

Automobile Liability: The Sudden Blackout What is a driver's liability?

BY DAVID L. HERZER, JR.

We have found that the misconceptions concerning a driver's liability for a sudden blackout resulting in an automobile accident range from those who believe there never is liability, to those who believe that there is full liability if the driver is shown to have been taking any prescription medications at all. The truth is that, like most areas of law, there is no easy rule but instead the answer lies somewhere between those two extremes. Liability is determined from the facts of the case, particularly concerning notice and foreseeability. By the end of this article, you should be conversant with the facts that inform the negligence analysis in these cases and know how to frame your investigation, assist in the defense, and make your settlement or trial decision.

According to *American Jurisprudence 2d*, a text compiling and summarizing the law in jurisdictions nationwide, the general rule is that the driver of an automobile is not liable for a collision if she becomes suddenly stricken by a fainting spell or otherwise loses consciousness from an unforeseen cause. Syncope while driving, therefore, can be a complete defense to an action based on negligence liability. Whether your particular case falls within the purview of that rule depends on how well the evidence demonstrates the suddenness and unforecastability of the syncope. A sudden blackout that was foreseeable



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subjects the driver to liability and an unforeseen blackout that comes on slowly does too. While the burden of proof is on the driver asserting the de-

fense to establish the blackout occurred and was sudden and unforeseeable, the injured plaintiff still bears the burden to establish a *prima facie* case of negligence against the driver.

If the available evidence is undisputed, then the sudden blackout defense might be decided as a matter of law on motion for summary judgment. However, given the fact-specific nature of the analysis, the defense of sudden blackout, like most defenses to negligence theories, rarely leaves no issue of fact for a jury to decide. Evidence of a medical condition or a prescription medication with syncope as a possible symptom or side-effect probably is enough to submit the question to the jury, who then decides whether the driver knew or should have known that her medical condition or medication presented a hazard of blackout on the roadway.

Summary judgment likely will be awarded if, for example, the undisputed evidence shows that the driver had no prior incidents of syncope, was otherwise healthy, took no medications, and had no indication of syncope while driving immediately prior to the accident that should have warranted pulling over. Summary judgment might also be awarded if the same driver had medical conditions and took medications, but none of them involved symptoms or side-effects of syncope. Since the negligence analysis of notice and foresee-

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ability involves what the driver knew or should have known, summary judgment might even be awarded if there was a prior episode of syncope, or if the driver knew or should have known she had medical conditions or medications that involved possible blackouts, but the driver was assessed by a doctor who told her that there was no risk of future syncope. Even if the doctor were wrong in so advising the driver (and opposing counsel has an expert witness to say so), summary judgment still might be awarded because the issue is what the driver knew or should have known. Once a doctor tells the driver that there is no hazard of blackouts, the driver "knows" there is no hazard and that driver is not liable for a resulting collision. However, if the driver has reason to know otherwise, because she had a blackout subsequent to the doctor's assessment, whether behind the wheel or not, the jury will decide whether she was negligent based on her knowledge of that hazard.

It should go without saying that if a driver causes herself to have a syncopal episode, she has no defense. If, for example, she drinks excessive alcohol

and blacks out, then she is liable even if the blackout is sudden. Taking a less extreme example, a driver probably is liable if she had no medical conditions, took no medications, and had no prior syncopal episodes, but she did not eat for a long period of time or got little sleep and had a resulting loss of consciousness. Again, the jury will be permitted to decide whether the blackout was foreseeable under those circumstances so as to hold the driver liable.

Indeed, the Maine Supreme Judicial Court considered a case where a driver caused himself to black out in *Johnstone v. Gardner*, 151 Me. 196, 116 A.2d 776 (1955). In that case, the driver got little sleep for several days, and while driving got "a little faint" and "dozed or blanked out or something" just before he sideswiped another vehicle. The Court considered these facts evidence of negligence.

There are several sources one can consult that might contain evidence of (1) prior medical conditions that include syncope as a symptom; (2) prior syncopal episodes, whether loss of consciousness, dizziness, vertigo etc., and (3) prior prescription or over-the-counter medications that include syncopal side-effects or warnings for activities like driving or operating heavy machinery:

- Medical records (use WebMD.com or some other medical information resource to get a listing of typical symptoms associated with the driver's medical conditions);

- Pharmacy records (the Physician's Desk Reference lists warnings and side-effects for prescription medications);

- The driver herself (she can tell you what non-prescription medication she was using; since the Physician's Desk Reference may not include some non-prescription medications, stopping at the local pharmacy to look at the warnings on boxes for those medications might prove worthwhile, although oftentimes the complete listing of warnings and side-effects appears on an insert inside the box);

- Employment records, including applications, medical assessments, performance reviews, disciplinary notes etc.;
- Workers' compensation records, including First Reports of Injury, work capacity assessments, and permanent impairment reports;
- School records, including counseling and nursing records;
- Social Security disability records, including applications, medical assessments, and determinations;
- Doctors', employers', and government assessments of fitness to drive, to operate heavy machinery etc.;
- Traffic Accident Reports and 48-Hour Reports for prior automobile accidents in which the driver was involved;
- State Bureau of Identification criminal records involving drug and alcohol abuse etc.; and
- Witnesses to incidents or admissions of syncope, such as family, friends, or co-workers.

To the extent you decide to collect this information, keep in mind that, generally speaking, records obtained from third parties, such as medical and employment records, cannot be withheld from opposing counsel if requested in discovery. The work-product immunity generally does not apply to those documents. Discussing a strategy with defense counsel for consulting – or deliberately not consulting – certain sources of information makes sense. However, keep in mind that the idea is to make sure the evidence that is or will be available to the plaintiff supports the sudden blackout defense before you bank on it. Also, being able to articulate just how you are able to prove the suddenness and unforecastability of the blackout with specific evidence goes a long way in planting seeds of doubt that will get the case settled for a reasonable amount at mandatory mediation or earlier – if settlement is the preferred course, that is. □

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newsletter

is published quarterly to inform you of recent developments in the law, particularly Maine law, and to address current topics of discussion in your daily business. These articles should not be construed as legal advice for a specific case. If you wish a copy of a court decision or statute mentioned in this issue, please e-mail, write or telephone us.

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Voir Dire and jurors, judges and attorneys

BY THEODORE H. KIRCHNER

Have you noticed the headlines regarding Martha Stewart's conviction in her criminal trial? Her attorney is seeking a new trial because one of the jurors lied during the attorney's voir dire. Could her attorney have asked a question in a different manner thus eliciting a different response? If the judge had asked the same question of that juror, would the response have been the same? Should only judges conduct voir dire? Should judges and/or lawyers both participate in voir dire?

A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present that next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off the law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could never do.

Justice William O. Douglas, The Anatomy of Liberty (1963).

The above quote from Justice Douglas may be a bit flowery, but one cannot overstate the importance of a jury to any particular case. No matter how carefully a claims professional, party or attorney evaluates a case, no matter how well prepared and well presented a case might be, we are at the mercy of the particular jurors in the particular case. We hope for, and are entitled to, a fair and unbiased jury. But how do we achieve the ideal fair

and impartial jury? The pertinent Maine statute, 14 M.R.S.A. § 1301, is deceptively simple:

The court, on motion of either party in an action, may examine, on oath, any person called as a juror therein, whether he is related to either party, has given or formed an opinion or is sensible of any bias, prejudice or particular interest in the cause. If it appears from his answers or from any competent evidence that he does not stand indifferent in the cause, another juror should be called and placed in his stead.

In most states attorneys are able to conduct extensive voir dire of the jury panel. Voir dire (literally, "to speak the truth") is the method for obtaining information to support the decision to eliminate jurors who have preconceived notions about a particular case or otherwise are inappropriate for service. In virtually every out-of-state trial seminar, no matter what the substantive area of law, there is a portion of the seminar devoted to effective voir dire. "Effective" voir dire in the seminar context means identifying, through the questioning of the prospective jurors, those jurors who are inclined to be favorable to one's side of the case. It also implies schmoozing the jurors. Attorneys who practice in other states are frequently astounded to learn that in Maine the court does not routinely permit the attorneys to conduct voir dire of the jurors, and very much limits the scope of its own questions put to the jurors.

In Maine state civil trials, the trial judge asks a relatively standard series of questions designed to elicit informa-



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tion from the jurors about any particular bias, knowledge of the case or familiarity with the parties or attorneys. There are generally a few questions regarding the specific issues in the case to determine whether any prospective jurors might have strong feelings about them. For example, in a legal malpractice case, a judge likely will ask whether any juror has had an experience where there was dissatisfaction with the service of an attorney. Based on the responses of the potential jurors, the court may on its own initiative remove jurors from the case for cause. Then the parties are permitted to request removal for cause of specific jurors based on their responses to the questions.

After the disqualified jurors are removed for cause, the names of all remaining jurors are drawn at random in an amount sufficient to decide the case, provide for any alternates and allow each party its allotted number of peremptory challenges, usually three. The parties are then permitted to exercise their peremptory challenges – remove a juror for any reason – without the jurors answering any further questions. The remaining jurors constitute the jury for the case.

In a recent Maine case, plaintiff's counsel requested permission from the court to conduct voir dire of the indi-

vidual jurors picked at random for the case, before the parties exercised their peremptory challenges. One of the arguments advanced was that it would enable both parties to make a more informed use of their peremptory challenges. It was a request that seemed highly unlikely to succeed. There are no reported cases in Maine where it had ever been done; and no one in our firm recalled it having been done before. Surprisingly, the court allowed it. While it might seem like a process that could be fair to each side, the concern is that plaintiff's counsel would begin trying to persuade the jurors to plaintiff's view of the case. As expected, plaintiff's counsel's questions were directed much more to conditioning the jurors to find in plaintiff's favor and award substantial damages, than to any legitimate effort to detect bias. Because it was a case of very significant damages and a very close call on liability, the defense was concerned about engaging in a new procedure that had the potential to tip the balance in plaintiff's favor. How to know, for example, whether a question concerning a juror's beliefs about "tort reform" might spark a sympathetic or antagonistic reaction? The jury eventually found for plaintiff and awarded substantial damages, but reduced it by 45% for plaintiff's comparative fault.

The case is now on appeal based on the court's decision to permit plaintiff's counsel to individually question the potential jurors, in the presence of all other potential jurors, a procedure which, our briefing of the appeal confirmed, was unprecedented. The appeal has been argued before the

Maine Supreme Judicial Court. The members of the Court displayed great interest in the issue. The broader issue – whether Maine should join the clear majority of states and allow the attorneys to conduct more extensive voir dire of jurors, generally before the challenges for cause are exercised – is one issue that we likely will face again. The plaintiffs' bar is quite interested in persuading the court to open voir dire to a wider range of questions in an effort to identify those jurors more likely to find for plaintiff and award substantial damages, and to allow the parties' attorneys, rather than the judge, to conduct the questioning.

Some attorneys who typically try cases for the defense see an equal benefit. The Law Court's opinion in my case on appeal could add to the debate. The narrow issue on appeal is whether the trial court committed reversible error by allowing a procedure not permitted under Maine's current statutes or Rules of Procedure. It is possible that the Law Court will comment more broadly on voir dire, given the opportunity. There are few Law Court cases in Maine dealing with jury selection. There have been some recent media reports regarding high profile cases dealing with jury selection in other jurisdictions, but jury selection in civil trials in Maine is generally perfunctory and uncontroversial.

One of the primary arguments against attorney-conducted individual jury voir dire is the additional time and related expense required. In the typical civil case in Maine, jury selection takes half a day. We are all aware of the celebrated criminal trials reported in the national media where it takes weeks to seat a jury. It took three weeks to select the jury in the Martha Stewart

case. Criminal cases have additional considerations, primarily constitutional protections for the accused, that are not applicable to civil cases. But in some states selecting civil juries also is quite time consuming. For example, Jim Polquin of this office tried a civil case in Connecticut where it required three weeks to seat the jury. Connecticut is not necessarily representative, because its Constitution, which appears to be unique, permits attorneys to voir dire the potential jurors individually. However, somewhere between the extreme of Connecticut and the current efficient Maine practice there is some range of additional time that would be required to try each case.

Whether the perceived advantage to obtaining more information about the individual jurors before selecting a jury is worth the additional cost, is debatable. For example, would an accurate response from the Martha Stewart juror have made a difference? How would one know whether that particular juror's prior encounter with law enforcement would make him more or less sympathetic to the defense? Whether the opportunity to attempt nudging jurors to a particular point of view is worth the risk that it could have the opposite effect, is also debatable. For example, how does one gauge whether a question to a juror about his or her family will be perceived as friendly or offensive? Given the current belief among the plaintiffs' bar that Maine jurors have become unnecessarily stingy and something must be done about it, we can expect the debate about whether to permit attorney-conducted and broader voir dire to continue. □

The Bushmaster decision and the “products-completed operations” exclusion

BY JAMES D. POLIQUIN

The United States District Court for the District of Maine recently ruled that Massachusetts Bay and Hanover had no duty to defend Bushmaster Firearms in the civil action against Bushmaster brought by victims of the Washington, D.C. sniper shootings. Although several insurance coverage issues were involved, the principal issue concerned the application of an exclusion for claims arising out of the “products-completed operations hazard” as defined in the policies. Although the events that gave rise to this coverage dispute involving Bushmaster fortunately do not occur on a regular basis, many more everyday issues are affected by whether a risk is within the definition of “products-completed operations hazard.”

The term “products-completed operations hazard” seeks to separate risks into two basic categories. In simplest terms, one category includes risks of injury or damage during the performance of operations. The second category includes risks associated with products and/or operations after the product is sold or operation is complete. This second category includes the risks that are within the definition of “products-completed operations hazard.” Standard commercial general liability policies cover risks within the “products-completed operations hazard,” although the application of certain exclusions in the policy may depend upon the determination of whether a risk is within the “products-completed operations hazard.”

On some occasions, an insurance policy is endorsed with an exclusion for all injury or damage within the “products-completed operations hazard.”

Such exclusionary endorsements are added for two major reasons. An insured, more often in smaller operations, may request the exclusionary endorsement in order to lower the cost of premiums. On other occasions, as in Bushmaster’s case, an insurer is unwilling to underwrite the “products” exposure, and therefore will agree to provide commercial general liability coverage only with the exclusionary endorsement. In those situations, the manufacturer must obtain separate “products” coverage to protect it against this risk of liability.

The victims in the D.C. sniper shootings brought a civil action against Mohammed and Malvo, the retail dealer and Bushmaster, who manufactured the assault rifle used in the shootings. The complaint against Bushmaster asserted several theories of liability connected to Bushmaster’s marketing of the assault weapon, distribution of the weapon and alleged negligence in selecting and monitoring the retail dealers to whom it sold such weapons. Bushmaster’s conduct also allegedly created a public nuisance. The complaint in no way was based upon any actual defect in the assault rifle, and in that sense was not a conventional “product liability” claim.

Massachusetts Bay (the primary CGL carrier) and Hanover (the umbrella carrier) declined to defend Bushmaster in the civil action and commenced a declaratory judgment action to determine the correctness of that decision. Bushmaster argued that the exclusion for risks within the “products-completed operations hazard” did not apply to this situation because the claim had nothing to do with any manufacturing or design defect pertaining to the assault rifle, but rather was based upon the conduct of



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Bushmaster even long before this particular rifle was sold and left Bushmaster’s possession. Massachusetts Bay and Hanover argued that the exclusion for all risks within the “products-completed operations hazard” did not depend upon the theory of liability asserted or the temporal relationship between the alleged act of negligence and the sale of a product, but only upon whether in fact the use of the product gave rise to a claim for injury after the product was sold by the manufacturer. Even conventional manufacturing defect cases involve the conduct of the manufacturer creating the defect before the product is sold, and therefore a “time of conduct” test would eviscerate the exclusion. Judge Brock Hornby held that Massachusetts Bay and Hanover had no duty to defend Bushmaster because the complaint did not give rise to any possibility of a judgment against Bushmaster that would be outside the scope of the exclusionary endorsement for all risks within the “products-completed operations hazard.”

This decision, if upheld following any appeal, is significant for several reasons. First, it strikes a blow to the growingly popular notion that insurers must defend “everything” under Maine’s

version of the "comparison test." Second, the decision confirms that the appropriate focus in determining whether a risk is within the "products-completed operations hazard" is the time of the injury-causing event, not that moment in time at which the insured allegedly

engaged in the conduct asserted as the basis of liability. Third, at least in the context of this issue, the "arising out of" requirement is satisfied if the insured's "product" or "work" is the instrumentality through which the injury was inflicted, even though the theory of liability is not related to an actual defect in

that product or work. Although policies endorsed with the blanket exclusion for all risks within the "products-completed operations hazard" are the exception and not the rule, a thorough understanding of these concepts is critical to a number of other coverage issues that arise on a more regular basis. □

Three recent decisions from the Law Court

BY DAVID P. VERY

What is an "appurtenance" to a public building for purposes of immunity?

The Maine Tort Claims Act creates an exception to immunity when a governmental entity is negligent in "the construction, operation or maintenance of any public building or the appurtenances to any public building." 14 M.R.S.A. § 8104-A(2). The Act does not define the term "appurtenances." Although the Law Court has previously considered the exception for appurtenances on several occasions, it has never defined the term. The Law Court did just that in *Sanford v. Town of Shapleigh*, 2004 ME 73 (June 3, 2004).

Daniel Sanford went to the Town of Shapleigh's waste facility to dispose of some trash. After disposing of some household trash, an attendant directed him to one of the free standing bins outside of the building with respect to the disposal of some scrap lumber. The door to the bin was closed. After loading some small light pieces of scrap wood into the bin, Sanford leaned a heavy piece of plywood against the bin. The attendant told Sanford to place the plywood inside of the bin. As Sanford lifted the plywood, he injured his left bicep. According to Sanford, the attendant's supervisor called him and stated that the attendant should have helped him, that the bin should have been open, and that remedial actions would

be taken. Sanford filed a complaint against the Town and the Town raised the affirmative defense of immunity.

The Superior Court denied the Town's motion for summary judgment holding that the trash bin was an "appurtenance" to a public building. In so holding, the Court found that the scope of the trash bin's function was significantly connected to the waste transfer station's function of processing waste. The Town was granted an immediate appeal to the Law Court as a claim of immunity is reviewable pursuant to the death knell exception to the final judgment rule.

While the Law Court acknowledged that the "function-based" definition of appurtenance employed by the Superior Court was sensible and offered a practical standard, it declined to adopt that approach and instead adopted a more restrictive understanding of the term. The Law Court held that an "appurtenance" is "an object or thing that belongs or is attached to a public building, and does not include personal property maintained outside the building." The Court held that a "function-based" definition would expand governmental liability by including personal property integral to the activities undertaken at a public building without regard to whether the property belongs or is attached to the building. The Court found that that definition would not support the act's purpose.

Pursuant to the new definition, the Law Court found that a freestanding trash



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bin outside of a waste facility building is personal property that does not belong and is not attached to the building. Thus, the Town was entitled to immunity.

What is not entirely clear from the decision is what the Court meant by an object or thing that "belongs" to a public building. It obviously does not include a freestanding trash bin with respect to a waste facility building.

The Court's definition of an appurtenance was tested in a second decision issued in the same week. In the *Sanford* case, the Law Court specifically stated that "fixtures" are distinguished from personal property because they are "regarded as an irremovable part of the real property with which they are associated." In *Donovan v. City of Portland*, 2004 ME 70 (June 1, 2004), the Law Court had to decide whether lighting fixtures attached to a building constitute an appurtenance to which an exception to immunity would apply.

Kimberly Donovan went to the Riverton Elementary School in Portland to pick up her children from an after-

school program. It was dark and foggy. As she was walking toward the entrance, she fell and injured her arm. She had not yet reached the school building or its stairs when she fell. She sued the City claiming that there were several lights attached to the building near the entrance and that the failure to have the lights illuminated was a cause of her fall. The Superior Court granted the City's motion for summary judgment concluding that the public building exception to the Maine Tort Claims Act did not apply.

On appeal, Donovan did not dispute that governmental immunity extended to sidewalks and parking lots. 14 M.R.S.A. § 8104-A(4). Donovan argued, however, that her injuries were not occasioned by a defect in the sidewalk or the parking area, but because the lights appurtenant to a public building were not illuminated. According to Donovan, although the City is immune from liability for any defect in the area where she fell, when it attached lighting to the public building, it became responsible for any deficiency in that lighting, even in areas where immunity otherwise applied.

In what amounts to truly a public policy decision, the majority of the Law Court held that the Act's public building exception to governmental immunity does not apply when the plaintiff falls on a sidewalk or parking area while the exterior lights on a nearby public building aren't lit. The Court stated that if it were to hold otherwise, municipalities would be exposed to litigation in an increasing radius around any outdoor lighting that the municipalities might provide to ensure that stairs and other building appurtenances remain safe. The Court stated that such a holding would run counter to the strict statutory construction required in interpreting the governmental immunity statutes.

Three justices dissented. The justices stated that the lights clearly were attached to the school building, and thus were either a part of or an "appurtenance" to that building. Further, the dissent found that there was indeed a dispute of material fact as to whether the lights

attached to the building, not being illuminated after dark, may have been negligently operated or maintained. The dissent further stated that there was a dispute of material fact as to whether the failure of operation of the lights, leaving the entrance way to the school improperly illuminated, was a cause of the Plaintiff's injuries. The dissenters noted that although the Plaintiff fell in or near the edge of a parking area, the focus of the Plaintiff's claim was not that the City was negligent in the maintenance of the public area, but rather that her injury was caused by the negligent operation or maintenance of the lights, which are attached to, and thus appurtenances to, the school building.

The dissent noted that in *Bussell v. City of Portland*, 1999 ME 103, 731A.2d 862 (1999), it held that improper operation of a sound system could generate liability under the public buildings exception to immunity. The dissenters stated that if the City of Portland may be liable for injuries caused by sound emanating from appurtenances to public buildings, then it may be liable for injuries caused by light, or lack of light, emanating from appurtenances to public buildings, as in this case.

These two decisions, and the Law Court's decisions of last year, *Peterson v. City of Bangor*, 2003 ME 102, 831A.2d 416, and *Lightfoot v. SAD #35*, 2003 ME 24, 816 A.2d 63, all clearly demonstrate that the Law Court has been consistently concerned with exposing governmental entities to liability and will strictly construe any exception to immunity.

What is UM exposure when insured's claim against tortfeasor is time barred?

The case of *Levine v. State Farm Mutual Automobile Ins. Co.*, 2004 ME 33, 843 A.2d 24, (March 8, 2004) presented the Law Court with an interesting underinsured motorist question. What is the effect on an insured's claim for UM benefits when the insured's action against the tortfeasor is time barred? A split Law Court took two different approaches to this question.

Nicole Levine was injured in a motor vehicle accident in 1992 as a result of a vehicle negligently operated by William Kruzynski. Kruzynski had liability coverage of \$50,000 per person. Levine had UM coverage with State Farm in the amount of \$100,000 per person. Kruzynski died one year after the accident and no probate proceedings were filed. When Levine filed a petition for formal adjudication of intestacy and appointment of a personal representative, the petition was dismissed on the grounds that the three year limit for commencing probate proceedings had expired. As a result, Levine was time barred from obtaining relief not only from Kruzynski or his estate, but also from Kruzynski's insurer.

Levine then filed an action against State Farm seeking recovery of the entire \$100,000 in UM benefits. A jury trial resulted in a verdict of \$100,000 in total damages. State Farm argued that it only owed Levine \$50,000, the figure by which the State Farm underinsured vehicle coverage exceeded Kruzynski's bodily injury coverage. The Superior Court concluded that State Farm was responsible not only for the undisputed \$50,000, but also for the \$50,000 of Kruzynski's available insurance, which had become unavailable due only to the passage of time.

On appeal, the majority of the Law Court noted that the State Farm policy expressly provided that it did not cover any amounts covered by "the total of the bodily injury limits of all other vehicle liability policies that apply to any person legally liable for such bodily injury." Of interest, the Law Court noted that the purpose of UM coverage is to provide "gap coverage." It is not intended to supplant the tortfeasor's coverage nor is it a substitute for primary coverage, stated the Court. The Court found that this policy clause was consistent with this purpose.

The Law Court stated that because Kruzynski was only covered to a maximum of \$50,000 per person, and Levine's damages total \$100,000, Kruzynski was "underinsured" in the amount of \$50,000.

Kruzynski was not, however, underinsured by the full \$100,000. To the contrary, the Law Court stated that \$50,000 coverage was available to Levine.

Of further interest, the Law Court noted that generally, an underinsured vehicle coverage carrier is entitled to offset the amount of tortfeasor's liability limits. The Court stated that this is consistent with the premise that underinsured vehicle coverage fills the gap left by an underinsured tortfeasor and is designed to permit the insured injured person the same recovery which would have been available to him had the tortfeasor been insured to the same extent as the injured party.

The Law Court then provided a policy justification for its decision. The majority stated that if they were to accept the argument that the UM carrier may not offset from its responsibility the amount of insurance held by the tortfeasor, the economic risks of injury in motor vehicle accidents would shift entirely to the UM carrier. The Court stated that the expense involved in providing UM vehicle cover-

age would increase, the cost to consumers would increase, and an insurance product originally required by the legislature to protect against those who failed to carry adequate insurance would be treated as if it were the primary source of coverage notwithstanding the tortfeasor's own coverage. The Court stated that the legislature neither mandated nor intended such a result.

Two dissenting Justices took a very different view of this case. The dissenters agreed that the language of State Farm's insurance contract denied Levine's coverage, but opined that the policy's language violated the provisions of Maine's UM vehicle law. Instead of the majority's view that UM insurance is "gap coverage," the minority stated that the UM vehicle statute's overall objective is to ensure that the injured insured receives full satisfaction of damages to which he or she is entitled before the insurance company subrogation rights are implicated. The Court found that because Levine never received payment from Kruzynski or Kruzynski's liability

carrier, State Farm, was not entitled to a \$50,000 offset, and that the "limit-reduction clause" contained in its UM coverage was unenforceable to the extent that it permits an offset when the injured party does not receive payment from the party responsible for causing the claimant's bodily injury.

Although the *Levine* case clearly stands for the proposition that a UM policy may contain a provision which allows it to offset the limits of a tortfeasor's policy, even if those limits have not been paid, it does not necessarily stand for the proposition that such a result would be mandated if a UM policy did not contain that language. Thus, while the majority's view of UM coverage as "gap coverage" is obviously very favorable to UM insurers, it still must be remembered that this decision was interpreting a specific provision contained in the State Farm policy that is not contained in all UM policies. Further, one must take caution in dealing with cases where the insured's damages exceeds the amount of UM coverage, a situation that was not present in the *Levine* case. □

C. Lindsey Morrill: new associate

Lindsey Morrill joined the firm in May of 2004 as an associate attorney and is working primarily in the areas of workers' compensation and employment issues. She is licensed to practice law in both Maine and New Hampshire.

A native of southern New Hampshire, Lindsey received her Bachelor's of Science in the field of Water Resource Management from the University of New Hampshire in 1998. During college, she was able to spend six months in Africa building wells and latrines in tribal areas. Following graduation, Lindsey spent a year working with researchers studying the effects of clear-cutting on sediment and nutrient loads in surface waters.



C. LINDSEY MORRILL

Lindsey is a 2002 graduate of the University of Kentucky, College of Law, in Lexington, Kentucky. At Kentucky, Lindsey served on the Editorial Board of the Kentucky Law Journal. She also

had the opportunity to have her note, titled "Informing Capital Juries about Parole: The Effect on Life or Death Decisions" published in Volume 90 of the Journal.

In 2000, Lindsey was able to work at Lexington's District Attorney's Office in the Juvenile Division. She was involved in many child neglect, abuse, and dependency cases. The following school year, Lindsey worked in the law department of the Lexington County Government. She primarily researched and briefed legal issues surrounding real estate, zoning, and municipal law. She also spent a summer clerking at a mid-sized law firm in Cincinnati, Ohio. In her final semester of law school, Lindsey

clerked for United States District Judge Joseph M. Hood.

Following law school, Lindsey had the honor of serving as Attorney-Advisor to Judge Daniel J. Roketenetz in Cincinnati, Ohio. Judge Roketenetz is

the Chief District Administrative Law Judge in the Department of Labor. Through this position, Lindsey became very familiar with the Longshore and Harbor Workers' Harbor Compensation

Act, the Black Lung Act, and many whistleblower protection acts.

Lindsey is glad to return to New England. She enjoys running, skiing, and hopes to develop her fishing skills. Lindsey lives in Portland. □

Question: When is a wild card not a wild card? Answer: When the Maine State Lottery is playing.

BY DAVID P. VERY

In a decision issued last February, *Larry Moody v State Liquor & Lottery Commision*, 2004 ME 103, 843 A.2d 43 (February 25, 2004) the Law Court proved that while it may not understand the rules of poker, it does know how to protect the coffers of the Maine State Lottery in interpreting the meaning of "wild card."

Larry Moody submitted a Wild Card Cash lottery ticket to the Maine State Lottery and requested payment on what he claimed was a winning ticket. The directions on the ticket stated: "Get a pair in any hand, win prize shown for that hand. Use wild card to make a pair in any hand, win prize shown for that hand." There are six hands on the ticket, and when scratched, each hand reveals two boxes with numbers or letters in them that, if they match, create a winning pair. There

is a separate scratch box labeled "wild card," that when scratched, reveals a number or a letter.

None of the six hands on Moody's ticket made a pair. The number revealed when Moody scratched the wild card box was a five, which did not match any of the numbers or letters in any of the hands. Moody contended that the common definition of a wild card permitted him to disregard the number five in the wild card box and allowed him to determine the value of the wild card. He chose the wild card to be a four or a six, which were numbers in the hand positioned above the \$20,000 prize.

The state returned the ticket to Moody, explaining that the ticket was a non-winning ticket, and that if the game were played as Moody suggested, every ticket would be a winning ticket. In response, Moody filed suit claiming breach of contract and fraud. The Superior Court dismissed Moody's Complaint and Moody appealed.

On appeal, Moody argued that the Court must interpret the term "wild card" in accordance with the generally prevailing meaning of the term, that is, that the holder of a wild card is free to determine the value of the card that is designated as the wild card. In the alternative, Moody contended that the various interpretations of the meaning of a wild card render the contract ambiguous.

The Court noted that Moody's interpretation would make *every* Wild Card Cash ticket a winning ticket. The Court found that Moody's interpretation was not only unreasonable, but frivolous. Although the Maine State Lottery won the day, one suspects that it will be more careful in designing scratch games like Wild Card Cash, especially if it is selling lottery tickets to poker players. □

Restructuring of Workers' Compensation Board

BY JOHN H. KING

To the relief of virtually every participant in the workers' compensation system, Maine's ten year experiment with a Workers' Compensation Board equally divided between four labor and four management members came to an end on April 8, 2004. On that date, Governor John Baldacci signed into law as emergency legislation, L. D. 1909, An Act to Promote Decision making within the Workers' Compensation Board.

The 1992 reforms created a Workers' Compensation Board of eight members, four of whom were nominated by the Maine AFL/CIO and four of whom were nominated by the Maine State Chamber of Commerce. The structure of the Board led to dissension, deadlock, and misery. The situation became particularly acute when the Board was unable to take any action upon the expiration of the terms of hearing officers, leaving the dispute resolution component of the system in a state of disarray.

L. D. 1909 restructures the Board. The Board now consists of three management members, three labor members and the Executive Director who serves as chair and, if necessary, a tiebreaker. The Executive Director is appointed by the Governor and serves as a member of the Governor's cabinet, as well. Paul Dionne of Winthrop, who has served as the Executive Director of the Board since 1996, continues as the first Executive Director under the new structure.

The legislation anticipates that the Chamber and the AFL-CIO will submit twelve names to the Governor for consideration for appointment to the Board by August of 2004. In the meantime, Dave Gauvin and Pat Lemaire have left the Board.

Following the enactment of the legislation, the newly restructured board got off to an auspicious start when it first met on April 20, 2004. It was agreed, in principal, to establish three-year terms



JOHN H. KING

for new hearing officers and seven-year terms for hearing officers for reappointment. Hearing Officer Elwin, one of the Augusta hearing officers whose term had expired, had been, up until that point, a victim of the previous Board's inability to agree on virtually anything. On April 20th, however, the new Board unanimously reappointed Hearing Officer Elwin for a seven-year term. That action alone came as a breath of fresh air and, with luck, will prove illustrative of the new Board's ability to work together in the future. □

Workers' compensation – Law Court decisions

BY STEPHEN W. MORIARTY

Criteria for Total Incapacity

In a recent decision, the Law Court had an opportunity to comment upon the type of evidence necessary to support a finding that an employee is entitled to benefits for total incapacity. Although the case was decided in the context of former §54-B and §55-B, the key findings apply equally well to entitlement pursuant to §212 and §213.

In *Moore v. City of Portland*, 2004 ME 49 (April 8, 2004), the employee was voluntarily paid the equivalent of benefits for total incapacity following a 1988

injury. In 1995, the Board denied the employer's Petition for Review. In that decision, the presiding Hearing Officer did not explicitly indicate whether the employee was entitled to receive ongoing benefits for total incapacity pursuant to former §54-B, for ongoing benefits for partial at a 100% rate pursuant to former §55-B. The employer challenged the nature of the employee's entitlement in a second Petition for Review filed in 2001. The presiding Hearing Officer (the same Hearing Officer who denied the employer's earlier petition) construed the earlier decree as an award of benefits for

total. Although this finding was challenged on appeal, the Court ruled that the Hearing Officer committed no legal error in interpreting the earlier decision. This portion of the opinion reinforces the deference that the Court has typically given to Hearing Officers on determinations of entitlement to benefits.

The Hearing Officer also determined that the employee was entitled to receive ongoing benefits for total and denied the Petition for Review, but the Court vacated this portion of the decision on the grounds that the findings of fact were both confusing and contradictory. The

Court observed that a claimant may establish entitlement to total based upon a complete inability to perform any work, whether on a part-time or full-time basis. In addition, entitlement to total may be found where an employee is not able to perform full-time work in Maine's ordinary competitive labor market. The burden falls upon the employer to establish that within the state a full-time position exists that the employee is capable of performing, and that burden can be satisfied whenever a single full-time job is identified. Once an employer has come forward with evidence of such a position, it is no longer necessary to canvass the state in search of other jobs in different locations. The employer may satisfy its burden by showing the existence of such a job in any community in the state, including the employee's own community.

Because of inconsistencies in the decision interpreting the impact of the employer's labor market evidence, the matter was remanded for further findings.

Offset for Retraining Benefits

Section 220 entitles an employer to a full credit for the amount of unemployment benefits received by an employee pursuant to Maine's Employment Security Law. The predecessor to §220 was enacted in direct response to an earlier Law Court decision holding that no statutory setoff existed for the receipt of unemployment benefits. In a recent case, the Court underscored the limitations of the extent of the statutory credit.

In *Johnson v. S. D. Warren*, 2004 ME 26 (February 12, 2004), an employee received 50 weeks of so-called Trade Readjustment Allowance (TRA) benefits pursuant to the Federal Trade Act of 1974. The statute was enacted to provide

retraining benefits to employees who lose their positions due to foreign competition. The Hearing Officer allowed the employee to take a credit for the TRA benefits.

The Court vacated the decision of the Board and remanded the matter for further proceedings. The Court observed that the §220 offset applies only to unemployment benefits paid pursuant to a particular chapter of the Employment Security Law. While TRA benefits in this state are administered by the Maine Department of Labor, that authority exists under a different chapter of the Employment Security Law. Accordingly, because the §220 offset applies only to unemployment benefits, and not to all benefits administered under the Maine Employment Security Law, the Court found that the Hearing Officer committed legal error in treating the TRA payments as unemployment benefits. □

Briefs/Kudos

Inner city public schools lack resources that we in certain areas of Maine take for granted. For an in-depth review of inner city schools and the disparity that exists between inner city students and their peers who live in the suburbs, please read **Jim Gooch's** thought provoking analysis in this winter's issue of the *Quinnipiac Law Review* (22 *Quinnipiac L. Rev.* 395). Although this Hamden, Connecticut law review article focuses on inner city schools in Connecticut, there is much in it that is universal and applicable to any school system existing in socioeconomic isolation.

Tracie D'Alessio, Steve Hessert's legal assistant/paralegal, was responsible for coordinating and delivering the firm's old computers to the Arturo Toscanini CIS 145 middle school (grades 5th through 8th) in the South Bronx. In March, Tracie and her daughter, Heather, along with



Some of the JHS 145 Arturo Toscanini students who volunteered to help unload computers.

Tracie's sister, Nancie Bogart, and her two children, Molly and Hannah, drove from Portland to New York to donate the computers to the school where Tracie's other daughter, Amanda, is a teacher. Amanda, a graduate of Simmons College, is a 6th grade special education teacher placed in the middle school by *Teach for America*. Within fifteen minutes of Tracie's arrival at the school,

excited students and staff appeared and helped unload the truck. "They were just great, very polite and most appreciative. The kids kept asking the staff if their rooms would be 'getting one' of the computers," said Tracie. The special education teachers were particularly grateful because prior to this donation, the special education students had no access to computers. This middle school has 1500 kids. They have no computer budget and one teacher donates his time by trying to maintain the computer lab and by raising money or parts for computers through donations. The school's principal was most appreciative of the NH&D computer donation because all the computers were set up, in working condition, and ready to be installed. Tracie and Heather made one more trip to the junior high school in May when they delivered the firm's fifteen remaining computers. Tracie would like to thank the firm for its

generosity and she extends special thanks to the following for their assistance: **Lorri Hall, Ben King, Jean Corbett, Debbie Becker, Don Russell, and Julie Welch.** The firm wishes to commend Tracie for her thoughtfulness in developing this idea and for her perseverance and goodness for seeing this project through to the end. All our computers are being used and we are contributing to the learning experience of some wonderful kids. Thank you, Tracie.

Steve Moriarty moderated a panel on workers' compensation issues at the Maine Human Resources Convention at the Samoset in early May.

Later that month, he spoke at a seminar sponsored by Lorman Education Services dealing with return to work, vocational rehabilitation, and discrimination issues.

Steve was unopposed in his re-election bid for a fifth term on the Cumberland Town Council.

Adrian Kendall, Aaron Baltes, Lance Walker, and Jim Gooch represented the firm at the WorldQuest games where Norman, Hanson & DeTroy sponsored a table. The games bring together several high school students sponsored by area businesses. The students compete for academic honors. NH&D sponsored four terrific students from Yarmouth high school.



Adrian Kendall, Jim Gooch, Lance Walker and Aaron Baltes with four bright, competitive Yarmouth High School students.

Lance Walker is undertaking the challenge of studying for the Chartered Property Casualty Underwriter professional designation. This rigorous curriculum for insurance professionals and risk managers consists of several courses and tests. Lance has taken and passed his first three courses.

Lance recently conducted a seminar on property coverage for mold claims held at the Woodlands Club. The seminar emphasized the new, limited endorsement for mold coverage. The presentation, cosponsored by Colonial Adjustment, was well attended by many of our clients.

The NH&D family welcomed summer 2004 by participating in our annual ice cream social. On June 21st, we all indulged in America's summer delight, ice cream sundaes with the works! □

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