

Claim Under 93A Yields \$6.7 Million in Fatal Fall Case

By Phillip Bantz

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A pair of attorneys who failed to persuade a jury that building code violations at a Boston bar resulted in a college student's fatal fall down a staircase still managed to walk out of court with a \$6.7 million award.

Though jurors didn't buy their argument, plaintiffs' lawyers Jeffrey A. Newman and Joseph S. Sano were able to convince Superior Court Judge Elizabeth M. Fahey that the pub should be made to pay under a Chapter 93A claim.

The Boston attorneys spent months tracking down the defendant pub's employees, many of whom were reluctant to testify in court. They also had to overcome the fact that the student drank heavily in the hours leading to his death, and that no one really knew how he fell down the stairs. And, most importantly, they had to link the defendants' alleged flouting of the building code with the student's death.

Newman and Sano zeroed in on the defendants' alleged failure to obtain a building permit for the stairs when they were initially constructed in the mid-1980s and rebuilt in the late 1990s. With its steep, narrow steps, lack of proper lighting and railings, and an entrance covered only by dark vinyl strips rather than a proper door, the stairway was an accident waiting to happen, Newman says.

"The bar knew patrons would go in the area of the stairs frequently," he says. "In the context of this case, [the victim] fell because of the defects with the stairs and not because he was intoxicated."

The defense, which contended that the proper building permits had been obtained but were later misplaced, focused on the 21-year-old student's blood-alcohol content, which was .208 — twice the legal driving limit — after his death.

"You put a really drunk guy on some stairs with a beer bottle in one hand and a cell phone in the other. How did he fall?" asks defendants' attorney



Jeffrey A. Newman

Kevin S. Taylor of Denver, Colo. "The condition of those stairs did not cause this accident."

No witnesses, no permits

Because no one saw Northeastern University student Samuel "Jacob" Freeman fall at Our House East, both sides brought in expert witnesses to present theories on how he died.

Based on his injuries and other physical evidence, the plaintiffs suggested that Freeman had no inkling he was standing in front of the stairway when he leaned into the vinyl strips and fell down the steps.

Defense experts told jurors that Freeman was actually ascending the stairs from the basement when he tumbled backward, bolstering their argument that the accident occurred in an area that was off limits to customers.

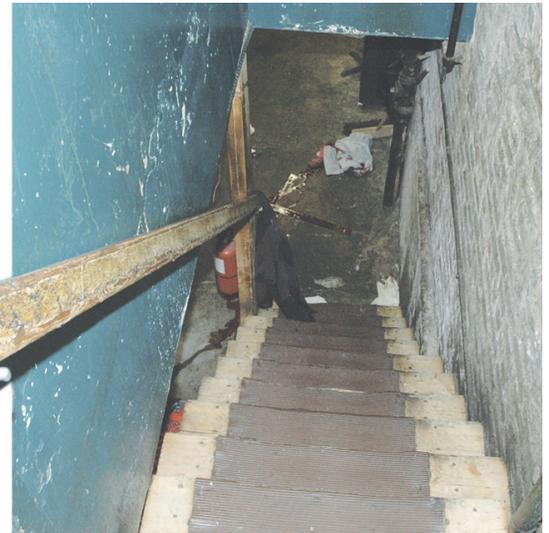
"This is why I think the jury ruled in our favor. It's 'CSI 101.' Who knows how it happened?" Taylor says. "If he fell at the bottom of the stairs, what was he doing down there? He was trespassing."

Judge Fahey accepted the plaintiffs' version of the accident. She further determined from the testimony of pub employees that patrons routinely were allowed to access the alcove near the stairway's opening. A kitchen manager, who Newman located after a three-month search, also testified that she had fallen down the stairs and had seen a liquor company representative fall as well.

To counter the plaintiffs' argument that the area was dangerous, the defendants stressed that the pub had passed its annual inspections. Taylor also claimed that the pub owners "possibly" obtained a building permit for the stairs, but the paperwork went missing due to a clerical error.

"That place was inspected nine ways from Sunday," he says.

The permit wasn't lost in the shuffle, according



The stairway at Our House East in Boston, which was at the center of a recent Superior Court trial

to Newman, who says it never existed. And the pub was able to fly under the radar of city inspectors for so long only because its owners had built the stairs without a permit. Had they obtained a permit, a building inspector would have examined the stairs during and after the construction process to ensure that everything was up to code, he says.

"The yearly inspections are cursory," Newman says. "They kind of go through to see if there's anything major, and they wouldn't necessarily be looking at the stairs. The [defendants] made a conscious decision to not go through the process of getting a building permit."

Sano adds: "This idea that because [the inspectors] didn't catch the violation means that they're not responsible is ridiculous. The fact that nobody catches me violating the law doesn't mean that I get a free pass."

Applying 93A

While the jury refused to hold the defendants liable for Freeman's death, it did find in a non-bind-

ing advisory opinion that the pub had violated the building code.

Ruling on a separate 93A claim that did not go before the jury, the judge ordered the pub owners to pay treble damages of \$6,733,400, along with attorneys' fees and costs, to the student's family.

Fahey determined that the plaintiffs were entitled to 93A damages because the defendants had intentionally avoided complying with the building code for more than two decades, which qualified as "unfair or deceptive acts," and the result was Freeman's fatal fall. The judge also said that "any reasonable person looking at these stairs would realize they are a safety hazard."

The defendants' decision to ignore the permitting process constituted "numerous deceptive acts and a willful and deliberate endangerment of the public over many years," Fahey said. "The defendants knowingly, intentionally and willfully engaged in acts that violate c. 93A."

Taylor says he plans to appeal Fahey's decision.

He argues that a 93A claim cannot be applied to a wrongful death case, only cases that involve injury. The wrongful death statute, G.L.c. 229, §2, preempts the 93A claim, he says, adding that the 93A claim cannot survive Freeman's death because such claims are not specifically listed in the survival statute, G.L.c. 228, §1.

Fahey rejected those arguments.

Multiple damages provisions under Chapter 93A are designed to serve a broad public interest, and "since a claim under c. 93A is not 'merely personal' to the decedent, unlike, for example, certain torts, a claim under chapter 93A survives the decedent's death," Fahey ruled.

The defense's 93A argument appears to present an issue of first impression at the appellate level, according to Boston lawyer Michael B. Bogdanow of Meehan, Boyle, Black & Bogdanow. He says 93A claims are often included with separate claims under the wrongful death statute, but in most cases the issue of whether 93A could apply to wrongful death is not addressed.

Bogdanow, who wrote a book on tort law that includes a chapter on 93A claims, says the claim is "applicable if, on the facts of a particular case, an unfair or deceptive practice resulted in wrongful death."

Tip of the iceberg

In Boston and other cities, business owners frequently engage in secret construction, and many are never caught.

"They do get away with it, until you have something like this happens and they're scrutinized," Newman says. "Hopefully someone will examine the broader implications of this case. It's dangerous to the public."

But, according to Taylor, the real danger is the court applying a 93A claim in a wrongful death case. If the Supreme Judicial Court adopts Fahey's interpretation, businesses will suffer, he predicts.

"We're in the middle of a serious economic crisis in this country," Taylor says. "I think it's a mistake to open up businesses to punitive damages and treble damages in cases where the Legislature has already deemed the appropriate remedies."

But Newman says businesses that obtain the necessary building permits and adhere to the state building code have nothing to worry about.

"The only reason his client got in trouble is because they didn't follow

Action: Negligence & tort

Injuries alleged: Death

Case name: Klairmont, et al. v. Gainsboro Restaurant Inc., et al.

Court/case no.: Suffolk Superior Court, No. 07-05373

Jury and/or judge: Jury/ Elizabeth M. Fahey

Amount: \$6,733,440, plus costs and attorneys' fees and interest (on 93A claim)

Date: February 2011

Attorneys: Jeffrey A. Newman, Law Offices of Jeffrey A. Newman, Boston, and Joseph Sano, Prince, Lobel, Glovsky & Tye, Boston (for the plaintiffs)



LAW OFFICES OF JEFFREY A. NEWMAN & ASSOCIATES