NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
Summer 2002
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Identity theft – fastest growing crime in the nation

What to do if your identity is stolen

BY ADRIAN P. KENDALL

Identity theft was the top consumer complaint in the country last year, and it happens when someone takes your personal identifying information – your social security number, birth date, mother's maiden name, credit card, and uses it to buy merchandise or borrow money in your name. Thieves can use a variety of ways to filch your identity, such as stolen mail, unauthorized telephone service, manipulation of bank accounts and investments. You may not discover the theft until you're faced with bills you didn't even know existed. In our Spring Newsletter we offered some common sense measures to take to minimize the risk of becoming a victim. Now we'll explore steps to take once you've discovered that someone is misusing your identity.

Think passwords. Today's electronics, the company computer, your home computer, banking and ATM machines, web sites, voice mail, and home security systems all require passwords, and the average computer user will choose an easy-to-remember password. Unfortunately, hackers can use programs that can run through thousands of words in minutes, so it may be time to consider the unusual in passwords, perhaps the cryptic, using upper and lower-case letters, numbers and punctuation.

When you learn that your name has been stolen, act quickly. Keep a record of all your conversations and correspondence. The precise steps to take will depend on what has been stolen and how misused, but three basic courses of action will be appropriate in almost all cases.

1. Contact the fraud departments of each of the three major credit bureaus.

Call and write the credit bureaus to notify them you are a victim of identity theft. Ask that a "fraud alert" be placed in your file, as well as a statement asking creditors to call you before they open any requested new accounts or change your existing accounts. Also order copies of your credit reports from each bureau. The bureaus must give you a free copy if your report is inaccurate because of fraud, and you request it in writing.

Review the reports carefully to make sure no new fraudulent accounts have been opened in your name, or unauthorized changes made to your existing accounts. Check the sections of the reports that list inquiries. Where inquiries appear from companies that opened the false accounts, ask the bureau that they remove them from the report. After six weeks or so, order new copies of your reports to verify that corrections and changes have been made, and to make sure no new fraudulent activity has occurred. Here are the three national consumer reporting agencies:

Equifax Credit Information Services
Tel. (800) 525-6285
P.O. Box 740241
Atlanta, GA 30374-0241
www.equifax.com

Experian Information Solutions
Tel. (888) 397-3742
P.O. Box 9530
Allen, TX 75013
www.experian.com

TransUnion
Tel. (800) 680-7289
Fraud Victim Assistance Division
P.O. Box 6790
Fullerton, CA 92634-6790
www.transunion.com

2. Call and write retail creditors for any false or falsified accounts.

Ask to speak to someone in their security or fraud departments, and be sure to follow up with a letter. Notify credit card issuers in writing. Under current law, provisions for consumer protection require written notice for resolving errors on credit card billing statements. Close the accounts that have been

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tampered with, and open new ones with new personal identification numbers and passwords. Avoid using easily available information such as your mother's maiden name, your birthday, or the last four digits of your social security or telephone number.

3. File a report with your local police or police in the community where the identity theft took place.

Once the police report is filed, get a copy of it in case your bank, credit card company, or others need proof of the crime. Even if the police cannot catch the identity thief in your case, having a copy of the police report can help you when dealing with creditors.

There are other ways of stealing your identity:

Stolen mail. If your mail has been stolen to get new credit cards, bank or credit card statements, or if an identity thief has falsified a change of address form, report these crimes to your local postal inspector. Contact your post office for the telephone number of the nearest postal inspection service office, or check the postal service website at www.usps.gov/websites/depart/inspect.

Change of address on credit card accounts. If you discover a thief has changed the billing address on an existing credit card account, close the account immediately. When opening a new one, ask that a password be used before any charges, inquiries or changes can be made on the account. Be sure to avoid using easily available personal information for the password.

Bank accounts. If someone has tampered with any of your bank accounts or ATM cards, close the account immediately. On opening the new account, insist on password-only access to minimize the possibility of identity theft. If any checks have been stolen, stop payment on them. The check verification companies can help you in tracking your stolen or misused checks. Here are some major ones: SCAN: 1-800-262-7771. TeleCheck: 1-800-710-9898. CrossCheck: 1-707-586-0431. Equifax Check Systems: 1-800-437-5120. International Check Services: 1-800-526-5380.

If your ATM card has been lost, stolen, or otherwise compromised, cancel it as soon as you can and order another with a new PIN. Notify the issuer in writing.

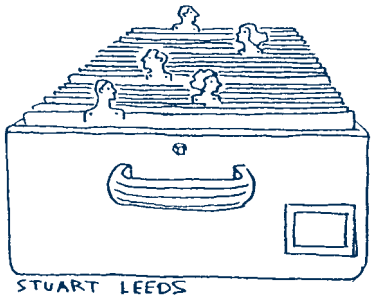
Investments. If you believe that your securities investments or brokerage account has been tampered with, report it immediately to your broker or account manager, and to the Securities and Exchange Commission. Complaints can be filed with the SEC by visting its website at www.sec.gov/complaint.shtml. Telephone at 202-942-7040.

Telephone service. If someone has established new telephone service under your name, or is making unauthorized calls that are billed to your telephone or cell phone, contact your service provider immediately. Cancel the account and/or any calling cards affiliated with it. If you're having trouble getting fraudulent telephone changes removed from your account, contact the Maine Public Utilities Commission for local service providers at (207) 287-3831. For long-distance service providers and cellular providers, call 1-888-CALL-FCC, or on the web at www.fcc.gov/ccb/enforce/complaint.html.

Employment. If someone is using your social security number to apply for a job or to work, that is also a crime. These instances should be reported to the SSA's fraud hotline at 1-800-269-0271. You can also telephone the SSA at 1-800-772-1213 to verify the accuracy of the earnings reported on your SSN, and to request a copy of your social security statement. As with all other cases, follow up your calls in writing.

Driver's license. If you learn that your name or SSN is being used by someone else to get a driver's license or a non-driver's ID, contact your Department of Motor Vehicles. Maine's Office of Investigations can be reached at 207-624-9000, ext. 5214.

Bankruptcy. It is entirely possible, and has happened before. If someone has filed for bankruptcy using your name,



write to the U.S. Trustee in the region where the bankruptcy was filed. A list of the U.S. Trustee regions can be found at www.usdoj.gov/ust. Your letter should describe the situation and include proof of your identity. If appropriate, the U.S. Trustee will refer the matter to criminal law enforcement authorities if you provide appropriate documents to verify your claim. File a complaint also with the U.S. Attorney and/or the FBI in the city where the illegal bankruptcy was filed.

One final recommendation: if you have been a victim of identity theft, be certain also to file a complaint with the Federal Trade Commission. Contact their special telephone hotline, toll-free, at 1-877-IDTHEFT, or 438-4338. Write to Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. Online at www.consumer.gov/idtheft. □

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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.

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

Norman, Hanson & DeTroy, LLC
P.O. Box 4600, Portland, ME 04112
Telephone (207) 774-7000
FAX (207) 775-0806
E-mail address: lstinitiallastname@nhdlaw.com
Website: www.nhdlaw.com

Current legal limits for sexual abuse claims

By David P. Very

Recent publicity about revelations of sexual abuse claims against priests of the Catholic Church has raised the profile of sexual abuse claims in general. Many of these claims are for sexual abuse that occurred many years ago, thus invoking repressed memory and statute of limitations issues.

During the 1980s, there was an increase of civil litigation by victims of sexual abuse, alleging that they had repressed memories of the abuse for many years. In 1991, the Maine Legislature amended the statute of limitations for sexual abuse claims, 14 M.R.S.A. § 752-C, to provide for a "discovery rule" that would allow repression of memory to toll the running of the statute of limitations: "Actions based upon sexual intercourse or a sexual act . . . with a person under the age of majority must be commenced within 12 years after the cause of action accrues, or within six years of the time the person discovers or reasonably should have discovered the harm, whichever occurs later."

The Legislature further provided that the amendment applied to all actions occurring after the effective date, October 9, 1991, and all actions for which the claim had not yet been barred by any previous statute of limitations. The previous statute for sexual abuse claims provided for a six year limitation. Given that claims would be tolled during a person's minority, any claim of sexual intercourse or sexual act by a victim who had reached the age of 24 before October 9, 1985 would be barred and unaffected by the 1991 Act. This was confirmed by the Maine Law Court in *McAfee v. Cole*, 637 A.2d 463 (Me. 1994). Mark McAfee alleged that he was sexually abused by Warren Cole hundreds of times between 1965 and 1971, but repressed all memories of the abuse until 1992. The Law Court not only ruled that the statute of limitations was not retroactive and thus did not apply to McAfee's claims, but also declined to adopt a judicially crafted discovery rule for sexual abuse claims. Justice Dana dissented, arguing that the Court should adopt a judicial discovery rule in this situation if there were "corroborating evidence." The McAfee Court also held that in order for a claimant to assert mental illness under the mental illness tolling statute, the claimant must demonstrate an "overall inability to function in society."

Two years later, the Law Court, in *Nuccio v. Nuccio*, 673 A.2d 1331 (Me. 1996), held that a defendant would not be equitably estopped, or prevented, from asserting the statute of limitations even where the claimant alleged that she repressed all memory of the abuse as a result of the defendant's threats, abuse, and specific acts of violence directed toward her. The following year, the Law Court, in *Harkness v. Fitzgerald*, 701 A.2d 370 (Me. 1997), ruled that a claimant could not escape the statute of limitations by alleging that her parents fraudulently concealed her cause of action against her father. As a result of this trilogy of Law Court decisions, victims of sexual abuse who had reached the age of 24 prior to 1985 have no remedy, unless they can demonstrate extraordinary circumstances such as continuing duress or an actual overall inability to function in society.

In 1999, the Legislature once again amended 14 M.R.S.A. § 752-C to provide absolutely no limitation on actions based upon "sexual acts or sexual contact" toward minors. The Legislature provided that the Act only applied to actions based upon a sexual act or sexual contact occurring on or after August 11, 2000, or for all actions for which the claim had not yet been barred by the previous statute of limitations. This law not only removed any statute of limitations for these claims, but also broadened the claims that are included in the statute to include all claims of sexual contact.

This latter issue was specifically addressed by the U. S. District Court in *Hinkley v. Baker*, 122 F. Supp. 2nd 48 (D. Me. 2000). The claimant asserted that she was sexually abused between 1982 and 1985. Because the alleged conduct occurred while the plaintiff was a minor, the statute of limitations did not begin to run until she reached the age of majority, on December 27, 1993. The District Court held that the 1991 statute of limitations provision for sexual acts toward minors did not apply to her claim as it only included claims of "sexual intercourse" or "sexual acts." Sexual acts require direct physical contact. Since the plaintiff only alleged that the defendant's inappropriate contact was through clothing, his conduct was defined as "sexual contact" rather than a sexual act. As the statute of limitations on her claim would have expired prior to the effective date of the broader 1999 statute, August 11, 2000, her claim was barred.

Therefore, for any claim involving sexual contact, or sexual abuse through clothing, the wrongful act must have occurred on or after August 11, 2000, or for anyone who had not yet reached the age of 24 on that date for negligence claims for allowing the abuse to occur, or the age of 20 on that date for assault claims. Because the 1999 amendment provides for no time limitation for sexual abuse claims, the issue of whether a repression of memory resulted in the claimant's failure to "discover" the claim is now effectively moot in Maine. Indeed, because the 1991 amendment allowed for a 12-year statute of limitations, the provision that allowed repression of memory to toll the statute of limitations was never used by a claimant in Maine. □

Briefs/Kudos

ADRIAN KENDALL was invited, together with state officials from Massachusetts and business leaders from across New England, to a reception in Boston hosted by the German airline Lufthansa and Logan Airport officials. The occasion was to mark Lufthansa's new non-stop service from Boston to Munich year-round, an indication of the present and future business growth between Germany's State of Bavaria and New England. Adrian serves as representative to the State of Maine for the German Consulate General in Boston.

EMILY BLOCH was elected to the Board of Directors of Maine Businesses for Social Responsibility at their annual conference on June 5, 2002.

The Maine Municipal Association held a day-long seminar on Technology in Local Government this spring. NH&D attorneys **BOB BOWER** and **ANNE CARNEY** presented an in-depth look at current Maine and federal laws on e-commerce, and the special risks accompanying employees' use of computers and telephones.

DAVE HERZER is the State Representative in Maine for the national Defense Research Institute, which serves law firms and corporations, and is particularly strong in the fields of employment law and human resource issues. Dave has been successful in demonstrating the benefits of DRI membership to Maine corporations, including Hannaford Brothers Company, a large regional food and drug retailer.

The Alumni Association of the University of Maine School of Law has appointed **MARK LAVOIE** and **JOHN VEILLEUX** to the Board of Directors.

The Maine Trial Lawyers Association held a two-and-half day course on trial advocacy at the Cumberland County Superior Court, and our associates **DORIS RYGALSKI, AARON BALTES**, and **RACHEL REEVES** attended. They presented opening statements, closing arguments, and witness examinations before a faculty of judges and senior trial attorneys.

Maine's Credit Unions are reaching out to youth with various programs that will encourage their education in money management. Last year, Lisbon Community Federal Credit Union introduced FOCUS, a program for teens, in which they offered monthly drawings for prizes and an opportunity to apply for checking accounts, ATM cards, and computer banking. Nearly a year later, 168 teens have opened FOCUS accounts, and its popularity is growing.

In Northern Maine, the Eastmill Federal Credit Union reported that a five-year-old member of its Monty Moose program chose to spend her Moose Bucks on toys for less fortunate children this past Christmas. And as we reported earlier, in Portland the Cumberland County Teachers FCU offers a banking program for grade school children; one dollar can open an account.

Three years ago, as lawsuits against the tobacco companies were underway, Norman Hanson & DeTroy developed for the State of Maine's legal action the proof that cigarette smoking caused illnesses and fatalities. The tobacco companies paid to Maine, and 40 other states who sued them, damages of many billions, monies to be spent on education to reduce smoking.

At a recent meeting of the Maine Lung Association, the Attorney General of Mississippi, Michael Moore, who began the tobacco suits, commented on Maine's proper use of the settlement monies. The Bureau of the Budget confirmed that Maine spends its yearly allocation of tobacco funds only on smoking education and health. Most other states are spending their settlement monies on unrelated projects, such as highways and unemployment insurance.

On August 7, 2002 **STEVE MORIARTY** will speak on critical issues in workers' compensation at a seminar sponsored by Lorman Education Services in Portland. Steve will address new case law, legislation and regulations in workers' comp, and will participate in a panel discussion.

Addictions in our society are not new. Besides those individuals addicted to alcohol and drugs, computers have been shown to create, in some people, true addictions. When an office supervisor was recently discovered playing computer games continually during working hours, the therapist consulted determined that the employee was addicted. However, an employment claims authority stated that because of the newness of computers in offices, it is not yet covered under the Americans with Disabilities Act!

Workers' compensation – Legislative developments and Law Court decisions

By Stephen W. Moriarty

Legislature overturns *Kotch*

All was quiet on the legislative front in the first several weeks following the Law Court's decision in ***Kotch v. American Protective Services, Inc.***, 2002 ME 19, 788 A.2d 582. In that controversial decision, the Court held that the "whole body" approach to permanent impairment in §213 required the Board to combine all occupational and non-occupational impairment together for purposes of the statutory threshold. As a result, individuals with significant levels of unrelated, pre-injury permanent impairment could qualify for lifetime partial benefits.

A period of intense public and political debate began on March 25, when the Governor introduced legislation designed to reverse the holding in *Kotch*. While the employer and insurance communities mobilized in support of the legislation, organized labor staunchly opposed all attempts at repeal. Following prolonged and intense debate, the Legislature ultimately passed a bill on April 25 which re-defines the type of permanent impairment which can be considered for determining eligibility for unlimited partial benefits.

Under newly-enacted §213(1-A) of the Workers' Compensation Act, permanent impairment may be "stacked" only under very limited circumstances. For purposes of the statutory threshold, only the permanent impairment caused by the occupational injury and any aggravation or acceleration of a pre-existing condition may be considered. This portion of the statute essentially mirrors and affirms the Law Court's earlier decision in *Churchill v. Central Aroostook Association for Retarded Citizens, Inc.* 1999 ME 192, 742 A.2d 475. However, for injuries occurring on or after January 1, 2002, the Board may combine the impairment caused by the occupational injury with impairment attributable to a previous occupational injury, provided that the following criteria are satisfied:

1. The prior injury must have arisen out of and in the course of employment and the employer must have completed a first report pursuant to §303;
2. The employee must have received a benefit or compensation under Title 39-A;
3. The compensability of the prior injury must not have been denied by the Board;
4. The prior injury must combine with the current injury to produce incapacity.

Under these provisions, only prior occupational injuries which occurred in Maine can be considered. If a previous injury has been resolved by lump sum settlement, impairment may not be stacked if the prior impairment was equal to or greater than the PI threshold in effect at the time of the settlement. Except as provided, no consideration may be given to prior impairment which was not caused, aggravated, or accelerated by an occupational injury.

The Board was required by §213(2) to adjust the PI threshold effective January 1, 2002, but had not done so at the time of the passage of this new legislation. The new law requires the Board to retain two actuaries (one chosen by management members of the Board and the other chosen by labor members) who must submit a recommendation no later than September 30 regarding a new impairment threshold. The Board must then establish a threshold by November 1, but if it fails to do so, the issue must be referred to binding and non-appealable arbitration. The arbitrator must issue a decision by December 1, and the Board must adopt the decision of the arbitrator.

STEPHEN W. MORIARTY

The new law is fully retroactive and applies to all pending claims. However, it does not apply to cases in which a final decree has been issued establishing the extent of permanent impairment, and it does not permit a re-opening of cases in which entitlement to benefits for partial has expired.

The law will take effect on July 25, 2002. Recently, organized labor announced its intention to initiate a petition drive in order to trigger a "people's veto" referendum election in November. To force a referendum, at least 42,101 signatures had to be submitted to the Maine Secretary of State no later than July 24. However, on June 17 the Maine AFL-CIO announced that it would abandon its efforts to seek a referendum. Instead, labor will focus on legislative races and possible reforms to the Workers' Compensation Act next year.

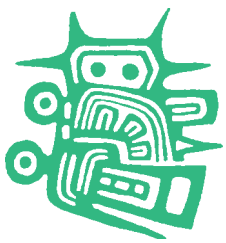
Mediation agreements

Several years ago, the Law Court held that any agreements contained within a written record of mediation are fully binding upon the parties. *Bureau v. Staffing Network, Inc.*, 678 A.2d 583 (Me. 1996). A recent appeal raised the

issue of whether the parties are bound indefinitely by mediation agreements. In ***Commercial Union v. MEMIC***, 2002 ME 56, 794 A.2d 77, the claimant sustained two separate occupational, injuries working for the same employer, and while that employer was insured by CU and MEMIC, respectively. At a 1996 mediation conference, the carriers agreed to a 30/70 division of responsibility, with MEMIC accepting the larger share.

Two years later, MEMIC requested the appointment of an arbitrator to apportion liability between the carriers pursuant to the provisions of former §354. (Please note that §354 has since been amended to restore to the Board the authority to decide all apportionment issues.) During apportionment arbitration, MEMIC offered evidence establishing that the two injuries were equally responsible, and the arbitrator agreed. CU appealed to the Superior Court, which vacated the decision of the arbitrator. MEMIC then appealed to the Law Court, and the original decision of the arbitrator was affirmed.

The Court held that the arbitrator did not exceed his authority in agreeing with the medical evidence submitted by MEMIC. More importantly, however, the Court held that both mediation agreements, like formal decrees, can be modified upon a finding of "changed circumstances." As a result, it is clear that agreements reached at mediation are subject to the same "changed circumstances" standard that applies to decrees of the Board. In other words, the terms of an agreement may be modified or terminated based upon comparative medical evidence or any other comparative change that may have developed since the mediation record was signed.



Cyber risks – workplace policies can prevent employer liability

By Anne M. Carney

While computer terminals and internet access are essential in most Maine workplaces, if an employee misuses this technology, employers can be exposed to significant criminal and civil liability. The only way an employer can protect itself from cyber risks is to adopt a policy regulating employee use of telephones and electronic communications in the workplace, and actively enforcing it. Active enforcement involves distributing a written Telephone and Electronic Communications Policy, educating employees about the meaning of the policy, investigating promptly any report of improper use, and taking corrective action.

Unauthorized access

Several federal and state laws create criminal liability on the part of an employer for unauthorized access to electronic communications. The federal Wiretap Act, 18 U.S.C. §2510 prohibits any individual, including an employer, from intercepting electronic communications in transit. The penalty is a maximum five-year term of imprisonment and a significant fine. Employers generally do not face liability under the federal Wiretap Act, because an employer's access to electronic communications usually occurs after transmission, when the message is received and stored. The federal Act does not address stored communications.

The Maine Interception of Wire and Oral Communications Act, 15 M.R.S.A. §709, does appear to apply to access of stored communications as well as communications in transit. Under the Maine statute, unauthorized interception is a Class C crime, and exposes an employer to significant civil liability. Maine's Criminal Code also creates two computer-related crimes, Criminal Invasion of Computer Privacy, 17-A M.R.S.A. §432, and Aggravated Criminal Invasion of Computer Privacy, 17-A M.R.S.A. §433. Criminal invasion occurs when an individual intentionally accesses another's electronically stored information, knowing the access is unauthorized. It is a Class D crime. An aggravated crime involves unauthorized copying of a computer program or electronically stored information, damaging a computer resource, or intentionally introducing a virus. It is a Class C crime.

An employer can insulate itself from criminal liability under these laws by adopting a written policy that informs employees they have no reasonable expectation of privacy in their use of workplace computer terminals and computer systems. The policy must be supplemented by requiring written consent from all employees who use a workplace computer terminal or computer system to permit the employer's access to and use of any communication accomplished on workplace computer equipment. An employer should provide a written reminder of the policy, displayed near workplace computer terminals or on the computer screen itself.

Criminal conduct by an employee

Another risk involves an employee's use of a workplace computer terminal to commit a crime. If the employee is convicted of disseminating sexually explicit materials, or possession of sexually explicit materials, or crimes involving use of a computer to transmit or view child pornography, an employer is subject to criminal forfeiture of any workplace equipment used by the employee. 17 M.R.S.A. §2925. Several Maine cases illustrate the potential for an employee to use a computer terminal to engage in criminal activity or misconduct.

• Recently an individual was con-

victed of violating a protective order by contacting his child through e-mail. *State v. Turner*, 766 A.2d 1025 (Me. 2001). Although this case did not involve the employer/employee relationship, employers must be aware of the potential for an employee to use a workplace computer to evade a protective order.

• The Maine Supreme Judicial Court has held that an employee who uses the employer's computer to engage in fraud has committed "misconduct," disqualifying the employee from receiving unemployment compensation benefits. *Wellby v. Maine Unemployment Insurance Comm'n*, 603 A.2d 476 (Me. 1992). While this case did not involve a criminal conviction, clearly any employer faces a risk that an employee will use a workplace computer to engage in fraud or embezzlement.

Wrongful conduct by an employee

Telecommunications present unique issues regarding defamation and invasion of privacy. Employers and employees can both be subject to civil claims based on publication of false and defamatory statements about another employee, or the publication of private information regarding another. While the exclusivity and immunity provisions of the Maine Workers' Compensation Act will limit an employer's or co-worker's liability, the targeted employee or person may still recover damages for harm to reputation and loss of privacy from use of a workplace computer to spread false or private information about another. Unfortunately, a computer's storage of electronic information means that evidence of defamation or other tortious conduct is forever preserved in the employer's electronic equipment. The only way to prevent these cyber risks of liability is to actively enforce your Telephone and Electronic Communication Policy.

Employment discrimination claims

Use of an employer's computer system to create a hostile work environment has received significant attention from courts in almost every jurisdiction in the country. A hostile work environment exists when an employee is subjected to physical or verbal conduct offensive to the employee because of her sex, race, national origin, ancestry or religion, and that offensive conduct is so severe and pervasive that it permeates the workplace. A hostile work environment can be created by the display of offensive material on a computer screen, by sending offensive material to an employer's printer thereby exposing other employees to it, and the use of e-mail to send offensive pictures, jokes, and other material.

By incorporating the dangers of cyber risks into an employer's equal employment opportunity policies and training, employers can mitigate the risk that an employee will use his computer to create a hostile work environment. For example, the annual notification required by Maine law, 26 M.R.S.A. §807, can be modified to include an example of sexual harassment through electronic communications. An employer's Telephone and Electronic Communication Policy and Equal Employment Opportunity Policy should reference each other, and should advise employees that they are subject to cumulative discipline for conduct that violates both policies. An employer must also call supervisors' attention to the possible use of their internal e-mails in the course of an investigation to either defeat or establish the employer's liability. Supervisor communications about allegations of discriminatory conduct must show that the employer has taken its obligation to investigate and correct any discriminatory conduct seriously.

Maine employers can significantly reduce these "cyber risks" by adopting policies appropriate to their workplace, training employees, and actively enforcing the policies when violations occur. These preventive steps are minimal when compared to the consequences of possible criminal conviction, forfeiture of equipment, civil liability, and the costs of defending a lawsuit. □

The fundamental and still litigated difference between intentional wrongs and negligent wrongs was expressed by Justice Oliver Wendell Homes of the U.S. Supreme Court in eleven lively words: "...even a dog distinguishes between being stumbled over and being kicked."

Federal reinsurance law for terrorism coverage underway

As we go to press, the news from Congress is that the Senate has passed a bill that deals with the shortfalls of reinsurance coverage for terrorism risks. Bill S 2600, however, is drastically different fron the reinsurance coverage bill passed by the House of Representatives. This ensures that after further negations for amendments, the amended bill will go to Conference Committee for its final approval and Senate vote.

Three significant Law Court decisions

By David P. Very

Landlord not liable for attack by tenant's dog

The recent high profile dog attack case in San Francisco in which the victim died raised the profile of liability for a dog attack. In ***Stewart v. Aldrich***, 2002 ME 16, 788 A.2d 603, the Law Court held that a landlord was not liable for an attack by a tenant's dog that occurred in the tenant's apartment, because the dog was owned by and under the control of the tenant.

Defendant Harrison Aldrich had rented an apartment to Donald and Robin Bailey pursuant to a month-to-month agreement. The tenancy agreement was not in writing and the terms were implied. The landlord allowed the Baileys to have dogs, and the couple acquired an Akita. Shortly after, the dog attacked the Baileys' two-year old daughter and created a serious wound on her head. The Baileys continued to keep the dog, and three months later, seven-year old Kristin Stewart, who was a friend of the Baileys' daughter, came over unexpectedly for a visit. While alone in the living room with the dog, she was attacked and received injuries to her face.

Kristin's mother brought a lawsuit against the landlord, Aldrich, arguing that he had a duty to ensure the premises he rented did not possess any dangerous conditions, and that he had violated this duty by allowing the Baileys to remain in the apartment with a dog that he knew to be dangerous. The landlord filed a motion for summary judgment. Although there was a factual dispute as to whether the landlord knew of the previous dog attack, for the purposes of summary judgment, the Court assumed that the landlord knew of the attack, and that as a result, should have known that the dog was dangerous or had vicious propensities. The Superior Court granted summary judgment in favor of the landlord finding that the landlord owed no duty to Kristen, as the dog was owned by and under the control of the Baileys.

On appeal, the Law Court stated that the dispositive issue is whether the landlord, because he could have evicted the Baileys or not renewed their tenancy, retained "control" over the presence of the dog on the premises at the time of the attack. The Court held that the mere power to coerce the conduct of tenants through the threat of eviction or by refusing to renew the tenancy is not the "control" contemplated to hold a landlord liable for a dangerous condition. The Court stated that leasors should be able to convey interest in property for a limited time without assuming inordinate liability for the conduct of those to whom they rent or lease. This policy, noted the Court, benefits both the leasor and the leasee, as people should be able to acquire property interests of a limited duration without completely forfeiting their freedom to make their own decisions about how they will live their lives. The Court observed that if landlords were to be held responsible for their tenants' conduct, the result would be substantially more regulation by the landlord of the previously private conduct of tenants, i.e., landlords would no longer allow tenants to own dogs.

Although the Court did not come out and state that a landlord can never be held liable for an attack by a tenant's dog, the decision makes it clear that a landlord may not be held liable simply for not taking steps to remove a dangerous or vicious dog from the rented premises.

Governmental entity's liability for negligent rescue

Is a governmental entity liable for its failure to execute an efficient rescue due to the alleged negligent use of equipment and vehicles? On March 13, 1999, Thomas Thompson was gravely injured in a snowmobile accident on a trail maintained and controlled by the Department of Inland Fisheries and Wildlife. Mr. Thompson filed a complaint against the Department, the State, the Maine Warden Service, and the Maine Army National Guard alleging that his rescue was delayed by hours because of the State's negligent acts with regard to its ownership, maintenance, and use of the rescue vehicles, aircraft, snowmobiles and other machinery at its disposal. Specifically, Thompson claimed that the National Guard helicopter that had been dispatched to rescue him was unable to locate the extraction point because it had navigational equipment that was incompatible with the equipment used by the warden service's ground units; that it was inadequately fueled to enable it to continue searching for a sufficient amount of time; and the warden service's ground units were not equipped with adequate radio communications equipment. Thompson claimed that the injuries he suffered from the snowmobile accident were exacerbated by this negligence.

The State moved to dismiss Thompson's complaint on behalf of all the defendants, and the Superior Court granted the motion, finding that all defendants were immune from liability pursuant to the Maine Tort Claims Act (MTCA).

On appeal, in ***Thompson v. Department of Inland Fisheries and Wildlife, et al.***, 2002 ME 78 (May 13, 2002), the Law Court noted that the MTCA expressly exempts from immunity the negligent acts or omissions of a governmental entity in the "ownership, maintenance or use" of its motor vehicles, special mobile equipment, trailers, aircraft, watercraft, snowmobiles, and other machinery or equipment. Thompson ar-

gued that the State's failure to sufficiently fuel the helicopter and to maintain adequate communication and navigation equipment squarely fell within the plain meaning of this exemption.

The Law Court noted that it has made clear that the kind of negligence falling within this exception to immunity involves harms that flow naturally or directly from the negligent use or maintenance of vehicles or equipment. The essence of Thompson's complaint, the Court stated, was that he was harmed not by contact with a negligently operated or maintained vehicle, but by the State's failure to execute an efficient rescue. The Court held that negligence in the execution of a rescue does not fall within the MTCA's exception to immunity for negligence in the ownership, maintenance, or use of vehicles. The Superior Court's dismissal of plaintiff's complaint was therefore affirmed.

Law Court clarifies damages allowed in wrongful death actions

On June 3, 1996, a rock from a truck operated by Kevin Williams became airborne and broke through the windshield of the car behind it. The rock struck the driver, Barbara Carter, on her left hand and shoulder, before striking her daughter Karen in the head causing her death. Barbara's husband and Karen's father, Robert Carter, was in the front passenger seat and Jessica Carter, age 5, was sitting beside her sister Karen in the back seat of the car.

The Carters filed multiple claims against the truck driver and his employer, to include claims for wrongful death; negligent infliction of emotional distress on Barbara, Robert and Jessica; negligence in causing Barbara's injuries; pecuniary loss as a result of Karen's death; and Barbara's and Robert's loss of each other's consortium. Following a jury-waived trial, the Court awarded $83,812 on the wrongful death claim, $7,500 on Jessica's NIED claim for witnessing the injury to Barbara, $100,000 for Barbara's personal injuries, $30,000 for Robert's loss of consortium, and costs and interest. The Court found for the defendants on Barbara's, Robert's and Jessica's NIED claims from witnessing Karen's death, Robert's NIED claim from witnessing Barbara's injuries, and Barbara's claim for loss of consortium. The Court did not award any additional sum for the parents' pecuniary loss. The Carters appealed.

On appeal, in ***Carter v. Williams***, 2002 ME 50 (March 29, 2002), the Carters first argued that the pecuniary loss they suffered due to Karen's death was not so speculative as to preclude recovery. The Law Court noted that it is inherently difficult to determine pecuniary loss upon the death of a child. The Court cited a 1914 decision in which it stated, "The child might have provided financial assistance to his mother during the next 20 years if he had been industrious and frugal, and had not taken on other domestic burdens by marriage, but that all these elements are more or less speculative, existing in the realm of possibility not the realm of certainty." The Court cited another 1914 decision in which it stated, "The majority of children, eight years of age, will have cost their parents during their lifetime, a much larger outlay than they will have contributed to their benefit." The Law Court therefore found that the Superior Court did not err in concluding, based on the evidence presented, that the pecuniary injury to the parents resulting from the child's death was too speculative to be determined to the necessary degree of certainty.

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The Carters next argued that the wrongful death statute did not prevent them from recovering for the emotional distress they suffered as bystanders in witnessing Karen's death. The defendants contended that the Maine wrongful death statute precludes separate claims for emotional distress arising from the facts alleged in the wrongful death claim. The wrongful death statute states in part, "including any damages for emotional distress arising from the same facts as those constituting the underlying claim, to the persons for whose benefit the action is brought." 18-A M.R.S.A. § 2-804(b). Because Robert and Barbara were the beneficiaries of their daughter's estate, and because their claim was based on the same facts as the wrongful death claim, the Law Court found that the Superior Court properly concluded that they may not bring NIED claims separate from the wrongful death claim.

The Law Court, however, held that Jessica, Karen's sister, is not an heir to her sister's estate and thus does not share in the wrongful death claim. The wrongful death statute would therefore not apply to her claim for damages from witnessing her sister's death. To conclude otherwise, noted the Court, would leave Jessica without any remedy, unlike her parents, who have a remedy pursuant to the wrongful death statute. The Court ruled that the trial court erred in not permitting Jessica to recover on her emotional distress claim.

The Carters then argued that the Superior Court erred in concluding that Robert failed to establish that he suffered serious emotional distress from witnessing his wife's injuries. The Law Court reiterated that, "Serious emotional distress exists where a reasonable person normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the event." The Court further noted that Robert received the maximum amount allowed by law for the grief he

suffered as a result of his daughter's tragic death. The Court found that the Superior Court, in considering Robert's request for additional emotional distress caused by witnessing his wife's injuries, correctly found the evidence insufficient to establish this separate claim.

Barbara Carter next contended that the wrongful death statute does not bar her claim for loss of consortium resulting from Robert's emotional injuries. The Carters alleged that she was injured by Robert's withdrawal following her injury and the death of Karen. The defendants argued that the Superior Court properly denied Barbara's claim of loss of consortium because the wrongful death statute provides the exclusive remedy for psychological injuries resulting from Karen's death. The Law Court observed that the Superior Court read the wrongful death statute to prevent Barbara's claim for loss of consortium because Robert's withdrawal resulted from the same facts as the wrongful death claim and to allow a separate claim would improperly permit recovery beyond the amount established by the statute. The Law Court agreed, noting that the wrongful death statute limits recovery for emotional distress, and should be construed to limit recovery when the effects of that distress cause a fellow beneficiary's loss of consortium.

Finally, the Carters argued that the Superior Court erred in failing to award damages for Robert's lost wages. In order to help his family following the accident, he worked locally instead of traveling as a ship's chief engineer. The Law Court found that, although the Superior Court stated it would not award lost wages pursuant to Robert's loss of consortium claim, it erred in failing to determine whether he established wage loss damages pursuant to his separate claim for pecuniary loss based on the death of his child.

The Law Court therefore remanded this action to the Superior Court to determine Jessica's damages on her NIED claim, and for further findings on Robert's claim for pecuniary loss. □

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

Return service requested

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