

## Navigating Maine's Wrongful Death Act

BY JOHN R. VEILLEUX

Every lawsuit for wrongful death is guided by Maine's Wrongful Death Act. More specifically, the amount and type of damages recoverable in a death action are limited by the Act. Almost everyone is familiar with one simple concept for death claims – capped damages. However, the Act itself does not limit all damages, and the courts are continually evaluating what damages are and are not available or capped pursuant to the Act.

Several of the wrongful death statutes' requirements are not subject to much debate. All wrongful death claims must be brought in the name of the Personal Representative of the deceased person within two years of the date of death. An estate must be set up even if there are no surviving spouses, children, or other heirs.

The wrongful death statute only applies where there is some causal connection between a defendant's negligence and the death. In most general liability cases, there is little dispute that the death was caused by an event or incident. There are those rare cases, however, where a wrongful death act claim is brought, but causation is not established. For example, where a Jehovah's Witness is injured in an automobile accident and requires surgical repair of broken bones, refuses blood products during the surgery, and later dies, a wrongful death claim is questionable. In that situation, the avoidable consequences doctrine would likely bar

a claim that the death was proximately caused by the defendant's negligence in the auto accident. The Law Court in *Walter v. Wal-Mart Stores, Inc.*, 2000 ME 63, ¶ 17, 25, 748 A.2d 961, 968, 970 stated that "[a] classic application of the avoidable consequences doctrine is made when the plaintiff fails to seek medical treatment after being injured by the defendant."

Assuming the causation threshold is met and the claim is appropriately brought in the name of the Personal Representative of the decedent's estate within the two-year statute of limitation, the wrongful death statute operates as a mechanism to limit the amount of money damages recoverable for the estate. Courts analyzing the Wrongful Death Act typically break damages down into two primary categories: non-pecuniary and pecuniary.



JOHN R. VEILLEUX

### **Non-pecuniary Damages**

The first thing most attorneys and adjusters recognize when presented with a wrongful death claim is that a statutory cap limits the amount of damages available to the estate. However, the only capped damages under the Act are so-called non-pecuniary damages. Non-pecuniary damages are subject to a \$400,000 cap and include all claims for "the loss of comfort, society, and companionship of the deceased, including any damages for emotional distress arising from" the incident at issue in the lawsuit. The Act only operates to cap these emotional-type damages that are not easily assigned a monetary value. The Law Court recently held that damages for bystander negligent infliction of emotional distress are subsumed and capped by the wrongful death statute if they arise out the same facts involved in the wrongful death claim. *Carter v. Williams*, 2002 ME 50, ¶ 14, 792 A.2d 1093, 1098.

## INSIDE

*Navigating Maine's  
Wrongful Death Act* 1

*The Statute of Limitations:  
Which payments extend?* 3

*Briefs/Kudos* 4

*Workers' Compensation -  
Law Court decisions* 5

*Two recent decisions from  
the Law Court* 7

## Pecuniary Damages

The Wrongful Death Act does not limit or cap the amount of pecuniary damages recoverable by the estate. Where liability is not at issue, uncapped pecuniary damages are often the subject of much litigation. "Pecuniary" damages are those financial losses suffered by the estate (or more specifically, the heirs of the estate), and include loss of support damages resulting from the decedent's death. Loss of support claims most typically involve lost revenue to the decedent's heirs that would be used to pay a home mortgage, insurance, groceries, and clothing. These claims often require the assistance of an economist to determine the present value of the lost financial support suffered by the heirs of the estate as a result of the death. A number of variables are involved in assessing the value of a loss of support claim. For example, the death of a 30-year-old breadwinner with two minor dependents and a non-working spouse is likely a much larger claim than the loss of support for a 65-year-old decedent with no dependents except for a surviving spouse.

## Relational Losses

Creative attorneys and receptive Courts have also attempted to expand the availability of pecuniary losses to include "relational losses" suffered by a minor child who loses a parent. These "relational" losses can include "the pecuniary value of [a decedent's] services, instruction, advice, counsel, parental training, care and guidance, assistance and protection, as well as [the decedent's] attention to the physical, moral, and educational welfare of his children." *Feighery v. York Hospital, et al.*, 38 F.Supp. 2d 142, 147 (D.Me. 1999). In *Feighery*, the Federal District Court held that such relational losses can be assigned a monetary value by a jury, presumably with the assistance of an expert. Although the Maine Law Court has not yet ruled on this issue, the Court held in *Feighery* that damages for relational losses including the loss of

parental advice, counsel, and guidance are pecuniary and, therefore, recoverable under the relevant wrongful death statute. It is important to note, however, that the Court in *Feighery* determined that such damages were not identical to the non-pecuniary, emotional damages and are not subject to the \$400,000 statutory cap.

The *Feighery* decision preceded the Law Court's pronouncement in *Carter v. Williams*, 2002 ME 50, ¶ 9,10, 792 A.2d 1093, 1097-98 that "damages may not be awarded when the proof is speculative . . . it is inherently difficult to determine pecuniary loss upon the death of a child."

## Conscious Pain and Suffering

The Wrongful Death Act also does not cap or limit damages recoverable for the conscious pain and suffering of a decedent prior to his or her death. In most cases where death is nearly instantaneous, valuing the conscious pain and suffering claim is often very difficult. In the recent York County Superior Court case decided by Justice Fritzsche, *Healy v. York Hospital, et al.*, the Court ordered a remittitur when a jury awarded \$1.5 million for the deceased's conscious pain and suffering. In that case, the evidence at trial was that the decedent survived a day and a half after receiving an inappropriate amount of

clot-breaking medication, but there was little evidence about exactly how much pain she was in during that time period. Although the Court found that each case must be determined on its own facts, it ruled that the sum of \$1.5 million "exceeds the bounds of rationality and exceeds the limits of evidentiary support." Because each claim is determined on a case by case basis, there are certainly other instances where the trial judge has approved a substantial award for conscious pain and suffering where there is an evidentiary basis for it.

## Punitive Damages

The Wrongful Death Act also caps awards of punitive damages to \$75,000.

## Funeral and Burial Expenses

The estate is entitled to recover the reasonable funeral and burial expenses incurred.

## Settlements Involving Minors

In any wrongful death action that involves a settlement for the benefit of minor children, an application for the approval of the minor settlement must be filed in accordance with Maine Rule of Civil Procedure 17A. The Court requires that the settlements be approved so that the best interests of the child are furthered.

## Conclusion

Claims for wrongful death must be carefully evaluated, paying particular attention to the amount and type of damages that are capped and uncapped by the statute. Given the severe limitation on recoverable emotional damages under the statute, the courts and the plaintiff's bar continue to entertain new ways to open the door for uncapped damage claims. Ultimately, where there is evidentiary support for pecuniary loss or conscious pain and suffering under the Act, these uncapped damage claims can be substantial. □

---

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  
Lorri A. Hall, Managing Editor

Norman, Hanson & DeTroy, LLC  
P.O. Box 4600, Portland, ME 04112  
Telephone (207) 774-7000  
FAX (207) 775-0806  
E-mail address: linitiallastname@nhdlaw.com  
Website: www.nhdlaw.com  
Copyright 2005 by Norman, Hanson & DeTroy, LLC

# The Statute of Limitations: Which payments extend?

BY STEPHEN W. MORIARTY

There are two ways in which the basic two-year statute of limitations set forth in §306 can be extended to the full six years. The first method is through formal recognition of an injury. In other words, if the occurrence of an injury is established either by decree, by agreement reached at mediation, or by other agreement of the parties (as with the Consent form or an “accepted” MOP), the statute of limitations is extended to six years. Alternatively, the payment of “benefits under this Act”, either with or without prejudice, also triggers the 6-year statute of limitations. This article will briefly review the types of benefits which extend the statute as well as some of the factual and procedural complications which can arise.

## What are “benefits”?

Not every monetary payment made by an employer will qualify as a benefit for purposes of §306, as the statute applies only to benefits paid “under this Act”. Accordingly, it has been held that payments made by a general health insurer were not made pursuant to the requirements of the Act and therefore did not extend the statute of limitations. *Deabay v. St. Regis Paper Company*, 442 A.2d 963 (Me. 1982). However, payment of incapacity benefits or payment of medical expenses for treatment resulting from an injury fall clearly within the coverage of the statute and extend the period of limitations. *Rutter v. Allstate Auto Insurance Company*, 655 A.2d 1258 (Me. 1995). The same would presumably apply to payments for the purchase of medication, medical supplies, prosthetic devices, and the like. The statute would similarly be extended following payment of fees incurred by a specialist providing job placement services or retraining. In

fact, the Law Court held in *Johnson v. Bath Iron Works Corp.*, 551 A.2d 838 (Me. 1988) that payment of an employee’s attorney’s fees or witness’ fees also extends the statute.

In some situations an injured worker may fall under the protection of a concurrent workers’ compensation program, such as the Longshore and Harbor Workers’ Compensation Act applicable to maritime workers. In such cases, the Court has held that payments under the Longshore system are “essentially equivalent” to payments made under the Act and thus extend the time period for filing claims. *Stockford v. Bath Iron Works Corp.*, 482 A.2d 843 (Me. 1984).

## Necessity of “Payment”

Not every concession or accommodation made by an employer necessarily constitutes a “payment” within the meaning of the statute. The Court has emphasized that an actual payment of some type must be made to stop the running of the statute.

We have traditionally interpreted the term “payment made under the Act” to refer to monetary payments, either made directly to the employee, as in the case of incapacity benefits, or to a third party for the purchase of an employee benefit, for example, the payment of medical expenses, or attorney fees...the term “payment” in the statute of limitations refers to the payment of money for a benefit or service, rather than the provision of some other direct benefit. *Dahms v. Osteopathic Hospital of Maine*, 2001 ME 145, ¶9, ¶10, 782 A.2d 774, 777.

Thus, although the issue had been uncertain for a number of years (see,

e.g., *Eaton v. Bath Iron Works Corp.*, 502 A.2d 1040 (Me. 1986)), the Court held in *Dahms* that the transfer of an injured worker to a light duty position was not a “payment” within the meaning of the statute. Accordingly, the law requires an actual payment, and the simple provision of a benefit will not suffice.

In a similar fashion the Court has held that an employer’s providing direct medical treatment at an in-house medical care facility did not constitute the payment of a benefit and therefore did not extend the statute of limitations. *Joyce v. S. D. Warren Paper Company*, 2000 ME 163, 759 A.2d 712, *Moreau v. S. D. Warren Paper Company*, 2000 ME 62, 748 A.2d 1001. To soften the impact of these decisions, the Legislature amended §306(2) in 2001 to bring direct medical care from a health care provider employed by or under contract with the employer within the scope of a payment of benefits under the Act, under some circumstances. Still, under *Dahms*, employer-initiated actions such as reinstatement, transfer, and retraining will not qualify as a payment of a benefit.

## Defense Cost

Employers presented with a claim for benefits may incur a variety of expenses in the course of defending the case. However, the payment of defense costs has no impact upon the statute of limitations. The Court unequivocally held in *Cline v. Wood*, 510 A.2d 530 (Me. 1986), that payment for an employer-requested examination under the predecessor of §207 was not the type of payment which could extend the statute of limitations. As the Court held:

To reach a contrary conclusion requires the untenable declaration that the employer is helpless to prevent the extension of the limitation

period when he initiates an examination of the employee...to determine if the injury is work-related.

The logic and rationale of the decision applies to the full range of defense-related expenditures, such as acquiring medical records, retaining investigators, and securing legal representation.

### Payments by Others

Generally speaking, payment of benefits by another insurer or another employer will not impact your own statute of limitations. *Pottle v. Bath Iron Works Corp.*, 551 A.2d 112 (Me. 1988). However, there are some limited circumstances in which the reverse is true. Payments by a subsequent insurer may extend the statute of limitations for a prior injury if the employer had contemporaneous knowledge that the payments might be related in part to the earlier

injury. *Klimas v. Great Northern Paper Company*, 582 A.2d 256 (Me. 1990). The same is true for payments made by a previous carrier, if once again the employer was on notice that the payments were partially related to the injury in question. *Lister v. Roland's Service, Inc.*, 1997 ME 23, 690 A.2d 491. To invoke this exception to the general rule, it is vitally important that an employer have actual knowledge that another party's payments are related to its injury. As the Court has just held in *Leighton v. S. D. Warren Co.*, 2005 ME 111, 883 A.2d 906, the burden of proof rests with the employee to establish the existence of such knowledge.

### Post-expiration Payments

An employer or an insurer may inadvertently pay benefits on account of an injury after the six year statute of limitations has expired. The Court has ruled

that, in these instances, a payment following expiration of the statute of limitations will not revive an otherwise expired claim. *Dahms, supra, Harvie v. Bath Iron Works Corp.*, 561 A.2d 1023 (Me. 1989). While there is no procedure under the Act to recover an inadvertent payment after the statute of limitations has run, there are no legal consequences to such a payment and an employer does not become exposed to additional liability.

### Summary

The Act is structured in such a manner that the periodic payment of benefits can keep the statute of limitations open virtually indefinitely. While employers must meet their legal obligations to injured workers, employers should take care to verify that a requested benefit is in fact related to an injury before issuing payment. □

## Briefs/Kudos

**DAVID VERY** was recently elected President of Portland's Back Cove Neighborhood Association. Dave has served as the Association's Vice-President for the past two years.

**ADRIAN KENDALL** was invited to speak at a meeting of the Directors of International Trade for all of the New England states held in Concord, New Hampshire. Adrian, whose practice includes a concentration in international commercial law, addressed the group of policy makers on present issues in European and international trade and attracting foreign direct investment to the New England region as part of a revitalized effort to compete with the increased international investment that is occurring in the southeastern United States. Adrian is the Northern New England Representative of the German Consulate General, Boston, served as Special Advisor on Governor Baldacci's

2004 trade mission to Germany and Italy, and also briefed New Hampshire Governor Jack Lynch and participants on the 2005 trade mission to Germany, the Czech Republic and the Ukraine.

**DAVID HERZER** joined Associate Law Court Justice Susan Calkins on a panel of evaluators for the finals of the Maine State Bar Association Mock Trial Competition held at the Cumberland County Court House in early December. Teams from Hampden Academy and Cape Elizabeth High School advanced to the finals.

**STEVE MORIARTY** spoke at a seminar titled "Workers' Compensation Law in Maine" sponsored by Lorman Education Services in Portland in early December.

**JONATHAN BROGAN** has been elected Maine State Chair for the International Association of Defense

Counsel (IADC). Jonathan has been active on the speaker's circuit lately, having addressed the Maine Trial Lawyers' Association on the topic "Delivering Effective Closing Arguments" and having addressed the Maine Claims Managers' Association regarding Medicare and Medicaid super liens. In addition, Jonathan participated in a Maine State Bar Association seminar on the subject of the effective use of cross-examination.

**JOHN KING** has been appointed as Chair of the Board of Bar Overseers Fee Arbitration Commission and will serve a two-year term through the end of December 2008.

**STEVE MORIARTY, PAUL DRISCOLL,** and **ANN FREEMAN** participated in the 25th Annual Mid-Winter Classic Ten-Miler Road Race in Cape Elizabeth in early February.

(Continued on Page 9)



# Workers' Compensation- Law Court decisions

BY STEPHEN W. MORIARTY

## The Compensability of Pre-existing Conditions

A claim involving a pre-existing condition, sometimes known as a “combined effects” case, poses challenges to the employer and employee alike. Prior to the effective date of the Workers' Compensation Act of 1992, employers were generally responsible for the full extent of incapacity as long as the occupational injury remained one (out of possibly many) contributing cause. Section 201(4) was enacted to restrict the scope of an employer's responsibility in a combined effects situation. In somewhat circuitous fashion, the language of the statute provides 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.

In a recent opinion the Law Court reexamined the venerable *Bryant* decision together with the “significant” contribution requirement, and explained the steps that must be taken to determine the compensability of a combined effects injury.

In *Celentano v. Department of Corrections*, 2005 ME 125 (December 22, 2005), the claimant had a pre-existing but asymptomatic back condition at the time of an August 2001 injury. On that date he stood up from a table while attending a required training session and caught himself on a table leg. He twisted to avoid falling and felt an immediate onset of pain, and was diagnosed with significant nerve root compression. The Board held that the employee had sustained a compensable personal injury and awarded benefits accordingly.

Having granted the employer's Petition for Appellate Review, the Court

took the opportunity to set forth the sequential analysis that must be applied in a case involving a pre-existing condition. Before §201(4) may be applied at all, the Board must first determine whether the claimant has sustained a work-related injury. The Court then reaffirmed its earlier decision in *Bryant v. Masters Machine Company*, 444 A.2d 329 (Me. 1982) and held that in a combined effects case an employee must establish both medical causation and legal causation before an injury can be found to have occurred. Medical causation requires evidence showing a probable relationship between employment activity and resulting symptoms or limitations. Legal causation, by contrast, requires proof of a substantial element of increased risk of injury within the employment environment which offsets the personal risk which a claimant with a preexisting condition faces in normal, everyday living. As the *Bryant* Court held:

Only by that mechanism [legal causation] can we distinguish the disability that is more likely than not produced, at least in part, by a risk related to the employment from one that is not produced in any way by such a risk. *Id.* 337.

Thus, legal causation is established by comparing occupational and non-occupational risks.

In *Celentano*, the Court found that the Board was justified in finding that the twisting episode with the table leg was medically responsible for the employee's disability, even though there was evidence to the contrary. Although its analysis was superficial, the Court further found that the risk presented by the table leg was sufficient to meet the legal causation requirement.



STEPHEN W. MORIARTY

Once the tests of medical and legal causation had been met, and an injury was found to have occurred, the Court then turned to the provisions of §201(4) and emphasized that the **employment** (and not the injury itself) must contribute to the disability in a significant manner. In this case the employment-related activity of rising from a table while attending a mandatory training session was sufficiently connected to employment for purposes of satisfying the statute. It is clear that the employment activity may be relatively trivial in the scheme of things if it nevertheless stands as a significant contributor to the disability. The Court expressly rejected the argument that work activity must be so significant as to have caused the disability in the absence of a pre-existing condition, ruling that the plain language of the statute did not support such a construction.

In summary, a claimant in a combined effects case must establish the occurrence of an injury by proving the existence of both medical causation and legal causation. Only after the determination of the occurrence of an injury has been made can the provisions of §201(4) be applied, and at that point the Board must focus upon the contributory

significance of employment activities to the resulting disability.

### Disability Insurance Offset

Section 221(3) allows an employer to reduce its weekly workers' compensation payments by the amount of benefits paid pursuant to a disability insurance policy provided by the same employer. However, subsection 10 sets forth two seemingly contradictory exceptions to coordination of benefits. Initially, the statute provides that an employer may not take an offset for benefits paid pursuant to a disability plan in existence on December 31, 1992. The statute further provides that an insurance plan either entered into or renewed on or after January 1, 1993 may expressly preclude coordination of benefits. Although the issue may seem arcane and of marginal impact upon the system, the Law Court accepted an appeal from a decision interpreting §221(10).

In *Temm v. S. D. Warren Company*, 2005 ME 118 (December 6, 2005), the employer provided disability insurance protection prior to December 31, 1992 and the plan was renewed thereafter. The renewed plan did not state whether benefits could be coordinated. The employee had sustained occupational injuries in 1995 and 1996, and began to receive disability benefits as a result of his injuries in 1998. In granting petitions for award for the two injuries the Board determined that the employer was entitled to offset the disability retirement payments. The employee appealed to the Law Court.

The Court described the key issue as "whether benefits paid pursuant to an old plan that was renewed after January 1, 1993, but as silent as to coordination, must be offset", and found that the statute was ambiguous. The Court then examined legislative intent, and noted that the purpose of §221 "is to prohibit double recoveries and stacking of benefits", and "is consistent with the overall purpose of the 1992 Act to reduce costs in the workers' compensation system". The Court then held that disability ben-

efits paid pursuant to a plan renewed on or after January 1, 1993 are automatically subject to coordination unless the plan provides otherwise. The decision of the Hearing Officer was affirmed.

### Statute of Limitations

Sixteen years ago the Court held in *Klimas v. Great Northern Paper Company*, 582 A.2d 256 (Me. 1990) that payments made in connection with a subsequent injury can extend the statute of limitations for an earlier injury if an employer had contemporaneous notice that the payments were related at least in part to the earlier injury. In a recent decision the Court addressed the appropriate allocation of the burden of proof in a case in which the statute of limitations for an earlier injury is claimed to have been extended by payments made on account of a later injury. In *Leighton v. S. D. Warren Company*, 2005 ME 111, 883 A.2d 906, the employee sustained an initial occupational injury on May 29, 1983, and the last medical benefits were paid on November 18, 1991. He sustained a second occupational injury on January 26, 2000. The ten-year statute of limitations established by former §95 applied to the case, and the tenth anniversary of the final payment was November 18, 2001. On December 5, 2002, the employee filed a Petition for Restoration for the 1983 injury. Relying upon *Klimas, supra*, the employee claimed that payments made by the employer for the 2000 injury extended the statute of limitations for the 1983 injury.

The Law Court initially confirmed that, when the statute of limitations defense has been raised by an employer, the employee bears the burden of proof to show that the statute has not expired. However, in a case in which the issue turns upon the employer's payment history, the employer must come forward to establish the date of the last payment of benefits. Citing *Patriotti v. General Electric Company*, 587 A.2d 231 (Me. 1991), the Court held that it was appro-

priate to assign this burden of production to an employer as an employer will always have superior access to payment of records or other documentation establishing the timing of the last payment. However, once an employer has come forward with evidence showing that the last payment was made beyond the statutory period, the burden then shifts to the employee to establish that either the employer or the insurer had contemporaneous notice that payments made on account of a subsequent injury were in part related to the earlier claim. The Court assigned this burden to the employee on grounds of "fairness and convenience", on the theory that an employee can best establish how and when the key information linking recent payments with an older injury was communicated to an employer.

As an illustration of how an employee might satisfy the burden, the Court noted that an employee might offer medical records which relate recent symptoms to the prior injury. In addition, an employee could offer evidence that he or she had "asserted a belief to the employer at the time payments were being made the older injury is at least in part responsible for the later incapacity". In other words it could be sufficient to satisfy the burden if an employee testified that a relationship between current problems and an older injury had been communicated directly to an employer representative.

In *Leighton*, the Hearing Officer had found that the employer did not have contemporaneous notice that payments made after the 2000 injury were partly related to the 1983 injury. The Court rejected an argument that the employer should have had constructive notice as the two injuries involved finger amputation on the same hand. Although the Court noted that there was evidence which might have supported a finding of contemporaneous employer notice, it observed that the Hearing Officer was not persuaded by such evidence and it declined to substitute its own factual findings for those of the Hearing Officer. □

# Two recent decisions from the Law Court

BY DAVID P. VERY

## Workers' comp immunity for temporary employee

Christine Marcoux was an on-site coordinator at Nichols Portland for Kelly Services, a staffing company that provided temporary employment services to Nichols. One of Marcoux's duties was to verify the temporary Kelly employees' hours with the appropriate Nichols' supervisors. While Marcoux was making her rounds to the supervisors, she lost her footing while in the Nichols' plant and fell.

Kelly Services had secured the payment of workers' compensation benefits for its employees, and Marcoux filed a worker's compensation claim with Kelly Services. Marcoux then brought a negligence action against Nichols. Nichols filed a motion for summary judgment based on the statutory provided grant of immunity related to the securing of workers' compensation coverage. The Superior Court denied the motion and Nichols appealed.

In *Marcoux v. Parker Hannifin-Nichols Portland Div.*, 2005 ME 107, 881 A.2d 1138 (September 19, 2005), the Law Court first noted that 39-A M.R.S.A. § 104 provides immunity from suit to an employer that uses a private employment agency for temporary help services as long as the temporary help service has secured the payment of compensation. Marcoux contended that she did not work under the direction and control of Nichols, and thus was not necessarily an employee of a temporary help services for purposes of Section 104 and her status was more akin to that of an independent contractor. Nichols countered that it was entitled to immunity from suit by any Kelly employee who worked at its plant, including Marcoux, because the immunity afforded by Section 104 is unqualified; that is, it does not distinguish between the types of temporary employees from

whom a third-party employer is immune to suit. Because Kelly Services meets the definition of a temporary help service and secured the payment of workers' compensation for its employees, Nichols argued that it was immune from suit by Marcoux because she was a Kelly employee at the time of her injury, regardless of whether she was working under Nichols' direction and control.

The Law Court concluded that Section 104 was reasonably susceptible to both interpretations offered by the parties. As a result, the Law Court looked to the legislative history of the statute for guidance. According to the legislative history, the statute was intended to clarify that the immunity only applies when the loaned employee is under the direction and control of the third party. Thus, the Law Court held that it appears that the Legislature intended that a third party employer's immunity from suit by a temporary employee is subject to the requirement that the temporary employee was one who was subject to the direction and control of the third party employer. Accordingly, a temporary help service employee who is working at the premises of a third party employer, but who is not under the direction and control of the third party employer, does not fall within the gambit of Section 104 immunity.

The Law Court further held that disputed facts existed with regard to the degree of direction and control Nichols exercised over Marcoux. Therefore, the question of Marcoux's status was a disputed question of fact to be resolved by a fact finder. Thus, the Law Court remanded the action to the Superior Court.

N H & D's Jonathan Brogan and Russell Pierce represented Nichols Portland in this action.



DAVID P. VERY

## Loss of consortium held to be a wholly separate and independent right of recovery

In *Parent v. Eastern Maine Medical Center, et al.*, 2005 ME 112, 884 A.2d 93 (October 26, 2005), the Law Court addressed for the first time whether a loss of consortium claim must be joined with the underlying personal injury claim. After reviewing its prior law on loss of consortium actions, the Law Court held that joinder is not required, as a loss of consortium claim provides an individual with a wholly separate and independent right of recovery.

Karen Parent was mistakenly diagnosed with breast cancer. She filed a medical malpractice claim. While her claim was pending, a judgment of divorce was entered between her and her husband, James, and the divorce court awarded James his loss of consortium claim stemming from the misdiagnosis of Karen's cancer.

After Karen settled her claim, James filed a notice of claim for loss of consortium against the medical malpractice defendants and the defendants were granted summary judgment. The trial court held that the willful failure of an individual to join a claim for loss of consortium with the principal claim constitutes a waiver unless the person is

unaware of the pendency of the principal claim or is prohibited from joining the action by some circumstance beyond his or her control. Because James was well aware of the pendency of Karen's claim, the trial court held that James had waived his loss of consortium claim.

On appeal, in a split decision, the Law Court noted that jurisdictions are split as to whether a person who fails to join in his spouse's tort action is barred from pursuing his own loss of consortium claim stemming from the same facts. The Law Court noted that loss of consortium actions are authorized by 14 M.R.S.A. § 302 which states, "A married person may bring a civil action in that person's own name for loss of consortium of that person's spouse." The Court reviewed two prior decisions in which it addressed loss of consortium actions.

In *Dionne v. Libbey-Owens Ford Co.*, 621 A.2d 414 (Me. 1993), the Court held that the loss of consortium statute was enacted to provide "a separate right to the spouse." As a result, the Court held that any damages awarded to a wife for loss of consortium were not subject to the workers' compensation lien on any damages recovered by the employee-husband.

In *Hardy v. St. Clair*, 739 A.2d 368 (Me. 1999), the Court held that a spouse's loss of consortium claim is an independent cause of action that was not barred by a release signed by the injured spouse. The Law Court noted that although derivative in the sense that both causes of action arise from the same set of facts, the injured spouse's claim is based on the common law of negligence while the claim of the other spouse is based on statutory law. Each claim is independent of the other and the pre- or post-injury release of one spouse's claim does not bar the other spouse's claim.

After reviewing its prior decisions, the Law Court held that Maine's loss of consortium statute provides an individual with a wholly separate and independent right of recovery. The Court further noted that Section 302 contains no statutory requirement of joinder, unlike other provisions of the Maine Revised Statutes. As a result, the Court held that there is no requirement to join a loss of consortium claim with the underlying personal injury claim.

The Court noted that any concern about double recovery could be addressed by careful limitations on the types of damages allowed. The Court further noted that a defendant has the right to move pursuant to Maine Rule of Civil Procedure 19(a) to join a plaintiff to any pending lawsuit if disposition of

the action without that plaintiff would leave any other persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Thus, if a defendant felt it was appropriate, a defendant has the right to join a spouse's loss of consortium action, even if not filed, in the pending action by the other spouse regarding the underlying personal injury claim.

Justice Alexander and Chief Justice Saufley dissented. The dissenters argued that a joinder requirement would support the justice system's goal of achieving finality of judgments and securing the just, speedy and inexpensive determination of every action. The dissent argued that the trial court correctly determined that James Parent waived his claim for loss of consortium by his willful failure to join his claim with Karen's claim for medical malpractice, after he was informed of the malpractice claim and his pending settlement.

On another note, one of the defendants had argued that James' loss of consortium claim terminated upon his divorce. That argument was not addressed below and thus the Law Court did not consider that argument in its opinion. □



**JONATHAN BROGAN** won his ninth club championship last year at the Purpoodock Club, and has been elected President of the club for the second time.

The firm recently hired three new employees. **DOM LAGRAVINESE** joined the firm in October as a paralegal in the Litigation Group. Dom graduated from Providence College last year with a degree in Economics.

In February **CATHERINE HOLT** was hired as a legal secretary to support Emily Bloch in the medical malpractice group. Catherine relocated to Maine last year from the Washington, D.C. area where she worked as a Security Officer for a government contractor.

Catherine worked as a paralegal in New Mexico and then moved to New Hampshire where she was a paralegal at the law firm of Shaines & McEachern for more than ten years.

Also in February **NICOLE BOTTS** was hired as a paralegal to provide support to the medical malpractice group. Nicole has been employed as a Litigation/Medical Malpractice paralegal at Friedman, Gaythwaite, Wolf & Leavitt for the past two years.

**STAFF SGT. RYAN O'DONNELL** son of Patte and Jim O'Donnell has safely returned from his second one-year tour of duty in Iraq. Sgt. O'Donnell is assigned to the 3d Armored Calvary Regiment based in Ft.

Carson, Colorado. Ryan and his new wife are relocating to Fort Knox, Kentucky where he will be a drill instructor.

Congratulations to **PATTE O'DONNELL** who just celebrated her 25th anniversary with the firm.

On February 10, 2006, our Workers' Compensation Practice Group sponsored a "Medicare Secondary Payer Seminar" at the Portland Country Club featuring Thomas Hatchfield from the Centers for Medicare and Medicaid Services. Mr. Hatchfield offered valuable insight on the consideration of Medicare's interests in settling workers' compensation claims. □

---

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

Return service requested

*Winter 2006 issue*