NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
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What constitutes 'vacancy' in insurer's fire policy exclusion?

First Circuit Court defines vacancy under a dwelling fire policy

BY RACHEL L. REEVES

In a recent decision, ***Langill v. Vermont Mutual Insurance Co.***, No. 01-1074 (1st Cir. 2001), the First Circuit Court of Appeals considered the question of whether an insured dwelling had been vacant for more than 60 consecutive days at the time of the fire. Under Massachusetts law, an Insurer's Fire Dwelling Policy must carry this exclusion: "Unless otherwise provided in writing, we will not be liable for loss caused by fire or lightning occurring while a described building is vacant, whether intended for occupancy by owner or tenant, beyond a period of sixty consecutive days for residential purposes of three units or less, and 30 consecutive days for all other residential purposes."

The insured premises was a rental dwelling about 35 to 40 feet away from the Langill's residence. Two tenants who had lived at the rental unit for 12 years moved out in February 1999, leaving the property in poor condition. Mr. Langill undertook to refurbish the house. During this period, the doors were locked, the utilities maintained, and heating oil supplied. In the building were Mr. Langill's tools, a stepladder, two chairs, a mattress, a bed frame and box spring, a radio and an ashtray. Mr. Langill spent one to two hours a day working on the unit, sometimes visited it at night to smoke or meet friends, had coffee there with a friend six or seven times, and once stayed the entire night.

On May 5th, fire broke out at the rental property in the middle of the night. Vermont Mutual, relying on the statutory exclusion for vacancy, denied coverage. The Langills brought suit, and the question presented to the First Circuit was whether, under Massachusetts law, the undisputed facts depict a dwelling that had been, at the time of the fire, "vacant" for more than sixty consecutive days.

In reaching its decision, the Court examined the policy reasons behind the vacancy exclusion. Those reasons included the increased likelihood that a fire will remain undiscovered when the building is left vacant, thereby causing more damage, and the greater risk of arson. The court held that the sparse inventory of personal property in the rental unit and the intermittent use of the unit hardly provided the appearance of occupancy and was ineffective for protection from vandalism. The Court therefore upheld Vermont Mutual's denial of coverage.

The Court stated that whether the building is attended and occupied is the central question. The test for de-

RACHEL L. REEVES

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termining vacancy when the premises is a dwelling is whether there is a sustained presence of a resident, particularly during the hours of darkness, and the presence of furnishings and amenities minimally necessary for human habitation. In this case, the Court found that the furnishings present, and the limited presence of Mr. Langill was not sufficient. The First Circuit, however, did not foreclose the possibility of a set of facts not involving a resident but so paralleling the conditions of residency as to avoid application of the exclusion clause.

Maine law has a similar required statutory exception in the policy when the building is vacant. 24-A M.R.S.A. § 3002 (1) provides, "Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring . . . (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days . . .."

The First Circuit decision, while not binding, is instructive to Maine courts in determining what constitutes 'vacancy.' □

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Stephen W. Moriarty, Editor
Rachael Finne, Managing Editor
Beth Branson, Copy Editor

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: lstinitiallastname@nhdlaw.com
Website: www.nhdlaw.com
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E-commerce causing changes in Maine laws and case discovery

BY ADRIAN KENDALL

The 120th Maine Legislature's new laws offer an excellent illustration of both the promising side and the darker side of the Internet, taking into account human nature as it is exhibited on the Internet. Technological developments have affected not only the types of cases that now come before the courts, but also the management procedures for those cases as well. Changes are seen most notably in the area of personal jurisdiction and in the conduct of discovery.

Earlier, Maine adopted the Uniform Electronic Transactions Act (UETA), and the Maine Digital Signature Act (MDSA). These laws are designed to bolster confidence in on-line transactions by providing a uniform framework for enforcement of both consumer and commercial business conducted on the Internet, but do not represent a substantial change in the laws of contracts and commerce. The means by which contracts are formed – the extension of an offer and the acceptance of that offer such that a "meeting of the minds" takes place – remains the same.

Recent enactments

Some of the more important laws the Legislature enacted that will affect Internet-based technology, including the MDSA, are:

An Act Conforming the Maine Digital Signature Law to the Federal Law.

This act repeals the law that exempts deeds, mortgages and other documents that affect title to real estate from the law that validates electronic or digital signatures. It brings Maine law into line with the federal enactments.

An Act Relating to Personal Privacy and Government Information Practices.

This new law requires each public entity that has a publicly accessible web site (1) develop a policy regarding information practices relating to personal information, and (2) post notices of these practices on the web site. The policy must address the type of personal information collected, its use and disclosure, procedures for access and protection, and security.

An Act to Prohibit Cyberstalking. This act revises the definition of stalking as "conveying oral or written threats" that include causing a communication to be initiated by computer or other similar device.

An Act to Specify that Possession of Sexually Explicit Materials by way of the Internet is Criminal. This act amends the current law to expressly criminalize possession of sexually explicit materials that have come into a person's possession via the Internet.

Jurisdictional theory

Two essential requirements must be met for an action to be brought in a particular court: personal jurisdiction and subject matter. Personal jurisdiction involves the court's ability to exercise its powers over a person or entity so that the "traditional notions of fair play and substantial justice" under the U.S. Constitution's due process clause is satisfied. The question of jurisdiction in a lawsuit based on Internet use alone has not yet been confronted by the Law Court, but the Court's previous decisions, as well as case law in other court systems, offer reasonably good guidance on whether a Maine court can exercise jurisdiction over a non-resident.

Maine's long-arm statute expressly states that "it shall be applied so as to assert jurisdiction over non-resident defendants to the fullest extent permitted by the due process clause of the United States Constitution, 14th Amendment." The long-arm statute, 14 M.R.S.A. §704-A(1), lists activities considered giving rise to

personal jurisdiction, including: the "transaction of business" in Maine, and the "[d]oing or causing a tortious act to be done, or causing a tortious act to be done, or causing the consequences of a tortious act to occur" in Maine. Case law has fleshed out this definition. Before a court can exercise personal jurisdiction over a non-resident, it must conclude that:

1. Maine has a legitimate interest in the subject matter of the action;

2. The defendant, by its conduct, should reasonably have anticipated litigation in Maine; and

3. The exercise of jurisdiction by Maine's courts would comport with traditional notions of fair play and substantial justice.

Internet contacts with a web site with active solicitation and sales in this state are comparable to commercial activity through newspaper advertisements, via fax or over the telephone. Multiple sales via the Internet to Maine residents will almost certainly expose the non-resident to jurisdiction. However, the instance of the single sale is a situation for which no certain answer can yet be given. Greater scrutiny would fall on which party initiated the contact and the scope of communications. For example in *Murphy v. Keenan*, 667 A.2d 591 (Me. 1995), where the sale of a boat to a Maine resident was a single event and the defendant did not initiate the contact, no jurisdiction was found.

Changes in conduct of discovery

Attorneys are now using a broader interpretation of "document" as used in Rule 34 of the Maine Rules of Civil Procedure. Computer hard drives, e-mail records, back-up tapes, and other magnetic and digital media are subject to discovery. Most recently, compact discs that can be recorded by the consumer (CD-Rs) can be included in a request for production. But these advances have led to additional costs and considerations. The deciphering of hard drive information, or retrieving deleted documents and messages, is a job for experts, and fees may now be incurred that would not have been included in the standard paper trail.

E-mail and other computer data are subject to the Maine Rules of Evidence as to admissibility. The rules that pertain to hearsay, for example, will apply unless the statement is specifically defined as not being hearsay under Rule 801(d), or one of the other exceptions.

The law historically has never been swift to respond to societal and technological change, likely to avoid being spun by the prevailing breeze of the moment. Yet we cannot afford the luxury of waiting to see how a certain technological trend will play out. Consequently, the use of "cookie cutter" responses and boilerplate language could make matters worse if not customized to the case. Economies of scale that often go with repeated similar transactions and patterns may be harder to come by. This may in turn translate into higher transaction costs as attorneys make the needed adjustments to strategy and practice. □

Rare challenge for insurers

The insurance industry is facing an actuarial challenge of a high order, though not for the first time. Insurers base their premiums on risk. But even the mathematical specialists who build the "what if" models are being stumped by the events of September 11. Actuaries need a number of events of similar pattern that can be turned into data and viewed over the years to reveal a pattern, a statistical model, factoring in probability. The model does not take into account the unimaginable. There is no actuarial way to say that there's not going to be another event like the catastrophes of the World Trade Center and the Pentagon.

Until September 11, the natural disasters of floods, earthquakes and hurricanes – in contrast to the man made disasters of fires, pollution, explosions or nuclear fallout – have been the most catastrophic. At its simplest, a statistical model multiplies the probability of a happening by its probable size to determine the likely cost – translating into the price charged for insurance. Nearly all standard property liability policies covered terrorism as a matter of course before September 11th. The industry now is rethinking this coverage, and actuaries report they need time to develop a history that can tell them if terrorism will be in our future.

Meanwhile, insurers are informing Congress on the problems of covering terrorism risk because it cannot be modeled. The industry has been discussing with lawmakers ways they can work together on providing coverage for terrorism acts. One solution being considered is to establish a system of pooled premiums that would purchase reinsurance from the federal government. However, since property insurance is state regulated, any proposed activity of federal legislators would likely involve input from state insurance regulators.

The problem of balancing property liability coverage in terrorism claims should be addressed by Congress in its session of 2002. Meanwhile, since no federal backup is in place as yet, state insurance regulators have begun granting requests from companies seeking to exclude coverage for terrorism from commercial policies. The National Association of Insurance Commissioners is recommending to states that they allow insurance carriers to exclude terrorism coverage if an act causes at least $25 million dollars in damages. Exclusions would not apply to auto, home, or life insurance coverage. Should Congress eventually enact a federal backup, the terrorism exclusions would expire. □

Two recent Law Court decisions

By David P. Very

Common carriers' duty to protect impaired passengers

Does a taxi driver have a duty of care not to drop off a customer whom he knew was intoxicated near his automobile? In a split decision, the Law Court answered that question in the negative in **Mastriano v. Blyer**, 2001 ME 134 (September 14, 2001).

Douglas Dionne spent the early evening hours of August 4, 1997 drinking beer at the Elk's Lodge in Skowhegan. The Lodge refused to serve Dionne any more liquor and another patron called Blyer Taxi Service to give Dionne a ride home. A friend helped him into the cab and told the driver, Clifford Groder, Jr., to take Dionne home because he had too much to drink. Once in the cab, Dionne refused to give his home address and instead directed Groder to take him to the Kennebec Valley Inn. When that proved to be closed, he asked the driver to take him to Bloomfields Tavern. Once there, Dionne paid the fare and walked into the bar.

Later that evening, Groder responded to a call from the tavern to pick up Dionne. Dionne gave Groder directions to drive him to a convenience store to purchase cigarettes. Dionne then directed Groder to return him to the Elk's Lodge.

At the Elk's Lodge, Dionne paid the fare plus a large tip, exited the taxi, and walked past his automobile. Groder related that he knew the car was Dionne's because he saw Dionne walk up to it, kick it, and call it a "piece of junk." Dionne then walked over to a fence and Groder assumed Dionne was going to relieve himself. Groder heard other voices in the area and, assuming Dionne would be safe, he left the Lodge and resumed work. Later that evening, Dionne died in a single car accident while driving his automobile. His blood alcohol content was .25. It is not known if Dionne had anything more to drink after he left Groder's cab for the last time.

Dionne's personal representative filed a wrongful death action against the driver and the taxi company. The defendants moved for a summary judgment, arguing that it had not been established that the defendants had breached any duty of care to Dionne. The Superior Court granted the motion, finding that the plaintiff had "failed to raise a genuine issue of material fact to dispute defendants' statement that the place of discharge was reasonably safe and that the passenger/carrier relationship had ended." The Court also declined to "extend the carrier's duty to include preventing Dionne from drinking and/or driving after safe discharge in a reasonably safe place."

On appeal, the Law Court reiterated that a common carrier owes its passengers a duty that requires the exercise of the highest degree of care compatible with the practical operation of a machine in which the conveyance was undertaken. The Law Court held that this heightened standard of care continues until the carrier has given its passenger a "reasonably safe discharge at a reasonably safe location." The Court further reiterated that absent a special relationship, the law imposes no duty to act to protect someone from danger unless the dangerous situation was created by the defendant.

While a common carrier does have a special relationship with its passengers, the Law Court held that in this instance any special responsibility ended with Dionne's safe exit at a safe place. The Court found that the cab driver had no further duty to act affirmatively to protect the passenger from himself after he left the taxi. To hold otherwise, the Court observed, would expose common carriers to potential liability any time someone claims, with the clarity of hindsight and the emotion of subsequent tragedy, that the carrier should have noticed a passenger's possible impairment and, accordingly, taken steps, perhaps against the passenger's wishes, to protect the passenger from each and every potential harm of the passenger's own design. The Court noted that while Mr. Dionne's death was a tragedy, "it was a tragedy caused by his own hand in becoming intoxicated, entering his car, and driving himself to his death."

Chief Justice Wathen, in one of his last decisions, dissented. The chief judge noted that discharging an intoxicated passenger at his or her car may not be discharging the passenger at a reasonably safe location. A carrier could simply refuse service to an apparently intoxicated individual who requested to be transported to an unsafe location such as his or her car. Justice Wathen argued that the summary judgment should have been vacated, as a jury could find that Groder knew Dionne was disabled due to his intoxication and discharging Dionne at his car exposed him to an unreasonable risk of harm resulting in his death.

While this decision deals with the duty of taxi companies, it is also a very strong statement both on the obligation of individuals to accept personal responsibility for their own safety, and on the obligation of others to protect the individual from potential harm of the individual's own design.

Intentional and negligent infliction of emotional distress claims clarified

In a most interesting split decision, new Chief Justice Leigh Saufley, writing for the majority, addressed the significant differences between claims of

intentional and negligent infliction of emotional distress.

The case involved the assault and robbery of a Domino's Pizza delivery person. The three defendants were drinking at defendant Lisa Gagne's house and decided to order a pizza and have it delivered to a vacant house nearby. Gagne knew that her companions had no money. When the two male defendants left her house, she cautioned them, "Don't get caught." Gagne did not go with them. When the pizza delivery driver, Barbara Curtis, arrived at the vacant house, she was assaulted, injured, and robbed by one of the defendants. Gagne later told the other defendants to throw the pizza boxes into the river, and she also lied to the police about several aspects of the events.

DAVID P. VERY

Three years after the assault and robbery, Curtis filed a complaint against the three defendants. Her claim was voluntarily dismissed because of the two-year statute of limitations. Curtis then filed an amended complaint, and on a motion for summary judgment, the trial court dismissed the claims of negligent and intentional infliction of emotional distress against defendant Gagne.

On appeal, in ***Curtis v. Porter***, 2001 ME 159, 784 A.2d 18, Chief Justice Saufley first commented on the summary judgment process. The Chief Justice stated, "Summary judgment is no longer an extreme remedy. It is simply a procedural device for obtaining judicial resolution of those matters that may be decided without fact-finding." The Court noted that where the defendant moves for summary judgment, the plaintiff must establish a prima facie case for each element of the cause of action that is properly challenged in the defendant's motion. Uncontroverted facts are accepted as true and, in addition to the specific facts set forth by the parties, the Court "will consider any reasonable inferences that a fact-finder could draw from the given facts."

Regarding the claim of the **intentional** infliction of emotional distress, the real dispute before the Court was what reasonable inferences could be drawn from the facts presented. The Court reiterated that in order to withstand a motion for summary judgment regarding a claim of intentional infliction of emotional distress, a plaintiff must present facts in support of the following four elements:

(1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct;

(2) The conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community;

(3) The actions of the defendant caused the plaintiff's emotional distress; and

(4) The emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

The defendant had argued that her limited role, if any, in the assault and robbery could not have caused the plaintiff's emotional distress, that her conduct was not outrageous, and that it did not rise to the level of intentional or reckless behavior. The Court noted that a person acts "intentionally" if subjectively he wants or foresees that harm to another will almost certainly result from his actions. A person acts "recklessly" if he knows or should know that his conduct creates an unreasonable risk of harm to another person and the unreasonableness of his actions exceeds negligence. The Court stated that a person involved in "planning" a nighttime theft from a delivery person knows or should know that the theft may result in serious emotional harm to that person. It concluded that the facts presented were sufficient to allow a jury to "infer" that Gagne was an active participant in the robbery. In addition, the Court could not, as a matter of law, say that participation and planning in a nighttime robbery is not extreme and outrageous conduct regarded as atrocious and utterly intolerable. The Court noted that, while a fact finder could conclude the inferences and conclusions are not borne out when evidence is presented at trial, they were sufficient to defeat the defendant's motion for summary judgment on the claim of intentional infliction of emotional distress.

The dissent argued that while there was evidence from which a jury could infer that Gagne had some "knowledge" that the other defendants were contemplating a theft, there was insufficient evidence that Gagne participated in the "planning" of the theft. Further, the dissent found that the plaintiff's emotional distress was caused not by the theft, but by the assault, an action that Gagne could not foresee. While the majority of justices stated that a court may not speculate when it comes to facts, the dissent highlights that a trial court may "infer" facts favorable to the plaintiff to defeat a summary judgment motion.

The Court then addressed the claim for the **negligent** infliction of emotional distress. Chief Justice Saufley noted that the conclusion that Gagne may have engaged in the intentional infliction of emotional distress does not lead to the conclusion that the claim for negligent infliction must also lie. The Court reiterated that the claims are not distinguished merely by the level of intentionality in the conduct at issue. The Court noted that in the famous case of *Gammon v. Osteopathic Hosp. of Maine*, 534 A.2d

1282, (Me. 1987), the Court discussed the claim of negligent infliction of emotional distress in terms of general foreseeability. It has since declined to apply a pure foreseeability analysis to determine whether a duty to avoid negligently causing emotional harm exists. Although each person has a duty to act reasonably to avoid causing physical harm to others, the Court noted, there is no analogous general duty to avoid negligently causing emotional harm to others. Thus, while any person may be liable for intentional infliction if the conduct causing the harm is sufficiently outrageous and is intentional or reckless, the universe of those who may be liable in tort for the negligent infliction of emotional distress is much more limited.

Therefore, the Court held that a duty to act reasonably to avoid emotional harm to others would only be recognized in three very limited circumstances. First, in claims commonly referred to as "bystander liability actions" where someone closely related to the victim suffers serious emotional distress from witnessing harm caused to that person by the tortfeasor's negligent act. Second, where a "special relationship" exists between the tortfeasor and the person emotionally harmed. The Court cited previous cases holding that the physician/patient relationship and the psychotherapist/patient relationship are such unique relationships. The *Gammon* case was also placed in this category given a hospital's relationship to the family of a deceased in the handling of the deceased's remains. On the other side of the coin, the Court pointed out that it previously held that the relationship between a member of the clergy and members of the church does not constitute such a special relationship.

The third circumstance is where the wrongdoer has committed another tort. The Court stated however that the claim of distress is usually subsumed in any award entered on the separate tort. While negligent infliction claims are routinely added to complaints stating a cause of action in tort, the Court observed that the practice is rarely necessary unless the claim is made by a "bystander" or against one with a "special relationship" to the plaintiff. The Court further highlighted that a negligent infliction claim requires proof of "severe" emotional distress, an element of damage that is not required when the separate tort provides for recovery of emotional damages.

In *Curtis v. Porter*, as there was no special relationship between the parties and as there was no bystander liability, the Court found the plaintiff did not have a separate claim for negligent infliction of emotional distress. It vacated the summary judgment on the claim of intentional infliction of emotional distress, and affirmed the judgment for the defendant on the claim of negligent infliction of emotional distress. □

Federal Court adopts implied co-insured doctrine barring subrogation

In ***North River Insurance Company v. Snyder***, Magistrate Judge David Cohen of the United States District Court held that a tenant cannot be liable in subrogation to the insurer of a landlord absent an express agreement to the contrary in a written lease. In his decision, Magistrate Judge Cohen adopted the rationale first set forth in *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975), and subsequently adopted by a number of courts.

In *North River*, the defendants were tenants in a multi-tenant apartment complex. The defendants had signed a standard lease agreement that did not expressly provide that the landlord could assert a subrogation action. Although the defendants did have tenants' insurance, the lease did not require that they obtain coverage. In reaching his decision, Magistrate Judge Cohen noted that subrogation is an equitable remedy, and a contrary result would cause tenants and landlords of multi-tenant buildings to insure the same real property, which would merely be a windfall to insurance companies.

Magistrate Judge Cohen's Memorandum of Decision in favor of North River was recently adopted by U.S. District Court Judge Hornby, but the issue has been certified to the Maine Supreme Judicial Court for a resolution of state law. It is expected that the Maine Law Court will issue a decision, and finally resolve this legal issue by April, 2002.

This decision, and any future rulings, will significantly affect insurers' handling of subrogation claims. The state of the law on this issue is unclear until the Maine Law Court renders its opinion. Nevertheless, it is extremely important that adjusters take these issues into account when handling subrogation claims.

Although this decision will alter insurers' handling of subrogation claims, it is important to note the limits of this decision. Even if the Law Court adopts the implied co-insured doctrine barring subrogation, this case would only apply to residential tenants in multi-tenant buildings. The more interesting issue will be whether the Law Court would extend this doctrine to non-residential leases or single-tenant buildings in future cases.

We will keep clients updated on the status of this important issue through future editions of the Newsletter and NH&D's new E-Newsletter.

Tom Marjerison

Three NH&D attorneys elected members of the firm

Emily Bloch, Adrian Kendall and Thomas Marjerison

Warm congratulations are in order to three able associates, Emily Bloch, Adrian Kendall and Tom Marjerison, who were elected members of the firm as of January 1, 2002.

EMILY BLOCH of the litigation group specializes in medical malpractice defense and general litigation. She is a graduate of Connecticut College with majors in Asian studies and psychology, and Cornell University Law School, with a concentration in public law. She is a member of the Maine and Cumberland County Bar Associations, has served as Co-chair of the Women's Law Section of the Maine State Bar Association, and was active in the Maine Businesses for Social Responsibility as Co-chair of the Public Policy Committee.

Emily and her husband, Richard Frost, live in Falmouth with their eight-year-old son Jackson, and six-year-old daughter Dana.

ADRIAN KENDALL of the commercial group earned a B.A. in political science from the University of Pennsylvania, and his J.D. from the University of Maine School of Law, cum laude. Before coming to Norman Hanson & DeTroy, Adrian spent five years in practice with a Portland law firm primarily in commercial, corporate and admiralty law.

At NH&D, Adrian concentrates in real estate, corporate and commercial law, and also serves Maine's credit unions. Adrian is fluent in German and serves as representative to the State of Maine for the German Consulate General in Boston. He lives in Cumberland with his family, where he also serves on the town's Board of Assessment and Appeals. He is an annual speaker on business entity issues and most recently was a keynote speaker on e-commerce legal developments.

THOMAS MARJERISON is a member of the litigation group, and concentrates his practice on civil and criminal litigation. He received his undergraduate degree from Connecticut College and his law degree from the University of Maine School of Law, where he served as an associate editor of the Maine Law Review.

Prior to joining the firm, Tom was employed as an Assistant Attorney General, and was a frequent instructor at the Maine Criminal Justice Academy. In 1998, he was a Legal Specialist to the International Criminal Tribunal for the former Yugoslavia in The Hague. In that position, Tom advised the Office of the Prosecutor on the prosecution of war criminals in the national courts of Bosnia-Herzegovina.

Tom is involved in a number of insurance industry groups, and frequently provides seminars to clients on emerging insurance issues. He is a member also of the Maine Supreme Judicial Court's Advisory Committee on the Rules of Criminal Procedure and is Chairperson of the Criminal Law Section of the Maine State Bar Association. Tom and his family live in South Portland.

New Chief Justice appointed to Maine Supreme Judicial Court

Last fall the Chief Justice of the Maine Supreme Judicial Court, Daniel Wathen, in a surprise move stepped down from his post to announce his decision to run for the governorship in the election of 2002. However, after a test of the political waters, Justice Wathen withdrew, leaving open the post of Chief Justice.

The full Maine Senate confirmed Governor King's nomination in December, and Leigh Ingalls Saufley, sworn in on January 9, 2002, became the first woman Chief Justice of the Maine Supreme Court, and the youngest to serve since the Court first began hearing cases in 1820 in York Village.

Justice Saufley has served on the seven member appellate court since 1997, and has been a judge for the past 11 years, serving on the Superior and the District Courts in Maine, the first Chief Justice to have done so. Justice Saufley has said that it was her experience in the lower courts, and as deputy attorney general in the human services division, that was her best preparation for the post of Chief Justice.

Educated in Maine public schools from kindergarten through law school, Justice Saufley has worked for the state nearly her entire career. The core of her experience she believes came from her years in District Court, both as a lawyer and a judge. Its docket carries 20 to 60 cases a day, and is expected to make some of the most harrowing decisions affecting a family. Justice Saufley, as a Supreme Court Justice, continues to serve one day each month on a District Court bench. She is married and the mother of two teen-age children. □

Workers' compensation - recent Law Court decisions

BY STEPHEN W. MORIARTY

Maximum benefit level

Section 211 of the Workers' Compensation Act provides that the maximum benefit level shall be the higher of $441 or 90% of the state average weekly wage. The benefit level remained unchanged for a number of years, but as the result of progressive increases in the state average weekly wage, the level has been raised three times by the Board, and now stands at $471.76.

In ***Dudley v. Burns & Rowe Construction Group***, 2001 ME 161 (November 28, 2001), the Court had an opportunity to address the issue of entitlement to increased compensation based on revisions to the maximum benefit level. The employee had been injured in 1997 and had received ongoing benefits for total incapacity ever since. His average weekly wage entitled him to benefits at the maximum rate. The employee filed a petition to calculate the compensation rate, claiming that he was entitled to benefits based upon the several Board-approved increases. The Court affirmed an award of benefits based upon each increase in the rate. In so ruling, the Court rejected the employer's argument that an employee entitled to receive benefits at the maximum rate is locked into the rate in effect at the time of injury. Instead, the Court found that the plain language of the statute entitled the employee to compensation based upon each increase to the maximum rate.

Reinstatement offers

In two recent decisions the Law Court has strengthened to the remedies available to an employer under §214. In ***Holt v. S.A.D. #6***, 2001 ME 146, 782 A.2d 779, the employee had returned to work with accommodations following an occupational injury, and later resigned without good and reasonable cause. A Hearing Officer awarded ongoing benefits for partial incapacity, and rejected the employer's argument that the employee's resignation constituted a refusal of a bona fide offer of suitable employment.

STEPHEN W. MORIARTY

In reversing the decision of the Hearing Officer, the Court initially held that §214(1) applies whether or not an employer had actually begun paying benefits to a disabled worker. More importantly, the Court held that an ongoing and existing employment relationship creates an implied offer of suitable employment, and that a resignation from such employment is equivalent to a rejection of a continuing offer to come to work. A formal or affirmative offer of reinstatement is unnecessary where a claimant has already returned to work. Therefore, because the employee had voluntarily resigned without good cause, the Court held that the employee had forfeited her entitlement to benefits for the duration of her refusal to work.

In ***Roe v. Yarmouth Lumber, Inc.***, 2001 ME 159 (November 20, 2001), the Court held that employers paying benefits without prejudice may make offers of reinstatement to suitable employment, and that benefits may be forfeited when such offers are rejected without good and reasonable cause. The employee had been paid benefits without prejudice following injuries sustained in 1994 and 1997, and an offer of reinstatement was made within restrictions recommended by the treating physician. The employee refused the offer and filed petitions for award. Although the Hearing Officer granted the petitions, no benefits were awarded based upon a finding of rejection of reinstatement without good cause.

On appeal, the employee argued that §214 did not apply where benefits were being paid without prejudice. Chapter 1, §2(2) of the WCB Rules provides as follows:

2. If no payment scheme exists, the employer may reduce or suspend the payment of benefits pursuant to 39-A M.R.S.A. §205(9)(B)(1). The provisions of 39 M.R.S.A. §214 do not apply to compensation payments that are made without prejudice.

The Court affirmed the decision of the Hearing Officer and rejected the argument that §214 did not apply. It held that the rule was contrary to the plain language of the statute, and that employers paying benefits without prejudice can extend reinstatement offers under §214. The decision of the Hearing Officer declining to award benefits was affirmed.

Work search

Disabled workers' compensation claimants receiving unemployment benefits are required to make at least three job inquiries per week to maintain eligibility. However, as the Court has now held, work search efforts sufficient to secure unemployment benefits may not

be adequate to satisfy the traditional work search requirement. In ***Morse v. Fleet Financial Group***, 2001 ME 142, 782 A.2d 769, benefits for total compensation had been awarded based on the employee's testimony that she had contacted three potential employers per week to qualify for unemployment benefits. None of the businesses contacted were identified, nor was there any evidence that the businesses were actually hiring, or that there were positions available for which the employee was qualified.

Although the Court agreed that a Hearing Officer may examine an employee's personal characteristics (such as age and educational background) in examining overall employability, it held that such evidence cannot, without more, establish the unavailability of work within an employee's community. The Court emphasized that the lack of employment opportunities can be established by customary work search evidence or by labor market evidence, but that the claimant's evidence of job inquiries to other unemployment benefits was not specific enough to support an award of benefits for total compensation. The Court held that the employee was not entitled to benefits for total or partial at a 100% rate, and remanded the matter for further proceedings.

Statute of limitations

Several years ago, the Law Court suggested in Eaton v. BIW, 502 A.2d 1040 (Me. 1986), that a transfer to suitable employment might be the equivalent of the payment of compensation benefits for purposes of extending the statute of limitations. However, in ***Dahms v. Osteopathic Hospital of Maine***, 2001 ME 145, 782 A.2d 774, the Court confronted the issue directly and held that "a transfer to light-duty employment is not a payment for the purposes of tolling the statute of repose."

The employee had been injured in 1983, and benefits were last paid in June 1987. The employee had returned to work in a variety of positions. Following a casual conversation with an employer nurse in 1993 concerning ongoing problems connected with the injury, the employee was relieved of more demanding physical duties and his employment continued. Following additional surgery, the employee filed a petition for restoration in 1998, and the employer raised the former 10-year statute of limitations as a defense to the petition. The Hearing Officer granted the petition and awarded ongoing benefits.

The Court vacated the decision and held that the statute of limitations can only be extended upon the making of monetary payments either directly to the employee or to a third party, such as a health care provider. As the Court held, "the term 'payment' in the statute of limitations refers to the payment of money for a benefit or service, rather than the provision of some other direct benefit." Although this case was decided pursuant to former §95, it appears unlikely that transferring an employee to a new position would be found to constitute a payment of benefits pursuant to current §306.

Unavailability of work

The employee had been injured in 1974 and eventually stopped working for his post-injury employer in 1999. He began to receive temporary disability benefits from that employer, but under the terms of the plan his benefits would be cut in half if he were to earn more than $100 per week with a new employer. He filed a petition for restoration, and the Hearing Officer held that the adverse impact of entitlement to disability benefits rendered positions paying more than $100 per week "unavailable" to him.

In **Hogan v. Great Northern Paper, Inc.**, 2001 ME 162 (November 28, 2001), the Court vacated the decision of the Hearing Officer and emphasized that post-injury wage-earning capacity is based upon physical ability to earn income coupled with the availability of work within one's physical restrictions. The Court acknowledged that in some extreme circumstances it may be possible that negative financial consequences may make post-injury employment "unavailable." However, the Court found that the mere potential reduction of disability benefits did not make positions paying more than $100 per week unavailable to the employee. The decision of the Hearing Officer was vacated and the matter was remanded for further proceedings.

Settlement and apportionment

In multiple injury cases with different responsible carriers, the settlement of one carrier's claim has had uncertain impact upon the responsibility of the non-settling carrier or carriers. The Court has now held that settlement with one carrier cannot increase the obligations of a non-settling carrier, as previously established through an apportionment proceeding.

In Edwards v. Travelers Insurance Co., 2001 ME 148, 783 A.2d 163, the employee sustained separate repetitive motion injuries while working for two different employers. The insurer on the risk at the time of the more recent injury began paying benefits for total incapacity and sought apportionment against the earlier carrier, pursuant to the former version of §354. An arbitrator was appointed, and following arbitration proceedings, liability for payment of compensation was divided on a 50/50 basis. Eventually, the second carrier settled with the employee, and several months later, the employee filed a petition for restoration against the first carrier. The Board granted the petition and ordered the carrier to pay benefits for total incapacity, with a small set-off to reflect that portion of the settlement allocated to wage loss benefits.

Noting a long-standing policy disfavoring duplicate recoveries, the Court vacated the Hearing Officer's decision. The critical issue was whether the parties were bound by the previous apportionment allocation. Although the Court noted that an employee's rights generally cannot be affected by an apportion-

ment dispute, it found that the employee had actively participated in the apportionment proceedings, and that the order approving the lump sum settlement specified that the first carrier would continue to pay its previously-established 50% share. The Court held that the employee was precluded from arguing that she should not be bound by the arbitrator's decision. The matter was remanded with instructions to establish the first carrier's responsibility at a 50% level.

Clerical error

Section 318 provides a mechanism for the correction of a clerical error in a decree. In a 1996 decision, a Hearing Officer found that the employee had established all the necessary elements for an award of total incapacity benefits, but nevertheless ordered payment "commensurate with 100% partial incapacity benefits." No appeal was taken. In 1999 the employee filed a petition for award of inflation adjustments for his 1992 injury, and asserted that the initial decree contained a clerical error within the meaning of §318 which could be corrected in subsequent litigation. The successor Hearing Officer agreed and found a clerical error in the original decree. It was further found that the employee was totally disabled within the meaning of former §54-B, and that he was entitled to inflation adjustments.

In ***Chmielewski v. J. C. Management***, 2001 ME 160 (November 28, 2001) the Court refused to find that there was any ambiguity in the original decision and that therefore the successor Hearing Officer was without legal authority to "correct" or "clarify" that decision pursuant to §318. The Court further found that even if the original decree had been legally incorrect, a legal error does not constitute a clerical mistake or an "oversight or omission" subject to later correction under §318. The Court observed that the employee should have appealed from the original decision. □

Briefs/Kudos

ROD ROVZAR, head of the commercial practice group, spoke to attendees at a Maine Credit Union League conference in September. The forum on Account Basics was anything but basic, as the many listeners discovered, while Rod explained the legal essentials in accounts management. Participants included Credit Union CEOs, management staff, regulatory compliance staff and other front line personnel.

Credit unions, since they originated in the 1920s, have historically contributed to their communities in many ways. In northern Maine recently, the Katahdin Federal Credit Union was a sponsor of the town of Millinocket's Oral History project. One of the residents interviewed was a 103 year-old woman, who contributed fascinating stories to the history project.

Attorney **ANNE JORDAN** gave a lecture on Animal Welfare Law and the Legislative Process at Tufts University, School of Veterinary Medicine in November.

BOB HANSON addressed the New England Opthamological Society in Boston in December, leading discussions on examples of patient cases involved in risk management. Mal-occurrences involving complications in eye-care and a patient's subsequent legal actions are of concern to opthamologists.

The Center for Community Dental Health, at its annual Board of Directors meeting in November, elected attorney **RUSS PIERCE** president. The CCDH has clinics in Portland, Farmington, Auburn, Saco, and Sanford, and is a United Way agency.

A new paralegal joined us in November to support Mark Lavoie in the area of medical malpractice. We welcome **MARJORIE PERKINS**, who previously was associated with several major law firms in Maine.

Twin boys arrived to grace the **JOHN VEILLEUX** family in December, and John and his wife Lisa welcomed them with joy and delight. Unlike most twins, however, Jacob and Justin will have separate birthdays: Jacob was born at 11:58 PM December 21st, and Justin arrived the next day at 12:11 AM. All arrived home Christmas Eve, and the parents settled them into a well-organized nursery. What they could not plan for, however, was an organized sleep schedule for the new arrivals.

At the Cumberland County Teachers Federal Credit Union, even a 5-cent deposit is welcomed in a savings account. The credit union serves the Lyseth Elementary School in Portland, one of only a handful of banking programs in the country operating to serve grade school children. One dollar is enough to open an account, and the credit union pays a current annual interest rate of 2 percent on savings accounts. School officials say it's never too early to teach money management.

An attorney who serves NH&D clients works primarily behind the scenes as our middleman of knowledge. **JULIE W. WELCH** has just marked her fifth year with the firm as our indispensable researcher and librarian. When litigation counselors pose a question to Julie, she in turn interviews the questioner, for as she observed, the art of asking questions is even more important than the knowledge of sources.

Light duty workers with carpal tunnel syndrome not covered by ADA, Supreme Court rules

BY: ROBERT W. BOWER, JR.

On January 8, 2002 the U.S. Supreme Court ruled for the employer and held that a worker limited to light duty by carpal tunnel syndrome was not "disabled" under one part of the stautory definition of that word, and was therefore not protected by the federal law known as the Americans with Disabilities Act (ADA). ***Toyota Motor Manufacturing v. Williams***, No. 00-1089 (1/8/02).

In *Toyota Motor*, the employee was an assembly line worker suffering from work related bilateral carpal tunnel syndrome (CTS). She had returned to light duty work but was having increased pain. She requested additional accommodations which she alleged were refused. She was taken out of work by her physician and then dismissed about six weeks later.

She sued, alleging violations of the ADA, the Kentucky Civil Rights Act, and the Family and Medical Leave Act (FMLA). The District Court granted judgment in favor of the employer on all claims. The Sixth Circuit affirmed the District Court's ruling on the FMLA claim. It also agreed with the District Court that the employee failed to make a prima facie case that the employer violated the ADA when it terminated her. However, it reversed the District Court on the question of whether the employer failed to reasonably accommodate her before she was taken out of work by her doctor. The Sixth Circuit held that the employer had failed in its duty under the ADA because the employee was "disabled" and therefore covered by the statute.

Toyota appealed to the United States Supreme Court. The issues raised on the appeal apparently did not include the alleged violation of the FMLA or that the ADA was violated when she was discharged.

Instead, the employer appealed to the Supreme Court the narrow question of whether this light duty worker with CTS was "disabled" under the ADA because she was "substantially limited" in performing a major life activity. The Sixth Circuit had held that the employee's limitations made out a prima facie case that she was substantially limited in the major life activity of performing "manual tasks." It therefore reversed and remanded the case to the the Sixth Circuit. It did not need to reach the question of whether the employee was disabled because she was substantially limited in performing the major life activities of lifting and working. It also did not need to reach the question of whether the employee was covered by the ADA because she had "a record" of a qualifying impairment, or the question of whether the employee was covered by the ADA because she was "regarded as" having such an impairment, since the Sixth Circuit had not addressed these issues.

The Supreme Court reasoned that the employee was capable of tending to her personal hygiene and household chores. She was also capable of performing the manual tasks associated with part of her light duty job, and also able to work in her flower garden. These facts established no substantial limitation with manual tasks as a matter of law.

The Court deemed insufficient the proof that the employee was incapable of performing "repetitive work with hands and arms extended at or above shoulder levels for extended periods of time."

In this case the Supreme Court has substantially narrowed the already limited definition of "disability" announced in the *Sutton v. United Airlines* case ("disability" defined as inability to perform a broad range of jobs). Now, in *Toyota Motor*, the Court held it was legal error for the Sixth Circuit to focus only on the employee's ability to perform manual tasks at work. Instead, the new test is whether the employee can perform "the variety of tasks central to most people's daily lives…," including non-work-related activities. If so, the employee is not "disabled" from the major life activity of performing "manual tasks" under the ADA.

ROBERT W. BOWER, JR.

Toyota Motor creates a powerful defense to disability discrimination claims based on failure to accommodate. However, it does not address claims under the Maine Human Rights Act, the FMLA, Maine FMLA, discrimination or retaliation claims under the ADA. Further, this decision does not decide whether the employee was protected by the ADA because she was "regarded as" having a disability, or because she had a "record of " a disability. Also, it does not address whether the employee was "disabled" because she was substantially limited from the major life activities of "lifting" and "working." Should the employee qualify as "disabled" for these separate reasons, she may be able to make out a viable claim under the ADA on remand.

Claims of this kind, which the Supreme Court did not address in this case, continue to create risks for Maine employers. Employers must still tread carefully as they manage the light duty worker, notwithstanding the holding in *Toyota Motor*. □

Norman, Hanson & DeTroy, LLC
415 Congress Street
P.O. Box 4600
Portland, Maine 04112

Return service requested

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