To: Supervising Attorney
From: Law Clerk
Date: September 18, 2006
RE: Big Office Case

I. Statement of Facts

Our client, Big Office, a major office and school supply retailer doing business in Hadley, Massachusetts, wants to know whether the recent investigation of a suspected theft at Hadley, and an injury for a customer, create liability for Big Office.

The Hadley Big Office (HBO) store is large, and well lit. It has wide aisles containing displays of merchandise. Office furniture is also located in the main aisle, some of it unassembled in boxes that customers could easily transport home. As one of the measures HBO takes to prevent employee and customer theft, the store employs "store guides" to monitor the exits and periodically check to make sure that the items customers buy match the items listed on the sales receipts. The store guides, unlike HBO's security guards, do not wear uniforms and are identified only by badges that include their name and the greeting "Welcome to Big Office!" The store guides are not trained in theft prevention. They are specifically instructed to call a security guard to assist them if they believe there has been a theft of merchandise.

On August 18, 2006, John Robie, a HBO salesperson, took four (4) PDA's out of the locked cases where they are stored and demonstrated them for Frances Stevens, a customer and sister of Robie. Stevens inspected the PDA's, and then purchased one and paid for it with a credit card. Robie placed the PDA in the

packaging and placed a bright orange "Paid in Full – Big Office" sticker on the box to indicate that Stevens had paid for the item so that she would not have to stop at the cash register at the front of the store. He then put the merchandise in a shopping bag and Stevens put the bag in a shopping cart.

When Stevens attempted to exit the store, Al Smith, an HBO store guide, approached her and asked to see her receipt. Stevens gave Smith the receipt which indicated she had purchased a PDA for $125. However, the packaging indicated that the PDA in her shopping bag cost $350.

Smith then took Stevens by the arm and led her toward the rear of the store. They passed by a box on the floor and a desk on sale. They stopped at the side of the wide main aisle. He then let go of her arm and stood between her and the store exit. Smith told Stevens that there was a discrepancy between the receipt and merchandise. Smith then asked for her license and credit card. Stevens mentioned that she purchased the PDA from her brother, and at that point Smith called for the guard. Smith explained the discrepancy to the security guard.

The security guard radioed Andrea Hughson, Director of Shrinkage Control at HBO, and explained the problem. She confronted Robie and asked if he was involved in the theft. Hughson explained that store security was questioning his sister about the theft of a PDA. Robie vehemently denied any theft. Robie was questioned for another fifteen minutes by security guards before they told him to leave the premises.

In the meantime, Stevens was yelling at Smith and demanding her license and credit card so that she could leave. She repeatedly said that he was keeping

her from her children at daycare. About forty minutes after Stevens was first questioned, Smith opened the packaging for the PDA and discovered that the PDA inside the box was the $125 model. Apparently, Robie had inadvertently put the less expensive PDA in the more expensive PDA packaging. At that point, Smith returned Stevens' license and credit card.

Once Stevens had her driver's license and credit card back, she quickly headed for the exit. On her way across the main aisle of the store, she tripped over a box and fell to the floor. In attempting to avoid merchandise and other customers, Stevens had walked around a desk that was displayed for sale. Immediately behind the desk there was ordinarily a stack of boxes containing unassembled desks that customers could purchase and assemble at home. At the time Stevens was in the store, only one box remained, measuring approximately three feet by five feet long by eight inches tall. The box was made of corrugated cardboard and was lying flat on the tan colored linoleum tile floor. Customers helped Stevens to her feet, as she was clutching her wrist. Stevens appeared to be in pain, but she hurried out of the store.

On August 19, 2006, Stevens called the store manager, angrily claiming that as a result of her unreasonable detention by Smith, the daycare center had refused to continue providing care for her children.

II. Issue(s)

a. Under Mass. Gen. Laws ch. 231 §94B (2006), can a shopkeeper have a defense against a false imprisonment claim when he takes a suspected

shoplifter from the exit, and retain their license and credit card for forty minutes?

b. Under the "Open and Obvious Danger Rule", can a shopkeeper have a defense against a negligence claim when customers in general know that the store keeps unassembled office furniture in boxes in the aisles for easy transport home?

III. Brief Answer

HBO probably has a defense on the false imprisonment claim. The three formal requirements for the Massachusetts statute for a false imprisonment defense are most likely met. Based upon the facts of the case, it appears that HBO had reasonable grounds to detain Stevens in a reasonable manner within a reasonable amount of time.

HBO probably has a defense as well on the negligence claim. The three elements that constitute the "open and obvious danger" rule are most likely met where the dangers were known to Stevens before she exited the store and could have been avoided if she took proper precautions for her own safety.

IV. Discussion

a. False Imprisonment

Unlawful restraint of an individual does not specifically mean restraint by force or threat upon the person's freedom of movement. Any demonstration of physical power which causes submission by the person is considered unlawful restraint. See Coblyn v. Kennedy's, Inc., 268 N.E.2d 860 (Mass. 1971).

There are three specific elements to analyze in the tort of false imprisonment to have a proper defense. In order to have a defense to a claim of false imprisonment, the detainment needs to be done in a reasonable manner, under reasonable grounds within a reasonable amount of time. Mass. Gen. Laws ch. 231 §94B.

In our case, an objective test will be applied to the three elements to determine the reasonableness of each element. The parties will disagree about whether Stevens was detained in a reasonable manner, if the forty minutes was a reasonable amount of time, and if there were reasonable grounds.

1) Detained in a Reasonable Manner

"Reasonable manner" is not defined in the Massachusetts statute, but "unreasonable manner" has been defined by the Supreme Judicial Court of Massachusetts as any manner involving threats, accusations, physical force or any other conduct that indicates unwarranted restraint. See Proulx v. Pinkerton's Nat'l Detective Agency, Inc., 178 N.E.2d 575 (Mass. 1961).

In Coblyn, the Supreme Judicial Court of Massachusetts gave a directed verdict to the defendant because the plaintiff could not prove that she was detained in an unreasonable way. The court reasoned that the plaintiff was not accused of stealing. "There were no acts of physical force, threats or other conduct that indicate any restraint upon her". Id. In contrast, another Massachusetts court found that a plaintiff was detained in an unreasonable manner, "with the physical restraint in a public place imposed upon the plaintiff, an elderly man, who had exhibited no aggressive intention to depart." Coblyn,

359 Mass. at 320. This court also found lack of identification material, stating "we observe that Goss's failure to identify himself as an employee ... and to disclose the reasons for his inquiry and actions ... could be said to constitute an unreasonable method by which to effect detention." Id. This is distinguished from Proulx because the detectives identified themselves as from the Pinkerton detective agency.

In the present case, HBO can argue that they detained Stevens in a reasonable manner. HBO can contrast the facts in its case to the facts in Coblyn. Unlike Coblyn, in our case, HBO provided Smith with a badge which identified his name and the greeting, "Welcome to Big Office!" Stevens exhibited an aggressive intention to depart by stating that she was in a hurry, and made it clear she needed to be somewhere. Unlike in Coblyn, the plaintiff did not exhibit an aggressive intention to leave, but was complicit and agreed to go back to the store when the storekeeper blocked his exit. To avoid a scene, Smith took Stevens by the arm to the back of the store away from the exit to discuss this further which can be distinguished from Coblyn because Stevens made her intentions of leaving clear. Smith did not accuse Stevens of stealing, but clearly stated that "There is a slight irregularity here", unlike in Coblyn where the employee did not disclose the reasons for his questions and actions, and essentially accused the plaintiff of stealing the scarf. Our case is more analogous to Proulx where the detectives identified themselves and their intentions. Smith identified himself, gave reasonable cause for Stevens to be suspect and gave her an opportunity to explain.

Stevens will argue that Smith detained her in an unreasonable manner. Like in Coblyn where the storekeeper did not identify himself, Stevens will say that Smith did not explicitly identify himself. Stevens will point out that a badge in itself is not sufficient form of identification because in Proulx, the detectives told the plaintiff who they were. Stevens will argue that Smith physically lead her by her arm to the back of the store, and as in Coblyn was physical restraint in a public place imposed upon her. Stevens will argue that she was accused of stealing when Smith told the guard that he thought Robie had helped his sister pull a "bait and switch", like in Coblyn when the employee told the plaintiff, "Stop. Where did you get that scarf?" Unlike in Proulx, where the plaintiff could have left at any time, Stevens will argue that she could not leave the store because Smith retained her driver's license and credit card.

HBO can respond by stating that all employees have badges to identify themselves which is sufficient to distinguish an employee from a customer, unlike in Coblyn where the employee had no identification to reasonably believe he was an employee. In Coblyn, the court found that a firm grasp of an elderly man in front of other people constituted unnecessary physical restraint. In our case, it could be argued that there was no unnecessary physical restraint because Stevens made her intentions of leaving clear, and therefore to avoid a scene in front of all the customers in the first place, she was led to the back of the store. HBO can argue that Stevens was not directly accused of stealing, as in Coblyn, and that Smith was just communicating to the guard why they were questioning Stevens. HBO can also argue that they needed the credit card and driver's license to verify

the purchase, and that during questioning Stevens was yelling at Smith, demanding them back so that she could leave. Again, because Stevens made her intentions clear, Smith needed to resolve the discrepancy before he could let Stevens leave.

The court will probably find that Smith detained Stevens in a reasonable manner. Smith's name tag clearly identified who he was. Smith did not outright accuse Stevens of stealing. The restraint was not aggressive in nature, and it is logical that in order to sort out a discrepancy with merchandise one would not want the customer by the exit. As for the driver's license and credit card, these were needed in order to verify the purchase. Since Stevens made it clear that once she got those items back that she would leave, it is reasonable to assume that before Smith had resolved the discrepancy, Stevens would have left.

2) A Reasonable Amount of Time

Although the phrase "reasonable length of time" is not defined in the statute, the Supreme Judicial Court of Massachusetts has defined the standard for a reasonable time in Proulx, where the court found that even though the plaintiff was detained for one hour, the detectives had valid reasons such as questioning and discovery. Based upon certain circumstances even one hour is reasonable, where "this cannot be deemed an unreasonable length of time in view of her admitted violations of company rules…" Proulx, 343 Mass. at 391.

In Proulx, the court found that "on the most favorable aspect of the plaintiff's case, the interview did not exceed one hour." Id. Not only did the

plaintiff admit to the detectives that she violated company rules, but also stated that she was quite sure that "something was going over the counter that should not have been going over the counter." Id. Once the employer resolved the issue of possible theft, he fired the employee. The court found that there was no evidence that the plaintiff was not at all times free to leave the premises. Id. In Coblyn, both parties conceded that the detention of five minutes was a reasonable length of time. Coblyn, 359 Mass. at 320. The reasonable length of time is the time necessary to question the suspect and ascertain whether they stole an item based on the facts and circumstances. Proulx, 343 Mass. at 391

In the present case, HBO can argue that Smith detained Stevens for a reasonable length of time. HBO can compare the facts and circumstances with Proulx, where Smith was asking questions to ascertain why her receipt was for a $125 model, but the model in her bag was for $350. Stevens admitted that she bought the item from her brother, Robie, an HBO employee. Like in Proulx, where the plaintiff admitted to violating rules and possible theft, the admission of buying the item from someone she knew, was enough to suspect a "bait and switch" and therefore retain Stevens until they sorted the situation out. While Smith was questioning Stevens during the forty minutes, Hughson was questioning Robie on whether he was involved. Smith then opened the packaging, and realized that the less expensive model was in the expensive model packaging. At that point, the discrepancy was resolved, and Smith gave Stevens back her cards.

Stevens will argue that she was retained for an unreasonable amount of time. Stevens will say that the daycare center refused to continue care for her children because of how long she was detained. Stevens will also mention that she emphatically explained the urgency of her situation many times. Unlike in Proulx, where the employee was free to leave the premises at any time, Smith held her license and credit card so that Stevens could not leave the store and drive to get her children. Also, when she mentioned that she purchased the item from her brother, Smith should have checked the packaging at that time, instead of forty minutes later.

HBO can respond by explaining that the urgency and cost associated with the time have no relevance to reasonable length of time. HBO can also state that they needed the driver's license and credit card for verification. At no point did Smith tell Stevens that she could not leave the store. Due to the confusion of the situation, once the questioning of Robie and Stevens was complete, Smith had a better understanding of the issue and at that point thought to check the packaging. HBO could point out that store guides are not trained in theft prevention, and naturally would not think to check the packaging first.

The court will probably find that Smith detained Stevens for a reasonable amount of time. During the time Smith detained Stevens, HBO was also questioning Robie in a suspected collusion for a "bait and switch" of the PDA. Once Smith cleared up the confusion, he checked the packaging and gave Steven's back her cards. At no point did the employees tell Stevens that she could not leave.

3) If there were Reasonable Grounds

The statute defines "reasonable grounds" as "to believe that the person so detained was committing or attempting to commit a violation ... or attempting to commit larceny of goods for sale on such premises…" Mass. Gen. Laws ch. 231 §94B.

In Coblyn, the Supreme Judicial Court stated that "At common law in an action for false imprisonment, the defense of probable cause, as measured by the prudent and cautious man standard, was available to a merchant." Coblyn, 359 Mass. at 321. "The words 'reasonable grounds' and 'probable cause' have traditionally been accorded the same meaning". Id. The test for probable cause is "such a state of facts as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." Id at 322. A merchant needs an honest and strong suspicion that the suspect is committing larceny of goods for sale on premises in order to satisfy the reasonable grounds to detain the person. Id.

In the present case, HBO can argue that they had reasonable grounds to detain Stevens. It is store policy that in order to take measures to prevent employee and customer theft, that the store guides periodically check to make sure that the items customers buy match the items listed on the sales receipts. Smith approached Stevens as she was leaving, and politely asked to see her receipt and merchandise. Smith at this point realized that there was a $250 difference between what was on the receipt and what was actually in the bag. As in Proulx, the detectives had honest and strong suspicion when a customer told

them that the plaintiff rung up the sale without giving her a receipt. A reasonable person would find that a discrepancy between purchased items on a receipt and actual items would cause an honest and strong suspicion of possible larceny. This is in sharp contrast to Coblyn, where there were no grounds for suspicion because the plaintiff came into the store with the scarf, and only stopped at the exit to put it back on. Also in Coblyn, the plaintiff did not intend to leave the store when approached. In our case, Stevens made it clear that she needed to leave the store quickly.

Stevens will argue that HBO did not have reasonable grounds to detain her. In comparison to Coblyn, there were no reasonable grounds for being detained because she was heading to the exit with purchased item in hand. She will mention that she had the bright orange sticker which stated "Paid in Full – Big Office", she will also mention that she fully cooperated with Smith, and that she should not have caused suspicion because she had a receipt with the item she purchased. In contrast to Proulx, the plaintiff did not give receipts to the customers when ringing up the sale. This caused suspicion that the plaintiff was depositing some of the cash from the transaction. In our case, if Smith did not find a receipt in the shopping bag, than this would have been suspicious enough to constitute reasonable grounds of detainment. Smith did find a receipt and so there were no reasonable grounds for detainment.

HBO can respond by stating that a receipt in and of itself is not enough proof that the item is not stolen. HBO can mention that there are non-obvious tactics for theft, involving an inside person. An employee could scan a similar but

cheaper item, and give the more expensive item to the customer. This technique tries to circumvent the receipt check because the item is similar enough to one described in the receipt. If employees are trained, they would be able to figure out the discrepancy between the item and receipt. This would give reasonable suspicion of larceny and therefore detainment for questioning.

The court will probably find that Smith had reasonable grounds to detain Stevens. It is store policy to check customer's periodically on the way out of the store. During one of Smith's routine checks, he came across a discrepancy with Steven's receipt. With Stevens making it clear that she needed to leave the store when approached, coupled with the discrepancy of the receipt and the item in the shopping bag, would be probable cause to question the customer further in order to verify that no larceny was going on.

b. Negligence

1) Dangers on Premises Were Known to Plaintiff

Courts have considered the duty owed by the defendant to the plaintiff in negligence cases, such as the duty a shopkeeper owes a customer in its store. As the court stated in Letiecq, "Some latitude must be allowed to the proprietor of a store to display goods in a manner consistent with the nature of the goods and of the business." Letiecq v. Denholm & McKay Co., 102 N.E.2d 86 (Mass. 1951).

The court in Letiecq found that if the danger was open and obvious to the Plaintiff, then "it would be placing an unreasonable burden on the defendant's agents to have required them to anticipate that the equipment over which the

plaintiff fell was a source of danger of which she should have been warned." Id. The court also addressed the duty the defendant had to the plaintiff if the danger was open and obvious. It stated "[T]here is no duty upon a landowner to warn a business visitor of dangers, knowledge of which the landowner may reasonably assume the visitor has." Id. "Before liability for negligence can be imposed, there must first be a legal duty owned by the defendant to the plaintiff, and a breach of that duty proximately resulting in the injury." O'Sullivan v. Shaw, 726 N.E.2d 951 (Mass. 2000).

In the present case, HBO can argue that they had no duty to warn Stevens of the unassembled desk box because Stevens should have known about the box. The open and obvious danger rule is a defense that if the danger was open and obvious to the plaintiff, than the storekeeper has no duty to warn. Id. As to the openness requirement, the HBO store is large and well lit. It has wide aisles containing displays of merchandise. Office furniture is also located in the main aisle, some of it unassembled in boxes that customers could easily transport home. As to the obviousness requirement, the box was a fairly (3 ft by 5 ft) large corrugated box on a tan linoleum floor, right next to the open display of the desk. As Smith was leading Stevens to the back of the store, they passed by the box in the aisle. Like in Letiecq, the plaintiff had passed the footstool and knew it was there, but forgot it was there when she turned around and tripped over it.

Stevens will argue that HBO had a duty to warn her about the unassembled desk box on the floor. Stevens will state that there was no warning about boxes in the aisles, and that they pose a risk of danger in the store because

the box was not in plain sight. She may concede that she did see the box when she walked past it, but that she forgot about the box after forty minutes of being detained unreasonably.

HBO can respond to such an argument by stating that it did not have a duty to warn Stevens about the box. The court in Adriance stated "some latitude must be allowed to the proprietor of a store to display goods in a manner consistent with the nature of the goods and of the business." Adriance v. Henry Duncan Corp., 196 N.E. 906 (Mass. 1935). The court found in Adriance that the defendant had a right to assume that there was no reason to anticipate danger to a customer from the position in which the item was placed. Id.

The court will probably find that HBO owed no duty to warn Stevens. The court may find that the store aisles are open and well lit. It is standard store policy to place the unopened boxes next to the open items in the store.

2) Dangers on Premises Would Have Been Obvious to a Person of Ordinary Intelligence

In determining the negligence of a defendant, courts also have looked at the obviousness to persons of ordinary intelligence, as the court found in O'Sullivan that the "duty to protect lawful visitors against dangerous conditions ... does not extend to dangers that would be obvious to person of average intelligence". O'Sullivan, 431 Mass. at 203.

In O'Sullivan, the objective question is whether the danger was, "so obvious that the defendant would be reasonable in concluding that an ordinarily intelligent plaintiff would perceive and avoid it and, therefore, that any further

warning would be superfluous." Id. In order to apply this objective test, the court stated that an intelligent plaintiff is "A visitor with ordinary perception and judgment exercising reasonable care for his safety." Id.

In the present case, HBO can argue that the reasonable, intelligent plaintiff test applies to this set of facts. It is known policy that the HBO stores the unassembled products next to all of the open displays. This policy is a matter of convenience for the customer's so that they can take the equipment home without ordering it. A customer of average intelligence walking through the wide aisles with the furniture and displays would be aware of the merchandise around them. In Adriance, the plaintiff was not looking in the direction she should have been looking because if she had she would not have hit the lawnmower. This lack of awareness in Adriance is in sharp contrast to a reasonable person looking where they are going in a store.

Stevens will argue that a box lying on the ground, similar in color to the floor is not open and obvious to even a reasonably intelligent person. Stevens could also state that HBO is trying to apply the defenses of contributory negligence or assumption of risk, if relying on Adriance. Massachusetts is a comparative negligence state and therefore those defenses are not applicable anymore.

HBO can respond to such an argument by stating that this is a comparative negligence state, but Massachusetts law still recognizes the open and obvious danger rule set when a danger is "obvious to a person of ordinary intelligence" standard. O'Sullivan, 431 Mass. at 203. A person of ordinary intelligence would

presume that it would be dangerous to quickly head out of the store with an aisle full of merchandise on the floor.

The court will probably find that the danger was "open and obvious" to a person of average intelligence. Since contributory negligence and assumption of risk are no longer valid in the state of Massachusetts these standards would not stand. A reasonable person could assume that one does not quickly walk through an area that contains numerous displays and open office furniture on display.

3) Plaintiff was Exercising Care for His/Her Own Safety

In determining the negligence of a defendant, courts also have looked at if the plaintiff was exercising care for their own safety. If a plaintiff purposely places themselves in harms' way within a place of business without regard to their own safety, then courts have looked at this is a possible defense with the "open and obvious" doctrine. Id.

In O'Sullivan, the court stated that a business owner is not expected to provide maximum safety, "but only one which would be safe to a person who exercises such minimum care as the circumstances reasonably indicate." Id.

In the present case, HBO can argue that Stevens did not exercise care of her own safety when leaving the store. She was yelling at Smith to get her license back so that she could leave. Apparently agitated, Stevens quickly headed for the exit. Without taking the appropriate precautions when traversing through the main aisle with all the displays, she tripped over one of the desk boxes. This can be compared with the Letiecq case, where the plaintiff tripped over a shoe stand that she saw minutes before. Stevens would have noticed the box coming to the rear of

the store. Like the show stand, the box itself is for desk furniture which is something commonly sold in the store and was lying next to the actual desk model. Like in the Adriance case, the plaintiff did not pay attention to where she was walking because if she did she would have noticed the handles of the lawnmower. Stevens was in to much of a hurry and did not take the precautions of walking and looking where she was going because if she had, she most likely would not have fallen. In the O'Sullivan case, the court found that "a person of average intelligence would have recognized that ... posed a risk of suffering injury…" Id. In the present case, HBO can contend that the test applied here would come to the same result, which an average customer would have known about the boxes in the aisles.

Stevens will argue that she did exercise care for her own safety when leaving the store. She may contend that the box was similar in color to the floor and therefore was not open and obvious. Stevens may also argue that due to the unreasonable amount of time that she was detained, and the fact she needed to go pick up her children, that her frame of mind was not of a "reasonable person with average intelligence" and therefore the test is inapplicable.

HBO can respond by stating that the box was open and obvious danger on the floor. HBO can say that the "reasonable person with average intelligence" test still an objective test based on the circumstances, not meant to be subjective in regards to the thoughts of the person.

The court will probably find that Stevens did not exercise care for her own safety by virtue of her quickly heading for the exit. The box on the floor was an

"open and obvious" danger to a "reasonable person with average intelligence". In this instance, a reasonable person with average intelligence would realize that running through the main aisle of a store with office furniture could pose a danger to oneself.

V. Conclusion

The formal requirements for the Massachusetts Statute Mass. Gen. Laws ch. 231 §94B seem to be met.

HBO should be able to prove that it detained Stevens in a reasonable manner. Smith had a badge which clearly identified himself. Stevens demonstrated an aggressive intention to leave the store and therefore Smith had to lead Stevens to the back of the store. Smith gave Stevens an opportunity to explain the situation without accusing her of anything.

HBO should also be able to prove that it detained Stevens for a reasonable amount of time. Smith took the time to question Stevens, find out more information with regards to Robie, and time to inspect the packaging especially after Stevens mentioned that Robie was her brother. Smith also never told Stevens that she could not leave.

HBO should be able to prove it had reasonable grounds to detain Stevens. The store policy is to inspect shopping bags of customers periodically before they exit, there was a discrepancy on the receipt itself for a difference of $250, and her own brother sold the merchandise to her.

The formal requirements for the "Open and Obvious Danger" rule also seem to be met.

HBO should be able to prove that the danger on the Plaintiff knew of the danger on the premises. Shopkeepers are typically given latitude for keeping products necessary for the sale of goods. The store itself has large, wide, well lit aisles, and Stevens passed by the box when she was led to the back of the store.

HBO should also be able to prove the dangers on the premises would have been obvious to a person of ordinary intelligence. A person of ordinary intelligence would know to be careful in busy aisles, especially with furniture models and their unassembled counterparts. Applying this objective test to the current facts seems to satisfy this test.

Finally, HBO should be able to prove that the plaintiff did not exercise care for her own safety. Stevens quickly headed for the exit without taking any precautions in regard to the floor displays.

Because it is likely the court will find for both defenses on both likely claims, we should advise HBO to pursue this action or to settle. We can contact HBO to either settle this matter or file a complaint.

Patrick Hoey