NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law
Fall 1999
Vol. 13, No. 3

Supreme Court clarifies definition of disability

BY ANNE M. CARNEY
ROBERT W. BOWER, JR.

Three recent U. S. Supreme Court decisions clarify – some say improperly restrict – the type of impairment which can support a claim under Title I of the Americans with Disabilities Act of 1990 (ADA). Title I of the ADA prohibits discrimination in employment against a "qualified individual with a disability," as well as individuals with a record of a disability and those individuals "regarded as" disabled.

The EEOC has long advocated an interpretation of "disability" which ignores mitigating measures such as medication, eye glasses, other devices, and compensating behavior. The agency has issued guidelines directing that determination of disability be made without regard to any mitigating measures used by the employee or applicant.

In ***Sutton v. United Airlines, Inc.*** 119 S.Ct. 2139 (1999), the Supreme Court called the EEOC's position "an impermissible interpretation of the ADA." The Court adopted a "functional approach to determining disability," and illustrated its application in *Sutton* and two other ADA cases which it decided on the same day. This approach asks the employer to determine whether the employee or applicant has a disability by deciding, with mitigating measures in place, whether the individual functions the same as a person without a similar physical impairment.

The *Sutton* case involved identical twin sisters who applied to United Air Lines for the position of global airline pilot. During an interview, it became apparent that the sisters could not meet the airline's minimum vision requirement, which was uncorrected visual acuity of 20/100 or better. With glasses, both plaintiffs had vision of 20/20 or better.

ANNE M. CARNEY

The U. S. Supreme Court held that Sutton and her sister could not state a claim under the ADA because they did not have a disability – their impaired vision was correctable with glasses to the point that they functioned as well as individuals without severe myopia. The Court also rejected the argument that United Airlines "regarded" Sutton and her sister as disabled. An employee or applicant can only assert a claim that they were regarded as having a disability if an employer mistakenly believes that a physical impairment substantially limits an employee or applicant in a major life activity. This argument was rejected because United Airlines only declined to hire them for the position of global airline pilot, which is a single job. As the Supreme Court emphasized, "[t]his allegation does not support the claim that [United] regards [the pilots] as having a *substantially limiting* impairment."

In ***Murphy v. United Parcel Service, Inc.*** 119 S.Ct. 2133 (1999), the Supreme Court analyzed whether a mechanic, under treatment for hypertension since he was ten years old, had a disability. The mechanic's hypertension prohibited him only from lifting heavy objects. United Parcel dismissed the mechanic when he failed to meet DOT's health certification requirements, which included a maximum blood pressure measurement. The Court confirmed that the mechanic could not assert an ADA claim because he could function normally as a

INSIDE

mechanic despite his blood pressure. His "regarded as" claim was also rejected because he could perform a wide range of mechanic tasks; he simply could not perform those that required him to obtain DOT certification.

Albertsons, Inc. v. Kirkingburg, 119 S.Ct. 2162 (1999), presented a slightly different issue. The plaintiff, a commercial truck driver, effectively had monocular vision, and could not meet DOT vision standards. He had performed his job for several years based on an erroneous certification. When he applied for re-certification, his monocular vision was discovered, and his employment was terminated. Subsequently, he received a waiver of the requirement under a recently introduced DOT program, but Albertsons refused to rehire him. The Supreme Court decided that the driver did not have a disability because it was established that his brain had developed a mechanism for coping with his visual impairment. The Court reasoned that his body compensated for his disability in the same way that a corrective device, such as glasses, would enable an individual to function normally.

ROBERT W. BOWER, JR.

The Court then went on to determine an issue in this case which will be of significant help to employers. Did Albertsons appropriately impose the DOT standard and reject the waiver? If DOT's action waived an essential job requirement, then the driver was not qualified to perform the job without the certification. On the other hand, if the certification covered non-essential functions, then Albertsons would have to meet the burden of proving that the driver posed a "direct threat" to the health or safety of others. The Court held that Albertsons was entitled to require as an essential job qualification that the driver meet the DOT standard. Further, the employer was not required to accept the waiver, because the waiver program, unlike the original certification requirement, was not based on any valid study establishing that the waiver provided for safe operation of commercial vehicles.

Although this trio of cases has been heralded as a benefit for employers continually trying to determine whether they must meet the ADA "reasonable accommodation" mandate, in reality the cases underscore the need to review asserted disabilities on a case-by-case basis. An employee must be prepared to offer specific proof regarding limitations created by any physical or mental impairment. An employee who is relying on the "major life activity" of working must establish a limited ability to perform a broad class of jobs, and not just one particular employment position. Employers must seek this detailed information from an employee who asserts a disability. In reaching an employment decision, reliance on a person's general assertion of disability rather than on detailed evidence may violate the "regarded as" provision of the ADA. □

NORMAN, HANSON & DETROY, LLC

newsletter

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

Stephen W. Moriarty, Editor
Rachael Finne, Managing Editor

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

1999 NH&D Fall Forum for clients to be held November 5

Each year Norman Hanson & DeTroy presents for its clients an afternoon Fall Forum that examines the new developments for insurers and employers in both property and casualty and workers' compensation. The feature presentation for the 1999 Forum will be "Who is Disabled Under the Americans with Disabilities Act?" Attorneys Anne Carney and Bob Bower will examine the extent to which the U.S. Supreme Court has eliminated ADA protections for workers.

Jon Brogan will review tactics for the defense of claims for civil damages, Mark Lavoie and Tom Marjerison will present strategies in dealing with fraudulent insurance claims, and Jim Poliquin will speak on court decisions and new laws affecting the defense of claims.

The workers' compensation attorneys will cover recent amendments to the Act and new Board rules governing the hearing process, the caps for older and newer injuries, the highlights of case law affecting compensation claims, and a review of the policies and goals of the Board. John King, Steve Hessert, Bill LaCasse, Alex McCann and Steve Moriarty offer programs concurrent with the property and casualty topics from 2:15 to 4:00 PM.

We cordially invite all interested clients to join us on Friday, November 5.

Time:
1:30 – 4:00 PM

Cocktail Reception:
4:00 – 5:30

Place:
Portland Country Club
11 Foreside Road
Portland, Maine

Please reserve early as seating is limited. Telephone or e-mail:

Lorri Peterlin
774-7000, ext.663
lpeterlin@nhdlaw.com

The unnecessary gamble – is your Maine sales promotion an unlicensed game of chance?

By Adrian P. Kendall

Competition in the business world has given rise to contests, drawings, raffles, and door prizes that businesses are using to lure customers. While promotions on a small scale may seem simple and harmless, company marketers should take care to structure these events so they do not qualify as a "game of chance" under state law. Operators of games of chance must obtain licenses from the Chief of the Maine State Police and the penalties that lurk for the violator are real.

What is a Game of Chance?

Under Maine's statute, 17 M.R.S.A. § 330(2), a game of chance is any game, contest, scheme or device in which:

(A) A person stakes or risks something of value to win something of value;

(B) The rules of operation or play require an event, the result of which is determined by chance, outside the control of the contestant or participant; **and**

(C) Chance enters as an element that influences the outcome in a manner that cannot be eliminated through the application of skill.

All these criteria must be met for an event to qualify as a game of chance.

The law specifically states that a random drawing constitutes "an event, the result of which is determined by chance."

Is your sales promotion plan actually a game of chance?

In most promotions there is no question the consumer is attempting to win "something of value." Clearly, the value of the prize serves as the lure, so the second part of the first "game of chance" criterion will almost always be met. Also, unless the promotion involves the contestant's skill and that skill will directly affect the likelihood of success, the promotion will meet the second and third criteria of the law's game of chance definition.

In most cases, however, the focus will be on whether or not the participant is "*staking or risking anything of value.*" The statute provides no useful definition of value, but one can assume that value would be broadly construed. Value may not simply consist of paying for a ticket; submitting a fee or a deposit with a loan or credit application may be regarded as value. Even the disclosure of personal data of the type used in marketing studies (such as age, household income, employment and education) may well qualify as "value."

If the participant does risk or offer something of value, and no other exception applies, then the game of chance must be licensed. This is the reason why so many promotional contests bear the legend "no purchase necessary to enter" and game pieces or other evidence of participation are made available free by mail or at store locations. The "sweepstakes" contests that were the subject of recent congressional investigation, make it as difficult as possible to qualify for the promotion without making a purchase.

Door prizes and raffles

Some exceptions to the licensing requirements exist. For example, 17 M.R.S.A. § 331(3) creates an exception for "door prizes," but it carries fairly stringent requirements.

> **3. Door Prizes.** Distribution of tickets to any event upon which appear details concerning any prize to be given away as a result of a drawing is to be considered a game of chance within the meaning of this chapter, except that such distribution of tickets containing only the words "Door Prize," without further description, shall be excluded from the provisions of this chapter, provided that no promotional materials or presentations, written or oral, shall further describe the door prize.

Unfortunately, the restriction eliminates much of the incentive to attend that a description of the prize would create.

The State Department of Public Safety has advised that if a door prize <u>is</u> described, then the "game of chance" is treated as a "raffle." The statute defines a raffle as a game of chance in which a person pays something of value for a chance to win a prize represented by a number, and the winning chance is determined by a drawing from a container holding all numbers of the chances sold.

A raffle is exempt from licensing if (1) the prize is worth less than $10,000, and (2) if it is conducted by a "bona fide non-profit corporation that is either charitable, educational, political, civic, recreational, fraternal, patriotic or religious or any auxiliary of such organization." 17 M.R.S.A. § 331(6).

Most businesses would not qualify under the bona fide, non-profit corporation standard, although some trade groups may. If a door prize promotion is used, then the prize must be kept a mystery until awarded. If the disclosure and marketing of the prize is critical to the promotion (and it usually is), then either the "raffle" exemption must be met, or a license must be obtained.

Business marketers planning to boost sales or event attendance with a contest, drawing, raffle or door prize will want to review their plan carefully to avoid an unnecessary gamble. An unlicensed game of chance carries damaging penalties. □

Workers' compensation - recent Law Court decisions

By Stephen W. Moriarty

Refusal of reinstatement offer

Section 214(1)(A) of the Act provides that if an employee refuses a bona fide offer of reasonable employment or reinstatement with the employer, and the refusal is without good and reasonable cause, the employee is deemed to have voluntarily withdrawn from the work place and forfeits any entitlement to wage loss benefits for the period of the refusal. In an important new decision, the Law Court has held that this statute is intended both to encourage employees to return to work, and to provide employers a means of reducing compensation costs by offering reinstatement to injured workers.

Several earlier Law Court decisions have focused on the reinstatement offer. In *Thompson v. Claw Island Foods*, 1998 ME 101, 713 A.2d 316, the Court set forth a series of factors which must be considered when a reinstatement offer has been refused after an employee has moved or relocated. More recently, in *Ladd v. Grinnel Corp.*, 1999 ME 76, 728 A.2d 1275, the Court held that voluntary participation in a labor union strike does not automatically disqualify an individual from receiving benefits.

In ***Loud v. Kezar Falls Woolen Co.,*** 1999 ME 118 (July 27, 1999), the Court addressed the question of when the period of refusal of a reinstatement offer may be considered to have ended. In *Loud*, the employee suffered occupational injuries in 1991 and 1993 while working for the same employer. Her employer was insured by different carriers at the time of both injuries. After having been out of work following the second injury, the employee was ultimately released to full-time duty, but was laid off in September, 1994 as part of an economic shutdown of the mill. When she was recalled from layoff in February 1995, the employee refused the offer. Ultimately, she obtained a part-time and lower-paying position at a local convenience store.

STEPHEN W. MORIARTY

While working at the store, the employee had casual contact with her former supervisor, and she asked whether or not the mill was still hiring. She was told that the mill was not hiring and that there had been at least one layoff in the employee's trade since the reinstatement offer had been made.

The employee filed petitions against both insurers, presumably seeking benefits for partial incapacity, and the second insurer filed a Petition for Forfeiture based on refusal of the reinstatement offer. The Board granted the employee's petitions and found that she was incapacitated on an ongoing basis as the combined result of both injuries. With regard to the Petition for Forfeiture, the Board found that the employee's refusal of the offer of reinstatement resulted in an initial period of forfeiture, but that the period of refusal of the offer ended when the employee spoke with her former supervisor about the continuing availability of work. As a result, the Board awarded the employee ongoing partial benefits after the period of refusal had ended. The two insurers then appealed to the Law Court.

In analyzing the language of §214(1)(A), the Court observed that an initial refusal of an offer of reinstatement did not result in a permanent forfeiture of benefits. The Court agreed with the insurers that, as a matter of law, the evidence did not support a finding that the period of refusal of the reinstatement offer had ended. As the Court held:

> As a matter of common usage, a period of refusal begins when an employee rejects an offer of employment, and ends when the employee communicates to the employer a willingness to accept the offer previously rejected.

The Court held that an employee must affirmatively communicate to the employer an intent to accept an offer before the period of refusal can end.

The Court further found that the layoff of some workers after the reinstatement offer was made did not necessarily imply that the offer had been withdrawn. Given the built-in incentive in Section 214 to reinstate injured workers, the Court found it conceivable the employer might have reinstated the employee even though others had been laid off.

The Court also rejected the employee's argument that she had rebutted the presumption of voluntary withdrawal from the work place by obtaining part-time employment. While recognizing that acceptance of post-injury employment is an appropriate factor to consider in determining the reasonableness of refusal of an offer, the Court held that the purpose of §214 (1)(A) would be frustrated if a claimant could avoid the presumption merely by obtaining part-time or low-paying work.

Finally, the Court addressed the interesting procedural problem created by the consolidation of claims for an "old law" and a "new law" injury. Section 214

is one of the eight sections of the Workers' Compensation Act of 1992 which is not retroactive. However, the Court had held in *Ray v. Carland Construction*, 1997 ME 206, 703 A.2d 648, that when an older injury combines with an injury that occurred on or after January 1, 1993 to produce a single period of incapacity, the employee's entitlement to benefits is governed by the new Act. The Legislature acted to reverse the result by adopting §201(6), which took effect on June 30, 1998. That section provides that where "old" and "new" injuries combine, the law in effect at the time of the older injury determines the employee's entitlement to benefits for all incapacity flowing from that injury.

The petitions in ***Loud,*** however, were pending as of the effective date of §201(6), and the Court found no clear and unequivocal language in that statute suggesting the Legislature intended it to apply to pending proceedings. The Court followed a number of earlier decisions and held that actions pending on the effective date of an act or statutory amendment are not affected by the change, in the absence of a clear legislative intent to apply the change to pending proceedings. Over time, this part of the opinion will have decreasing importance as the number of cases which were pending as of June 30, 1998 continues to diminish.

Determining entitlement to total incapacity

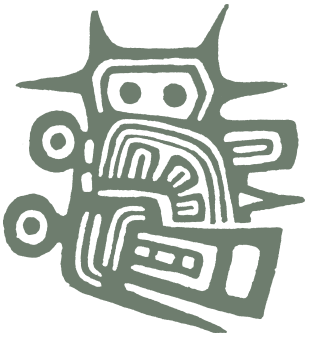
For injuries preceding January 1, 1993, a claimant's entitlement to benefits for total or partial incapacity is governed by the versions of former §54-B and §55-B, which were in effect on the date of the injury. Effective November 20, 1987, §54-B provided that benefits for total incapacity were to be adjusted on the third anniversary date of the injury and annually thereafter. That section also contained a critical sub-paragraph, which provided in part as follows:

> 2. **Limitation.** Any employee who has reached maximum medical improvement and is able to perform full-time remunerative work in the ordinary competitive labor market in the State, regardless of the availability of such work in and around his community, is not eligible for compensation under this section, but may be eligible for compensation under §55-B.

From November 20, 1987 to October 16, 1991, former §55-B provided that if no work was available in the employee's community or if the employee was unable to obtain work due to the effects of an injury, the level of partial incapacity could be established at 100%. However, there were no inflation adjustment provisions for benefits for partial incapacity. In addition, benefits for partial were limited to 400 weeks after maximum medical improvement had been attained.

Clearly, the determination of entitlement to benefits for total incapacity under former §54-B, as opposed to benefits for partial under former §55-B, can have great significance for employees and employers alike. In a recent decision, the Law Court reviewed the provisions of the former statutes and set forth the means for determining whether an employee was totally or partially incapacitated.

In ***Adams v. Mt. Blue Health Center,*** 1999 ME 105 (July 7, 1999), the employee sustained an injury to his back on November 8, 1990, and with the exception of one brief interruption, had received benefits at a 100% rate ever since. Previously it was determined by decree that maximum medical improvement was attained on August 15, 1993. The employee's benefits were never adjusted for inflation, and in October, 1996 the Employee filed a Petition for Award of Inflation Adjustment. This petition was essentially a procedural vehicle for obtaining a determination of entitlement to total or partial incapacity under §54-B and §55-B, and has been used in the past to achieve the same purpose. *See,* e.g. *Toothaker v. Lauri, Inc.*, 631 A.2d 1241 (Me. 1993). After a hearing, the Board found that the employee was not totally disabled because he had some ability to perform work within limitations. It denied the Petition for Award of Inflation Adjustment and ruled that the employee was entitled to continue to receive benefits for partial at a 100% rate.



The employee appealed to the Law Court, and the Court vacated the Board's decision. The Court held that it must apply the law in effect at the time of the 1990 injury to determine the employee's entitlement. Noting that the Act has never defined the term "total incapacity," the Court observed that in the past it had concluded that total incapacity existed either where an individual was unable to perform any type of work on a full-time or part-time basis, or where work remained unavailable to an individual because of the limitations the injury imposed. Finding that the limitation language of former §54-B cited above was ambiguous, the Court reviewed the Legislative history of the statute to ascertain its meaning.

The Court concluded that an employee could receive benefits for total incapacity under §54-B only if he or she were actually unable to perform any work, regardless of the availability of employment, or by establishing that there was no part-time or full-time work available within the employee's community, and that the employee was physically unable to perform full-time work in the statewide labor market. Therefore, for an injury occurring in 1990, an employee seeking benefits for total incapacity must establish total or partial incapacity in the medical sense which results in an inability to obtain any type of work within the local community, and an inability to

perform full-time work in the competitive labor market of the state. The record showed that no work was available within Mr. Adams's community, and the Court held that the Board had implicitly found that the employee was not able to work on a full-time basis in the state-wide labor market. Accordingly, it concluded that the employee was entitled to total benefits under former §54-B.

It is significant, however, that the Court rejected the employee's suggestion that an individual employed on a part-time basis might still be entitled to benefits for total incapacity under former §54-B. The Court held that the actual receipt of post-injury wages precluded the Board from awarding total incapacity benefits. The Court also observed in a footnote that by 1991 it appeared that the Legislature had begun to view the term "total incapacity" as meaning total incapacity in a medical or physical sense. However, the Court determined that, notwithstanding a possible evolution in the Legislature's understanding of the concept of total incapacity, it was required to interpret the language of former §54-B as consistent with the Legislature's intent at the time of its original enactment. □

CGL policies: Law Court decides coverage for inducing patent infringement

Term 'belittle' in policy not limited to common law tort

BY JAMES D. POLIQUIN

For the first time the Law Court addressed coverage issues for claims of inducing patent infringement in ***Foundation for Blood Research v. St. Paul Marine and Fire Insurance Co.,*** 1999 ME 87 (June 3, 1999). The Court was answering this certified question from the U.S. District Court for the District of Maine:

Does a duty to defend exist under the legal "comparison test" in the context of the "advertising injury" or "personal injury" provisions of the General Liability Policy issued by St. Paul for an underlying third-party complaint which asserts claims of inducing patent infringement when the complaint is devoid of any concrete factual allegations describing the circumstances of the alleged injury?

The Biomedical Patent Management Corp. filed a complaint against a Maine corporation, Foundation for Blood Research, alleging it performed diagnostic services which infringed its patent and intentionally caused others to infringe its patent. FBR demanded that St. Paul provide a defense. Most of the cases around the country addressing these coverage issues concerned only whether a claim for patent infringement was possibly covered by the "advertising injury" language in CGL policies. Few cases have addressed the question of whether a claim for *inducing* patent infringement could be within either the "personal injury" or "advertising injury" coverage.

The standard CGL definition of "personal injury" includes "oral or written publication of material that . . . disparages a person's or organization's goods, products or services." In the St. Paul policy the definition of personal injury included "making known to any person or organization written or spoken material that belittles the products, work or completed work of others."

The complaint filed against the Foundation for which it sought a defense did not state the facts surrounding the claim of inducement. The Court therefore analyzed the duty to defend by asking whether under any circumstance a claim for inducing patent infringement could be within the St. Paul definition of "personal injury."

The Court reviewed the elements of a claim for inducing patent infringement, and observed that a person could be liable for advising a third party that an existing patent on a particular device was invalid. The Court then turned to the meaning of the term "belittle" in the St. Paul policy. The Law Court found that the term was not limited to common law tort such as trade libel or disparagement, and interpreted the term "belittle" in its ordinary meaning. Because it was possible that the Foundation induced patent infringement by "belittling" to a third party the patent that belonged to Biomedical, the Court held that there was a duty to defend.

The issue for the future is whether CGL insurers now must defend under the "personal injury" coverage all claims for inducing patent infringement. One unresolved question is whether the Law Court would interpret the term "disparage" in standard CGL policies in the same way it interpreted "belittle" in the St. Paul policy. If in future decisions the Court rejects the argument that the word "disparage" in the ISO form is limited to the common law tort of disparagement or trade libel, then any unspecified claim for inducing patent infringement is possibly within the definition of "personal injury." If the term "disparage" is given its accepted meaning in tort law, rather than its dictionary definition, insurers would not be obligated to defend complaints alleging only inducement of patent infringement and patent infringement. □

Four significant Law Court decisions

BY DAVID P. VERY

Costs and expenses in excess of UM coverage

Viola Trask was severely injured as a passenger in an automobile accident. Mrs. Trask received $40,000 from medical payments coverage and from the tortfeasor's liability policy. She herself had UM coverage of $300,000, and the vehicle she was in had UM coverage of $500,000. She brought an action against both carriers and the jury awarded her $821,000. The trial court entered judgment in the amount of $760,000, which reflected the $800,000 of available UM coverage, less the $40,000 Mrs. Trask previously received in both liability and medical payments. The court concluded that Mrs. Trask could not recover pre-judgment interest, or any costs and expenses because any recovery would exceed the coverage limits.

On appeal, in ***Trask v. Automobile Insurance Co.,*** 1999 ME 94 (June 23, 1999), the Law Court reiterated that, absent bad faith by the insurer in delaying the litigation process, an insured cannot recover pre-judgment interest in excess of the underinsured motorist policy limit. The Court stated that because pre-judgment interest is an element of compensatory damages, it is governed by the policy language limiting recovery for damages. Thus, while an insured may be entitled to recover prejudgment interest from a UM insurer, an insured cannot recover pre-judgment interest in excess of the coverage limit.

On the other hand, the Law Court held that costs and expenses, unlike pre-judgment interest, are not a form of compensatory damages and therefore not limited by policy language stating that the insurer will pay up to its limit of liability for "all damages." The Court specifically found that the coverage limitation preventing recovery of pre-judgment interest did not apply to costs. Unless the insurance contract specifically prohibits such costs, a prevailing insured can recover costs and expenses, even if these monies would exceed the policy limits. The Law Court modified the judgment and granted costs and expenses of $18,396.43 to Mrs. Trask.

Consequently, for claims exceeding the UM coverage amount, the total exposure will be the amount of coverage available, plus the insured's costs and expenses as awarded by the court. Since the Law Court has held that pre-judgment interest will be awarded above the coverage limit only in cases where the insurer acted in bad faith by delaying litigation, UM carriers may see this allegation in complaints where the damages potentially exceed the available coverage.

Pre-judgment and post-judgment interest

In November 1987, Deborah Fitzgerald bought a house from Charles Ziemba and Carol Gamester. Mrs. Fitzgerald sued the sellers, alleging several claims, including fraud and misrepresentation. The trial court found the sellers liable for fraud, and awarded punitive damages of $15,000 against Ziemba, and $25,000 against Gamester, plus compensatory damages of $3,500 against the sellers jointly and severally. The trial court aggregated all the awards to determine interest on the judgment, and the sellers appealed.

In ***Fitzgerald v. Gamester,*** 1999 ME 92 (June 22, 1999), the Law Court stated that for both pre-judgment and post-judgment interest, there are two possible rates by which the court calculates interest. In cases where the damages claimed or awarded do not exceed the jurisdictional limit of the district court, or $30,000, the pre-judgment interest is calculated at a rate of 8%, and the post-judgment interest is calculated at the rate of 15%, pursuant to 14 M.R.S.A. § 1602(1)(A) and 1602-A(1). In cases where the damages claimed or awarded exceed $30,000, pre-judgment interest is calculated at a rate of the 52-week U.S. treasury bill, plus 1%; post-judgment interest is calculated by the 52-week U.S. treasury bill, plus 7%, pursuant to 14 M.R.S.A. § 1602(1)(b) and 1602-A(2). At the time of judgment in this case, the court calculated pre-judgment interest at 4.61 percent, and the post-judgment interest at 10.61 percent.

DAVID P. VERY

The question before the Law Court was whether awards against separate defendants should be aggregated when determining whether the amount awarded exceeds the district court's jurisdictional limit. The Law Court concluded that the damages awarded must be aggregated. Therefore, for the purposes of determining pre-judgment and post-judgment interest, a defendant will be entitled to a lower interest rate if the total amount awarded to the plaintiff against all defendants exceeds $30,000, even if the judgment against the individual defendant is less than $30,000.

Express warranties and the Unfair Trade Practices Act

Elizabeth Courtney saw an antique table advertised by Blue Dolphin Antiques of Northport, Maine. The final line in the ad read, "We guarantee complete satisfaction." Courtney telephoned the shop and was told that with the exception of a knob, the table was "all original." The Blue Dolphin represented that the table had been constructed between 1770 and 1790. After viewing photographs of the table, the plaintiff agreed to buy the table for $8,250.

When the table was delivered, the plaintiff was extremely disappointed in the table's appearance, and it appeared that a piece of wood had been replaced. The plaintiff called the Blue Dolphin and told them she was not satisfied and wanted a refund. After initially promising a refund, the antique dealer said that she would refund the purchase price if the table was not what it was represented to be. The Blue Dolphin then had two appraisals performed, both of which showed the table was authentic. One appraiser determined that the table was constructed in the late 18th or early 19th century, and that the drawer did contain a piece of replacement wood. However, the replacement wood did not affect the table's value. The dealer then notified Mrs. Courtney it would not return the $8,250, and that their guarantee promised a refund only if an item was not authentic.

The plaintiff filed suit against the Blue Dolphin claiming a breach of express warranty and violation of the Unfair Trade Practices Act. While the defendant argued that it only guaranteed the authenticity of a piece, the trial court ruled that the defendant had expressly guaranteed that the plaintiff could return the table if she were unsatisfied. The court found that the defendant had represented the table to be all original, and it was not because a piece of wood in the drawer had been replaced, thus defendant had violated the Unfair Trade Practices Act. The defendant appealed.

The Law Court, in ***Courtney v. Bassano***, 1999 ME 101 (June 30, 1999), first stated that whether language creates an express warranty and whether a warranty has been breached are questions of fact. The Court decided that the trial court's finding that the advertisement created an express warranty of plaintiff's satisfaction was not improper. The Court also found that defendant had expressly warranted the table was all original and it breached that warranty as part of the drawer had been replaced.

The Law Court upheld the trial court's ruling that defendant breached an express warranty and had violated the Unfair Trade Practices Act. Defendant argued that the plaintiff was required to show that it acted in bad faith. On the contrary, the Law Court stated, merely because a seller makes misrepresentations in good faith does not excuse him or her from liability. The Court reiterated that private plaintiffs need not prove bad faith in order to establish a violation of the Unfair Trade Practices Act. The case was remanded to Superior Court for determination and award of attorneys' fees to the plaintiff.

Defense counsel's contacts with plaintiff's doctor

Can a defendant's attorney contact a treating physician without approval of the plaintiff? The United States District Court for the District of Maine held that such contact is not allowed. In ***Neubeck v. Lundquist***, 98-380-P-C (U.S.D.C. Me. June 14, 1999), defense counsel had contacted a treating physician without notice to the plaintiff which resulted in the physician's execution of an affidavit. Defendant's attorney had intended to designate the doctor as an expert witness for trial. Defendant's lawyer wished to have further contact with the physician, and on learning of this, plaintiff's counsel notified her that further contact without plaintiff's approval would violate the physician/patient privilege.

The District Court noted that while there are no reported decisions in this jurisdiction which squarely address the issue, the Maine Board of Overseers of the Bar had issued an ethics opinion stating that Maine Bar Rules do not prohibit *ex parte* contact between treating physicians and defense counsel.

However, in order to preserve the integrity of the physician/patient privilege the Court held, a defendant must be limited to the formal mechanisms of discovery provided by the Rules of Procedure, unless a plaintiff authorizes defendant's contact with plaintiff's treating physician. The Court noted that even though the privilege is waived as to the issues put into play by the litigation, the waiver is limited, and a treating physician could easily be confused about the extent to which the waiver applies. The Court found that restricting a defendant's access to formal methods of discovery protects against unintentional disclosure of privileged information.

In ***Neubeck***, the fact that defendant designated the physician as an expert witness made no difference under the circumstances, the Court stated. Otherwise, defense counsel could have unfettered *ex parte* access to all the plaintiff's treating physicians merely by naming them as a potential expert witness.

Although this decision applies to cases pending in the federal system, it represents the prevailing sentiment in the state system as well. Therefore, unless the plaintiff agrees, defense counsel should not interview treating physicians except through a formal deposition. □

Briefs/Kudos

Anne Carney is serving on the Executive Committee of the Labor and Employment Law Section of the Maine State Bar Association.

Adrian Kendall is contributing to his family's community with service on the Board of Adjustment and Appeals in the Town of Cumberland. And continuing his involvement in properties and dwelling places, Adrian also spoke in September at the annual meeting of the Manufactured Housing Association of Maine.

At the seventh annual Comp Summit seminar at Sugarloaf in September, **Steve Hessert** moderated a panel addressing current trends in the workers' compensation insurance market in Maine. **Steve Moriarty** spoke on a panel focusing on reinstatement offers and requests.

Northern New England Law Publishers just published the year 2000 edition of the *Maine Employer's Guide: Workers' Compensation.* **Steve Moriarty** is a co-author of the Guide, originally published in 1992, and now in its third edition.

Attorneys **Emily Bloch, Anne Jordan,** and our librarian **Julie Welch** are elated at the news that the Breast Cancer Project serving imprisoned Maine women, created by the Women's Law Section of the Maine Bar, has won a national nod. The Project has been chosen for a grant, one of only 12 in the country, by the Susan G. Komen Breast Cancer Foundation. Maine's project was showcased in Dallas in early October.

Anne Jordan has been elected Vice President of the Camp Fire/Hitowana Council Board of Directors. The Council serves over 2500 girls and boys, ages 4-16, with Camp Fire activities, adventure-based outdoor programs and summer day camp at the Camp Ketcha facility in Scarborough. The Council has been busy since March raising funds to rebuild the Camp's main building after the 125 year old barn was destroyed by fire.

Jon Brogan once more has won the Purpoodock Club's golf championship – his fourth, overall. Also, Jon has been included in the millennium edition of *Who's Who in American Law.*

Dan Cummings and **Dave Herzer** participated in the walkathon for the Maine Children's Cancer Center Program in late summer, with **Paul Driscoll** and many NH&D employees contributing to fundraising for this unique service. The MCCP offers free services to children with cancer and their families without insurance at the Barbara Bush wing of Maine Medical Center, which has been open just over a year.

The Maine Credit Union League, in the face of fierce media coverage of Y2K at year's end, recommends that credit unions, and businesses too, reassure members and customers about their readiness with a constant flow of Y2K-related information. "The more facts they have in hand, the less likely they are to be swayed by sensational stories in the press," said MECUL.

The American Bar Association set up the Central and East European Law Initiative several years ago, and Norman Hanson & DeTroy has supported its efforts to help the new Eastern European democracies reconstruct their legal systems. **Tom Marjerison**, in concert with other lawyers from the U.S., recently assisted CEELI in an analysis of proposed laws on the use of polygraph tests in the Republic of Lithuania.

Bob Bower spoke at a late summer seminar sponsored by Lorman Education Services on recent Law Court decisions and legislative amendments to the Workers' Compensation Act. □

New law grants employment leave for victims of violence

The Maine Legislature has enacted a law, effective September 18, 1999, requiring employers to grant "reasonable and necessary" leave to an employee who is a victim of violence or assault as defined by Maine's Criminal Code, or is a victim of stalking or other conduct that would entitle the victim to an Order for Protection from Abuse. An employee is entitled to leave to prepare for and attend court proceedings, receive medical treatment, and obtain services to remedy a crisis caused by the violence, such as locating substitute housing. Employers may pay an employee during the leave of absence, but are not required to.

The law prohibits employers from taking any adverse action against an employee because the employee has taken leave required by the new law. Employers, however, may deny leave if it would create "undue hardship" for the employer, if the employer is not notified of the need for leave in a "reasonable time," or if the leave is "impractical, unreasonable, or unnecessary."

The law is enforced by the Department of Labor, which may assess civil penalties of up to $200 for each violation. An employee who believes leave was improperly denied has six months in which to notify the Department of Labor and the employer. □

Anne M. Carney

New federal law Limits Y2K Lawsuit boundaries

President Clinton signed a new Y2K Act into law on July 20, 1999. The legislation applies to any lawsuit brought after January 1, 1999 for a Y2K failure that has caused harm or injury before January 1, 2003. Business managers will feel some assurance that frivolous actions against them will be severely limited by the parameters set out in this new Y2K law. Here are some of its chief provisions:

• Before any lawsuit is filed, plaintiffs must provide defendants written notice of the Y2K problem they believe exists.

• The defendant then has 30 days to respond to the notice. The response must describe the action that defendant has taken or plans to take to correct the problem, or state its willingness to engage in alternative dispute resolution. The defendant then has 60 more days to complete the proposed remedial action or the ADR process.

• In assessing liability, defendants are required to pay only the amount of monies that reflect their proportion of liability. This departs from the standard joint and several liability that normally applies when a judgment is rendered against more than one defendant. However, an exception may be made when a plaintiff cannot collect damages from other defendants. The limit created by proportionate liability does not apply to defendants who cause plaintiffs intentional harm. The Y2K Act contains other exceptions to the collection of damages as well.

• Punitive damages for small businesses – those with fewer than 50 employees – are capped at the *lesser* of three times the amount awarded for compensatory damages, or not more than $250,000.

• Plaintiffs are required to mitigate their damages, except in cases of intentional fraud.

The new Y2K Act has additional provisions that will create fairer litigation scenarios. For example, the Act draws distinctions between contract and tort lawsuits, and creates a distinct and separate standard for "bystander liability." Please feel free to contact me, or the other members of NH&D's commercial group – Dan Cummings, Paul Driscoll, or Rod Rovzar – for more information. □

Adrian Kendall

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

Return service requested

Fall 1999 issue