

New corporate law effective in Maine

ADRIAN P. KENDALL

As of July 1, 2003 an entirely new title of the Maine Revised Statutes Annotated, Title 13-C, was adopted to control the formation, governance and dissolution of Maine Business Corporations. The prior title, Title 13-A, has been repealed in its entirety and Title 13-C has replaced it. Since January of 2000, the office of the Department of the Secretary of State and the Corporate Law Revision Committee of the Business Law Section of the Maine State Bar Association engaged in an in-depth study of the Model Business Corporation Act and the prior Maine Business Corporation Act.

The new Maine Business Corporation Act brings with it the following benefits:

- Flexibility. The Act allows significant flexibility for shareholders to adopt provisions in the articles of incorporation or bylaws to facilitate raising capital, address corporate governance issues and also deal with relations among shareholders and directors.

- Meeting the Needs of Privately Held Corporations. A particular provision of the Act is specifically designed for and limited to corporations without publicly traded shares. Most Maine corporations are privately held and this is particularly appropriate. This provision of the Act offers privately held corporations the maximum ability to establish a customized "private order" to meet the needs of closely held corporations.



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INSIDE

New corporate law effective in Maine 1

Law changes calculation of pre- and post-judgement interest 3

The Law Court clarifies the foreign object exception to the medical malpractice statute of limitations. 4

Three recent Law Court decisions 6

Briefs/Kudos 8

Noah D. Wuesthoff: new associate 9

Workers' Compensation - Law Court decisions 10

Recent amendments to Workers' Compensation Act 12

Fall Forum 13

- Predictability. The prior Maine law left many questions open to interpretation. This uncertainty can have a chilling effect on innovation and growth. The Act provides greater certainty for corporations and the official comments to the Act provide a great deal of additional guidance in its interpretation.

- Encourage Incorporation in Maine. One goal was to make Maine law sufficiently flexible so that not only would the outflow of incorporations be stemmed, but that this trend could possibly also be reversed.

Highlights of Title 13

General Provisions. The Act eliminates definitions associated with the historic "legal capital" maze. The previous Maine law frequently imposed unnecessary and complex constraints on Maine corporations in their dealings with relation to stock redemptions, stock repurchases, issuance of dividends and other transactions.

Filing requirements with the Maine Secretary of State have been simplified and electronic filings are to become standard. Filing fees are now revenue-neutral (under the prior law filing fees were tied to the value of shares being issued).

The office of "Clerk" will be continued. This position is not provided for in the Model Act, but was retained from the prior existing statute due to historical tradition and ease of understanding in the transition process.

Incorporation. The general mechanism of forming a corporation by filing articles of incorporation remains unchanged. In addition, the Act preserves the prior Maine process which allows the formation of a “directorless” corporation, which is to say a corporation that is managed directly by its shareholders.

Under the Act, a more evolved approach is taken to director liability. Under this new law, the articles of incorporation may limit or altogether eliminate the personal liability of directors except for (a) financial benefit to which they are not entitled; (b) intentional infliction of harm; (c) a violation of law that limits distribution from the corporation to its shareholders or (d) an intentional violation of criminal law. However, a provision which grandfathered prior law for existing Maine corporations is also included.

Selection of Corporate Name. The Act eliminates the preexisting standard which prohibited “deceptively similar” corporate names and substitutes it with a standard requiring that the new corporate name be “distinguishable on the records” of the Secretary of State. This new approach relieves the Secretary of State from its current role of making

subjective determinations of what may be deceptively similar under the circumstances.

Shares and Distributions. The Act abandons the prior terminology of “common” and “preferred” shares as well as the terminology relating to “par value.” This means that differing rights are permitted in various classes and series of shares issued. However, flexibility is permitted so that the articles of incorporation can still refer to those terms.

In addition, future consideration, e.g. promissory notes and future services, may now be accepted as payment for shares. This was not permitted under prior law.

Preemptive rights were established by default under the old law and corporations needed to affirmatively opt out of the preemptive rights of shareholders. Under the new Act, this standard is reversed and corporations must now opt to preserve preemptive rights for shareholders.

Distributions to Shareholders. Because the concepts of par value, stated capital, capital surplus and earned surplus have been eliminated, distributions are now measured only by insolvency tests. Accordingly, distributions are prohibited if, at the time of or after giving affect to the distribution, the corporation is unable to pay its debts as they become due in the ordinary course or if liabilities exceed assets. Both of these tests must be met in order for a distribution to be lawful and directors still have personal liability if they vote for such an unlawful distribution.

The Act also eliminates the concept of “treasury shares.” Instead of providing that shares of stock acquired by the corporation are held as treasury shares they are now simply viewed as constituting “authorized but unissued shares.”

Shareholder matters. Under the Act, the shareholders of privately held corporations are given extensive flexibility in organizing their affairs and in managing the corporation. As part of this flexibility, shareholder agreements may (1) eliminate the board of directors

or restrict their discretion or powers; (2) authorize distributions whether or not in proportion of ownership of shares; (3) establish who are directors or officers of a corporation, their terms of office, and manner of selection or removal; (4) tailor voting power by or between the shareholders and directors, including the use of weighted voting rights or director proxies; (5) establish the terms and conditions for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them; (6) transfer to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders; (7) require dissolution of the corporation at the request of one or more of the shareholders or upon occurrence of the specified event or contingency; or (8) otherwise govern the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, so long as not contrary to public policy.

The shareholders agreement itself can be set forth in the articles or bylaws of a corporation and approved by all shareholders at the time of adoption, or it can be set forth in a separate shareholder agreement that is signed by all of the directors. The duration of the agreement is perpetual unless otherwise limited and it can be amended by written agreement of all of the shareholders at the time of the amendment, unless the agreement by its terms provides otherwise.

Directors and Officers. The new Act contains no requirement for a minimum number of directors. This is a deviation from prior Maine law which required that there be at least 3 directors. This requirement frequently led to the appointment of directors to fill necessary slots but who had little or no actual

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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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role in the business. The new law eliminates this needless burden.

The Act also adopts much clearer provisions dealing with standards of conduct for directors and officers. The focus of these provisions is on the manner in which directors perform their duties, not the correctness of the decisions made. It is worth pointing out, however, that the new Act will continue the provisions of the prior Maine law which allowed directors to consider the interests of certain "other constituencies," including employees, communities, vendors, etc. The new Act also

adopts a detailed set of procedures for approving transactions in which one or more directors have a serious conflict of interest. These provisions are much clearer than the prior Maine law and will allow directors to act with greater confidence on such matters. Also, the new Maine Act does not specifically require any officers (other than a clerk). Preexisting Maine law always required a President, a Treasurer, and a Clerk.

Conclusion

As one would expect when an entire Title of the Maine Revised Statutes

is replaced, there are comprehensive changes to the Maine Business Corporation Laws. It is beyond the scope of this article to go through those changes in any greater detail and many of the changes are quite technical in nature and would require significant explanation. With new laws will come new questions and some unintended effects may come to light. However, the Act does promise greater certainty, definition and "user friendliness" that should benefit all those affected by Maine's New Business Corporation Act. □

New 2003 law changes calculation of pre- and post-judgment interest

BY AARON K. BALTES

2003 was a quiet legislative year for tort and insurance law. A significant piece of legislation, P.L. 2003, c.460, addressed an ambiguity regarding the calculation of pre- and post-judgment interest. This ambiguity was created by the Court Unification Project in 2001. Prior to 2001, the applicable interest rate depended on whether the amount of the judgment was above or below the "jurisdictional limit" of the District Court. In 2001, the limit was \$30,000. If the judgment was below \$30,000, the pre- and post-judgment interest rates were 8% and 15%, respectively. If the judgment was equal to or above \$30,000, the interest rates were calculated by reference to the weekly average of one-year United States Treasury bill rates.

As part of the Court Unification Project, the District Court's jurisdictional limit was abolished without a corresponding amendment to the statute governing pre- and post-judgment interest. Since this rendered the interest statute ambiguous as to what interest rate to apply, the Superior Court adopted a practice of simply applying the 8%

and 15% pre- and post-judgment interest rates to all judgments. Since interest rates have been at historic lows during the last couple of years, this amounted to a windfall to successful plaintiffs.

The Legislature has resolved this ambiguity by overhauling the interest statute, 14 M.R.S.A. §1602-B and §1602-C. For actions involving a contract or note, including small claims actions, any contractual provisions governing pre- and post-judgment interest continue to trump the statute. However, prejudgment interest is no longer available in other small claims actions. In all other actions, the prejudgment interest rate is the one-year United States Treasury bill rate plus 3%. Post-judgment interest is allowed in small claims actions and other civil actions at the one-year United States Treasury bill rate plus 6%.

As before, prejudgment interest begins to accrue from the date a sworn notice of claim is served or, if a notice of claim is not served, from the date a complaint is filed. Post-judgment interest begins to accrue from the date of

entry of judgment and includes the period of any appeal. The new statute also clarifies that prejudgment interest may not be added to the judgment amount in calculating post-judgment interest. The Legislature approved these amendments by emergency legislation with an effective date of July 1, 2003. For those actions where prejudgment interest began to accrue before July 1, 2003, the prejudgment interest rate on judgments \$30,000 or less is 8%, and for judgments in excess of \$30,000, the rate is one-year United States Treasury bill rate plus 1%.

In 14 M.R.S.A. §1602-B and §1602-C, 'one-year United States Treasury bill rate' means the weekly average one-year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System, for the last full week of the calendar year immediately prior to the year in which prejudgment (or post-judgment) interest begins to accrue. For rate information, please explore the data available at: <http://www.federalreserve.gov/releases>, the website for the Federal Reserve Statistical Tables. □

The Law Court clarifies the foreign object exception to the medical malpractice statute of limitations.

BY: EMILY A. BLOCH

In May of 2003, the Maine Supreme Judicial Court (the "Law Court") decided *Despres v. Moyer*, 2003 ME 41, 827 A.2d 61, a case of first impression. The Court ruled that plaintiffs may only take advantage of the foreign object exception to the three-year medical malpractice statute of limitations when the foreign object in question was placed in the plaintiff by the physician being sued. When the foreign object exception applies, the statute of limitations is extended beyond three years until the plaintiff actually discovers, or reasonably should have discovered, the presence of the foreign object. This decision by a unanimous court, replaces a prior unanimous but opposite decision rendered two months earlier by the Law Court in the same case.

In this case the Plaintiff had an upper molar extracted by her dentist. The extraction left a hole, or fistula, that connected the now empty tooth socket with the sinus immediately above it. When the hole did not heal properly, her dentist referred the Plaintiff to the Defendant, an oral surgeon. Before surgically closing the hole, Defendant detected and removed from Plaintiff's sinus several pieces of foreign matter. The Plaintiff returned to Defendant on two occasions complaining that the stitches closing the hole had fallen out and Defendant replaced them. Subsequent to the surgery closing the hole, the Plaintiff experienced pain and pressure in the sinus from which Defendant removed foreign matter. Defendant ultimately referred her to an ear, nose, and throat specialist who, after diagnostic studies, removed additional foreign matter from the same sinus. At no time did Defendant place anything in the Plaintiff's sinus and nothing he used to treat the Plaintiff's tooth socket migrated into her

sinus. There was also no evidence offered that her dentist placed anything in the Plaintiff's sinus.

The Plaintiff sued Defendant after the expiration of the three-year medical malpractice statute of limitations set forth in 24 M.R.S.A. §2902, but within three years from the time of the surgery performed by the ear, nose and throat specialist removing additional foreign matter. She initially claimed that Defendant had simply failed to properly clean out her sinus but argued that she was nevertheless entitled to take advantage of the extension to the statute of limitations provided by the foreign object exception because additional foreign matter was later removed from the site where Defendant originally performed surgery.

Defendant moved for summary judgment based upon the untimely filing of Plaintiff's claim arguing that because he was not the source of the foreign matter ultimately removed from Plaintiff's sinus, the foreign object exception to the statute of limitations did not apply to save her claim. Sensing a dead end, the Plaintiff modified her argument to claim that the case was not ripe for a motion for summary judgment and that the question whether Defendant was the source of the foreign matter ultimately removed from her sinus should proceed to a jury trial. Originally, the Superior Court agreed with the Plaintiff and denied Defendant's motion for summary judgment, holding that because both the Plaintiff and Defendant denied being the source of the foreign matter ultimately removed from Plaintiff's sinus, there was a genuine issue of material fact that precluded granting summary judgment to the Defendant.



EMILY A. BLOCH

Subsequent to Defendant's Motion for Reconsideration, however, the Superior Court granted the factual portion of Defendant's Motion for Summary Judgment and held that the Plaintiff had failed to come forward with any competent evidence to challenge the Defendant's evidence that he was not the source of the foreign matter subsequently removed from her sinus. Further, Plaintiff's mere denial that she was not the source of the foreign matter was insufficient for this purpose. The Superior Court also found, however, that the statute and case law governing the legal question whether the Plaintiff could circumvent the three-year statute of limitations where the Defendant was not the source of the foreign matter at issue were unclear and, therefore granted Defendant's motion to report the legal question to the Maine Supreme Court for resolution.

In its original decision on March 26, 2003, a unanimous Law Court agreed with the Plaintiff and with the Superior Court's first decision, and held that because the Plaintiff and Defendant both denied being the source of the foreign matter ultimately removed from Plaintiff's sinus, there was a genuine

issue of material fact that precluded Defendant prevailing on his Motion for Summary Judgment. The Court, therefore, declined to reach the legal question seeking definition of a foreign object in the context of the medical malpractice statute of limitations.

Less than two months later, upon Defendant's Motion for Reconsideration, a unanimous Law Court withdrew its previous opinion and found for the Defendant in all respects. Of particular import in the Court's decision were two points. First, the Plaintiff did not supply competent evidence to controvert Defendant's assertions that: 1) he did not put anything into Plaintiff's sinus, and 2) no item originating with the Defendant migrated into Plaintiff's sinus. Second, Plaintiff's claim that she did not put anything into her sinus was deemed insufficient under summary judgment jurisprudence to controvert Defendant's material facts. The Court therefore upheld the Superior Court's grant of partial summary judgment to Defendant on the facts before finally turning its attention to the reported legal question relevant to this case.

In that regard, the Court found the legal question raised to be an issue of first impression in Maine. In addressing this question, the Court looked for guidance to the medical malpractice statute of limitations, legislative intent, related Maine cases, and case law from other jurisdictions. The Court found the statute to provide no clear guidance whether the exception to the statute, which is described as "the leaving of a foreign object in the body," referred only to physicians (or other health care providers) who had placed the foreign object in question into the patient or, alternatively, also to third parties from whom the object originated, including the patient or a previous physician.

The Defendant had argued strenuously against the second interpretation because if accepted, the foreign object exception would apply to extend the statute of limitations beyond the usual three years in a wide variety of cases

including the following examples: 1) an employee in an industrial accident finds bits of metal embedded in his or her arm. After diagnostic studies, most but not all of the metal is removed; 2) a patient who has been treated by a general practitioner for a number of years later discovers a needle that was left inside from a surgery by a different physician; and 3) a child inserts two Lego gear shifts into his or her nose and the emergency room physician detects and removes only one. The Defendant further argued that in each of these cases a plaintiff may bring a claim for negligence, but not after the expiration of the statute of limitations. The Court similarly found little assistance from the legislative history except for indicating the Legislature's obvious intent to control the recent proliferation of medical malpractice claims and the resulting rise in malpractice premiums. The Court then turned its attention to relevant case law.

After lengthy debate, and recognizing the decision as a significant departure from the prior rule, the Court first recognized the foreign object exception to the medical malpractice statute of limitations in *Myrick v. James*, 444 A.2d 987 (Me. 1982). A key consideration that persuaded the Court to deviate from the general accrual rule and embrace the foreign object exception in that case, as applied to the original surgeon, was the unique situation that occurs during a surgical procedure where "the surgeon bears the responsibility for exercising the ultimate control, in a supervisory sense at least, for placing objects in and removing them from the patient's body during surgery." Subsequent cases confirmed that the medical malpractice discovery rule was reserved for foreign objects only, and not cases resting on allegations of professional diagnostic judgment or discretion. See *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994) (Physician's motion to dismiss patient's medical malpractice action based on the statute of limitations

granted even where patient did not discover tumor that physician had failed to detect or diagnose until after the expiration of the statute of limitations); *Dasha v. Maine Medical Center*, 665 A.2d 993 (Me. 1995) (Equitable principles did not estop the defendant hospital from pleading the statute of limitations to bar plaintiff's action even where hospital's negligent misdiagnosis and treatment of plaintiff's brain caused damage such that plaintiff was deprived of the ability to recognize and timely file cause of action.)

Cases from other jurisdictions provided important guidance as well where courts have refused to extend the foreign object exception to instances where the physician sued did not introduce the foreign objects into the patients. See e.g., *Dalby v. Banks*, 264 S.E.2d 4 (Ga. 1980); *Clark v. Mem'l Hospital of Bainbridge*, 243 S.E.2d 695 (Ga. 1978); *Garrett v. Brooklyn Hosp.*, 471 N.Y.S.2d 621 (N.Y. App. Div. 1984); and *Soto v. Greenpoint Hosp.*, 429 N.Y.S.2d 723 (N.Y. App. Div. 1980).

The Law Court was persuaded that in cases such as the one before it, legislative intent and relevant case law indicate that rather than expanding the foreign object exception to cover instances when a third party, including a patient or previous physician inserted foreign matter into the patient, the exception should be narrowly construed and the usual three-year statute of limitations should govern a plaintiff's allegations that a defendant's surgery, diagnosis, or treatment was negligent. The Law Court further embraced Defendant's argument and reasoned that if the foreign object exception were applied to the facts in this case, the exception would necessarily expand such that it would threaten to swallow the rule in all cases involving foreign matter, regardless of the original source. The Law Court therefore concluded that if a physician has not inserted the foreign object in question into the patient, the exception to the statute of limitations does not apply. □

Three recent decisions from the Law Court

BY DAVID P. VERY

Intentional act exclusion in negligent supervision of a child claim

In two companion cases issued in 1997, the Law Court stated that policy language in an insurance contract that excluded coverage for injuries arising from the intentional act of “any insured” would also bar coverage for injuries in connection with the negligence of “an insured” when the injuries are not separate from those caused by “any insured.” Where the policy only excluded coverage for injuries caused by the intentional acts of “the insured,” however, coverage was available for the negligent acts of a co-insured resulting in the same injuries. Those cases involved claims against an insured that negligently allowed a child to be sexually abused. What was not clear from these cases was when there is coverage for insureds whose negligence was a “factor” in causing damage from sexual abuse, and when there is not. The Law Court helped clarify that question in the recent case of *Korhonen v. Allstate Ins. Co.*, 2003 ME 77, 827 A.2d 833, decided June 16, 2003.

Sally Korhonen’s daughter, age 13, was sexually abused by her relative, William Korhonen, Jr., at a Christmas party he and his wife, Margaret, hosted for several teenage girls. William was prosecuted and pled guilty to felony unlawful sexual contact.

Sally subsequently filed a civil suit against William and Margaret. Count III of the complaint alleged that on the day that William committed the sexual abuse, both William and Margaret “negligently supervised” the child who “accessed the alcohol in their home and became extremely ill as a result.” Count IV of the complaint alleged that Margaret negligently inflicted emotional distress, first, by failing to learn that William had in fact engaged in sexual acts

with the child, and second, by verbally blaming, admonishing, and degrading the child and accusing her of lying. Count V of the complaint alleged an earlier incident of negligent supervision regarding alcohol that was nearly identical to the incident asserted in count III.

Allstate Insurance Company, William and Margaret’s homeowners’ carrier, denied their request for a defense and indemnification. As a result, by agreement of the parties, the Superior Court entered consent judgments against William and Margaret for damages each caused to the child.

Sally subsequently filed a reach and apply action against Allstate to collect the judgment obtained against Margaret. The Superior Court granted Allstate a summary judgment, finding the policy’s use of “any insured person” in the intentional act exclusion was dispositive in light of the 1997 decisions in *Johnson v. Allstate Ins. Co.*, 1997 ME 3, 687 A.2d 642 and *Hanover Ins. Co. v. Crocker*, 1997 ME 19, 688 A.2d 928.

On appeal, the plaintiff conceded that Allstate was not liable for William’s intentional, criminal actions, but contended that Margaret’s separate negligence resulted in separate injuries to her daughter, distinct from the injuries caused by William’s acts. The Law Court found that although Margaret’s negligence occurred in the same home and on the same date as her husband’s intentional criminal acts, it was not specifically claimed in the complaint that her negligence facilitated the sexual abuse, i.e., the complaint did not allege that Margaret’s negligence in allowing the child to drink alcohol facilitated the sexual abuse by her husband. The Court held that unlike the negligence claims against the grandmother in the Johnson case, in which the Plaintiff did not allege damages separate from those caused by



DAVID P. VERY

the grandfather, the negligent supervision claims asserted against Margaret were for injuries distinct from those associated with William’s intentional and criminal conduct. Because of this fundamental difference, the Court held that summary judgment should not have been awarded in favor of Allstate on the two counts alleging negligent supervision.

The Court, however, reached a different conclusion with respect to the Plaintiff’s claim of negligent infliction of emotional distress. First, the Court stated that as pleaded, Margaret’s actions represent intentional conduct because the only possible interpretation is that Margaret “intended” to admonish and degrade the child. The Court reiterated that a person acts “intentionally” if he subjectively wants or subjectively foresees that harm to another will almost certainly result from his actions. The Court further noted that this conclusion is not affected by the question of whether Margaret operated under a mistaken belief that the child was lying. The Court stated that Maine has not recognized a duty to investigate under these circumstances, and none was suggested by the allegations in the com-

plaint. Thus, the Court held that under the terms of the policy, Allstate had no duty to defend or indemnify Margaret for the allegations of negligent infliction of emotional distress because the alleged acts were intentional in nature and therefore excluded from coverage.

City's liability for playground accident

Five year old Cebrina Fiandaca, daughter of Lori Peterson, was allowed to play on the Vine Street Elementary School's playground, located in Bangor, by her teachers while she awaited the arrival of the school bus. Cebrina was injured when she fell from the monkey bars. Her mother filed suit against the City of Bangor. The Superior Court granted summary judgment in favor of the City, concluding that the playground was not an "appurtenance" to the school and that the acts of the teachers, while supervising Cebrina and the other students, were discretionary activities protected by discretionary function immunity.

On appeal, in *Peterson v. City of Bangor*, 2003 ME 102, 831 A.2d 416, decided August 6, 2003, the plaintiff argued that because the playground was housed by fencing that surrounds the entire school and is only a short distance from the building itself, the playground is "appurtenant" to the Vine Street School. The Maine Tort Claims Act provides an exception to governmental immunity for negligent acts or omissions in the construction, operation, or maintenance of any public building or the appurtenances to any public building.

Instead of deciding whether the Superior Court was correct in ruling that the playground was not an appurtenance to a public building, the Law Court focused on the fact that the record on appeal was devoid of any evidence demonstrating some defect in the monkey bars. The Court reiterated that the operation of a public building exception to immunity must implicate the physical structure of the public building and in-

volve more than passive conditions. The Court stated that even if it concluded that the playground was an appurtenance, the plaintiff could only prevail by demonstrating some defect in the monkey bars.

The plaintiff further alleged that the City was liable for failing to enact a rule or regulation to prohibit the younger children from using the monkey bars while awaiting the school bus. The Court held that the decision of the teachers to allow Cebrina to play on the monkey bars is not a sufficient basis to impose liability on the City for Cebrina's injuries and is not the operation of an appurtenance to a public building.

Because the Law Court held that the City was not liable for Cebrina's injuries pursuant to the public building exception to immunity, it did not address whether the City would be entitled to discretionary function immunity.

This case, and the Law Court's case of *Lightfoot v. School Administrative District #35*, 2003 ME 24, 816 A.2d 63, make it clear that a plaintiff will probably not be able to recover for claims based on the lack of supervision of students under the Maine Tort Claims Act. The decision also leaves open the argument that a city or school district is not liable for injuries on a school playground under the theory that the school playground is not an appurtenance to the public building.

Admission of evidence of post-accident condition and subsequent remedial repairs

Ledrena Freeman, who suffers from multiple sclerosis, was using a park wheelchair during a visit to Funtown, an amusement park in Saco. While being pushed by her son down a wheelchair ramp at the park, a portion of the wheelchair allegedly struck the ground tipping Mrs. Freeman over and breaking her ankle. Plaintiff alleged that immediately after the accident, a man appearing to be a Funtown employee noticed a problem with the wheelchair, stopped them, and was able to quickly repair the

footrest from catching on the ground.

At trial, Funtown moved to exclude evidence of this subsequent remedial measure. The Superior Court ruled that evidence of the repair could not be introduced in the plaintiff's case in chief, but that introduction may be allowed in plaintiff's rebuttal case, depending on the defendant's evidence. At trial, Mrs. Freeman was asked whether she noticed any problems with the wheelchair catching on the ground after she fell, and she replied, "No." Plaintiff's counsel told the Court that the plaintiff was mistaken in answering the question no. As a result, he asked the Court to allow him to refresh Mrs. Freeman's recollection. The Court denied the request stating in part that unless the witness said she is unsure, there is no opportunity to refresh a witness's memory. Mrs. Freeman's counsel again sought to introduce the subsequent remedial measures' evidence and the Court reaffirmed its prior ruling. Because Mrs. Freeman and her son apparently were not aware of any problem with the wheelchair prior to the accident, neither Mrs. Freeman nor her son were asked whether they noticed any problems with the foot pedal before the accident. The jury returned a unanimous verdict in Funtown's favor and the plaintiff appealed.

On appeal, in *Freeman v. Funtown/Splashtown USA*, 2003 ME 101, 828 A.2d 752, decided August 1, 2003, the plaintiff first argued that the evidence of a subsequent repair to the wheelchair should have been admitted because it was offered not to prove negligence or fault, but rather to prove causation and malfunction. The Law Court disagreed stating that evidence of causation is a necessary element of a negligence claim and allowing evidence of subsequent repair as malfunction evidence would essentially nullify the rule that disallows such evidence because a plaintiff could always allege a malfunction in every case where a product failed to perform as intended. The Court reiterated that the generally accepted rationale for excluding evidence of subse-

quent remedial repairs is that exclusion is justified because admissibility would deter the sound public policy of encouraging repairs.

The plaintiff then argued that the Superior Court erred in not allowing testimony regarding the wheelchair's condition immediately after the accident, but prior to the repair. The Law Court first pointed out that the Superior Court did indeed allow such evidence, but it was not the testimony plaintiff's counsel wanted. As a result, in a second attempt to introduce evidence that the

foot pedal dragged on the ground after the accident, plaintiff's counsel sought the Court's permission to refresh his client's recollection. The Law Court held that the Superior Court properly denied this request because there was no indication that the plaintiff's recollection needed to be refreshed, as she answered the question "no."

The Court further stated that even if the plaintiff had been permitted to change her testimony and testified that she did recall some post-accident foot pedal striking of the ground, the Court

would not have erred in excluding such evidence as irrelevant. The Court noted that the plaintiff failed to lay the necessary foundation to show that the wheelchair's condition after the accident was the same as it had been before the accident. Absent any evidence of the condition of the wheelchair before the accident, evidence of its condition after the accident is irrelevant because the plaintiff could not establish that they were the same.

The Law Court therefore affirmed the judgment in favor of Funtown. □

Briefs/Kudos

DAVID VERY was a presenter on the topic, "Current Issues in Uninsured Motorist's Coverage" at the seminar, *Insurance in Maine*, presented in Portland on July 25, 2003 to claims adjusters and attorneys.

At the annual Comp Summit seminar at Sugarloaf in late September, **STEVE MORIARTY, STEVE HESSERT**, and **BOB BOWER** served as moderators and presenters. In addition, the indomitable **STEVE HESSERT** received the first annual *Person of the Year Award*. Presented by Bud Bernstein of Law Publishers, Inc., the award recognizes Steve's contribution to as well as his achievement in the area of workers' compensation law.



Bud Bernstein congratulates Steve Hessert

LANCE WALKER has been appointed to the Zoning Board of Appeals for the Town of North Yarmouth.

Our firm administrator, **ELIZABETH CARDER**, was elected president of the Association of Legal Administrators Downeast Chapter for the 2003-2004 term.

The firm welcomed three new employees. **JENNIFERA. WRIGHT**, a paralegal in the insurance practice group, is a Colby graduate who formerly worked as a paralegal in two Washington, DC firms.

ROBINE. TOZIER is a Case Manager in the Workers' Compensation group. A graduate of Andover College, Robin has an extensive background in the comp area having previously worked with the State of Maine Workers' Compensation Board for six years.

TAMARA N. NORRIS is a graduate of Georgetown University and she is a paralegal in the firm's insurance practice group.

Golfer **JONATHAN BROGAN** won the club championship at the Purpoodock Country Club for the seventh time. That ties the record for most men's championships won by the same person.

ADRIAN P. KENDALL and his wife, Rebecca, joyfully welcomed their second son, Kurt Fritz Kendall, born October 20, 2003.



Rachael Finne and her husband Wladislaw

In July, **RACHAEL R. FINNE** announced her retirement. For the past eleven years, she was the Managing Editor of the NH&D Newsletter. Her skills and dedication to the production of this Newsletter are recognized and appreciated by our attorneys as well as by our clients.

Rachael is vigorously pursuing another passion, improving the environment. She is a volunteer with the Maine Indoor Air Quality Council. Also, Rachael and her husband, Wladislaw, are immersed in the renovation plans for their Yarmouth home.

Thank you, Rachael.

Briefs/Kudos continued on page 9

Briefs/Kudos continued from page 8

On August 2nd, 4273 runners from 41 states and 16 countries completed the Peoples Beach to Beacon 10k in Cape Elizabeth. Among those participants were 9 members of the Norman Hanson & DeTroy Corporate Challenge Team: **AARON BALTES, BETH BRANSON, PAUL DRISCOLL, DAN EDWARDS, TED KIRCHNER, BILL LACASSE, TOM MARJERISON, STEVE MORIARTY, and ROD ROVZAR.** NH&D competed in the Mixed (male/female) Division, placing 5th in a field of 17 teams. The top four runners (Steve, Bill, Ted and Beth) determine a team's overall score which is computed using an age and gender adjusted system. The team is currently recruiting and training for the 2004 event. Congratulations!

The following attorneys and staff are seeing their children off to college. These students are all members of the class of 2007. **STEVE MORIARTY'S** daughter, Kathy, is a freshman at Boston University. **BILL LACASSE'S** son, Samuel, is in upstate New York at Hobart College of Hobart and William Smith Colleges. **SUE FUSILLO'S** daughter, Virginia ("Ginny"), is attending the University of Maine, Farmington. **MARY STACKPOLE'S** daughter, Emily, is in Massachusetts at Smith College where she is one of two freshmen on the soccer team. **MAGGIE DEGRISHE'S** son, Mike, is enrolled at Elmira College in New York. **PETER DETROY'S** son, Victor, after a year abroad in Germany, France, and India, is in New York City at Columbia College, the undergraduate school of Columbia University.

J. JULIE WELCH, the information specialist and law librarian with the firm for nearly seven years, is also now the managing editor of NH&D's Newsletter. She is a graduate of the University of Tennessee College of Law and was admitted to practice in New Jersey. Julie also earned her Master's degree in Library and Information Science at Simmons College. □

Noah D. Wuesthoff: new associate

Noah Wuesthoff recently joined NH&D as an associate attorney and is working primarily with Mark Lavoie in the area of medical malpractice defense.

Noah is a 1987 graduate of Cheverus High School in Portland. While at Cheverus, Noah was captain of the varsity track and soccer teams and was selected to Maine's all state soccer team. He also participated in a service project in Kingston, Jamaica where he was privileged to work with the Jesuits and the nuns from the Missionaries of Charity, the order founded by Mother Teresa. Upon graduation, Noah taught English in Jaca, Spain.

Noah attended McGill University in Montreal from which he graduated cum laude in 1991 with a B.A. degree in political science. At the University of Maine School of Law, he was a member of the Moot Court team, attained the Best Oralist distinction at the 1993 Trilateral Moot Court Competition in Canada and was awarded the Edward T. Gignoux Award for Appellate Advocacy as the top oralist in his graduating class. Noah was admitted to practice law in Maine and Massachusetts in 1994.

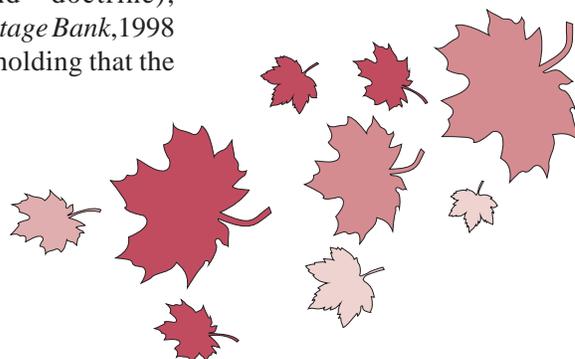
After earning his law degree, Noah practiced law at a Portland firm for six years specializing in insurance defense. He has argued several cases before the Maine Supreme Court including *York Insurance Group of Maine v. Van Hall*, 1997 ME 230, 704 A.2d 366 (leading to the clarification and adoption in Maine of the "common fund" doctrine); *Denham v. Peoples Heritage Bank*, 1998 ME 12, 704 A.2d 411 (holding that the



NOAH WUESTHOFF

Bank was not responsible for injuries that occurred on the public sidewalk abutting its premises); *Landrey v. Samantha Leonard and North East Insurance Company*, 1998 ME 241, 720 A.2d 907 (holding that a person who engages in armed robbery has committed an intentional act and is not entitled to insurance coverage). Noah has served as Chairperson of the Insurance Practice Section of the Maine State Bar Association and has lectured at several seminars regarding insurance defense issues.

Noah and his family recently returned to Maine after spending the last two years in Pittsburgh, Pennsylvania where his wife, Lisa Rutstein, M.D., completed her fellowship in surgical oncology and where Noah practiced law in a litigation firm. Noah and Lisa live in Falmouth with their two children, Benjamin, age 4, and Sarah, age six months. □



Workers' compensation – Law Court decisions

BY STEPHEN W. MORIARTY

Hearing Officer Status

The full labor-management Workers' Compensation Board is empowered by 39-A M.R.S.A. §152 to hire an unspecified number of hearing officers to adjudicate cases. The statute provides that appointed hearing officers may serve "at the pleasure of the board," but makes no reference to the length of the terms of appointment. Since 1994, the Board has appointed a number of hearing officers to serve three-year terms with fixed expiration dates. In many instances, hearing officers have been re-appointed to additional three-year terms.

In late 2002, five hearing officers were up for reappointment, and ultimately three of the five were re-appointed for additional terms. By statute, a hearing officer can only be appointed or retained by a "super majority" of the Board, and must receive at least two supporting votes from Board members representing labor and management, respectively. Hearing Officers Johnson and McCurry failed to receive the necessary number of votes to obtain reappointment and their terms expired on December 31, 2002.

Following the Board deadlock, the Executive Director authorized the two hearing officers to decide any cases in which the evidence had closed prior to the end of 2002. Notwithstanding this order, there has been ongoing uncertainty concerning the status and continuing authority of the hearing officers. In *D'Amato v. S. D. Warren Company*, 2003 ME 116 (September 19, 2003), the Law Court addressed the legality of fixed terms as well as the ongoing authority following expiration of a term. In this particular case, the

evidence had closed before Hearing Officer Johnson prior to the end of 2002, and she issued a decision granting the employee's Petitions for Award and Restoration after her term had expired.

The Court initially determined that it (and not the Superior Court) had jurisdiction to hear the appeal. Turning to the issue of fixed terms, the Court held that the Board appropriately exercised its discretion by appointing the hearing officers for terms of three years. It rejected the argument that the statutory mandate to serve "at the pleasure of the board" precluded time-limited appointments. Therefore, because the three-year term was valid, the Court rejected the argument that an affirmative vote of the Board was required to actually remove Hearing Officer Johnson from office.

Having concluded that the hearing officer's term expired on December 31, 2002, the Court then, on its own initiative, raised and resolved the issue of continuing authority. Citing established principles of administrative law, the Court concluded that Hearing Officer Johnson had authority as a "de facto officer" to decide individual cases. In reaching this conclusion, the Court noted that Hearing Officer Johnson had served for a lengthy period in her position and was properly qualified as a hearing officer when the evidence in the case closed. In addition, the Court noted that the Executive Director had authorized her to decide cases on which the evidence had closed, and that no new hearing officer had been appointed by the Board to take her place. Accordingly, the Court found that Hearing Officer Johnson acted within her authority as a "de facto officer" at the



STEPHEN W. MORIARTY

time that she issued her decision, notwithstanding the fact that her term had expired.

While the Court's approval of fixed terms for hearing officers brings stability to the system, the concept of a "de facto officer" is still vague and undefined. For example, it is not clear that such authority can only exist in cases in which the evidence had closed prior to expiration of a term. There appears to be no standard by which the existence of de facto authority can be determined on a system-wide basis, and the duration of de facto power is equally unclear. The issues of status and authority may not be fully resolved until the Board officially appoints new hearing officers.

Retirement Presumption

The Court continues to interpret the retirement presumption set forth in §223 in a manner consistent with legislative intent. In *Costales v. S. D. Warren Co.*, 2003 ME 115 (September 19, 2003), the employee had been injured in 1990 and eventually accepted an early non-disability retirement from the

employer in 1994. He obtained part-time positions with different employers thereafter, and ultimately stopped working altogether in 1998. He then filed a petition for restoration for the 1990 injury, which was denied by the Board on the basis of the retirement presumption. In the following year the employee filed a second petition for review and offered extensive evidence of an unsuccessful search for work. The claim for additional benefits was once again denied, and the employee appealed.

The Court held that traditional work search evidence typically offered by an otherwise active employee is insufficient to overcome the retirement presumption. The language of §223 focuses not upon the unavailability of work within physical restrictions, but rather upon the inability to perform work suitable to qualifications, training, and experience. As the Court held, “in order to rebut the retiree presumption, the employee must show a total physical inability to perform any work that would otherwise be suitable.” Having reached similar conclusions in the earlier cases of *Pendexter v. Tilcon of Maine, Inc.*, 1999 ME 34, 724 A.2d 618 and *Bowie v. Delta Airlines, Inc.*, 661 A.2d 1128 (Me. 1995), the Court upheld the decision of the Board.

Return to Work and Termination of Benefits

It has long been recognized that employers paying compensation are entitled to a credit or offset for post-injury earnings received from another employer. This concept is now codified in §214(1)(C), which provides that an employee whose current average

weekly wage is higher than the pre-injury average weekly wage is no longer entitled to receive wage loss benefits. A number of years ago the Law Court held in *Davis v. Scott Paper Company*, 507 A.2d 581 (Me. 1986) that there is a set-off for wages paid as against compensation benefits otherwise owed. It was implicitly understood that an employer could automatically and unilaterally take advantage of the offset for wages, but the Law Court has now held otherwise.

In *Grant v. Central Maine Power Company*, 2003 ME 96, 828 A.2d 800, decided July 25, 2003, the employee had been injured in 1993 and later obtained full-time employment with a different employer. At a time when the employee’s earnings were less than his pre-injury, the Board granted a Petition for Award and ordered ongoing benefits for fixed partial incapacity. At some point after the decree, the employee’s earnings increased to the point where his weekly income was higher than the pre-injury wage. The employer filed a Petition for Review, and then several months later notified the Board that benefits would be paid on a varying rates basis to take credit for the earnings. Because of the offset, payment of benefits stopped.

The employee fully acknowledged the amount of his current earnings, and in fact stipulated that the Petition for Review should be granted on the basis of increased earnings. However, the employee claimed that the employer was still required to continue paying benefits in accordance with the decree until the Board acted upon the employer’s Petition for Review. The presiding Hearing Officer granted the review and approved a prospective termination of benefits, but ordered pay-

ment retroactively between the time benefits were suspended and the date of the decision.

The Law Court accepted the employer’s Petition for Review, but upheld the decision of the Board. The Court concluded that the language of §205(9)(B) does not allow an employer paying benefits pursuant to a decree to unilaterally reduce or suspend those benefits until a Petition for Review is filed and a decision is rendered, regardless of the extent of current earnings. The Court found that unilateral action is permitted only under circumstances in which an employee returns to work for the same employer paying compensation benefits.

The requirement to continue to pay where no wage loss exists is completely inconsistent with legislative policy and intent. The Court itself has held on a number of occasions that the workers’ compensation system disfavors double recovery or double dipping. Requiring employers to continue to pay conflicts sharply with the primary purpose of the Workers’ Compensation Act of 1992, which was to achieve savings for employers within the system.

As a result of this decision, employees in similar circumstances have no incentive to agree to the termination of benefits in advance of a decree. In the absence of any further legislative change, an employer paying pursuant to a decree or other compensation payment scheme must file a review and continue to pay until the petition is acted upon. Employers should always aggressively pursue an expedited hearing in circumstances such as these, as some degree of overpayment is inevitable. □

Recent amendments to Workers' Compensation Act

BY STEPHEN W. MORIARTY

The recently-concluded First Regular Session of the 121st Maine Legislature saw an increase in the volume of proposed changes to the Act (39-A M.R.S.A. § 101 et seq.) in comparison to recent years, but by the time of adjournment, only a relatively small number of amendments had been enacted and signed by the Governor. The more controversial proposals either received negative recommendations from the Labor Committee or were carried forward to the next session. This article will summarize the most significant changes to the statute, all of which took effect on September 13, 2003.

Hardship extensions. Section 213(1) authorizes the Workers' Compensation Board (the "Board") to extend payment of partial benefits beyond the statutory cap "in cases involving extreme financial hardship due to inability to return to gainful employment." The authority is entirely discretionary and must be exercised expeditiously. Significantly, as originally enacted, the statute expressly provided that a request for a hardship extension could not be delegated by the eight-member Board to a Hearing Officer, and had to be addressed by the full Board itself. However, the statute has now been amended and provides that the Board may, on a case-by-case basis, delegate the authority either to a single hearing officer or to a panel consisting of three hearing officers. This is the only instance in the Act in which panels of hearing officers are empowered to hear claims and issue decisions.

The amendment also provides that a party may not appeal from the decision of a single hearing officer or from a panel to the Board itself, and that a party may only seek discretionary review by the Maine Supreme Judicial

Court pursuant to §322. It remains to be seen how often the Board will exercise its discretion and delegate hardship extension requests to a hearing officer or to a panel. The decision may be based upon workload considerations or upon the contentious nature of a hardship extension request itself. The ability to delegate such requests may eliminate a source of friction among the members of the Board and, thereby, promote a more collaborative working relationship.

Electronic filing. Section 152(2-A) directs the Board to adopt rules which will require the electronic filing of all information either required by the Act or by the Workers' Compensation Board Rules. Presumably the legislative intent is to reduce administrative costs associated with the manual receipt and filing of first reports, memoranda of payment, etc. The full scope of the impact must await the rule-making process.

First reports. Currently §303 provides that a first report must be completed if an injury has required the services of a health care provider but has not caused a lost day of work. A copy of the first report must be provided to the employee, but need not be filed with the Board. As amended, the statute will eventually require the electronic filing of first reports in "medical only" cases. The obligation will exist only if the Board adopts "a major substantive rule" requiring the electronic filing of first reports in these circumstances. The administrative process for the adoption of a major substantive rule is more complex than the usual rule-making process, and has not yet begun. The requirement to file first reports in medical only cases will not be triggered until that process has been completed.

Fringe benefits. As is well known, fringe benefits may not be included in the average weekly wage if the resulting

benefit level is greater than two-thirds of the state average weekly wage at the time of the injury. However, §102(4)(H) has now been amended to eliminate this provision in cases in which an injury results in the death of an employee. In such claims, the full value of the fringe benefits must be included in the wage regardless of impact upon the benefit level.

Legislative confirmation. Nominees to the eight-member Board have previously required approval by the legislature's State and Local Government Committee, but §151(1) has been amended to transfer authority to the Labor Committee. Of all the legislature's various committees, the Labor Committee is most familiar with the structure of the Workers' Compensation Board and the scope of the Act.

Definition of employee. The statutory definition of "employee" is phrased in the broadest possible terms, and includes everyone "in the service of another under any contract of hire, express or implied, oral or written." Generally speaking, volunteers are not considered to be employees. However, §102(11)(F) now provides that a search and rescue worker certified as such by the Director of the Maine Emergency Management Agency is considered an employee of the state. An employment relationship exists only when the individual is actually performing search and rescue activity and when such activities are undertaken at the request of a state, county, or local governmental entity. In such cases, the average weekly wage will be calculated based upon the rescue worker's regular employment.

A further change has been enacted to provide that state employees who may be barred from suing the state under admiralty law or other federal statutes are covered by the Act. □

2003 NH&D Fall Forum and Client Reception

*November 14, 2003 • Portland • Regency Hotel • 20 Milk Street
The Fall Forum 2 - 4 PM • Annual Client Reception 4 - 7 PM*

The seventh annual Norman, Hanson & DeTroy, LLC., Fall Forum for our clients will be held in Portland on Friday, November 14, at the Portland Regency Hotel.

The Forum will be followed by our

annual client reception at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail.

We hope to see you there!

Concurrent Sessions 2:00 - 4:00 p.m.

Workers' Compensation

The Year in Review

A summary of statutory amendments and significant Law Court decisions of the past year.

Speakers:

Stephen W. Moriarty, Esq.

Doris V.R. Champagne, Esq.

Discrimination Claims

A review of claims for discrimination brought under §353.

Speaker:

William O. LaCasse, Esq.

Medicare Liens and HIPPA Requirements

A review of the impact of Medicare and HIPPA upon workers' compensation practice.

Speaker:

Stephen Hessert, Esq.

Workers' Compensation Board Update

A discussion of the key issue now pending before the Workers' Compensation Board.

Speaker:

John H. King, Jr., Esq.

Property and Casualty

Complex Regional Pain Syndrome

How to recognize and address this new chronic pain diagnosis.

Speaker:

Mark E. Dunlap, Esq.

Landowner Liability

A review of the potential for liability faced by owners and occupiers of land.

Speaker:

Jonathan W. Brogan, Esq.

The Year in Review

A summary of recent Law Court decisions and legislative developments affecting the defense of claims.

Speaker:

David P. Very, Esq.

Developments in Insurance Coverage

A discussion of current issues and trends in insurance coverage law.

Speakers:

James D. Poliquin, Esq.

Lance E. Walker, Esq.

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