

Merchants know falling merchandise presents dangerous risks to unwary customers, and courts are holding them accountable.

Falling merchandise

Jeffrey A. Hyman and Molly E. Homan

Stack it high and let it fly.

—anonymous stocker of merchandise on a sky shelf

During the past decade, thousands of people have been injured, some killed, by falling merchandise while shopping in retail warehouses.¹ From doors, hot water heaters, and televisions to pet supplies, houseware goods, and toys, merchandise is falling off high shelves and causing injuries to customers at an alarming rate.

Since 1987, about 30,000 falling-merchandise incidents resulting in injuries to customers have occurred at Wal-Mart.² During a recent 18-month period, 68 customers sued Home Depot for injuries sustained from falling merchandise.³ Other companies operating a retail warehouse business include Lowe's, Kmart, Toys'R' Us, PetsMart, Costco, Sam's Club, and Staples. The retail warehouse business exploded during the 1990s and shows no signs of slowing down.

In 1962, the first Wal-Mart and Kmart stores opened, and these merchants were about to "hit" the consumer in a big way. These stores operated on the formula that it was more efficient, less expensive, and more profitable to warehouse as much merchandise as possible on the sales floor, rather than in off-site warehouses or backroom storage areas. High stacking of merchandise was born, and a profitable business strategy at the expense of customer safety was created.

Falling-merchandise incidents have the following common characteristics.

High stacking. A trademark of the retail warehouse merchant is high stacking, characterized by safety experts as the storage of merchandise on the sales floor above eye level.⁴ Merchandise is often stacked on shelves 15 feet above the sales floor. A sales clerk or customer must stretch, use a ladder or step stool, or climb on shelves to handle merchandise.

Unsecured merchandise. Typically, merchants do not use physical-restraining safety devices such as security bars, fencing, safety ties, and shelf extenders on high shelves because of the expense involved and the employee time it would take to use them. Kmart representatives have testified that use of the devices is simply “not practical.”⁵ Wal-Mart takes the position that merchandise can be safely stacked on high shelves without the use of the devices.⁶

Triggering events. Falling merchandise can be triggered by moving merchandise that has been stacked in an unstable manner; moving merchandise on one shelf in such a way that merchandise on an adjacent shelf falls, referred to as “push through”; stacking different size boxes on top of each other; and stacking heavy merchandise on top of lighter merchandise. Vibrations in and out of a store, merchandise left hanging over the lip of a shelf, and merchandise too large for a shelf can also cause the problem.

No warning of danger. Typically, the merchandise falls without any warning to unsuspecting customers. Notwithstanding that merchants know of the risk of falling merchandise from high stacking and the potential for serious injury to customers, they do not warn customers of these risks with signs, banners, or placards; do not cordon off shopping aisles when merchandise is being stocked or retrieved; and do not use spotters when stocking is in progress.

Customer not negligent. Generally, the customer is not the cause of the merchandise falling and is generally not charged with a duty to watch for falling merchandise or to expect merchandise to fall.

Improper training. Often store personnel are improperly trained, or not trained at all, in stocking techniques or in recognizing and correcting the hazards of falling merchandise. A number of incidents could be prevented if merchants would train employees in procedures for recognizing hazards and would ensure that the merchandise is safely stacked.

Nature of injuries. A significant percentage of injuries occur to the head, neck, back, and upper torso. Even light merchandise becomes dangerous when it falls from a high shelf. For example, a 5-pound object falling about 2 feet exerts a force of about 319 pounds.

Incidents tracked. Merchants in the retail warehouse business commonly track incidents. They know of the serious nature of the problem. Also, most know there are a far greater number of “near misses” than “hits.”

Law of falling merchandise

Falling merchandise is a relatively new and rapidly evolving area of premises liability.⁷ The seminal case that exposed the magnitude of the problem is *Scharrel v. Wal-Mart Stores, Inc.*, in which it was discovered that between 1989 and 1994, 17,000 falling-merchandise incidents resulting in injuries to customers occurred in Wal-Mart stores.⁸

A Denver jury awarded Phillip Scharrel more than \$3 million for injuries he sustained when he was struck by 80 pounds of merchandise from a high shelf.

Since *Scharrel*, the problem has received national attention.⁹ Case law has developed favorably for customers. However, aggressive defense tactics often lead to lengthy, bitter, and expensive battles.

The law recognizes that merchants have a duty to invitees to exercise reasonable care to keep their premises in a reasonably safe condition and to warn of unsafe or hazardous conditions of which the merchant knows or should know through reasonable care and inspection.¹⁰ It is well established that merchants owe a duty to their customers to keep their businesses, aisles, passages, and other public places in a reasonably safe condition and to use ordinary care to prevent injuries to customers.

A premises hazard is a condition posing an unreasonable risk of harm.¹¹ Merchants must take reasonable precautions to protect their customers from foreseeable dangers. An employee's knowledge of an unsafe condition may be imputed to the merchant.¹²

Certain states have abolished the distinction between invitees and licensees, declaring that landowners owe the same duty of reasonable care to all people lawfully on their premises. Other states have codified common law premises liability.¹³

Courts recognize that merchants must place merchandise on shelves safely so it will not fall.¹⁴ The merchant must take affirmative steps to prevent it from falling,¹⁵ including checking the shelves periodically to ensure that merchandise is in a safe position¹⁶ and using devices to stabilize it.¹⁷

The law recognizes that stacking merchandise on high shelves creates an unwarranted risk, and it is reasonably foreseeable that doing this contributes to the risk of merchandise falling.¹⁸ Several courts have held that stacking boxed merchandise on a shelf above customers' heads creates an unreasonable danger.¹⁹

In *Lapeyrouse v. Wal-Mart Stores, Inc.*, the court said that “stacking items three on top of each other and overlapping the shelf can obviously cause objects to fall.”²⁰ In *Matthews v. Schwegmann Giant Supermarkets, Inc.*, the Louisiana Supreme Court held that cans falling from a shelf that had not been touched by the plaintiff or any other customers established that “the condition of the shelf presented an unreasonable risk of harm.”²¹

In *Lorinovich v. Kmart Corp.*, the court said that a genuine issue of fact was presented regarding whether a reasonably prudent merchant would stack unsecured cans on shelves six feet off the floor, with no ladders or personnel available to assist the customers and with no warning of the likely danger involved in reaching for the cans. The court noted that the company knew that people had been injured in its store by cans falling from above eye level and that it was store policy not to place merchandise above eye level unless it was secured.²²

In *Dougherty v. Great Atlantic & Pacific Tea Co.*, the court held that a jury could conclude that the stocking of jars on high shelving, not readily reachable or viewable by the customers, subjects customers to an unwarranted risk of harm. “The very reason for the need to exercise due care in stacking is that the initial or subsequent disarray may cause an item to fall,” the court said.²³

Courts routinely reject a merchant’s argument that movement of merchandise by a customer other than the plaintiff is an intervening cause absolving the merchant of liability, because the other customer’s conduct was foreseeable.²⁴ Courts recognize that merchants must anticipate that customers will handle and move merchandise.²⁵

Courts also have held that merchants must anticipate that customers will attempt to reach merchandise located on high shelves.²⁶ In *Safeway Stores v. Leake*, the court held:

In a self-service store, where goods are displayed beyond the reach of a person of ordinary height, and no means are provided for reaching such goods, the store owner is bound to anticipate that a customer may attempt to reach the goods by stepping on a lower shelf or projection and that such action may cause articles to fall from one of the shelves.²⁷

Applying this reasoning, the court in *Pullia v. Builders Square* deemed it foreseeable that displaying merchandise beyond the reach of the average customer and with a lower shelf or projection that “encourages self-service customers to step up onto it to retrieve goods” subjects customers to an unreasonable risk of harm.²⁸ The merchant should have expected that customers would try to reach the merchandise themselves. As a matter of

public policy, self-service merchants should display merchandise only where customers can reach it safely, provide more readily available assistance to customers, or warn of the danger.

Notice of a hazardous condition, always a critical issue in any premises liability case, is a difficult element of proof in these cases. *Scharrel* is significant on this issue. The court upheld the introduction of a Wal-Mart report of 17,000 falling-merchandise incidents under Colorado Rule of Evidence 404(b), for the limited purpose of establishing Wal-Mart's notice of a problem.²⁹ The court noted that a significant percentage of the incidents involved injuries similar to the plaintiff's injuries. Wal-Mart's contention that the incidents were "not similar" to the plaintiff's injuries was rejected.

In *Shafer v. Wal-Mart Stores, Inc.*, the Ninth Circuit upheld the admission of the same report as evidence that the risk to customers posed by high stacking was foreseeable.³⁰ This evidence also showed that Wal-Mart failed to minimize that risk by stacking merchandise carefully.

In *Cochran v. Lowe's Home Center, Inc.*, the court upheld the admission of 13 other falling-merchandise incidents as evidence of the defendant's notice of the dangerous condition. The injuries were not "generalized 'falls' which involve 'sheer speculation' and 'unrelated and indefinite circumstances,'"³¹ as argued by the defendant:

They [we]re specifically caused by boxes falling from shelves which were stacked too high and were therefore unstable and likely to fall. Plaintiff . . . show[ed] by these other incidents a particular hazard created by an habitual practice of stacking merchandize [sic] in a manner which the proprietor knew to be dangerous and knew to have caused injuries to customers in a particular manner and for a particular reason that may render these incidents similar.³²

In *Wal-Mart Stores, Inc. v. Sholl*, the court held that the evidence showed Wal-Mart had constructive knowledge of the hazardous condition. The evidence showed Wal-Mart stacked paint cans three or four high on a riser, was aware that heavy objects should be placed on lower shelves to maintain a lower center of gravity, knew that merchandise occasionally fell from shelves causing injuries to customers or employees, and knew customers would try to reach or move the cans on the riser to read their labels.³³

Res ipsa loquitur

In falling-merchandise cases, it can be difficult to establish that the defendant had "exclusive management control" over the instrumentality that produced the injury, or the

merchandise. Courts often reject applying the doctrine because customers handle merchandise and have access to the areas where it is located.³⁴

In *Gonzales v. Shoprite Foods, Inc.*, the New Mexico Supreme Court stated that “where we are dealing with the display and arrangement of merchandise being offered to the public for sale on the shelves of a self-service supermarket serving between 900 and 1,000 people on a normal Saturday . . . all with equal access to the merchandise, the merchandise can hardly be said to be within the sole and exclusive control of the [defendant].”³⁵

The doctrine may be applied, however, when “control” is interpreted to mean a “right to control.”³⁶ A court may also apply the doctrine when the plaintiff demonstrates the merchandise is located on high shelves for storage purposes and not for immediate sale; only store employees are intended to have access to the merchandise by requiring use of ladders or other reaching devices, and the merchant prevents customer access to such devices (e.g., “please ask for assistance” signage); and no one else was in the area and/or there was no known cause of the fall.³⁷

Comparative and contributory negligence

Defendants in these cases often try to blame the customer. They argue the danger was “obvious” and the plaintiff was negligent for not watching for falling merchandise, for not being aware of the danger of high stacking, for not avoiding an aisle where merchandise was being stocked, or for reaching for merchandise on a high shelf and not asking for help.

In *Stone v. Kmart Corp.*, the plaintiff was injured when an employee dropped merchandise onto the plaintiff’s head.³⁸ Kmart’s only evidence of comparative negligence was that the plaintiff should not have been in the area when she saw an employee on a ladder stocking merchandise. The trial court refused Kmart’s request for a comparative negligence instruction.

The court weighed the risk involved and the foreseeability and likelihood of injury against the social utility of the customers’ conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden on the merchant.³⁹ It ultimately held that the customer does not bear the burden to foresee the possibility that merchandise may fall. The court distinguished a falling-merchandise case from a slip-and-fall case, where a rainfall, melting snow, ice, or water on a floor places a plaintiff on heightened safety awareness.

The court recognized that placing the burden on the customer to guard against falling merchandise is inappropriate. “[I]f one took it to its logical extreme, everyone would have to

take a crash course . . . in taking care. You'd have to wear safety helmets indoors.”⁴⁰ The trial court refused to instruct the jury that the plaintiff simply should not have been in the aisle. Under the circumstances, it said, the merchant, rather than the customer, best bears the burden to guard against and prevent falling merchandise.⁴¹

The Ninth Circuit also addressed this issue in *Shafer*. It ruled that evidence that merchandise had fallen and injured customers, suggesting that Wal-Mart knew its stacking methods posed a risk of harm and failed to minimize that risk, negated Wal-Mart's position that the only likely explanation for the incident was plaintiff's mishandling of the boxes or shelves.⁴²

In *Lorinovich v. Kmart Corp.*, the merchant argued that a display of salsa cans six feet off the floor presented an obvious danger and that the plaintiff therefore was contributorily negligent. The court stated:

When a reasonable occupier of land should anticipate that a dangerous condition will likely cause physical harm to the lawful visitor, notwithstanding its known and obvious danger, the occupier of the land is not absolved from liability. In this case, assuming the salsa display presented an obviously dangerous condition, which itself is a question of fact, there is evidence that would support a conclusion that defendant should have anticipated that its customers could be injured from this type of display.⁴³

Protection for the unwary shopper

Courts are increasingly protecting the unwary shopper from merchants who negligently stack merchandise too high. Merchants know that this practice presents an unwarranted and dangerous risk to the shopper.

Store managers must anticipate that high-stacked unrestrained merchandise will fall, customers will move merchandise and cause it to be unstable or fall, and customers will try to reach for merchandise if help is not readily available.

Courts are likely to admit evidence of other incidents in the same store or other stores in order to show that the merchant knew of the dangerous condition and also to negate the defense argument that the plaintiff's negligence is the only explanation for the fall.

Finally, courts are increasingly refusing to instruct the jury on contributory or comparative negligence absent evidence of affirmative conduct on the part of the plaintiff. The defense argument that “accidents happen” does not fly in a falling-merchandise case.

Notes

1. Maria Durand, *Shop at Your Own Risk* (Aug. 18, 2000), at <http://www.abcnews.com>. See *generally* <http://www.fallingmerchandise.com> (visited Nov. 12, 2000).

2. *Real v. Wal-Mart Stores, Inc.*, No. CIV 177137 (Cal., Ventura County Super. Ct. July 19, 2000); see also Christa Zevitas, *Falling Merchandise Is a New P.I. Niche*, LAW. WKLY. USA, June 28, 1999, at 595.

3. Davan Maharaj, 'Sky Shelves' Can Be Lethal for Shoppers, L.A. TIMES, Aug. 16, 2000, at A1.

4. See *Stone v. Kmart Corp.*, No. 94 CV 2858, (Colo., Arapahoe County Dist. Ct. May 15, 1999) (trial testimony of Hal Hendricks, Ph.D., CPE, DABTE, safety expert).

5. See *id.* (trial testimony of Mike Rice and Michael Lordino, representatives and managers of Kmart).

6. *E.g.*, *Scharrel v. Wal-Mart Stores, Inc.*, No. 94 CV 2734 (Colo., Denver Dist. Ct. Apr. 20, 1995) (trial testimony of Wal-Mart management, including Kevin Husted, former Wal-Mart director of risk control); see also *Real*, No. CIV 177137.

7. Although research indicates that cases involving merchandise falling date back to the 1950s (see, e.g., *Young v. Hartford Accident & Indem. Co.*, 47 So. 2d 365 (La. Ct. App. 1950)), falling merchandise as a serious problem developed with the emergence of the retail warehouse shopping business.

8. 949 P.2d 89, 95 (Colo. Ct. App. 1997).

9. See, e.g., Gilbert T. Adams III & Alto V. Watson III, *Big Box Retailers: Discovery Abuse*, TRIAL, Apr. 2000, at 38; Maharaj, *supra* note 3; Zevitas, *supra* note 2.

10. See *Wooley v. Great Atl. & Pac. Tea Co.*, 180 F. Supp. 529, 531 (W.D. Pa.), *aff'd*, 281 F.2d 78 (3d Cir. 1960); *Colonial Stores, Inc. v. Donovan*, 154 S.E.2d 659, 660-61 (Ga. Ct.

App. 1967); Pullia v. Builders Square, Inc., 638 N.E.2d 688, 691-92 (Ill. App. Ct. 1994); Lapeyrouse v. Wal-Mart Stores, Inc., 725 So. 2d 61, 63 (La. Ct. App. 1998), writ denied, 739 So. 2d 209 (La. 1999). An invitee must prove that the landowner knew or should have known that the invitee would not discover, appreciate, or take precautions against the danger.

11. Bridgman v. Safeway Stores, Inc., 348 P.2d 696 (Cal. 1960); Lopez v. Wal-Mart Stores, Inc., 700 So. 2d 215, 217-18 (La. Ct. App. 1997); Matthews v. Schwegmann Giant Supermarkets, Inc., 555 So. 2d 671, 673 (La. Ct. App. 1989), judgment set aside, 559 So. 2d 488 (La. 1990).

12. See, e.g., McKenney v. Quality Foods, Inc., 319 P.2d 448, 449 (Cal. Ct. App. 1957).

13. COLO. REV. STAT. 13-21-115 (3)(c)(I) (2000); GA. CODE ANN. 51-3-1 (2000); LA. REV. STAT. ANN. 9:2800.6(A) (West 1988) (codifying the duty of a merchandiser in a slip-and-fall or falling-merchandise case); Nelson v. Freeland, 507 S.E.2d 882, 886-87 (N.C. 1998), reh'g denied, 533 S.E.2d 467 (N.C. 1999).

14. See, e.g., Mannina v. Wal-Mart Stores, Inc., 757 So. 2d 98, 102 (La. Ct. App. 2000), writ denied, 763 So. 2d 597 (La. 2000); Davis v. Wal-Mart Stores, Inc., 751 So. 2d 357, 360-61 (La. App. Ct. 2000), writ granted, 759 So. 2d 768 (La. 2000); Morais v. Schwegmann Bros. Giant Supermarket, 290 So. 2d 357, 359 (La. Ct. App. 1974), repudiated by Gonzales v. Winn-Dixie La., Inc., 309 So. 2d 697 (La. Ct. App. 1975).

15. Morais, 290 So. 2d 357, 360.

16. Mannina, 757 So. 2d 98, 102.

17. Wal-Mart Stores, Inc. v. Berry, 833 S.W.2d 587, 591 (Tex. Ct. App. 1992).

18. See, e.g., Wooley, 180 F. Supp. 529, 531; Safeway Stores, Inc. v. Leake, 147 A.2d 439, 440 (D.C. 1959); Colonial Stores, Inc., 154 S.E.2d 659; Dougherty v. Great Atl. & Pac. Tea Co., 289 A.2d 747, 748-49 (Pa. Super. Ct. 1972).

19. See, e.g., Byrd v. Wal-Mart Stores, Inc., 203 F.3d 819 (4th Cir. 2000); Pullia, 638 N.E.2d 688, 695; Dougherty, 289 A.2d 747, 748-49.

20. 725 So. 2d 61, 65.

21. 559 So. 2d 488, 488 (La. 1990).

22. 516 S.E.2d 643, 646 (N.C. Ct. App.), cert. denied, 1999 WL 1053295 (N.C. Nov. 4, 1999). The court also upheld admission of evidence that other stores in the area did not stack merchandise as high as the defendant did.

23. Dougherty, 289 A.2d 747, 748-49.

24. See, e.g., Colonial Stores, Inc., 154 S.E.2d 659, 661; Zitzow v. Wal-Mart Stores, Inc., No. CO-99-402, 1999 WL 993993, at *2 (Minn. Ct. App. Nov. 2, 1999); see also 62A AM. JUR. 2D Premises Liability 595 (1990).

25. See, e.g., Zitzow, 1999 WL 9993993, at *2. In Zitzow, the court noted that the evidence established that at the time of the accident, the store manager was aware that a customer in one aisle could push top-shelf merchandise and cause merchandise to fall from the top shelf and injure an innocent customer in the adjacent aisle, yet nothing was done about the danger. See also Wooley, 180 F. Supp. 529, 531.

26. See, e.g., Blau v. Kmart Corp., No. 98-CV-131 (Colo., Jefferson County Dist. Ct. Jan. 14, 2000) (reported in 18 Jury Verdict Rep. of Colo., No. 11 (Mar. 13, 2000)); Leake, 147 A.2d 439, 440; Pullia, 638 N.E.2d 688, 692; Dougherty, 289 A.2d 747.

27. Leake, 147 A.2d 439, 440; see also Wooley, 180 F. Supp. 529, 531; Bridgman, 348 P.2d 696; Pullia, 638 N.E.2d 688, 691-92.

28. Pullia, 638 N.E.2d 688, 693, 695.

29. Scharrel, 949 P.2d 89, 95.

30. Nos. 97-16534, 97-16537, 1999 WL 197238 (9th Cir. Apr. 8, 1999), appeal after remand, 2000 WL 1523069 (9th Cir. Oct. 13, 2000).

31. Cochran v. Lowe's Home Ctr., Inc., 487 S.E.2d 50, 52 (Ga. Ct. App. 1997).

32. *Id.*

33. 990 S.W.2d 412, 418 (Tex. Ct. App. 1999).

34. See, e.g., *Byrd*, 203 F.3d 819; *Monahan v. Wal-Mart Stores, Inc.*, 139 F.3d 912 (10th Cir. 1998); *Monforti v. Kmart, Inc.*, 690 So. 2d 631 (Fla. Dist. Ct. App. 1997).

35. 364 P.2d 352, 355-56 (N.M. 1961).

36. Michael P. Sullivan, Annotation, *Liability for Injury to Customer or Other Invitee of Retail Store by Falling of Displayed, Stored, or Piled Objects*, 61 A.L.R. 4TH 27, 2[a] (2000); 62A AM. JUR. 2D 595, *supra* note 24; 62 AM. JUR. 2D 64 (1990); see also *Barker v. Crown Drug Co.*, 284 S.W.2d 559 (Mo. 1955); *Copher v. Barbee*, 361 S.W.2d 137 (Mo. Ct. App. 1962); *Perito v. Sunrise Supermarket Corp.*, 229 N.Y.S.2d 667 (App. Term. 1961).

37. See, e.g., *Copher*, 361 S.W.2d 137.

38. No. 94 CV 2858.

39. See also *Pullia*, 638 N.E.2d 688, 692-95 (discussing the factors to be considered in analyzing whether a party owes a legal duty to others).

40. *Stone*, No. 94 CV 2858 (trial transcript, vol. 9, at 7-12).

41. *Id.*

42. Nos. 97-16534, 97-16537, 1999 WL 197238, at *1.

43. 516 S.E.2d 643, 646-47 (citation omitted). *North Carolina, Virginia, and Kentucky are the remaining states to recognize the contributory negligence theory.*

Jeffrey A. Hyman is special counsel to the law firm of Lohf Shaiman, Denver, Colorado. Molly E. Homan is an associate of the firm.