, and unprotected against the negligent and incautious." *Libby v. Maine C. R. Co.*, 85 Me. 34, 39 (1892).

Likewise, nearly a century after *Libby*, the Law Court endorsed the "prevailing doctrine" that "a proprietor of an inn, hotel, motel, restaurant, or similar establishment" has a duty to exercise reasonable care to protect its patrons from foreseeable violence. *Brewer v. Roosevelt Motor Lodge*, 295 A.2d 647, 651 (Me. 1972). In 2010, the Law Court extended this affirmative duty to convenience stores. *Kaechele v. Kenyon Oil Co.*, 2000 ME 39, 747 A.2d 167.

In *Kaechele*, one patron was attacked by another patron in the convenience store parking lot. Just recently, Judge Levy reaffirmed *Kaechele* in a case of ours, in *Castonguay v. Mac's Convenience Stores*, holding that "a special relationship does exist [between the proprietor of a convenience store and the store's customers] if the proprietor has reason to anticipate that a

patron will be assaulted and fails to exercise reasonable care under the circumstances to prevent the assault or interfere with it." 1:21-cv-00083-JDL, 2022 U.S. Dist. Lexis 142137, at *6-7 (D. Me. Aug. 10, 2022).

Anyone who frequents convenience stores may think it odd to classify the relationship between a convenience store and its patrons as a "special relationship." However, the courts have their reasons for placing this sort of heightened duty on convenience stores. There are few places in America more dangerous than 24-hour convenience stores. Studies have shown that convenience store employees suffer homicides at a remarkably high rate, and convenience stores -- particularly those open 24 hours a day -- are the sites of a wildly disproportionate share of robberies and violent crime.

In Maine, at least, convenience stores have a duty to protect their customers from foreseeable dangers of their customers. Hopefully, that makes it a little bit safer to buy a Big Gulp in our wonderful state.

Taylor Asen earned his JD from the Yale Law School and served as a law clerk to judges on the Federal Courts. Before leaving to open his own firm, Gideon Asen LLC, in November 2020, Asen was an associate at the Lewiston based law firm, Berman & Simmons PA.

At Maine Law, Meryl Poulin distinguished herself as an appellate advocate, winning the honor of "Prize Arguer" in her class and the Gignoux Award for Appellate Advocacy. After law school, she worked at a large firm in Portland defending medical malpractice and personal injury cases. More recently, she worked at Pine Tree Legal Assistance, trying nearly twenty cases to verdict and prevailing in all but one.

An Act to Create the Data Privacy and Protection Act

Maine's proposed Data Privacy and Protection Act represents a significant step forward in the protection of individual privacy and the regulation of data practices.

HP 1270, LD 1977, presented by representatives Margaret O'Neil (D-Saco), Morgan Rielly (D-Westbrook), David Boyer Jr. (R-Portland), Michael Brennan (D-Portland), and Senator Craig Hickman (D-Kennebec), is poised to provide Maine with some of the most comprehensive data protection and privacy laws in the country.

The statute outlines stringent guidelines for covered entities (persons other than individuals acting in a non-commercial context) and service providers (entities who process data on behalf of other covered entities), and binds them to collecting, processing, and transferring data only as necessary to provide requested services. Contracts between covered entities and service providers must articulate data processing procedures, instructions, the nature of data, duration of processing, rights, and obligations.

The statute emphasizes that service providers must retain copies of previous contracts, engage in due diligence, and exercise reasonable safeguards for the security and confidentiality of cov-

ered data. Additionally, service providers must allow and cooperate with assessments by covered entities and may engage other service providers only after notice and pursuant to a written contract.

Service providers are crucial players in ensuring compliance with the Act, and their adherence to instructions and contractual obligations will be paramount if the Act is adopted.

Further, a third party may only process data for the purposes specified by the individual's consent or as outlined in the contract with the covered entity. Covered entities transferring data to third parties must enter into written contracts specifying the purposes for data use, restricting data utilization solely for those purposes, and mandating compliance with the Act's provisions.

Due diligence is required in deciding to transfer covered data to third parties, ensuring they provide the same level of privacy and security protection as mandated by the Act.

The Act would establish robust enforcement mechanisms, allowing government officials, including the Attorney General, district attorneys, or municipal councils to bring civil actions against covered entities or service providers who violate the Act.

Remedies for violations are proposed to include injunctive relief, enforcement of

compliance, damages, civil penalties, restitution, and attorney fees. Individuals affected by a violation can bring civil actions, seeking damages, punitive damages, injunctive and declaratory relief, and attorney fees. Notably, small businesses are exempt from individual civil actions.

Moreover, the Act invalidates pre-dispute arbitration agreements or joint-action waivers for disputes arising under the Act, emphasizing the right to legal recourse for individuals affected by a violation.

The statute would establish a robust framework for safeguarding individual privacy and

regulating data practices. The intricate provisions regarding service providers, third-party data processing, and enforcement mechanisms reflect a concerted effort to balance innovation with privacy protection in the digital era.

-Erin Van den Berghe, ev@mainelawyersreview.com



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