NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
Fall 2001
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Who let the dogs out?

New Maine law may cloud homeowners' coverage issues

BY ANNE H. JORDAN

In what seems to be an annual occurrence, the Maine State Legislature has once again changed the law as it relates to the liability for damages done by animals. This year, the Legislature has included a new provision that greatly changes the liability for damages or injuries caused by a dog when the animal is not on its owner's or keeper's premises.

At a public hearing on March 1, 2001, and in a subsequent work session the week following, the Legislature's Agriculture Conservation and Forestry Committee heard intensive and often emotional testimony from persons who had been bitten, chased or terrified by animals. One reoccurring point in the testimony was the belief that there was no legal recourse for injuries sustained when an animal, and in particular a dog, inadvertently got off the owner's or keeper's property and caused the injury.

As a result, the Legislature repealed the prior law for damages done by animals, and enacted the following language making dog owners and keepers specifically liable for their animals' injuries to others, on or off their property:

1. When an animal damages a person or that person's property due to negligence of the animal's owner or keeper, the owner or keeper of that animal is liable in a civil action to the person injured for the amount of damage done if the damage was not occasioned through the fault of the person injured.

2. Injuries by dog. Notwithstanding subsection 1, when a dog injures a person who is not on the owner's or keeper's premises at the time of the injury, the owner or keeper of the dog is liable in a civil action to the person injured for the amount of the damages. Any fault on the part of the person injured may not reduce the damages recovered for physical injury to that person unless the Court determines that the fault of the person injured exceeds the fault of the dog's keeper or owner. 7 M.R.S.A. §3961.

The law became effective September 21, 2001.

As a result, owners or keepers are now responsible for any injury caused by their dog that occurs off their premises. This drastically changes the application of comparative fault previously permitted to determine damages. Under Maine's general comparative negligence standard, a jury is charged with determining and apportioning the relative degree of fault or responsibility for the damage. In an ordinary comparative negligence case, if, during the process of apportionment, the jury finds the plaintiff was either equally responsible for the damage sustained or more responsible than the defendant, then plaintiff may not be awarded damages.

INSIDE

The aftermath

The attorneys and staff at Norman Hanson & DeTroy join all Americans in expressing deepest sympathies to the families and friends who mourn the victims of the September 11 tragedies.

We have been moved and inspired by the heroism of the people involved in September's rescue and recovery, and of those who continue the dangerous work in New York.

Working together, we will restore our country's hope and conviction, and will re-affirm our national unity as Americans.

However, if the jury finds that the plaintiff's responsibility was less than the defendant's, it must first find and record the total damages recoverable to the plaintiff as if the plaintiff were not at fault. Jurors are then required to reduce the amount by dollars and cents, and not by percentage, to the extent the jury feels is just and equitable, taking into account the plaintiff's responsibility for the damages. See 14 M.R.S.A. §156.

With the new law for off-premises injuries by dogs, the court will now be required to alter its comparative negligence instruction as it relates to these types of injuries. First, the jury must determine whether or not the dog was off the owner's premises at the time of injury. If the dog was still on its property, then the regular comparative negligence standard applies.

If the jury determines however, that the dog was off the owner's or keeper's property when it injured a person, the Court must instruct the jury that the dog's owner or keeper is absolutely liable to the injured person for the total amount of the damages. This absolute liability does not consider whether or not the owner or keeper was responsible for the dog escaping the property.

No reduction in damages because of the comparative negligence or fault of the injured person is permitted, unless the Court determines that the fault of the injured person exceeds the fault of the dog's owner or keeper. Then and only then can the jury consider a reduction in damages.

This new law changes the rule on damage awards in off-premises dog injury cases. The previously applicable comparative negligence provisions have been tossed out. In its place, instead of prohibiting the award of full damages to the party equally or more at fault, the law now provides that damages will still be awarded to the injured party. Damages for physical injury may only be reduced if the fault of the person injured exceeds the fault of the dog's keeper or owner. The new law is silent as to emotional injury.

This subtle language change has the potential for drastic impact on the insurance industry in this state. While injury figures for the State of Maine are not separately available, according to studies from the American Veterinary Medical Association, the Center for Disease Control and Prevention and the Insurance Information Institute, there are approximately 4.7 million dog bites per year in this country. Nearly 800,000 people require medical treatment, and sadly, an average of 17 people a year, mostly young children and elderly people, die from injuries sustained as a result of dog attacks.

The property /casualty insurance industry paid roughly $310 million in damages in 1999 because of dog bites. Nearly one-third of all homeowners insurance liability payouts in 1999 were the result of dog bites or injuries.

The enormity of the problems and costs associated with dog bites have led many companies to consider changing their underwriting standards by either increasing premiums or eliminating the availability of homeowners coverage for owners of certain breeds of dogs. The company's actions are often well founded in fact. According to a study published in the June 2001 edition of the *Journal of American Veterinary Medicine*, ten breeds of dogs are responsible for 70% of dog bites and dog bite-related fatalities over the past 20 years. In descending order, the breeds that are considered the highest risks are Pit Bulls, Rotweillers, German Shepherds, Huskies, Alaskan Malamutes, Doberman Pinchers, Chows, Great Danes, St. Bernards, and Akitas.

Given Maine's new law, and the new liability exposure for dog owners or keepers, the question now becomes: What, if anything, should companies do to properly analyze and underwrite the nature of the risk of providing homeowners coverage for those who own or keep these kinds of dogs? Should new standards be established? Does the increased exposure justify increased premiums or refusal to provide coverage if a dog is in the home?

In examining the situation, companies should be aware that there is a movement in Augusta to submit legislation that would prohibit an insurance company from setting higher homeowner's premiums, or refusing to renew or insure homeowners because they own certain breeds of dogs. To date, only one state, Pennsylvania, currently prohibits a company from refusing to insure or increase rates due to the presence of a presumably dangerous type dog in the home. Other states, notably New York, Connecticut and Washington, have considered, but rejected, similar legislation. □

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

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Mandatory alternative dispute resolutions for cases filed after January 1, 2002

Various categories of cases may be excluded

By David P. Very

As many readers may have heard earlier this year, the Maine Supreme Judicial Court amended the Maine Rules of Civil Procedure to implement mandatory alternative dispute resolution procedures in the Superior Court. The new rules will affect the majority of cases filed in the Superior Court, with some exceptions. The new procedures will apply only to cases filed after January 1, 2002, and only to actions filed in the Superior Court or removed to the Superior Court from the District Court.

Pursuant to new Rule 16B of the Maine Rules of Civil Procedure, the parties, promptly after filing an answer, must confer and select an alternative dispute resolution process and a neutral third party to conduct it. They may decide on mediation, early neutral evaluation, or non-binding arbitration. The parties are free to choose whomever they desire as a third party neutral, although the State is in the process of training individuals to serve as court neutrals. If the parties cannot agree on a neutral, the Court will designate a neutral third party from the roster of court neutrals being developed. Fees and expenses of the ADR conference will be apportioned equally to each party. The rule does not address fees to be charged by the neutral, and fee arrangements are to be worked out by the parties and the neutral.

The parties must inform the court within 60 days of its scheduling order the date of the conference and name of the neutral. The ADR conference is to be held and completed within 120 days of the date of the scheduling order. Parties may move to extend this deadline for "good cause." Clearly this is important, as there are many cases in which ADR will not be effective until some discovery is conducted.

Individual parties and adjusters for insurance companies are required to attend the conference. However, if approved by the neutral, a party or an insurance adjuster may attend by telephone. If a lienholder is essential to settlement discussions, the parties may request that the neutral require the lienholder to attend. If the parties are unable to settle the case at conference, they are encouraged to enter into any stipulations and reach an agreement on what issues are in dispute.

The jury fee will be deferred until 150 days after the date of the scheduling order for all cases conducting an ADR conference. The expense of the conference is a cost of suit, which will be taxed as costs pursuant to any judgment in the case.

The new rule exempts various categories of cases from the ADR requirements. First, in actions for recovery of personal injury damages where the plaintiff requests exemption and certifies that likely recovery of damages will not exceed $30,000, the Court will waive mandatory ADR. This can only be initiated by the plaintiff and cannot be initiated by the defendant. Therefore, a plaintiff with a personal injury action of less than $30,000 can force the defendant to go to ADR. The Civil Rules Advisory Committee noted, "The choice is limited to the plaintiff, as it is the plaintiff's potential recovery and any resulting contingent fee that may be most impacted by ADR related cost increases." Of significant interest, where the plaintiff does seek an exemption by stating the likely recovery will not exceed $30,000, this estimate does not preclude a plaintiff, at trial or in any other forum where the claim is addressed, from seeking and recovering more than $30,000. Presumably, if the defendant wants to proceed to mandatory ADR, the defendant may challenge the plaintiff's estimate that damages are not likely to exceed $30,000.

Second, the rule does allow either party to file a motion with the Court

within 30 days of the scheduling order date to seek an exemption from the mandatory ADR procedure if the party can demonstrate good cause. The Court indicated, for instance, that the parties may persuade a court that "no ADR process is likely to deliver benefits to the parties sufficient to justify the resources consumed by its use." The Court specifically stated that exemptions are not automatic and will not be granted merely because both parties agree to waive the ADR requirement.

Third, the ADR requirement will not apply to medical malpractice or Maine Human Rights Act cases, or any other action where the parties had previously participated in a dispute resolution process. Finally, the ADR requirement will not apply to divorce actions, forcible entry and detainer actions, civil violation actions, small claims actions, 80B and C appeals, state tax assessor's appeals, actions for nonpayment of notes and mortgage foreclosures, and actions by or against incarcerated persons. □

Recent statutory changes

The 120th Maine Legislature passed a number of new laws and amendments of special interest this past year. Here are some highlights of changes in Maine's legal landscape. The list is not meant to be exhaustive, so if you have questions about these or other new statutes, be sure to contact your NH&D attorney. The laws went into effect September 21, 2001, unless otherwise noted.

Minors who are injured by a government entity now have extra time to serve notice and bring an action. 14 M.R.S.A. §810, sub-§2 of the Maine Tort Claims Act has been amended to provide that if the claimant is a minor when the injury accrues, the notice may be presented within 180 days of the minor's reaching 18 years of age. The action may be commenced within two years of the minor reaching the age of majority. Any injured person whose statute of limitations regarding age has not expired may take advantage of the amendment.

Make certain your automobile insurance is kept in force and not allowed to lapse. The new law, 29-A M.R.S.A. §1601-A, authorizes the Secretary of State to suspend the license of an uninsured person who is involved in an accident and causes damage to another vehicle or person. The suspension remains in effect until the operator has paid all damages to the other vehicle and/or the person injured. Although damage to a motor vehicle is relatively easy to determine, the statute does not address situations where the existence or extent of damages to a person is in dispute. The law does not define "damages," so it is unclear if it includes emotional as well as physical injuries. Aspects of damages such as pain and suffering, loss of consortium, or loss of enjoyment of life are not covered in the statute's language. It will be interesting to see how a court may rule on these issues, although the law requiring mandatory insurance coverage makes it less likely these issues will be litigated.

Plaintiffs' attorneys in cases involving multiple injured parties have cause to be pleased. A new law, 14 M.R.S.A. §169 prohibits, as a condition of settlement negotiations, the exclusion of a plaintiff's attorney in that litigation from representating other injured persons in a related action that involves the opposing party in the settled litigation. Settlements that have been reached after September 21, 2001 which contain a plaintiff attorney's exclusion clause are void and unenforceable.

The statute regarding appeals, 14 M.R.S.A. §1802, was amended to allow the Superior Court, in addition to the Law Court, to award the prevailing party treble costs if the court deems the appeal to be frivolous, and intended for delay.

There is a new incentive for liability insurers to construe their duty to defend more broadly. Under the new law, 24-A. M.R.S.A. §2436-B, an insurer must pay costs and attorney's fees if the policy holder prevails in a declaratory judgment action to determine the duty to defend. Most important, the new law purports to limit assignment of the insured's rights to third party claimants. For more details, see below, *Insurers' Obligation to Pay Attorney Fees.*

Aaron K. Baltes

INSURERS' OBLIGATION TO PAY ATTORNEY FEES EXPANDED IN DECLARATORY JUDGMENT CASES

Whether losing or winning declaratory judgment actions to determine the duty to defend, insurers previously did not have to pay their policy holder's attorney fees no matter which party filed the action – unless the court found the insurance company's position in "bad faith." The Maine Legislature has passed a new law, M.R.S.A. § 2436-B, that allows insureds who prevail in declaratory judgment actions to recover costs and attorney's fees. The law went into effect September 21, 2001. Under the new law, the insurance company must pay attorney fees if the court decides it must defend its policy holder, even if the insurer has a good faith basis for challenging the duty to defend.

The new law defines "insured" to mean only a natural person and not corporations, trusts, partnerships or other types of legal entities. The distinction is not really between consumer and commercial insurance, but whether the insured is a natural person or a corporate entity. The statute apparently will apply to commercial policies if issued to individual insureds.

The new law on payment of attorney fees and costs applies to a wide range of liability insurance coverages, both personal and commercial, as long as the insured is a natural person. It does not apply to several specified coverages other than liability insurance. By its terms, the statute seems limited to litigation that involves only the duty to defend. It is not clear whether it applies only to declaratory judgment actions filed after the September 21 effective date, or will apply to fees incurred after this date for pending DJ actions. Although the former interpretation seems most plausible, that question is likely to be contested.

Jim Poliquin

Insurer's claims file documents ordered to be produced

Maine Federal Court decision opens new road in disputes over work product protection

BY AARON K. BALTES

This summer, a discovery dispute as to whether certain documents of Eastern Electric Corp. and its insurer, Acadia Insurance Co., may be considered privileged work product was brought before Federal Magistrate Margaret Kravchuk. The Court's carefully reasoned Memorandum of Decision regarding the discoverability of documents in an insurer's claims file may help litigants decide whether a case should better be brought in state court or in federal court.

The case, ***S.D.Warren Co. v. Eastern Electric Corp.***, Civil No. 01-31-B-K (July 17, 2001), involved an accident at S.D. Warren's paper mill on May 12, 1999. Eastern was performing electrical work on site when a power outage shut down three paper machines. Within a month, the paper company put Eastern's insurer, Acadia, on notice of its claim.

The accident was a technically complex matter, and Acadia hired an independent engineer and accounting firm to help adjusters with the claim. Then on October 24, 2000, S.D.Warren sent Eastern a notice for prejudgment interest on its claim of $1.5 million dollars, and filed suit in February, 2001. Acadia had not, as of the filing of suit, denied the insured's claim.

The parties' dispute concerned the following materials: a document prepared by Acadia's claims adjuster that, according to Eastern, contains the adjuster's thoughts about coverage, reserves, liability, and further investigation; a statement the insurer obtained from an Eastern employee; and a letter and e-mail between Acadia and its consultants. Eastern's attorney had not submitted these materials to the Court for the Magistrate's *in camera*, or private, review. The essential question before the Court was whether the documents were prepared in anticipation of litigation or for the purposes of adjusting the claim. Magistrate Kravchuk first observed that work product protection is derived from a court's rules of procedure. Federal courts are governed by the Federal Rules of Procedure, and therefore federal case law, rather than state case law, defined the scope of protection for work product. Consequently, the Maine Law Court's precedent-setting decision addressing work product privilege, *Harriman v. Madducks*, 518 A.2d 1027 (Me. 1986) was inapplicable. In *Harriman*, the Maine Supreme Judicial Court held that insurance companies must be understood as being in the business of preparing for litigation; therefore an insurer's documents prepared in connection with a claim were presumed to be in anticipation of litigation, and automatically entitled to work product protection. To defeat the protection, a party seeking the documents had to demonstrate that obtaining the equivalent of the documents was not possible without undue hardship.

Magistrate Kravchuk observed that the majority of federal courts used a different approach. In it, work product immunity depended on a case-by-case, fact-specific inquiry into whether a particular document was prepared in anticipation of litigation. She found this approach far more sound because it recognized that insurance companies are in the business of adjusting and settling claims, as well as preparing for litigation. In her view, an insurer's preliminary time and energy is geared toward investigating and settling a claim, and only at some point later does the insurer shift to preparing for litigation. The Magistrate dismissed the *Harriman* court's concern that fact-specific inquires would consume too much of the trial court's time and resources.

Having adopted the fact-specific rule, Magistrate Kravchuk recognized that the party asserting the work product privilege had the burden of proving that a requested document was prepared in anticipation of litigation. She found that Eastern had not met its burden. The Court therefore ordered that all the requested documents be produced. The Magistrate did point out, however, that the document allegedly containing the adjuster's thoughts regarding coverage, reserves, liability and further investigation was potentially irrelevant, and invited Eastern's counsel to raise an objection on that ground and submit it for *in camera* review.

A magistrate's decision is not precedent, and does not bind other magistrates or judges in federal or state courts. The *Harriman* rule continues to apply in Maine's state courts. In future cases involving work product protection, however, it is certainly likely that federal magistrates and judges in Maine will employ the fact-specific approach – unless and until there is a contrary decision by the First Circuit or U.S. Supreme Court. In light of *S.D. Warren v. Eastern Electric Corp.*, insurers and litigants who are considering whether to bring or remove a case to federal court should weigh the impact of their choice of forum on the discoverability of any documents in a claims file. □

Two recent Law Court decisions

By David P. Very

University's duty to protect students from sexual assaults

Does a university have a duty to protect its students from sexual assaults? In ***Stanton v. University of Maine System***, 2001 ME 96, 773 A.2d 1045, the Law Court held that a university does indeed owe such a duty.

Plaintiff Delores Stanton, age 17, was attending a pre-season soccer program at the University of Southern Maine in Gorham. Students participating in the program were allowed to stay in dormitories on campus. On August 28, 1997, Ms. Stanton went to a fraternity party. She met a young man who told her that he had friends at her dorm and he would walk back with her. When they arrived, she used her key to open the door and he walked in and rode up the elevator with her. She got off at her floor and he stayed on the elevator. She went to her room, opened the door with a key, propped the door open and went to the window. When she turned around, the young man was there. He entered the room and sexually assaulted her.

Statistics prepared by USM showed that the last recorded rape on the Gorham campus occurred in 1991, and that no rapes or sexual assaults were reported from 1992 to 1997. The university also had employed a number of security measures. It provided students with a key to the dorm entrance and their room, equipped each dorm room with an active telephone service, installed telephones inside and outside the front entrance of the dormitory providing direct access to university police, and assigned resident assistants to each dormitory floor. The plaintiff asserted that there were no group meetings with resident assistants or the soccer team when she arrived for pre-season training, and she received no instruction on rules and regulations regarding safety within the USM residence hall facilities. No signs were posted in the dorms informing students of who should or should not be allowed there.

In 1999, Ms. Stanton and her parents filed an action against the University of Maine System for negligence, negligent infliction of emotional distress, and breach of an implied contract. The Superior Court granted summary judgment in favor of the University on all three counts, and the plaintiffs appealed on the negligence and implied contract claims.

The University had based its motion for summary judgment on the contention that it owed no duty of care to the plaintiff and that, even if it owed a duty, it fulfilled that duty by providing a dormitory that was reasonably safe and secure in light of the circumstances. The Law Court noted that "the law of Maine is that the owner of premises owes a legal duty to his business invitees to protect them from those dangers reasonably to be foreseen." The Court held that it is foreseeable that a sexual assault could occur in a dormitory room on a college campus, and that fact is evidenced in part on the security measures that the University had implemented. The Court noted that the concentration of young people, especially young women, on a college campus, creates a favorable opportunity for criminal behavior. Many of the students tend to be away from home for the first time and may not be fully conscious of the dangers that are present. The Law Court reasoned that the threat of criminal behavior is self-evident.

The Law Court specifically found that the University of Southern Maine owed a duty to reasonably warn and advise students of steps they could take to improve their personal safety. The plaintiff had alleged that the University failed to warn her of any dangers or explain the security measures implemented. The Court found that this assertion was sufficient to generate a genuine issue of material fact as to the University's breach of its duty. The Law Court, therefore, vacated the Superior Court's grant of summary judgment to the University on the plaintiffs' negligence claim and remanded the case to the Superior Court for further proceedings. The Court affirmed the lower Court's grant of summary judgment to the University on the implied contract claim.

Auto policy "regular use" exclusion for family members

In ***Acadia Insurance Company v. Mascis***, 2001 ME 101, 776 A.2d 617, the Law Court discussed and defined the "regular use" exclusion in automobile liability policies.

Mary Mascis and Richard Pascucci contracted with Acadia Insurance Company for automobile insurance. Coverage extended to family members, including Mary's daughter, Samantha Mascis. The policy contained the following "regular use" exclusion: "We do not provide liability coverage for the ownership, maintenance or use of . . . any vehicle, other than 'your covered auto,' which is . . . furnished or available for the regular use of any 'family member.'"

During the summer of 1997, Samantha had her learner's permit, but was not yet a licensed driver. She could drive only when accompanied by a licensed driver at least 18 years old. Samantha was then dating 19-year old Nathan Legere, who had his own vehicle and was insured. Samantha drove Legere's vehicle, with him accompanying her, three to five times per week over a two-month period that summer in order to gain driving experience. She did not

have keys to Legere's vehicle, Legere always had to accompany her when driving, Legere's vehicle was never left in Samantha's possession, and Legere drove a majority of the time when they were together, but let Samantha drive when she wanted to.

On the evening of September 19, 1997, Samantha, then 16 years old, was driving Legere's vehicle, with Legere. Her brother, and her brother's friend, Patrick Adams, were in the back seat. Samantha lost control of the vehicle and the car went off the road, hitting four trees and a stone wall. Adams was injured, and he asserted a claim against Samantha. Legere's insurance provided primary coverage for the accident, but a question arose as to Acadia's duty to provide secondary coverage. Acadia sought a declaratory judgment that Samantha was ineligible for coverage pursuant to the regular use exclusion because Legere's vehicle was furnished or available for Samantha's regular use. The Superior Court concluded that Acadia owed Samantha a duty to indemnify her for Adams' potential claims according to the policy.

On appeal, Acadia contended that Samantha's use of the vehicle came within the regular use exclusion because Legere's vehicle was furnished for Samantha's regular use in that she used his car three to five times each week, had blanket permission to use the vehicle, and Samantha's use of Legere's vehicle was therefore regular, and her driving of that car became habitual, customary, usual and frequent. Samantha and Adams contended that Samantha's use was not regular, noting that the vehicle was never left in Samantha's possession and Samantha had to ask Legere's permission each time before driving his car; she had to be accompanied by a driver over 18; she did not have her own keys to his car; her use was limited by many factors including the times that she saw Legere and their social engagements; her use was limited to social purposes and was therefore a casual use; and the Legere vehicle was not Samantha's principal means of transportation. Accordingly, they argued that Samantha's mother could not reasonably have been expected to pay additional premiums for Samantha's use of Legere's vehicle and Samantha's use of Legere's vehicle was not a regular use within the exclusion.

The Law Court reiterated that the purpose of the "regular use" provision in an automobile liability policy is to cover "occasional or incidental use of other cars without the payment of an additional premium, but to exclude the habitual use of other cars, which would increase the risk on the insurance company without a corresponding increase in the premium." The Court noted that an example of a regular use to which the exclusion would apply is when one household uses two vehicles interchangeably, but insures only one of the vehicles. The Court also stated that regular use may be found even when restrictions are imposed on that use. The Court referred to an earlier decision where it upheld the finding of regular use when a sailor left his car in the care of a friend while overseas though restrictions were imposed on use of the car, such as no alcohol consumption before driving. Because the driver was given both the right and the opportunity to use the vehicle any time, the Court concluded that an uncompensated risk was created for the insurance company. See *Allstate Insurance Co. v. Government Employees Ins. Co.*, 263 A.2d 78 (Me. 1970).

In analyzing whether Samantha's use of Legere's vehicle constituted a regular use under the policy exclusion, the Law Court noted that no single factor is dispositive in answering the question and a number of factors are relevant to its determination. The Court noted that Samantha had neither an unrestricted right nor an unfettered opportunity to drive Legere's vehicle. Her ability to drive it was strictly limited by his permission and the time she spent with him. The vehicle was not left in her possession and she did not own a set of keys. Further, the Court found that Samantha's mother could not have reasonably expected that she would have to pay additional premiums for Samantha's use of Legere's vehicle. Given those factors and the "liberal construction of insurance policies in favor of coverage for the insured," the Law Court held that Samantha's use of Legere's vehicle did not rise to a level of regularity so as to remove it from the scope of Acadia's coverage.

Accordingly, the Law Court upheld the Superior Court's decision that the Legere's vehicle was not furnished or available for Samantha's regular use within the meaning of the exclusion. □

2001 NH&D Fall Forum and client party

November 16 Portland Regency Hotel

The fifth annual Norman Hanson & DeTroy Fall Forum for our clients will be held in Portland on Friday, November 16 at the Portland Regency Hotel.

The Forum will be followed by our annual client party at the hotel, and we cordially invite all interested clients to join us. Please mark your calendars, and look for your invitation and topic announcements in the mail shortly.

We hope to see you there!

The Fall Forum
1:30 – 4:00 PM
Annual client party
4:00 – 7:00 PM

The Portland Regency Hotel
20 Milk Street

Briefs/Kudos

CHRIS TAINTOR's observations were recently published in a recent issue of "Medical Malpractice," a publication of the National Law Journal. Chris offered enlightening comments on how to preserve the confidentiality of peer review records when government agencies demand disclosure.

The Maine state government agency, the Bureau of Banking, has changed its name to the Bureau of Financial Institutions, effective January 1, 2002. Governor King signed the Legislature's bill to change the name, which would more correctly reflect its oversight of all Maine's 81 credit unions as well as its banks.

TRICORP Federal Credit Union of Portland, Maine, Northern New England's only corporate credit union, has been approved to serve a national field of membership. TRICORP applied to the National Credit Union Administration for a countrywide field of membership to provide deposit alternatives and investment products. Corporate credit unions primarily serve individual credit unions and offer a variety of institutional financial products and services. NH&D has served as counsel for TRICORP since 1980.

ANNE JORDAN has been appointed by Governor Angus King to the Animal Welfare Advisory Committee. The Committee is charged with conducting an investigation of the state of animal welfare in Maine, working with the Commissioner of Agriculture and the Legislature to revise and improve the animal welfare system.

NH&D paralegal **SUE FUSILLO** has assumed new responsibilities as a Case Manager for the Workers' Compensation Group, working with John King, Bill LaCasse and Steve Moriarty. Joanne LeBlanc continues as Case Manager, supporting Steve Hessert and Bob Bower.

AARON BALTES geared up for a powerful autumn season by competing in a Triathalon over Labor Day weekend: a half-mile swim, a 26-mile bicycle race, and a $6\frac{1}{2}$ mile run. The competition was sponsored by Maine Sport Outfitters.

This July, attorney **RUSS PIERCE** was a lecturer at a Continuing Legal Education seminar for practicing paralegals and legal assistants on the topic, "The Basics of Civil Litigation in Maine."

JON BROGAN was invited to membership in the International Association of Defense Counsel, and will also be included in the 2002 edition of Who's Who in America. In the sports field, Jon was a medalist in this year's annual Maine Amateur Golf Tournament. He continues to carry the scepter at Purpoodock Club, where he won his sixth club championship. □

After the lobbyists – Where do Maine laws begin?

While state and federal courts help interpret Maine laws, new statutes and revisions of existing laws begin with a member of the Legislature. A legislator, having decided to sponsor a proposed law, will sit down with a state employee in the Revisor's Office. A member of the Legislature is rarely experienced enough to write a bill that will pass legal muster, and consultation with a Revisor, a non-partisan legal expert who will help draft the proposed law in a legally accurate form, is essential. The Revisor's Office, located on the bottom floor of the State House, carefully reviews the language of some 2,000 bills to be heard in the Legislative Committees.

Other non-partisan advisors to the Legislators are from the Office of Policy and Legal Analysis (OPLA) who sit on the 17 standing committees and advise on matters of law and policy. OLPA experts have years of experience regarding the issues before their committees, and offer them valuable, rigorously non-partisan facts and history on the subjects of the proposed bills. In this era of term limits, the role of these permanent advisors to Legislators is even more significant.

In this past session, the Maine Senate reached out to high school students and established a Shadow Program, which is designed to connect the soon-to-be-voters with the legislative process. The hope is the program will also increase public confidence, understanding, and possible reforms. Last spring juniors and seniors from Brunswick, Freeport, and Yarmouth each spent a day with a Senator, and worked in all Senatorial capacities (except voting). They prepared essays for the Legislative leadership in both houses on their experiences and views. □

Three new attorneys join Norman, Hanson & Detroy

Doris V. Rygalski

Our newest associate attorney comes from the Bangor area by way of Vietnam. Born in Saigon, Doris and her family were evacuated in 1975 when the city fell. Her father, a member of the Central Intelligence Agency, moved the family to Bangor on the warm recommendation of a friend. Doris and her siblings attended Bangor public schools, and Doris graduated from Bangor High School

At the University of Maine, Doris majored in Journalism, with a concentration in Russian language and history, and graduated in 1990. For two years she worked in Maine and in 1992 she moved to Washington, D.C. as an analyst and reports officer for the CIA. During her three years with the Agency Doris developed extensive knowledge of Middle Eastern, South Asian and Far East Asian countries. Her languages include Vietnamese, French and Russian, and she has traveled widely.

Returning to Maine in 1996, she enrolled in the University of Maine School of Law, and served as a writer and an editor of the *Maine Law Review*. After earning her law degree, Doris was an associate with a Bangor law firm for one year, then served as law clerk to Justice Paul Rudman of the Maine Supreme Judicial Court.

Doris is deeply interested in writing, in reading, painting and drawing (inspired in her Saigon school days), dancing, biking and skiing. She is a member of the Maine State Bar Association, the American Bar Association, and the John Ballou Inn of Court in Bangor. At Norman, Hanson & Detroy, she will be working with our worker's compensation practice group.

Rachel L. Reeves

Rachel is a native of the southern Maine community of Yarmouth. She attended a small private school through her junior year of high school and then transferred to Greely High School in Cumberland, graduating in 1993.

Rachel began her college education over 6,000 miles away at Hawaii Pacific University, where she studied business administration for two years. She edged closer to the mainland by transferring to Portland State University in Oregon, and then transferred again to the University of Southern Maine for her senior year, graduating with a degree in Business Administration. At USM, Rachel was active on the cross country running team. During her college years out of state, Rachel worked for Sedgwick James in Hawaii and Oregon, where she serviced large commercial accounts in risk management. She participated in comparative law studies in France and Spain, and has traveled widely in Europe.

Rachel earned her law degree from the University of Maine School of Law in 2001, after having worked as a summer intern at Norman, Hanson & DeTroy last year. She served on the Moot Court team, and was active in the Business Law Association as well as the International Law Society. Although she had an early interest in commercial transactions, she developed a strong interest in litigation and trial practice while in law school. She is a member of the Maine State Bar Association.

Married last October, she and her husband Glenn have just purchased a home in Portland. She is active in running and outdoor sports such as mountain biking, golfing and occasional canoeing. At Norman, Hanson & DeTroy, Rachel Reeves will be working primarily in the litigation group.

Lance E. Walker

Lance is a native of the central Maine community of Dover-Foxcroft, and graduated from Foxcroft Academy. For two years he was a pre-med student at the University of Kentucky, and then transferred to the University of Maine and graduated with a major in Philosophy, and a minor in Economics. Lance was a member of the University Debate Team, active in regional competitions, and a member of the University's Finance and Investment Club. The University provided the Club investment monies, and was rewarded with continuing high returns.

Lance attended the University of Maine School of Law, and prior to his second year he clerked for Justices Dana and Saufley of the Maine Supreme Judicial Court. During his second year, Lance served as law clerk for Judge Joseph Field of the Maine District Court. At the Law School, Lance was a member of the Moot Court Board and taught legal research and writing. He earned the Harold T. Rubin Scholarship for Trial Advocacy, and was presented with the Edward T. Gignoux award for outstanding appellate advocacy.

Following graduation from law school in 2000, Lance served this past year as a law clerk at the Kennebec County Superior Court in Augusta. He is a member of the Maine State Bar Association, American Bar Association, Cumberland County Bar Association, and the Maine Trial Lawyer's Association. Lance and his wife Heidi, married last December, live in North Yarmouth. He enjoys golf, mountain biking, canoeing and fishing in the Allagash. At Norman, Hanson & DeTroy, Lance will be working with the litigation group. □

Workers' compensation – recent Law Court decisions

By Stephen W. Moriarty

"Consistently intermittent" employees

In an important and closely-divided opinion, the Law Court recently ruled that a hearing officer erroneously failed to consider the residual or "fallback" method of calculating the average weekly wage. The four mechanisms for calculating the wage are set forth in Section 102(4) of the Workers' Compensation Act, and the options are to be applied in the order stated until the appropriate method is determined. In cases in which the first three methods "can not reasonably and fairly be applied," the parties may resort to "Method D" to determine the average weekly wage by examining earnings from comparable employees.

In ***Alexander v. Portland Natural Gas***, 2001 ME 129 (August 7, 2001), the claimant worked for most of his life as a side-boom operator on pipe line construction projects. In recent years, however, he had made a voluntary decision to minimize his earnings and had scaled back his income to approximately $19,000 per year. In 1998 he sustained two injuries while working on a project in Maine, and argued that his average weekly wage should be determined by applying "Method B." With this method the average weekly wage is determined by averaging all income received from the pre-injury employer during the one-year period preceding the injury. The employer argued that "Method D" should apply.

The Hearing Officer applied "Method B" and divided the total earnings received from the employer by the number of weeks worked, producing an average weekly wage of $2,056.16. The employer appealed, and the Law Court repeated its frequent observation that calculating the average weekly wage is designed to arrive at a fair estimate of an individual's future earning capacity. The Court rejected the employee's assertion that "Method D" could only be triggered when none of the preceding methods could be applied. Instead, the Court noted that "Method D" must be used in "all cases in which the ordinary calculation methods would lead to an unfair or unreasonable result." The Court then observed that some individuals have a "consistently intermittent" relationship with the labor market, characterized by irregular and short-term periods of employment. In such cases determination must be made whether a claimant has voluntarily chosen part-time or intermittent employment. If so, the Court held that "Method D" must be considered.

The Court found that because of the employee's history of consistently intermittent employment, relying upon "Method B" produced an inflated average weekly wage and an unfair result. Accordingly, the matter was remanded to the Board to consider "Method D" in light of the evidence the employer presented. This decision emphasizes that "Method D" is not a mere relic in the statutory framework, and may be relied upon when traditional options produce an exaggerated wage.

Section 312 examiner disqualification

In ***Laskey v. S.D. Warren Company***, 2001 ME 103, 774 A.2d 358, the impartiality of a Section 312 examiner had been challenged by an employee before a hearing officer on grounds of conflict of interest. According to Chapter 4, Section 2(6) of the WCB Rules, a conflict may arise if a physician has "a relationship with industry, insurance companies, and labor groups," such as when a physician receives payments or "something of value" from one of the groups. The evidence before the Board showed that the physician performed a high volume of Section 207 examinations at the request of carriers and employers, averaging between 90% to 95% of the total number of weekly exams. In addition, approximately 75% of the physician's annual income was derived from Section 207 exams. Based upon the volume of work the doctor performed for employers, and the extent of income earned from such referrals, the Hearing Officer disqualified the examining physician.

On appeal, the Law Court rejected the employer's argument that the Hearing Officer had inappropriately disqualified a physician chosen by the Board to perform Section 312 exams. The Court found that the Board was free to delegate disqualification determinations to hearing officers, and that in this case the Hearing Officer's decision was adequately supported by the evidence and was, therefore, not clearly erroneous. In affirming the Hearing Officer's decision, the Court stressed the importance of the Section 312 system in the overall scheme of the Act, and emphasized that "independence, integrity and absence of conflict of interest" are vitally important in light of the weight given to the opinions of a Section 312 examiner.

Subsequent non-occupational injury

The employee sustained a knee injury in 1990, and experienced a non-occupational heart attack in the following year. Medical limitations were imposed by virtue of the two separate injuries. Weighing all of the restrictions together, the Hearing Officer concluded that the employee was entitled to benefits for total disability pursuant to former Section 54-B because he could not per-

form full-time work in the statewide labor market. However, the Hearing Officer found that if the restrictions associated with the heart attack had not been considered, the employee could have worked full-time. As a result, benefits for total incapacity were awarded but were reduced by 20% to account for the contribution of the heart attack.

In ***Pratt v. Fraser Paper, Ltd.***, 2001 ME 102, 774 A.2d 351, a divided Court relied upon the language of Section 201(5) and vacated the decision of the Board. That section provides as follows:

"If an employee suffers a nonwork-related injury or disease that is not causally connected to a previous compensable injury, the subsequent nonwork-related injury or disease is not compensable under this Act."

The Court held that the unambiguous language of the statute prevented the Board from taking into account the effects of the non-occupational injury in determining whether benefits for total or partial should be awarded. Instead, the Board should have subtracted out the effects of the non-occupational injury in calculating entitlement to benefits. As a result, the Court ruled that the Board should have awarded benefits for partial at a 100% rate, with an appropriate reduction to account for the effects of the heart attack.

Two justices dissented and argued that the Board was not precluded by Section 201(5) from considering the employee's entire condition in determining eligibility for total or partial, as long as benefits were reduced by the proportionate contribution of the non-occupational injury.

Dual purpose doctrine

Occasionally a trip taken by an employee may serve both a business and a personal purpose. Many jurisdictions recognize the so-called "dual purpose doctrine," which essentially provides that an injury sustained on such a trip may be compensable if the trip would have been made anyway, even if there were no private or personal aspects to the trip. However, under the "deviation" doctrine, an injury is not compensable if an injury occurs during an identifiable side-trip or departure from the business trip.

In ***Cox v. Coastal Products, Inc.***, 2001 ME 100, 774 A.2d 347, the employer's place of business was located in Westbrook and the employee was instructed to use a company vehicle to make a delivery to a customer. Following completion of the delivery, the employee was given permission to continue to use the truck to drive to a car dealership in Windham in order to sign documents to purchase a personal vehicle. After finishing the delivery the employee drove back through Westbrook in the direction in which he had come, but did not stop at the employer's premises. He continued driving to Windham, and was injured in an automobile accident.

The Hearing Officer relying upon the dual purpose doctrine, found that the trip taken by the employee had a fundamental business purpose, and that the personal portion of the trip would never have taken place at all if not for the delivery made to the employer's customer. The employee's Petition for Award was granted.

The Court denied the employer's appeal, finding that the decision of the Hearing Officer was rational and adequately supported by competent evidence. Although the Court readily acknowledged that the same evidence would have supported an opposite result, it nevertheless concluded that the decision reached was not "impermissible or clearly erroneous." The decision illustrates the extent to which the Court is prepared to defer to factual findings made by hearing officers. A hearing officer is not required to reach a "correct" conclusion, but only one which is rational and not arbitrary.

A dissenting justice observed that the employee's journey was not a single interconnected trip, and that the employee had deviated from the course of employment to pursue a personal purpose after having returned to Westbrook following the completion of the delivery. □

Civil appeals period correction

The Summer issue of the NH&D Newsletter reported that the civil actions appeals period had been shortened to 21 days. The appeals period remains at 30 days; the period in which to file for an extension of the appeals period has been shortened to 21 days.

JURY AWARD TRENDS IN MEDICAL MALPRACTICE

A recent report analyzing jury verdicts and out-of-court settlements nationally for 1999 – the latest year for available data – provides a window into the proportion of winners and losers in medical malpractice cases. About 176,000 awards and settlements were analyzed, finding that, from 1998 to 1999, the average malpractice awards rose about 6.7 percent, from $750,000 to $800,000. Settlements showed a larger increase, rising 30 percent, from $500,000 to $650,000.

The largest awards were for negligence in childbirth, next were cases concerning medication mistakes, misdiagnosis errors, and surgical negligence. Interestingly, brain damage commanded higher awards than wrongful death, and obstetrical negligence averaged three times those for failure to diagnose cancer.

Yet, of the cases that go to trial, plaintiffs win only about one-third of all medical malpractice suits, while physicians and hospitals continue to win some two-thirds of the verdicts. The 2000 report, "Current Award Trends in Personal Injury," is published by Jury Verdict Research of Horsham, Pennsylvania. □

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Return service requested

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