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Law Court: Insurers Lose Control of Defense if Defending Insured Under Reservation of Rights

BY LANCE E. WALKER

In perhaps what amounts to one of the most significant insurance coverage decisions in the last 25 years, the Law Court held in *Patrons v. Harris*, 2006 ME 72, (June 16, 2006) that an insurer who defends under a reservation of rights relinquishes complete control of the defense including the ability to prevent a stipulated judgment from being entered into between the insured and plaintiff. The full scope of the impact of the Law Court's decision will not be known for some time. However, what is clear is that insurers need to carefully evaluate the strength of potential coverage defenses and advance them in a manner that mitigates the impact of the *Patrons* rule or avoids it altogether.

Background

The factual and procedural history of *Patrons* is divided into two categories. The first category relates to the events in the underlying case of *Luce v. Harris*, Docket No. CV-2002-149 (Penobscot County Superior Court), which culminated in the entry of a judgment in favor of Luce against Harris without Patrons' participation and over Patrons' objection. Patrons sought to defend Harris on the merits and then moved to intervene and was not permitted to do either.

The second category relates to the subsequent reach and apply action brought to enforce that judgment against Patrons. The reach and apply action involved the actual evidentiary hearing regarding the substantive coverage issue of "permissive use" and the legal arguments relating to whether the circumstances surrounding Luce's obtaining of the judgment against Harris allows that judgment to be enforced against Patrons.

Underlying Action

In May of 2000, Darrell Luce, Jr. was struck and injured by a truck owned and insured by David Ferguson and driven by Preston Harris. Patrons insured David Ferguson under a personal auto policy. Mr. Ferguson had let his son, Kurt Ferguson, borrow his vehicle. Preston Harris, a person who lived in the same neighborhood as Kurt Ferguson, went with Kurt Ferguson to a party at the location where Luce was injured.

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Upon being notified of the accident, Patrons' investigation constituted various statements including a recorded interview of Preston Harris. Harris acknowledged that he was "extremely drunk" and that "several parts of the night were blocked out."

After conducting this investigation, including the interview with Preston Harris, counsel for Patrons wrote to Preston Harris advising him of the coverage issues that were presented and repeatedly requested a statement under oath. Luce then filed a complaint against Harris, and Patrons expressly advised Harris that it was retaining counsel to defend him in the action subject to a reservation of rights. Patrons again reiterated that it remained unclear to Patrons whether Harris was even asserting coverage under the policy. Counsel for Patrons also made the same

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request of Harris to submit to an examination under oath on at least three other occasions, to no avail.

Immediately after agreeing to assume the defense of Harris under a reservation of rights, Patrons learned that Luce and Harris, through their respective attorneys, intended to enter into a stipulation pursuant to which Harris would default on liability and would not contest any hearing on damages. Patrons objected to any such default and stipulation and filed a motion to intervene, which was denied by the Superior Court. Patrons also filed a declaratory judgment action.

While the motion to intervene and the separate declaratory judgment action were pending, Luce and Harris entered into the stipulated entry of judgment against Preston Harris. The stipulation expressly stated that the judgment would not be enforced against the defendant personally but only against any applicable insurance.

Reach and Apply Action

Luce as a judgment creditor then brought a reach and apply action against Patrons to recover the judgment. Patrons asserted a number of defenses, including breach of the insurance contract by Harris, the fraud and collusion defense under the reach and apply statute, and the defense that Patrons was denied a meaningful opportunity to litigate any issues in the underlying action and therefore could not be bound to the judgment without a denial of due process. Following a trial in the reach and apply action regarding the substantive coverage issue of permissive use, Justice Mead found that Harris was a permissive user and therefore coverage existed. Although Harris was by his own admission extremely drunk and did not have a driver's license, the Court essentially carved out an emergency doctrine to the permissive use issue. The Court did not give any weight to the fact that the "emergency" may have been of Harris' own making when they were confronted by a hostile crowd of people at a party.

More significantly, the Court rejected Patrons' argument that it could not be bound by the judgment because Patrons lacked a meaningful opportunity to contest liability and damages. Patrons appealed these issues to the Law Court.

The Law Court Treatment

Although the substantive coverage aspect of *Patrons* was less significant than the Court's holding regarding the consequences of defending under a reservation of rights, it nevertheless represents an important development. The Court held that based on the exigency of a confrontation at the party Harris and Ferguson were attending, when an angry crowd ordered them to leave the party or else suffer bodily injury, Harris had a reasonable belief that he was entitled to use the vehicle even if Harris did not inform Ferguson that Harris did not hold a valid driver's license. The Court reasoned that in the heat of the moment there was no time for Harris and Ferguson to converse about whether Harris should or shouldn't drive because he was unlicensed.

The Court did not discuss whether such an exigency of the purported insured's own making would alter the Court's conclusion, and, if so, what that would mean in terms of the lower court's responsibility in determining who is the antagonist in these drunken imbroglios. One presumes that the Superior Court bench would not welcome such a responsibility although it is an issue that will have to be resolved in future cases. The Law Court also disregarded the fact that Harris had obtained the keys only a few minutes earlier before they drove to the party and when there was no such emergency situation.

How Meaningful is Your Meaningful Opportunity to Be Heard?

Patrons argued that it could not be bound by the stipulated judgment because it was denied due process when not allowed to participate in the underlying litigation. The Court rejected this argument and embraced the rule advanced by only two other jurisdictions. That rule provides that an insurer who reserves the right to deny coverage cannot control the defense of a lawsuit brought against its insured by an injured party. In other words, if the insurer has reserved its right to deny coverage, the insurer cannot compel the insured to surrender control of the litigation, nor can it contest a settlement between the insured and Plaintiff.

The Court determined that this position strikes a fair balance in the tension between insurer and insured when potential coverage defenses exist. The Court applied the two bites of the apple analogy. If the insurer could continue to control the insured's defense by reserving its rights to later deny coverage, it could assert a liability defense and insist on fully litigating the insured's case, thus exposing the insured to personal liability if there is a verdict favorable to the claimant. If the verdict is favorable to the claimant, the insurer still has another opportunity to avoid liability on the policy by doing exactly as Patrons did here, litigating coverage in a declaratory judgment action. As such, the Court held that the insured risks financial catastrophe if he is held liable while the insurer may save itself by litigating both issues – the insured's liability and coverage defense – and winning either.

The Court found that Patrons had a "meaningful opportunity" to participate when it chose to defend under a reservation of rights. At that moment Patrons

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put all of its eggs in the coverage basket and voluntarily chose to forego its ability to control the defense of the underlying action. Patrons still reserved its coverage defenses and could argue them in the context of a reach and apply action or declaratory judgment action.

The constitutional principal of due process is a very low threshold to meet and does not require exhaustive process, only that process which is due under the circumstances. The Court believed the choice insurers have between defending their insured unconditionally or arguing coverage defenses satisfies the due process requirement, especially if the insurer has the right to challenge the reasonableness of any resolution.

Limitations of *Patrons v. Harris* Rule

The Court limited the effect of these types of stipulated judgments by holding that they are binding on the insurer only to the extent that the insured or the claimant can show that it is reasonable and only after coverage is deemed to exist. The stipulated judgment also must be non-fraudulent and non-collusive to be binding on the insurer under the reach and apply statute. That likely means at a minimum that the plaintiff and/or defendant must notify the insurer of the prospective settlement agreement and give the insurer a reasonable opportunity to withdraw its reservation of rights.

Although the Court held that the lack of cooperation by an insured is not dispositive on the issue of collusion, it is a relevant factor. Presumably, that means that if an insurer defends under a reservation of rights at least in part due to the insured's failure to cooperate with the insurer's investigation of coverage issues, the judgment may not be binding on the insurer.

Although the Court held that covenants not to execute are still permissible as a general proposition, they are not dispositive on the issue of whether the terms of the settlement and amount of damages were reasonable based on the *merits* of the plaintiff's case. The Court remanded the case to the Superior Court for Luce to make the showing of reasonableness and for the Court to determine whether the settlement was collusive.

Unresolved Issues

One significant issue raised by *Patrons* is whether an insured who fails to cooperate, which precipitates a reservation of rights letter, is allowed to invoke the *Patrons* rule. Allowing an insured who breaches his cooperation obligation to benefit from that breach would be indulgent and not supported by any principled policy rationale. Rather than creating a new appendage to the *Patrons* rule dealing with this situation, the Court seems to indicate that lack of cooperation by the insured may constitute collusion, which is a defense under the reach and apply statute. In light of the fact that Patrons did everything that the Law Court has required insurers to do when faced with potential coverage issues and the duty to defend, this would seem to be the wiser practical course.

Another unresolved issue involves what effect a reservation of rights as to only a portion of a claim has on the applicability of the *Patrons* rule. It seems unlikely that the Court will allow an insured to stipulate to judgment on claims that the insurer expressly states are covered. The most common context in which this is likely to occur is in construction cases under CGL policies, where the coverage issues apply only to certain elements of the claim.

What factors are relevant to the so-called "reasonableness hearing"? It appears from the *Patrons* decision that whether a stipulated judgment was reasonable will be informed by what a reasonably prudent person in the insured's position would have settled for on the *merits* of the claim assuming an interest in the outcome. The logical conclusion is that the existence of a covenant not to execute does not by itself make every stipulated judgment reasonable. The court acknowledged that an insured being defended under a reservation of rights might settle for an inflated amount or capitulate to a frivolous case merely to escape personal exposure or further annoyance. As such, if the covenant not to execute was the *sine qua non* of a reasonable judgment, there would be no need for a reasonableness hearing related to the merits of the underlying case including the terms of the settlement and amount of the damages as the Law Court now requires under *Patrons*. As such, a relatively heavy burden falls on the plaintiff to be able to support the reasonableness of such stipulated judgments, and perhaps a covenant not to execute serves as a red flag that the settlement is not the product of a normal, arms-length negotiation.

What are the consequences of the stipulated judgment being found unreasonable? There is some authority in other jurisdictions that an unreasonable judgment is unenforceable in its entirety and cannot simply be resuscitated in a second attempt by plaintiff and insured to find a "reasonable" amount that will be binding in the reach and apply action. The *Patrons* decision indicates that insurers will not be bound by judgments found to be unreasonable, but also states that a claimant may recover only that portion he proves reasonable. These are somewhat inconsistent statements requiring clarification in future cases.

Measuring the Odds

Although the significance of the general rule enunciated by *Patrons* cannot be overstated, it also should be understood in the context in which it arose and by reference to the limitations and qualifications previously discussed. As a practical matter, the category of cases where such deals may be attractive to plaintiffs are relatively narrow in scope and are likely to include some combination of the following factors:

- Collection problem insured (*i.e.*, covenant not to execute not giving up anything of value);
- Thin liability (*i.e.*, settlement escapes high risk of outright loss);
- Winnable coverage arguments from the standpoint of plaintiffs (*i.e.*, no downside to letting insured with assets escape exposure); and
- Plaintiff's counsel who is willing to litigate coverage issues.

Plaintiff's counsel run a substantial risk in striking these deals if these conditions do not strongly support it.

What Now?

The inescapable irony of the Court's decisions is that Patrons was penalized for complying with all of the restrictive coverage principles relating to the duty to defend and the timing of disputing coverage issues the Court has imposed on insurers over the last 25 years. No doubt some insurers may see very little distinction in the consequences of refusing to defend an insured and defending an insured under a reservation of rights, thereby making an outright declination of coverage a more frequent occurrence than it has been historically. However, the *Patrons* Court held that defending under a reservation of rights was not a breach of contract, and therefore the consequences of denying a defense outright when one was in fact owed has the potential of more serious consequences than simply defending under a reservation of rights, even if the end result is a default or stipulated judgment against the insured for which the insurer may have to answer.

Conclusion

Managing the *Patrons* rule in your day to day claims handling operations will require new thinking and new approaches, particularly to coverage evaluation and coverage litigation. However, with a thoughtful case by case approach, insurers can mitigate the impact of or avoid altogether such settlement agreements. □

Workers' Compensation and Termination for Fault: Does it Matter?

By Stephen W. Moriarty

It has been recognized for decades that employee fault in bringing about the occurrence of a work-related personal injury is irrelevant, and that the compensation remedy is a "no-fault" concept. As the leading commentator has written:

> The typical workers' compensation act has these features: ...(b) negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his or her rights and in the sense that the employer's complete freedom from fault does not lessen its liability.

Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, § 1.01 (2006). By statute the impact of fault is limited to a small number of carefully defined situations. No benefits may be awarded for an intentional injury or an injury that is caused by voluntary intoxication. 39-A M.R.S.A. § 202. Benefits may be forfeited in the event of a refusal to participate in a properly scheduled Section 207 examination. Finally, an employee serving a sentence of incarceration following a criminal conviction is disqualified from receiving benefits while incarcerated. 39-A M.R.S.A. § 203. The Law Court has been completely unwilling to expand the circumstances in which employees may lose benefits through fault.

The potential role of employee fault in causing a post-injury termination with the resulting loss of income was litigated under the predecessor statute to the current workers' compensation act. In *Cousins v. Georgia-Pacific Corp.*, 599 A.2d 73 (Me. 1991) the Law Court held that an employee terminated for dishonesty was not thereafter disqualified from receiving benefits for partial incapacity. In *Cote v. Great Northern Paper Co.*, 611 A.2d 58 (Me. 1992), the Court held that an employee who failed a required drug screening test did not thereby refuse an offer of reinstatement and therefore did not forfeit the right to continued compensation. In both cases the claimants were still physically limited by virtue of their injuries, and in both cases the Court declined to judicially expand the statutory penalties for misconduct. Thus, as the Court concisely observed:

> Pursuant to former Title 39, an employee's termination for fault does not constitute grounds for discontinuing workers' compensation benefits. *Bernard v. Mead Publishing Paper Divison,* 2001 ME 15, ¶ 9, 765 A.2d 576, 579.

The issue seemed well-settled prior to the effective date of the Workers' Compensation Act of 1992.

In the new law, however, fault for the first time emerged as a potential issue in instances of post-injury termination. In somewhat cryptic language, § 214(1)(D) of the statute sets forth entitlement to partial where an employee has been employed for 100 weeks or more but "loses that job through no fault". In similar fashion, § 214(1)(E) details entitlement for an employee who has been working for less than 100 weeks but "loses the job through no fault". From this language employers have drawn an inference that an

employee who does lose post-injury employment through his or her fault is disqualified from receiving benefits for partial.

The issue was first addressed in a peripheral manner in *Bureau v. Staffing Network, Inc.*, 678 A.2d. 853 (Me. 1996). In that case the claimant returned to work and was eventually terminated for unspecified performance problems which were not related to an earlier injury. In a decision citing *Cote* and *Cousins*, *supra*, the Court held that termination for cause was not equivalent to the refusal of an offer of suitable employment pursuant to § 214(1)(A). Accordingly, an award of benefits following termination was affirmed.

Two years later the issue arose in the case of an employee terminated for non-compliance with company policies. Although the hearing officer found as a fact that the claimant had lost her job as a result of her own fault, the hearing officer refused to find that the employee was disqualified from receiving partial under § 214(1)(E), and ongoing benefits were awarded. On appeal only six members of the Law Court participated in the decision, and they divided equally on the meaning of the statutory language. Accordingly, the decision of the hearing officer was affirmed. *Webber v. Cyro, Inc.*, 1998 ME 149, 711 A.2d 157 (Memorandum Decision).

Matters rested in this uncertain state until the Court issued two opinions in mid-June of this year. In *Williams v. Tyson's Food, Inc.*, 2006 ME 66 (June 12, 2006), an employee with post-injury restrictions was terminated for chronic tardiness associated with childcare problems. The employer argued that the resulting loss of income was due to the employee's fault, and that the right to receive partial had been forfeited. The Court found the language of § 214(1)(E) to be ambiguous and attempted to examine legislative intent. Although the Court found that § 214 is derived from a Michigan counterpart, it concluded that the Michigan statute is distinguishable and offers no guidance in interpreting the Maine Act. Ultimately, the Court held as follows:

> Neither the plain meaning of the statute nor the legislative history discloses an intent that section 214(1)(E) should be construed to effectuate a forfeiture of workers'compensation benefits when an employee is fired from post-injury employment for cause. ¶ 19.

The hearing officer had analogized "fault" within the meaning of § 214(1)(E) with "misconduct" as defined in Maine's Employment Security Law. Specifically, that statute defines "misconduct" as "a culpable breach of the employee's duties or obligations to the employer or a pattern of irresponsible behavior, which in either case manifests a disregard for a material interest of the employer". The hearing officer found that the childcare problems did not constitute culpable or irresponsible behavior. The Court then affirmed the hearing officer's conclusion that the employee's conduct "did not rise to a level that might deserve a reduction or cessation of benefit pursuant to § 214(1)(E)". ¶ 20.

In effect, the Court left the door open to the possibility that serious misconduct rising to the level of a breach of duty or of clearly irresponsible behavior might justify a forfeiture. Just three days later, the Court issued a second opinion which involved more serious misconduct. In *Flickinger v. Oakhurst Dairy*, 2006 ME 69 (June 15, 2006), the employee assaulted a co-worker and threatened his supervisor with physical violence if his claim were not paid. He was fired as a result. The Board ultimately awarded benefits for total incapacity for a closed period.

On appeal the employer argued that the provisions of either § 214(1)(D) or (E) further disqualified the employee, but the Court pointed out that benefits for total and not partial had been awarded, and that § 212 does not contain any language regarding fault. Therefore, the award of benefits was upheld.

The unresolved and intriguing question is whether the extreme degree of fault in *Flickinger* would have disqualified the employee from receiving partial benefits. Given the persistent uncertainty, Chief Justice Saufley filed a blunt and concise concurring opinion agreeing with the result but pointing out the inherent difficulty with the statutory language. As she wrote:

> I write separately to note that, in this area of law created entirely by legislative action, issues related to termination for fault generate substantial confusion and litigation. Employees and employers alike would be well-served by legislative action clarifying the ramifications, if any, of an employee's termination caused by his or her own fault.

In effect, the Chief Justice has issued an extraordinary appeal to the legislature for action to unmistakably resolve the weight to be given to fault in post-injury termination. When the legislative reconvenes following the 2006 elections, it will be difficult to ignore this direct call for explicit clarification. □

The Jury Trial: To Be or Not To Be . . .

By Jonathan W. Brogan

The jury trial is the foundation of Anglo-American jurisprudence. It is a fundamental tenet of our personal freedom guaranteed by the Magna Carta, United States Constitution and the Maine Constitution.

Yet, increasingly, commentators and observers of the American justice system have noted that a jury trial is becoming a rare event. The numbers of jury trials held in the United States has dropped off radically in the last twenty years. In Europe, the jury trial is essentially a thing of the past. Except in criminal cases, and then mostly only in England, juries are no longer called upon to make decisions involving their fellow citizens.

Why has this happened? Many point to the rise of alternative dispute resolution, judicial animosity towards jury trials, and summary judgment practice as reducing the number of jury trials in the United States. Clearly, all of these factors have reduced jury trials.

There appears, however, to be something more basic and fundamental occurring. Juries are no longer trusted. Commentators are heard to deride the decisions of juries and when someone mentions "the *McDonald's* case," everyone immediately pictures runaway juries awarding huge sums of money to people who are undeserving or simply dishonest in manipulating the jury system.

Young lawyers with significant jury trial experience, outside of the criminal arena, are very rare today. Anyone under the age of thirty-five who has tried more than ten civil jury trials is considered very experienced. It is not unusual for a "litigator" to not try a civil jury case for years. Needless to say, those who rely upon civil trial lawyers for advice and knowledge have a shrinking pool of experts at their disposal. Most, if not all, decisions regarding the value of cases for settlement are based upon knowledge of what a jury in a specific geographic area may do. It goes without saying that if there are less people with that experience then there will be less good advice regarding the actual value of cases.

Additionally, defendants, and insurance carriers, have become increasingly cautious about juries. The descriptions of runaway juries and baseless jury verdicts make all risk managers nervous. The interesting thing about the insurance industry is that risk is something that must be managed and therefore, leaving the fate of any case in the hands of nine strangers is, necessarily, antithetical to the training of any insurance professional.

We all have heard many times, both from judges and the plaintiffs' bar, that any time a case goes to trial, it is a failure. It certainly would be a failure for any plaintiff's attorney to take a case in which liability was difficult, and damages sketchy, to trial. Those are the cases that every plaintiff's lawyer wants to, and should, settle. Those, however, are the cases in which every risk manager should try.

No one would suggest that every case has to be tried. Anyone who has attended a judicial settlement conference understands that everyone in the system prefers a settlement to a trial. A trial is a difficult, lengthy procedure. Jurors have to be impaneled and the jurors themselves do not want to leave their jobs and families. The courthouses, on jury selection day, are filled with unhappy people whether they be judges, lawyers, clerks, or jurors.

Yet, when a jury is finally impaneled, a magical transformation seems to occur. Jurors for the most part enjoy listening to cases and making decisions. They view their duty solemnly. They make decisions based on evidence and facts, not on raw emotion and bias. They understand that witnesses take oaths to tell the truth and they take oaths to decide the case based on the evidence presented to them and the law given to them by the judge.

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Admittedly, there is risk in any jury trial. Anyone who has ever presented a case to a jury understands that it never goes exactly as planned. Every experienced trial lawyer has numerous "war stories" about jurors, jury trials, and the complications that happen when nine strangers are put together to decide a case. Nonetheless, it is uncanny how often jurors get it right.

Clearly, there are cases in which juries can become overwhelmed. Extraordinarily technical arguments or complicated legal theories can bog down any jury. These types of cases are relatively rare and should not serve as a deterrent to adopting a more accepting approach to trying cases. Risk professionals should view juries as a tool that can help them reduce their risk and reduce the number of groundless claims that are made every day.

As an example, over the past thirty years, the rise of whiplash, "minor" traumatic brain injury, and chronic nonobjective pain cases have risen, because they have been advanced by the plaintiffs' bar and willing medical professionals. Billions of dollars have been collected for these cases. Had more of them been tried to a jury, substantially less would have been collected. This is because the average juror is more skeptical of non-objective claims than are the attorneys and doctors who see and work with these claims every day. In that way, juries serve as a reality check to those who are unable to see the forest because of their familiarity with the trees.

Any plaintiff's lawyer reading this article will point out to the insurance professionals that I am not an unbiased observer. Clearly, more jury trials will lead to higher defense costs. Higher defense costs will benefit defense lawyers, like myself.

That argument, however, has little merit. The insurance industry controls its defense costs in a myriad of ways. There are more computer programs analyzing defense lawyers' billable hours than there are reasoned studies of the costs of settling a no damage rearend whiplash case. When an insurance carrier makes the decision to begin to try more cases with questionable liability and fanciful damages, the carrier will lower its indemnity payouts. In comparison to defense costs, indemnity costs mount much more quickly. Without the real threat of a vigorous defense and a jury, indemnity payments skyrocket.

So should every case be tried? Of course not. That being said, the fact that a case has the possibility of huge damages should not be a deciding factor on whether a case goes to trial. If there is little chance of a reasonable jury's finding against the defendant, then an insurance professional should "risk" a jury. Not every case will be won. Some cases that appear to be sure winners will be lost. In the long run, however, juries will do the right thing and the system will prove, again, that it works and is the best way to ensure a just and reasonable civil justice system. □

New Associate: Ann M. Freeman

We are pleased to announce that Ann M. Freeman joined the firm in May 2006 as an associate attorney. Ann has worked closely with Peter DeTroy and Russell Pierce in the general liability group.

Ann was raised in Bowdoinham, Maine and graduated from Dartmouth College in 1997, with a major in Environmental Geology and a concentration in German and Environmental Studies. Her senior thesis, titled "The Contribution of the Claremont, New Hampshire Incinerator to the Trace Metal Deposition in its Vicinity" was published in *Water, Air, & Soil Pollution*.

The following two years were exciting ones for Ann when she moved to Switzerland, to teach at Chalet Hohliebi, an international school in Europe. Ann taught a residual program to 7th and 8th grade students, which included outdoor environmental education. During the summer months, she was the program manager for ESL Camp (English as a Second Language). Ann took advantage of her time off and traveled to many European countries during this period of living abroad.

Following her return to Maine, Ann accepted a position at the Nature Conservatory in Brunswick. She also taught earth science at the Middle School in Topsham and was an executive assistant of the Maine T.R.E.E. Foundation (Timber Resource & Environmental Education), where she enjoyed educating teachers about Maine's working forest.

Ann then attended Vermont Law School and earned a JD as well as Masters Degree cum laude in environmental law. While in school she was a member of the National Moot Court Team and competed in national competition in New York City.

Before joining Norman, Hanson & DeTroy, Ann spent a semester clerking at the Vermont Prisoners' Rights Office in Montpelier, and also worked one summer at the Conservation Law Foundation.

ANN M. FREEMAN

Ann and her husband Josh reside in Portland with their daughter Francesca. □

Three recent Law Court decisions

By David P. Very

Defendant allowed to contest liability without appearing at trial

Can a civil defendant contest liability through his counsel without appearing at trial? In *Owen v. Healy*, 2006 ME 57 (May 12, 2006), the Law Court answered that question in the affirmative.

Charlotte Owen brought a lawsuit against defendant Shawn Healy as a result of an automobile accident. Mr. Healy was not personally present at trial, although his counsel was present. Upon learning of Mr. Healy's absence, the trial court stated that the defendant was in default and the allegations of the complaint were taken as admitted, to include the defendant's negligence. The Court then proceeded with a hearing on damages and entered an award in favor of the Plaintiff.

On appeal, the Law Court noted that there is no legal obligation that a party to a civil action be present at trial. The Court stated that if the opposite party wants to assure a party's availability to be called as a witness, that party must take steps to compel the attendance of a witness through subpoena or otherwise. Therefore, the Court held that a party may not be defaulted if represented by counsel at trial.

The Court further noted that if a party does not appear at trial, it is appropriate for the jury to be instructed that it may draw an adverse inference from a party's choice not to appear. The Court noted that evidence of a party's unexplained failure to appear in person is highly relevant and probative evidence at trial. However, it does not justify a default that avoids trial where the missing party is represented by counsel.

Workers' compensation immunity for temporary employees

Spencer Penn was an employee of Manpower, an employment agency, and was assigned to work at FMC Corporation's Rockland facility. Manpower paid Penn for his work, and FMC paid Manpower a fee for Penn's services. Penn contended that other Manpower employees had been employed at FMC for more than a year prior to Penn's assignment. Penn worked at FMC for over seven months before being injured on the job. Penn sought and received workers' compensation benefits for his injuries under Manpower's workers' compensation policy.

Penn then filed an action asserting negligence against FMC. The Superior Court held that FMC was immune from suit under the provisions of the Workers' Compensation Act, which provides for employer immunity from civil suits brought by the employees of temporary help agencies under contract with the employer.

On appeal, in *Penn v. FMC Corporation*, 2006 ME 87 (July 19, 2006), Penn conceded that an employer that contracts with a private employment agency for temporary help services is, as a general rule, immune from a civil suit brought by an employee of the private employment agency for work place injuries so long as the agency has secured workers' compensation protection for the employee. Penn argued, however, that the legislature, by using the word "temporary," intended for a time limitation to inhere beyond which a worker's temporary employment no longer qualifies as "temporary" and the employer's immunity from suit no longer applies. Penn asserted that at least two other Manpower employees were working at FMC on a long-term basis and that he believed his employment at FMC was not temporary because he was never informed to the contrary. He argued that these allegations established a genuine dispute of material fact as to whether he was

DAVID P. VERY

engaged in "temporary help services" at the time of his injury.

The Law Court held, contrary to Penn's assertion, that the Workers' Compensation Act did not contain any temporal limit on a temporary employee's "temporary help services" assignment, nor did it require that a temporary services employee be explicitly informed that the assignment was temporary in order for the employer's immunity to be preserved. The Court found that neither the fact that Penn worked at FMC for approximately seven months at the time of his injury, nor the fact that other Manpower employees were assigned to FMC for periods greater than Penn's assignment, generated a dispute of material fact that if resolved in Penn's favor could negate FMC's immunity. The Law Court thus affirmed the summary judgment in favor of FMC on the grounds of workers' compensation immunity.

Jury awards and motions for additur

Plaintiff Linda Provencher's vehicle was rear-ended by a vehicle driven by defendant Peter Faucher. Provencher was treated for a neck injury as a result of the accident. She had pre-existing neck problems at the time of the acci-

dent. The parties stipulated that Provencher's medical expenses following the accident were $11,312.08. The parties did not stipulate as to causation relative to the medical expenses, i.e., that all the medical expenses were proximately caused by the accident. The Defendant also alleged that the plaintiff was comparatively negligent.

Following the trial, the jury found that plaintiff was negligent in bringing about the accident, but that her negligence was less than the defendant. The jury further found that plaintiff's total damages were $11,312.08, reducing this amount to $6,787.25 because of her comparative fault. After judgment, the trial court denied the plaintiff's motion for a new trial and/or additur, holding that the jury's assessment of damages did not reflect any impropriety and was not irrational given the evidence of pre-existing symptoms and complaints.

On appeal, in *Provencher v. Faucher*, 2006 ME 59 (May 19, 2006), the plaintiff argued that it was beyond dispute that the jury's award of total damages consisted solely of medical expenses because it matched the stipulated medical expenses to the penny. Plaintiff argued that the jury could not have believed that the plaintiff was injured, which it apparently did, without also believing that she suffered some pain and suffering as a result of the accident.

The Law Court disagreed that the jury's total damages award was "necessarily" an award of medical expenses alone, even though it matched precisely the stipulated medical expenses. The Court noted that the verdict form asked the jury to list the plaintiff's total damages and they were not asked to itemize damages by category. Thus, the Court held that it was "difficult" to tell whether the jury actually awarded the plaintiff only her medical expenses or whether it intended to award some amount for pain and suffering, once again, even though the award was the exact same amount of the medical expenses.

The Law Court held that the jury could have believed that at least part of the reason that the plaintiff sought pain relief treatment following the accident was due to her pre-existing condition. The jury could have decided to exclude some of her medical expenses from this award and award her some amount for the pain and suffering she experienced as a result of the accident. The Court stated that the award of damages claimed may have been a "convenient" means by which the jury included damages for pain and suffering, while disallowing some of the claimed damages. As a result, the Law Court affirmed the jury's verdict and affirmed the denial of an additur to the verdict. □

Briefs/Kudos

ROD ROVZAR recently addressed groups of Credit Union directors in Portland and Bangor. Rod's seminar, produced by the Maine Credit Union League, focused on the many rules and regulations governing the activities and responsibilities of volunteer Board members. The programs were well attended and the League has been asked for more programs of a similar nature in the months ahead.

STEVE HESSERT spoke at the annual SEAK National Workers' Compensation and Occupational Medicine Conference held in Hyannis, Massachusetts. Steve spoke on investigating and defending psychological injury claims, and also conducted a day-long preconference workshop on the basics of workers' compensation law.

PETER DeTROY and **MARK LAVOIE** were listed once again in *Chambers USA*, an annual publication profiling leading attorneys for business in the nation. Peter was credited for his "versatility and great instincts" and was described as "well versed in all kinds of civil litigation, criminal defense, professional liability and insurance matters". Mark was praised for having done a "superlative job in complex cases", with a focus on civil litigation, medical malpractice defense, and professional liability matters.

ANN JORDAN drafted ground-breaking legislature to allow courts to include pets within the scope of protection from abuse orders in domestic violence. The legislation was passed and signed into law this past session, and Ann has been interviewed by the Canadian Broadcasting System, the Chicago Tribune, the New York Times, the International Herald Tribune, and the American Bar Association Journal. Ann has been invited to speak at a major conference on domestic violence and Maine's new statute to be held in Canada in October.

STEVE MORIARTY has been elected to a sixth one-year term as chairman of the Cumberland Town Council.

DORIS CHAMPAGNE spoke at a recent seminar on "Advanced Workers' Compensation in Maine" sponsored by Lorman Education Services.

JOHN VEILLEUX has been elected to the Casco Bay Hockey Association Board of Directors and will serve as the Initiation Coaching Director.

The golf team consisting of **LANCE WALKER, JOHN VEILLEUX, JIM POLIQUIN**, and **ROD ROVZAR** participated in the Maine Credit Union League's annual charity golf tournament at Val Halla Golf and Recreation Center in Cumberland. The tournament raised a record $22,000 for the Maine Credit Unions' Campaign to End Hunger in Maine. □

Workers' Compensation- Law Court and Board Decisions

By Stephen W. Moriarty

Notice of Controversy

Last year, in *Bridgeman v. S. D. Warren Company*, 2005 ME 38, 872 A.2d 961, the Law Court upheld Ch. 1, §1 of the WCB Rules and its serious consequences for the late filing of a NOC. As is well known, the rule requires an employer "within 14 days of notice or knowledge of a claim for incapacity or death benefits" to either pay benefits or file a NOC, and in the event of a late NOC benefits must be paid retroactive to the beginning of the period of incapacity.

In a recent decision, the Court emphasized that an actual claim for benefits is a necessary prerequisite to the duty to file a NOC. In *Pearson v. Freeport School Department*, 2006 ME 78 (June 27, 2006), a school teacher advised her principal in May 2002 that she had recently been hospitalized for depression and requested a leave of absence for the upcoming academic year. Her request was granted, and the leave of absence began approximately three months later. In January of the following year, while she was out on leave, the employee advised the business manager that she was out due to occupational stress, and a timely First Report and NOC were filed. Ultimately, the employee's claim for benefits was denied upon the merits, but the employee asserted that retroactive benefits should have been awarded because a NOC had not been filed following the initial conversation with the school principal.

The Court held that while the school was aware of the possible occurrence of an injury in May 2002, the employee did not make a claim for compensation at that time. The Court observed that Rule 1 does not require an employer to controvert the mere occurrence of an injury but rather imposes the duty to controvert upon the assertion of a claim. Because the employer was not aware of a claim for compensation until January 2003, the NOC filed within 14 days of knowledge was found to have been timely.

Of course, it may not always be clear in any given case when a "claim" for compensation has been asserted. While the Court held that a petition or similar formal filing is not necessary, it observed that some type of actual request for benefits must be made by the claimant. Citing *Carroll v. Gates Formed Fibre Products*, 663 A.2d 23 (Me. 1995), the Court ruled that an employer must have knowledge of an obligation to pay incapacity benefits before the duty to file a NOC arises. The knowledge can be acquired either directly from the claimant or from "the circumstances of the injury". Because the necessary knowledge may be only implicit or inferred, it is therefore recommended that a NOC be filed whenever in doubt.

There was another significant aspect of the opinion. The initial NOC resulted in an unsuccessful mediation, and several months later petitions were filed. At that point the employer erroneously believed that it was in violation of Rule 1, and a brief period of benefits was paid coupled with the filing of a MOP and a new NOC. The employee claimed that the filing of the MOP required payment of benefits retroactive to the onset of incapacity in accordance with *Bridgeman*, but the Court disagreed. Essentially, the Court found that the second NOC was redundant and unnecessary, and that the payment of benefits pursuant to the MOP merely reflected "over-compliance with the rule." Several years ago, it had been held in *Croteau-Robinson v. Merrill Trust/Fleet Bank*, 669 A.2d 763 (Me. 1996), that the continued payment of full salary following the filing of a NOC

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was not equivalent to the acceptance of the compensability of the injury, and did not invalidate the NOC. In *Pearson*, the Court extended this rationale and held that the mistaken and unnecessary payment of disability benefits following a timely NOC was without legal significance and did not compel the employer to pay benefits retroactive to the onset of the claim.

Employer Premises

It has long been recognized that injuries sustained while traveling to and from the place of employment are not compensable. Known generally as the "going and coming rule", this doctrine protects employers from workers' compensation liability for injuries sustained while a claimant is merely exposed to the same risks as those faced by the traveling public generally. It is generally understood, however, that once the business commute is over and a claimant has arrived upon employer premises, injuries occurring from that point forward are not subject to the rule. Therefore, before the rule can be invoked it is necessary to determine where the employer's premises begin, and a recent decision from the Maine Supreme Judicial Court illustrates how difficult that determination can be.

In *Fournier v. Aetna, Inc.*, 2006 ME 71 (June 16, 2006), the claimant was employed by Aetna and worked in office space leased by Aetna in several floors of a high-rise office building in Portland. Aetna did not own or maintain the building, and the landlord from whom the space was leased had a contractual obligation to remove ice and snow from outside common areas, such as stairways and paved surfaces. On the date of injury the claimant left to take a half-hour unpaid lunch break, and slipped and fell while returning on an outside staircase leading to the building entrance. She claimed workers' compensation benefits for the personal injury sustained as a result.

The presiding hearing officer determined that the scope of the employer's premises includes any areas in which its employees have "some kind of right of passage", as with stairs, elevators, lobbies, hallways, etc. The hearing officer then found that the staircase in question was part of the employer's premises, and that because the employee was located upon employer premises at the time of the injury, the "going and coming rule" did not apply. It was also held that the injury arose out of and occurred in the course of employment, and benefits were awarded accordingly.

The Law Court accepted the case for review, and noted that the key issue was whether the stairway leading to the building fell within or without "the bright line of the employer's premises". The Court observed that a majority of jurisdictions include common areas within the place of employment, and held that the hearing officer's refusal to apply the "going and coming rule" was reasonable and did not misconceive the law. Accordingly, because the common staircase was determined to be part of the employer's premises, the hearing officer's decision was affirmed.

Aetna also challenged the compensability of the injury on the grounds that the employee was returning from an unpaid lunch break and was not performing any employment-related responsibilities at the time of the incident. Aetna argued that the risk presented by the stairs was unrelated to the claimant's employment and that she was not under the control of the employer at the time of injury. While reciting the firmly-established definitions of "in the course of" and "arising out of", the Court relied upon the more generic criteria for compensability set forth in *Comeau v. Maine Coastal Services*, 449 A.2d 362 (Me. 1982) and affirmed the award of benefits. In determining that the injury was compensable, the hearing officer had found that the employee had not substantially deviated from her employment, had not violated any rules, was not reckless, and had not created any excessive risks of injury. The Court declined to review the hearing officer's analysis in detail, and did not suggest that the hearing officer was required or compelled to find compensability. Instead, the Court merely observed that the underlying decision was "neither arbitrary nor without rational foundation" and that therefore the conclusion was strong enough to withstand appellate review. The Court signaled that it would not substitute its own judgment where a hearing officer's decision was found to be rationally based and with sufficient support in the evidence.

As a result of this decision, the "bright line" that marks the beginning of an employer's premises has been extended further into the public streets or common areas to which employees have rights of access. The distinctions may not always be as clear as they were in *Fournier*, and the applicability of the "going and coming rule" will continue to turn upon the facts in each case.

Discrimination

At a meeting in early July, the full labor-management Workers' Compensation Board took the unusual step of voting to overturn the decision of a hearing officer in a key discrimination claim. In the matter of *Shaver v. Poland Springs Bottling*, the employee was terminated for violation of company policy after he reported the occurrence of a work-related personal injury on the day following the injury. The employer's policy actually required the immediate reporting of all injuries. The employee filed a Petition to Remedy Discrimination, which was denied by Hearing Officer Goodnough on the grounds that the employer's policy was neutral on its face and did not discriminate against the employee for an assertion of rights under the Act.

Late last year the Board accepted the case for review, and in a 4 – 3 decision the Board has now voted to reverse the Hearing Officer. In its written decision dated July 25, 2006, the Board relied upon the rationale of *Lindsay v. Great Northern Paper Company*, 532 A.2d 151 (Me. 1987), in which the Court found that disciplinary action following an absence related to a compensable injury was discriminatory. In addition, the majority noted that the Act provides a 90–day period for giving notice, and that the employer's policy could not, in effect, shorten the time period for giving notice as established by the Legislature. It is anticipated that the employer will pursue appellate review before the Law Court. ☐

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