

## REMEMBERING THE CUSTOMER'S RESPONSIBILITY

Without question, the owner of a store, restaurant or hotel has responsibility to maintain their premises in a reasonably safe condition. Failure to do so can lead to liability for a person who suffers an injury when encountering a hazard. But what about the plaintiff's responsibility for his or her own safety?

In West Virginia, we have adopted the law of modified comparative negligence. *Bradley v. Appalachian Power*, 260 S.E.2d 839 (W.Va. 1979). Bradley is applicable to nearly all cases alleging negligence, in particular those involving claims of premises liability. Bradley recognizes that a plaintiff may be responsible for his or her own injuries by virtue of his or her own negligence. Under the doctrine of modified comparative negligence, the jury is asked to compare the negligence of the plaintiff with that of the premises owner. The total of the percentages of negligence allotted by the jury must equal 100%. If the jury finds that the plaintiff was 50% or more at fault for their own injuries, then the plaintiff can make no recovery. If the plaintiff is less than 50% at fault, then their damages are reduced by the percentage of negligence allotted to the plaintiff by the jury. Only if the plaintiff is found to be completely without fault, will plaintiff make a full recovery of all damages that the jury may award.

Modified comparative negligence allows a premises owner to defend itself by shifting the responsibility for the accident back to the plaintiff.

In addition, West Virginia law holds that the person who is moving or walking has a duty to look, and look effectively, and to exercise reasonable care to avoid a hazard. The jury may consider that the failure to do so is negligence and assign an appropriate percentage of negligence to a plaintiff who fails to look effectively in order to appreciate and avoid hazards. Further, West Virginia law holds that a premises owner is not responsible for a hazard which is open and obvious. *McDonald v. University of West Virginia Board of Trustees*, 444 S.E.2d 57 (W.Va. 1994).

Accordingly, because of the strength of the above cited law in West Virginia, premises liability cases are among the most defensible in this plaintiff oriented jurisdiction. Motions for Summary Judgment are often appropriate. If cases do get to a jury, defense verdicts are relatively common and a split verdict finding some percentage of fault on the

---

For additional assistance regarding hospitality issues, you may contact:

Thomas V. Flaherty, Esq. is an attorney in the Charleston, West Virginia office of Flaherty, Sensabaugh & Bonasso, West Virginia's largest litigation firm. He is admitted to practice in West Virginia and can be reached at 304-345-0200.

Robert C. James, Esq. is an attorney in the Wheeling, West Virginia office of Flaherty, Sensabaugh & Bonasso, West Virginia's largest litigation firm. He is admitted to practice in Ohio, Pennsylvania and West Virginia and can be reached at 304-230-6600.

plaintiff occur far more frequently than do pure plaintiff's verdicts. This body of law is also effectively used to encourage plaintiffs to accept nominal settlements at the early stages of litigation. Where a plaintiff in a situation such as this is bound and determined to be unreasonable, the premises owner is stocked with a great body of defense oriented law in West Virginia with which to defend itself.