NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
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Constitutionality of medical malpractice screening panels upheld

BY EMILY A. BLOCH

The Law Court recently revisited a case involving the constitutionality of the medical malpractice pre-litigation screening panel statute, 24 M.R.S.A. §2851-2859. Three years ago, in *Irish v. Gimbel*, 1997 ME 50, 691 A.2d 664 ("*Irish 1*"), the Court addressed a number of issues in the context of an appeal by the parents of a child from a jury verdict in favor of a physician. The screening panel process is mandated by statute unless waived by the parties, and unanimous findings unfavorable to a claimant are admissible in a subsequent action for negligence. In *Irish* 1, a screening panel had unanimously found that the defendant physician had not been negligent at the time of the birth of the plaintiffs' child, and a civil action followed. Central to the plaintiffs' appeal from an unfavorable jury verdict was the constitutionality of the screening panel process and the circumstances under which the unanimous findings of a panel may be admitted as evidence.

At trial in *Irish 1* the findings of the panel were admitted in accordance with §2857 and the presiding justice counseled the jury as follows:

"It is important for you to understand that you are not bound by the findings of the panel. You are the final decision makers in this case. However, in your deliberations at the close of this case, you may consider those findings as you would any other evidence that may be presented in this trial. You may give those findings whatever weight you find is appropriate."

Plaintiffs' counsel were restricted to comments about the panel findings that did not exceed the court's explanation noted above and were further prohibited from explaining to the jury that their ability to discuss the panel findings was restricted by §2857, which provided that the findings were admissible "without explanation." On appeal, the plaintiffs raised a number of objections to the screening panel process, the most important of which was an alleged deprivation of the constitutionally-guaranteed right to a trial by jury. In *Irish 1* the Law Court upheld the constitutionality of the screening panel process, but agreed that the admission of unanimous findings

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"without explanation" was a fatal flaw resulting in the withholding of information essential to the jury's role as a fact-finder. As the Court held:

"The total absence of information and the unexplained silence of plaintiffs' counsel on the face of the highly prejudicial findings invited unprincipled evaluation and can only result in juror confusion."

The Court declared that the constitutional deficiency could be overcome if the trial court provided the jurors with the following information:

1) the panel process is merely a preliminary procedural step through which malpractice claims proceed;

2) the panel in this case consisted of (the name and identity of the members);

3) the panel conducts a summary hearing and is not bound by the Rules of Evidence;

4) the hearing is not a substitute for a full trial and may or may not have included all of the same evidence that is presented at the trial;

5) the jury is not bound by the finding(s) and it is the jurors' duty to reach their own conclusion based on all of the evidence presented to them;

6) the panel proceedings are privileged and confidential. Consequently, the parties may not introduce panel documents or present witnesses to testify about the panel proceedings, and they may not comment on the panel finding(s) or proceedings except to reiterate the information in 1 through 6.

The judgment in favor of the physician was vacated and the matter was remanded for further proceedings.

On retrial a jury reached a verdict for the defendant physician, and the plaintiffs again appealed. In *Irish v. Gimbel*, 2000 ME 2, 743 A.2d 736 ("*Irish 2*"), the plaintiffs raised many of the same constitutional objections to the panel screening process that had been made in the earlier appeal. The Law Court in a split decision ruled that these issues had previously been "litigated and addressed" in *Irish 1* and refused to disturb its earlier ruling. However, the plaintiffs asserted that the specific jury instructions required by *Irish 1* violated the doctrine of separation of powers set forth in Article III of the Maine Constitution. More specifically, the plaintiffs claimed that because the statute required admission of unanimous findings "without explanation," the Court's insistence upon the described jury instructions was an impermissible intrusion into the legislative process.

In rejecting the plaintiffs' argument, the Court explained that the "neutral information" recommended in *Irish 1* for the trial court to impart to the jury was designed to prevent a jury from drawing improper inferences from the unexplained silence of a plaintiff's attorney in response to the admission of highly prejudicial evidence. The Court concluded that requiring trial court to present neutral information about the panel process and the unanimous findings of a panel did not violate the "without explanation" mandate of §2857. Accordingly, the Court found no constitutional defect or violation of the doctrine of separation of powers.

Two dissenting justices concluded that the confidentiality provisions of the statute are unconstitutional, because they preclude a plaintiff from explaining or criticizing the findings of a panel or cross-examining the members of a panel. The dissenters described *Irish 1* as an "attempt to save an unconstitutional statute [which] was both inappropriate and ultimately unsuccessful," and favored overruling the decision.

Incidentally, effective September 18, 1999, §2857 was amended to delete the "without explanation" language. Given the majority opinion in *Irish 2*, the amendment will have no impact on the screening process or the neutral instructions a court must give whenever unanimous panel findings have been admitted.

In summary, the prelitigation screening panel process has withstood its second constitutional challenge in three years, although not without sharp criticism from two justices of the Law Court. The majority concluded that the "neutral information" in the recommended jury instructions will adequately preserve the parties' constitutional right to trial by jury. □

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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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Chief Justice Daniel E. Wathen looks at the state of the judiciary today

Justice Daniel E. Wathen, Chief Justice of the Maine Supreme Judicial Court, serves also as overseer of all courts in the state. In an unusual project during 1999, the Chief Justice has presided for a day in thirteen different District Courts throughout the state, and one Superior Court. As a trial judge, he has decided current divorce cases in Fort Kent, juvenile cases in Portland, child protection cases in Bangor, and domestic violence petitions in every court. He has thirty-four more courts in which he plans to preside, and his visits have given a unique opportunity for the Chief Justice of the Maine court system to see, close up, how the stream of justice flows in Maine.

Each year the Chief Justice addresses the Legislature on the state of the judiciary, and from his remarks in February we offer a few excerpts that speak to all Maine citizens.

The changes in Maine's third branch of government at the turning of the Millennium are far-reaching and profound, but they can be summarized in one sentence – last year Maine courts moved beyond passive adjudication and began actively intervening to help solve persistent problems in the lives of real people.

We can be very proud of the contributions of the Maine legal profession, and I know they are redoubling their efforts to provide free legal service – but it is not enough, and never can be. Here is the paradox: at a time when we have no shortage of lawyers, the working poor and even those in the middle income bracket are often effectively frozen out of the market for legal services. Why?

Part of the answer lies in the way legal services are marketed. In many court matters, the menu of legal representation is full service and you cannot order a la carte. In the past, we have set legal and ethical standards on the assumption that a lawyer's relationship to a client was one involving singleminded deliberation, research and representation over an extended period. This being so, questions about liability and ethical quandaries have discouraged private lawyers from offering limited services representation. By this I mean such occasional, time-limited, and specific help as information, simple case evaluation, or planning for court appearances and other advice for individuals representing themselves. For many in Maine, self-representation is an economic necessity, they should not be cut off from help they need and could pay for. Legal traditions are designed to service people, not to needlessly disadvantage them.

Today, I call upon the Court's Advisory Committee on Professional Responsibility, the Maine State Bar Association, and others of the legal service community to propose for the Court's consideration, an amendment to the Code of Professional Responsibility that will make it possible for lawyers to offer limited services representation to the people of Maine.

There are many opportunities for public service, and none is more important than jury service. Eighty percent of Americans say that juries are the fairest way to determine guilt or innocence, seventy percent say that trial by jury is THE most important part of the criminal justice system. They are right. Under our system of laws, in the final analysis the jury is in charge. The jury is the linchpin of our democracy. We need the continued cooperation of people in Maine in discharging their civic duty, and nothing is more important to the continued existence of our country than a strong and vital jury system.

There are a host of human needs within the courts that could be met by volunteers. With support from the Libra Foundation, we have established the Maine Volunteers for Justice Project, and we are now ready to support meaningful involvement in the court system by volunteers. We need information aides, clerical assistants, recording assistants, and a host of others to assist litigants in our fifty court locations. As our brochure says, "Opportunity Knocks." The Maine justice system needs you. Anyone wishing to become a volunteer for justice, please contact my office, and I will send you a brochure.*

If courts are to be faster, cheaper, more effective, and still fair, we must join the information revolution. We now have the capacity to electronically collect and organize data concerning court operations. The next step is to put that in the hands of the people who need it by posting it on the Web in an interactive format. Only then will we achieve the constitutional promise of prompt and affordable justice. □

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Briefs/Kudos

STEVE HESSERT and his 12 sled dogs competed this winter in the eighth annual Can-Am 250, a grueling 250-mile dog sled race held in Fort Kent, the northern reaches of Maine. Sixteen teams of dogs raced from Fort Kent through the Allagash Wilderness Area, circling to the Canadian border and back to Fort Kent in three days. Steve and his veteran dog team stopped every four to six hours so he could check and feed the dogs, with rest stops for the mushers at logging camps.

Steve raised eleven of his dogs in Cumberland, with genetics from racing kennels in Alaska, but his unusual lead dog, Mickey, standing taller than the pack, is a black and brown house dog from a pound. Steve says that sled dogs are indeed born to run, and if you let them they'll run like crazy for 40 miles. He and his team began training in October, running 20 to 35 miles on weekends and more.

The Can-Am 250 is the longest race in New England, and the only regional qualifier for the Alaskan Iditarod. Dog teams from Maine, Massachusetts, Minnesota, Montana, Ontario and Quebec competed this year, with Steve and his team placing seventh among the finishers. The *Maine Times* carried a feature story on this year's Can-Am and Steve Hessert in its issue of March 16-22, 2000.

PETER DETROY was pleased to serve as a guest lecturer at Harvard University School of Law's Winter Trial Advocacy Workshop. For a three-day period in January, Peter worked with volunteer judges critiquing law students' performances and teaching them the skills of trial advocacy in simulated trials.

TOM MARJERISON has been appointed to the Maine Supreme Judicial Court's Advisory Committee on Rules of Criminal Procedure, and will serve until December 31, 2002.

Safety alert: Maine state regulation requires drivers of vehicles and their

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Workers' compensation - recent Law Court decisions

By Stephen W. Moriarty

Gradual injuries

Last November the Law Court issued a decision dealing with the occurrence of a gradual injury in a case in which an injured employee had worked for multiple employers over a 20-year period. In *Derrig v. Fels Company*, 1999 ME 162, the Law Court re-affirmed the concept of a gradual injury and held that "a gradual injury is a single injury caused by repeated, cumulative trauma without any sudden incapacitating event." The Court vacated a decision of the Board and remanded the matter for further proceedings.

The employers involved filed Motions for Reconsideration, and on March 7, 2000 the Court issued a revised decision, replacing its earlier opinion. In its revised opinion, the Court emphasized that §201(4) of the Act is not applicable in determining whether an employee has sustained a gradual occupational injury. That section provides in full as follows:

> If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner.

The Court held that §201(4) comes into play only after an employee has established the occurrence of a gradual injury. At that point, if the claimant had a preexisting condition, the Board must determine whether the employment significantly aggravated the condition. The Court also held that treating each period of employment as a separate injury was "inconsistent with the concept of a gradual injury as a single condition occurring gradually over a long period of time." The claim was remanded to the Board once again.

STEPHEN W. MORIARTY

Durational limits

Those involved with the workers' compensation system for some time will recall that in 1987 the Legislature passed a series of reforms designed to save costs and encourage insurance carriers to remain in the state and provide compensation coverage. One of the most critical reforms was the creation of a limit on the duration of entitlement to benefits for partial incapacity. For those individuals injured between November 20, 1987 to October 16, 1991, §55-B of the former Act provided that the entitlement to benefits for partial incapacity was limited to 400 weeks after maximum medical improvement had been reached. Since 1987 there has been persistent disagreement, however, as to whether an employee was entitled to 400 weeks of compensation paid or whether the entitlement existed for 400 consecutive calendar weeks following the date of MMI. Several Hearing Officers had reached opposite conclusions on the issue, and the conflict was resolved by the Law Court in a recent decision.

In *Williams v. E. S. Boulos Co.*, 2000 ME 40 (March 1, 2000), the presiding Hearing Officer had ruled that the language of the statute was plain and unambiguous and provided for a period of entitlement to partial for 400 calendar weeks *following* MMI. However, the Law Court reversed the decision of the Board and concluded that §55-B established an entitlement to 400 weeks of partial incapacity benefits *received*. In reaching this conclusion, the Court closely examined the language of §55-B as well as other provisions of the former Act which expressly limited entitlement by the passage of time. Following a detailed grammatical analysis of §55-B, the Court concluded that the use of the phrase "payments under this section" compelled the conclusion that the 400 week period was intended to refer to weeks of compensation paid rather than to the passage of a fixed period from the date of MMI. The Court also observed that the Legislature could have imposed a cap based upon calendar weeks if it had so intended, and noted that the legislative history suggested a deliberate intent to calculate the duration of entitlement to partial on the basis of weeks of compensation paid.

On a related issue, the Court held that once maximum medical improvement has been established by decree, the date of MMI cannot be changed later if an employee's condition worsens and the extent of permanent impairment increases. In *Williams* it had been determined in a 1992 decree that the employee had reached MMI in April 1990 and was entitled to benefits for a 9% whole person permanent impairment. Eventually, the employee underwent total knee replacement in 1995, and sought an increase in the level of permanent impairment and a corresponding change of the date of MMI. While the presiding Hearing Officer awarded additional permanent impairment benefits, she refused to alter the prior determination of maximum medical improvement.

The Court affirmed and observed that MMI was grounded upon a probability that an employee's condition will not improve in the future. The Court found nothing inconsistent with the attainment of MMI in 1990 and the subsequent increase in the level of permanent impairment in 1995. The Court held that a determination of MMI may not be altered or amended by virtue of a subsequent change in an employee's condition, to include an increase in the level of permanent impairment.

Apportionment

The employee suffered three occupational injuries to his neck and shoulder while working for the same employer and while that employer was insured by three different carriers. The last carrier sought appointment of an arbitrator to apportion liability among the carriers pursuant to the version of §354 which was in effect at the time. However, before apportionment proceedings were begun, the parties litigated claims pertaining to each of the injuries before the Board. Ultimately, a Hearing Officer ruled that the last insurer was responsible for payment of all benefits, but also ruled that all three injuries had combined to produce the employee's incapacity on an ongoing basis. At some point afterward, apportionment proceedings took place before an arbitrator, and the parties submitted proposals for apportionment in accordance with §354(3). The arbitrator adopted the submission of the first insurer, and found that the insurer of the first injury bore no responsibility for the employee's incapacity.

The second carrier appealed the decision of the arbitrator to the Superior Court, and the Court vacated the decision on the grounds that the arbitrator had exceeded his authority. The first carrier then appealed to the Law Court.

In *Livingstone v. A-R Cable Services of Maine*, 2000 ME 18 (February 4, 2000), the Law Court addressed two issues. First, the Court held that appeals from the decision of an arbitrator appointed pursuant to §354 are appealable to the Superior Court initially, and not directly to the Law Court. The Court held that the Administrative Procedure Act, 5 M.R.S.A. §11001 et. seq. established the appropriate avenue of appeal, and that because the arbitrator had been appointed by the Superintendent of Insurance, the arbitrator's decision was final agency action. As such, the decision was appealable directly to the Superior Court.

The Law Court then vacated the judgment of the Superior Court and held that the arbitrator had not exceeded his authority. Noting that the statute required the arbitrator to choose between the submissions of the parties, the Court held that the adoption of a submission which did not conform to the factual findings made separately by the Board was not tantamount to an abuse of authority.

This decision is now of limited value, as §354 was amended effective September 18, 1999. As amended, the statute abolishes apportionment by arbitration and restores to the Board the authority to apportion liability among carriers and employers. In addition, the Board is not limited to selecting one of the submissions offered by the parties. An appeal from a Board decree apportioning liability among the parties is limited to discretionary review by the Law Court pursuant to §322.

Change of circumstances

The employee had injured his left ankle in August 1989, and in 1992 the former Workers' Compensation Commission granted the employer's Petition for Review and reduced the employee's entitlement to 25% partial. The reduction of benefits was based in part upon the employee's failure to have conducted a good faith search for work.

Two years later the employee received an associate's degree in business management and ultimately secured full time employment with a new employer. The employee earned less per week than he had prior to the injury, and continued to search for higher paying employment on an ongoing basis. The employee filed a Petition for Review seeking an increase in the level of benefits, but apart from a closed period of time reflecting recuperation from surgery, the Board declined to increase the level of partial on the grounds that the employee had failed to show a change of circumstances since the prior decree.

In *McIntyre v. Great Northern Paper, Inc.*, 2000 ME 6, 743 A.2d 744, the Law Court vacated the decision of the Board and held that the employee had in fact established a change in circumstances since the prior determination. The Court observed that the "changed circumstances" rule was designed to prevent relitigation of a claim on the same set of underlying facts. The Court held that the employee had "substantially changed his circumstances by seeking out and completing vocational education, by engaging in a search for employment, and by committing himself to that new employment." The Court also held that the Act's purpose to encourage injured employers to seek and obtain post-injury employment would be frustrated if claimants already receiving partial could not qualify for an increased level of entitlement after having made genuine efforts to re-enter the work force. Because the employee had shown a sufficient change of circumstances since the 1992 decree, the matter was then remanded for a determination of the level of partial incapacity commencing at the time the employee began looking for work.

Vocational rehabilitation

Section 217(1) provides that the Rehabilitation Assistant Administrator may order an evaluation of the need for rehabilitation services upon the request of a party. Once an evaluation has been completed, the Administrator may order

implementation of a plan under §217(2) if it is found that the plan is likely to return the claimant to suitable employment at a reasonable cost. The statute provides that the costs of implementation must be paid from the Employment Rehabilitation Fund if the employer refuses to do so. If an injured worker ultimately returns to suitable employment following completion of a rehabilitation plan, §217(3) provides that the non-consenting employer shall be ordered to reimburse the Fund pursuant to §355(7), which in turn imposes an assessment upon the employer of 180% of the cost of plan implementation.

In *McAdam v. United Parcel Service*, 2000 ME 5, 743 A.2d 741, the Law Court had an opportunity to review and interpret these provisions of the Act. The Court initially held that an order of plan implementation is final, and concluded that the Legislature did not intend that employers should have the right to immediately appeal from such an order. Reasoning that the purpose of the statute was to "encourage prompt delivery of vocational rehabilitation services and to permit an appeal only if the employer is ordered to pay 180% of the costs following completion of the rehabilitation plan," the Court held that an appeal from an order of plan implementation may only be taken after a plan has been completed and the Board has ordered a non-consenting employer to reimburse the fund.

In *McAdam* the Administrator had at the outset ordered the employer to pay for the costs of plan development and implementation. The Court observed that §217(1) does not require an employer to pay for the costs of an evaluation of suitability, and that §355(7) provides that the "actual and direct costs of implementing plans ordered by the Board" must be borne by the Fund. The Court, therefore, held that the employer was not responsible initially for the costs of plan development or implementation, and vacated the Administrator's order directing the employer to pay for plan development.

To summarize, non-consenting employers may not immediately appeal from an order implementing a vocational rehabilitation plan. In addition, an employer may not be initially assessed with the costs of a rehabilitation evaluation or of plan development. An order directing a non-consenting employer to pay for the cost of plan development can only be entered under §217(3) after an employee has successfully completed a plan and has returned to suitable employment. Thereafter, an employer may appeal to the Board following a 180% assessment imposed under §355(7). However, the scope of such an appeal may be limited to challenging the amount of the assessment, and may not include an objection to the underlying implementation order.

Stacking of permanent impairment

In a recent decision, the Law Court for the first time addressed the issue of whether permanent impairment attributable to a pre-injury condition or disability may be combined with impairment from an occupational injury in order to calculate the entitlement to partial benefits under §213. In *Churchill v. Central Aroostook Assoc. for Retarded Citizens, Inc.*, 1999 ME 192, 742 A.2d 475, the employee sustained an occupational injury to her back in 1985, and eventually settled her claims with the responsible employer. Shortly afterward, she began working for Central Aroostook Association and sustained a second injury to her back in August 1995. In granting a Petition for Award for that injury, the Board found that there was significant aggravation of the pre-existing problem attributable to the 1985 injury.

The employee eventually filed a Petition to Determine the Extent of Permanent Impairment for the 1995 injury, and the Board concluded that the employee had a 15% whole body permanent impairment from both injuries. However, the Board found that only 6% of the impairment was related to the 1995 injury, and rejected the argument that impairment from both injuries ought to be considered in determining whether the level of impairment exceeded the §213 threshold.

On appeal, the Law Court vacated the decision of the Board and held that in some circumstances §213 requires that impairment from all sources and origins be considered. Critical to the Court's ruling was the finding that the 1995 injury had significantly aggravated a pre-existing condition. In such circumstances, the Court ruled that the Board must combine the pre-injury impairment with the impairment caused by the injury to determine the extent of entitlement to partial incapacity benefits. In reaching this decision, the Court distinguished its earlier decision in *Bourgoin v. J. P. Levesque & Sons*, 1999 ME 21, 726 A.2d 201. In *Bourgoin*, the employee sustained an occupational injury to his back resulting in a 23% whole person impairment, but also had a pre-injury 30% whole person impairment due to diabetes. However, because the employee did not establish that the occupational injury had aggravated the diabetes in a significant manner, the impairment attributable to the diabetes could not be considered for purposes of §213 and the durational limit on the entitlement to partial.

After *Churchill*, the law regarding the combining or "stacking" of permanent impairment assessments may be summarized as follows. If a pre-existing condition has not been significantly aggravated by a subsequent occupational disease, any impairment attributable to the pre-existing condition may not be considered in evaluating permanent impairment for purposes of §213. However, if an occupational injury aggravates, accelerates, or combines with a pre-existing condition in a significant manner to produce disability, the impairment from the pre-existing condition and the subsequent occupational injury must be added together. The duration of entitlement to benefits for partial incapacity will be based on the combined total. □

Voting rights case may broaden class of race discrimination plaintiffs

By Anne M. Carney

Race discrimination in employment is prohibited by 42 U.S.C. §1981. This statute, enacted in 1866 to implement the Thirteenth Amendment, establishes that "all persons" have the same right to enter into contracts, including employment contracts, "as is enjoyed by white citizens." This statute is the avenue of recovery for employees who allege they have been discriminated against on the basis of race. Courts have equated the statute's reference to "white citizens" with a prohibition against discrimination on the basis of "race" even though the term "race" is not used in the statute. The Equal Employment Opportunities Act, ("Title VII") enacted in 1964, also prohibits discrimination in employment on the basis of "race." The rights guaranteed by Title VII have been construed by courts as co-extensive with 42 U.S.C. §1981.

There is an important difference between the statutes: while a recovery under Title VII is subject to caps on compensatory and punitive damages, there is no limit on damages in a race discrimination claim brought under §1981. A jury verdict awarding $1,000,000 in punitive damages could be reduced to as low as $50,000 in a Title VII case. In a §1981 case, the same jury verdict would translate to a $1,000,000 judgment against the employer.

The United States Supreme Court has issued a decision which may have a dramatic impact on race discrimination claims brought under both §1981 and Title VII. In *Rice v. Cayetano, Governor of Hawaii*, decided on February 23, 2000, the U.S. Supreme Court addressed whether a Hawaiian statute violated the Fifteenth Amendment to the United States Constitution. The Fifteenth Amendment prohibits discrimination on the basis of race in voting. The Hawaiian statute limited the right to vote in the state election to those citizens whose ancestors were in Hawaii before Captain Cook made landfall on the islands in 1778. Those permitted to vote elected trustees to administer a public trust for the benefit of this same class of people.

The purpose of the public trust is to preserve, to the extent possible, the unique culture that developed in Hawaii from the time it was first inhabited in approximately 750 to Captain Cook's arrival in 1778. The U.S. Supreme Court described how this unique culture had been negatively impacted both by immigration of people of many races and cultures to Hawaii beginning around 1850, and by the devastating effects on the pre-1778 population of diseases brought by the settlers.

The State of Hawaii argued that the voting rights classification was based on ancestry, not race, and therefore did not violate the Fifteenth Amendment. The U.S. Supreme Court rejected the State's argument that the classification was based on ancestry rather than race. Like §1981, the Fifteenth Amendment was proposed after the Civil War to implement the emancipation of slaves. The Fifteenth Amendment prohibits any state from denying or abridging a citizen's right to vote "on account of race, color, or previous condition of servitude." Noting that the Fifteenth Amendment, like Title VII and §1981, mandates neutrality rather than granting more favorable treatment to members of a particular race, the U.S. Supreme Court moved on to analyze the meaning of "race."

In analyzing whether the voting rights limitation was a race-based classification, the U.S. Supreme Court emphasized cultural characteristics. In support of its ancestry argument, the State of Hawaii introduced evidence showing that the Hawaiian population of 1778 consisted of racial groups other than Polynesians, including immigrants from the Marquesas Islands and the Pacific Northwest. The U.S. Supreme Court found this evidence immaterial. Because the inhabitants of Hawaii had, by 1778, developed a "common culture," they constituted a race. The U.S. Supreme Court's decision succinctly describes this culture as having "well-established traditions and customs and . . . a polytheistic religion." The Court also observed that Hawaiian "[k]ings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject." Based upon this evidence of a "common culture," the U.S. Supreme Court held that a voting classification granting rights only to decedents of this cultural group violated the Fifteenth Amendment prohibition against racially discriminatory voting laws.

ANNE M. CARNEY

This decision could have a significant impact in the area of employment discrimination. If "race" is primarily a cultural characteristic of an employee, than many more employees will be able to frame their claims as §1981 claims rather than, or in addition to, Title VII claims. For example, members of a reli-

gious group often share a common culture that is as distinctive as their religious practice. An employee who previously could have asserted only a Title VII claim can now assert a §1981 claim, seeking unlimited compensatory and punitive damages.

More significantly, employers will face the challenge of determining whether a characteristic which might lead an employer to reject an applicant or discharge an employee is related to the employee's membership in a "culturally distinguishable" group. Body piercing, tattoos, and manner of dress are all characteristics that evidence the cultural background of an employee. Yet employers often must enforce a dress code that conforms to generally acceptable business standards. Refusal to hire an employee because he has extensive facial tattoos may, under this "cultural" definition of race, violate §1981.

Unfortunately, most employers haven't the resources to conduct the extensive research necessary to resolve whether the characteristic the employer finds unacceptable in a business environment does constitute a protected characteristic. However, employers will need to approach these issues more cautiously as a result of the *Rice v. Cayetano* analysis. □

When are falsehoods and omissions on insurance applications considered material?

Law Court sets standards for recission

BY: ANNE H. JORDAN

Maine law provides that an insurer may refuse to pay a claim or defend an action where the insured has made a fraudulent and material misrepresentation or omission on the application. 24-A M.R.S.A. Section 2411. But what constitutes a *material* fraudulent misrepresentation or omission? In *York Mutual Insurance Co. v. Bowman*, 2000 ME 27 (February 14, 2000), the Law Court recently set forth the test to be used to determine whether an insured's application statements are material.

The Court stated that an insurance contract may be rescinded if the insured fraudulently or materially misrepresented or omitted information in the insurance application. In this case, Mrs. Wanda Bowman applied for insurance for five family vehicles. She listed her husband, Bruce Bowman, and herself as the insureds. She failed to identify her two sons, ages 17 and 20, as either having any ownership interest in the vehicles, or as being temporarily away from home. Both boys had ownership interest in two of the vehicles. Each also had extensive motor vehicle records, including convictions for speeding, and failing to keep right. One had a juvenile excessive blood alcohol content violation.

Mrs. Bowman did not reveal that she and her husband recently had their auto insurance cancelled by another company, and that at the time of application they had been without coverage for nearly ten days. Not knowing this information, York Mutual quoted the Bowmans a price, and an insurance policy was put in place.

About three months after the York Mutual policy was in force, Bruce Bowman was involved in an accident. A personal injury suit was filed against him. Only then did York Mutual learn of the misrepresentations and omissions. The insurer asked the trial court to order the contract rescinded retroactively, based on these material misrepresentations and omissions. The court ruled that the Bowmans had falsified their application, but it refused to rescind the contract. The court held that, although there had been material misrepresentations concerning the sons, the law permitting recission did not apply. The trial court reasoned that the law limits it to considering whether or not the material representations related to underwriting the risk *at issue* – that is, whether Wanda or Bruce Bowman might operate a vehicle negligently.

On appeal, the Law Court reversed this ruling. In cases of application fraud, the Court found, the relevant inquiry is not whether the insured's misrepresentations and omissions are related to the cause of the loss. Rather, the test to be applied is to determine whether the facts, if stated truly *at the time of application*, would have influenced a reasonable insurer in deciding:
a) whether to accept or reject the risk of entering into a contract, b) the premium rate, c) the amount of coverage, or d) provision of coverage with respect to the hazard resulting in loss.

The Law Court observed that a fact that has been misstated or omitted is deemed "material" if it could reasonably affect the insurer's decision to enter into the contract or affect its evaluation of the risk. The test, then, of materiality is whether the misrepresentation or omission deprived the insurer of its free choice as to the kind of risk it chooses to insure.

The *Bowman* decision clarifies Maine's law regarding fraudulent insurance applications. Insurers now have a clear test to use in determining obligations when fraudulent material misrepresentations are discovered. □

Four significant Law Court decisions

By David P. Very

Duty to defend under a new "speculative comparison test"

In a decision involving an uncharacteristic four-to-three split of the justices, the Law Court further extended the law regarding duty to defend. In *York Insurance*, 1999 ME 173, (740 A.2d 984), Richard Lambert obtained a power of attorney from his stepfather, and using the power of attorney, transferred tangible and intangible personal property from his stepfather to himself. After his stepfather's death, the heirs brought a complaint against him alleging claims for breach of fiduciary duty or constructive trust, conversion, and interference with an expectancy of inheritance.

Lambert's insurer, York Insurance, filed a declaratory judgment action requesting the court declare that its homeowner's policy did not cover the allegations contained in the complaint. The Superior Court entered summary judgment in favor of York Insurance, ruling, based on the heirs' answers to interrogatories, that York Insurance did not have a duty to defend Lambert in the underlying action because the damages sought were economic damages, which are not covered by the homeowner's insurance policy.

On appeal, the Law Court reiterated the law regarding duty to defend cases. First, the duty to defend is a question of law. Second, the duty to defend is determined by comparing the allegations in the underlying complaint with the provisions of the insurance policy. Third, the duty to defend exists if the complaint reveals a potential that the facts ultimately proved may come within the coverage. Finally, the Court will not consider evidence beyond the face of the complaint and the policy itself in determining a duty to defend.

Confining its review to an examination of the complaint and the policy, the Law Court concluded that a potential exists that the facts alleged may result in bodily injury that would fall within coverage of the homeowner's policy. The Court then stated, "Although on its face the complaint does not specifically include allegations of emotional distress or emotional pain and suffering, the general allegations of the interference with an expectancy of inheritance claim carry the *possibility* of an award for emotional distress." (emphasis added). Even though the heirs specifically indicated in their answers to interrogatories that they were not claiming emotional distress, the Law Court stated, "Even though evidence beyond the pleadings may later establish the absence of a duty to defend, that evidence is not properly considered in determining the duty to defend." The Court held that York Insurance must defend Lambert, its insured.

While the three dissenting justices did not disagree with the majority's summary of the current state of the law regarding duty to defend cases, the dissent complained that the Court's opinion "extends the law beyond where we have gone before, speculating about what the complaint might, but does not, allege to create a duty to defend under a new speculative comparison test." The dissent noted that the complaint included no allegations of emotional distress, bodily injury or property damage to generate a duty to defend under the York Insurance policy. The duty to defend was derived, the dissent remarked, not from the face of the complaint, but from speculation that proof of one of the economic torts alleged might carry the possibility of an award for emotional distress.

DAVID P. VERY

"Owner" of motor vehicle defined

For purposes of exclusions in an insurance contract, who *is* the "owner" of a motor vehicle, the person who purchased the vehicle or the person who registered and insured the vehicle? In *Bourque*, 1999 ME 178, (741 A. 2d 50), the Law Court held it is the latter.

Robert Bourque was living with his mother and stepfather. His stepfather had purchased a vehicle without any funds from Bourque and then later sold the vehicle to a third party with none of the proceeds going to Bourque. On the other hand, Bourque was virtually the sole driver of the vehicle, owned no other vehicle during the policy period in question, had registered the vehicle, and insured it under his own separate policy.

The Law Court held that under these facts, Bourque would be considered the owner of that vehicle as that term is used in insurance policies. The term "owner" was not separately defined in the insurance policy.

Pre- and post-judgment interest and costs in excess of UM coverage

William Moholland received $20,000 from a tortfeasor's liability insurer as a result of an automobile accident. Moholland had UM coverage in the amount of $40,000 per person. He filed an action against his UM insurer, and the jury awarded him $45,000 in damages.

The Court entered judgment for Moholland in the amount of $20,000, the difference between his UM policy limit and settlement with the tortfeasor. The trial court denied Moholland's request for interest and costs, ruling that the UM insurer's total exposure could not exceed policy limits.

In *Moholland v. Empire Fire and Marine Insurance Co.*, 2000 ME 26 (February 11, 2000), the Law Court first noted that, pursuant to its recent decision in *Trask v. Automobile Ins. Co.*, 1999 ME 94, 736 A. 2d 237, pre-judgment interest is a species of compensatory damages. It is therefore governed by policy language limiting an insurer's exposure for damages. Thus, pre-judgment interest is unavailable if its grant would exceed the contractual limits in Moholland's policy. On the other hand, the Court observed that *Trask* now allows a court to award costs to an insured irrespective of the policy limits, because costs are not a form of compensatory damages and are not subject to the policy's contractual limitations.

As Empire had not paid the undisputed $20,000 judgment, Moholland requested an award of post-judgment interest from the Law Court. Noting that this presented an issue of first impression in Maine, the Court held that post-judgment interest, unlike pre-judgment interest, does not compensate an insured for additional damage arising from delay in litigation. The Law Court declared that post-judgment interest is an enforcement tool to ensure that, once litigants have successfully invoked the power of the courts, the award of just compensation will not be diminished by delay in payment. Therefore, the Law Court vacated the Superior Court's judgment denying costs and post-judgment interests.

UM and multiple claimants

Robert Saucier was injured in an automobile accident as a passenger in Alden Pelletier's vehicle. Two other passengers riding in Pelletier's car were also injured. Pelletier carried liability insurance with Progressive Insurance, with limits of $25,000/$50,000. Saucier's share of the settlement was $10,594.65. Saucier had a UM policy with Allstate with limits of $50,000/$100,000. During settlement negotiations, Allstate indicated it was compelled to offset Saucier's UM coverage by the $25,000 limit of the tortfeasor's per person liability coverage. Saucier brought suit against Allstate, alleging that he was entitled to the difference between what he was actually paid and the limit of his UM coverage. He also asserted that Allstate had violated the unfair claims practices statute by knowingly misrepresenting the extent of his coverage.

The Superior Court ruled that Allstate was entitled to reduce Saucier's coverage only by the amount he was actually paid by the tortfeasor. The jury found that the car accident was the result of Pelletier's negligence and awarded damages to Saucier of $200,000. The jury further found that Allstate misrepresented pertinent facts of its policy provisions.

In *Saucier v. Allstate Insurance Co.*, 1999 ME 197, 742 A. 2d 197, Allstate first argued that the Superior Court erred in ruling that it could only offset its coverage by the amount actually paid to Saucier by the tortfeasor's carrier and not by amounts paid to all claimants. Saucier's policy with Allstate provided that "damages payable will be reduced by . . . all amounts paid by the owner or operator of the uninsured auto or anyone else responsible." Allstate argued that this language should be construed to mean reduced by the entire amount available to Saucier, but paid out by the underinsured motorist to all claimants, and not just by that paid to its insured. The provision, Allstate noted, does not specify to whom, or to how many claimants the amount is paid.

Notwithstanding Allstate's observation that the policy provision regarding its offset does not specify to whom "amounts paid" refers, the Law Court stated the language is not ambiguous. The Court again reiterated that they will construe insurance policies liberally in favor of the insured, and will view the language from the perspective of an average person. The Court held that the Superior Court did not err when it determined that, pursuant to Allstate's own policy provision, Saucier's coverage could be offset only by the amount *he* was paid by the tortfeasor's carrier. Therefore, Allstate's maximum exposure was the difference between the $50,000 per person limit and the $10,594.65 Saucier received from Progressive.

Allstate then argued the Superior Court erred by allowing the issue of Allstate's knowing misrepresentation of its coverage to go before the jury, and by not setting aside the jury's verdict. Allstate argued that its claim analyst did not consciously misrepresent terms of the policy because she was relying on directions from Allstate and its representatives. Further, Allstate argued that its representations were based on its interpretation of a question of law. The Court held that the trial court correctly instructed the jury on the issue of knowing misrepresentation:

"Knowing misrepresentation means to be aware that you are misrepresenting something. In other words, you know the policy says one thing and means one thing but you tell the insured something else . . . And in this case, also, the question isn't who is right or wrong or whether Allstate took a position that was different from Mr. Saucier's . . . So this has to be a knowledgeable misrepresentation and awareness that there was a misrepresentation, not a dispute as to what something says."

The Law Court found that having been correctly instructed on Allstate's obligations, a jury could have found that it knowingly misrepresented the extent of its coverage, notwithstanding the fact that Allstate sought to justify its representations with case law. The Court further noted that because the meaning of policy provisions is always a question of law, Allstate's argument would, in effect, preclude any insurer from being held accountable for its misrepresentations unless the very same policy provisions had been previously construed by the Court. □

The EEOC prohibits employers from using qualification standards that screen out a disabled employee or class of employees

Appeals court creates new defense for employers on claims of discrimination in safety-sensitive jobs

BY ROBERT W. BOWER, JR.

In a case of first impression, the U.S. Court of Appeals for the Fifth Circuit has relaxed the burden on employers who must defend safety-based employment qualification standards, standards applying to employees of a given class. In *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F. 3d 871 (5th Cir. 2000), the issue was Exxon's decision to demote and remove oil tanker officers who underwent substance abuse treatment several decades ago. The tanker officers contended that they were fully rehabilitated. The demotions were carried out following a tough substance abuse policy the company had enacted in response to the Exxon Valdez disaster. The policy permanently removes from safety-sensitive, little supervised positions any employee who has undergone treatment at any time for substance abuse.

The EEOC sued Exxon, contending that its policy unlawfully failed to make an individual assessment of each affected employee, and would remove the employee only if he/she posed a "direct threat" to the safety of others. EEOC's long held interpretive guidance requires employers to satisfy the "direct threat" test for all safety-based qualification standards. The lower court agreed, and granted judgment for EEOC.

The Fifth Circuit reversed. It ruled that the direct threat test is applicable *only* when an employer responds to an individual employee's supposed risk that an existing qualification standard does not address. When an employee is screened out of a job on grounds of a safety-based standard that applies to all of a given class, the Court held, the employer may defend its actions based on the *general* defense that the policy was "consistent with business necessity."

EEOC v. Exxon is not mandatory authority in Maine's federal court circuit, and the issue will ultimately go to the U.S. Supreme Court; nonetheless it is exceptionally good news for employers. As this case illustrates, proving that an individual poses a "direct threat" is difficult, requiring expert testimony on each person. Exxon could not even prove this regarding its tanker captains! However, the business necessity defense requires less individualized evidence, and can be proved by reference to issues important to business. A court would take into account the magnitude of the possible harm, as well as the probability of its occurrence. Even if the probability of harm is very low – as it is with cured substance abusers – employee discrimination based on disability can be justified, provided the potential damages that could be caused is extremely high (as in the Exxon Valdez disaster). The Fifth Circuit indicated that evaluating "business necessity" for a safety-based policy also includes the potential for environmental impact and tort liability that an employee may cause.

This case converts the "safety" issue from whether the individual employee involved is at risk to create harm, an expensive and difficult task, to whether the class of individuals, of which the employee is one, would create enough of a safety risk to make the policy a "business necessity."

Employers are strongly advised to study their safety-sensitive operations and consider policy revisions and changes to job descriptions that are justified by business necessity. Written policies, properly conceived and carried out, may insulate employers from ADA discrimination claims in the "safety defense" context. □

passengers to wear seatbelts. To enforce it, there is now a $62 fine for the driver not wearing a seat belt, and for each individual passenger in the vehicle as well.

Thirteen years ago the Saco Valley Credit Union began a community program to help families at Christmas, and it is now a year-round charitable organization which, in 1999 alone, helped more than 600 area families. Named "Carrie's Kids," it is a labor of love for

Saco Valley Credit Union CEO Carrie Shaw, who is helped by over 500 volunteers from the community and the CU. Many requests for help come through parish priests, school nurses, and friends. The CU's charitable group has given money for a child's funeral, food and shelter for an abused woman and her children, and help to families in turmoil. Carrie's Kids has created a clearing house with other agencies through which it processes all aid requests. This helps avoid duplication of efforts.

Local businesses have been generous in support, and some offer payroll deductions with employer matches. "Our board," said Carrie Shaw, "has been incredibly involved with Carrie's Kids. Without their support, we couldn't do it." □

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