NORMAN, HANSON & DETROY, LLC

newsletter

Current developments in Maine law

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Norman, Hanson & DeTroy merges with Lewiston law firm Bonneau & Geismar

BY ROBERT W. BOWER, JR.

We are delighted to announce the merger of Norman, Hanson & DeTroy and the preeminent Lewiston law firm of Bonneau & Geismar effective January 1, 2008. This merger has been many months in the planning, and results in a new full service law firm still under the name Norman, Hanson & DeTroy, with offices in both Portland and Lewiston. Our two new members are John V. Bonneau and John W. Geismar.

John Bonneau, a Lewiston native, graduated from Bowdoin College in 1967. He then graduated cum laude from Villanova Law School where he served as a member of the law review. John began his law practice in Philadelphia in 1971, and then returned to Lewiston in 1975. He has practiced in Lewiston ever since. He is a member of the bars of both Maine and Pennsylvania. John concentrates his practice in the area of estate planning and probate. He also represents numerous corporate and commercial interests, as well as individuals. John was elected Fellow of the American College of Trust and Estate Counsel in 1991. He has played an active role with many local non-profit organizations. John currently serves as treasurer of the board of John F. Murphy Homes, a social service agency, and is president of the friends of the Lewiston Public Library. John will be heading up our trust and estate practice group.

John Geismar has been practicing law in Lewiston since 1982. John is a graduate of Colby College and the New England School of Law, cum laude, where he served on the law review. John concentrates his practice in the areas of health care law, tax law (including practice before the IRS), pension and welfare benefit law, corporate law and commercial transactions. John is licensed to practice before the United States Tax Court. John is a member of the National Health Lawyers' Association. He serves on the St. Joseph's School Board, the Boys and Girls Club Board, the Lewiston Mill Redevelopment Finance Committee, and chairs the Town of Minot Planning Board. John is general counsel to Sisters of Charity Health System, Inc., which owns St. Mary's Hospital in Lewiston.

JOHN V. BONNEAU

JOHN W. GEISMAR

CHARLES C. HEDRICK

KENNETH J. ALBERT, III

CHRISTOPHER J. KNOX

In addition to our new members, we have added three associates practicing out of our new Lewiston office, Charles C. Hedrick, Kenneth J. Albert, III, and Christopher J. Knox.

Chip Hedrick has been practicing since 1998. He is a Maine native and graduate of Hebron Academy, St. Michael's College and the University of Maine School of Law. Chip served as research editor for the Maine Law Review. Chip is a 2001 recipient of the Maine Bar Foundation and Volunteer Lawyers' Project Pro Bono Publico Award. Chip concentrates his practice in the areas of business law, corporate law, probate, trusts and estates and wills.

Ken Albert was admitted to the Maine and federal bars in 2003. A native of Maine, Ken graduated from Central Maine Medical Center's School of Nursing in 1986. He holds a current RN certification. After serving in vari-

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ous clinical and administrative positions within the healthcare arena, Ken returned to school and graduated from the University of Southern Maine, magna cum laude in 1999. He then attended the University of Maine School of Law where he served as research and technology editor of the Maine Law Review. Ken's practice concentrates in healthcare law. Ken is a director on the boards of trustees of two local not-for-profit agencies, and is active in Scouting and local youth sports organizations.

Chris Knox earned his undergraduate degree in English from Boston College in 1996. After a number of years working in domestic and international trade in the seafood industry, he attended the University of Maine School of Law and graduated cum laude in 2007. While in law school, Chris served as a teaching assistant in the area of contract law and worked as a tax intern at the accounting firm of Baker, Newman & Noyes in Portland. Chris also spent a semester as an extern at the United States Attorney's Office, Bankruptcy Division. Chris concentrates his practice in trusts, estates and transactional law.

This historic merger adds significant fire power to our already deep bench of transactional and commercial attorneys led by Rod Rovzar, Paul Driscoll, Adrian Kendall, Dan Cummings and Jeff Herbert. In addition, we will now be able to provide more robust tax and healthcare law advice to our many clients in need of such services.

Most importantly, we have joined with another group of professionals who we trust and who share our philosophy of providing the highest quality legal services to our clients at the most reasonable price. You can reach our new friends through our regular office number, (207) 774-7000. Take the opportunity to pick up the phone and give our new colleagues a call. You will be glad you did. We look forward to many more years of service to you, our trusted and valued clients. ☐

Kudos

CHRIS TAINTOR was presented with an award from the Maine Bar Foundation for having accepted the most family law case referrals among Cumberland County attorneys from the Volunteer Lawyers Project in 2007.

MARK LAVOIE has been appointed to the Maine Civil Rules Committee by the Law Court. Mark also recently spoke at surgical grand rounds at the Maine Medical Center on the legal dimensions of medical practice in Maine.

DAVE VERY spoke at a recent meeting of the Maine Coalition of Home Inspection Professionals in Augusta addressing liability issues involving home inspection professionals.

STEVE HESSERT spoke at the 5th Annual Workers' Compensation Insurance ExecuSummit in New York City on February 5 on the topic of "Psychological Injuries: Investigation, Development, Evaluation and Trial".

JOHN VEILLEUX is serving his second term as the Initiation Director of the Casco Bay Hockey Association. John also serves as a member of the Board of Directors of the Association.

For the past four years, **DAVE VERY** has served as head coach of the Portland Steelers youth football team, and in 2007 the team was undefeated. The Steelers were crowned 2007 Maine State Youth Football champions following a 30-0 win over the Brunswick Dragons in the state championship game.

ADRIAN KENDALL and several fellow hikers successfully climbed Baxter and Hamlin Peaks in Baxter State Park in January.

The 2008 Edition of The Best Lawyers in America, published by Woodward/White, Inc. of Aiken, South Carolina has included the following members of NH & D: **BOB BOWER** (workers' compensation law), **JON BROGAN** (personal injury litigation), **PETER DeTROY** (commercial litigation, non-white-collar and white-collar criminal defense, and personal injury litigation), **PAUL DRISCOLL** (real estate law), **MARK DUNLAP** (insurance law), **STEVE HESSERT** (workers' compensation law), **MARK LAVOIE** (medical malpractice law and personal injury litigation), **TOM MARJERISON**, (personal injury litigation), **STEVE MORIARTY** (workers' compensation law), **JIM POLIQUIN**, (appellate law and insurance law) and **ROD ROVZAR** (corporate law and real estate law). ☐

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.

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Foster v. Oral Surgery Associates:
The Law Court limits the admissibility of expert testimony equating ethical standards and standards of care

By Christopher C. Taintor

The Foster Decision

On January 31st the Maine Supreme Judicial Court, sitting as the Law Court, decided *Elizabeth Foster v. Oral Surgery Associates*, a case with potentially far-reaching consequences for medical malpractice litigation in Maine. Fortunately, the Court declined the plaintiff's invitation to radically reformulate the standard of care for Maine health care professionals.

In *Foster* the plaintiff claimed to have been harmed by the conduct of the defendants, her oral surgeons, who had inserted a teflon proplast implant to replace the meniscus in her temporomandibular joint (TMJ). In essence, her theory of liability was that the materials used in the manufacture of the implants made them dangerous, and that the doctors knew or should have known of that danger. The case had a tortured procedural history. There were originally multiple plaintiffs, multiple defendants, and multiple theories of liability, and the case had been to the Law Court several times already. The cases brought by several plaintiffs had been dismissed on statute of limitations grounds, and the plaintiffs who remained had seen their claims narrowed considerably. By the time Elizabeth Foster's case was ready for trial, only two claims remained alive. One theory of liability was that the defendants had fraudulently concealed their failure to warn her of known risks before embarking on the surgery (the informed consent claim would be barred by the statute of limitations unless the plaintiff could establish concealment, which would toll the statute). The other was that the defendants, upon learning of new information about defects in the implants, had negligently failed to advise her that she should have them removed. As the Law Court noted, "both claims necessarily involve[d] the issue of informed consent."

In support of these claims the plaintiff offered no expert testimony from an oral surgeon. The only expert testimony she offered was that of Ronald Green, a Dartmouth College professor of bioethics who, by his own admission, was unfamiliar with the standards of practice actually observed by members of the oral surgery community. Professor Green was aware of certain medical literature that had been published before the plaintiff's surgery, which suggested that there were risks associated with the use of teflon implants. He conceded, however, that he did not have the expertise to assess the validity of the scientific conclusions drawn by the authors of that literature. Dr. Green simply proposed to testify that any medical professional – whether it be an oral surgeon or anyone else – has an ethical obligation to inform his or her patient of the existence of data raising significant questions about the existence of a risk, even if the data are inconclusive and irrespective of what other similarly-trained professionals routinely tell their patients.

Professor Green, who has experience advising universities and other institutions about their ethical obligations in clinical research projects, also testified that the oral surgeons involved in the plaintiff's care had acquired heightened duties by virtue of their own "research" endeavors. This research

CHRISTOPHER C. TAINTOR

consisted of a retrospective study, published in a peer-reviewed medical journal, of a series of implant procedures performed in the defendants' practice; the study discussed, among other things, various complications of the procedure. According to Dr. Green, the fact that the implant procedure was "cutting edge" surgical practice using "novel" materials imposed upon the defendants a heightened standard of care, superseding the ordinary medical standard of care. On the basis of Professor Green's testimony the plaintiff argued that she was not required to demonstrate what information oral surgeons typically share with their patients, since the professional community as a whole might fall short of that higher standard.

On the opening day of trial, counsel for the defendants invoked Maine Rule of Evidence 705 to examine Professor Green, out of the presence of the jury, to explore whether the "facts or data" upon which he relied afforded a "sufficient basis for expressing an opinion." After hearing the basis for Professor Green's proposed testimony, the trial judge ruled

that it was inadmissible. And, because expert testimony was essential to support the plaintiff's case, the court ordered that judgment be entered in the defendants' favor as a matter of law.

On appeal, NH&D filed an *amicus curiae* ("friend of the court") brief on behalf of the Maine Medical Association and in support of the defendants, arguing that the Law Court has never wavered, and should not now depart, from its insistence that the standard of care applicable to medical professionals is determined by reference to the actual practice of the profession. The *amicus* brief also pointed out that the plaintiff's position – that whenever a health care practitioner is more familiar than his colleagues with scientific advances, or when he is engaged in "cutting-edge" work, he may be held to a heightened standard of care – is inconsistent with other basic principles of malpractice law in Maine. Most notably, such a standard would conflict with the "two schools of thought" or "respectable minority" rule, which provides that "[e]ven if . . . an alternative treatment would have been feasible, a physician does not incur liability merely by electing to pursue one of several recognized courses of treatment."

The Law Court affirmed the decision of the Superior Court. The Court noted that "Green did not intend to, and could not, testify regarding the standard of care for informed consent for oral and maxillofacial surgeons under the same or similar circumstances as OSA because he was not familiar with it. Instead, he planned to opine about what the standard should be, as dictated by ethics." Notably, the Law Court rejected the plaintiff's argument that the Superior Court had improperly read into the law a requirement that one be a medical professional to testify about the medical standard of care. The Court reasoned:

> The Superior Court . . . did not make that finding, rather it excluded Green's testimony because he purported to testify as an ethicist regarding what he believed the standard *should* be, not what the legal standard applicable to OSA actually was, relative to the relevant standards of practice among oral and maxillofacial surgeons. The court did not determine whether a non-medical expert who did have knowledge of the applicable standard could testify under [the informed consent statute]. In affirming the Superior Court's exclusion of Green's testimony, we do not interpret [the statute] as *requiring* the testimony of a medical expert. We find only that the Superior Court did not err in finding that Green was unable to provide the required testimony regarding the applicable standard of care.
>
> Our ruling, moreover, does not preclude an ethics expert from testifying about informed consent in another case. In this case, Green had neither the requisite knowledge of the extent of the defendants' communications with the patient, nor an understanding of the scope of informed consent standards relied upon by similarly situated oral surgeons.

The decision in *Foster* is a sound one, which should be reassuring to medical professionals. *Foster* reinforces the notion that there is no abstract, ideal "standard of care" that exists without regard to the way physicians practice in the real world, and that expert testimony should be admitted only to the extent it is based upon a witness's knowledge of how the professional community actually practices. By the same token, a medical professional is not held to the standard of "the most highly skilled" or the most learned of his profession simply because he happens to have done more reading or performed more research than his peers. There is no "sliding scale" of due care, depending on a professional's level of education or training. Of course, this works both ways. Just as one cannot be held to a higher standard on the theory that he is more knowledgeable than his peers, so also a medical professional cannot plausibly argue that he should be held to a more lenient standard of care if he has failed to keep abreast of scientific developments in his field.

The Admissibility of Ethical Testimony After *Foster*

While it affirmed of the exclusion of Professor Green's testimony in *Foster*, the Law Court left open the possibility that testimony about ethical standards may be admissible in a different case. In recent years much has been written about the conditions under which a court should receive purportedly "expert" testimony offered by a bioethicist. And there is some case law, albeit scant, addressing that question. These authorities may be helpful in predicting how Maine courts will treat this sort of testimony after *Foster*.

Ethical testimony may be thought of as generally falling into different categories, depending on the purpose for which it is offered. Testimony concerning ethics is characterized as "descriptive" when a witness "makes an empirical claim about ethical beliefs or practices" – that is, where he "purport[s] to describe the ethical beliefs that a group or profession either avowed or actually practiced." Imwinkelried, *Expert Testimony by Ethicists: What Should Be The Norm?*, 76 TEMP. L. REV. 91, 96 (2003). "Normative" ethical testimony, by contrast, addresses values rather than objective facts. "Descriptive testimony answers the question, 'As a matter of historical fact, what is the person's or group's belief or practice?" "Normative testimony addresses a radically different

question, "What ought to be the practice?" *Id.* at 98.

Assuming a witness is otherwise qualified, and that he is equipped to offer testimony that is truly descriptive and "fits" the facts of a case, it might be appropriate to allow him to testify. *Hall v. Anwar*, 774 So.2d 41 (Fla. App. 2000), makes this point. In *Hall*, the court held that it had been in error to let a professor of bioethics testify that a physician acted "appropriately" and "within the standard of care" when he discontinued efforts to resuscitate a prematurely-born child. The court first observed that if the witness "had testified solely as to whether it was moral or ethical to resuscitate or terminate resuscitation of the infant, then his testimony would have been irrelevant to the legal issue of negligence." *Id.* at 43. The court went on to reason:

> We recognize that some medical standards of care are influenced by medical ethics. A decision concerning the termination of resuscitation efforts is probably an example of an area in which the standard of care includes an ethical component. The standard of care, however, still involves the level of care owed by a similar health care provider and not that owed by an ethicist. Under these circumstances, it may occasionally be appropriate for a medical expert to testify about the ethical aspects underlying the professional standard of care. It is not appropriate to allow an ethicist to testify about the medical standard of care.

***Id.* (citations omitted).**

> *Hall* supports the view that descriptive ethical testimony may be relevant, and therefore admissible, to supplement, explain, or otherwise illuminate evidence establishing the standard of care. It is not, however, a substitute for such evidence. See also *Heinrich v. Sweet*, 308 F.3d 48, 66 (1st Cir. 2002) (testimony of bioethicist, to the effect that "research should not have been conducted" given absence of benefit to patients, held inadmissible in part because "it did not state the standard of care or that [the defendant] had violated the standard of care"). Pure normative testimony, on the other hand, should virtually never be admitted. This is so for several reasons.

Most fundamentally, the existence of numerous and diverse schools of ethical thought – including "competing systems of bioethics" – makes it impossible for anyone to offer normative ethical testimony that can be said to be accurate. Imwinkelried, *supra*, at 106-107. There is, in short, no such thing as a true "expert" on normative issues. "Trained ethicists have no superior competence or knowledge on normative matters to qualify them specially as moral arbiters. On such matters, their opinion is no better than anyone else's." *Id.* at 108-109. Indeed, one court has held that testimony of this sort is not admissible for the more fundamental reason that Rule 702 permits only opinion testimony grounded in "scientific, technical, or other specialized knowledge," and a witness's "personal, subjective views" concerning "purported ethical standards" are not grounded in "knowledge" at all. *In re Rezulin Products Liability Litigation*, 309 F.Supp.2d 531, 543 (S.D.N.Y. 2004).

The caution courts have shown when they have been asked to receive expert testimony concerning normative ethical issues is well-founded for another reason. Testimony that is cast as "ethical" in nature may be legal opinion testimony in disguise. It is generally established, in Maine and elsewhere, that expert witnesses should not be allowed to testify about the legal standards that guide a factfinder's decision. Normative ethical testimony is thus subject to "the principle that expert opinions that would encroach on the role of the trial judge in instructing the jury as to the applicable law are inadmissible." *Id.* at 544 n.36.

A third, related reason that normative ethical testimony ought to be excluded is that ethicists are essentially unaccountable for the opinions they give in court. Increasingly, the medical profession has come to treat its members' expert testimony as an element of their practice, and to subject their testimony to peer review. *See* Turner, *After The "Hired Guns": Is Improper Expert Witness testimony Unprofessional Conduct Or The Negligent Practice Of Medicine?*, 33 PEPP. L. REV. 275, 282-84 (2006) (describing peer review of expert testimony undertaken by, *inter alia*, the American College of Neurological Surgeons and the American College of Radiology). Peer review of expert testimony is possible when opinions have to be grounded in facts. When an expert's testimony consists of pure opinion, however – as where an ethicist testifies about what a doctor "should" disclose to a patient when eliciting consent to surgery – no meaningful review is possible. And, more fundamentally, even if review were theoretically possible no forum exists in which it can occur. No state, including Maine, has a licensing board for ethicists, and no national certifying body decides whether an ethicist should be allowed to give expert testimony.

Conclusion

Recent and ongoing advances in medical technology – advances affecting conception, quality of life, and death – make it increasingly likely that ethical issues will take center stage in medical negligence litigation. In light of *Foster*, it is likely that bioethicists will be called upon in these cases to give their opinions about the relationship between ethical standards and professional standards of care. Whenever such testimony is offered, it will be important to ensure that courts adhere to the central lesson of *Foster* – that health care providers' legal obligations are defined by standards of practice in the real world, and not by abstract or academic principles of perceived morality. ☐

Workers' compensation – Law Court decisions and Board update

By Stephen W. Moriarty

STEPHEN W. MORIARTY

Stacking PI

In *Smith v. Hannaford Brothers Company*, 2008 ME 8 (January 15, 2008), the employee sustained separate occupational injuries in 1986, 1997, and 2002, and a §312 examiner assessed whole person PI resulting from the injuries at 10%, 17%, and 2%, respectively. The Hearing Officer combined or "stacked" all three assessments and found that the employee had a combined level of 27% whole person PI. The employer claimed that the impairment from the first and second injuries should not have been stacked, and that the 17% assessment for the second injury was incorrect. The Law Court accepted only the stacking issue for appellate review, and by implication affirmed the Board's acceptance of the 17% figure.

Pointing out that 17% PI for the second injury was sufficient to give the employee unlimited durational benefits regardless of the stacking issue, the employee argued that the appeal should be dismissed because the stacking issue was moot. Generally speaking, an issue is considered "moot" if it does not involve a real or substantial controversy or if no relief can be obtained. As a matter of practice the Court will generally not address an issue that is found to be moot, because to do so would be equivalent to issuing an advisory opinion. The employee argued that because her PI was above the threshold regardless of the 1986 injury, there was no genuine issue left to be resolved.

As is true with many court-made doctrines there are exceptions that may apply, and the employer argued that the stacking issue was a matter of great public concern which required guidance for the benefit of the workers' compensation system. The Court held that public interest did not justify a decision at this point, and ruled that the issue should be reserved until a claim arose in which a decision would have an actual impact upon the entitlement and obligations of the parties. Accordingly, the employer's appeal was dismissed.

Extension of Benefits

For the first time in seven years the Workers' Compensation Board has extended the durational limit of benefits for partial incapacity by an additional 52 weeks. The Board adopted Ch. 2, §2(7) of the WCB Rules extending benefits to 416 weeks effective January 1, 2007. Since 1999 the durational limit has been extended from five to eight years, and pursuant to §213(4) of the Act, the Board has the authority to ultimately approve two additional 52-week extensions, assuming that there is sufficient supporting actuarial data to do so. By statute the durational limit cannot be extended beyond 520 weeks.

Employers may wonder whether the benefit extension applies to those individuals who had received less than 364 weeks of partial as of January 1, 2007. In *Abbott v. S.A.D. #53*, 2000 ME 201, 762 A.2d 546, the Law Court ruled that the Board's first extension of benefits applied to those whose entitlement to partial had not expired as of the effective date of the extension. Therefore, injured workers who had received less than 364 weeks of partial benefits as of January 1, 2007 now have an additional 52 weeks of entitlement. However, the *Abbott* Court made clear that a benefit extension does not either revive or restore additional entitlement to those whose benefits have already expired. Therefore, this latest benefit extension will not apply retroactively to claimants whose entitlement to partial had been exhausted prior to January 1, 2007.

Settlements and Medical Expenses

The Board has amended Ch. 12, §6 of the WCB Rules to require a Hearing Officer to make a determination of anticipated future medical costs when approving a lump sum settlement. The Rules do not indicate what sort of evidence or information may be required, and Hearing Officers may very well have different individual preferences in this regard. Conceivably, the Rule could delay the process if a Hearing Officer determined that detailed consideration of past payment history was necessary to project future expenses.

Of greater concern is the possibility that an employee could seek to annul a settlement pursuant to §321(1) by alleging a mistake of fact if medical expenses following settlement turn out to be substantially higher than the amount projected by the Hearing Officer. There are no time limits that apply to the filing of a Petition to Annul. It is therefore recommended that employers protect themselves by including in the settlement documentation an acknowledgement that actual expenses may exceed the figure determined by the Hearing Officer, and that the settling claimant accepts that risk. □

The Reach and Apply Action: A Primer

By Hannah L. Bass

Maine's "reach and apply" statute[1] is often referenced, but not widely understood. This article is meant to give a brief overview of the statute and applicable case law so that insurance professionals can better understand how its quirks affect claims handling and case management. Section 2904 provides, in pertinent part,

> Whenever any person…recovers a final judgment against any other person for any loss or damage…the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment by bringing a civil action, in his own name, against the insurer to reach and apply the insurance money, if when the right of action accrued, the judgment debtor was insured against such liability and if before the recovery of the judgment, the insurer had had notice of such accident, injury or damage.

Maine law does not allow an injured party to sue the tortfeasor's liability insurer directly. *Allen v. Pomroy*, 277 A.2d 727, 730 (Me.1971). Section 2904 gives the judgment creditor, who is most often the plaintiff, the exclusive mechanism to collect insurance proceeds from the defendant's insurer to satisfy a final judgment obtained against the insured. It applies to all types of casualty insurance.

There are a few notable requirements of the reach and apply statute, most of which have been interpreted by the courts and are worth exploring briefly.

Notice

In order for an insurer to be liable under the reach and apply statute, it must have been given "notice of such accident, injury or damage…before the recovery of the judgment." 24-A M.R.S.A. § 2904. Notice is sufficient even if it occurs after entry of default, but before default judgment. There are a couple of important Law Court decisions interpreting these clauses.

a) *Michaud v. Mut. Fire, Marine & Inland Ins. Co.,* 505 A.2d 786 (Me. 1986).

This case addressed whether an insurer could be held liable under Section 2904 if it received first notice of the action after entry of default, but before a hearing on damages. In this case, the insurer learned of the original claim directly from the injured party. The insurer repeatedly attempted, unsuccessfully, to contact its insured by mail. Even after the plaintiff served the insured with a complaint, the insured failed to notify his insurer or answer the complaint. It was only after the court entered default that the insurer became aware of the lawsuit. The insurer did not participate in the damages hearing, despite having notice. The court entered default judgment and the plaintiff subsequently commenced a reach and apply action.

The Law Court held the insurer liable because, while default had been entered, a default judgment had not, and therefore the insurer had a procedural opportunity to move for relief from the default, which would have been granted upon a showing of good cause. Consequently, the Court held that the insurer had "meaningful notice adequate to satisfy the requirements of due process." *Id.* at 790. This holding provided the basis for the *MacDowell* holding, discussed below, and is a strong reminder to insurers to act affirmatively to protect their interests when put on notice at such a procedural stage. Insurers should also make every effort to be sure that all possible insureds have complete contact information for the insurer should a complaint be served.

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b) *MacDowell v. MMG Ins. Co.*, 2007 ME 56, 920 A.2d 1044.

In this case, MMG had first notice at the same procedural stage as in *Michaud*, after entry of default but before default judgment, but here, MMG retained counsel and filed a motion to lift default, which was denied. After a hearing on damages, MMG unsuccessfully appealed the denial of the motion to lift default. A reach and apply action commenced and the court awarded summary judgment to the plaintiff. MMG appealed, arguing that its due process rights were violated because it had no meaningful opportunity to be heard on the merits. The Law Court, however, agreed with the plaintiff and held, without much explanation, that due process was satisfied by the simple existence of the procedural right to file a motion to lift the default, regardless of whether it succeeded.

This decision underscores the importance of supplying insurer contact information to every possible insured and to maintain contact with such potential insureds should it appear that a complaint is forthcoming, even if there are coverage issues. It may also be wise to request that the claimant's counsel agree to provide the insurer with a copy of the complaint, should one be filed or served, before entering into any settlement discussions.

Final Judgment

As mentioned above, it is prohibited in Maine to bring a direct action against

the tortfeasor's insurer. *Allen v. Pomroy*, 277 A.2d 727, 730 (Me.1971). In order for an injured party to reach and apply insurance money, he or she must first obtain a final judgment against the insured. A court enters a final judgment after the rights of the parties and virtually all matters in controversy (liability and damages) are decided. Then and only then, can a reach and apply action be commenced under Section 2904.

Coverage

Despite the doom and gloom mentioned above, an insurer maintains any and all substantive coverage defenses in a reach and apply action. In *Michaud*, the Law Court held that section 2904's enumerated defenses[2] is an exclusive list. It seems counterintuitive, but an insured's breach of a contractual condition will not bar an injured party's recovery under the reach and apply statute. Nonetheless, an insurer can prevail under section 2904 if it successfully argues that the underlying facts fall within a policy's substantive coverage exclusion; for example, the expected or intended injury exclusion.

Insurance professionals will benefit by reminding themselves and each other about Section 2904 and the defenses thereto, because until the legislature rewrites the statute, vigilance after notice is the insurer's best protection. ☐

1 **24-A M.R.S.A. § 2904**

2 **1. Motor vehicle operated illegally or by one under age.** When the insured automobile, motor vehicle or truck is being operated by any person contrary to law as to age or by any person under the age of 16 years where no statute restricts the age; or

2. Motor vehicle used in race contest. When such automobile, motor vehicle or trust is being used in any race or speed contest; or

3. Motor vehicle used for towing a trailer. When such automobile, motor vehicle or truck is being used for towing or propelling a trailer unless such privilege is indorsed on the policy or such trailer is also insured by the insurer; or

4. Liability assumed. In the case of any liability assumed by the insured for others; or

5. Liability under workers' compensation. In the case of any liability under any workers' compensation agreement, plan or law; or

6. Fraud or collusion. When there is fraud or collusion between the judgment creditor and the insured.

The Monaghan Decision: Court Clarifies Work Search Requirement

BY C. LINDSEY MORRILL

Recently, the Law Court issued its decision in *Monaghan v. Jordan Meats et al.*, 2007 ME 100, 928 A.2d 786, and provided the workers' compensation system with a great deal of guidance in determining when an injured employee's work search warrants an award of 100% partial incapacity benefits under the so-called "work-search rule." Although the Law Court declined to provide a bright-line rule or easy answer, it did provide a comprehensive, easy to use roadmap for Hearing Officers and practitioners alike.

The underlying facts of *Monaghan* are far from unique in litigated cases. Ms. Monaghan injured both her knees while working for Jordan Meats but she later regained a full time work capacity with modified duty restrictions. She filed a Petition for Award seeking 100% partial incapacity benefits. She sought to establish that work was unavailable to her in her community by presenting evidence that she had contacted 147 employers regarding available work, but she did not secure employment. The employer submitted a labor market report identifying 50 advertised jobs in the local labor market within Ms. Monahan's restrictions. Hearing Officer Sue Jerome concluded that although Ms. Monaghan continued to suffer partial incapacity from the knee injury, she was not persuaded that work within Ms. Monaghan's restrictions was unavailable to her based on the work injury. Therefore, she awarded Ms. Monahan ongoing partial benefits based on an imputed earning capacity of $300.00 per week.

Ms. Monaghan appealed this case to the Law Court, specifically arguing that her work search was adequate as a matter of law pursuant to the work

C. LINDSEY MORRILL

search rule. The Law Court took this opportunity to discuss the work search rule and the appropriate factors to consider when evaluating the adequacy of an injured employee's work search. The work search rule establishes that 100 percent partial incapacity benefits are appropriate if an employee can show that, notwithstanding his or her

partial work capacity, work in the employee's local community remains unavailable as a result of the work-related injury. If the employee meets that burden, the employer is required to show that it is more probable than not that there is work available in the community within the employee's physical ability. As a practical matter, an employee routinely presents a work search and the employer routinely attempts to rebut the work search with a labor market survey. Whether the labor market survey is sufficient to rebut the work search is often based on the quality of the employee's work search.

Ms. Monaghan specifically requested a bright line rule for evaluating the number of inquiries necessary to establish an adequate work search. She suggested that 25 inquiries should be deemed adequate as a matter of law. The Law Court expressly rejected such a bright line approach, rather stating that the inquiry required taking a variety of factors into consideration. Notably, each factor provided had been set forth in prior decisions of the Law Court. *Monaghan*, however, finally provided us with a user-friendly list as to the factors which must be considered. The list includes:

1) the number of inquiries made or applications submitted by an employee;
2) whether the search was undertaken in good faith;
3) whether the search was too restrictive;
4) whether the search was limited solely to employers who were not advertising available positions or whether the employee also made use of classified ads or other employment resources in the search;
5) whether the search was targeted to work that the employee is capable of performing;
6) whether the employee overemphasized work restrictions when applying for jobs;
7) whether the employee engaged in other efforts to find employment or increased prospects for employment;
8) the employee's personal characteristics such as age, training, education and work history; and
9) the size of the job market in the employee's geographic area.

The Law Court specifically noted that this is a non-exclusive list and that a hearing officer's task "is not to focus on any single aspect of the employee's efforts, but to view the evidence through a broad lens to determine whether the employee's efforts to demonstrate that she was unable to find work because (1) no stable market for the kind of work she is able to performs exists in the local community; or (2) if there is such a market, that work is unavailable to the employee due to the persisting effects of the work-related injury." The Board further noted that a bright line test which simply looks into the number of inquiries "cannot substitute for a thorough evaluation and weighing of all the factors bearing on the reasonableness of her work search."

The Law Court ultimately found that the Board's decision did not provide enough details with respect to the factors considered in the Hearing Officer's analysis. Therefore, the Law Court remanded the case to the Hearing Officer for further review.

On remand, Hearing Officer Jerome expressly weighed every factor listed by the Law Court. Her opinion as to the inadequacy of Ms. Monaghan's work search did not change. Specifically, she noted that very few of the employers who were contacted were actually hiring at the time. She found the work search to be very unfocused. Ms. Monaghan's pattern of work search was simply to go to different places without knowledge of the kind of work involved or whether the employers were even hiring. Therefore, specifically based on factors weighing the appropriateness of the inquiries and targeted nature of the work search, Hearing Officer Jerome found that she could not establish on a more probable than not basis that work within her restrictions is unavailable to her as a result of her injury. The Employee did file a Motion for Further Findings of Facts and Conclusions of Law, which the Board denied. As the Employee's timeline for filing an appeal has not expired, the possibility exists that she will again pursue review from the Law Court.

Although the Law Court's decision in *Monaghan* did not alter any existing law, it did provide much needed clarification which aids employees and employers alike. No longer are employees performing (and employers critiquing) work searches without any type of road map or basis for analysis. These nine simple factors have provided clear guidelines to follow when analyzing a work search to determine whether 100 percent partial incapacity benefits may be appropriate. □

Two recent Law Court decisions

By David P. Very

DAVID P. VERY

Definition of "bodily injury" in insurance contract and bystander emotional distress claims

A recent decision by the Law Court reinforces the cardinal rule that one must review the precise language of all of the insurance contracts involved in order to appropriately adjust a claim.

In August of 2002, nineteen-month-old Daisy Ryder was tragically struck and killed by a vehicle driven by Robert Donath. The accident was witnesses by her mother Nettie and her brother. Donath was insured under a policy from Progressive with liability limits of $50,000 for each person and $100,000 for each accident. Nettie also had UM coverage with USAA for $50,000 for each person and $100,000 for each accident.

The Ryders filed a complaint in the Superior Court asserting three claims arising out of the accident: (1) wrongful death of Daisy brought on behalf of her estate; (2) negligent bystander distress to Nettie; and (3) negligent bystander distress to their son. The Ryders also brought a declaratory judgment seeking to establish the amount of coverage available under both the Progressive and USAA policies.

The Progressive policy defined the $50,000 " each person" limit as including not only the "total of all claims made for bodily injury to a person" but also "all claims of others derived from such bodily injury, including, but not limited to, emotional injury or mental anguish resulting from the bodily injury of another or from witnessing the bodily injury to another." Accordingly, Progressive policy's "each person" limit explicitly encompassed the estate's wrongful death claim and Nettie and her son's derivative bystander distress claims so that no more than $50,000 of liability coverage was available under the Progressive policy. As a result, Progressive subsequently settled the claim with a payment of $50,000 and the Ryders agreed to dismiss all claims against Progressive and Progressive's insured.

The USAA policy's UM coverage, on the other hand, insured against "bodily injury sustained by any person and any one auto accident." As a result, if Nettie and her son's bystander distress claims constituted separate claims for "bodily injury" under the policy, then the $100,000 per accident limit would apply and there would exist $50,000 of UM coverage available under the USAA policy.

The USAA policy defined "bodily injury" as "bodily harm, sickness, disease or death." The Superior Court determined that the term "bodily injury" as defined in the contract unambiguously did not include a claim for bystander emotional distress. As a result, the Superior Court determined that the Ryders' liability claims were sufficient to trigger only the $50,000 per person coverage limit of the USAA policy, and not the $100,000 per accident coverage limit. The Court therefore entered summary judgment on all claims in favor of USAA.

On appeal, in *Ryder v. USAA General Indemnity Co.*, 2007 ME 146 (December 6, 2007), the Law Court agreed that the majority of the jurisdictions that have considered this matter have held that "bodily injury," when either undefined or defined as "bodily" followed by a noun series, is unambiguous and encompasses only physical harm. The Court stated that the definitions of "bodily injury" provided by these insurance policies usually fall into one of two categories: (1) "bodily" followed by the noun series: "injury (or harm), sickness, or disease," or (2) this same noun series with an additional non-restrictive clause such as "including death resulting therefrom." The Law Court noted that the reason courts hold this language to be unambiguous is because it conforms to the standard grammatical rule that when an adjective modifies the first of a series of nouns, a reader will expect the adjective to modify the rest of the series as well (i.e. "bodily injury, [bodily] sickness, or [bodily] disease").

The Law Court noted, however, that the USAA policy did not contain the same definition of "bodily injury" considered in the overwhelming majority of cases. Rather, it defines "bodily injury" as "bodily harm, sickness, disease or death." As a result, when the standard grammatical rule is applied, the adjective "bodily" modifies not only harm, sickness, and disease, but also death. The Law Court held that the phrase "bodily death," although relevant in the spiritual realm, carried little meaning in the secular world of insurance contracts. As a result, the Court stated that it is unclear given the grammatical structure employed in this definition whether "bodily" is intended to modify all of the nouns that follow it. The Law Court therefore found the policy's definition of "bodily injury" ambiguous. The Court concluded that the words "sickness" and "disease" were not modified by the word "bodily" in the policy and served instead to expand coverage beyond "bodily harm."

The Court then turned to whether a claim for emotional distress would invoke UM coverage for "sickness" or "disease." The Court first stated that conditions pertaining to the mind are expressly included within the definition of sickness and disease. As a result, the Court found that the language of the USAA policy would extend coverage to sicknesses and diseases that are not corporeal. The Law Court, however, went on to explain just what type of emotional distress is required in order to qualify for coverage for sickness and disease. The Court held that as applied to the UM coverage provided by the USAA policy at issue in the case, the Ryders must not only show that they suffered emotional distress that was serious, but they must also demonstrate that the distress constituted a "diagnosable" sickness or disease in order for coverage to exist. As a result, the Law Court vacated the summary judgment awarded to USAA and remanded the case to the Superior Court to determine whether Nettie and her son's alleged serious emotional distress qualified as a diagnosable sickness or disease.

Of interest, the Law Court, in a footnote, indicated that the mental disorder "must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one." Instead, they must demonstrate "clinically significant impairment or distress" in order to qualify for coverage for sickness or disease. Finally, it is important to note that the Law Court does not appear to take issue with the vast majority of case law across the country defining "bodily injury" and that this decision would only apply to policies containing the same or similar language to the USAA policy.

"Regular use" exclusion in UM policies

In *Pease v. State Farm Mutual Automobile Insurance Company*, 2007 ME 134 (September 20, 2007), the Law Court discussed the viability of the "regular use" exclusion in UM policies.

On Christmas day, 2002, Jason Pease, a detective sergeant in the Lincoln County Sheriff's Office, was dispatched to a reported disturbance. Pease drove his unmarked patrol vehicle to the scene. Upon arrival, Pease got out of his vehicle, leaving the engine running. Michael Montagna, the individual causing the disturbance, got into the driver's seat of Pease's vehicle. Pease was severely injured while attempting to prevent the theft of his vehicle.

The Law Court had previously decided that Montagna's auto coverage did not apply because it did not cover his unlawful possession of Pease's patrol vehicle. As a result, Montagna was uninsured. Further, Lincoln County chose not to carry UM coverage for its employees injured on the job. As a result, Pease sought insurance coverage for his injuries through the UM coverage of his personal insurance policy issued by State Farm.

The State Farm auto policy contained an exclusion which stated that an uninsured motor vehicle does not include a motor vehicle "furnished for the regular use of you, your spouse or any relative." State Farm argued that this exclusion prevented Pease from recovering from injuries he sustained when struck by a vehicle furnished to him for his regular use. State Farm further maintained that this exception applied even though Montagna stole and unlawfully operated the vehicle.

The Superior Court agreed and stated, "For State Farm to extend coverage to a patrol car owned by the Lincoln County Sheriff's Department and used regularly by Pease for both private and law enforcement purposes, it would be assuming a large, and uncompensated risk. Such risk is properly assumed by the Sheriff Department's insurance carrier."

On appeal, Pease argued that the "regular use" exclusion was invalid because it contravened the UM statute and was void against public policy. Although not addressed by either party on appeal, the Law Court decided that the dispositive issue was to interpret the policy provision in light of the fact that the vehicle was stolen. The Law Court held that at the moment Montagna stole the vehicle, it stopped being a vehicle furnished for the deputy's use, and was simply a stolen vehicle. As a result, the majority of the Law Court construed the policy to exclude vehicles stolen from the insured from the "regular use" exclusion. Thus, the majority of the Law Court did not address whether the "regular use" exclusion is valid under Maine UM statute.

Justice Silver issued a separate concurring opinion stating that he would find that "regular use" exclusion violated the UM statute. He stated that the purpose of the UM statute is to permit an insured injured person the same recovery which would have been available had the tortfeasor been insured to the same extent as the injured party. Justice Silver indicated that the statute does not refer to exclusions at all and that the Court has previously said that it would not sanction reductions in coverage for which the legislature had not provided. Thus, Justice Silver stated that even if the exclusionary language in State Farm's policy was explicit and unambiguous, it could not prevail if it was contrary to the UM's statute or public policy.

Therefore, Justice Silver's opinion notwithstanding, at present, the regular use policy exclusion remains valid although perhaps in jeopardy. □

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