

Health Care Providers' Duties to Non-Patients: When Do They Arise and Where Do They End?

BY CHRISTOPHER C. TAINTOR

Most health care providers, when making diagnostic and treatment decisions, reasonably assume that their professional obligations extend to their patients and no further. To take an obvious example, if a patient directs his doctor to forego or withdraw life-prolonging therapy, the doctor need not be concerned with the emotional or economic effects an otherwise preventable death will have on the patient's family. In many circumstances, however, courts have found that doctors and other practitioners do owe duties to non-patients. Recent and current litigation in Maine courts reflects this trend.

Background: The Law Court's Decisions In Malpractice Suits Brought By Non-Patients.

The Law Court's first opportunity to address the duty of a health care provider to a non-patient was *Joy v. Eastern Maine Medical Center*, 529 A.2d 1364 (Me. 1987), a case involving a claim by a non-patient against a physician and a hospital for failing to warn their patient of the effect an eye patch – part of the patient's treatment for an eye injury – would have on his driving ability. The Court concluded that there is a “general requirement that when a doctor knows, or reasonably should know that his patient's ability to drive has been affected, he has a duty to the driving public as well as to the patient to warn his patient of that fact.”

The issue next arose in *Flanders v. Cooper*, 1998 ME 28, 706 A.2d 589, where the Law Court affirmed the dis-

missal of a medical malpractice notice of claim alleging that a physical therapist, practicing beyond the scope of his license, had “employed ‘bizarre and inappropriate’ treatment modalities, and implanted in the mind of [the plaintiff's] daughter false memories of sexual abuse perpetrated by [the plaintiff].” The Court held that health care providers owe no duty to avoid harm to third parties which could arise from the “treatment decisions” they make for the benefit of their patients.

In arriving at its decision in *Flanders*, the Law Court had to find a way to distinguish *Joy*. The plaintiff in *Flanders* argued that *Joy* established a broad “duty of reasonable care to third persons who may foreseeably be injured by [a] caregiver's negligence.” The Law Court, however, rejected that as an overbroad reading of *Joy*. The *Flanders*



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Court reasoned that in *Joy*, there was no allegation that the physician's treatment of his patient had been negligent. “Thus, the recognition of the physician's duty to the driving public to warn the patient of the risks of driving did not implicate the treatment decisions of the physician.” *Flanders v. Cooper*, ¶ 6, 706 A.2d at 590. The claim asserted in *Flanders*, by contrast, went “to the core of the relationship between a patient and a health care professional.” *Id.* ¶ 8, 706 A.2d at 591. The Law Court reasoned that if it extended physicians' duties to persons other than patients:

A health care professional who suspected that a patient had been the victim of sexual abuse and wanted to explore that possibility in treatment would have to consider the potential exposure to legal action by a third party who committed the abuse. “The focus of the concern of medical care practitioners should be upon the patient and any diversion of attention or resources to accom-

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moderate the sensitivities of others is bound to detract from that devoted to patients.” Although procedurally we must accept the allegation in this case that negligent treatment by a health care professional resulted in the implantation of false memories of sexual abuse, we must assess the impact of the duty urged by Flanders on the willingness of the competent professional to pursue proper treatment in the care of patients. Our recognition of the duty Flanders advocates might restrict the treatment choices of health care professionals, and hence it would intrude directly on the professional-patient relationship. We are not prepared to sanction such an intrusion.

Id. (citation omitted).

Duties to Non-Patients in Other Contexts

a. The Duty To Warn Of Risks Posed By Mentally Ill Patients

Although this issue has not yet found its way again to the Law Court, it occasionally is litigated in the Superior Court. The context in which it most commonly arises is the mental health arena. In the famous case of *Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334, the California Supreme Court held that a psychiatrist had a duty to warn an identifiable potential victim of a patient’s expressed intention to harm her. It is widely assumed that most states, including Maine, would adopt the so-called “Tarasoff rule” when the proper case presents itself. However, in a recent Maine Superior Court case (the name of the case is confidential, as the only decision rendered thus far came in the context of a prelitigation screening panel proceeding), a man whose wife had committed suicide argued for the extension of *Tarasoff*; claiming that the decedent’s counselor had a duty to tell him about his wife’s suicidal ideation – even though the patient herself had instructed the counselor not to. The Superior Court agreed with the argument advanced by NH&D, on behalf of the therapist, that *Tarasoff* should not be extended to situations involving threats

of suicide. The rationale for this limitation is that:

The imposition of a duty upon a psychiatrist to disclose to others vague or even specific manifestations of suicidal tendencies on the part of the patient who is being treated in an outpatient setting could well inhibit psychiatric treatment. . . . [T]he dynamics of interaction between the psychotherapist and the patient seen in office visits are highly complex and subtle. Intimate privacy is a virtual necessity for successful treatment. Were it not for the assurance of confidentiality in the psychotherapist-patient relationship, many in need of treatment would be reluctant to seek help. Even those who do seek help under such circumstances may be deterred from fully disclosing their problems.

Bellah v. Greenson, 81 Cal. App. 3d 614, 621-22, 146 Cal. Rptr. 535, 539-40 (1978). Although, in the classic *Tarasoff* case, society’s interest in protecting an “identifiable” potential victim outweighs the interest in patient privacy, the Superior Court agreed that where the threat is one of suicide, not violence directed toward another, the value of medical privacy is paramount. This decision is currently on appeal to the

Law Court, whose ruling can be expected to offer helpful guidance to mental health care providers.

b. The Duty To Treat Conditions Posing Risks To Public Health And Safety

Another recent Superior Court case presents a slight variation of the situation the Law Court addressed in *Joy v. EMMC*. In this case, a patient with a distant history of seizures presented to a hospital emergency room after losing consciousness in church. She was diagnosed as having suffered a vasovagal episode, and released from the hospital with instructions to see her primary care physician. Two days later, while driving to the doctor’s office, she lost consciousness at the wheel and caused an accident. The patient’s auto insurer sued the hospital, seeking reimbursement of the money it had paid to settle with the other driver. The insurer alleged that the emergency room personnel had been negligent in failing to perform an appropriate workup for a seizure disorder – which, if performed, likely would have revealed that the patient’s blood Dilantin level was sub-therapeutic – and in failing to warn the patient not to drive. The hospital, represented by NH&D, moved for summary judgment on several grounds, including the ground that no duty was owed to the driving public – essentially that *Flanders v. Cooper* had effectively overruled *Joy v. EMMC*. The Superior Court granted the hospital’s motion, although not on the ground that the hospital owed no duty to non-patients. In discussing that theory of defense, the Court observed:

With respect to [the hospital’s] argument that it did not owe any duty to the [non-patient driver], the court would be inclined to reconcile the Law Court’s decisions in *Joy v. Eastern Maine Medical Center*, 529 A.2d 1364 (Me. 1987), and *Flanders v. Cooper*, 1998 ME 28, 706 A.2d 589, by holding that [the hospital] did not have a duty to the [driver] with respect to any of its diagnosis and treatment decisions (whether correct or incorrect) but it did have a duty . . . with respect to the specific instructions it gave (or did not give)

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[its patient] with respect to driving. On this theory, [the insurer] could pursue a claim of negligence with respect to the giving of warnings as to driving, but could not challenge any diagnosis or treatment decisions – matters which are between doctor and patient.

Doctors can also be sued by non-patients for misdiagnosing their patients' communicable diseases, including sexually-transmitted diseases. The Law Court has never been called upon to decide whether and under what circumstances such a duty may arise. Most courts that have addressed the issue have found that some duty exists. See *Garcia v. Santa Rosa Health Care Corp.*, 925 S.W.2d 372, 377 (Tex.App.1996) (health care professionals owed duty to inform patient's wife of patient's probable infection with HIV); *Reisner v. Regents of Univ. of Cal.*, 31 Cal.App.4th 1195, 37 Cal.Rptr.2d 518, 519 (1995) (physicians owed duty to patient's boyfriend to warn patient of her HIV status and of dangers associated with the disease, even where physicians did not know boyfriend existed); *DiMarco v. Lynch Homes-Chester County, Inc.*, 583 A.2d 422 (Pa. 1990) (patient's sexual partner, who contracted hepatitis from patient, was within the class of persons whose health was likely to be threatened by doctor giving erroneous advice to his patient, and therefore had standing to sue for malpractice). A few courts, however, have refused to recognize such a duty. *McNulty v. City of New York* (Ct. App. 2003) (physician treating patient for infectious meningitis owed no duty to advise patient's friend to seek treatment that would have immunized her from the disease); *Lemon v. Stewart*, 682 A.2d 1177, 1183-84 (Md. Ct. Spec. App. 1996) (declining to extend physician liability to third parties for failing to notify them of patient's HIV status).

It is uncertain whether Maine courts would impose upon health care providers a duty to share information about a communicable disease with a patient's spouse, partner, or any other

person at high risk of exposure. Arguably, however, the obligation to give such information is defined exclusively by statute and regulation. Under Maine law, "[w]henver any physician knows or has reason to believe that any person whom the physician examines or cares for has or is afflicted with any disease or condition designated as notifiable, that physician shall notify the department and make such a report as may be required by the rules of the department." 22 M.R.S.A. §822. Regulations issued by the Department of Human Services, Bureau of Public Health to implement this directive (Chapter 258: "Rules for the Control of Notifiable Conditions") spell out in detail what conditions must be reported, who must report, when, how, and to whom. The statute also provides that one who reports in good faith compliance with the law is immune from any liability arising from the report. Although the statute does not explicitly say that health care providers need go no further – for example, by directly notifying family members or others at risk – it seems reasonable to infer that the Legislature meant to be exhaustive, and that the elaborate statutory scheme it created should not be augmented by common-law obligations running to non-patients. This is an issue Maine courts undoubtedly will confront in the not-too-distant future.

c. Duties Arising From The Risks of Drug Diversion And Misuse

Finally, another circumstance in which non-patients are increasingly suing doctors is where drugs prescribed to a patient are diverted and misused. Over the past several years the local headlines have reported dozens of overdose deaths from controlled substances that ended up in the hands of non-patients. The parents of one young man who allegedly died as a result of taking a friend's prescribed methadone have brought a lawsuit in the Superior Court against the clinic that dispensed the drug and various health care professionals associated with the clinic. The parents contend both that the patient was given an excessive dose – a fact which presumably made it more likely he

would give some away – and that he should have been warned more forcefully about the dangers of sharing his dose with someone who allegedly was "opiate-naïve," and thus had little tolerance for the drug. Summary judgment motions will soon be filed in the case, and their resolution will help to delineate the scope of health care providers' duty to non-patients.

In this situation, a court engaging in an analysis like the one described above should conclude that the surviving parents, whose son was not a clinic patient, have no standing to assert a claim based on the alleged excessiveness of the dose prescribed for his friend, but that they can assert a claim based on the adequacy of the warnings he was given. Of course, however, even if a court should decide that the warning could reasonably be characterized as inadequate in this circumstance, it might still rule that the defendants have an absolute defense to liability based on the decedent's wrongful conduct, see *Pappas v. Clark*, 494 N.W.2d 245, 247 (Iowa App. 1992) (rejecting claim brought against a physician and a pharmacy by the widow of a man who had died from an overdose of cocaine that he fraudulently obtained, invoking the principle that "[a] person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws"), or on the ground that a better or different warning would have been ineffective to prevent the narcotic misuse.

Conclusion

Identifying where a health care provider's duty ends is not easy, and it will only get more difficult. Advances in medical science and technology – especially in genetic testing and counseling, and in organ transplantation – make it certain that the issue will emerge in new contexts and in new forms. □

Federal and Maine Family Medical Leave Rights Expand

BY ANNE M. CARNEY

Recent amendments to the federal Family and Medical Leave Act of 1993 and the Maine Family Medical Leave Requirements grant expanded leave rights to employees. The federal Family and Medical Leave Act of 1993 (FMLA) applies to any Maine employer with 50 or more employees, and also includes all state and local government entities. Generally the FMLA grants eligible employees 12 weeks of leave during any 12-month period. Maine's Family Medical Leave Requirements (FMLR) apply to any private employer that employs 15 or more employees at any one location, and to any municipal entity that employs 25 or more employees. Generally the FMLR entitles eligible employees to 10 weeks of leave in any two-year period. The amendments to the FMLA and FMLR significantly expand the circumstances under which employees may take medical leave.

Federal Family and Medical Leave Act Amendments

The National Defense Authorization Act For Year 2008 (NDAA) contained provisions that create one new basis for family and medical leave, and one entirely new type of leave. The NDAA added to the already existing bases for leave, leave:

[b]ecause of any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

29 U.S.C. §2612(a)(1)(E). Although this amendment became effective on January 28, 2008, when President Bush

signed the NDAA, "qualifying exigency" leave will not become operative until the Secretary of Labor defines "qualifying exigency" through the normal federal rulemaking process.

The proposed rules indicate that a "qualifying exigency" will involve urgent circumstances an employee faces specifically because of the employee's spouse or parent's active duty status. Generally, it relates to non-medical exigencies. Likely the regulations will define the exigencies to include making arrangements for child care; making financial and legal arrangements to address the servicemember's absence; attending counseling related to the active duty of the servicemember; attending official ceremonies or programs where the participation of a family member is requested by the military; attending to farewell or arrival arrangements for a servicemember; and attending to affairs caused by the missing status or death of a servicemember. Interestingly, although the "qualifying exigency" provision refers to a son or daughter who is on active duty, the FMLA itself defines a son or daughter as someone who is under the age of 18, or if over the age of 18, is incapable of self care due to a mental or physical disability. Unless the Secretary of Labor adopts regulations that separately define "son or daughter who is on active duty," a parent could not use the "qualifying exigency" leave to see his or her child off to active duty, or welcome the child back home.

"Qualifying exigency" leave is limited to 12 weeks in any 12-month period. "Qualifying exigency" leave may be taken on an intermittent or reduced leave schedule. An employer may require an employee to provide certification that the employee's spouse or parent is on active duty.



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The NDAA amendments to the FMLA also create a new type of leave, which differs markedly from the other FMLA leave provisions. Servicemember Family Leave entitles:

an eligible employee who is the spouse, son, daughter, parent or next of kin of a covered servicemember . . . to a total of 26 work weeks of leave during a 12-month period to care for the servicemember. The leave described in this paragraph shall only be available during a single 12-month period.

29 U.S.C. §2612(a)(3). A "covered servicemember" is a member of the Armed Forces who is "undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness." 29 U.S.C. §2611(16). A "serious injury or illness" is an injury or illness incurred "in line of duty on active duty in the Armed Forces." 29 U.S.C. §2611(19). Servicemember Family Leave became effective on January 28, 2008.

Unlike FMLA leave, Servicemember Family Leave can last up to 26 work weeks during any 12-month period. Servicemember Family Leave runs concurrent with FMLA leave, such that no employee is entitled to more than 26

work weeks of leave in a single 12-month period. Servicemember Family Leave also applies to a broader range of relatives. Leave is available to care for a spouse, child, parent, and an employee may be entitled to Servicemember Family Leave to care for a servicemember if the employee is the “nearest blood relative” of the injured or ill servicemember. An employee would be entitled to servicemember family leave for a son or daughter under the age of 18, or a son or daughter over the age of 18 whose service-related injury or illness rendered the son or daughter incapable of self care. An employee is only entitled to one 26 week Servicemember Family Leave to care for that employee’s spouse, child, parent or next of kin. The statute does not, however, address whether an employee could take multiple Servicemember Family Leaves to care for a different servicemember who is subsequently injured on active duty.

An employee must meet the usual eligibility requirements to be entitled to either “qualifying exigency” leave or Servicemember Family Leave. For example, the employee must have worked for the employer for 12 months, and worked for 1,250 hours during the 12-month period preceding the leave.

Servicemember Family Leave may be taken on an intermittent or reduced leave schedule. An employer may temporarily transfer an employee on intermittent or reduced Servicemember Family Leave to an available alternative position with equivalent pay and benefits that better accommodates the leave schedule.

The U.S. Department of Labor has created a supplement to the FMLA poster, notifying employees of the right

to take “qualifying exigency” leave and Servicemember Family Leave. The notice can be found at <http://www.dol.gov/esa/whd/fmla/NDA AAmndmnts.pdf>.

Maine Family Medical Leave Requirements

The Maine Legislature enacted four changes to Maine’s Family Medical Leave Requirements. The amendments became effective on September 20, 2007.

The class of family members covered by FMLR has been expanded to include leave for the birth or adoption of an employee’s domestic partner’s child, or the serious health condition of the employee’s domestic partner. “Domestic partner” is defined by six criteria: (1) the employee and the domestic partner must be “a mentally competent adult”; (2) the employee and domestic partner must have been legally domiciled together for at least 12 months; (3) the domestic partner cannot be legally married to another individual; (4) the domestic partner must be the sole partner of the employee and expect to remain so; (5) the domestic partner and the employee may not be siblings; and (6) they must be “jointly responsible . . . for each other’s common welfare as evidenced by joint living arrangements, joint financial arrangements, or joint ownership of real or personal property.” 26 M.R.S.A. §843(7).



Maine’s FMLR also now expressly permits intermittent and reduced schedule leave. An employer must provide intermittent or reduced schedule leave at the request of an employee, if the intermittent or reduced schedule leave is medically necessary and is based upon a serious health condition. The employer may transfer the employee to an equivalent position that better accommodates the leave schedule. 26 M.R.S.A. §844(3). An employer may grant intermittent or reduced schedule leave for the birth or adoption of an employee’s child or an employee’s domestic partner’s child, but only if the arrangement is agreeable to the employer.

The Maine Legislature also amended the FMLR to entitle an employee to medical leave for the donation of an organ of that employee for transplant. 26 M.R.S.A. §843(4)(E). Finally, the FMLR includes a provision granting leave due to the death or serious health condition of the employee’s spouse, domestic partner, parent or child who dies or incurs a serious health condition while on active duty. 26 M.R.S.A. §843(4)(F).

The 2007 amendments to the FMLR do not alter the eligibility requirements or the extent of leave to which an employee is entitled. An employee must have been employed by the same employer for 12 consecutive months prior to beginning FMLR leave. An employee is entitled to only 10 work weeks of leave in any two-year period. 26 M.R.S.A. §844.

The Maine Department of Labor has updated its poster to include the expansion of Maine’s Family Medical Leave Requirements. A copy of the poster can be downloaded from: <http://mainegov-images.informe.org/labor/posters/regulationofemployment.pdf>. □

Two recent Law Court decisions

BY DAVID P. VERY

Expert testimony and reasonable inferences as to proximate cause of an injury

In a multiple opinion, 43-page decision, the Maine Law Court issued a significant decision regarding the admissibility of expert testimony on causation, reasonable inferences as to proximate causation, and discretionary function immunity.

In *Tolliver v. Department of Transportation*, 2008 ME 83 (May 13, 2008), Caroline Knight was driving west on Route 302 when she struck Lucas Tolliver, a pedestrian. The portion of Route 302 where the accident occurred was under construction by MDOT and had recently been repaved. While there were yellow reflective markers delineating the center of the road, there were no white edge lines separating the travel lanes from the breakdown lanes. Tolliver claimed that the MDOT had been negligent in failing to stripe Route 302 in a timely fashion and in failing to maintain safe conditions on Route 302 through the use of temporary edge line markings.

At a jury trial, although Lucas Tolliver testified as to his damages, he was unable to give his account of the circumstances of the accident because he had no memory of it. The Plaintiff, however, sought to establish that he was walking in the breakdown lane at the time of the accident and that Knight's vehicle struck him from behind. MDOT's theory was that the Plaintiff had been walking in the travel lane and, as Knight attempted to safely pass him on the right by traveling in the breakdown lane, the Plaintiff pivoted to his right and walked into the path of the moving vehicle. The evidence also revealed that the Plaintiff's blood alcohol was around .24 percent at the time of the accident. The jury found that the Plaintiff's total damages were

\$3,310,000 and reduced the verdict to \$2,925,000 in light of the Plaintiff's own negligence.

On appeal, MDOT first argued that it had discretionary function immunity. In a four to three decision, the majority held that the MDOT employees responsible for implementing the decision by laying out, scheduling and painting the edge lines did not have the kind of discretion that is necessary for a government entity to claim the benefit of discretionary function immunity—they were simply required to stripe Route 302 in a reasonable manner. The three judge minority did agree that choices regarding the performance of routine maintenance that are similar or identical to choices made by people generally in society are not entitled to discretionary function immunity. The minority, however, stated that decisions as to whether the construction and repaving project was complete, whether the new paving was sufficiently cured, and if so, when to schedule and commit resources within a reasonable time to replace the fog line, are inherently discretionary decisions, unique to the functions of MDOT as a governmental agency and thus subject to discretionary function immunity.

The Court next addressed the admissibility of the Plaintiff's expert witness testimony on causation. The Plaintiff had designated a road construction consultant who testified that in his opinion, the lack of an edge line was a substantial contributor to the accident. The majority of the Court ruled that the Plaintiff's expert certainly was qualified to testify that edge lines are important on roadways for the safety of the public and pedestrians. The majority, however, ruled that the expert lacked the foundation necessary to offer an opinion as to the cause of this particular accident. The Court noted that the expert had limited knowledge about the accident scene and that he was not an accident reconstruc-



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tionist. The Court stated that the expert may have been permitted to opine that the lack of an edge line created an unsafe condition that was a "possible" cause of the accident, but not that it was a "proximate" cause of the accident. As a result, the Court found that the expert's opinion that the lack of an edge line substantially contributed to the accident was speculation. The Law Court therefore held, with one dissenter, that the Superior Court should have excluded such testimony.

Finally, the Court addressed the issue of whether, after excluding the Plaintiff's expert's testimony on causation, there was sufficient evidence of proximate cause. The Court first stated that the principle of proximate cause contains two elements, substantiality and foreseeability. The Court noted, "evidence is sufficient to support a finding of proximate cause if the evidence and inferences that may reasonably be drawn from the evidence indicate that the negligence played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or reasonably foreseeable consequence of the negligence."

The Court acknowledged that jurors are allowed to draw reasonable inferences based on their own experience as to whether a particular act or omission is a proximate cause of an injury. The Court, however, went on to state that in

cases involving complex facts beyond the ken of the average juror, or those potentially involving multiple causes, more substantial evidence of proximate cause may be required.

In the present case, the Court acknowledged that the Plaintiff presented substantial evidence that the purpose of the white edge line of a road was, at least in part, to make the road safer for drivers and pedestrians. The Court stated that although the Plaintiff argued that this evidence allows an inference of causation, this evidence more accurately establishes the “foreseeability” component of proximate cause, but not the “substantiality” component of proximate cause. The Court stated that given the conflicting and inconsistent theories of what caused the accident in this case, such evidence regarding foreseeability does not support an inference that the lack of an edge line played a substantial part in bringing about or actually causing the accident that resulted in the Plaintiff’s injuries.

The Law Court then concluded that any inference that the lack of an edge line was an actual cause of the accident would amount to nothing more than speculation on the part of the jury. The Court noted that the Plaintiff was unable to give his account of the circumstances of the accident because he had no memory of it. The Court further noted, given its prior ruling, that there was no expert testimony concluding that a lack of an edge line was a substantial contributor to the accident. The Court held that the testimony regarding the need for an edge line for safety purposes established that the accident was “foreseeable”, and the jury was permitted to conclude as such. However, to allow the jury to also infer actual causation from the conflicting and inconclusive evidence in the case, from expert and lay witnesses alike, would be to replace fact-finding with sheer conjecture. As a result, the Court concluded with one dissenter that MDOT was entitled to judgment as a matter of law in its favor and vacated the judgment in favor of the Plaintiff.

Wrongful death benefits not available to beneficiary who caused the decedent’s death

In *Amica Mutual Insurance Co. v. Estate of Esther Pecci*, 2008 ME 93 (June 10, 2008), the Law Court for the first time addressed whether a wrongful death action may be maintained if the sole beneficiary of the action is also the party whose negligence was the sole proximate cause of the decedent’s death. Under such circumstances, the Court held that the Estate may not recover in the wrongful death action to the extent it benefits the person solely responsible for the decedent’s death but that the Estate may recover for reasonable medical and funeral expenses.

In May of 2005, Lawrence Pecci negligently pulled his automobile out into traffic on Route 1 resulting in an accident. His wife, Esther Pecci, died due to injuries she sustained in the accident. The Peccis’ adult daughter was subsequently appointed the personal representative of her mother’s estate and after Amica, her father’s insurer, refused to make a claim payment to the Estate, she filed suit in her capacity as the Estate’s personal representative against Amica and her father alleging breach of contract and wrongful death. The sole beneficiary of any recovery of the wrongful death suit was Lawrence Pecci himself.

In response to the claim, Amica instituted an action seeking a declaratory judgment that public policy bars the Estate from maintaining its wrongful death action. The Superior Court granted summary judgment to the extent that the action benefits the surviving spouse, but denied summary judgment for reasonable medical and funeral expenses.

On appeal, Amica argued that the wrongful death statute should contain an implied exception that bars an action based on the general rule that it is contrary to public policy to allow one to benefit from his own wrongdoing. The Law Court disagreed and stated that by its plain terms, the wrongful death statute does not prohibit an estate from initiating an action, brought for a surviving spouse’s benefit, against that same spouse as the sole tortfeasor.

The Court, however, noted that under current Maine law, when damages are recoverable by a party partially at fault, any recovery must be reduced by an amount deemed just and equitable based on the claimant’s comparative negligence pursuant to Maine’s comparative negligence statute. The Court further noted that a wrongful death action is brought by and in the name of the personal representative of the deceased person for the exclusive benefit of the, in this case, surviving spouse Lawrence Pecci. Therefore, the Court held, if the wrongful death action were to proceed for Mr. Pecci’s exclusive benefit, the comparative negligence statute would operate to prevent his right to recover any damages under the wrongful death statute. Because the parties had stipulated that Mr. Pecci’s negligence was the sole proximate cause of the accident, the Court held that he is a claimant equally at fault who may not recover. Accordingly, the Law Court held that the comparative negligence statute barred Mr. Pecci’s right to recover in the case. The Court did agree with the Superior Court’s reasoning that the Estate was allowed to recover for reasonable medical and funeral expenses, as those expenses were not for the exclusive benefit of Mr. Pecci.

Of great interest, the Law Court added that if a surviving spouse renounces his or her interest in any recovery under the wrongful death statute, the spouse is treated as having predeceased the decedent. Thus, the Court stated that if Mr. Pecci were to renounce his share as the surviving spouse, the Estate’s wrongful death action may be maintained for the benefit of the deceased heirs to be distributed as provided in the wrongful death statute. In this case, if Mr. Pecci did indeed renounce his share, his adult daughter would be the sole beneficiary and she would be entitled to wrongful death benefits from Amica. Further, although not addressed by the Court, it would appear that where a beneficiary is not solely at fault for an accident, but is partially at fault for an accident, that the comparative negligence statute would apply to reduce the benefits available based on a proportion of the beneficiary’s fault. □

Workers' Compensation – Law Court decisions

BY STEPHEN W. MORIARTY

Section 201(5): Subsequent Nonwork-Related Injuries and Diseases

Section 201(5) provides that subsequent nonwork-related injuries or diseases which are not causally connected to a prior occupational injury are not compensable under the Act. In previous decisions the Law Court had ruled that the statute requires a Hearing Officer to separate out the effects of a subsequent non-occupational injury in calculating the amount of compensation benefits owed to a claimant. In a sharply divided 4 – 3 decision, the Court has radically limited the applicability of §201(5) in cases in which a subsequent injury or disease itself becomes totally disabling.

In *Roy v. Bath Iron Works*, 2008 ME 94 (June 10, 2008), the Hearing Officer found that the employee had become totally disabled as the result of the combination of separate occupational injuries to the back and neck. However, several years following both injuries he developed liver disease which became progressively more severe. The disease was not causally connected to either occupational injury. Eventually the disease progressed to the point where it rendered the employee totally disabled in and of itself. In granting the employee's Petition for Review, the Hearing Officer awarded benefits for total incapacity to the date by which the liver disease became completely disabling, and ordered that benefits cease at that point on the grounds that the ongoing disability was caused by a subsequent and unrelated condition. The Court accepted the case for review.

The four-member majority ruled that the Hearing Officer had inappropriately applied §201(5) on the grounds that the statute does not allow the reduction or discontinuance of payments when additional disability develops from non-occupational causes. After distinguishing prior decisions, the Court ruled that "the purpose of section 201(5) is to

assure that...subsequent nonwork injuries do not *increase* the level or duration of workers' compensation benefits paid for work injuries (emphasis added)." Notwithstanding the fact that the subsequent non-occupational disease had also become totally incapacitating, the Court ruled that "nothing in section 201(5) requires termination of workers' compensation benefits for which a worker is qualified because of a subsequent nonwork injury".

Stated simply, the majority held that while post-injury incapacity cannot be *increased* to reflect additional disability caused by unrelated injury or diseases, disability benefits cannot be *decreased* when a subsequent injury or disease intervenes and causes additional or even total incapacity. According to the majority, benefits must be paid upon the full extent of disability caused by an occupational injury, regardless of the disabling effects of a subsequent injury. The Hearing Officer's decision was vacated, and the matter was remanded for further proceedings.

In a rare concurring opinion, two justices of the four-member majority wrote separately to make the point that the doctrine of independent intervening cause was effectively eliminated following the adoption of §201(5) and its predecessor. Even if the doctrine still survived, the concurring justices reasoned, the employee would not have lost his entitlement to benefits because the occupational injuries remained a substantial cause of the ongoing incapacity.

The dissenting opinion was written by Justice Ellen Gorman, who served as a Workers' Compensation Commissioner in the 1980s. The dissenters strenuously argued that "the purpose of our workers' compensation system is to provide wage replacement when an individual is unable to earn income as a result of a work injury", and that therefore no continuing entitlement exists if an individual



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becomes totally disabled due to an unrelated condition. Because the employee would have been incapable of earning income regardless of the effects of the occupational injuries, the dissenters concluded that there was no statutory authority for the continued payment of benefits. Severe reservations were expressed about the impact of the majority decision.

To hold, as the majority has done here, that the employer remains obligated to pay benefits to someone who is totally disabled by a nonwork-related injury changes the benefits received from wage replacement benefits to disability payments.

This compelling observation underscores the critical consequence of the majority opinion; employers are required to continue to pay benefits for the extent of disability related to an occupational injury, even when a separate and unrelated cause for total incapacity has come into play.

The majority suggested that if the Legislature had intended to *reduce* or *eliminate* compensation benefits to take unrelated conditions into account, "section 201(5) would have been written differently". It remains to be seen whether the Legislature will address the issue through corrective action.

Payment of "Facility Charges"

By the narrowest possible margin, the Law Court has ruled that an employer is required to pay the "facility

charges” established by an ambulatory surgical center and may not reduce the charges to lesser amounts actually received from other third party payors. In another sharply divided 4 – 3 decision, the Court affirmed a Hearing Officer’s refusal to allow an employer to conduct legal discovery regarding the amounts that the surgical center received from health insurers and similar parties for the same services, and affirmed a decision ordering payment of the charges.

In *Fernald v. Shaw’s Supermarkets, Inc.*, 2008 ME 81 (May 8, 2008), separate claims involving Shaw’s and Bath Iron Works were consolidated on appeal. In both cases the claimants had received surgical care through Central Maine Orthopaedics, a medical practice group and an ambulatory surgical center. The amounts billed for the surgical procedures themselves were not in controversy, but in both cases CMO billed the employers certain additional amounts for “facility charges”. The undisputed portions of the charges were paid voluntarily, and CMO filed Petitions for Payment seeking recovery of the unpaid balance.

The Board is required by the statute to adopt fee schedules by rule which establish “standards, schedules or scales of maximum charges for individual services, procedures or courses of treatment”. Although the Board has adopted a fee schedule relating to the services provided by physicians, the rule expressly does not apply to facility charges. Accordingly, in litigation before the presiding Hearing Officer the employers argued that pursuant to §206(7) they were only responsible for payment of charges found to be “reasonable”, as well as both necessary and adequate. Specifically, the employers contended that the facility charges should not exceed the sums accepted from private insurers. CMO maintained that the “usual and customary charge” within the meaning of the statute was equivalent to its own published schedule of fees. The Hearing Officer refused to allow the employers to inquire into the amounts received from health insurers and ordered the employers to pay the unpaid balances. The Hearing Officer attempt-

ed to appeal his decisions to the full labor-management Board but the Board declined to accept the cases. The Law Court agreed to hear the employers’ appeals.

On appeal the Court side-stepped the basic statutory requirement that charges of any nature must first be reasonable, and focused instead upon the language of §209(2), which provides that in the absence of a rule a health care facility must be paid “its usual and customary charge for any health care services”. Since no rule has been adopted which addresses facility charges, the majority held that a provider’s own designation of its usual and customary charges automatically establishes the amounts which must be paid by employers. The majority felt that a case-by-case inquiry into the amounts accepted from third party insurers would increase litigation, lengthen the decision-making process, and effectively require Hearing Officers to engage in rate-setting in each individual case. The majority refused to require providers to accept payment from employers in amounts equivalent to these accepted from private third-party payers for the same medical services. The Court upheld the Hearing Officer’s decision that a provider’s own designation of the costs for its services constituted conclusive proof of the usual and customary charges for those services for purposes of §209(2).

The three dissenting justices argued that employers should be entitled to challenge the fees unilaterally established by providers, where the Board itself has not adopted a governing rule. The dissenters wrote that the employers should have been given an opportunity to explore the amounts paid by health insurers and other third-party payors in order to implement the intent of the Legislature to reduce costs within the system. The dissenters rejected the proposition that employers should automatically be bound by a provider’s published schedule of fees.

While litigation was ongoing in these cases, BIW filed suit against the Board to compel the adoption of a fee schedule for facility charges. In response to the complaint the Board argued that the 5% discount for prompt

payment set forth in ch. 5, §3 of the WCB Rules was, in effect, a “fee schedule” within the meaning of the Act. The issue has now been fully briefed before the Kennebec County Superior Court and the parties are awaiting a decision. In the meantime, the Board has initiated the rule-making process for a fee schedule for facility charges.

Statute of Limitations: No Lost Time Cases

In May 2004 the employee filed a claim for a gradual foot injury, asserting a February 11, 2004 date of injury. The employer filed a first report promptly following receipt of the petition. In litigation the employer asserted that the actual date of injury was substantially earlier, based upon the employee’s acknowledged awareness in 1999 or 2000 of a relationship between her work activities and the development of her foot problems. The employer also raised the statute of limitations defense. Ultimately, the Hearing Officer found as a fact that the correct date of injury was July 1, 2000.

The employee did not lose any time from work during the two year period following the July 1, 2000 date of injury, and in fact did not begin to lose time until late March 2004. Similarly, no medical expenses or other benefits were paid by the employer on account of the injury within two years thereafter.

In her initial decree, the Hearing Officer ruled that the claim was barred by the statute of limitations because it had not been filed within two years of the date of injury. However, in response to a motion for findings of fact, the Hearing Officer revised her decision and concluded that the statute of limitations did not begin to run until the first report of injury had been filed. The Court granted the employer’s Petition for Appellate Review.

In *Wilson v. Bath Iron Works*, 2008 ME 47 (March 18, 2008), the employer pointed out that it was not required to file a first report pursuant to § 303 until there had been a lost day of work, and that because the employee did not lose time until more than two years had passed since the date of injury the claim was barred. In *Joyce v. S. D. Warren*

Company, 2000 ME 163, 759 A.2d 712, the Court had previously ruled that the statute of limitations was not extended if an employer did not file a first report which was not *required* to be filed. Several panels of the Appellate Division of the former Workers' Compensation Commission had reached the same conclusion. However, in 1999 the Legislature had amended § 306(1) to provide that the statute of limitations expires either two years from the date of injury or two years from the filing of a first report as required, "whichever is later". Relying upon this critical phrase, which was not included in the version of the statute interpreted in *Joyce*, supra, the Court affirmed the Hearing Officer and held that the statute of limitations does not begin to run until a first report is filed when required.

The employer argued that the statute of limitations would never begin to run in a case involving no lost time, as there is no duty to file a first report in such cases. If this were the result, the employer argued, the purpose of the statute of limitations in encouraging prompt resolution of disputes and protecting employers from having to defend stale claims would be frustrated, and the cost-savings goals of the Workers' Compensation Act of 1992 would be

compromised. The employer further pointed out that delaying the running of the statute of limitations until a first report is required to be filed would, in effect, give an indefinite limitations period to the least seriously injured, an illogical result surely not intended by the Legislature.

The Court disagreed and held that the "whichever is later" language of the amended statute clearly controlled regardless of how much time passes between the date of injury and the triggering of the duty to file a first report. Therefore, despite the fact that statutes of limitation are to be strictly construed in favor of the bar that they create, the Court held that the petition filed nearly four years following the date of injury was nevertheless timely filed.

Offset for Prior Settled Injury

In *Legassie v. Securitas, Inc.*, 2008 ME 43 (March 4, 2008), the Law Court addressed three issues of great significance to the functioning and application of the Maine Workers' Compensation System. Briefly, the claimant had sustained an initial injury in 1995 while working for another employer, and later settled that claim for \$30,000. In 2003, he sustained a second injury to the same portion of the body while working for

Securitas. At the time of the 2003 injury, his average weekly wage was lower than it had been in 1995. The employee filed a Petition for Award, and although the Petition was granted and benefits for total were awarded, the Hearing Officer reduced the employee's entitlement by half to reflect the continuing contribution of the original 1995 injury which had been settled.

In awarding benefits, the Hearing Officer ordered that all payments must be based upon the lower 2003 average weekly wage, as all rights and entitlement flowing from the 1995 injury had been extinguished by settlement.

Finally, the claimant had filed a Petition to Determine Permanent Impairment and conflicting opinions were offered based upon the "Diagnosis-Related Estimates" (DRE) model and the "Range of Motion" (ROM) models. In spite of the fact that the DRE model is the preferred method prescribed by the 4th Ed. of the AMA Guides, the Hearing Officer relied upon the ROM model and found the level of PI to be 14%.

The Law Court granted the employer's Petition for Appellate Review and addressed each issue in sequence.

Settled Injury

As noted, the Hearing Officer

Kudos

STEVE HESSERT is currently serving as chair of the American Law Firm Association (ALFA) Workers' Compensation Practice Group. In early April Steve and **DORIS CHAMPAGNE** spoke at a seminar sponsored by ALFA in Baltimore, Maryland and addressed Medicare Set-Aside issues. Also participating in the program was Dan Ferguson, Risk Manager for Bath Iron Works.

JOHN VEILLEUX has been elected to a third term as a member of the Board of Directors of the Casco Bay Hockey Association. He will serve on the executive board and will also run the Initiation Division with approximately 200 players.

STEVE MORIARTY participated in two panel presentations with three other attorneys at the annual Maine Human Resources Convention held in early May at the Samoset Resort in Rockport.

HANNAH BASS helped organize an event sponsored by the Maine Women's Fund in early June to raise funds to provide grants to Maine organizations with emerging leaders who serve young women and girls. Also attending the event were **LINDSEY MORRILL** and **ANN FREEMAN**.

The Cumberland/North Yarmouth Lion's Club presented its annual Citizen of the Year award to **STEVE MORIARTY** at a banquet held in May. Steve is currently serving in his 17th year as a member of the Cumberland Town

Council, and during the course of that time has served six one-year terms as chairman. In addition, he has served on numerous sub-committees and has acted as Council liaison to a variety of appointed and advisory boards.

ROD ROVZAR attended his 29th and the 70th annual meeting of the Maine Credit Union League and served as



parliamentarian during the event. Also attending was Steve Ford, son of the late President Gerald Ford, who delivered an entertaining summary of his experiences in the White House during the Ford presidency. □

reduced the employee's recovery on the Petition for Award by half due to the effects of the initial injury. The employer argued that it did not seek an apportionment as such, but merely a reduction in benefits to reflect the continuing contribution of the settled injury in order to prevent a double recovery. Relying upon its earlier decisions in *Cust v. University of Maine*, 2001 ME 29, 767 A.2d 566 and *Edwards v. Travelers Insurance Company*, 2001 ME 148, 783 A.2d 163, the Court affirmed the Hearing Officer and emphasized its long-standing intent to avoid interpretations of the Act which result in duplicate recoveries. As the Court stated:

Requiring the most recent insurer to pay a benefit that includes compensation for the first, paid-in-full injury would result in the employee receiving compensation over and above what he agreed to receive as full compensation for that injury.

Because the employee settled his first claim with full awareness of possible adverse impact upon entitlement resulting from a subsequent injury, the Court found no entitlement for a claim

for continued disability benefits flowing from the first injury. The Court also upheld the Hearing Officer's allocation of a 50% share of responsibility to the first injury.

Average Weekly Wage

At the time of the initial 1995 injury the employee's average weekly wage was \$390.95, but when injured in 2003 his average weekly earnings were \$263.01. In several earlier decisions the Court had held that if earnings at the time of a second injury are lower due to the continuing effects of an earlier injury, "the Hearing Officer should calculate the benefit based on the average weekly wage that best reflects the employee's uninjured work-capacity."

In *Legassie* the employee claimed that his 2003 earnings were lower as a result of the earlier injury, and the Court remanded the issue to the Hearing Officer for a determination of whether the employee earned less in 2003 as a result of the 1995 injury. If such a finding were made, the Court also instructed the Hearing Officer to determine which of the two average weekly wages "best reflects his uninjured future earning

capacity". The Court rejected outright the proposition that the 1995 wage could not be considered at all by virtue of the lump sum settlement of that claim.

Permanent Impairment

On appeal the employer challenged the Hearing Officer's use of the ROM model in determining permanent impairment. Unfortunately, the Court essentially side-stepped the issue and ruled that the extent of PI was "moot" in light of the fact that the employee had been awarded benefits for total incapacity. Because the level of PI has no impact upon the duration of benefits for total incapacity, the Court found that a decision in the employer's favor would not provide it any meaningful relief. The issue was therefore found to be "moot" because there was no real controversy which could have resulted in specific relief through a final judgment.

Multiple motions for reconsideration were filed within several weeks of the issuance of the decision, all of which have now been denied. The only issue to be determined on remand is consideration of the appropriate average weekly wage for the 2003 injury. □

An Evening in the Park



Norman, Hanson and DeTroy is proud to announce its acceptance of a recent invitation to join the prestigious Portland Lawyers Coed Softball League.

This honor, to enter the League as its first expansion franchise in 10 years, came after 2.5 minutes of direct negotiation with the League Commissioner. The vetting process consisted of one question; can you/will you pay the League dues? With that we became full fledged members with all accompanying privileges, aches and pains. A link to the League schedule is available at the NHD website. All games are broadcast, subject to blackout, on the

ESPN Twilight Zone channel.

Fielding a combined team of attorneys and staff, NHD currently has 6 games under its belt and has shown some flashes of brilliance under the combined managerial talents of Lindsey Morrill, David Herzer and John Veilleux. Other stalwarts on the attorney side have included Dan Cummings, Chris Taintor, David Very, Lance Walker, Aaron Baltes, Doris Champagne, Ann Freeman, Hannah Bass,



Matt Mehalic and summer associate Katlyn Sawyer. Completing the roster with a rotating group of staff and family members, the games have provided a

"one night a week" opportunity to get outdoors with good company and enjoy the beautiful Maine spring. As the season unfolds we will do our best to keep you up to date on the progress of the team. We invite and encourage anyone who's looking for an evening hour of free light-hearted entertainment to come on by and cheer us on in our quest for the League Championship. All game fields are noted on the schedule. Bring your lawn chair and sense of humor. Start times are 5:45. □



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Return service requested

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